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

[In Furman the Supreme Court struck down Georgia's system of capital punishment on 8th Amendment grounds: it is cruel and unusual punishment. The majority could not agree on one opinion. Four justices dissented.]

JUSTICE MARSHALL, concurring.

These three cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution. [Footnote 4/1]
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In No. 69-5003, Furman was convicted of murder for shooting the father of five children when he discovered that Furman had broken into his home early one morning. Nos. 69-5030 and 69-5031 involve state convictions for forcible rape. Jackson was found guilty of rape during the course of a robbery in the victim's home. The rape was accomplished as he held the pointed ends of scissors at the victim's throat. Branch also was convicted of a rape committed in the victim's home. No weapon was utilized, but physical force and threats of physical force were employed.
The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed on each of the petitioners and to determine whether or not it violates the Eighth Amendment. The question then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is "a punishment no longer consistent with our own self-respect" [Footnote 4/2] and, therefore, violative of the Eighth Amendment.
The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint. [Footnote 4/3] Hence, we must proceed with caution to answer the question presented. [Footnote 4/4] By first examining the historical derivation of the Eighth Amendment and
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the construction given it in the past by this Court, and then exploring the history and attributes of capital punishment in this country, we can answer the question presented with objectivity and a proper measure of self-restraint.
Candor is critical to such an inquiry. All relevant material must be marshaled and sorted and forthrightly examined. We must not only be precise as to the standards of judgment that we are utilizing, but exacting in examining the relevant material in light of those standards.
Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution. While this fact cannot affect our ultimate decision, it necessitates that the decision be free from any possibility of error.

Part I
[Justice Marshall conducts a review of the origins of "cruel and unusual" and then looks at precedent]
....
The Court used the same approach seven years later in the landmark case of *Weems v. United States,* 217 U. S. 349 (1910). Weems, an officer of the Bureau of Coast Guard and Transportation of the United States Government of the Philippine Islands, was convicted of falsifying a "public and official document." He was sentenced to 15 years' incarceration at hard labor with chains on his ankles, to an unusual loss of his civil rights, and to perpetual surveillance. Called upon to determine whether this was a cruel and unusual punishment, the Court found that it was. [Footnote 4/21] The Court emphasized that the Constitution was not an "ephemeral" enactment, or one "designed to meet passing occasions." [Footnote 4/22] Recognizing that "[t]ime works changes, [and] brings into existence new conditions and purposes," [Footnote 4/23] the Court commented that, "[i]n the application of a constitution . . .
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our contemplation cannot be only of what has been, but of what may be." [Footnote 4/24]
In striking down the penalty imposed on Weems, the Court examined the punishment in relation to the offense, compared the punishment to those inflicted for other crimes and to those imposed in other jurisdictions, and concluded that the punishment was excessive. [Footnote 4/25] Justices White and

Holmes dissented, and argued that the cruel and unusual prohibition was meant to prohibit only those things that were objectionable at the time the Constitution was adopted. [Footnote 4/26]
Weems is a landmark case because it represents the first time that the Court invalidated a penalty prescribed by a legislature for a particular offense. The Court made it plain beyond any reasonable doubt that excessive punishments were as objectionable a those that were inherently cruel. Thus, it is apparent that the dissenters' position in *O'Neil* had become the opinion of the Court in *Weems*.
Weems was followed by two cases that added little to our knowledge of the scope of the cruel and unusual language, *Badders v. United States,* 240 U. S. 391 (1916), and *United States ex rel. Milwaukee Social Democratic Publishing Co. v. Burleson,* 255 U. S. 407 (1921). [Footnote 4/27] Then
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came another landmark case, *Louisiana ex rel. Francis v. Resweber,* 329 U. S. 459 (1947).
Francis had been convicted of murder and sentenced to be electrocuted. The first time the current passed through him, there was a mechanical failure, and he did not die. Thereafter, Francis sought to prevent a second electrocution on the ground that it would be a cruel and unusual punishment. Eight members of the Court assumed the applicability of the Eighth Amendment to the States. [Footnote 4/28] The Court was virtually unanimous in agreeing that "[t]he traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain," [Footnote 4/29] but split 5-4 on whether Francis would, under the circumstances, be forced to undergo any excessive pain. Five members of the Court treated the case like *In re Kemmler,* and held that the legislature adopted electrocution for a humane purpose, and that its will should not be thwarted because, in its desire to reduce pain and suffering in most cases, it may have inadvertently increased suffering in one particular case. [Footnote 4/30]
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The four dissenters felt that the case should be remanded for further facts.
As in *Weems,* the Court was concerned with excessive punishments. *Resweber* is perhaps most significant because the analysis of cruel and unusual punishment questions first advocated by the dissenters in *O'Neil*was at last firmly entrenched in the minds of an entire Court.

