

CAPITAL PUNISHMENT: RACE, POVERTY & DISADVANTAGE

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Class Two - Part One: *McGautha - Furman*

Decline in the Use of the Death Penalty in the 1940s, 50s and 60s

U.S. executions reached their peak in 1935, when 199 people were put to death. After that, the number dropped off steeply. 1947 was the last year with more than 150 executions, 1951 the last year with more than 100. There were only 42 executions in 1961 and only 21 in 1963. The southern states executed 105 people in 1947, 48 in 1957, and 13 in 1963. 1968 was the first year in U.S. history during which not a single person was executed. Per capita, the execution rate had been dropping steadily since the 1880s.

From Stuart Banner, *THE DEATH PENALTY: AN AMERICAN HISTORY*:

The territories of Alaska and Hawaii abolished the death penalty in 1957. Delaware abolished it in 1958, only to bring it back in 1961. Oregon conducted a referendum in 1964 in which more than 60 percent of the electorate voted for abolition. New York, Iowa, Vermont, and West Virginia abolished it in 1965. When New Mexico abolished the death penalty in 1969, it became the fourteenth state to do so. There had never been so many.

Executions in the United States by year and average for five-year intervals, 1935-69

Year	Number of Executions	Five year Average
1935	199	
1936	195	
1937	147	
1938	190	
1939	160	178
1940	124	
1941	123	
1942	147	
1943	131	
1944	120	129
1945	117	
1946	131	
1947	153	
1948	119	
1949	119	138
1950	82	
1951	105	
1952	83	
1953	62	
1954	71	83
1955	76	
1956	65	
1957	65	
1958	49	
1959	49	61
1960	56	
1961	42	
1962	46	
1963	21	
1964	15	36

1965	7	
1966	1	
1967	2	
1968	0	
1969	0	10

[There were no executions from 1968 through 1976.]

Source: Bureau of Justice Statistics, U.S. Department of Justice, *Capital Punishment 1978*, at 16, Table 1 (1979).

Executions in five-year intervals for four regions of the United States, 1935-69

Five-year intervals	Northeast	North Central	West	South
1935-39	145	113	100	524
1940-44	110	42	73	413
1945-49	74	64	76	419
1950-54	56	42	65	244
1955-59	51	16	51	181
1960-64	17	16	45	102
1965-69	0	5	3	2
Totals	453	298	413	1,887

Source: Bureau of Justice Statistics, U.S. Department of Justice, *Capital Punishment 1981*, at 15, Table 2 (1982).

Executions by regions, 1977 through 2012

Northeast	Midwest	West	South
4	155	82	1,079

Source: Death Penalty Information Center, Facts About the Death Penalty at 3 (Jan. 14, 2013) (available at www.deathpenaltyinfo.org/documents/FactSheet.pdf).

Executions in five-year intervals for Southern states performing over 100 executions from 1930 to 1969, and total executions by those states from 1977 to 2011

5-yr intervals	GA	TX	NC	FL	SC	MS	AL	LA	AR	KY
1930-34	64	48	51	15	37	26	19	39	20	18
1935-39	73	72	80	29	30	22	41	19	33	34
1940-44	58	38	50	38	32	34	29	24	20	19
1945-49	72	36	62	27	29	26	21	23	18	15
1950-54	51	49	14	22	16	15	14	14	11	8
1955-59	34	25	5	27	10	21	6	13	7	8
1960-64	14	29	1	12	8	10	4	1	9	1
1965-69	0	0	0	0	0	0	1	0	0	0
Totals										
1930-69	366	297	263	170	162	154	135	133	118	103
39 years										
Executions										
1977-2012	52	492	43	74	43	21	55	28	27	3
34 years										

Sources: Bureau of Justice Statistics, U.S. Department of Justice, *Capital Punishment 1981*, at 15, Table 2 (1982); Death Penalty Information Center, *Facts About the Death Penalty* at 3 (Jan. 14, 2013) (available at www.deathpenaltyinfo.org/documents/FactSheet.pdf).

Capital Punishment in the Rest of the World

By the 1960s, capital punishment has been abolished or abandoned in much of the world. Mexico abolished capital punishment for political crimes in 1857, and the federal government and the Mexican states abolished it for all crimes in 1929. Portugal was the first Western European country to abolish capital punishment, doing so in 1867; it then reinstated the penalty for treason, but permanently abolishing it in 1976. Germany, Austria, and Italy stopped executions after the Second World War although they did not formally abolish capital punishment until later.

Great Britain abolished the death penalty for murder in 1969. The last execution, by hanging, took place in 1964. Statutes providing for the death penalty for treason and piracy with violence were not repealed until 1998.

Canada removed capital punishment from the criminal code in 1976, while retaining it for a number of military offenses, including treason and mutiny. However, it was not applied for those crimes and in 1998 it was abolished entirely with legislation removing all references to it from the National Defence Act.

Denmark abolished the death penalty in 1978. France abolished it in 1981. The effort in France was led by Robert Badinter, the minister of justice, who had defended some of the last men executed and was a long time opponent of capital punishment. *See* Robert Badinter, *ABOLITION: ONE MAN'S BATTLE AGAINST THE DEATH PENALTY* (2008). France amended its Constitution to ban the death penalty in 2007. The last execution in France, by guillotine, took place in 1977. It was the last execution in the Western European countries of Belgium, France, Germany, Italy, Luxembourg and the Netherlands. *See* Andrew Hammel, *ENDING THE DEATH PENALTY: THE EUROPEAN EXPERIENCE IN GLOBAL PERSPECTIVE*. (2010).

The Council of Europe, made up of 47 member states, has made abolition of the death penalty a prerequisite for membership.

The Constitutional Court of South Africa declared the death penalty unconstitutional in one of its first decisions after the end of apartheid. *State v. Makwanyane*, Constl. Ct. of South Africa, June 6, 1995, 16 HUMAN RTS. L. J. 154 (1995).

At least 23 countries carried out executions in 2010, and 67 imposed death sentences. China is believed to have carried out thousands, but it does not release statistics on the number executed. Other countries which carried out a significant number of executions were Iran (252+), North Korea (60+), Yemen (53+) and the United States (46).¹

Maxwell v. Bishop

A statistical argument that Arkansas discriminated against African Americans in the application of the death penalty for rape was presented to the United States Court of Appeals for the Eighth Circuit in the case of William L. Maxwell, a black man who had been sentenced to death in 1962 upon conviction of rape of a white woman in Garland County, Arkansas. *Maxwell v. Bishop*, 398 F.2d 138 (8th Cir. 1968).

Maxwell, represented by Anthony Amsterdam and the NAACP Legal Defense and Educational Fund, presented the results of a survey conducted in the summer of 1965 of 55 rape convictions during the period 1945-1965 in 19 counties that made up more than 47% of the population of Arkansas. It was part of a larger study of such sentencing in 12 southern states.

The survey included a number of variables such as the defendant's race, age, occupation, and prior criminal record; the victim's race, age, occupation; aspects of the prior relationship, if any, between the defendant and the victim; and certain circumstances of the offense such as the degree of threat or violence, and the injury inflicted; and the involvement of alcohol or drugs. However, the study did not include Garland County, where Maxwell was convicted and sentenced, because the black population of the county was less than

1. See Amnesty International, *Death Sentences and Executions 2010* (2011).

19,000.

Dr. Marvin Wolfgang, a criminologist-statistician from the University of Pennsylvania, testified that the most critical variables with regard to sentence were the race of the offender and the race of the victim. An African American man convicted of raping a white woman had about a 50 percent chance of receiving a death sentence, regardless of the facts and circumstances surrounding the crime, while a man convicted of raping a woman of his own race had about only a 14 percent chance of receiving the death sentence. Dr. Wolfgang testified that the difference could not be attributed to chance.

Maxwell also presented an exhibit prepared by the United States Bureau of Prisons that showed that, for the years 1930 to 1962, 446 persons were executed in the United States for rape and that, of these, only 45 were white but 399 were black and two were of other races, and that, for the same period, 3,298 were executed for murder and, of these, 1,640 were white, 1,619 were black, and 39 were of other races.

The Legal Defense Fund argued that inferences could be drawn from the its evidence that applied to the entire state and to Maxwell's case. Therefore, it argued, Maxwell had made a *prima facie* case of racial discrimination and was entitled to relief because the State presented no evidence to overcome it. It also noted that on three previous occasions it had presented evidence of discrimination and been rejected each time "notwithstanding that on each successive occasion the evidence tended in the direction of more depth and completeness." This demonstrates, it was said, "how difficult it is for Negro litigants generally and those without means particularly, to make courts see 'the reality of the world, indeed * * * the segregated world' * * * in which they live[.] * * * [T]he law [needs to] 'see what all others see.'"

