

FURMAN v. GEORGIA
United States Supreme Court, 1972
408 U.S. 238

PER CURIAM

Certiorari was granted limited to the following question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"... The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.

So ordered.

Mr. Justice DOUGLAS, Mr. Justice BRENNAN, Mr. Justice STEWART, Mr. Justice WHITE, and Mr. Justice MARSHALL have filed separate opinions in support of the judgments. The Chief JUSTICE, Mr. Justice BLACKMUN, Mr. Justice POWELL, and Mr. Justice REHNQUIST have filed separate dissenting opinions.

Mr. Justice DOUGLAS, concurring.

That the requirements of due process ban cruel and unusual punishment is now settled. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463, and 473-474 (Burton, J., dissenting); *Robinson v. California*, 370 U.S. 660, 667. It is also settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature. *Weems v. United States*, 217 U.S. 349, 378-382. . . .

It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler*, 136 U.S. 436, 447. It is also said in our opinions that the proscription of cruel and unusual punishments "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, *supra*, at 378. A like statement was made in *Trop v. Dulles*, 356 U.S. 86, 101, that the Eighth Amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."

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

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

There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature¹. . . .

The English Bill of Rights, enacted December 16, 1689, stated that “excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted.”² These were the words chosen for our Eighth Amendment. A like provision had been in Virginia’s Constitution of 1776 and in the constitutions of seven other States. The Northwest Ordinance, enacted under the Articles of Confederation, included a prohibition of cruel and unusual punishments. But the debates of the First Congress on the Bill of Rights throw little light on its intended meaning. All that appears is the following:³

“Mr. SMITH, of South Carolina, objected to the words ‘nor cruel and unusual punishments,’ the import of them being too indefinite.
“Mr. LIVERMORE: The clause seems to express a great deal of humanity, on which account I have no objection to it; but, as it seems to have no meaning in it, I do not think it necessary. 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 future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislative to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.”

The words “cruel and unusual” certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is “cruel and unusual” to apply the death penalty--or any other penalty--selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board. . . .

The Court in *McGautha v. California*, 402 U.S. 183, 198, noted that in this country there was almost from the beginning a “rebellion against the common law

¹Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 Calif. L. Rev. 839, 845-846 (1969)

²1 W. & M., Sess. 2, c. 2; 8 English Historical Documents, 1660-1717, p. 122.

³1 Annals of Cong. 754 (1789).

rule imposing a mandatory death sentence on all convicted murderers.” The first attempted remedy was to restrict the death penalty to defined offenses such as “premeditated” murder. *Id.* But juries “took the law into their own hands” and refused to convict on the capital offense. *Id.*, at 199.

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

The Court concluded: “In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.” *Id.*, at 207.

The Court refused to find constitutional dimensions in the argument that those who exercise their discretion to send a person to death should be given standards by which that discretion should be exercised. *Id.*, at 207-208.

A recent witness at the Hearings before Subcommittee No. 3 of the House Committee on the Judiciary, 92d Cong. 2d Sess, Ernest van den Haag, testifying on H.R. 8414 et al., stated:

“Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The vice in this case is not in the penalty, but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.” *Id.*, at 116-117. (Emphasis supplied.)

But those who advance that argument overlook *McGautha*, *supra*.

We are now imprisoned in the *McGautha* holding. Indeed the seeds of the present cases are in *McGautha*. Juries (or judges, as the case may be) have practically untrammelled discretion to let an accused live or insist that he die. . . .

There is increasing recognition of the fact that the basic theme of equal protection is implicit in “cruel and unusual” punishments. “A penalty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.”⁴ The same authors add that “[t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness.”⁵ The President’s Commission on Law Enforcement and Administration of Justice recently concluded:⁶

⁴Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1790.

⁵ *Id.*, at 1792.

⁶ The Challenge of Crime in a Free Society 143 (1967).

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

A study of capital cases in Texas from 1924 to 1968 reached the following conclusions:⁷

“Application of the death penalty is unequal: most of those executed were poor, young, and ignorant.

“Seventy-five of the 460 cases involved co-defendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.

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

Warden Lewis E. Lawes of Sing Sing said:⁸

“Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows. Juries do not intentionally favor the rich, the law is theoretically impartial, but the defendant with ample means is able to have his case presented with every favorable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case.”

Former Attorney General Ramsey Clark has said, “It is the poor, the sick, the ignorant, the powerless and the hated who are executed.”⁹ One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loeb are given prison terms, not sentenced to death.

⁷ Koeninger, Capital Punishment in Texas, 1924-1968, 15 Crime & Delin. 132, 141 (1969).

⁸ Life and Death in Sing Sing 155-160 (1928).

⁹ Crime in America 335 (1970).

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

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

Later, the superintendent reported that the staff diagnosis was Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder. He concluded, however, that Furman was "not psychotic at present, knows right from wrong and is able to cooperate with his counsel in preparing his defense."

Branch, a black, entered the rural home of a 65-year-old widow, a white, while she slept and raped her, holding his arm against her throat. Thereupon he demanded money, and for 30 minutes or more, the widow searched for money, finding little. As he left, Jackson said if the widow told anyone what happened, he would return and kill her. The record is barren of any medical or psychiatric evidence showing injury to her as a result of Branch's attack.

He had previously been convicted of felony theft and found to be a borderline mental deficient and well below the average IQ of Texas prison inmates. He had the equivalent of five and half years of grade school education. He had a "dull intelligence" and was in the lowest fourth percentile of his class.

We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection

of the penalty. People live or die, dependent on the whim of one man or of 12. . . .

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

In a Nation committed to equal protection of the laws there is no permissible "caste" aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law a Brahman was exempt from capital punishment, and, under that law, "[g]enerally, in the law books, punishment increased in severity as social status diminished."¹⁰ We have, I fear, taken in practice the same position, partially as a result of making the death penalty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.

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

A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.

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

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. *Yick Wo v. Hopkins*, 118 U.S. 356. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death

¹⁰C. Drekmeier, *Kingship and Community in Early India* 233 (1962).

penalty would otherwise be constitutional is a question I do not reach.

Mr. Justice BRENNAN, concurring.

Almost a century ago, this Court observed that “[d]ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.” *Wilkerson v. Utah*, 99 U.S. 130, 125-136 (1879). Less than 15 years ago, it was again noted that “[t]he exact scope of the constitutional phrase ‘cruel and unusual’ has not been detailed by this Court.” *Trop v. Dulles*, 356 U.S. 86, 99 (1958). Those statements remain true today. The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition. Yet we know that the values and ideals it embodies are basic to our scheme of government. . . .

We have very little evidence of the Framers’ intent in including the Cruel and Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights. The absence of such a restraint from the body of the Constitution was alluded to, so far as we now know, in the debates of only two of the state ratifying conventions. In the Massachusetts convention, Mr. Holmes protested:

“What gives an additional glare of horror to these gloomy circumstances is the consideration that Congress have to ascertain, point out, and determine, what kind of punishments shall be inflicted on persons convicted of crimes. They are nowhere 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.” 2 J. Elliot’s Debates 111 (2d ed. 1876).

Holmes’ fear that Congress would have unlimited power to prescribe punishments for crimes was echoed by Patrick Henry at the Virginia convention:

“... Congress, from their general powers, may fully go into business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence--petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our [Virginia] bill of rights?-- ‘that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.’ Are you not, therefore, now calling on those gentlemen who are to compose Congress, to.... define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more--you depart from

the genius of your country. . . .

“In this business of legislation, your members of Congress will loose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your [Virginia] declaration of rights. What has distinguished our ancestors?-- That they would not admit of tortures, or cruel and barbarous punishment.” 3 *id.*, at 447

These two statements shed some light on what the Framers meant by “cruel and unusual punishments.” Holmes referred to “the most cruel and unheard-of-punishments,” Henry to “tortures, or cruel and barbarous punishment.” It does not follow, however, that the Framers were exclusively concerned with prohibiting torturous punishments. Holmes and Henry were objecting to the absence of a Bill of Rights, and they cited to support their objections the unrestrained legislative power to prescribe punishments for crimes. Certainly we may suppose that they invoked the specter of the most drastic punishments a legislature might devise.

In addition, it is quite clear that Holmes and Henry focused wholly upon the necessity to restrain the legislative power. Because they recognized “that Congress have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes,” they insisted that Congress must be limited in its power to punish. Accordingly, they called for a “constitutional check” that would ensure that “when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.”

The only further evidence of the Framers’ intent appears from the debates in the First Congress on the adoption of the Bill of Rights. As the Court noted in *Weems v. United States*, 217 U.S. 349, 368 (1910), the Cruel and Unusual Punishments Clause “received very little debate.” The extent of the discussion, by two opponents of the Clause in the House of Representatives, was this:

“Mr. SMITH, of South Carolina, objected to the words ‘nor cruel and unusual punishments,’ the import of them being too indefinite.
“Mr. LIVERMORE--The [Eighth Amendment] seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. . . . No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.
“The question was put on the [Eighth Amendment], and it was agreed to

by a considerable majority.” 1 Annals of Cong. 754 (1789)

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

Several conclusions thus emerge from the history of the adoption for the Clause. We know that the Framers’ concern was directed specifically at the exercise of legislative power. They included in the Bill of Rights a prohibition upon “cruel and unusual punishments” precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes. Yet we cannot now know exactly what the Framers thought “cruel and unusual punishments” were. Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that only tortuous punishments were to be outlawed. As Livermore’s comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered “cruel and unusual” at the time. The “import” of the Clause is, indeed, “indefinite,” and for good reason. A constitutional provision is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.” *Weems v. United States*, 217 U.S., at 373.

It was almost 80 years before this Court had occasion to refer to the Clause. See *Pervear v. The Commonwealth*, 5 Wall. 475, 479-480 (1867). These early cases, as the Court pointed out in *Weems v. United States*, *supra*, at 369, did not undertake to provide “an exhaustive definition” of “cruel and unusual punishments.” Most of them proceeded primarily by “looking backwards for examples by which to fix the meaning of the clause,” *id.*, at 377, concluding simply that a punishment would be “cruel and unusual” if it were similar to punishments considered “cruel and unusual” at the time the Bill of Rights was adopted. In *Wilkerson v. Utah*, 99 U.S., at 136, for instance, the Court found it “safe to affirm that punishments of torture...and all others in the same line of unnecessary cruelty, are forbidden.” The “punishments of torture,” which the Court labeled “atrocities,” were cases where the criminal “was embowelled alive, beheaded, and quartered,” and cases “of public dissection . . . and burning alive.” *Id.*, at 135. Similarly, *In re Kemmler*, 136 U.S. 436, 446 (1890), the Court declared that “if the punishment prescribed for an offence against the laws of the

State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. The Court then observed, commenting upon the passage just quoted from *Wilkerson v. Utah*, *supra*, and applying the “manifestly cruel and unusual” test, that “[p]unishments 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.” 136 U.S., at 447.

Had this “historical” interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights. As the Court noted in *Weems v. United States*, *supra*, at 371, this interpretation led Story to conclude that the provision “would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct.” And Cooley in his book, *Constitutional Limitations*, said the Court, “apparently in a struggle between the effect to be given to ancient examples and the inconsequence of a dread of them in these enlightened times, . . .hesitate[d] to advance definite views.” *Id.*, at 375. The result of a judicial application of this interpretation was not surprising. A state court, for example, upheld the constitutionality of the whipping post: “In comparison with the ‘barbarities of quartering, hanging in chains, castration, etc.,’ it was easily reduced to insignificance.” *Id.*, at 377.

But this Court in *Weems* decisively repudiated the “historical” interpretation of the Clause. The Court, returning to the intention of the Framers, “rel[ied] on the conditions which existed when the Constitution was adopted.” And the Framers knew “that government by the people instituted by the Constitution would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men.” *Id.*, at 375. The Clause, then, guards against “[t]he abuse of power”; contrary to the implications In *Wilkerson v. Utah*, *supra*, and *In re Kemmler*, *supra*, the prohibition of the Clause is not “confine[d] . . . to such penalties and punishment as were inflicted by the Stuarts.” 217 U.S., at 372. Although opponents of the Bill of Rights “felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation,” *ibid.*, the Framers disagreed:

“[Patrick] Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their [jealousy] of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not

unlimited, to give criminal character to the actions of men, with power unlimited to fix terms of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hand of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the [Stuarts’], or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.” *Id.*, at 372-373.

The court in *Weems* thus recognized that this “restraint upon legislatures” possesses an “expansive and vital character” that is “essential . . . to the rule of law and the maintenance of individual freedom.” *Id.*, at 376-377. Accordingly, the responsibility lies with the courts to make certain that the prohibition of the Clause is enforced. Referring to cases in which “prominence [was] given to the power of the legislature to define crimes and their punishment,” the Court said:

“We concede the power in most of its exercises. We disclaim the right to assert a judgment against that of the legislature of the expediency of the laws or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment, unless that power encounters in its exercise a constitutional prohibition. In such case not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked.” *Id.*, at 378.