Trop v. Dulles, 356 U. S. 86 (1958), marked the next major cruel and unusual punishment case in this Court. Trop, a native-born American, was declared to have lost his citizenship by reason of a conviction by court-martial for wartime desertion. Writing for himself and Justices Black, DOUGLAS, and Whittaker, Chief Justice Warren concluded that loss of citizenship amounted to a cruel and unusual punishment that violated the Eighth Amendment. [Footnote 4/31]

Emphasizing the flexibility inherent in the words "cruel and unusual," the Chief Justice wrote that "[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [Footnote 4/32] His approach to the problem was that utilized by the Court in *Weems:* he scrutinized the severity of the penalty in relation to the offense, examined the practices of other civilized nations of the world, and concluded that involuntary statelessness was an excessive and, therefore, an unconstitutional punishment. Justice Frankfurter, dissenting, urged that expatriation was not punishment, and that even if it were, it was not excessive. While he criticized the conclusion arrived at by the Chief Justice, his approach to the Eighth Amendment question was identical.
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Whereas, in *Trop,* a majority of the Court failed to agree on whether loss of citizenship was a cruel and unusual punishment, four years later, a majority did agree in *Robinson v. California,* 370 U. S. 660 (1962), that a sentence of 90 days' imprisonment for violation of a California statute making it a crime to "be addicted to the use of narcotics" was cruel and unusual. MR. JUSTICE STEWART, writing the opinion of the Court, reiterated what the Court had said in *Weems* and what Chief Justice Warren wrote in *Trop* -- that the cruel and unusual punishment clause was not a static concept, but one that must be continually reexamined "in the light of contemporary human knowledge." [Footnote 4/33] The fact that the penalty under attack was only 90 days evidences the Court's willingness to carefully examine the possible excessiveness of punishment in a given case even where what is involved is a penalty that is familiar and widely accepted. [Footnote 4/34]
We distinguished *Robinson* in *Powell v. Texas,* 392 U. S. 514 (1968), where we sustained a conviction for drunkenness in a public place and a fine of $20. Four Justices dissented on the ground that *Robinson* was controlling. The analysis in both cases was the same; only the conclusion as to whether or not the punishment was excessive differed. *Powell* marked the last time prior to today's decision that the Court has had occasion to construe the meaning of the term "cruel and unusual" punishment.

Several principles emerge from these prior cases and serve as a beacon to an enlightened decision in the instant cases.
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III

Perhaps the most important principle in analyzing "cruel and unusual" punishment questions is one that is reiterated again and again in the prior opinions of the Court: *i.e.,* the cruel and unusual language "must draw its meaning from the evolving standard of decency that mark the progress of a maturing society." [Footnote 4/35] Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.

The fact, therefore, that the Court, or individual Justices, may have in the past expressed an opinion that the death penalty is constitutional is not now binding on us. A fair reading of *Wilkerson v. Utah, supra; In re Kemmler, supra; and Louisiana ex rel. Francis v. Resweber, supra,* would certainly indicate an acceptance *sub silentio* of capital punishment as constitutionally permissible. Several Justices have also expressed their individual opinions that the death penalty is constitutional. [Footnote 4/36] Yet, some of these same Justices and others have at times expressed concern over capital punishment. [Footnote 4/37]
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...[edit]
At the present time, 41 States, the District of Columbia, and other federal jurisdictions authorize the death penalty for at least one crime. It would be fruitless to attempt here to categorize the approach to capital punishment taken by the various States. [Footnote 4/81] It is sufficient to note that murder is the crime most often punished by death, followed by kidnaping and treason. [Footnote 4/82] Rape is a capital offense in 16 States and the federal system. [Footnote 4/83]

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

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

V
In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.
There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. These are considered *seriatim* below.

