United States Supreme Court
FURMAN v. GEORGIA, (1972)
No. 69-5003
Argued: January 17, 1972 Decided: June 29, 1972

Together with No. 69-5030, Jackson v. Georgia, on certiorari to the same court, and No. 69-5031, Branch v. Texas, on certiorari to the Court of Criminal Appeals of Texas.

Imposition and carrying out of death penalty in these cases held to constitute cruel and unusual punishment in violation of Eighth and Fourteenth Amendments.

No. 69-5003, 225 Ga. 253, 167 S. E. 2d 628; No. 69-5030, 225 Ga. 790, 171 S. E. 2d 501; No. 69-5031, 447 S. W. 2d 932, reversed and remanded.

Anthony G. Amsterdam argued the cause for petitioner in No. 69-5003. With him on the brief were B. Clarence Mayfield, Michael Meltsner, Jack Greenberg, James M. Nabrit III, Jack Himmelstein, and Elizabeth B. DuBois. Mr. Greenberg argued the cause for petitioner in No. 69-5030. With him on the brief were Messrs. Meltsner, Amsterdam, Nabrit, Himmelstein, and Mrs. DuBois. Melvyn Carson Bruder argued the cause and filed a brief for petitioner in No. 69-5031.

Dorothy T. Beasley, Assistant Attorney General of Georgia, argued the cause for respondent in Nos. 69-5003 and 69-5030. With her on the briefs were Arthur K. Bolton, Attorney General, Harold N. Hill, Jr., Executive Assistant Attorney General, Courtney Wilder Stanton, Assistant Attorney General, and Andrew J. Ryan, Jr. Charles Alan Wright argued the cause for respondent in No. 69-5031. With him on the brief were Crawford C. Martin, Attorney General of Texas, Nola White, First Assistant Attorney General, Alfred Walker, Executive Assistant Attorney General, and Robert C. Flowers and Glenn R. Brown, Assistant Attorneys General. [408 U.S. 238, 239]

Theodore L. Sendak, Attorney General, and David O. Givens, Deputy Attorney General, filed a brief for the State of Indiana as amicus curiae urging affirmance in No. 69-5003. Paul Raymond Stone filed a brief for the West Virginia Council of Churches et al. as amici curiae urging reversal in Nos. 69-5003 and 69-5030. John E. Havelock, Attorney General, filed a brief for the State of Alaska as amicus curiae in Nos. 69-5003 and 69-5030. Briefs of amici curiae in all three cases were filed by Gerald H. Gottlieb, Melvin L. Wulf, and Sanford Jay Rosen for the American Civil Liberties Union; by Leo Pfeffer for the Synagogue Council of America et al.; by Chauncey Eskridge, Mario G. Obledo, Leroy D. Clark, Nathaniel R. Jones, and Vernon Jordan for the National Association for the Advancement of Colored People et al.; by Michael V. DiSalle for Edmund G. Brown et al.; and by Hilbert P. Zarky and Marc I. Hayutin for James V. Bennett et al.

PER CURIAM.

Petitioner in No. 69-5003 was convicted of murder in Georgia and was sentenced to death pursuant to Ga. Code Ann. 26-1005 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 253, 167 S. E. 2d 628 (1969). Petitioner in No. 69-5030 was convicted of rape in Georgia and was sentenced to death pursuant to Ga. Code Ann. 26-1302 (Supp. 1971) (effective prior to July 1, 1969). 225 Ga. 790, 171 S. E. 2d 501 (1969). Petitioner in No. 69-5031 was convicted of rape in Texas and was sentenced to death pursuant to Tex. Penal Code, Art. 1189 (1961). 447 S. W. 2d 932 (Ct. Crim. App. 1969). 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?" 403 U.S. 952 (1971). The Court holds that the imposition [408 U.S. 238, 240] 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.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitute "cruel and unusual punishment" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth. 1 I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments. [408 U.S. 238, 241]

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.

Congressman Bingham, in proposing the Fourteenth Amendment, maintained that "the privileges or immunities of citizens of the United States" as protected by the Fourteenth Amendment included protection against "cruel and unusual punishments:"

"[M]any instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guarantied privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, `cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none." Cong. Globe, 39th Cong., 1st Sess., 2542.

Whether the privileges and immunities route is followed, or the due process route, the result is the same. 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 [408 U.S. 238, 242] 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 if it is imposed under a procedure that gives room for the play of such prejudices.

There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature: 2

"Following the Norman conquest of England in 1066, the old system of penalties, which ensured equality between crime and punishment, suddenly disappeared. By the time systematic judicial records were kept, its demise was almost complete. With the exception of certain grave crimes for which the punishment was death or outlawry, the arbitrary fine was replaced by a discretionary [408 U.S. 238, 243] amercement. Although amercement's discretionary character allowed the circumstances of each case to be taken into account and the level of cash penalties to be decreased or increased accordingly, the amercement presented an opportunity for excessive or oppressive fines.

"The problem of excessive amercements became so prevalent that three chapters of the Magna Carta were devoted to their regulation. Maitland said of Chapter 14 that `very likely there was no clause in the Magna Carta more grateful to the mass of the people.' Chapter 14 clearly stipulated as fundamental law a prohibition of excessiveness in punishments:

"`A free man shall not be amerced for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise, saving his merchandise; in the same way a villein shall be amerced saving his wainage; if they fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood.'"

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." 3 These were the words chosen for our Eighth Amendment. A like provision had been in Virginia's Constitution of 1776 4 and in the constitutions[408 U.S. 238, 244] of seven other States. 5 The Northwest Ordinance, enacted under the Articles of Confederation, included a prohibition of cruel and unusual punishments. 6 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: 7

"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 Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind."
The words "cruel and unusual" certainly include penalties [408 U.S. 238, 245] 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. 8 Judge Tuttle, indeed, made abundantly clear in Novak v. Beto, 453 F.2d 661, 673-679 (CA5) (concurring in part and dissenting in part), that solitary confinement may at times be "cruel and unusual" punishment. Cf. Ex parte Medley, 134 U.S. 160 ; Brooks v. Florida, 389 U.S. 413 .

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 rule imposing a mandatory death sentence on all convicted[408 U.S. 238, 246] murderers." The first attempted remedy was to restrict the death penalty to defined offenses such as "premeditated" murder. 9 Ibid. But juries "took the [408 U.S. 238, 247] 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." Ibid.

The Court concluded: "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." 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., 10 stated:

"Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The [408 U.S. 238, 248] 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 untrammeled discretion to let an accused live or insist that he die. 11 [408 U.S. 238, 249]

Mr. Justice Field, dissenting in O'Neil v. Vermont, 144 U.S. 323, 340 , said, "The State may, indeed, make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be an unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration." What the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community.

There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "A penalty . . . should be considered `unusually' imposed if it is administered arbitrarily or discriminatorily." 12 The same authors add that "[t]he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness." 13 The President's Commission on Law Enforcement and Administration of Justice recently concluded: 14

"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 [408 U.S. 238, 250] poor, the Negro, and the members of unpopular groups."

A study of capital cases in Texas from 1924 to 1968 reached the following conclusions: 15
"Application of the death penalty is unequal: most of those executed were poor, young, and ignorant.
. . . . . [408 U.S. 238, 251]

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

"Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty."
Warden Lewis E. Lawes of Sing Sing said: 16

"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." 17 One searches our chronicles [408 U.S. 238, 252] in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death.

Jackson, a black, convicted of the rape of a white woman, was 21 years old. A court-appointed psychiatrist said that Jackson was of average education and average intelligence, that he was not an imbecile, or schizophrenic, or psychotic, that his traits were the product of environmental influences, and that he was competent to stand trial. Jackson had entered the house after the husband left for work. He held scissors against the neck of the wife, demanding money. She could find none and a struggle ensued for the scissors, a battle which she lost; and she was then raped, Jackson keeping the scissors pressed against her neck. While there did not appear to be any long-term traumatic impact on the victim, she was bruised and abrased 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 years old and had finished the sixth grade in school. Pending trial, he was committed to the Georgia Central State Hospital for a psychiatric examination on his plea of insanity tendered by court-appointed counsel. The superintendent reported that a unanimous staff diagnostic conference had concluded "that this patient should retain his present diagnosis of Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder." The physicians agreed that "at present the patient is not psychotic, but he is not capable of cooperating with his counsel in the preparation of his [408 U.S. 238, 253] 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 a half years of grade school education. He had a "dull intelligence" and was in the lowest fourth percentile of his class.

We cannot say from facts disclosed in these records that these defendants were sentenced to death because they were black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.

Irving Brant has given a detailed account of the Bloody Assizes, the reign of terror that occupied the [408 U.S. 238, 254] closing years of the rule of Charles II and the opening years of the regime of James II (the Lord Chief Justice was George Jeffreys):

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

"The story of The Bloody Assizes, widely known to Americans, helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual punishments. But in the polemics that led to the various guarantees of freedom, it had no place compared with the tremendous thrust of the trial and execution of Sidney. The hundreds of judicial murders committed by Jeffreys and his fellow judges were totally inconceivable in a free American republic, but any American could imagine himself in Sidney's place - executed for putting on paper, in his closet, words that later on came to express the basic principles of republican government. Unless barred by fundamental law, the legal rulings that permitted this [408 U.S. 238, 255] result could easily be employed against any person whose political opinions challenged the party in power." The Bill of Rights 154-155 (1965).

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. Id., at 155-163. 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 18 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, 19and under that law, "[g]enerally, in the law books, punishment increased in severity as social status diminished." 20 We have, I fear, taken in practice the same position, partially as a result of making the death penalty [408 U.S. 238, 256] 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 21 has no more sanctity than a law which in terms provides the same.

Thus, these discretionary statutes are unconstitutional [408 U.S. 238, 257] 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 penalty would otherwise be constitutional is a question I do not reach.

I concur in the judgments of the Court.

Footnotes

[Footnote 1] The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S. E. 2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S. E. 2d 501. The conviction of Branch of rape and the sentence of death were affirmed by the Court of Criminal Appeals of Texas and reported in 447 S. W. 2d 932.

[Footnote 2] Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 845-846 (1969).

[Footnote 3] 1 W. & M., Sess. 2, c. 2; 8 English Historical Documents, 1660-1714, p. 122 (A. Browning ed. 1953).

[Footnote 4] 7 F. Thorpe, Federal & State Constitutions 3813 (1909).

[Footnote 5] Delaware, Maryland, New Hampshire, North Carolina, Massachusetts, Pennsylvania, and South Carolina. 1 Thorpe, supra, n. 4, at 569; 3 id., at 1688, 1892; 4 id., at 2457; 5 id., at 2788, 3101; 6 id., at 3264.

[Footnote 6] Set out in 1 U.S.C. XXXIX-XLI.

[Footnote 7] 1 Annals of Cong. 754 (1789).

