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Perspectives on the Death Penalty: Judicial Behavior and the Eighth Amendment

Miriam Berkman*

Introduction

The Eighth Amendment to the United States Constitution prohibits the infliction of "cruel and unusual punishments." This clause has been described as "constitutional boilerplate." Mr. Justice Story suggested that "the provision would seem to be wholly unnecessary in a free government, since it is scarcely possible, that any department of such a government should authorize, or justify such atrocious conduct." Nevertheless, convicted persons repeatedly have invoked the protection of this express prohibition of cruel punishments in challenging the legitimacy of long prison terms for offenses perceived to be minor, innovative punishments, prison confinement under grossly debilitating conditions, and, perhaps most importantly, the death penalty. These challenges have forced judges to supply content to the words of the Eighth Amendment.

The phrase "cruel and unusual punishments" does not, on its face, describe any discrete set of readily ascertainable penalties. It does not have any "natural and proper" meaning. Rather, it is a label for a moral concept we call "cruelty." Giving concrete meaning to the cruel and unusual punishments clause is a process of clarifying the values associated with the constitutional concept of cruelty and applying them to particular cases. At the Eighth Amendment's present stage of development, the Court has not reached any real consensus on several points: whose moral judgments define the constitutional ban on cruel punishments; what methodology should be used for discovering the relevant moral judgments; and whether the questions raised by the cruel and unusual punishments cases are questions of morality that are not susceptible to resolution by deduction. The cases reveal a Court which re-

* J.D., Yale Law School, 1982.
2. STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, 750 (Cambridge, 1833).
3. CHARLES L. BLACK, JR., DECISION ACCORDING TO LAW, 23 (1980).
mains in the throes of an agonizing debate over substantive interpretation of the Eighth Amendment. A few of the Justices have accepted the responsibility of trying to articulate the constituent elements of the concept of cruelty in order to produce a rational definition of appropriate prohibitions.5 Others, attempting to avoid embroilment in a debate over moral philosophy or penal theory, have sought “objective” tests of cruelty whose applications are often characterized by heavy reliance on empirical evidence.6 And some have focused on the procedural regularity with which punishments are inflicted, perhaps in an attempt to induce governmental bodies to debate and articulate the substantive moral choices.7

The majority of Eighth Amendment opinions above focus more on different theories of judicial review, transcending the cruel and unusual punishments clause, than on disagreements unique to that clause. This is because many of the Court’s struggles, thus far, have concerned threshold questions. The debate over the appropriate judicial role is relatively developed. The debate over substantive moral principles is not.8

This article analyzes Supreme Court attempts to articulate standards for review in terms of the various Justices’ views of their own role in the decision-making process. Furthermore, the article specifically addresses the death penalty, which offers a particularly emotionally charged context in which to consider the meaning of cruel and unusual punishment. As the states begin not only to reenact capital punishment legislation, but also to resume the practice of execution, it is important to consider the jurisprudence that makes these developments possible.9 Individual


8. The court is so splintered with respect to the appropriate level of judicial scrutiny and the legitimate sources of law to be applied to Eighth Amendment cases that most of the published debate centers around these questions. Several opposing positions have been clearly articulated. On the current court, only Justices Brennan and Marshall have been willing to examine the moral principles underlying the cruel and unusual punishments clause. They do not engage in the same type of textual and empirical interpretation as Chief Justice Burger and Justice Rehnquist. Although the debate is polarized, the only meaningful dialogue between the Court’s members concerns the appropriate role of judges in interpreting the Eighth Amendment. The Justices’ applications of their various chosen methodologies are informative, but they do not address each other. Therefore, this discussion is organized around the opposing views of the judge’s proper role.

9. The death penalty is a special case. Indeed, the emotion surrounding the capital pun-
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opinions are considered from the perspective of judicial motive and role identification, in an effort to suggest explanations for the Justices' different conceptions of their roles. Opinions evidencing a common judicial role are considered together according to categories based on the Justices' own perceptions of their roles in the process of societal value clarification. The concluding section discusses which approach is most appropriate for Eighth Amendment adjudication in capital punishment cases. The opinions are grouped in the following categories discussed in order of increasing judicial activity: (1) Empirical approaches, including historical and contemporary public opinion analysis; (2) Procedural approaches not directly concerned with the substance of the ban on cruel and unusual punishments; and (3) Independent approaches seeking both to identify core principles underlying the cruel and unusual punishments clause and to apply those principles to current cases.

I. Judicial Restraint: The Search for an Empirical Definition

For some of the Supreme Court Justices, judicial "objectivity," or perhaps more accurately judicial "restraint," is of primary importance. They believe that the judiciary should never make independent substantive choices. They see the legitimacy of judicial action as being dependent on the Justices' willingness and ability to interpose barriers between their personal preferences and their interpretations of the Constitution. The judicial function, according to this view, is to enforce the substantive choices made by other institutional decisionmakers, not to analyze moral dilemmas from first principles. Legitimate sources of decision are all external—constitutional text, constitutional history, judicial precedent, legislative action, or contemporary public opinion. Consequently, the process of judging becomes heavily dependent on empirical research. This view of the judicial purpose has led to several different but related approaches to the cruel and unusual punishments clause in death penalty cases.

10. This judicial view seeks to depersonalize the judging process in order to avoid decisions representing nothing but the whims of individuals. Although the methods chosen by these Justices may not be the only alternatives to standardless subjectivity, they often denominate their approaches "objective," implying that all others are "subjective" and therefore inappropriate. In order to circumvent this problem, the "objective"/"subjective" terminology will be avoided here.
A. The Historical Approach

The first of the empirical approaches is the historical approach. Subscribers to this view would define the Eighth Amendment by the punishments that its authors sought to prohibit when they added that amendment to the Constitution. Historical evidence is the key to this approach. Although the legislative history of the cruel and unusual punishments clause is sparse, the evidence points to an intent to prohibit physically torturous punishments, such as the rack, drawing and quartering, breaking on the wheel, crucifixion and similar tortures practiced in Stuart, England. 11

Early Supreme Court opinions interpreting the cruel and unusual punishments clause applied the historical approach and rejected several Eighth Amendment challenges. For example, in Wilkerson v. Utah,12 the Court upheld the constitutionality of shooting as a method of carrying out a death sentence. In reaching its conclusion, the Court noted that shooting had long been a common mode of execution under military law. In defining the scope of the Eighth Amendment, the Court said only that

Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments such as [the Stuart tortures catalogued by Blackstone] and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the

11. For example, Mr. Holmes protested in the Massachusetts convention that:

[Congress is] nowhere restrained from inventing the most cruel and unheard—of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and giblets may be amongst the most mild instruments of their discipline. 2 J. ELLIOT, THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 111 (Philadelphia, 1866) (emphasis in original).

And in the Virginia convention, Patrick Henry insisted that:

[W]hen we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.

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

The Congressional debate on the proposed Eighth Amendment proceeded as follows:

Mr. Smith of South Carolina objected to the words “nor cruel and unusual punishments;” the import of them being too indefinite. Mr. Livermore, of New Hampshire: “The Clause seems to express a great deal of humanity, on which account I have no objection to it; but it seems to have no meaning in it, I do not think it is necessary. ... No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off, but are we in the future to be prevented from inflicting these punishments because they are cruel?, 1 ANNALS OF CONG. 782-3 (J. Gales ed. 1789). See generally Granucci, supra note 1.

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The historical approach has not commanded a majority of the Court in more recent capital punishment cases. It has maintained some adherents, however. Justice Black, for example, concurring in *McCautha v. California* argued that the words of the Eighth Amendment "cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted. It is inconceivable to me that the framers intended to end capital punishment by the Amendment."

Under the historical approach, constitutional interpretation becomes a search for the subjective intent of the Framers. If the clause embodies a moral condemnation of cruelty, cruelty is defined with reference to the Framers' moral standards, not the personal beliefs of the Justices, or of a contemporary majority of the American people. The tools of this type of interpretation are impersonal—historical research and linguistic analysis of the constitutional text. With respect to the death penalty, the widespread authorization of capital punishment at the time the Eighth Amendment was adopted, the absence of any statement in the legislative history indicating an intent to abolish capital punishment, and the textual references to capital punishment in other parts of the Constitution lead inescapably to the conclusion that the Framers contemplated the continued use of the death penalty as a criminal sanction.

The historical process of interpretation is appealing for several reasons. First, the focus on historical evidence and the words of the Constitution frees the Justices from possible accusations that they have injected their personal beliefs into the Constitution. Whatever role one envisions for the courts, it is generally accepted that federal judges are expected to be expounders of constitutional values, not political actors seeking to infuse their idiosyncratic beliefs into law. Although acceptance of the Framers' wishes is not the only alternative to unprincipled political action by judges, it is one clear alternative. Like

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13. *Id.* at 135-36.
16. The Fifth Amendment provides that "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . nor be deprived of life, liberty or property, without due process of law . . . . " Similarly, the Fourteenth Amendment provides that " . . . no State shall . . . deprive any person of the life, liberty, or property, without due process of law . . . . "
17. The Justices are also freed from direct blame for the beliefs and from the difficult task of justifying often controversial moral judgments.
every other approach to judicial decision-making, it is, of course, subject to the personal beliefs of the Justice since personal beliefs will partially determine which empirical evidence is convincing to a particular Justice. The limited, factual nature of the relevant evidence leaves less room for personalities to intrude than do many other approaches, however.

Further, by posing an historical question and then focusing on historical evidence, the Justices increase the likelihood that they will find a conclusive answer to the question before them. By choosing a question that has a discoverable (but not necessarily relevant) answer, they preserve the judicial myth that law is discovered, not made; that the words of the Constitution have natural and proper meanings which the Justices retrieve from obscurity and express with mathematical certainty; that right and wrong in law are analogous to right and wrong in science. Although the myth is false, it nevertheless persists. It provides judges with a sense of security—an escape from acknowledgement of their power to choose among competing values and to impose their will.

