MEMORANDUM TO THE CONFERENCE

Capital Cases

Bill Douglas has sent word that he thinks the lineup should appear at the foot of the per curiam. I attach one for consideration of the conference.

Bill also asks that the cases not come down before Monday, June 26, because he wants to prepare an additional footnote for his opinion.

W. J. B. Jr.
Mr. Justice Douglas, Mr. Justice Brennan, Mr. Justice Stewart, Mr. Justice White and Mr. Justice Marshall have filed separate opinions stating their reasons for reversal. The Chief Justice, Mr. Justice Blackmun, Mr. Justice Powell and Mr. Justice Rehnquist have filed separate opinions stating their reasons for affirmance.
Mr. Justice Douglas.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitutes "cruel and unusual punishments" within the meaning of the Eighth Amendment as applied to the States by the Fourteenth. I vote to vacate each.

1 The opinion of the Supreme Court of Georgia affirming Furman's conviction of murder and sentence of death is reported in 225 Ga. 253, 167 S. E. 2d 628, and its opinion affirming Jackson's conviction of rape and sentence of death is reported in 225 Ga. 790, 171 S. E. 2d 932. The conviction of Branch of rape and the sentence of death was affirmed by the Court of Criminal Appeals of Texas and reported in 447 S. W. 2d 852.
judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments.

That the requirements of due process ban cruel and unusual punishment is now settled. *Francis v. Resweber*, 332 U. S. 469, 473-474; *Robinson v. California*, 370 U. S. 660, 667. It is also settled that the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their proscription by the legislature. *Weems v. United States*, 217 U. S. 349, 373-376.

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

"... many instances of State injustice and oppression have already occurred in the State legislation of this Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever. Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done, for which and against which the Government of the United States had provided no remedy and could provide none." Cong. Globe, May 10, 1866, p. 2542.

Whether the Privileges and Immunities route is followed or the due process route, the result is the same. It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. *In re Kemmler*, 136 U. S. 436, 447. It is also said in our opinions
that the proscription of cruel and unusual punishments
"is not fastened to the obsolete but may acquire mean­ing as public opinion becomes enlightened by a humane justice." Wexman v. United States, supra, at 373. A
like statement was made in Trop v. Dulles, 356 U. S.
86, 101, that the Eighth Amendment "must draw its
meaning from the evolving standards of decency that
mark the progress of a maturing society."
The generalities of a law inflicting capital punish­ment is one thing. What may be said of the validity
of a law on the books and what may be done with the
law in its application do or may lead to quite different
conclusions.
It would seem to be incontestable that the death
penalty inflicted on one defendant is "unusual" if it
discriminates against him by reason of his race, religion,
wealth, social position, or class, or if it is imposed under a
procedure that gives room for the play of such prejudices.
There is evidence that the provision of the English
Bill of Rights of 1689 from which the language of the
Eighth Amendment was taken was concerned primarily
with selective or irregular application of harsh penalties
and that its aim was to forbid arbitrary and discrimi­natory penalties of a severe nature: 1

"Following the Norman conquest of England in
1066, the old system of penalties, which ensured
equality between crime and punishment, suddenly
disappeared. By the time systematic judicial rec­ords were kept, its demise was almost complete.
With the exception of certain grave crimes for
which the punishment was death or outlawry, the
arbitrary fine was replaced by a discretionary
amercement. Although amercement's discretionary

1 Gramucci, "Nor Cruel and Unusual Punishments Inflicted": The
character allowed the circumstances of each case to be taken into account and the level of cash penalties to be decreased or increased accordingly, the amercement presented an opportunity for excessive or oppressive fines.

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

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

The English Bill of Rights, enacted December 16, 1688, stated that "excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."2 These were the words chosen for our Eighth Amendment. A like provision had been in Virginia's Constitution of 17764 and in seven other States.5 The Northwest Ordinance, enacted under the

3 17 Thorpe, Federal & State Constitutions 3813 (1909).
4 Delaware, Maryland, New Hampshire, North Carolina, Maryland, Massachusetts, Pennsylvania, and South Carolina. 3 Thorpe, op. cit., supra, n. 4, 1892, 4 Thorpe 2457, 1 Thorpe, 2798, 3101, 6 Thorpe, 3257, 3294.
Articles of Confederation, included a prohibition of cruel and unusual punishments. But the debates of the First Congress on the Bill of Rights show little light on its intended meaning. All that appears is the following:

"Mr. Smith, of South Carolina, objected to the words 'nor cruel and unusual punishments,' the import of them being too indefinite.