In short, this Court finally adopted the Framers’ view of the Clause as a “constitutional check” to ensure that “when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.” That, indeed, is the only view consonant with our constitutional form of government. If the judicial conclusion that a punishment is “cruel and unusual” “depend [ed] upon virtually unanimous condemnation of the penalty at issue,” then, “[l]ike no other constitutional provision, [the Clause’s] only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom.” We know that the Framers did not envision “so narrow a role for this basic guaranty of human rights.” Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 Harv. L. Rev. 1773, 1782 (1970). The right to be free of cruel and unusual punishments, like the other guarantees of the Bill of Rights, “may not be submitted to vote; [it] depend[s] on the outcome of no elections.” “The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts.” *Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

Judicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes.

That is precisely the reason the Clause appears in the Bill of Rights. The difficulty arises, rather, in formulating the “legal principles to be applied by the courts” when a legislatively prescribed punishment is challenged as “cruel and unusual.” In formulating those constitutional principles, we must avoid the insertion of “judicial conception[s] of...wisdom or propriety,” *Weems v. United States*, 217 U.S., at 379, yet we must not, in the guise of “judicial restraint,” abdicate our fundamental responsibility to enforce the Bill of Rights. Were we to do so, the “constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.” *Id.*, at 373. The Cruel and Unusual Punishments Clause would become, in short, “little more than good advice.” *Trop v. Dulles*, 356 U.S., at 104.

Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century. Our task today is more complex. We know “that the words of the [Clause] are not precise, and that their scope is not static.” We know, therefore, that the Clause “must draw its meaning from the evolving standards of decency that mark the progress a maturing society.” *Id.*, at 100-101.¹¹ That knowledge, of course, is but the beginning of the inquiry.

In *Trop v. Dulles, supra*, at 99, it was said that “[t]he question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause].” It was also said that a challenged punishment must be examined “in light of the basic prohibition against inhuman treatment” embodied in the Clause. *Id.*, at 100 n. 32. It was said, finally, that:

“The basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards.” *Id.*, at 100.

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is “cruel and unusual,” therefore, if it does not comport with human dignity.

This formulation, of course, does not of itself yield principles for assessing the constitutional validity of particular punishments. Nevertheless, even though “[t]his Court has had little occasion to give precise content to the [Clause],” *ibid.*, there are principles recognized in our cases and inherent in the Clause sufficient to

¹¹The Clause “may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” *Weems v. United States*, 217 U.S., at 378.

permit a judicial determination whether a challenged punishment comports with human dignity.

The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. See *Weems v. United States*, 217 U.S., at 366. Yet the Framers also knew “that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.” *Id.*, at 372. Even though “[t]here may be involved no physical mistreatment, no primitive torture,” *Trop v. Dulles*, *supra*, at 101, severe mental pain may be inherent in the infliction of a particular punishment. See *Weems v. United States*, *supra*, at 366. That, indeed, was one of the conclusions underlying the holding of the plurality in *Trop v. Dulles* that the punishment of expatriation violates the Clause. And the physical and mental suffering inherent in the punishment of *cadena temporal*, see nn. 11-12, *supra*, was an obvious basis for the Court’s decision in *Weems v. United States* that the punishment was “cruel and unusual.”

More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, “punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like,” are, of course, “attended with acute pain and suffering.” *O’Neil v. Vermont*, 144 U.S. 323, 339 (1892) (Field, J., dissenting). When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

The infliction of an extremely severe punishment, then, like the one before the Court in *Weems v. United States*, from which “[n]o circumstance of degradation [was] omitted,” 217 U.S., at 366, may reflect the attitude that the person punished is not entitled to recognition as a fellow human being. That attitude may be apparent apart from the severity of the punishment itself. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947), for example, the unsuccessful electrocution, although it caused “mental anguish and physical pain,” was the result of “an unforeseeable accident.” Had the failure been intentional, however, the punishment would have been, like torture, so degrading and indecent as to amount to a refusal to accord the criminal human status. Indeed, a punishment may be degrading to human dignity solely because it is a punishment. A State may not punish a person for being “mentally ill, or a leper, or ... afflicted with a venereal disease,” or for being addicted to narcotics. *Robinson v. California*, 370 U.S. 660, 666 (1962). To inflict punishment for having a disease is to treat the individual as a diseased thing, rather than a sick human being. That the punishment is not severe, “in the abstract,” is irrelevant; “[e]ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a

common cold.” *Id.*, at 667. Finally, of course, a punishment may be degrading simply by reason of its enormity. A prime example is expatriation, a “punishment more primitive than torture,” *Trop v. Dulles*, 356 U.S., at 101, for it necessarily involves a denial by society of the individual’s existence as a member of the human community.

In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause--that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words “cruel and unusual punishments” imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 Calif. L. Rev. 839, 857-860 (1969).

This principle has been recognized in our cases. In *Wilkerson v. Utah*, 99 U.S., at 133-134, the Court reviewed various treatises on military law in order to demonstrate that under “the custom of war” shooting was a common method of inflicting the punishment of death. On that basis, the Court concluded:

“Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to [treatises on military law] are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the [Clause]. Soldiers convicted of desertion or other capital military offenses are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial.” *Id.*, at 134-135.

The Court thus upheld death by shooting, so far as appears, solely on the ground that it was a common method of execution.

As *Wilkerson v. Utah* suggests, when a severe punishment is inflicted “in the great majority of cases” in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is “something different from that which is generally done” in such cases, *Trop v. Dulles*, 356 U.S., at 101 n. 32, there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily. This principle is especially important today. There is scant danger, given the political processes “in an enlightened democracy such as ours,” *id.*, at 100, that extremely severe punishments will be widely applied. The more significant function of the Clause, therefore, is to protect against the danger of their arbitrary infliction.

A third principle inherent in the Clause is that a severe punishment must

not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible. Thus, for example, *Weems v. United States*, 217 U.S., at 380, and *Trop v. Dulles*, 356 U.S., at 102-103, suggest that one factor that may be considered is the existence of the punishment in jurisdictions other than those before the Court. *Wilkerson v. Utah*, *supra*, suggests that another factor to be considered is the historic usage of the punishment. *Trop v. Dulles*, *supra*, at 99, combined present acceptance with past usage by observing that “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.” In *Robinson v. California*, 370 U.S., at 666, which involved the infliction of punishment for narcotics addiction, the Court went a step further, concluding simply that, “in the light of contemporary human knowledge, a law which made a criminal offense of such a disease would doubtless be universally thought to be an infliction of cruel and unusual punishment.”

The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial task is to review the history of a challenged punishment and to examine society’s present practices with respect to its use. Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured not by its availability, for it might become so offensive to society as never to be inflicted, but by its use.

The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, *cf. Robinson v. California*, *supra*, at 666; *id.*, at 677 (DOUGLAS, J., concurring); *Trop v. Dulles*, *supra*, at 114 (BRENNAN, J., concurring), the punishment inflicted is unnecessary and therefore excessive.

This principle first appeared in our cases in Mr. Justice Field’s dissent in *O’Neil v. Vermont*, 144 U.S., at 337. He there took the position that:

“[The Clause] is directed, not only against punishments of the character mentioned [torturous punishments], but against all punishments which, by their excessive length or severity, are greatly disproportionate to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.” *Id.*, at 339-340.

Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime, the more

significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment. This view of the principle was explicitly recognized by the Court in *Weems v. United States*, *supra*. . . .

There are, then, four principles by which we may determine whether a particular punishment is “cruel and unusual.” The primary principle, which I believe supplies the essential predicate for the application of the others, is that a punishment must not by its severity be degrading to human dignity. The paradigm violation of this principle would be the infliction of a torturous punishment of the type that the Clause has always prohibited. . . .

Since the Bill of Rights was adopted, this Court has adjudged only three punishments to be within the prohibition of the Clause. See *Weems v. United States*, 217 U.S. 349 (1910) (12 years in chains at hard and painful labor); *Trop v. Dulles*, 356 U.S. 86 (1958) (expatriation); *Robinson v. California*, 370 U.S. 660 (1962) (imprisonment for narcotics addiction). Each punishment, of course, was degrading to human dignity, but of none could it be said conclusively that it was fatally offensive under one or the other of the principles. Rather, these “cruel and unusual punishments” seriously implicated several of the principles, and it was the application of the principles in combination that supported the judgment. That, indeed, is not surprising. The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity. They are, therefore, interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is “cruel and unusual.” The test, then, will ordinarily be a cumulative one: if a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

The punishment challenged in these cases is death. Death, of course, is a “traditional” punishment, *Trop v. Dulles*, *supra*, at 100, one that “has been employed throughout our history,” *id.*, at 99, and its constitutional background is accordingly an appropriate subject of inquiry.

There is, first, a textual consideration raised by the Bill of Rights itself. The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is entitled to certain procedural protections. We can thus infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishments Clause. Nor is there any indication in the debates on the Clause that a special exception was to be made for death. If anything, the indication is to the contrary, for Livermore specifically mentioned death as a candidate for future proscription under the Clause. . . . Finally, it does not advance analysis to insist that the Framers did not believe that adoption of the Bill of Rights would immediately prevent the infliction of the punishment of death;

neither did they believe that it would immediately prevent the infliction of other corporal punishments that, although common at the time...are now acknowledged to be impermissible.¹²

There is also the consideration that this Court has decided three cases involving constitutional challenges to particular methods of inflicting this punishment. In *Wilkerson v. Utah*, 99 U. S. 130 (1879), and *In re Kemmler*, 136 U.S. 436 (1890), the Court, expressing in both cases the since-rejected “historical” view of the Clause. . . approved death by shooting and death by electrocution. In *Wilkerson*, the Court concluded that shooting was a common method of execution. . . ; in *Kemmler*, the Court held that the Clause did not apply to the States, 136 U.S., 447-449. In *Louisiana ex rel. Francis v. Resweber, supra*, the Court approved a second attempt at electrocution after the first had failed. It was said that “[t]he Fourteenth [Amendment] would prohibit by its due process clause execution by a state in a cruel manner,” 329 U.S., at 463, but that the abortive attempt did not make the “subsequent execution any more cruel in the constitutional sense than any other execution,” *id.*, at 464. These three decisions thus reveal that the Court, while ruling upon various methods of inflicting death, has assumed in the past that death was a constitutionally permissible punishment. Past assumptions, however, are not sufficient to limit the scope of our examination of this punishment today. The constitutionality of death itself under the Cruel and Unusual Punishments Clause is before this Court for the first time; we cannot avoid the question by recalling past cases that never directly considered it.

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

Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. This natural human feeling appears all about us. There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. No other punishment has been so continuously restricted. . . nor has any State yet abolished

¹²Cf. *McGautha v. California*, 402 U.S. 183, 226 (1971) (separate opinion of Black, J.): “The [Clause] forbids ‘cruel and unusual punishments.’ In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the [Clause] was adopted. It is inconceivable to me that the framers intended to end capital punishment by the [Clause].” Under this view, of course, any punishment that was in common use in 1791 is forever exempt from the Clause.

prisons, as some have abolished this punishment. And those States that still inflict death reserve it for the most heinous crimes. Juries, of course, have always treated death cases differently, as have governors exercising their commutation powers. Criminal defendants are of the same view. As all practicing lawyers know, who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty.” *Griffin v. Illinois*, 351 U.S. 12, 28 (1956) (BURTON and MINTON, JJ., dissenting). Some legislatures have required particular procedures, such as two-stage trials and automatic appeals, applicable only in death cases. “It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations.” *Id.* See *Williams v. Florida*, 399 U.S. 78, 103 (1970) (all States require juries of 12 in death cases). This court, too, almost always treats death cases as a class apart. And the unfortunate effect of this punishment upon the functioning of the judicial process is well known; no other punishment has a similar effect.

The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death. Since the discontinuance of flogging as a constitutionally permissible punishment, *Jackson v. Bishop*, 404 F. 2d. 571 (CA8 1968), death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. Cf. *Ex parte Medley*, 134 U.S. 160, 172 (1890). As the California Supreme Court pointed out, “the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.” *People v. Anderson*, 6 Cal . 3d 628, 649 (1972). Indeed, as Mr. Justice FRANKFURTER noted, “the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon.” *Solesbee v. Balkcom*, 339 U.S. 9, 14 (1950) (dissenting opinion). The “fate of ever-increasing fear and distress” to which the expatriate is subjected, *Trop v. Dulles*, 356 U. S., at 102, can only exist to a greater degree for a person confined to prison awaiting death.

The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself. Expatriation, for example, is a punishment that “destroys for the individual the political existence that was centuries in the development,” that “strips the citizen of his status in the national and international political community,” and that puts “[h]is very existence” in jeopardy. Expatriation thus inherently entails “the total destruction of the individual’s status in organized society.” *Id.*, at 101. “In short, the expatriate has lost the right to have rights.” *Id.*, at 102. Yet, demonstrably, expatriation is not “a fate worse than death.” *Id.*, at 125 (Frankfurter, J.,

dissenting). Although death, like expatriation, destroys the individual's "political existence" and his "status in organized society," it does more, for, unlike expatriation, death also destroys "[h]is very existence." There is, too, at least the possibility that the expatriate will in the future regain "the right to have rights." Death forecloses even that possibility.

Death is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, see *Witherspoon v. Illinois*, 391 U.S. 510 (1968), yet the finality of death precludes relief. An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'"¹³

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

The outstanding characteristic of our present practice of punishing criminals by death is the infrequency with which we resort to it. The evidence is conclusive that death is not the ordinary punishment for any crime.

