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The Death Penalty: A Cruel and Unusual Punishment

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To some extent the eighth amendment to the United States Constitution now forbids the taking of life as punishment for crime. A stronger claim is difficult. Abolitionists, on the one hand, may argue that the Supreme Court's recent decision in Furman v. Georgia constitutes an absolute prohibition of capital punishment. Retentionists, on the other hand, may repose hope in the restriction of the holding to the facts of the three cases presented, the ambiguity and dissension in the nine separate opinions, and the imminent likelihood of change in the Court's membership. The judiciary faces the compounded difficulty of interpreting an ambiguous interpretation of a seldom used provision of the Constitution. State executives may feel the need to resolve the question of what to do with the present residents of death rows. Some legislatures have already abolished the death penalty by statute, but others are now forced to reevaluate their penological systems, and, where convinced of the wisdom and efficacy of capital punishment, to devise statutes that will pass constitutional muster. The Court's decision is simple enough to those now facing the threat of the death penalty: they will not be executed. But to those who must deal with the decision in a working legal context it is anything but simple.

The purpose of this Comment is to examine the holding and effects of the death penalty decision. Essential to such an examination is a review in Part I of the historical development of the basis of the decision, the constitutional proscription of cruel and unusual punishments, both as to the clause itself and as to previous interpretations by the United States Supreme Court. Of particular note is the California case examined in Part II, People v. Anderson, in which capital punishment was first declared absolutely to be a cruel or unusual punishment. Since it closely resembles Furman and is cited therein, the California case, unlike other state and lower federal court decisions, is treated specially in this Comment. Part III analyzes the opinions handed down in
In order to arrive at, as nearly as possible, the opinion of the Court, in Part IV various implications of the decision are explored. Finally, Part V sets forth several conclusions to be derived from the whole.

I. THE EVOLUTION OF "CRUEL AND UNUSUAL PUNISHMENTS"

A. The Original Meaning

The first appearance of the phrase "cruel and unusual punishment" was in the English Bill of Rights of 1689. The Bloody Assize, the Popish Plot, and the abdication of James II served as catalysts of the Glorious Revolution of 1688. In 1689, with Parliament in control and William pressing a weak legal claim to the throne, there existed a perfect opportunity for the people to speak out against abridgments of their civil rights. After reciting the circumstances and before acknowledging William as King, "[T]he said Lords Spirituall and Temporall and Commons . . . for the Vindicating and Asserting their auntient Rights and Liberties, Declare . . . That excessive Baile ought not to be required nor excessive Fines imposed nor cruel and unusuall Punishments inflicted."  

One historian suggests that the use of the word "unusual" was mere chance. According to him, a previous version of the Declaration at first used the word "illegal" and later the phrase "illegal and cruel." The same historian also suggests that the clause originally prohibited disproportionate penalties rather than tortures, since tortures were prevalent long after the adoption of the English Bill of Rights. Mr. Justice White, dissenting in Weems v. United States, disagreed. He argued instead that the original prohibition was addressed to the courts only and not to Parliament, and included no theory of proportionality, but attacked only those punishments which were unduly painful, violent, and sanguinary. Whatever view is taken, it is clear that the English Bill of Rights must be interpreted in its seventeenth century context, a context only remotely relevant to problems in the twentieth century on another continent.

B. Migration to the United States

The cruel and unusual punishments clause first appeared in America when, in 1776, the precise language of the English Bill of Rights was used in section

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"An Act declaring the Rights and Liberties of the Subject and Settleing the Succession of the Crowne, 1 W. & M., sess. 2, c. 2 (1688).

"The final phraseology, especially the use of the word 'unusual,' must be laid simply to chance and sloppy draftsmanship." Granucci, supra note 7, at 855. The recitation of grievances prefacing the actual enumeration of the rights referred to the infliction of "illegal and cruel punishments." Id. It is obvious that no adjective used was of particular significance and that the prohibition was directed at a generally recognized class of punishments and not only those punishments which were strictly cruel and/or unusual.

"Used in the context of the Titus Oates incident in which a rural minister was severely punished for perjury in announcing the existence of a plot to assassinate the King of England, the proscription did not apply to the method of punishment at all. "In the context of the Oates' 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, supra note 7, at 859.

217 U.S. 349, 382 (1910)."
9 of Virginia's Declaration of Rights. Whatever problems there may be in interpreting the original meaning of the clause in England, there is little doubt that it was used in this country to prevent the infliction of barbarous tortures as punishment for crime. Unlike the situation existing under the English monarchy which had prompted the enactment of a prohibition against cruel and unusual punishments, there was and is in this republic little likelihood of an abuse of the power to prescribe punishments for crime. Nevertheless, the fear of such abuse was real in 1788.

Like section 9 of the Virginia Constitution, the eighth amendment to the United States Constitution was taken directly from the English Bill of Rights.

See 1 T. Cooley, Constitutional Limitations 694 (8th ed. 1927):

It is certainly difficult to determine precisely what is meant by cruel and unusual punishments. Probably any punishment declared by statute for an offense which was punishable in the same way at the common law could not be regarded as cruel or unusual in the constitutional sense. And probably any new statutory offense may be punished to the extent and in the mode permitted by the common law for offenses of similar nature. But those degrading punishments which in any State had become obsolete before its existing constitution was adopted, we think may well be held forbidden by it as cruel and unusual.

See also 2 T. Calvert, The Constitution and the Courts 520 (1924).

14 "The provision [i.e., the eighth amendment] 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. It was, however, adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken place in England in the arbitrary reigns of some of the Stuarts." 2 J. Story, Commentaries on the Constitution of the United States 650 (5th ed. 1891). During the debates on the federal constitution in New York, Mr. Livingston, referring to the potential in Congress to abuse the power granted to it, stated: "A changeable assembly will be entirely incapable of conducting a system of mischief; they will meet with obstacles and embarrassments on every side." 2 J. Elliot, The Debates in the Several State Conventions on the Adoption of the Federal Constitution 345-46 (2d ed. 1901) [hereinafter cited as Elliot].

Mr. Holmes argued in the Massachusetts debates on the federal constitution:

What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kinds 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.

I do not pretend to say Congress will do this; but, sir, I undertake to say that Congress (according to the powers proposed to be given them by the Constitution) may do it; and if they do not, it will be owing entirely—I repeat it, it will be owing entirely—to the goodness of the men, and not in the least degree owing to the goodness of the Constitution.

2 Elliot 111.

In the Virginia debates, Patrick Henry warned thus:

In the definition of crimes, I trust they [Congress] will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our 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.

3 Elliot 447.

16 The only change was from "ought not to be" to "shall not." See note 1 supra, and text accompanying note 8 supra.
According to Justice McKenna in *Weems*, "[t]he provision received very little debate in Congress."17 Although the need for the clause was doubted, and its effectiveness in dealing with the feared abuse slighted, Congress adopted it almost as a matter of course as an expression of a fundamental right of American citizens, and the states ratified it with little or no discussion.18 The clause was, therefore, not regarded as an important substantive addition to the Constitution.19

Thus, while the clause was not viewed by its American framers to have the importance accorded it in England, at least the intent of the draftsmen was clear. Despite the uncertainty of purpose surrounding the clause in the English Bill of Rights, as part of the eighth amendment to the United States Constitution it prohibited the infliction of tortures or other extraordinarily painful punishments, and very little else. There was, however, one other important difference: while the English Bill of Rights was forever bound to the context of its enactment, the eighth amendment, as part of the vital foundation of a changing society, could be molded to relate to that society.

C. Development in Subsequent Cases

The Supreme Court held that the eighth amendment was not applicable to the states in *Pervear v. Massachusetts.*20 The petitioner had been convicted of the illegal sale of liquor and sentenced to pay a fine of fifty dollars and to be imprisoned for three months at hard labor. Although the Court did not formally reach the merits of petitioner's contention, Chief Justice Fuller did venture to remark that the Court did not view petitioner's sentence as excessive, cruel, or unusual.21

In *Wilkerson v. Utah,*22 however, the Court did apply the eighth amendment within the Utah Territory.23 Petitioner's sentence of death before the firing squad was upheld. In so holding the Court seemed to require that since all punishments are cruel to some extent a punishment must be unnecessarily cruel to violate the eighth amendment.24

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17 217 U.S. at 368. Mr. Smith of South Carolina voiced a brief objection to the indefiniteness of the clause. Moreover, "Mr. Livermore opposed the adoption of the clause saying: '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.'" He questioned who would be the arbiters of cruel and unusual punishments and what standard they would use. Id. at 369.

18 "The cruel and unusual punishments clause was considered constitutional 'boiler-plate.'" Granucci, supra note 7, at 840.

20 72 U.S. (5 Wall.) 475 (1866).

21 Id. at 480.

22 99 U.S. 130 (1879).

23 After an unfavorable decision by the Supreme Court of the Territory of Utah, petitioner sued out a writ of error to the United States Supreme Court as provided by Congress. Act of June 23, 1874, ch. 469, § 3, 18 Stat. 253. Congress had organized the territory on Sept. 9, 1850, and had vested the legislative power and authority over the territory in its Governor and legislature. Act of Sept. 9, 1850, ch. 51, 9 Stat. 458. Exercise of this power could not be inconsistent with the Constitution and laws of the United States. Act of Sept. 9, 1850, ch. 51, § 17, 9 Stat. 458.

