CONSTITUTIONAL LAW—EIGHTH AMENDMENT—THE DEATH PENALTY AS PRESENTLY ADMINISTERED UNDER DISCRETIONARY SENTENCING STATUTES IS CRUEL AND UNUSUAL—*Furman v. Georgia*, 408 U.S. 238 (1972).

William Henry Furman, a 26 year old black man, entered the home of William Micke, Jr. intending to burglarize it. Hearing a noise in an adjacent room, the defendant began to withdraw when he tripped over a wire and fell. This caused the gun he was carrying to discharge through a closed door, killing Micke, who was in the next room.[1] Furman was tried and convicted of murder[2] in a Georgia court. He was sentenced to death pursuant to the statute, which provided in part:

> The punishment for persons convicted of murder shall be death, but may be confinement in the penitentiary for life in the following cases: If the jury trying the case shall so recommend, or if the conviction is founded solely on circumstantial testimony, the presiding judge may sentence to confinement in the penitentiary for life. In the former case it is not discretionary with the judge; in the latter it is.[3]

The conviction and sentence were affirmed by the Georgia Supreme Court.[4]

Lucious Jackson, Jr., a 21-year-old black man, entered the home of a white woman one day after her husband had left for work. While holding a pair of scissors against her throat he forced her to look for money. Unable to find any, the woman attempted to take the scissors away from the defendant. He retained control over the weapon and keeping it pressed against her throat, raped her.[5] Jackson was tried and convicted of rape[6] in a Georgia court. He was sentenced to death pursuant to the statute, which provided:

> The crime of rape shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprison-

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1 Furman v. Georgia, 408 U.S. 238, 294 n.48 (Brennan, J., concurring), *rehearing denied*, 409 U.S.— (1972).

2 GA. CODE ANN. § 26-1002 (1953). The 1972 revision (§ 26-1101) is substantially the same.

3 GA. CODE ANN. § 26-1005 (Cum. Supp. 1971). The 1972 revision (§ 26-1101 (c)) is substantially the same.

4 Furman v. State, 225 Ga. 253, 254, 167 S.E.2d 628, 629 (1969). The Georgia Supreme Court rejected a challenge based upon the eighth amendment. *Id.*

5 Furman v. Georgia, 408 U.S. 238, 252 (Douglas, J., concurring), *rehearing denied*, 409 U.S.— (1972).

6 GA. CODE ANN. § 26-1301 (1953). The 1972 revision (§ 26-2001) is substantially the same.

> ment for life: Provided, however, the jury in all cases may fix the punishment by imprisonment and labor in the penitentiary for not less than one year nor more than 20 years.[7]

The conviction and sentence were affirmed by the Georgia Supreme Court.[8]

Elmer Branch, a 19-year-old black man, entered the home of a 65-year-old white woman by climbing through a window. Once inside, he raped her and robbed her of a meager amount of money.[9] Branch was tried and convicted of rape[10] by a Texas court. He was sentenced to death pursuant to the statute, which provided:

> A person guilty of rape shall be punished by death or by confinement in the penitentiary for life, or for any term of years not less than five.[11]

The Texas Court of Criminal Appeals affirmed both the conviction and sentence.[12]

The United States Supreme Court agreed to hear the appeals in these cases,[13] limiting argument to the issue of whether the death penalty violated the eighth[14] and fourteenth[15] amendments. The Court, by a 5-4 decision, issued a per curiam opinion holding

> that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.[16]

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7 GA. CODE ANN. § 26-1302 (Cum. Supp. 1971). The 1972 revision (§ 26-2001) is substantially the same.

8 Jackson v. State, 225 Ga. 790, 794, 171 S.E.2d 501, 504 (1969).

9 Branch v. State, 447 S.W.2d 932, 933 (Tex. Crim. App. 1969).

10 TEX. PENAL CODE ANN. art. 1183 (1961).

11 TEX. PENAL CODE ANN. art. 1189 (1961).

12 Branch v. State, 447 S.W.2d 932, 935 (Tex. Crim. App. 1969). The Texas Court of Criminal Appeals rejected a challenge based upon the eighth amendment. *Id.*

13 Furman v. Georgia, 403 U.S. 952 (1971). Certiorari was granted in a fourth case, Aikens v. California, 403 U.S. 952 (1971), but was dismissed as moot upon petitioner's suggestion, 406 U.S. 813, 814 (1972), after the California Supreme Court ruled that the death penalty violated art. 1, § 6 of the California Constitution: People v. Anderson, 6 Cal. 3d 628, 656-57, 493 P.2d 880, 889, 100 Cal. Rptr. 152, 171, *cert. denied*, 406 U.S. 958 (1972).

14 U.S. CONST. amend. VIII provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

15 U.S. CONST. amend. XIV, § 1 provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

16 Furman v. Georgia, 408 U.S. 238, 239-40, *rehearing denied*, 409 U.S.— (1972).

All nine justices filed separate opinions in *Furman v. Georgia*.[17]

The Court was faced with the problem of defining more precisely the scope of the eighth amendment's prohibition of cruel and unusual punishments.[18] They began by tracing the development of the eighth amendment and discussing its judicial history.[19]

The eighth amendment's prohibition of cruel and unusual punishments is derived from the English Bill of Rights.[20] Commentators and jurists have differed as to whether the English provision was designed to operate against "disproportionate penalties" or "tortuous and barbarous punishments."[21] It would appear, however, that the Framers of the United States Constitution intended to proscribe the latter.[22] Support for this conclusion can be drawn from the debates called to ratify the Federal Constitution. In those debates, drafters of state bills of rights[23]—which contained the words of the eighth amendment almost verbatim—reflected upon the absence of a cruel and unusual punishment clause in the Federal Constitution.[24] The adoption of the eighth

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17 408 U.S. 238, 240, *rehearing denied*, 409 U.S.— (1972).

18 *Id.* at 258 (Brennan, J., concurring).

19 *Id.* at 241-55 (Douglas, J., concurring), 258-82 (Brennan, J., concurring), 316-36 (Marshall, J., concurring), 376-84 (Burger, C.J., joined by Blackmun, Powell & Rehnquist JJ., dissenting) [hereinafter cited as Burger, C.J., dissenting], 418-33 (Powell, J., joined by Burger, C.J., Blackmun & Rehnquist, JJ., dissenting) [hereinafter cited as Powell, J., dissenting].

20 1 Wm. & M., sess. 2, c.2 (1688) provides:

> That excessive baile ought not to be required nor excessive fines imposed nor cruell and unusuall punishments inflicted.