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. . . .

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.

Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorized

¹³Stephen, Capital Punishments, 69 *Fraser's Magazine* 753, 763 (1864).

punishment for those crimes. However the rate of infliction is characterized--as "freakishly" or "spectacularly" rare, or simply as rare--it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be?

When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity: death is inflicted, they say, only in "extreme" cases.

Informed selectivity, of course, is a value not to be denigrated. Yet presumably the States could make precisely the same claim if there were 10 executions per year, or five, or even if there were but one. That there may be as many as 50 per year does not strengthen the claim. When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily "extreme." Nor is the distinction credible in fact. If, for example, petitioner Furman or his crime illustrates the "extreme," then nearly all murderers and their murders are also "extreme." Furthermore, our procedures in death cases, rather than resulting in the selection of "extreme" cases for this punishment, actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. *McGautha v. California*, 402 U.S. 183, 196-208 (1971). In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.

Although it is difficult to imagine what further facts would be necessary in order to prove that death is, as my Brother STEWART put it, "wantonly and . . . freakishly" inflicted, I need not conclude that arbitrary infliction is patently obvious. I am not considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.

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

Thus, although "the death penalty has been employed throughout our history," *Trop v. Dulles*, 356 U.S. at 99, in fact the history of this punishment is

one of successive restriction. What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience. The result of this movement is our current system of administering the punishment, under which death sentences are rarely imposed and death is even more rarely inflicted. It is, of course, "We, the People" who are responsible for the rarity both of the imposition and the carrying out of this punishment. Juries, "express[ing] the conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois*, 391 U.S., at 519, have been able to bring themselves to vote for death in a mere 100 or so cases among the thousands tried each year where the punishment is available. Governors, elected by and acting for us, have regularly commuted a substantial number of those sentences. And it is our society that insists upon due process of law to the end that no person will be unjustly put to death, thus ensuring that many more of those sentences will not be carried out. In sum, we have made death a rare punishment today.

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

The final principle to be considered is that an unusually severe and degrading punishment may not be excessive in view of the purposes for which it is inflicted. This principle, too, is related to the others. When there is a strong probability that the State is arbitrarily inflicting an unusually severe punishment that is subject to grave societal doubts, it is likely also that the punishment cannot be shown to be serving any penal purpose that could not be served equally well by some less severe punishment.

The States' primary claim is that death is a necessary punishment because it prevents the commission of capital crimes more effectively than any less severe punishment. The first part of this claim is that the infliction of death is necessary to stop the individuals executed from committing further crimes. The sufficient answer to this is that if a criminal convicted of a capital crime poses a danger to

society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined. The more significant argument is that the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment. The argument is not based upon evidence that the threat of death is a superior deterrent. Indeed, as my Brother MARSHALL establishes, the available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment. The States argue, however, that they are entitled to rely upon common human experience, and that experience, they say, supports the conclusion that death must be a more effective deterrent than any less severe punishment. Because people fear death the most, the argument runs, the threat of death must be the greatest deterrent.

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

In any event, this argument cannot be appraised in the abstract. We are not presented with the theoretical question whether under any imaginable circumstances the threat of death might be a greater deterrent to the commission of capital crimes than the threat of imprisonment. We are concerned with the practice of punishing criminals by death as it exists in the United States today. Proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered, the punishment of death is necessary to deter the commission of capital crimes. Whatever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment.

There is, however, another aspect to the argument that the punishment of death is necessary for the protection of society. The infliction of death, the States

urge, serves to manifest the community's outrage at the commission of the crime. It is, they say, a concrete public expression of moral indignation that inculcates respect for the law and helps assure a more peaceful community. Moreover, we are told, not only does the punishment of death exert this widespread moralizing influence upon community values, it also satisfies the popular demand for grievous condemnation of abhorrent crimes, and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands.

The question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment. There is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders. Surely if there were such a danger, the execution of a handful of criminals each year would not prevent it. The assertion that death alone is a sufficiently emphatic denunciation for capital crimes suffers from the same defect. If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted upon the criminals who commit the crimes. Furthermore, it is certainly doubtful that the infliction of death by the State does, in fact, strengthen the community's moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values. That, after all, is why we no longer carry out public executions. In any event, this claim simply means that one purpose of punishment is to indicate social disapproval of crime. To serve that purpose our laws distribute punishments according to the gravity of crimes, and punish more severely the crimes society regards as more serious. That purpose cannot justify any particular punishment as the upper limit of severity.

There is, then, no substantial reason to believe that the punishment of death, as currently administered, is necessary for the protection of society. The only other purpose suggested, one that is independent of protection for society, is retribution. Shortly stated, retribution in this context means that criminals are put to death because they deserve it.

Although it is difficult to believe that any State today wishes to proclaim adherence to "naked vengeance," *Trop v. Dulles*, 356 U.S., at 112 (BRENNAN, J., concurring), the States claim, in reliance upon its statutory authorization, that death is the only fit punishment for capital crimes and that this retributive purpose justifies its infliction. In the past, judged by its statutory authorization, death was considered the only fit punishment for the crime of forgery, for the first federal criminal statute provided a mandatory death penalty for that crime. Act of April 30, 1790, §14, 1 Stat. 115. Obviously, concepts of justice change; no immutable moral order requires death for murderers and rapists. The claim that death is a just punishment necessarily refers to the existence of certain public beliefs. The claim must be that, for capital crimes, death alone comports with society's notion of proper punishment. As administered today, however, the punishment of death cannot be justified as a necessary means of exacting retribution from criminals. When the overwhelming number of criminals who commit capital crimes go to

prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment. The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few. As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them.

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

Mr. Justice STEWART, concurring.

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

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

The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. In a word, neither State has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses. . . .

Instead, the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment’s guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. *Robinson v. California*, 370 U.S. 660. In the first place, it is clear that these sentences are “cruel” in the sense, that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. *Weems v. United States*, 217 U.S. 349. In the second place, it is equally clear that these sentences are “unusual” in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I

do not rest my conclusion upon these two propositions alone.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. See *McLaughlin v. Florida*, 379 U.S. 184. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be wantonly and so freakishly imposed. . . .

Mr. Justice WHITE, concurring.

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that, no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when, for so many in like circumstances, life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

Most important, a major goal of the criminal law--to deter others by punishing the convicted criminal--would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. For present purposes, I accept the morality and utility of punishing one person to influence another. I accept also the effectiveness of punishment generally and need not reject the death penalty as a more effective deterrent than a lesser punishment. But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.

The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition

in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

It is also my judgment that this point has been reached with respect to capital punishment as it is presently administered under the statutes involved in these cases. Concededly, it is difficult to prove as a general proposition that capital punishment, however administered, more effectively serves the ends of the criminal law than does imprisonment. But however that may be, I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.

I need not restate the facts and figures that appear in the opinions of my Brethren. Nor can I “prove” my conclusion from these data. But, like my Brethren, I must arrive at judgment; and I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes, and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. The short of it is that the policy of vesting sentencing authority primarily in juries--a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence--has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has, for all practical purposes, run its course.

Judicial review, by definition, often involves a conflict between judicial and legislative judgment as to what the Constitution means or requires. In this respect, Eighth Amendment cases come to us in no different posture. It seems conceded by all that the Amendment imposes some obligations on the judiciary to judge the constitutionality of punishment, and that there are punishments that the Amendment would bar whether legislatively approved or not. Inevitably, then, there will be occasions when we will differ with Congress or state legislatures with respect to the validity of punishment. There will also be cases in which we shall strongly disagree among ourselves. Unfortunately, this is one of them. But, as I see it, this case is no different in kind from many others, although it may have wider impact and provoke sharper disagreement.

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

regularly conferred upon them. In my judgment, what was done in these cases violated the Eighth Amendment. . . .

Mr. Justice MARSHALL, concurring.

Perhaps the most important principle in analyzing “cruel and unusual” punishment questions is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language “must draw its meaning from the evolving standard of decency that mark the progress of a maturing society.”¹⁴ Thus, a penalty that was permissible at one time in our Nation’s history is not necessarily permissible today.

The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us. A fair reading of *Wilkinson v. Utah, supra*; *In re Kemmler, supra*; and *Louisiana ex rel. Francis v. Resweber, supra*, would certainly indicate an acceptance *sub silentio* of capital punishment as constitutionally permissible. Several Justices have also expressed their individual opinions that the death penalty is constitutional. Yet, some of these same Justices and others have at times expressed concern over capital punishment. There is no holding directly in point, and the very nature of the Eighth Amendment would dictate that, unless a very recent decision existed, *stare decisis* would bow to changing values, and the question of the constitutionality of capital punishment at a given moment in history would remain open. . . .

* * *

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

There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. These are considered *seriatim* below.

The concept of retribution is one of the most misunderstood in all of our criminal jurisprudence. The principal source of confusion derives from the fact that, in dealing with the concept, most people confuse the question “why do men in fact punish?” with the question “what justifies men in punishing?”¹⁵ Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law. Thus, it can

¹⁴*Trop v. Dulles*, 356 U.S. 86, 101 (1958).

¹⁵See Hart, *Murder and the Principles of Punishment: England and the United States*, 52 Nw. U. L. Rev. 433, 448 (1957); Report of Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, §52-53, pp. 17-18 (1953).

correctly be said that breaking the law is the *sine qua non* of punishment, or, in other words, that we only tolerate punishment as it is imposed on one who deviates from the norm established by the criminal law.

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. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. See *Trop v. Dulle*, 356 U.S., at 111 (BRENNAN, J., concurring). Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.

Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

In *Weem v. United States*, 217 U.S., at 381, the Court, in the course of holding that Weems' punishment violated the Eighth Amendment, contrasted it with penalties provided for other offenses, and concluded:

“[T]his contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing, and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.”

It is plain that the view of the *Weems* Court was that punishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view that the Court could have taken if the “cruel and unusual” language were to be given any meaning. Retribution surely underlies the imposition of some punishment on one who commits a criminal act. But the fact that some punishment may be imposed does not mean that any punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would, by definition, be acceptable means for designating society's moral approbation of a particular act. The “cruel and unusual” language would thus be read out of the Constitution, and the fears of Patrick Henry and the other Founding Fathers would become realities.

To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times, a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves. The “cruel and unusual” language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty, and

a return to the rack and other tortures would be possible in a given case. . . .

The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent to crime. . . .

The two strongest arguments in favor of capital punishment as a deterrent are both logical hypotheses devoid of evidentiary support, but persuasive nonetheless. The first proposition was best stated by Sir James Stephen in 1864:

“No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove simply because they are, in themselves, more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. . . . No one goes to certain inevitable death except by compulsion. Put the matter the other way. Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because ‘All that a man has will he give for his life.’ In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly.”¹⁶

This hypothesis relates to the use of capital punishment as a deterrent for any crime. The second proposition is that, “if life imprisonment is the maximum penalty for a crime such as murder, an offender who is serving a life sentence cannot then be deterred from murdering a fellow inmate or a prison officer.”¹⁷ This hypothesis advocates a limited deterrent effect under particular circumstances.

Abolitionists attempt to disprove these hypotheses by amassing statistical evidence to demonstrate that there is no correlation between criminal activity and the existence or nonexistence of a capital sanction. Almost all of the evidence involves the crime of murder, since murder is punishable by death in more jurisdictions than are other offenses, and almost 90% of all executions since 1930 have been pursuant to murder convictions.¹⁸

Thorsten Sellin, one of the leading authorities on capital punishment, has

¹⁶Reprinted in Royal Commission, *supra*, n. 14, §57, at 19.

¹⁷United Nations, Department of Economic and Social Affairs, Capital Punishment, Pt. 11, §139, at 118.

¹⁸T. Sellin, *The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute (ALI)* 5 (1959); Morris, *Thoughts on Capital Punishment*, 35 Wash. L. Rev. & St. Bar J. 335, 340 (1960).

urged that if the death penalty deters prospective murderers, the following hypotheses should be true:

“(a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects--character of population, social and economic condition, etc.--in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these states.

“(b) Murders should increase when the death penalty is abolished, and should decline when it is restored.

“(c) The deterrent effect should be greatest, and should therefore affect murder rates most powerfully, in those communities where the crime occurred and its consequences are most strongly brought home to the population.

“(d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than in those without it.”¹⁹

Sellin's evidence indicates that not one of these propositions is true. This evidence has its problems, however. One is that there are no accurate figures for capital murders; there are only figures on homicides, and they, of course, include noncapital killings. A second problem is that certain murders undoubtedly are misinterpreted as accidental deaths or suicides, and there is no way of estimating the number of such undetected crimes. A third problem is that not all homicides are reported. Despite these difficulties, most authorities have assumed that the proportion of capital murders in a State's or nation's homicide statistics remains reasonably constant, and that the homicide statistics are therefore useful.

Sellin's statistics demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction. He compares States that have similar characteristics and finds that, irrespective of their position on capital punishment, they have similar murder rates. . . .

Sellin also concludes that abolition and/or reintroduction of the death penalty had no effect on the homicide rates of the various States involved. This conclusion is borne out by others who have made similar inquiries and by the experience of other countries. Despite problems with the statistics, Sellin's evidence has been relied upon in international studies of capital punishment.

