Furman v. Georgia—Deathknell for Capital Punishment?

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FURMAN V. GEORGIA—DEATHKNELL FOR CAPITAL PUNISHMENT?

On the morning of June 29, 1972, death row inmates at the Georgia State Prison in Reidsville suddenly began to shout and cheer. They had just heard a radio newscaster announce that the United States Supreme Court had struck down the death penalty as presently imposed. Lucious Jackson, Jr., a convicted rapist, poignantly summed up the emotions of those marking time in death row cellblocks across the country: "I've been thinking about death for a long time. Now I can think about living."\(^1\)

Writs of certiorari, limited to the question of whether the death sentences in the cases under review were unconstitutional "cruel and unusual" punishments,\(^2\) had been granted to Jackson, to William Furman, convicted of murder in Georgia, and to Elmer Branch, convicted of rape in Texas. The Court, in a brief per curiam opinion, held 5-4 that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."\(^3\) Each of the nine Justices filed a separate opinion in the case. The failure of any majority Justice to adopt the reasoning of any other has clouded the standards to be employed in considering eighth amendment claims and raises at least two additional questions: the fate of capital punishment in those narrow instances where it has not been abolished and the possible application of the various rationales offered by the Justices to other penalties and exercises of discretion.

Two members of the majority, Justices Brennan and Marshall, found the death penalty unconstitutional \textit{per se}. The remaining three, Justices Douglas, Stewart and White, condemned capital punishment as imposed under the discretionary sentencing systems favored by most states but did not reach the question of the constitutionality of a mandatory death penalty. Chief Justice Burger and Justices Blackmun, Powell and Rehnquist based their dissenting opinions on the argument that the Court's holding violates the root principles of stare decisis and the separation of powers.

\(^{2}\) 403 U.S. 952 (1971). Certiorari was also granted to Earnest Aikens of California, a convicted murderer, but the grant was dismissed, Aikens v. California, No. 68-5027, \textit{cert. dismissed}, 406 U.S. 813 (1972), in light of the Supreme Court of California's decision striking down the death penalty on state constitutional grounds, People v. Anderson, 3 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, \textit{cert. denied}, 406 U.S. 958 (1972).
\(^{3}\) Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (emphasis added).
HISTORY OF THE CRUEL AND UNUSUAL PUNISHMENT CLAUSE

The forfeiture of life as punishment for breach of an accepted standard of human conduct is a penalty as ancient as man himself.\(^4\) The oldest recorded instance of human execution for crime appears *circa* 1500 B.C. in the Amherst papyri.\(^5\) The Bible is replete with references to the death penalty for crimes such as murder,\(^6\) adultery,\(^7\) bestiality,\(^8\) and rape,\(^9\) and, in addition, mentions some of the methods employed to exact the supreme penalty.\(^10\) In England, the laws of Alfred (871-901) authorized capital punishment\(^11\) but execution was left to private enforcement. During the reign of Henry II (1154-1189) this burden began to shift to the State and the rule of personal vengeance was gradually replaced with the recognition that the infliction of death was more than a purely private affair.\(^12\) With the rise of the absolute monarch and the emergence of the modern nation, the execution of capital punishment became the exclusive prerogative of the State.\(^13\)

While the pages of the history of capital punishment are filled with descriptions of the numerous petty crimes which once warranted the death penalty\(^14\) and the barbaric means employed in its execution,\(^15\) attempts were made from the earliest days to place some limitations on its application. *Lex talionis*,\(^16\) the familiar "eye for an eye" injunction of the Mosaic law,\(^17\) at least replaced unrestricted retaliation with a maximum permissible punishment.\(^18\) In addition, the rab-

\(^4\) In some ancient cultures, however, the death penalty was virtually unknown. *See*, e.g., 2 J. Escarra, *Code Pénal de la République de Chine* at xxv (1930).


\(^6\) Genesis 9:6; Exodus 21:12.

\(^7\) Leviticus 20:21.

\(^8\) Exodus 22:18.

\(^9\) Deuteronomy 22:25.

\(^10\) E.g., Leviticus 21:9 (burning); Deuteronomy 22:21 (stoning).


\(^12\) G. Scott, *History of Capital Punishment* 5 (1950) [hereinafter Scott].


\(^14\) *See* Bedau, *Introduction to The Death Penalty in America* (H. Bedau ed. 1967) [hereinafter Bedau].

\(^15\) *See* Scott, *supra* note 12, at 19-35.


\(^17\) Exodus 21:25.

binical court or sanhedrin espoused a philosophy of criminal punishment which rendered execution a highly unlikely occurrence.\textsuperscript{19} Prior to the Norman conquest in 1066, England operated under a codification of the lex talionis promulgated by King Alfred (\textit{circa} 900 A.D.).\textsuperscript{20} This new system reflected the various Germanic,\textsuperscript{21} Greek,\textsuperscript{22} and Roman\textsuperscript{23} influences on English punishment theory and generally apportioned penalties according to the gravity of the crime committed. With the advent of William the Conqueror, however, the old law disappeared and a new system of amercements, or fines, was substituted for the traditional “eye for an eye” approach. The amounts of these amercements were entirely discretionary and their imposition was soon abused in an effort to increase royal revenue. Eventually the nobility was compelled to put an end to the ruinous system of discretionary fining and in 1215 King John was forced to include three chapters banning excessive fines in the Magna Carta.\textsuperscript{24} This prohibition was extended to include corporal punishments by a fourteenth century document that purported to be a copy of the laws of Edward the Confessor (1042-66),\textsuperscript{25} and was recognized judicially in the 1615 case of Hodges v. Humkin, Mayor of Liskerret,\textsuperscript{26} wherein the court ruled that “imprisonment ought always to be according to the quality of the offense . . . .”\textsuperscript{27}

The first use of the phrase “cruel and unusual punishments” appears in the Declaration of Rights of 1689.\textsuperscript{28} James II was accused of

\textsuperscript{19} Perhaps most indicative of the rabbinical attitude toward capital punishment is the following passage from the \textit{Talmud}:

\begin{quote}
A sanhedrin which executes a criminal once in seven years is called a “court of destroyers.” Rabbi Eliezer ben Azariah states this is so even if it executes one every seventy years.
\end{quote}

\textit{Makkot} 1:7.

\textsuperscript{20} Granucci, \textit{supra} note 16, at 844.

\textsuperscript{21} The Norsemen standardized their system of crime and punishment by listing offenses and their punishments in the Gulathing and Frustathing laws. T. Dufwa, \textit{The Viking Laws and the Magna Carta} 51-52 (1963).

\textsuperscript{22} Aristotle offered the theory that inequality, regardless of at who’s expense, was unjust. \textit{Ethics} 148-49 (Penguin Classics ed. 1955).


\textsuperscript{25} Granucci, \textit{supra} note 16, at 846.

\textsuperscript{26} E. Bulstrode, \textit{The Reports of Edward Bulstrode} (Cases in King’s Bench, 1609-1626) (2d ed. 1668).

\textsuperscript{27} Id. at 139-40. \textit{See} Granucci, \textit{supra} note 16, at 847.


Following James' defeat and his flight from England, a convention of the estates of the realm proposed the Declaration and presented it to William and Mary when they were tendered the crown. The new monarchs, anxious to secure their support, quickly
having committed a number of crimes. Among the charges were the following: "excessive fines have been imposed; and illegal and cruel punishments inflicted." The Bill of Rights thus declared "that excessive bail ought not to be required nor excessive fines imposed nor cruel and unusual punishment inflicted." 

The cruel and unusual punishment clause of the English Bill of Rights has been characterized as an objection to the imposition of punishments which were not within the jurisdiction of the sentencing court nor authorized by statute. Further, the clause served as a reiteration of the policy against disproportionate penalties which policy, by 1689, had become firmly imbedded in English law.

The clause was soon utilized in an attempt by Lord Devonshire to have an excessive fine reduced by the Court of King's Bench. The House of Lords, in reviewing the case, decided that the fine "was excessive and exorbitant, against Magna Charta, the common right of the subject and the law of the land."

Opinions differ as to what the framers of the American eighth amendment intended in employing the English terms "cruel and unusual." It has been suggested that, through a misinterpretation of
Blackstone, the framers assumed a meaning at variance with the English understanding: that they supposed the words to have a meaning derived from the Bloody Assizes, the writings of Sir Robert Beale and the work of Nathaniel Ward of Massachusetts, i.e., that the clause prohibited inhumane, inherently cruel punishment rather than excessive, disproportionate or illegal punishment. The courts have taken a more expansive view of the framers' intent:

It is clear, however, that in this country the phrase was understood to encompass the former and to prohibit both new forms of physical cruelty and existing punishments which courts might later hold to be cruel.

This interpretation did not exclude the condemnation of disproportionate penalties, as reference to the relevant provisions of the newly independent states' constitutions will demonstrate. Cruel and unusual punishment clauses were incorporated into eight of these documents and two states specifically included language requiring proportionality of punishments.

33 Beale's most influential work, A Book against Oaths Ministered in the Courts of Ecclesiastical Commission, is a vigorous protest against state torture and inhuman treatment. See Granucci, supra note 16, at 848.

34 "For bodilie punishments we allow none that are inhumane, barbarous, or cruel." Ward, Body of Liberties, in R. Perry, Sources of Our Liberties 153 (1959).

This provision was enacted by the Massachusetts General Court in 1641. See W. Whittmore, Colonial Laws of 1660-1672, at 8 (1889). See also Massachusetts Special Commission Established for the Purpose of Investigating and Studying the Abolition of the Death Penalty in Capital Cases, Report and Recommendations 98 (1958) [hereinafter Mass. Report].


Md. Const. § 22 (1776), 3 Thorpe 1688, see also id. § 14:

That sanguinary laws ought to be avoided, as far as is consistent with the safety of the state: and no law, to inflict cruel and unusual pains and penalties, ought to be made in any case, or at any time hereafter.

Mass. Const. art. 26 (1780), 3 Thorpe 1892.

N.H. Const. § 33 (1784), 4 Thorpe 2457.

N.C. Const. § 10 (1776), 5 Thorpe 2788.

Pa. Const. art. 9, § 13 (1790), 5 Thorpe 3101: "nor cruel punishments inflicted."

S.C. Const. art. 9, § 4 (1790), 6 Thorpe 3264: "nor cruel punishments inflicted."

Va. Const., Declaration of Rights, § 9 (1776), 7 Thorpe 3813.