24 The Court acknowledged the difficulty in attempting precisely to define this constitutional provision but concluded that "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 136.
In re Kemmler involved an attack on New York's use of electrocution as an unusual punishment. As in Pervear, the Court denied application of the eighth amendment to the states, but also as in Pervear, the Court intimated its approval of the sentence, in this case as being a more humane means of execution than hanging. At the time electrocution was only slightly more novel than electricity itself; but more than novelty was required for unusualness in the constitutional sense. As for constitutional cruelty, Chief Justice Fuller, writing for a unanimous Court, remarked: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the constitution. It implies there is something inhuman and barbarous, something more than the mere extinguishment of life."

In O'Neil v. Vermont petitioner, a citizen of New York, had been tried and convicted in Vermont for the unlawful sale of liquor within its boundaries. Found guilty of 307 separate offenses, he had been sentenced to pay a fine of $6,140 and to be imprisoned for over fifty-four years. The Court again refused to apply the eighth amendment to the states, although this time three Justices dissented. Speaking for the dissenters, Justice Field argued that as an expression of a fundamental right of a United States citizen the eighth amendment applied to the states through the fourteenth amendment to prohibit disproportionate and excessive punishments. The inhibition," said Justice Field, "is directed, not only against punishments of the character mentioned [i.e., tortures such as the rack, the thumbscrew, the iron boot, and stretching of limbs], but against all punishments which by their excessive length or severity are greatly disproportioned to the offense charged. The whole inhibition is against that which is excessive ..."

This expanded interpretation was followed in Weems v. United States, in which the Court for the first time struck down a punishment as being cruel and unusual. Weems had been convicted in the Territory of the Philippines

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20 136 U.S. 436 (1890).
21 As has already been indicated, the eighth amendment derives all of its language but little of its meaning from the English Bill of Rights. See part I, section A supra. Even though use of the word "unusual" in the latter may have been due to chance which carried over in the text, the appearance of the word in the former cannot be so regarded under rules of constitutional construction. It therefore provides a basis for constitutional adjudication.
22 It did, however, recognize as proper petitioner's argument based on the fourteenth amendment. Petitioner had not argued that the eighth amendment applied to the states, even through the fourteenth. He argued only that imposition of a cruel and unusual punishment by a state constituted an abridgment of the privileges and immunities clause and the due process clause. The Court's adjudication of the merits of this argument in no way amounts to an assertion that the eighth amendment applies even indirectly to the states, despite the argument's close resemblance to the "ordered liberties" approach later adopted by the Court. Only one year after Kemmler the Court reiterated that the first ten amendments did not apply to the states and distinguished this claim from the fourteenth amendment argument. McElvaine v. Brush, 142 U.S. 155 (1891).
23 136 U.S. at 449.
24 Id. at 447.
25 144 U.S. 323 (1892).
26 Id. at 363.
27 Id. at 339-40. The minority view seems to have been followed in Howard v. Fleming, 191 U.S. 126 (1903), even though in that case petitioner's ten-year sentence for conspiracy to defraud was affirmed.
29 Though the Court actually applied the prohibition found in the Philippine Bill of
under a statute punishing the falsification of official documents by a public official by a fine and *cadena temporal*. The latter punishment, of Spanish origin, consisted of imprisonment from not less than twelve years and one day to not more than twenty years at hard and painful labor, the prisoner always to wear a chain at his ankle hanging from his waist. This imprisonment was accompanied by the loss of certain civil rights, the perpetual disqualification from the enjoyment of certain privileges, and the perpetual subjection to surveillance by the authorities with certain affirmative duties imposed.\(^8\) Weems' actual sentence was 4,000 pesetas\(^9\) and fifteen years imprisonment, both in excess of the minimum required by statute. To deserve this punishment with all its accoutrements Weems had falsified two documents relating to expenditures and pocketed 612 pesos.\(^7\) The Court held this punishment to be cruelly excessive and unusual in comparison with punishments authorized in the United States for crimes seemingly of greater magnitude than the falsification here involved.

Justice McKenna wrote of the eighth amendment provision itself:

> Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be.\(^3\)

From this view of the eighth amendment Justices White and Holmes dissented, reciting the original meaning of "cruel and unusual punishments" and recommending adherence to it.\(^9\) *Weems* made clear, however, that the dissenters represented a waning approach to the eighth amendment, one that was giving ground to the new tests of unnecessary cruelty, disproportionality, and excessiveness.

When the Court considered an eighth amendment question thirty-seven years later\(^40\) in *Louisiana ex rel. Francis v. Resweber*,\(^41\) it balked at expanding Rights, the result would have been the same under the eighth amendment to the United States Constitution since "the provision of the Philippine bill of rights, prohibiting the infliction of cruel and unusual punishment, was taken from the Constitution of the United States and must have the same meaning." *Id.* at 367.

\(^5\) The convict under this sentence lost all rights of parental and marital authority, along with the right to administer property and to dispose of it *inter vivos*. He was barred from holding office, voting, acquiring honors, collecting retirement pay, and enjoying in general the benefits of citizenship. His perpetual surveillance resembled the American parole system save that it was to last until he died. He was obligated to fix his domicile and notify the authorities thereof, to secure employment, and to submit to inspection by the authorities at any time. *Id.* at 366.

\(^8\) About $772 in 1950.

\(^9\) About $306 in 1950.

\(^{21}\) About $217 U.S. at 373.

\(^{29}\) *Id.* at 409-10.

\(^{30}\) *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), are passed over. In the former Justice Holmes, then in the majority, wrote the Court's opinion upholding petitioner's concurrent sentences for mail fraud totalling thirty-five years imprisonment and a fine of $7,000. Badders' argument on the eighth amendment was summarily rejected. In
the meaning of "cruel and unusual punishments" to include highly speculative psychological pain. Francis had been sent to the electric chair for murder, but due to a mechanical malfunction the attempted execution had failed. When Louisiana proposed to try again, Francis objected on the ground that the second attempt would be cruel and unusual in violation of the Eighth Amendment. The majority held that were the amendment applicable to the states—a question expressly reserved—a second attempt would not involve such psychological strain as to render the punishment unconstitutionally cruel.4

If doubt remained as to the expansion of the Eighth Amendment beyond its originally intended meaning, it was resolved in Trop v. Dulles.44 While stationed in French Morocco during World War II, petitioner had escaped for two days from the stockade where he had been confined for breach of discipline. Captured and court-martialed for wartime desertion, he was sentenced to three years at hard labor, forfeiture of all pay and allowances, and a dishonorable discharge. Some years later he learned that in addition to this punishment he had lost his citizenship.45 In petitioning the Supreme Court to declare his citizenship, he urged that expatriation as a punishment contravened the Eighth Amendment. Chief Justice Warren, joined by three other Justices,46 wrote: "The basic concept underlying the Eighth Amendment is nothing less than the dignity of man."47 Standing upon this foundation as a unitary prohibition, "The [Eighth] Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."48 Expatriation involves no physical pain. Instead it destroys the individual's political existence so that "the expatriate has lost the right to have rights."49

Chief Justice Warren's opinion made clear that capital punishment, though not in issue here, did not offend the new "evolving standards of decency" test.50 Seeing a paradox in this result, Justice Frankfurter was forced to ask in

the latter case dissenting Justice Brandeis suggested that the revocation of petitioner newspaper's second-class mail permit and the imposition of a fine of $150 each day subversive material was printed, all in accordance with the provisions of the Espionage Act, was cruel and unusual punishment. 255 U.S. at 435 (dissenting opinion). The majority made no reference at all to Brandeis' contention. Neither case represents a significant development in the interpretation of the Eighth Amendment.

42 Id. at 462.
43 The four dissenters would have remanded for additional facts before ruling on the merits of the case. Id. at 472. Apparently, the uncertainty critical to the dissenters was whether a current had passed through Francis. If so, the punishment lost its humane aspects and became a shocking torture.
45 Section 401(g) of the Nationality Act of 1940, 54 Stat. 1168, as amended, 8 U.S.C. § 1481(a)(8) (1970), prescribed the loss of nationality for one convicted of wartime desertion and dishonorably discharged.
46 There was no majority on the Eighth Amendment issue. Justice Brennan joined the Chief Justice and Justices Black, Douglas, and Whittaker in striking down expatriation, but on the grounds that Congress had overstepped its constitutional authority in requiring it in this case. 356 U.S. at 114; see note 56 infra. The four dissenters, like the Chief Justice, used the Weems approach, but they arrived at the opposite conclusion. 356 U.S. at 126-27.
47 Id. at 100.
48 Id. at 101.
49 Id. at 102.
50 The Chief Justice wrote, "At the outset, let us put to one side the death penalty as an index of the constitutional limit on punishment. Whatever the arguments may be against capital punishment—and they are forceful—the death penalty has been employed through-
his dissent: "Is constitutional dialectic so empty of reason that it can be seriously urged that loss of citizenship is a fate worse than death?" But even if expatriation is not worse than death, neither is the *cadena temporal* struck down in *Weems*. For the Chief Justice, the standard was neither absolute cruelty—necessarily all punishments have an element of cruelty—nor cruelty as understood by the eighth amendment’s framers. The standard derived from the amendment as a whole was, rather, that advocated by the O’Neil dissenters: the disproportionality and excessiveness of the punishment relative to the crime in the context of contemporary society. Treason may thus be punished by death, but the “crime” of having a cold may not be punished by even one day’s imprisonment.

In relying on *Weems*, the *Trop* test almost completely ignores the specific words “cruel and unusual punishment.” Cruelty should be easily relatable to society’s mores, but the Chief Justice made no attempt to do so. Unusualness, on the other hand, has no apparent relation to standards of decency, and the Chief Justice found evidence of it in the fact that expatriation was a novel punishment in the United States, an argument the Court had refused to admit with regard to electrocution in *Kemmler*. Finally, as to punishment, Frankfurter argued convincingly for the dissent, expressing the opinion of a majority of the Court, that expatriation as used in this case was merely an exercise of Congress’ war power and not a punishment for crime within the meaning of the eighth amendment. In refusing to acknowledge these problems and, instead, relying on the overall thrust of the clause rather than the specific words, the “evolving standards of decency” test represents an unprecedented departure from traditional approaches to and interpretations of the eighth amendment.

The particular nature of the crime rather than the punishment was emphasized in *Robinson v. California*. Under the “light of contemporary human knowledge,” a standard resembling the *Trop* test, petitioner’s sentence to ninety days imprisonment for his conviction of addiction to narcotic drugs was seen to be violative of the eighth and fourteenth amendments. The majority

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*id.* at 125.


*The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static.* 356 U.S. at 100-01.

*Id.* at 101 n.32.

*See* note 28 *supra*, and accompanying text.

Justice Brennan in his concurring opinion refused to treat petitioner’s loss of citizenship as a punishment but found it instead to be “beyond the power of Congress to enact.” 356 U.S. at 114. He sided with the dissenters on this issue but joined the majority as to disposition of the case. *See* note 46 *supra*.

*Id.* at 124-25.

*Weems* provides no support for this position. Concededly the *Weems* Court looked beyond the original meaning of “cruel and unusual punishments.” But it did so with an eye toward relating the broadened interpretation to the actual text. Of the punishment it said: “It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character.” 217 U.S. at 377. *See also* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784-91 (1970).


*Id.* at 666.

Significantly, the Court for the first time made the eighth amendment applicable to
seemed to say that if the behavior in question was not properly classified as criminal then no punishment could be constitutionally inflicted, regardless of the nature of that punishment. This interpretation of Robinson was confirmed by the Court six years later in Powell v. Texas. The Robinson Court had used the eighth amendment to open the door to the substantive criminal law, but the Powell Court, after distinguishing the facts in Robinson, upheld a fine of $50 for public drunkenness, thus leaving the door ajar but carefully guarded.

The Supreme Court did not apply the eighth amendment again until, in Furman, it applied it for the first time to capital punishment.

II. People v. Anderson

A. The Trial and First Appeal

On the morning of April 18, 1965, Robert Page Anderson walked into a pawnshop in San Diego, California, and asked to see a rifle. Although he had less than two dollars cash in his pocket and a ring worth about ten dollars, he agreed to purchase the rifle and a box of ammunition. While Swienty, one of the two clerks, was totalling the bill, Anderson grabbed the ammunition and quickly loaded the rifle. When Richards, the other salesman, told Anderson he could have the rifle, Anderson turned and fired point blank at him, killing him. Swienty quickly ran upstairs, and for the next several hours he hid under a bed while Anderson fought a vicious gun battle with the police. Anderson killed no one else before the police apprehended him.

A jury found Anderson guilty of first degree murder, attempted murder, and first degree robbery. He was sentenced to die in California's gas chamber. On automatic appeal to the California Supreme Court Anderson unsuccessfully argued that the trial court had erred in failing to instruct the jury on the penalty phase that they could be influenced by pity or sympathy. The court unanimously affirmed the sentence.

B. The Second Appeal

The court faced the nature of Anderson's punishment in his second appearance two years later, although the actual decision of the case turned on the

the states through the fourteenth amendment. By this time, however, such a decision came as no great surprise. The groundwork for incorporation of the Bill of Rights in the fourteenth amendment had been laid in varying degrees in Palko v. Connecticut, 302 U.S. 319 (1937), and Adamson v. California, 332 U.S. 46 (1947).

62 CAL. PENAL CODE § 1239(b) (West 1970).

63 CAL. PENAL CODE § 190, 190.1 (West 1970).

64 In the case of first degree murder the punishment may, in the discretion of the trial court or jury, be death or life imprisonment; the sentence is to be determined at a separate proceeding after the defendant has been found guilty. CAL. PENAL CODE §§ 190, 190.1 (West 1970).

65 People v. Anderson, 64 Cal. 2d 633, 414 P.2d 366, 51 Cal. Rptr. 238 (1966). On the guilt issue the jury was instructed not to be moved by pity or sympathy. On the penalty issue the court simply instructed the jury that they were governed by its previous instructions only to the extent that they were applicable to the penalty phase of the trial. The supreme court held that the latter instructions did not effectively prohibit the jury from being properly influenced by any pity or sympathy.

66 Justice Peters dissented from the denial of rehearing. Id. at 639, 414 P.2d at 372, 51 Cal. Rptr. at 244.

United States Supreme Court's then recent ruling in *Witherspoon v. Illinois*. Anderson claimed that the death penalty was unconstitutional per se. He argued that punishment, especially when it deprives a person of the fundamental right to life, must be closely related to a compelling state interest, and that the state could show no such interest. Amici curiae argued further that the penalty caused tremendous psychological pain, indeed that it often drove men on death row insane, so as to constitute cruel and unusual punishment. After applying the provisions of both the California and United States constitutions, four of the seven justices came to the conclusion that the death penalty was not per se unconstitutional. They pointed to the continued wide acceptance of capital punishment and specifically approved the use of California's gas chamber. They rejected the argument that excessive psychological pain was involved, pointing to the failure of a similar contention in a previous case. Finally, they refused to enter the area of penology, leaving to the legislature the question of whether the death penalty should ever be imposed.

But Anderson also argued that the death penalty as applied to him was unconstitutional. The basis of this argument was that the determination of death upon the sentencing court's or jury's exercise of absolute and standardless discretion was arbitrary and blind to extenuating circumstances, thus placing the penalty so inflicted within the category of cruel and unusual punishments. The same four justices disagreed, arguing that if the legislature had the authority to prescribe the punishment at all it had the authority to vest discretionary power of determination in the trier of fact. Chief Justice Traynor and Justices Tobriner and Peters dissented on the ground that the potential abuse of discretion by the trier of fact rendered the California procedure unconstitutional. They carefully avoided the issue of the constitutionality of the death penalty per se.

### C. The Third Appeal: The Death Penalty Decision

Upon remand for resentencing, Anderson again received the death penalty. Although the constitutionality of capital punishment both per se and as ap-

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68 *391 U.S. 510 (1968).* *Witherspoon* held "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." *Id.* at 522.

69 *CAL. CONST.* art. 1, § 6 contains a prohibition similar to that in the eighth amendment to the United States Constitution: "Excessive bail shall not be required, nor excessive fines imposed; nor shall cruel or unusual punishments be inflicted."

70 Justice Burke, writing on behalf of Justices Mosk and Sullivan, discussed the issue at length. Justice McComb concurred in a separate opinion. Justice Mosk was extremely reluctant on the basis of personal beliefs to join in upholding the death penalty but concluded in a separate opinion, "As a judge, I am bound to the law as I find it to be and not as I might fervently wish it to be." 69 Cal. 2d at 628, 447 P.2d at 132, 73 Cal. Rptr. at 36.


72 *CAL. PENAL CODE* § 190.1 (West 1970) states, "The determination of the penalty of life imprisonment or death shall be in the discretion of the court or jury trying the issue of fact on the evidence presented . . . ." No guidelines for or restrictions on the exercise of discretion are established in the statute.

73 *69 Cal. 2d at 628, 447 P.2d at 132, 73 Cal. Rptr. at 36*. In addition to the potential evil of abuse of power, these three justices pointed out that the absence of standards for determining the sentence made it impossible for the defense to prepare its evidence or the appellate court to determine what evidence the sentenced had used.
plied to him had previously been determined, Anderson was entitled to raise the issue once again on his second automatic appeal to the California Supreme Court." Noting that *Aikens v. California* was pending decision before the United States Supreme Court" and apparently not wanting to pre-empt the High Court, the California Supreme Court struck down the death penalty solely on the basis of the state's constitution and without reference to the federal constitution."

The opinion of the near-unanimous court began by emphasizing the California constitution's disjunctive prohibition of cruel or unusual punishments." The use of "or" rather than "and," it was claimed, was specifically intended by the framers and not accidental." As evidence of this claim the court pointed to the fact that a majority of the constitutions used as models by the California framers in their deliberations also employed the disjunctive."

Fortunately, this distinction was not determinative of the question for the court. In the end the court relied on judicial rules of construction of constitutional provisions: "We may not presume, as respondent would have us do, that the framers of the California Constitution chose the disjunctive form 'haphazardly,' nor may we assume that they intended that it be accorded any but its ordinary meaning." Regardless of the history of the provision, then, the language of the provision was clear, and on that the court placed ultimate reliance. Since the *Anderson* court found that all previous cases involving the death penalty either failed to discern the either-or meaning of article I, section 6, or were based primarily on the United States Constitution's eighth amendment, it did not feel bound by their decisions. Neither did the court recognize a ratification of the death penalty in incidental references in the constitution or statutory prescriptions by the legislature. The stage was thus cleared for presentation of the question as a matter of first impression.

In view of the foregoing it is clear that the only showing necessary to overturn capital punishment was that of unconstitutional cruelty. The court accepted the *Trop* test of "evolving standards of decency that mark the progress..."
of a maturing society.\textsuperscript{81} It rejected popular polls, statutes, and jury decisions as indicia of the public acceptance of the death penalty, and instead emphasized the dehumanizing "1000 days" wait between sentencing and execution.\textsuperscript{83} The court argued that this wait necessarily involved a brutalizing psychological torture, much worse than any physical pain, which abjures the basic dignity of man. The effect of this torture is compounded by the fact that it is unnecessary to any penological policy the state might have.\textsuperscript{84} On the basis of these considerations the court found the death penalty to be unconstitutionally cruel.

Although this showing of cruelty was alone sufficient to strike down capital punishment, the court proceeded to discuss the unusualness of the punishment. Finding the penalty to be little used both nationally and internationally, the court held it to be "an unusual punishment among civilized nations."\textsuperscript{84} It is difficult to imagine how a punishment that has enjoyed widespread acceptance at all times throughout history could, in the space of fifty or sixty years, become unusual in any ordinary sense of the word and still be in common use in over half the countries of the world. Moreover, a head count of nations would seem to be hardly a more reliable indication of the acceptance of capital punishment than the popular polls and statutory affirmations rejected by the court, especially in view of the uncertainty of evidence with regard to international abolition.\textsuperscript{85} The court, however, accepted the evidence offered without question as prima facie proof of the unconstitutional unusualness of capital punishment.

This all seems even stranger when it is remembered that no showing of unusualness was necessary once cruelty had been established. The court's unwillingness to repose confidence in any one argument and its reliance instead on the additive result of several indicates the legal shakiness of them all. This is especially true in view of the fact that only two years before three of the six justices comprising the majority here upheld the same punishment in the same case.\textsuperscript{86} But regardless of the obscurity of the reasoning, the decision itself

\textsuperscript{81} Id. at 648, 493 P.2d at 893, 100 Cal. Rptr. at 165.
\textsuperscript{82} Id. at 648-50, 493 P.2d at 893-95, 100 Cal. Rptr. at 165-67.
\textsuperscript{83} The four penological objectives recognized by the court are retribution, rehabilitation, isolation, and deterrence. The use of punishment solely for retribution was barred in California in In re Estrada, 63 Cal. 2d 740, 408 P.2d 948, 48 Cal. Rptr. 172 (1965). Execution is in no way rehabilitative, nor does the grave isolate much more effectively than a prison cell. The court found evidence of the deterrent effect of capital punishment lacking. 6 Cal. 3d at 651-53, 493 P.2d at 895-97, 100 Cal. Rptr. at 167-69.
\textsuperscript{84} 6 Cal. 3d at 656, 493 P.2d at 899, 100 Cal. Rptr. at 171.
\textsuperscript{85} The court cited several sources as evidence that forty nations have abolished capital punishment. Id. at 655 n.44, 493 P.2d at 898 n.44, 100 Cal. Rptr. at 170 n.44. Less than two months following the decision the New York Times reported a United Nations survey which indicated, on the basis of replies from sixty-nine member nations, that only nineteen nations have abolished de jure capital punishment either totally or except in exceptional circumstances. In addition, two nations which did not respond and two non-member nations were added to the list. Three others were reported to have abolished de facto the death penalty. The paper also stated that the study indicated that only four governments had joined the ranks of the abolitionists in the last twenty-five years. N.Y. Times, Apr. 8, 1972, at 8, col. 1. While this latter survey is probably not as reliable as the one on which the court relied, the discrepancy between twenty-six nations and forty nations can hardly be attributed solely to this probability or otherwise ignored. The fact of abolition in other countries is difficult to ascertain precisely, and once ascertained to any reliable degree, it would seem to be of questionable relevance to the issue as presented within any jurisdiction in the United States.

\textsuperscript{86} See part II, section B supra.
was most clear, any suggestion of judicial fiat notwithstanding: capital punishment was unconstitutional in the State of California. 87

III. FURMAN V. GEORGIA

The United States Supreme Court consolidated four cases for oral argument: Aikens v. California, Furman v. Georgia, Jackson v. Georgia, and Branch v. Texas. Aikens was later disposed of on other grounds. 88 The cases presented to the Court three men traditionally deserving of the death penalty. 89 The punishment itself was on trial.

87 On appeal by the state of California, the United States Supreme Court denied certiorari. California v. Anderson, 406 U.S. 958 (1972). The Supreme Court later held the finality of Anderson to have rendered Aikens v. California moot. 406 U.S. 813 (1972). While the state and federal judiciary were thus in agreement as to the status of capital punishment in California, the state's Governor refused to accept the decision as final. N.Y. Times, Mar. 1, 1972, at 46, col. 7. Although Anderson resulted in the release of California's condemned men from the threat of death, the ultimate issue of whether and in what cases the legislature could prescribe the death penalty for crimes was put to the people in the form of a referendum on an amendment to California's constitution in the general election on Nov. 7, 1972. N.Y. Times, June 26, 1972, at 37, col. 3. The people favored the amendment more than two-to-one, thus reinstating the death penalty as far as the California constitution is concerned. N.Y. Times, Nov. 8, 1972, at 28, col. 1. The amendment states:

All statutes of this state in effect on February 17, 1972, requiring, authorizing, imposing, or relating to the death penalty are in full force and effect, subject to legislative amendment or repeal by statute, initiative or referendum. The death penalty provided for under those statutes shall not be deemed to be, or to constitute, the infliction of cruel or unusual punishments within the meaning of Article 1, Section 6, nor shall such punishment for such offenses be deemed to contravene any other provision of this Constitution. N.Y. Times, Mar. 19, 1972, at 63, col. 1. Subsequent to the placing of this proposition on the state ballot and prior to its passage, the California Supreme Court held that if passed it would have no retroactive effect, i.e., it would not subject to the death penalty any persons found guilty of a crime committed prior to the November passage of the amendment. White v. Brown, 468 F.2d 301 (9th Cir. 1972).


89 While breaking into a house in Savannah, Georgia, twenty-six-year-old Negro William Henry Furman was surprised by the owner of the house, a twenty-nine-year-old Caucasian father of five children. Furman quickly retreated into the early-morning darkness, slamming the door behind him. As he fled, he turned and fired his .22 caliber pistol at the closed door. The bullet pierced the door and struck the owner of the house in the chest, killing him. Brief for Petitioner at 2-6, Furman v. Georgia, 408 U.S. 238 (1972). Tried for murder, Furman received his death sentence from a jury which deliberated only one and one-half hours. Under Georgia law the penalty for murder is death unless the jury shall recommend and the judge, in his discretion, shall sentence to life imprisonment. Act of 1878-1879, [1878-1879] Ga. Acts 60, as amended, GA. CODE ANN. § 26-1101 (1972). This provision was effective prior to July 1, 1969, and thus applied to Furman.

Ludious Jackson, Jr., a twenty-one-year-old Negro, accosted a physician's Caucasian wife in her home as she tended her baby. Holding a pair of scissors to her throat, he threatened her with physical harm if she should fail to give him all the money she had in the house. During the search, while he was momentarily distracted, she grabbed the scissors and attempted to stab him. In the ensuing struggle Jackson recovered the scissors and pinned his would-be assailant to the floor, promising death if she struggled further. He thereupon raped her. The arrival of the maid frightened Jackson into escaping through an open window. Throughout the entire ordeal the victim suffered neither serious physical injuries nor serious or long-term psychological harm. Brief for Petitioner at 2-8, Jackson v. Georgia, 408 U.S. 238 (1972). A Georgia jury convicted Jackson of rape and sentenced him to die in the electric chair. The jury might have recommended mercy, in which case the sentence would have been life imprisonment; or it might have set the sentence at life imprisonment for not less than one nor more than twenty years. Act of 1866, [1866] Ga. Acts 151, as amended, GA. CODE ANN. § 26-2001 (1972). This provision was effective prior to July 1, 1969, and thus applied to Jackson.

Twenty-year-old Elmer Branch, a Negro, forced his way into a rural home one night, awakened its occupant, a sixty-five-year-old Caucasian widow, and raped her. He demanded money but received little; yet at no time prior to his departure did he threaten her with
A. The Death Penalty Per Se

In a per curiam decision, the Court ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth amendments." The holding of the Court was thus strictly limited to the circumstances of the cases presented. Not so uniformly limited, however, were the separate opinions of the five Justices who concurred in the Court's judgments. Justice Brennan declared: "The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as a punishment for crimes." With this statement Justice Marshall agreed. Though expressive of a small minority's view, their arguments against the death penalty per se deserve review.

As has already been noted, the question of the meaning to be accorded the eighth amendment is not easily resolved. The English and American history of the language, "cruel and unusual punishments," is uncertain at best. Likewise, the value of previous Supreme Court decisions as precedents may be called into question. Unwilling to deal with these problems, Justice Brennan maneuvered around them. He relied on neither history nor precedent for authority, but instead found in the Trop "evolving standards of decency" test a grant of carte blanche to constitutional arbiters to interpret and apply the eighth amendment. Then, exercising his free hand, he stated the fundamental principle underlying the eighth amendment proscription: "[A] punishment must not be so severe as to be degrading to the dignity of human beings." This degradation of human dignity would result if to any extent the punishment was either arbitrarily inflicted by the state, morally rejected by society, or judicially declared excessive or unnecessary in light of modern penology. For Justice Brennan, the infrequent infliction of the death penalty made "the conclusion . . . virtually inescapable that it is being inflicted arbitrarily." This infrequent infliction, together with the increasing public debate over the morality of the punishment, implied societal rejection. Modern penological goals made capital punishment unnecessary as a penal sanction and no longer more effective than life imprisonment. Ultimately, inherent in the very nature of capital punishment was the basic denial of the executed person's humanity. The premises considered, Justice Brennan's conclusion was inescapable: "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 physical harm, nor did he ever seriously injure her. Brief for Petitioner at 3-5, Branch v. Texas, 408 U.S. 238 (1972). A jury found him guilty of rape under Texas law and sentenced him to death. Death is not a mandatory punishment for rape in Texas. TEX. PEN. CODE ANN. art. 1189 (1961).

Petitioner's counsel in Aikens described Aikens' murders, crimes as heinous as those in the companion cases above, as "unmitigated atrocities." Brief for Petitioner at 3, Aikens v. California, 406 U.S. 813 (1972). Without detracting from the abhorrent nature of the other crimes described above, the characterization may perhaps be a bit strong when applied to them. At least the happenstance of Furman's murder and the lack of serious injury to the rape victims serve partially to mitigate the atrocities.

99 408 U.S. 238, 239-40 (1972). The original grant of certiorari had been limited to this question. 403 U.S. 952 (1971).
94 408 U.S. at 305.
92 see part I supra.
93 408 U.S. at 271.
94 408 U.S. at 293.
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.'

Justice Marshall shared many of Justice Brennan's objections to the death penalty but emphasized historical derivation and case law development over the more esoteric concepts of decency, dignity, and humanity. After a thorough review of history and precedent, Justice Marshall determined the meaning of "cruel" to be "torturous" and the meaning of "unusual" to be "out of the ordinary." Cruelty, however, as the case law points out, is a relative term and involves a societal judgment as to the amount of pain inflicted. If that pain level is excessive or unnecessary, then the punishment is cruel, regardless of whether another age would have agreed. To Justice Marshall it was "immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or unnecessary, or because it is abhorrent to currently existing moral values." After reviewing the possible reasons for the use of capital punishment, Justice Marshall concluded that the infliction of the punishment violated the eighth amendment. Only then did he analyze the sort of moral considerations that concerned Justice Brennan, concluding: "Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand."

Justices Brennan and Marshall should perhaps be lauded for refusing to hide behind legalistic euphemisms skirting the real issue and instead addressing themselves to the moral problem presented, the merits of death as a punishment for crime. Unfortunately, moral considerations often have little to do with the Constitution as a body of law and commend themselves, as the dissenters urged, to legislatures rather than courts. Justice Marshall disagreed: "The point has now been reached at which deference to the legislature is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution." The effect of this serious invasion of legislative province is consequential in its own right, in addition to the direct blow struck at capital punishment.

B. The Death Penalty Imposed

While also concurring in the judgments of the Court, Justices Douglas, Stewart, and White refused to venture so far beyond the traditional boundaries of judicial review as their brothers, Brennan and Marshall. Almost totally

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88 Id. at 286.
89 Id. at 303-31.
90 Id. at 332-33.
91 Id. at 369.
92 See part III, section C infra.
93 408 U.S. at 359.
95 Justice Douglas wrote: "Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach." 408 U.S. at 257. Justice Stewart found it "unnecessary to reach the ultimate question" of whether the death penalty is ever constitutional. Id. at 306. Justice White warned, "I do not at all intimate that the death penalty is un-
ignoring the moral aspects of the question and the various ramifications of
the word "cruel," they based their arguments on the unusual nature of the
death penalty as it is presently administered. The penalty itself with its long
history was unquestionably usual in the sense that it has always been an ordi-
nary punishment for crime. What bothered Douglas, Stewart, and White was
that, in White's words, "the death penalty is exacted with great infrequency
even for the most atrocious crimes and . . . 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 infrequency of its imposition made the penalty consti-
tutionally unusual.

For Douglas, the problem was not that there was no basis at all, but rather
that the basis was discriminatory in violation of equal protection concepts. If
so, then "[i]t 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 pro-
cedure that gives room for the play of such prejudices."

Much ado had been made by petitioners Jackson and Branch over statistics showing racial discrim-
ation in the imposition of the death penalty by judges and juries who might
have imposed lesser sentences. The emphasized statistics showed a clear trend
in rape cases for the death penalty to be imposed more frequently on black
rapists of white women than on white rapists. On the basis of this evidence
Justice Douglas found statutes to which the statistics applied to be unconstitutional: "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." The evidence did
not prove, and Justice Douglas did not claim, that the statutes had actually
conceived discrimination. The charged pregnancy may have been a bit pre-
mature; the statistics were not without their weaknesses. Evidence of discrim-
ination in murder cases was even weaker. In any case, no actual discrimination
against any of the three petitioners was claimed or proved, and no evidence of
such was presented in the record or cited by Justice Douglas.

It is not hard to

constitutioonal _per se_ or that there is no system of capital punishment that would comport
with the Eighth Amendment." _Id._ at 310-11.

100 _Id._ at 313.
101 _Id._ at 242.
102 _Id._ at 313.
103 _Id._ at 242.
104 _Id._ at 242.
105 _Id._ at 242.
106 _Id._ at 242.
107 _Id._ at 242.
108 _Id._ at 242.
109 _Id._ at 242.
110 _Id._ at 242.
111 _Id._ at 242.
112 _Id._ at 242.
113 _Id._ at 242.
114 _Id._ at 242.
115 _Id._ at 242.
116 _Id._ at 242.
117 _Id._ at 242.
118 _Id._ at 242.
119 _Id._ at 242.
120 _Id._ at 242.
121 _Id._ at 242.
122 _Id._ at 242.
123 _Id._ at 242.
124 _Id._ at 242.
125 _Id._ at 242.
126 _Id._ at 242.
127 _Id._ at 242.
128 _Id._ at 242.
129 _Id._ at 242.
130 _Id._ at 242.
131 _Id._ at 242.
132 _Id._ at 242.
133 _Id._ at 242.
134 _Id._ at 242.
135 _Id._ at 242.
136 _Id._ at 242.
137 _Id._ at 242.
138 _Id._ at 242.
139 _Id._ at 242.
140 _Id._ at 242.
141 _Id._ at 242.
142 _Id._ at 242.
143 _Id._ at 242.
144 _Id._ at 242.
145 _Id._ at 242.
146 _Id._ at 242.
147 _Id._ at 242.
148 _Id._ at 242.
149 _Id._ at 242.
150 _Id._ at 242.
believe that there is some obvious truth in the statistics, but it is a giant step from such belief to any further claims of their universal veracity. The application of this evidence to Furman especially, but also to Jackson and Branch, goes even another step further.

Justice Douglas’ claimed discrimination aside, the total lack of any discernible, rational standards for the infrequent, discretionary imposition of the death penalty still remained troublesome to Justices White and Stewart. Statutes of the federal government and forty states prescribed death for many different crimes. Yet in the ten years 1961-1970 only 1,057 death sentences were imposed and only 135 were carried out. Justices White and Stewart argued that the constitutional meaning of “unusual” comprehended this established irregularity and infrequency, and, thus, the statutes from which these ills arose violated the eighth amendment. Among such statutes were those of Georgia and Texas under which petitioners had been sentenced.

This conclusion, however, seems fundamentally at odds with the Court’s decision only one year before in *McGautha v. California,* in which Justices White and Stewart had concurred. In that case McGautha had been convicted of murder and sentenced to death. California law vested in the sentencing jury standardless discretion for imposing the death penalty in murder cases. In so doing the legislature no longer had to prescribe sentences to be applied across the board for a given crime regardless of any mitigating considerations presented in a particular case. Instead, the law left the choice between life imprisonment and death to the jury, subject only to the condition that their decision be unanimous. What had thus been lauded as a great advance in penology was attacked by McGautha as a deprivation of life without due process of law. Faced with the possible alternative of a mandatory death pen-

show intent or purpose in the given situation. See Florida *ex rel.* Thomas v. Culver, 253 F.2d 507, 508 (5th Cir. 1958); Rudolph v. State, 275 Ala. 115, 152 So. 2d 662, cert. denied, 375 U.S. 889 (1965); Brickhouse v. Commonwealth, 208 Va. 533, 159 S.E.2d 611 (1968). But a recent decision by the Fifth Circuit on banc declared proof of intent unnecessary and instead relied on statistical evidence to raise the suspect classification question. Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972). See also Note, *Equal Protection and Municipal Services,* 25 Sw. L. J. 758 (1971). Even under the more relaxed requirements of Hawkins, the acceptance in *Furman* of particularly weak and unconvincing statistics as demonstrative of a suspect classification may stretch the concepts of numerical and proportional equality beyond their limits. See *Developments in the Law—Equal Protection,* 82 Harv. L. Rev. 1065, 1165-66 (1969). Justice Douglas’ ready acceptance of the statistical evidence in *Furman* as proof of an eighth amendment violation would hardly seem to comport with the cautious recognition of such evidence elsewhere under the fourteenth amendment.

Aside from evidentiary difficulties, the problem of state action remains. In *Furman* the state action is obviously jury sentencing. An attack on such action involves a slap at the entire jury system. As the Chief Justice pointed out, "(T)o assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death, is to cast grave doubt on the basic integrity of our jury system." 408 U.S. at 388-89 (Burger, C.J., dissenting). Justice Douglas’ treatment of the eighth amendment would seem to extend the arm of the fourteenth amendment equal protection beyond the jury sentence to reach the substantive considerations of the jury always before held inviolate, and this on the basis of weak statistical evidence unrelated to the particular cases before the court. See *Andres v. United States,* 333 U.S. 740 (1948); *Winston v. United States,* 172 U.S. 303, 312-13 (1899).

See Department of Justice, National Prisoner Statistics, No. 46, Capital Punishment 1930-1970, at 50. At the time of the decision the California Supreme Court had abolished the death penalty in that state. See Part III infra. But see note 87 supra.

Department of Justice, National Prisoner Statistics, No. 40, at 9.
alty for a broad and inadequately defined crime, the Court expressed its confidence in the jury system. "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision . . . ." Justices Douglas, Brennan, and Marshall dissented.

The Furman Court varied in their views of McGautha. Justice Marshall totally ignored it; Justice White alluded to it only indirectly and then not by name; Justice Stewart distinguished it as not having presented an eighth amendment question. For Justices Douglas and Brennan and the four dissenters McGautha was a central issue. It is submitted that the real effect of Furman on McGautha depends on a fine distinction not clearly drawn by any of the Justices. The judgment in McGautha upheld discretionary sentencing only and did not address the question of capital punishment. No relation between the two issues is immediately apparent. If, however, the death penalty is cruel and unusual because it is imposed arbitrarily, then the issues are the same, and McGautha would seem to be overruled. Furman would strike down an arbitrary imposition of the death penalty as being violative of the eighth amendment, contrary to the decision in McGautha based on the fourteenth amendment. On the other hand, if the death penalty is cruel and unusual because it is imposed infrequently, then the procedure for imposition would be irrelevant. The constitutionality of the penalty would then turn not on the legal question of arbitrariness as proper procedure, but rather on the fact question of how many times the death penalty is imposed. A statute carrying a mandatory death sentence would escape the fault of arbitrariness at the price of returning to an insensitive penology. It might also result in the more frequent imposition of death. But such a statute, even if limited to the most carefully defined, most extraordinary, most heinous crime, would fall if applied infrequently. If infrequency implies unusualness, then the constitutional defect is absolutely fatal. Only by imposing capital punishment in a multitude of cases could the defect be avoided, and in such an unlikely event the defect of unusualness would be replaced by the charge of excessiveness and unconstitutional cruelty.

While the rule of stare decisis is not binding on the Supreme Court, the overturning of a case decided only a year before hardly adds to the stability of the law. On the other hand, it would seem obvious that "[t]he punishment of death is, doubtless, the most dreadful and the most impressive spectacle of public justice; and it is not possible to adopt any other punishment equally powerful by its example. It ought to be confined to the few cases of the most atrocious character, for it is only in such cases that public opinion will warrant the measure, or the peace and safety of society require it." It is, thus, some-

113 Id. at 207-08.
114 2 J. Kent, Commentaries on American Law 14 (13th ed. 1884).
what anomalous to find fault with the infrequent imposition of a penalty which ought to be imposed only in rare cases. In any case, neither arbitrariness nor infrequency is closely related to the language, "cruel and unusual," or even to "evolving standards of decency." Still more disturbing is the Court's failure in nine separate opinions to deal with any of these problems in any meaningful and comprehensive way. For Justice Marshall alone they are irrelevant. Justice White faulted the death penalty for infrequent imposition, apparently dismissing out of hand the argument that it ought to be reserved for special cases. Justices Stewart, Douglas, and Brennan faulted the penalty for both infrequent and arbitrary imposition, Justice Stewart without discussing the effect on McGautha, in which he had concurred. The current manner of imposition of the death penalty seems on its face vulnerable to serious objections, and the arguments urged in support of these objections by abolitionists are legion. But the attempts by the majority to marshall these arguments are mired in confusion. Only the judgment itself is clear: the death penalty is today administered in a way that is violative of the eighth amendment.

C. The Dissent

Chief Justice Burger and Justices Blackmun, Powell, and Rehnquist dissaent from the judgments of the Court. Each wrote his own opinion, and each joined the Chief Justice and Justices Powell and Rehnquist in their opinions. Justice Blackmun was not joined by his brothers, perhaps because of the largely personal nature of his comments and arguments. Presented with the opportunity to make a unified, carefully reasoned response to the majority, the dissenters seemed to lapse instead into the same confusion that plagued the majority. Five principal arguments emerged.

First, the dissenters argued that the majority had gone far beyond the straightforward meaning of "cruel and unusual." In the words of the Chief Justice: "... I submit that the questions raised by the necessity approach are beyond the pale of judicial inquiry under the Eighth Amendment." Justice Powell argued that the eighth amendment did not make the Court the final arbiter of the excessiveness of punishments unless blatantly harsh. Neither conceded mere infrequency to be a constitutional standard, and both pointed to the lack of necessary connection between infrequency and arbitrariness and discrimination. In short, the objections of excessiveness, lack of necessity, arbitrariness, and infrequency raised by the majority were simply not comprehended within the meaning of "cruel and unusual." But this charge that the majority had misread the Constitution, while the most serious, is the least meaningful. As Justice Hughes once pointed out, the Constitution is what the judges say it is; indeed, it is what a majority says it is. The dissent's first argument amounts to no more than the obvious: they interpreted the eighth amendment differently.

The second argument is much like the first. Accepting as the true eighth amendment test the Trop "evolving standards of decency" test, all four Justices

114 For an excellent anthology, see H. Bedau, The Death Penalty in America (1964).
115 408 U.S. at 396.
116 Id. at 433-34.
117 1 M. Pusey, Charles Evans Hughes 204 (1951).
claimed that the public's standards of decency have not evolved to the point that they bar capital punishment. For the majority, the infrequent imposition of the death penalty, the increased growth of the abolitionist movement, the national and international trends toward abolition, the development of enlightened penological systems, all pointed to the societal rejection of the death penalty. For the dissent, the retention of capital punishment in forty states and the federal government, the continued imposition by juries having the discretion to choose a lesser sentence, the lack of meaningful statistics, all pointed to a lack of change in society's standards of decency since the time of earlier decisions such as *Trop*. Such a basic disagreement over facts does little to point up illogicalities or inconsistencies in the majority's position. The upshot is merely that four Justices would have found the facts otherwise.

The third argument, apparently underlying the first two, was that the majority had violated the legislative province. The dissent argued that matters of penology and evaluations of standards of decency were not proper considerations for the Court at all, but were instead matters solely addressed to the legislatures. The Chief Justice stated that the majority's determination of standards of decency constituted a denial of the fact that "in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society." In addition to abstract questions of power between coordinate branches of government, Justice Rehnquist also noted that the possibility for error in such a grave matter was much higher among nine men than among hundreds: "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." In addition to abstract questions of power between coordinate branches of government, Justice Rehnquist also noted that the possibility for error in such a grave matter was much higher among nine men than among hundreds: "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." The sobering disadvantage of constitutional adjudication of this magnitude, Justice Powell added, "is the universality and permanence of the judgment." However, the dissent did not deny that the eighth amendment was a proper basis for judicial review, only that review was not proper in these cases. This question of degree, like the questions of fact and constitutional interpretation, was in basic dispute.

The fourth argument presented the first real attack on the merits of the majority's arguments. It was, quite simply, that the majority had overruled *McGautha* without saying so and without discussing the reasons for doing so. The Court, of course, is not bound by the principle of stare decisis, and the Chief Justice quickly admitted this. "It may be thought appropriate to subordinate principles of *stare decisis* where the subject is as sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year." The arguments to counter those accepted by a six-man majority only one year before had gone unstated. *McGautha*, the dissent charged, had been silenced.

As has already been seen, *McGautha* has not necessarily been overruled, despite the claims of the dissenters and Justices Douglas and

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118 408 U.S. at 384.
119 Id. at 468.
120 Id. at 462.
121 Id. at 400.
122 See part III, section A supra.
Brennan. While *McGautha* indeed presents a focal point of serious weakness in the majority's opinions (except for Justice Marshall's), the dissenters failed to capitalize on that fact. They, too, seemed to confuse arbitrariness with infrequency. The dissenters emphasized differences of opinion, allowing quite serious flaws in the majority opinions to go unchallenged.

What pervades all four dissenting opinions is the fifth argument, best stated by Justice Blackmun: "I fear the Court has overstepped." Justice Blackmun's principal difficulty with the majority's judgments was "the suddenness of the Court's perception of progress in the human attitude since decisions of only a short while ago." Justice Powell spoke of the majority's action as "sweeping" and recalled Justice Holmes' exhortation of judicial self-restraint. Justice Rehnquist charged that the majority had even ceased to act as Justices, concluding "that this decision holding unconstitutional capital punishment is not an act of judgment, but rather an act of will." But by far the most serious indictment came at the hand of Chief Justice Burger. "The five opinions in support of the judgment differ in many respects, but they share a willingness to make sweeping factual assertions, unsupported by empirical data, concerning the manner of imposition and effectiveness of capital punishment in this country."

It is submitted that if the majority had really gone so far, reply to their errors should have taken a form other than mere tirade. In fact, it would seem that the dissenters fell prey to the same confusion that pervaded the majority opinions. The judgment of the Court is clear; the opinions are not. The key to the enigmatic arguments must be found in future decisions.

IV. THE EFFECTS OF FURMAN

*Furman* has thus far posed two major practical questions: whether bail may be denied in cases involving crimes previously carrying the death penalty, and what procedures should be used to resentence prisoners on death row. An additional theoretical question is presented: how capital punishment legislation may be drafted to pass constitutional muster. All three questions will be discussed briefly with particular emphasis in the first two on Texas law.

A. Bail

Article I, section 11 of the Texas Constitution provides in part: "All prisoners shall be bailable by sufficient sureties, unless for capital offenses, when the proof is evident . . . ." As of 1970 the constitutions of at least thirty-seven states established the right to bail with language similar to that used in the Texas Constitution. A capital offense is defined in Texas as "[a]n offense for which the highest penalty is death." The abolition of capital punishment

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138 408 U.S. at 414.
139 Id. at 410.
140 Id. at 468.
141 Id. at 405.
142 TEX. CONST. art. I, § 11. TEX. CODE CRIM. PROC. ANN. art. 1.07 (1966) contains a similar provision: "All prisoners shall be bailable unless for capital offenses when the proof is evident."
144 TEX. PEN. CODE ANN. art. 47 (1961). It has also been defined as a case or crime
under *Furman* raises the question of whether a prisoner charged with an easily provable crime which, prior to *Furman*, might have carried the death penalty, is bailable. Two arguments have been made.

Prior to *Furman* only one argument, the "definitional" argument, was accepted. It had been urged and adopted time and again in states whose legislatures had abolished the death penalty by statute without changing the phrasing of the right to bail in the state constitution. The constitutional language in such instances, it is argued, is clear: bail is to be denied only in capital cases. It was reasoned that the framers' concern was that a prisoner faced with the prospect of forfeiting his life would much more likely forfeit whatever sureties he had posted in order to escape the threat of conviction. Their concern extended only to those cases in which the death penalty would probably be exacted, and the limitation thus imposed upon the fundamental right to bail should be applied only in such cases. Because death can no longer be a penalty for crime, the argument continues, there are no capital offenses. Therefore, there are no cases in which bail can be denied.

The second argument, the "classification" argument, originated in a footnote to the California Supreme Court decision in *People v. Anderson*. It reasons that bail is excluded from a certain class of crimes. The death penalty is a characteristic but not a prerequisite of the crimes in the class. The punishment actually prescribed is incidental to the constitutional definition and not part of the fundamental policy involved. Whether punished by death or not, certain crimes, for example murder with malice, ought not to carry the right to bail. "The underlying gravity of those offenses endures [beyond the abolition of capital punishment] and the determination of their gravity for the purpose of bail continues unaffected . . . ."

Since *Furman* the definitional argument has been accepted in Texas. In *Ex parte Contella* appellants appealed from orders in habeas corpus proceedings refusing them bail after they had been charged with murder. The Texas Court of Criminal Appeals held that "there is no case in which bail may be denied under the provisions of Art. I, Section 11 of the Texas Constitution . . . ." Citing *Furman*, the court pointed out that "Since the death penalty may not be imposed, there no longer exists a 'capital felony' as defined

"In or for which death penalty may, but need not necessarily, be inflicted." BLACK'S LAW DICTIONARY 263 (4th ed. 1957).

While the precise extent of the ruling in *Furman* is uncertain, it is clear that the death penalty is no longer available for most murder and rape statutes under which death is not a mandatory sentence. See *In re Welisch*, 18 Ariz. 517, 163 P. 264 (1917) (Arizona repealed the death penalty between 1916 and 1918 only); *Ex parte Ball*, 106 Kan. 536, 188 P. 424 (1920); State v. Pett, 233 Minn. 429, 92 N.W.2d 205 (1958); City of Sioux Falls v. Marshall, 48 S.D. 378, 204 N.W. 999 (1925); *In re Perry*, 19 Wis. 676 (1865).


*Id.*


*Id.* at 912. On rehearing Judge Douglas found the questions presented by both appellants to be moot. The judgments of reversal were, therefore, set aside and the lower judgments affirmed. However, Judge Douglas noted, "Nothing [in the rehearing opinion] alters the holding in the original opinion." *Id.* at 912 n.1.
in Art. 47, V.A.P.C.128 This reasoning has also been followed in New Jersey129 and Pennsylvania.128

The classification argument has been adopted by Colorado130 and Louisiana131 in addition to California. While the classification argument seems to provide for the least upheaval as a result of the death penalty decisions in Furman and Anderson, it also seems to contravene the plain language of the respective constitutions involved. It is suggested that the better path is that taken by the Texas Court of Criminal Appeals, with constitutional change, if any, left to the legislature and the people.

B. Resentencing

In abolishing capital punishment Furman is fully retroactive to convictions under statutes subject to the same faults as those actually struck down.141 This aspect of the decision has proved extremely troublesome, requiring the high courts of the several states to establish resentencing procedures.142 Conflicts thus posed between due process and legal efficiency are commonly difficult to resolve.

In some states resentencing procedure is dictated or provided for by statute. In California, for example, the supreme court in People v. Anderson simply modified Anderson's death sentence to life imprisonment,143 establishing this as the remedy for all prisoners then under the death sentence.144 Illinois law requires that in any case in which the original sentence has been vacated, the trial court must hold a "hearing in aggravation and mitigation," and after hearing evidence, impose any sentence which the jury could have imposed at the original trial.145 The Illinois Supreme Court held this procedure applicable to prisoners whose death sentences were overturned by Furman.146

In the few instances in which a statute provides more than one alternative to the death penalty, a new trial will be required, at least with regard to sentencing.147 But where the only alternative to death is life imprisonment,

128 485 S.W.2d at 912.
131 People ex rel. Dunbar v. District Court, 500 P.2d 358 (Colo. 1972).
132 State v. Flood, 269 So. 2d 212 (La. 1972). Louisiana has extended the classification argument to apply to all procedural protections such as unanimous jury verdict and jury sequestration provided by law for capital offenses. State v. Holmes, 269 So. 2d 207 (La. 1972).
141 "Whatever uncertainties may hereafter surface, several of the consequences of today's decision are unmistakably clear. . . . The Court's judgment removes the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country." 408 U.S. at 416-17 (Powell, J., dissenting).
142 The retroactive decision in Witherspoon v. Illinois, 391 U.S. 510 (1968), posed a similar but not identical problem. Because Witherspoon attacked jury selection, a new trial as to punishment was required in the cases to which the decision applied. The taint of capital punishment per se, however, is not so deeply rooted in the trial and may more readily be purged.
143 California appellate courts are empowered by statute to "reduce the degree of the offense or the punishment imposed." CAL. PENAL CODE § 1260 (West Supp. 1972).
144 The supreme court provided that "any prisoner now under a sentence of death, the judgment as to which is final, may file a petition for writ of habeas corpus in the superior court inviting that court to modify its judgment [i.e., from death to life imprisonment]." 6 Cal. 3d at 657 n.45, 493 P.2d at 899 n.45, 100 Cal. Rptr. at 171 n.45.
several courts have held that reformation, either at the trial court or at the appellate court level, may be a matter of course. The supreme courts of Pennsylvania\(^{148}\) and Delaware\(^{149}\) have themselves reformed death sentences in this way. The Louisiana Supreme Court chose instead to set aside the death sentence and remand to the trial court with instructions to sentence the defendant to life imprisonment.\(^{150}\)

The situation in Texas has been unique. In attempting to deal with cases remanded by the United States Supreme Court under Witherspoon, the Texas Court of Criminal Appeals held that it was not empowered either to resentence or to remand for resentencing cases in which the death penalty had been illegally assessed by a jury.\(^{151}\) Until Whan v. State\(^{152}\) the only course left was to reverse and remand for a new trial.\(^{153}\) But in that case the court ruled that the Governor's commutation of appellant's death sentence to life imprisonment while the case was pending decision on remand from the United States Supreme Court cured the Witherspoon defects. In light of the Governor's commutation the court concluded that "the proper course to follow is to again affirm the judgment of the trial court."\(^{154}\) Judge Onion urged in his dissent that the Governor could not commute a sentence set aside by the United States Supreme Court and, thus, no longer in existence.\(^{155}\)

The situation in Texas after Furman was identical. After the death penalty was abolished, the Governor commuted the sentences of all prisoners on death row in Texas. Again over Judge Onion's dissent, the court held the commutations valid.\(^{156}\) In sustaining this easy escape from the resentencing problems currently faced by other states, the Texas Court of Criminal Appeals completely ignored appellants' arguments for new trials based on due process. Texas resentencing has thus been accomplished by fiat rather than by carefully reasoned legal scheme.

### C. Possibilities for a Constitutional Capital Punishment

Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's

punishes first-degree murder with death or imprisonment for any term not less than twenty years nor more than life. VA. CODE ANN. § 18.1-22 (1960).


\(^{150}\) State v. Franklin, 263 La. 344, 268 So. 2d 249 (1972). A novel twist to this disposition of the problem was presented in a habeas corpus proceeding in a federal district court sitting in Alabama. That court held the imposition of the death penalty to have been a purely clerical error which the state sentencing court could amend nunc pro tunc or on writ of error coram nobis. Eaton v. Capps, 348 F. Supp. 237 (M.D. Ala. 1972).


\(^{152}\) 485 S.W.2d 284 (Tex. Crim. App. 1972); Turner v. State, 485 S.W.2d 282 (Tex. Crim. App. 1972). On rehearing of both cases the court took notice of the Governor's subsequent commutations and, following Whan, affirmed the decisions of the lower courts.

\(^{153}\) Harris v. State, 485 S.W.2d 284 (Tex. Crim. App. 1972); Quintana v. State, 485 S.W.2d 281 (Tex. Crim. App. 1972). See also note 130 supra. The logical appeal of Judge Onion's dissent notwithstanding, the court adopted the procedure established in Whan in the Witherspoon cases that followed.

ruling is to demand an undetermined measure of change from the various state legislatures and the Congress. While I cannot endorse the process of decisionmaking that has yielded today's result and the restraints which that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.\textsuperscript{107}

Recognizing the quandary in which state legislatures would find themselves after \textit{Furman}, the Chief Justice endeavored in his dissent to provide certain guidelines for change. The demise of capital punishment is not absolute: "Today the Court has not ruled that capital punishment is \textit{per se} violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes."\textsuperscript{118} For those legislatures convinced of the efficacy of the death penalty some latitude remains for action. The twofold problem then becomes to find the constitutional loophole and to draft statutes accordingly.

For the Chief Justice the loophole was clear: "[I]f the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past."\textsuperscript{119} The Chief Justice saw as the main objection of the majority the lack of evenhanded justice in the discretionary imposition of the death penalty. If this is in fact the case, then the simple cure is to remove from the hands of sentencing judges and juries the discretion to impose death. This can be effected in two ways.

In the first place, some discretion may be reposed in the sentencing judges and juries if carefully defined standards are provided by the legislatures. "Since the two pivotal concurring opinions [those of Justices Stewart and White] turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases . . . ."\textsuperscript{120} Under this option only sentencing statutes and not statutes actually defining crimes would require alteration. The legislature would be required to set out the considerations upon which the determination of sentence would turn. Possible examples would be prior criminal record, attitude toward the crime committed, rehabilitative potentialities, etc. Such standards and evidence thereof would have to be detailed and precise. The possibility that a legislature could make such an exhaustive and detailed statement is slight.

But equally slight is the alternative. Arbitrariness could be eliminated by making death mandatory for certain narrowly defined crimes. Under this option a legislature would have to rewrite sentencing statutes to require death in all cases in which a conviction is obtained. Only by acquittal could the imposition of death be avoided. For example, it would then be necessary to specify

\textsuperscript{107} 408 U.S. at 403 (Burger, C.J., dissenting).
\textsuperscript{118} Id. at 396.
\textsuperscript{119} Id. at 397.
\textsuperscript{120} Id. at 400.
the exact elements of murder with malice or rape with threat of grievous bodily injury. It is perhaps impossible for a legislative body to make such a priori definitions of crimes. At least the Court in *McGautha* was convinced that such specificity had never been achieved.\(^6\)

Accordingly, the loophole indicated by the Chief Justice is small indeed. In fact, it may be nonexistent. The Chief Justice emphasized arbitrariness as the primary fault of capital punishment found by the majority, and dismissed as "ironical" the infrequency argument. Obviously the majority did not call for the death sentence in more cases. But if infrequency of imposition implies societal rejection of the penalty, and, thus, constitutional unusualness, then arbitrariness as an abuse of discretion in sentencing is irrelevant.\(^8\) The implication is weak; but it cannot be dismissed as a matter of course. Despite the Chief Justice's advice, no easy escape from *Furman* is clear from the majority opinions.

At least one state has followed Chief Justice Burger's advice. Delaware law imposes death as the mandatory penalty for murder in the first degree.\(^9\) In a separate statute allowance is made for reduction in sentence if the jury recommends mercy.\(^9\) The Delaware Supreme Court has held that *Furman* overruled the latter statute but not the former.\(^9\) Therefore, "the mandatory death provision of the Murder Statute, standing alone, will not constitute 'cruel and unusual' punishment in violation of the constitutional guaranties."\(^9\) In the future all persons found guilty of first degree murder in Delaware will automatically be sentenced to death.

V. CONCLUSION

And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of every man's brother will I require the life of a man. Whoso sheddeth man's blood, by man shall his blood be shed; for in the image of God made he man.\(^*\)

Since before the age of Noah, from our earliest recollections, death has been used as punishment for crime. As recently as 1819 the number of capital crimes in England was estimated to be 223.\(^8\) From 1805 to 1810 between two and three thousand people were executed there each year.\(^8\) Death was acknowledged as a punishment for crime by the framers of the American

\(^{161}\) "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability." 402 U.S. at 204.

\(^{162}\) See part III, section B supra.

\(^{163}\) DEL. CODE ANN. tit. 11, § 571 (1953).

\(^{164}\) Id., § 3901.

\(^{165}\) State v. Dickerson, 298 A.2d 761 (Del. Sup. Ct. 1972). The court held that the murder statute was separable from the mercy statute. DEL. CODE ANN. tit. 1, § 308 (1953).

\(^{166}\) State v. Dickerson, 298 A.2d 761, 768 (Del. Sup. Ct. 1972). The court rejected all arguments that the death penalty was unconstitutional per se.

\(^{167}\) Genesis 9: 5-6.


\(^{169}\) Id., citing L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 3-5, 153 (1948).
In the last twelve years Congress has passed three new laws requiring the death penalty. Throughout this entire period, especially in the last hundred years, the abolitionist movement has grown markedly, but the history of capital punishment is one of continuous, uninterrupted use.

Arguments from the past—"it has always been done in this way"—must fall in the face of enlightened concepts of the future, for man is free to develop new and better means of living and working. He depends on, but is not limited to, the teachings of history. So the science of penology is an evolving one, and the cruelty and unusualness of punishments against which the Constitution stands are to be interpreted under the "evolving standards of decency that mark the progress of a maturing society."

At the same time, the experience of six thousand years cannot lightly be disregarded, and it is far from clear that it in fact has been. Chief Justice Warren looked hard for evidence of popular moral rejection of capital punishment but found none. Fourteen years later and just prior to the decision in Furman a national poll indicated that fifty percent of the country favors the death penalty for murder while forty-one percent does not. Slightly over four months after Furman was handed down the citizens of California, undeterred by the opinions of the United States Supreme Court and the California Supreme Court, passed by a two-to-one margin an amendment to the California Constitution reinstating the death penalty. The Delaware Supreme Court has refused to find its state's death penalty unconstitutional. And in Florida the House Death Penalty Committee recently approved a bill that would make mandatory the death penalty for premeditated murders, rape of a child under the age of thirteen, bomb-killings, and kidnappings which result in the death of the victim.

Society's standards of decency cannot be created ex nihilo by adjudication or legislation. If such standards be indeed the touchstone of the eighth amendment, then we must wait for evolution to run its course.

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179 For example, U.S. Const. amend. V provides that "No person shall . . . be deprived of life . . . without due process of law . . . ."
182 Id. at 99.
183 N.Y. Times, Mar. 16, 1972, at 29, col. 3.
184 See note 87 supra.