A. The concept of retribution is one of the most misunderstood in all of our criminal jurisprudence. The principal source of confusion derives from the fact that, in dealing with the concept, most people confuse the question "why do men in fact punish?" with the question "what justifies men in punishing?" [Footnote 4/84] Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law. Thus, it can correctly be said that breaking the law is the *sine qua non* of punishment, or, in other words, that we only

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tolerate punishment as it is imposed on one who deviates from the norm established by the criminal law. The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State's sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. *See Trop v. Dulles,* 356 U.S. at 356 U. S. 111 (BRENNAN, J., concurring). Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.
Punishment as retribution has been condemned by scholars for centuries, [Footnote 4/85] and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.
In *Weems v. United States,* 217 U.S. at 217 U. S. 381, the Court, in the course of holding that Weems' punishment violated the Eighth Amendment, contrasted it with penalties provided for other offenses, and concluded:
"[T]his contrast shows more than different exercises of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice. The State thereby suffers nothing, and loses no power. *The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.*"
(Emphasis added.)
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It is plain that the view of the *Weems* Court was that punishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view that the Court could have taken if the "cruel and unusual" language were to be given any meaning. Retribution surely underlies the imposition of some punishment on one who commits a criminal act. But the fact that *some* punishment may be imposed does not mean that *any* punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would, by definition, be acceptable means for designating society's moral approbation of a particular act. The "cruel and unusual" language would thus be read out of the Constitution, and the fears of Patrick Henry and the other Founding Fathers would become realities. To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. [Footnote 4/86] It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times, a cry is heard that morality requires vengeance to evidence
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society's abhorrence of the act. [Footnote 4/87] But the Eighth Amendment is our insulation from our baser selves. The "cruel and unusual" language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty, and a return to the rack and other tortures would be possible in a given case.
Mr. Justice Story wrote that the Eighth Amendment's limitation on punishment
"would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct. [Footnote 4/88]"
I would reach an opposite conclusion -- that only in a free society would men recognize their inherent weaknesses and seek to compensate for them by means of a Constitution.
The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.

B. The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent to crime. [Footnote 4/89]
While the contrary position has been argued, [Footnote 4/90] it is my firm opinion that the death penalty is a more severe sanction than life imprisonment. Admittedly, there are
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some persons who would rather die than languish in prison for a lifetime. But, whether or not they should be able to choose death as an alternative is a far different question from that presented here -
- *i.e.,* whether the State can impose death as a punishment. Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always

been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such. [Footnote 4/91]
It must be kept in mind, then, that the question to be considered is not simply whether capital punishment is
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a deterrent, but whether it is a better deterrent than life imprisonment. [Footnote 4/92]
There is no more complex problem than determining the deterrent efficacy of the death penalty.
"Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged. [Footnote 4/93]"
This is the nub of the problem, and it is exacerbated by the paucity of useful data. The United States is more fortunate than most countries, however, in that it has what are generally considered to be the world's most reliable statistics. [Footnote 4/94]
The two strongest arguments in favor of capital punishment as a deterrent are both logical hypotheses devoid of evidentiary support, but persuasive nonetheless. The first proposition was best stated by Sir James Stephen in 1864:
"No other punishment deters men so effectually from committing crimes as the punishment of death. This is one of those propositions which it is difficult to prove simply because they are, in themselves, more obvious than any proof can make them. It is possible to display ingenuity in arguing against it, but that is all. The whole experience of mankind is in the other direction. The threat of instant death is the one to which resort has always been made when there was an absolute necessity for producing some result. . . . No one goes to certain
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inevitable death except by compulsion. Put the matter the other way. Was there ever yet a criminal who, when sentenced to death and brought out to die, would refuse the offer of a commutation of his sentence for the severest secondary punishment? Surely not. Why is this? It can only be because 'All that a man has will he give for his life.' In any secondary punishment, however terrible, there is hope; but death is death; its terrors cannot be described more forcibly. [Footnote 4/95]"
This hypothesis relates to the use of capital punishment as a deterrent for any crime. The second proposition is that,
"life imprisonment is the maximum penalty for a crime such as murder, an offender who is serving a life sentence cannot then be deterred from murdering a fellow inmate or a prison officer. [Footnote 4/96]"
This hypothesis advocates a limited deterrent effect under particular circumstances.
Abolitionists attempt to disprove these hypotheses by amassing statistical evidence to demonstrate that there is no correlation between criminal activity and the existence or nonexistence of a capital sanction. Almost all of the evidence involves the crime of murder, since murder is punishable by death in more jurisdictions than are other offenses, [Footnote 4/97] and almost 90% of all executions since 1930 have been pursuant to murder convictions. [Footnote 4/98]
Thorsten Sellin, one of the leading authorities on capital punishment, has urged that, if the death penalty
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deters prospective murderers, the following hypotheses should be true:
"(a) Murders should be less frequent in states that have the death penalty than in those that have abolished it, other factors being equal. Comparisons of this nature must be made among states that are as alike as possible in all other respects -- character of population, social and economic condition, etc. -- in order not to introduce factors known to influence murder rates in a serious manner but present in only one of these states."
"(b) Murders should increase when the death penalty is abolished, and should decline when it is restored."
"(c) The deterrent effect should be greatest, and should therefore affect murder rates most powerfully, in those communities where the crime occurred and its consequences are most strongly brought home to the population."
"(d) Law enforcement officers would be safer from murderous attacks in states that have the death penalty than in those without it. [Footnote 4/99]"
(Footnote omitted.)
Sellin's evidence indicates that not one of these propositions is true. This evidence has its problems, however. One is that there are no accurate figures for capital murders; there are only figures on homicides, and they, of course, include noncapital killings. [Footnote 4/100] A second problem is that certain murders undoubtedly are misinterpreted as accidental deaths or suicides, and there