38 N.H. Const. § 18 (1784), 4 Thorpe 2456: "All penalties ought to be proportioned to the nature of the offense."

S.C. Const. § 40 (1778), 6 Thorpe 3257, directed the legislature to reform the penal code so that punishments might be made "less sanguinary, and in general more proportionate to the crime."
Although individual liberties were left unprotected by the Articles of Confederation, the Northwest Ordinance of 1787 did provide such guarantees for the citizens of the Northwest Territory and included within its provisions a prohibition of cruel and unusual punishments.39

The failure of the proposed federal Constitution of 1787 to include a bill of rights prompted the well-known debates in the state ratifying conventions. New York,40 Virginia41 and North Carolina,42 where sentiment expressing desire for the inclusion of a bill of rights was the strongest, submitted proposals for such a bill which included prohibitions of cruel and unusual punishment.43

In the Massachusetts ratifying convention, one delegate expressed his desire to see a cruel and unusual punishment clause included within the Constitution:

They [Congress] are no where restrained from inventing the most cruel and unheard of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline.44

In the Virginia convention, Patrick Henry warned of the dangers of adopting a constitution without a cruel and unusual punishment clause to restrain the legislature:

But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.45

The eighth amendment occasioned very little discussion in Congress prior to its adoption, and that only in the House. Congressman Smith of South Carolina characterized the amendment as indefinite and Congressman Livermore of New Hampshire speculated that the Congress might be hamstrung by the amendment in the setting of proper punishments for crime.46

39 Ordinance of 1787: The Northwest Territorial Government, The Confederate Congress, July 13, 1787; art. II: "All fines shall be moderate; and no cruel or unusual punishments shall be inflicted." 1 U.S.C. at 23 (1971).
40 1 J. Elliot, Debates in the Several State Conventions on the Adoption of the Federal Constitution 229 (2d ed. 1863) [hereinafter Elliot's Debates].
42 4 Elliot's Debates 242.
43 1 Elliot's Debates 228 (New York), 3 id. at 658 (Virginia), 4 id. at 244 (North Carolina).
46 Mr. Smith, of South Carolina, objected to the words 'nor cruel and unusual punishments', their import being too indefinite.
Development of an Eighth Amendment Standard

Since the passage of the eighth amendment, the Court has allowed the concept of cruel and unusual punishment to remain largely undeveloped. Although the Justices have struck down various penalties as violative of the clause and have upheld others, it is undeniably true that "the exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by th[e] Court."

In the search for a relevant eighth amendment standard, the question of separation of powers is necessarily encountered. What are the proper roles of the legislatures and the Court in the determination of the parameters of the cruel and unusual punishment clause? Upon which branch is a definition of the clause promulgated by another branch binding?

The answers given to these inquiries have frequently been framed in absolute terms. Some have vigorously asserted that punishment policy, especially that concerning the abolition or retention of capital

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

The question was put on the clause, and it was agreed to by a considerable majority.

1 Annals of Cong. 754 (1789). Interestingly, Mr. Livermore seems to have correctly foreseen that the cruel and unusual punishment clause might be used to bar capital punishment.


Robinson marks the sole occasion that five Justices agreed that a particular punishment violated the cruel and unusual punishment clause. In Trop, the opinion was joined in by three other Justices; Justice Brennan concurred separately. A four Justice majority produced the Weems decision.

That the state has broad discretion in determining the proper punishment for crime is not open to serious dispute. A legislative body is, however, bound to observe the guarantees of individual liberty enumerated in the Constitution. In setting punishment standards, therefore, the state may not violate the proscription of cruel and unusual punishment contained in the eighth amendment.

The essence of the argument that punishment policy, especially that relating to capital punishment, is but a political or social issue is the belief that the eighth amendment is directed to the legislature as a sanction against the enactment of only the most barbaric and cruelly excessive punishments condemned at the time of its passage. But if this were so, the cruel and unusual punishment clause would be little more than an empty promise, for no state would conceivably consider reestablishing disembowelment or crucifixion as punishment for any

51 The Court has offered guidelines to aid in the determination of whether an issue is political:

In determining whether a question falls within the political question category, the appropriateness under our system of government of attributing finality to the action of the political departments and also the lack of satisfactory criteria for a judicial determination are dominant.


Adequate standards do exist to measure whether a punishment falls within the prohibition of the eighth amendment; see text accompanying notes 103, 106, 112 and 117, infra. The Court retains the power to make the ultimate determination; see text accompanying note 59, infra; Baker v. Carr, 369 U.S. 186 (1962).
52 Christian Science Monitor, January 27, 1972, § 2, at 1, col. 4.


The proposition has been extended to encompass the contention that if the penalty falls within the limits set by the legislature, it is not cruel and unusual. See, e.g., Weems v. United States, supra at 375; Schultz v. Zerbst, 73 F.2d 663 (10th Cir. 1934); Jones v. State, 247 Md. 530, 239 A.2d 791 (1967); State v. Cannon, 55 Del. 581, 190 A.2d 514 (1963). See also cases collected in Note, The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment, 36 N.Y.U.L. Rev. 846, 852 n.38 (1961) [hereinafter Effectiveness of the Eighth Amendment].

For an early rejoinder to this contention see O'Neil v. Vermont, 144 U.S. 223, 370-71 (1892) (Field, J., dissenting).
crime.\textsuperscript{66} This realization does not, however, destroy the present day relevancy of the amendment. The state must be restrained from enacting cruel and unusual punishments in addition to those of an obviously barbaric nature.\textsuperscript{67}

A legislator’s allegiance is pledged to his conscience and his constituency, neither of which might quail at a statute inflicting a cruelly excessive punishment on a member of a small, unpopular minority, especially if the legislator were required only to acquiesce in the utilization of a law long on the books but seldom (and then only arbitrarily) enforced.\textsuperscript{68} It is in precisely such a situation that a court is most clearly called on to enforce the prohibition of cruel and unusual punishment.\textsuperscript{69}

In order to do so, the court must ascertain the meaning and scope of the cruel and unusual punishment clause.\textsuperscript{70} It can neither leave this duty to the state nor shirk the responsibility to decide the ultimate constitutional question.\textsuperscript{61}

\textbf{The Constitutional Concept of Cruelty}

The failure of the Supreme Court to present a meaningful analysis of the cruel and unusual punishment clause, a failure left uncorrected by \textit{Furman}, is due largely to the difficulty of defining with precision the terms “cruel” and “unusual.”\textsuperscript{62} There is little doubt\textsuperscript{63} that the constitutional proscription of cruelty forbids all historical forms of tor-

\begin{footnotesize}
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\item \textsuperscript{66} See Weems v. United States, 217 U.S. 349, 371 (1910).
\item \textsuperscript{68} See Weems v. United States, 217 U.S. 349, 375 (1910):
\begin{itemize}
\item The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men.
\end{itemize}
\item \textsuperscript{69} Id. at 378 ("our legal duty ... is invoked"); \textit{see also In re Kemmler}, 136 U.S. 436, 446-47 (1890) ("it would be the duty of the courts to adjudge").
\item \textsuperscript{70} Weems v. United States, 217 U.S. 349, 373 (1910); People v. Anderson, 6 Cal. 3d 628, 640, 649, 680, 888, 100 Cal. Rptr. 152, 160, cert. denied, 406 U.S. 958 (1972).
\item Representative Livermore intimated this clearly in arguing against the amendment: "It lays with the court to decide. ..." \textit{1 Annals of Cong. 754 (1789)}.
\item \textsuperscript{61} Trop v. Dulles, 356 U.S. 86, 103 (1958) (plurality opinion of Warren, C.J.); Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803); People v. Anderson, 6 Cal. 3d 628, 640-41, 493 P.2d 880, 888, 100 Cal. Rptr. 152, 159-60, cert. denied, 406 U.S. 958 (1972).
\item \textsuperscript{63} See Jackson v. Bishop, 404 F.2d 571 (6th Cir. 1968); \textit{but see State v. Cannon, 55 Del. 585, 190 A.2d 514 (1963) (upholding whipping); R. Caldwell, Red Hannah (1947).}
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whether outright barbarity or inhumane treatment. The Court has specifically condemned such inherently cruel practices as the infliction of a lingering death,\(^6\) burning at the stake, crucifixion, breaking on the wheel,\(^6\) mutilation,\(^6\) use of the rack and thumbscrew,\(^6\) and similar atrocities perpetrated in the past.\(^6\) However, the infliction of physical pain as a necessary adjunct to execution was not thought to be included within the amendment's scope.\(^7\)

The amendment's limitation upon state power is not confined to bodily torture. Also violative of the clause prohibiting cruelty are those punishments which inflict pain primarily psychological in nature. While the Court was slow in recognizing this concept,\(^7\) it was eventually held that under certain circumstances a particular form of punishment could "subject the individual to a fate of ever increasing fear and distress"\(^7\) and that this "psychological hurt . . . must be reckoned a substantial factor in the ultimate judgment"\(^7\) of whether the punishment violates the eighth amendment.

The scope of the constitutional prohibition of cruelty is not limited to the physical or mental suffering inhering in the penalty itself or attending its mode of execution. The amendment is also concerned with those punishments which are cruelly excessive, i.e., those which are wholly disproportionate to the crime for which they are exacted. This doctrine of excessiveness was first proposed in the Court by Justice Field, dissenting in *O'Neil v. Vermont.*\(^7\)

The inhibition [of the eighth amendment] is directed, not only against punishments of the character mentioned [torture], but against all punishments which by their excessive length or severity are greatly disproportional to the offenses charged.\(^7\)

\(^{64}\) Weems v. United States, 217 U.S. 349, 370 (1910); *In re Kemmler,* 136 U.S. 436, 447 (1890); Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

\(^{65}\) *In re Kemmler,* 136 U.S. 436, 447 (1890).

\(^{66}\) Id. at 446.


\(^{68}\) Weems v. United States, 217 U.S. 349, 370 (1910).


\(^{70}\) The Court has characterized pain as cruelty; see *id.* at 366. But this dictum was distinguished in *Louisiana ex rel. Francis v. Resweber,* 329 U.S. 459, 463-64 (1947) (only "unnecessary" pain condemned); cf. *id.* at 473 (Burton, J., dissenting) ("unnecessarily" cruel means). This concept finds its origins in *Wilkerson v. Utah,* 99 U.S. 130, 136 (1878) ("and all others in the same line of unnecessary cruelty").


\(^{73}\) *Id.* at 111 (Brennan, J., concurring).

\(^{74}\) 144 U.S. 323 (1892).

\(^{75}\) *Id.* at 339-40 (Field, J., dissenting). For an earlier view of Justice Field's eighth
It is against excessive severity of the punishment as applied to the offenses for which it is inflicted, that the inhibition is directed.\(^{17}\)

Justice Field was, of course, treading on less than solid ground when he offered this explanation of cruelty in the constitutional sense, for it had long been recognized that the state has the widest possible latitude in determining the limits of punishment.

In *Weems v. United States*,\(^{77}\) the Court had occasion to review a sentence imposed in the Philippines. The Philippine constitution contained the same prohibition of cruelty found in the eighth amendment. The penalty involved was *cadena temporal*,\(^{78}\) imposed for the crime of falsifying entries in a government cash book. Justice McKenna, reacting with "wonder" at the severity of the punishment, reiterated the Field doctrine:

> Such penalties for such offenses amaze those who have formed their conception of the relation of a state to even its offending citizens from the practice of the American commonwealths, and believe that it is a precept of justice that punishment for crime should be graduated and proportioned to the offense.\(^{79}\)

The Field-*Weems* excessiveness doctrine, however, did not live up to its potential, possibly because Justice McKenna relied too heavily on the fact that *cadena* was outrageously excessive in comparison to punishments meted out for similar offenses in the United States.\(^{80}\) In *Badders v. United States*,\(^{81}\) the Court, emphasizing the primacy of the legislature in the determination of the proper punishment for a given crime, obliquely repudiated the Field-*Weems* doctrine of excessiveness by citing the precedent of *Howard v. Fleming*,\(^{82}\) which cautioned against such judicial trespassing in the province of the legislature.

