June 16, 1972

Re: Capital Cases

Dear Harry, Lewis and Bill:

Please join me in your opinions.

Regards,

Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

Copies to the Conference
The petitioners in these cases are under sentences of death. The petitioner in No. 69-5003 was convicted of murder in Georgia; the petitioners in No. 69-5030 and No. 69-5031 were convicted, in Georgia and Texas respectively, of rape. We granted certiorari, 403 U.S. 952 (1971), to consider whether death is today a punishment for crime that is "cruel and unusual" and consequently, by virtue of the Eighth and Fourteenth Amendments, beyond the power of the State to inflict.1

1 The Eighth Amendment provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." (Emphasis added.) The Cruel and Unusual Punishments Clause is fully applicable to the States through the Due Process Clause of the Fourteenth Amendment. Robinson v. California, 370 U. S. 660 (1962); Gideon v. Wainwright, 372 U. S. 335,
Almost a century ago, this Court observed that "[d]ifficulty 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." Wilkerson v. Utah, 99 U.S. 130, 136 (1878). Less than 15 years ago, it was again noted that "[t]he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court." Trop v. Dulles, 356 U.S. 86, 103 (1958). Those statements remain true today. The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible to precise definition. Yet we know that the values and ideas it embodies are basic to our scheme of government. And we know also that the Clause imposes upon this Court the duty, when the issue is properly presented, to determined the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, "[t]hat issue confronts us, and the task of resolving it is inescapably ours." Trop v. Dulles, 356 U.S. 86, 103 (1958). To that task I now turn.

I

We have very little evidence of the Framers' intent in including the Cruel and Unusual Punishments Clause among those restraints upon the new Government enumerated in the Bill of Rights. The absence of such a restraint from the body of the Constitution was alluded to, so far as we now know, in the debates of only two of the state ratifying conventions. In the Massachusetts convention, Mr. Holmes protested:

"What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and deter-

342 (1963); Malley v. Hogan, 378 U.S. 1, 6 n. 6 (1964); Powell v. Texas, 392 U.S. 514 (1968).
mine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them, but that racks and gibbets may be amongst the most mild instruments of their discipline." 2 Elliot's Debates 111 (2d ed. 1876).

Holmes' fear that Congress would have unlimited power to prescribe punishments for crimes was echoed by Patrick Henry at the Virginia convention:

"... Congress, from their general powers, may fully go into the business of human legislation. They may legislate, in criminal cases, from treason to the lowest offence—petty larceny. They may define crimes and prescribe punishments. In the definition of crimes, I trust they will be directed by what wise representatives ought to be governed by. But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our [Virginia] bill of rights?—'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' Are you not, therefore, now calling on those gentlemen who are to compose Congress, to ... define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them loose; you do more—you depart from the genius of your country. ..."
These two statements shed little light on what the Framers meant by “cruel and unusual punishments.” Holmes referred to “the most cruel and unheard-of punishments.” Henry to “tortures, or cruel and barbarous punishments.” It does not follow, however, that the Framers were exclusively concerned with prohibiting torturous punishments. Holmes and Henry were objecting to the absence of a Bill of Rights, and they cited to support their objections the unrestrained legislative power to prescribe punishments for crimes. Certainly we may suppose that they invoked the spectre of the most drastic punishments that Congress might devise.

One point, however, is perfectly clear. Holmes and Henry focused wholly upon the necessity to restrain the legislative power. Because they recognized “that Congress have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes,” they insisted that Congress must be limited in its power to punish. They therefore called for a “constitutional check” that would ensure that “when

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Henry continued:

"But Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confessions by torture, in order to punish with still more relentless severity. We are then lost and undone." 3 Elliot’s Debates 447-448 (2d ed. 1876).

These remarks, although spoken in the context of a discussion of Congress’ power to prescribe punishments for crimes, were clearly directed to the use of torture for the purpose of extracting confessions from those suspected of having committed crimes. See n. 2, infra.
we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives.""

The only further evidence of the Framers' intent appears from the debates in the First Congress concerning the adoption of the Bill of Rights. As the Court noted in Weems v. United States, 217 U.S. 349, 368 (1910),

"It is significant that the response to Henry's plea, by George Nicholas, was simply that a Bill of Rights would be ineffective as a means of restraining Congress:

"But the gentleman says that, by this Constitution, they have power to make laws to define crimes and prescribe punishments; and that, consequently, we are not free from torture. . . . If we had no security against torture but our [Virginia] declaration of rights, we might be tortured tomorrow; for it has been repeatedly misused and disregarded." 3 Elliott's Debates 451 (2d ed. 1876).

George Mason misinterpreted Nicholas' response to Henry:

"Mr. GEORGE MASON replied that the worthy gentleman was mistaken in his assertion that the [Virginia] bill of rights did not prohibit torture; for that one clause expressly provided that no one can give evidence against himself; and that the worthy gentleman must know that, in those countries where torture is used, evidence was extorted from the criminal himself. Another clause of the bill of rights provided that no cruel and unusual punishments shall be inflicted; therefore, torture was included in the prohibition." Id., at 452.

Nicholas concluded the colloquy by restating his point again:

"Mr. NICHOLAS acknowledged the [Virginia] bill of rights to contain that prohibition, and that the gentleman was right with respect to the practice of extracting confession from the criminal in those countries where torture is used; but still he saw no security arising from the bill of rights as separate from the Constitution, for that it had been frequently violated with impunity." Ibid.

Those comments also reflect the confusion engendered by Henry's references to the use of torture to elicit confessions, see n. 2, supra, which Mason correctly noted was prohibited by the right against self-incrimination contained in the Virginia bill of rights.

"We have not been referred to any mention of the Cruel and Unusual Punishments Clause in the debates of the state legislatures on ratification of the Bill of Rights."
the Cruel and Unusual Punishments Clause "received very little debate." The extent of the discussion, by two opponents of the Clause in the House of Representatives, was this:

"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. . . . 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 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 could 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 question was put on the clause, and it was agreed to by a considerable majority." 1 Annals of Congress 754 (1789)."
ishment. However, in contrast to Holmes and Henry, who were supporting the Clause, Livermore, opposing it, did not refer to punishments that were considered barbarous and torturous. Instead, he objected that the Clause might someday prevent Congress from inflicting what were then quite common and, in his view, "necessary" punishments—death, whipping, and ear-cropping. To the extent that an inference can be drawn from Livermore's statement, it can only be that the "considerable majority" were prepared to run that risk. No member of the House rose to reply that the Clause was intended only to prohibit torture.

Several conclusions thus emerge from the history of the adoption of the Clause. We know that the Framers' concern was directed specifically to the exercise of legislative power. They included in the Bill of Rights a prohibition upon "cruel and unusual punishments" precisely because Congress would otherwise have had the unfettered power to prescribe punishments for crimes. Yet we cannot now know exactly what the Framers thought "cruel and unusual punishments" were. Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that only torturous punishments were to be outlawed. As Livermore's comments demonstrate, the Framers were well aware that the reach of the Clause was not limited to the proscription of unspeakable atrocities. Nor did they intend simply to forbid punishments considered "cruel and unusual" at the time. The "import" of the Clause is, indeed, "indefinite," and for good reason. A constitutional provision "is enacted, it is true, from an experience of evils, but its general lan-

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* Indeed, the first federal criminal statute, enacted by the First Congress, prescribed 36 lashes for larceny and for receiving stolen goods and one hour in the pillory for perjury. Act of April 30, 1790, c. 9, 1 Stat. 112, 116, §§16-18.
gauge should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth.” *Weems v. United States*, 217 U. S. 349, 373 (1910).