Harry Blackmun, then a judge on the Eighth Circuit, wrote the opinion rejecting Maxwell's claims. He noted that Maxwell's evidence did not relate specifically to Garland County where he was convicted and sentenced to death; it did not take every variable into account; and it did not show that race was the reason that the jury sentenced

Maxwell to death.

The Court noted that with regard to Garland County, for the decade beginning January 1, 1954, Maxwell's evidence was that seven whites were charged with rape with four not prosecuted and three sentenced on reduced charges; that three blacks were charged with rape, with one of a black woman not prosecuted and another of a black receiving a reduced sentence, and the third, Maxwell, receiving the death penalty. It also observed that in the last fourteen years the men executed for rape in Arkansas had been two whites and two blacks.

Emphasizing that it was "concerned with * * * Maxwell's case and only Maxwell's case," future Justice Blackmun wrote for the Court of Appeals:

We are not ready to condemn and upset the result reached in every case of a Negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice. This is particularly so on a record so specific as this one. And we are not yet ready to nullify this petitioner's Garland County trial on the basis of results generally, but elsewhere, throughout the South.

We therefore reject the statistical argument in its attempted application to Maxwell's case. Whatever value that argument may have as an instrument of social concern, whatever suspicion it may arouse with respect to southern interracial rape trials as a group over a long period of time, and whatever it may disclose with respect to other localities, we feel that the statistical argument does nothing to destroy the integrity of Maxwell's trial.

The Court acknowledged:

We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this. But, as we have noted before, with respect to the issue of jury selection, improper state practice of the past

does not automatically invalidate a procedure of the present.

Finally, Judge Blackmun stated with regard to Maxwell's case, which was before the Court for a second time:

[T]he efforts on behalf of Maxwell would not thus be continuing * * * were it not for the fact that it is the death penalty, rather than life imprisonment, which he received on his rape conviction. This fact makes the decisional process in a case of this kind particularly excruciating for the author of this opinion who is not personally convinced of the rightness of capital punishment and who questions it as an effective deterrent. But the advisability of capital punishment is a policy matter ordinarily to be resolved by the legislature or through executive clemency and not by the judiciary.

The Supreme Court granted *certiorari* and twice heard oral argument in Maxwell's case. However, the Court resolved the case in a brief per curiam opinion in which it set aside Maxwell's sentence based on a recent juror qualification decision, *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Maxwell v. Bishop*, 398 U.S. 262 (1970). The jury qualification issue had not been raised by Maxwell in either the state or federal courts.

For consideration and discussion

Maxwell argued that "the law needs to see what all others see" with regard to racial discrimination in the infliction of the death penalty upon African Americans convicted of rape.

How would that be done in his case or any case?

What are the primary obstacles that make it difficult?

Is it ever possible?

Dennis Councle McGAUTHA, Petitioner,
v.
State of CALIFORNIA.

James Edward CRAMPTON, Petitioner,
v.
State of OHIO.

United States Supreme Court
402 U.S. 183, 91 S.Ct. 1454 (1971)

Mr. Justice HARLAN delivered the opinion of the Court.

Petitioners McGautha and Crampton were convicted of murder in the first degree in the courts of California and Ohio respectively and sentenced to death pursuant to the statutes of those States. In each case the decision whether the defendant should live or die was left to the absolute discretion of the jury. In McGautha's case the jury, in accordance with California law, determined punishment in a separate proceeding following the trial on the issue of guilt. In Crampton's case, in accordance with Ohio law, the jury determined guilt and punishment after a single trial and in a single verdict. We granted certiorari in the *McGautha* case limited to the question whether petitioner's constitutional rights were infringed by permitting the jury to impose the death penalty without any governing standards. We granted certiorari in the Crampton case limited to that same question and to the further question whether the jury's imposition of the death sentence in the same proceeding and verdict as determined the issue of guilt was constitutionally permissible. For the reasons that follow, we find no constitutional infirmity in the conviction of either petitioner, and we affirm in both cases.

I

It will put the constitutional issues in clearer focus to begin by setting out the course which each trial took.

A. McGautha's Guilt Trial

McGautha and his codefendant Wilkinson were charged with committing two armed robberies and a murder on February 14, 1967. In accordance with California procedure in capital cases, the trial was in two stages, a guilt stage and a punishment stage.

At the guilt trial, * * * [t]he jury found both defendants guilty of two counts of armed robbery and one count of first-degree murder as charged.

B. McGautha's Penalty Trial

At the penalty trial, which took place on the following day but before the same jury, the State waived its opening, presented evidence of McGautha's prior felony convictions and sentences, and then rested. Wilkinson testified in his own behalf, relating his unhappy childhood in Mississippi as the son of a white father and a Negro mother, his honorable discharge from the Army on the score of his low intelligence, his regular attendance at church, and his good record for holding jobs and supporting his mother and siblings up to the time he was shot in the back in an unprovoked assault by a street gang. Thereafter, he testified, he had difficulty obtaining or holding employment. About a year later he fell in with McGautha and his companions, and when they found themselves short of funds, one of the group suggested that they "knock over somebody." This was the first time, Wilkinson said, that he had ever had any thoughts of committing a robbery. He admitted participating in the two robberies but said he had not known that the stores were to be held up until McGautha drew his gun. He testified that it had been McGautha who struck Mrs. Smetana and shot Mr. Smetana.

Wilkinson called several witnesses in his behalf. An undercover narcotics agent testified that he had seen the murder weapon in McGautha's possession and had seen McGautha demonstrating his quick draw. A minister with whom Wilkinson had boarded testified to Wilkinson's church attendance and good reputation. He also stated that before trial Wilkinson had expressed his horror at what had happened and requested the minister's prayers on his behalf. A former fellow employee testified that Wilkinson had a good reputation and was honest and peaceable.

McGautha also testified in his own behalf at the penalty hearing. He admitted that the murder weapon was his, but testified that he and Wilkinson had traded guns, and that it was Wilkinson who had * * * killed [the victim]. McGautha testified that he came from a broken home and that he had been wounded during World

War II. He related his employment record, medical condition, and remorse. * * *

The jury was instructed in the following language:

in this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling.

* * *

You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand.

* * * Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. * * * Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.

Deliberations began in the early afternoon of August 24, 1967. * * * Late in the afternoon of August 25 the jury returned verdicts fixing Wilkinson's punishment at life imprisonment and McGautha's punishment at death.

C. Crampton's Trial.

Petitioner Crampton was indicted for the murder of his wife, Wilma Jean, purposely and with premeditated malice. He pleaded not guilty and not guilty by reason of insanity. In accordance with the Ohio practice which he challenges, his guilt and punishment were determined in a single unitary proceeding.

*** [Two months after leaving the state mental hospital, where he was undergoing observation and treatment for alcoholism and drug addiction, Crampton shot his wife. He had previously threatened her and she had urged him to return to the hospital and requested police protection.]

The defense called Crampton's mother as a witness. She testified about Crampton's background, including a serious concussion received at age nine, his good grades in junior high school, his stepfather's jealousy of him, his leaving home at age 14 to live with various relatives, his enlistment in the Navy at age 17, his marriage to a girl named Sandra, the birth of a son, a divorce, then a remarriage to Sandra and another divorce shortly after, and finally his marriage to Wilma [the victim]. Mrs. Crampton also testified to Crampton's drug addiction, to his brushes with the law as a youth and as an adult, and to his undesirable discharge from the Navy.

Crampton's attorney also introduced into evidence a series of hospital reports which contained further information on Crampton's background, including his criminal record, which was substantial, his court-martial conviction and undesirable discharge from the Navy, and the absence of any significant employment record. They also contained his claim that the shooting was accidental[.] *** All the reports concluded that Crampton was sane in both the legal and the medical senses. He was diagnosed as having a sociopathic personality disorder, along with alcohol and drug addiction. Crampton himself did not testify.

The jury was instructed that:

If you find the defendant guilty of murder in the first degree, the punishment is death, unless you recommend mercy, in which event the punishment is imprisonment in the penitentiary during life.

The jury was given no other instructions specifically addressed to the decision whether to recommend mercy, but was told in connection with its verdict generally:

You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your findings and to render your verdict accordingly. *** Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy, or prejudice, so that the State of Ohio and the defendant will feel that their case was fairly and impartially tried.

The jury deliberated for over four hours and returned a verdict of guilty, with no recommendation for mercy. [The death sentence was imposed about two weeks later.]

II

*** Our function is not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes the present procedures of these two States in such cases. In assessing the validity of the conclusions reached in this opinion, that basic factor should be kept constantly in mind.

