CRUEL AND UNUSUAL PUNISHMENT

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Two hundred years ago the Senate and the House of Representatives sent to the President the Bill of Rights which was subsequently ratified by the states. This document included a provision prohibiting the imposition of cruel and unusual punishments. Two hundred years later, the Supreme Court of the United States is still trying to give meaning to the provision. I shall focus on what the cruel and unusual punishment clause means and the methodology to be used in deciding what it means.

Let us begin our examination of the meaning with the fascinating case of *Solem v. Helm*.[1] When Jerry Helm wrote a check for $100, knowing that he had no account, he knew he was committing a crime, but it is unlikely that he expected to be sentenced to life imprisonment without possibility of parole.[2] That, however, was the result. He was a repeat offender who was committing his seventh non-violent felony.[3] South Dakota's recidivist statute provided that the appropriate sentence was life imprisonment[4] without possibility of parole,[5] and the judge so sentenced him.

Some people might consider that penalty to be too severe and argue that the sentence was a violation of the cruel and unu-

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1 463 U.S. 277 (1983). *See* Baker & Baldwin, *Eighth Amendment Challenges to the Length of a Criminal Sentence: Following the Supreme Court*, 27 ARIZ. L. REV. 25 (1985) (for an excellent discussion of the *Solem* opinion).

2 Normally, the maximum punishment for issuing a "no account" check would have been five years imprisonment in the state penitentiary and a $5,000 fine. *Solem*, 463 U.S. at 281 (citing S.D. CODIFIED LAWS ANN. § 22-6-1(7) (Supp. 1982)).

3 The crimes previously committed by Jerry Helm included three convictions for third-degree burglary, one for obtaining money by false pretenses, one for grand larceny (more than $50), and a third-offense for driving while intoxicated. *Id.* at 279-80 (footnotes omitted).

4 South Dakota's recidivist statute provided that " '[w]hen a defendant has been convicted of at least three prior convictions [sic] in addition to the principal felony, the sentence for the principal felony shall be enhanced to the sentence for a Class 1 felony.' " *Id.* at 281 (quoting S.D. CODIFIED LAWS ANN. § 22-7-8 (1979) (amended 1981)). For a Class 1 felony, the maximum penalty was "life imprisonment in the state penitentiary and a $25,000.00 fine." *Id.* (citing S.D. CODIFIED LAWS ANN. § 22-6-1 (1967 & Supp. 1978) (amended 1979 and 1980)).

5 South Dakota law specifically stated that " '[a] person sentenced to life imprisonment is not eligible for parole by the board of pardons and paroles.' " *Id.* at 282 (quoting S.D. CODIFIED LAWS ANN. § 24-15-4 (1974)).

sual punishment clause under the eighth amendment of the United States Constitution. A quick reaction of many people who follow the decisions of the United States Supreme Court might have been that despite the severity of the penalty, Helm would have little chance of winning because of the existence of the, then, recent decision of *Rummel v. Estelle*.[6] Bill Rummell had similarly been convicted under Texas' recidivist statute which provided that a third time offender could get life imprisonment.[7] Rummel's offenses had been less serious than Jerry Helm's and he had only committed three of them. His crimes included the fraudulent use of a credit card to obtain $80 worth of goods or services, passing a forged check for $28.36, and obtaining $120.75 by false pretenses.[8] However, they were felonies. In that case, the Supreme Court decided that such a penalty was not cruel and unusual punishment.

The *Rummel* case provoked consternation and many newspapers and citizens criticized the decision. But the nation's highest Court decided the case and it was the law. Thus, it might have been thought that Jerry Helm, who had committed seven offenses including three non-violent burglaries, might have been out of luck. However, in *Rummel* the punishment was life imprisonment and in *Solem* it was life imprisonment without possibility of parole. Would this factor be enough to get a different result despite the more serious nature of Jerry Helm's offenses?

A review of *Rummel* would present two factors which would lead Jerry Helm's supporters to hope. First, *Rummel* was a five-four opinion. Second, a line in the opinion stated that "[i]f nothing else, the possibility of parole, however slim, serves to distinguish Rummel from a person sentenced under a recidivist statute like Mississippi's which provides for a sentence of life without parole upon conviction of three felonies including at least one violent felony."[9] These facts would certainly give the attorneys for Helm some basis for optimism. One Justice did switch sides and Jerry Helm won. Apparently, Justice Blackmun, the Justice who

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[6] 445 U.S. 263 (1980).

[7] Texas' recidivist statute provided that " '[w]hoever shall have been three times convicted of a felony less than capital punishment shall on such third conviction be imprisoned for life in the penitentiary.' " *Id.* at 264 (quoting TEXAS PENAL CODE Art. 63 (1973) (current version at TEXAS PENAL CODE ANN. § 12.42(d) (1974)).

[8] *Id.* at 265-66. Thus, the sum total of his three offenses amounted to $229.11. *See id.*

[9] *Id.* at 281. *See* MISS. CODE. ANN. § 99-19-33 (Supp. 1979).

switched sides, believed that the distinction between life imprisonment and life imprisonment without possibility of parole was important enough to change his approach. I use the word apparently because Justice Blackmun did not write an opinion in either case but simply joined the majority in both cases. This case was extremely important in the evolution of the meaning of the cruel and unusual punishment clause because, for the first time, a term of years simply by its length was held to be cruel and unusual punishment. None of the earlier cases finding conduct to be cruel and unusual punishment had been based simply on a punishment for a term of years.[10] Such cases included factors like punishment at hard and painful labor,[11] the death penalty,[12] or loss of citizenship.[13]

I emphasize this case at the beginning because it clearly emphasizes the subtle distinctions the Court must make in analyzing a cruel and unusual punishment case. Many other cases also illustrate the subtle distinctions that the Court must make in deciding cruel and unusual punishment cases.