It was almost 80 years before this Court had occasion to refer to the Clause. See *Pervear v. The Commonwealth*, 72 U. S. (5 Wall.) 475, 479-480 (1867). These early cases, as the Court pointed out in *Weems v. United States*, supra, at 369, did not undertake to provide “an exhaustive definition” of “cruel and unusual punishments.” Most of them proceeded primarily by “looking backwards for examples by which to fix the meaning of the clause,” id., at 377, concluding simply that a punishment would be “cruel and unusual” if it were similar to punishments considered “cruel and unusual” at the time the Bill of Rights was adopted. In *Wilkinson v. Utah*, 99 U. S. 130, 136 (1878), for example, the Court found it “safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden.” The “punishments of torture,” which the Court labeled “atrocities,” were cases where the criminal “was embowelled alive, beheaded, and

1 Many of the state courts, “feeling constrained thereto by the incidents of history,” *Weems v. United States*, 217 U. S. 349, 376 (1910), were apparently taking the same position. One court “expressed the opinion that the provision did not apply to punishment by fine or imprisonment or both, but such as that inflicted at the whipping post, in the pillory, burning at the stake, breaking on the wheel,” etc. *Ibid.* Another court “said that ordinarily the terms imply something inhuman and barbarous, torture and the like . . . . Other cases have selected certain typical acts of the English monarchs as illustrating the meaning of the clause and the extent of its prohibition.” *Ibid.*, at 368.
quartered," and cases "of public dissection ... and burning alive." Id., at 135. Similarly, in *In re Kemmler*, 136 U. S. 436, 446 (1880), the Court declared that "if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition." The Court then observed, commenting upon the passage just quoted from *Wilkerson v. Utah* and applying the "manifestly cruel and unusual" test, that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the mere extinguishment of life." Id., at 447.

Had this "historical" interpretation of the Cruel and Unusual Punishments Clause prevailed, the Clause would have been effectively read out of the Bill of Rights. As the Court noted in *Weems v. United States*, 217 U. S. 349, 371 (1910), this interpretation led Story to conclude "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.'" And Cooley, said the Court, "apparently in a struggle between the effect to be given to ancient examples and the inconsequence of a dread of them in these enlightened times, ... hesitate[d] to advance definite views." Id., at 375. The result of a judicial application of this interpretation was not surprising. A state court, for example, upheld the constitutionality of the whipping post: "In comparison with the barbarities of quarter-
ing, hanging in chains, castration, etc.," it was easily reduced to insignificance." *Id.*, at 377.

But this Court in *Weems* decisively repudiated the "historical" interpretation of the Clause. The Court, returning to the intentions of the Framers, "ref[led] on the conditions which existed when the Constitution was adopted." And the Framers knew "that government by the people instigated by the Constitution would not imitate the conduct of arbitrary monarchs. The abuse of power might, indeed, be apprehended, but not that it would be manifested in provisions or practices which would shock the sensibilities of men." *Id.*, at 375. The Clause, then, serves to restrain "[t]he abuse of power"; contrary to the implications in *Wilkerson v. Utah*, supra, and *In re Kemmler*, supra, the reach of the Clause is not "confine[d] . . . to such penalties and punishment as were inflicted by the Stuarts." 217 U.S., at 372.

Although opponents of the Bill of Rights "felt sure that the spirit of liberty could be trusted, and that its ideals would be represented, not debased, by legislation," *ibid.*, the Framers disagreed:

"[Patrick] Henry and those who believed as he did would take no chances. Their predominant political impulse was distrust of power, and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation. With power in a legislature great, if not unlimited, to give criminal character to the actions of men, with power unlimited to fix terms
of imprisonment with what accompaniments they might, what more potent instrument of cruelty could be put into the hands of power? And it was believed that power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like the Stuarts, or to prevent only an exact repetition of history. We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked.” *Id.*, at 372–373.

The Court thus recognized that this “restraint upon legislatures” possessed an “expansive and vital character” that was “essential . . . to the rule of law and the maintenance of individual freedom.” *Id.*, at 376–377. Accordingly, the responsibility lay with the courts to make certain that the prohibition of the Clause was enforced. Referring to cases in which “prominence [was] given to the power of the legislature to define crimes and their punishment,” the Court said:

“We concede the power in most of its exercises. We disclaim the right to assert a judgment

*The Court had earlier emphasized this point in *In re Kemmler*, 136 U. S. 436 (1890), even while stating the narrow, “historical” interpretation of the Clause:

“This (English) Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England; but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offence against the laws of the State were manifestly cruel and unusual . . . it would be the duty of the court to adjudge such penalties to be within the constitutional prohibition. And we think this equally true of the (Clause), in its application to Congress.” *Id.*, at 440–447 (emphasis added).
against that of the legislature of the expediency of
the laws or the right to oppose the judicial power
to the legislative power to define crimes and fix
their punishment, unless that power encounters in
its exercise a constitutional prohibition. In such
case not our discretion but our legal duty, strictly
defined and imperative in its direction, is invoked."

Id., at 378."

In short, this Court in \textit{Weems} returned to the Framers' view of the Clause as a "constitutional check" to ensure that "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." If the judicial conclusion that a punishment is "cruel and unusual" "depend[ed] upon virtually unanimous condemnation of the penalty at issue," then, "[[l]ike no other constitutional provision, [the Clause's] only function would be to legitimize advances already
made by the other departments and opinions already the
conventional wisdom." We know that the Framers did
not envision "so narrow a role for this basic guaranty
of human rights." Goldberg & Dershowitz, Declaring
the Death Penalty Unconstitutional, 83 Harv. L. Rev.
1773, 1782 (1970). The right to be free of "cruel and
unusual punishments," like the other guarantees of the
Bill of Rights, "may not be submitted to vote; [it]
depend[s] on the outcome of no elections." "The very
purpose of a Bill of Rights was to withdraw certain sub-
jects from the vicissitudes of political controversy, to
place them beyond the reach of majorities and officials
and to establish them as legal principles to be applied

\footnote{Indeed, the Court in \textit{Weems} refused even to comment upon some
decisions from state courts because they were "based upon sentences of courts, not upon the constitutional validity of laws." 217 U. S., at 377.}

Judicial interpretation of the Clause, then, is not rendered more difficult simply because of the obvious truth that legislatures have the power to prescribe punishments for crimes. That is precisely the reason the Clause appears in the Bill of Rights. The difficulty arises, rather, in formulating the “legal principles to be applied by the courts” when a legislatively prescribed punishment is challenged as “cruel and unusual.” In formulating those constitutional principles, we must avoid the insertion of “judicial conception[s] of ... vision or propriety.” Weems v. United States, 217 U.S. 349, 379 (1910), yet we must not, in the guise of “judicial restraint,” abdicate our fundamental responsibility to enforce the Bill of Rights. Were we to do so, the “constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted into impotent and lifeless formulas. Rights declared in words might be lost in reality.” Id., at 373. The Cruel and Unusual Punishments Clause would become, in short, “little more than good advice.” Trop v. Dulles, 356 U.S. 86, 104 (1958).