[Footnote 8] "When in respect of any class of offenses the difficulty of obtaining convictions is at all general in England, we may hold it as an axiom, that the law requires amendment. Such conduct in juries is the silent protest of the people against its undue severity. This was strongly exemplified in the case of prosecutions for the forgery of bank-notes, when it was a capital felony. It was in vain that the charge was proved. Juries would not condemn men to the gallows for an offense of which the punishment was out of all proportion to the crime; and as they could not mitigate the sentence they brought in verdicts of Not

Guilty. The consequence was, that the law was changed; and when secondary punishments were substituted for the penalty of death, a forger had no better chance of an acquittal than any other criminal. Thus it is that the power which juries possess of refusing to put the law in force has, in the words of Lord John Russell, `been the cause of amending many bad laws which the judges would have administered with professional bigotry, and above all, it has this important and useful consequence, that laws totally repugnant to the feelings of the community for which they are made, can not long prevail in England.'" W. Forsyth, History of Trial by Jury 367-368 (2d ed. 1971).

[Footnote 9] This trend was not universally applauded. In the early 1800's, England had a law that made it possible to impose the death sentence for stealing five shillings or more. 3 W. & M., c. 9, 1. When a bill for abolishing that penalty (finally enacted in 1827, 7 & 8 Geo. 4, c. 27) was before the House of Lords in 1813, Lord Ellenborough said:

"If your Lordships look to the particular measure now under consideration, can it, I ask, be seriously maintained, that the most exemplary punishment, and the best suited to prevent the commission of this crime, ought not to be a punishment which might in some cases be inflicted? How, but by the enactments of the law now sought to be repealed, are the cottages of industrious poverty protected? What other security has a poor peasant, when he and his wife leave their home for their daily labours, that on their return their few articles of furniture or of clothes which they possess besides those which they carry on their backs, will be safe? . . . [B]y the enacting of the punishment of death, and leaving it to the discretion of the Crown to inflict that punishment or not, as the circumstances of the case may require, I am satisfied, and I am much mistaken if your Lordships are not satisfied, that this object is attained with the least possible expenditure. That the law is, as it has been termed, a bloody law, I can by no means admit. Can there be a better test than by a consideration of the number of persons who have been executed for offences of the description contained in the present Bill? Your Lordships are told, what is extremely true, that this number is very small; and this very circumstance is urged as a reason for a repeal of the law; but, before your Lordships are induced to consent to such repeal, I beg to call to your consideration the number of innocent persons who might have been plundered of their property or destroyed by midnight murderers, if the law now sought to be repealed had not been in existence: - a law upon which all the retail trade of this commercial country depends; and which I for one will not consent to be put in jeopardy." Debate in House of Lords, Apr. 2, 1813, pp. 23-24 (Longman, Hurst, Rees, Orme, & Brown, Paternoster-Row, London 1816).

[Footnote 10] H. R. 3243, 92d Cong., 1st Sess., introduced by Cong. Celler, would abolish all executions by the United States or by any State.

H. R. 8414, 92d Cong., 1st Sess., introduced by Cong. Celler, would provide an interim stay of all executions by the United States or by any State and contains the following proposed finding:

"Congress hereby finds that there exists serious question -
"(a) whether the infliction of the death penalty amounts to cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution; and
"(b) whether the death penalty is inflicted discriminatorily upon [408 U.S. 238, 248] members of racial minorities, in violation of the fourteenth amendment to the Constitution,
"and, in either case, whether Congress should exercise its authority under section 5 of the fourteenth amendment to prohibit the use of the death penalty."
There is the naive view that capital punishment as "meted out in our courts, is the antithesis of barbarism." See Henry Paolucci, New York Times, May 27, 1972, p. 29, col. 1. But the Leopolds and Loebs, the Harry Thaws, the Dr. Sheppards and the Dr. Finchs of our society are never executed, only those in the lower strata, only those who are members of an unpopular minority or the poor and despised.

[Footnote 11] The tension between our decision today and McGautha highlights, in my view, the correctness of MR. JUSTICE BRENNAN'S dissent in that case, which I joined. 402 U.S., at 248 . I should think that if the Eighth and Fourteenth Amendments prohibit the imposition of the death penalty on petitioners because they are "among a capriciously selected random handful upon whom the sentence of death has in fact been imposed," opinion of MR. JUSTICE STEWART, post, at 309-310, or because "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not," opinion of MR. JUSTICE WHITE, post, at 313, statements with which I am in complete agreement - then the Due Process Clause of the Fourteenth Amendment would render unconstitutional "capital sentencing procedures that are purposely [408 U.S. 238, 249] constructed to allow the maximum possible variation from one case to the next, and [that] provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice." McGautha v. California, 402 U.S. 183, 248 (BRENNAN, J., dissenting).

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

[Footnote 13] Id., at 1792.

[Footnote 14] The Challenge of Crime in a Free Society 143 (1967).

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

In H. Bedau, The Death Penalty in America 474 (1967 rev. ed.), it is stated:

RACE OF THE OFFENDER BY FINAL DISPOSITION
Final Negro White Total Disposition N % N % N % Executed 130 88.4 210 79.8 340 82.9 Commuted 17 11.6 53 20.2 70 17.1 Total 147 100.0 263 100.0 410 100.0
X2.=4.33; P less than .05. (For discussion of statistical symbols, see Bedau, supra, at 469.)

"Although there may be a host of factors other than race involved in this frequency distribution, something more than chance has operated over the years to produce this racial difference. On the basis of this study it is not possible to indict the judicial and other public processes prior to the death row as responsible for the association between Negroes and higher frequency of executions; nor is it entirely correct to assume that from the time of their appearance on death row Negroes are discriminated against by the Pardon Board. Too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship. Nevertheless, because the Negro/high-execution association is statistically present, some suspicion of racial discrimination can hardly be avoided. If such a relationship had not appeared, this kind of suspicion could have been allayed; the existence of the relationship, although not `proving' differential bias by the Pardon Boards over the years since 1914, strongly suggests that such bias has existed."
The latter was a study in Pennsylvania of people on death row between 1914 and 1958, made by Wolfgang, Kelly, & Nolde and printed [408 U.S. 238, 251] in 53 J. Crim. L. C. & P. S. 301 (1962). And see Hartung, Trends in the Use of Capital Punishment, 284 Annals 8, 14-17 (1952).

[Footnote 16] Life and Death in Sing Sing 155-160 (1928).

[Footnote 17] Crime in America 335 (1970).

[Footnote 18] See Johnson, The Negro and Crime, 217 Annals 93 (1941).

[Footnote 19] See J. Spellman, Political Theory of Ancient India 112 (1964).

[Footnote 20] C. Drekmeier, Kingship and Community in Early India 233 (1962).

[Footnote 21] Cf. B. Prettyman, Jr., Death and The Supreme Court 296-297 (1961).

"The disparity of representation in capital cases raises doubts about capital punishment itself, which has been abolished in only nine states. If a James Avery [345 U.S. 559] can be saved from electrocution because his attorney made timely objection to the selection of a jury by the use of yellow and white tickets, while an Aubry Williams [349 U.S. 375] can be sent to his death by a jury selected in precisely the same manner, we are imposing our most extreme penalty in an uneven fashion.
"The problem of proper representation is not a problem of money, as some have claimed, but of a lawyer's ability, and it is not true that only the rich have able lawyers. Both the rich and the poor usually are well represented - the poor because more often than not the best attorneys are appointed to defend them. It is the middle-class defendant, who can afford to hire an attorney but not a very good one, who is at a disadvantage. Certainly William Fikes [352 U.S. 191], despite the anomalous position in which he finds himself [408 U.S. 238, 257] today, received as effective and intelligent a defense from his court-appointed attorneys as he would have received from an attorney his family had scraped together enough money to hire.
"And it is not only a matter of ability. An attorney must be found who is prepared to spend precious hours - the basic commodity he has to sell - on a case that seldom fully compensates him and often brings him no fee at all. The public has no conception of the time and effort devoted by attorneys to indigent cases. And in a first-degree case, the added responsibility of having a man's life depend upon the outcome exacts a heavy toll."

MR. JUSTICE BRENNAN, concurring.

The question presented in these cases is whether death is today a punishment for crime that is "cruel and unusual" and consequently, by virtue of the Eighth and Fourteenth Amendments, beyond the power of the State to inflict. 1 [408 U.S. 238, 258]

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, 135 -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. And we know also that the Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, "[t]hat issue confronts us, and the task of resolving it is inescapably ours." Id., at 103.

I

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, [408 U.S. 238, 259] 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? - [408 U.S. 238, 260] That they would not admit of tortures, or cruel and barbarous punishment." 3 id., at 447. 2
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 [408 U.S. 238, 261] 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." 3

The only further evidence of the Framers' intent appears from the debates in the First Congress on the adoption of the Bill of Rights. 4 As the Court noted in Weems v. United States, 217 U.S. 349, 368 (1910), [408 U.S. 238, 262] 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). 5

Livermore thus agreed with Holmes and Henry that the Cruel and Unusual Punishments Clause imposed a limitation upon the legislative power to prescribe punishments. [408 U.S. 238, 263] 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. 6 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 of 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 torturous punishments were to be outlawed. As Livermore's comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. 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[408 U.S. 238, 264] 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. 7 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 In re Kemmler, [408 U.S. 238, 265] 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. [408 U.S. 238, 266]

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 [408 U.S. 238, 267] might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the [Stuarts',] or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through 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. 8 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 [408 U.S. 238, 268] 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. 9

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 [408 U.S. 238, 269] 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 .

II

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 [408 U.S. 238, 270] of a maturing society." Id., at 100-101. 10 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 permit a judicial determination whether a challenged punishment comports with human dignity. [408 U.S. 238, 271]

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 . 11 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. 12 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. 13 And the [408 U.S. 238, 272] 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."14

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 [408 U.S. 238, 273] 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 as 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 [408 U.S. 238, 274] denial by society of the individual's existence as a member of the human community. 15

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 16 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). 17 [408 U.S. 238, 275]

This principle has been recognized in our cases. 18 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 [408 U.S. 238, 276] 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 fulness 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. 19

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, 20 there is a substantial [408 U.S. 238, 277] 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. 21 [408 U.S. 238, 278] 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. 22 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 [408 U.S. 238, 279] 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 .23 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 [408 U.S. 238, 280] their excessive length or severity are greatly disproportioned 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, 24 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 the Court, reviewing a severe punishment inflicted for the falsification of an official record, found that "the highest punishment possible for a crime which may cause the loss of many thousand[s] of dollars, and to prevent which the duty of the

State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account." Id., at 381. Stating that "this contrast shows more than different exercises of legislative judgment," the Court concluded that the punishment was unnecessarily severe in view of the purposes for which it was imposed. Ibid. 25 [408 U.S. 238, 281] See also Trop v. Dulles, 356 U.S., at 111 -112 (BRENNAN, J., concurring). 26
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. Yet "[i]t is unlikely that any State at this moment in history," Robinson v. California, 370 U.S., at 666 , would pass a law providing for the infliction of such a punishment. Indeed, no such punishment has ever been before this Court. The same may be said of the other principles. It is unlikely that this Court will confront a severe punishment that is obviously inflicted in wholly arbitrary fashion; no State would engage in a reign of blind terror. Nor is it likely that this Court will be called upon to review a severe punishment that is clearly and totally rejected throughout society; no legislature would be able even to authorize the infliction of such a punishment. Nor, finally, is it likely that this Court will have to consider a severe punishment that is patently unnecessary; no State today would inflict a severe punishment knowing that there was no reason whatever for doing so. In short, we are unlikely to have occasion to determine that a punishment is fatally offensive under any one principle. [408 U.S. 238, 282]

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.