For example, I often begin my class on the death penalty by asking whether the death penalty is cruel and unusual punishment. I ask for a show of hands indicating how many think the Court has found that it is and how many think the Court has found that it is not. Most students raise their hands in favor of the position that capital punishment has not been found to be cruel and unusual. In fact, neither answer is correct. In *Gregg v. Georgia*,[14] the Court held it was not cruel and unusual punishment to give the death penalty to a murderer under appropriate cir-

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10 *See* Hutto v. Davis. 454 U.S. 370 (1982). In *Hutto*, the Supreme Court rejected respondent's claim that a 40-year sentence, upon conviction for one count of distribution of marijuana and one count of possession with intent to distribute, was so grossly disproportionate that it constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. *Id.* at 371. The Supreme Court approvingly quoted the Fourth Circuit's recognition that the "Court 'has never found a sentence for a term of years within the limits authorized by statute to be, by itself, a cruel and unusual punishment.' " *Id.* at 372 (quoting Davis v. Davis, 585 F.2d 1226, 1229 (4th Cir. 1978)). *Cf.* Robinson v. California, 370 U.S. 660 (1962) (where the Court struck down a statute which provided for the imprisonment of persons convicted of being addicted to drugs). The *Robinson* Court, however, did not invalidate the term of imprisonment based on the length of time, but rather, recognized that addiction is tantamount to an illness and any penalty for an illness would be cruel and unusual. *See id.* at 666-68.

11 Weems v. United States, 217 U.S. 349 (1910).

12 Coker v. Georgia, 433 U.S. 584 (1977).

13 Trop v. Dulles, 356 U.S. 86 (1958).

14 428 U.S. 153 (1976).

cumstances. Conversely, in *Coker v. Georgia*,[15] it was cruel and unusual punishment to give the death penalty to a rapist. In *Ford v. Wainwright*[16] the court held that you could not execute a person who was insane at the time of the execution. In *Penry v. Lynaugh*,[17] however, the court held that you could execute a person who was retarded. There are no easy answers in the cruel and unusual punishment cases.

In *Enmund v. Florida*[18] the Supreme Court held that a person who had helped plan a robbery and then drove the car to the scene but did not directly participate in the unplanned shooting that occurred could not receive the death penalty. However, in *Tison v. Arizona*[19] the Court said that *Enmund* was not intended to preclude capital punishment in all accessory cases. Thus, the two sons who had helped their dad and another man escape from prison, supplied them with guns, helped them kidnap a family, and then stood by while the father and the other man killed the kidnapped family, could receive the death penalty.

In *Robinson v. California*,[20] the Supreme Court held that it was cruel and unusual punishment to sentence a person who was addicted to the use of drugs merely because of his addiction. However, in *Powell v. Texas*,[21] the court held that a person could be convicted for being drunk in a public place even though he was an alcoholic.

These few cases demonstrate the difficult tasks which the Court is faced with in analyzing those few words of the eighth amendment. This symposium issue celebrates the bicentennial of the Bill of Rights and while I applaud the foresight and wisdom of the authors of that document, it should be noted that the

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15 433 U.S. 584 (1977). It should be noted that the plurality opinion suggests that the death penalty is always disproportionate to the crime of rape, but Justice Powell's concurrence was limited to the facts of this particular case. *See id.* at 601.

> Although rape invariably is a reprehensible crime, there is no indication that petitioner's offense was committed with excessive brutality or that the victim sustained serious or lasting injury. The plurality, however, does not limit its holding to the case before us or to similar cases. Rather, in an opinion that ranges well beyond what is necessary, it holds that capital punishment *always* — regardless of the circumstances — is a disproportionate penalty for the crime of rape.

Id. (emphasis in original).

16 477 U.S. 399 (1986).

17 109 S. Ct. 2934 (1989).

18 458 U.S. 782 (1982).

19 481 U.S. 137 (1987).

20 370 U.S. 660 (1962).

21 392 U.S. 514 (1968).

authors of the Bill of Rights did not provide much guidance to the Justices in making decisions dealing with the cruel and unusual punishments clause.[22]

When the eighth amendment was adopted as part of the Bill of Rights, there was, unfortunately, practically no reported debate concerning the cruel and unusual punishments provision. One speaker complained that the phrase was too indefinite while another said he was concerned that it might abolish some forms of punishments which he believed to be appropriate. Without further discussion or debate, however, the convention approved the amendment.[23]

It is generally accepted that the provision came from the Virginia Constitution which had adopted it from the English Bill of Rights of 1689.[24] Some observers have concluded from the language used by the authors that the real intent of the provision was to abolish torture and other forms of punishment such as drawing and quartering, disembowelment, boiling in oil, and the like. This approach would limit the scope of the provision to types or modes of punishment. Another argument, expressed by some commentators[25] and Justices,[26] is that the provision came from the entire English experience which they argue supports the position that the clause was intended to include a proportionality review to determine if the punishment is excessive in light of the crime committed and was not limited to a prohibition on types or forms of punishment. The same position in favor of a proportionality review is argued by other commentators[27] but based on the position that the authors of the Bill of Rights were also influenced by the Enlightenment with its belief in a proportionality review. From the fragments left it is difficult to make a compelling argument as to what the actual intent of the framers was, so

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22 *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910).

23 *See* Baker & Baldwin, *supra* note 1, at 28 n.16.