II

Ours would indeed be a simple task were we required merely to measure a challenged punishment against those that history has long condemned. That narrow and unwarranted view of the Clause, however, was left behind with the 19th century. Our task today is more complex. We know “that the words of the [Clause] are not precise, and that their scope is not static.” We know, therefore, that the Clause “must draw its meaning from the evolving standards of decency that mark the prog-

In *Trop v. Dulles*, supra, at 96, it was said that "[t]he question is whether [a] penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [Clause]." It was also said that a challenged punishment must be examined "in light of the basic prohibition against inhuman treatment" embodied in the Clause. *Id.*, at 100 n. 32. It was said, finally, that:

"The basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards." *Id.*, at 100.

At bottom, then, the Cruel and Unusual Punishments Clause prohibits the infliction of uncivilized and inhuman punishments. The State, even as it punishes, must treat its members with respect for their intrinsic worth as human beings. A punishment is "cruel and unusual," therefore, if it does not comport with human dignity.

This formulation, of course, does not of itself yield principles for assessing the constitutional validity of particular punishments. Nevertheless, even though "[t]his Court has had little occasion to give precise content to the [Clause]," *id.*, there are principles recognized in our cases and inherent in the Clause sufficient to permit a determination whether a challenged punishment is inconsistent with human dignity.

10 The Clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice." *Weems v. United States*, 217 U. S. 349, 378 (1910).
The primary principle is that a punishment may not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an extremely severe punishment will often entail physical suffering. See Weems v. United States, 217 U. S. 349, 366 (1910). Yet the Framers also knew "that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation." Id., at 372. Even though "[t]here may be involved no physical mistreatment, no primitive torture," Trop v. Dulles, 356 U. S. 86, 101 (1958), severe mental pain may be inherent in the infliction of a particular punishment. See Weems v. United States, supra, at 366. That, indeed, was one of the conclusions underlying the holding in Trop v. Dulles that the punishment of expatriation violates the Clause. And the

11 "It may be that even the cruelty of pain is not omitted. He must bear a chain night or day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain."

12 "His prison bars and chains are removed, it is true, after twelve years, but he goes from them to a perpetual limitation of his liberty. He is forever kept under the shadow of his crime, forever kept within voice and view of the criminal magistrate, not being able to change his domicile without giving notice to the 'authority immediately in charge of his surveillance,' and without permission in writing. He may not seek, even in other scenes and among other people, to retrieve his fall from rectitude. Even that hope is taken from him and he is subject to tormenting regulations that, if not so tangible as iron bars and stone walls, oppress as much by their continuance, and deprive of essential liberty."

13 "This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banish-
physical and mental suffering inherent in the punishment of *cadena temporal*, see nn. 11-12, supra, was an obvious basis for the Court's decision in *Weems v. United States* that the punishment was "cruel and unusual." 16

More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, "punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like," are, of course, "attended with acute pain and suffering." *O'Neil v. Vermont*, 144 U. S. 323, 339 (1892) (Field, J., dissenting). When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat

ment, a fate universally detested by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment objectionable." *Trop v. Dulles*, 356 U. S. 86, 102 (1958). Cf. id., at 110-111 (BRENNAN, J., concurring):

"[I]t can be supposed that the consequences of greatest weight, in terms of ultimate impact on the petitioner, are unknown and unknowable. Indeed, in truth, he may live out his life with but minor inconvenience. . . . Nevertheless it cannot be denied that the impact of expatriation—especially where statelessness is the upshot—may be severe. Expatriation, in this respect, constitutes an especially demeaning sanction. The uncertainty, and the consequent psychological hurt, which must accompany one who becomes an outcast in his own land must be reckoned a substantial factor in the ultimate judgment."

16 "It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind." *Weems v. United States*, 217 U. S. 340, 377 (1910).
people as nonhumans. They are, therefore, inconsis-
tent with the fundamental premise of the Clause that
even the vilest criminal remains a human being pos-
essed of the dignity of a human being.

The infliction of an extremely severe punishment then,
like the one before the Court in *Weems v. United States*,
from which "[n]o circumstance of degradation [was]
omitted," 217 U. S., at 306, may reflect the attitude that
the criminal punished is not entitled to recognition as
a fellow human being. That attitude may be apparent
apart from the severity of the punishment itself. In
*Louisiana ex rel. Francis v. Resweber*, 329 U. S. 450,
464 (1947), for example, the unsuccessful electrocution,
although it caused "mental anguish and physical pain,"
was the result of "an unforeseeable accident." Had the
failure been intentional, however, the punishment would
have been, like torture, so degrading and indecent as to
amount to a refusal to accord the criminal human status.
Indeed, a punishment may be degrading to human dig-
nity solely because it is a punishment. A State may not
punish a person for being "mentally ill, or a leper, or ... 
afflicted with a venereal disease," or for being addicted
(1962). To inflict punishment for having a disease is to
treat the person punished as a diseased thing rather than
as a sick human being. That the punishment is not
severe, "in the abstract," is irrelevant; "[e]ven one day
in prison would be a cruel and unusual punishment for
the 'crime' of having a common cold." Id., at 667.

Finally, and perhaps most importantly, a punishment
may be degrading simply by reason of its enormity. A
prime example is expatriation, a "punishment more prim-
(1958), for it inherently involves a denial by society
of the criminal’s existence as a member of the human community.\textsuperscript{15}

In determining whether a punishment comports with human dignity, we are aided also by a second principle—that the State may not arbitrarily inflict a severe punishment. This principle is inherent in the Clause; the very words “cruel and unusual punishments” imply condemnation of the irregular infliction of harsh punishments. Indeed, the English history of the Clause\textsuperscript{16} reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 Calif. L. Rev. 839, 857–860 (1969).\textsuperscript{17} We,

\textsuperscript{15}“There may be involved no physical mistreatment, no primitive torture. There is instead the total destruction of the individual’s status in organized society. It is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development. The punishment strips the citizen of his status in the national and international political community. His very existence is at the sufferance of the country in which he happens to find himself. While any one country may accord him some rights, and presumably so long as he remained in this country he would enjoy the limited rights of an alien, no country need do so because he is stateless. Furthermore, his enjoyment of even the limited rights of an alien might be subject to termination at any time by reason of deportation. In short, the expatriate has lost the right to have rights.”\textsuperscript{18} Trop v. Dulles, 356 U. S. 86, 101–102 (1958).

\textsuperscript{16}The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688. . . .” Trop v. Dulles, 356 U. S. 86, 100 (1958).

\textsuperscript{17}The specific incident giving rise to the provision was the perjury trial of Titus Oates in 1685. “None of the punishments inflicted upon Oates amounted to torture. . . . In the context of the Oates’ case, ‘cruel and unusual’ seems to have meant a severe punishment unauthorized by statute and not within the jurisdiction of the court to impose.” Granucci, “Nor Cruel and Unusual Punishments Inflicted:” The Original Meaning, 57 Calif. L. Rev. 839, 859 (1969). Thus, “[t]he irregularity and anomaly of Oates’ treatment was
too, must be concerned, for the arbitrary infliction of a severe punishment is wholly inconsistent with the respect the State must accord the human dignity of those it punishes for the commission of crimes.