For the history of the English origins of the clause, *see* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

21 The early cases suggest the latter. Gottlieb, *Testing the Death Penalty*, 34 S. CAL. L. REV. 268, 271 (1961); Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 637 (1966). *But see* Granucci, *supra* note 20, at 865.

22 Granucci, *supra* note 20, at 865. The author concluded that the Framers misinterpreted the English history of the background of the clause, relying particularly upon Blackstone in drafting the eighth amendment.

23 *E.g.*, Virginia Declaration of Rights (1776), Delaware Declaration of Rights (1776), Maryland Declaration of Rights (1776), Massachusetts Declaration of Rights (1780), New Hampshire Bill of Rights (1783). 1 B. SCHWARTZ, THE BILL OF RIGHTS: A DOCUMENTARY HISTORY 276-81, 337-42, 374-79 (1971).

24 Patrick Henry, at the Virginia Convention, remarked:

> By this Constitution, some of the best barriers of human rights are thrown away. Is there not an additional reason to have a bill of rights? . . . What says our 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 prescribe trials and define punishments without this control? . . .
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> . . . They may introduce the practice . . . of torturing, to extort a confession of the crime. . . . We are then lost and undone.

3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 446-48 (J. Elliot ed. 1888).

amendment by the first Congress evoked little debate.[25]

The first judicial mention of the cruel and unusual punishment clause appeared in the Court's opinion in *Pervear v. Commonwealth*,[26] but the first major challenge based on the clause arose in *Wilkerson v. Utah*.[27] The defendant in *Wilkerson* was sentenced to death by shooting and he contended that the imposition of the death penalty by that method was contrary to the eighth amendment.[28] The Court attempted to define the limits of the eighth amendment by examining the historical background of cruel and unusual punishment. The Court referred to Blackstone,[29] who had reported that "terror, pain, or disgrace are superadded" to the death penalty,[30] and concluded that it was "safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden . . . ."[31] Since the Court determined that shooting was not included in that category and was a common method of execution by the military in the territory, it found that the punishment was not cruel and unusual.[32]

Twelve years later, in 1890, another case came before the Supreme Court that challenged the infliction of the death penalty by a particular method as cruel and unusual. The defendant in *In re Kemmler*[33] was sentenced by a New York court to death by electrocution.[34] The Court, referring to the English origins of the eighth amendment and to *Wilkerson*, reasoned that the amendment proscribed those punishments

25 *See* Granucci, *supra* note 20, at 842.

26 72 U.S. (5 Wall.) 475, 479-80 (1867). The Court held that the eighth amendment was not applicable to the states, relying upon Barron v. Baltimore, 32 U.S. (7 Pet.) 243, 250 (1833), which held that the Bill of Rights applied only to the federal government in the absence of specific language to the contrary. This was before passage of the fourteenth amendment, which today has allowed most of the provisions of the first eight amendments to be applied against the states. *See, e.g.*, Duncan v. Louisiana, 391 U.S. 145 (1968) (sixth amendment right to a jury trial); Malloy v. Hogan, 378 U.S. 1 (1964) (fifth amendment privilege against self-incrimination); Robinson v. California, 370 U.S. 660 (1962) (eighth amendment proscription against cruel and unusual punishments); Mapp v. Ohio, 367 U.S. 643 (1961) (fourth amendment ban on unreasonable searches and seizures).

27 99 U.S. 130 (1879).

28 The defendant challenged the mode of punishment; he did not contend the death penalty was per se unconstitutional. *Id.* at 136-37.

29 *Id.* at 135. The punishments included: "embowelled alive, beheaded . . . quartered . . . . public dissection . . . and burning alive." *Id.*

30 4 W. BLACKSTONE, COMMENTARIES 370 (5th ed. 1773); *see* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1780 (1970) [hereinafter cited as Goldberg]; Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1328 (1968).

31 99 U.S. at 136. "Unnecessary cruelty" apparently referred to the superadded punishments.

32 *Id.* at 135.

33 136 U.S. 436 (1890). The Court held the eighth amendment inapplicable to the states. *Id.* at 446.

34 *Id.* at 441.

which were "manifestly cruel and unusual."[35] Applying that standard to the death penalty, the Court said 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.[36]

The Court denied petitioner's application for a writ of habeas corpus, holding that the eighth amendment did not apply to the states through the fourteenth and there was no denial of due process by the State of New York.[37]

This historical approach was rejected in 1910 when the Court decided *Weems v. United States*,[38] and, for the first time, ruled that a punishment provided by statute was cruel and unusual.[39] Weems was convicted of falsifying a public document for a nominal sum.[40] He was sentenced to "fifteen years of Cadena, together with the accessories . . . and to pay a fine of four thousand pesetas . . . ."[41] Justice McKenna, writing for the Court, determined that the scope of the eighth amendment must be measured by evolving standards:

> 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. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. . . . In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be.[42]

In reversing the conviction and sentence, the Court added a new standard by which punishments were to be measured[43]— a dispropor-

35 *Id.* at 446-47. Those punishments would include "burning at the stake, crucifixion, breaking on the wheel." *Id.* at 446.

36 *Id.* at 447.

37 *Id.* at 449.

38 217 U.S. 349 (1910).

39 *Id.* at 381.

40 *Id.* at 357-58.

41 *Id.* at 358. Cadena involved imprisonment at hard and painful labor, always chained at the wrists and ankles. *Id.* at 364.

The accessories mentioned were civil interdiction, which involved the deprivation of parental authority, guardianship of property, martial authority, the right to dispose of property by *inter vivos* acts; perpetual absolute disqualification, which involved deprivation of the right to hold office or vote; and subjection to life surveillance. *Id.*

42 *Id.* at 373.

43 *Id.* at 377, where the Court said:

> It is cruel in its *excess* of imprisonment . . . . Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind. (emphasis added).

tionate test. The Court measured the statutory punishment against those given for similar or more serious offenses. The punishment to which the defendant was sentenced was excessive when compared with penalties for similar crimes in other jurisdictions, or for more severe crimes in the same jurisdiction. The punishment was therefore disproportionate to the relative gravity of the offense.[44] The Court in finding the penalty disproportionate adopted the view of the dissent in an earlier case.[45]

It was 1947 before the Court, in *Louisiana ex rel. Francis v. Resweber*,[46] again faced a major challenge based upon the cruel and unusual punishment clause. The defendant was sentenced to death by electrocution, but a malfunctioning electric chair prevented his scheduled execution from being completed. A second execution date was set, and the defendant contended that this would be cruel and unusual punishment.[47] The Court, in its plurality opinion, quoted with approval from *Kemmler* its finding that "mere extinguishment of life" is not unconstitutional cruelty.[48] The Court, in permitting the second attempt at execution, stated that the Constitution protected a convicted man against "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."[49]

Justice Frankfurter, concurring in the judgment in this 5-4 decision, refused to vote with the dissent although he personally agreed with them. He felt that the principle set forth in *Weems* should be applied; that it is not the intentions of the Framers, but the "consensus

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44 *Id.* at 380-81; *see* Goldberg, *supra* note 30, at 1786; Comment, *supra* note 30, at 1330.