The myth also reassures the public about the role of judges. If judges are seen as passive mouthpieces for static law, then they need not be feared. Indeed they become expositors of certainty in a confused world, and thus allay fears bred of confusion. On the other hand, if judges are viewed as usurpers whenever their creative role becomes obvious, the myth itself poses a danger. It cannot possibly be fulfilled, yet we demand that judges strive to fulfill it. Inevitably, they confuse the law in an effort to assume an impossible role.

Although historical analysis may often provide a simple and definitive answer, the historical meaning of the cruel and unusual punishments clause, namely which punishments the Framers intended to prohibit, may not be readily discernible. Collective psychological states in general, and two hundred year old psychological states, in particular, are not susceptible to rigorous proof. Nevertheless, the question may be easier to answer than one directed at defining the moral concept of cruelty. It is also in a form that supports the myth—it searches for an intent which has become obscured with time in order to reaffirm the meaning of a law which has not changed.

Finally, in the case of the cruel and unusual punishments clause, acceptance of the historical approach can serve to avoid conflict with the majoritarian branches of government. Although the moral beliefs of the eighteenth century Constitutional Framers are not necessarily closer to the beliefs of the contemporary popular majority than are the beliefs of

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present day judges, acceptance of the Framers' standards for punishment legitimates all penalties short of physical torture. So, while the people may be more tolerant of a court striking down democratically enacted statutes as violative of five Justices personal beliefs than they would be of a court striking down the same statutes as violative of two hundred year old moral standards long rejected by American society, the reality in this area is that application of the historical approach legitimates governmental action.

This reality, however, reveals the inadequacy of history as a guiding principle for interpreting the cruel and unusual punishments clause. Conceptions of cruelty, like all moral values, may change over time. If the American notion of cruelty has changed since the end of the eighteenth century, the Framers' definition ceases to be a very good index of what is now cruel. In fact, our conception of cruelty has changed. Some punishments routinely inflicted in the eighteenth century and not considered cruel, whipping and pillorying\(^{19}\) for example, undoubtedly would be viewed as cruel today. Tying the constitutional prohibition of cruelty to its eighteenth century conception legitimates the infliction of punishments now acknowledged to be cruel and authorizes legislatures to act cruelly. The only limitation on such legislative action would be that it must take the form of a previously acceptable punishment. Adoption of the historical approach, therefore, leads to the conclusion that the Eighth Amendment is meaningless, unnecessary and obsolete.

Moreover, although the Framers' definition of cruelty is reasonably clear, it is not clear that they intended to enact a static ban on certain specific punishments. If they intended the Eighth Amendment to be limited to physical torture, why does it proscribe cruel and unusual punishments in such general language? The intent may have been to prohibit the concept of cruel punishments, allowing the constitutional definition of cruelty to change as the societal conception of cruelty changed over time, and as previously unimagined cases arose. If so, the Framers' subjective conceptions of cruelty are as irrelevant as the Justices' preferences. The Court must then reject the eighteenth century standard which has been outgrown in order to apply the general concept to new cases and give effect to the broader goal of the same Framers — to prohibit government from acting cruelly, even toward persons convicted of crimes.\(^{20}\)

\(^{19}\) "Pillory—a frame erected on a pillory and made with holes and movable boards, through which the heads and hands of criminals were put." BLACK'S LAW DICTIONARY 1305 (4th ed. 1968). See Furman v. Georgia, 408 U.S. at 430 (Powell, J., dissenting), citing Jackson v. Bishop, 404 F.2d 571 (8th Cir. 1968).

\(^{20}\) R. DWORKIN, TAKING RIGHTS SERIOUSLY, 135-36 (1977); Radin, The Jurisprudence of
An obvious alternative to the historical approach is an analysis linked to contemporary popular consensus. In several of the recent death penalty cases, some members of the Court have sought to develop a method of Eighth Amendment analysis which transcends the limitations of history without abandoning the ideal of "objectivity" expressed in empirical verifiability. These Justices, like those subscribing to the historical approach, absolutely refuse to inject themselves into the substantive decision-making process. Rather than accepting the substantive moral choices of the constitutional Framers, however, they attempt to apply the moral standards of the present American society, as revealed through "objective indicia." This approach relies on legislative behavior, jury behavior and public opinion polls to capture a contemporary popular notion of cruelty.

The two clearest examples of Supreme Court opinions basing the definition of cruelty on contemporary public opinion are *Gregg v. Georgia*\(^2\) and *Coker v. Georgia*.\(^2\) Both involve the Georgia death penalty statute. In *Gregg* the Court upheld the constitutionality of the death penalty for murder, at least under the procedural safeguards of the Georgia statute,\(^2\) concluding that the use of capital punishment was not in all cases repugnant to the moral standards of the American people today. The Court relied heavily on the fact that, since *Furman v. Georgia*\(^2\) invalidated capital punishment statues which allowed for unfettered jury discretion in choosing whether to impose the death penalty,\(^2\) thirty-five state legislatures and Congress had reenacted death penalty statutes applicable to some crimes. The plurality argued that it was inconceivable that capital punishment violated the American people's notion of cruelty when so many legislatures, in reconsidering the issue, had recently reenacted capital punishment statutes.

In *Coker*, the Court applied a similar line of reasoning to hold the death penalty unconstitutional when inflicted as punishment for the rape of an adult woman. In contrast to the ubiquity of the post-*Furman*

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statutes authorizing the death penalty for murder, only three state legislatures had prescribed the death penalty for rape in the wake of Furman. No state which had not previously imposed capital punishment for rape did so after Furman, and several states dropped rape from their list of capital offenses. In addition, two of the three state statutes authorizing the death penalty for rape had been invalidated because they imposed mandatory death sentences on those convicted. Hence, Georgia was left with the only operative capital punishment statute applicable to rape. The Court also considered the behavior of Georgia juries under the statute and was impressed by the fact that in nine out of ten rape cases juries had not voted to impose the death penalty. Based on this evidence of popular opinion, the Court held that capital punishment is disproportionate to the crime of raping an adult woman, and is therefore repugnant to the Eighth Amendment.

Although adopted with the commendable objective of avoiding the stranglehold of historical interpretation, this type of analysis is not acceptable. Instead of accepting the moral judgments of the past, it accepts the moral judgments of the present majority. This ignores the very purpose of constitutional safeguards — to prevent a temporal majority from imposing its will in violation of the constitutional principles agreed upon in advance. To allow the Court to assign the job of defining the Eighth Amendment constitutional right to those whose activity the Constitution seeks to restrain is to emasculate that right entirely.

In both Gregg and Coker the Court denied that it was abdicating its decision-making authority to the popular will. It claimed to be using objective indicia of popular opinion as evidence of contemporary moral standards on which it can base its own determination of the bounds of

27. See discussion of the proportionality principle in Coker infra p. 55.
28. Were wide acceptance — measured by statutory authorization or public opinion polls — enough to authorize a punishment, the clause would indeed be "drained of any independent integrity as a governing normative principle." Like no other constitutional provision, its only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom.
29. For example, the Court in Gregg stated that "... public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with 'the dignity of man' which is the 'basic concept underlying the Eighth Amendment.'" 428 U.S. at 173, quoting Trop v. Dulles, 356 U.S. 86, 100 (1958).
Similarly, in Coker, Justice White explained that, "These recent events evidencing the attitudes of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment," 433 U.S. at 597.
the constitutional ban on cruel and unusual punishments. Extreme reliance on so-called "objective indicia," coupled with a strong presumption that the legislative decisions are constitutional, belies the Court's claim of independence, however.

The decision-making tools used by Justices applying historical and contemporary-opinion approaches to the cruel and unusual punishments clause are often similar to the tools used by the Justices, discussed in Part IV below, who attempt to forge their own way through the moral dilemmas associated with the Eighth Amendment and the capital punishment issue. History and contemporary political behavior are important to both modes of analysis. The difference lies in the weight accorded to external, empirical evidence. The approaches discussed here emphasize depersonalized evidence alone. The alternative approaches discussed below forthrightly accept the judging process as human and seek to integrate empirical research with intuition and reflection.

The appeal of the public opinion approach is essentially the same as the appeal of the historical approach. The Court maintains an impersonal, detached stance, enabling it to fend off any criticism that it is personalizing the Constitution. The sources of decision are reasonably concrete facts that are likely to lead to a definite answer. Here again, this mode of analysis avoids conflict with the majoritarian branches of government.

Such conflict avoidance is a central concern. Its cardinal principle is that "Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices." By directly defining the constitutional concept of cruelty in terms of popular opinion the Court makes legislative decisions the best evidence of the Eighth Amendment's meaning. It then adopts the legislative judgments wholesale.

In Gregg, when faced with such overwhelming legislative support of the death penalty for murder, the Court was simply unwilling to probe into either the legitimacy of legislative ends (is vengeance permissible under the Eighth Amendment?) or the fit between means and ends (does capital punishment really deter more than life imprisonment?). Legislative authorization answered all of the questions. Justice White's concurring opinion in Gregg actually argued that widespread legislative approval of the death penalty proves: (1) the people do not think capital punishment is morally abhorrent, (2) the people think capital punishment is an effective deterrent, and (3) the popular demand for retribution cannot be satisfied by any lesser punishment.

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Only in Coker, where Georgia stood alone in authorizing capital punishment for rape, was the Court willing to invalidate the legislative judgment. This implies that the difference in result lies in the variance in political risk. The Court in Coker did not perceive the political cost of crossing a single state legislature to be as high as the costs of confronting a majority of state legislatures and Congress in Gregg. The Coker decision can be seen more as a triumph of national uniformity than as an example of judicial bravery in enforcing constitutional rights.

