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CRUEL AND UNUSUAL PUNISHMENT

The Death Penalty Cases:

Furman v. Georgia, Jackson v. Georgia, Branch v. Texas, 408 U.S. 238 (1972)

In *Furman v. Georgia*,[1] the Supreme Court held in a per curiam decision that in the cases before it, the imposition and carrying out of the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. In so ruling, the Court departed from its earlier decisions that had tacitly approved the death penalty as constitutional[2] and extended its previous decisions defining cruel and unusual punishments.[3]

The fate of three defendants, William Henry Furman, Lucious Jackson Jr., and Elmer Branch, was decided by the Court in *Furman*. Each of the defendants had been convicted of an aggravated felony, Furman for murder,[4] Jackson and Branch for rape.[5] Each had been sentenced to death. The convictions of Furman and Jackson were affirmed by the Georgia supreme court.[6] The court of criminal appeals of Texas affirmed Branch's conviction.[7] The Supreme Court granted certiorari in all three cases.[8]

Prior to its decision in *Furman*, the Court had considered questions regarding the cruel and unusual punishment clause of the eighth amendment[9] without ruling definitively on the constitutionality of the death penalty.

In its first interpretations of the phrase "cruel and unusual punishments" as applied to the death penalty, the Court was more concerned with the method of inflicting punishment rather than the type of punishment itself or the punishment's excessive nature when compared to the crime. In *Wilkerson v. Utah*,[10] the Court unanimously upheld a sentence of public execution by shooting. The Court admitted the difficulty in trying to define the exact meaning of "cruel and unusual" but indicated that punishments of torture including being disembowelled alive, beheaded and quartered and those of similar "unnecessary cruelty" were certainly prohibited.[11] In *In re Kemmler*,[12] the Court ruled that electrocution was not a cruel and unusual punishment since cruel and unusual implies "more than the mere extinguishment of life."[13]

In *Weems v. United States*,[14] the Supreme Court expanded the definition of a cruel and unusual punishment. The Court in *Weems* invalidated for the first time a legislatively established penalty as "cruel and unusual", holding that as a "precept of justice punishment for crime should be graduated and proportioned to the offense."[15] The Court thereby recognized that not only could the method of punishment be inherently cruel, as are acts of torture, but the punishment may be excessive when compared to the offense and hence cruel and unusual. In *Weems*, fifteen years at hard labor in ankle chains was held to be excessive for the crime of falsifying government records.[16] The *Weems* decision was, however, largely overlooked by succeeding Courts mainly because the eighth amendment was not considered applicable to the states at that time.[17]

Almost fifty years after *Weems*, the Supreme Court reconsidered the scope of the eighth amendment in *Trop v. Dulles*.[18] The Court held that deprivation of a man's political existence affronted the

[1] 408 U.S. 238 (1972).

[2] *See, e.g., In re* Kemmler, 136 U.S. 546 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).

[3] *See, e.g.*, Robinson v. California, 370 U.S. 660 (1972); Trop v. Dulles, 356 U.S. 86 (1958); Weems v. United States, 217 U.S. 349 (1910).

[4] Furman during an armed robbery attempt shot and killed the father of the household.

[5] Jackson raped a woman while holding a pair of scissors to her throat. Branch raped a woman during the course of a robbery at the victim's home.

[6] Furman v. Georgia, 225 Ga. 253, 167 S.E.2d 628 (1969); Jackson v. Georgia, 225 Ga. 790, 171 S.E.2d 501 (1969).

[7] Branch v. State, 447 S.W.2d 932 (Tex. Crim. App. 1969).

[8] 403 U.S. 952 (1971).

[9] U.S. CONST. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[10] 99 U.S. 130 (1878).

[11] *Id.* at 135–36.

[12] 136 U.S. 436 (1890).

[13] *Id.* at 447.

[14] 217 U.S. 349 (1910).

[15] *Id.* at 367.

[16] *Id.* at 381.

[17] *See, e.g.*, Collins v. Johnston, 237 U.S. 502 (1915); *In re* Kemmler, 136 U.S. 436 (1890).