45 O'Neil v. Vermont, 144 U.S. 323 (1892). The defendant was sentenced to more than 54 years imprisonment when he failed to pay a fine for the illegal sale of alcoholic beverages. Justice Field, in his dissent, wrote:

> That designation [cruel and unusual], it is true, is usually applied to punishments which inflict torture, such as the rack, the thumbscrew, the iron boot, the stretching of limbs and the like, which are attended with acute pain and suffering. . . . The inhibition is directed, not only against punishments of the character mentioned, 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 . . . .

Id. at 339-40.

46 329 U.S. 459 (1947).

47 *Id.* at 460-61, 464 (Reed, J., joined by Vinson, C.J., Black & Jackson, JJ., concurring) [hereinafter cited as Reed, J., concurring]. It might be noted that English law required a second attempt at execution if the first attempt failed. *See* L. RADZINOWICZ, A HISTORY OF ENGLISH CRIMINAL LAW 185-86 (1948).

48 329 U.S. at 463-64 n.4. (Reed, J., concurring) (quoting from Kemmler, 136 U.S. at 447).

49 *Id.* at 464.

of society's opinion which, for purposes of due process, is the standard enjoined by the Constitution."[50] It was his contention that for the Court to overturn the executive action of the State of Louisiana, there would have to be a gross violation of due process.[51] He concluded that the second attempt at execution would not offend a "principle of justice 'rooted in the traditions and conscience of our people.' "[52]

The Court continued to measure the eight amendment by evolving standards when it decided *Trop v. Dulles*.[53] The petitioner was convicted of war-time desertion by a military court-martial and was divested of his citizenship.[54] The Court found that this punishment totally destroyed a man's existence in organized society and concluded that the function of the eighth amendment was to preserve the "dignity of man."[55] There was no question of the disproportionate character of the penalty since the death penalty could have been imposed.[56] The Court inferred that the psychological torture experienced by an expatriate was as intolerable to the Constitution as was physical torture.[57]

Justice Brennan, who cast the deciding vote in *Trop*, based his concurrence on the ground that the punishment did not serve a legitimate legislative interest since there was no deterrent or rehabilitative value and society was not protected from the offender.[58] A punishment based upon "naked vengeance" was beyond the power of Congress to impose.[59]

The decision of *Robinson v. California*[60] marked the third and last time, prior to the *Furman* case, that the Court overturned a statute and sentence under it as violative of the eighth amendment's prohibition of cruel and unusual punishment. The defendant was sentenced to "not less than 90 days" imprisonment for being "addicted to the use of narcotics."[61] The Court, although not citing *Weems*, seemed to apply the disproportionate test, finding the punishment excessive because the

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50 *Id.* at 471.

51 *Id.* at 470-72. Justice Frankfurter did not believe in incorporation. *Id.* at 467-69.

52 *Id.* at 470 (quoting from Snyder v. Massachusetts, 291 U.S. 97, 105 (1934)).

53 356 U.S. 86 (1958).

54 *Id.* at 87 (Warren, C.J., joined by Black, Douglas & Whittaker, JJ., concurring) [hereinafter cited as Warren, C.J., concurring].

55 *Id.* at 100-01.

56 *Id.* at 99.

57 *Id.* at 101-02; *see* Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U.L. REV. 846, 875 (1961).

58 356 U.S. at 111-12 (Brennan, J., concurring).

59 *Id.* at 112, 114.

60 370 U.S. 660 (1962).

61 *Id.* at 660-61.

defendant was punished merely on account of his status.[62] Unlike *Trop*, the punishment overturned was not inherently cruel and unusual but was disproportionate in its application. This decision also settled the question of whether the eighth amendment was applicable against the states through the fourteenth.[63]

It was with this background that the Court heard argument on the application of the eighth amendment to the death penalty. The Court first had to determine whether the Constitution itself provided a barrier to a determination in favor of the petitioners by virtue of the fifth and fourteenth amendments. These provisions, by providing special protection for persons whose lives are threatened by state action,[64] would seem to foreclose the idea that the Framers ever intended to abolish the death penalty through the eighth amendment.[65] No other punishment received such specific mention in the Constitution. The application of the eighth amendment to the punishment of death, suggested Justice Powell, was to be made on a case by case basis, but the Constitution prohibited the judicial abolition of the penalty *in toto*.[66] Justice Brennan, while considering this contention, felt that these provisions recognized a punishment which was common at the time the Bill of Rights was adopted and merely provided safeguards in the application of the punishment. It would seem unlikely that the Framers would provide for the constitutionality of the death penalty without specific language to that effect.[67]

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62 *Id.* at 667, where the Court said:

> To be sure, imprisonment for ninety days is not, in the abstract, a punishment which is either cruel or unusual. But the question cannot be considered in the abstract. Even one day in prison would be a cruel and unusual punishment for the "crime" of having a common cold.

See 408 U.S. at 393 n.18 (Burger, C.J., dissenting). Comment, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964). Powell v. Texas, 392 U.S. 514 (1968) distinguishing *Robinson*, upheld a conviction for *public* drunkenness on the grounds that it did not punish "status." *Id.* at 532 (Marshall, J., joined by Warren, C.J., Black & Harlan, JJ., concurring).

63 370 U.S. at 666.

64 Justice Powell referred to U.S. CONST. amend. V, which provides in part:

> No person shall be held to answer for a *capital* . . . crime, unless on a presentment or indictment of a Grand Jury . . . ; nor shall any person be subject for the same offence 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).

He also referred to U.S. CONST. amend. XIV, § 1, which provides in part:

> [N]or shall any State deprive any person of *life*, liberty, or property, without due process of law . . . . (emphasis added).

65 408 U.S. at 380 (Burger, C.J., dissenting), 418-20 (Powell, J., dissenting).

66 *Id.* at 420-21.

67 *See* 408 U.S. at 283 n.28.