24 *See* Goldberg, *Memorandum to the Conference Re: Capital Punishment; October Term, 1963*, 27 S. TEX. L. REV. 493 (1986).

25 *See generally* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969) (theorizing that the cruel and unusual punishments clause was intended to apply to excessive penalties as well as barbarous methods of punishment).

26 *See, e.g.*, Weems v. United States, 217 U.S. 349 (1910) (Justice McKenna's majority opinion).

27 *See generally* Note, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 BUFFALO L. REV. 783 (1975) (advocating the application of the proportionality doctrine to terms of imprisonment).

we now turn to the decisions of the United States Supreme Court concerning the cruel and unusual punishment clause.

With the exception of one case in 1910, there was very little judicial consideration by the United States Supreme Court of the meaning of the cruel and unusual punishment provision until the middle of the twentieth century.[28] Undoubtedly this was in large part the result of the fact that the eighth amendment had not been made applicable to the states until 1962.[29] Additionally, although there had already been serious debates over the efficacy and correctness of the death penalty,[30] until that time there was really no significant judicial challenge to the death penalty. This may also reflect the fact that most of the jurisdictions in the United States were relatively progressive in their approach to punishments.

However, the methodology for interpreting the provision was developed in that early 1910 case, *Weems v. United States*[31] and clearly articulated in 1958 in *Trop v. Dulles*.[32] Pursuant to this methodology, "[t]he amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[33] It still appears to be the accepted doctrine today

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28 *See supra* note 13.

29 *See* Robinson v. California, 370 U.S. 660 (1962). The Court, for the first time, specifically made the eighth amendment applicable to the states when it held that a state law which inflicted cruel and unusual punishment was in violation of the eighth and fourteenth amendments. *See id.* 666-67. *See also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (Court discussed the applicability of the eighth amendment to the states, however, never clearly stated that those principles did in fact apply to the states).

30 *See* Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishment*, 36 N.Y.U. L. REV. 846 (1961).

31 217 U.S. 349 (1910).

32 356 U.S. 86 (1958). In an article critical of the Court's use of the "evolving standards of decency" test one commentator expressed that:

> By positing that society's standards of decency "evolve," the Court committed itself to the view that the moral content of the Constitution and, more specifically, the eighth amendment, changes with time. This commitment entails the proposition that the principles upon which the court bases its decisions also changes with time. The Court's position is epistemologically unsound. Plato argued that one can only know that which does not change, because it is impossible to know something that is in a constant state of flux. If the Court asserts that its moral decisions are based upon standards that change over time, it is compelled to conclude that these standards are unknowable. If these standards are unknowable, the legitimacy of the Court's moral decisions is greatly impaired.

Note, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. MIAMI L. REV. 357, 371 (1984) (footnotes omitted).

33 *Trop*, 356 U.S. at 101.

and is recognized by virtually all members of the Court. Thus, the Court has not attempted to interpret this provision of the Constitution in a purely historical or static manner but has accepted the concept that it must develop over time. While this statement could be the result of a number of jurisprudential positions, in my view at least the most recent decisions have interpreted it in a sociological manner. Law is determined by society's view of right and wrong.[34] Any arguments from a natural law prospective seem to have been clearly rejected, at least by the present majority on the Court.

Utilizing this method of analysis can of course be questioned and criticized, but even if we accept this sociological approach it raises serious questions as to the manner of discovering the view of society. In this presentation I shall attempt to present the current Court's method of determining society's view and then examine that methodology in terms of prior Supreme Court decisions and in terms of logical consistency.

In 1961, before the vast bulk of cruel and unusual punishment decisions had been written, a commentator in a law review article[35] discussed the perplexities of trying to determine what society's view is on cruel and unusual punishment. He said that most judges, in state cases dealing with cruel and unusual punishment, "have simply stated that a cruel and unusual punishment is one which will 'shock the moral sense of the people,' or used words of like import."[36] The courts have "then proceeded to decide the cases before them without stopping to consider how the quality of 'the moral sense of the people' was to be determined."[37] The author then cites to Judge Frank who recognized the inherent difficulties of ascertaining the community's attitude and referred to the "common conscience" as basically unknowable. He also referred to other commentators who argued that the judge should not try to ascertain the common conscience, but rather should base the determination on the moral decision of the judge. Concluding, the author proclaimed that "[t]herefore it probably makes little practical difference in most cases whether a judge professes to follow community conscience or not[,] [t]he appeal is essentially to his own innate standards of

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34 "The punishment is either 'cruel and unusual' (i.e., society has set its face against it) or it is not. The audience for these arguments, in other words, is not this Court." Stanford v. Kentucky, 109 S. Ct. 2969, 2979 (1989).

35 *See* Note, *supra* note 30.

36 *Id.* at 850 (footnotes omitted).

37 *Id.*

fairness and humanity."[38]

Today the same controversy envelopes the Court. In my view, Justice Scalia takes the position that the decision of what is cruel and unusual is determined by what society views as cruel and unusual, while Justice Brennan feels that the Justices decide what is cruel and unusual after considering the views of society.

We will return to the philosophical differences shortly, but first I would like to consider the attempt made by the Court to determine what the community believes. There has been an intensive effort on the part of the Supreme Court to develop some objective criteria for deciding what society's view is. As we study these objective criteria, questions to be posed include whether or not the objective criteria are really objective and whether or not the Justices choose the "objective" criteria which they believe might support the result they want to reach. As we ask these questions we will also speculate as to whether Judge Frank was right when he said the common conscience is really unknowable.