"Mr. Livermore: 'The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man, villains often deserve whipping, and perhaps having their ears cut off; but are we in the future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it would be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.'"

The words "cruel and unusual" certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is "cruel and unusual" to apply the death penalty—or any other penalty—selectively to minorities whose numbers are few, who are outcasts of society, and who are—

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7 1 Annals Congress, 1st Cong., 1st Sess. 754 (1789).
unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the boards. Judge Tuttle indeed made abundantly clear in *Naval v. Beta*, 453 F. 2d 601, 671-679, that solitary confinement may at times be "cruel and unusual" punishment. Cf. *In re Medley*, 134 U. S. 160; *Brooks v. Florida*, 389 U. S. 413.

The Court in *McGautha v. California*, 402 U. S. 183, 198, noted that in this country there was almost from the beginning a "rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers." The first attempted remedy was to restrict the death penalty to defined offenses such as "premeditated" murder. *Ibid.* But juries took "the
law into their own hands" and refused to convict on the capital offense. Id., at 199.

"In order to meet the problem of jury nullification, legislatures did not try, as before, to refine further the definition of capital homicides. Instead they adopted the method of forthrightly granting juries the discretion which they had been exercising in fact."

1827, 7 & 8 Sec. 4th, c. 27) was before the House of Lords in 1813, Lord Ellenborough said:

"If your Lordships look to the particular measure now under consideration, can it, I ask, be seriously maintained, that the most exemplary punishment, and the best suited to prevent the commission of this crime, ought not to be a punishment which might in some case be inflicted? How, but by the enactments of the law now sought to be repealed, are the cottages of industrious poverty protected? What other security has a poor peasant, when he and his wife leave their home for their daily labours, that on their return their few articles of furniture or of clothes which they possess besides those which they carry on their backs, will be safe? . . . [by the enacting of the punishment of death, and leaving it to the discretion of the Crown to inflict that punishment or not, as the circumstances of the case may require, I am satisfied, and I am much mistaken if your Lordships are not satisfied, that this object is attained with the least possible expenditure. That the law is, as it has been termed, a bloody law, I can by no means admit. Can there be a better test than by a consideration of the number of persons who have been executed for offences of the description contained in the present Bill? Your Lordships are told, what is extremely true, that the number is very small; and this very circumstance is urged as a reason for a repeal of the law; but, before your Lordships are induced to consent to such repeal, I beg to call to your consideration the number of innocent persons who might have been plundered of their property or destroyed by midnight murdurers, if the law now sought to be repealed had not been in existence—a law upon which all the retail trade of this commercial country depends; and which I for one will not consent to be put in jeopardy." Debate in House of Lords, April 2, 1813 (London 1816), pp. 22-23.
The Court concluded "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to any thing in the Constitution." Id. 207.

The Court refused to find constitutional dimensions in the argument that those who exercise their discretion to send a person to death should be given standards by which that discretion should be exercised. Id. 207-208.

A recent witness before the Committee of the Judiciary, United States House of Representatives, Ernest van den Haag, testifying on H. R. 8414 and H. R. 3243, stated:

"Any penalty, a fine, imprisonment or the death penalty could be unfairly or unjustly applied. The

"H. R. 8414, 92d Cong., 1st Sess., introduced by Cong. Celler would stay for two years all executions by the United States or by any State.

H. R. 3243, 92d Cong., 1st Sess., introduced by Cong. Celler would also provide an interim stay of all executions by the United States or by any State and contains the following proposed finding:

"Congress hereby finds that there exist serious questions—

"(a) whether the infliction of the death penalty amounts to cruel and unusual punishment in violation of the eighth and fourteenth amendments to the Constitution; and

"(b) whether the death penalty is inflicted discriminatorily upon members of racial minorities, in violation of the fourteenth amendment to the Constitution,

"And, in either case, whether Congress should exercise its authority under section 5 of the fourteenth amendment to prohibit the use of the death penalty."

There is the naive view that capital punishment as "meted out in our courts, is the antithesis of barbarism." See Henry F. Alford, New York Times, May 27, 1972. But the Leopolds and Loebes, the Harry Thaws, the Dr. Sheppards and the Dr. Finches of our society are never executed, only those in the lower strata, only those who are members of an unpopular minority or poor and despised.
vice in this case is not in the penalty but in the process by which it is inflicted. It is unfair to inflict unequal penalties on equally guilty parties, or on any innocent parties, regardless of what the penalty is.

"I conclude that this vice must be corrected, if it exists, not by changing penalties but by changing the processes by which they are judicially inflicted."

But those who advance that argument overlook McGautha.

We are now imprisoned in the McGautha holding. Indeed the seeds of the present cases are in McGautha. Juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die.

Mr. Justice Field, dissenting in O'Neil v. Vermont, 144 U. S. 323, 340, said, "The State may, indeed, make the drinking of one drop of liquor an offence to be punished by imprisonment, but it would be unheard-of cruelty if it should count the drops in a single glass and make thereby a thousand offences, and thus extend the punishment for drinking the single glass of liquor to an imprisonment of almost indefinite duration."

What the legislature may not do for all classes uniformly and systematically, a judge or jury may not do for a class that prejudice sets apart from the community.

There is increasing recognition of the fact that the basic theme of equal protection is implicit in "cruel and unusual" punishments. "A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." The same authors add that "The extreme rarity with which applicable death

1 Goldberg & Derdzinski, Detering the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1790.
penalty provisions are put to use raises a strong inference of arbitrariness." The President's Commission on Law Enforcement and Administration of Justice recently concluded: 10

"Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and the members of unpopular groups." 11

A study of capital cases in Texas from 1924 to 1968 reached the following conclusions: 12

"Application of the death penalty is unequal:

<table>
<thead>
<tr>
<th>Disposition</th>
<th>Negro</th>
<th>White</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>Executed</td>
<td>130</td>
<td>88.4</td>
<td>210</td>
</tr>
<tr>
<td>Commuted</td>
<td>17</td>
<td>11.6</td>
<td>53</td>
</tr>
<tr>
<td>Total</td>
<td>147</td>
<td>100.0</td>
<td>263</td>
</tr>
</tbody>
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\[X^2 = 4.33; P < 0.05\]

"Although there may be a host of factors other than race involved in this frequency distribution, something more than chance has operated over the years to produce this racial difference. On the basis of this study it is not possible to indict the judicial and other public processes prior to the death row as responsible for the association between Negroes and higher frequency of executions; nor is it entirely correct to assume that from the time of their appearance on death row Negroes are discriminated against by the Pardon Board. Too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship. Nevertheless,
most of those executed were poor, young, and ignorant.

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

"Another ethnic disparity is found in the type
of sentence imposed for rape. The Negro convicted
of rape is far more likely to get the death penalty
than a term sentence, whereas whites and Latinos
are far more likely to get a term sentence than the
death penalty."

Warden Lewis E. Lawes of Sing Sing said: 15

"Not only does capital punishment fail in its
justification, but no punishment could be invented
with so many inherent defects. It is an unequal
punishment in the way it is applied to the rich
and to the poor. The defendant of wealth and
position never goes to the electric chair or to the
gallows. Juries do not intentionally favour the
rich, the law is theoretically impartial, but the de-
fendant with ample means is able to have his case

because the Negro/high-exposure association is statistically present,
some suspicion of racial discrimination can hardly be avoided. If
such a relationship had not appeared, the kind of suspicion could
have been allayed; the existence of the relationship, although not
'proving' differential bias by the Pardon Boards over the years since
1914, strongly suggests that such bias has existed."

The latter was a study in Pennsylvania of people on death row be-
tween 1914 and 1938, made by Wolfgang, Kelly, and Nolde and
printed in 84 J. Cr. L. Cr. & Pol. Sci. 301 (1962). And see Hartung,

15 Life & Death in Sing Sing, 155-160 (1928).
presented with every favourable aspect, while the poor defendant often has a lawyer assigned by the court. Sometimes such assignment is considered part of political patronage; usually the lawyer assigned has had no experience whatever in a capital case.\footnote{Former Attorney General Ramsey Clark has said, "It is the poor, the sick, the ignorant, the powerless and the hated who are executed." One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loeb's are given prison terms, not sentenced to death. Jackson, a Black, convicted of the rape of a white woman, was 21 years old. A court-appointed psychiatrist said that Jackson was of average education and average intelligence, that he was not an imbecile or schizophrenic or psychotic, that his traits were the product of environmental influences, and that he was competent to stand trial. Jackson had entered the house after the husband left for work. He held scissors against the neck of the wife, demanding money. She could find none and a struggle ensued for the scissors, a battle which she lost; and she was then raped. Jackson keeping the scissors pressed against her neck. While there did not appear to be any long-term traumatic impact on the victim, she was bruised and abraded in the struggle but was not hospitalized. Jackson was a convict who had escaped from a work gang in the area, a result of a three-year sentence for auto theft. He was at large for three days and during that time had committed several other offenses—burglary, auto theft, and assault and battery. Furman, a Black, killed a householder while seeking to enter the home at night. Furman shot the deceased through a closed door. He was 26-years-old and had}{\footnote{Crime in America 335 (1971).}}
finished the sixth grade in school. Pending trial he was committed to the Georgia Central State Hospital for a psychiatric examination on his plea of insanity tendered by court-appointed counsel. The superintendent reported that a unanimous staff diagnostic conference on the same date had concluded "that this patient should retain his present diagnosis of Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder." The physicians agreed that "at present the patient is not psychotic, but he is not capable of cooperating with his counsel in the preparation of his defense"; and the staff believed "that he is in need of further psychiatric hospitalization and treatment."

Later he reported that the staff diagnosis was Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder. He concluded, however, that Furman was "not psychotic at present, knows right from wrong and is able to cooperate with his counsel in preparing his defense."

Branch, a Black, entered the rural home of a 65-year-old widow, a White, while she slept and raped her, holding his arm against her throat. Thereupon he demanded money and for 30 minutes or more the widow searched for money, finding little. As he left, Jackson said if the widow told anyone what happened, he would return and kill her. The record is barren of any medical or psychiatric evidence showing injury to her as a result of Branch's attack.

He had previously been convicted of felony theft and found to be a borderline mentally deficient and below the average IQ of Texan prison inmates. He had the equivalent of five and a half years of grade school education. He had a "dull intelligence" and was in the lower four percentile of his class.

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

Irving Brant has given a detailed account of the Bloody Assizes, the regime of terror that occupied the closing years of the rule of Charles II and the opening years of the regime of James. The Lord Chief Justice was Jeffreys:

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

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

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based not on equal justice, but on discrimination. In those days the target was not the Blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the people. Id., pp. 155-163. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishments" contained in the Eighth Amendment.

In a Nation committed to Equal Protection of the laws there is no permissible "caste" aspect 17 of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices

against the accused if he is poor and despised, poor and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law a Brahmin was exempt from capital punishment. And in those days, “Generally, in the law books, punishment increased in severity as social status diminished.” We have, I fear, taken in practice the same position, partially as a result of making the death penalty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.

The high service rendered by the “cruel and unusual” punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparingly, selectively, and spottily to unpopular groups. A law that stated that anyone making more than $50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that Blacks, those who never went beyond the fifth grade in school, or those who made less than $3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.

18 See Spellman, Political Theory in Ancient India 112 (1964).
19 Dickmeier, Kingship and Community in Early India 233 (1962).

“The disparity of representation in capital cases raises doubts about capital punishment itself, which has been abolished in only nine states. If a James Avery [345 U.S. 619] can be saved from electrocution because his attorney made timely objection to the selection of a jury by the use of yellow and white tickets, while an
We should hold these discretionary statutes unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.

I would vacate each of these judgments.

Aubry Williams [362 U. S. 375] can be sent to his death by a jury selected in precisely the same manner, we are imposing our most extreme penalty in an uneven fashion.

"The problem of proper representation is not a problem of money, as some have claimed, but of a lawyer's ability, and it is not true that only the rich have able lawyers. Both the rich and the poor usually are well represented—the poor because more often than not the best attorneys are appointed to defend them. It is the middle-class defendant, who can afford to hire an attorney but not a very good one, who is at a disadvantage. Certainly William Fikes [352 U. S. 191], despite the anomalous position in which he finds himself today, received as effective and intelligent a defense from his court-appointed attorneys as he would have received from an attorney his family had scraped together enough money to hire.

"And it is not only a matter of ability. An attorney must be found who is prepared to spend precious hours—the basic commodity he has to sell—in a case that seldom fully compensates him and often brings him no fee at all. The public has no conception of the time and effort devoted by attorneys to indigent cases. And in a first-degree case, the added responsibility of having a man's life depend upon the outcome exacts a heavy toll."
June 15, 1972

Re: Capital Cases

Dear Lewis:

Please join me.

Sincerely,

Mr. Justice Powell

Copies to the Conference
June 15, 1972

Re: Capital Cases

Dear Chief:

Please join me.

Sincerely,

Mr. Chief Justice

Copies to the Conference