Proceeding on the assumption that the Constitution would not block its inquiry, the Court began to apply the principles of the eighth amendment to the death penalty. It was agreed in the earlier cases[68] that punishments were cruel in the constitutional sense when they involved the use of physical cruelty—torture—and, as such, would violate the eighth amendment. Measured by those standards, the death penalty had never been thought to be cruel.[69] But *Weems* took notice that psychological cruelty was also brutalizing and degrading to the human spirit.[70] *Resweber* seemed to indicate that psychological punishment could not be a violation of the eighth amendment,[71] but the *Trop* decision appeared, in large part, to reverse that position.[72] Three Justices in *Furman* indicated that the death penalty was cruel in its psychological burden upon the condemned man,[73] with only Justice Brennan suggesting that the death penalty might be physically inhumane.[74]

The concurring opinions can be distilled into five bases for the majority's holding that the death penalty is cruel and unusual: arbitrariness of infliction; discrimination in its application; unacceptableness to society; disproportionate to what is thought to be necessary; and lack of a valid legislative basis.

All five members of the majority found that the death penalty was inflicted arbitrarily.[75] It was argued by petitioners that the punishment of death, under discretionary statutes,[76] was inflicted in but a small proportion of the cases and that those so sentenced were not necessarily the worst offenders.[77] Justice Brennan concluded that the fact that the death penalty is inflicted infrequently leads to a presumption that the infliction is arbitrary. This presumption can only be rebutted by an explicit demonstration of "nonarbitrary [sic] inflic-

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68 Louisiana *ex rel.* Francis v. Resweber, 329 U.S. at 463; *In re* Kemmler, 136 U.S. at 447; Wilkerson v. Utah, 99 U.S. at 136.

69 *E.g.*, Trop v. Dulles, 356 U.S. at 99 (Warren, C.J., concurring); *In re* Kemmler, 136 U.S. at 447 (both dicta).

70 *See* 217 U.S. at 366.

71 *See* 329 U.S. at 464 (Reed, J., concurring).

72 *See* 356 U.S. at 101-02 (Warren, C.J., concurring).

73 *See* 408 U.S. at 245 (Douglas, J., concurring), 288 (Brennan, J., concurring), 346-48 (Marshall, J., concurring).

74 *Id.* at 288.

75 *Id.* at 249 (Douglas, J., concuring), 293 (Brennan, J., concurring), 309-10 (Stewart, J., concurring), 313 (White, J., concurring); *see id.* at 363 (Marshall, J., concurring).

76 See notes 3, 7 & 11 *supra* and accompanying text.

77 408 U.S. 309-10 (Stewart, J., concurring), 434-35 (Powell, J., dissenting). At oral argument, counsel for petitioner Furman suggested that the ratio of death sentences imposed to capital convictions was 1 to 12-13. *Id.* at 435 n.19.

tion."[78] Without this demonstration the punishment "smacks of little more than a lottery system."[79] Justice White, admitting he could not "prove" his conclusion from the data, determined that when

> the death penalty is exacted with great infrequency even for the most atrocious crimes . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.[80]

Justice Stewart found the death penalty " 'unusual' in the sense that the penalty of death is infrequently imposed . . . ."[81] He concluded that those condemned to die were "capriciously selected" and "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death . . . so wantonly and so freakishly imposed."[82]

Justice Marshall, although not specifically addressing himself to arbitrary infliction, points out that convicted murderers are rarely executed, and that, in passing sentence, potential recidivism does not appear to be a factor in capital cases.[83] Justice Douglas suggested that the extreme infrequency with which the death penalty was imposed permits the " 'strong inference of arbitrariness.' "[84]

Two members of the Court found the death penalty to be applied discriminatorily. Justice Marshall concluded that the evidence indicated that the death penalty discriminated against minorities, the poor, and the powerless.[85] Justice Douglas decided that there is "equal protection of the laws . . . implicit in the ban on 'cruel and unusual' punishments."[86] Because

> [a]ny law which is nondiscriminatory [sic] on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment,[87]

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78 *Id.* at 293.

79 *Id.*

80 *Id.* at 313. In 1967, there were 88 first degree murder convictions and 17 death sentences in California; in 1969, the figures were 87 and 8 respectively. 6 Cal. 3d at 653 n.41, 493 P.2d at 897, 100 Cal. Rptr. at 169. Until 1960, about 20% of those convicted of murder in New Jersey received the death sentence. 408 U.S. at 435-36 n.19 (Powell, J., dissenting).

81 408 U.S. at 309.

82 *Id.* at 309-10.

83 *Id.* at 363. Recidivism refers to habitual criminality. See BLACK'S LAW DICTIONARY 1435 (4th ed. 1968).

84 408 U.S. at 249 (quoting from Goldberg, *supra* note 30, at 1792).

85 408 U.S. at 364.

86 *Id.* at 257.

87 *Id.* (referring to Yick Wo v. Hopkins, 118 U.S. 356 (1886)); *cf.* Comment, *supra* note 62, at 1077.

Douglas would find that death penalty statutes which are applied discriminatorily are unconstitutional.[88]

The members of the majority, in their discussion of arbitrary and discriminatory infliction of the death penalty, utilized these bases to establish the unusualness of the punishment. It must be noted, however, that the word unusual has been ignored, for the most part, in judicial construction of the eighth amendment.[89] If the word has had any meaning at all historically, it meant something foreign or new.[90] Cases have, however, discussed arbitrariness without equating it with unusualness.[91]

Justices Brennan and Marshall concluded that the death penalty, as inflicted today, was unacceptable to contemporary society. In *Trop*, the plurality opinion by Chief Justice Warren contained this dictum:

> Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.[92]

Justice Brennan discussed the continual narrowing of the boundaries within which the death penalty could be imposed.[93] Juries have used their discretion to impose that penalty in fewer and fewer cases. As Justice McKenna, speaking for the Court in *Weems*, wrote, the eighth amendment was to "acquire meaning as public opinion becomes enlightened by a humane justice."[94] Brennan found that when the penalty was authorized but imposed so rarely, society was indicating by its reluctance its rejection of the punishment. "Indeed, the likelihood is great that the punishment is tolerated only because of its disuse."[95]

Justice Marshall concluded that in the determination of whether

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88 408 U.S. at 257; *see* Comment, *supra* note 62, at 1082 n.35.

89 This was discussed by Chief Justice Warren in Trop v. Dulles, 356 U.S. at 100-01 n.32:

> 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.

Accord, 408 U.S. at 376-79 (Burger, C.J., dissenting). *See also* Note, *supra* note 57, at 850. *But see* Goldberg, *supra* note 30, at 1789-90.

90 *See, e.g.*, Weems v. United States, 217 U.S. at 377; *In re* Kemmler, 136 U.S. at 443.

91 *Cf.* Weems v. United States, 217 U.S. at 365-66; *In re* Kemmler, 136 U.S. at 443.