An additional problem in trying to gauge the Court's position on cruel and unusual punishment is the lack of consensus within the Court itself. Not only are there some basic divisions between the liberal and conservative blocks in the Court, but there are also significant analytical differences between Justices who may come to the same conclusion. The diversity of opinion in the Court in this area is clearly demonstrated in *Furman v. Georgia*.[39] In that case all nine Justices wrote separate opinions. While five Justices did agree that the death penalty statutes were unconstitutional and four decided that they were not unconstitutional, each Justice felt so strongly about the issue that he wrote his own opinion.

Even Justices Brennan and Marshall, who are often lumped together on cruel and unusual punishment issues because they both believe that capital punishment is *per se* unconstitutional, are jurisprudentially worlds apart. I believe that Justice Brennan's approach is essentially a natural law approach[40] and that Justice

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38 *Id.* at 851 (footnotes omitted).

39 408 U.S. 238 (1972).

40 *See, e.g., id.* at 257-306 (Brennan, J., concurring). In his concurring opinion, Justice Brennan observed that the battle over the death penalty "[a]t bottom, . . . 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." *Id.* at 296 (Brennan, J., concurring). Several years later, in a dissenting opinion, Justice Brennan again expressed his belief:

Marshall's approach is a modified sociological approach.[41] Justice Brennan seemingly feels that the Court should decide what is cruel and unusual punishment after reviewing the thinking of other groups. While the Court's decision should be informed by the other groups in society, it is ultimately for the Court to decide what punishments are cruel and unusual by determining whether they are consistent with the dignity of man. Justice Marshall, on the other hand, accepts the idea that society's decision controls, however, it is not for all members of society, but rather "informed members of society" to decide.

A look at the recent opinions on capital punishment display the same fractured approach that was demonstrated in *Furman*. Justices will concur in some but not all the results reached in a decision, but even when they agree, they agree for different reasons.[42]

> This Court inescapably has the duty, as the ultimate arbiter of the meaning of the Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society.

Gregg v. Georgia, 428 U.S. 153, 229 (1976) (Brennan, J., dissenting) (footnote omitted).

41 *See, e.g.*, *Gregg*, 428 U.S. at 231-41 (Marshall, J., dissenting). In his dissent, Justice Marshall recognized that the actions of 35 legislatures reenacting death penalty statutes might have undercut his position against capital punishment since his position seemed to have been based on society's view. *Id.* at 232 (Marshall, J., dissenting). However, he emphasized that even "if the constitutionality of the death penalty turns, . . . on the opinion of an *informed* citizenry, . . . the enactment of new death statutes cannot be viewed as conclusive." *Id.* (emphasis in original). In addition, Justice Marshall considered the punishment "excessive" and based this judgment primarily on his perception that there is no support for the efficacy of the death penalty as a deterrent. *Id.* at 233-37 (Marshall, J., dissenting).

42 *See, e.g.*, Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The heading in *Penry* announcing the opinion of the Court provides an excellent illustration.

> O'CONNOR, J., announced the judgment of the Court and delivered the opinion for a unanimous Court with respect to Parts I and IV-A, the opinion of the Court with respect to Parts II-B and III, in which BRENNAN, MARSHALL, BLACKMUN, and STEVENS, JJ., joined, the opinion of the Court with respect to Parts II-A and IV-B, in which REHNQUIST, C.J., and WHITE, SCALIA, and KENNEDY, JJ., joined, and an opinion with respect to Part IV-C. BRENNAN, J., filed an opinion concurring in part and dissenting in part, in which MARSHALL, J., joined. STEVENS, J., filed an opinion concurring in part and dissenting in part, in which BLACKMUN, J., joined. SCALIA, J., filed an opinion concurring in part and dissenting in part, in which REHNQUIST, C.J., and WHITE, and KENNEDY, JJ., joined.

Id. at 2940. *See also* Note, Thompson v. Oklahoma: *Debating the Constitutionality of Juvenile Executions*, 16 PEPPERDINE L. REV. 737 (1989) (discussing the Court's inability to agree on juvenile executions).

The following are some of the factors which it has been argued should go into the Court's determination of society's view of what is cruel and unusual:

a) legislative action;
b) jury decisions;
c) opinions from other countries;
d) public opinion polls;
e) learned groups; and
f) informed citizens.

The Supreme Court's most recent discussions of the cruel and unusual punishment clause appeared in two decisions rendered in June of 1989. Those cases involved the death penalty for juveniles sixteen and seventeen years old[43] and the death penalty for retarded persons.[44] In those cases the Court expressed its view on the evolving standards. While both cases are important and interesting, I have decided to focus on the Court's decision in *Stanford v. Kentucky*.[45]

Justice Scalia, writing for the *Stanford* majority, recognized that "the evolving standards of decency that mark the progress of a maturing society"[46] is the appropriate test to be applied and that the provision is to be interpreted in a "flexible and dynamic manner."[47] However, he rejected any natural law type argument that the Justices could use their own concepts of what was cruel and unusual punishment or that the Court could rely on any views from beyond the borders of the United States. Justice Scalia said that it is not appropriate to look to our own conceptions of decency (meaning the individual Justices') but to those of modern American society as a whole. Rejecting outright any natural law view or innate understanding of right and wrong, Justice Scalia adopted a sociological

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[43] Stanford v. Kentucky, 109 S. Ct. 2969 (1989).

[44] Penry v. Lynaugh, 109 S. Ct. 2934 (1989). Another extremely important issue in *Penry*, beyond the scope of this article, dealt with whether the jury was improperly instructed since the judge failed to inform the jury that it "could consider and give effect to [the defendant's] mitigating evidence in imposing its sentence." *Id.* at 2941. The Court ultimately determined that the jury had been improperly instructed and remanded the case, on this ground, for resentencing. *Id.* at 2952. *See* Fetzner, *Execution of the Mentally Retarded: A Punishment Without Justification*, 40 S.C.L. REV. 419 (1989).