The opinions of Chief Justice Burger and Justice Rehnquist most dramatically illustrate Supreme Court rejection of judicial subjectivity. Indeed, Burger and Rehnquist appear to believe that judicial objectivity in interpreting the cruel and unusual punishments clause does not exist at all. They defer to the legislature in every case. For them, only strong evidence of "legislative default" would trigger a more active judicial posture. Burger and Rehnquist principally differ from the Coker majority in their views toward national uniformity. Their strong adherence to the notion that each state is unique leads to the finding that a rejection of any particular punishment by most states does bear on the appropriateness of that same punishment in even a single state. The articulated rationale is one of federalism. The effect of the Burger/Rehnquist approach is to deny the existence of any relevant evidence as to the acceptability of a particular punishment, other than the legislative act authorizing it.

II. Procedural Approaches

During the past fifteen years, the Supreme Court continually has been grappling with issues involving the constitutionality of capital punishment. In many of these cases, some or all of the Justices have refused to consider the claim that the death penalty is cruel and unusual punishment per se. Like the Justices employing the empirical approaches dis-

32. Daniel Polsby argues, similarly:
So long as the crucial matter of fact is taken to be what "society" thinks or does, I can think of no reason, a priori, why the relevant society to look to ought not to be the people of each separate state. If the people of Minnesota abhor the death penalty, . . . , and find it unnecessary, then let them abolish it. As a matter of fact, they did, some fifty years ago. But why, for purposes of establishing constitutional norms, the feelings of the "society" for citizens of Minnesota ought to control what is cruel and unusual punishment in South Carolina does not seem to be obvious. [E]ven if it is established that Arkansas, for example, hangs only its Negro murderers and rapists, that fact would logically furnish no Eighth Amendment justification for why Montana could not hang its white murderers and rapists.
cussed above, they refuse to assume responsibility for defining the substance of "cruelty." Unlike the empiricists, however, they do not readily accept external definitions. They have not simply legitimated the death penalty. Instead they have focused on procedures employed by the statutes in question to select those defendants who will be executed, and have taken an active role in prescribing acceptable procedures. These cases can be seen as attempts by the Court to avoid imposing its own substantive decision as to the cruelty of capital punishment while demanding that the substantive moral decisions be brought into the open. This forces other decision-making centers to confront the difficult moral issues and to make rational choices in public forums. Also, the cases may be viewed as attempts to create a procedural screen to blunt public criticism of the Court's substantive decisions.

A. The Due Process Clause

The first of the capital punishment procedure cases arose under the Fourteenth Amendment due process clause rather than under the cruel and unusual punishments clause of the Eighth Amendment. In *Witherspoon v. Illinois*, the Court held that the automatic exclusion of persons with conscientious scruples against the death penalty from sentencing juries in capital cases violated the requirements of due process. Since the jury is supposed to represent the conscience of the community, and it is the body which possesses the delegated authority to determine when to apply the ultimate sanction, all shades of public opinion must be able to have a voice in that decision-making forum. Laurence Tribe has explained the *Witherspoon* decision by suggesting that the acceptability of capital punishment is a question on which society has not yet reached a consensus. As a result the Court's role is not to resolve the conflict itself but to facilitate its resolution by assuring continued open discussion in other forums.

Less sympathetic critics and the *Witherspoon* dissenters argued that the majority was motivated by substantive dislike of the death penalty and sought to use procedural excuses to discourage its use.

In *McGautha v. California*, the Court was faced with a frontal chal-

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35. Justice White commented, in dissent, "If the Court can offer no better constitutional grounds than those provided in the opinion, it should restrain its dislike for the death penalty and leave the decision to the other branches of government." 391 U.S. at 542. Justice Black protested similarly that "if this Court is to hold capital punishment unconstitutional, . . . it should do so forthrightly. . . ." 391 U.S. at 532. See also A. Bickel, *The Supreme Court and the Idea of Progress*, 70-71 (1970).
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Challenge to the common system of delegating complete authority to a jury, unguided by legislatively promulgated standards, in decisions regarding the imposition of the death penalty in any capital case. The petitioners argued that it was a violation of due process for the state legislatures to commit classification decisions to a transient body, acting secretly, without standards and without review, where it had been determined that some and perhaps most persons convicted of capital offenses should not be put to death.

Justice Harlan, speaking for the majority, rejected this contention. He reasoned instead that it is impossible to specify in advance which homicides justify capital punishment, that any legislative attempt to promulgate standards for jury discretion could produce only meaningless generalities. Thus, a system which trusts the jury, as the conscience of the community, to maintain a link between the administration of the criminal law and the evolving morals of society does not violate any constitutional guarantee. Justice Brennan argued vehemently in dissent:

We are not presented with a legislative attempt to draw wisdom from experience through a process looking toward growth in understanding through the accumulation of a variety of experiences. We are not presented with the slightest attempt to bring the power of reason to bear on the considerations relevant to capital sentencing. We are faced with nothing more than stark legislative abdication. Not once in the history of this Court, until today, have we sustained against a due process challenge such an unguided, unbridled, unreviewable exercise of naked power. Almost a century ago, we found an almost identical California procedure constitutionally inadequate to license a laundry. Yick Wo v. Hopkins, 118 U.S. 356, 366-367, 369-370 (1886). Today we hold it adequate to license a life.37

B. The Eighth Amendment

(a) Furman: Unfettered Jury Discretion

Interestingly, McGautha did not end the dispute over the constitutionality of unfettered jury discretion in capital cases. Rather than continuing under the due process clause, the procedural debate became embedded in the Eighth Amendment. In the term immediately following McGautha, the Court was presented with another attack on the death penalty in Furman v. Georgia.38 Although the grant of certiorari in Furman was limited to Eighth Amendment questions,39 three Justices’ opinions

37. Id. at 252 (Brennan, J., dissenting).
38. 408 U.S. 238 (1972).
39. Certiorari in McGautha had been limited to issues of due process.
focused entirely on procedure, refusing to reach the broader issue of whether capital punishment could ever be inflicted under any procedure without violating the Eighth Amendment proscription of cruel and unusual punishments.

Justice Douglas’s concurring opinion\(^{40}\) argued that there is an implicit principle of equal protection at the core of the Eighth Amendment. Citing *Yick Wo v. Hopkins*,\(^ {41}\) Douglas wished to strike down the statutes allowing the imposition of a death sentence at the hands of a totally unguided jury because that system is “pregnant with discrimination.”\(^ {42}\) Douglas acknowledged that none of the petitioners had proven that he had been sentenced to die because he was black or because he was poor. Nevertheless he was willing to invalidate the challenged statutes for three reasons: they allowed room for decision based on race and class prejudices, the petitioners had compiled statistical evidence showing that the burden of the death penalty did fall far more heavily on the black and the poor, and the challenged system did not attempt to interpose any safeguards against discriminatory application.

Justice Stewart’s concurring opinion\(^ {43}\) argued that the unguided discretion statutes had operated to impose the death penalty so infrequently that a death sentence had become “freakish.”\(^ {44}\) Comparison of those defendants sentenced to die with those given mercy revealed no basis for differentiating the two groups. Consequently, Stewart concluded that the system must be operating arbitrarily and unconstitutionally. And in a concurring opinion similar to Justice Stewart’s, Justice White argued that executions had become so rare that they could not possibly either deter future crime or exact retribution for particularly heinous crimes already committed.\(^ {45}\)

Despite their focus on procedure, Justices Douglas, Stewart and White all pegged their concurring opinions on the cruel and unusual punishments clause. The reason for this is quite mysterious, as is the reason for the Court’s progression from *McGautha* to *Furman*. Justice Douglas stated in *Furman* that, “We are . . . imprisoned in the *McGautha* holding.”\(^ {46}\) The result in *Furman*, however, belies that claim. Justices Stewart and White reversed their votes from *McGautha* to *Furman* without explanation. No one explained why a procedure not in violation of

\(^{40}\) 408 U.S. at 240.
\(^{41}\) 118 U.S. 356 (1886).
\(^{42}\) 408 U.S. at 257.
\(^{43}\) 408 U.S. at 306.
\(^{44}\) Id. at 310.
\(^{45}\) Id. Both White and Stewart rejected the contention that the miniscule number of death sentences represented a refinement of the selection process rather than arbitrariness of discrimination.
\(^{46}\) 408 U.S. at 248.
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the due process clause (the constitutional provision most relevant to claims of arbitrariness in the administration of the judicial system) did violate the cruel and unusual punishments clause. Perhaps the explanation is that rather than being imprisoned in their previous holding in McGautha, the Court was imprisoned in its limited grant of certiorari. Or, perhaps the Court was loath to admit that two of its members had simply changed their minds. In any event, Furman injected a requirement of heightened procedural regularity into the Eighth Amendment, at least as applied to death penalty cases, and post-Furman procedural challenges have remained rooted in the Eighth Amendment.

(b) Gregg: Restricted Jury Discretion

The next great wave of death penalty cases came four years later in Gregg v. Georgia and its companions.47 This family of cases raised challenges to two types of capital punishment statues enacted in response to the Court's opinions in Furman. Some sought to restrict jury discretion by prescribing specific factors to be considered by the sentencing jury. The others imposed a mandatory death sentence on anyone convicted of specific categories of offenses. Challenges to these statutes resulted in the Court's rejection of the petitioners' claim that the death penalty is in all cases repugnant to the cruel and unusual punishments clause, regardless of the procedures used for selecting the individuals to be executed. The plurality again focused on procedure and upheld the guided discretion statutes.48 It struck down the mandatory capital punishment statutes.49

The proceduralist plurality, consisting of Justices Stewart, Powell and Stevens, reasoned that the Georgia, Florida, and Texas statues sufficiently curtailed the jury's authority to avoid the vices of Furman. Those statues either specified aggravating and mitigating factors for the jury to weigh in reaching its conclusion50 or asked the jury a series of questions which arguably would have the same effect.51 All provided for appellate review of the sentencing decisions.