92 356 U.S. at 99.

93 408 U.S. at 296-99.

94 217 U.S. at 378.

95 408 U.S. at 300. Justice Powell notes that Congress has been adding new capital statutes, *e.g.*, Aircraft Piracy, 49 U.S.C. § 1472(i) (1970); Presidential Assassination, 18 U.S.C. § 1751 (1970); Congressional Assassination, 18 U.S.C. § 351 (1970). 408 U.S. at 437.

a punishment is cruel and unusual, the opinions of a fully informed citizenry were to be the standard. The penalty must be shocking and offensive to its sense of justice, rather than shocking to the conscience of the "people"—a test which is abstract and difficult to apply.[96] Marshall's conclusion was that the citizenry, if fully informed, would find the death penalty unacceptable because it rejects the moral values of our society, discriminates against minorities, and creates the potential for the execution of an innocent person.[97]

The next major ground for the decision was that the death penalty was disproportionate or excessive in its application.[98] The Constitution itself requires:

> *Excessive* bail shall not be required, nor *excessive* fines imposed, nor cruel and unusual punishments inflicted.[99]

As Justice Marshall observed, "[t]he entire thrust of the Eighth Amendment is . . . against 'that which is excessive.' "[100] Marshall took judicial notice that over the past two centuries evidence has been accumulated to demonstrate that capital punishment does not serve a purpose which would not be equally well served by another punishment. He therefore concluded that the death penalty was excessive and unnecessary.[101]

Justice Stewart found that the death penalties imposed in these cases were excessive because they "go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary."[102]

Justice Brennan found that since the death penalty was arbitrary,

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96 408 U.S. at 361. This test was apparently derived from Robinson v. California, 370 U.S. at 666. *See* Goldberg, *supra* note 30, at 1783. The latter standard was proposed by Judge Frank in United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952). He had previously considered the standard to be the "attitude of our ethical leaders." Repouille v. United States, 165 F.2d 152, 154 (1947) (dissenting opinion).

97 408 U.S. at 363–69. Much evidence was submitted to support petitioners' contentions. *E.g.*, THE DEATH PENALTY IN AMERICA (H. Bedau ed. 1964); Bedau, *The Courts, the Constitution and Capital Punishment*, 1968 UTAH L. REV. 201; *Hearings on H.R. 8414, H.R. 8483, H.R. 9486, H.R. 3243, H.R. 193, H.R. 11797, and H.R. 12217 Before Subcomm. No. 3 of the House Comm. on the Judiciary* 92nd Cong., 2nd Sess, ser. 29, at 307 *et seq.* (1972) [hereinafter cited as *Hearings*].

98 The decision in *Weems* was almost entirely based upon this ground:

> It is cruel in its *excess* of imprisonment and that which accompanies and follows imprisonment. . . . Its punishments come under the condemnation of the bill of rights, both on account of their degree and kind.

217 U.S. at 377 (emphasis added).

99 U.S. CONST amend. VIII (emphasis added).

100 408 U.S. at 332.

101 *Id.* at 358-59.

102 *Id.* at 309.

and was disapproved by society, it served no purpose that a lesser punishment might serve equally well. He concluded that the death penalty was excessive for the purposes for which it was imposed.[103]

Finally, three Justices concluded that the punishment of death did not fulfill any social or legislative interest. Justice White concluded that the infrequency with which the death penalty was imposed had caused it to fail as an effective deterrent as well as a means of societal retribution.[104]

Justice Marshall listed six conceivable uses for the death penalty: retribution, deterrence, prevention of recidivism, encouragement of guilty pleas and confessions, eugenics, and economics.[105] He then concluded that either the purpose was not legitimate or the legitimate aim was not effected.[106]

Justice Brennan concluded that the manner in which the death penalty was inflicted made the threat of such punishment "remote and improbable." On this basis the death penalty could have no real deterrent value,[107] and the fulfillment of any retributive need was no more effective than that from any other punishment.[108] Brennan would

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103 *Id.* at 302-05.

104 *Id.* at 311-12.

105 Retribution is a proper function of punishment, *see* Williams v. New York, 337 U.S. 241, 248 (1949), but the authorities prohibit this as a sole end. *Cf.* Weems v. United States, 217 U.S. at 381, where the Court said: "[C]rime is repressed by penalties of just, *not tormenting*, severity . . . ." (emphasis added); Trop v. Dulles, 356 U.S. at 112 (Brennan, J., concurring).

Deterrence is, as yet, an open and hotly contested question. *See* Comment, *supra* note 30, at 1275-92.

Recidivism is obviously prevented by the execution of a criminal, but the evidence tends to indicate that capital prisoners, or those who could have been sentenced to death for their crime, have the lowest recidivism rates. In addition, in arriving at its decision, the jury does not attempt to separate the recidivists from those who are not. *See* Comment, *supra* note 30, at 1292-97.

The death penalty, when used to encourage guilty pleas and confessions, is a violation of the sixth amendment's guarantee of a trial by jury. United States v. Jackson, 390 U.S. 570, 583 (1968).

Eugenics has never been thought a proper goal in this country. 408 U.S. at 357 (Marshall, J., concurring).

Economics should not be a factor when considering human life. In fact, however, it costs more to execute a convict than to keep him imprisoned for life. *See* Comment, *supra* note 30, at 1311-13.

Justice Marshall discusses these points in 408 U.S. at 342-59. The four possible bases for punishment considered by Justice Brennan in his concurring opinion in *Trop* were: retribution, deterrence, isolation, and rehabilitation. 356 U.S. at 111-12.

106 408 U.S. at 342-59.

107 *Id.* at 302.

108 *Id.* at 304.

place the burden upon the state to demonstrate that its bases for punishment were valid by a clear and convincing showing.[109]

A crucial question of law was whether society's retribution against the accused was a valid legislative basis for punishment. While appellants suggested that there is no aspect of retribution which could be satisfied by the relative handful sentenced to death,[110] even if retribution were achieved, it might not alone be an adequate basis for punishment. While Justice Stewart would not rule out retribution per se as a valid basis,[111] both *Weems* and *Trop* indicate that the eighth amendment might not tolerate retribution as the sole legislative basis for punishment.[112] Justices Brennan and Marshall concluded that the death penalty would fail by that standard.[113]

All the concurring opinions in *Furman,* upon close examination, indicate that the system of discretionary sentencing was primarily at fault.[114] All three petitioners were sentenced to death under discretionary statutes,[115] much like one whose validity under the due process clause of the fourteenth amendment was examined by the Court only last year in *McGautha v. California.*[116] In that case the Court held that

> [i]n light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.[117]

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109 *Id.* at 293.