III

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[408 U.S. 238, 283] 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. 27 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. 28 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. See supra, at 262. Finally, it does not advance analysis to insist that the Framers did not believe that adoption [408 U.S. 238, 284] 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, see n. 6, supra, are now acknowledged to be impermissible.29

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, see supra, at 264-265, approved death by shooting and death by electrocution. In Wilkerson, the Court concluded that shooting was a common method of execution, see supra, at 275-276; 30 in Kemmler, the Court held that the Clause did not apply to the States, 136 U.S., at 447 -449. 31 [408 U.S. 238, 285] 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. 32 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. 33 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 [408 U.S. 238, 286] 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, see infra, at 296-298, nor has any State yet abolished 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." Ibid. See Williams v. Florida, 399 U.S. 78, 103 (1970) (all States require juries of 12 in death cases). This Court, too, almost [408 U.S. 238, 287] always treats death cases as a class apart. 34 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. 35 Since the discontinuance [408 U.S. 238, 288] 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, 493 P.2d 880, 894 (1972). 36 Indeed, as Mr. Justice Frankfurter noted, "the onset of insanity while awaiting [408 U.S. 238, 289] 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 in prison awaiting death. 37

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). 38 Although death, like expatriation, destroys the [408 U.S. 238, 290] 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.'" 39 [408 U.S. 238, 291]

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

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

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. In the 1930's, executions averaged 167 per year; in the 1940's, the average was 128; in the 1950's, it was 72; and in the years 1960-1962, it was 48. There

have been a total of 46 executions since then, 36 of them in 1963-1964. 40 Yet our population and the number of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline. That rarity is plainly revealed by an examination of the years 1961-1970, the last 10-year period for which statistics are available. During that time, an average of 106 death sentences [408 U.S. 238, 292] was imposed each year. 41 Not nearly that number, however, could be carried out, for many were precluded by commutations to life or a term of years, 42 transfers to mental institutions because of insanity, 43 resentences to life or a term of years, grants of new trials and orders for resentencing, dismissals of indictments and reversals of convictions, and deaths by suicide and natural causes.44 On January 1, 1961, the death row population was 219; on December 31, 1970, it was 608; during that span, there were 135 executions. 45 Consequently, had the 389 additions to death row also been executed, the annual average would have been 52. 46 In short, the country [408 U.S. 238, 293] might, at most, have executed one criminal each week. In fact, of course, far fewer were executed. Even before the moratorium on executions began in 1967, executions totaled only 42 in 1961 and 47 in 1962, an average of less than one per week; the number dwindled to 21 in 1963, to 15 in 1964, and to seven in 1965; in 1966, there was one execution, and in 1967, there were two. 47

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

Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes. 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 [408 U.S. 238, 294] 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." 48 Furthermore, our procedures in death cases, [408 U.S. 238, 295] 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 puts 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.

I cannot add to my Brother MARSHALL'S comprehensive treatment of the English and American history of[408 U.S. 238, 296] this punishment. I emphasize, however, one significant conclusion that emerges from that history. From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, "the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries." 49 It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.

Our practice of punishing criminals by death has changed greatly over the years. One significant change has been in our methods of inflicting death. Although this country never embraced the more violent and repulsive methods employed in England, we did for a long time rely almost exclusively upon the gallows and the firing squad. Since the development of the supposedly [408 U.S. 238, 297] more humane methods of electrocution late in the 19th century and lethal gas in the 20th, however, hanging and shooting have virtually ceased. 50Our concern for decency and human dignity, moreover, has compelled changes in the circumstances surrounding the execution itself. No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.

Also significant is the drastic decrease in the crimes for which the punishment of death is actually inflicted. While esoteric capital crimes remain on the books, since 1930 murder and rape have accounted for nearly 99% of the total executions, and murder alone for about 87%. 51 In addition, the crime of capital murder has itself been limited. As the Court noted in McGautha v. California, 402 U.S., at 198 , there was in this country a "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." Initially, that rebellion resulted in legislative definitions that distinguished between degrees of murder, retaining the mandatory death sentence only for murder in the first degree. Yet "[t]his new legislative criterion for isolating crimes appropriately punishable by death soon proved as unsuccessful as the concept of `malice aforethought,'" ibid., the common-law means of separating murder from manslaughter. Not only was the distinction between degrees of murder confusing and uncertain in practice, but even in clear cases of first-degree murder juries continued to take the law into [408 U.S. 238, 298] their own hands: if they felt that death was an inappropriate punishment, "they simply refused to convict of the capital offense." Id., at 199. The phenomenon of jury nullification thus remained to counteract the rigors of mandatory death sentences. Bowing to reality, "legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact." Ibid. In consequence, virtually all death sentences today are discretionarily imposed. Finally, it is significant that nine States no longer

inflict the punishment of death under any circumstances, 52 and five others have restricted it to extremely rare crimes. 53 [408 U.S. 238, 299]

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, [408 U.S. 238, 300] 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[408 U.S. 238, 301] 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 [408 U.S. 238, 302] 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. 54 [408 U.S. 238, 303]

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 [408 U.S. 238, 304] 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 [408 U.S. 238, 305] 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.

IV

When this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative. Since that time, successive restrictions, imposed against the background of a continuing moral controversy, have drastically curtailed the use of this punishment. Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore "cruel and unusual," and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime [408 U.S. 238, 306] is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." Weems v. United States, 217 U.S., at 381 .

I concur in the judgments of the Court.

[Footnote 1] The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Emphasis added.) The Cruel and Unusual Punishments Clause is fully applicable to the States through the Due Process Clause of the Fourteenth Amendment. Robinson v. California, [408 U.S. 238, 258] 370 U.S. 660 (1962); Gideon v. Wainwright, 372 U.S. 335, 342 (1963); Malloy v. Hogan, 378 U.S. 1, 6 n. 6 (1964); Powell v. Texas, 392 U.S. 514 (1968).

[Footnote 2] Henry continued:

"But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany - of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone." 3 J. Elliot's Debates 447-448 (2d ed. 1876).
Although these remarks have been cited as evidence that the Framers considered only torturous punishments to be "cruel and unusual," it is obvious that Henry was referring to the use of torture for the purpose of eliciting confessions from suspected criminals. Indeed, in the ensuing colloquy, see n. 3, infra, George Mason responded that the use of torture was prohibited by the right against self-incrimination contained in the Virginia Bill of Rights.

[Footnote 3] It is significant that the response to Henry's plea, by George Nicholas, was simply that a Bill of Rights would be ineffective as a means of restraining the legislative power to prescribe punishments:

"But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. . . . If we had no security against torture but our [Virginia] declaration of rights, we might be tortured to-morrow; for it has been repeatedly infringed and disregarded." 3 J. Elliot's Debates, supra, at 451.
George Mason misinterpreted Nicholas' response to Henry:
"Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the [Virginia] bill of rights did not prohibit torture; for that one clause expressly provided that no man can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition." Id., at 452.
Nicholas concluded the colloquy by making his point again:
"Mr. NICHOLAS acknowledged the [Virginia] bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extorting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity." Ibid.
There was thus no denial that the legislative power should be restrained; the dispute was whether a Bill of Rights would provide a realistic restraint. The Framers, obviously, believed it would.

[Footnote 4] We have not been referred to any mention of the Cruel and Unusual Punishments Clause in the debates of the state legislatures on ratification of the Bill of Rights.

[Footnote 5] The elided portion of Livermore's remarks reads: "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." Since Livermore did not ask similar rhetorical questions about the Cruel and Unusual Punishments Clause, it is unclear whether he included the Clause in his objection that the Eighth Amendment "seems to have no meaning in it."

[Footnote 6] Indeed, the first federal criminal statute, enacted by the First Congress, prescribed 39 lashes for larceny and for receiving stolen goods, and one hour in the pillory for perjury. Act of Apr. 30, 1790, 16-18, 1 Stat. 116.

[Footnote 7] Many of the state courts, "feeling constrained thereto by the incidences of history," Weems v. United States, 217 U.S. 349, 376 (1910), were apparently taking the same position. One court "expressed the opinion that the provision did not apply to punishment by `fine or imprisonment or both, but such as

that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel,' etc." Ibid. Another court "said that ordinarily the terms imply something inhuman and barbarous, torture and the like. . . . Other cases . . . selected certain tyrannical acts of the English monarchs as illustrating the meaning of the clause and the extent of its prohibition." Id., at 368.

[Footnote 8] The Court had earlier emphasized this point in In re Kemmler, 136 U.S. 436 (1890), even while stating the narrow, "historical" interpretation of the Clause:

"This [English] Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England; but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, . . . it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the [Clause], in its application to Congress." Id., at 446-447 (emphasis added).

[Footnote 9] Indeed, the Court in Weems refused even to comment upon some decisions from state courts because they were "based upon sentences of courts, not upon the constitutional validity of laws." 217 U.S., at 377 .

[Footnote 10] The 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.

[Footnote 11] "It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain."

[Footnote 12] "His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicil without giving notice to the `authority immediately in charge of his surveillance,' and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuity, and deprive of essential liberty."

[Footnote 13] "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, [408 U.S. 238, 272] a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious." Trop v. Dulles, 356 U.S. 86, 102(1958). Cf. id., at 110-111 (BRENNAN, J., concurring):

"[I]t can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable. Indeed, in truth, he may live out his life with but minor inconvenience. . . . Nevertheless it cannot be denied that the impact of expatriation - especially where statelessness is the upshot - may be severe. Expatriation, in this respect, constitutes an especially demoralizing sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment."

[Footnote 14] "It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind." Weems v. United States, 217 U.S., at 377 .

[Footnote 15] "There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual's status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably as long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights." Trop v. Dulles, 356 U.S., at 101 -102.

[Footnote 16] "The phrase in our Constitution was taken directly from the English Declaration of Rights of 1689. . . . ." Id., at 100.

[Footnote 17] The specific incident giving rise to the provision was the perjury trial of Titus Oates in 1685. "None of the punishments inflicted upon Oates amounted to torture. . . . In the context of the Oates' [408 U.S. 238, 275] case, `cruel and unusual' seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose." Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif. L. Rev. 839, 859 (1969). Thus, "[t]he irregularity and anomaly of Oates' treatment was extreme." Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1789 n. 74 (1970). Although the English provision was intended to restrain the judicial and executive power, see n. 8, supra, the principle is, of course, fully applicable under our Clause, which is primarily a restraint upon the legislative power.

[Footnote 18] In a case from the Philippine Territory, the Court struck down a punishment that "ha[d] no fellow in American legislation." Weems v. United States, 217 U.S., at 377 . After examining the punishments imposed, under both United States and Philippine law, for similar as well as more serious crimes, id., at 380-381, the Court declared that the "contrast" "exhibit[ed] a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice," id., at 381. And in Trop v. Dulles, supra, in which a law of Congress punishing wartime desertion by expatriation was held unconstitutional, it was emphasized that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." Id., at 102. When a severe punishment is not inflicted elsewhere, or when more serious crimes are punished less severely, there is a strong inference that the State is exercising arbitrary, "unrestrained power."