The same three Justices held the North Carolina and Louisiana statues invalid, however, based on three grounds. First, they argued that the mandatory statues failed to reflect prevailing moral standards in American society because the history of capital punishment in the United States revealed a general election restriction in the use of the

51. TEx CODE CRIM. PROC. ANN., art. 37.071(b) (Vernon Supp. 1975-1976).
death penalty — a progressive rejection of mandatory death penalty schemes together with a progressive restriction in the number of capital crimes. Second, they argued that because mandatory death sentences are unacceptable to the American people, the statutes, even if facially neutral, would not be so applied. Jury nullification and prosecutorial discretion would be used to mitigate the harshness of the statutes, and these mechanisms would maintain the same arbitrary pattern of execution found so appalling in Furman. Third, the plurality argued that a mandatory statute must fail because it “treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”

Considering the overall result of the proceduralist series of death penalty decisions — sentencing by totally unfettered juries is unconstitutional; mandatory infliction of death upon conviction of a capital offense is unconstitutional; and sentencing by a jury guided by legislatively promulgated standards is constitutional — it is possible to see these cases as a continuation of Witherspoon as explained by Tribe. The proceduralist opinions can be seen as attempts to force the maximum amount of public debate, involving the widest spectrum of opinion, dispersed among the maximum number of decision-makers, as to the continued acceptability of capital punishment. The Justices espousing these views are unwilling to examine for themselves the competing moral claims in this dispute. Given the importance of life, the irrevocability of the death penalty and the near inevitability of mistake in its application, however, they are willing to demand that other decision-making bodies think very carefully and articulate clearly the basis for their conclusions before condemning anyone to death.

Viewed from this perspective, the unguided jury discretion system must fail, since it permits executions without any institutional level articulation of the reasons for choosing life or death. Decisions may be based on constitutionally impermissible factors such as race or class, but there is no way of finding that out. Moreover, juries may not articulate, even to themselves, the basis for their decisions. They are transient bodies, composed of individuals who do not have to account to anyone for their choices. Under such a system, persons may conceivably be executed without much thought.

Statutes prescribing the automatic imposition of a death sentence on everyone convicted of certain precisely defined categories of offenses represent the legislative battle with the issue of who should live and who

52. Woodson, 428 U.S. at 304.
53. See infra note 34.
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should die. Once the legislature has acted, however, the contemplative process stops. Jurors have no input. Circumstances unforeseen by the legislature or individual characteristics of particular defendants can be taken into account only through the mechanism of jury nullification. Mandatory capital punishment schemes may be seen as unacceptable both because they cut off debate prematurely and because they allow the legislature to condemn a person to death from a distance. Abstract condemnation may be seen as illegitimate because it is unknowing. It may be seen as illegitimate for the State to impose such an awesome penalty without some official's personal involvement and hence implicit moral responsibility for a forced forfeiture of life.

The statutes attempting to provide sentencing juries with guidelines within which to exercise their discretion may be approved because they spread the decision-making process over time and between decision-makers, with the inherent procedural opportunities for mercy. In Georgia, for example, the state legislature first debated the issue and specified the aggravating factors creating the potential for capital punishment in each case. Now, with these factors in mind, each sentencing jury considers the same moral dilemma of the propriety of official murder, in the context of a particular defendant's personal history and criminal behavior. Finally, an appellate tribunal reviews the record for evidence of racial or other prejudice, and for consistency with other Georgia decisions imposing the death penalty. The appellate court must file a written opinion, citing cases it relied on to conclude that the death sentence in that case is consistent with Georgia practice in prosecutions for similar crimes.

Judicial legitimation of such a scheme may be regarded as an attempt to force the difficult moral dilemma out into the open in as many forums as possible. Increased public debate may then lead to a "rational" capital punishment system which selects the worst offenders for execution, to the democratic rejection of capital punishment, to more relevant evidence on which the Court could later base its own rejection of capital punishment, or to convincing arguments that capital punishment is not unacceptably cruel.

A closer comparison of the capital sentencing systems upheld against those struck down reveals distinctions more formal than real. The inquiry has been limited almost exclusively to jury discretion, although other discretionary areas in the criminal justice system present similar opportunities for discrimination. The proceduralist demand that sentencing systems provide both equal and individual treatment of persons convicted of capital crimes introduces an irresolvable tension into the Eighth Amendment procedural requirements. Consequently, an idealis-
tic attempt to make sense of these cases based on their results alone is simply untenable.

Justice Rehnquist's dissent in *Woodson v. North Carolina*\(^5\) convincingly argues that the rationales advanced by the plurality in holding the mandatory capital punishment statutes unconstitutional do not suffice. It is not clear if the mandatory capital punishment schemes are more subject to risks of arbitrary or discriminatory application than are the guided discretion schemes. The risk of arbitrariness enters the process through each available avenue of discretion. The points of risk are different in the guided discretion procedures. They are not eliminated. Under a mandatory capital punishment system, the prosecutor's decision whether to charge the capital offense, his or her decision whether or not to accept a guilty plea to a lesser offense, and the jury's decision on guilt or innocence are the major points where prejudice may enter the decision-making process. Under the Georgia system, upheld in *Gregg*, no jury may impose a death sentence in the absence of a unanimous finding, beyond a reasonable doubt, that one of the enumerated aggravating factors was present. The jury is free to consider any mitigating factors it deems relevant and may decline to impose the death penalty at any time, whether its reason is rational or irrational, or whether it is motivated by feelings of mercy toward a defendant or by racial prejudice against an unpopular victim. In addition, the prosecutor has the same charging and bargaining powers in guided-discretion jurisdictions as in mandatory jurisdictions. It is not clear why prosecutors in jurisdictions leaving some discretion to the jury will exercise their charging/bargaining powers with more self-restraint than prosecutors in mandatory death penalty jurisdictions. Similarly, there is no reason that juries in statutorily guided-discretion jurisdictions will act less arbitrarily than mandatory jurisdiction juries. The former jury exercises its discretion within the constraints of the specified guidelines. The latter exercises the same discretionary power by choosing between the "mandatory" capital conviction and lesser included offences not necessarily supported by the evidence.

In fact, a comparison of the statutes sustained with those invalidated in the *Gregg* family, reveals that none of the five imposes any serious limits on the capital sentencing process. The Georgia statute upheld in *Gregg* lists ten aggravating factors justifying a death sentence,\(^5\)

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54. 428 U.S. at 311-312 (Rehnquist, J., dissenting).
55. GA. CODE ANN. § 27-2534.1 (b) (Supp. 1975) lists the following aggravating circumstances:

1. The offense of murder, rape, armed robbery or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense or murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

2. The offense of murder, rape, armed robbery or kidnapping was committed while the
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including:

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or an aggravated battery to the victim.

This so-called standard is so vague as to authorize capital punishment in almost any case, and is exactly the same system that the Court struck down four years earlier in Furman.

The Florida statute sustained in Proffitt is similar to the Georgia statute, and includes at least one clause which could authorize death on a

offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

56. FLA. STAT. ANN. § 921.141 (5) (Supp. 1976-1977) lists the following aggravating circumstances:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony, or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death of many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose or avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gains.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

FLA. STAT. ANN. § 921.141 (6) (Supp. 1977) lists the following mitigating circumstances:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relative minor.
whim:

(h) The capital felony was especially heinous, atrocious or cruel.

Unlike the Georgia statute, the Florida statute provides that the jury recommend whether or not to impose the death penalty by majority vote, after weighing the aggravating and mitigating factors. The actual sentence is then chosen by the judge, who is free to reject the jury's recommendation if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ."\(^5\) Of course, in this case at least seven jurors, supposedly representative of the community, do differ.

The Texas statute upheld in _Jurek_ allows the jury to impose the death penalty where a defendant is convicted of "capital murder," a subspecies of murder characterized by any of five aggravating additional circumstances.\(^5\) At the sentencing hearing, the court may admit all evidence it deems relevant to sentencing. It then submits the following three questions to the jury:

1. whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
2. whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
3. if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if

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\(^5\) The defendant acted under extreme duress or under the substantial domination of another person.

\(f\) The capacity of the defendant to appreciate the criminality of this conduct or to conform his conduct to the requirements of law was substantially impaired.

\(g\) The age of the defendant at the time of the crime.

57. Tedder v. State, 322 So. 2d 908, 910 (1975) (This is the authoritative construction of the statute by the Florida Supreme Court.)

58. _TEXAS PENAL CODE ANN., ART. 1257_ (Vernon Supp. 1973) _superseded by_ _TEX. PENAL CODE ANN. § 19.03_ (Vernon 1974) provided:

(b) The punishment for murder with malice aforethought shall be death or imprisonment for life if:

1. The person murdered a peace officer or fireman who was acting in the lawful discharge of an official duty and who the defendant knew was a peace officer or fireman;
2. The person intentionally committed the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, forcible rape, or arson;
3. The person committed the murder for remuneration or the promise of remuneration or employed another to commit the murder for remuneration or the promise of remuneration;
4. The person committed the murder while escaping or attempting to escape from a penal institution;
5. The person, while incarcerated in a penal institution, murdered another who was employed in the operation of the penal institution.
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It is hard to imagine how a jury could answer "no" to question (1) having already found the defendant to have "intentionally or knowingly" caused the death. Similarly, it is difficult to understand how a jury could answer "no" to question (3) having already declined to find the provocation that would make the defendant guilty of manslaughter rather than murder. That leaves question (2); it is not clear how a jury of laypersons can answer this question at all given the present development of the science of behavior prediction. Question (2) asks the jury to determine whether there is a probability, beyond a reasonable doubt, that the defendant will commit violent acts in the future. Even if behavior were predictable, the question arguably is meaningless, for it contains two conflicting standards of certainty. The statute does not specify what probability of future violence is required to send a defendant to his or her death, but it does tell the jury to be certain beyond a reasonable doubt that that probability exists. In addition, there is no explanation of why the jury is to be provided with all evidence that the judge deems relevant to sentencing if it is only used to guess about future behavior. If, as is suggested by the plurality opinion in Jurek, question (2) is to be the vehicle for the sentencing jury's consideration of mitigating circumstances, the question posed gives no hint of that function to the jury. The Texas statute places mitigating evidence before the jury, asks three irrelevant questions and assumes that if the jury is sufficiently moved it will answer "no" to one of them. Such a scheme is worse than one that provides no guidance for decision-making. It leads the jury in the wrong direction. It refuses to allow the jury the power to grant mercy (as the Georgia and Florida statutes do), thus forcing it to either reverse its previous decision on intent or provocation, or to predict future non-dangerousness.