The "compelling interest test" was proposed where state interests conflicted with individual interests in property. It has been suggested that the state should also show compelling interest when they wish to interfere with an individual's life. *See* Goldberg, *supra* note 30, at 1785; Comment, *supra* note 30, at 1272.

Justice Goldberg suggested that the state show "compelling" interest rather than "reasonable" justification for all fundamental, personal liberties in Griswold v. Connecticut, 381 U.S. 479, 497 (1965) (concurring opinion).

110 408 U.S. at 311 (White, J., concurring), 394 (Burger, C.J., dissenting).

111 *Id.* at 308.

112 Trop v. Dulles, 356 U.S. at 112 (Brennan, J., concurring):

> He who refuses to act as an American should no longer be an American—what could be fairer? But I cannot see that this is anything other than forcing retribution from the offender—naked vengeance.

See Weems v. United States, 217 U.S. at 381:

> The purpose of punishment is fulfilled, crime is repressed by penalties of *just, not tormenting, severity,* its repetition is prevented, and hope is given for the reformation of the criminal. (emphasis added).

113 408 U.S. at 304-05 (Brennan, J., concurring), 345 (Marshall, J., concurring).

114 *Id.* at 256-57 (Douglas, J., concurring), 293-95 (Brennan, J., concurring), 309-10 (Stewart, J., concurring), 313 (White, J., concurring), 365 (Marshall, J., concurring).

115 See text accompanying notes 3, 7, 11 *supra.*

116 402 U.S. 183 (1971).

117 *Id.* at 207.

Discretion was granted to the juries, which had been exercising such discretion de facto for some time. Juries had been known to acquit, rather than convict, if they felt that the circumstances of the crime did not justify the imposition of the death penalty.[118] This discretion must be used wisely as "juries 'do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.' "[119]

The Court in *Furman* appears to have disregarded *McGautha* as precedent.[120] Only Justice Douglas conceded that *McGautha* was binding upon the Court in *Furman*,[121] while Justices Marshall, Stewart and Brennan, although mentioning the case and its problems, felt that it was not controlling.[122] Justice White ignored it altogether.[123] Chief Justice Burger, in his dissent, remarked that "today's ruling has . . . overrule[d] *McGautha* in the guise of an Eighth Amendment adjudication."[124] However, *McGautha* considered the discretionary system operating at its theoretical best, a point which Brennan said cannot be reached in practice.[125]

The decision in *Furman* was, therefore, considered by the majority as one of the first impression, and not in violation of the principle of stare decisis.[126] Only once before, in *Boykin v. Alabama*,[127] has the same issue which was decided in *Furman* been briefed and argued to the Court, but that case was disposed on other grounds.[128] The case history of the eighth amendment might provide a basis for the contention that the constitutionality of the death penalty was decided sub silentio.[129] There is a profound difference, however, between a determination of constitutionality, and the assumption of that status without

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118 *Id.* at 199.

119 *Id.* at 202 (quoting from Witherspoon v. Illinois, 391 U.S. 510, 519 (1968)).

120 *See* 408 U.S. at 248 n.11 (Douglas, J., concurring).

121 *Id.* at 248.

122 *Id.* at 295 (Brennan, J., concurring), 306-10 (Stewart, J., concurring), 329 n.37 (Marshall, J., concurring).

123 *Id.* at 310-14 (White, J., concurring).

124 *Id.* at 400.

125 *See id.* at 293-94.

126 *E.g., id.* at 329-30 n.37 (Marshall, J., concurring).

127 395 U.S. 238 (1969).

128 *Id.* at 249 n.3 (dissenting opinion); Ralph v. Warden, 438 F.2d 786, 789 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972); Goldberg, *supra* note 30, at 1775, 1798.

129 408 U.S. at 380 (Burger, C.J., dissenting), 417 (Powell, J., dissenting).

The decisions in *Wilkerson*, *Kemmler* and *Resweber* have been used to support this argument. But in *Wilkerson* petitioner did not challenge the constitutionality of the death penalty per se. 99 U.S. at 136-37. In *Kemmler* petitioner contended only that the new mode of execution—electrocution—was unconstitutional. 136 U.S. at 441. In *Resweber*, petitioner claimed only that allowing a second attempt at execution would be unconstitutional. 329 U.S. at 464. *But see* Comment, *supra* note 30, at 1334.

so deciding.[130] Traditional practices of judicial economy would, moreover, demand that the case in question be decided upon the narrowest possible ground.[131] In addition, Justice Marshall read *Trop* to permit relaxation from all but very recent precedent,[132] as the standard enunciated therein was not static, but "the evolving standards of decency that mark the progress of a maturing society."[133]

The dissent offered some recent cases involving convictions under capital statutes with subsequent sentences of death as precedent affirming the constitutional status of the death penalty.[134] Those cases, however, did not present an eighth amendment issue, but were disposed on sixth and fourteenth amendment grounds.[135] According to Justice Powell, if the constitutional status of the death penalty were not sound, those decisions would be " 'singularly academic exercise[s].' "[136] But Justice Marshall pointed out that the issue in *Furman* was not covered by the grants of certiorari for those cases, and therefore, they could not be proffered as dispositive of the issue in the instant case.[137]

The opinions by all four dissenters in *Furman* suggested that the Court exceeded the bounds of self-restraint in its decision.[138] They felt that the decision to abolish the death penalty was one for the legislative, or perhaps the executive branch, rather than the judiciary, which is constitutionally insulated from public reaction.[139] But Justice White noted that judicial review always involves a conflict between the legislature and the judiciary. "[T]his case is no different in kind from many others, although it may have wider impact and provoke sharper disagreement."[140] Other Justices hearing capital cases, however, held other views:

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130 Goldberg, *supra* note 30, at 1805.

131 Ashwander v. TVA, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring).

132 408 U.S. at 329-30 n.37.

133 Trop v. Dulles, 356 U.S. at 101.

134 408 U.S. at 426 (Powell, J., dissenting) (citing McGautha v. California, 402 U.S. 183 (1971) and Witherspoon v. Illinois, 391 U.S. 510 (1968)).

135 402 U.S. at 196; 391 U.S. at 522.

136 408 U.S. at 427 (quoting from brief for State of Texas at 6).

137 408 U.S. at 329-30 n.37.