Statistics also show that the deterrent effect of capital punishment is no greater in those communities where executions take place than in other

¹⁹Sellin, *supra*, n. 17, at 21.

communities. In fact, there is some evidence that imposition of capital punishment may actually encourage crime, rather than deter it. And, while police and law enforcement officers are the strongest advocates of capital punishment, the evidence is overwhelming that police are no safer in communities that retain the sanction than in those that have abolished it.

There is also a substantial body of data showing that the existence of the death penalty has virtually no effect on the homicide rate in prisons. Most of the persons sentenced to death are murderers, and murderers tend to be model prisoners.

In sum, the only support for the theory that capital punishment is an effective deterrent is found in the hypotheses with which we began and the occasional stories about a specific individual being deterred from doing a contemplated criminal act. These claims of specific deterrence are often spurious, however, and may be more than counterbalanced by the tendency of capital punishment to incite certain crimes.

The United Nations Committee that studied capital punishment found that “[i]t is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime.”²⁰

Despite the fact that abortionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject. But, even if further proof were to be forthcoming, I believe there is more than enough evidence presently available for a decision in this case. . . .

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

Much of what must be said about the death penalty as a device to prevent recidivism is obvious--if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes, either in prison or upon their release. For the most part, they are first offenders, and when released from prison they are known to become model citizens. Furthermore, most persons who commit capital crimes are not executed. With respect to those who are sentenced to die, it is critical to note that the jury is never asked to determine whether they are likely to be recidivists. In light of these facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive; no general

²⁰United Nations, *supra*, n. 16, §159, at 123.

need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.

The three final purposes which may underlie utilization of a capital sanction-- encouraging guilty pleas and confessions, eugenics, and reducing state expenditures--may be dealt with quickly. If the death penalty is used to encourage guilty pleas, and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. *United States v. Jackson*, 390 U.S. 570 (1968). Its elimination would do little to impair the State's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency.

Moreover, to the extent that capital punishment is used to encourage confessions and guilt pleas, it is not being used for punishment purposes. A State that justifies capital punishment on its utility as part of the conviction process could not profess to rely on capital punishment as a deterrent. Such a State's system would be structured with twin goals only: obtaining guilty pleas and confessions and imposing imprisonment as the maximum sanction. Since life imprisonment is sufficient for bargaining purposes, the death penalty is excessive if used for the same purposes.

In light of the previous discussion on deterrence, any suggestions concerning the eugenic benefits of capital punishment are obviously meritless. As I pointed out above, there is not even any attempt made to discover which capital offenders are likely to be recidivists, let alone which are positively incurable. No test or procedure presently exists by which incurables can be screened from those who would benefit from treatment. On the one hand, due process would seem to require that we have some procedure to demonstrate incurability before execution; and, on the other hand, equal protection would then seemingly require that a incurables be executed, cf. *Skinner v. Oklahoma*, 316 U.S. 535 (1942). In addition, the "cruel and unusual" language would require that life imprisonment, treatment, and sterilization be inadequate for eugenic purposes. More importantly, this Nation has never formally professed eugenic goals, and the history of the world does not look kindly on them. If eugenics is one of our purposes, then the legislatures should say so forthrightly and design procedures to serve this goal. Until such time, I can only conclude . . . that capital punishment cannot be defended on the basis of any eugenic purposes.

As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive. Appeals are often automatic, and courts admittedly spend more time with death cases. At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.

During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the State. There are also continual assertions that the condemned prisoner has gone insane. Because there is a formally established policy of not executing insane persons, great sums of money may be spent on detecting and curing mental illness in order to perform the execution. Since no one wants the responsibility for the execution, the condemned man is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball. The entire process is very costly.

When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.

There is but one conclusion that can be drawn from all of this--*i.e.*, the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment. The statistical evidence is not convincing beyond all doubt, but it is persuasive. It is not improper at this point to take judicial notice of the fact that for more than 200 years men have labored to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally well. And they have done so with great success. Little, if any, evidence has been adduced to prove the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.²¹

In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.

In judging whether or prompt a given penalty is morally acceptable, most courts have said that the punishment is valid unless “it shocks the conscience and sense of justice of the people.”²²

Judge Frank once noted the problems inherent in the use of such a measuring stick:

“[The court,] before it reduces a sentence as ‘cruel and unusual,’ must

²¹This analysis parallels in some ways the analysis used in striking down legislation on the ground that it violates Fourteenth Amendment concepts of substantive due process. See Packer, *Making the Punishment Fit the Crime*, 77 Harv. L. Rev. 1071, 1074 (1964). There is one difference, however. Capital punishment is unconstitutional because it is excessive and unnecessary punishment, not because it is irrational.

²²*United States v. Rosenberg*, 195 F. 2d 583, 608 (CA2) Frank, J.).

have reasonably good assurances that the sentence offends the ‘common conscience.’ And, in any context, such a standard--the community’s attitude--is usually an unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels. Even a carefully taken ‘public opinion poll’ would be inconclusive in a case like this.”

While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention “shocks the conscience and sense of justice of the people.” but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.

In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

This is not to suggest that with respect to this test of unconstitutionality people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens.

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

This information would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. This problem arises from the fact that the public’s desire for retribution, even though this is a goal that the legislature cannot constitutionally pursue as its sole justification for capital punishment, might influence the citizenry’s view of the morality of capital punishment. The solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people

who have injected a sense of purpose into our penology. I cannot believe that at this state in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional.

But, if this information needs supplementing, I believe that the following facts would serve to convince even the most hesitant of citizens to condemn death as a sanction; capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system. Each of these facts is considered briefly below.

Regarding discrimination, it has been said that “[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group--the man who, because he is without means, and is defended by a court-appointed attorney--who becomes society’s sacrificial lamb. . . .”²³ Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro.²⁴ Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape.²⁵ It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. Racial or other discrimination should not be surprising. In *McGautha v. California*, 402 U.S., at 207, this Court held “that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution,” This was an open invitation to discrimination.

There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of sanction that the

²³Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess. (1968) (statement of M. DiSalle).

²⁴National Prisoner Statistics No. 45, Capital Punishment 1930-1968, p. 7 (Aug., 1969).

²⁵*Ibid.*

wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today's situation.

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.

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

No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law. . . .

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

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

Although the Eighth Amendment literally reads as prohibiting only those

punishments that are both, “cruel” and “unusual,” history compels the conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed.

The most persuasive analysis of Parliament’s adoption of the English Bill of Rights of 1689--the unquestioned source of the Eighth Amendment wording--suggests that the prohibition against “cruel and unusual punishments” was included therein out to aversion to severe punishments not legally authorized and not within the jurisdiction of the courts to impose. To the extent that the term “unusual” had any importance in the English version, it was apparently intended as a reference to illegal punishments.²⁶

From every indication, the Framers of the Eighth Amendment intended to give the phrase a meaning far different from that of its English precursor. The records of the debates in several of the state conventions called to ratify the 1789 draft Constitution submitted prior to the addition of the Bill of Rights show that the Framers’ exclusive concern was the absence of any ban on tortures. The later inclusion of the “cruel and unusual punishments” clause was in response to these objections. There was no discussion of the interrelationship of the terms “cruel” and “unusual,” and there is nothing in the debates supporting the inference that the Founding Fathers would have been receptive to torturous or excessively cruel punishments even if usual in character or authorized by law.

The cases decided under the Eighth Amendment are consistent with the tone of the ratifying debates. In *Wilkinson v. Utah*, 99 U.S. 130 (1879), this Court held that execution by shooting was not a prohibited mode of carrying out a sentence of death. Speaking to the meaning of the Cruel and Unusual Punishments Clause, the Court stated,

“[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution. *Id.*, at 136.

The Court made no reference to the role of the term “unusual” in the constitutional guarantee.

In the case of *In re Kemmler*, 136 U.S. 436 (1890), the Court held the Eighth Amendment inapplicable to the States and added the following dictum:

“So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the...[prohibition of the New York constitution]. And we think this equally true of the Eighth

²⁶See Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 Calif. L. Rev. 839, 852-860 (1969). Earlier drafts of the Bill of Rights used the phrase “cruel and illegal.” It is thought that the change to the “cruel and unusual” wording was inadvertent and not intended to work any change in meaning. *Ibid.*

Amendment, in its application to Congress.

“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.” *Id.*, at 446-447.

This language again reveals an exclusive concern with extreme cruelty. The Court made passing reference to the finding of the New York courts that electrocution was an “unusual” punishment, but it saw no need to discuss the significance of that term as used in the Eighth Amendment.

Opinions in subsequent cases also speak of extreme cruelty as though that were the sum and substance of the constitutional prohibition. See *O’Neil v. Vermont*, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting); *Weems v. United States*, 217 U.S. 349, 372-373 (1910); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947). As summarized by Mr. Chief Justice Warren in the plurality opinion in *Trop v. Dulles*, 356 U.S. 86, 100 n. 32 (1958):

“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. See *Weems v. United States*, *supra*; *O’Neil v. Vermont*, *supra*; *Wilkerson v. Utah*, *supra*. These cases indicate that the 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.’”

I do not suggest that the presence of the word “unusual” in the Eighth Amendment is merely vestigial, having no relevance to the constitutionality of any punishment that might be devised. But where, as here, we consider a punishment well known to history, and clearly authorized by legislative enactment, it disregards the history of the Eighth Amendment and all the judicial comment that has followed to rely on the term “unusual” as affecting the outcome of these cases. Instead, I view these cases as turning on the single question whether capital punishment is “cruel” in the constitutional sense. The term “unusual” cannot be read as limiting the ban on “cruel” punishments, or as somehow expanding the meaning of the term “cruel.” For this reason, I am unpersuaded by the facile argument that since capital punishment has always been cruel in the everyday sense of the word, and has become unusual due to decreased use, it is, therefore, now “cruel and unusual.”

Counsel for petitioners properly concede that capital punishment was not impermissibly cruel at the time of the adoption of the Eighth Amendment. Not only do the records of the debates indicate that the Founding Fathers were limited

in their concern to the prevention of torture, but it is also clear from the language of the Constitution itself that there was no thought whatever of the elimination of capital punishment. The opening sentence of the Fifth Amendment is a guarantee that the death penalty not be imposed “unless on a presentment or indictment of a Grand Jury.” The Double Jeopardy Clause of the Fifth Amendment is a prohibition against being “twice put in jeopardy of life” for the same offense. Similarly, the Due Process Clause commands “due process of law” before an accused can be “deprived of life, liberty, or property.” Thus, the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment; it does not expressly or by implication acknowledge the legal power to impose any of the various punishments that have been banned as cruel since 1791. Since the Eighth Amendment was adopted on the same day in 1791 as the Fifth Amendment, it hardly needs more to establish that the death penalty was not “cruel” in the constitutional sense at that time.

In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly “cruel” in the constitutional sense. *Wilkerson v. Utah*, 99 U.S. 130 (1879); *Louisiana ex rel. Francis v. Resweber*, 329 U.S., at 464. *In re Kemmler*, 136 U.S. 436 (1890) (dictum). It is only 14 years since Mr. Chief Justice Warren, speaking for four members of the Court, stated without equivocation:

“Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment--and they are forceful--the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.” *Trop v. Dulles*, 356 U.S., at 99.

It is only one year since Mr. Justice Black made his feelings clear on the constitutional issue:

“The Eighth Amendment forbids ‘cruel and unusual punishments.’ In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment.” *McGautha v. California*, 402 U.S. 183, 226 (1971) (separate opinion).

By limiting its grants of certiorari, the Court has refused even to hear argument on the Eighth Amendment claim on two occasions in the last four years. *Witherspoon v. Illinois*, cert. granted, 389 U.S. 1035, rev’d, 391 U.S. 510 (1968);

McGautha v. California, cert. granted, 398 U.S. 936 (1970), aff'd, 402 U.S. 183 (1971). In these cases the Court confined its attention to the procedural aspects of capital trials, it being implicit that the punishment itself could be constitutionally imposed. Nonetheless, the Court has now been asked to hold that a punishment clearly permissible under the Constitution at the time of its adoption and accepted as such by every member of the Court until today, is suddenly as cruel as to be incompatible with the Eighth Amendment.

Before recognizing such an instant evolution in the law, it seems fair to ask what factors have changed that capital punishment should now be “cruel” in the constitutional sense as it has not been in the past. It is apparent that there has been no change of constitutional significance in the nature of the punishment itself. Twentieth century modes of execution surely involve no greater physical suffering than the means employed at the time of the Eighth Amendment’s adoption. An although a man awaiting execution must inevitably experience extraordinary mental anguish, no one suggests that this anguish is materially different from that experienced by condemned men in 1791, even though protracted appellate review processes have greatly increased the waiting time on “death row.” To be sure, the ordeal of the condemned man may be thought cruel. But if the Constitution proscribed every punishment producing severe emotional stress, then capital punishment would clearly have been impermissible in 1791.