III

*** [P]etitioners contend that to leave the jury completely at large to impose or withhold the death penalty as it see fit is fundamentally lawless and therefore violates the basic command of the Fourteenth Amendment that no State shall deprive a person of his life without due process of law. *
* *

A

In order to see petitioners' claim in perspective, it is useful to call to mind the salient features of the history of capital punishment for homicides under the common law in England, and subsequent statutory developments in this country. This history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die. * * *

* * *

* * * [I]n this country, * * * there was rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers. Thus, in 1794, Pennsylvania attempted to reduce the rigors of the law by abolishing capital punishment except for "murder of the first degree," defined to include all "willful, deliberate and premeditated" killings, for which the death penalty remained mandatory. * * *

This new legislative criterion for isolating crimes appropriately punishable by death soon proved * * * unsuccessful * * *. The result was characterized in this way by Chief Judge Cardozo:

What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy.

At the same time, jurors on occasion took the law into their own hands in cases which were "willful, deliberate, and premeditated" in any view of that phrase, but which nevertheless were clearly inappropriate for the death penalty. In such cases they simply refused to convict of 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. Tennessee was the first State to give juries sentencing discretion in capital cases, but other States followed suit, as did the Federal Government in 1897. Shortly thereafter, in *Winston v. United States*, 172 U.S. 303 (1899), this

Court dealt with the federal statute for the first time. The Court reversed a murder conviction in which the trial judge instructed the jury that it should not return a recommendation of mercy unless it found the existence of mitigating circumstances. The Court found this instruction to interfere with the scheme of the Act to commit the whole question of capital punishment "to the judgment and the consciences of the jury."

* * *

B

Petitioners * * * assert[] the death penalty is imposed on far fewer than half the defendants found guilty of capital crimes. The state and federal legislatures which provide for jury discretion in capital sentencing have, it is said, implicitly determined that some – indeed, the greater portion – of those guilty of capital crimes should be permitted to live. But having made that determination, petitioners argue, they have stopped short – the legislatures have not only failed to provide a rational basis for distinguishing the one group from the other, but they have failed even to suggest any basis at all. * * * [P]etitioners contend the mechanism is constitutionally intolerable as a means of selecting the extraordinary cases calling for the death penalty, which is its present-day function.

* * * Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

* * *

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The

States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. * * *

IV * * *

A

Crampton's argument for bifurcation runs as follows. [H]e enjoyed a constitutional right not to be compelled to be a witness against himself. Yet under the Ohio single-trial procedure, he could remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment. He contends that under the Due Process Clause of the Fourteenth Amendment, he had a right to be heard on the issue of punishment and a right not to have his sentence fixed without the benefit of all the relevant evidence. Therefore, he argues, the Ohio procedure * * * creates an intolerable tension between constitutional rights. Since this tension can be largely avoided by a bifurcated trial, petitioner contends that there is no legitimate state interest in putting him to the election, and that the single verdict trial should be held invalid in capital cases.

* * *

The criminal process, like the rest of the legal system, is replete with situations requiring "the making of difficult judgments" as to which course to follow. Although a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the Constitution does not by that token always forbid requiring him to choose. * * *

B

* * * We see nothing in the history, policies, or precedents relating to the privilege [against

compelled self-incrimination] which requires such means to be available.

* * *

C

* * * Petitioner's contention therefore comes down to the fact that the Ohio single-verdict trial may deter the defendant from bringing to the jury's attention evidence peculiarly within his own knowledge, and it may mean that the death verdict will be returned by a jury which never heard the sound of his voice. * * * Assuming that in this case there was relevant information solely within petitioner's knowledge, we do not think the Constitution forbids a requirement that such evidence be available to the jury on all issues to which it is relevant or not at all. * * *

V

* * * It may well be * * * that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds[.] * * * The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected. * * *

* * *

Separate opinion of **Mr. Justice BLACK.**

I concur in the Court's judgments and in substantially all of its opinion. However, in my view, this Court's task is not to determine whether the petitioners' trials were "fairly conducted." The Constitution grants this Court no power to reverse convictions because of our personal beliefs that state criminal procedures are "unfair," "arbitrary," "capricious," "unreasonable," or "shocking to our conscience." Our responsibility is rather to determine whether petitioners have been denied rights expressly or impliedly guaranteed by the Federal Constitution as written. * * * The Eighth Amendment forbids "cruel and unusual punishments." In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law

here and in the countries from which our ancestors came at the time the Amendment was adopted. * * * Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power.

Mr. Justice DOUGLAS, with whom Mr. Justice BRENNAN and Mr. Justice MARSHALL concur, dissenting.

In my view the unitary trial which Ohio provides in first-degree murder cases does not satisfy the requirements of procedural Due Process under the Fourteenth Amendment.

* * *

The truth is * * * that the wooden position of the Court, reflected in today's decision, cannot be reconciled with the evolving gloss of civilized standards which this Court, long before the time of those who now sit here, has been reading into the protective procedural due process safeguards of the Bill of Rights. * * *

The Court has history on its side – but history alone. * * *

* * *

Who today would say it was not “cruel and unusual punishment” within the meaning of the Eighth Amendment to impose the death sentence on a man who stole a loaf of bread, or in modern parlance, a sheet of food stamps? Who today would say that trial by battle satisfies the requirements of procedural due process?

* * * It is a mystery how in this day and age a unitary trial that requires an accused to give up one constitutional guarantee to save another constitutional guarantee can be brought within the rubric of procedural due process. * * *

* * *

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice MARSHALL join, dissenting. * * *

* * *

* * * Unlike the Court, I do not believe that the legislatures of the 50 States are so devoid of wisdom and the power of rational thought that they are unable to face the problem of capital punishment directly, and to determine for themselves the criteria under which convicted capital felons should be chosen to live or die. * * * Finally, even if I shared the Court's view that the rule of law and the power of the States to kill are in irreconcilable conflict, I would have no hesitation in concluding that the rule of law must prevail.

* * * [I]f state power is to be exerted, these choices must be made by a responsible organ of state government. * * * If there is no effective supervision of this process to insure consistency of decision, it can amount to nothing more than government by whim. But ours has been “termed a government of laws, and not of men.” *Marbury v. Madison*, 1 Cranch 137, 163, 2 L.Ed. 60 (1803). Government by whim is the very antithesis of due process.

It is not a mere historical accident that “[t]he history of liberty has largely been the history of observance of procedural safeguards.” *McNabb v. United States*, 318 U.S. 332, 347 (1943) (Frankfurter, J.). * * * Such procedures may take a variety of forms. The decisionmaker may be provided with a set of guidelines to apply in rendering judgment. His decision may be required to rest upon the presence or absence of specific factors. * * * The specificity of standards may be relaxed, directing the decisionmaker's attention to the basic policy determinations underlying the statute without binding his action with regard to matters of important but unforeseen detail. He may be instructed to consider a list of factors – either illustrative or exhaustive – intended to illuminate the question presented without setting a fixed balance. * * *

I.

[Justice Brennan then discusses extensively various aspects of the Due Process Clause and concludes as follows:]

* * * First, due process of law requires the States to protect individuals against the arbitrary exercise of state power by assuring that the fundamental

policy choices underlying any exercise of state power are explicitly articulated by some responsible organ of state government. Second, due process of law is denied by state procedural mechanisms that allow for the exercise of arbitrary power without providing any means whereby arbitrary action may be reviewed or corrected. Third, where federally protected rights are involved due process of law is denied by state procedures which render inefficacious the federal judicial machinery that has been established for the vindication of those rights. If there is any way in which these propositions must be qualified, it is only that in some circumstances the impossibility of certain procedures may be sufficient to permit state power to be exercised notwithstanding their absence. * * * Before we conclude that capital sentencing is inevitably a matter of such complexity that it cannot be carried out in consonance with the fundamental requirements of due process, we should at the very least examine the mechanisms developed in not incomparable situations and previously approved by this Court [such as the termination of welfare benefits, *see Goldberg v. Kelly*, 397 U.S. 254, 255 (1970).] * * *

II

A legislature that has determined that the State should kill some but not all of the persons whom it has convicted of certain crimes must inevitably determine how the State is to distinguish those who are to be killed from those who are not. * * *

* * *

* * * I see no reason whatsoever to believe that the nature of capital sentencing is such that it cannot be surrounded with the protections ordinarily available to check arbitrary and lawless action. * * *

III

* * *

A

* * *

There is in my view no way that this Ohio capital sentencing procedure can be thought to pass muster under the Due Process Clause.

* * *

* * * The policies applied by the State of Ohio to determine that James Edward Crampton should die were neither articulated to nor explained by the jury that made that decision. Nor have they been elsewhere set forth. * * *

* * * [T]he capital sentencing process in Ohio contains elements that render difficult if not impossible any consistency in result. Presumably all judges, and certainly some juries (i.e., those who are specifically so instructed) will be cognizant of the possibility of parole from a sentence to life imprisonment. Other juries will not. If this is an irrelevant factor, it is hard to understand why some juries may be given this information. If it is a relevant factor, it is equally hard to understand why other juries are not. And if it is a relevant factor, the inevitable consequence of presenting the information, for no explicable reason, to some but not all capital sentencing juries, is that consistency in decisionmaking is impossible. * * *

* * *

* * * Although the Due Process Clause does not forbid a State from imposing “a different punishment for the same offence * * * under particular circumstances,” it does command that punishment be “dealt out to all alike who are similarly situated.” * * *

* * *

B

* * *

I find [the California] procedure likewise defective under the Due Process Clause. * * *

First. * * * Like Ohio, California fails to provide any means whereby the fundamental questions of state policy with regard to capital sentencing may be authoritatively resolved. * * * Nothing whatsoever anywhere in the process gives any assurance that one defendant will be sentenced upon notions of California penological policy even

vaguely resembling those applied to the next.