The North Carolina statute held unconstitutional in Woodson imposed the death penalty on every defendant convicted of "willful, deliberate and premeditated killing" or of killing in the course of perpetrating any felony. The statute mandates the execution of every robber who acci-
dentally kills his or her victim and of every killer deemed to have acted willfully. The Louisiana statute invalidated in Roberts ordered capital punishment for everyone convicted of first degree murder—a crime requiring “a specific intent to kill or to inflict great bodily harm” coupled with one of five additional elements, including killing while “engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery.”63 Second degree murder is defined as killing with “a specific intent to kill or to inflict great bodily harm” or killing while “engaged in the perpetration or attempted perpetration of aggravated arson, aggravated burglary, aggravated kidnapping, aggravated escape, armed robbery, or simple robbery.”64

The Louisiana and North Carolina statutes require death for those convicted of the capital offense. Neither statute mandates charging the capital offense nor prohibits plea bargaining in capital cases. Thus, the discretion to differentiate among defendants lies with the prosecutor. Some defendants will risk their lives while others will risk only imprisonment, although their acts both may fall within the definition of the capital crime. The prosecutor’s choice is virtually unreviewable. It is also important to note that under both the North Carolina and Louisiana statutes, life or death hinges in large part on the jury’s possibly erroneous decision. If it is difficult or impossible for a jury to determine with certainty what another person intended at some point in the past, as

kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State’s prison.

This statute was enacted after the North Carolina Supreme Court declared that the provision of the previous statute allowing the jury to recommend mercy was unconstitutional under the rule of Furman v. Georgia, and held that statute, construed so as to eliminate the offending provision, was constitutional. State v. Waddell, 282 N.C. 431, 194 S.E. 2d 19 (1973). Following Waddell, the legislature enacted the wholly mandatory statute.

63. LA. REV. STAT. ANN. § 14.30 (1974) provided:
   First degree murder is the killing of a human being:
   (1) When the offender has a specific intent to kill or to inflict attempted perpetration of aggravated kidnapping, aggravated rape or armed robbery; or
   (2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or a peace officer who is engaged in the performance of his lawful duties; or
   (3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or
   (4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or
   (5) When the offender has a specific intent to commit murder and has been offered or has received anything of value for committing the murder.
required by the Louisiana statute, a jury determination of whether the killing was premeditated, as required by the North Carolina statute, poses an even greater problem. As a legal scholar has stated:

If “meditation” connotes some duration of thought, then “premeditation” might be expected to denote thought about the killing over a considerable time. But judges have repeatedly said that the premeditation need not be of any particular length; a moment is enough. On the other hand, “premeditation” is not the same as “intent to kill.” . . . In sum, in a great many close cases, no matter how patiently the judge tries to explain to the jury that which he himself only cloudily understands, the net result must be that twelve laypersons have no alternative to using their general sense of the equities of the matter. But this means that these purported rules, at the crucial line of separation between those who are to die and those who are to live, conceal a discretion which, however benevolent, is to all intents and purposes standardless.65

In essence, the guided jury discretion schemes held to be constitutional do nothing to remedy the problem addressed by Furman. The mandatory capital punishment systems held to be unconstitutional do address the narrow jury discretion problem by curtailing the jury’s authority to grant mercy. None of the post-Furman statutes make any attempt to limit prosecutorial discretion leading to the imposition of capital punishment, none limit the use of the pardoning power, and none make any clearer the abstract psychological questions separating guilt from innocence in the definition of capital offenses. Capital sentencing post-Gregg is basically the same as capital sentencing pre-Furman.

The proceduralist plurality opinions in Gregg and its companions can be seen as attempts to avoid the Court’s holding in Furman without embracing a substantive interpretation of the Eighth Amendment. If the true vice of the capital punishment systems outlawed in Furman was legislative abdication of responsibility leading to capriciousness in the exercise of jury discretion, then the logical remedy is to eliminate jury discretion. This goal may be attained either by forcing the legislature to specify precisely which criminals are to be executed or by eliminating

65. Charles L. Black Jr., Capital Punishment: The Inevitability of Caprice and Mistake 48-50 (1974). Black argues similarly with respect to sanity determinations in capital cases:

Once again, let us remember that we have committed ourselves not to kill by law, or even to punish, anyone who satisfies certain criteria as to the connection of “insanity” with this commission of the act. Yet the astounding fact is that having made this commitment, for what must be the most imperative moral reasons, we cannot state these criteria in any understandable form, in any form satisfying to the relevant specialists or comprehensible to either judge or jury, despite repeated and earnest trials.

Id. at 52-53. When these inadequate criteria result in a mistaken determination of sanity in a noncapital case, a sane person goes to a mental hospital or an insane person goes to jail. In a capital case, mistake results in a wrongful death.
the death penalty entirely. The problem with this logic is that selection of the former solution leads to the conclusion that the execution of large numbers of carefully classified persons does not offend the cruel and unusual punishments clause, although the random execution of a few persons does. Such a result would be ridiculous. If the Eighth Amendment means anything at all, it must be the constitutional embodiment of the principles of mercy, dignity, and humane treatment of all persons. It is plainly absurd to suggest that the constitutional provision prohibiting cruelty is indifferent to whether government replaces an impermissibly arbitrary execution system with one taking more lives, fewer lives, or abandoning completely the taking of lives by official process. If only to avoid complete absurdity, the proceduralists had to find a way to reject the mandatory capital punishment statutes. The method that they chose for their rejection of mandatory death sentences was the requirement of individual treatment in the sentencing process.\footnote{See infra p. 57.} Unfortunately, this approach is unsatisfactory because the tension between individual decision-making, and regularized decision-making, which eliminates arbitrariness and discrimination to the greatest possible extent, is simply irresolvable. The procedures which remove individuals from the "faceless, undifferentiated mass" permit those removals to be made on constitutionally objectionable grounds.

It is not the rejection of mandatory capital punishment statutes on procedural grounds, but the refusal to reject the plainly unsatisfactory attempts to rationalize the jury's decision-making process, that makes the proceduralist opinions in the \textit{Gregg} family of cases untenable. The statutes do not provide any concrete standards for the jury. Moreover, even if they did, there are many other points in the process leading to execution where decision-makers can exercise their unreviewable discretion. Rationalizing the jury's role would make little difference. The prosecutor's choice of charge, the prosecutor's willingness to plea bargain, the jury's choice between conviction on the capital offense or a lesser included offense, and the executive decision to commute the death sentence all operate to render unpredictable the decision regarding state-sanctioned killing.\footnote{See generally} \textit{BLACK}, supra note 65; \textit{Goldberg \\& Dershowitz}, supra note 23 at 1789-94.

It is also possible to see \textit{Gregg} and its companions as multiplying the procedural hurdles a state must clear before it legitimately may take a life. This results not in a channeling of democratic problem-solving energies, but only in a minimization of the number of executions. From

\footnote{66. See infra p. 57. 67. See generally BLACK, supra note 65; Goldberg \\& Dershowitz, supra note 23 at 1789-94.}
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dthis viewpoint, the Court does indirectly what it is afraid to do, or be-
lieves itself unempowered to do, directly.

This mode of judicial behavior is wrong both as a matter of theoreti-
cal legitimacy and as a matter of practical efficacy. Both the legitimacy
of the Court’s edicts and their persuasive power turn on the reasoning
set forth in published opinions. Publishing opinions that evade the basis
for the result or play “hide-the-ball” do not fulfill the judicial function.
Such opinions do not sufficiently indicate why a democratically enacted
statute is invalid. They discourage further public debate of the true is-

issues. Instead they seek to deflect public discussion to other topics — in
this case from the substantive constitutionality of the death penalty to
alternative procedures for its infliction. The Court eases away from a
deeply discomfiting subject to one with which it is more familiar and
more willing to claim expertise. If the lie is unsuccessful, the Court is
cought in its own evasive web with a resulting weakening of public be-
lief in its adjudicative abilities. If the lie is successful, the Court has
truly usurped power: It commands a substantive result while hiding
from the real debate on the propriety of its position.

In more practical terms, the Court’s failure to articulate substantive
reasons for rejecting the death penalty only makes its abolition more
difficult. By resting its decisions on procedural grounds, the Court legiti-
mates the penalty itself. Both the Furman and Gregg decisions leave to
other governmental institutions the freedom to discard capital punish-
ment. To an extent the Court’s multiplication of procedure encourages
them to do so. Opinions focusing on procedural inadequacies encourage
legislatures to invent new procedures, but not to reexamine the funda-
mental moral questions raised by capital punishment, or the relation-
ship between the death penalty and the ends sought to be served by the
criminal justice system.

In the case of capital punishment, it is possible that proceduralism
could have provided an acceptable means of Eighth Amendment analy-

sis, had the Court been willing to carry the argument to its logical con-
clusion and mandate abolition of the death penalty. It would be
plausible to argue that the tension between eliminating all possible
sources of prejudice in the system and retaining the individual decision-
making required to do justice in unforeseen circumstances cannot be
resolved, that in any case it is impossible to eliminate prejudice entirely,
that mistakes are inevitable, and that consequently our judicial process
is just too feeble to be trusted with the responsibility of choosing people
to die.68

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68. To say that the judicial process cannot be trusted to select individuals for execution is
Justice Brennan, dissenting in *McGautha*, would take this position only after attempts to devise constitutionally acceptable procedures had failed. Justice Douglas, concurring in *Furman*, hints at this conclusion. Daniel Polsby ridicules Douglas’s position, however, arguing that this approach:

boils down to one of two propositions: (1) The poverty of these defendants prevented them from getting adequate lawyers—which is in this instance plainly incorrect. (2) The low social status of defendants prejudiced the jury against them, a bias which is (a) invidious if all possible steps were not taken to prevent bias, or (b) inevitable if no conceivable steps could have ameliorated the bias. If 2(a) is accepted, then what is wanted is a new trial. If 2(b) is accepted—and unconstitutionality is nonetheless found—then what is wanted is a new world, where worldly advantages do not prove advantageous.