138 *Id.* at 403-05 (Burger, C.J., dissenting), 410-11 (Blackmun, J., dissenting), 461-65 (Powell, J., dissenting), 465-70 (Rehnquist, J., joined by Burger, C.J., Blackmun & Powell, JJ., dissenting) [hereinafter cited as Rehnquist, J., dissenting]. Justice Rehnquist, who devoted his entire opinion to this issue, concluded that the *Furman* decision was "not an act of judgment, but rather an act of will." *Id.* at 468.

139 *Id.* at 466, 468 (Rehnquist, J., dissenting).

140 *Id.* at 314 (White, J., concurring). But there is a difference:

> I do not concede that whatever process is "due" an offender faced with a fine or a prison sentence necessarily satisfies the requirements of the Constitution in a capital case. The distinction is by no means novel, . . . nor is it negligible, being literally that between life and death.

Reid v. Covert, 354 U.S. 1, 77 (1957) (Harlan, J., concurring) (citation omitted).

> When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.[141]

The reverberations from *Furman* will be great and have already begun. It has been over five years since the last execution in the United States.[142] Over six hundred men and women on death row have been spared by this and the subsequent memorandum decisions of the Court.[143] Moreover, the Kentucky Court of Appeals ordered the execution of Robert Call for September 1, 1972, in apparent violation of this decision.[144] Only eight years ago it was written that "[t]he Supreme Court is obviously not about to declare that the death penalty *simpliciter* is so cruel and unusual as to be constitutionally intolerable."[145] But two recent decisions at lower levels did precisely the same thing, while New Jersey struck down its death penalty for homocide this year on another constitutional ground.[146]

In 1970, the United States Court of Appeals for the Fourth Circuit decided in *Ralph v. Warden*[147] that the death penalty was excessive, and therefore cruel and unusual, when prescribed for the crime of rape where life was neither taken nor endangered.[148] The California Supreme Court, by a 6-1 decision in *People v. Anderson*, ruled that the

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141 Stein v. New York, 346 U.S. 156, 196 (1953).

142 The last man to be executed in the United States was Luis Jose Monge who died in Colorado's gas chamber on June 2, 1967. *Hearings, supra* note 97, at 306.

143 *E.g.*, Stewart v. Massachusetts, 408 U.S. 845 (1972); Koonce v. Oklahoma, 408 U.S. 934 (1972); Marks v. Louisiana, 408 U.S. 933 (1972); McCants v. Alabama, 408 U.S. 933 (1972); Miller v. Maryland, 408 U.S. 934 (1972); Scoleri v. Pennsylvania, 408 U.S. 934 (1972); Smith v. Washington, 408 U.S. 934 (1972); Billingsley v. New Jersey, 408 U.S. 934 (1972); Hurst v. Illinois, 408 U.S. 935 (1972); Thomas v. Florida, 408 U.S. 935 (1972); Duisen v. Missouri, 408 U.S. 935 (1972); Walker v. Nevada, 408 U.S. 935 (1972); Davis v. Connecticut, 408 U.S. 935 (1972); Irving v. Mississippi, 408 U.S. 935 (1972); Keaton v. Ohio, 408 U.S. 936 (1972); Kelbach v. Utah, 408 U.S. 935 (1972); Atkinson v. South Carolina, 408 U.S. 936 (1972); Hamby v. North Carolina, 408 U.S. 937 (1972); Alvarez v. Nebraska, 408 U.S. 937 (1972); Herron v. Tennessee, 408 U.S. 937 (1972); Williams v. Kentucky, 408 U.S. 938 (1972); Seeney v. Delaware, 408 U.S. 939 (1972); Brown v. Virginia, 408 U.S. 940 (1972); Sims v. Eyman, 408 U.S. 934 (1972) (Arizona).

144 Commonwealth v. Call, Crim. No. — (Ky. Ct. App., filed June 30, 1972). This order was recalled in Call v. Commonwealth, Crim. No. — (Ky. Ct. App., filed Aug. 25, 1972).

145 Comment, *supra* note 62, at 1081.

146 Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972); People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972); State v. Funicello, 60 N.J. 60, 286 A.2d 55 (1972). The decision was based upon the use of the non-vult plea as determinative of the sentence. *Id.* at 65-67, 286 A.2d at 58-59; *see* United States v. Jackson, 390 U.S. 570 (1968).

147 438 F.2d 786 (4th Cir. 1970), *cert. denied*, 408 U.S. 942 (1972).

148 *Id.* at 793. This was first suggested in a dissent from the denial of certiorari in Rudolph v. Alabama, 375 U.S. 889, 891 (1963) (Goldberg, J., joined by Douglas & Brennan, JJ.).

death penalty per se was cruel and unusual,[149] although their basis was not the eighth amendment but the California Constitution.[150] The reasoning in that decision was quite close to that in *Furman*, close enough for Justice Blackmun to suggest that perhaps the majority might have used it as precedent.[151]

Furman invalidated capital statutes in at least thirty-nine states, in addition to those of the federal government,[152] although most state court decisions have upheld the constitutionality of the death penalty, probably relying upon the Supreme Court "precedent."[153] In recent times courts have withheld judgment, noting that the issue was presently before the Supreme Court.[154] Federal appeals courts have also upheld the constitutionality of the death penalty.[155]

The *Furman* decision gives the legislatures an opportunity, if not a mandate, to determine the will of the people in their respective jurisdictions. The Court has referred to public opinion polls which indicate that only fifty percent of the people in this country are in favor of retaining the death penalty.[156] A better indication of popular opinion is, perhaps, the regular refusal of jurors to impose the death penalty in the great majority of cases,[157] or the difficulty that some prosecutors

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149 6 Cal. 3d 628, 656, 493 P.2d 880, 899, 100 Cal. Rptr. 152, 171 (1972), *cert. denied*, 406 U.S. 958 (1972).

150 CAL. CONST. art. 1, § 6.

151 408 U.S. at 411.

152 Those states not authorizing the death penalty by statute are: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia and Wisconsin. *Id.* at 340 n.79 (Marshall, J., concurring). California had abolished the death penalty by judicial action. See note 13 *supra*. Rhode Island's mandatory death penalty was not affected. See note 160 *infra*.

153 *E.g.*, People v. St. Martin, 1 Cal. 3d 524, 463 P.2d 390, 83 Cal. Rptr. 166 (1970); Manor v. State, 223 Ga. 594, 157 S.E.2d 431 (1967); State v. Forcella, 52 N.J. 263, 245 A.2d 181 (1968); Siros v. State, 399 S.W.2d 547 (Tex. Crim. App. 1966).

154 *E.g.*, State v. Doss, 60 N.J. 32, 35, 286 A.2d 41, 42 (1972).