Second. * * * The Due Process Clause commands us * * * to make certain that no State takes one man's life for reasons that it would not apply to another. * * * [The sentencing power is exercised] without guideline or check, without review, without any explanation of reasons or findings of fact, without any opportunity for ultimate legislative acceptance or rejection of the policies applied. * * *

* * * Third. Like its Ohio counterpart, the California procedure before us inevitably operates to frustrate the institution of federal judicial review. We do not and cannot know what facts the jury relied upon in determining that petitioner McGautha should be killed, or the reasons upon which it based that decision.

C

* * * [E]ven if I thought these procedures adequate to try a welfare claim – which they are not, *Goldberg v. Kelly*, 397 U.S. 254, 255 (1970) – I would have little hesitation in finding them inadequate where life itself is at stake. For we have long recognized that the degree of procedural regularity required by the Due Process Clause increases with the importance of the interests at stake.

IV

* * *

* * * I cannot help concluding that the Court's opinion, at its core, rests upon nothing more solid than its inability to imagine any regime of capital sentencing other than that which presently exists. I cannot assent to such a basis for decision. "If we would guide by the light of reason, we must let our minds be bold." *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

THE EIGHTH AMENDMENT

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

- Eighth Amendment, U.S. Constitution

Wallace Wilkerson's Challenge to the Firing Squad

Wallace Wilkerson, convicted of murder in the territory of Utah, was sentenced to "be publically shot until you are dead." Wilkerson challenged this method of carrying out the death penalty before the Supreme Court.

In rejecting his challenge, the Court said that "[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishment shall not be inflicted," but, after noting the use of punishments such as public dissection, burning alive, drawing and quartering, the Court said, "it is safe to affirm that punishments of torture such as those mentioned . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." *Wilkerson v. Utah*, 99 U.S. 130, 135-36 (1878). However, the Court held that the amendment did not prohibit shooting:

Cruel and unusual punishments are forbidden by the Constitution, but . . . shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category Soldiers convicted of desertion or other capital offenses are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial.

Following the decision,

Wilkerson was let into a jailyard where he declined to be blindfolded. A sheriff gave the command to fire and Wilkerson braced for the barrage. He moved just enough for the bullets to strike his arm and torso but not his heart.

“My God!” Wilkerson shrieked. “My God! They have missed!” More than 27 minutes passed as Wilkerson bled to death in front of astonished witnesses and a helpless doctor.¹

William Kemmler’s Challenge to the Electric Chair

In 1885, in his annual message to the legislature, the governor of New York stated: “The present mode of executing criminals by hanging has come down to us from the dark ages, and it may well be questioned whether the science of the present day cannot provide a means for taking the life of such as are condemned to die in a less barbarous manner. I commend this suggestion to the consideration of the legislature.” Too many hangings – which were then carried out in public – had been botched. A short drop did not always snap the condemned prisoner’s neck, so some gagged and died a gruesome death. A long drop sometimes took the condemned’s head off entirely.

In 1886, the legislature chose a three-member commission to investigate “the most humane and practical method known to modern science” for carrying out executions. The commission soon focused on electricity as the best alternative. And, since one of the three commissioners was a dentist by profession, the panel recommended an electrified chair. Electrocutation was considered amid intense competition between Thomas Edison’s direct current and George Westinghouse’s alternating current. Although alternating current had lower transmission costs, there was concern that it was considerably more dangerous than direct current. Edison, who was losing the marketing battle to Westinghouse, recommended that alternating current be used for electrocutions in hope that the link between death and alternating current would diminish consumers’ use of AC in their homes.² The commission adopted this recommendation, and the legislature enacted a law providing that,

The punishment of death must, in every case, be inflicted by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death, and the application of such current must be continued until such convict is dead.

One of Edison’s associates suggested “westinghouse” as an appropriate noun for the device and a handy verb to describe the process in which it would be employed. Just as French criminals were guillotined, he reasoned, American criminals could be “westinghoused.”

William Kemmler, sentenced to death by electrocution for the murder of his lover in a fit of drunken and jealous rage over her relationship with another man, challenged the new method of execution. Westinghouse secretly hire lawyers to defend William Kemmler, arguing that the electric chair constituted cruel and unusual punishment. Although the Eighth Amendment had not been held applicable to the states, the Court found that the Fourteenth Amendment prohibited punishments that were “manifestly cruel and unusual as burning at the stake, crucifixion, breaking on the wheel and the like,” but, after referring to *Wilkerson*, concluded:

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous, – something more than the mere extinguishment of life.

The courts of New York held that the mode adopted in this instance might be said to be unusual because it was new, but that it could not be assumed to be cruel in the light of that common knowledge which has stamped certain punishments as such; that it was for the legislature to say in what manner sentences of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; that the courts were bound to presume that the legislature was possessed of the facts upon which it took action; and that by evidence taken * * * that presumption could not be overthrown.

1. Gilbert King, *Cruel and Unusual History*, N.Y. TIMES (op-ed), April 23, 2008.

2. See Deborah W. Denno, *Is Electrocutation an Unconstitutional Method of Execution? The Engineering of Death over the Century*, 35 WM & MARY L. REV. 551 (1994).

In re Kemler, 136 U.S. 436, 447 (1890).

In 1890, after Westinghouse sought unsuccessfully to restrain the state from using its dynamos for the purpose of the execution, William Kemmler became the first person to die in the electric chair. A historian described the execution as follows:

After a thousand volts of current struck Kemmler on Aug. 6, 1890, the smell of burnt flesh permeated the room. He was still breathing. Saliva dripped from his mouth and down his beard as he gasped for air. Nauseated witnesses and a tearful sheriff fled the room as Kemmler's coat burst into flames.

Another surge was applied, but minutes passed as the current built to a lethal voltage. Some witnesses thought Kemmler was about to regain consciousness, but eight long minutes later, he was pronounced dead.³

The three doctors who conducted the autopsy concluded that Kemmler became "instantly unconscious" by the first jolt and that his death was "painless." Westinghouse insisted that "[t]hey could have done better with an ax."

PAUL A. WEEMS
v.
UNITED STATES

United States Supreme Court
217 U.S. 349 (1909)

[Paul A. Weems was convicted of falsification by a public official of a public and official document. No fraud, intent to defraud, intent of personal gain or injury was necessary for conviction. Weems was sentenced to 12 years imprisonment in chains at "hard and painful labor," followed by perpetual surveillance without the right to vote or hold office. He challenged his sentence under the "cruel and unusual" clause of the Phillipine Bill of Rights. Basing its decision on

3. Gilbert King, *Cruel and Unusual History*, N.Y. TIMES (op-ed), April 23, 2008.

interpretations of the Eight Amendment, the Supreme Court stated:]

What constitutes a cruel and unusual punishment has not been exactly decided. It has been said that ordinarily the terms imply something inhuman and barbarous, – torture and the like. * * * The court, however * * * conceded the possibility "that punishment in the state prison for a long term of years might be so disproportionate to the offense as to constitute a cruel and unusual punishment." * * *

The provision received very little debate in Congress. * * *

* * *

No case has occurred in this court which has called for an exhaustive definition.

* * *

* * * [From the debates regarding adoption of the Bill of Rights] [i]t appears that [some framers] felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation. [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 [in England]. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts', or to prevent only

an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through punishment was overlooked. * * *

Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, "designed to approach immortality as nearly as human institutions can approach it." The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. * * *

* * *

* * * The clause of the Constitution, in the opinion of the learned commentators, may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice. * * *

* * * There are degrees of homicide that are not punished so severely, nor are the following crimes: misprision of treason, inciting rebellion, conspiracy to destroy the government by force, recruiting soldiers in the United States to fight against the United States, forgery of letters patent, forgery of bonds and other instruments for the purpose of defrauding the United States, robbery, larceny, and other crimes. * * * If we turn to the legislation of the Philippine Commission we find that * * * the highest punishment possible for a crime which may cause the loss of many thousand of dollars * * * is not greater than that which may be imposed for falsifying a single item of a public account. And this contrast shows more than

different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. 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.

* * *

Louisiana's Efforts to Execute Willie Francis

Willie Francis, a stuttering 17-year-old black youth sought to prevent Louisiana from attempting to electrocute him a second time after the first attempt at the jail in St. Martinville, La., was unsuccessful. He walked away from the electric chair known as "Gruesome Gertie" in 1946 after two executioners (an inmate and a guard) from the state penitentiary at Angola botched the wiring of the chair.