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is no way of estimating the number of such undetected crimes. A third problem is that not all homicides are reported. Despite these difficulties, most authorities have assumed that the proportion of capital murders in a State's or nation's homicide statistics remains reasonably constant, [Footnote 4/101] and that the homicide statistics are therefore useful.
Sellin's statistics demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction. He compares States that have similar characteristics and finds that, irrespective of their position on capital punishment, they have similar murder rates. In the New England States, for example, there is no correlation between executions [Footnote 4/102] and homicide rates. [Footnote 4/103] The same is true for Midwestern States, [Footnote 4/104] and for all others studied. Both the United Nations [Footnote 4/105] and Great Britain [Footnote 4/106] have acknowledged the validity of Sellin's statistics.
Sellin also concludes that abolition and/or reintroduction of the death penalty had no effect on the homicide rates of the various States involved. [Footnote 4/107] This conclusion is borne out by others who have made similar
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inquiries [Footnote 4/108] and by the experience of other countries. [Footnote 4/109] Despite problems with the statistics, [Footnote 4/110] Sellin's evidence has been relied upon in international studies of capital punishment. [Footnote 4/111]
Statistics also show that the deterrent effect of capital punishment is no greater in those communities where executions take place than in other communities. [Footnote 4/112] In fact, there is some evidence that imposition of capital punishment may actually encourage crime, rather than deter it. [Footnote 4/113] And, while police and law enforcement officers
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are the strongest advocates of capital punishment, [Footnote 4/114] the evidence is overwhelming that police are no safer in communities that retain the sanction than in those that have abolished it. [Footnote 4/115]
There is also a substantial body of data showing that the existence of the death penalty has virtually no effect on the homicide rate in prisons. [Footnote 4/116] Most of the persons sentenced to death are murderers, and murderers tend to be model prisoners. [Footnote 4/117]
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In sum, the only support for the theory that capital punishment is an effective deterrent is found in the hypotheses with which we began and the occasional stories about a specific individual being deterred from doing a contemplated criminal act. [Footnote 4/118] These claims of specific deterrence are often spurious, [Footnote 4/119] however, and may be more than counterbalanced by the tendency of capital punishment to incite certain crimes. [Footnote 4/120]
The United Nations Committee that studied capital punishment found that
"[i]t is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime. [Footnote 4/121]"
Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to accept the presently existing statistics and demanded more proof. It may be that we now possess all the proof that anyone could ever hope to assemble on the subject. But, even if further proof were to be forthcoming, I believe there is more than enough evidence presently available for a decision in this case.
In 1793, William Bradford studied the utility of the death penalty in Pennsylvania and found that it probably had no deterrent effect, but that more evidence
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was needed. [Footnote 4/122] Edward Livingston reached a similar conclusion with respect to deterrence in 1833 upon completion of his study for Louisiana. [Footnote 4/123] Virtually every study that has since been undertaken has reached the same result. [Footnote 4/124]
In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect. [Footnote 4/125]
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C. Much of what must be said about the death penalty as a device to prevent recidivism is obvious -- if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes, either in prison or upon their release. [Footnote 4/126] For the most part, they are first offenders, and, when released from prison, they are known to become model citizens. [Footnote 4/127] Furthermore, most persons who commit capital crimes are not executed. With respect to those who are sentenced to die, it is critical to note that the jury is never asked to determine whether they are likely to be recidivists. In light of these facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive; no general need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.