[Footnote 19] In Weems v. United States, supra, at 369-370, the Court summarized the holding of Wilkerson v. Utah, 99 U.S. 130 (1879), as follows:

"The court pointed out that death was an usual punishment for murder, that it prevailed in the Territory for many years, and was inflicted by shooting, also that that mode of execution was usual under military law. It was hence concluded that it was not forbidden by the Constitution of the United States as cruel or unusual."

[Footnote 20] It was said in Trop v. Dulles, supra, at 100-101, n. 32, that "[o]n the few occasions this Court has had to consider the meaning of the [Clause], precise distinctions between cruelty and unusualness do not seem to have been drawn. . . . If the word `unusual' is to have any meaning apart from the word `cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." There are other statements in prior cases indicating that the word "unusual" has a distinct meaning:

"We perceive nothing . . . unusual in this [punishment]." Pervear v. The Commonwealth, 5 Wall. 475, 480 (1867). "[T]he judgment of mankind would be that the punishment was not only an unusual but a cruel one . . . ." O'Neil v. Vermont, 144 U.S. 323, 340 (1892) (Field, J., dissenting). "It is unusual in its character." Weems v. United States, supra, at 377. "And the punishment [408 U.S. 238, 277] inflicted . . . is certainly unusual." United States ex rel. Milwaukee Social Democratic Pub. Co. v. Burleson, 255 U.S. 407, 430 (1921) (Brandeis, J., dissenting). "The punishment inflicted is not only unusual in character; it is, so far as known, unprecedented in American legal history." Id., at 435. "There is no precedent for it. What then is it, if it be not cruel, unusual and unlawful?" Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 479 (1947) (Burton, J., dissenting). "To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual." Robinson v. California, 370 U.S., at 667 .
It is fair to conclude from these statements that "[w]hether the word `unusual' has any qualitative meaning different from `cruel' is not clear." Trop v. Dulles, supra, at 100 n. 32. The question, in any event, is of minor significance; this Court has never attempted to explicate the meaning of the Clause simply by parsing its words.

[Footnote 21] The danger of subjective judgment is acute if the question posed is whether a punishment "shocks the most fundamental instincts of civilized man," Louisiana ex rel. Francis v. Resweber, supra, at 473 (Burton, J., dissenting), or whether "any man of right feeling and heart can refrain from shuddering," O'Neil v. Vermont, supra, at 340 (Field, J., dissenting), or whether "a cry of horror would rise from every civilized and Christian community of the country," ibid. Mr. Justice Frankfurter's concurring opinion in [408 U.S. 238, 278] Louisiana ex rel. Francis v. Resweber, supra, is instructive. He warned "against finding in personal disapproval a reflection of more or less prevailing condemnation" and against "enforcing . . . private view[s] rather than that consensus of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution." Id., at 471. His conclusions were as follows: "I cannot bring myself to believe that [the State's procedure] . . . offends a principle of justice `rooted in the traditions and conscience of our people.'" Id., at 470. ". . . I cannot say that it would be `repugnant to the conscience of mankind.'" Id., at 471. Yet nowhere in the opinion is there any explanation of how he arrived at those conclusions.

[Footnote 22] Cf. Louisiana ex rel. Francis v. Resweber, supra, at 463: "The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."

[Footnote 23] It may, in fact, have appeared earlier. In Pervear v. The Commonwealth, 5 Wall., at 480, the Court stated:

"We perceive nothing excessive, or cruel, or unusual in this [punishment]. The object of the law was to protect the community against the manifold evils of intemperance. The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps, all of the States. It is wholly within the discretion of State legislatures."
This discussion suggests that the Court viewed the punishment as reasonably related to the purposes for which it was inflicted.

[Footnote 24] Mr. Justice Field apparently based his conclusion upon an intuitive sense that the punishment was disproportionate to the criminal's moral guilt, although he also observed that "the punishment was greatly beyond anything required by any humane law for the offences," O'Neil v. Vermont, 144 U.S., at 340 . Cf. Trop v. Dulles, 356 U.S., at 99 : "Since wartime desertion is punishable by death, there can be no argument that the penalty of denationalization is excessive in relation to the gravity of the crime."

[Footnote 25] "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal." Weems v. United States, 217 U.S., at 381 .

[Footnote 26] The principle that a severe punishment must not be excessive does not, of course, mean that a severe punishment is constitutional merely because it is necessary. A State could not now, for example, inflict a punishment condemned by history, for any such punishment, no matter how necessary, would be intolerably offensive to human dignity. The point is simply that the unnecessary infliction of suffering is also offensive to human dignity.

[Footnote 27] The Fifth Amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . .; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; . . . nor be deprived of life, liberty, or property, without due process of law . . . ." (Emphasis added.)

[Footnote 28] No one, of course, now contends that the reference in the Fifth Amendment to "jeopardy of . . . limb" provides perpetual constitutional sanction for such corporal punishments as branding and earcropping, which were common punishments when the Bill of Rights was adopted. But cf. n. 29, infra. As the California Supreme Court pointed out with respect to the California Constitution:

"The Constitution expressly proscribes cruel or unusual punishments. It would be mere speculation and conjecture to ascribe to the framers an intent to exempt capital punishment from the compass of that provision solely because at a time when the death penalty was commonly accepted they provided elsewhere in the Constitution for special safeguards in its application." People v. Anderson, 6 Cal. 3d 628, 639, 493 P.2d 880, 887 (1972).

[Footnote 29] Cf. 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.
[Footnote 30] The Court expressly noted that the constitutionality of the punishment itself was not challenged. Wilkerson v. Utah, 99 U.S., at 136 -137. Indeed, it may be that the only contention made was that, in the absence of statutory sanction, the sentencing "court possessed no authority to prescribe the mode of execution." Id., at 137.

[Footnote 31] Cf. McElvaine v. Brush, 142 U.S. 155, 158 -159 (1891):

"We held in the case of Kemmler . . . that as the legislature of the State of New York had determined that [electrocution] did not inflict cruel and unusual punishment, and its courts had sustained that [408 U.S. 238, 285] determination, we were unable to perceive that the State had thereby abridged the privileges or immunities of petitioner or deprived him of due process of law."

[Footnote 32] It was also asserted that the Constitution prohibits "cruelty inherent in the method of punishment," but does not prohibit "the necessary suffering involved in any method employed to extinguish life humanely." 329 U.S., at 464 . No authority was cited for this assertion, and, in any event, the distinction drawn appears to be meaningless.

[Footnote 33] In a nondeath case, Trop v. Dulles, it was said that "in a day when it is still widely accepted, [death] cannot be said to violate the constitutional concept of cruelty." 356 U.S., at 99 (emphasis added). This statement, of course, left open the future constitutionality of the punishment.

[Footnote 34] "That life is at stake is of course another important factor in creating the extraordinary situation. The difference between capital and non-capital offenses is the basis of differentiation in law in diverse ways in which the distinction becomes relevant." Williams v. Georgia, 349 U.S. 375, 391 (1955) (Frankfurter, J.). "When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance." Stein v. New York, 346 U.S. 156, 196 (1953) (Jackson, J.). "In death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948) (Reed, J.). Mr. Justice Harlan expressed the point strongly: "I do not concede that whatever process is `due' an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death." Reid v. Covert, 354 U.S. 1, 77 (1957) (concurring in result). And, of course, for many years this Court distinguished death cases from all others for purposes of the constitutional right to counsel. See Powell v. Alabama, 287 U.S. 45 (1932); Betts v. Brady, 316 U.S. 455 (1942); Bute v. Illinois, 333 U.S. 640 (1948).

[Footnote 35] See Report of Royal Commission on Capital Punishment 1949-1953, §§ 700-789, pp. 246-273 (1953); Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 19-21 (1968) (testimony of Clinton Duffy); H. Barnes & N. Teeters, New Horizons [408 U.S. 238, 288] in Criminology 306-309 (3d ed. 1959); C. Chessman, Trial by Ordeal 195-202 (1955); M. DiSalle, The Power of Life and Death 84-85 (1965); C. Duffy & A. Hirschberg, 88 Men and 2 Women 13-14 (1962); B. Eshelman, Death Row Chaplain 26-29, 101-104, 159-164 (1962); R. Hammer, Between Life and Death 208-212 (1969); K. Lamott, Chronicles of San Quentin 228-231 (1961); L. Lawes, Life and Death in Sing Sing 170-171 (1928); Rubin, The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty, 15 Crime & Delin. 121, 128-129 (1969); Comment, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1338-1341 (1968); Brief amici curiae filed by James V. Bennett, Clinton T. Duffy, Robert G. Sarver, Harry C. Tinsley, and Lawrence E. Wilson 12-14.

[Footnote 36] See Barnes & Teeters, supra, at 309-311 (3d ed. 1959); Camus, Reflections on the Guillotine, in A. Camus, Resistance, Rebellion, and Death 131, 151-156 (1960); C. Duffy & A. Hirschberg, supra, at 68-70, 254 (1962); Hammer, supra, at 222-235, 244-250, 269-272 (1969); S. Rubin, The Law of Criminal Correction 340 (1963); Bluestone & McGahee, Reaction to Extreme Stress: Impending Death by Execution, 119 Amer. J. Psychiatry 393 (1962); Gottlieb, Capital Punishment, 15 Crime & Delin. 1, 8-10 (1969); West, Medicine and Capital Punishment, in Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee [408 U.S. 238, 289] on the Judiciary, 90th Cong., 2d Sess., 124 (1968); Ziferstein, Crime and Punishment, The Center Magazine 84 (Jan. 1968); Comment, The Death Penalty Cases, 56 Calif. L. Rev. 1268, 1342 (1968); Note, Mental Suffering under Sentence of Death: A Cruel and Unusual Punishment, 57 Iowa L. Rev. 814 (1972).

[Footnote 37] The State, of course, does not purposely impose the lengthy waiting period in order to inflict further suffering. The impact upon the individual is not the less severe on that account. It is no answer to assert that long delays exist only because condemned criminals avail themselves of their full panoply of legal rights. The right not to be subjected to inhuman treatment cannot, of course, be played off against the right to pursue due process of law, but, apart from that, the plain truth is that it is society that demands, even against the wishes of the criminal, that all legal avenues be explored before the execution is finally carried out.

[Footnote 38] It was recognized in Trop itself that expatriation is a "punishment short of death." 356 U.S., at 99 . Death, however, was distinguished on the ground that it was "still widely accepted." Ibid.

[Footnote 39] Stephen, Capital Punishments, 69 Fraser's Magazine 753, 763 (1864).

[Footnote 40] From 1930 to 1939: 155, 153, 140, 160, 168, 199, 195, 147, 190, 160. From 1940 to 1949: 124, 123, 147, 131, 120, 117, 131, 153, 119, 119. From 1950 to 1959: 82, 105, 83, 62, 81, 76, 65, 65, 49, 49. From 1960 to 1967: 56, 42, 47, 21, 15, 7, 1, 2. Department of Justice, National Prisoner Statistics No. 46, Capital Punishment 1930-1970, p. 8 (Aug. 1971). The last execution in the United States took place on June 2, 1967. Id., at 4.