155 The circuits have been divided, however, in their reasoning. The fourth circuit, before its decision in *Ralph*, had refused to decide the issue, assuming the death penalty to be constitutional, until the Supreme Court acted. Ralph v. Pepersack, 335 F.2d 128, 141 (4th Cir. 1964). The eighth circuit has followed the same line. Maxwell v. Stephens, 348 F.2d 325, 332 (8th Cir. 1965). Dictum in a later opinion of the eighth circuit would leave the impression, however, that the court considered the death penalty not cruel and unusual. Jackson v. Bishop, 404 F.2d 571, 577-79 (8th Cir. 1968). The fifth circuit has upheld the constitutionality of the death penalty without discussion. Powers v. Hauck, 399 F.2d 322, 325 (5th Cir. 1968); while the ninth circuit has read the case history of the eighth amendment as having determined the constitutionality of the punishment. Jackson v. Dickson, 325 F.2d 573, 575 (9th Cir. 1963).

156 408 U.S. at 386 n.9 (Burger, C.J., dissenting). The utility of a public opinion poll has been discussed judicially before. *See, e.g.*, United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952).

157 *See* 408 U.S. at 299 (Brennan, J., concurring).

have had in obtaining a jury.[158] The will of the people must be heard and heeded by the legislatures; otherwise the Court will use its own interpretation of that will in passing upon a re-enacted statute.[159] They must provide a penalty that is mandatory for the crime,[160] or which explicitly instructs the sentencing authority in making its penalty decision,[161] a mandate almost impossible to carry out.[162]

Newly enacted mandatory death penalties may provide a disquieting sequel to *Furman*. Throughout its history the death penalty has been employed in a successively more restricted manner; the enlightened idea being to provide such a penalty when it is absolutely necessary, allowing mercy whenever possible.[163] *Furman* could reverse that trend. If legislatures choose to re-enact death statutes which are mandatory, the room for mercy is gone. The decision in *Furman* was made because that system worked too well.[164]

The Supreme Court has gradually narrowed the boundaries within which the death penalty can be imposed. A defendant cannot plea bargain away his right to a jury trial in order to avoid the death penalty.[165] Death qualified juries are no longer permitted.[166] Now the death penalty itself can no longer be imposed, except under those few mandatory statutes not affected by *Furman*.[167]

As long as the constitutionality of the penalty was an open question there was the chance that the legislative[168] or executive branch might act. Once argued, the Court had few choices: declare the death penalty unconstitutional per se; decide that the death penalty was within con-

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158 Bedau, *supra* note 97, at 207.

159 *Cf.* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. at 471 (Frankfurter, J., concurring).

160 The only capital statute in Rhode Island, for murder by a life prisoner, requires a mandatory death penalty. R.I. GEN. LAWS ANN. § 11-23-2 (1970).

Other states also retain mandatory death penalties for certain offenses. *E.g.*, N.J. STAT. ANN. § 2A:148-1 (1969) (treason). Chief Justice Burger would rather have total abolition of capital punishment than mandatory death penalties. 408 U.S. at 401.

161 *See* 408 U.S. at 400 (Burger, C.J., dissenting).

162 *See* McGautha v. California, 402 U.S. at 204:

> To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

163 *See* 408 U.S. at 388 (Burger, C.J., dissenting).

164 *Id.* at 313 (White, J., concurring), 398 (Burger, C.J., dissenting).

165 United States v. Jackson, 390 U.S. 570 (1968).

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

167 See statutes cited note 160 *supra*; 408 U.S. at 417 n.2 (Powell, J., dissenting).

168 *E.g.*, *Hearings*, *supra* note 97. Both Chief Justice Burger and Justice Blackmun wrote that they would act to abolish the death penalty were they members of the legislature or executive. 408 U.S. at 375 (Burger, C.J., dissenting), 406 (Blackmun, J., dissenting).

stitutional bounds; or take a middle path. The first choice might have been an egregious usurpation of the function of the other branches of government and a violation of the principles of judicial economy. The second choice would have placed a decision on point in the law, a decision that future courts might have great difficulty reversing despite the "evolving standards of a maturing society." What was done was perhaps the least of the evils.

If state death penalties are re-enacted, their prevalence may be determinative. If but a few states re-enact capital statutes, it is quite possible the Court will void them as aberrant.[169] Additionally, the Court may, in the future, be faced with decisions on a crime by crime basis. It may find the death penalty disproportionate to specific offenses, such as rape.[170] Perhaps the long wait on death row while appeals are being heard will be found, in reality, to be a "lingering death,"[171] and future scientific evidence may show us that today's supposedly humane methods of execution do indeed cause cruel and unnecessary pain.[172]

Justice Brennan began his opinion by challenging the Court to determine the constitutional validity of the death penalty: " '[t]hat issue confronts us, and the task of resolving it is inescapably ours.' "[173] The Court by its decision in *Furman* did not totally resolve that issue. It did, however, make what appeared to many to be a significant advance in the history of the eighth amendment.[174]

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169 *See* 408 U.S. at 385 (Burger, C.J., dissenting); Comment, *supra* note 62, at 1073.

170 Rape is punishable by death in certain federal jurisdictions. *E.g.*, 18 U.S.C. § 2031 (1970). It is punishable by death in but sixteen of the states: ALA. CODE tit. 14, § 395 (1959); ARK. STAT. ANN. § 41-3403 (Supp. 1971); FLA. STAT. ANN. § 794.01 (Supp. 1972-73); GA. CODE ANN. § 26-2001 (1972); KY. REV. STAT. § 435.090 (1962); LA. REV. STAT. § 14:42 (1950); MD. ANN CODE art. 27, § 462 (1971); MISS. CODE ANN. § 2358 (1956); MO. REV. STAT. § 559.260 (1959); NEV. REV. STAT. § 200.363 (1967); N.C. GEN. STAT. § 14-21 (1969); OKLA. STAT. ANN. tit. 21, § 1115 (Supp. 1972-73); S.C. CODE ANN. § 16-72 (1952); TENN. CODE ANN. § 39-3702 (1956); TEX. PENAL CODE ANN. art. 1189 (1961); VA. CODE ANN. § 18.1-44 (Cum. Supp. 1972).

171 *In re* Kemmler, 136 U.S. at 447.

172 *See* 408 U.S. at 273 (Brennan, J., concurring); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 464 (1946). *See also* Comment, *supra* note 30, at 1338-42; *Hearings*, *supra* note 97, at 304-07.

173 408 U.S. at 258 (quoting from Trop v. Dulles, 356 U.S. at 103).

174 The last chapter is yet to be written, as the Court, early in its 1972 term, denied rehearings in these cases. 409 U.S. — (1972).