Reverend Maurice L. Rousseve described the first attempt to execute Frances as follows:

After he was strapped to the chair the Sheriff of St. Martin Parish asked him if he had anything to say about anything and he said nothing. Then the hood was placed before his eyes. Then the officials in charge of the electrocution were adjusting the mechanisms and when the needle of the meter registered to a certain point on the dial, the electrocutioner pulled down on the switch and at the same time said: "Goodby Willie". At that very moment, Willie Francis' lips puffer out and his body squirmed and tensed and he jumped so that the chair rocked on the floor. Then the condemned man said: "Take it off. Let me breathe." Then the switch was turned off. Then some of the men left and a few minutes after the Sheriff of St. Martin Parish, Mr. E. L. Resweber, came in and announced that the governor had granted the condemned man a reprieve.¹

1. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 480 n. 2 (Burton, J., dissenting) (1947).

Those in charge of the electrical equipment insisted that no electric current reached Francis.

Gov. Jimmie Davis ordered Francis returned to the chair six days later. However, Francis' lawyers obtained a stay and eventually presented his arguments to the Supreme Court.² A plurality of the Supreme Court analyzed the issue before it in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), as follows:

As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no man is to blame. We turn to the question as to whether the proposed enforcement of the criminal law of the state is offensive to any constitutional requirements to which reference has been made.

329 U.S. at 462. It rejected Francis' claim:

We find nothing in what took place here which amounts to cruel and unusual punishment in the constitutional sense. The case before us does not call for an examination into any punishments except that of death. The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. * * *

Petitioner's suggestion is that because he once underwent the psychological strain of preparation for electrocution, now to require him to undergo this preparation again subjects him to a lingering or cruel and unusual punishment. Even the fact that petitioner has already been subjected to a current of electricity does not

2. Francis was represented in the United States Supreme Court by J. Skelly Wright of New Orleans, who was later appointed United States District Judge and enforced the Supreme Court's decision in *Brown v. Board of Education* in desegregating the public schools in New Orleans. He was later appointed by President Kennedy to the United States Court of Appeals for the District of Columbia Circuit. See Arthur S. Miller, A CAPACITY FOR OUTRAGE: THE BIOGRAPHY OF JUDGE J. SKELLY WRIGHT (Greenwood Press 1984).

make his subsequent execution any more cruel in the constitutional sense than any other execution. The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other occurrence, such as, for example, a fire in the cell block. We cannot agree that the hardship imposed upon the petitioner rises to that level of hardship denounced as denial of due process because of cruelty.

329 U.S. at 463-64. The Court also rejected the other grounds asserted by Francis for preventing a second attempt to execute him.

Justices Burton, Douglas, Murphy and Rutledge dissented. In an opinion by Justice Burton, they noted that the Louisiana courts had not conducted any hearing to resolve the disputed question of whether a current of electricity had actually passed through the body of Francis, and expressed the view that the case should be remanded for a determination of material facts.

The dissenters had no doubt that if Francis' "allegation that the official electrocutioner 'turned on the switch and a current of electricity was caused to pass through [his] body,'" was true, a second attempt to execute him would constitute "cruel and unusual punishment violative of due process of law. It exceeds any punishment prescribed by law. There is no precedent for it. What then is it, if it be not cruel, unusual and unlawful?" 379 U.S. at 479.

The dissenters were not persuaded by the other justices' focus on lack of intent. They responded: "Lack of intent that the first application be less than fatal is not material. The intent of the

executioner cannot lessen the torture or excuse the result. It was the statutory duty of the state officials to make sure that there was no failure.” 329 U.S. at 477. Justice Burton framed the issue as follows:

In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. The contrast is that between instantaneous death and death by installments – caused by electric shocks administered after one or more intervening periods of complete consciousness of the victim. Electrocution, when instantaneous, can be inflicted by a state in conformity with due process of law. * * *

* * *

[The Louisiana death penalty law] does not provide for electrocution by interrupted or repeated applications of electric current at intervals of several days or even minutes. It does not provide for the application of electric current of an intensity less than that sufficient to cause death. It prescribes expressly and solely for the application of a current of sufficient intensity to cause death and for the continuance of that application until death results. Prescribing capital punishment, it should be construed strictly. There can be no implied provision for a second, third or multiple application of the current. * * *

329 U.S. at 474-75.

Justice Frankfurter cast the deciding fifth vote rejecting Francis’ claim. In a concurring opinion, he characterized the teenager’s ordeal as an “innocent misadventure” which did not violate the Constitution:

I cannot bring myself to believe that for Louisiana to leave to executive clemency, rather than to require, mitigation of a sentence of death duly pronounced upon conviction for murder because a first attempt to carry it out was an innocent misadventure, offends a principle of justice “Rooted in the traditions and conscience of our people”. Short of the compulsion of such a principle, this Court must abstain from

interference with State action no matter how strong one’s personal feeling of revulsion against a State’s insistence on its pound of flesh. * * * Strongly drawn as I am to some of the sentiments expressed by [the dissent], I cannot rid myself of the conviction that were I to hold that Louisiana would transgress the Due Process Clause if the State were allowed, in the precise circumstances before us, to carry out the death sentence, I would be enforcing my private view rather than that consensus of society’s opinion which, for purposes of due process, is the standard enjoined by the Constitution.

329 U.S. at 470-71.

After the Court rendered its decision, Justice Frankfurter made an extraordinary and virtually unprecedented effort to have Francis’ death sentence commuted to life imprisonment. He wrote to a friend who was a prominent member of the Louisiana bar asking him to seek clemency for Francis.³ Although his friend did so, Francis was denied clemency.

Right before the second attempt to execute Francis, his lawyers discovered that the two executioners who had botched the first attempt to execute him were “so drunk it would have been impossible for them to have known what they were doing.”⁴ After unsuccessful efforts to obtain a stay in the state courts, lawyers for Francis tried again to bring the case before the Supreme Court, reaching the Court only 24 hours before Francis was to be executed. After conferring, the Court denied the petition for habeas corpus.

On May 9, 1947, Willie Francis, wearing pinstriped slacks, black dress shoes and a white shirt with dark stripes and unshackled, walked out of the jail in New Iberia with the sheriff and deputies, got in a car and was taken nine miles to the jail in St. Martinsville. “I’m wearing my Sunday pants and my Sunday heart to the chair,” Francis said. “Ain’t going to wear no beat-up pants to see the Lord. Been busy talking my way into

3. Gilbert King, *THE EXECUTION OF WILLIE FRANCIS: RACE, MURDER AND THE SEARCH FOR JUSTICE IN THE AMERICAN SOUTH* 233-37 (2008).

4. *Id.* at 239-40.

heaven for this past year. Them folks expecting me to come in style.”

He was taken to a cell on second floor. After visits with his family, his lawyer and his priest, he walked 13 steps to the same electric chair he had been in before. He died upon receiving 2,500 volts of current. He was 18 years old.⁵

Both Chief Justice John Roberts and Justice Clarence Thomas relied on decision in Francis’ case in their opinions rejecting challenges to lethal injection in *Baze v. Rees*, 128 S.Ct. 1520 (2008).

Albert L. TROP

v.

**John Foster DULLES, as Secretary of State
and United States Department of State.**

United States Supreme Court
356 U.S. 86 (1958)

[Albert L. Trop, a private in the U.S. Army, was convicted of desertion from a military stockade at Casablanca in 1944, and sentenced to three years at hard labor, forfeiture of all pay and allowances and a dishonorable discharge. When he applied for a passport in 1952, he learned that a federal statute had stripped him of his citizenship by reason of his conviction and dishonorable discharge for wartime desertion.

[In response to Trop’s argument that forfeiture of citizenship was cruel and unusual, the Supreme Court, in a plurality opinion by Chief Justice Warren, writing for four justices, framed the issues as follows:]

Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime. The question is whether this penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment.

[The Chief Justice continued:]

5. *Id.* at 244-249, 278.

At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment – and they are forceful – the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty. But it is equally plain that the existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination.

* * *

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. * * * The Court recognized in [*Weems*] that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

[The Chief Justice observed in footnote 32, that “[w]hether the word ‘unusual’ has any qualitative meaning different from ‘cruel’ is not clear,” but stated “[i]f the word ‘unusual’ is to have any meaning apart from the word ‘cruel,’ however, the meaning should be the ordinary one, signifying something different from that which is generally done. Denationalization as a punishment certainly meets this test. It was never explicitly sanctioned by this Government until 1940 and never tested against the Constitution until this day.”]

* * *

There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the

individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.

This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies.