[Footnote 41] 1961 - 140; 1962 - 103; 1963 - 93; 1964 - 106; 1965 - 86; 1966 - 118; 1967 - 85; 1968 - 102; 1969 - 97; 1970 - 127. Id., at 9.

[Footnote 42] Commutations averaged about 18 per year. 1961 - 17; 1962 - 27; 1963 - 16; 1964 - 9; 1965 - 19; 1966 - 17; 1967 - 13; 1968 - 16; 1969 - 20; 1970 - 29. Ibid.

[Footnote 43] Transfers to mental institutions averaged about three per year. 1961 - 3; 1962 - 4; 1963 - 1; 1964 - 3; 1965 - 4; 1966 - 3; 1967 - 3; 1968 - 2; 1969 - 1; 1970 - 5. Ibid.

[Footnote 44] These four methods of disposition averaged about 44 per year. 1961 - 31, 1962 - 30; 1963 - 32; 1964 - 58; 1965 - 39; 1966 - 33; 1967 - 53; 1968 - 59; 1969 - 64; 1970 - 42. Ibid. Specific figures are available starting with 1967. Resentences: 1967 - 7; 1968 - 18; 1969 - 12; 1970 - 14. Grants of new trials and orders for resentencing: 1967 - 31; 1968 - 21; 1969 - 13; 1970 - 9. Dismissals of indictments and reversals of convictions: 1967 - 12; 1968 - 19; 1969 - 33; 1970 - 17. Deaths by suicide and natural causes: 1967 - 2; 1968 - 1; 1969 - 5; 1970 - 2. National Prisoner Statistics No. 42, Executions 1930-1967, p. 13 (June 1968); National Prisoner Statistics No. 45, Capital Punishment 1930-1968, p. 12 (Aug. 1969); National Prisoner Statistics, supra, n. 40, at 14-15.

[Footnote 45] Id., at 9.

[Footnote 46] During that 10-year period, 1,177 prisoners entered death row, including 120 who were returned following new trials or treatment at mental institutions. There were 653 dispositions other than by [408 U.S. 238, 293] execution, leaving 524 prisoners who might have been executed, of whom 135 actually were. Ibid.

[Footnote 47] Id., at 8.

[Footnote 48] The victim surprised Furman in the act of burglarizing the victim's home in the middle of the night. While escaping, Furman killed the victim with one pistol shot fired through the closed kitchen door from the outside. At the trial, Furman gave his version of the killing:

"They got me charged with murder and I admit, I admit going to these folks' home and they did caught me in there and I was coming back out, backing up and there was a wire down there on the floor. I was coming out backwards and fell back and I didn't intend to kill nobody. I didn't know they was behind the door. The gun went off and I didn't know nothing about no murder until they arrested me, and when the gun went off I was down on the floor and I got up and ran. That's all to it." App. 54-55.

The Georgia Supreme Court accepted that version:

"The admission in open court by the accused . . . that during the period in which he was involved in the commission of a criminal act at the home of the deceased, he accidentally tripped over a wire in leaving the premises causing the gun to go off, together with other facts and circumstances surrounding the death of the deceased by violent means, was sufficient to support the verdict of guilty of [408 U.S. 238, 295] murder . . . ." Furman v. State, 225 Ga. 253, 254, 167 S. E. 2d 628, 629 (1969).

About Furman himself, the jury knew only that he was black and that, according to his statement at trial, he was 26 years old and worked at "Superior Upholstery." App. 54. It took the jury one hour and 35 minutes to return a verdict of guilt and a sentence of death. Id., at 64-65.

[Footnote 49] T. Sellin, The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute 15 (1959).

[Footnote 50] Eight States still employ hanging as the method of execution, and one, Utah, also employs shooting. These nine States have accounted for less than 3% of the executions in the United States since 1930. National Prisoner Statistics, supra, n. 40, at 10-11.

[Footnote 51] Id., at 8.

[Footnote 52] Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin have abolished death as a punishment for crimes. Id., at 50. In addition, the California Supreme Court held the punishment unconstitutional under the state counterpart of the Cruel and Unusual Punishments Clause. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880 (1972).

[Footnote 53] New Mexico, New York, North Dakota, Rhode Island, and Vermont have almost totally abolished death as a punishment for crimes. National Prisoner Statistics, supra, n. 40, at 50. Indeed, these five States might well be considered de facto abolition States. North Dakota and Rhode Island, which restricted the punishment in 1915 and 1852 respectively, have not carried out an execution since at least 1930, id., at 10; nor have there been any executions in New York, Vermont, or New Mexico since they restricted the punishment in 1965, 1965, and 1969 respectively, id., at 10-11. As of January 1, 1971, none of the five States had even a single prisoner under sentence of death. Id., at 18-19.

In addition, six States, while retaining the punishment on the books in generally applicable form, have made virtually no use of it. Since 1930, Idaho, Montana, Nebraska, New Hampshire, South Dakota, and Wyoming have carried out a total of 22 executions. Id., at 10-11. As of January 1, 1971, these six States had a total of three prisoners under sentences of death. Id., at 18-19. Hence, assuming 25 executions in 42 years, each State averaged about one execution every 10 years.

[Footnote 54] There is also the more limited argument that death is a necessary punishment when criminals are already serving or subject to a sentence of life imprisonment. If the only punishment available is further imprisonment, it is said, those criminals will have nothing to lose by committing further crimes, and accordingly the threat of death is the sole deterrent. But "life" imprisonment is a misnomer today. Rarely, if ever, do crimes carry a mandatory life sentence without possibility of parole. That possibility ensures that criminals do not reach the point where further crimes are free of consequences. Moreover, if this argument is simply an assertion that the threat of death is a more effective deterrent than the threat of increased imprisonment by denial of release on parole, then, as noted above, there is simply no evidence to support it.

MR. JUSTICE STEWART, concurring.

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

For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide. See Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (Brandeis, J., concurring).

The opinions of other Justices today have set out in admirable and thorough detail the origins and judicial history of the Eighth Amendment's guarantee against the infliction of cruel and unusual punishments, 1 and the origin and judicial history of capital punishment. 2 There [408 U.S. 238, 307] is

thus no need for me to review the historical materials here, and what I have to say can, therefore, be briefly stated.

Legislatures - state and federal - have sometimes specified that the penalty of death shall be the mandatory punishment for every person convicted of engaging in certain designated criminal conduct. Congress, for example, has provided that anyone convicted of acting as a spy for the enemy in time of war shall be put to death. 3 The Rhode Island Legislature has ordained the death penalty for a life term prisoner who commits murder. 4 Massachusetts has passed a law imposing the death penalty upon anyone convicted of murder in the commission of a forcible rape. 5 An Ohio law imposes the mandatory penalty of death upon the assassin of the President of the United States or the Governor of a State. 6

If we were reviewing death sentences imposed under these or similar laws, we would be faced with the need to decide whether capital punishment is unconstitutional for all crimes and under all circumstances. We would need to decide whether a legislature - state or federal - could constitutionally determine that certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, 7 only [408 U.S. 238, 308] the automatic penalty of death will provide maximum deterrence.

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

The constitutionality of capital punishment in the abstract is not, however, before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. 8 And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. 9 In a word, neither State [408 U.S. 238, 309] has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses. As MR. JUSTICE WHITE so tellingly puts it, the "legislative will is not frustrated if the penalty is never imposed." Post, at 311.

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.10 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, 11 many just as reprehensible as these, the petitioners are among a capriciously [408 U.S. 238, 310] selected random handful upon whom the sentence of death has in fact been imposed. 12 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. 13 See McLaughlin v. Florida, 379 U.S. 184 . But racial discrimination has not been proved, 14and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

For these reasons I concur in the judgments of the Court.

[Footnote 1] See dissenting opinion of THE CHIEF JUSTICE, post, at 376-379; concurring opinion of MR. JUSTICE DOUGLAS, ante, at 242-244; concurring opinion of MR. JUSTICE BRENNAN, ante, at 258-269; concurring opinion of MR. JUSTICE MARSHALL, post, at 316-328; dissenting opinion of MR. JUSTICE BLACKMUN, post, at 407-409; dissenting opinion of MR. JUSTICE POWELL, post, at 421-427.

[Footnote 2] See dissenting opinion of THE CHIEF JUSTICE, post, at 380; concurring opinion of MR. JUSTICE BRENNAN, ante, at 282-285; concurring opinion of MR. JUSTICE MARSHALL, post, at 333-341; dissenting opinion of MR. JUSTICE POWELL, post, at 421-424.

[Footnote 3] 10 U.S.C. 906.

[Footnote 4] R. I. Gen. Laws Ann. 11-23-2.

[Footnote 5] Mass. Gen. Laws Ann., c. 265, 2.

[Footnote 6] Ohio Rev. Code Ann., Tit. 29, 2901.09 and 2901.10

[Footnote 7] Many statistical studies - comparing crime rates in jurisdictions with and without capital punishment and in jurisdictions before and after abolition of capital punishment - have indicated that there is little, if any, measurable deterrent effect. See H. Bedau, The Death Penalty in America 258-332 (1967 rev. ed.). There remains uncertainty, however, because of the difficulty of identifying and holding constant all other relevant variables. See Comment, The Death [408 U.S. 238, 308] Penalty Cases, 56 Calif. L. Rev. 1268, 1275-1292. See also dissenting opinion of THE CHIEF JUSTICE, post, at 395; concurring opinion of MR. JUSTICE MARSHALL, post, at 346-354.

[Footnote 8] Georgia law, at the time of the conviction and sentencing of the petitioner in No. 69-5030, left the jury a choice between the death penalty, life imprisonment, or "imprisonment and labor in the penitentiary for not less than one year nor more than 20 years." Ga. Code Ann. 26-1302 (Supp. 1971) (effective prior to July 1, 1969). The current Georgia provision for the punishment of forcible rape continues to leave the same broad sentencing leeway. Ga. Crim. Code 26-2001 (1971 rev.) (effective July 1, 1969). Texas law, under which the petitioner in No. 69-5031 was sentenced, provides that a "person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five." Texas Penal Code, Art. 1189.

[Footnote 9] Georgia law, under which the petitioner in No. 69-5003, was sentenced, left the jury a choice between the death penalty and life imprisonment. Ga. Code Ann. 26-1005 (Supp. 1971) (effective [408 U.S. 238, 309] prior to July 1, 1969). Current Georgia law provides for similar sentencing leeway. Ga. Crim. Code 26-1101 (1971 rev.) (effective July 1, 1969).

[Footnote 10] See dissenting opinion of THE CHIEF JUSTICE, post, at 386-387, n. 11; concurring opinion of MR. JUSTICE BRENNAN, ante, at 291-293.

[Footnote 11] Petitioner Branch was sentenced to death in a Texas court on July 26, 1967. Petitioner Furman was sentenced to death in a Georgia court on September 20, 1968. Petitioner Jackson was sentenced to death in a Georgia court on December 10, 1968.

[Footnote 12] A former United States Attorney General has testified before the Congress that only a "small and capricious selection of offenders have been put to death. Most persons convicted of the same crimes have been imprisoned." Statement by Attorney General Clark in Hearings on S. 1760 before the Subcommittee on Criminal Laws and Procedures of the Senate Committee on the Judiciary, 90th Cong., 2d Sess., 93.