However, the inquiry cannot end here. For reasons unrelated to any change in intrinsic cruelty, the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment. A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. This notion is not new to Eighth Amendment adjudication. In *Weems v. United States*, 217 U.S. 349 (1910), the Court referred with apparent approval to the opinion of the commentators that “[t]he cause of the Constitution...may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice.” 217 U.S., at 378. Mr. Chief Justice Warren, writing the plurality opinion in *Trop v. Dulles*, *supra*, stated, “The Amendment must draw its meaning from the he evolving standards of decency that mark the progress of a maturing society.” 356 U.S., at 101. Nevertheless, the Court, up to now has never actually held that a punishment has become impermissibly cruel due to a shift in the weight of accepted social values; nor has the Court suggested judicially manageable criteria for measuring such a shift in moral consensus.

The Court’s quiescence in this area can be attributed to the fact that in a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. For this reason, early commentators suggested that the “cruel and unusual punishments” clause was an unnecessary constitutional provision. As acknowledged in the principal brief for

petitioners, “both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society’s standards of decency.”²⁷ Accordingly, punishments such as branding and the cutting off of ears, which were commonplace at the time of the adoption of the Constitution, passed from the penal scene without judicial intervention because they became basically offensive to the people and the legislatures responded tot his sentiment.

Beyond any doubt, if we were today called upon to review such punishments, we would find them excessively cruel because we could say with complete assurance that contemporary society universally rejects such bizarre penalties. However, this speculation on the Court’s probable reaction to such punishments is not of itself significant. The critical fact is that this Court has never had to hold that a mode of punishment authorized by a domestic legislature was so cruel as to be fundamentally at odds with our basic notions of decency. Cf. *Weems v. United States*, *supra*. Judicial findings of impermissible cruelty have been limited, for the most part, to offensive punishments devised without specific authority by prison officials, not by legislature. . . . The paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that in this country legislatures have, in fact, been responsive--albeit belatedly at times--to changes in social attitudes and moral values.

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

There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. It is not a punishment such as burning at the stake that everyone would ineffably find to be repugnant to all civilized standards. Nor is a punishment so roundly condemned that only a few aberrant legislatures have retained it on the statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes. On four occasions in the last 11 years Congress has added to the list of federal crimes punishable by death. In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced.

One conceivable source of evidence that legislatures have abdicated their essentially barometric role with respect to community values would be public opinion polls, of which there have been many in the past decade addressed to the question of capital punishment. Without assessing the reliability of such polls, or

²⁷Brief for Petitioner in *Aikens v. California*, No. 68-5027, p. 19, (cert. dismissed, 406 U.S. 813 (1972)).

intimating that any judicial reliance could ever be placed on them, it need only be noted that the reported results have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values.”

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

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

“And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary values and the penal system--a link without which the determination of punishment could hardly reflect ‘the evolving standards of decency that mark the progress of a maturing society.’ ” 391 U.S., at 519 and n. 15 (emphasis added).

The selectivity of juries in imposing the punishment of death is properly viewed as a refinement on, rather than repudiation of, the statutory authorization for that penalty. Legislatures prescribe the categories of crimes for which the death penalty should be available, and acting as “the conscience of the community,” juries are entrusted to determine in individual cases that the ultimate punishment is warranted. Juries are undoubtedly influenced in this judgment by myriad factors. The motive or lack of motive of the perpetrator, the degree of injury or suffering of the victim or victims, and the degree of brutality in the commission of the crime would seem to be prominent among these factors. Given the general awareness that death is no longer a routine punishment for the crimes for which it is made available, it is hardly surprising that juries have been increasingly meticulous in their imposition of the penalty. But to assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death, is to cast grave doubt on the basic integrity of our jury system.

It would, of course, be unrealistic to assume that juries have been perfectly consistent in choosing the cases where the death penalty is to be imposed, for no human institution performs with perfect consistency. There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State. In this sense their fate has been controlled by a fortuitous circumstance. However, this element of fortuity does not stand as an indictment either of the general functioning of juries in capital cases or of the integrity of jury decisions in individual cases. There is no empirical basis for concluding that juries have generally failed to discharge in good faith the responsibility described in *Witherspoon*--that of choosing between life and death in individual cases according to the dictates of community.

The rate of imposition of death sentences falls far short of providing the requisite unambiguous evidence that the legislatures of 40 States and the Congress have turned their backs on current or evolving standards of decency in continuing

to make the death penalty available. For, if selective imposition evidences a rejection of capital punishment in those cases where it is not imposed, it surely evidences a correlative affirmation of the penalty in those cases where it is imposed. Absent some clear indication that the continued imposition of the death penalty on a selective basis is violation of prevailing standards of civilized conduct, the Eighth Amendment cannot be said to interdict its use. . .

Capital punishment has also been attacked as violative of the Eighth Amendment on the ground that it is not needed to achieve legitimate penal aims and is thus “unnecessarily cruel.” As a pure policy matter, this approach has much to recommend it, but it seeks to give a dimension to the Eighth Amendment that it was never intended to have and promotes a line of inquiry that this Court has never before pursued.

The Eighth Amendment, as I have noted, was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy. One of the few to speak out against the adoption of the Eighth Amendment asserted that it is often necessary to use cruel punishments to deter crimes.²⁸ But among those favoring the Amendment, no sentiment was expressed that a punishment of extreme cruelty could ever be justified by expediency. The dominant theme of the Eighth Amendment debates was that the ends of the criminal laws cannot justify the use of measures of extreme cruelty to achieve them. Cf. *Rochin v. California*, 342 U.S. 165, 172-173 (1952).

The apparent seed of the “unnecessary cruelty” argument is the following language, quoted earlier, found in *Wilkerson v. Utah*, *supra*:

“Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . *and all others in the same line of unnecessary cruelty*, are forbidden by the amendment to the Constitution.” 99 U.S., at 135-136 (emphasis added).

To lift the italicized phrase from the context of the *Wilkerson* opinion and now view it as a mandate for assessing the value of punishments in achieving the aims of penology is a gross distortion; nowhere are such aims even mentioned in the *Wilkerson* opinion. The only fair reading of this phrase is that punishments similar to torture in their extreme cruelty are prohibited by the Eighth Amendment. In *Louisiana ex rel. Francis v. Resweber*, 329 U.S., at 463, 464, the Court made reference to the Eighth Amendment’s prohibition against the infliction of “unnecessary pain” in carrying out an execution. The context makes abundantly clear that the Court was disapproving the wanton infliction of physical pain, and once again not advising pragmatic analysis of punishments approved by

²⁸1 Annals of Cong. 754 (1789) (remarks of Rep. Livermore).

legislatures.

Apart from these isolated uses of the word “unnecessary,” nothing in the cases suggests that it is for the courts to make a determination of the efficacy of punishments. The decision in *Weems v. United States*, *supra*, is not to the contrary. In *Weems* the court held that for the crime of falsifying public documents, the punishment imposed under the Philippine Code of 15 years’ imprisonment at hard labor under shackles, followed by perpetual surveillance, loss of voting rights, loss of the right to hold public office, and loss of right to change domicile freely, was violative of the Eighth Amendment. The case is generally regarded as holding that a punishment may be excessively cruel within the meaning of the Eighth Amendment because it is grossly out of proportion to the severity of the crime;²⁹ some view the decision of the Court primarily as a reaction to the mode of the punishment itself. Under any characterization of the holding, it is readily apparent that the decision grew out of the Court’s overwhelming abhorrence of the particular penalty for the particular crime; it was making an essentially moral judgment not a dispassionate assessment of the need for the penalty. The Court specifically disclaimed “the right to assert a judgment against that of the legislature of the expediency of the laws. . . .” 217 U.S., at 378. Thus, apart from the fact that the Court in *Weems* concerned itself with the crime committed as well as the punishment imposed, the case marks no departure from the largely unarticulable standard of extreme cruelty. However intractable that standard may be, that is what the Eighth Amendment is all about. The constitutional provision is not addressed to social utility and does not command the enlightened principles of penology always be followed.

By pursuing the necessity approach, it becomes even more apparent that it involves matters outside the purview of the Eighth Amendment. Two of the several aims of punishment are generally associated with capital punishment--retribution and deterrence. It is argued that retribution can be discounted because that, after all, is what the Eighth Amendment seeks to eliminate. There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes. See *Williams v. New York*, 337 U. S. 341, 248 (1949); *United States v. Lovett*, 328 U. S. 303, 324 (1946) (Frankfurter, J., concurring). Furthermore, responsible legal thinkers of widely varying persuasions have debated the sociological and philosophical aspects of the retribution question for generations, neither side being able to convince the other. It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose.

The less esoteric but no less controversial question is whether the death

²⁹There is no serious claim of disproportionality presented in these cases. Murder and forcible rape have always been regarded as among the most serious crimes. It cannot be said that the punishment of death is out of all proportion to the severity of these crimes.

penalty acts as a superior deterrent. Those favoring abolition find no evidence that it does. Those favoring retention start from the intuitive notion that capital punishment should act as the most effective deterrent and note that there is no convincing evidence that it does not.³⁰ Escape from this empirical stalemate is sought by placing the burden of proof on the States and concluding that they have failed to demonstrate that capital punishment is a more effective deterrent than life imprisonment. Numerous justifications have been advanced from shifting the burden, and they are not without their rhetorical appeal. However, these arguments are not descended from established constitutional principles, but are born of the urge to bypass an unresolved factual question. Comparative deterrence is not a matter that lends itself to precise measurement; to shift the burden to the States is to provide an illusory solution to an enormously complex problem. If it were proper to put the States to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment. Yet I know of no convincing evidence that life imprisonment is a more effective deterrent than 20 years' imprisonment, or even that a \$10 parking ticket is a more effective deterrent than a \$5 parking ticket. In fact, there are some who go so far as to challenge the notion that any punishments deter crime. If the States are unable to adduce convincing proof rebutting such assertions, does it then follow that all punishments are suspect as being "cruel and unusual" within the meaning of the Constitution? On the contrary, I submit that the questions raised by the necessity approach are beyond the pale of judicial inquiry under the Eighth Amendment.

Today the Court has not ruled that capital punishment is *per se* violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice STEWART and Mr. Justice WHITE, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent; 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. This approach--not urged in oral arguments or briefs--misconceives the nature of the constitutional command against "cruel and unusual punishments," disregards controlling case law, and demands a rigidity in capital cases which, if possible of achievement, cannot be regarded as a welcome change. Indeed the contrary seems to be the case.

As I have earlier stated, the Eighth Amendment forbids the imposition of punishments that are so cruel and inhumane as to violate society's standards of

³⁰See *e.g.*, Hoover, Statements in Favor of the Death Penalty, in H. Bedau, *The Death Penalty in America* 130 (1967 rev. ed.); Allen, Capital Punishment: Your Protection and Mine, in *The Death Penalty in America*, *supra*, at 135. See also Hart, 52 *Nw. U. L. Rev.*, *supra*, at 457; Bedau, *The Death Penalty in America*, *supra*, at 265-266.

civilized conduct. The Amendment does not prohibit all punishments the States are unable to prove necessary to deter or control crime. The Amendment is not concerned with the process by which a State determines that a particular punishment is to be imposed in a particular case. And the Amendment most assuredly does not speak to the power of legislatures to confer sentencing discretion on juries, rather than to fix all sentences by statute.

The critical factor in the concurring opinions of both Mr. Justice STEWART and Mr. Justice WHITE is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence of capital punishment--the inference that petitioners would have the Court draw--but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion.

To be sure, there is a recitation cast in Eighth Amendment terms: petitioners' sentences are "cruel" because they exceed that which the legislatures have deemed necessary for all cases; petitioners' sentences are "unusual" because they exceed that which is imposed in most cases. This application of the words of the Eighth Amendment suggests that capital punishment can be made to satisfy Eighth Amendment values if its rate of imposition is somehow multiplied; it seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand. The implications of this approach are madly ironical. For example, by this measure of the Eighth Amendment, the elimination of death-qualified juries in *Witherspoon v. Illinois*, 391 U. S. 510 (1968), can only be seen in retrospect as a setback to "the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S., at 101.

This novel formulation of Eighth Amendment principles--albeit necessary to satisfy the terms of our limited grant of *certiorari*--does not lie at the heart of these concurring opinions. The decisive grievance of the opinions--not translated into Eighth Amendment terms--is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern. This claim of arbitrariness is not only lacking in empirical support, but also it manifestly fails to establish that the death penalty is a "cruel and unusual" punishment. The Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process. The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument.

This ground of decision is plainly foreclosed as well as misplaced. Only one year ago, in *McGautha v. California*, the Court upheld the prevailing system of sentencing in capital cases. The Court concluded:

"In light of history, experience, and the present limitations of human

knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.” 402 U.S., at 207.

In reaching this decision, the Court had the benefit of extensive briefing, full oral argument, and six months of careful deliberations. The Court’s labors are documented by 130 pages of opinions in the United States Reports. All of the arguments and factual contentions accepted in the concurring opinions today were considered and rejected by the Court one year ago. *McGautha* was an exceedingly difficult case, and reasonable men could fairly disagree as to the result. But the Court entered its judgment, and if *stare decisis* means anything, that decision should be regarded as a controlling pronouncement of law.

Although the Court’s decision in *McGautha* was technically confined to the dictates of the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, it would be disingenuous to suggest that today’s ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication. It may be thought appropriate to subordinate principles of *stare decisis* where the subject is as sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year. This pattern of decisionmaking will do little to inspire confidence in the stability of the law. . . .