This principle is reflected to some extent in our prior cases. In Wilkerson v. Utah, 99 U. S. 130, 133-134 (1878), the Court reviewed various treatises on military law in order to demonstrate that under "the customs of war" shooting was a common method of inflicting the punishment of death. On that basis, the Court concluded:

"Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to [treatises on military law] are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of..."

Goldberg & Dershowitz, Declaring the Death Penalty Unconstitutional, 83 Harv. L. Rev. 1773, 1789 n. 74 (1970). Although the English provision was intended to restrain the judicial and executive power, see n. 8, supra, the principle is, of course, fully applicable under our Clause, which is primarily a restraint upon the legislative power to prescribe punishments for crimes.

In a case from the Philippine Territory, the Court struck down a punishment that "ha[d] no fellow in American legislation." Weems v. United States, 217 U. S. 349, 377 (1910). After examining the punishments imposed, under both United States and Philippine law, for similar as well as more serious crimes, id., at 380-381, the Court observed that the "contrast" "exhibit[ed] a difference between unrestrained power and that which is exercised under the spirit of constitutional limitations formed to establish justice," id., at 381. And in Trop v. Dulles, 356 U. S. 86 (1958), in which a law of Congress punishing wartime desertion by expatriation was held unconstitutional, it was emphasized that "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime." Id., at 102. When a severe punishment is not inflicted elsewhere, or when more serious crimes are punished less severely, there is a strong inference that the State is exercising arbitrary, "unrestrained power."
murmur in the first degree is not included in that category, within the meaning of the [Clause]. Soldiers convicted of desertion or other capital military offenses are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fullness by the writers upon the subject of courts-martial."

The Court thus upheld death by shooting, so far as appears, solely on the ground that it was a common method of execution."

As Wilkerson v. Utah suggests, when a severe punishment is inflicted "in the great majority of cases" in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of the punishment is "something different from that which is generally done" in such cases, Trop v. Dulles, 350 U. S. 86, 100 n. 32 (1956), there is a substantial likelihood that the State, contrary to the re-

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19 In Werm v. United States, 217 U. S. 349, 369-370 (1910), the Court summarized the holding of Wilkerson v. Utah as follows:

"The court pointed out that death was an usual punishment for murder, that it prevailed in the Territory for many years, and was inflicted by shooting, so that the mode of execution was usual under military law. It was hence concluded that it was not forbidden by the Constitution of the United States as cruel or unusual."

20 "It was said in Trop v. Dulles, 350 U. S. 86, 100 n. 32 (1956), that "[o]n the few occasions this Court has had to consider the meaning of the [Name], precise distinctions between cruelty and unusualness do not seem to have been drawn. . . . If the word 'unusual' is to have any meaning apart from the word 'cruel,' however, the meaning should be the ordinary one, signifying something different from that which is generally done." There are other statements in prior cases indicating that the word 'unusual' has a distinct meaning:

"We perceive nothing . . . unusual in this [punishment]." Penrose v. The Commonwealth, 72 U. S. (4 Wall.) 472, 480 (1867). "... the judgment of mankind would be that the punishment was not only an unusual but a cruel one . . . ." O'Neil v. Vermont, 144 U. S. 323,
quirements of regularity and fairness embodied in the Clause, is singling people out for severe punishment. This principle is especially important today. There is scant danger, given the political processes "in an enlightened democracy such as ours," id., at 100, that severe punishments will be widely applied. The more significant function of the Clause, therefore, is to protect against the danger of their rare and random infliction.

A third principle inherent in the Clause is that a punishment may not be morally unacceptable to contemporary society. Although this principle is well established, it has never been fully explained in our cases. The difficulty, of course, lies in making certain that the judicial determination is as objective as possible.16


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16 340 (1892) (Field, J., dissenting). "It is unusual in its character." Weems v. United States, 217 U. S. 349, 377 (1910). "And the punishment inflicted . . . is certainly unusual." United States ex rel. Milwaukee Social Democratic Pub. Co. v. Ruston, 236 U. S. 467, 480 (1915) (Borkenau, J., dissenting). "The punishment inflicted is not only unusual in character; it is, so far as known, unprecedented in American legal history." id., at 485. "There is no precedent for it. What then is it, if it's not cruel, unusual and unlawful?" Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, 470 (1947) (Burton, J., dissenting). "To be sure, imprisonment for ninety days is not, in the abstract, a punishment that is either cruel or unusual." Robinson v. California, 370 U. S. 660, 667 (1962).

It is fair to conclude from these statements that "[w]hether the word 'unusual' has any qualitative meaning different from 'cruel' is not clear." Trop v. Dulles, supra, at 100 n. 32. The question, in any event, is of minor significance; this Court has never attempted to explicate the meaning of the Clause simply by parsing its words.

"The danger of subjective judgment is acute if the question posed is whether a punishment "shocks the most fundamental instincts of civilized man." Louisiana ex rel. Francis v. Resweber, 329 U. S. 459, 471 (1947) (Burton, J., dissenting); or whether "any man of right feeling and heart can refrain from shuddering," O'Neil v. Vermont, 144 U. S. 323, 340 (1892) (Field, J., dissenting), or whether "a cry of horror would rise from every civilized and Christian community..."
Weems v. United States, 217 U. S. 349, 389 (1910), and Trop v. Dulles, 356 U. S. 102-103 (1958), suggest that one factor to be considered is the existence of the punishment in jurisdictions other than those before the Court. Wilkerson v. Utah, 99 U. S. 130 (1878), suggests that another factor is the historic usage of the punishment.29 Trop v. Dulles, supra, at 99, added present acceptance to past usage without, however, explaining how present acceptance was to be determined; it was observed only that “the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.” In Robinson v. California, 370 U. S. 660, 666 (1962), the Court seemed to go a step further, concluding simply that “in the light of contemporary human knowledge, a law which made a criminal offense of such a disease [as narcotics addiction], would doubtless be universally thought to be an infliction of cruel and unusual punishment.”

It is apparent that no fully satisfactory criteria can be developed for application to any and all punishments. Basically however, this principle requires us to consider the history of a punishment and to examine society’s

of the country.” Ibid. Mr. Justice Frankfurter’s separate opinion in Louisiana ex rel. Francis v. Resweber, supra, is instructive. He warned “against finding in personal disapproval a reflection of more or less prevailing condemnation” and against “enforcing . . . private view[s] rather than that consensus of society’s opinion which, for purposes of due process, is the standard enjoined by the Constitution.” Id., at 471. His conclusions were as follows: “I cannot bring myself to believe that [the State’s procedure] offends a principle of justice ‘rooted in the traditions and conscience of our people.’” Id., at 470. “. . . I cannot say that it would be ‘repugnant to the conscience of mankind.’” Id., at 471. Yet nowhere in the opinion is there any explanation of how he arrived at those conclusions.

present practices with respect to its use. Obviously, if a punishment were totally condemned throughout society, there would be no need for this Court to determine its constitutionality, for it would never be inflicted. That, of course, is what happened to such once-common punishments as branding and earcropping. Enforcement of the Clause today, therefore, means that the question is whether there are objective indicators of substantial societal doubt that a particular punishment is appropriate for human beings.