[18] 356 U.S. 86 (1958). The Court in *Trop* ruled that denationalization of a convicted wartime deserter, who had already served three years at hard labor, forfeited all pay, and received a dishonorable discharge amounted to a cruel and unusual punishment.

dignity of man, the basic concept behind the eighth amendment. The meaning of the phrase "cruel and unusual" is not static, referring only to punishments considered abhorrent in 1789. Rather the amendment derives current meaning from the "evolving standards of decency that mark the progress of a maturing society." [19]

With its decision in *Robinson v. California*[20] the Supreme Court revitalized the principles it expounded in *Weems*. The Court ruled that incarceration for ninety days for being addicted to the use of narcotics was excessive and thus a violation of the eighth amendment. As in *Weems*, the Court was concerned with the excessive nature of a punishment in relation to the offense. It noted that the cruel and unusual punishments clause must be continually reviewed in the light of contemporary human knowledge to determine its current meaning. *Robinson* also removed any lingering doubts that the eighth amendment is applicable to the states through the fourteenth amendment.[21]

Although the Supreme Court decided that the death penalty was cruel and unusual in the three cases at hand, the *Furman* decision did not fully resolve the issue.[22] The decision consists of nine separate opinions with no true majority position. Five Justices, Marshall, Brennan, Douglas, Stewart, and White concurred that in these cases, the death penalty violated the eighth amendment. Of these, only Justices Marshall and Brennan considered the death penalty to be totally impermissible under all circumstances. Justices Burger, Powell, Rehnquist, and Blackmun dissented in separate opinions.

For the "majority", Mr Justice Marshall asserted that the most important principle in analyzing the cruel and unusual clause is that its language "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [23] Therefore, a penalty which was acceptable at one time in our history may be cruel and unusual now. The permissibility of a particular punishment today is open to question regardless of previous decisions. This rationale allowed Mr. Justice Marshall to ignore those previous decisions —*Wilkerson*[24] and *Resweber*[25] and *Kemmler*[26]— which had tacitly approved of the death penalty.

After reviewing the reasons why a legislature might select death as a punishment including retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics and economy,[27] Marshall argues that all of these legislative purposes could be accomplished through less severe penalties. Marshall contends that punishment for the sake of retribution is not permitted by the eighth amendment.[28] Moreover, capital punishment is not necessary as a deterrent to crime in this society;[29] in fact, murderers are extremely unlikely to be recidivists and often become model citizens.[30] Marshall also reasons that the elimination of the death penalty would not impair the states' bargaining position in obtaining confessions and guilty pleas since the threat of imprisonment would be sufficient for this purpose.[31] Further, capital punishment can not be defended on the ground that it improves society since legislatures have never intended eugenic goals[32] in formulating death sentences. Finally, the death penalty can not be defended as economical since execution is actually more costly than life

[19] *Id.* at 101.

[20] 370 U.S. 660.

[21] *See* 408 U.S. at 328 n.34. Previously in Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), the Court stated that the eighth amendment prohibited the infliction of unnecessary pain and that eighth amendment principles apply to the states under the fourteenth amendment's due process clause.

[22] The Supreme Court recently has had several opportunities to consider the death penalty question but has either denied certiorari, *e.g.*, Snider v. Cunningham, 292 F.2d 683 (4th Cir. 1961), *cert. denied*, 375 U.S. 889 (1963); Rudolph v. State, 275 Ala. 115, 152 So. 2d 662 (1963), *cert. denied*, 375 U.S. 899 (1963); Swain v. State, 275 Ala. 508, 156 So. 2d 368 (1963), *cert. denied*, 382 U.S. 944 (1965); Craig v. State, 179 So. 2d 202 (Fla. 1965), *cert. denied*, 383 U.S. 959 (1966); State v. Alvarez, 182 Neb. 358, 154 N.W.2d 746 (1967), *cert. denied*, 393 U.S. 823 (1968); Williams v. State, 427 S.W.2d 868 (Tex. Crim. App. 1967), *cert. denied*, 391 U.S. 926 (1968); or has decided the case on other grounds, as in, Maxwell v. Bishop, 398 U.S. 262 (1970), Boykin v. Alabama, 395 U.S. 238 (1969), or Witherspoon v. Illinois, 391 U.S. 510 (1969).

[23] 408 U.S. at 329 (Justice Marshall citing Trop v. Dulles, 356 U.S. 86, 100–01 (1958)).

[24] 99 U.S. 130 (1878).

[25] 329 U.S. 459 (1947).

[26] 136 U.S. 436 (1890).

[27] 408 U.S. at 342.

[28] *Id.* at 343 (Mr. Justice Marshall relying on Weems v. United States, 217 U.S. at 381).

[29] *Id.* at 345–54 (Mr. Justice Marshall citing T. SELLIN, THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE 5, 21, 35–39, 56–58 (1959); UNITED NATIONS, DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, CAPITAL PUNISHMENT 101–102, 116–118, 123 (1968); Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L.C. & P.S. 539, 542 (1970); Royal Commission on Capital Punishment, 1949–1953, Cmd. 8932, 17–20).

[30] 408 U.S. at 355.