* * *

The civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime. It is true that several countries prescribe expatriation in the event that their nationals engage in conduct in derogation of native allegiance. Even statutes of this sort are generally applicable primarily to naturalized citizens. But use of denationalization as punishment for crime is an entirely different matter. The United Nations' survey of the nationality laws of 84 nations of the world reveals that only two countries, the Philippines and Turkey, impose denationalization as a penalty for desertion. In this country the Eighth Amendment forbids that to be done.

[Justice Brennan, concurring, framed the question as follows: "we must inquire whether there exists a relevant connection between the particular legislative enactment and the power granted to Congress by the Constitution." He

found expatriation to be a severe, uncertain punishment without justification of achieving rehabilitation or specific deterrence. "Clearly the severity of the penalty, in the case of a serious offense, is not enough to invalidate it where the nature of the penalty is rationally directed to achieve the legitimate ends of punishment," Brennan wrote, but he found the relation between the punishment of expatriation was too tenuous to rationally achieve the governmental purpose of augmenting Congress's war powers.]

Note – *Robinson v. California*

The Court held that the Cruel and Unusual Punishments Clause applies to the States through the operation of the Fourteenth Amendment in *Robinson v. California*, 370 U.S. 660 (1962). The Court held that imprisonment for the crime of being a drug addict was cruel and unusual. Because drug addiction is an illness which may be contracted involuntarily, the Court said that "imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold." *Id.*

The Court Re-Examines The Death Penalty in 1972 – *Furman v. Georgia*

As we have read, the Supreme Court rejected a challenged to the death penalty under the due process clause of the Fourteenth Amendment in *McGautha v. California* in 1971, holding that:

In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.

Nevertheless, the Court considered an Eighth Amendment challenge to the death penalty just a year after *McGautha* in *Furman v. Georgia*. The author of the *McGautha* opinion, John Marshall Harlan II retired from the Court in 1971 and was

replaced by William Rehnquist. Hugo Black, who wrote a concurring opinion in *McGautha*, also retired from the Court in 1971 and was replaced by Lewis F. Powell, Jr. Both were appointed by President Richard M. Nixon. The other members of the *McGautha* Court continued to serve in 1972.

When the Court decided *Furman*, it included two other Nixon appointees, Chief Justice Warren Burger and Associate Justice Harry Blackmun. The other members of the Court were William O. Douglas, appointed by President Franklin D. Roosevelt; William Brennan, Jr. and Potter Stewart, both appointed by President Dwight D. Eisenhower; Byron White, appointed by President John F. Kennedy; and Thurgood Marshall, appointed by President Lyndon B. Johnson.

For consideration and discussion

As you read *Furman v. Georgia*, identify how each of the nine justices interprets the Eighth Amendment’s prohibition of “cruel and unusual punishment.” That is, what were the core principles of the Eighth Amendment identified by the different justices and how do they apply them?

Even though the five justices in the majority each wrote separately, are there any areas of overlap or agreement? What are the areas of agreement among the dissenting justices?

What are the main concerns of each of the Justices in the majority? *I.e.*, what constitutional defects do they see in the way the death penalty is being carried out? Could those defects be corrected and, if so, how?

What justices in the majority leave open the possibility of a death penalty statute that satisfies their Eighth Amendment analysis?

Does the meaning of the “cruel and unusual” clause change as society “matures” and “becomes more enlightened” or does that even occur?

Assuming that it does, what is your understanding from the different opinions about how the Court is to assess the “evolving standards of decency” of society? Is this a proper role for the Court?

How do the different justices see the role of the purposes of sentencing – deterrence, retribution, incapacitation, rehabilitation, etc. – in the Eighth Amendment analysis?

What is the most fundamental difference between the five who found the death penalty unconstitutional and the four who did not?

Assuming that you were drafting a death penalty statute that would satisfy the concerns in *Furman*, what approach would you take?

William Henry FURMAN,
v.
State of GEORGIA.

Lucious JACKSON, Jr.,
v.
State of GEORGIA.

Elmer BRANCH,
v.
State of TEXAS.

Supreme Court of the United States
408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)

PER CURIAM.

[William Henry Furman] was convicted of murder in Georgia and was sentenced to death. * * * [Lucious Jackson] was convicted of rape in Georgia and was sentenced to death. * * * [Elmer Branch] was convicted of rape in Texas and was sentenced to death. * * * Certiorari was granted limited to the following question: “Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?” The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings. So ordered.

Mr. Justice DOUGLAS, concurring.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitute “cruel and unusual punishment” within the meaning of the Eighth Amendment as applied to the States by the Fourteenth. I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments.

* * *

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. 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 v. United States*, 217 U.S. at 378. A like statement was made in *Trop v. Dulles*, 356 U.S. 86, 101, that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.

It would seem to be incontestable that the death penalty inflicted on one 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 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.”¹² The same authors add that “[t]he 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:

Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups.

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 codefendants, 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.

Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.

Warden Lewis E. Lawes of Sing Sing said:

* * * It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favour the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the

12. Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv.L.Rev. 1773, 1790.

court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned 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."¹⁷ One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loeb's are given prison terms, not sentenced to death.

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. * * * 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. Furman 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 Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder. 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. * * *

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. He had a "dull intelligence" and was in the lowest fourth percentile of his class.

We cannot say from facts disclosed in these records 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 of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

* * *

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 not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed

17. CRIME IN AMERICA 335 (1970).

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 discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, 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 a Brahman was exempt from capital punishment, and under that law, "[g]enerally, in the law books, 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, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily 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 in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.²¹

21. Cf. B. Prettyman, Jr., *DEATH AND THE SUPREME COURT* 296-297 (1961).

Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.

* * *

Mr. Justice BRENNAN, concurring. * * *

I

* * *

Several conclusions thus emerge from the history of the adoption of the [Cruel and Unusual] Clause [of the Eighth Amendment]. 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. The Framers

The disparity of representation in capital cases raises doubts about capital punishment itself, which has been abolished in only nine states. If a James Avery (345 U.S. 559) can be saved from electrocution because his attorney made timely objection to the selection of a jury by the use of yellow and white tickets, while an Aubry Williams (349 U.S. 375) can be sent to his death by a jury selected in precisely the same manner, we are imposing our most extreme penalty in an uneven fashion.

* * *

And it is not only a matter of ability. An attorney must be found who is prepared to spend precious hours – the basic commodity he has to sell – on a case that seldom fully compensates him and often brings him no fee at all. The public has no conception of the time and effort devoted by attorneys to indigent cases. And in a first-degree case, the added responsibility of having a man's life depend upon the outcome exacts a heavy toll.

were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered “cruel and unusual” at the time. The “import” of the Clause is, indeed, “indefinite,” and for good reason. A constitutional provision “is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.” *Weems v. United States*, 217 U.S., at 373

* * *

* * * If the judicial conclusion that a punishment is “cruel and unusual” “depend[ed] upon virtually unanimous condemnation of the penalty at issue,” then, “[l]ike 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.” 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] depend[s] 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.”

* * *

II

Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. * * * Our task today is more complex. We know “that the words of the [Clause] are not precise, and that their scope is not static.” We know, therefore, 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. * * *

[E]ven though “[t]his Court has had little occasion to give precise content to the [Clause],” there are principles recognized in our cases and inherent in the Clause sufficient to permit a judicial determination whether a challenged punishment comports 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. * * *

More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. * * *

* * * 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*, 356 U.S. at 101, 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. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words “cruel and unusual punishments” imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments.

* * *

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: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. 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. * * * 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.

* * *

* * * 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.

III

The punishment challenged in these cases is death. * * *

* * * 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. * * *

Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. * * *

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. * * * Since the discontinuance of flogging as a constitutionally permissible punishment, 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." * * *

The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself. * * *

* * * The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. * * *

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. The evidence is conclusive that death is not the ordinary punishment for any crime.

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. * * * 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. * * * [E]xecutions 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. To dispel it would indeed require a clear showing of nonarbitrary infliction.

Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes. * * * [I]t would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be?

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 probability of arbitrariness is sufficiently substantial that it can be relied upon,

in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.

* * * I turn * * * 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. * * *

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. The States point out that many legislatures authorize death as the punishment for certain crimes and that substantial segments of the public, as reflected in opinion polls and referendum votes, continue to support it. Yet the availability of this punishment through statutory authorization, as well as the polls and referenda, which amount simply to approval of that authorization, simply underscores the extent to which our society has in fact rejected this punishment. When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute. At the very least, I must conclude that contemporary society views this punishment with substantial doubt.

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. This principle, too, is related to the others. When there is a strong probability that the State is arbitrarily inflicting an unusually severe punishment that is subject to grave societal doubts, it is likely also that the punishment cannot be shown to be serving any penal purpose that could not be served equally well by some less severe punishment.

* * * We are not presented with the theoretical question whether under any imaginable circumstances the threat of death might be a greater deterrent to the commission of capital crimes than the threat of imprisonment. We are concerned with the practice of punishing criminals by death as it exists in the United States today. 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. A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital crimes. * * *

* * *

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, one that is independent of protection for society, is retribution. Shortly stated, retribution in this context means that criminals are put to death because they deserve it.