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

The legislatures are free to eliminate capital punishment for specific crimes or to carve out limited exceptions to a general abolition of the penalty, without adherence to the conceptual strictures of the Eighth Amendment. The legislatures can and should make an assessment of the deterrent influence of capital punishment, both generally and as affecting the commission of specific types of crimes. If legislatures come to doubt the efficacy of capital punishment, they can abolish it, either completely or on a selective basis. If new evidence persuades them that they have acted unwisely, they can reverse their field and reinstate the penalty to the extent it is thought warranted. An Eighth Amendment ruling by judges cannot be made with such flexibility or discriminating precision.

The world-wide trend toward limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight, hardly points the way to a judicial solution in this country under a written Constitution. Rather, the change has generally come about through legislative action, often on a trial basis and with the retention of the penalty for certain limited classes of crimes. Virtually nowhere has change be wrought by so crude a tool as the Eighth Amendment. The complete and unconditional abolition of capital punishment in this country by judicial fiat would have undermined the careful progress of the legislative trend and foreclosed further inquiry on many as yet unanswered questions in this area.

Quite apart from the limitations of the Eighth Amendment itself, the preference for legislative action is justified by the inability of the courts to participate in the debate at the level where the controversy is focused. The case against capital punishment is not the product of legal dialectic, but rests primarily on factual claims, the truth of which cannot be tested by conventional judicial processes. The five opinions in support of the judgments differ in many respects, but they share a willingness to make sweeping factual assertions, unsupported by empirical data, concerning the manner of imposition and effectiveness of capital punishment in this country. Legislatures will have the opportunity to make a more penetrating study of these claims with the familiar and effective tools available to them as they are not to us.

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. The “hydraulic pressure[s]”³¹ that Holmes spoke of as being generated by cases of great import have propelled the Court to go beyond the limits of judicial power, while fortunately leaving some room for legislative judgment.

Mr. Justice BLACKMUN, dissenting.

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

* * *

The several concurring opinions acknowledge, as they must, that until

³¹*Northern Securities Co. v. United States*, 193 U.S. 197, 401 (1904) (dissenting opinion).

today capital punishment was accepted and assumed as not unconstitutional *per se* under the Eighth Amendment or the Fourteenth Amendment. This is either the flat or the implicit holding of a unanimous Court in *Wilkerson v. Utah*, 99 U.S. 130, 134-135, in 1879; of a unanimous Court in *In re Kemmler*, 136 U.S. 436, 447, in 1890; of the Court in *Weems v. United States*, 217 U.S. 349, in 1910; of all those members of the Court, a majority, who addressed the issue in *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463-464, 471-472, in 1947; of Mr. Chief Justice Warren, speaking for himself and three others (Justices Black, Douglas, and Whittaker) in *Trop v. Dulles*, 356 U.S. 86, 99, in 1958; in the denial of certiorari in *Randolph v. Alabama*, 375 U.S. 889, in 1963 (where, however, Justices Douglas, Brennan, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had “neither taken nor endangered human life”); and of Mr. Justice Black in *McGautha v. California*, 402 U.S. 183, 226, decided only last Term on May 3, 1971.

Suddenly, however, the course of decision is now the opposite way, with the Court evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook. The argument, plausible and high-sounding as it may be, is not persuasive, for it is only one year since *McGautha*, only eight and one-half years since *Randolph*, 14 years since *Trop*, and 25 years since *Francis*, and we have been presented with nothing that demonstrates a significant movement of any kind in these brief periods. The Court has just decided that it is time to strike down the death penalty. There would have been as much reason to do this when any of the cited cases were decided. But the Court refrained from that action on each of those occasions.

The Court has recognized, and I certainly subscribe to the proposition, that the Cruel and Unusual Punishment Clause “may acquire meaning as public opinion becomes enlightened by a humane justice.” *Weems v. United States*, 217 U.S., at 378. And Mr. Chief Justice Warren, for a plurality of the Court, referred to “the evolving standards of decency that mark the progress of a maturing society.” *Trop v. Dulles*, 356 U.S., at 101. Mr. Jefferson expressed the same thought well.³²

My problem, however, as I have indicated, is the suddenness of the Court’s perception of progress in the human attitude since decisions of only a short while ago.

To reverse the judgments in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts--perhaps the rationalizations--that this is the compassionate decision for a maturing society; that this is the moral and the “right” thing to do; that thereby we convince ourselves that we are moving down the road toward human decency; that we value life even though that life has taken another or others or has grievously scarred another or others and their families; and that we

³²Cf. Letter to Samuel Kercheval, July 12, 1816, 15 *The Writings of Thomas Jefferson* 40-42 (Memorial ed. 1904).

are less barbaric than we were in 18798, or in 1890, or in 1910, or in 1947, or in 1958, or a year ago, in 1971, when *Wilkerson*, *Kemmler*, *Weems*, *Francis*, *Trop*, *Rudolph*, and *McGautha* were respectively decided.

This, for me, is good argument, and it makes some sense. But it is good argument and it makes sense only in a legislative and executive way, and not as a judicial expedient. As I have said above, were I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. And were I the chief executive of a sovereign State, I would be sorely tempted to exercise executive clemency as Governor Rockefeller of Arkansas did recently just before he departed from office. There--on the Legislative Branch of the State or Federal Government, and secondarily, on the Executive Branch--is where the authority and responsibility for this kind of action lies. The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.

I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents. Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible. . . .

It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions makes reference to the misery the petitioners' crimes occasioned to the victims, to the families of the victims, and to the communities where the offenses took place. The arguments for the respective petitioners, particularly the oral arguments, were similarly and curiously devoid of reference to the victims. There is risk, of course, in a comment such as this, for it opens one to the charge of emphasizing the retributive. But see *Williams v. New York*, 337 U.S. 241, 248 (1949). Nevertheless, these cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked. Let us hope that, with the Court's decision, the terror imposed will be forgotten by those upon whom it was visited, and that our society will reap the hoped-for benefits of magnanimity.

Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end.

Mr. Justice POWELL, dissenting.

Petitioners assert that the constitutional issue is an open one uncontrolled by prior decisions of this Court. They view the several cases decided under the Eighth Amendment as assuming the constitutionality of the death penalty without

focusing squarely upon the issue. I do not believe that the case law can be so easily cast aside. The Court on numerous occasions has both assumed and asserted the constitutionality of capital punishment. In several cases that assumption provided a necessary foundation for the decision, as the issue was whether a particular means of carrying out a capital sentence would be allowed to stand. Each of those decisions necessarily was premised on the assumption that some method of exacting the penalty was permissible.

The issue in the first capital case in which the Eighth Amendment was invoked, *Wilkerson v. Utah*, 99 U. S. 130 (1879), was whether carrying out a death sentence by public shooting was cruel and unusual punishment. A unanimous Court upheld that form of execution, noting first that the punishment itself, as distinguished from the mode of its infliction, was “not pretended by the counsel for the prisoner” (*Id.*, at 137) to be cruel and unusual. The Court went on to hold that:

Cruel and unusual punishments are for forbidden by the Constitution, but the authorities...are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category....” *Id.*, at 134-135.

Eleven years later, in *In re Kemmler*, 136 U.S. 436 (1890), the Court again faced a question involving the method of carrying out a capital sentence. On review of a denial of habeas corpus relief by the Supreme Court of New York, this Court was called on to decide whether electrocution, which only very recently had been adopted by the New York Legislature as a means of execution, was impermissibly cruel and unusual in violation of the Fourteenth Amendment.³³ Chief Justice Fuller, speaking for the entire Court, ruled in favor of the State. Electrocution had been selected by the legislature, after careful investigation, as “the most humane and practical method known to modern science of carrying into effect the sentence of death.” *Id.*, at 444. The Court drew a clear line between the penalty itself and the mode of its execution:

“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.” *Id.*, at 447.

³³The Court pointed out that the Eighth Amendment applied only to the Federal Government and not to the States. The Court’s power in relation to state action was limited to protecting privileges and immunities and to assuring due process of law, both within the Fourteenth Amendment. The standard—for purposes of due process—was held to be whether the State had exerted its authority, “within the limits of those fundamental principles of liberty and justice which lie at the base of all our civil and political institutions.” 136 U.S., at 448.

More than 50 years later, In *Louisanna ex rel. Francis v. Resweber*, 329 U.S. 459 (1947), the Court considered a case in which, due to a mechanical malfunction, Louisiana's initial attempt to electrocute a convicted murderer had failed. Petitioner sought to block a second attempt to execute the sentence on the ground that to do so would constitute cruel and unusual punishment. In the plurality opinion written by Mr. Justice Reed, concurred in by Chief Justice Vinson and Justices Black and Jackson, relief was denied. Again the Court focused on the manner of execution, never questioning the propriety of the death sentence itself.

“The case before us does not call for an examination into any punishments except that of death. . . . The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence. . . .

“. . . 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.” *Id.*, at 463-464.

Mr. Justice Frankfurter, unwilling to dispose of the case under the Eighth Amendment's specific prohibition, approved the second execution attempt under the Due Process Clause. He concluded that “a State may be found to deny a person due process by treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted though not when it treats him by a mode about which opinion is fairly divided.” *Id.*, at 469-470.

The four dissenting Justices, although finding a second attempt at execution to be impermissibly cruel, expressly recognized the validity of capital punishment:

“In determining whether the proposed procedure is unconstitutional, we must measure it against a lawful electrocution. . . .Electrocution, when instantaneous, *can* be inflicted by a state in conformity with due process of law. . .

“The all-important consideration is that the execution shall be so instantaneous and substantially painless that the punishment shall be reduced, as nearly as possible, to no more than that of death itself.” *Id.*, at 474.

Each of these cases involved the affirmation of a death sentence where its validity was attacked as violating the Eighth Amendment. Five opinions were written in these three cases, expressing the views of 23 Justices. While in the narrowest sense it is correct to say that in none was there a frontal attack upon the constitutionality of the death penalty, each opinion went well beyond an

unarticulated assumption of validity. The power of the States to impose capital punishment was repeatedly and expressly recognized.

In addition to these cases in which the constitutionality of the death penalty was a necessary foundation for the decision, those who today would have this Court undertake the absolute abolition of the death penalty also must reject the opinions of other cases stipulating or assuming the constitutionality for capital punishment. *Trop v. Dulles*, 356 U. S. 86, 99,100 (1958); *Weems v. United States*, 217 U.S. 349, 382, 409 (1910) (White, J., joined by Holmes, J., dissenting). See also *McGautha v. California*, 402 U.S., at 226 (separate opinion of Black, J.); *Robinson v. California*, 370 U.S. 660, 676 (1962) (Douglas, J., concurring).

The plurality opinion in *Trop v. Dulles*, *supra*, is of special interest since it is this opinion, in large measure, that provides the foundation for the present attack on the death penalty. It is anomalous that the standard urged by petitioners--“evolving standards of decency that mark the progress of a maturing society” (356 U.S., at 101)--should be derived from an opinion that so unqualifiedly rejects their arguments. Chief Justice Warren, joined by Justices Black, Douglas, and Whittaker, stated flatly:

“At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment--and they are forceful--the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.” *Id.*, at 99.

The issue in *Trop* was whether forfeiture of citizenship was a cruel and unusual punishment when imposed on a wartime deserter who has gone “over the hill” for less than a day and had willingly surrendered. In examining the consequences of the relatively novel punishment of denationalization, Chief Justice Warren drew a line between “traditional” and “unusual” penalties:

“While the State has the power to punish, the [Eighth] Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect.” *Id.*, at 100.

The plurality’s repeated disclaimers of any attack on capital punishment itself must be viewed as more than offhand dicta since those views were written in direct response to the strong language in Mr. Justice Frankfurter’s dissent arguing that denationalization could not be a disproportionate penalty for a concededly capital offense.

The most recent precedents of this Court--*Witherspoon v. Illinois*, 391

U.S. 510 (1968), and *McGautha v. California*, *supra*--are also premised to a significant degree on the constitutionality of the death penalty. While the scope of review in both cases was limited to questions involving the procedures for selecting juries and regulating their deliberations in capital cases, those opinions were “singularly academic exercise[s]” if the members of this Court were prepared at those times to find in the Constitution the complete prohibition of the death penalty. This is especially true of Mr. Justice Harlan’s opinion for the Court in *McGautha*, in which, after a full review of the history of capital punishment, he concluded that “we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.” *Id.*, at 207.

Perhaps enough has been said to demonstrate the unswerving position that this Court has taken in opinions spanning the last hundred years. On virtually every occasion that any opinion has touched on the question of the constitutionality of the death penalty, it has been asserted affirmatively, or tacitly assumed, that the Constitution does not prohibit the penalty. No justice of the Court, until today, has dissented from this consistent reading of the Constitution. The petitioners in these cases now before the Court cannot fairly avoid the weight of this substantial body of precedent merely by asserting that there is no prior decision precisely in point. *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. *Green v. United States*, 356 U.S. 165, 189-193 (1958) (Frankfurter, J., concurring). While these oft-repeated expressions of unchallenged belief in the constitutionality of capital punishment may not justify a summary disposition of the constitutional question before us, they are views expressed and joined in over the years by no less than 29 Justices of this Court and therefore merit the greatest respect. Those who now resolve to set those views aside indeed have a heavy burden.

Petitioners seek to avoid the authority of the foregoing cases, and the weight of express recognition in the Constitution itself, by reasoning which will not withstand analysis. The thesis of petitioners’ case derives from several opinions in which members of this Court have recognized the dynamic nature of the prohibition against cruel and unusual punishments. The final meaning of those words was not set in 1791. Rather, to use the words of Chief Justice Warren speaking for a plurality of the Court in *Trop v. Dulles*, 356 U.S. at 100-101:

“T[he] words of the Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”

But this was not new doctrine. It was the approach to the Eighth Amendment taken by Mr. Justice McKenna in his opinion of the Court in *Weems v. United States*, 217 U.S. 349 (1910). Writing for four Justices sitting as the majority of the six-man Court deciding the case, he concluded that the clause must be

“progressive”; it is not “fastened to the obsolete becomes enlightened by a humane justice.” *Id.*, at 378. The same test was offered by Mr. Justice Frankfurter in his separate concurrence in *Louisiana ex rel. Francis v. Resweber*, 329 U.S., at 469. While he rejected the notion that the Fourteenth made the Eighth Amendment fully applicable to the States, he nonetheless found as a matter of due process that the States were prohibited from “treating even one guilty of crime in a manner that violates standards of decency more or less universally accepted.”

Whether one views the question as one of due process or of cruel and unusual punishment, as I do for convenience in this case, the issue is essentially the same. The fundamental premise upon which either standard is based is that notions of what constitutes cruel and unusual punishment or due process de evolve. Neither the Congress nor any state legislature would today tolerate pillorying, branding, or cropping or nailing of the ears--punishments that were in existence during our colonial era. Should, however, any such punishment be prescribed, the courts would certainly enjoin its execution. See *Jackson v. Bishop*, 404 F. 2d 571 (CA8 1968). Likewise, no court would approve any method of implementation of the death sentence found to involve unnecessary cruelty in light of presently available alternatives. Similarly, there may well be a process of evolving attitude with respect to the application of the death sentence for particular crimes. See *McGautha v. California*, 402 U.S., at 242 (Douglas, J., dissenting).

But we are not asked to consider the permissibility of any of the several methods employed in carrying out the death sentence. Nor are we asked, at least as part of the core submission in these cases, to determine whether the penalty might be a grossly excessive punishment for some specific criminal conduct. Either inquiry would call for a discriminating evaluation of particular means, or of the relationship between particular conduct and its punishment. Petitioners’ principal argument goes far beyond the traditional process of case-by-case inclusion and exclusion. Instead the argument insists on an unprecedented constitutional rule of absolute prohibition of capital punishment for any crime, regardless of its depravity and impact on society. In calling for a precipitate and final judicial end to this form of penalty as offensive to evolving standards of decency, petitioners would have this Court abandon the traditional and more refined approach consistently followed in its prior Eighth Amendment precedents. What they are saying, in effect, is that the evolutionary process has come suddenly to an end; that the ultimate wisdom as to the appropriateness of capital punishment under all circumstances, and for all future generations, has somehow been revealed. . . .

Petitioners’ contentions are premised, as indicated above, on the long-accepted view that concepts embodied in the Eighth and Fourteenth Amendments evolve. They present, with skill and persistence, a list of “objective indicators” which are said to demonstrate that prevailing standards of human decency have progressed to the final point of requiring the Court to hold, for all cases and for all time, that capital punishment is unconstitutional.

Briefly summarized, these proffered indicia of contemporary standards of decency include the following: (i) a worldwide trend toward the disuse of the death penalty; (ii) the reflection in the scholarly literature of a progressive rejection of capital punishment founded essentially on moral opposition to such treatment; (iii) the decreasing numbers of executions over the last 40 years and especially over the last decade; (iv) the small number of death sentences rendered in relation to the number of cases in which they might have been imposed; and (v) the indication of public abhorrence of the penalty reflected in the circumstance that executions are no longer public affairs. The foregoing is an incomplete summary but it touches the major bases of petitioners' presentation. Although they are not appropriate for consideration as objective evidence, petitioners strongly urge two additional propositions. They contend, first, that the penalty survives public condemnation only through the infrequency, arbitrariness, and discriminatory nature of its application, and, second, that there no longer exists any legitimate justification for the utilization of the ultimate penalty. Before turning to those arguments, I first address the argument based on "objective" factors.

Any attempt to discern contemporary standards of decency through the review of objective factors must take into account several overriding considerations which petitioners choose to discount or ignore. In a democracy the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives. Mr. Justice Marshall's opinion today catalogues the salient statistics. Forty States, the District of Columbia, and the Federal Government still authorize the death penalty for a wide variety of crimes. That number has remained relatively static since the end of World War I. That does not mean, however, that capital punishment has become a forgotten issue in the legislative arena. As recently as January, 1971, Congress approved the death penalty for congressional assassination. 18 U.S.C. §351. In 1965 Congress added the death penalty for presidential and vice presidential assassinations. 18 U.S.C. §1751. Additionally, the aircraft piracy statute passed in 1961 also carries the death penalty. 49 U.S.C. §1472 (i). . . . On the converse side, a bill proposing the abolition of capital punishment for all federal crimes was introduced in 1967 but failed to reach the Senate floor.

At the state level, New York, among other States, has recently undertaken reconsideration of its capital crimes. A law passed in 1965 restricted the use of capital punishment to the crimes of murder of a police officer and murder by a person serving a sentence of life imprisonment. N.Y. Penal Code §125.30 (1967).

I pause here to state that I am at a loss to understand how those urging this Court to pursue a course of absolute abolition as a matter of constitutional judgment can draw any support from the New York experience. As is also the case with respect to recent legislative activity in Canada and Great Britain, New York's decision to restrict the availability of the death penalty is a product of refined and discriminating legislative judgment, reflecting, not the total rejection of capital punishment as inherently cruel, but a desire to limit it to those circumstances in which legislative judgment deems retention to be in the public

interest. No such legislative flexibility is permitted by the contrary course petitioners urge this Court to follow.

In addition to the New York experience, a number of other States have undertaken reconsideration of capital punishment in recent years. In four States the penalty has been put to a vote of the people through public referenda--a means likely to supply objective evidence of community standards. In Oregon a referendum seeking abolition of capital punishment failed in 1958 but was subsequently approved in 1964. Two years later the penalty was approved in Colorado by a wide margin. In Massachusetts in 1968, in an advisory referendum, the voters there likewise recommended retention of the penalty. In 1970, approximately 64% of the voters in Illinois approved the penalty. In addition, the National Commission on Reform of Federal Criminal Laws reports that legislative committees in Massachusetts, Pennsylvania, and Maryland recommended abolition, while committees in New Jersey and Florida recommended retention. The legislative views of other States have been summarized by Professor Hugo Bedau in his compilation of sources on capital punishment entitled *The Death Penalty in America*:

“What our legislative representatives think in the two score states which still have the death penalty may be inferred from the fate of the bills to repeal or modify the death penalty filed during recent years in the legislatures of more than half of these states. In about a dozen instances, the bills emerged from committee for a vote. But in none except Delaware did they become law. In those states where these bills were brought to the floor of the legislatures, the vote in most instances wasn’t even close.”³⁴

This recent history of activity with respect to legislation concerning the death penalty abundantly refutes the abolitionist position.

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

Any attempt to discern . . . where the prevailing standards of decency lie must take careful account of the jury’s response to the question of capital punishment. During the 1960’s juries returned in excess of a thousand death sentences, a rate of approximately two per week. Whether it is true that death sentences were returned in less than 10% of the cases as petitioners estimate or whether some higher percentage is more accurate, these totals simply do not support petitioners’ assertion at oral argument that “the death penalty is virtually unanimously repudiated and condemned by the conscience of contemporary society.”³⁵ It is also worthy of note that the annual rate of death sentences has remained relatively constant over the last 10 years and that the figure for 1970--

³⁴Bedau, *The Death Penalty in America*, at 232 (1967).

³⁵Tr. Of Oral Arg. In *Aikens v. California*, No. 68-5027, p. 21.

127 sentences--is the highest annual total since 1961. It is true that the sentencing rate might be expected to rise, rather than remain constant, when the number of violent crimes increases as it has in this country. And it may be conceded that the constancy in these statistics indicates the unwillingness of juries to demand the ultimate penalty in many cases where it might be imposed. But these considerations fall short of indicating that juries are imposing the death penalty with such rarity as to justify this Court in reading into this circumstance a public rejection of capital punishment.

One must conclude, contrary to petitioners' submission, that the indicators most likely to reflect the public's view--legislative bodies, state referenda and the juries which have the actual responsibility--do not support the contention that evolving standards of decency require total abolition of capital punishment. Indeed the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for abolition. But however one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery--not the core--of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function.

Petitioners seek to salvage their thesis by arguing that the infrequency and discriminatory nature of the actual resort to the ultimate penalty tend to diffuse public opposition. We are told that the penalty is imposed exclusively on uninfluential minorities--"the poor and powerless, personally ugly and socially unacceptable."³⁶ It is urged that this pattern of application assures that large segments of the public will be either uniformed or unconcerned and will have no reason to measure the punishment against prevailing moral standards.

Implicitly, this argument concedes the unsoundness of petitioners' contention . . . that objective evidence shows a present and widespread community rejection of the death penalty. It is now said, in effect, not that capital punishment presently offends our citizenry, but that the public would be offended if the penalty were enforced in a nondiscriminatory manner against a significant percentage of those charged with capital crimes, and if the public were thereby made aware of the moral issues surrounding capital punishment. Rather than merely registering the objective indicators on a judicial balance, we are asked ultimately to rest a far-reaching constitutional determination on a prediction regarding the subjective judgments of the mass of our people under hypothetical assumptions that may or may not be realistic.

Apart from the impermissibility of basing a constitutional judgment of this magnitude on such speculative assumptions, the argument suffers from other defects. If, as petitioners urge, we are to engage in speculation, it is not at all certain that the public would experience deep-felt revulsion if the States were to execute as many sentenced capital offenders this year as they executed in the mid-

³⁶Brief for Petitioner in No. 68-5027, p. 51.

1930's. It seems more likely that public reaction, rather than being characterized by undifferentiated rejection, would depend upon the facts and circumstances surrounding each particular case.

Members of this Court know, from the petitions and appeals that come before us regularly, that brutish and revolting murders continue to occur with disquieting frequency. Indeed, murders are so commonplace in our society that only the most sensational receive significant and sustained publicity. It could hardly be suggested that in any of these highly publicized murder cases--the several senseless assassinations or the too numerous shocking multiple murders that have stained this country's recent history--the public has exhibited any signs of "revulsion" at the thought of executing the convicted murderers. The public outcry, as we all know, has been quite to the contrary. Furthermore, there is little reason to suspect that the public's reaction would differ significantly in response to other less publicized murders. It is certainly arguable that many such murders, because of their senselessness or barbarousness, would evoke a public demand for the death penalty rather than a public rejection of that alternative. Nor is there any rational basis for arguing that the public reaction to any if these crimes would be muted if the murderer were "rich and powerful." The demand for the ultimate sanction might well be greater, as a wealthy killer is hardly a sympathetic figure. While there might be specific cases in which capital punishment would be regarded as excessive and shocking to the conscience of the community, it can hardly be argued that the public's dissatisfaction with the penalty in particular cases would translate into a demand for absolute abolition.

In pursuing the foregoing speculation, I do not suggest that it is relevant to the appropriate disposition of these cases. The purpose of the digression is to indicate that judicial decisions cannot be founded on such speculations and assumptions, however appealing they may seem.

But the discrimination argument does not rest alone on a projection of the assumed effect on public opinion of more frequently executions. Much also is made of the undeniable fact that the death penalty has a greater impact on the lower economic strata of society, which include a relatively higher percentage of persons of minority racial and ethnic group backgrounds. The argument drawn from this fact is two-pronged. In part it is merely an extension of the speculative approach pursued by petitioners, *i.e.*, that public revulsion is suppressed in callous apathy because the penalty does not affect persons from the white middle class which constitutes the majority in this country. This aspect, however, adds little to the infrequency rationalization for public apathy which I have found unpersuasive.

As Mr. Justice Marshall's opinion today demonstrates, the argument does have a more troubling aspect. It is his contention that if the average citizen were aware of the disproportionate burden of capital punishment borne by the "poor, the ignorant, and the underprivileged," he would find the penalty "shocking to this conscience and sense of justice," and would not stand for its further use. This argument, like the apathy rationale, calls for further speculation on the part of the Court. It also illuminates the quicksands upon which we are asked to base this decision. Indeed, the two contentions seem to require contradictory assumptions

regarding the public's moral attitude toward capital punishment. The apathy argument is predicated on the assumption that the penalty is used against the less influential elements of society, that the public is fully aware of this, and that it tolerates use of capital punishment only because of a callous indifference to the offenders who are sentenced. Mr. Justice Marshall's argument, on the other hand, rests on the contrary assumption that the public does not know against whom the penalty is enforced and that if the public were educated to this fact it would find the punishment intolerable. Neither assumption can claim to be an entirely accurate portrayal of public attitude; for some acceptance of capital punishment might be a consequence of hardened apathy based on the knowledge of infrequent and uneven application, while for others acceptance may grow only out of ignorance. More significantly, however, neither supposition acknowledges what, for me, is a more basic flaw.

Certainly the claim is justified that this criminal sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The "have-nots" in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amendment. The same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms. The Due Process Clause admits of no distinction between the deprivation of "life" and the deprivation of "liberty." If discriminatory impact renders capital punishment cruel and unusual, it likewise renders invalid most of the prescribed penalties for crimes of violence. The root causes of the higher incidence of criminal penalties on "minorities and the poor" will not be cured by abolishing the system of penalties. Nor, indeed, could any society have a viable system of criminal justice if sanctions were abolished or ameliorated because most of those who commit crimes happen to be underprivileged. The basic problem results not from social and economic factors that have plagued humanity since the beginning of recorded history, frustrating all efforts to create in any country at any time the perfect society in which there are no "poor," no "minorities" and no "underprivileged." The causes underlying this problem are unrelated to the constitutional issue before the Court.

Finally, yet another theory for abolishing the death penalty--reflected in varying degrees in each of the concurring opinions today--is predicated on the discriminatory impact argument. Quite apart from measuring the public's acceptance or rejection of the death penalty under the "standards of decency" rationale, Mr. Justice Douglas finds the punishment cruel and unusual because it is "arbitrarily" invoked. He finds that "the basic theme of equal protection is implicit" in the Eighth Amendment, and that the Amendment is violated when jury sentencing may be characterized as arbitrary or discriminatory. While Mr. Justice Stewart does not purport to rely on notions of equal protection, he also rests primarily on what he views to be a history of arbitrariness. Whatever may be the facts with respect to jury sentencing, this argument calls for a reconsideration of the "standards" aspects of the Court's decision in *McGautha v. California*, 402

U.S. 183 (1971). Although that is the unmistakable thrust of these opinions today, I see no reason to reassess the standards question considered so carefully in Mr. Justice Harlan's opinion for the Court last Term. Having so recently reaffirmed our historic dedication to entrusting the sentencing function to the jury's "untrammelled discretion" (*Id.*, at 207), it is difficult to see how the Court can now hold the entire process constitutionally defective under the Eighth Amendment. For all of these reasons I find little merit in the various discrimination arguments, at least in the several lights in which they have been cast in these cases.

Although not presented by any of the petitioners today, a different argument, premised on the Equal Protection Clause, might well be made. If a Negro defendant, for instance, could demonstrate that members of his race were being singled out for more severe punishment than others charged with the same offense, a constitutional violation might be established. This was the contention made in *Maxwell v. Bishop*, 398 F. 2d 138 (CA8 1968), vacated and remanded on other grounds, 398 U.S. 262 (1970), in which the Eighth Circuit was asked to issue a writ of habeas corpus setting aside a death sentence imposed on a Negro defendant convicted of rape. In that case substantial statistical evidence was introduced tending to show a pronounced disproportion in the number of Negroes receiving death sentences for rape in parts of Arkansas and elsewhere in the South. That evidence was not excluded but was found to be insufficient to show discrimination in sentencing in Maxwell's trial. Mr. Justice Blackmun, then sitting on the court of Appeals for the Eighth Circuit, concluded:

"The petitioner's argument is an interesting one and we are not disposed to say that it could not have some validity and weight in certain situations. Like the trial court, however . . . we feel that the argument does not have validity and pertinent application to Maxwell's case. . . .

"We are not yet ready to condemn and upset the result reached in every case of a Negro rape defendant in the State of Arkansas on the basis of broad theories of social and statistical injustice. . . .

"We do not say that there is no ground for suspicion that the death penalty for rape may have been discriminatorily applied over the decades in that large area of states whose statutes provide for it. There are recognizable indicators of this. But. . . improper state practice of the past does not automatically invalidate a procedure of the present. . . ." *Id.*, at 146-148.

I agree that discriminatory application of the death penalty in the past, admittedly indefensible, is no justification for holding today that capital punishment is invalid in all cases in which sentences were handed out to members of the class discriminated against. But *Maxwell* does point the way to a means of raising the equal protection challenge that is more consonant with precedent and the Constitution's mandates than the several courses pursued by today's concurring opinions.

A final comment on the racial discrimination problem seems appropriate. The possibility of racial bias in the trial and sentencing process has diminished in

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

I come now to consider, subject to the reservations above expressed, the two justifications most often cited for the retention of capital punishment. The concept of retribution--though popular for centuries--is now criticized as unworthy of a civilized people. Yet this Court has acknowledged the existence of a retributive element in criminal sanctions and has never heretofore found it impermissible. In *Williams v. New York*, 337 U.S. 241 (1949), Mr. Justice Black stated that,

“Retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.” *Id.*, at 248.

It is clear, however, that the Court did not reject retribution altogether. The record in that case indicated that one of the reasons why the trial judge imposed the death penalty was his sense of revulsion at the “shocking details of the crime.” *Id.*, at 244. Although his motivation was clearly retributive, the Court “has never held that anything in the constitution requires that penal sanctions be designed solely to achieve therapeutic or rehabilitative effects.

While retribution alone may seem an unworthy justification in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized. Lord Justice Denning, now Master of the Rolls of the court of Appeal in England, testified on this subject before the British Royal Commission on Capital Punishment:

“Many are inclined to test the efficacy of punishment solely by its value as a deterrent: but this is too narrow a view. Punishment is the way in which society expresses its denunciation of wrong doing, and, in order to maintain respect for a law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. It is a mistake to consider the objects of punishment as being deterrent or reformatory or preventive and nothing else. If this were so, we should not send to prison a man who was guilty of motor manslaughter, but only disqualify him from driving; but would public opinion be content with this? The truth is that some crimes are so outrageous that society insists on adequate punishment, because the

wrongdoer deserves it, irrespective of whether it is a deterrent or not.”³⁷

The view expressed by Lord Denning was cited approvingly in the Royal Commission’s Report, recognizing “a strong and widespread demand for retribution.”³⁸ Mr. Justice Stewart makes much the same point in his opinion today when he concludes that expression of man’s retributive instincts in the sentencing process “serves an important purpose in promoting the stability of a society governed by law.” The view, moreover, is not without respectable support in the jurisprudential literature in this country, despite a substantial body of opinion to the contrary. And it is conceded on all sides that, not infrequently, cases arise that are so shocking or offensive that the public demands the ultimate penalty for the transgressor.

Deterrence is a more appealing justification, although opinions again differ widely. Indeed, the deterrence issue lies at the heart of much of the debate between the abolitionists and retentionists. Statistical studies, based primarily on trends in States that have abolished the penalty, tend to support the view that the death penalty has not been proved to be a superior deterrent. Some dispute the validity of this conclusion, pointing out that the studies do not show that the death penalty has no deterrent effect on any categories of crimes. On the basis of the literature and studies currently available, I find myself in agreement with the conclusions drawn by the Royal Commission following its exhaustive study of this issue:

“The general conclusion which we reach, after careful review of all the evidence we have been able to obtain as to the deterrent effect of capital punishment, may be stated as follows. *Prima facie* the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible. It is accordingly important to view this question in a just perspective and not base a penal policy in relation to murder on exaggerated estimates of the uniquely deterrent force of the death penalty.”³⁹

Only recently this Court was called on to consider the deterrence argument in relation to punishment by fines for public drunkenness. *Powell v. Texas*, 392 U. S. 514 (1968). The Court was unwilling to strike down the Texas statute on grounds that it lacked a rational foundation. What Mr. Justice Marshall said there

³⁷Royal Commission on Capital Punishment, Minutes of Evidence 207 (1949-1953).

³⁸Report of Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, §53, p. 18.

³⁹*Id.*, §68, at 24.

would seem to have equal applicability in this case:

“The long-standing and still raging debate over the validity of the deterrence justification for penal sanctions has not reached any sufficiently clear conclusions to permit it to be said that such sanctions are ineffective in any particular context or for any particular group of people who are able to appreciate the consequences of their acts. . . .” *Id.*, at 531.

As I noted at the outset of this section, legislative judgments as to the efficacy of particular punishments are presumptively rational and may not be struck down under the Eighth Amendment because this Court may think that some alternative sanction would be more appropriate. Even if such judgments were within the judicial prerogative, petitioners have failed to show that there exist no justifications for the legislative enactments challenged in these cases. While the evidence and arguments advanced by petitioners might have proved profoundly persuasive if addressed to a legislative body, they do not approach the showing traditionally required before a court declares that the legislature has acted irrationally.

Mr. Justice REHNQUIST, dissenting.

The Court’s judgments today strike down a penalty that our Nation’s legislators have thought necessary since our country was founded. My Brothers Douglas, Brennan, and Marshall would at one fell swoop invalidate laws enacted by Congress and 40 of the 50 state legislatures, and would consign to the limbo of unconstitutionality under a single rubric penalties for offenses as varied and unique as murder, piracy, mutiny, highjacking, and desertion in the face of the enemy. My Brothers Stewart and White, asserting reliance on a more limited rationale--the reluctance of judges and juries actually to impose the death penalty in the majority of capital cases--join in the judgments in these cases. Whatever its precise rationale, today’s holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society. How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?

The answer, of course, is found in Hamilton’s Federalist Paper No. 78 and in Chief Justice Marshall’s classic opinion in *Marbury v. Madison*, 1 Cranch 137 (1803). An oft-told story since then, it bears summarization once more. Sovereignty resides ultimately in the people as a whole and by adopting through their States a written Constitution for the Nation and subsequently adding amendments to that instrument, they have both granted certain powers to the National Government, and denied other powers to the National and the State Governments. Courts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess, in a case before them,

whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body. For the theory is that the people themselves have spoken in the Constitution, and therefore its commands are superior to the commands of the legislature, which is merely an agent of the people.

The Founding Fathers thus wisely sought to have the best of both worlds, the undeniable benefits of both democratic self-government and individual rights protected against possible excesses of that form of government.

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

“[W]hile unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our own sense of self-restraint.” 297 U.S. 1, 78-79 (1936)

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

“The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power.” *On Liberty* 28 (1885).

A separate reason for deference to the legislative judgment is the consequence of human error on the part of the judiciary with respect to the constitutional issue before it. Human error there is bound to be, judges being men and women, and men and women being what they are. But an error in mistakenly

sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual's constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

The task of judging constitutional cases imposed by Art. III cannot for this reason be avoided, but it must surely be approached with the deepest humility and genuine deference to legislative judgment. Today's decision to invalidate capital punishment is, I respectfully submit, significantly lacking in those attributes. For the reasons well stated in the opinions of The Chief Justice, Mr. Justice Blackmun, and Mr. Justice Powell, I conclude that this decision holding unconstitutional capital punishment is not an act of judgment, but rather an act of will. It completely ignores the strictures of Mr. Justice Holmes, writing more than 40 years ago in *Baldwin v. Missouri*:

“I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand, I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of the Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us carte blanche to embody our economic or moral beliefs in its prohibitions. Yet I can think of no narrower reason that seems to me to justify the present and the earlier decisions to which I have referred. Of course, the words ‘due process of law,’ if taken in their literal meaning, have no application to this case; and while it is too late to deny that they have been given a much more extended and artificial signification, still we ought to remember the great caution shown by the Constitution in limiting the power of the States, and should be slow to construe the clause in the Fourteenth Amendment as committing to the Court, with no guide but the Court's own discretion, the validity of whatever laws the States may pass.” 281 U.S. 586, 595 (1930) (dissenting opinion).

More than 20 years ago, Justice Jackson made a similar observation with respect to this Court's restriction of the States in the enforcement of their own criminal laws:

“The use of the due process clause to disable the States in protection of society from crime is quite as dangerous and delicate a use of federal judicial power as to use it to disable them from social or economic experimentation.” *Ashcraft v. Tennessee*, 322 U.S. 143, 174 (1944)

(dissenting opinion).

If there can be said to be one dominant theme in the Constitution, perhaps more fully articulated in the Federalist Papers than in the instrument itself, it is the notion of checks and balances. The Framers were well aware of the natural desire of office holders as well as others to seek to expand the scope and authority of their particular office at the expense of others. They sought to provide against success in such efforts by erecting adequate checks and balances in the form of grants of authority to each branch of the government in order to counteract and prevent usurpation on the part of others.

This philosophy of the Framers is best described by one of the ablest and greatest of their number, James Madison, in Federalist No. 51:

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

Madison’s observation applies to the Judicial Branch with at least as much force as to the Legislative and Executive Branches. While overreaching by the Legislative and Executive Branches may result in the sacrifice of individual protections that the Constitution was designed to secure against action of the State, judicial overreaching may result in sacrifice of the equally important right of the people to govern themselves. The Due Process and Equal Protection Clauses of the Fourteenth Amendment were “never intended to destroy the States’ power to govern themselves.” Black, J., in *Oregon v. Mitchell*, 400 U.S. 112, 126 (1970).

The very nature of judicial review, as pointed out by Justice Stone in his dissent in the *Butler* case, makes the courts the least subject to Madisonian check in the event that they shall, for the best of motives, expand judicial authority beyond the limits contemplated by the Framers. It is for this reason that judicial self-restraint is surely an implied, if not an expressed, condition of the grant of authority of judicial review. The Court’s holding in these cases has been reached, I believe, in complete disregard of that implied condition.