The final principle inherent in the Clause is that a severe punishment may not be excessive, in the sense of unnecessary. This principle derives from the notion that the infliction of a severe punishment by the State cannot comport with human dignity if it is nothing more than the infliction of pointless suffering. The question, then, is whether there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, cf. Robinson v. California, 370 U.S. 660, 668 (1962); id., at 677 (DOUGLAS, J., concurring); Trop v. Dulles, 356 U.S. 86, 114 (1958) (BRENNAN, J., concurring); if there is, the punishment inflicted is excessive and unnecessary.

This principle first appeared in our cases in Mr. Justice Field's dissent in O'Neil v. Vermont, 144 U.S. 323, 337 (1892). He there took the position that the Clause

"is directed, not only against punishments of the

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12 It may, in fact, have appeared earlier. In Pervear v. The Commonwealth, 72 U.S. (3 Wall.) 475, 480 (1867), the Court stated:

"We perceive nothing excessive, or cruel, or unusual in this [punishment]. The object of the law was to protect the community against the manifold evils of intemperance. The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps, all of the States. It is wholly within the discretion of State legislatures." This discussion suggests that the Court viewed the punishment as reasonably related to the purposes for which it was inflicted.
character mentioned [torturous punishments], but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted." *Id.*, at 339-340.

Although the rationale for a determination that a punishment is "greatly disproportioned" to a crime is not always evident," certainly one basis is that the punishment serves no purpose more effectively than a far less severe punishment. This view of the principle was explicitly recognized by the Court in *Weems v. United States*, 217 U. S. 349 (1910). There the Court found that "the highest punishment possible for a crime which may cause the loss of many thousands of dollars, and to prevent which the duty of the State should be as eager as to prevent the perversion of truth in a public document, is not greater than that which may be imposed for falsifying a single item of a public account." *Id.*, at 381. Stating that "this contrast shows more than different exercises of legislative judgment," the Court concluded that the punishment was unnecessarily severe.

14 It is not altogether clear precisely what is meant by the statement that a punishment is excessively severe in view of the crime. Mr. Justice Field apparently based his conclusion upon an intuitive sense that the punishment was disproportionate to the criminal's moral guilt. In *Weems v. United States*, 217 U. S. 349 (1910), the Court repeatedly made such statements ("adaptation of punishment to the degree of crime," *id.*, at 365; "punishment for crime should be graduated and proportioned to offense," *id.*, at 367), but never explained what the standards were for reaching such a conclusion. Cf. *Trop v. Dulles*, 356 U. S. 86, 99 (1958): "Since wartime desertion is punishable by death, there can be no argument that the penalty of desertion is excessive in relation to the gravity of the crime."
in view of the purposes for which it was imposed. Ibid. See also Trop v. Dulles, 356 U. S. 86, 111-112 (1958) (BRENNAN, J., concurring). There are, then, four principles by which we may determine whether a particular punishment is "cruel and unusual." The primary principle, which supplies the essential predicate for the application of the others, is that a punishment may not be too severe, in the sense of degrading to human dignity. The paradigm under this principle is a torturous punishment of the type that the Clause has always prohibited. Yet "[i]t is unlikely that any State at this moment in history," Robinson v. California, 370 U. S. 660, 666 (1962), would pass a law providing for the infliction of such a punishment. Indeed, no such punishment has ever been before this Court. The same may be said of the other principles. It is unlikely that this Court will confront a severe punishment that is obviously inflicted in a totally arbitrary fashion; no State would engage in a reign of blind terror. Nor is it likely that this Court will be called upon to review a punishment that is clearly and absolutely rejected by society; no legislature would be able to authorize the infliction of such a punishment. Nor, finally, is it likely that this Court will have to consider a severe punishment that is patently unnecessary.

* * *

15 "The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting severity, its repetition is prevented, and hope is given for the reformation of the criminal." Weems v. United States, 217 U. S. 349, 381 (1910).

16 This principle does not, of course, mean that a punishment is constitutional merely because it is necessary. A State could not now, for example, inflict a punishment condemned by history, for any such punishment would be intolerably offensive to human dignity no matter how necessary. This principle is simply that the infliction of purposeless suffering is also offensive to human dignity.
sary; no State today would inflict a severe punishment knowing that there was no reason whatever for doing so. In short, we are likely to have occasion to determine conclusively that a punishment is fatally offensive under any one principle.

Since the Bill of Rights was adopted, this Court has adjudged only three punishments to be within the prohibition of the Clause. See Weems v. United States, 217 U.S. 349 (1910); Trop v. Dulles, 356 U.S. 86 (1958); Robinson v. California, 370 U.S. 660 (1962). Each punishment, of course, was unusually severe, but of none could it be said conclusively that it was fatally offensive under one or the other of the principles. Rather, these "cruel and unusual punishments" seriously implicated several of the principles, and it was the combination that supported the judgment. That, indeed, is not surprising. The function of these principles, after all, is simply to provide means by which a court can determine whether a challenged punishment is truly inconsistent with human dignity. They are, therefore, interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is "cruel and unusual." The test in these cases will thus be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if there are objective indicators of substantial public doubt as to its fitness as a punishment for human beings, and if there is no significant evidence that it serves any state purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

III

The punishment challenged in these cases is death. Death, of course, is a "traditional" punishment, Trop v.
Dulles, 356 U. S. 66, 100 (1958), one that "has been employed throughout our history," id., at 96, and its constitutional background is accordingly an appropriate subject of inquiry.

There is, first, a textual consideration raised by the Bill of Rights itself. The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is entitled to certain procedural protections. We can thus infer that the Framers recognized the existence of a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishments Clause. Nor is there any indication in the debates on the Clause that a special exception was to be made for death. If anything, the indication is to the contrary, for Livermore specifically mentioned death as a candidate for future proscription under the Clause. See p. —, supra. Finally, it does not advance analysis to insist that the Framers did not believe that adoption

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27 The Fifth Amendment provides: "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 ..." (Emphasis added.)

28 It would indeed be a novel argument that the reference in the Fifth Amendment to "jeopardy of ... limb" provides perpetual constitutional sanction for such corporal punishment as branding and earrapping, which were not uncommon punishments when the Bill of Rights was adopted. As the California Supreme Court pointed out with respect to the California Constitution: "The Constitution expressly proscribes cruel or unusual punishments. It would be mere speculation and conjecture to ascribe to the framers an intent to exempt capital punishment from the compass of that provision solely because at a time when the death penalty was commonly accepted, they provided elsewhere in the Constitution for special safeguards in its application." People v. Anderson, 6 Cal. 3d 628, 639, 403 P. 2d 880, 887, 100 Cal. Rptr. 152, 159 (1972).
of the Bill of Rights would immediately prevent the infliction of the punishment of death; neither did they believe that it would immediately prevent the infliction of other corporal punishments common at the time. See n. 6, supra.¹⁰

There is also the consideration that this Court has decided three cases involving constitutional challenges to particular methods of execution. In Wilkerson v. Utah, 99 U. S. 130 (1878), and In re Kemmler, 136 U. S. 436 (1890), the Court, expressing in both cases the since-rejected "historical" view of the Clause, see pp. ___-___, supra, approved death by shooting and by electrocution. In Wilkerson, the Court concluded that shooting was a common method of execution, see p. ___-___, supra; in Kemmler, the Court held that the Clause did not apply to the States, 136 U. S., at 447-449.¹¹


"The [Clause] forbids 'cruel and unusual punishments.' In my view, these words 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 [Clause] was adopted. It is inconceivable to me that the framers intended to end capital punishment by the [Clause]."