[31] *Id.* at 356.

[32] *Id.* at 356 & n.130.

imprisonment.[33] Since any possible legitimate purpose of capital punishment could be served equally well by imprisonment, Justice Marshall concluded that the death penalty is an excessive punishment and is, therefore, unconstitutional.[34]

Even if capital punishment were not an excessively cruel and unusual penalty as judged by the purposes it is supposed to serve, the death penalty would still violate the eighth amendment, according to Justice Marshall, "because it is morally unacceptable to the people of the United States at this time in our history." [35] Marshall narrowed the test often used by courts that a punishment is valid unless "it shocks the conscience and sense of justice of the people," [36] to include only "informed citizens". Justice Marshall argues that if the average citizen were informed as to the liabilities of the death penalty, he would conclude, as Marshall does, that the death penalty is both cruel and unusual. Justice Marshall contends that even the strongest proponent of the death penalty would find it unacceptable if he were aware that the death penalty is meted out discriminatorily,[37] that innocent persons have been executed,[38] and that the death penalty distorts our system of criminal justice, undesirably affecting the jury, the attorneys, the judge and the public during the course of certain trials.[39]

Mr. Justice Brennan argued that a punishment that does not comport with human dignity is cruel and unusual.[40] Brennan stated four interrelated principles which enable the Court to determine whether a punishment comports with human dignity.[41]

First and most important, a punishment must not degrade the dignity of a human being. Mr. Justice Brennan argued that the death penalty is degrading just as the Court held in *Trop v. Dulles*[42] that expatriation which strips an individual of his political identity and his status in organized society is degrading and hence cruel and unusual. Death ends not only one's political existence but terminates his very existence. Further, the process of implementing the death penalty has been recognized by some as being so degrading and brutalizing to the spirit of man as to constitute an impermissible psychological torture.[43]

Brennan's second principle is that the punishment must not be arbitrarily inflicted by the state. Since the death penalty is used so rarely, Brennan concluded that it must be inflicted arbitrarily.[44] Juries have complete discretion to impose the death penalty,[45] thereby permitting the arbitrary and capricious selection of victims for the death penalty.

Third, to comport with human dignity a punishment must be acceptable to society. Justice Brennan finds that because the scope of the death penalty has been increasingly restricted and its use increasingly less frequent, society disapproves of capital punishment.[46] The current moratorium on

[33] *Id.* at 357 (Mr. Justice Marshall citing Caldwell, *Why is the Death Penalty Retained?* 284 ANNALS 48 (1952); McGee, *Capital Punishment as Seen by a Correctional Administrator*, 28 FED. PROB. 11, 13–14 (June 1964); Bailey, *Rehabilitation on Death Row*, in THE DEATH PENALTY IN AMERICA, 556 (H. Bedau ed. 1967); T. THOMAS, THIS LIFE WE TAKE, 20 (3d ed. 1965)).

[34] 408 U.S. at 359.

[35] *Id.* at 360. In addition to being excessive or morally unacceptable, Justice Marshall contended that a punishment could also be cruel and unusual if it involved so much physical pain and suffering that the public would not tolerate it or if a penalty were previously unknown to a particular offense. The latter two reasons, Marshall believes, are not applicable to capital punishment. *Id.* at 330–31.

[36] United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir. 1952), *cert. denied*, 344 U.S. 838 (1952). *See also*, Kasper v. Brittain, 245 F.2d 92, 96 (6th Cir. 1957), *cert. denied*, 355 U.S. 834 (1957) ("Shocking to the sense of justice"); People v. Morris, 80 Mich. 634, 639, 45 N.W. 591–92 (1890) ("Shock the moral sense of the people").

[37] Since 1930 there have been 3,859 persons executed in this country: 1751 white, 2066 black, 32 women. NATIONAL PRISONER STATISTICS, CAPITAL PUNISHMENT 1930–1968 (No. 45, Aug. 1969). The last execution in the United States occurred on June 2, 1967, NATIONAL PRISONER STATISTICS, CAPITAL PUNISHMENT 1930–1970 (No. 46, Aug. 1971).

[38] 408 U.S. at 366 (Justice Marshall citing E. BORCHARD, CONVICTING THE INNOCENT (1932); J. FRANK & B. FRANK, NOT GUILTY (1957); E. GARDNER, COURT OF LAST RESORT (1952)). These three books examine cases of innocent persons sentenced to death but not executed. Bedau, *Murder, Errors of Justice and Capital Punishment*, in THE DEATH PENALTY IN AMERICA (H. Bedau ed. 1967), contends that innocent persons have been executed.