* * * As administered today, however, the punishment of death cannot be justified as a necessary means of exacting retribution from criminals. When the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment. * * * 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: * * * The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

IV

When this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative. Since that time successive restrictions, imposed against the background of a continuing moral controversy, have drastically curtailed the use of this punishment. Today death is a uniquely and unusually severe punishment. When 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.” *Weems v. United States*, 217 U.S., at 381.

Mr. Justice STEWART, concurring.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

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 under the Eight and Fourteenth Amendments. 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.
* * *

If we were reviewing death sentences imposed under these or similar laws, we would be faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. We would need to decide whether a legislature – state or federal – could constitutionally determine that certain criminal conduct is so atrocious that society’s interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, only the automatic penalty of death will provide maximum deterrence.

On that score I would say only that 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 imposed upon all those who are found guilty of

forcible rape.⁸ And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder.⁹ 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. As Mr. Justice White so tellingly puts it, the “legislative will is not frustrated if the penalty is never imposed.”

Instead, the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment’s guarantee against cruel and unusual punishments. In the first place, it is clear that these sentences are “cruel” in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. In the second place, it is equally clear that these 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 by 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

8. Georgia law, at the time of the conviction and sentencing of [Jackson] left the jury a choice between the death penalty, life imprisonment, or “imprisonment and labor in the penitentiary for not less than one year nor more than 20 years.” The current Georgia provision for the punishment of forcible rape continues to leave the same broad sentencing leeway. Texas law, under which [Branch] was sentenced, provides that a “person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five.”

9. Georgia law, under which [Furman] was sentenced, left the jury a choice between the death penalty and life imprisonment. Current Georgia law provides for similar sentencing leeway.

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.

* * *

Mr. Justice WHITE, concurring.

The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us. In joining the Court's judgments, therefore, 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. * * *

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. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

Most important, a major goal of the criminal law – to deter others by punishing the convicted criminal – would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. * * * [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 imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

It is also my judgment that this point has been reached with respect to capital punishment as it is presently administered under the statutes involved in these cases. * * * I cannot avoid the conclusion that as the statutes before us are now administered,

the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.

* * * I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries – a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence – has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course.

* * *

In this respect, I add only that past and present legislative judgment with respect to the death penalty loses much of its force when viewed in light of the recurring practice of delegating sentencing authority to the jury and the fact that a jury, in its own discretion and without violating its trust or any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime. Legislative “policy” is thus necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them. In my judgment what was done in these cases violated the Eighth Amendment.

Mr. Justice MARSHALL, concurring.

* * *

The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But, we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed on each of the petitioners and to

determine whether or not it violates the Eighth Amendment. The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is “a punishment no longer consistent with our own self-respect” and, therefore, violative of the Eighth Amendment.

* * *

* * * I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution. While this fact cannot affect our ultimate decision, it necessitates that the decision be free from any possibility of error.

* * *

* * * It has often been noted that American citizens know almost nothing about capital punishment. Some of the conclusions arrived at * * * and the supporting evidence would be critical to an informed judgment on the morality of the death penalty: *e.g.*, that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become lawabiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

This information would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. This problem arises from the fact that the public’s desire for retribution, even though this is a goal that the legislature cannot constitutionally pursue as its sole justification for capital punishment, might influence the citizenry’s view of the morality of capital punishment. The

solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology. I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional.

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. Each of these facts is considered briefly below.

Regarding discrimination, it has been said that “[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group – the man who, because he is without means, and is defended by a court-appointed attorney – who becomes society’s sacrificial lamb . . .” Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. Racial or other discriminations should not be surprising. In *McGautha v. California*, this Court

held “that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution.” This was an open invitation to discrimination.

* * *

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today’s situation. * * *

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our “beyond a reasonable doubt” burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. * * *

Proving one’s innocence after a jury finding of guilt is almost impossible. While reviewing courts are willing to entertain all kinds of collateral attacks where a sentence of death is involved, they very rarely dispute the jury’s interpretation of the evidence. This is, perhaps, as it should be. But, if an innocent man has been found guilty, he must then depend on the good faith of the prosecutor’s office to help him establish his innocence. There is evidence, however, that prosecutors do not welcome the idea of having convictions, which they labored hard to secure, overturned, and that their cooperation is highly unlikely.

No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. * * *

* * *

To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey. * * *

At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But, the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve "a major milestone in the long road up from barbarism" and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

Justice Marshall appended to his opinion various documents about states which had repealed the death penalty, homicide rates and number of executions. See 408 U.S. at 372.

Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN, Mr. Justice POWELL, and Mr. Justice REHNQUIST join, dissenting.

* * *

I

If we were possessed of legislative power, I would either join with Mr. Justice BRENNAN and Mr. Justice MARSHALL or, at the very least, 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 and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment. There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but, of all our fundamental guarantees, the ban on "cruel and unusual punishments" is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command. Yet it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.

Although the Eighth Amendment literally reads as prohibiting only those punishments that are both "cruel" and "unusual," history compels the conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed.

* * *

II

Counsel for petitioners properly concede that capital punishment was not impermissibly cruel at the time of the adoption of the Eighth Amendment. Not only do the records of the debates indicate that the Founding Fathers were limited in their concern to the prevention of torture, but it is also clear from the language of the Constitution itself that there was no thought whatever of the elimination of capital punishment. 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." The Double Jeopardy Clause of the Fifth Amendment is a prohibition against being "twice put in jeopardy of life" for the same offense. Similarly, the Due Process Clause commands "due process of law" before an accused can be "deprived of life, liberty, or property." Thus, the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment. * * *

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. * * *

* * *

I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but, rather, that the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default.

III

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. It is not a punishment such as burning at the stake that everyone would ineffably find to be repugnant to all civilized standards. Nor is it a punishment so roundly condemned that only a few aberrant legislatures have retained it on the statute books. Capital punishment is authorized by statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes. On four occasions in the last 11 years Congress has added to the list of federal crimes punishable by death. In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced.

* * * Without assessing the reliability of [public opinion] polls, or intimating that any judicial reliance could ever be placed on them, it need only be noted that the reported results have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values.

Counsel for petitioners rely on a different body of empirical evidence. They argue, in effect, that the number of cases in which the death penalty is imposed, as compared with the number of cases in which it is statutorily available, reflects a general revulsion toward the penalty that would lead to its

repeal if only it were more generally and widely enforced. * * *

It is argued that in those capital cases where juries have recommended mercy, they have given expression to civilized values and effectively renounced the legislative authorization for capital punishment. At the same time it is argued that where juries have made the awesome decision to send men to their deaths, they have acted arbitrarily and without sensitivity to prevailing standards of decency.

* * *

* * * 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. * * * Given the general awareness that death is no longer a routine punishment for the crimes for which it is made available, it 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. There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State. In this sense their fate has been controlled by a fortuitous circumstance. However, this element of fortuity does not stand as an indictment either of the general functioning of juries in capital cases or of the integrity of jury decisions in individual cases. There is no empirical basis for concluding that juries have generally failed to discharge in good faith the[ir] responsibility – that of choosing

between life and death in individual cases according to the dictates of community values.

* * * [I]f selective imposition evidences a rejection of capital punishment in those cases where it is not imposed, it surely evidences a correlative affirmation of the penalty in those cases where it is imposed.

* * *

IV

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.” As a pure policy matter, this approach has much to recommend it, but it 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.

* * *

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. * * *

* * * Two of the several aims of punishment are generally associated with capital punishment – retribution and deterrence. * * * There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes.

The less esoteric but no less controversial question is whether the death penalty acts as a superior deterrent. Those favoring abolition find no evidence that it does. Those favoring retention start from the intuitive notion that capital punishment should act as the most effective deterrent and note that there is no convincing evidence that it does not. Escape from this empirical stalemate is sought by placing the burden of proof on the States and concluding that they have failed to demonstrate that capital punishment is a more effective deterrent than life imprisonment. * * * If it were proper to put the

States to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment. Yet I know of no convincing evidence that life imprisonment is a more effective deterrent than 20 years’ imprisonment, or even that a \$10 parking ticket is a more effective deterrent than a \$5 parking ticket. 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.

V

* * *

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. * * *

* * * The decisive grievance of the [concurring] opinions – not translated into Eighth Amendment terms – 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 it manifestly fails to establish that the death penalty is a “cruel and unusual” punishment. * * * The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and

exclusively a procedural due process argument. *
* *

* * * [I]t would be disingenuous to suggest that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication. * * *

Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition.

It seems remarkable to me that with our basic trust in lay jurors as the keystone in our system of criminal justice, it should now be suggested that we take the most sensitive and important of all decisions away from them. 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. * * *

VI

Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress. * * * I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.