[45] 109 S. Ct. 2969 (1989).

[46] *Id.* at 2974 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). It could be argued, after a careful reading of Justice Scalia's opinion, that he accepted the Court's "evolving standards of decency" test more from a recognition of precedent rather than his own personal conviction. *See id.* at 2975.

[47] *Id.* at 2974 (quoting Gregg v. Georgia, 428 U.S. 153, 171 (1976)).

approach determining what is right by what the majority of society thinks is right.

Justice Scalia, in a footnote, made it abundantly clear "that it is *American* conceptions of decency that are dispositive, rejecting the contentions of petitioners and their various *amici* (accepted by the dissent . . .) that the sentencing practices of other countries are relevant."[48] The Court thus ignores the factors that a great number of countries have abolished capital punishment in general, that many of the countries that still allow capital punishment have banned it for juveniles under eighteen, and that since 1979 only eight juveniles have been executed throughout the world.[49] Of the eight, three occurred in the United States, while the other five were carried out in Bangladesh, Pakistan, Rwanda, and Barbados.[50]

This argument neglects to consider the fact that the United States Supreme Court, in the first case to articulate clearly the evolving standards of decency rule, relied heavily on the positions in other countries. In that case, *Trop v. Dulles*,[51] the Court was considering congressional legislation rather than state legislation. In fact, because the legislation dealt with citizenship there was no state legislation on point. Therefore, the federal legislation presumably should have represented the views of society as a whole. However, the Supreme Court declared the punishment of denationalization for desertion to be cruel and unusual punishment and stressed the importance of world opinion saying "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishments for crime."[52]

Justice Scalia insisted that we look to "objective factors" in determining the evolving standards of decency. Justice Scalia stated that the reason we are relying on these objective factors is that "[t]his approach is dictated both by the language of the amendment—which proscribes only those punishments that are both 'cruel and *unusual*'—and by the 'deference we owe to the decisions of the state legislatures under our federal system.' "[53]

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48 *Id.* at 2975 n.1 (emphasis in original).

49 *Id.* at 2985 (Brennan, J., concurring).

50 *Id.* (footnote omitted).

51 356 U.S. 86 (1958).

52 *Id.* at 102.

53 Stanford v. Kentucky, 109 S. Ct. 2969, 2975 (1989) (emphasis in original) (quoting Gregg v. Georgia, 428 U.S. 153, 176 (1976)). Justice Scalia appears to be emphasizing two independent considerations and stressing the "unusual" nature of the penalty. *See id.* In Trop v. Dulles, 356 U.S. 86 (1958), Chief Justice Warren said:

Whether the word "unusual" has any qualitative meaning different from

Justice Brennan, referring to the deference issue, argued that "Justice Scalia's approach would largely return the task of defining the contours of Eighth Amendment protection to political majorities."[54] Justice Brennan reaffirmed that "the very purpose of a Bill of Rights was to withdraw certain subjects 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 by the courts."[55]

Justice Scalia responded to the arguments of Justice Brennan and the other dissenters in *Stanford* by suggesting that " 'those institutions which the Constitution is supposed to limit' include the Court itself."[56] Justice Scalia argued that the dissent's view "that it is for *us* to judge, not on the basis of what we perceive the Eighth Amendment originally prohibited, or on the basis of what we perceive the society through its democratic processes now overwhelmingly disapproved, but on the basis of what we think 'proportionate' and 'measurably contributory to acceptable goals of punishment'—to say that and to mean that, is to replace judges of the law with a committee of philosopher-kings."[57]

Justice Scalia appears to limit his considerations of objective factors[58] to the views of legislatures, juries, and prosecutors, and

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> "cruel" is not clear. On the few occasions this Court has had to consider the meaning of the phrase, precise distinctions between cruelty and unusualness do not seem to have been drawn. . . . These cases indicate that the Court simply examines the particular punishment involved in the light of the basic prohibition against inhuman treatment, without regard to any subtleties of meaning that might be latent in the word "unusual."

Id. at 100 n.32. A student considering the issue stated that "[i]t is certain at any rate that 'unusual' does not mean 'novel,' for such an interpretation would bar any innovations in penology." Note, *The Effectiveness of the Eighth Amendment: An Appraisal of Cruel and Unusual Punishments*, 36 N.Y.U. L. REV. 846, 849 (1961). The Note concludes by suggesting that "[i]t may well be in the last analysis the eighth amendment stands for a ban on all undue cruelty, whether unusual or not." *Id.* at 850.

54 Stanford v. Kentucky, 109 S. Ct. 2969, 2986-87 (1989) (Brennan, J., dissenting).

55 *Id.* at 2987 (Brennan, J., dissenting) (quoting West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943)).

56 *Id.* at 2980.

57 *Id.* (emphasis in original).

58 *See id.* at 2975-80. Justice Scalia stated:

> Having failed to establish a consensus against capital punishment for 16- and 17-year-old offenders through state and federal statues and the behavior of prosecutors and juries, petitioners seek to demonstrate it through other indicia, including public opinion polls, the views of interest groups and the positions adopted by various professional associations. We decline the invitation to rest constitutional law upon such uncertain foundations. A revised national consensus so broad, so clear

specifically declines to rely upon public opinion polls, the views of interest groups, or positions adopted by various professional organizations.

The first and most important "objective" criterion in the decision of the *Stanford* majority is the statutes passed by legislatures. In *Stanford*, both the majority and the dissent spent substantial time counting and arguing about how the various legislatures should be counted for purposes of determining a national consensus.[59] It is clear, however, that there is no consensus on how many states have to go a particular way to affect the balance. For example, in *Stanford*, the dissent contended that the majority of states, 28, would not permit the death penalty for juveniles who are sixteen.[60] However, in Justice Scalia's view this did not constitute the "degree of national consensus [the] Court has previously thought sufficient to label a particular punishment cruel and unusual."[61] Justice Scalia then cited to four recent cases in which the United States Supreme Court considered the punishment cruel and unusual. In two of those cases, Justice Scalia noted that there was only one state in the country that provided such a severe penalty, in another case no state specifically provided for such a penalty, and in the remaining one only eight states provided for such a severe penalty.[62]

> and so enduring as to justify a permanent prohibition upon all units of democratic government must appear in the operative acts (laws and the application of laws) that the people have approved.

Id. at 2979.

59 *Cf.* Baker & Baldwin, *supra* note 1, at 59 (criticizing an approach that does not give greater emphasis to the human dignity approach, stating that "[h]uman dignity goes beyond statistical study and the Justices must be more than statisticians").

60 Stanford v. Kentucky, 109 S. Ct. 2969, 2982-83 (1989) (Brennan, J., dissenting). This figure is arrived at by adding the 12 States whose capital punishment statutes specifically exempt those offenders under 18 years of age, with the 15 States (including the District of Columbia) which prohibit the imposition of capital punishment altogether, and South Dakota which arguably has abandoned the death penalty although statutorily provided for. *Id.*

61 *Id.* at 2975-76. Justice Scalia, however, relied on the fact that only 15 of the 37 States authorizing capital punishment "decline to impose it upon 16-year-old offenders and [,] 12 decline to impose it on 17-year-old offenders," thus rejecting Justice Brennan's computation. *Id.* at 2975. Justice Scalia also points out that the burden of proof, in cruel and unusual punishment cases, is for the petitioner "to establish a national consensus *against* it." *Id.* at 2977 (emphasis in original).

62 *See* Ford v. Wainwright, 477 U.S. 399, 408 (1986) (finding the eighth amendment precludes execution of the insane and thus requires an adequate hearing on the issue of sanity, the Court relied upon (in addition to the common-law rule) the fact that "no State in the Union" permitted such punishment); Solem v. Helm, 463 U.S. 277, 300 (1983) (striking down a life sentence without parole under a recidivist statute, the Court stressed that "[i]t appears that [petitioner] was treated more severely than he would have been in any other State"); Enmund v. Florida, 458 U.S. 782, 792 (1982) (striking down capital punishment for participating in a robbery

It should be noted, however, that even among the twenty-two remaining states relied upon by the *Stanford* majority to justify the death penalty for sixteen-year-old juveniles, there is some dispute. There is no dispute about four because those states specifically provide that a sixteen-year-old can receive the death penalty. The other states do not specifically so provide, but rather reach that result because in those states juveniles who are sixteen years old can be tried as adults. Thus, the *Stanford* court decided that these state legislatures intended that juveniles sixteen and sometimes younger were to receive the death penalty. The majority felt it is unnecessary to respond to the dissent's argument that the failure of the state legislature to actually say that they intended the death penalty to apply to juveniles under eighteen may have indicated that they did not intend to make it applicable to those under eighteen because in the majority's view that position is clearly untenable. Those of us familiar with the New Jersey experience may not consider the position as untenable. In New Jersey the legislature passed a death penalty statute without setting forth a specific age. By operation of the waiver provisions of the juvenile laws in this state, children as young as fourteen could have received the death penalty. Subsequently, when a death penalty case was brought against a juvenile the legislature hastily amended the legislation and plainly admitted that it never intended that it apply to juveniles. When the statute was amended in New Jersey the statement on the bill said:

> The committee adopted an amendment which would clarify that a juvenile tried and convicted of murder as an adult may not be sentenced to death. With regard to this amendment, the committee wished to stress that it was not the intent of the Legislature to have juveniles eligible for capital punishment and that this clarification should be applied to pending cases.[63]

The Supreme Court concluded that, because twenty-two states still permit capital punishment for juveniles who are sixteen and seventeen, society has not clearly communicated its intent that such punishments are cruel and unusual.

Thus, a basic issue dividing the Court is who makes the decision—the Justices after considering different views of society, or the

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which an accomplice takes a life, the Court emphasized that only eight jurisdictions authorized similar punishment); Coker v. Georgia, 433 U.S. 584, 595-96 (1977) ("in invalidating the death penalty for rape of an adult woman, we stressed that Georgia was the sole jurisdiction that authorized such a punishment").

63 NEW JERSEY SENATE JUDICIARY COMMITTEE, STATEMENT TO SENATE NO. 2652 (1985).

society and the Justices simply figure out what society's decision is. As already noted, Justice Scalia joined by Justices Rehnquist, White, O'Connor, and Kennedy decided that they could not rely upon their own view of what is cruel and unusual punishment, but rather had to rely on the view of society as primarily demonstrated in the decisions of the legislatures. However, it should be noted that five years earlier a number of those Justices deciding *Spaziano v. Florida*[64] reached just the opposite result. In that case, the issue concerned the role of the judge, versus the jury, in sentencing in death penalty cases. In the earlier death penalty cases it appeared that the influence of the jury in reflecting community standards was important in legitimating the death penalty.[65] Thus, Florida's statute which permitted a judge to overrule a jury's recommendation of mercy in a death penalty case and authorize the death penalty came under challenge. The Court again counted the number of states permitting capital punishment and concluded that "30 out of 37 jurisdictions with a capital sentencing statute give the life-or-death decision to the jury, with only 3 of the remaining 7 allowing a judge to override a jury's recommendation of life."[66] Notwithstanding the fact that a majority of jurisdictions have adopted a different practice, "this alone does not establish that contemporary standards of decency are offended by the jury override."[67] The Court then concluded that " '[a]lthough the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment' is violated by a challenged practice."[68] The Court's approach thus seems to be result oriented—the Justices reach a particular result and then adopt the test which permits them to achieve that result. In two cases just five years apart, certain Justices adopted two diametrically opposed positions, but the result in each is the same, let the death penalty be enforced.

Returning for a moment to *Stanford*, Justice Brennan utilized

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64 468 U.S. 447 (1984). Chief Justice Rehnquist, and Justices White and O'Connor who agreed with Justice Scalia in *Stanford*, had also agreed previously with Justice Blackmun in *Spaziano*.

65 *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976).

66 *Spaziano*, 468 U.S. at 463 (footnote omitted).

67 *Id.* at 464.

68 *Id.* (quoting Enmund v. Florida, 458 U.S. 782, 797 (1982)). *See* Coker v. Georgia, 433 U.S. 584, 597 (1977) (Court stated that "events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment").

the sociological approach of the majority to conclude that capital punishment was unconstitutional and stated that:

> Together, the rejection of the death penalty for juveniles by a majority of the States, the rarity of the sentence for juveniles, both as an absolute and comparative matter, the decisions of respected organizations in relevant fields that this punishment is unacceptable, and its rejection generally throughout the world, provide to my mind a strong grounding for the view that it is not constitutionally tolerable that certain States persist in authorizing the execution of adolescent offenders.[69]

However, Justice Brennan did not stop there, further stating that public perceptions of standards of decency are not conclusive. A penalty must also accord with the dignity of man. This concept was first articulated in *Trop v. Dulles*[70] wherein the Court said "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man."[71] Of course, that approach requires some standards to guide the decision as to what is inconsistent with the dignity of man. Justice Brennan says the dignity of man means at least that the punishment not be excessive. "[T]he inquiry into 'excessiveness' has two aspects. First, the punishment must not involve the unnecessary and wanton infliction of pain. . . . Second, the punishment must not be grossly out of proportion to the severity of the crime."[72] As already indicated, there is some historical support for the view that the eighth amendment was intended to include a proportionality review. However, even conceding that, the great diffi-

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69 Stanford v. Kentucky, 109 S. Ct. 2969, 2986 (1989) (Brennan, J., dissenting). Justice Brennan relied on the fact that the American Bar Association, the National Council of Juvenile and Family Court Judges, and other respected organizations have adopted resolutions opposing the imposition of capital punishment upon any person for an offense committed under the age of 18. *Id.* at 2985 (Brennan, J., dissenting). Furthermore the Justice stated that:

> Many countries, of course — over 50, including nearly all in Western Europe — have formally abolished the death penalty, or have limited its use to exceptional crimes such as treason. . . . Twenty-seven others do not in practice impose the penalty. . . . Of the nations that retain capital punishment, a majority—65—prohibit the execution of juveniles. . . . Sixty-one countries retain capital punishment and have no statutory provision exempting juveniles, though some of these nations are ratifiers of international treaties that do prohibit the execution of juveniles.

Id. *See supra* note 47 and accompanying text.

70 356 U.S. 86 (1958).

71 *Id.* at 100.

72 *Stanford*, 109 S. Ct. at 2987 (Brennan, J., dissenting) (quoting Gregg v. Georgia, 428 U.S. 153, 173 (1976)).

culty is deciding what is the unnecessary and wanton infliction of pain and what is excessive. In recently discussing this with my seminar, we labeled the test "too harsh." It is almost like Justice Stewart's comment about pornography, I can't define it but I know it when I see it.[73] Of course, everyone has different views of what is so bad that it should be considered pornography, just as everyone has different views of what are appropriate punishments for various crimes.

It should be noted that Justice Scalia appears to be rejecting any proportionality test beyond the implicit considerations of proportionality included in a review of what the legislatures and juries have done.[74] However, as to this part of his *Stanford* opinion it represents the view of only four members of the Court. Justice O'Connor, although concurring with the decision of the Court that capital punishment for juveniles is not cruel and unusual punishment at least for sixteen- and seventeen-year-old juveniles did not join in that portion of Justice Scalia's opinion that held that there should not be a proportionality review.[75]

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[73] Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

[74] Stanford v. Kentucky, 109 S. Ct. 2969, 2980 (1989). Justice Scalia stated that:

> While the dissent is correct that several of our cases have engaged in so-called "proportionality" analysis, examining whether "there is a disproportion 'between the punishment imposed and the defendant's blameworthiness,' " and whether a punishment makes any "measurable contribution to acceptable goals of punishment," . . . we have never invalidated a punishment on this basis alone. All of our cases condemning a punishment under this mode of analysis also found that the objective indicators of state laws or jury determinations evidenced a societal consensus against the penalty. . . . In fact, the two methodologies blend into one another, since "proportionality" analysis itself can only be conducted on the basis of the standards set by our own society; the only alternative, once again, would be our personal preferences.

Id.

[75] *Id.* at 2981-82 (O'Connor, J., concurring in part and dissenting in part) (Justice O'Connor was unable to join a portion of the plurality's opinion for the reasons stated in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988) (O'Connor, J., concurring in judgment)).

> Part V of the plurality's opinion "emphatically reject[s]," . . . the suggestion that, beyond an assessment of the specific enactments of American legislatures, there remains a constitutional obligation imposed upon this Court to judge whether the "nexus between the punishment imposed and the defendant's blameworthiness" is proportional. . . . Part IV-B of the plurality's opinion specifically rejects as irrelevant to Eighth Amendment considerations state statutes that distinguish juveniles from adults for a variety of other purposes. In my view, this Court does have a constitutional obligation to conduct proportionality analysis.

Id. at 2981 (quoting Enmund v. Florida, 458 U.S. 782, 825 (1982) (O'Connor, J., dissenting)).

It would appear today that many of the decisions of the Supreme Court on cruel and unusual punishment are so closely divided that it is very difficult to predict the outcome of future cases.

As a teacher, I always like to leave the students both satisfied and perplexed. I try to provide the satisfaction by saying what appears to be the hornbook law in a particular area and the perplexity by pointing out some of the unanswered questions. Unfortunately, in the area of constitutional law with the shifting makeup of the Court and the complexity of the issues it is always easier to provide the perplexities than it is to provide any hornbook law. However, we do know some things.

We know as a result of *Weems v. United States* that the Philippine punishment of "*cadena temporal*", which involved twelve years of hard and painful labor with a chain always extended from the wrist to the ankle and other severe permanent disabilities even after the term was ended, was cruel and unusual punishment for a public official who made an illegal entry in the books. We know as a result of *Trop v. Dulles* that loss of citizenship for one day of desertion when the individual did not desert to the enemy, but merely left the stockade where he was being held for another offense, was cruel and unusual punishment.

We also know that to give life imprisonment without possibility of parole to a person who committed seven non-violent felonies is cruel and unusual. We know that the death penalty for crimes other than murder are probably cruel and unusual punishment in light of the *Coker v. Georgia* case that held that capital punishment was not appropriate in a rape case—at least in the case of an adult who has been raped but not seriously injured beyond, of course, the inevitable horrible repercussions from the rape itself. We know that insane people cannot be executed but that mentally retarded people can. We know that some accessories to murder cannot get the death penalty but others can. Additionally, there are of course a myriad of cases dealing with the procedural safeguards which must be used in dealing with a death penalty case. We are left, however, with the basic question still unanswered after 200 years; how do we decide what is cruel and unusual punishment? The Justices have tried valiantly to answer this question, however, the Court seems so evenly divided in the area that there is little predictability as to the results in the next close case.

In an excellent law review article[76] Professors Baker and Bald-

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[76] *See* Baker & Baldwin, *supra* note 1.

win argue that the concept of cruel and unusual punishment can only evolve in one direction. "The 'evolving concept of human decency' is the benchmark, the dignity of man the goal."[77] In their view, as certain punishments are deemed cruel and unusual, the Court and society cannot go back. "Once the community's morality has condemned a punishment and that condemnation has been incorporated into the constitutional morality, there is no going back."[78] But are Professors Baker and Baldwin setting forth a rule or a hope? It would seem that if we follow the approach set forth in the *Stanford* opinion the Court can go back. If enough states determine that a particular punishment is appropriate and it is not one of those horrendous examples, like breaking at the wheel, could it be approved by the Court? If a group of ten or eleven states now got together and decided that life imprisonment without possibility of parole should be the penalty for seven non-violent felonies, like that in *Solem v. Helm*, would it then become acceptable because in the evolution of the American society it could not longer be said in the words of Justice Scalia that "society has set its face against it?"[79] Further, if those same ten states decided that the death penalty was appropriate for rapists and enacted such death penalty statutes,

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77 *Id.* at 60.

78 *Id.* Justice Rehnquist casts some doubt on this progressive theory with his statement, in Rummel v. Estelle, 445 U.S. 263 (1980), that "[w]e all, of course, would like to think that we are 'moving down the road toward human decency.'" *Id.* at 283 (quoting Furman v. Georgia, 408 U.S. 238, 410 (1972) (Blackmun J., dissenting). "Within the confines of this judicial proceeding, however, we have no way of knowing in which direction that road lies." *Id.*

79 *See supra* note 34.

It should be noted that it is not really anticipated by the author that many states will go back to Draconian forms of punishment. If they do, in at least some of the states, the state courts will use their own state constitutional provisions on cruel and unusual punishment to prohibit such measures. Many state courts have exercised the authority of their own constitutions to give greater protections to their citizens than the Supreme Court has given under the federal Constitution. The United States Supreme Court has clearly acknowledged the rights of state courts to extend greater constitutional rights under their own constitutions. In fact Justice Brennan has specifically applauded this state action.

Just last year, the New Jersey Supreme Court which had previously not hesitated to use its constitution to give greater rights to its citizens even when the provision was identically worded to the federal Constitution for example in the areas of search and seizure, freedom of speech, right of privacy and others, added to that list the cruel and unusual punishment clause. While the court in State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987) had upheld the general constitutionality of the New Jersey death penalty statute under both the federal and state constitutions, the court held in State v. Gerald, 113 N.J. 40, 549 A.2d 792 (1988) that one aspect of the New Jersey death penalty statute was unconstitutional under the New Jersey Constitution even though it was constitutional under the federal Constitution.

meeting all procedural requirements as set forth in *Gregg v. Georgia* would such statutes then be constitutional?

Could we in theory go back to the days of the adoption of the Bill of Rights, when many crimes carried the death penalty and as long as enough states wanted to make theft punishable by death it would not be considered cruel and unusual punishment? It can be argued that this could be the result of the opinion in *Stanford*, but as already indicated each case must be examined carefully because of the subtle distinctions made by the Court.