In McGautha v. California, 402 U.S. 183 , the Court dealt with claims under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. We expressly declined in that case to consider claims under the constitutional guarantee against cruel and unusual punishments. See 398 U.S. 936 (limited grant of certiorari).

[Footnote 13] See concurring opinion of MR. JUSTICE DOUGLAS, ante, at 249-251; concurring opinion of MR. JUSTICE MARSHALL, post, at 366 n. 155.

[Footnote 14] Cf. Note, A Study of the California Penalty Jury in First-Degree-Murder Cases, 21 Stan. L. Rev. 1297 (1969); dissenting opinion of THE CHIEF JUSTICE, post, at 389-390, n. 12.

MR. JUSTICE WHITE, concurring.

The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us. In joining the Court's judgments, therefore, I do not at all[408 U.S. 238, 311] intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided.

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

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death [408 U.S. 238, 312] 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 [408 U.S. 238, 313] 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 [408 U.S. 238, 314] 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.

I concur in the judgments of the Court.

MR. JUSTICE MARSHALL, concurring.

These three cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. 1 [408 U.S. 238, 315]

In No. 69-5003, Furman was convicted of murder for shooting the father of five children when he discovered that Furman had broken into his home early one morning. Nos. 69-5030 and 69-5031 involve state convictions for forcible rape. Jackson was found guilty of rape during the course of a robbery in the

victim's home. The rape was accomplished as he held the pointed ends of scissors at the victim's throat. Branch also was convicted of a rape committed in the victim's home. No weapon was utilized, but physical force and threats of physical force were employed.

The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But, we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed on each of the petitioners and to determine whether or not it violates the Eighth Amendment. The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is "a punishment no longer consistent with our own self-respect" 2 and, therefore, violative of the Eighth Amendment.

The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint. 3 Hence, we must proceed with caution to answer the question presented. 4 By first examining the historical derivation of the Eighth Amendment and [408 U.S. 238, 316] the construction given it in the past by this Court, and then exploring the history and attributes of capital punishment in this country, we can answer the question presented with objectivity and a proper measure of self-restraint.

Candor is critical to such an inquiry. All relevant material must be marshaled and sorted and forthrightly examined. We must not only be precise as to the standards of judgment that we are utilizing, but exacting in examining the relevant material in light of those standards.

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

I

The Eighth Amendment's ban against cruel and unusual punishments derives from English law. In 1583, John Whitgift, Archbishop of Canterbury, turned the High Commission into a permanent ecclesiastical court, and the Commission began to use torture to extract confessions from persons suspected of various offenses. 5 Sir Robert Beale protested that cruel and barbarous torture violated Magna Carta, but his protests were made in vain. 6 [408 U.S. 238, 317]

Cruel punishments were not confined to those accused of crimes, but were notoriously applied with even greater relish to those who were convicted. Blackstone described in ghastly detail the myriad of inhumane forms of punishment imposed on persons found guilty of any of a large number of offenses. 7 Death, of course, was the usual result. 8

The treason trials of 1685 - the "Bloody Assizes" - which followed an abortive rebellion by the Duke of Monmouth, marked the culmination of the parade of horrors, and most historians believe that it was this event that finally spurred the adoption of the English Bill of Rights containing the progenitor of our prohibition against cruel and unusual punishments. 9 The conduct of Lord Chief Justice Jeffreys at those trials has been described as an "insane lust for cruelty" which was "stimulated by orders from the King" (James II). 10 The assizes received wide publicity from Puritan pamphleteers and doubtless had some influence on the adoption of a cruel and unusual punishments clause. But, [408 U.S. 238, 318] the legislative history of the English Bill of Rights of 1689 indicates that the assizes may not have been as critical to the adoption of the clause as is widely thought. After William and Mary of Orange crossed the channel to invade England, James II fled. Parliament was summoned into session and a committee was appointed to draft general statements containing "such things as are absolutely necessary to be considered for the better securing of our religion, laws and liberties." 11An initial draft of the Bill of Rights prohibited "illegal" punishments, but a later draft referred to the infliction by James II of "illegal and cruel"

punishments, and declared "cruel and unusual" punishments to be prohibited. 12The use of the word "unusual" in the final draft appears to be inadvertent.

This legislative history has led at least one legal historian to conclude "that the cruel and unusual punishments clause of the Bill of Rights of 1689 was, first, an objection to the imposition of punishments that were unauthorized by statute and outside the jurisdiction of the sentencing court, and second, a reiteration of the English policy against disproportionate penalties," 13 and not primarily a reaction to the torture of the High Commission, harsh sentences, or the assizes. [408 U.S. 238, 319]

Whether the English Bill of Rights prohibition against cruel and unusual punishments is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and in including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments. 14

The precise language used in the Eighth Amendment first appeared in America on June 12, 1776, in Virginia's "Declaration of Rights," 9 of which read: "That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." 15 This language was drawn verbatim from the English Bill of Rights of 1689. Other States adopted similar clauses, 16 and there is evidence in the debates of the various state conventions that were [408 U.S. 238, 320] called upon to ratify the Constitution of great concern for the omission of any prohibition against torture or other cruel punishments. 17

The Virginia Convention offers some clues as to what the Founding Fathers had in mind in prohibiting cruel and unusual punishments. At one point George Mason advocated the adoption of a Bill of Rights, and Patrick Henry concurred, stating:

"By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? . . . 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 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 prescribe trials and 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 [408 U.S. 238, 321] cruel and unusual punishments. These are prohibited by your declaration of rights. What has distinguished our ancestors? - That they would not admit of tortures, or cruel and barbarous punishment. But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany - of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession by torture, in order to punish with still more relentless severity. We are then lost and undone." 18
Henry's statement indicates that he wished to insure that "relentless severity" would be prohibited by the Constitution. Other expressions with respect to the proposed Eighth Amendment by Members of the First Congress indicate that they shared Henry's view of the need for and purpose of the Cruel and Unusual Punishments Clause. 19 [408 U.S. 238, 322]

Thus, the history of the clause clearly establishes that it was intended to prohibit cruel punishments. We must now turn to the case law to discover the manner in which courts have given meaning to the term "cruel."

II

This Court did not squarely face the task of interpreting the cruel and unusual punishments language for the first time until Wilkerson v. Utah, 99 U.S. 130 (1879), although the language received a cursory examination in several prior cases. See, e. g., Pervear v. Commonwealth, 5 Wall. 475 (1867). In Wilkerson, the Court unanimously upheld a sentence of public execution by shooting imposed pursuant to a conviction for premeditated murder. In his opinion for the Court, Mr. Justice Clifford wrote:

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

Thus, the Court found that unnecessary cruelty was no more permissible than torture. To determine whether the punishment under attack was unnecessarily cruel, the Court examined the history of the Utah Territory and the then-current writings on capital punishment, and compared this Nation's practices with those of other countries. It is apparent that the Court felt it could not dispose of the question simply by referring to traditional practices; instead, it felt bound to examine developing thought.

Eleven years passed before the Court again faced a challenge to a specific punishment under the Eighth [408 U.S. 238, 323] Amendment. In the case of In re Kemmler, 136 U.S. 436 (1890), Chief Justice Fuller wrote an opinion for a unanimous Court upholding electrocution as a permissible mode of punishment. While the Court ostensibly held that the Eighth Amendment did not apply to the States, it is very apparent that the nature of the punishment involved was examined under the Due Process Clause of the Fourteenth Amendment. The Court held that the punishment was not objectionable. Today, Kemmler stands primarily for the proposition that a punishment is not necessarily unconstitutional simply because it is unusual, so long as the legislature has a humane purpose in selecting it. 20

Two years later in O'Neil v. Vermont, 144 U.S. 323 (1892), the Court reaffirmed that the Eighth Amendment was not applicable to the States. O'Neil was found guilty on 307 counts of selling liquor in violation of Vermont law. A fine of $6,140 ($20 for each offense) and the costs of prosecution ($497.96) were imposed. O'Neil was committed to prison until the fine and the costs were paid; and the court provided that if they were not paid before a specified date, O'Neil was to be confined in the house of corrections for 19,914 days (approximately 54 years) at hard labor. Three Justices - Field, Harlan, and Brewer - dissented. They maintained not only that the Cruel and Unusual Punishments Clause was applicable to the States, but that in O'Neil's case it had been violated. Mr. Justice Field wrote:

"That designation [cruel and unusual], it is true, is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which [408 U.S. 238, 324] are attended with acute pain and suffering. . . . The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive . . . ." Id., at 339-340.

In Howard v. Fleming, 191 U.S. 126 (1903), the Court, in essence, followed the approach advocated by the dissenters in O'Neil. In rejecting the claim that 10-year sentences for conspiracy to defraud were cruel and unusual, the Court (per Mr. Justice Brewer) considered the nature of the crime, the purpose of the law, and the length of the sentence imposed.

The Court used the same approach seven years later in the landmark case of Weems v. United States, 217 U.S. 349 (1910). Weems, an officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was convicted of falsifying a "public and official document." He was sentenced to 15 years' incarceration at hard labor with chains on his ankles, to an unusual loss of his civil rights, and to perpetual surveillance. Called upon to determine whether this was a cruel and unusual

punishment, the Court found that it was. 21 The Court emphasized that the Constitution was not an "ephemeral" enactment, or one "designed to meet passing occasions." 22 Recognizing that "[t]ime works changes, [and] brings into existence new conditions and purposes," 23 the Court commented that "[i]n the application of a constitution [408 U.S. 238, 325] . . . our contemplation cannot be only of what has been but of what may be." 24

In striking down the penalty imposed on Weems, the Court examined the punishment in relation to the offense, compared the punishment to those inflicted for other crimes and to those imposed in other jurisdictions, and concluded that the punishment was excessive. 25 Justices White and Holmes dissented and argued that the cruel and unusual prohibition was meant to prohibit only those things that were objectionable at the time the Constitution was adopted. 26

Weems is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable as those that were inherently cruel. Thus, it is apparent that the dissenters' position in O'Neil had become the opinion of the Court in Weems.

Weems was followed by two cases that added little to our knowledge of the scope of the cruel and unusual language, Badders v. United States, 240 U.S. 391 (1916), and United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S. 407 (1921). 27 Then [408 U.S. 238, 326] came another landmark case, Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947).

Francis had been convicted of murder and sentenced to be electrocuted. The first time the current passed through him, there was a mechanical failure and he did not die. Thereafter, Francis sought to prevent a second electrocution on the ground that it would be a cruel and unusual punishment. Eight members of the Court assumed the applicability of the Eighth Amendment to the States. 28 The Court was virtually unanimous in agreeing that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain," 29 but split 5-4 on whether Francis would, under the circumstances, be forced to undergo any excessive pain. Five members of the Court treated the case like In re Kemmler and held that the legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to reduce pain and suffering in most cases, it may have inadvertently increased suffering in one particular case. 30 [408 U.S. 238, 327] The four dissenters felt that the case should be remanded for further facts.

As in Weems, the Court was concerned with excessive punishments. Resweber is perhaps most significant because the analysis of cruel and unusual punishment questions first advocated by the dissenters in O'Neil was at last firmly entrenched in the minds of an entire Court.

Trop v. Dulles, 356 U.S. 86 (1958), marked the next major cruel and unusual punishment case in this Court. Trop, a native-born American, was declared to have lost his citizenship by reason of a conviction by court-martial for wartime desertion. Writing for himself and Justices Black, DOUGLAS, and Whittaker, Chief Justice Warren concluded that loss of citizenship amounted to a cruel and unusual punishment that violated the Eighth Amendment. 31

Emphasizing the flexibility inherent in the words "cruel and unusual," the Chief Justice wrote that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 32 His approach to the problem was that utilized by the Court in Weems: he scrutinized the severity of the penalty in relation to the offense, examined the practices of other civilized nations of the world, and concluded that involuntary statelessness was an excessive and, therefore, an unconstitutional punishment. Justice Frankfurter, dissenting, urged that expatriation was not punishment, and that even if it were, it was not excessive. While he criticized the conclusion arrived at by the Chief Justice, his approach to the Eighth Amendment question was identical. [408 U.S. 238, 328]

Whereas in Trop a majority of the Court failed to agree on whether loss of citizenship was a cruel and unusual punishment, four years later a majority did agree in Robinson v. California, 370 U.S. 660 (1962), that a sentence of 90 days' imprisonment for violation of a California statute making it a crime to "be addicted to the use of narcotics" was cruel and unusual. MR. JUSTICE STEWART, writing the opinion of the Court, reiterated what the Court had said in Weems and what Chief Justice Warren wrote in Trop - that the cruel and unusual punishment clause was not a static concept, but one that must be continually re-examined "in the light of contemporary human knowledge." 33 The fact that the penalty under attack was only 90 days evidences the Court's willingness to carefully examine the possible excessiveness of punishment in a given case even where what is involved is a penalty that is familiar and widely accepted. 34

We distinguished Robinson in Powell v. Texas, 392 U.S. 514 (1968), where we sustained a conviction for drunkenness in a public place and a fine of $20. Four Justices dissented on the ground that Robinson was controlling. The analysis in both cases was the same; only the conclusion as to whether or not the punishment was excessive differed. Powell marked the last time prior to today's decision that the Court has had occasion to construe the meaning of the term "cruel and unusual" punishment.

Several principles emerge from these prior cases and serve as a beacon to an enlightened decision in the instant cases. [408 U.S. 238, 329]

III

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 standards of decency that mark the progress of a maturing society." 35 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 Wilkerson 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. 36 Yet, some of these same Justices and others have at times expressed concern over capital punishment. 37 [408 U.S. 238, 330] 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.

Faced with an open question, we must establish our standards for decision. The decisions discussed in the previous section imply that a punishment may be deemed cruel and unusual for any one of four distinct reasons.

First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them - e. g., use of the rack, the thumbscrew, or other modes of torture. See O'Neil v. Vermont, 144 U.S., at 339 (Field, J., dissenting). Regardless of public sentiment with respect to imposition of one of these punishments in a particular case or at any one moment in history, the Constitution prohibits it. These are punishments that have been barred since the adoption of the Bill of Rights. [408 U.S. 238, 331]

Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense. Cf. United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson, 255 U.S., at 435 (Brandeis, J., dissenting). If these punishments are intended to serve a humane purpose, they may be constitutionally permissible. In re Kemmler, 136 U.S., at 447 ; Louisiana ex rel. Francis v. Resweber, 329 U.S., at 464 . Prior decisions leave open the question of just how much the word

"unusual" adds to the word "cruel." I have previously indicated that use of the word "unusual" in the English Bill of Rights of 1689 was inadvertent, and there is nothing in the history of the Eighth Amendment to give flesh to its intended meaning. In light of the meager history that does exist, one would suppose that an innovative punishment would probably be constitutional if no more cruel than that punishment which it superseded. We need not decide this question here, however, for capital punishment is certainly not a recent phenomenon.

Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. Weems v. United States, supra. The decisions previously discussed are replete with assertions that one of the primary functions of the cruel and unusual punishments clause is to prevent excessive or unnecessary penalties, e. g., Wilkerson v. Utah, 99 U.S., at 134 ; O'Neil v. Vermont, 144 U.S., at 339 -340 (Field, J., dissenting); Weems v. United States, 217 U.S., at 381 ; Louisiana ex rel. Francis v. Resweber, supra; these punishments are unconstitutional even though popular sentiment may favor them. Both THE CHIEF JUSTICE and MR. JUSTICE POWELL seek to ignore or to minimize this aspect of the Court's prior decisions. But, since Mr. Justice Field first suggested that "[t]he whole inhibition [of the prohibition against cruel and unusual punishments] [408 U.S. 238, 332] is against that which is excessive," O'Neil v. Vermont, 144 U.S., at 340 , this Court has steadfastly maintained that a penalty is unconstitutional whenever it is unnecessarily harsh or cruel. This is what the Founders of this country intended; this is what their fellow citizens believed the Eighth Amendment provided; and this was the basis for our decision in Robinson v. California, supra, for the plurality opinion by Mr. Chief Justice Warren in Trop v. Dulles, supra, and for the Court's decision in Weems v. United States, supra. See also W. Bradford, An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania (1793), reprinted in 12 Am. J. Legal Hist. 122, 127 (1968). It should also be noted that the "cruel and unusual" language of the Eighth Amendment immediately follows language that prohibits excessive bail and excessive fines. The entire thrust of the Eighth Amendment is, in short, against "that which is excessive."

Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it. For example, if the evidence clearly demonstrated that capital punishment served valid legislative purposes, such punishment would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable. A general abhorrence on the part of the public would, in effect, equate a modern punishment with those barred since the adoption of the Eighth Amendment. There are no prior cases in this Court striking down a penalty on this ground, but the very notion of changing values requires that we recognize its existence.

It is immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or [408 U.S. 238, 333] unnecessary, or because it is abhorrent to currently existing moral values.

We must proceed to the history of capital punishment in the United States.

IV

Capital punishment has been used to penalize various forms of conduct by members of society since the beginnings of civilization. Its precise origins are difficult to perceive, but there is some evidence that its roots lie in violent retaliation by members of a tribe or group, or by the tribe or group itself, against persons committing hostile acts toward group members. 38 Thus, infliction of death as a penalty for objectionable conduct appears to have its beginnings in private vengeance. 39

As individuals gradually ceded their personal prerogatives to a sovereign power, the sovereign accepted the authority to punish wrongdoing as part of its "divine right" to rule. Individual vengeance gave way to the vengeance of the state, and capital punishment became a public function. 40 Capital punishment worked its way into the laws of various countries, 41 and was inflicted in a variety of macabre and horrific ways. 42

It was during the reign of Henry II (1154-1189) that English law first recognized that crime was more than a personal affair between the victim and the perpetrator. 43 [408 U.S. 238, 334] The early history of capital punishment in England is set forth in McGautha v. California, 402 U.S. 183, 197 -200 (1971), and need not be repeated here.

By 1500, English law recognized eight major capital crimes: treason, petty treason (killing of husband by his wife), murder, larceny, robbery, burglary, rape, and arson. 44 Tudor and Stuart kings added many more crimes to the list of those punishable by death, and by 1688 there were nearly 50. 45 George II (1727-1760) added nearly 36 more, and George III (1760-1820) increased the number by 60. 46

By shortly after 1800, capital offenses numbered more than 200 and not only included crimes against person and property, but even some against the public peace. While England may, in retrospect, look particularly brutal, Blackstone points out that England was fairly civilized when compared to the rest of Europe. 47 [408 U.S. 238, 335]

Capital punishment was not as common a penalty in the American Colonies. "The Capitall Lawes of New-England," dating from 1636, were drawn by the Massachusetts Bay Colony and are the first written expression of capital offenses known to exist in this country. These laws make the following crimes capital offenses: idolatry, witchcraft, blasphemy, murder, assault in sudden anger, sodomy, buggery, adultery, statutory rape, rape, manstealing, perjury in a capital trial, and rebellion. Each crime is accompanied by a reference to the Old Testament to indicate its source. 48 It is not known with any certainty exactly when, or even if, these laws were enacted as drafted; and, if so, just how vigorously these laws were enforced. 49 We do know that the other Colonies had a variety of laws that spanned the spectrum of severity. 50

By the 18th century, the list of crimes became much less theocratic and much more secular. In the average colony, there were 12 capital crimes. 51 This was far fewer than existed in England, and part of the reason was that there was a scarcity of labor in the Colonies. 52 Still, there were many executions, because "[w]ith county jails inadequate and insecure, the criminal population seemed best controlled by death, mutilation, and fines."53

Even in the 17th century, there was some opposition [408 U.S. 238, 336] to capital punishment in some of the colonies. In his "Great Act" of 1682, William Penn prescribed death only for premeditated murder and treason,54 although his reform was not long lived. 55

In 1776 the Philadelphia Society for Relieving Distressed Prisoners organized, and it was followed 11 years later by the Philadelphia Society for Alleviating the Miseries of Public Prisons. 56 These groups pressured for reform of all penal laws, including capital offenses. Dr. Benjamin Rush soon drafted America's first reasoned argument against capital punishment, entitled An Enquiry into the Effects of Public Punishments upon Criminals and upon Society. 57 In 1793, William Bradford, the Attorney General of Pennsylvania and later Attorney General of the United States, conducted "An Enquiry How Far the Punishment of Death is Necessary in Pennsylvania." 58 He concluded that it was doubtful whether capital punishment was at all necessary, and that until more information could be obtained, it should be immediately eliminated for all offenses except high treason and murder. 59

The "Enquiries" of Rush and Bradford and the Pennsylvania movement toward abolition of the death [408 U.S. 238, 337] penalty had little immediate impact on the practices of other States. 60 But in the early 1800's, Governors George and DeWitt Clinton and Daniel Tompkins unsuccessfully urged the New York Legislature to modify or end capital punishment. During this same period, Edward Livingston, an American lawyer who later became Secretary of State and Minister to France under President Andrew Jackson, was appointed by the Louisiana Legislature to draft a new penal code. At the center of his proposal was "the total abolition of capital punishment." 61 His Introductory Report to the System of Penal Law Prepared for the State of Louisiana 62contained a systematic rebuttal of all arguments favoring

capital punishment. Drafted in 1824, it was not published until 1833. This work was a tremendous impetus to the abolition movement for the next half century.

During the 1830's, there was a rising tide of sentiment against capital punishment. In 1834, Pennsylvania abolished public executions, 63 and two years later, The Report on Capital Punishment Made to the Maine Legislature was published. It led to a law that prohibited the executive from issuing a warrant for execution within one year after a criminal was sentenced by the courts. The totally discretionary character of the law was at odds with almost all prior practices. The "Maine Law" resulted in little enforcement of the death penalty, which was not surprising since the legislature's idea in passing the law was that the affirmative burden placed on the governor to issue a warrant one full year [408 U.S. 238, 338] or more after a trial would be an effective deterrent to exercise of his power. 64 The law spread throughout New England and led to Michigan's being the first State to abolish capital punishment in 1846. 65

Anti-capital-punishment feeling grew in the 1840's as the literature of the period pointed out the agony of the condemned man and expressed the philosophy that repentance atoned for the worst crimes, and that true repentance derived, not from fear, but from harmony with nature. 66

By 1850, societies for abolition existed in Massachusetts, New York, Pennsylvania, Tennessee, Ohio, Alabama, Louisiana, Indiana, and Iowa. 67 New York, Massachusetts, and Pennsylvania constantly had abolition bills before their legislatures. In 1852, Rhode Island followed in the footsteps of Michigan and partially abolished capital punishment. 68 Wisconsin totally abolished the death penalty the following year. 69 Those States that did not abolish the death penalty greatly reduced its scope, and "[f]ew states outside the South had more than one or two . . . capital offenses" in addition to treason and murder. 70

But the Civil War halted much of the abolition furor. One historian has said that "[a]fter the Civil War, men's finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and [408 U.S. 238, 339] blunted." 71 Some of the attention previously given to abolition was diverted to prison reform. An abolitionist movement still existed, however. Maine abolished the death penalty in 1876, restored it in 1883, and abolished it again in 1887; Iowa abolished capital punishment from 1872-1878; Colorado began an erratic period of de facto abolition and revival in 1872; and Kansas also abolished it de facto in 1872, and by law in 1907. 72

One great success of the abolitionist movement in the period from 1830-1900 was almost complete elimination of mandatory capital punishment. Before the legislatures formally gave juries discretion to refrain from imposing the death penalty, the phenomenon of "jury nullification," in which juries refused to convict in cases in which they believed that death was an inappropriate penalty, was experienced. 73 Tennessee was the first State to give juries discretion, Tenn. Laws 1837-1838, c. 29, but other States quickly followed suit. Then, Rep. Curtis of New York introduced a federal bill that ultimately became law in 1897 which reduced the number of federal capital offenses from 60 to 3 (treason, murder, and rape) and gave the jury sentencing discretion in murder and rape cases. 74

By 1917 12 States had become abolitionist jurisdictions. 75 But, under the nervous tension of World War I, [408 U.S. 238, 340] four of these States reinstituted capital punishment and promising movements in other States came grinding to a halt. 76 During the period following the First World War, the abolitionist movement never regained its momentum.

It is not easy to ascertain why the movement lost its vigor. Certainly, much attention was diverted from penal reform during the economic crisis of the depression and the exhausting years of struggle during World War II. Also, executions, which had once been frequent public spectacles, became infrequent private affairs. The manner of inflicting death changed, and the horrors of the punishment were, therefore, somewhat diminished in the minds of the general public. 77

In recent years there has been renewed interest in modifying capital punishment. New York has moved toward abolition, 78 as have several other States. 79 In 1967, a bill was introduced in the Senate to abolish [408 U.S. 238, 341] capital punishment for all federal crimes, but it died in committee. 80

At the present time, 41 States, the District of Columbia, and other federal jurisdictions authorize the death penalty for at least one crime. It would be fruitless to attempt here to categorize the approach to capital punishment taken by the various States. 81 It is sufficient to note that murder is the crime most often punished by death, followed by kidnaping and treason. 82 Rape is a capital offense in 16 States and the federal system. 83

The foregoing history demonstrates that capital punishment was carried from Europe to America but, once here, was tempered considerably. At times in our history, strong abolitionist movements have existed. But, they have never been completely successful, as no more than one-quarter of the States of the Union have, at any one time, abolished the death penalty. They have had partial success, however, especially in reducing the number of capital crimes, replacing mandatory death sentences with jury discretion, and developing more humane methods of conducting executions.

This is where our historical foray leads. The question now to be faced is whether American society has [408 U.S. 238, 342] reached a point where abolition is not dependent on a successful grass roots movement in particular jurisdictions, but is demanded by the Eighth Amendment. To answer this question, we must first examine whether or not the death penalty is today tantamount to excessive punishment.

V

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.

A. 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?" 84 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 correctly be said that breaking the law is the sine qua non of punishment, or, in other words, that we only [408 U.S. 238, 343] 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. Dulles, 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, 85 and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

In Weems 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." (Emphasis added.) [408 U.S. 238, 344]

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. 86 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 [408 U.S. 238, 345] society's abhorrence of the act. 87 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.

Mr. Justice Story wrote that the Eighth Amendment's limitation on punishment "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." 88

I would reach an opposite conclusion - that only in a free society would men recognize their inherent weaknesses and seek to compensate for them by means of a Constitution.

The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.

B. The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent to crime. 89

While the contrary position has been argued, 90 it is my firm opinion that the death penalty is a more severe sanction than life imprisonment. Admittedly, there are [408 U.S. 238, 346] some persons who would rather die than languish in prison for a lifetime. But, whether or not they should be able to choose death as an alternative is a far different question from that presented here - i. e., whether the State can impose death as a punishment. Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such. 91

It must be kept in mind, then, that the question to be considered is not simply whether capital punishment is[408 U.S. 238, 347] a deterrent, but whether it is a better deterrent than life imprisonment. 92

There is no more complex problem than determining the deterrent efficacy of the death penalty. "Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder

because of the fear of being hanged." 93 This is the nub of the problem and it is exacerbated by the paucity of useful data. The United States is more fortunate than most countries, however, in that it has what are generally considered to be the world's most reliable statistics. 94

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[408 U.S. 238, 348] 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." 95
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." 96 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, 97 and almost 90% of all executions since 1930 have been pursuant to murder convictions. 98

Thorsten Sellin, one of the leading authorities on capital punishment, has urged that if the death penalty [408 U.S. 238, 349] 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." 99 (Footnote omitted.)

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. 100 A second problem is that certain murders undoubtedly are misinterpreted as accidental deaths or suicides, and there [408 U.S. 238, 350] 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, 101 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. In the New England States, for example, there is no correlation between executions 102 and homicide rates. 103 The same is true for Midwestern States, 104and for all others studied. Both the United Nations 105 and Great Britain 106 have acknowledged the validity of Sellin's statistics.

Sellin also concludes that abolition and/or reintroduction of the death penalty had no effect on the homicide rates of the various States involved. 107 This conclusion is borne out by others who have made similar [408 U.S. 238, 351] inquiries 108 and by the experience of other countries. 109 Despite problems with the statistics,110 Sellin's evidence has been relied upon in international studies of capital punishment. 111

Statistics also show that the deterrent effect of capital punishment is no greater in those communities where executions take place than in other communities. 112 In fact, there is some evidence that imposition of capital punishment may actually encourage crime, rather than deter it. 113 And, while police and law enforcement officers [408 U.S. 238, 352] are the strongest advocates of capital punishment, 114 the evidence is overwhelming that police are no safer in communities that retain the sanction than in those that have abolished it. 115

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. 116 Most of the persons sentenced to death are murderers, and murderers tend to be model prisoners. 117 [408 U.S. 238, 353]

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. 118 These claims of specific deterrence are often spurious, 119 however, and may be more than counterbalanced by the tendency of capital punishment to incite certain crimes. 120

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." 121

Despite the fact that abolitionists 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 1793 William Bradford studied the utility of the death penalty in Pennsylvania and found that it probably had no deterrent effect but that more evidence [408 U.S. 238, 354] was needed. 122 Edward Livingston reached a similar conclusion with respect to deterrence in 1833 upon completion of his study for Louisiana. 123 Virtually every study that has since been undertaken has reached the same result. 124

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. 125 [408 U.S. 238, 355]

C. Much of what must be said about the death penalty as a device to prevent recidivism is obvious - if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers

are extremely unlikely to commit other crimes either in prison or upon their release. 126 For the most part, they are first offenders, and when released from prison they are known to become model citizens. 127 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 need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.

D. The three final purposes which may underlie utilization of a capital sanction - encouraging guilty pleas and confessions, eugenics, and reducing state expenditures - may be dealt with quickly. If the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. United States [408 U.S. 238, 356] v. Jackson, 390 U.S. 570 (1968). 128 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 guilty 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. 129 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 all incurables be executed, cf. Skinner v. Oklahoma, 316 U.S. 535 (1942). In addition, the "cruel and unusual" language [408 U.S. 238, 357] 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, as has virtually everyone else who has looked at the problem, 130 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. 131 Condemned men are not productive members of the prison community, although they could be, 132 and executions are expensive. 133 Appeals are often automatic, and courts admittedly spend more time with death cases. 134 [408 U.S. 238, 358]

At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, 135 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. 136 Because there is a formally established policy of not executing insane persons, 137 great sums of money may be spent on detecting and curing mental illness in order to perform the

execution. 138 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. 139 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. 140

E. 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 [408 U.S. 238, 359] 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. 141 [408 U.S. 238, 360]

VI

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 not 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." 142 [408 U.S. 238, 361]

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 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." 143

While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, 144 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. 145 [408 U.S. 238, 362]

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. 146

It has often been noted that American citizens know almost nothing about capital punishment. 147 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 [408 U.S. 238, 363] 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; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

This information would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. This problem arises from the fact that the public's desire for retribution, even though this is a goal that the legislature cannot constitutionally pursue as its sole justification for capital punishment, might influence the citizenry's view of the morality of capital punishment. The solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology. I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional.

But, if this information needs supplementing, I believe that the following facts would serve to convince [408 U.S. 238, 364] 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 . . . ." 148 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. 149 Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 150 455 persons, including 48 whites and 405 Negroes, were executed for rape. 151 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. 152 [408 U.S. 238, 365] Racial or other discriminations should not be surprising. In McGautha v. California, 402 U.S., at 207 , this Court held "that committing to the untrammeled 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. 153 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. 154

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged [408 U.S. 238, 366] members of society. 155 It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern

might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today's situation.

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not fool-proof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death. 156 [408 U.S. 238, 367]

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. 157

No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. 158 We have no way of [408 U.S. 238, 368] 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.

While it is difficult to ascertain with certainty the degree to which the death penalty is discriminatorily imposed or the number of innocent persons sentenced to die, there is one conclusion about the penalty that is universally accepted - i. e., it "tends to distort the course of the criminal law." 159 As Mr. Justice Frankfurter said:

"I am strongly against capital punishment . . . . When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the Judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life." 160 [408 U.S. 238, 369]

The deleterious effects of the death penalty are also felt otherwise than at trial. For example, its very existence "inevitably sabotages a social or institutional program of reformation." 161 In short "[t]he presence of the death penalty as the keystone of our penal system bedevils the administration of criminal justice all the way down the line and is the stumbling block in the path of general reform and of the treatment of crime and criminals." 162

Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. 163 For this reason alone capital punishment cannot stand. [408 U.S. 238, 370]

VII

To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey. The amount of information that we have assembled and sorted is enormous. [408 U.S. 238, 371] Yet, I firmly believe that we have not deviated in the slightest from the principles with which we began.

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

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve "a major milestone in the long road up from barbarism" 164 and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment. 165

I concur in the judgments of the Court.

[Appendices omitted]

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

The Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded. 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 [408 U.S. 238, 466] 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 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 [408 U.S. 238, 467] 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). [408 U.S. 238, 468]

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 [408 U.S. 238, 469] any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. 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[408 U.S. 238, 470] particular office at the expense of others. They sought to provide against success in such efforts by erecting adequate checks and balances in the form of grants of authority to each branch of the government in order to counteract and prevent usurpation on the part of the others.

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

"In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to controul the governed; and in the next place, oblige it to 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 over-reaching 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. [408 U.S. 238, 471]