Under this view, of course, any punishment that was in common use in 1791 is forever clothed with the mantle of constitutionally validity.

¹¹ The constitutionality of the punishment itself was not challenged. Wilkerson v. Utah, 99 U. S. 130, 136-137 (1878). Indeed, it may be that the only contention made was that the sentencing "court possessed no authority to prescribe the mode of execution." Id., at 137.


"We held in the case of Kemmler . . . that as the legislature of the State of New York had determined that it did not inflict cruel and unusual punishment, and its courts had sustained that determination, we were unable to perceive that the State had thereby abridged the privileges or immunities of petitioner or deprived him of due process of law."
Louisiana ex rel. Francis v. Resweber, 329 U. S. 450 (1947), the Court approved a second attempt at electrocution after the first had failed. It was said that “'[t]he Fourteenth Amendment] would prohibit by its due process clause execution by a state in a cruel manner,” id., at 463, but that the abortive attempt did not make the “subsequent execution any more cruel in the constitutional sense than any other execution,” id., at 464.13

These three decisions thus reveal that the Court has assumed in the past that death was a permissible punishment.13 Past assumptions, however, are not sufficient to limit the scope of our examination of this punishment today. The constitutionality of death under the Cruel and Unusual Punishments Clause is before this Court for the first time; we cannot avoid the question by recalling past cases that never considered it.

The question, then, is whether the deliberate infliction of death is today consistent with the command of the Clause that the State may not inflict punishments that do not comport with human dignity. The punishment of death must be analyzed in terms of the principles developed above and the cumulative test to which they

13 It was also asserted, without citation of authority, that the Constitution prohibits “emery inherent in the method of punishment,” but does not prohibit “the necessary suffering involved in any method employed to extinguish life humanely,” 329 U. S., at 464. The comparison in this statement appears to be meaningless. It was said in dissent that “[c]onfirmity with due process of law is no bar to the infliction by a state in conformity with due process of any method employed to extinguish life humanely,” id., at 474 (Burton, J., dissenting) (emphasis in original). The only authority cited for this assertion was In re Kemmler, 136 U. S. 436 (1890).

14 In a no-death case, Trop v. Dulles, 356 U. S. 86 (1958), it was said that “in a day when it is still widely accepted, [death] cannot be said to violate the constitutional concept of cruelty.” Id., at 99 (emphasis added). This statement, of course, leaves open the future constitutionality of the punishment.
lead: It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as fit for human beings and that cannot be shown to serve any state purpose more effectively than a significantly less drastic punishment. Under these principles and this test, death is today a "cruel and unusual" punishment.

Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common view is that death is the ultimate sanction. This natural human feeling appears all about us. There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. No other punishment has been so continuously restricted, see pp. ---, infra, nor has any State yet abolished prisons, as some have abolished this punishment. And those States that still inflict death reserve it for the most heinous crimes. Juries, of course, have always treated death cases differently, as have governors exercising their commutation powers. Criminal defendants are of the same view. "As all practicing lawyers know, who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty." Griff in v. Illinois, 351 U. S. 12, 28 (1956) (Burton and Minton, JJ., dissenting). Some legislatures have required particular procedures, such as two-stage trials and automatic appeals, applicable only in death cases. "It is the universal experience in the administration of criminal justice that those charged with capital offenses are granted special considerations." Ibid. See Williams v. Florida, 399 U. S. 78, 103 (1970) (all States require juries of 12 in death cases); cf. Johnson v. Louisiana, --- U. S. ---, --- (1972) (unanimous jury verdicts). This Court, too, almost always treats death cases as a
class apart. And the unfortunate effect of this punishment upon the functioning of the judicial process is wellknown; no other punishment has a similar effect.

The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death.

Since the discon-
tinunce of flogging as a constitutionally permissible punishment, Jackson v. Bishop, 404 F. 2d 571 (CAS 1968), death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. Cf. Ex parte Medley, 134 U. S. 160, 172 (1890). The evidence is abundant that, as the California Supreme Court pointed out, "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture." People v. Anderson, 6 Cal. 3d 628, 646, 493 P. 2d 880, 894, 100 Cal. Rptr. 152, 166 (Hl72). Indeed, as Mr. Justice
Frankfurter noted, "the onset of insanity while awaiting execution of a death sentence is not a rare phenomenon." Solesbee v. Balkcom, 339 U. S. 9, 14 (1950) (dissenting opinion). The "fate of ever-increasing fear and distress" to which this Court has held the ex-patriate is subjected, Trop v. Dulles, 356 U. S. 86, 102 (1958), can only exist to a greater degree for a person confined in prison awaiting death."

The unusual severity of death is manifested most clearly in its finality and enormity. The closest punishment to death in these respects is expatriation, a punishment that "destroys for the individual the political existence that was centuries in the development," that "strips the citizen of his status in the national and international political community," and that puts "[h]is very existence" in jeopardy. Expatriation thus inherently entails "the total destruction of the individual's status in organized society." Id., at 101. "In short, the expatriate has lost the right to have rights." Id., at 102. Yet, demonstrably, expatriation is not "a fate worse than death." Id., at 125 (Frankfurter, J., dissenting).

Although death, like expatriation, destroys the individual's "political existence" and his "status in organized society," it does more, for, unlike expatriation, death also destroys "[h]is very existence." There is,
too, at least the possibility that the expatriate will in the future regain "the right to have rights." Death forecloses even that possibility.

Death is a truly awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of those punished by imprisonment is evident. An individual in prison does not lose "the right to have rights." He retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a "person" for purposes of due process of law and the equal protection of the laws. He remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, see Witherspoon v. Illinois, 391 U. S. 510 (1968), yet the finality of death precludes relief. An executed person has indeed "lost the right to have rights." As one 19th century proponent of punishing criminals by death declared, "When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world. Take your chance elsewhere.'"

In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity. The unusual

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60-5003, 27C.--CONCUR (B)

FURMAN v. GEORGIA

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severity of this punishment, therefore, requires us to scrutinize it carefully under the other principles embodied in the Clause. I turn to the second principle—that the State may not arbitrarily inflict an unusually severe punishment.

The outstanding characteristic of our present practice of punishing criminals by death is the extreme rarity with which we resort to it. The evidence is conclusive that death is not the usual punishment for any crime.