I would argue that if 2(b) is accepted and a new world is not among the available alternatives, then the only option is to conclude that in this imperfect world, capital punishment cannot be tolerated. The proceduralists have not taken this position. They have attempted to distinguish between procedures, and those attempts have failed.

### III. Substantive Independent Judicial Consideration of Eighth Amendment Claims

The alternative to a judicial search for empirical certainty or a retreat into procedure is for judges, in capital cases, to make their own independent, substantive decisions defining the constitutional concept of cruelty. Such judgments are not tied to either historical practice or contemporary public opinion, although they may draw on those sources to support conclusions reached independently. Judges operating in this mode view themselves as guardians of important constitutional values, such as liberty, equality, human dignity, and mercy. Consequently,

not necessarily to say that it cannot be trusted to make any decisions at all, or that it cannot be trusted to inflict lesser punishments. Capital punishment may be singled out because of the unique agony of the extinction of life and because of its irrevocability. Time spent in prison cannot be given back. But a person wrongfully convicted can be released, and some monetary compensation can be given. A prison sentence can be shortened if the prisoner exhibits good behavior while incarcerated or if in more sober judgment the original sentence appears too harsh. Nothing can give back a life. *See Black, supra* note 65, at 40-41.

69. 402 U.S. at 248.
70. 408 U.S. at 240.
72. *See* Radin, *supra* note 20, at 1016-1030 arguing that capital punishment should be prohibited by a moral risk of error principle. Radin reasons that, although accepted moral principles do not reveal a consensus either in favor of abolishing or of retaining the death penalty, the harmonizing of moral principles about which there is a consensus requires a reduction of the risk of error in applying the death penalty.
they are unwilling to defer to other decision-makers' substantive choices as a matter of course. They are not afraid to use their intuition as a decision-making tool, or to announce a conclusion which is less than mathematically certain. They then support their conclusions with arguments drawn from history, social science data, moral philosophy, and textual analysis.

Substantive analysis under the cruel and unusual punishments clause has taken two basic forms. One is based on a concept of proportionality said to underlie the Eighth Amendment. Punishments that are excessively harsh in relation to the crime for which they are imposed are unconstitutional under this standard. Both the crime and the penalty are subject to judicial analysis. The relationship between them is the central subject of inquiry. Other cases brought under the Eighth Amendment consider certain punishments categorically, rejecting those that are too cruel and degrading to human dignity to be inflicted in response to any crime, regardless of how horrible. This type of analysis focuses on the governmental behavior alone. The triggering criminal act is irrelevant.\(^7\)

If one were motivated to articulate a single fundamental principle underlying the cruel and unusual punishments clause, a possible candidate is a ban on "excessive" rather than "disproportionate" punishments.\(^7\)\(^4\) In its utilitarian form, the excessiveness test transcends the

\(^{73}\) It could be argued that to reject a penalty, such as the death sentence, absolutely is to say that it is disproportionate to any and all crimes, thereby collapsing the two types of Eighth Amendment inquire into one, rooted in the proportionality principle. There is a difference, however, even if only in emphasis, between saying that a particular crime does not warrant the punishment imposed, and saying that the punishment is so brutal that the Constitution cannot ever countenance its application. I believe that to collapse one into the other adds nothing to the discussion. The articulation of an absolute ban of categories of punishments in terms of excessiveness or disproportionality may obscure the reason for the ban. To say that a penalty is unconstitutional because it is disproportionate to one crime is to imply that some crime exists to which it is not disproportionate. If the very nature of some penalties mandates their rejection under the Eighth Amendment, then it only confuses the discussion to talk about proportionality, which requires analysis of both the crime and the penalty. This consideration implicates the dignity principle described by Justice Brennan with reference to classic tortures:

The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the [cruel and unusual punishments] clause that even the vilest criminal remains a human being possessed of common human dignity. *Furman*, 408 U.S. at 272-73 (Brennan, J., concurring).

\(^{74}\) In *Coker*, Justice White announced a two part test for determining whether a punishment is excessive (and thus unconstitutional). The Georgia statute failed under the second half, a disproportionality criterion. The first prong of the *Coker* test, which was not applied there, or in any other case, embodies a utilitarian rather than a retributive notion of excessiveness. Under that test the Court must judge the fit between the punishment imposed and the ends sought to be served by its imposition, rather than the fit between the punishment and the crime. In the end, if the test is to be effective, it must lead to some type of least restrictive
categorization of the Eighth Amendment cases suggested above. Under this excessiveness test the judicial process becomes a means/ends analysis, which can be applied not only where the challenged punishment is alleged to be too great for a particular crime but also where the challenged punishment is alleged to be too brutal to be inflicted in any case. Even if a utilitarian concept of excessiveness could be applied to all of the Eighth Amendment cases, that approach has seldom been used by the Court. In part this may be due to the difficulty of applying a least restrictive means analysis to challenged criminal sanctions. First, such an analysis would demand resolution of the continuing confusion over the often conflicting purposes to be served by criminal sanctions. Second, such an analysis is dependent on determinations of how much and what kind of punishment is enough to serve the purposes accepted as legitimate — determinations which for the most part are infeasible at the present time. The utilitarian excessiveness principle fails as an overarching principle. But, it does serve as a complement to the dignity principle. This principle helps explain why punishments which are excessive in a utilitarian sense should be forbidden. An excessive punishment is not merely a waste of societal resources but an unwarranted imposition of suffering. It is an affront to the dignity of the person inflicting the punishment as well as the dignity of the victim. The excessiveness principle complements the dignity principle by suggesting a methodology — means/ends analysis — for identifying violations of the value embodied in the dignity principle.

In contrast, the proportionality principle seeks to impose a punish-
ment which the criminal "deserves" in response to his or her criminal behavior. It acts as a limit on the infliction of punishment where the criminal behavior does not inflict great harm on a victim or on the community. The principle rests on a notion of moral blameworthiness. The utilitarian excessiveness principle could not effect the same limitation unless some notion of proportionality were included at the point of evaluating the acceptability of legislative ends.

Most of the Court's attempts to grapple independently with the meaning of the Eighth Amendment fall under the rubrics of either the dignity or the proportionality principles. These two principles represent separate constituent elements of the constitutional proscription on cruel and unusual punishments. Therefore, the discussion below will be organized around these principles, as applied by various Justices of the Supreme Court.

A. The Proportionality Principle

An important recent application of the proportionality principle\(^\text{78}\) in a death penalty case occurred in *Coker v. Georgia*.\(^\text{79}\) Justice White's majority opinion initially focused on the national consensus against imposing the death penalty for rape.\(^\text{80}\) The opinion then turned to an independent examination of the harm caused by the rapist to the rape victim and to the community, first as measured against the damage done by a murderer, whose life the Court had previously held could be taken in punishment, and second as compared to the harm done by capital punishment. White concluded that where the rapist does not take the victim's life, the government may not constitutionally demand the rapist's life in return.

Rape is without doubt deserving of serious punishment; but in terms of moral depravity and of the injury to the person and to the public, it does not compare with murder, which does involve the unjustified taking of human life. Although it may be accompanied by another crime, rape by definition does not include the death of or even the serious injury to another person. The murderer kills; the rapist, if no more than that, does not. Life is over for the victim of the murder; for the rape victims, life may not be nearly so happy as it was, but it is not over and normally is not

\(^{78}\) The Court had previously articulated the proportionality principle as a component of the cruel and unusual punishments clause in *Weems v. U.S.*, 217 U.S. 349 (1910) (holding the Philippine punishments of *cadena temporal* — 12 years imprisonment at hard labor plus loss of civil liberties — disproportionate to the crime of falsifying government records). *See also* *O'Neil v. Vermont*, 144 U.S. 323, 339-340 (1892) (Field, J., dissenting) (arguing 54 years imprisonment disproportionate to prohibition offense).

\(^{79}\) 433 U.S. 584 (1977), holding the death penalty disproportionate to the crime of raping an adult woman, as discussed p. 49.

\(^{80}\) *See supra* pp. 49, 51-52.
beyond repair. We have the abiding conviction that the death penalty, which "is unique in its severity and irrevocability," Gregg v. Georgia, 423 U.S. at 187, is an excessive penalty for the rapist who, as such, does not take human life.81

The underlying principle here is one of individual criminal responsibility. It limits the infliction of punishment for the legitimate utilitarian purpose of deterrence through the retributive notion of just desserts. Each person may be punished only as much as is warranted by his or her own criminal acts. Greater punishment is forbidden no matter how effective a deterrent. In Coker, dissenters argued that legislatures should be free to exact heavy penalties, greater than an eye for an eye,82 in order to control crimes that are particularly prevalent locally, or especially difficult to detect or deter.83 But this argument was rejected in favor of the retributive limitation.

The proportionality principle can also be seen to embody a notion of equal treatment — not absolute equality regardless of the crime committed, but equality in the degree of harshness or mercy with which all crimes are treated. The proportionality principle requires a rational ordering of crimes, the establishment of a parallel gradient of punishment, and the maintenance of a constant coefficient for translating crime into punishment. This principle forbids the singling out of certain offenses for the imposition of penalties which are so harsh as to be aberrant in the context of the whole criminal code.

This argument presumes the susceptibility of legislative decisions, ordering a criminal code, to judicial review for rationality. If any ordering of offenses is permissible, there will be no way of determining if a particular penalty is aberrantly severe, in violation of the proportionality principle, or merely appropriate to a crime considered particularly reprehensible in a certain jurisdiction.

It is in undertaking an independent ordering of crimes that the Court most imposes its own moral judgments. For example, Justice White, in Coker,84 holds that the Georgia statute allowing the imposition of the death penalty for some rapes (that is, if one or more statutory aggravating factors is present) while forbidding its imposition for some intentional murders (that is, if no statutory aggravating factors are present) is constitutionally impermissible under the proportionality principle. If this is true, it is because the unique nature of life in our ethical and legal system makes the intentional extinguishment of life always worse than

81. 433 U.S. at 598.
82. 433 U.S. at 620-21 (Burger, C.J., dissenting).
84. 433 U.S. at 584.
any offense to the body which does not extinguish a life, regardless of attendant circumstances. The judicial recognition of the overriding importance of life generates two related conclusions: (1) all purposeful takings of life must be punished more severely than all other injuries to person or property; and (2) where the defendant takes less than a life, the State may not take a life in punishment.\(^8\)

Throughout the proportionality cases the Court disavows any intent to become the "ultimate arbiter of the standards of criminal responsibility."\(^8^6\) Yet, at the margins that is exactly what it is doing. Perhaps the labelling of punishments as "grossly disproportionate"\(^8^7\) signifies an intention by members of the Court to impose an independent judgement of criminal responsibility only in extreme cases, using the proportionality principle as an interpretive guide similar to a rule of reasonability.

B. The Dignity Principle

Unlike the proportionality principle, which focuses on the offender's behavior and ultimately demands rationality and consistency in the ordering of a State's criminal code, the dignity principle treats the offender's acts as irrelevant, and has more often been applied in cases involving capital punishment.\(^8^8\)

The dignity principle can be derived from a repudiation of physical torture. This principle prohibits punishments which, like torture, inflict enormous suffering on their victims, horrify observers, and dehumanize the persons inflicting the punishment. The problem facing Justices applying the dignity principle is to develop a methodology more sophisticated than just an intuitive response. There is a need to identify those punishments that overstep the limits of dignity. The two instances of violation of the dignity principle that appear most frequently in Supreme Court opinions are excessiveness, as measured by a means/ends analysis,\(^8^9\) and community rejection of the challenged

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85. Similarly, Justice Powell's dissent in Rummel v. Estelle, 445 U.S. 263, 285 (1980), emphasizes the hierarchical importance of life, physical well-being, and material wealth as subjects of state protection through criminal law. The Texas recidivist statute's imposition of equal penalties for capital murder and three time theft and its failure to impose harsher penalties for crimes of physical violence than for non-violent crimes to property transgress that moral hierarchy. The Rummel dissent also identifies the less specific proportionality requirement of maintaining a gradient of punishments — a value not served by the Texas statute, which treats all three-time felons alike without regard to the offenses committed.


88. The dignity principle is also applied in cases involving prison conditions which affect a whole class of persons convicted of a variety of crimes. See e.g., Rhodes v. Chapman, 452 U.S. 337 (1981); Estelle v. Gamble, 429 U.S. 97 (1976); Hutto v. Finney, 437 U.S. 678 (1978).

89. See infra pp. 67-68.
punishment.

In the opinions discussed below community rejection is not used as an independent determinant of constitutionality, as it is in the opinions applying an empirical public opinion approach to Eighth Amendment adjudication. Instead, it is used as evidence that the punishment is employed with inhumane motives or inflicts dehumanizing agony on its victims. Under this approach, a punishment is not unconstitutional because the people oppose it. That the people oppose it (or would oppose it if they knew of its effects) indicates that there is something abhorrent about it which may violate the Eighth Amendment.

In *Furman v. Georgia* Justice Marshall develops the principle prohibiting retribution for its own sake by connecting it with the dignity principle. Justice Marshall, concurring in *Furman*, put forth a four-pronged definition of the constitutional concept of cruelty, applying the four elements in the alternative. First, the Eighth Amendment bans physically torturous punishments, as intended by the Framers. These punishments are always unconstitutional, no matter how public opinion changes. Second, the Eighth Amendment prohibits new and unusual punishments not invented in the interest of punishing with less pain than traditional punishments. Third, excessive punishments serving no valid legislative purposes are prohibited. And fourth, the cruel and unusual punishments clause proscribes punishments that have been rejected by popular sentiment. Because the death penalty has a long history of acceptance in the United States, it passes the first two tests. Justice Marshall would hold it unconstitutional under both the third and fourth tests.

The third prong of Marshall's analysis requires an articulation of the legitimate goals of punishment and an examination of capital punishment's utility in furthering those goals. Marshall applies a least restrictive means standard to the excessiveness test. The only legitimate governmental purposes of punishment that Marshall recognizes are iso-

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90. See infra pp. 44-51.
91. 408 U.S. at 314 (Marshall, J., concurring).
92. In *Trop v. Dulles*, 356 U.S. 86 (1958), the Court struck down a federal statute imposing loss of citizenship as the penalty for desertion during wartime. Chief Justice Warren held for the plurality that the penalty of expatriation violated the principle of dignity at the foundation of the Eighth Amendment. Justice Brennan filed a separate concurring opinion holding that expatriation beyond the enumerated powers of Congress and rejecting "naked vengeance" as a legitimate Congressional goal. In *Furman*, Justice Marshall connected the separate analyses of *Trop*.
93. See 408 U.S. at 330-32.
94. *Id.* at 358-59, 369.
95. *Id.* at 342.
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lation, rehabilitation, and deterrence. Based on the statistical evidence produced by the petitioners Marshall concludes that they had met their burden having shown through clear and convincing evidence that capital punishment is not a greater deterrent to murder than life imprisonment. Also, incarceration for life can be equally effective in serving the purpose of incapacitating particular offenders. Obviously, capital punishment contributes nothing toward the goal of rehabilitation. In order to hold the death penalty unconstitutionally excessive, Justice Marshall rejects retribution as a permissible purpose of punishment. "Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society." According to Marshall, the retributive notion of just desserts is appropriate only to initially justify punishing criminals. Once a person has been convicted of a crime, and has thereby become deserving of some punishment, the extent and nature of the punishment must be determined by some other utilitarian goal. "At times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves."

Marshall also rejects capital punishment under the fourth prong of his test — rejection by contemporary public opinion. The key to this conclusion is that Marshall regards the relevant public opinion to be an informed public opinion. Legislative authorization of capital punishment and public opinion polls in its support, do not, he argues, reveal informed opinion and so are irrelevant. Marshall hypothesizes that if the public knew that capital punishment is not a more effective deterrent than life imprisonment, that it is applied in a discriminatory manner, that murderers are rarely recidivists and usually have good records while in prison, then the American public would reject capital punishment. Marshall argues that executions are too infrequent and too concentrated on the poor and powerless sectors of society to make people aware of the moral issues relating to capital punishment. In Furman, because the usual indicators of public opinion had been warped, and the relevant information had been brought to the consciousness of the

96. Id. at 343 (citing Brennan's concurrence in Trop, 356 U.S. at 111).
97. 408 U.S. at 353.
98. 408 U.S. at 343.
99. Id. at 344-345.
100. Id. at 362-369. Sarat and Vidmar attempted to test the Marshall hypothesis empirically. Their study found that: (1) a majority of the public is uninformed about capital punishment; (2) the information which Marshall argues would change people's minds would in fact convince a large number of people to reject capital punishment; and (3) to the extent that public support for capital punishment is based on a desire for retribution, increased information would not change people's minds. Sarat and Vidmar, Public Opinion, the Death Penalty and the Eighth Amendment: Testing the Marshall Hypothesis, 1976 WISC. L. REV. 171.
Court, it was the Court's duty to apply the moral principles which the people could not apply for themselves.\textsuperscript{101}

Justice Brennan's concurring opinion in \textit{Furman}\textsuperscript{102} is in some respects similar to Justice Marshall's. Like Marshall, Brennan first identifies protection of human dignity as the central value underlying the cruel and unusual punishments clause. His opinion then diverges from Marshall's as he applies a four factor cumulative analysis in order to determine whether capital punishment violates the dignity principle.\textsuperscript{103} First, he considers the enormity or severity of the punishment, including its pain, both physical and psychological, and its irrevocability. Second, he considers the procedural regularity or arbitrariness with which the punishment is inflicted, reasoning that the anomalous infliction of harsh penalties is one of the evils that the cruel and unusual punishments clause was designed to prevent.\textsuperscript{104} Brennan asserts that frequent, regular application of a penalty is strong evidence that it is not unconstitutionally cruel. Third, Brennan considers the acceptability of the punishment to contemporary society, measuring acceptance by usage, not by statutory authorization. And fourth, he considers whether the punishment is excessive or unnecessary, since a punishment cannot comport with the dignity principle if it involves the pointless infliction of suffering.

In order for punishment to be prohibited by the Eighth Amendment under Brennan's analysis, it need not run afoul of any single element of his test. All four elements move on independent sliding scales.\textsuperscript{105} As a punishment approaches unconstitutionality on one scale, it takes less from the other elements to invalidate the challenged punishment. Justice Brennan does not describe explicitly the weight to be accorded to each element or how to do the complicated analytical calculus required by this approach.\textsuperscript{106}

\textsuperscript{101} "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." 408 U.S. at 366. This argument is reminiscent of the ideology of \textit{Caroline Products}, 304 U.S. 144, 152-153 & n.4 (1938).
\textsuperscript{102} 408 U.S. at 270.
\textsuperscript{103} \textit{Id.} at 271-81.
\textsuperscript{104} Brennan cites the perjury trial of Titus Oates in 1685 as the incident giving birth to the cruel and unusual punishments clause in the English Declaration of Rights. 408 U.S. at 274 n.17. Oates had been condemned to a variety of degrading but nontorturous punishments, including marching from town to town to stand in the pillory, in obedience not to statutory authorization but to the sentencing judge's discretion. See Grannuci, supra note 1, at 856-9.
\textsuperscript{105} 408 U.S. at 282.
\textsuperscript{106} Brennan's cumulative approach makes sense because it is quite likely that a punishment that affronts more than one of the constituent elements of his test is, as a whole, degrading to human dignity, even if it is not so bad when each element is considered in isolation.
Applying this cumulative analysis to the death penalty, Justice Brennan concludes that capital punishment is forbidden by the Eighth Amendment. First, he reasons that death is uniquely severe in its conscious infliction of physical and psychological pain, in its irrevocability, and in its socially alienating effect upon those sentenced to die. But for the long history of capital punishment in the United States, the sheer severity of the death penalty would make it unconstitutional. Next, he notes that the extreme infrequency of execution makes it highly unlikely that the death penalty is being imposed on the few worst offenders; thus, a presumption of arbitrariness is raised. The longstanding debate over the morality of capital punishment, restrictions on its authorization, and its infrequent application indicate to Justice Brennan that society seriously questions the acceptability of capital punishment. It may be that American society continues to tolerate the death penalty only because of its disuse. In any event, there is a substantial doubt about its acceptability. Moreover, there is insufficient evidence of any purpose served by capital punishment that could not be served by a lesser punishment. In fact, the statistical evidence cited by the petitioners indicated that capital punishment is not a superior deterrent to murder than life imprisonment. Similarly, there is no evidence that capital punishment contributes more to the reinforcement of the societal abhorrence of murder than imprisonment, or that officially administered murder is necessary to prevent citizens from resorting to lynch law, or that the people really believe that murderers and rapists deserve to die.

Brennan's cumulative analysis makes it easy for him to declare the death penalty unconstitutional because it does not force him to rely on only one element, or even to articulate how much he relies on each element. More importantly, it automatically shifts the burden to the states to justify capital punishment. Once Brennan concludes that the severity of death as a punishment is almost enough to make it unconstitutional, the petitioners need not prove much more. They must only raise substantial doubts as to procedural fairness, community acceptance, and utility. Despite the difficulties associated with applying either the

The test is very difficult to apply, however, because the final conclusion must be reached by adding apples and oranges.

107. Id. at 286-305.
108. 408 U.S. at 300-305. Brennan does not hold that retribution is a constitutionally impermissible motivation for inflicting punishment. Instead, he argues, "The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few. As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them." 408 U.S. at 304-305.
109. Although shifting the burden at first may appear to be a cheap device for achieving a result that cannot be justified without that manipulation, it can be argued that Brennan has
Brennan or the Marshall approach to the dignity principle, both Justices have made large contributions to Eighth Amendment jurisprudence by identifying the violation of human dignity as a central element of the concept of cruelty and by attempting to identify the constituent elements of human dignity.

One salient characteristic of the activist opinions discussed here is the Justices’ willingness to use intuition and human experience as decision-making tools.110 Yet, a particular problem with the cruel and unusual punishment cases, and with the death penalty cases in particular, is most Justices’ refusal to exercise such intuitive judgement. Judges are human beings who must draw on their experience to solve problems. Emotional responses are not enough; their conclusions must be supported by reasons. For Supreme Court Justices, intuitive antipathy for the death penalty cannot be a stopping point. But this does not mean that human feeling is irrelevant to judicial decision-making. It is a necessary starting point when dealing with the moral problems posed by the Eighth Amendment. Perhaps one reason for the Court’s difficulty with these cases is that issues of life and death are so emotionally charged. The Justices are conscious that their emotions may play a much greater role in capital punishment cases than in other constitutional controversies. As a result, they deny the relevance of their intuitive antipathy — that the harsher the punishment, the stricter the level of scrutiny. Where the ultimate sanction is concerned, little leeway should be left for experiments. Killing erroneously is so horrible that we cannot afford to wait for absolutely conclusive proof that death is not a superior deterrent, if early returns indicate that killing does not fulfill its asserted function. See Radin, supra note 20, at 1024-25, 1048.

110. Justice Marshall clearly describes this judicial role in replying to Justice Powell’s criticism that Marshall was merely speculating about what an informed public would believe:

Mr. Justice Powell himself concedes that judges somehow know that certain punishments are no longer acceptable in our society; for example, he refers to branding and pillorying. Whence comes this knowledge? The answer is that it comes from our intuition as human beings that our fellow human beings will no longer tolerate such punishments.

I agree wholeheartedly with the implication in my Brother Powell’s opinion that judges are not free to strike down penalties that they find personally offensive. But, I disagree with his suggestion that it is improper for judges to ask themselves whether a specific punishment is morally acceptable to the American public. Contrary to some current thought, judges have not lived lives isolated from a broad range of human experience. They have come into contact with many people, many ways of life, and many philosophies. They have learned to share with their fellow human beings common views of morality. If, after drawing on this experience and considering that vast range of people and views that they have encountered, judges conclude that these people would not knowingly tolerate a specific penalty in light of its costs, then this conclusion is entitled to weight (citation omitted).

. . . I cannot agree that the American people have been so hardened, so embittered, that they want to take the life of one who performs even the basest criminal act knowing that the execution is nothing more than bloodlust. This has not been my experience with my fellow citizens. Rather, I have found that they earnestly desire their system of punishments to make sense in order that it can be a morally justifiable system. 408 U.S. at 369-370 n. 163.
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tive responses, even as a starting point for analysis, in an effort to refrain from constitutionalizing their emotional preferences.

The Justices need not be so afraid that their emotional responses will taint the process of constitutional adjudication. One purpose of published opinions is to force the Justices to explain to themselves and to the people the reasons for their conclusions. Courts, and especially the Supreme Court, do not announce naked conclusions like criminal juries. They must explain themselves, and the explanation is part of the contemplative process of adjudication. The fact that human emotion produces the first glimmer of a correct answer to a problem in a judge’s mind does not invalidate the answer. If a judge’s intuition is so incorrect that it cannot be legitimated by reason the judge should be forced, in the course of writing a convincing opinion, to change his or her mind. And if the judge’s thought processes are so out of tune with the people that the opinion is unconvincing or nonsensical, the Court can be persuaded to change its mind in later cases, or, in an extreme case, the decision may be reversed by constitutional amendment.

IV. Conclusion

If the Supreme Court is to give any strong meaning to the cruel and unusual punishments clause it must approach the problems presented by that clause independently, as some of the Justices discussed above have attempted to do. The questions that need to be answered are difficult and the ground is unfamiliar. The prohibition of cruelty is a moral concept which makes the Justices uncomfortable. Discomfort often breeds avoidance. In the case of the Eighth Amendment discussions this takes the form of excessively mechanical tests intended to be “objective” and procedural requirements lacking internal consistency (and which, even if consistent, are irrelevant to the core question of defining cruelty). Particularly in the death penalty cases, the cruel and unusual punishments clause demands a decision-making process that does not shy away from moral problems, but confronts them. Such a process must identify the underlying moral principles and apply these rationally to solve the problems presented.

The Court must engage in this moral problem-solving process for several reasons. First, the victims of cruel and unusual punishment are powerless to protect themselves in the political forums of government. Leaving aside the question of racial or class prejudice, the victims are politically powerless because they are criminals. They are socially deviant. They are despised, feared, and loathed by the majority. As Justice Marshall argued in Furman, penalties which affect only the powerless
members of society are not likely to be changed by legislatures.\textsuperscript{111} In fact legislators, desperate to respond to constituents terrified of crime and demanding a solution, are quite likely to authorize harsh penalties even knowing them to be excessive. Only the courts, which are not directly responsible to the electorate, have a chance of giving effect to the cruel and unusual punishments clause in the face of legislation favoring harsher treatment of criminals.

The special contemplative role of the judiciary further justifies, and indeed necessitates, active judicial interpretation of the Eighth Amendment. Because judges must give reasons for their decisions categorizing penalties as unconstitutionally cruel, the adjudicative process becomes one of clarifying social values. Legislatures:

are not ideologically committed or institutionally suited to search for the meaning of constitutional values, but instead see their primary function in terms of registering the actual, occurrent preferences of the people — what they want and what they believe should be done.\textsuperscript{112}

The legislative process works through compromises, not through reason or principle. Legislatures make decisions prescribing extensive intrusions on the personal liberty of convicted persons, but they do not give reasons for their actions. The Eighth Amendment poses a variety of difficult moral dilemmas: Is the state ever justified in taking a life? Is retribution a permissible purpose of criminal sanctions? Is violent crime always worse than nonviolent crime? Given the uncertainty of the behavioral sciences, how much extra punishment should we inflict to make sure that crime is deterred? Which experiments with new punishments are too intrusive to try?

Legislative decisions prescribing criminal penalties merely assume answers to these and similar questions. Given the ultimate personal intrusion caused by the death penalty, the cruel and unusual punishments clause demands answers that result from contemplation, not from assumption. That is the responsibility of the judicial process. Arguments are heard presenting both the state’s justification of the punishment and the defendant’s objections. The court must reply with an opinion setting forth not only its conclusion but the reasons behind it. The judge’s reasoning may stimulate further debate in other decision-making forums. Thus, the court may become involved in a dialogue which clarifies public values. Other decision-makers participate in the values-clarification process associated with the concept of cruelty by passing new statutes, by amending existing statutes, or even by defying the

\textsuperscript{111} 408 U.S. at 366.
\textsuperscript{112} Fiss, \textit{supra} note 4 at 10.
court. Others set the agenda by determining which cases come to court. But the essential role courts must play is to focus the debate by explaining their reasoning. As discussed above, the procedural opinions fail, in part because the reasoning set forth in the opinions leads legislatures to ask the wrong questions. The Court must find the strength to honestly address the moral questions at the heart of the Eighth Amendment.