D. The three final purposes which may underlie utilization of a capital sanction -- encouraging guilty pleas and confessions, eugenics, and reducing state expenditures -- may be dealt with quickly. If the death penalty is used to encourage guilty pleas, and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. *United States*
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v. Jackson, 390 U. S. 570 (1968). [Footnote 4/128] Its elimination would do little to impair the State's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency.
Moreover, to the extent that capital punishment is used to encourage confessions and guilty pleas, it is not being used for punishment purposes. A State that justifies capital punishment on its utility as part of the conviction process could not profess to rely on capital punishment as a deterrent. Such a State's system would be structured with twin goals only: obtaining guilty pleas and confessions and imposing imprisonment as the maximum sanction. Since life imprisonment is sufficient for bargaining purposes, the death penalty is excessive if used for the same purposes.
In light of the previous discussion on deterrence, any suggestions concerning the eugenic benefits of capital punishment are obviously meritless. [Footnote 4/129] As I pointed out above, there is not even any attempt made to discover which capital offenders are likely to be recidivists, let alone which are positively incurable. No test or procedure presently exists by which incurables can be screened from those who would benefit from treatment. On the one hand, due process would seem to require that we have some procedure to demonstrate incurability before execution; and, on the other hand, equal protection would then seemingly require that all incurables be executed, *cf. Skinner v. Oklahoma,* 316 U. S. 535 (1942). In addition, the "cruel and unusual" language
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would require that life imprisonment, treatment, and sterilization be inadequate for eugenic purposes. More importantly, this Nation has never formally professed eugenic goals, and the history of the world does not look kindly on them. If eugenics is one of our purposes, then the legislatures should say so forthrightly and design procedures to serve this goal. Until such time, I can only conclude, as has virtually everyone else who has looked at the problem, [Footnote 4/130] that capital punishment cannot be defended on the basis of any eugenic purposes.
As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support. a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. [Footnote 4/131] Condemned men are not productive members of the prison community, although they could be, [Footnote 4/132] and executions are expensive. [Footnote 4/133] Appeals are often automatic, and courts admittedly spend more time with death cases. [Footnote 4/134]
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At trial, the selection of jurors is likely to become a costly, time-consuming problem in a capital case, [Footnote 4/135] and defense counsel will reasonably exhaust every possible means to save his client from execution, no matter how long the trial takes.
During the period between conviction and execution, there are an inordinate number of collateral attacks on the conviction and attempts to obtain executive clemency, all of which exhaust the time, money, and effort of the State. There are also continual assertions that the condemned prisoner has gone insane. [Footnote 4/136] Because there is a formally established policy of not executing insane persons, [Footnote 4/137] great sums of money may be spent on detecting and curing mental illness in order to perform the execution. [Footnote 4/138] Since no one wants the responsibility for the execution, the condemned man

is likely to be passed back and forth from doctors to custodial officials to courts like a ping-pong ball. [Footnote 4/139] The entire process is very costly.
When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life. [Footnote 4/140]

E. There is but one conclusion that can be drawn from all of this -- *i.e.,* the death penalty is an excessive and unnecessary punishment that violates the Eighth
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Amendment. The statistical evidence is not convincing beyond all doubt, but it is persuasive. It is not improper at this point to take judicial notice of the fact that, for more than 200 years, men have labored to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally well. And they have done so with great success. Little, if any, evidence has been adduced to prove the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that, at some point, the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment. [Footnote 4/141]
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VI
In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.
In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless "it shocks the conscience and sense of justice of the people." [Footnote 4/142]
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Judge Frank once noted the problems inherent in the use of such a measuring stick:
"[The court,] before it reduces a sentence as 'cruel and unusual,' must have reasonably good assurances that the sentence offends the 'common conscience.' And, in any context, such a standard -- the community's attitude -- is usually an unknowable. It resembles a slithery shadow, since one can seldom learn, at all accurately, what the community, or a majority, actually feels. Even a carefully taken 'public opinion poll' would be inconclusive in a case like this. [Footnote 4/143]"
While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, [Footnote 4/144] its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends not on whether its mere mention "shocks the conscience and sense of justice of the people," but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable. [Footnote 4/145]
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In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.
This is not to suggest that, with respect to this test of unconstitutionality, people are required to act rationally; they are not. With respect to this judgment, a violation of the Eighth Amendment is totally dependent on the predictable subjective, emotional reactions of informed citizens. [Footnote 4/146]
It has often been noted that American citizens know almost nothing about capital punishment. [Footnote 4/147] Some of the conclusions arrived at in the preceding section and the supporting evidence would be critical to an informed judgment on the morality of the death penalty: *e.g.,* that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are
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rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become law-abiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that, while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

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

But, if this information needs supplementing, I believe that the following facts would serve to convince

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even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system. Each of these facts is considered briefly below.