[39] 408 U.S. at 369 (Marshall citing Ehrmann, *The Death Penalty and the Administration of Justice*, 284 ANNALS 73, 83 (1952); F. FRANKFURTER, OF LAW AND MEN 81 (1956)).

[40] *Id.* at 270 (Brennan citing Trop. v. Dulles, 356 U.S. at 100–01).

[41] *Id.* at 271–79.

[42] 356 U.S. at 101.

[43] 408 U.S. at 288 (Mr. Justice Brennan citing People v. Anderson, 6 Cal. 3d 628, 649, 493 P.2d 880, 100 Cal. Rptr. 152, 166 (1972)).

[44] 408 U.S. at 291. *See* NATIONAL PRISONER STATISTICS, CAPITAL PUNISHMENT 1930–1970 (No. 46 Aug. 1971).

[45] McGautha v. California, 402 U.S. 183, 207 (1971), concluded:

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

[46] 408 U.S. at 297. *See* note 44 *supra*.

executions further indicates that society finds the death penalty abhorrent.[47]

Finally, like Marshall, Mr. Justice Brennan sees no reason to believe that capital punishment accomplishes any penal function better than the less severe forms of punishment. To inflict the death penalty under these circumstances would be an excessive punishment because a less severe penalty would serve the interests of society equally well.[48]

Thus, Justice Brennan finds that the death penalty is inconsistent with each of his four principles indicating that capital punishment does not comport with human dignity and therefore is unconstitutional in all cases.

Of the remaining "majority Justices", neither Justices Stewart, White, nor Douglas decided that the death penalty is inherently unconstitutional. Each Justice indicated that there may be conditions under which the death penalty could be permissible.

Mr. Justice Douglas argued that the death penalty provides judges and juries with complete discretion to say which defendant will live and which will die.[49] This discretion allows the death penalty to be applied arbitrarily and discriminatorily against blacks, the poor, the young and the ignorant.[50] The infrequency with which the death penalty is imposed raises a strong inference that it is being meted out arbitrarily in violation of equal protection concepts implicit in the eighth amendment. Any punishment administered in an arbitrary or discriminatory manner is "unusually" imposed, Douglas contends.[51] Discretionary statutes, like death sentences, are "pregnant with discrimination", imposing penalties which are cruel and unusual.[52] Although he did not expressly consider the validity of a mandatorily imposed death penalty, Justice Douglas might find a carefully drawn statute which eliminates all discretion and could not be discriminatorily applied, permissible under the eighth amendment. Douglas did note, however, that a statute apparently non-discriminatory on its face could still be applied so as to violate the fourteenth amendment.[53]

Although Mr. Justice Stewart found that there are persuasive reasons for finding the death penalty cruel and unusual—the penalty's uniqueness and irrevocability, its total rejection of concepts of rehabilitation and humanity—he did not decide the inherent constitutionality of capital punishment.[54]

Mr. Justice Stewart, relying on *Weems v. United States*,[55] found the death penalty as applied to the petitioners "cruel" because it goes excessively beyond the kind of punishment considered necessary by the state legislatures, and "unusual" in that the death penalty is only rarely imposed for either rape or murder.[56] The present random and capricious selection of those sentenced to death makes the death penalty cruel and unusual just as being struck by lightning is random and capricious and cruel and unusual.[57] Stewart concluded that "the Eighth and Fourteenth Amendments can not tolerate . . . [a penalty that is] so wantonly and so freakishly imposed." [58]

Unlike Marshall, Mr. Justice Stewart believes that retribution is a constitutionally permissible aspect of punishment. Retribution serves certain justifiable needs and goals of society.[59] If uniformly imposed, the death penalty would provide a measure of retribution. It is conceivable, therefore, that Justice Stewart might find certain crimes so heinous that they deserve to be punished by death in all cases.

Mr. Justice White considered the consitutionality of capital punishment statutes when 1) the legislature authorizes the imposition of the death penalty for murder or rape; 2) the death penalty is not mandatory for any particular class or kind of case but it delegates the decision of when the death penalty will be imposed to judges and juries; and 3) judges and juries have ordered the death penalty so infrequently that the odds are now very much against imposition and execution with

[47] *Id.* at 291 n.40. *See* note 37 *supra.*
[48] *Id.* at 305.
[49] *Id.* at 249. *See* note 45 *supra.*
[50] *Id.* at 250 (Mr. Justice Douglas citing: PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967); Koeninger, *Capital Punishment in Texas, 1927–1968*, 15 CR. & DEL. 132, 141 (1969); THE DEATH PENALTY IN AMERICA 474 (H. BEDAU ed. 1967)).
[51] *Id.* at 249. (Douglas citing: Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970)).
[52] *Id.* at 257.
[53] *Id.* at 257 (Justice Douglas citing Yick Wo v. Hopkins, 118 U.S. 356 (1886)).
[54] *Id.* at 306.
[55] 217 U.S. 349 (1910).
[56] 408 U.S. at 309 (Mr. Justice Stewart citing the opinions of Mr. Justice Brennan and Chief Justice Burger).
[57] *Id.* at 309.
[58] *Id.* at 310.
[59] *Id.* at 308. Mr. Justice Stewart argued that retribution is part of man's natural instinct and that the seeds of anarchy will be sown if that instinct is not satisfied.

respect to any convicted murderer or rapist.[60] Like the other concurring Justices, White found the infrequency with which the death penalty is imposed significant. However, unlike his Brothers who considered infrequency to be either an indication of society's disapproval of the death penalty or an indication of arbitrary or discriminatory use, Justice White argued that a penalty that is used so rarely fails as a deterrent and has little retributive value. He reasoned that a penalty with such "negligible returns to the State would be patently excessive and . . . violative of the Eighth Amendment." [61]

Justice White neither stated nor implied that the death penalty is unconstitutional per se or that there could be no circumstances in which its imposition would not comply with the eighth amendment. White did imply that there could be conditions under which the application of the death penalty would be permissible. Justice White does not consider the death penalty to be inherently "cruel"; he finds that those who are executed may well have received what they deserved.[62] If the death penalty could be imposed so as to produce greater deterrent and retributive value, as in the case of a mandatory death penalty for certain crimes, Mr. Justice White might well find it permissible.

The dissenting opinion of Chief Justice Burger contains an analysis of whether the eighth amendment prohibits capital punishment and a plea for judicial non-involvement on the issue of abolition of the death penalty. He begins with an examination of the scope of the prohibition against cruel and unusual punishments. The Chief Justice asserts:

> Although the Eighth Amendment literally reads as prohibiting only those punishments that are both "cruel" and "unusual," history compels the conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed.[63]

According to Chief Justice Burger's interpretation the Founding Fathers were most concerned with torturous or excessively cruel punishments.[64] Early Supreme Court decisions reflected this concern and focused primarily on whether the punishment was "cruel" rather than whether it was "unusual." [65] When the eighth amendment was adopted, capital punishment was not considered cruel.[66] Since then, Burger claims, judicial decisions have cast no doubt upon the constitutionality of the death penalty.[67]

Despite past indications of constitutionality, the Chief Justice acknowledges that whether capital punishment is cruel and unusual today must be determined by reference to contemporary standards of permissibility. Past decisions have recognized that interpretations of the eighth amendment prohibition necessarily change as the mores of society change.[68] However, Chief Justice Burger counsels judicial restraint when the Court is asked to interpret societal mores. No judicially manageable technique has been developed for measuring an evolution in society's moral consensus on capital punishment. Thus the courts must defer to

[60] *Id.* at 311.
[61] *Id.* at 312.
[62] *Id.* at 313.
[63] *Id.* at 376.
[64] During the Massachusetts debates on ratification of the Bill of Rights, Mr. Holmes referred to "the most cruel and unheard-of punishments." 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (2d ed. J. Elliot 1836). During the Virginia debates, Patrick Henry referred to "tortures, or cruel and barbarous punishment". *Id.* at 447.

But see Justice Brennan's opinion, where he states that it does not follow from these statements that the Framers were concerned solely with cruel punishments. 408 U.S. at 260.

[65] Attempting to define the meaning of the eighth amendment prohibition, the Supreme Court has stated: "[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution." Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

Furthermore, Chief Justice Warren stated that precedent has shown no regard for the effect the term "unusual" may have on the meaning of the prohibition. Trop v. Dulles, 356 U.S. 86, 100 n.32 (1958).

[66] The fifth amendment guarantees that death will not be imposed without a grand jury indictment. The double jeopardy clause of the fifth amendment prohibits being put in jeopardy twice for the same offense. U.S. CONST. amend V. Since the fifth and eighth amendments were adopted together, these explicit references to capital punishment signify that the framers did not consider it to violate the eight amendment.

[67] Trop v. Dulles, 356 U.S. 86 (1958); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Wilkerson v. Utah, 99 U.S. 130 (1878). *But see* Justice Goldberg's dissent from a denial of certiorari in Snider v. Cunningham, 375 U.S. 889, 890 (1963), where he suggests that, judged by contemporary standards, the death penalty for rape may be unconstitutional.

[68] The Supreme Court has stated that the eighth amendment prohibition "may acquire meaning as public opinion becomes enlightened by a humane justice." Weems v. United States, 217 U.S. 349, 378 (1910). In Trop v. Dulles, the plurality opinion stated: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." 356 U.S. 86, 101 (1958).

the legislatures when such a judgement is needed.[69] In a democracy, the legislative judgement is presumed to mirror prevailing standards of decency. Therefore a legislatively approved penalty carries a presumption of validity.[70] Only proof of overwhelming public condemnation of capital punishment will overcome this presumption.

The Chief Justice then asserts there are no obvious indications of societal condemnation of capital punishment sufficient to overcome the presumption of legislative validity.[71] Public opinion polls show no universal rejection of capital punishment.[72] Further, Chief Justice Burger rejects the contention put forth by Justices Marshall and Brennan that the infrequent imposition of the death penalty reflects widespread disapproval by society. It is argued that, in capital cases where juries impose death, they are acting arbitrarily and without sensitivity to prevailing standards of decency. However, it is the duty of the jury to reflect contemporary standards,[73] and there is no empirical proof that juries have failed to discharge this duty.[74] The declining rate of imposition does not establish that capital punishment is now considered intolerably cruel.[75]

For Justice Stewart, the low rate of imposition is not indicative of societal disapproval of capital punishment, but reflects an abuse by juries of their discretion in sentencing. Punishments are cruel when they exceed that which the legislatures have deemed necessary for all cases; punishments are unusual when they exceed that which is imposed in most cases. Chief Justice Burger views this as a procedural due process attack against discretionary sentencing cast in the language of the eighth amendment. He repeats his claim that no empirical data reveals arbitrary sentencing practices.[76] Furthermore, only last year in *McGautha v. California*,[77] the Supreme Court upheld discretionary sentencing practices in capital cases. Under the opinions of Justices Stewart and White, legislatures must establish strict standards for juries to follow in determining sentences in capital cases. This disregards the belief that such standards are impossible to fashion.[78] The Chief Justice asserts that the eighth amendment does not demand the elimination of jury discretion in sentencing.

Chief Justice Burger rejects the view, adopted by Justices Marshall and Brennan, that capital punishment is cruel since it is not necessary to achieve legitimate penal ends. Considerations of the efficacy of a punishment are not within the scope of an eighth amendment inquiry. The Chief Justice asserts: "Apart from these isolated uses of the word 'unnecessary,' nothing in these cases suggests that it is for the courts to make a determination of the efficacy of punishments."[79] He concludes that the eighth amendment is not addressed to social utility, nor does it require adherence to principles of penology.

Justice Blackmun repeats the advice of Chief Justice Burger: the decision whether capital punishment is considered cruel and unusual by contemporary society is a legislative decision.[80] Argu-

[69] "[B]oth in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society's standards of decency." 408 U.S. at 383 (Burger, C. J., dissenting).

[70] *Id.* at 384.

[71] This presumption is great because 80% of the states, as well as the federal government have capital punishment statutes. Nor is there a trend toward abolition of the death penalty. In the last eleven years, four new capital crimes have been approved by the federal government. Capital punishment is now authorized for the assassination of the President, Vice-President, or nominee for those offices; for the assassination of a Congressman; for explosives offenses resulting in death; and for airplane hijacking.

[72] A 1969 poll indicated that 51% favored capital punishment, with 40% opposed. This reflects a growth in approval of the death penalty from 1966 when only 42% approved. Erskine, *The Polls: Capital Punishment*, 34 PUB. OPINION Q. REV. 290 (1970). In support of the Chief Justice, Justice Powell cites a 1966 Colorado referendum which indicated approximately 65% approval of capital punishment. THE DEATH PENALTY IN AMERICA 233 (H. Bedau ed. 1967). In 1970, 64% of the Illinois voters approved of capital punishment. Bedau, *The Death Penalty in America*, 35 FED. PROB. 32, 35 (Feb. 1971).

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

Witherspoon v. Illinois, 391 U.S. 510, 519 (1968).

[74] 408 U.S. at 389.

[75] *Id.* at 390.

[76] *Id.* at 399.

[77] 402 U.S. 183 (1971). *See* note 45 *supra*.

[78] "[H]istory reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die." 402 U.S. at 197.

[79] 408 U.S. at 393.

In Wilkerson v. Utah, 99 U.S. 130, 136 (1878), the Supreme Court stated: "[I]t is safe to affirm that punishments of torture and all others in the same line of unnecessary cruelty, are forbidden by the Constitution." In Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463 (1947), the Supreme Court referred to the eighth amendment prohibition against the infliction of unnecessary pain. Chief Justice Burger interprets both statements as referring to the cruelty involved, not a questioning of the efficacy of the punishment.

[80] Justice Blackmun states in his dissent, 408 U.S. at 406:

ments claiming that the total abolition of capital punishment is the decent and moral thing to do make sense, but only when argued in the legislative arena. Justice Blackmun urges judicial restraint because of the potential effect of this decision on state legislatures and Congress. He fears that many legislatures will enact mandatory death penalty statutes, an approach he considers a regressive step in criminal justice.[81]

Finally, Justice Blackmun agrees with the Chief Justice that prevailing societal standards do not indicate condemnation of capital punishment. The Supreme Court has consistently upheld the permissibility of capital punishment.[82] He points to overwhelming Congressional majorities in favor of recent capital punishment statutes.[83] The legislators, whose function it is to represent prevailing societal opinion, clearly believe capital punishment to be permissible. In the face of this evidence, Justice Blackmun concludes that the Supreme Court must not impose its personal beliefs upon society.

For Justice Powell the principles of *stare decisis*, judicial restraint, and federalism should control the decision of the Court in these cases. Contrary to the opinion of Justice Marshall, he asserts that previous cases have decided the constitutionality of capital punishment. The decisions in *Wilkerson v. Utah*[84] and *In re Kemmler*,[85] which involved the constitutionality of methods of execution, were of logical necessity based upon the constitutionality of capital punishment.[86] Other decisions have stipulated or assumed its constitutionality.[87] The principle of *stare decisis* requires a high degree of proof that capital punishment does indeed violate the eighth amendment.

However, Justices Douglas and Marshall seek to avoid the weight of precedent by invoking the "evolving standards of decency" doctrine enunciated in *Trop v. Dulles*.[88] Mr Justice Powell, like the Chief Justice and Justice Blackmun, admits this approach is valid in determining what is cruel and unusual within the meaning of the eighth amendment, but he advises judicial restraint. The Court must not force personal opinions about capital punishment upon society under the guise of contemporary community standards.[89] Notions of federalism also counsel judicial restraint. Justice Powell argues that "designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies." [90] Where the statutes of forty states and the federal government are involved, the necessity for judicial restraint is great indeed.[91]

The principles of *stare decisis*, judicial restraint, and federalism thrust a heavy burden of proof upon the majority's attempt to prove that contemporary society considers capital punishment to be cruel and unusual. Justice Powell ruled that the proofs offered by Justices Marshall and Brennan do not meet this heavy burden. Powell concludes:

Were I a legislator, I would vote against the death penalty for the policy reasons adopted in the several opinions filed by the Justices who vote to reverse these convictions.

[81] Justice Blackmun interprets Justices Stewart and White to mean if capital punishment were mandatorily imposed it would be constitutional. Blackmun wants the discretion to remain with the jury, so they may exercise mercy where warranted. *Id.* at 413. Chief Justice Burger also feared the enactment of mandatory death statutes, claiming the jury would vote to acquit where they felt death was not appropriate.

[82] *E.g.* McGautha v. California, 402 U.S. 183 (1971); Trop v. Dulles, 356 U.S. 86, 99 (1958).

[83] The aircraft piracy statute passed the Senate 92–0, 1961. 107 CONG. REC. 15440 (1961). The Omnibus Crime Act, which included the Congressional assassination statute passed the House 341–26. 116 CONG. REC. 35363–35364 (1971). The Act passed the Senate 59–0. 116 CONG. REC. 35743 (1971).

[84] 99 U.S. 130 (1878).

[85] 136 U.S. 436 (1890).

[86] In Wilkerson v. Utah, the Court ruled that public shooting was a legitimate method of execution. 99 U.S. 130 (1878). In *In re* Kemmler, electrocution was held to be a permissible method of execution. 136 U.S. 436 (1890). Both cases specifically establish the constitutionality of the death penalty. Inquiry into method would have been a mere academic exercise if the Court had believed death itself was unconstitutional.

[87] Trop v. Dulles, 356 U.S. 86 (1958):

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

Id. at 99.

[88] *Id.* at 100–01.

[89] It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy. It must observe a fastidious regard for limitations on its own power, and this precludes the Court's giving effect to its own notions of what is wise or politic. That self-restraint is of the essence in the observance of the judicial oath, for the Constitution has not authorized the judges to sit in judgment of the wisdom of what Congress and the Executive Branch do.

Id. at 120 (dissenting opinion).

[90] 408 U.S. at 431.

[91] *Id.* at 432.

> [T]he indicators most likely to reflect the public's view—legislative bodies, state referenda, and the juries which have the actual responsibility—do not support the contention that evolving standards of decency require total abolition of capital punishment.[92]

Petitioners sought to salvage the claim that contemporary society condemns capital punishment by arguing that the infrequent imposition of the death penalty has effectively diffused public opposition. If capital punishment were imposed in a greater number of cases, and if society became aware of the moral issues involved, the public would repudiate the death penalty. Justice Powell again advocates judicial restraint in considering this argument, since conjecture about possible public response to capital punishment involves no judicially manageable standards. A similar argument, presented by Justice Marshall, claims that if the public knew of the discriminatory imposition of capital punishment they would condemn the death penalty. This position is rejected by Justice Powell as too speculative.[93]

Justice Powell agrees with Chief Justice Burger that questions of the efficacy of capital punishment in achieving criminal ends are not within the scope of the eighth amendment. If such questions were within the scope of judicial inquiry, a presumption of validity would attach to legislatively approved penalties.[94] Proofs such as those advanced by Justices Brennan and Marshall, that the death penalty fulfills no penal function better than other penalties, would not be sufficient to overcome the presumption of legislative validity.[95]

Of the four dissenting Justices, only Justice Powell discusses the claim that capital punishment is disproportionate to the crime of rape.[96] Past decisions have ruled that the eighth amendment prohibits punishments greatly disproportionate to the crime charged.[97] However, Justice Powell asserts that the Court may prohibit such punishments only where it is "grossly" excessive or "greatly" disproportionate.[98] It is impossible, he argues, to rule that the death penalty is grossly excessive for all crimes of rape.[99] Justice Powell does indicate approval of an analysis of individual sentences of death under the eighth amendment.[100]

Justice Rehnquist does not deal with the question of whether capital punishment is cruel and unusual within the meaning of the eighth amendment. Instead he argues that the Court should not have decided this question. While the exercise of executive and legislative power is subject to judicial review, this grant of power surely was not meant to leave the judiciary unchecked. Rather this power was granted with the implied, if not express, condition of judicial self-restraint. Justice Rehnquist believes that the Court has exceeded its power, completely disregarding the principle of judicial restraint:

> The task of judging constitutional cases imposed by Art. III cannot for this reason be avoided, but it must surely be approached with the deepest humility and genuine deference to legislative judgement. Today's decision to invalidate capital punishment is significantly lacking in those attributes. For the reasons well stated in the opinions of the Chief Justice, Mr. Justice Powell, and Mr. Justice Blackmun, I conclude that this decision holding unconstitutional capital punishment is not an act of judgement, but rather an act of will.[101]

In sum, in *Furman v. Georgia* five Supreme Court Justices for separate reasons agreed that the death penalty was cruel and unusual for the three de-

[92] *Id.* at 442.

Forty states presently have capital punishment statutes. This number has remained relatively stable since World War I. While legislative committees in Pennsylvania and Maryland recommended abolition of capital punishment, committees in New Jersey and Florida have recommended retention. 2 NATIONAL COMMISSION ON REFORM OF FEDERAL CRIMINAL LAW, WORKING PAPERS, 1365 (1970). Federal legislation also shows no repudiation of capital punishment. *See* note 83 *supra.*

State referenda also do not reflect overwhelming condemnation of the death penalty. An Oregon referendum seeking the abolition of the death penalty was approved in 1964. THE DEATH PENALTY IN AMERICA 233 (H. Bedau ed. 1967). However, the death penalty was approved by 65% of Colorado voters in 1966. *Id.* In 1970, approximately 64% of the voters in Illinois approved capital punishment. H. Bedau, *The Death Penalty in America*, 35 FED. PROB. 35 (Feb. 1971).

[93] 408 U.S. at 446.

[94] Since the authorization of criminal sanctions is an area within the special competency of the legislature, the courts have created a presumption of validity. Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 470 (1947) (concurring opinion); Weems v. United States, 217 U.S. 349, 378–9 (1910); *In re* Kemmler, 136 U.S. 438, 449 (1890).

[95] 408 U.S. at 456.

[96] Chief Justice Burger stated that he agreed with Justice Powell's conclusion. Justice Blackmun simply stated that he believed that capital punishment was not disproportionate for the crime of rape. *Id.* at. 414

[97] Weems v. United States, 217 U.S. 349 (1910); O'Neill v. Vermont, 144 U.S. 323, 339–40 (1892) (dissenting opinion).

[98] 408 U.S. at 457.

[99] *Id.* at 458.

[100] Specific rape and homicide cases can be imagined in which the conduct of the accused may not warrant the imposition of death. *Id.* at 461.

[101] *Id.* at 468.