It is also conceivable that the concept of excessiveness as developed

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\(^{17}\) 144 U.S. at 364.

\(^{77}\) 217 U.S. 349 (1910). *Weems* is a landmark case for it is the first instance in which the Court invalidated a penalty prescribed by a legislature for a particular offense.

\(^{78}\) The *cadena temporal* consisted of the following:

a) 12 years and 1 day to 20 years imprisonment at hard labor carrying chains at wrist and ankle;

b) civil interdiction;

c) subject to surveillance for life; and

d) perpetual absolute disqualification from the exercise of civil rights.

See *id.* at 364-65.

\(^{79}\) Id. at 366-67. See also H. Knight, *With Liberty and Justice for All* 208-09 (1967); Tingler, *Unconstitutional Punishment*, 6 Crim. L. Bull. 311 (1970).


\(^{81}\) 240 U.S. 391 (1916).

\(^{82}\) 191 U.S. 126, 136 (1903): "Undue leniency in one case does not transform a reasonable punishment in another case to a cruel one."
in Weems was adulterated by the addition of the inherently cruel features of the *cadena* to the grounds of condemnation. Whatever the case, the excessiveness doctrine was kept alive largely through the vehicles of dissent and concurrence until the present time. However, the concept of disproportionate punishment as excessive cruelty retains its validity under certain circumstances. As Justice Douglas has pointed out:

A punishment all out of proportion to the offense may bring it within the ban against 'cruel and unusual punishment.' . . . The principle that would deny power to exact capital punishment for a petty crime would also deny power to punish a person by fine or imprisonment for being sick.

Such a punishment would serve no legitimate purpose, and would clearly fall under the amendment's ban.

**The Test for Cruelty**

Once the meaning of the constitutional concept of cruelty has been determined, the proper standards by which a particular punishment can be adjudged cruel remain to be developed.

**Inherent Cruelty**

Inherent cruelty is not a static concept. The Court has recognized that the relevant eighth amendment standard is "progressive, and not fastened to the obsolete," for the "provisions of the Constitution are

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83 "[E]ven the cruelty of pain is not omitted." 217 U.S. at 366. See Revival of the Eighth Amendment, supra note 62, at 1007.


Then, too, a cruelly disproportionate relation between what the law requires and the sanction for its disobedience may constitute a violation of the Eighth Amendment as a cruel and unusual punishment. . . .


Concurring in *Trop*, Mr. Justice Brennan, whose vote was necessary for a majority, denied the legislature the power to "adopt any measure at all to demonstrate its displeasure and exact its penalty from the offender against its laws." *Trop* v. Dulles, *supra* at 113. He also pointed out the harshness of the punishment imposed in this case. Id. at 110. Torture or the like was not at issue.

86 Robinson v. California, 370 U.S. 660, 676 (1962). See Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972), in which the death penalty was stricken down as excessive punishment for the crime of rape where the victim received no substantial bodily injury.

Blackstone's commentary also loses none of its validity today; see note 30 *supra*.

The cruel and unusual punishment clause must therefore draw its meaning from "the evolving standards of decency that mark the progress of a maturing society."91

Since the Court has indicated that the key to the meaning of the cruel and unusual punishment clause is contained in the standards of society, it becomes imperative that some method of gauging this sentiment be developed. The difficulty of such a task is demonstrated by the various approaches used to determine valid indicia of community attitudes toward punishment policy.

For example, in an effort to substitute objectivity for personal revulsion at the imposition of certain penalties,92 judges have often utilized a "shock the conscience" test to arrive at a conclusion of cruelty.93 This method is, however, susceptible to the criticism that judges who use it are, in reality, only brushing a thin coat of universality over what is essentially a personal gut reaction.94

Another approach looks to the historic usage of a particular punishment to determine its compatibility with the prevailing standards of society.95 Such a conceptualization contradicts the evolving nature

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90 Id. at 373.
94 See, e.g., Rochin v. California, 342 U.S. 165, 179 (1952) (Douglas, J., concurring); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 470-71 (1947) (Frankfurter, J., concurring). Witness also the fact that there are often "reasonable men" who dissent from such a finding.
95 See Wilkerson v. Utah, 99 U.S. 130, 133 (1878).
of the amendment. Punishments thought perfectly compatible with the standards of eighteenth century American society would meet widespread repugnance today.\(^6\)

This was recognized in \textit{Weems, Trop v. Dulles} and \textit{Robinson v. California}, where the Court struck down punishments (\textit{cadena, denationalization, and imprisonment for narcotics addiction}) previously justified by historical usage.

A third method utilizes comparative reference to the statutes of other jurisdictions to determine the acceptability of the punishments under review. In \textit{Weems}, the Philippine \textit{cadena temporal} was compared to United States penalties for the same offense\(^7\) and, in \textit{Trop}, denationalization was found to be a rare punishment within the community of civilized nations.\(^8\) This approach is, of course, susceptible to the \textit{Badders} criticism\(^9\) as well as to the observation that some members of the "civilized" world have only recently, if at all, abandoned torture as an instrument of repression.\(^10\)

Raw public opinion, as measured through the use of polls, yields at best a highly suspect picture of the attitude of the community toward punishment policy.\(^11\) Public acquiescence in the imposition of a particular punishment may bear no relation to its constitutionality.\(^12\)

The Court has said that the type of public opinion which must be utilized in determining prevalent community attitudes is that which has become "enlightened by a humane justice."\(^13\) It is this "enlightened" public opinion which reveals the standard of decency against which a punishment suspect as inherently cruel must be measured. A reasonable assumption is that the body of enlightened opinion is most validly reflected by those segments of society that are knowledgeable of the subject. The opinions of legislators, jurors, penologists, crimi-

\(^{6}\) For a comprehensive compilation of punishment statutes in effect during the period, see Brief for Petitioner, Aikens v. California, No. 68-5027, at app. G, \textit{cert. dismissed}, 408 U.S. 813 (1972).

The early commentators realized that the clause would be unnecessary if read only to forbid barbarities prevalent during the past. \textit{See, e.g., 2 J. Story, Commentaries on the Constitution of the United States § 1903 at 650 (6th ed. 1891).}


\(^{9}\) \textit{See} text accompanying note 81, \textit{supra}.

\(^{10}\) \textit{See}, \textit{e.g., N.Y. Times}, May 25, 1972, at 3, col. 1 (torture used for political repression in Argentina).

\(^{11}\) Community sentiment is usually too amorphous to be determined by simple polling methods. \textit{See United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir.), cert. denied, 344 U.S. 838 (1952).}

\(^{12}\) \textit{See Ralph v. Warden, 438 F.2d 786, 792 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972): "Public awareness diminishes as the frequency of imposing the penalty decreases. . . ."}

nologists, psychologists, sociologists, and jurists, as well as informed members of the population at large, should, therefore, be consulted to determine prevailing community standards.\[104\]

The *Weems-Trop* test of inherent cruelty, that a punishment is inherently cruel which violates the evolving standards of decency as measured by informed public opinion, must be supplemented by a vital corollary. Speaking for the *Trop* plurality, Chief Justice Warren declared, "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."\[105\] Once it is seen that the dominant effect of inherently cruel punishment is not the infliction of pain and suffering but the degradation and dehumanization of victim and spectator,\[106\] then it should be clear that inherently cruel punishments involve a denial of the dignity of the individual and must also fall under the constitutional condemnation of the eighth amendment.

Excessive Cruelty

A cruelly excessive punishment cannot be measured by the same standard utilized to determine inherent cruelty. A violation of the eighth amendment by the former is usually a more subtle and difficult proposition to evaluate. Justice Brennan, concurring in *Trop v. Dulles*,\[107\] opened one possible avenue of approach:

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.\[108\]

The traditional ends of punishment have been characterized as retribution, deterrence, reform and isolation for the protection of the community.\[109\] If the interest of the state in imposing a particular pun-

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104 See Robinson v. California, 370 U.S. 660, 666 (1962). The contemporary human knowledge referred to in this comment is surely that of an "enlightened" body of opinion. See also Repouille v. United States, 165 F.2d 152, 154 (2d Cir. 1947) (Frank, J., dissenting) ("attitude of our ethical leaders"); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1783 (1970) [hereinafter Goldberg & Dershowitz].


106 There is no doubt that severe corporal punishment brutalizes not only the victim but the person who executes the punishment and the spectators, awakening sadistic tendencies and demoralizing the finer sensibilities.

4 ENCYC. SOC. SCI. 413 (1931). See *Revival of the Eighth Amendment*, supra note 62, at 1000.

107 See Robinson v. California, 370 U.S. 660, 666 (1962). The contemporary human knowledge referred to in this comment is surely that of an "enlightened" body of opinion. See also Repouille v. United States, 165 F.2d 152, 154 (2d Cir. 1947) (Frank, J., dissenting) ("attitude of our ethical leaders"); Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1783 (1970) [hereinafter Goldberg & Dershowitz].


Punishment for the sole purpose of retribution is no longer regarded as legitimate
ishment is illegitimate,\textsuperscript{110} or is demonstrably unnecessary to justify the punishment imposed,\textsuperscript{111} it is cruelly excessive in violation of the eighth amendment.\textsuperscript{112} Such a standard condemns both the infliction of a grossly disproportionate punishment as well as one which would serve no legitimate purpose of the state.

The Constitutional Concept of Unusualness

The imprecision of the concept of cruelty in the constitutional sense is more than matched by the vagueness of the term "unusual." Once again, the Court has provided few guidelines to aid in distinguishing the two prohibitions of the clause. In \textit{Trop v. Dulles},\textsuperscript{113} Chief Justice Warren commented on this problem:

Whether the word "unusual" has any qualitative meaning different from "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. [T]he Court simply examines the particular punishment involved in light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual."\textsuperscript{114}

The Chief Justice concluded that if the word "unusual" is to have an independent constitutional meaning, it should be "the ordinary one, signifying something different from that which is usually done."\textsuperscript{115}

\textsuperscript{110} E.g., political repression or retribution alone.

\textsuperscript{111} See W. Bradford, \textit{An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania} (1793), reprinted in 12 \textit{Am. J. Leg. Hist.} 122, 127 (1968).

\textsuperscript{112} See O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting) ("the punishment was greatly beyond anything required by any humane law for the offenses"). The fact that a punishment might be deemed to be necessary does not permit it to be inflicted despite the fact that it is inherently cruel.

\textsuperscript{113} 356 U.S. 86 (1958).

\textsuperscript{114} \textit{Id.} at 100 n.32 (plurality opinion of Warren, C.J.) (citations omitted); see Jackson v. Bishop, 404 F.2d 571, 580 (8th Cir. 1968). \textit{But cf.} United States \textit{ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson}, 255 U.S. 407, 430 (1921) (Brandeis, J., dissenting); \textit{In re Kemmler}, 136 U.S. 496, 443 (1890).

\textsuperscript{115} 356 U.S. at 100-01 n.32. Certainly the term could not mean "novel" for this interpretation would effectively prevent the introduction of punishment that might prove beneficial to the convict. \textit{See In re Candido}, 31 Hawaii 982, 992 (1931); \textit{see also In re Kemmler}, 136 U.S. 496 (1890) (upholding the novel punishment of electrocution).
CRUEL AND UNUSUAL PUNISHMENT

A penalty should therefore be considered constitutionally suspect as unusual if it is rarely or infrequently imposed.

The basis for this suspect treatment is that a punishment which is exacted in only a small minority of cases is susceptible of arbitrary or discriminatory imposition. The public is more inclined to tolerate a punishment rarely and infrequently imposed and the legislature will consequently feel little pressure to eliminate laws which do not excite the common displeasure. Discriminatory application of punishment actually aids in the suppression of public outrage for it is an easy matter to acquiesce in the punishment of a member of a small, unpopular minority, especially when the application is coincident with one's personal prejudices. History offers many instances in which a colonial population, small in size and far from the mother country, has suffered under oppressive taxation policies imposed by the representatives of a distant majority. Thus, arbitrary or discriminatory application of the law is precisely what is prohibited by the eighth amendment term "unusual."

The word assumes an even fuller meaning when considered in the context of the due process clause of the fourteenth amendment. The eighth amendment was held fully applicable to the states through the vehicle of the fourteenth amendment in the 1962 case, Robinson v. California. In the administration of criminal justice, the fourteenth

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It has been suggested that the term can be understood as an adverbial modifier of cruel, i.e., unusually cruel punishment; see Note, The Cruel and Unusual Punishment Clause and the Substantive Criminal Law, 79 Harv. L. Rev. 635, 689 (1966); Effectiveness of the Eighth Amendment, supra note 55, at 849-50; Bedau, The Courts, The Constitution and Capital Punishment, 1968 Utah L. Rev. 201, 231. This analysis has considerable merit and leads to the ultimate conclusion that the clause prohibits excessive punishment.

The Supreme Court of California has found that "excessive" or "disproportionate" punishment is unusual; see People v. Oppenheimer, 156 Cal. 733, 106 P. 74 (1909); but see People v. Anderson, 6 Cal. 3d 628, 654, 493 P.2d 877, 897, 100 Cal. Rptr. 152, 169, cert. denied, 406 U.S. 958 (1972). Excessiveness, however, relates to the proportionality between the penalty and the crime and the justification for its infliction, while unusualness is primarily concerned with the frequency of its imposition and the identity of the individuals upon whom the penalty is imposed.

In the words of Mr. Justice Brennan:

The question, in any event, is of minor significance; this Court has never attempted to explicate the meaning of the Clause by simply parsing its words.


Goldberg & Dershowitz, supra note 104, at 1790.

370 U.S. 660 (1962). There can be little doubt that this Bill of Rights guarantee, whose "basic concept ... is nothing less than the dignity of man" (Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion of Warren, C.J.)), satisfies the most restrictive test for adoption as a measure of due process. Its derivation from times anterior to Magna Carta, through the Bill of Rights of 1689, amply establishes that it is a "principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." Palko v. Connecticut, 302 U.S. 319, 325 (1937), quoting Snyder v. Massachusetts, 291 U.S. 97, 103 (1944); see Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947).
amendment forbids arbitrariness and discrimination and "requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offenses."\textsuperscript{118}

**The Death Penalty as Cruel and Unusual Punishment**

Until June of this year, the Supreme Court had considered eighth amendment claims relating only to methods of imposing the death penalty. The constitutionality of the penalty itself was never expressly approved or disapproved although the Court assumed its validity sub silentio in the course of affirming particular methods of execution. Tacit approval of capital punishment was expressed in more recent cases.

*Wilkerson v. Utah\textsuperscript{119}* provides an example of this assumption of constitutionality. At a time when the eighth amendment had not yet been applied to the states, the Court unanimously sustained death by shooting, finding it to be a common historical method of execution in the Utah territory. Twelve years later the Court approved the new method of electrocution in the case of *In re Kemmler*,\textsuperscript{120} although re-affirming that the eighth amendment did not apply to the states. The Court pronounced the following dictum:

"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."\textsuperscript{121}

The method of imposing the death penalty was not challenged on eighth amendment grounds for the next 57 years until *Louisiana ex rel. Francis v. Resweber*,\textsuperscript{122} where the Court was faced with a challenge to a second electrocution after the first attempt had failed due to mechanical malfunction of the electric chair. Again the constitutionality of the death penalty was assumed by the Court:

\[\text{The incorporation achieved in Robinson was subsequently reaffirmed in Gideon v. Wainwright: }\]

\[\text{The Court has made obligatory on the States ... the Eighth's ban on cruel and unusual punishment.}\]

\[372 \text{ U.S. 335, 341-42 (1963). See Malloy v. Hogan, 378 U.S. 1, 6 n.6 (1964).}\]

\[\text{\textsuperscript{118} In re Kemmler, 136 U.S. 436, 449 (1890). This applies only to the legislature in setting the statutory penalties for crime; within the specified limits set, judges and juries can determine the proper individual sentence. But see text accompanying notes 181, 187, infra.}\]

\[\text{\textsuperscript{119} 99 U.S. 130 (1878).}\]

\[\text{\textsuperscript{120} 196 U.S. 436 (1890).}\]

\[\text{\textsuperscript{121} Id. at 446-47.}\]

\[\text{\textsuperscript{122} 329 U.S. 459 (1947).}\]
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.123

In 1958, Chief Justice Warren, speaking for a plurality of the Court in *Trop v. Dulles*,124 gratuitously applied the “evolving standards” criteria to the death penalty in an often-quoted dictum:

Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purpose 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.125

While chipping away at the death penalty by surrounding its imposition with numerous procedural safeguards126 the Court in the past steadfastly refused to review its constitutionality by denying certiorari,127 by limiting certiorari to non-eighth amendment issues128 and by deciding cases without reference to the eighth amendment question.129

The road to reversal of this time-honored position was precipitously short but marked by two significant decisions. In 1970, the Court of Appeals for the Fourth Circuit declared that capital punishment for the crime of rape, where the victim suffered no serious bodily injury, was unconstitutional as cruelly excessive in violation of the eighth amendment.130 And, earlier this year, the Supreme Court of California struck down state capital punishment statutes as cruel and unusual in

123 Id. at 464.
125 Id. at 99 (plurality opinion of Warren, C.J.).

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 countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the Framers intended to end capital punishment by the Amendment.

402 U.S. at 226 (concurring opinion). Other punishments known to the Framers and approved as penalties at that time were whipping and earcropping; see note 46 supra.
violation of the California Constitution. The United States Supreme Court had by this time finally agreed to decide the question whether capital punishment was cruel and unusual in violation of the eighth and fourteenth amendments. On June 29, 1972 the Court rendered its decision in Furman v. Georgia; each of the Justices presented a separate opinion indicating his position on the constitutionality of the death penalty.

The Furman Opinions

Mr. Justice Douglas, concurring

Mr. Justice Douglas condemns the death penalty in those cases where its imposition is discretionary but does not decide whether a mandatory death sentence would also violate the eighth amendment. This is a result of his overriding concern with the constitutionality of capital punishment as viewed in light of the eighth amendment prohibition of "unusual" punishment. Emphasizing that one of the indicia of unusualness is discrimination in the application of a particular punishment, Mr. Justice Douglas states the following test: a punishment is proscribed as "unusual" in violation of the eighth amendment if it discriminated against [a defendant] 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.

The opinion is thus strongly oriented toward the fourteenth amendment's equal protection clause, which Justice Douglas declares to be implicit in the cruel and unusual prohibition of the eighth amendment. This approach necessitates an inquiry into the identity of those who are executed in the country. Justice Douglas maintains that it is the poor, the powerless and the minority group members who are isolated for imposition of the death penalty. This contention is supported by the personal observations of those familiar with the execution process. Former Governor Michael Di Salle of Ohio described his contacts with the death penalty thusly:

134 Id. at 257.
135 But the Leopolds and the Loeb, the Harry Thaws, the Dr. Sheppards and the Dr. Finchs of our society are never executed, only those in the lower strata, only those who are members of an unpopular minority or poor and despised.
Id. at 247 n.10.
During my experience as Governor of Ohio, I found the men in death row had one thing in common; they were penniless...the fact that they had no money was a principal factor in their being condemned to death.\textsuperscript{136}

Official studies of capital offenders indicate that 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.\textsuperscript{137}

Racial discrimination in the imposition of the death penalty is a matter difficult to prove. The raw execution figures establish only that, since 1930, more blacks than whites have been executed.\textsuperscript{138} However, no reliable statistics breaking down death sentence figures according to race are available for the post-1930 period. Variables, such as the heinousness of the crime and the skill of the accused's counsel, cannot be held constant to insure a valid statistical comparison. The figures for rape do, however, indicate a vast disproportionality between the executions of blacks and whites during this time period. All but one of the states retaining the death penalty for rape are southern or border states.\textsuperscript{139} It should be noted that, during the four decades for which figures are available, many procedural safeguards against discriminatory application of the death penalty have been instituted and the social attitudes of jurors may have undergone significant changes. The allegation of discrimination is buttressed by studies of racial and socioeconomic characteristics of offenders sentenced to death locally\textsuperscript{140} and

\begin{table}[h]
\centering
\begin{tabular}{|c|c|c|c|c|c|c|c|}
\hline
 & \textbf{All Offenses} & & \textbf{Murder} & & \textbf{Rape} & \\
 & Total & White & Negro & Total & White & Negro & Total & White & Negro \\
\hline
1930-1972 & 3,899 & 1,751 & 2,148 & 3,334 & 1,664 & 1,670 & 455 & 48 & 407 \\
\hline
Percent & 100.0 & 45.4 & 54.6 & 100.0 & 49.9 & 49.9 & 100.0 & 10.5 & 89.0 \\
\hline
\end{tabular}
\caption{Death Sentence Figures According to Race}
\end{table}


\textsuperscript{138} U.S., DEPARTMENT OF JUSTICE, BUREAU OF PRISONS, NATIONAL PRISONER STATISTICS, CAPITAL PUNISHMENT 1930-1970 at 8 (1971) [hereinafter N.P.S.]. "Other" racial and crime classifications have been omitted.


\textsuperscript{140} See, e.g., Bedau, \textit{Capital Punishment in Oregon, 1903-1964}, 45 Ore. L. Rev. 1
While these studies are by no means conclusive, the inference can certainly be drawn that discrimination constitutes a relevant factor in the determination of who shall be executed.

Mr. Justice Douglas cites the discretionary system of sentencing as the primary cause enabling discrimination to affect the imposition of the death penalty. He states that 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 require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups. 142

While the laws regarding discretionary sentencing are nondiscriminatory on their face, they may be applied in such a way as to violate the equal protection clause of the fourteenth amendment which, in Mr. Justice Douglas' view, is implicit in the ban on "cruel and unusual punishments." 143 Thus he condemns the death sentences in these cases as unconstitutional but does not decide whether a mandatory death sentence would also violate the eighth amendment.

Mr. Justice Brennan, concurring

Mr. Justice Brennan presents a comprehensive indictment of the death penalty per se as cruel and unusual punishment. He offers four distinct but interrelated principles to aid in the determination of whether a punishment falls within the amendment's ban. 144
In Justice Brennan's view, the infliction of a particular punishment is violative of the cruel and unusual punishment clause if by its severity it is "degrading to human dignity."\textsuperscript{145} He declares that this principle is primary and that it "supplies the essential predicate" for the application of the other standards. This concept finds precedent in the opinion of Chief Justice Warren in \textit{Trop v. Dulles}: "The basic concept underlying the [clause] is nothing less than the dignity of man."\textsuperscript{146}

Justice Brennan feels that death is a unique punishment in the United States\textsuperscript{147} because of its extreme severity, which is reflected in the unusual pain, finality and enormity of the penalty. He condemns death as inherently cruel, both physically and psychologically. While the information is inconclusive, it appears that no available method would guarantee an immediate and painless death.\textsuperscript{148} Furthermore, the psychological trauma inherent in the infliction of death is an inseparable part of the process.\textsuperscript{149}

Death is the absolutely final punishment from which there is no appeal. It may be said that, in contrast to the prisoner who still retains the possibility of having his punishment reversed, the executed person has truly lost the "right to have rights."\textsuperscript{150} In summarizing his finding that the death sentence is cruel and unusual \textit{per se}, Mr. Justice Brennan states:

\textsuperscript{145} Furman v. Georgia, 408 U.S. 283, 281 (1972) (Brennan, J., concurring).
\textsuperscript{146} Trop v. Dulles, 356 U.S. 86, 100 (1958) (plurality opinion of Warren, C.J.).
\textsuperscript{148} See \textit{Hearings, supra} note 136, at 20 (hanging); id. at 21 (lethal gas); L. Lawes, \textit{Life and Death in Sing Sing} 170-71 (1928) (electrocution); see generally Marcus & Weisbrodt, \textit{The Death Penalty Cases}, 56 Calif. L. Rev. 1268, 1339-41 (1968). But see R. Elliot, \textit{Agent of Death} (1940); N.Y. Times, February 25, 1965, at 20, col. 6 (death is "both instantaneous and painless" by electrocution).
\textsuperscript{149} [T]he process of carrying out a verdict of death is so often so degrading and brutalizing to the human spirit as to constitute psychological torture.
The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity.\textsuperscript{151}

Mr. Justice Marshall, concurring

In an exhaustive 62-page concurring opinion condemning capital punishment as unconstitutional \textit{per se}, Mr. Justice Marshall offers four distinct reasons for finding that a given penalty is proscribed by the cruel and unusual clause: inherent cruelty, \textit{i.e.}, torture, whether physical or psychological;\textsuperscript{152} literal unusualness, signifying that the punishment was previously unknown as a penalty for a given offence;\textsuperscript{153} excessive cruelty; and abhorrence to currently existing moral values. If the punishment meets any one of these criteria, it is repugnant to the Constitution.

Reference to excessive or unnecessary cruelty invites an examination of whether the death penalty is necessary to meet the ends of punishment.\textsuperscript{154} Justice Marshall examines the concept of retribution as justification for the infliction of the death penalty and notes that

\[\text{the fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing.}\textsuperscript{155}\]

Justice Marshall then rejects vengeance alone as a proper justification for the infliction of the death penalty, citing historical\textsuperscript{156} and legal\textsuperscript{157}  

\textsuperscript{151}Furman v. Georgia, 408 U.S. 238, 290 (1972) (Brennan, J., concurring).
\textsuperscript{152}The inherent cruelty of the death penalty is discussed in the opinion of Justice Brennan. \textit{See text accompanying note 147 supra.}
\textsuperscript{153}Justice Marshall states that "if these punishments are intended to serve a humane purpose, they may be constitutionally permissible." 408 U.S. at 331.
\textsuperscript{154}See text accompanying note 109. Consideration of the death penalty requires modification of the traditional list. Rehabilitation is obviously rendered impossible by execution. The necessity of retaining the death penalty to prevent recidivism is undercut by the finding that capital offenders are the least likely to commit another crime after parole; \textit{see, e.g.}, \textit{Royal Commission, supra} note 109, at 456-91; Stanton, \textit{Murderers on Parole, 15 Crime \\& Delinq.} 149 (1969).

Mr. Justice Marshall adds to the traditional list the encouragement of guilty pleas and confessions, eugenics and economy. The first, if utilized for the purpose of discouraging the exercise of the accused's sixth amendment rights, is termed unconstitutional, citing \textit{United States v. Jackson}, 390 U.S. 570 (1968). Justice Marshall dismisses eugenics as "obviously meritless" and rejects the third contention, declaring that the costs of long term imprisonment are more than outweighed by the expenditures involved in the exercise of the full panoply of constitutional rights usually concomitant with a capital case. 408 U.S. at 355-58.

\textsuperscript{155}408 U.S. at 343.
\textsuperscript{156}\textit{See, e.g.}, C. Beccaria, \textit{On Crimes and Punishment} (H. Paolucci transl. 1968); \textit{Plato, Protagoras} 211-12 (Modern Library ed. 1928):

\textit{[N]o one punishes the evildoers under the notion, or for the reason, that he has done wrong,—only the unreasonable fury of a beast acts in that manner. But he who desires to inflict rational punishment does not retaliate for a past wrong which cannot be undone; he has regard to the future, and is desirous that the man who is punished, may be deterred from doing wrong again.}
\textsuperscript{157}Justice Marshall cites \textit{Weems v. United States}, 217 U.S. 349, 381 (1910), stating
precedents. He acknowledges the proposition that society demands vengeance to evidence its disapproval of the immorality of crime but rejects this approach as falling too near the limits set by the eighth amendment.

Justice Marshall then explores the deterrent function of capital punishment in full detail. Describing death as the ultimate sanction that society can apply, he frames the question as "not simply whether capital punishment is a deterrent, but whether it is a better deterrent than life imprisonment." The claims that execution is an effective deterrent to crime are depicted as largely hypothetical or based primarily on the impressionistic personal experiences of law enforcement officials. Justice Marshall prefers to rely on the statistics collected by Dr. Thorsten Sellin, one of the leading authorities on capital punishment. He found that no correlation existed between the court therein deemed retribution for its own sake impermissible by its omission from its enumeration of the purposes of punishment. 408 U.S. at 344.

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I think it is highly desirable that criminals should be hated, that the punishment inflicted on them should be so construed as to give expression to that hatred, and to justify it so far as the public provision of means for expressing and gratifying a healthy natural sentiment can justify and encourage it.

See also Allen, Capital Punishment: Your Protection and Mine, in Bedau, supra note 14, at 133; Vallenga, Christianity and the Death Penalty, in id. at 129.

160 Certainly the eighth amendment prescribes the bounds of vengeance; if it were not so, perhaps the rack might better express society's outrage at crime. See A. Koestler, Reflections on Hanging 105-06 (1957):

The desire for vengeance has deep, unconscious roots and is roused when we feel strong indignation. . . . Deep inside every man there lurks a tiny Stone Age man . . . screaming an eye for an eye. But we would rather not have that little fur-clad figure dictate the law of the land.

161 But see Barzun, In Favor of Capital Punishment, in Bedau, supra note 14, at 154, 163; Hook, The Death Sentence, in id. at 152.

408 U.S. at 346-47. It has been asserted that no punishment is effective as a deterrent to crime; see, e.g., K. Menningier, The Crime of Punishment 206-08 (1968).

162 See, e.g., Royal Commission, supra note 109, at 19. This theoretical argument can be offset by another, that there exist very few individuals who think rationally about the consequences of being convicted of a capital crime before the act has been accomplished; see Furman v. Georgia, 408 U.S. 238, 301 (Brennan, J., concurring). Further, there are certainly undeterrible crimes, i.e., those which no amount of punishment will prevent. Common examples are crimes committed under the compulsion of extreme psychological stress and those committed out of necessity (starving pickpockets plying their trade at the hanging of their confederates).

163 See, e.g., Bedau, supra note 14, at 267, for a representative case—robbery suspects confessing to the police that they used simulated or unloaded weapons rather than chance killing someone and thereby risking the death penalty. See also Desky, Should Capital Punishment be Abolished in California, 39 The Commonwealth 19, 23 (1963). Self-interest renders this type of confession highly unreliable.

164 408 U.S. at 348. Sellin, in his comprehensive analysis of the deterrent effect of the death penalty, T. Sellin, The Death Penalty (1959) [hereinafter Sellin], advances, inter alia, the hypotheses that if the death penalty deters prospective murderers, the murder rate should be lower in retentionist than in comparative abolitionist states; that murders should increase when the death penalty is abolished and decline when it is rein-
tween the murder rate and the presence or absence of capital punishment, nor was there any evidence that the abolition and subsequent reintroduction of the death penalty had any effect on the homicide rates involved. Furthermore, law enforcement officers were no safer in those states which retained the death penalty than in abolitionist states. Justice Marshall summarizes his statistical argument by quoting a United Nations report on capital punishment:

[T]he data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime.

Statistics are inconclusive as to the superiority of the death penalty over life imprisonment as a deterrent to capital crime, but Justice Marshall feels that they do show by clear and convincing evidence that capital punishment is unnecessary to achieve this end. This conclusion shifts the burden of proving the necessity of the death penalty to the State, and, since it cannot do so, Justice Marshall condemns such a

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167 See Sellin, supra note 164, at 56-58; Campion, Does the Death Penalty Protect the State Police, in BEDAU, supra note 14, at 301-15; Sellin, Does the Death Penalty Protect Municipal Police, in id., at 284-901.

168 See Sellin, supra note 164, at 349-51. Prison officials are also no safer in states which retain the death penalty; see Mass. REPORT, supra note 54, at 21-22; Sellin, Homicides and Assaults in American Prisons, 51 ACTA CRIMINOLOGIAE ET MEDICINAE LEGALIS JAPONICA 1939 (1965).

169 UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT 119 (1968) [hereinafter U.N.].

The statistical picture is clouded by several problems. The assumption must be made that the proportion of capital murders in a reporting jurisdiction remains reasonably constant. This is necessitated by the fact that non-capital killings are included in the homicide statistics, for there are no statistics available reflecting only capital murders. Also, undetected murders are often reported as accidents or suicide or not at all. See Furman v. Georgia, 408 U.S. 238, 349-50 (1972) (Marshall, J., concurring).

Professor Sellin's statistics have been acknowledged as valid by both the United Nations, U.N., supra at 117, and Great Britain, ROYAL COMMISSION, supra note 109, at 349-51. See Vold, Extent and Trend of Capital Crimes in the United States, 284 ANNALS 1, 4 (1952).

170 See Goldberg & Dershowitz, supra note 104, at 1785 (1970):

The interest protected by the cruel and unusual punishment clause should not be taken as any less central than those protected by these other provisions of the Bill of Rights.

The authors argue for the adoption of the "compelling interest test" to force the State to justify its imposition of the death penalty, rather than give the legislature the benefit of the constitutional doubt. See Shapiro v. Thompson, 394 U.S. 618 (1969).
punishment as cruelly excessive in violation of the eighth amendment.

Justice Marshall does not rest his case on these grounds alone. He further declares that since the death penalty is morally unacceptable to the people of the United States, it is therefore violative of the eighth amendment. He acknowledges the difficulty of determining the proper indicia of community sentiment but minimizes the value of the public opinion poll as a gauge of whether capital punishment violates the popular conscience. The proper standard, the Justice contends, is

Whether a substantial portion of American citizens would today, if polled, opine that capital punishment is barbarously cruel . . . in the light of all information presently available.

Mr. Justice Marshall feels that exposure to factual information about the death penalty would convince most citizens that its preservation is unwise as a matter of policy. The capital punishment facts that Mr. Justice Marshall considers significant are: the threat of execution cannot be proven to be a more effective deterrent to capital crime than life imprisonment; it is more expensive to execute an offender than to imprison him; and capital criminals are less susceptible to recidivism than other types of offenders. Most persuasive of all, however, is the evidence that death is inflicted arbitrarily and discriminatorily. If this were widely known, Justice Marshall is certain that “even the most hesitant citizens” would come to view capital punishment as morally reprehensible. He thus finds that capital punishment is repugnant to the Constitution as it would be abhorrent to informed public opinion.

170 See text accompanying note 101, supra.
171 See text accompanying note 102, supra. The polls are inconclusive on the subject of retention of the death penalty:
1965—45% favor death penalty for murder; id.
172 408 U.S. at 562 (emphasis added). The Justice here utilizes the test of “enlightened” public opinion. See text accompanying note 103 supra.
173 Id. at 364.
In condemning capital punishment, Justice Marshall is convinced that we "achieve a major milestone in the long road up from barbarism"\(^{174}\) and celebrate our regard for civilization and humanity.\(^{175}\)

Mr. Justice Stewart, concurring

The brief opinion of Mr. Justice Stewart narrows the issue to whether capital punishment as imposed under present legal procedures constitutes cruel and unusual punishment. In concluding that it does, Justice Stewart cites two separate reasons for his decision; first, that the death sentences in these cases 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,"\(^{176}\) and, secondly, that "the death penalty is infrequently imposed for murder, and its imposition for rape is extraordinarily rare."\(^{177}\)


\(^{175}\) 408 U.S. at 371.

\(^{176}\) \textit{Id.} at 309 (Stewart, J., concurring). Justice Stewart here cites \textit{Weems v. United States}, 217 U.S. 349 (1910). Apparently the Justice means that while the punishment is not disproportionate to the crime, it goes beyond what the legislatures of Georgia and Texas have deemed necessary to fulfill the policy of their states. This is evidenced by the fact that they did not make the death penalty mandatory but, as an alternative, prescribed a term of years as sufficient to achieve their ends.

\(^{177}\) \textit{Id.} Statistics are extremely difficult to compile in this area. The most formidable problem encountered at the outset of any inquiry into the frequency of imposition of the death penalty is the dearth of reliable information relating to the actual number of individuals convicted of a capital offense in any given year. The \textit{Uniform Crime Reports}, published by the Federal Bureau of Investigation (U.S., \textit{Department of Justice, Federal Bureau of Investigation, Uniform Crime Reports} (1971) [\textit{hereinafter U.C.R.}]), offers data on reported crimes and actual arrests but no record of convictions is included.

The \textit{National Prisoner Statistics}, published by the Bureau of Prisons, \textit{supra} note 138, includes the number of executions per year, the number of prisoners received under sentence of death during the year, and the number of individuals who have been sentenced to death in the recent past, but does not present the number of those who have been convicted of capital crimes. \textit{See generally} Brief for Petitioner, \textit{Aikens v. California}, No. 68-5027, app. F, \textit{cert. dismissed}, 406 U.S. 813 (1972), for a detailed exposition of the problem.

From these sources a rough picture can be composed of the attrition that occurs as offenders are processed through the legal system en route to final punishment:

<table>
<thead>
<tr>
<th>YEAR</th>
<th>CRIMES*</th>
<th>DEATH SENTENCES**</th>
<th>EXECUTIONS***</th>
</tr>
</thead>
<tbody>
<tr>
<td>1961</td>
<td>25,520</td>
<td>140</td>
<td>42</td>
</tr>
<tr>
<td>1962</td>
<td>25,640</td>
<td>103</td>
<td>47</td>
</tr>
<tr>
<td>1963</td>
<td>28,840</td>
<td>93</td>
<td>21</td>
</tr>
<tr>
<td>1964</td>
<td>20,270</td>
<td>106</td>
<td>15</td>
</tr>
<tr>
<td>1965</td>
<td>32,820</td>
<td>86</td>
<td>7</td>
</tr>
<tr>
<td>1966</td>
<td>36,250</td>
<td>118</td>
<td>1</td>
</tr>
<tr>
<td>1967</td>
<td>39,190</td>
<td>85</td>
<td>2</td>
</tr>
<tr>
<td>1968</td>
<td>34,710</td>
<td>102</td>
<td>-</td>
</tr>
<tr>
<td>1969</td>
<td>51,060</td>
<td>97</td>
<td>-</td>
</tr>
<tr>
<td>1970</td>
<td>53,080</td>
<td>127</td>
<td>-</td>
</tr>
</tbody>
</table>

* U.C.R., \textit{supra}, at 65. Crimes are all first degree murders and forcible rapes reported for the years indicated.


*** \textit{Id.} at 8. The last man executed in this country was Luis Monge, at the Colorado State Prison, June 2, 1967.
Justice Stewart does not reach the ultimate question whether the death penalty is unconstitutional *per se*, a question that would be squarely presented only in a situation involving a mandatory death sentence for a particularly atrocious crime. In such a case, Justice Stewart apparently feels that society's interests in retribution and deterrence might well outweigh any consideration of reform or rehabilitation.\(^{178}\) However, since the legislatures in the cases presented to the Court for review did not enact automatic death penalty statutes, the constitutionality of capital punishment need only be presently considered in the context of the legal systems wherein it arises.

In Justice Stewart's colorful phraseology, the death sentences in these cases are cruel and unusual "in the same way that being struck by lightning is cruel and unusual."\(^{179}\) In other words, the pronouncement of the death sentence here was entirely a matter of chance,\(^{180}\) for the petitioners' crimes were no more reprehensible than many of the thousands of other offenses committed during the same time period and for which perpetrators received lesser sentences.\(^{181}\) Since capital

These figures indicate, albeit imperfectly, the dimensions of the funnel at its extremities. See McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. 11, 12 (1964) (20% of persons convicted of murder in California received death penalty).\(^{178}\)

Justice Stewart, while recognizing the inconclusive nature of the empirical evidence regarding the efficacy of the death penalty as a deterrent, nevertheless indicates that if it were automatically applied, it would provide the maximum deterrence to this type of crime. Retribution is not viewed by the Justice as constitutionally impermissible as it is rooted in man's nature and serves the important purpose of preventing vendettas and self help. See 408 U.S. at 307-08.

\(^{179}\) 408 U.S. at 309.

\(^{180}\) The question of whether a capital criminal will be executed under the prevailing system depends on so many different variables that the actual possibility of execution is remote. The crime must be committed in one of the 36 states in which first degree murder merits a capital penalty, one of the 16 states which permit execution for rape, or in the federal jurisdiction, which allows capital punishment for both. Other crimes for which death is the prescribed penalty are seldom committed. See N.P.S., *supra* note 138, at 46-47, 50; see also Ralph v. Warden, 438 F.2d 786, 791-92 (4th Cir. 1970), cert. denied, 408 U.S. 942 (1972).

Some states authorize the death penalty but never impose it, or if they do impose it, never carry it out; e.g., the last execution in New Hampshire was 1939, in Montana, 1944, in Massachusetts, 1947, in South Dakota, 1949, in Delaware, 1949, in the District of Columbia, 1959, in Idaho, 1959 and in Nebraska, 1959. See N.P.S., *supra*, at 10-11.

Apart from these and other geographical considerations, the discretionary aspect of imposing the death penalty further serves to introduce the element of chance into the proceedings. At each step in the process of the imposition of the death penalty, from prosecutor, to judge and jury, to clemency board and governor, discretion is the hallmark of the system. As Ramsey Clark said while serving as Attorney General:

A small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned. Experienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious, than those in death row.

*Hearings, supra* note 136, at 98.

\(^{181}\) Differences between sentences for the same offense imposed in different jurisdictions is no cause for a finding of unconstitutionality; see Badders v. United States, 240 U.S. 391 (1916). However, recognizing that the penalty of death is final and irrevocable,
punishment as imposed under the present legal system is so "wantonly" and "freakishly" applied, it cannot be tolerated under the eighth and fourteenth amendments.

Mr. Justice White, concurring

Justice White, like Justice Stewart, is concerned only with the constitutionality of capital punishment under discretionary procedures applicable in the country today. He finds that none of the ends of punishment are fulfilled when the death penalty is so infrequently imposed. It is therefore evident to Justice White that the infliction of capital punishment is unnecessary:

A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

Mr. Justice White does not offer any empirical evidence of the infrequency of imposition of the capital penalty, but relies on his personal experience as a judicial officer. Like Justices Stewart and Douglas, he attributes the infrequent application of the death penalty to the policy of discretionary sentencing, primarily exercised by juries, which, in the Justice's opinion, has now "run its course."

Mr. Chief Justice Burger and Mr. Justices Powell, Blackmun and Rehnquist, dissenting

arbitrariness can play no part in the imposition of the death sentence, for once the punishment has been executed, further review is impossible. Mr. Justice Stewart indicates that if any basis can be discerned for the selection of so few to die, it is the constitutionally impermissible basis of race. 408 U.S. at 310.

Justice White leaves the door open to the retention or enactment of mandatory death sentences for first degree murder, for narrowly drawn categories of murder or for rape, 408 U.S. at 310.

Retribution is impliedly approved as a method of reinforcement of community values; deterrence would also be served if the death penalty were evenhandedly applied. 408 U.S. at 311-12.

As the statutes before us are now administered, the death penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice. 408 U.S. at 313.

"Infrequency," as Justice White uses the term, implies little of the flavor of sub rosa arbitrariness that can be drawn from Justice Stewart's opinion. Justice White, however, finds infrequency, or rarity, as the root cause of rendering capital punishment unnecessary and attributes this infrequency to the discretionary sentencing system. He does not venture further.
The dissenting opinions are characterized primarily by their findings that the Court's holding is incompatible with the cardinal principles of judicial restraint: i.e., stare decisis and respect for the separation of powers. Chief Justice Burger and Justice Powell present comprehensive opinions which are also highly critical of the premises upon which members of the majority have built their individual concurrences, while Justices Blackmun and Rehnquist limit their opinions to condemnation of the lack of judicial restraint allegedly exhibited by the majority. All four dissenters at bottom object to the holding of the Court on jurisprudential grounds.

The concept of stare decisis, declare the dissenters, has been dealt a serious blow by the majority's determination that the death penalty constitutes cruel and unusual punishment. They cite the long line of cases from Wilkerson v. Utah to McGautha v. California to support the proposition that the validity of the death penalty was initially assumed sub silentio and later openly approved by the Court:

In calling for a precipitous and final judicial end to this form

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188 "Judicial self-restraint is surely an implied, if not expressed, condition of the grant of authority of judicial review." 408 U.S. at 470 (Rehnquist, J., dissenting).
189 Stare decisis, if it is a doctrine founded on principle, surely applies where there exists a long line of cases endorsing or necessarily assuming the validity of a particular matter of constitutional interpretation.
190 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.
408 U.S. at 405 (Burger, C.J., dissenting).
191 E.g., Chief Justice Burger disputes the validity of the concept that excessiveness or unnecessary cruelty is violative of the Eighth Amendment for both historical and jurisprudential reasons; it is not grounded in sound interpretation of the available precedents and is a matter appropriately left to the legislative branch for final determination. 408 U.S. at 391-96; see id. at 451-56 (Powell, J., dissenting).

Neither Chief Justice Burger nor Justice Powell doubt the constitutionality of retribution as a legitimate end of punishment. 408 U.S. at 394 (Burger, C.J., dissenting); id. at 452-54 (Powell, J., dissenting). Nor do the Justices accept the ineffectiveness of the death penalty as a deterrent in the light of the inconclusive nature of the statistical evidence. 408 U.S. at 395-96 (Burger, J., dissenting); id. at 454-56 (Powell, J., dissenting).

Both Chief Justice Burger and Justice Powell vigorously deny that discrimination has been proven in the cases at bar and they maintain that the infrequency of imposition of the death penalty is due to the prudence and discretion exercised by judges and juries. 408 U.S. at 387-89 (Burger, C.J., dissenting); id. at 443-50 (Powell, J., dissenting). See Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968).

The death penalty is not universally condemned by informed public opinion, for the people, the legislatures and the members of juries, who are the true indicators of contemporary community sentiment, have made their attitude toward capital punishment known by referenda, the retention of capital punishment statutes on the books, and by the continued imposition of the death penalty. 408 U.S. at 385-91 (Burger, C.J., dissenting); id. at 433-43 (Powell, J., dissenting).
192 99 U.S. 130 (1878).
of penalty as offensive to evolving standards of decency, petitioners would have this Court abandon the traditional and refined approach consistently followed in its prior Eighth Amendment precedents.\textsuperscript{194}

The dissenting Justices illustrate their contention that the majority has ignored stare decisis by emphasizing that little more than one year has elapsed since the discretionary sentencing system was upheld in \textit{McGautha}. This is clear evidence, in the dissenters' opinion, that the Court has failed to exercise the proper degree of judicial restraint.\textsuperscript{195} Attention to precedent is vital to the operation of our legal system, say the dissenters, since it restrains judges from reading their personal preferences into the Constitution under the rubric of universally held "standards of decency."\textsuperscript{196} The dissenters find that the Court has "sought and has achieved an end."\textsuperscript{197}

The dissenting Justices maintain that it is the basic function of the legislatures to define and implement the standards of the community relating to the punishment of criminals. The Court should, in the opinion of the dissenters, intrude in this area with the utmost reticence.\textsuperscript{198} The majority has failed, in the dissenters' opinion, to sustain the burden of overcoming the presumption of the constitutionality of legislative enactments and the Court has therefore violated the basic principles of judicial restraint.

\textit{Furman: Confusing the Complex}

\textit{Furman v. Georgia} presents a multitude of questions to the student of constitutional development, not the least of which is the scope of the decision itself. No single majority opinion was issued beyond a brief per curiam statement and none of the five separate concurring opinions was joined by any of the other Justices. An analysis of the precise range of the Court's holding must therefore proceed along the lines set by the narrowest of the concurring opinions, those of Justices White and Stewart.\textsuperscript{199}

It would thus appear that \textit{Furman} has invalidated all of the death penalties imposed under the prevailing discretionary sentencing system

\textsuperscript{194} 408 U.S. at 430 (Powell, J., dissenting).
\textsuperscript{195} 408 U.S. at 399-403 (Burger, C.J., dissenting); \textit{id.} at 427 (Powell, J., dissenting).
\textsuperscript{196} See 408 U.S. at 431 (Powell, J., dissenting).
\textsuperscript{197} \textit{id.} at 414 (Blackmun, J., dissenting).
\textsuperscript{198} See \textit{id.} at 383-84 (Burger, C.J., dissenting); \textit{id.} at 410-11 (Blackmun, J., dissenting); \textit{id.} at 431-33 (Powell, J., dissenting); \textit{id.} at 466-70 (Rehnquist, J., dissenting).
\textsuperscript{199} See text accompanying notes 176 and 182 \textit{supra}.
in the United States.\textsuperscript{200} 

McGautha v. California,\textsuperscript{201} which upheld the discretionary system of sentencing offenders to death, has clearly been dealt a mortal blow.\textsuperscript{202} Mr. Justice Powell described the effect of the Court's holding in these words:

The capital punishment laws of no less than 39 States and the District of Columbia are nullified. In addition, numerous provisions of the Criminal Code of the United States are also voided.\textsuperscript{203}

Mandatory death sentences which have been imposed for "first degree murder, for . . . narrowly defined categories of murder or for rape"\textsuperscript{204} are unaffected by the Court's holding, for the opinions of

\textsuperscript{200} The Court's judgment removes the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country. At least for the present, it also bars the States and the Federal government from seeking sentences of death for defendants awaiting trial on charges for which capital punishment was heretofore a potential alternative. 408 U.S. at 417 (Powell, J., dissenting).

\textsuperscript{201} See Furman v. Georgia, 408 U.S. 238, 397 (1972), (Burger, C.J., dissenting): "... if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past."


\textsuperscript{204} Mr. Justice Powell evaluated the gravity of the Furman holding in these words: "Nothing short of an amendment to the United States Constitution can reverse the Court's judgment." 408 U.S. at 462 (dissenting opinion). Justice Powell's statement fails to provide for another method of reversal, that used to overcome McGautha. This is consistent with the Justice's strict views on stare decisis.

The passage of a capital punishment amendment has already been proposed; see 118 Cong. Rec. at H6477 (daily ed. June 30, 1972) (remarks of Mr. Wyman).

Justices Douglas, White and Stewart make clear that they do not reach the question whether a mandatory death penalty would be unconstitutional for these crimes. At minimum, therefore, the decision must be read to permit mandatory imposition of the death penalty "for first degree murder, for more narrowly defined categories of murder or for rape," at least until the Court has opportunity to examine such sentences.

The introduction of mandatory sentences for "more narrowly defined" crimes would, however, certainly run afoul of the objection articulated by McGautha:

The infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need. All past efforts "to identify before the fact" specific cases which warrant capital punishment have been "uniformly unsuccessful," for even the most atrocious crime in the abstract must be evaluated in the light of the circumstances under which it was committed, especially when it is realized that the heinuousness of the crime is all too frequently proportional to the mental or emotional instability of the perpetrator. The imposition of a mandatory death penalty for the commission of a crime also forecloses any consideration whatsoever of the severity of the offense in relation to others of the same genre. These considerations can only be neglected at the risk of jury nullification. Even within the framework of first degree murder, it is not unreasonable to assume that a jury will distinguish between the mens rea of a cold-blooded professional gunman and an individual guilty of felony murder, euthanasia, foeticide, or dueling. If capital punishment must be
imposed on the latter individual, the jury will inevitably be tempted
to bring in a conviction of lesser degree homicide. If this option is
closed, the prosecution runs the further risk of acquittal. Nevertheless,
it must be regarded as likely that some legislatures, responding to
public sentiment or political pressure, will attempt to institute
mandatory death penalties for such crimes as the murder of police-
men or correctional officers.\footnote{\textsuperscript{211}}

\textit{Furman} leaves the status of the petitioners and other death row
inmates totally unresolved. Remanding the cases for “further pro-
cedings,” the Court reversed the lower court judgments in each case
only insofar as they left undisturbed the death sentence imposed.\footnote{\textsuperscript{212}}

The Court failed to outline the nature of the remand proceedings.

The precedents in the area are meager. The California Supreme
Court, in declaring the death penalty void under the state constitution,
specifically substituted a life sentence for the appellant’s voided death sentence\footnote{\textsuperscript{213}} and made the holding in the case fully retroactive. The
California opinion also included instructions as to the procedure to
be followed to obtain similar modifications in other cases.\footnote{\textsuperscript{214}} In 1970,
the Eighth Circuit Court of Appeals, in overturning the death sentence

\footnote{\textsuperscript{211}} See, e.g., S. 3914, 92d Cong., 2d Sess. (1972).

A week after \textit{Furman} was decided, the Philadelphia District Attorney asked the Pennsyl-
vania Legislature to enact legislation authorizing the imposition of the death penalty
for crimes such as the murder of a policeman, assassination, a contracted murder, murder
by a parolee previously convicted of murder, murder by a life term convict, murder com-
mitted during the commission of arson, rape, robbery or burglary where the defendant
was previously convicted of those crimes, and murder resulting from a hijacking. \textit{See} 11
\textit{Crim. L. Rep.} 2424 (August 9, 1972). Presumably the death penalty for these crimes
would be mandatory.

After the \textit{Anderson} decision, California experienced the same reaction to the banning
of capital punishment; an amendment to the California Constitution was introduced to
17 was permitted to remain on the ballot, it is clear that, because of \textit{Furman}, discretionary
death penalties could not be reinstated by any such amendment to a state constitution. \textit{See}

A special committee on capital punishment of the National Association of Attorneys
General was convened for the purpose of drafting model legislation for the reinstatement
of the death penalty. Members of the committee were divided in opinion as to whether
such legislation would pass judicial muster. \textit{See} 168 \textit{N.Y.L.J.} 75, October 18, 1972, at 6,
col. 4. \textit{See} text accompanying note 167 \textit{supra}.

\footnote{\textsuperscript{212}} 408 U.S. at 240. The Court also vacated judgment as to the death penalty and
remanded “for further proceedings” 119 pending cases, 408 U.S. at 845, 932-41 (1972),
and disposed of four others summarily by vacating judgments as to the death penalty without
a remanding, \textit{id.} at —. In No. 204 O.T. 1970, Crampton v. Ohio, a companion case to
\textit{McGautha}, the Court granted rehearing and vacated its previous judgment reported in 402
U.S. 183 (1971). The death penalty affirmed by the Supreme Court of Ohio was vacated and
the case remanded for “further proceedings.” 408 U.S. at 941 (1972). This action further
illustrates the Court’s displeasure with \textit{McGautha}.

\footnote{\textsuperscript{213}} \textit{People v. Anderson}, 6 Cal. 3d 628, 637, 493 P.2d 880, 899, 100 Cal. Rptr. 152, 171,

\footnote{\textsuperscript{214}} \textit{Id.}}
of a convicted rapist on cruel and unusual punishment grounds, remanded the case to the district court with instructions to withhold a writ of habeas corpus for a reasonable time to permit the state to impose a "penalty other than death." It is unlikely that federal or state courts would impose on remand a sentence other than life imprisonment. Whether parole would then be permitted is a question yet to be decided.

The elimination of capital punishment by the California Supreme Court in *Anderson* quickly produced requests for bail from those charged with capital offenses to whom it had been prohibited by statute. The California court modified its decision to include a paragraph denying bail to these individuals, declaring that the gravity of the offenses was unaffected by the decision. The Supreme Court of New Jersey declined, however, to agree with its California counterpart. In *State v. Johnson*, the court reasoned that since the New Jersey capital punishment statutes were invalid, bail could not be denied to the "capital" offender. This is certainly an appropriate area for legislative action.

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216 In reaction to *Furman*, the Florida legislature enacted a statute, to take effect on October 1, 1972, requiring substitution of a life sentence without possibility of parole for a death sentence voided by *Furman*. On September 9, 1972, the Supreme Court of Florida rendered this statute meaningless, however, by commuting the death sentences of 40 killers and rapists to life imprisonment and making these convicts eligible for eventual parole. In addition, the court indicated that a prison term short of life might be considered if the trial court found some reason to grant mercy to convicted rapists. See N.Y. Times, Sept. 10, 1972, at 35, col. 1.

Perhaps the lesser sentence might be imposed for rape without serious bodily injury to the victim. See note 205 supra.

The Supreme Court of Illinois has gone a step further. In *State v. Speck*, the court declined to automatically commute death sentences which were invalidated by *Furman* to life imprisonment. Instead the court mandated a full de novo sentencing rehearing for convicted mass-murderer Richard Speck. The re-sentencing procedure will permit the admission of evidence of extenuating and mitigating circumstances which arose after the original sentencing.


A Texas district attorney's efforts to commute voided death sentences to life imprisonment were met with a request for a federal restraining order by a former death row inmate. The petitioner reasoned that since the original sentence of death was jury imposed, any new penalty must similarly be imposed by a jury at a new trial. The federal district court declined to grant the relief requested, stating that *Younger v. Harris*, 401 U.S. 37 (1971), bars interference in the state proceedings at this stage because the harm caused by the commutation was neither immediate or irreparable, nor was the prosecutor acting in "bad faith". Payton v. Vance, — F. Supp. — (S.D. Tex. 1972).


219 *Accord*, *Ex parte* Contella, — S.W.2d — (Tex. Crim. App. 1972). Following the
Furman v. Georgia must certainly be viewed as a reaffirmance of the principle that punishments must be evenhandedly and non-arbitrarily applied. But the extreme narrowness of the minimum grounds of the decision and the inability of any majority Justice to join in the opinion of any other all but foreclose the application of any of the various rationales offered by the Justices to any other method of punishment.

The very uniqueness of the death penalty as a punishment is clearly stressed in the broadest of the concurring opinions, those of Justices Brennan and Marshall. This concept of uniqueness necessitates a most conservative approach in evaluating the ramifications of Furman in other areas of the law.

Nevertheless, challenges to other penalties are certain to follow in the wake of Furman. Such challenges are likely to utilize two tests found in the concurring opinions: the “necessity” test of excessive cruelty accepted by four members of the majority and the concept of “infrequency” mentioned by two of the Justices.

An argument for an extension of Furman on the basis of the “necessity” test would reason that if a punishment is excessive, i.e., is unnecessary to achieve the ends of criminal justice, it should be struck down as violative of the eighth amendment. The Chief Justice discussed some implications of this argument:

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 asser-
tions, does it then follow that all punishments are suspect of being "cruel and unusual" within the meaning of the Constitution?223

Chief Justice Burger's fear that all criminal penalties may now be suspect as cruel and unusual is clearly unwarranted for, even if deterrence and vengeance are discounted arguendo, incarceration of the criminal for the purposes of rehabilitation and the prevention of recidivism is still a wholly necessary and legitimate end of criminal justice. And it is plainly the province of the legislature, subject to only limited judicial review,224 to determine what term of years will best serve this end.

The concept of "infrequency" will also offer little basis for the expansion of Furman to penalties other than death. Mr. Justice White attributes the failure of the death penalty to serve as a credible deterrent to capital crime or an effective expression of moral condemnation to the infrequency with which it is imposed. It is therefore unnecessarily cruel and violative of the eighth amendment. Mr. Justice Stewart, on the other hand, in adopting the rationale that the infrequency with which a penalty is exacted renders it suspect on eighth amendment grounds,225 does no more than verbalize the proposition that rare imposition is symptomatic of arbitrary, capricious or discriminatory enforcement of the laws. The Justice does not condemn infrequency per se but rather utilizes it as evidence that the system by which the penalty is imposed leaves the door open to less than evenhanded justice. The Chief Justice characterizes this underlying concern in these terms:

The decisive grievance of the opinions . . . is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to death, but that the selection process has followed no rational pattern.226

It is highly unlikely, therefore, that the mere infrequency with which a particular penalty is imposed will serve as anything more

223 408 U.S. at 396 (dissenting opinion).
Justice Marshall answers this argument by stating that anyone challenging these penalties will have to bear the heavy burden of overcoming the presumption of the validity of statutes passed by a legislature and he notes that the challengers of the death penalty have overcome this burden by 200 years of debate, inquiry and evidence gathering. Id. at 359 n.141 (concurring opinion).

224 Id. at 458 (Powell, J., dissenting). Justice Powell uses the terms "grossly excessive" and "greatly disproportionate" to emphasize that the Court's power to strike down punishments as excessive must be exercised with the "greatest circumspection." See also text accompanying note 79 supra.

225 See text accompanying note 116 supra.

226 408 U.S. at 398-99 (dissenting opinion).
than a warning of the possibility of injustice. If arbitrary or discriminatory punishment is then found, the Court is equipped to deal with it by traditional due process and equal protection means.

The majority's displeasure with the discretionary sentencing system is, however, likely to lead to challenges of other exercises of discretion in the judicial system, most notably that utilized by judges in fixing prison terms or in granting probation where no discernible standards are employed. While this exercise of judicial discretion has long been deemed, in the absence of extraordinary circumstances, an inappropriate area for federal judicial review, perhaps the emphasis the Furman majority placed upon the evenhanded application of justice may spur the courts to reexamine their standards for the judicial review of a judge's discretionary power. However, this reexamination is

227 See, e.g., United States v. Tucker, 404 U.S. 443, 446-47 (1972); Gore v. United States, 357 U.S. 886, 393 (1958) (problems relating to judges' power to review sentences are "particularly questions of legislative policy"); Blockburger v. United States, 284 U.S. 229, 305 (1932); United States v. Rosenberg, 195 F.2d 583, 604 (2d Cir.), cert. denied, 244 U.S. 838 (1952) ("an appellate court has no power to modify a sentence"); Gurera v. United States, 40 F.2d 338, 340-41 (8th Cir. 1930).

This solid wall of federal precedent has been breached; see United States v. Daniels, 446 F.2d 967 (6th Cir. 1971). The court of appeals remanded Daniels' case to the district court with instructions to impose a reduced sentence. The court found it to be an abuse of discretion by the district judge to sentence the defendant to the maximum statutory period despite uncontested evidence of mitigating circumstances. See Note, Daniels v. United States: Appellate Review of Criminal Sentencing—Limiting the Scope of the Non-Review Doctrine, 23 U. Pitt. L. Rev. 917 (1972).

Although the Daniels case is an aberration in federal law, the power of appellate courts to engage in some form of sentencing review has been recognized in 21 states. See ABA, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 13-15, 67-85 (1968); Mueller, Penology on Appeal: Appellate Review of Legal but Excessive Sentences, 15 VAND. L. REV. 671, 688-97 (1962) for a collection of relevant statutes and decisions.

Quite independently of Furman, the subject of judicial discretion in sentencing has become a center of heated controversy in New York. The New York statute authorizing appellate review of sentencing (N.Y. CRIM. PRO. LAW § 470.15 (McKinney 1971)), has failed to reduce sentencing disparities. See N.Y. Times, October 2, 1972, at 40, col. 1. One solution which has been implemented on an experimental basis in New York City is the establishment of three-judge "sentencing panels" at the trial court level to review all cases prior to sentencing. See N.Y. Times, October 3, 1972, at 1, col. 1. The Chief Judge of the New York Court of Appeals has gone even further, suggesting that judges be completely divested of sentencing power and that it be delegated instead to correction officials or a specially instituted agency. Id.

Furman may provide the impetus for appellate review of sentences in those jurisdictions which have not yet provided that safeguard. Action is more likely in the federal system, however, due to the Supreme Court's supervisory powers over the federal judiciary. See generally McNabb v. United States, 318 U.S. 332, 340 (1943); Note, The Supervisory Powers of the Federal Courts, 76 HARV. L. REV. 1656 (1963).

228 Mr. Justice Stewart, speaking of appellate review of sentencing, has stated: It is an anomaly that a judicial system which has developed so scrupulous a concern for the protection of a criminal defendant throughout every other stage of the proceedings against him should have so neglected this most important dimension of fundamental justice.

more likely to take the form of promulgating stricter sentencing standards than of abolishing judicial discretion in this area.

CONCLUSION

The complexity of the capital punishment controversy is clearly illustrated by the nine separate opinions filed in the case. The members of the majority have, however, added to the confusion surrounding the issue by failing to agree on a single common ground for condemnation of the death penalty. As a result of their failure, the future of capital punishment must remain in limbo until a mandatory death penalty statute is reviewed by the Court.

When such an event finally occurs, challengers will be hard-pressed to overcome the unwillingness of Justices White and Stewart to find retribution an impermissible end of criminal punishment and their refusal to acknowledge the ineffectiveness of the death penalty as a deterrent. The attitudes of these two members of the Furman majority undermine the utility of the “excessiveness” argument against capital punishment in future Supreme Court challenges.

Justices Marshall and Brennan find capital punishment per se violative of the eighth amendment and offer the convincing rationale that capital punishment now stands condemned by “enlightened public opinion.” The other Justices in the majority failed to embrace this reasoning, and this impasse makes it highly unlikely that capital punishment will be judicially eliminated by the Supreme Court in the foreseeable future.

A less obvious result of the other majority members’ rejection of the per se argument is that the combination of rationales appears to promise more in the way of possible application to other penalties than the authors actually intended to offer. A possible consequence is that the next few years will see numerous constitutional challenges to various state penalty schemes, challenges that, for reasons discussed above, will ultimately meet disappointment.

Although total judicial elimination of capital punishment is not

disparities between sentences for similar crimes would have to be greatly excessive to entitle the defendant to appellate review. Id. at 409.

229 408 U.S. at 308 (Stewart, J., concurring) (“I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment’’); id. at 311 (White, J., concurring) (“those executed may deserve exactly what they received").

230 408 U.S. at 307-08 (Stewart, J., concurring) (“despite the inconclusive empirical evidence, only the automatic penalty of death will provide maximum deterence’’); id. at 312 (White, J., concurring) (“I . . . need not reject the death penalty as a more effective deterrent than a lesser punishment’’).

231 408 U.S. at 296-300 (Brennan, J., concurring); id. at 360-69 (Marshall, J., concurring).

See text accompanying notes 103 and 173 supra.
likely to occur in the near future, Furman has necessitated legislative review of the entire capital punishment issue.\textsuperscript{232} This reevaluation will undoubtedly result in the repeal of even those mandatory death penalty statutes presently employed by many jurisdictions. In a kind of counter-effect, other jurisdictions are almost equally certain to move toward mandating capital punishment for certain crimes but, if past experience is any guide, such newly enacted mandatory death penalties will be short-lived.\textsuperscript{233} It is this long-range accomplishment that saves the deathknell tolled by Furman v. Georgia from sounding a hollow ring.

\textsuperscript{232}408 U.S. at 403 (Burger, C.J., dissenting) ("legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment").

A complete reevaluation of the capital punishment issue has begun in Florida. \textit{See} 11 CRIM. L. REP. 2508 (September 6, 1972). A similar inquiry has been initiated in New York. \textit{See N.Y. Times, October 17, 1972, at 26, col. 2.}

\textsuperscript{233}\textit{See} text accompanying notes 206-210 supra. Justice Blackmun characterizes the possible post-Furman institution of mandatory death penalties as "regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment." 408 U.S. at 413 (dissenting opinion).