* * *

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. * * *

Mr. Justice BLACKMUN, dissenting.

1. Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments.

2. Having lived for many years in a State that does not have the death penalty [Minnesota], that effectively abolished it in 1911, and that carried out its last execution on February 13, 1906 capital punishment had never been a part of life for me. In my State, it just did not exist. So far as I can determine, the State, purely from a statistical deterrence point of view, was neither the worse nor the better for its abolition, for, as the concurring opinions observe, the statistics prove little, if anything. But the State and its citizens accepted the fact that the death penalty was not to be in the arsenal of possible punishments for any crime.

* * *

5. To reverse the judgments in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts – perhaps the rationalizations – 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. But it is good argument and it makes sense only in a legislative and executive way and not as a judicial expedient. As I have said above, were I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. And were I the chief executive of a sovereign State, I would be sorely tempted to exercise executive clemency * * *. There – on the Legislative Branch of the State or Federal Government, and secondarily, on the Executive Branch – is where the authority and responsibility for this kind of action lies. The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue. * * *

* * *

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.

Mr. Justice POWELL, with whom THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice REHNQUIST join, dissenting.

* * *

Any attempt to discern contemporary standards of decency through the review of objective factors must take into account several overriding considerations which petitioners choose to discount or ignore. 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. * * *

The second and even more direct source of information reflecting the public’s attitude toward capital punishment is the jury. * * *

* * * During the 1960’s juries returned in excess of a thousand death sentences, a rate of approxi-

mately two per week. 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 at oral argument that “the death penalty is virtually unanimously repudiated and condemned by the conscience of contemporary society.” * * *

One must conclude, contrary to petitioners’ submission, that the indicators most likely to reflect the public’s view – legislative bodies, state referenda and the juries which have the actual responsibility – do not support the contention that evolving standards of decency require total abolition of capital punishment. * * *

Petitioners seek to salvage their thesis by arguing that the infrequency and discriminatory nature of the actual resort to the ultimate penalty tend to diffuse public opposition. We are told that the penalty is imposed exclusively on uninfluential minorities – “the poor and powerless, personally ugly and socially unacceptable.” It is urged that this pattern of application assures that large segments of the public will be either uninformed or unconcerned and will have no reason to measure the punishment against prevailing moral standards.

* * *

Apart from the impermissibility of basing a constitutional judgment of this magnitude on such speculative assumptions, the argument suffers from other defects. 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.

* * *

* * * Much also is made of the undeniable fact that the death penalty has a greater impact on the lower economic strata of society, which include a

relatively higher percentage of persons of minority racial and ethnic group backgrounds. * * *

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. The Due Process Clause admits of no distinction between the deprivation of “life” and the deprivation of “liberty.” 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. Nor, indeed, could any society have a viable system of criminal justice if sanctions were abolished or ameliorated because most of those who commit crimes happen to be underprivileged. 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.

Although not presented by any of the petitioners today, a different argument, premised on the Equal Protection Clause, might well be made. If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established. * * *

[D]iscriminatory application of the death penalty in the past, admittedly indefensible, is no justification for holding today that capital

punishment is invalid in all cases in which sentences were handed out to members of the class discriminated against. * * *

* * * The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have “evolved” in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.

* * *

I find no support – in the language of the Constitution, in its history, or in the cases arising under it – 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. While the cases affirm our authority to prohibit punishments that are cruelly inhumane, and punishments that are cruelly excessive in that they are disproportionate to particular crimes, the precedents of this Court afford no basis for striking down a particular form of punishment because we may be persuaded that means less stringent would be equally efficacious.

Secondly, if we were free to question the justifications for the use of capital punishment, a heavy burden would rest on those who attack the legislatures’ judgments to prove the lack of rational justifications. This Court has long held that legislative decisions in this area, which lie within the special competency of that branch, are entitled to a presumption of validity.

I come now to consider, subject to the reservations above expressed, the two justifications most often cited for the retention of capital punishment. The concept of retribution – though popular for centuries – is now criticized as unworthy of a civilized people. Yet this Court has acknowledged the existence of a retributive element in criminal

sanctions and has never heretofore found it impermissible. * * *

* * *

Deterrence is a more appealing justification, although opinions again differ widely. * * *

* * *

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. * * *

* * * [I]n *Weems v. United States*, * * * [t]he defendant, charged with falsifying Government documents, had been sentenced to serve 15 years in *cadena temporal*, a punishment which included carrying chains at the wrists and ankles and the perpetual loss of the right to vote and hold office. Finding the sentence grossly excessive in length and condition of imprisonment, the Court struck it down. This notion of disproportionality – that particular sentences may be cruelly excessive for particular crimes – has been cited with approval in more recent decisions of this Court.

These cases, while providing a rationale for gauging the constitutionality of capital sentences imposed for rape, also indicate the existence of necessary limitations on the judicial function. The use of limiting terms in the various expressions of this test found in the opinions – *grossly* excessive, *greatly* disproportionate – emphasizes that the Court’s power to strike down punishments as excessive must be exercised with the greatest circumspection. * * *

Operating within these narrow limits, I find it quite impossible to declare the death sentence grossly excessive for all rapes. Rape is widely recognized as among the most serious of violent crimes, as witnessed by the very fact that it is punishable by death in 16 States and by life imprisonment in most other States. The several reasons why rape stands so high on the list of serious crimes are well known: It is widely viewed as the most atrocious of intrusions upon the

privacy and dignity of the victim; never is the crime committed accidentally; rarely can it be said to be unpremeditated; often the victim suffers serious physical injury; the psychological impact can often be as great as the physical consequences; in a real sense, the threat of both types of injury is always present. * * *

The argument that the death penalty for rape lacks rational justification because less severe punishments might be viewed as accomplishing the proper goals of penology is as inapposite here as it was in considering *per se* abolition. * * *

* * *

With deference and respect for the views of the Justices who differ, it seems to me * * * as a matter of policy and precedent, this is a classic case for the exercise of our oft-announced allegiance to judicial restraint. I know of no case in which greater gravity and delicacy have attached to the duty that this Court is called on to perform whenever legislation – state or federal – is challenged on constitutional grounds. It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process. Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many might decry their failure either to abolish the penalty entirely or selectively, or to establish standards for its enforcement. But impatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers. * * *

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice POWELL join, dissenting.

The Court’s judgments today strike down a penalty that our Nation’s legislators have thought necessary since our country was founded. * * * Whatever its precise rationale, today’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*. An oft-told story since then, it bears summarization once more. 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, in a case before them, 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 Founding Fathers thus wisely sought to have the best of both worlds, the undeniable benefits of both democratic self-government and individual rights protected against possible excesses of that form of government.

The courts in cases properly before them have been entrusted under the Constitution with the last word, short of constitutional amendment, as to whether a law passed by the legislature conforms to the Constitution. But just because courts in general, and this Court in particular, do have the last word, the admonition of Mr. Justice Stone dissenting in *United States v. Butler* must be constantly borne in mind:

[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.

297 U.S. 1, 78-79 (1936).

Rigorous attention to the limits of this Court's authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others. Judges differ only in that they have the power, if not the authority, to enforce their desires. This is doubtless why nearly two centuries of judicial precedent from this Court counsel the sparing use of that power. The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court. * * *

A separate reason for deference to the legislative judgment is the consequence of human error on the part of the judiciary with respect to the constitutional issue before it. Human error there is bound to be, judges being men and women, and men and women being what they are. But an error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

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. * * *

* * *

If there can be said to be one dominant theme in the Constitution, perhaps more fully articulated in the Federalist Papers than in the instrument itself, 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. The Due Process and Equal Protection Clauses of the Fourteenth Amendment were "never intended to destroy the States' power to govern themselves."

The very nature of judicial review, as pointed out by Justice Stone in his dissent in the *Butler* case, makes the courts the least subject to Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the Framers. It is for this reason that 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.

The impact of *Furman*

There were 589 inmates on death rows in 1972 when *Furman* was decided. Five hundred and five had been sentenced to death for murder, 80 for rape, and four for armed robbery. Their sentences were reduced to life imprisonment.

The states paroled 322 of the 589. Of the parolees, 75 later were returned to prison for technical parole violations of the conditions of their parole or minor crimes, 32 committed more serious crimes, and five committed murder. Joan M. Cheever, *BACK FROM THE DEAD* (2006). Approximately 250 of the parolees were still alive when Cheever began her book; she interviewed half of them.

William Henry Furman was paroled in 1984. He was arrested for burglaries in 2004, 2005 and 2006. On October 4, 2006, Furman age 64, pleaded guilty to burglary and was sentenced to 20 years in prison.

Thirty-five states promptly redrafted their death penalty statutes to address the concerns expressed by the Justices in the majority in *Furman* about the arbitrary application of the death penalty and resumed having capital trials. The Supreme Court reviewed the statutes of five of those states in 1976.