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. In the 1930's, executions per year averaged 167; in the 1940's, the average was 128; in the 1950's, it was 72; and in the years 1960-1962, it was 48. There have been a total of 46 executions since then, 36 of them in 1963-1964. Yet our population and the numbers of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline. That rarity is plainly revealed by an examination of the years 1961-1970, the last 10-year period for which statistics are available. During that time, an average of 106 death sentences were imposed each year. Not nearly that number,

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69-5003, ETC.—CONCUR (B)

FURMAN v. GEORGIA

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however, could be carried out, for many were precluded by commutations to life or a term of years, transfers to mental institutions because of insanity, resentences to life or a term of years, transfers to mental institutions because of insanity, resentences to life or a term of years, grants of new trials and orders for resentencing, dismissals of indictments and reversals of convictions, and deaths by suicide and natural causes. On January 1, 1961, the death row population was 219; on December 31, 1970, it was 608; during that span, there were 135 executions. Consequently, had the 389 additions to death row also been executed, the annual average would have been 52. In short, the country


47 During that 10-year period, 1,171 prisoners entered death row, including 120 who were returned following new trials or treatment at mental institutions. There were 653 dispositions other than by execution, leaving 524 prisoners who might have been executed, of whom 135 actually were. National Prisoner Statistics, supra, n. 40, at 9.
night, at most, have executed one criminal each week. In fact, of course, far fewer were executed. Even before the moratorium began in 1967, executions totaled only 42 in 1961 and 47 in 1962, an average of less than one per week; the number dwindled to 21 in 1963, to 15 in 1964, and to seven in 1965; in 1966, there was one execution, and in 1967, there were two.18

When a country of over 200 million people inflicts an unusually severe punishment only 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.

Although there are no exact figures available, we know that thousands of murders and rapes are committed annually in States where death is an authorized punishment for those crimes. However the rate of infliction is characterized, as "freakishly" or "spectacularly" rare, or simply as rare, it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases. How much rarer, after all, could the infliction of death be!

When the punishment of death is inflicted in only a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than random selection. The States claim, however, that this rarity is evidence not of arbitrariness, but of informed selectivity: Death is inflicted, they say, only in "extreme" cases.

Informed selectivity, of course, is a value not to be denigrated. Yet presumably the States could make precisely the same claim if there were 10 executions per year, or five, or even if there were only one. That there may be as many as 50 per year does not substan-

18 National Prisoner Statistics, supra, n. 40, at 8.
tially improve the claim. When the rate of infliction is at this low level, the assertion that only the worst criminals or the criminals who commit the worst crimes is highly implausible. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily "extreme." Nor is the distinction credible in fact. If, for example, petitioner Furman or his crime illustrate the "extreme," then virtually all murderers and their murders are also "extreme." Furthermore, our procedures in death cases, rather than resulting in the selection of "extreme" cases for this punishment, actually sanction an arbitrary selection. For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. McCleskey v. Virginia, 419 U. S. 312 (1974). In other words, our procedures are not constructed to guard against totally capricious selection of criminals for the punishment of death.

Death, of course, is not inflicted by a lottery system, and we cannot conclude that arbitrary infliction is patently obvious. We are not, however, considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that we can rely upon it, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.

48 [Facts of Furman case.]
When there is a strong probability that an unusually severe and degrading punishment is being inflicted arbitrarily, we may well expect that there will be signs that society disapproves of its infliction. I turn, therefore, to the third principle. An examination of the history and present operation of the American practice of punishing criminals by death reveals significant doubts in contemporary society that this punishment is appropriate for infliction upon human beings.

I cannot add to my Brother MARSHALL’s comprehensive treatment of the English and American history of capital punishment. I emphasize, however, one significant conclusion that emerges from that history. From the beginning of our Nation, this punishment has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can without a fundamental inconsistency follow the practice of deliberately putting some of its members to death. In the United States as in other nations of the western world, “the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior.
during the nineteenth and twentieth centuries." It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.

Our practice of punishing criminals by death has changed greatly over the years. One significant change has been in our methods of inflicting death. Although this country never embraced the more violent and repulsive methods employed in England, we did for a long time rely almost exclusively upon the gallows and the firing squad. Since the development of the supposedly more humane methods of electrocution late in the 19th century and lethal gas in the 20th, however, hanging and shooting have virtually ceased. Our concern for decency and human dignity, moreover, has compelled changes in the circumstances surrounding the execution itself. No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all.

Also significant is the drastic decrease in the crimes for which the punishment of death is actually inflicted. While esoteric capital crimes remain on the books, since 1930 murder and rape have accounted for nearly 90% of the total executions, and murder alone for about 87%. In addition, the crime of capital murder has itself been limited. As the Court noted in *McGautha v. California*, 402 U. S. 183, 198 (1971), there was in this

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89 Eight States still employ hanging as the method of execution, and one, Utah, also employ shooting. These nine States have accounted for less than 3% of the executions in the United States since 1930. *National Prisoner Statistics*, supra, n. 40, at 10-11.
90 National Prisoner Statistics, supra, n. 40, at 8.
country a “rebellion against the common-law rule imposing a mandatory death sentence on all convicted murderers.” Initially that rebellion resulted in legislative definitions that distinguished between degrees of murder, retaining the mandatory death sentence only for murder in the first degree. Yet “[i]t’s new legislative criterion for isolating crimes appropriately punishable by death soon proved as unsuccessful as the concept of ‘malice aforethought,’” ibid., the common-law mean of separating murder from manslaughter. Not only was the distinction between degrees of murder confusing and uncertain in practice, but even in clear cases of first degree murder juries continued to take the law into their own hands: if they felt that death was an inappropriate punishment, “they simply refused to convict of the capital offense.” Id., at 199. The phenomenon of jury nullification thus remained to counteract the rigors of mandatory death sentences. Bowing to reality, “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.” Ibid. As a result, virtually all death sentences today are discretionarily imposed. Finally, it is significant that nine States no longer inflict the punishment of death under any circumstances, and five others have restricted it to extremely rare crimes.  

55 Alabama, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin have abolished death as a punishment for crimes. National Prisoner Statistics, supra, n. 40, at 50. In addition, the California Supreme Court held the punishment unconstitututional under the state counterpart of the Cruel and Unusual Punishments Clause. People v. Anderson, 6 Cal. 3d 628, 493 P. 2d 850, 100 Cal. Rptr. 152 (1972).  

66 New Mexico, New York, North Dakota, Rhode Island, and Vermont have almost totally abolished death as a punishment for
Thus, although "the death penalty has been employed throughout our history," *Trop v. Dulles*, 360 U. S. 96, 99 (1959), in reality the history of this punishment is one of successive restriction. What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. This historical view of this punishment evidences not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience. The result of this movement is our current system of administering this punishment, under which death sentences are rarely imposed and death is even more rarely inflicted. It is, of course, "We, the People" who are responsible for the rarity both of the imposition and the carrying out of this punishment. Juries, "express[ing] the conscience of the community on the ultimate question of life or death," *Witherspoon v. Illinois*, 391 U. S. 510, 519 (1968), have been able to bring themselves to vote for death in a mere 100 or so cases among the thousands tried each year where the punishment is sought. National Prisoner Statistics, supra, p. 40, at 50. These five States might well be considered de facto abolition States. North Dakota and Rhode Island, which restricted the punishment in 1915 and 1852 respectively, have not carried out an execution since at least 1930, id., at 10; nor have there been any executions in New York, Vermont, or New Mexico since they restricted the punishment in 1965, 1965, and 1909 respectively, id., at 10-11. As of January 1, 1971, none of the five States had even a single prisoner under sentence of death. Id., at 15-19.