Regarding discrimination, it has been said that

"[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group -- the man who, because he is without means, and is defended by a court-appointed attorney -- who becomes society's sacrificial lamb. . . . [Footnote 4/148] Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. [Footnote 4/149] Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; [Footnote 4/150] 455 persons, including 48 whites and 405 Negroes, were executed for rape. [Footnote 4/151] It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that, while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. [Footnote 4/152]

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Racial or other discriminations should not be surprising. In *McGautha v. California,* 402 U.S. at 402 U. S. 207, this Court held"

"that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution."

This was an open invitation to discrimination.

There is also overwhelming evidence that the death penalty is employed against men, and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate. [Footnote 4/153] It is difficult to understand why women have received such favored treatment, since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes. [Footnote 4/154]

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged

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members of society. [Footnote 4/155] It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the *status quo,* because change would draw attention to the problem and concern might develop. Ignorance is perpetuated, and apathy soon becomes its mate, and we have today's situation.

Just as Americans know little about who is executed and why, they are unaware of the potential dangers of executing an innocent man. Our "beyond a reasonable doubt" burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death. [Footnote 4/156]

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Proving one's innocence after a jury finding of guilt is almost impossible. While reviewing courts are willing to entertain all kinds of collateral attacks where a sentence of death is involved, they very rarely dispute the jury's interpretation of the evidence. This is, perhaps, as it should be. But if an innocent man has been found guilty, he must then depend on the good faith of the prosecutor's office to help him

establish his innocence. There is evidence, however, that prosecutors do not welcome the idea of having convictions, which they labored hard to secure, overturned, and that their cooperation is highly unlikely. [Footnote 4/157]
No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. [Footnote 4/158] We have no way of
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judging how many innocent persons have been executed, but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.
While it is difficult to ascertain with certainty the degree to which the death penalty is discriminatorily imposed or the number of innocent persons sentenced to die, there is one conclusion about the penalty that is universally accepted -- *i.e.,* it "tends to distort the course of the criminal law." [Footnote 4/159] As Mr. Justice Frankfurter said:
"I am strongly against capital punishment. . . . When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the Judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be, in my judgment, does not outweigh the social loss due to the inherent sensationalism of a trial for life. [Footnote 4/160] "
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The deleterious effects of the death penalty are also felt otherwise than at trial. For example, its very existence "inevitably sabotages a social or institutional program of reformation." [Footnote 4/161] In short
"[t]he presence of the death penalty as the keystone of our penal system bedevils the administration of criminal justice all the way down the line, and is the stumbling block in the path of general reform and of the treatment of crime and criminals. [Footnote 4/162]"
Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. [Footnote 4/163] For this reason alone, capital punishment cannot stand.
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VII

To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey. The amount of information that we have assembled and sorted is enormous.
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Yet I firmly believe that we have not deviated in the slightest from the principles with which we began. At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects simple solutions that compromise the values that lie at the roots of our democratic system.

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve "a major milestone in the long road up from barbarism" [Footnote 4/164] and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment. [Footnote 4/165]
I concur in the judgments of the Court.

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MR. JUSTICE BLACKMUN, dissenting.

I join the respective opinions of THE CHIEF JUSTICE, MR. JUSTICE POWELL, and MR. JUSTICE REHNQUIST, and add only the following, somewhat personal, comments.

1. Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible

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with the philosophical convictions I have been able to develop. It is antagonistic to any sense of "reverence for life." Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments.

2. Having lived for many years in a State that does not have the death penalty, [Footnote 7/1] that effectively abolished it in 1911, [Footnote 7/2] and that carried out its last execution on February 13, 1906, [Footnote 7/3] capital punishment had never been a part of life for me. In my State, it just did not exist. So far as I can determine, the State, purely from a statistical deterrence point of view, was neither the worse nor the better for its abolition, for, as the concurring opinions observe, the statistics prove little, if anything. But the State and its citizens accepted the fact that the death penalty was not to be in the arsenal of possible punishments for any crime.

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

If we were possessed of legislative power, I would either join with MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes. Our constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment. There is no novelty in being called upon to interpret a constitutional provision that is less than

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self-defining, but, of all our fundamental guarantees, the ban on "cruel and unusual punishments" is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command. Yet it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.

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

....