In addition, six States, while retaining the punishment on the books in generally applicable form, have made virtually no use of it. Since 1930, Idaho, Montana, Nebraska, New Hampshire, South Dakota, and Wyoming have carried out a total of 22 executions. Id., at 10-11. As of January 1, 1971, these six States had a total of three prisoners under sentences of death. Id., at 18-19. Here, assuming 22 executions in 42 years, each State averaged about one execution every 10 years.
ment is available. Governors, elected by and acting for us, have regularly commuted a substantial number of those sentences. And it is our society that insists upon due process of law to the end that no person will be unjustly put to death, thus ensuring that many more of those sentences will not be carried out. In sum, we have made death a rare punishment today.

The progressive decline in and the current rarity of the infliction of death demonstrates that our society seriously questions the appropriateness of this punishment today. When an unusually severe punishment is authorized for wide-scale application but not, because of society’s refusal, inflicted save in a few instances, the inference is inescapable that there is a deep-seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. The States remind us that many legislatures authorize death as the punishment for certain crimes and that substantial segments of the public, as reflected in opinion polls and referendum votes, continue to support it. Yet statutory authorization, as well as polls and referenda, which amount simply to approval of that authorization, cannot be determinative under this principle. The moral acceptability of an unusually severe punishment is demonstrated not by its availability, for it might be so offensive as never to be inflicted at all, but by its use. The objective indicator of society’s view of an unusually severe punishment is what society does with it. We can measure acceptance only by what society accepts, and today that means a limited numbers of deaths, inflicted in secret upon an apparently random sample of the eligible criminals. That an unusually severe punishment remains on the statute books under these circumstances cannot dispel the conclusion that society views the punishment with substantial doubt.
The final principle we must consider is that an unusually severe and degrading punishment may not be excessive in view of the purposes for which it is inflicted. This principle, too, is related to the others. When there is substantial reason to believe that the State is arbitrarily inflicting an unusually severe punishment that is subject to grave societal doubts, it is likely also that the punishment cannot be shown to be serving any state purposes that could not be served equally well by some less severe punishment.

The States' primary claim is that death is a necessary punishment because it prevents the commission of capital crimes more effectively than any less severe punishment. The first part of this claim is that the infliction of death is necessary to prevent certain criminals from committing further crimes. The sufficient answer to this is that if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined.

The more significant argument is that the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment. The argument is not based upon evidence that the threat of death is a superior deterrent. Indeed, as my Brother MARSHALL establishes, the available evidence uniformly indicates, although it does not conclusively prove, that today the threat of death has no greater deterrent effect than the threat of imprisonment. The States argue, however, that they are entitled to rely upon common human experience, and that experience, they say, supports the conclusion that death must be a more effective deterrent than any less severe punishment. Because people fear death the most, the
argument runs, the threat of death must be the greatest deter­rent. It is important to focus upon the precise import of this argument. It is not denied that many, and prob­ably most, capital crimes cannot be deterred by the threat of punishment. Thus the argument can apply only to those who think rationally about the com­mission of capital crimes. Particularly is that true when the po­tential criminal, under this argument, must not only consider the risk of punishment, but also distinguish be­tween two possible punishments. The concern, then, is with a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. On the face of it, the assumption that such persons exist is implausible.

In any event, this argument cannot be appraised in the abstract. We are not presented with the theoretical question whether under any imaginable circumstances the threat of death might be a greater deterrent to the com­mission of capital crimes than the threat of imprison­ment. We are concerned with the practice of punish­ing criminals by death as it exists in the United States today. Proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted not with the certainty of a speedy death, but only with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of long­term imprisonment is near and great. In short, what
ever the speculative validity of the assumption that the threat of death is a superior deterrent, there is nothing to justify the conclusion that as currently administered the punishment of death is necessary to deter the commission of capital crimes. What ever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibility are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment. 54

There is, however, another aspect to the argument that the punishment of death is necessary for the protection of society. The infliction of death, the States urge, serves to manifest the community’s outrage at the commission of the crime. It is, they say, a concrete public expression of moral indignation that inculcates respect for the law and helps assure a more peaceful community. Moreover, we are told, not only does the punishment of death exert this widespread moralizing influence upon community values, it also satisfies the popular demand for grievous condemnation of abhorrent crimes and thus prevents disorder, lynching, and attempts by private citizens to take the law into their own hands.

54There is also the more limited argument that death is a necessary punishment when criminals are already serving or subject to a sentence of life imprisonment. If the only punishment available is further imprisonment, it is said, those criminals will have nothing to lose by committing further crimes, and consequently the threat of death is the only deterrent. But “life” imprisonment is a misnomer today. Rarely, indeed, so far as we are informed, never, do crimes carry a mandatory life sentence without possibility of parole. That possibility ensures that criminals do not reach the point where further crimes are free of consequences. Moreover, if this argument is simply an assertion that the threat of death is a more effective deterrent than the threat of increased imprisonment by denial of release on parole, then, as noted above, there is simply no evidence to support it.
The question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment. There is no evidence whatever that utilization of imprisonment rather than death would encourage private blood feuds and other disorders. Certainly if there were such a danger, the execution of a handful of criminals each year would not prevent it. The assertion that death alone is a sufficiently emphatic denunciation for capital crimes suffers from the same defect. If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted upon the criminals who commit the crimes. Furthermore, it is certainly doubtful that the infliction of death by the State does in fact strengthen the community's moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values. That, after all, is why we no longer carry out public executions. In any event, this claim simply means that one purpose of punishment is to indicate social disapproval of crime. To serve that purpose our laws distribute punishments according to the gravity of crimes and punish more severely the crimes society regards as more serious. That purpose cannot justify any particular punishment as the upper limit of severity.

There is, then, no substantial reason to believe that the punishment of death, as curiously administered, is necessary for the protection of society. The only other purpose suggested, one that is independent of society, is retribution. Simply stated, retribution in this context means that criminals are put to death because they deserve it.

Although it is difficult to believe that any State today wishes to proclaim adherence to "naked vengeance," Trop
v. Dulles, supra, at 112 (BRENNAN, J., concurring), the States claim, in reliance upon its statutory authorization, that death is the only fit punishment for capital crimes and that this retributive purpose justifies its infliction. In the past, judged by its statutory authorization, death was considered the only fit punishment for the crime of forgery, for the first federal criminal statute provided a mandatory death penalty for that crime. Act of April 30, 1790, c. 9, 1 Stat. 115, § 14. Obviously, concepts of justice change; no immutable moral order requires death for murderers and rapists. The claim that death is a just punishment necessarily refers to the existence of certain public beliefs. The claim must be that for capital crimes death alone comports with society's notion of proper punishment. As administered today, however, the punishment of death cannot be justified as a necessary means of exacting retribution from criminals. When the overwhelming number of criminals who commit capital crimes go to prison, we cannot conclude that death serves the purpose of retribution more effectively than imprisonment. 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.

In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; there are objective indicators of serious societal doubt as to its appropriateness as a punishment; and there is no significant evidence that it serves any purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable us to determine whether a pun-
ishment comports with human dignity. Death, quite simply, does not.

IV

When this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative to the execution of serious criminals. Since that time, successive restrictions, imposed against the background of an intense moral controversy, have drastically curtailed the use of this punishment. Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore "cruel and unusual," and the States may not continue to inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. The words of this Court in Weems v. United States, 217 U.S. 349, 381 (1910), bear repetition here:

"The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal."