

Mar. 7 (Class 7) Death Penalty Abolition: Globally, Locally

Death penalty opponents are currently debating whether the time is ripe to bring a challenge to the constitutionality of the death penalty to the Supreme Court. To understand the competing positions, this session will examine the history of the abolition movement and evaluate the success of the abolition strategies deployed. What are the arguments for abolition? The lines to be drawn or refused? How is the doctrine and practice of the death penalty impacted by global developments? To what end? To what extent does death penalty abolition frustrate other reform efforts, for example in the use of LWOP and solitary confinement; in which ways does it benefit from these efforts?

Adam Liptak, *Death Penalty Foes Split Over Taking Issue to the Supreme Court*, N.Y. TIMES (Nov. 3, 2015)

Furman v. Georgia, 408 U.S. 238 (1972) (excerpts)

Gregg v. Georgia, 428 U.S. 153 (1976) (excerpts)

McCleskey v. Kemp, 481 U.S. 279 (1987) (review from week 2)

Roper v. Simmons, 543 U.S. 551 (2005) (excerpts)

Ernest A. Young, *Comment: Foreign Law and the Denominator Problem*, 119 HARV. L. REV. 148 (2005)

Glossip v. Gross, 135 S.Ct. 1885 (2015) (excerpts)

Dahlia Lithwick, *Fates Worse Than Death? Justice Kennedy's own logic shows why he should make the Supreme Court abolish the death penalty*, SLATE (July 14, 2015)

Chris McDaniel, *Oklahoma General Asks to Halt Three Executions After State Didn't Follow Own Procedures*, BUZZFEED NEWS (Oct. 2, 2015)

Optional Reading

David Garland, *PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION*, (2012) (excerpts)



The New York Times | <http://nyti.ms/1MweL2n>

POLITICS

Death Penalty Foes Split Over Taking Issue to Supreme Court

By ADAM LIPTAK NOV. 3, 2015

WASHINGTON — In the long legal struggle against the death penalty, the future has in some ways never looked brighter.

In a passionate dissent in June, Justice Stephen G. Breyer invited a major challenge to the constitutionality of capital punishment. This fall, Justice Antonin Scalia all but predicted that the court's more liberal justices would strike down the death penalty.

But lawyers and activists opposed to the death penalty, acutely conscious of what is at stake, are bitterly divided about how to proceed. Some say it is imperative to bring a major case to the court as soon as practicable. Others worry that haste may result in a losing decision that could entrench capital punishment for years.

"If you don't go now, there's a real possibility you have blood on your hands," said Robert J. Smith, a fellow at the Charles Hamilton Houston Institute of Harvard Law School. His scholarship was cited in Justice Breyer's dissent from a decision upholding the use of an execution drug that three death row inmates argued risked causing excruciating pain.

But others are wary. "There are reasons to be cautious about pushing the court to a decision too early," said Jordan M. Steiker, a law professor at the University of

Texas.

The divide is partly generational. Many veteran litigators have suffered stinging setbacks in the Supreme Court, and they favor an incremental strategy. They would continue to chip away at the death penalty in the courts, seek state-by-state abolition and try to move public opinion.

Some younger lawyers and activists urge a bolder course: to ask the Supreme Court to end capital punishment nationwide right away.

Though Justice Breyer's dissent was joined only by Justice Ruth Bader Ginsburg, the more aggressive advocates are confident they can persuade five justices to do away with a punishment explicitly contemplated in the Fifth and 14th Amendments, which call for grand juries in federal cases involving "a capital or other infamous crime" and say that no person may be deprived "of life, liberty or property, without due process of law." That means picking up the votes of not only the rest of the court's liberal wing — Justices Sonia Sotomayor and Elena Kagan — but also, crucially, Justice Anthony M. Kennedy.

Evan J. Mandery, the author of "A Wild Justice," a history of the last major challenges to the death penalty in the 1970s, said there were good arguments on both sides of whether to mount such an effort.

"It's a very complicated gamble," he said. "The fear is that if you push and you lose, you could end up worse off."

All concerned agree that much has changed since the Supreme Court reinstated the death penalty in 1976, four years after it had effectively struck it down. Last year, only seven states carried out executions. Nineteen states and the District of Columbia have abolished the death penalty entirely, seven of them in the last decade.

Governors and courts have imposed moratoriums in others, and the number of death sentences and executions continues to drop. The Supreme Court itself has barred the execution of juvenile offenders, people with intellectual disabilities and

those convicted of crimes against individuals other than murder in the last decade.

The more cautious, step-by-step approach would ask the court to further narrow the availability of the death penalty by, for instance, forbidding the execution of mentally ill people and of accomplices who did not kill anyone. The more assertive one would introduce a broad case aimed at the death penalty itself.

Both sides look to history for instruction, but they draw different lessons.

Justice Breyer has told friends that his dissent was partly inspired by a similar one a half-century before. The earlier dissent, by Justice Arthur J. Goldberg, helped create the modern movement for the abolition of the death penalty and led to a four-year moratorium on executions.

The 1963 dissent, in *Rudolph v. Alabama*, was drafted by a law clerk, Alan M. Dershowitz, who would go on to become a law professor at Harvard and a prominent litigator. A young Stephen G. Breyer began his own clerkship with Justice Goldberg the year after.

Collecting data on national and international practice, Justice Goldberg's dissent urged the court to hear a case on whether the death penalty for rape violated the Eighth Amendment's ban on cruel and unusual punishment.

"The goal was to ask litigators to start raising challenges to the death penalty," Professor Dershowitz said. "It was an invitation to litigation. It was not a common tactic back then, and we were much criticized for it."

The dissent spurred the creation of capital litigation projects at the NAACP Legal Defense and Educational Fund and at the American Civil Liberties Union.

Justice Breyer's dissent was far more elaborate. It was 46 pages long, included charts and maps, and set out in detail the argument that the death penalty violated the Eighth Amendment's ban on cruel and unusual punishments.

Professor Dershowitz said he was delighted that another former clerk of Justice Goldberg's was carrying on his old boss's project.

"The goal in both cases is to encourage the court to play a more active role and to encourage litigants," he said.

But opinions vary about the correct reading of the aftermath of the Goldberg dissent. Some veteran opponents of the death penalty noted that it took nine years of methodical litigation after the 1963 dissent before the Supreme Court effectively struck down the death penalty in 1972 in *Furman v. Georgia*. Even then, they said, the effort in the end yielded only a relatively brief moratorium.

Sherrilyn Ifill, the president of the NAACP Legal Defense and Educational Fund, which has long played a central role in the fight against the death penalty, chose her words carefully in response to questions about her group's current strategy.

"There is something undoubtedly powerful in having a Supreme Court justice lay out the brief for the unconstitutionality of the death penalty and to issue the challenge," she said. But it is Justice Kennedy and not Justice Breyer, she said, whose vote will be crucial.

Litigators who work in cases in states committed to the death penalty said they were not counting on a general reprieve from the Supreme Court.

"The Breyer dissent was a dissent that two justices signed," said David R. Dow, a law professor at the University of Houston and the founder of the Texas Innocence Network.

"I don't get too excited about two justices," he added. "The Breyer dissent means so little in terms of the imminent demise of the death penalty that I wouldn't spend any time on it."

On the other side of the debate is the Eighth Amendment Project, a new group seeking prompt action.

"We certainly have a feeling we're getting close," said Henderson Hill, the group's executive director. "We're getting warm."

He said he understood why some were skeptical. "Lawyers are by their nature cautious," he said. "When you've been part of the killing fields of Texas, you have to concentrate on your clients and you don't have the luxury of thinking, 'What if?' "

Mr. Hill said one case from Texas might serve as the right vehicle to mount a broad challenge. It concerns Julius Murphy, who was convicted of robbing and killing a stranded motorist. Among his lawyers is Neal K. Katyal, a prominent Supreme Court litigator and a former law clerk to Justice Breyer.

"After Justice Breyer's dissenting opinion," Mr. Katyal said, "the time to test his views in the crucible of argument before the full court has come."

In a brief to Texas' highest court for criminal matters, Mr. Katyal's law firm devoted a substantial passage to a direct attack on the death penalty, echoing Justice Breyer's dissent. Should the Texas court rule against Mr. Murphy, an appeal to the Supreme Court seems inevitable.

In the meantime, the Eighth Amendment Project is hard at work identifying other cases that could serve as vehicles to end the death penalty, ideally ones involving impulsive crimes, intellectual disability and claims of innocence. Among the cases it hopes to avoid are ones arising from killings of police officers, murders for hire and torture. Whatever the eventual case, the group wants to have dozens of friend-of-the-court briefs ready for filing.

Professor Dershowitz said a vigorous litigation strategy was the right approach.

"Justice Breyer would not have written this dissent if he did not think this was a good time to bring cases to the attention of the court," he said. "Now it's up to litigants to figure out the right case."

A version of this article appears in print on November 4, 2015, on page A1 of the New York edition with the headline: Death Penalty Foes Torn on When to Press Case.

92 S.Ct. 2726
Supreme Court of the United States
William Henry FURMAN, Petitioner,
v.
State of GEORGIA.
Lucious JACKSON, Jr., Petitioner,
v.
State of GEORGIA.
Elmer BRANCH, Petitioner,
v.
State of TEXAS.

Nos. 69-5003, 69-5030, 69-5031. | Argued
Jan. 17, 1972. | Decided June 29, 1972.

PER CURIAM.

Mr. Justice DOUGLAS, Mr. Justice BRENNAN, Mr. Justice STEWART, Mr. Justice WHITE, and Mr. Justice MARSHALL have filed separate opinions in support of the judgments.

THE CHIEF JUSTICE, Mr. Justice BLACKMUN, Mr. Justice POWELL, and Mr. Justice REHNQUIST have filed separate dissenting opinions.

Mr. Justice DOUGLAS, concurring.

In these three cases the death penalty was imposed, one of them for murder, and two for rape. In each the determination of whether the penalty should be death or a lighter punishment

was left by the State to the discretion of the judge or of the jury. In each of the three cases the trial was to a jury. They are here on petitions for certiorari which we granted limited to the question whether the imposition and execution of the death penalty constitute ‘cruel and unusual punishment’ within the meaning of the Eighth Amendment as applied to the States by the Fourteenth. I vote to vacate each judgment, believing that the exaction of the death penalty does violate the Eighth and Fourteenth Amendments.

* * * *

It has been assumed in our decisions that punishment by death is not cruel, unless the manner of execution can be said to be inhuman and barbarous. It is also said in our opinions that the proscription of cruel and unusual punishments ‘is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.’ A like statement was made in *Trop v. Dulles*, that the Eighth Amendment ‘must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’

The generality of a law inflicting capital punishment is one thing. What may be said of the validity of a law on the books and what may be done with the law in its application do, or may, lead to quite different conclusions.

It would seem to be incontestable that the death penalty inflicted on one defendant is ‘unusual’ if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.

There is evidence that the provision of the English Bill of Rights of 1689, from which the language of the Eighth Amendment was taken, was concerned primarily with selective or irregular application of harsh penalties and that its aim was to forbid arbitrary and discriminatory penalties of a severe nature:

....

The English Bill of Rights, enacted December 16, 1689, stated that 'excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' These were the words chosen for our Eighth Amendment. A like provision had been in Virginia's Constitution of 1776⁴ and in the constitutions of seven other States.⁵ The Northwest Ordinance, enacted under the Articles of Confederation, included a prohibition cruel and unusual punishments.⁶ But the debates of the First Congress on the Bill of Rights throw little light on its intended meaning. All that appears is the following:⁷

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

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

invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.'

The words 'cruel and unusual' certainly include penalties that are barbaric. But the words, at least when read in light of the English proscription against selective and irregular use of penalties, suggest that it is 'cruel and unusual' to apply the death penalty-or any other penalty-selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the board. . . .

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

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

The Court concluded: 'In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death

in capital cases is offensive to anything in the Constitution.’

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

....

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

* * * *

There is increasing recognition of the fact that the basic theme of equal protection is implicit in ‘cruel and unusual’ punishments. ‘A penalty . . . should be considered ‘unusually’ imposed if it is administered arbitrarily or discriminatorily.’ The same authors add that ‘(t)he extreme rarity with which applicable death penalty provisions are put to use raises a strong inference of arbitrariness.’ The President’s Commission on Law Enforcement and Administration of Justice recently concluded:

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

....

Jackson, a black, convicted of the rape of a white woman, was 21 years old. A court-appointed psychiatrist said that Jackson was of average education and average intelligence, that he was not an imbecile, or schizophrenic, or psychotic, that his traits were the product of environmental influences, and that he was competent to stand trial. Jackson had entered the house after the husband left for work. He held scissors against the neck of the wife, demanding money. She could find none and a struggle ensued for the scissors, a battle which she lost; and she was then raped, Jackson keeping the scissors pressed against her neck. While there did not appear to be any long-term traumatic impact on the victim, she was bruised and abraded in the struggle but was not hospitalized. Jackson was a convict who had escaped from a work gang in the area, a result of a three-year sentence for auto theft. He was at large for three days and during that time had committed several other offenses-burglary, auto theft, and assault and battery.

Furman, a black, killed a householder while seeking to enter the home at night. Furman shot the deceased through a closed door. He was 26 years old and had finished the sixth grade in school. Pending trial, he was committed to the Georgia Central State Hospital for a psychiatric examination on his plea of insanity tendered by court-appointed counsel. The superintendent reported that a unanimous staff diagnostic conference had concluded ‘that this patient should retain his present diagnosis of Mental Deficiency, Mild to Moderate, with Psychotic Episodes associated with Convulsive Disorder.’ The physicians agreed that ‘at present the patient is not psychotic, but he is not capable of cooperating with his counsel in the preparation of his defense’; and the staff believed ‘that he is in need of further psychiatric hospitalization and

treatment.’

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

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

He had previously been convicted of felony theft and found to be a borderline mental deficient and well below the average IQ of Texas prison inmates. He had the equivalent of five and a half years of grade school education. He had a ‘dull intelligence’ and was in the lowest fourth percentile of his class.

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

* * * *

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

In a Nation committed to equal protection of the laws there is no permissible ‘caste’ aspect¹⁸ of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position. In ancient Hindu law a Brahman was exempt from capital punishment,¹⁹ and under that law, ‘(g)enerally, in the law books, punishment increased in severity as social status diminished.’²⁰ We have, I fear, taken in practice the same position, partially as a result of making the death penalty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.

The high service rendered by the ‘cruel and

unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.

A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fall, as would a law that in terms said that blacks, those who never went beyond the fifth grade in school, those who made less than \$3,000 a year, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in terms provides the same.

Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments.

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. Such conceivably might be the fate of a mandatory death penalty, where equal or lesser sentences were imposed on the elite, a harsher one on the minorities or members of the lower castes. Whether a mandatory death penalty would otherwise be constitutional is a question I do not reach.

I concur in the judgments of the Court.

Mr. Justice BRENNAN, concurring.

The question presented in these cases is whether death is today a punishment for crime that is

'cruel and unusual' and consequently, by virtue of the Eighth and Fourteenth Amendments, beyond the power of the State to inflict.

Almost a century ago, this Court observed that '(d)ifficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted.' Less than 15 years ago, it was again noted that '(t)he exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court.' Those statements remain true today. The Cruel and Unusual Punishments Clause, like the other great clauses of the Constitution, is not susceptible of precise definition. Yet we know that the values and ideals it embodies are basic to our scheme of government. And we know also that the Clause imposes upon this Court the duty, when the issue is properly presented, to determine the constitutional validity of a challenged punishment, whatever that punishment may be. In these cases, '(t)hat issue confronts us, and the task of resolving it is inescapably ours.'

....

II

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

of the inquiry.

In *Trop v. Dulles*, it was said that ‘(t)he question is whether (a) penalty subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the (Clause).’ It was also said that a challenged punishment must be examined ‘in light of the basic prohibition against inhuman treatment’ embodied in the Clause. It was said, finally, that:

‘The basic concept underlying the (Clause) is nothing less than the dignity of man. While the State has the power to punish, the (Clause) stands to assure that this power be exercised within the limits of civilized standards.’

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

This formulation, of course, does not of itself yield principles for assessing the constitutional validity of particular punishments. Nevertheless, even though ‘(t)his Court has had little occasion to give precise content to the (Clause),’ there are principles recognized in our cases and inherent in the Clause sufficient to permit a judicial determination whether a challenged punishment comports with human dignity.

The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings. Pain, certainly, may be a factor in the judgment. The infliction of an

extremely severe punishment will often entail physical suffering. Yet the Framers also knew ‘that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.’ Even though ‘(t)here may be involved no physical mistreatment, no primitive torture,’ every mental pain may be inherent in the infliction of a particular punishment. * * *

More than the presence of pain, however, is comprehended in the judgment that the extreme severity of a punishment makes it degrading to the dignity of human beings. The barbaric punishments condemned by history, ‘punishments which inflict torture, such as the rack, the thumb-screw, the iron boot, the stretching of limbs, and the like,’ are, of course, ‘attended with acute pain and suffering.’ When we consider why they have been condemned, however, we realize that the pain involved is not the only reason. The true significance of these punishments is that they treat members of the human race as nonhumans, as objects to be toyed with and discarded. They are thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.

* * * Indeed, a punishment may be degrading to human dignity solely because it is a punishment. A State may not punish a person for being ‘mentally ill, or a leper, or . . . afflicted with a venereal disease,’ or for being addicted to narcotics.. To inflict punishment for having a disease is to treat the individual as a diseased thing rather than as a sick human being. That the punishment is not severe, ‘in the abstract,’ is irrelevant; ‘(e)ven one day in prison would be a cruel and unusual punishment for the ‘crime’ of

having a common cold.’ Finally, of course, a punishment may be degrading simply by reason of its enormity. A prime example is expatriation, a ‘punishment more primitive than torture,’ for it necessarily involves a denial by society of the individual’s existence as a member of the human community.

In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause—that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words ‘cruel and unusual punishments’ imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments.

* * * *

As *Wilkerson v. Utah* suggests, when a severe punishment is inflicted ‘in the great majority of cases’ in which it is legally available, there is little likelihood that the State is inflicting it arbitrarily. If, however, the infliction of a severe punishment is ‘something different from that which is generally done’ in such cases, there is a substantial likelihood that the State, contrary to the requirements of regularity and fairness embodied in the Clause, is inflicting the punishment arbitrarily. This principle is especially important today. There is scant danger, given the political processes ‘in an enlightened democracy such as ours,’ that extremely severe punishments will be widely

applied. The more significant function of the Clause, therefore, is to protect against the danger of their arbitrary infliction.

A third principle inherent in the Clause is that a severe punishment must not be unacceptable to contemporary society. Rejection by society, of course, is a strong indication that a severe punishment does not comport with human dignity. In applying this principle, however, we must make certain that the judicial determination is as objective as possible. Thus, . . . one factor that may be considered is the existence of the punishment in jurisdictions other than those before the Court. . . . [A]nother factor to be considered is the historic usage of the punishment. . . . The question under this principle, then, is whether there are objective indicators from which a court can conclude that contemporary society considers a severe punishment unacceptable. Accordingly, the judicial task is to review the history of a challenged punishment and to examine society’s present practices with respect to its use. Legislative authorization, of course, does not establish acceptance. The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use.

The final principle inherent in the Clause is that a severe punishment must not be excessive. A punishment is excessive under this principle if it is unnecessary: The infliction of a severe punishment by the State cannot comport with human dignity when it is nothing more than the pointless infliction of suffering. If there is a significantly less severe punishment adequate to achieve the purposes for which the punishment is inflicted, the punishment inflicted is unnecessary and therefore excessive.

....

Although the determination that a severe punishment is excessive may be grounded in a judgment that it is disproportionate to the crime,²⁴ the more significant basis is that the punishment serves no penal purpose more effectively than a less severe punishment. . . .

* * * The function of these [four] principles, after all, is simply to provide means by which a court can determine whether a challenged punishment comports with human dignity. They are, therefore, interrelated, and in most cases it will be their convergence that will justify the conclusion that a punishment is ‘cruel and unusual.’ The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.

III

The punishment challenged in these cases is death. Death, of course, is a ‘traditional’ punishment, one that ‘has been employed throughout our history,’ and its constitutional background is accordingly an appropriate subject of inquiry.

There is, first, a textual consideration raised by the Bill of Rights itself. The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is

entitled to certain procedural protections.²⁷ We can thus infer that the Framers recognized the existence of what was then a common punishment. We cannot, however, make the further inference that they intended to exempt this particular punishment from the express prohibition of the Cruel and Unusual Punishments Clause. Nor is there any indication in the debates on the Clause that a special exception was to be made for death. If anything, the indication is to the contrary, for Livermore specifically mentioned death as a candidate for future proscription under the Clause. . . .

There is also the consideration that this Court, * * * while ruling upon various methods of inflicting death, has assumed in the past that death was a constitutionally permissible punishment. Past assumptions, however, are not sufficient to limit the scope of our examination of this punishment today. The constitutionality of death itself under the Cruel and Unusual Punishments Clause is before this Court for the first time; we cannot avoid the question by recalling past cases that never directly considered it.

* * * I will analyze the punishment of death in terms of the principles set out above and the cumulative test to which they lead: It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment. Under these principles and this test, death is today a ‘cruel and unusual’ punishment.

Death is a unique punishment in the United States. In a society that so strongly affirms the sanctity of life, not surprisingly the common

view is that death is the ultimate sanction. This natural human feeling appears all about us. There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. No other punishment has been so continuously restricted, nor has any State yet abolished prisons, as some have abolished this punishment. And those States that still inflict death reserve it for the most heinous crimes. * *

The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering. Although our information is not conclusive, it appears that there is no method available that guarantees an immediate and painless death. Since the discontinuance of flogging as a constitutionally permissible punishment, , death remains as the only punishment that may involve the conscious infliction of physical pain. In addition, we know that mental pain is an inseparable part of our practice of punishing criminals by death, for the prospect of pending execution exacts a frightful toll during the inevitable long wait between the imposition of sentence and the actual infliction of death. As the California Supreme Court pointed out, 'the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture.' . . .

* * *

The unusual severity of death is manifested most clearly in its finality and enormity. . . . Death is truly an awesome punishment. The

calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. The contrast with the plight of a person punished by imprisonment is evident. An individual in prison does not lose 'the right to have rights.' A prisoner retains, for example, the constitutional rights to the free exercise of religion, to be free of cruel and unusual punishments, and to treatment as a 'person' for purposes of due process of law and the equal protection of the laws. A prisoner remains a member of the human family. Moreover, he retains the right of access to the courts. His punishment is not irrevocable. Apart from the common charge, grounded upon the recognition of human fallibility, that the punishment of death must inevitably be inflicted upon innocent men, we know that death has been the lot of men whose convictions were unconstitutionally secured in view of later, retroactively applied, holdings of this Court. The punishment itself may have been unconstitutionally inflicted, yet the finality of death precludes relief. An executed person has indeed 'lost the right to have rights.' As one 19th century proponent of punishing criminals by death declared, 'When a man is hung, there is an end of our relations with him. His execution is a way of saying, 'You are not fit for this world, take your chance elsewhere.'³⁹

In comparison to all other punishments today, then, the deliberate extinguishment of human life by the State is uniquely degrading to human dignity. I would not hesitate to hold, on that ground alone, that death is today a 'cruel and unusual' punishment, were it not that death is a punishment of longstanding usage and acceptance in this country. I therefore turn to the second principle-that the State may not arbitrarily inflict an unusually severe punishment.

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

There has been a steady decline in the infliction of this punishment in every decade since the 1930's, the earliest period for which accurate statistics are available. In the 1930's, executions averaged 167 per year; in the 1940's, the average was 128; in the 1950's, it was 72; and in the years 1960-1962, it was 48. There have been a total of 46 executions since then, 36 of them in 1963-1964. Yet our population and the number of capital crimes committed have increased greatly over the past four decades. The contemporary rarity of the infliction of this punishment is thus the end result of a long-continued decline. That rarity is plainly revealed by an examination of the years 1961-1970, the last 10-year period for which statistics are available. During that time, an average of 106 death sentences was imposed each year. Not nearly that number, however, could be carried out, for many were precluded by commutations to life or a term of years, transfers to mental institutions because of insanity, resentences to life or a term of years, grants of new trials and orders for resentencing, dismissals of indictments and reversals of convictions, and deaths by suicide and natural causes.....

When a country of over 200 million people inflicts an unusually severe punishment no more than 50 times a year, the inference is strong that the punishment is not being regularly and fairly applied. To dispel it would indeed require a clear showing of nonarbitrary infliction.

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

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

* * *When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment. No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily 'extreme.' Nor is the distinction credible in fact. If, for example, petitioner Furman or his crime illustrates the 'extreme,' then nearly all murderers and their murders are also 'extreme.' Furthermore, our procedures in death cases, rather than resulting in the selection

of 'extreme' cases for this punishment, actually sanction an arbitrary selection. * * *

Although it is difficult to imagine what further facts would be necessary in order to prove that death is, as my Brother STEWART puts it, 'wantonly and . . . freakishly' inflicted, I need not conclude that arbitrary infliction is patently obvious. I am not considering this punishment by the isolated light of one principle. The probability of arbitrariness is sufficiently substantial that it can be relied upon, in combination with the other principles, in reaching a judgment on the constitutionality of this punishment.

When there is a strong probability that an unusually severe and degrading punishment is being inflicted arbitrarily, we may well expect that society will disapprove of its infliction. I turn, therefore, to the third principle. An examination of the history and present operation of the American practice of punishing criminals by death reveals that this punishment has been almost totally rejected by contemporary society.

I cannot add to my Brother MARSHALL's comprehensive treatment of the English and American history of this punishment. I emphasize, however, one significant conclusion that emerges from that history. From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can,

without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, 'the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries.' It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.

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

all death sentences today are discretionarily imposed. Finally, it is significant that nine States no longer inflict the punishment of death under any circumstances, and five others have restricted it to extremely rare crimes.

Thus, although 'the death penalty has been employed throughout our history,' in fact the history of this punishment is one of successive restriction. What was once a common punishment has become, in the context of a continuing moral debate, increasingly rare. The evolution of this punishment evidences, not that it is an inevitable part of the American scene, but that it has proved progressively more troublesome to the national conscience. * * *

* * * The States point out that many legislatures authorize death as the punishment for certain crimes and that substantial segments of the public, as reflected in opinion polls and referendum votes, continue to support it. Yet the availability of this punishment through statutory authorization, as well as the polls and referenda, which amount simply to approval of that authorization, simply underscores the extent to which our society has in fact rejected this punishment. When an unusually severe punishment is authorized for wide-scale application but not, because of society's refusal, inflicted save in a few instances, the inference is compelling that there is a deep-seated reluctance to inflict it. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. The objective indicator of society's view of an unusually severe punishment is what society does with it, and today society will inflict death upon only a small sample of the eligible criminals. Rejection could hardly be more complete without becoming absolute. At

the very least, I must conclude that contemporary society views this punishment with substantial doubt.

The final principle to be considered is that an unusually severe and degrading punishment may not be excessive in view of the purposes for which it is inflicted. This principle, too, is related to the others. When there is a strong probability that the State is arbitrarily inflicting an unusually severe punishment that is subject to grave societal doubts, it is likely also that the punishment cannot be shown to be serving any penal purpose that could not be served equally well by some less severe punishment.

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

The more significant argument is that the threat of death prevents the commission of capital crimes because it deters potential criminals who would not be deterred by the threat of imprisonment. The argument is not based upon evidence that the threat of death is a superior deterrent. Indeed, as my Brother MARSHALL establishes, the available evidence uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment. The States argue, however, that they are entitled

to rely upon common human experience, and that experience, they say, supports the conclusion that death must be a more effective deterrent than any less severe punishment. Because people fear death the most, the argument runs, the threat of death must be the greatest deterrent.

It is important to focus upon the precise import of this argument. It is not denied that many, and probably most, capital crimes cannot be deterred by the threat of punishment. * * * The concern, then, is with a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment, which may well be for the rest of his life, but will not commit the crime knowing that the punishment is death. On the face of it, the assumption that such persons exist is implausible.

In any event, this argument cannot be appraised in the abstract. We are not presented with the theoretical question whether under any imaginable circumstances the threat of death might be a greater deterrent to the commission of capital crimes than the threat of imprisonment. We are concerned with the practice of punishing criminals by death as it exists in the United States today. Proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. * * * The risk of death is remote and improbable; in contrast, the risk of long-term imprisonment is near and great. In short, whatever the speculative validity of the assumption that the threat of death is a superior deterrent, there is no reason to believe that as currently administered the punishment of death is necessary to deter the commission of capital

crimes. * * *

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

The question, however, is not whether death serves these supposed purposes of punishment, but whether death serves them more effectively than imprisonment. * * *

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

Although it is difficult to believe that any State today wishes to proclaim adherence to 'naked vengeance,' the States claim, in reliance upon its statutory authorization, that death is the only fit punishment for capital crimes and that this retributive purpose justifies its infliction. * * * The claim that death is a just punishment necessarily refers to the existence of certain public beliefs. The claim must be that for capital crimes death alone comports with society's

notion of proper punishment. As administered today, however, the punishment of death cannot be justified as a necessary means of exacting retribution from criminals. When the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment. The asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few. As the history of the punishment of death in this country shows, our society wishes to prevent crime; we have no desire to kill criminals simply to get even with them.

In sum, the punishment of death is inconsistent with all four principles: Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

IV

When this country was founded, memories of the Stuart horrors were fresh and severe corporal punishments were common. Death was not then a unique punishment. The practice of punishing criminals by death, moreover, was widespread and by and large acceptable to society. Indeed, without developed prison systems, there was frequently no workable alternative. Since that time successive restrictions, imposed against the background of

a continuing moral controversy, have drastically curtailed the use of this punishment. Today death is a uniquely and unusually severe punishment. When examined by the principles applicable under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual,' and the States may no longer inflict it as a punishment for crimes. Rather than kill an arbitrary handful of criminals each year, the States will confine them in prison. 'The state thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting, severity, its repetition is prevented, and hope is given for the reformation of the criminal.'

I concur in the judgments of the Court.

Mr. Justice STEWART, concurring.

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eight and Fourteenth Amendments. Their case is a strong one. But I find it unnecessary to reach the ultimate question they would decide.

....

The constitutionality of capital punishment in

the abstract is not . . . before us in these cases. For the Georgia and Texas Legislatures have not provided that the death penalty shall be imposed upon all those who are found guilty of forcible rape. And the Georgia Legislature has not ordained that death shall be the automatic punishment for murder. In a word, neither State has made a legislative determination that forcible rape and murder can be deterred only by imposing the penalty of death upon all who perpetrate those offenses. As Mr. Justice White so tellingly puts it, the 'legislative will is not frustrated if the penalty is never imposed.'

Instead, the death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment. In the first place, it is clear that these sentences are 'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. In the second place, it is equally clear that these sentences are 'unusual' in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare. But I do not rest by conclusion upon these two propositions alone.

These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few

to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side. I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.

For these reasons I concur in the judgments of the Court.

Mr. Justice WHITE, concurring.

The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us. In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional per se or that there is no system of capital punishment that would comport with the Eighth Amendment. That question, ably argued by several of my Brethren, is not presented by these cases and need not be decided.

The narrower question to which I address myself concerns the constitutionality of capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case (that is, legislative will is not frustrated if the penalty is never imposed), but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much

against imposition and execution of the penalty with respect to any convicted murderer or rapist. It is in this context that we must consider whether the execution of these petitioners would violate the Eighth Amendment.

I begin with what I consider a near truism: that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked.

Most important, a major goal of the criminal law-to deter others by punishing the convicted criminal-would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. . . . [C]ommon sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little

contribution to deterring those crimes for which it may be exacted.

The imposition and execution of the death penalty are obviously cruel in the dictionary sense. But the penalty has not been considered cruel and unusual punishment in the constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. It is my view that it would, for its imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes. A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment.

....

I concur in the judgments of the Court.

Mr. Justice MARSHALL, concurring.

These three cases present the question whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution.¹

....

The criminal acts with which we are confronted are ugly, vicious, reprehensible acts. Their sheer brutality cannot and should not be minimized. But, we are not called upon to condone the penalized conduct; we are asked only to examine the penalty imposed on each of the petitioners and to determine whether or not it violates the Eighth Amendment. The question

then is not whether we condone rape or murder, for surely we do not; it is whether capital punishment is 'a punishment no longer consistent with our own self-respect' and, therefore, violative of the Eighth Amendment.

The elasticity of the constitutional provision under consideration presents dangers of too little or too much self-restraint.³ Hence, we must proceed with caution to answer the question presented.⁴ By first examining the historical derivation of the Eighth Amendment and the construction given it in the past by this Court, and then exploring the history and attributes of capital punishment in this country, we can answer the question presented with objectivity and a proper measure of self-restraint.

Candor is critical to such an inquiry. All relevant material must be marshaled and sorted and forthrightly examined. We must not only be precise as to the standards of judgment that we are utilizing, but exacting in examining the relevant material in light of those standards.

Candor compels me to confess that I am not oblivious to the fact that this is truly a matter of life and death. Not only does it involve the lives of these three petitioners, but those of the almost 600 other condemned men and women in this country currently awaiting execution. While this fact cannot affect our ultimate decision, it necessitates that the decision be free from any possibility of error.

....

The foregoing history demonstrates that capital punishment was carried from Europe to America but, once here, was tempered

considerably. At times in our history, strong abolitionist movements have existed. But, they have never been completely successful, as no more than one-quarter of the States of the Union have, at any one time, abolished the death penalty. They have had partial success, however, especially in reducing the number of capital crimes, replacing mandatory death sentences with jury discretion, and developing more humane methods of conducting executions.

This is where our historical foray leads. The question now to be faced is whether American society has reached a point where abolition is not dependent on a successful grass roots movement in particular jurisdictions, but is demanded by the Eighth Amendment. To answer this question, we must first examine whether or not the death penalty is today tantamount to excessive punishment.

V

In order to assess whether or not death is an excessive or unnecessary penalty, it is necessary to consider the reasons why a legislature might select it as punishment for one or more offenses, and examine whether less severe penalties would satisfy the legitimate legislative wants as well as capital punishment. If they would, then the death penalty is unnecessary cruelty, and, therefore, unconstitutional.

There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. These are considered seriatim below.

A. The concept of retribution is one of the most misunderstood in all of our criminal jurisprudence. The principal source of confusion derives from the fact that, in dealing with the concept, most people confuse the question ‘why do men in fact punish?’ with the question ‘what justifies men in punishing?’⁸⁴ Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law. Thus, it can correctly be said that breaking the law is the sine qua non of punishment, or, in other words, that we only tolerate punishment as it is imposed on one who deviates from the norm established by the criminal law.

The fact that the State may seek retribution against those who have broken its laws does not mean that retribution may then become the State’s sole end in punishing. Our jurisprudence has always accepted deterrence in general, deterrence of individual recidivism, isolation of dangerous persons, and rehabilitation as proper goals of punishment. Retaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society.

Punishment as retribution has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance.

. . . It is plain that the view of the Weems Court was that punishment for the sake of retribution was not permissible under the Eighth Amendment. This is the only view that the Court could have taken if the ‘cruel and unusual’ language were to be given any meaning. Retribution surely underlies the imposition of some punishment on one who

commits a criminal act. But, the fact that some punishment may be imposed does not mean that any punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would be definition be acceptable means for designating society’s moral approbation of a particular act. The ‘cruel and unusual’ language would thus be read out of the Constitution and the fears of Patrick Henry and the other Founding Fathers would become realities.

To preserve the integrity of the Eighth Amendment, the Court has consistently denigrated retribution as a permissible goal of punishment. It is undoubtedly correct that there is a demand for vengeance on the part of many persons in a community against one who is convicted of a particularly offensive act. At times a cry is heard that morality requires vengeance to evidence society’s abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves. The ‘cruel and unusual’ language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.

. . . .

B. The most hotly contested issue regarding capital punishment is whether it is better than life imprisonment as a deterrent to crime.

While the contrary position has been argued, it is my firm opinion that the death penalty is a more severe sanction than life imprisonment. . . .

There is no more complex problem than determining the deterrent efficacy of the death penalty. ‘Capital punishment has obviously failed as a deterrent when a murder is

committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged.' This is the nub of the problem and it is exacerbated by the paucity of useful data. The United States is more fortunate than most countries, however, in that it has what are generally considered to be the world's most reliable statistics.

...

In 1793 William Bradford studied the utility of the death penalty in Pennsylvania and found that it probably had no deterrent effect but that more evidence was needed. Edward Livingston reached a similar conclusion with respect to deterrence in 1833 upon completion of his study for Louisiana. Virtually every study that has since been undertaken has reached the same result.

In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect.

....

D. The three final purposes which may underlie utilization of a capital sanction-encouraging guilty pleas and confessions, eugenics, and reducing state expenditures-may be dealt with quickly. If the death penalty is used to encourage guilty pleas and thus to deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional. Its elimination would do little to impair the State's bargaining position in criminal cases, since life imprisonment remains a severe sanction which can be used as leverage for bargaining for pleas or confessions in exchange either for charges of lesser offenses or recommendations of leniency.

Moreover, to the extent that capital punishment is used to encourage confessions and guilty pleas, it is not being used for punishment purposes. A State that justifies capital punishment on its utility as part of the conviction process could not profess to rely on capital punishment as a deterrent. Such a State's system would be structured with twin goals only: obtaining guilty pleas and confessions and imposing imprisonment as the maximum sanction. Since life imprisonment is sufficient for bargaining purposes, the death penalty is excessive if used for the same purposes.

In light of the previous discussion on deterrence, any suggestions concerning the eugenic benefits of capital punishment are obviously meritless. . .

As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming that such an argument, if true, would support a capital sanction, it is simply incorrect. A disproportionate amount of money spent on prisons is attributable to death row. Condemned men are not productive members of the prison community, although they could be, and executions are expensive.¹³³ Appeals are often automatic, and courts admittedly spend more time with death cases.¹³⁴

...When all is said and done, there can be no doubt that it costs more to execute a man than to keep him in prison for life.¹⁴⁰

E. There is but one conclusion that can be drawn from all of this-i.e., the death penalty is an excessive and unnecessary punishment that violates the Eighth Amendment. The statistical evidence is not convincing beyond all doubt, but it is persuasive. It is not improper at this point to take judicial notice of the fact that for more than 200 years men have labored to demonstrate that capital punishment serves no purpose that life

imprisonment could not serve equally well. And they have done so with great success. Little, if any, evidence has been adduced to prove the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine, not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.

VI

In addition, even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.

In judging whether or not a given penalty is morally acceptable, most courts have said that the punishment is valid unless 'it shocks the conscience and sense of justice of the people.'

....

While a public opinion poll obviously is of some assistance in indicating public acceptance or rejection of a specific penalty, its utility cannot be very great. This is because whether or not a punishment is cruel and unusual depends, not on whether its mere mention 'shocks the conscience and sense of justice of the people,'

but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust, and unacceptable.

In other words, the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it to be so in the light of all information presently available.

...

It has often been noted that American citizens know almost nothing about capital punishment. Some of the conclusions arrived at in the preceding section and the supporting evidence would be critical to an informed judgment on the morality of the death penalty: e.g., that the death penalty is no more effective a deterrent than life imprisonment, that convicted murderers are rarely executed, but are usually sentenced to a term in prison; that convicted murderers usually are model prisoners, and that they almost always become lawabiding citizens upon their release from prison; that the costs of executing a capital offender exceed the costs of imprisoning him for life; that while in prison, a convict under sentence of death performs none of the useful functions that life prisoners perform; that no attempt is made in the sentencing process to ferret out likely recidivists for execution; and that the death penalty may actually stimulate criminal activity.

This information would almost surely convince the average citizen that the death penalty was unwise, but a problem arises as to whether it would convince him that the penalty was morally reprehensible. This problem arises from the fact that the public's desire for retribution,

even though this is a goal that the legislature cannot constitutionally pursue as its sole justification for capital punishment, might influence the citizenry's view of the morality of capital punishment. The solution to the problem lies in the fact that no one has ever seriously advanced retribution as a legitimate goal of our society. Defenses of capital punishment are always mounted on deterrent or other similar theories. This should not be surprising. It is the people of this country who have urged in the past that prisons rehabilitate as well as isolate offenders, and it is the people who have injected a sense of purpose into our penology. I cannot believe that at this stage in our history, the American people would ever knowingly support purposeless vengeance. Thus, I believe that the great mass of citizens would conclude on the basis of the material already considered that the death penalty is immoral and therefore unconstitutional.

But, if this information needs supplementing, I believe that the following facts would serve to convince even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system. Each of these facts is considered briefly below.

Regarding discrimination, it has been said that '(i)t is usually the poor, the illiterate, the underprivileged, the member of the minority group-the man who, because he is without means, and is defended by a court-appointed attorney-who becomes society's sacrificial lamb' Indeed, a look at the bare statistics regarding executions is enough to betray much

of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population. Studies indicate that while the higher rate of execution among Negroes is partially due to a higher rate of crime, there is evidence of racial discrimination. Racial or other discriminations should not be surprising. . . .

There is also overwhelming evidence that the death penalty is employed against men and not women. Only 32 women have been executed since 1930, while 3,827 men have met a similar fate.¹⁵³ It is difficult to understand why women have received such favored treatment since the purposes allegedly served by capital punishment seemingly are equally applicable to both sexes.

It also is evident that the burden of capital punishment falls upon the poor, the ignorant, and the under privileged members of society. It is the poor, and the members of minority groups who are least able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction that the wealthier, better-represented, just-as-guilty person can escape. So long as the capital sanction is used only against the forlorn, easily forgotten members of society, legislators are content to maintain the status quo, because change would draw attention to the problem and concern might develop. Ignorance is perpetuated and apathy soon becomes its mate, and we have today's situation.

Just as Americans know little about who is executed and why, they are unaware of the

potential dangers of executing an innocent man. Our 'beyond a reasonable doubt' burden of proof in criminal cases is intended to protect the innocent, but we know it is not foolproof. Various studies have shown that people whose innocence is later convincingly established are convicted and sentenced to death.¹⁵⁶

...

No matter how careful courts are, the possibility of perjured testimony, mistaken honest testimony, and human error remain all too real. We have no way of judging how many innocent persons have been executed but we can be certain that there were some. Whether there were many is an open question made difficult by the loss of those who were most knowledgeable about the crime for which they were convicted. Surely there will be more as long as capital punishment remains part of our penal law.

While it is difficult to ascertain with certainty the degree to which the death penalty is discriminatorily imposed or the number of innocent persons sentenced to die, there is one conclusion about the penalty that is universally accepted-i.e., it 'tends to distort the course of the criminal law.' As Mr. Justice Frankfurter said:

'I am strongly against capital punishment When life is at hazard in a trial, it sensationalizes the whole thing almost unwittingly; the effect on juries, the Bar, the public, the Judiciary, I regard as very bad. I think scientifically the claim of deterrence is not worth much. Whatever proof there may be in my judgment does not outweigh the social loss due to the inherent sensationalism of a trial for life.'

The deleterious effects of the death penalty are also felt otherwise than at trial. For example, its

very existence 'inevitably sabotages a social or institutional program of reformation.'¹⁶¹ In short '(t)he presence of the death penalty as the keystone of our penal system bedevils the administration of criminal justice all the way down the line and is the stumbling block in the path of general reform and of the treatment of crime and criminals.'

Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would, in my opinion, find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand.

VII

To arrive at the conclusion that the death penalty violates the Eighth Amendment, we have had to engage in a long and tedious journey. The amount of information that we have assembled and sorted is enormous. Yet, I firmly believe that we have not deviated in the slightest from the principles with which we began.

At a time in our history when the streets of the Nation's cities inspire fear and despair, rather than pride and hope, it is difficult to maintain objectivity and concern for our fellow citizens. But, the measure of a country's greatness is its ability to retain compassion in time of crisis. No nation in the recorded history of man has a greater tradition of revering justice and fair treatment for all its citizens in times of turmoil, confusion, and tension than ours. This is a country which stands tallest in troubled times, a country that clings to fundamental principles, cherishes its constitutional heritage, and rejects

simple solutions that compromise the values that lie at the roots of our democratic system.

In striking down capital punishment, this Court does not malign our system of government. On the contrary, it pays homage to it. Only in a free society could right triumph in difficult times, and could civilization record its magnificent advancement. In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute. We achieve ‘a major milestone in the

Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN, Mr. Justice POWELL, and Mr. Justice REHNQUIST join, dissenting.

At the outset it is important to note that only two members of the Court, Mr. Justice BRENNAN and Mr. Justice MARSHALL, have concluded that the Eighth Amendment prohibits capital punishment for all crimes and under all circumstances. Mr. Justice DOUGLAS has also determined that the death penalty contravenes the Eighth Amendment, although I do not read his opinion as necessarily requiring final abolition of the penalty. For the reasons set forth in Parts I-IV of this opinion, I conclude that the constitutional prohibition against ‘cruel and unusual punishments’ cannot be construed to bar the imposition of the punishment of death.

Mr. Justice STEWART and Mr. Justice WHITE have concluded that petitioners’ death sentences must be set aside because prevailing sentencing practices do not comply with the Eighth Amendment. For the reasons set forth in Part V of this opinion, I believe this approach fundamentally misconceives the nature of the Eighth Amendment guarantee and flies directly in the face of controlling authority of extremely

long road up from barbarism’¹⁶⁴ and join the approximately 70 other jurisdictions in the world which celebrate their regard for civilization and humanity by shunning capital punishment.

I concur in the judgments of the Court.

...

recent vintage.

I

It we were possessed of legislative power, I would either join with Mr. Justice BRENNAN and Mr. Justice MARSHALL or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes. Our constitutional inquiry, however, must be divorced from personal feelings as to the morality and efficacy of the death penalty, and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment. There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but, of all our fundamental guarantees, the ban on ‘cruel and unusual punishments’ is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today’s opinions reveal the haze that surrounds this constitutional command. Yet it is essential to our role as a court that we not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law.

Although the Eighth Amendment literally reads as prohibiting only those punishments that are both ‘cruel’ and ‘unusual,’ history compels the

conclusion that the Constitution prohibits all punishments of extreme and barbarous cruelty, regardless of how frequently or infrequently imposed.

The most persuasive analysis of Parliament's adoption of the English Bill of Rights of 1689—the unquestioned source of the Eighth Amendment wording—suggests that the prohibition against 'cruel and unusual punishments' was included therein out of aversion to severe punishments not legally authorized and not within the jurisdiction of the courts to impose. To the extent that the term 'unusual' had any importance in the English version, it was apparently intended as a reference to illegal punishments.²

From every indication, the Framers of the Eighth Amendment intended to give the phrase a meaning far different from that of its English precursor. The records of the debates in several of the state conventions called to ratify the 1789 draft Constitution submitted prior to the addition of the Bill of Rights show that the Framers' exclusive concern was the absence of any ban on tortures. The later inclusion of the 'cruel and unusual punishment' clause was in response to these objections. There was no discussion of the interrelationship of the terms 'cruel' and 'unusual,' and there is nothing in the debates supporting the inference that the Founding Fathers would have been receptive to torturous or excessively cruel punishments even if usual in character or authorized by law.

The cases decided under the Eighth Amendment are consistent with the tone of the ratifying debates. In *Wilkerson v. Utah*, this Court held that execution by shooting was not a prohibited mode of carrying out a sentence of death.

Speaking to the meaning of the Cruel and Unusual Punishments Clause, the Court stated, '(I)t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.'

The Court made no reference to the role of the term 'unusual' in the constitutional guarantee.

....

I do not suggest that the presence of the word 'unusual' in the Eighth Amendment is merely vestigial, having no relevance to the constitutionality of any punishment that might be devised. But where, as here, we consider a punishment well known to history, and clearly authorized by legislative enactment, it disregards the history of the Eighth Amendment and all the judicial comment that has followed to rely on the term 'unusual' as affecting the outcome of these cases. Instead, I view these cases as turning on the single question whether capital punishment is 'cruel' in the constitutional sense. The term 'unusual' cannot be read as limiting the ban on 'cruel' punishments or as somehow expanding the meaning of the term 'cruel.' For this reason I am unpersuaded by the facile argument that since capital punishment has always been cruel in the everyday sense of the word, and has become unusual due to decreased use, it is, therefore, now 'cruel and unusual.'

....

II

Counsel for petitioners properly concede that capital punishment was not impermissibly cruel

at the time of the adoption of the Eighth Amendment. Not only do the records of the debates indicate that the Founding Fathers were limited in their concern to the prevention of torture, but it is also clear from the language of the Constitution itself that there was no thought whatever of the elimination of capital punishment. The opening sentence of the Fifth Amendment is a guarantee that the death penalty not be imposed 'unless on a presentment or indictment of a Grand Jury.' The Double Jeopardy Clause of the Fifth Amendment is a prohibition against being 'twice put in jeopardy of life' for the same offense. Similarly, the Due Process Clause commands 'due process of law' before an accused can be 'deprived of life, liberty, or property.' Thus, the explicit language of the Constitution affirmatively acknowledges the legal power to impose capital punishment; it does not expressly or by implication acknowledge the legal power to impose any of the various punishments that have been banned as cruel since 1791. Since the Eighth Amendment was adopted on the same day in 1791 as the Fifth Amendment, it hardly needs more to establish that the death penalty was not 'cruel' in the constitutional sense at that time.

In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of capital punishment. In rejecting Eighth Amendment attacks on particular modes of execution, the Court has more than once implicitly denied that capital punishment is impermissibly 'cruel' in the constitutional sense. . . .

Nonetheless, the Court has now been asked to hold that a punishment clearly permissible under the Constitution at the time of its adoption and accepted as such by every member of the Court

until today, is suddenly so cruel as to be incompatible with the Eighth Amendment.

Before recognizing such an instant evolution in the law, it seems fair to ask what factors have changed that capital punishment should now be 'cruel' in the constitutional sense as it has not been in the past. It is apparent that there has been no change of constitutional significance in the nature of the punishment itself. Twentieth century modes of execution surely involve no greater physical suffering than the means employed at the time of the Eighth Amendment's adoption. And although a man awaiting execution must inevitably experience extraordinary mental anguish, no one suggests that this anguish is materially different from that experienced by condemned men in 1791, even though protracted appellate review processes have greatly increased the waiting time on 'death row.' To be sure, the ordeal of the condemned man may be thought cruel in the sense that all suffering is thought cruel. But if the Constitution proscribed every punishment producing severe emotional stress, then capital punishment would clearly have been impermissible in 1791.

However, the inquiry cannot end here. For reasons unrelated to any change in intrinsic cruelty, the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the Eighth Amendment. A punishment is inordinately cruel, in the sense we must deal with it in these cases, chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies a moral judgment. The standard itself remains the same, but its applicability must change as the basic mores of society change. This notion is not new

to Eight Amendment adjudication. In *Weems v. United States*, the Court referred with apparent approval to the opinion of the commentators that ‘(t)he clause of the Constitution . . . may be therefore progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice.’ Mr. Chief Justice Warren, writing the plurality opinion in *Trop v. Dulles*, *supra*, stated, ‘The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.’ Nevertheless, the Court up to now has never actually held that a punishment has become impermissibly cruel due to a shift in the weight of accepted social values; nor has the Court suggested judicially manageable criteria for measuring such a shift in moral consensus.

The Court’s quiescence in this area can be attributed to the fact that in a democratic society legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people. For this reason, early commentators suggested that the ‘cruel and unusual punishments’ clause was an unnecessary constitutional provision. As acknowledged in the principal brief for petitioners, ‘both in constitutional contemplation and in fact, it is the legislature, not the Court, which responds to public opinion and immediately reflects the society’s standards of decency.’ Accordingly, punishments such as branding and the cutting off of ears, which were commonplace at the time of the adoption of the Constitution, passed from the penal scene without judicial intervention because they became basically offensive to the people and the legislatures responded to this sentiment.

Beyond any doubt, if we were today called upon to review such punishments, we would find

them excessively cruel because we could say with complete assurance that contemporary society universally rejects such bizarre penalties. However, this speculation on the Court’s probable reaction to such punishments is not of itself significant. The critical fact is that this Court has never had to hold that a mode of punishment authorized by a domestic legislature was so cruel as to be fundamentally at odds with our basic notions of decency. Judicial findings of impermissible cruelty have been limited, for the most part, to offensive punishments devised without specific authority by prison officials, not by legislatures. The paucity of judicial decisions invalidating legislatively prescribed punishments is powerful evidence that in this country legislatures have in fact been responsive-albeit belatedly at times-to changes in social attitudes and moral values.

I do not suggest that the validity of legislatively authorized punishments presents no justiciable issue under the Eighth Amendment, but, rather, that the primacy of the legislative role narrowly confines the scope of judicial inquiry. Whether or not provable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default.

III

There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. It is not a punishment such as burning at the stake that everyone would ineffably find to be

repugnant to all civilized standards. Nor is it a punishment so roundly condemned that only a few aberrant legislatures have retained it on the statute books. Capital punishment is authorized by statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes. On four occasions in the last 11 years Congress has added to the list of federal crimes punishable by death. In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced.

One conceivable source of evidence that legislatures have abdicated their essentially barometric role with respect to community values would be public opinion polls, of which there have been many in the past decade addressed to the question of capital punishment. Without assessing the reliability of such polls, or intimating that any judicial reliance could ever be placed on them, it need only be noted that the reported results have shown nothing approximating the universal condemnation of capital punishment that might lead us to suspect that the legislatures in general have lost touch with current social values.

Counsel for petitioners rely on a different body of empirical evidence. They argue, in effect, that the number of cases in which the death penalty is imposed, as compared with the number of cases in which it is statutorily available, reflects a general revulsion toward the penalty that would lead to its repeal if only it were more generally and widely enforced. It cannot be gainsaid that by the choice of juries-and sometimes judges-the death penalty is imposed in far fewer than half the cases in which it is available. To go further and characterize the rate of imposition as 'freakishly rare,' as petitioners insist, is unwarranted hyperbole. And regardless

of its characterization, the rate of imposition does not impel the conclusion that capital punishment is now regarded as intolerably cruel or uncivilized.

It is argued that in those capital cases where juries have recommended mercy, they have given expression to civilized values and effectively renounced the legislative authorization for capital punishment. At the same time it is argued that where juries have made the awesome decision to send men to their deaths, they have acted arbitrarily and without sensitivity to prevailing standards of decency. This explanation for the infrequency of imposition of capital punishment is unsupported by known facts, and is inconsistent in principle with everything this Court has ever said about the functioning of juries in capital cases.

....

The responsibility of juries deciding capital cases in our system of justice was nowhere better described than in *Witherspoon v. Illinois*, supra:

'(A) jury that must choose between life imprisonment and capital punishment, can do little more-and must do nothing less-than express the conscience of the community on the ultimate question of life or death.'

'And one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system-a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society''

The selectivity of juries in imposing the punishment of death is properly viewed as a

refinement on, rather than a repudiation of, the statutory authorization for that penalty. Legislatures prescribe the categories of crimes for which the death penalty should be available, and, acting as 'the conscience of the community,' juries are entrusted to determine in individual cases that the ultimate punishment is warranted. Juries are undoubtedly influenced in this judgment by myriad factors. The motive or lack of motive of the perpetrator, the degree of injury or suffering of the victim or victims, and the degree of brutality in the commission of the crime would seem to be prominent among these factors. Given the general awareness that death is no longer a routine punishment for the crimes for which it is made available, it is hardly surprising that juries have been increasingly meticulous in their imposition of the penalty. But to assume from the mere fact of relative infrequency that only a random assortment of pariahs are sentenced to death, is to cast grave doubt on the basic integrity of our jury system.

It would, of course, be unrealistic to assume that juries have been perfectly consistent in choosing the cases where the death penalty is to be imposed, for no human institution performs with perfect consistency. There are doubtless prisoners on death row who would not be there had they been tried before a different jury or in a different State. In this sense their fate has been controlled by a fortuitous circumstance. However, this element of fortuity does not stand as an indictment either of the general functioning of juries in capital cases or of the integrity of jury decisions in individual cases. There is no empirical basis for concluding that juries have generally failed to discharge in good faith the responsibility described in Witherspoon—that of choosing between life and death in individual cases according to the dictates of community values.

The rate of imposition of death sentences falls far short of providing the requisite unambiguous evidence that the legislatures of 40 States and the Congress have turned their backs on current or evolving standards of decency in continuing to make the death penalty available. For, it selective imposition evidences a rejection of capital punishment in those cases where it is not imposed, it surely evidences a correlative affirmation of the penalty in those cases where it is imposed. Absent some clear indication that the continued imposition of the death penalty on a selective basis is violative of prevailing standards of civilized conduct, the Eighth Amendment cannot be said to interdict its use.

....

IV

Capital punishment has also been attacked as violative of the Eighth Amendment on the ground that it is not needed to achieve legitimate penal aims and is thus 'unnecessarily cruel.' As a pure policy matter, this approach has much to recommend it, but it seeks to give a dimension to the Eighth Amendment that it was never intended to have and promotes a line of inquiry that this Court has never before pursued.

....

By pursuing the necessity approach, it becomes even more apparent that it involves matters outside the purview of the Eighth Amendment. Two of the several aims of punishment are generally associated with capital punishment—retribution and deterrence. It is argued that retribution can be discounted because that, after all, is what the Eighth Amendment seeks to eliminate. There is no authority suggesting that the Eighth Amendment

was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes. Furthermore, responsible legal thinkers of widely varying persuasions have debated the sociological and philosophical aspects of the retribution question for generations, neither side being able to convince the other. It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose.

The less esoteric but no less controversial question is whether the death penalty acts as a superior deterrent. Those favoring abolition find no evidence that it does. Those favoring retention start from the intuitive notion that capital punishment should act as the most effective deterrent and note that there is no convincing evidence that it does not. Escape from this empirical stalemate is sought by placing the burden of proof on the States and concluding that they have failed to demonstrate that capital punishment is a more effective deterrent than life imprisonment. Numerous justifications have been advanced for shifting the burden, and they are not without their rhetorical appeal. However, these arguments are not descended from established constitutional principles, but are born of the urge to bypass an unresolved factual question. Comparative deterrence is not a matter that lends itself to precise measurement; to shift the burden to the States is to provide an illusory solution to an enormously complex problem. If it were proper to put the States to the test of demonstrating the deterrent value of capital punishment, we could just as well ask them to prove the need for life imprisonment or any other punishment. Yet I know of no convincing evidence that life

imprisonment is a more effective deterrent than 20 years' imprisonment, or even that a \$10 parking ticket is a more effective deterrent than a \$5 parking ticket. In fact, there are some who go so far as to challenge the notion that any punishments deter crime. If the States are unable to adduce convincing proof rebutting such assertions, does it then follow that all punishments are suspect as being 'cruel and unusual' within the meaning of the Constitution? On the contrary, I submit that the questions raised by the necessity approach are beyond the pale of judicial inquiry under the Eighth Amendment.

V

Today the Court has not ruled that capital punishment is per se violative of the Eighth Amendment; nor has it ruled that the punishment is barred for any particular class or classes of crimes. The substantially similar concurring opinions of Mr. Justice STEWART and Mr. Justice WHITE, which are necessary to support the judgment setting aside petitioners' sentences, stop short of reaching the ultimate question. The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions, is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past. This approach-not urged in oral arguments or briefs-misconceives the nature of the constitutional command against 'cruel and unusual punishments,' disregards controlling case law, and demands a rigidity in capital cases which, if possible of achievement, cannot be

regarded as a welcome change. Indeed the contrary seems to be the case.

As I have earlier stated, the Eighth Amendment forbids the imposition of punishments that are so cruel and inhumane as to violate society's standards of civilized conduct. The Amendment does not prohibit all punishments the States are unable to prove necessary to deter or control crime. The Amendment is not concerned with the process by which a State determines that a particular punishment is to be imposed in a particular case. And the Amendment most assuredly does not speak to the power of legislatures to confer sentencing discretion on juries, rather than to fix all sentences by statute.

The critical factor in the concurring opinions of both Mr. Justice STEWART and Mr. Justice WHITE is the infrequency with which the penalty is imposed. This factor is taken not as evidence of society's abhorrence of capital punishment-the inference that petitioners would have the Court draw-but as the earmark of a deteriorated system of sentencing. It is concluded that petitioners' sentences must be set aside, not because the punishment is impermissibly cruel, but because juries and judges have failed to exercise their sentencing discretion in acceptable fashion.

To be sure, there is a recitation cast in Eighth Amendment terms: petitioners' sentences are 'cruel' because they exceed that which the legislatures have deemed necessary for all cases; petitioners' sentences are 'unusual' because they exceed that which is imposed in most cases. This application of the words of the Eighth Amendment suggests that capital punishment can be made to satisfy Eighth Amendment values if its rate of imposition is somehow multiplied; it seemingly follows that

the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand. The implications of this approach are mildly ironical. For example, by this measure of the Eighth Amendment, the elimination of death-qualified juries in *Witherspoon v. Illinois*, can only be seen in retrospect as a setback to 'the evolving standards of decency that mark the progress of a maturing society.'

This novel formulation of Eighth Amendment principles-albeit necessary to satisfy the terms of our limited grant of certiorari-does not lie at the heart of these concurring opinions. The decisive grievance of the opinions-not translated into Eighth Amendment terms-is that the present system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern. This claim of arbitrariness is not only lacking in empirical support, but also it manifestly fails to establish that the death penalty is a 'cruel and unusual' punishment. The Eighth Amendment was included in the Bill of Rights to assure that certain types of punishments would never be imposed, not to channelize the sentencing process. The approach of these concurring opinions has no antecedent in the Eighth Amendment cases. It is essentially and exclusively a procedural due process argument.

This ground of decision is plainly foreclosed as well as misplaced. Only one year ago, in *McGautha v. California*, the Court upheld the prevailing system of sentencing in capital cases. The Court concluded:

'In light of history, experience, and the present limitations of human knowledge, we find it

quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.'

....

Although the Court's decision in McGautha was technically confined to the dictates of the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, it would be disingenuous to suggest that today's ruling has done anything less than overrule McGautha in the guise of an Eighth Amendment adjudication. It may be thought appropriate to subordinate principles of stare decisis where the subject is as sensitive as capital punishment and the stakes are so high, but these external considerations were no less weighty last year. This pattern of decisionmaking will do little to inspire confidence in the stability of the law.

While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made. Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed. If such standards can be devised or the crimes more meticulously defined, the result cannot be

detrimental. However, Mr. Justice Harlan's opinion for the Court in McGautha convincingly demonstrates that all past efforts 'to identify before the fact' the cases in which the penalty is to be imposed have been 'uniformly unsuccessful.' One problem is that 'the factors which determine whether the sentence of death is the appropriate penalty in particular cases are too complex to be compressed within the limits of a simple formula. As the Court stated in McGautha, '(t)he infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need.' But even assuming that suitable guidelines can be established, there is no assurance that sentencing patterns will change so long as juries are possessed of the power to determine the sentence or to bring in a verdict of guilt on a charge carrying a lesser sentence; juries have not been inhibited in the exercise of these powers in the past. Thus, unless the Court in McGautha misjudged the experience of history, there is little reason to believe that sentencing standards in any form will substantially alter the discretionary character of the prevailing system of sentencing in capital cases. That system may fall short of perfection, but it is yet to be shown that a different system would produce more satisfactory results.

Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition.

It seems remarkable to me that with our basic

trust in lay jurors as the keystone in our system of criminal justice, it should now be suggested that we take the most sensitive and important of all decisions away from them. I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution. The very infrequency of death penalties imposed by jurors attests their cautious and discriminating reservation of that penalty for the most extreme cases. . . . I do not see how this history can be ignored and how it can be suggested that the Eighth Amendment demands the elimination of the most sensitive feature of the sentencing system.

As a general matter, the evolution of penal concepts in this country has not been marked by great progress, nor have the results up to now been crowned with significant success. If anywhere in the whole spectrum of criminal justice fresh ideas deserve sober analysis, the sentencing and correctional area ranks high on the list. But it has been widely accepted that mandatory sentences for crimes do not best serve the ends of the criminal justice system. Now, after the long process of drawing away from the blind imposition of uniform sentences for every person convicted of a particular offense, we are confronted with an argument perhaps implying that only the legislatures may determine that a sentence of death is appropriate, without the intervening evaluation of jurors or judges. This approach threatens to turn back the progress of penal reform, which has moved until recently at too slow a rate to absorb significant setbacks.

Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress. While I cannot endorse the process of decisionmaking that has yielded today's result and the restraints that that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment. If today's opinions demonstrate nothing else, they starkly show that this is an area where legislatures can act far more effectively than courts.

The legislatures are free to eliminate capital punishment for specific crimes or to carve out limited exceptions to a general abolition of the penalty, without adherence to the conceptual strictures of the Eighth Amendment. * * * If legislatures come to doubt the efficacy of capital punishment, they can abolish it, either completely or on a selective basis. If new evidence persuades them that they have acted unwisely, they can reverse their field and reinstate the penalty to the extent it is thought warranted. An Eighth Amendment ruling by judges cannot be made with such flexibility or discriminating precision.

The world-wide trend toward limiting the use of capital punishment, a phenomenon to which we have been urged to give great weight, hardly points the way to a judicial solution in this country under a written Constitution. Rather, the

VI

change has generally come about through legislative action, often on a trial basis and with the retention of the penalty for certain limited classes of crimes. Virtually nowhere has change been wrought by so crude a tool as the Eighth Amendment. The complete and unconditional abolition of capital punishment in this country by judicial fiat would have undermined the careful progress of the legislative trend and foreclosed further inquiry on many as yet unanswered questions in this area.

Quite apart from the limitations of the Eighth Amendment itself, the preference for legislative action is justified by the inability of the courts to participate in the debate at the level where the controversy is focused. The case against capital punishment is not the product of legal dialectic, but rests primarily on factual claims, the truth of which cannot be tested by conventional judicial processes. The five opinions in support of the judgments differ in many respects, but they share a willingness to make sweeping factual assertions, unsupported by empirical data, concerning the manner of imposition and effectiveness of capital punishment in this country. Legislatures will have the opportunity to make a more penetrating study of these claims with the familiar and effective tools available to them as they are not to us.

The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits. The 'hydraulic pressure(s)'³² that Holmes spoke of as being generated by cases of great import have propelled the Court to go beyond the limits of judicial power, while fortunately leaving some room for legislative judgment.

Mr. Justice BLACKMUN, dissenting.

I join the respective opinions of THE CHIEF JUSTICE, Mr. Justice POWELL, and Mr. Justice REHNQUIST, and add only the following, somewhat personal, comments.

1. Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of 'reverence for life.' Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the respective petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these judgments.

2. Having lived for many years in a State that does not have the death penalty, that effectively abolished it in 1911, and that carried out its last execution on February 13, 1906³, capital punishment had never been a part of life for me. In my State, it just did not exist. So far as I can determine, the State, purely from a statistical deterrence point of view, was neither the worse nor the better for its abolition, for, as the concurring opinions observe, the statistics prove little, if anything. But the State and its citizens accepted the fact that the death penalty was not to be in the arsenal of possible punishments for any crime.

....

The Court has recognized, and I certainly subscribe to the proposition, that the Cruel and Unusual Punishments Clause ‘may acquire meaning as public opinion becomes enlightened by a humane justice.’

My problem, however, as I have indicated, is the suddenness of the Court’s perception of progress in the human attitude since decisions of only a short while ago.

To reverse the judgments in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts-perhaps the rationalizations-that this is the compassionate decision for a maturing society; that this is the moral and the ‘right’ thing to do; that thereby we convince ourselves that we are moving down the road toward human decency; that we value life even though that life has taken another or others or has grievously scarred another or others and their families; and that we are less barbaric than we were in 1879, or in 1890, or in 1910, or in 1947, or in 1958, or in 1963, or a year ago, in 1971, when Wilkerson, Kemmler, Weems, Francis, Trop, Rudolph, and McGautha were respectively decided.

This, for me, is good argument, and it makes some sense. But it is good argument and it makes sense only in a legislative and executive way and not as a judicial expedient. As I have said above, were I a legislator, I would do all I could to sponsor and to vote for legislation abolishing the death penalty. And were I the chief executive of a sovereign State, I would be sorely tempted to exercise executive clemency as Governor Rockefeller of Arkansas did recently just before he departed from office. There-on the Legislative Branch of the State or

Federal Government, and secondarily, on the Executive Branch-is where the authority and responsibility for this kind of action lies. The authority should not be taken over by the judiciary in the modern guise of an Eighth Amendment issue.

I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents. Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today’s decision reveals, they are almost irresistible.

. . .

Although personally I may rejoice at the Court’s result, I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement. I fear the Court has overstepped. It has sought and has achieved an end.

Mr. Justice POWELL, with whom THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice REHNQUIST join, dissenting.

The Court granted certiorari in these cases to consider whether the death penalty is any longer a permissible form of punishment. It is the judgment of five Justices that the death penalty, as customarily prescribed and implemented in this country today, offends the constitutional

prohibition against cruel and unusual punishments. The reasons for that judgment are stated in five separate opinions, expressing as many separate rationales. In my view, none of these opinions provides a constitutionally adequate foundation for the Court's decision.

....

Whatever uncertainties may hereafter surface, several of the consequences of today's decision are unmistakably clear. The decision is plainly one of the greatest importance. The Court's judgment removes the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country. At least for the present, it also bars the States and the Federal Government from seeking sentences of death for defendants awaiting trial on charges for which capital *punishment was heretofore a potential alternative. The happy event for these countable few constitutes, however, only the most visible consequence of this decision. Less measurable, but certainly of no less significance, is the shattering effect this collection of views has on the root principles of stare decisis, federalism, judicial restraint and-most importantly-separation of powers.

The Court rejects as not decisive the clearest evidence that the Framers of the Constitution and the authors of the Fourteenth Amendment believed that those documents posed no barrier to the death penalty. The Court also brushes aside an unbroken line of precedent reaffirming the heretofore virtually unquestioned constitutionality of capital punishment. Because of the pervasiveness of the constitutional ruling sought by petitioners, and accepted in varying degrees by five members of the Court, today's departure from established precedent invalidates

a staggering number of state and federal laws. . . .

In terms of the constitutional role of this Court, the impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic prerogative of the legislative branch-both state and federal-to protect the citizenry through the designation of penalties for prohibitable conduct. It is the very sort of judgment that the legislative branch is competent to make and for which the judiciary is ill-equipped. Throughout our history, Justices of this Court have emphasized the gravity of decisions invalidating legislative judgments, admonishing the nine men who sit on this bench of the duty of self-restraint, especially when called upon to apply the expansive due process and cruel and unusual punishment rubrics. I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent. . . .

Mr. Justice REHNQUIST, with whom THE CHIEF JUSTICE, Mr. Justice BLACKMUN, and Mr. Justice POWELL join, dissenting.

The Court's judgments today strike down a penalty that our Nation's legislators have thought necessary since our country was founded. My Brothers DOUGLAS, BRENNAN, and MARSHALL would at one fell swoop invalidate laws enacted by Congress and 40 of the 50 state legislatures, and would consign to the limbo of unconstitutionality under a single rubric penalties for offenses as varied and unique as murder, piracy, mutiny, highjacking, and desertion in the face of the enemy. By

Brothers STEWART and WHITE, asserting reliance on a more limited rationale—the reluctance of judges and juries actually to impose the death penalty in the majority of cases—join in the judgments in these cases. Whatever its precise rationale, today’s holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society. How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government?

The answer, of course, is found in Hamilton’s Federalist Paper No. 78 and in Chief Justice Marshall’s classic opinion in *Marbury v. Madison*. * * * Sovereignty resides ultimately in the people as a whole and, by adopting through their States a written Constitution for the Nation and subsequently adding amendments to that instrument, they have both granted certain powers to the National Government, and denied other powers to the National and the State Governments. Courts are exercising no more than the judicial function conferred upon them by Art. III of the Constitution when they assess, in a case before them, whether or not a particular legislative enactment is within the authority granted by the Constitution to the enacting body, and whether it runs afoul of some limitation placed by the Constitution on the authority of that body. For the theory is that the people themselves have spoken in the Constitution, and therefore its commands are superior to the commands of the legislature, which is merely an agent of the people.

The Founding Fathers thus wisely sought to have the best of both worlds, the undeniable

benefits of both democratic self-government and individual rights protected against possible excesses of that form of government.

....

Rigorous attention to the limits of this Court’s authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth, and justice upon others. Judges differ only in that they have the power, if not the authority, to enforce their desires. This is doubtless why nearly two centuries of judicial precedent from this Court counsel the sparing use of that power. The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been granted a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy or morality suddenly found unacceptable by a majority of this Court. . . .

A separate reason for deference to the legislative judgment is the consequence of human error on the part of the judiciary with respect to the constitutional issue before it. Human error there is bound to be, judges being men and women, and men and women being what they are. But an error in mistakenly sustaining the constitutionality of a particular enactment, while wrongfully depriving the individual of a right secured to him by the Constitution, nonetheless does so by simply letting stand a duly enacted law of a democratically chosen legislative body. The error resulting from a mistaken upholding of an individual’s constitutional claim against the validity of a legislative enactment is a good deal more serious. For the result in such a case is not

to leave standing a law duly enacted by a representative assembly, but to impose upon the Nation the judicial fiat of a majority of a court of judges whose connection with the popular will is remote at best.

The task of judging constitutional cases imposed

by Art. III cannot for this reason be avoided, but it must surely be approached with the deepest humility and genuine deference to legislative judgment. Today's decision to invalidate capital punishment is, I respectfully submit, significantly lacking in those attributes. . . .

96 S.Ct. 2909
Supreme Court of the United States

Troy Leon GREGG, Petitioner,
v.
State of GEORGIA.

No. 74-6257. | Argued March 31, 1976. |
Decided July 2, 1976. | Stay Granted July
22, 1976. | Rehearing Denied Oct. 4, 1976.

Opinion

Judgment of the Court, and opinion of Mr. Justice STEWART, Mr. Justice POWELL, and Mr. Justice STEVENS, announced by Mr. Justice STEWART.

The issue in this case is whether the imposition of the sentence of death for the crime of murder under the law of Georgia violates the Eighth and Fourteenth Amendments.

I

The petitioner, Troy Gregg, was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial was in two stages, a guilt stage and a sentencing stage. The evidence at the guilt trial established that on November 21, 1973, the petitioner and a traveling companion, Floyd Allen, while hitchhiking north in Florida were picked up by Fred Simmons and Bob Moore. Their car broke down, but they continued north after Simmons purchased another vehicle with some of the cash he was carrying. While still in Florida, they picked up another hitchhiker,

Dennis Weaver, who rode with them to Atlanta, where he was let out about 11 p. m. A short time later the four men interrupted their journey for a rest stop along the highway. The next morning the bodies of Simmons and Moore were discovered in a ditch nearby.

On November 23, after reading about the shootings in an Atlanta newspaper, Weaver communicated with the Gwinnett County police and related information concerning the journey with the victims, including a description of the car. The next afternoon, the petitioner and Allen, while in Simmons' car, were arrested in Asheville, N. C. In the search incident to the arrest a .25-caliber pistol, later shown to be that used to kill Simmons and Moore, was found in the petitioner's pocket. After receiving the warnings required by *Miranda v. Arizona*, 384 U.S. 436 (1966), and signing a written waiver of his rights, the petitioner signed a statement in which he admitted shooting, then robbing Simmons and Moore. He justified the slayings on grounds of self-defense. * * *

* * * *

* * * [At trial, t]he jury found the petitioner guilty of two counts of armed robbery and two counts of murder.

At the penalty stage, which took place before the same jury, neither the prosecutor nor the petitioner's lawyer offered any additional evidence. Both counsel, however, made lengthy arguments dealing generally with the propriety of capital punishment under the circumstances and with the weight of the evidence of guilt. The trial judge instructed the jury that it could recommend either a death sentence or a life prison sentence on each count. The judge further charged the jury that in determining what sentence was appropriate the jury was free to

consider the facts and circumstances, if any, presented by the parties in mitigation or aggravation.

Finally, the judge instructed the jury that it “would not be authorized to consider (imposing) the penalty of death” unless it first found beyond a reasonable doubt one of these aggravating circumstances:

“One That the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of (Simmons and Moore).

“Two That the offender committed the offense of murder for the purpose of receiving money and the automobile described in the indictment.

“Three The offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they (Sic) involved the depravity of (the) mind of the defendant.” Tr. 476-477.

Finding the first and second of these circumstances, the jury returned verdicts of death on each count.

* * * *

II

Before considering the issues presented it is necessary to understand the Georgia statutory scheme for the imposition of the death penalty. The Georgia statute, as amended after our decision in *Furman v. Georgia*, retains the death penalty for six categories of crime: murder,

kidnaping for ransom or where the victim is harmed, armed robbery rape, treason, and aircraft hijacking. The capital defendant’s guilt or innocence is determined in the traditional manner, either by a trial judge or a jury, in the first stage of a bifurcated trial.

If trial is by jury, the trial judge is required to charge lesser included offenses when they are supported by any view of the evidence. After a verdict, finding, or plea of guilty to a capital crime, a presentence hearing is conducted before whoever made the determination of guilt. The sentencing procedures are essentially the same in both bench and jury trials. At the hearing:

“(T)he judge (or jury) shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere of the defendant, or the absence of any prior conviction and pleas: Provided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge (or jury) shall also hear argument by the defendant or his counsel and the prosecuting attorney . . . regarding the punishment to be imposed.” s

The defendant is accorded substantial latitude as to the types of evidence that he may introduce. Evidence considered during the guilt stage may be considered during the sentencing stage without being resubmitted.

In the assessment of the appropriate sentence to be imposed the judge is also required to

consider or to include in his instructions to the jury “any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of (10) statutory aggravating circumstances which may be supported by the evidence . . .” The scope of the nonstatutory aggravating or mitigating circumstances is not delineated in the statute. Before a convicted defendant may be sentenced to death, however, except in cases of treason or aircraft hijacking, the jury, or the trial judge in cases tried without a jury, must find beyond a reasonable doubt one of the 10 aggravating circumstances specified in the statute. The sentence of death may be imposed only if the jury (or judge) finds one of the statutory aggravating circumstances and then elects to impose that sentence. If the verdict is death, the jury or judge must specify the aggravating circumstance(s) found. In jury cases, the trial judge is bound by the jury’s recommended sentence.

In addition to the conventional appellate process available in all criminal cases, provision is made for special expedited direct review by the Supreme Court of Georgia of the appropriateness of imposing the sentence of death in the particular case. The court is directed to consider “the punishment as well as any errors enumerated by way of appeal,” and to determine:

“(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or anything arbitrary factor, and

“(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the jury’s or judge’s finding of a statutory aggravating circumstance as enumerated in section 27-2534.1(b), and

“(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” s 27-2537 (Supp.1975).

If the court affirms a death sentence, it is required to include in its decision reference to similar cases that it has taken into consideration.

A transcript and complete record of the trial, as well as a separate report by the trial judge, are transmitted to the court for its use in reviewing the sentence. * * * In cases in which the death sentence is affirmed there remains the possibility of executive clemency.

III

We address initially the basic contention that the punishment of death for the crime of murder is, under all circumstances, “cruel and unusual” in violation of the Eighth and Fourteenth Amendments of the Constitution. In Part IV of this opinion, we will consider the sentence of death imposed under the Georgia statutes at issue in this case.

The Court on a number of occasions has both assumed and asserted the constitutionality of capital punishment. In several cases that assumption provided a necessary foundation for the decision, as the Court was asked to decide whether a particular method of carrying out a capital sentence would be allowed to stand under the Eighth Amendment. But until *Furman v. Georgia* (1972), the Court never confronted squarely the fundamental claim that the punishment of death always, regardless of the

enormity of the offense or the procedure followed in imposing the sentence, is cruel and unusual punishment in violation of the Constitution. Although this issue was presented and addressed in *Furman*, it was not resolved by the Court. Four Justices would have held that capital punishment is not unconstitutional *per se*; two Justices would have reached the opposite conclusion; and three Justices, while agreeing that the statutes then before the Court were invalid as applied, left open the question whether such punishment may ever be imposed. We now hold that the punishment of death does not invariably violate the Constitution.

A

* * * *

In the earliest cases raising Eighth Amendment claims, the Court focused on particular methods of execution to determine whether they were too cruel to pass constitutional muster. The constitutionality of the sentence of death itself was not at issue, and the criterion used to evaluate the mode of execution was its similarity to “torture” and other “barbarous” methods.

But the Court has not confined the prohibition embodied in the Eighth Amendment to “barbarous” methods that were generally outlawed in the 18th century. Instead, the Amendment has been interpreted in a flexible and dynamic manner. The Court early recognized that “a principle to be vital, must be capable of wider application than the mischief which gave it birth.” Thus the Clause forbidding “cruel and unusual” punishments “is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened

by a humane justice.”

....

The substantive limits imposed by the Eighth Amendment on what can be made criminal and punished were discussed in *Robinson v. California* (1962). The Court * * * held, in effect, that it is “cruel and unusual” to impose any punishment at all for the mere status of addiction. The cruelty in the abstract of the actual sentence imposed was irrelevant: “Even one day in prison would be a cruel and unusual punishment for the ‘crime’ of having a common cold * * *

It is clear from the foregoing precedents that the Eighth Amendment has not been regarded as a static concept. * * * Thus, an assessment of contemporary values concerning the infliction of a challenged sanction is relevant to the application of the Eighth Amendment. As we develop below more fully, this assessment does not call for a subjective judgment. It requires, rather, that we look to objective indicia that reflect the public attitude toward a given sanction.

But our cases also make clear that public perceptions of standards of decency with respect to criminal sanctions are not conclusive. A penalty also must accord with “the dignity of man,” which is the “basic concept underlying the Eighth Amendment.” This means, at least, that the punishment not be “excessive.” When a form of punishment in the abstract (in this case, whether capital punishment may ever be imposed as a sanction for murder) rather than in the particular (the propriety of death as a penalty to be applied to a specific defendant for a

specific crime) is under consideration, the 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..

B

Of course, the requirements of the Eighth Amendment must be applied with an awareness of the limited role to be played by the courts. This does not mean that judges have no role to play, for the Eighth Amendment is a restraint upon the exercise of legislative power.

...

But, while we have an obligation to insure that constitutional bounds are not overreached, we may not act as judges as we might as legislators.

...

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people.

This is true in part because the constitutional test is intertwined with an assessment of contemporary standards and the legislative judgment weighs heavily in ascertaining such standards. “(I)n a democratic society legislatures, not courts, are constituted to

respond to the will and consequently the moral values of the people.” The deference we owe to the decisions of the state legislatures under our federal system, is enhanced where the specification of punishments is concerned, for “these are peculiarly questions of legislative policy.” Caution is necessary lest this Court become, “under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.” A decision that a given punishment is impermissible under the Eighth Amendment cannot be reversed short of a constitutional amendment. The ability of the people to express their preference through the normal democratic processes, as well as through ballot referenda, is shut off. Revisions cannot be made in the light of further experience.

C

* * * We now consider specifically whether the sentence of death for the crime of murder is a *per se* violation of the Eighth and Fourteenth Amendments to the Constitution. We note first that history and precedent strongly support a negative answer to this question.

....

Four years ago, the petitioners in *Furman* and its companion cases predicated their argument primarily upon the asserted proposition that standards of decency had evolved to the point where capital punishment no longer could be tolerated. The petitioners in those cases said, in effect, that the evolutionary process had come to an end, and that standards of decency required that the Eighth Amendment be construed finally as prohibiting capital punishment for any crime regardless of its depravity and impact on society. This view was accepted by two Justices.

Three other Justices were unwilling to go so far; focusing on the procedures by which convicted defendants were selected for the death penalty rather than on the actual punishment inflicted, they joined in the conclusion that the statutes before the Court were constitutionally invalid. The petitioners in the capital cases before the Court today renew the “standards of decency” argument, but developments during the four years since Furman have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society’s endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. These recently adopted statutes have attempted to address the concerns expressed by the Court in Furman. Primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory for specified crimes. But all of the post-Furman Statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people.

....

It may be true that evolving standards have

influenced juries in recent decades to be more discriminating in imposing the sentence of death. But the relative infrequency of jury verdicts imposing the death sentence does not indicate rejection of capital punishment *Per se*. Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases. Indeed, the actions of juries in many States since Furman are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since Furman,²⁷ and by the end of March 1976, more than 460 persons were subject to death sentences.

As we have seen, however, the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society. The Court also must ask whether it comports with the basic concept of human dignity at the core of the Amendment. Although we cannot “invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology,” the sanction imposed cannot be so totally without penological justification that it results in the gratuitous infliction of suffering.

The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.

In part, capital punishment is an expression of society’s moral outrage at particularly offensive conduct. This function may be unappealing to many, but it is essential in an ordered society that asks its citizens to rely on legal processes rather than self-help to vindicate their wrongs.

“The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they ‘deserve,’ then there are sown the seeds of anarchy of self-help, vigilante justice, and lynch law.”

“Retribution is no longer the dominant objective of the criminal law,” but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive. . . .

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of

death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.³⁴

The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts. Indeed, many of the post-Furman statutes reflect just such a responsible effort to define those crimes and those criminals for which capital punishment is most probably an effective deterrent.

In sum, we cannot say that the judgment of the Georgia Legislature that capital punishment may be necessary in some cases is clearly wrong. Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Finally, we must consider whether the punishment of death is disproportionate in relation to the crime for which it is imposed. There is no question that death as a punishment is unique in its severity and irrevocability. But we are concerned here only with the imposition of capital punishment for the crime of murder, and when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is

an extreme sanction, suitable to the most extreme of crimes.

We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.

IV

We now consider whether Georgia may impose the death penalty on the petitioner in this case.

A

While *Furman* did not hold that the infliction of the death penalty *Per se* violates the Constitution's ban on cruel and unusual punishments, it did recognize that the penalty of death is different in kind from any other punishment imposed under our system of criminal justice. Because of the uniqueness of the death penalty, *Furman* held that it could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner. * * * *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

It is certainly not a novel proposition that discretion in the area of sentencing be exercised

in an informed manner. We have long recognized that "(f)or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender." Otherwise, "the system cannot function in a consistent and a rational manner."

The cited studies assumed that the trial judge would be the sentencing authority. * * * Jury sentencing has been considered desirable in capital cases in order "to maintain a link between contemporary community values and the penal system a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.' " But it creates special problems. Much of the information that is relevant to the sentencing decision may have no relevance to the question of guilt, or may even be extremely prejudicial to a fair determination of that question.⁴⁰ This problem, however, is scarcely insurmountable. Those who have studied the question suggest that a bifurcated procedure one in which the question of sentence is not considered until the determination of guilt has been made is the best answer. . . .

. When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.⁴¹

But the provision of relevant information under fair procedural rules is not alone sufficient to guarantee that the information will be properly used in the imposition of punishment, especially if sentencing is performed by a jury. Since the

members of a jury will have had little, if any, previous experience in sentencing, they are unlikely to be skilled in dealing with the information they are given. To the extent that this problem is inherent in jury sentencing, it may not be totally correctible. It seems clear, however, that the problem will be alleviated if the jury is given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision.

The idea that a jury should be given guidance in its decisionmaking is also hardly a novel proposition. Juries are invariably given careful instructions on the law and how to apply it before they are authorized to decide the merits of a lawsuit. It would be virtually unthinkable to follow any other course in a legal system that has traditionally operated by following prior precedents and fixed rules of law. * * *

While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to

ensure that death sentences are not imposed capriciously or in a freakish manner.

In summary, the concerns expressed in Furman that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

We do not intend to suggest that only the above-described procedures would be permissible under Furman or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of Furman, for each distinct system must be examined on an individual basis. Rather, we have embarked upon this general exposition to make clear that it is possible to construct capital-sentencing systems capable of meeting Furman's constitutional concerns.

B

We now turn to consideration of the constitutionality of Georgia's capital-sentencing procedures. * * *

Georgia * * * [narrowed] the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed.⁴⁸ In addition, the jury is authorized to consider any other appropriate

aggravating or mitigating circumstances. The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court, but it must find a *statutory* aggravating circumstance before recommending a sentence of death.

These procedures require the jury to consider the circumstances of the crime and the criminal before it recommends sentence. No longer can a Georgia jury do as Furman's jury did: reach a finding of the defendant's guilt and then, without guidance or direction, decide whether he should live or die. Instead, the jury's attention is directed to the specific circumstances of the crime: Was it committed in the course of another capital felony? Was it committed for money? Was it committed upon a peace officer or judicial officer? Was it committed in a particularly heinous way or in a manner that endangered the lives of many persons? In addition, the jury's attention is focused on the characteristics of the person who committed the crime: Does he have a record of prior convictions for capital offenses? Are there any special facts about this defendant that mitigate against imposing capital punishment (E. g., his youth, the extent of his cooperation with the police, his emotional state at the time of the crime). As a result, while some jury discretion still exists, "the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application."

As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or

prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.

In short, Georgia's new sentencing procedures require as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant. Moreover, to guard further against a situation comparable to that presented in Furman, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face these procedures seem to satisfy the concerns of Furman. No longer should there be "no meaningful basis for distinguishing the few cases in which (the death penalty) is imposed from the many cases in which it is not."

The petitioner contends, however, that the changes in the Georgia sentencing procedures are only cosmetic, that the arbitrariness and capriciousness condemned by Furman continue to exist in Georgia both in traditional practices that still remain and in the new sentencing procedures adopted in response to Furman.

1

First, the petitioner focuses on the opportunities for discretionary action that are inherent in the processing of any murder case under Georgia law. He notes that the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them. Further, at the trial the jury may choose to convict a

defendant of a lesser included offense rather than find him guilty of a crime punishable by death, even if the evidence would support a capital verdict. And finally, a defendant who is convicted and sentenced to die may have his sentence commuted by the Governor of the State and the Georgia Board of Pardons and Paroles.

* * * Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. Furman held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

The petitioner further contends that the capital-sentencing procedures adopted by Georgia in response to Furman do not eliminate the dangers of arbitrariness and caprice in jury sentencing that were held in Furman to be violative of the Eighth and Fourteenth Amendments. He claims that the statute is so broad and vague as to leave juries free to act as arbitrarily and capriciously as they wish in deciding whether to impose the death penalty. While there is no claim that the jury in this case relied upon a vague or overbroad provision to establish the existence of a statutory aggravating circumstance, the petitioner looks to the sentencing system as a whole (as the Court did in Furman and we do today) and argues that it fails to reduce sufficiently the risk of arbitrary infliction of death sentences. Specifically, Gregg urges that the statutory aggravating circumstances are too broad and too vague, that the sentencing procedure allows for arbitrary

grants of mercy, and that the scope of the evidence and argument that can be considered at the presentence hearing is too wide.

The petitioner attacks the seventh statutory aggravating circumstance, which authorizes imposition of the death penalty if the murder was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim,” contending that it is so broad that capital punishment could be imposed in any murder case. It is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction. In only one case has it upheld a jury’s decision to sentence a defendant to death when the only statutory aggravating circumstance found was that of the seventh, and that homicide was a horrifying torture-murder.

....

The petitioner next argues that the requirements of Furman are not met here because the jury has the power to decline to impose the death penalty even if it finds that one or more statutory aggravating circumstances are present in the case. This contention misinterprets Furman. Moreover, it ignores the role of the Supreme Court of Georgia which reviews each death sentence to determine whether it is proportional to other sentences imposed for similar crimes. Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not

create a substantial risk of arbitrariness or caprice.

The petitioner objects, finally, to the wide scope of evidence and argument allowed at presentence hearings. We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far-ranging argument. So long as the evidence introduced and the arguments made at the presentence hearing do not prejudice a defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

3

Finally, the Georgia statute * * * require[s] that the State Supreme Court review every death sentence to determine whether it was imposed under the influence of passion, prejudice, or any other arbitrary factor, whether the evidence supports the findings of a statutory aggravating circumstance, and “(w)hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. In performing a sentence-review function, the Georgia court has held that “if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts it will be set aside as excessive.” The court on another occasion stated that “we view it to be our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally”

It is apparent that the Supreme Court of Georgia has taken its review responsibilities seriously. In *Coley*, it held that “(t)he prior cases indicate that the past practice among juries faced with similar factual situations and like aggravating circumstances has been to impose only the sentence of life imprisonment for the offense of rape, rather than death.” It thereupon reduced *Coley*’s sentence from death to life imprisonment. Similarly, although armed robbery is a capital offense under Georgia law, the Georgia court concluded that the death sentences imposed in this case for that crime were “unusual in that they are rarely imposed for (armed robbery). Thus, under the test provided by statute, . . . they must be considered to be excessive or disproportionate to the penalties imposed in similar cases.” The court therefore vacated Gregg’s death sentences for armed robbery and has followed a similar course in every other armed robbery death penalty case to come before it.

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.

V

The basic concern of *Furman* centered on those defendants who were being condemned to death capriciously and arbitrarily. Under the

procedures before the Court in that case, sentencing authorities were not directed to give attention to the nature or circumstances of the crime committed or to the character or record of the defendant. Left unguided, juries imposed the death sentence in a way that could only be called freakish. The new Georgia sentencing procedures, by contrast, focus the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant. While the jury is permitted to consider any aggravating or mitigating circumstances, it must find and identify at least one statutory aggravating factor before it may impose a penalty of death. In this way the jury's discretion is channeled. No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here.

For the reasons expressed in this opinion, we hold that the statutory system under which Gregg was sentenced to death does not violate the Constitution. Accordingly, the judgment of the Georgia Supreme Court is affirmed.

It is so ordered.

Mr. Justice WHITE, with whom THE CHIEF JUSTICE and Mr. Justice REHNQUIST join,

* * * The issue in this case is whether the death penalty imposed for murder on petitioner Gregg under the new Georgia statutory scheme may constitutionally be carried out. I agree that it may.

....

Petitioner also argues that decisions made by the prosecutor either in negotiating a plea to some lesser offense than capital murder or in simply declining to charge capital murder are standardless and will inexorably result in the wanton and freakish imposition of the penalty condemned by the judgment in *Furman*. I address this point separately cause the cases in which no capital offense is charged escape the view of the Georgia Supreme Court and are not considered by it in determining whether a particular sentence is excessive or disproportionate.

Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the

prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.

Petitioner's argument that there is an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment a lesser penalty or are acquitted or never charged seems to be in final analysis an indictment of our entire system of justice. Petitioner has argued in effect that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law. Imposition of the death penalty is surely an awesome responsibility for any system of justice and those who participate in it. Mistakes will be made and discriminations will occur which will be difficult to explain. However, one of society's most basic tasks is that of protecting the lives of its citizens and one of the most basic ways in which it achieves the task is through criminal laws against murder. I decline to interfere with the manner in which Georgia has chosen to enforce such laws on what is simply an assertion of lack of faith in the ability of the system of justice to operate in a fundamentally

fair manner.

IV

For the reasons stated in dissent in *Roberts v. Louisiana*, , neither can I agree with the petitioner's other basic argument that the death penalty, however imposed and for whatever crime, is cruel and unusual punishment.

I therefore concur in the judgment of affirmance.

Statement of THE CHIEF JUSTICE and Mr. Justice REHNQUIST:

We concur in the judgment and join the opinion of Mr. Justice WHITE agreeing with its analysis that Georgia's system of capital punishment comports with the Court's holding in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Mr. Justice BLACKMUN, concurring in the judgment.

I concur in the judgment.

All Citations

428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859

I

125 S.Ct. 1183
Supreme Court of the United States
Donald P. ROPER, Superintendent,
Potosi Correctional Center,
Petitioner,
v.
Christopher SIMMONS.

No. 03–633. | Argued Oct. 13, 2004. |
Decided March 1, 2005.

KENNEDY, J., delivered the opinion of the Court, in which STEVENS, SOUTER, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a concurring opinion, in which GINSBURG, J., joined, *post*, p. 1205. O’CONNOR, J., filed a dissenting opinion, *post*, p. 1206. SCALIA, J., filed a dissenting opinion, in which REHNQUIST, C.J., and THOMAS, J., joined, *post*, p. 1217.

Opinion

Justice KENNEDY delivered the opinion of the Court.

This case requires us to address, for the second time in a decade and a half, whether it is permissible under the Eighth and Fourteenth Amendments to the Constitution of the United States to execute a juvenile offender who was older than 15 but younger than 18 when he committed a capital crime.* * *

At the age of 17, when he was still a junior in high school, Christopher Simmons, the respondent here, committed murder. About nine months later, after he had turned 18, he was tried and sentenced to death. There is little doubt that Simmons was the instigator of the crime. Before its commission Simmons said he wanted to murder someone. In chilling, callous terms he talked about his plan, discussing it for the most part with two friends, Charles Benjamin and John Tessmer, then aged 15 and 16 respectively. Simmons proposed to commit burglary and murder by breaking and entering, tying up a victim, and throwing the victim off a bridge. Simmons assured his friends they could “get away with it” because they were minors.

* * * Simmons and Benjamin entered the home of the victim, Shirley Crook, after reaching through an open window and unlocking the back door.* * *

Using duct tape to cover her eyes and mouth and bind her hands, the two perpetrators put Mrs. Crook in her minivan and drove to a state park. They reinforced the bindings, covered her head with a towel, and walked her to a railroad trestle spanning the Meramec River. There they tied her hands and feet together with electrical wire, wrapped her whole face in duct tape and threw her from the bridge, drowning her in the waters below.

* * * *

The next day, after receiving information of Simmons' involvement, police arrested him at his high school and took him to the police station in Fenton, Missouri. They read him his *Miranda* rights. Simmons waived his right to an attorney and agreed to answer questions. After less than two hours of interrogation, Simmons confessed to the murder and agreed to perform a videotaped reenactment at the crime scene.

* * * [Simmons] was tried as an adult. At trial the State introduced Simmons' confession and the videotaped reenactment of the crime, along with testimony that Simmons discussed the crime in advance and bragged about it later. The defense called no witnesses in the guilt phase. The jury having returned a verdict of murder, the trial proceeded to the penalty phase.

* * * *

During closing arguments, both the prosecutor and defense counsel addressed Simmons' age, which the trial judge had instructed the jurors they could consider as a mitigating factor. Defense counsel reminded the jurors that juveniles of Simmons' age cannot drink, serve on juries, or even see certain movies, because "the legislatures have wisely decided that individuals of a certain age aren't responsible enough."

Defense counsel argued that Simmons' age should make "a huge difference to [the jurors] in deciding just exactly what sort of punishment to make." In rebuttal, the prosecutor gave the following response: "Age, he says. Think about age. Seventeen years old. Isn't that scary? Doesn't that scare you? Mitigating? Quite the contrary I submit. Quite the contrary."

The jury recommended the death penalty after finding the State had proved each of the three aggravating factors submitted to it. Accepting the jury's recommendation, the trial judge imposed the death penalty.

* * * *

[After] this Court [decided *Atkins v. Virginia*, 536 U.S. 304 (2002)] Simmons filed a new petition for state postconviction relief, arguing that the reasoning of *Atkins* established that the Constitution prohibits the execution of a juvenile who was under 18 when the crime was committed.

The Missouri Supreme Court agreed.

* * * *

We granted certiorari, and now affirm.

II

* * * As the Court explained in *Atkins*, the Eighth Amendment guarantees individuals the right not to be subjected to excessive sanctions. The right flows

from the basic “ ‘precept of justice that punishment for crime should be graduated and proportioned to [the] offense.’ ” * * * By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons.

* * * *

[I]n *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court, over a dissenting opinion joined by four Justices, referred to contemporary standards of decency in this country and concluded the Eighth and Fourteenth Amendments did not proscribe the execution of juvenile offenders over 15 but under 18. The Court noted that 22 of the 37 death penalty States permitted the death penalty for 16-year-old offenders, and, among these 37 States, 25 permitted it for 17-year-old offenders. These numbers, in the Court’s view, indicated there was no national consensus “sufficient to label a particular punishment cruel and unusual.” A plurality of the Court also “emphatically reject [ed]” the suggestion that the Court should bring its own judgment to bear on the acceptability of the juvenile death penalty. (opinion of SCALIA, J., joined by REHNQUIST, C.J., and White and KENNEDY, JJ.) * * *

The same day the Court decided *Stanford*, it held that the Eighth Amendment did not mandate a categorical exemption from the death

penalty for the mentally retarded. *Penry v. Lynaugh*, 492 U.S. 302 (1989). In reaching this conclusion it stressed that only two States had enacted laws banning the imposition of the death penalty on a mentally retarded person convicted of a capital offense. * * *

Three Terms ago the subject was reconsidered in *Atkins*. We held that standards of decency have evolved since *Penry* and now demonstrate that the execution of the mentally retarded is cruel and unusual punishment. * * *

* * * The *Atkins* Court neither repeated nor relied upon the statement in *Stanford* that the Court’s independent judgment has no bearing on the acceptability of a particular punishment under the Eighth Amendment. Instead we returned to the rule, established in decisions predating *Stanford*, that “ ‘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.’ ” Mental retardation, the Court said, diminishes personal culpability even if the offender can distinguish right from wrong. The impairments of mentally retarded offenders make it less defensible to impose the death penalty as retribution for past crimes and less likely that the death penalty will have a real deterrent effect. Based on these considerations and on the finding of national consensus against executing the mentally retarded, the Court ruled that the death penalty

constitutes an excessive sanction for the entire category of mentally retarded offenders, and that the Eighth Amendment “ ‘places a substantive restriction on the State’s power to take the life’ of a mentally retarded offender.”

Just as the *Atkins* Court reconsidered the issue decided in *Penry*, we now reconsider the issue decided in *Stanford*.* * *

III

A

* * * When *Atkins* was decided, 30 States prohibited the death penalty for the mentally retarded. This number comprised 12 that had abandoned the death penalty altogether, and 18 that maintained it but excluded the mentally retarded from its reach. By a similar calculation in this case, 30 States prohibit the juvenile death penalty, comprising 12 that have rejected the death penalty altogether and 18 that maintain it but, by express provision or judicial interpretation, exclude juveniles from its reach. See Appendix A, *infra*. *Atkins* emphasized that even in the 20 States without formal prohibition, the practice of executing the mentally retarded was infrequent. * * * In the present case, too, even in the 20 States without a formal prohibition on executing juveniles, the practice is infrequent. * * * In December 2003 the Governor of Kentucky decided to spare the life of Kevin Stanford, and

commuted his sentence to one of life imprisonment without parole, with the declaration that “ ‘[w]e ought not be executing people who, legally, were children.’ ” By this act the Governor ensured Kentucky would not add itself to the list of States that have executed juveniles within the last 10 years even by the execution of the very defendant whose death sentence the Court had upheld in *Stanford v. Kentucky*.

* * * *

* * * The number of States that have abandoned capital punishment for juvenile offenders since *Stanford* is smaller than the number of States that abandoned capital punishment for the mentally retarded after *Penry*; yet we think the same consistency of direction of change has been demonstrated. Since *Stanford*, no State that previously prohibited capital punishment for juveniles has reinstated it. * * * Any difference between this case and *Atkins* with respect to the pace of abolition is thus counterbalanced by the consistent direction of the change.

The slower pace of abolition of the juvenile death penalty over the past 15 years, moreover, may have a simple explanation. When we heard *Penry*, only two death penalty States had already prohibited the execution of the mentally retarded. When we heard *Stanford*, by contrast, 12 death penalty States had already prohibited the execution of any juvenile under 18, and 15 had prohibited

the execution of any juvenile under 17. If anything, this shows that the impropriety of executing juveniles between 16 and 18 years of age gained wide recognition earlier than the impropriety of executing the mentally retarded. * * *

* * * *

* * * [T]he objective indicia of consensus in this case—the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice—provide sufficient evidence that today our society views juveniles, in the words *Atkins* used respecting the mentally retarded, as “categorically less culpable than the average criminal.”

B

A majority of States have rejected the imposition of the death penalty on juvenile offenders under 18, and we now hold this is required by the Eighth Amendment.

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit “a narrow category of the most serious crimes” and whose extreme culpability makes them “the most deserving of execution.” * * *

Three general differences between juveniles under 18 and adults demonstrate that juvenile offenders cannot with reliability be classified among the worst offenders. First, as any parent knows and as the scientific and sociological studies respondent and his *amici* cite tend to confirm, “[a] lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults and are more understandable among the young. These qualities often result in impetuous and ill-considered actions and decisions.” It has been noted that “adolescents are overrepresented statistically in virtually every category of reckless behavior.” In recognition of the comparative immaturity and irresponsibility of juveniles, almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without parental consent.

The second area of difference is that juveniles are more vulnerable or susceptible to negative influences and outside pressures, including peer pressure. * * * This is explained in part by the prevailing circumstance that juveniles have less control, or less experience with control, over their own environment. * * *

The third broad difference is that the character of a juvenile is not as well formed as that of an adult. The personality traits of juveniles are more transitory, less fixed. * * *

* * * From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed. * * *

* * * *

* * * Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult. Retribution is not proportional if the law's most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.

As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles, as counsel for petitioner acknowledged at oral argument. * * * Here, however, the absence of evidence of deterrent effect is of special concern because the same characteristics that render juveniles less culpable than adults suggest as well that juveniles will be less susceptible to deterrence. * * * To the extent the juvenile death penalty might have residual deterrent effect, it is worth noting that the punishment of life imprisonment without the possibility of parole is itself a severe sanction, in particular for a young person.

* * * Certainly it can be argued, although

we by no means concede the point, that a rare case might arise in which a juvenile offender has sufficient psychological maturity, and at the same time demonstrates sufficient depravity, to merit a sentence of death. * * *

* * * The differences between juvenile and adult offenders are too marked and well understood to risk allowing a youthful person to receive the death penalty despite insufficient culpability. An unacceptable likelihood exists that the brutality or cold-blooded nature of any particular crime would overpower mitigating arguments based on youth as a matter of course, even where the juvenile offender's objective immaturity, vulnerability, and lack of true depravity should require a sentence less severe than death. In some cases a defendant's youth may even be counted against him. In this very case, as we noted above, the prosecutor argued Simmons' youth was aggravating rather than mitigating. * * *

It is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption. * * * If trained psychiatrists with the advantage of clinical testing and observation refrain, despite diagnostic expertise, from assessing any juvenile under 18 as having antisocial personality disorder, we conclude that States should refrain from asking jurors to issue a far graver condemnation—that a juvenile offender

merits the death penalty. * * *

Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. * * * The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

These considerations mean *Stanford v. Kentucky* should be deemed no longer controlling on this issue. To the extent *Stanford* was based on review of the objective indicia of consensus that obtained in 1989, those indicia have changed. * * * [T]he *Stanford* Court should have considered those States that had abandoned the death penalty altogether as part of the consensus against the juvenile death penalty, * * * a State's decision to bar the death penalty altogether of necessity demonstrates a judgment that the death penalty is inappropriate for all offenders, including juveniles. Last, to the extent *Stanford* was based on a rejection of the idea that this Court is required to bring its independent judgment to bear on the proportionality of the death penalty for a particular class of crimes or offenders, it suffices to note that this rejection was inconsistent with prior Eighth Amendment decisions. It is also inconsistent with the premises of our recent decision in *Atkins*.

IV

Our determination that the death penalty is disproportionate punishment for offenders under 18 finds confirmation in the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty. This reality does not become controlling, for the task of interpreting the Eighth Amendment remains our responsibility. * * *

As respondent and a number of *amici* emphasize, Article 37 of the United Nations Convention on the Rights of the Child, which every country in the world has ratified save for the United States and Somalia, contains an express prohibition on capital punishment for crimes committed by juveniles under 18. Parallel prohibitions are contained in other significant international covenants.

* * * [O]nly seven countries other than the United States have executed juvenile offenders since 1990: Iran, Pakistan, Saudi Arabia, Yemen, Nigeria, the Democratic Republic of Congo, and China. Since then each of these countries has either abolished capital punishment for juveniles or made public disavowal of the practice. In sum, it is fair to say that the United States now stands alone in a world that has turned its face against the juvenile death penalty.

[T]he United Kingdom abolished the juvenile death penalty before these covenants came into being. The United Kingdom's experience bears particular relevance here in light of the historic ties

between our countries and in light of the Eighth Amendment's own origins.* * *

* * * The opinion of the world community, while not controlling our outcome, does provide respected and significant confirmation for our own conclusions.

* * * It does not lessen our fidelity to the Constitution or our pride in its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.

* * *

The Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. * * *

It is so ordered.

[Appendices to the Opinion of the Court Removed]

Justice STEVENS, with whom Justice GINSBURG joins, concurring.

Perhaps even more important than our specific holding today is our reaffirmation of the basic principle that informs the Court's interpretation of the Eighth Amendment. If the meaning of that Amendment had been frozen when it

was originally drafted, it would impose no impediment to the execution of 7-year-old children today. The evolving standards of decency that have driven our construction of this critically important part of the Bill of Rights foreclose any such reading of the Amendment. In the best tradition of the common law, the pace of that evolution is a matter for continuing debate; but that our understanding of the Constitution does change from time to time has been settled since John Marshall breathed life into its text. If great lawyers of his day—Alexander Hamilton, for example—were sitting with us today, I would expect them to join Justice KENNEDY's opinion for the Court. In all events, I do so without hesitation.

Justice O'CONNOR, dissenting.

The Court's decision today establishes a categorical rule forbidding the execution of any offender for any crime committed before his 18th birthday, no matter how deliberate, wanton, or cruel the offense. Neither the objective evidence of contemporary societal values, nor the Court's moral proportionality analysis, nor the two in tandem suffice to justify this ruling.

* * * [T]he evidence before us fails to demonstrate conclusively that any such consensus has emerged in the brief period since we upheld the constitutionality of this practice in *Stanford v. Kentucky*.

Instead, the rule decreed by the Court rests, ultimately, on its independent moral judgment that death is a disproportionately severe punishment for any 17-year-old offender. I do not subscribe to this judgment. Adolescents *as a class* are undoubtedly less mature, and therefore less culpable for their misconduct, than adults. But the Court has adduced no evidence impeaching the seemingly reasonable conclusion reached by many state legislatures: that at least *some* 17-year-old murderers are sufficiently mature to deserve the death penalty in an appropriate case. * * *

On this record—and especially in light of the fact that so little has changed since our recent decision in *Stanford*—I would not substitute our judgment about the moral propriety of capital punishment for 17-year-old murderers for the judgments of the Nation’s legislatures. Rather, I would demand a clearer showing that our society truly has set its face against this practice before reading the Eighth Amendment categorically to forbid it.

* * * *

The proportionality issues raised by the Court clearly implicate Eighth Amendment concerns. But these concerns may properly be addressed not by means of an arbitrary, categorical age-based rule, but rather through individualized sentencing in which juries are required to give appropriate mitigating weight to the defendant’s

immaturity, his susceptibility to outside pressures, his cognizance of the consequences of his actions, and so forth. In that way the constitutional response can be tailored to the specific problem it is meant to remedy. * * *

* * * *

* * * I disagree with Justice SCALIA’s contention that foreign and international law have no place in our Eighth Amendment jurisprudence. Over the course of nearly half a century, the Court has consistently referred to foreign and international law as relevant to its assessment of evolving standards of decency. This inquiry reflects the special character of the Eighth Amendment, which, as the Court has long held, draws its meaning directly from the maturing values of civilized society. * * * [T]his Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. * * * [T]he existence of an international consensus * * * can serve to confirm the reasonableness of a consonant and genuine American consensus. The instant case presents no such domestic consensus, however, and the recent emergence of an otherwise global consensus does not alter that basic fact.

* * * *

Justice SCALIA, with whom THE CHIEF JUSTICE and Justice THOMAS join, dissenting.

In urging approval of a constitution that gave life-tenured judges the power to nullify laws enacted by the people's representatives, Alexander Hamilton assured the citizens of New York that there was little risk in this, since "[t]he judiciary ... ha[s] neither FORCE nor WILL but merely judgment." * * * What a mockery today's opinion makes of Hamilton's expectation, announcing the Court's conclusion that the meaning of our Constitution has changed over the past 15 years—not, mind you, that this Court's decision 15 years ago was *wrong*, but that the Constitution *has changed*. The Court reaches this implausible result by purporting to advert, not to the original meaning of the Eighth Amendment, but to "the evolving standards of decency," of our national society. It then finds, on the flimsiest of grounds, that a national consensus which could not be perceived in our people's laws barely 15 years ago now solidly exists. Worse still, the Court says in so many words that what our people's laws say about the issue does not, in the last analysis, matter: "[I]n 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 Court thus proclaims itself sole arbiter of our Nation's moral standards—and in the course of discharging that awesome responsibility purports to take guidance from the views of foreign courts and legislatures. Because I do not believe that the meaning of our Eighth Amendment, any more than the meaning

of other provisions of our Constitution, should be determined by the subjective views of five Members of this Court and like-minded foreigners, I dissent.

I

* * * We have held that this determination should be based on "objective indicia that reflect the public attitude toward a given sanction"—namely, "statutes passed by society's elected representatives." As in [Atkins,] the Court dutifully recites this test and claims halfheartedly that a national consensus has emerged since our decision in *Stanford*, because 18 States—or 47% of States that permit capital punishment—now have legislation prohibiting the execution of offenders under 18, and because all of 4 States have adopted such legislation since *Stanford*.

Words have no meaning if the views of less than 50% of death penalty States can constitute a national consensus. Our previous cases have required overwhelming opposition to a challenged practice, generally over a long period of time. [Coker, Ford, Enmund, Stanford] * * *

In an attempt to keep afloat its implausible assertion of national consensus, the Court throws overboard a proposition well established in our Eighth Amendment jurisprudence. * * * The insinuation that the Court's new method of counting contradicts only "the

Stanford Court” is misleading. *None* of our cases dealing with an alleged constitutional limitation upon the death penalty has counted, as States supporting a consensus in favor of that limitation, States that have eliminated the death penalty entirely. * * * Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of *course* they don’t like it, but that sheds no light whatever on the point at issue. * * * The attempt by the Court to turn its remarkable minority consensus into a faux majority by counting Amishmen is an act of nomological desperation.

* * * [T]he Court says a legislative change in four States is “significant” enough to trigger a constitutional prohibition. It is amazing to think that this subtle shift in numbers can take the issue entirely off the table for legislative debate.

* * * *

Relying on such narrow margins is especially inappropriate in light of the fact that a number of legislatures and voters have expressly affirmed their support for capital punishment of 16– and 17–year–old offenders since *Stanford*. *** both the Missouri and Virginia Legislatures—which, at the time of *Stanford*, had no minimum age requirement—expressly established 16 as

the minimum. The people of Arizona⁵ and Florida⁶ have done the same by ballot initiative. Thus, even States that have not executed an under–18 offender in recent years unquestionably favor the possibility of capital punishment in some circumstances.

The Court[] * * * credits an argument that this Court considered and explicitly rejected in *Stanford*. That infrequency is explained, we accurately said, both by “the undisputed fact that a far smaller percentage of capital crimes are committed by persons under 18 than over 18,” 492 U.S., at 374, 109 S.Ct. 2969, and by the fact that juries are required at sentencing to consider the offender’s youth as a mitigating factor. * * *

It is, furthermore, unclear that executions of the relevant age group have decreased since we decided *Stanford*. * * * [T]he numbers of under–18 offenders subjected to the death penalty, though low compared with adults, have either held steady or slightly increased since *Stanford*. These statistics in no way support the action the Court takes today.

II

Of course, the real force driving today’s decision is not the actions of four state legislatures, but the Court’s “ ‘own judgment” ’ ” that murderers younger than 18 can never be as morally culpable as older counterparts. * * * If the Eighth

Amendment set forth an ordinary rule of law, it would indeed be the role of this Court to say what the law is. But the Court having pronounced that the Eighth Amendment is an ever-changing reflection of “the evolving standards of decency” of our society, it makes no sense for the Justices then to *prescribe* those standards rather than discern them from the practices of our people. On the evolving-standards hypothesis, the only legitimate function of this Court is to identify a moral consensus of the American people. By what conceivable warrant can nine lawyers presume to be the authoritative conscience of the Nation?

* * * *

Today’s opinion provides a perfect example of why judges are ill equipped to make the type of legislative judgments the Court insists on making here. To support its opinion that States should be prohibited from imposing the death penalty on anyone who committed murder before age 18, the Court looks to scientific and sociological studies, picking and choosing those that support its position. It never explains why those particular studies are methodologically sound; none was ever entered into evidence or tested in an adversarial proceeding. * * *

* * * [A]ll the Court has done today, to borrow from another context, is to look over the heads of the crowd and pick out its friends.

We need not look far to find studies contradicting the Court’s conclusions. *
* * Given the nuances of scientific methodology and conflicting views, courts—which can only consider the limited evidence on the record before them—are ill equipped to determine which view of science is the right one. Legislatures “are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.’ ” *McCleskey v. Kemp*, 481 U.S. 279, 319, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (quoting *Gregg, supra*, at 186, 96 S.Ct. 2909).

* * * *

* * * [Murder] is more than just risky or antisocial behavior. It is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults. * * * [T]he studies the Court cites in no way justify a constitutional imperative that prevents legislatures and juries from treating exceptional cases in an exceptional way—by determining that some murders are not just the acts of happy-go-lucky teenagers, but heinous crimes deserving of death.

That “almost every State prohibits those under 18 years of age from voting, serving on juries, or marrying without

parental consent,” is patently irrelevant[.]
* * * As we explained in *Stanford*, it is
“absurd to think that one must be mature
enough to drive carefully, to drink
responsibly, or to vote intelligently, in
order to be mature enough to understand
that murdering another human being is
profoundly wrong, and to conform one’s
conduct to that most minimal of all
civilized standards.” Serving on a jury or
entering into marriage also involve
decisions far more sophisticated than the
simple decision not to take another’s life.

Moreover, the age statutes the Court lists
“set the appropriate ages for the
operation of a system that makes its
determinations in gross, and that does not
conduct individualized maturity tests.”
Ibid. The criminal justice system, by
contrast, provides for individualized
consideration of each defendant. In
capital cases, this Court requires the
sentencer to make an individualized
determination, which includes weighing
aggravating factors and mitigating
factors, such as youth. In other contexts
where individualized consideration is
provided, we have recognized that at
least some minors will be mature enough
to make difficult decisions that involve
moral considerations. For instance, we
have struck down abortion statutes that
do not allow minors deemed mature by
courts to bypass parental notification
provisions. It is hard to see why this
context should be any different. Whether
to obtain an abortion is surely a much
more complex decision for a young
person than whether to kill an innocent

person in cold blood.

The Court concludes, however, that
juries cannot be trusted with the delicate
task of weighing a defendant’s youth
along with the other mitigating and
aggravating factors of his crime. This
startling conclusion undermines the very
foundations of our capital sentencing
system, which entrusts juries with
“mak[ing] the difficult and uniquely
human judgments that defy codification
and that ‘buil[d] discretion, equity, and
flexibility into a legal system.’ ”
McCleskey, supra, at 311, 107 S.Ct. 1756
(quoting H. Kalven & H. Zeisel, *The
American Jury* 498 (1966)). * * *

Nor does the Court suggest a stopping
point for its reasoning. If juries cannot
make appropriate determinations in cases
involving murderers under 18, in what
other kinds of cases will the Court find
jurors deficient? We have already held
that no jury may consider whether a
mentally deficient defendant can receive
the death penalty, irrespective of his
crime. Why not take other mitigating
factors, such as considerations of
childhood abuse or poverty, away from
juries as well? * * *

The Court’s contention that the goals of
retribution and deterrence are not served
by executing murderers under 18 is * * *
simply an extension of the earlier, false
generalization that youth *always* defeats
culpability. The Court claims that
“juveniles will be less susceptible to
deterrence,” *ibid.*, because “ ‘[t]he

likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonexistent,’ ” *ibid.* The Court unsurprisingly finds no support for this astounding proposition, save its own case law. The facts of this very case show the proposition to be false. Before committing the crime, Simmons encouraged his friends to join him by assuring them that they could “get away with it” because they were minors. This fact may have influenced the jury’s decision to impose capital punishment despite Simmons’ age. Because the Court refuses to entertain the possibility that its own unsubstantiated generalization about juveniles could be wrong, it ignores this evidence entirely.

III

Though the views of our own citizens are essentially irrelevant to the Court’s decision today, the views of other countries and the so-called international community take center stage.

* * * *

Unless the Court has added to its arsenal the power to join and ratify treaties on behalf of the United States, I cannot see how this evidence favors, rather than refutes, its position. That the Senate and the President—those actors our Constitution empowers to enter into

treaties, see Art. II, § 2—have declined to join and ratify treaties prohibiting execution of under-18 offenders can only suggest that *our country* has either not reached a national consensus on the question, or has reached a consensus contrary to what the Court announces. *

* *

It is interesting that whereas the Court is not content to accept what the States of our Federal Union *say*, but insists on inquiring into what they *do* (specifically, whether they in fact *apply* the juvenile death penalty that their laws allow), the Court is quite willing to believe that every foreign nation—of whatever tyrannical political makeup and with however subservient or incompetent a court system—in fact *adheres* to a rule of no death penalty for offenders under 18. Nor does the Court inquire into how many of the countries that have the death penalty, but have forsworn (on paper at least) imposing that penalty on offenders under 18, have what no State of this country can constitutionally have: a *mandatory* death penalty for certain crimes, with no possibility of mitigation by the sentencing authority, for youth or any other reason. I suspect it is most of them.

More fundamentally, however, the basic premise of the Court’s argument—that American law should conform to the laws of the rest of the world—ought to be rejected out of hand. In fact the Court itself does not believe it. In many significant respects the laws of most

other countries differ from our law—including not only such explicit provisions of our Constitution as the right to jury trial and grand jury indictment, but even many interpretations of the Constitution prescribed by this Court itself. * * * [Examples, including exclusionary rule, Establishment Clause, and the Court’s “abortion jurisprudence”]

The Court has been oblivious to the views of other countries when deciding how to interpret our Constitution’s requirement that “Congress shall make no law respecting an establishment of religion....” Amdt. 1. Most other countries—including those committed to religious neutrality—do not insist on the degree of separation between church and state that this Court requires. * * *

And let us not forget the Court’s abortion jurisprudence, which makes us one of only six countries that allow abortion on demand until the point of viability. * * *

The Court’s special reliance on the laws of the United Kingdom is perhaps the most indefensible part of its opinion. * * *

* [T]he Court undertakes the majestic task of determining (and thereby prescribing) *our* Nation’s *current* standards of decency. It is beyond comprehension why we should look, for that purpose, to a country that has developed, in the centuries since the Revolutionary War—and with increasing speed since the United Kingdom’s recent submission to the jurisprudence of European courts dominated by

continental jurists—a legal, political, and social culture quite different from our own. * * *

* * * To invoke alien law when it agrees with one’s own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry.

However sound philosophically, this is no way to run a legal system. We must disregard the new reality that, to the extent our Eighth Amendment decisions constitute something more than a show of hands on the current Justices’ current personal views about penology, they purport to be nothing more than a snapshot of American public opinion at a particular point in time[.] * * *

Harvard Law Review
November, 2005

The Supreme Court, 2004 Term
Comment

FOREIGN LAW AND THE DENOMINATOR PROBLEM

Ernest A. Young

Before *Roper v. Simmons*, American states split thirty to twenty on the legitimacy of the juvenile death penalty. On the international plane, however, the United States stood alone in condoning the practice. The question is the appropriate significance of the latter fact for American constitutional doctrine. Although this issue falls within a much broader debate over references to foreign law by American courts, I want to focus on the narrow question that arises when such law is used to bolster claims of “consensus” against (or in favor of) a particular practice.

The Court’s jurisprudence of “cruel and unusual” punishments has both objective morality and practice components. The latter determines whether a consensus rejects a challenged practice by canvassing the practices of other relevant jurisdictions. Such an inquiry requires choices about which other jurisdictions are relevant. One might envision this universe of relevant jurisdictions as the denominator of a fraction, with the jurisdictions actually pursuing the challenged practice supplying the numerator. If the numerator is small relative to the denominator then the Court will condemn the practice as an outlier, out of step with “evolving standards of decency.”

Roper’s “denominator problem” concerned whether foreign jurisdictions should count in Eighth Amendment cases. Justice Kennedy’s * claim that a domestic consensus rejected the juvenile death penalty was profoundly implausible given that twenty states retained the practice. But by shifting focus from the domestic to the international plane--where the United States stood as one jurisdiction against all the rest--the Roper majority made an implausible claim of “consensus” into a plausible one. Defenders of looking to foreign law typically describe that practice as a search for “persuasive authority”--an attempt, in Justice Breyer’s words, to “learn something” from a “judge in a different country dealing with a similar problem.” I argue here, however, that creating consensus by including foreign jurisdictions in the Eighth Amendment denominator goes considerably further and, in fact, gives the practices of those jurisdictions authoritative legal weight.

I have two objectives in this brief Comment. The first is to clarify how foreign law is used in cases like Roper and, consequently, the stakes in the debate over sources. The second is to sketch some cautions about expanding the denominator in such cases, although space will not permit much elaboration of these normative claims.

I. Foreign Law’s Influence

The Supreme Court’s use of foreign law in constitutional interpretation is hardly new. Neither is political opposition to foreign legal influence. This longstanding debate would benefit, however, from a more systematic effort to distinguish the different ways the Court has used foreign law. Such law may apply of its own force, or domestic * legal rules may incorporate foreign law in various ways. Roper and similar cases--most prominently, *Atkins v. Virginia* and *Lawrence v. Texas* --invoked foreign principles to influence the interpretation of wholly domestic legal provisions.

Within the category of influence, one may further distinguish between looking to foreign law to prove or disprove certain factual propositions and looking abroad for normative guidance. *Washington v. Glucksberg*, for example, looked to Dutch experience with physician-assisted suicide to ascertain whether recognizing that practice as a fundamental right might encourage related forms of euthanasia or undermine medical ethics. Use of foreign experience to resolve factual disputes like this is relatively (but not completely) uncontroversial. Roper, however, did not look to foreign experience to assess the consequences of abandoning the juvenile death penalty in the United States. Rather, the Court used foreign law to “confirm”

a proposition of value, that is, “that the death penalty is disproportionate punishment for offenders under 18.”

Normative influence comes in at least two flavors. Those Justices who believe in foreign citation have typically defended it as a form of persuasive authority: American judges look abroad for different or innovative ways of approaching common issues, but the foreign law has no force beyond the persuasiveness of its reasoning. When a court takes account of foreign legal practice as part of a search for “consensus,” by contrast, it typically looks to the mere fact of the foreign jurisdiction’s position on a particular issue. The process is one of counting * noses, with little regard to the reasons that led to the adoption or rejection of a practice in any particular jurisdiction.

I argue in the next two sections that the Supreme Court’s practice in *Roper* and similar cases has considerably more to do with nose counting than with assessing the reasons underlying a particular foreign practice. I want to stress that including foreign jurisdictions in the denominator of noses that count accords authoritative weight to their choices. In this situation, those choices—for example, to adopt or reject the juvenile death penalty—have legal significance without regard to the reasons for the choice. When a legal rule has force whether or not we agree with the reasons used to justify it, is that not the very definition of binding legal authority?

A. Persuasive Authority

The Justices who support foreign citation have often downplayed its importance. Justice Ginsburg argued recently that the issue is simply one of “sharing with and learning from others.” For Justice Breyer, the “enormous value” of “the similar experience of others” springs from the fact that “[j]udges in different countries increasingly apply somewhat similar legal phrases to somewhat similar circumstances, for example with respect to multiracial populations, growing immigration, economic demands, environmental concerns, modern technologies, and instantaneous media communication.” And Justice O’Connor recently insisted that public criticism of the Court’s use of foreign law is “much ado about nothing. . . . [I]t doesn’t hurt to be aware of what other countries are doing.”

It seems positively anti-intellectual and hubristic to say that we can learn nothing from foreign jurisdictions, and this fact probably * accounts for the broad support for foreign citation in the academy. *Roper*, however, does not read like a case in which the Court looked abroad hoping to “learn something.” The hallmark of persuasive authority is engagement with the reasons for a practice or a decision rather than the counting of noses. There is no imperative to choose the most widespread practice or rule, for example, if the minority position seems better thought out. But Justice Kennedy’s discussion of foreign law is all about noses, not reasons. It begins with “the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty”; invokes the prohibition of this punishment in the Convention on the Rights of the Child, “which every country in the world has ratified save for the United States and Somalia,” and to which “[n]o ratifying country has entered a reservation” on juvenile death; and observes that “only seven countries other than the United States have executed juvenile offenders since 1990.” The only country discussed in any detail is the United Kingdom. Again, the point is simply the fact of abolition; no inquiry is made into why the United Kingdom might have taken such a step. Only at the end is there a conclusory statement that this universal disavowal of the juvenile death penalty has “rest[ed] in large part on the understanding that the instability and emotional imbalance of young people may often be a factor in the crime.” That understanding, of course, mirrors precisely the judgment that the Court had already reached in its “independent” evaluation of the morality of the penalty. So what did we “learn,” exactly?

This lack of interest in the reasons underlying foreign practice is characteristic of the Court’s employment of foreign law. In *Atkins*, * the Court cited the practice of foreign jurisdictions without examining the whys and wherefores underlying those practices. Likewise, in *Lawrence*, the Court merely noted the fact that the European Court of Human Rights had struck down an antisodomy law without examining the reasoning in the European court’s opinion. One might tellingly contrast the Court’s practice with that of the South African Constitutional Court, for example, which engages in extensive analyses of the reasoning of foreign practice.

I submit that the Court’s neglect of the reasoning behind foreign practices is not simply sloppy opinion writing. The Justices are not searching foreign court opinions for innovative doctrinal formulae or new arguments not found in the American discourse (even though we might well find such if we looked). There is none of Vicki Jackson’s “engagement” with the foreign sources in *Roper*, nor did the Court use foreign law as a repository of common wisdom in the manner of Jeremy Waldron’s “*ius gentium*.” Rather, it is precisely the fact of foreign practice that is most relevant for the Court’s analysis. The *Roper* Court’s method thus was not simply an effort to approximate some form of persuasive influence that fell a little short

in terms of analytical rigor. It was a different method, with an entirely different focus.

B. Nose-Counting Authority

Decisions like *Roper* cite foreign law in order to corroborate the impression that the domestic practice under attack is an outlier, contrary to contemporary conceptions of morality. The practice component of the Court's inquiry asks how many jurisdictions continue to execute people for acts committed as juveniles, expressed as a fraction of the relevant jurisdictions overall. Including foreign practice shifts the question from whether places like Texas and Missouri--states maintaining the juvenile death penalty--are unusual out of the fifty-one American jurisdictions, to whether those states are unusual considered against the world as a whole (or perhaps some subset of countries with values similar to our own). The foreign jurisdictions, in other words, swell the denominator against which the set of jurisdictions retaining the benighted practice is measured.

* The point of swelling the denominator is that it is not big enough without these foreign practices. Justice Kennedy sought "evidence of national consensus against the death penalty for juveniles," but what he found was a nation deeply divided on the question. Twenty states retained the practice, while thirty had abolished it. The retaining states represented 123,438,384 persons, out of a national population of 293,655,404, or over forty-two percent of the nation. Such an even split hardly fits the common understanding of "consensus" as "[g]eneral agreement or concord" or "the collective unanimous opinion of a number of persons." This substantial minority position on the domestic plane becomes an aberrational practice, however, when judged against the backdrop of world opinion. Used in this way, foreign legal rules become dispositive of domestic law; without them, after all, there would be insufficient "consensus" to void state practice. So far, the Court has only used foreign practice to resolve an ambiguous domestic picture. But at least in theory, "extending the sphere" to the rest of the world could turn even a practice of a solid majority of states into an eccentric outlier.

Justice Kennedy's opinion in *Roper* purported to accord a more limited role to foreign law; such law, he said, "provide[s] respected and significant confirmation for our own conclusions." It is unclear exactly what "confirm" means in this context. Would a domestic conclusion that is not confirmed by foreign practice be insufficient to strike down a state law? If not, then what work is foreign practice doing in the opinion? Some foreign citations are no doubt purely ornamental, or perhaps meant as a "shout out" to express the Court's respect for * foreign opinion or to enhance the prestige of the cited court. But there are several reasons to take the Court's "confirmatory" discussion seriously: the extensiveness of Justice Kennedy's foreign law discussion and his description of its influence as "significant and respected"; the exceptionally weak evidence of domestic consensus and the Court's close division on the objective morality component; and the willingness of several Justices, in their extrajudicial statements, to defend and promote the practice of looking to foreign law. In any event, it seems best forthrightly to debate the legitimacy of foreign citation before the significance of such citations is firmly established.

One should not overstate the difference between persuasive and nose-counting authority. The most appealing account of the consensus test is that the Court looks to practice--both domestic and foreign--to confirm its own intuitions out of an appropriate sense of the limits of its own wisdom. The Court might feel strongly, based on its own moral reasoning, that the juvenile death penalty is immoral but be unwilling to override democratic processes unless it finds its intuitions shared by a large majority of respected legislators and jurists. This majority does not exist, of course, until the foreign jurisdictions are counted. Foreign practice thus "persuades" the Court, but it is persuasion of a particular kind. The Court is not persuaded by new rationales, but rather by the mere fact that foreign jurisdictions take a particular view. It has not "learned" anything from looking abroad other than to find out that others agree with what the Court already believed. It is deferring to numbers, not reasons.

* The crucial point is that, in this analysis, foreign practice carries weight that is independent of the underlying reasons for that practice. The Court thus chooses to treat foreign law as authoritative in Joseph Raz's sense: It treats the mere fact that foreign jurisdictions condemn the juvenile death penalty as a reason to condemn that practice in the United States. Foreign practice is not the only reason, of course, and it remains to be seen what the internationalist Justices will do in a case about, say, hate speech or libel law when international authorities point in an opposite direction from their own views about domestic law. But an honest Court would have to admit that it is according some degree of authoritative weight to foreign practice.

C. Judicial Networks and Indirect Normative Influence

All this talk about numerators, denominators, and persuasive force requires a certain suspension of disbelief: We must accept the Court's assertions that the weight of practice or the arguments of foreign judicial opinions actually matter for purposes of decision, and suspend our suspicion that what is really driving cases like *Roper* is the Justices' own moral predilections. But what if we open the door, at least a bit, to that suspicion? Even if we think that the Court is just imposing its own moral preferences through the Eighth Amendment, we should not necessarily dismiss the foreign law issue as a red herring. Rather, I suspect that foreign practices and jurists play an important role in influencing our Justices' moral predilections through what Anne-Marie Slaughter has described as "global networks" of judges.

Professor Slaughter has noted that meetings and exchanges between the judiciaries of various nations--including ours--have become increasingly institutionalized in recent years. These exchanges not only "serve to educate and to cross-fertilize" by "broaden[ing] the perspectives of the participating judges," but also "socialize their * members as participants in a common global judicial enterprise." The result "is an increasingly global constitutional jurisprudence, in which courts are referring to each other's decisions on issues ranging from free speech to privacy rights to the death penalty." In effect, Slaughter's theory of global judicial networks provides a relatively sophisticated institutional account to bolster the perception--common in grumpier conservative circles--that Justice Kennedy has been brainwashed on his summer trips to Europe.

The existence--perceived or real--of a moral "consensus" among the Justices' peers may well influence not only the doctrinal analysis discussed in the last section, but also the formation of the Justices' underlying preferences. Interactions between legal elites on a global scale make it increasingly likely that the views of lawyers and jurists abroad will form part of the reference set for our own Justices as they formulate their own moral views. Ryan Goodman and Derek Jinks have thus identified "acculturation" as a key mechanism by which international norms influence domestic actors. I am neither a psychologist nor a sociologist, and it would be extremely difficult for even someone trained in those fields to evaluate the effects of such dynamics on individual judges with respect to particular issues. But a substantial empirical literature supports the general phenomenon of acculturation, and it seems plausible to speculate that, at least on an issue like the juvenile death penalty on which the United States is a clear outlier, the existence of a global consensus may exert sociological as well as doctrinal pressure. Notably, such influence would take approximately the same form in each mode: The inclusion of foreign practices and * opinions reinforces--or even creates--the impression that U.S. practice is aberrant and improper.

This is not the place for a comprehensive discussion of judicial socialization. The important point is that debates about that form of influence and the more doctrinal inclusion of foreign jurisdictions in the practice denominator are (or ought to be) linked in at least three senses. First, Professors Goodman and Jinks have shown that acculturation is, like counting noses, distinct from persuasion: What counts is not the reasons underlying the consensus of one's peers, but simply the fact that they have adopted a particular view. Second, the propriety of both nose-counting influence and socialization may turn on whether the moral values embodied in a constitutional norm are thought to be universal or particular: If the Eighth Amendment's "standards of decency" are unique to America, then it is appropriate neither to count foreign jurisdictions when considering practice nor to allow oneself to be influenced by foreign peers. Finally, debating the doctrinal denominator problem may itself influence the process of socialization. If American courts were to conclude that only domestic practice is relevant, then their judges might feel pressure to distinguish American mores concerning punishment from the views they encounter on their European sabbaticals.

Some degree of socialization may be inevitable as courts and judges interact across borders. But like everything else in this debate, it will be less objectionable to the extent that judges candidly pin down and defend the factors influencing their moral judgments. To see clearly how much foreign law may matter, it may help to turn to an area where the denominator problem has always been at the forefront of doctrinal controversy.

D. The Denominator Problem in Obscenity Law

The foreign law question is hardly the only instance of a "denominator problem" in American constitutional law. The most sustained consideration of this sort of question has occurred in obscenity cases, which have always required that the offensiveness of a particular work be measured against some "community standard." Judge Learned Hand's seminal articulation of the community standards test made clear that it is predicated on evolving notions of decency similar to those at issue in Eighth Amendment cases. Judge Hand opined that "the word 'obscene' . . . indicate[s] the present critical point in the compromise between candor and shame at which the community may * have arrived here and now [T]he vague subject-matter is left to the gradual development of general notions about what is decent."

The original version of the denominator problem in obscenity law concerned what sorts of persons should be included in the

relevant community. English law evaluated putatively obscene material by its effect on the most sensitive or susceptible persons, but the U.S. Supreme Court rejected that approach in *Roth v. United States* as “unconstitutionally restrictive of the freedoms of speech and press.” Instead, courts were to ask “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.” Since those early cases, questions about who should be included in the community have consistently remained important considerations.

Most controversy, however, has concerned the proper geographic scope of the relevant community. In *Jacobellis v. Ohio*, Justice Brennan wrote, “the constitutional status of an allegedly obscene work must be determined on the basis of a national standard. It is, after all, a national Constitution we are expounding.” A majority of the Court squarely rejected that position, however, in *Miller v. California*. In that case, Chief Justice Burger observed that while “fundamental First Amendment limitations . . . do not vary from community to community, . . . this does not mean that there are, or should or can be, fixed, uniform national standards of precisely what appeals to the ‘prurient interest’ or is ‘patently offensive.’” As a result, “[i]t is neither realistic nor constitutionally sound to read the First Amendment as requiring that the people of Maine or Mississippi accept public depiction of conduct found tolerable in Las Vegas, or New York City.” Later cases accorded flexibility to the States as to whether the precise standard should be local, statewide, or even ambiguous. As Justice Rehnquist wrote in *Jenkins v. Georgia*, “[a] State may choose to * define an obscenity offense in terms of ‘contemporary community standards’ . . . without further specification, . . . or it may choose to define the standards in more precise geographic terms.”

The post-Miller cases have considered a number of subsidiary questions concerning the application of community standards in obscenity cases. In each of these cases, questions concerning whether a court may look to community practices, how those practices are to be defined, and what practices are relevant took center stage. More fundamentally, the obscenity cases have featured important debates about whether a coherent community standard can even be identified at a broad level of generality. Chief Justice Burger argued in *Miller* that “our Nation is simply too big and too diverse for this Court to reasonably expect that . . . standards could be articulated for all 50 States in a single formulation, even assuming the prerequisite consensus exists.” Justice Stevens suggested in *Smith v. United States* that “[t]he most significant reasons for the failure to define a national standard for obscenity apply with equal force to the use of local standards,” and he worried that because “the geographic boundaries of the relevant community are not easily defined,” they may be “subject to elastic adjustment to suit the needs of the prosecutor.” Notwithstanding their different conclusions, both Justices agreed that in order to employ any community standard, one must first consider whether a coherent consensus can be identified within the proposed frame of reference.

My point here is simple: No one is confused in these obscenity cases about whether the size of the denominator matters. Of course it does, and it may affect not only the analysis but also the result. Convictions can be reversed because the jury was instructed to consider a frame of relevant practice that was either too large or too small. And because the Justices are clear about the importance of the choice, their opinions feature a forthright debate about whether coherent community standards can exist at a given level of generality and which frame of * reference best suits the constitutional command that is being enforced. That is the sort of debate that we need to have about foreign law.

II. Keeping the Denominator Small

The size of the denominator matters in constitutional cases, and therefore the Court’s inclusion of foreign jurisdictions in that denominator matters as well. Whether one ultimately concludes that domestic practices should be measured against a national or an international “consensus,” the Court’s foreign citations should not be defended by downplaying their significance. In this Part, I sketch some arguments for keeping the denominator relatively small. Space will not permit detailed argument on these points, but they may suggest productive lines for future inquiry.

A. Arguments from Democracy

Whether courts consult foreign law for merely persuasive purposes or for purposes of establishing a broader “consensus,” such consultation presupposes that the foreign jurisdictions considered are, in some relevant way, similar to our own. Yet when we look to “other nations that share our Anglo-American heritage, and . . . the leading members of the Western European community,” we see divergence rather than convergence on many aspects of values and political culture. These divergences tend to undermine, in a variety of ways, our national democratic commitments.

Jed Rubenfeld has recently demonstrated that Americans and Europeans subscribe, for the most part, to fundamentally

different conceptions of constitutionalism. American law grounds constitutional rights in popular sovereignty, while European constitutionalism, and the international rhetoric of human rights, “is based on . . . universal rights and principles that derive their authority from sources outside of or prior to national democratic processes.” European legal rules governing the death penalty, for instance, do not have the same relation to popular opinion or “norms of decency” that American rules have; in fact, polls suggest that European nations abolished the death penalty notwithstanding broad popular support for the practice. The Court’s * Eighth Amendment jurisprudence is meant to ground constitutional doctrine in evolving democratic commitments, but foreign conceptions of rights are not necessarily democratic in the same sense that ours are.

We likewise lack a common demos in which different nations can engage in democratic debate over the morality of a given practice. Europeans have grappled with whether constitutionalism can flourish at a supranational level of governance that lacks a meaningful democratic community, or whether the member states of the EU, with their well-developed national communities, must remain the primary sites for the articulation and maintenance of constitutional values. This “No Demos” problem becomes even more pronounced at the international level; as Michael Ramsey has observed, “terms like ‘international opinion’ or opinions of ‘humankind’ or the ‘world community’ . . . disguise [] the fact that there is no unified ‘world community’ with a simple and easily accessible opinion to be had for the asking.” The problem is not simply a lack of a common discourse but also the absence of supranational institutions that, through the legitimating force of representation and deliberation, could transform the Court’s nose counting into a meaningful democratic conclusion.

Finally, the divergence between European nations and our own, particularly on issues associated with capital punishment, may simply be too great to sustain the basic commonality of values necessary to identify “the evolving standards of decency that mark the progress of a maturing society.” The relatively trivial sentence imposed by a German court on a man found to have conspired in the September 11 attacks, for instance, suggests a fundamental disparity in notions of appropriate punishment. And European laws on the death penalty * derive from a backlash against historical misuse of the penalty by autocratic regimes and, perhaps, the peculiar dynamics of European integration --neither of which has much purchase in the United States. These divergences increase the utility of foreign references for advocates: Opponents of the death penalty who have striven in vain to persuade their fellow Americans to abandon the measure will find more support by extending their sphere of argument to take in foreign opinions and practices. Appeals to foreign law are thus a symptom not of convergence of values at the international level but rather of divergence at the national level. As American political life becomes increasingly polarized, it is not surprising that partisans of one view or another find that they have more in common with groups outside the domestic society. In any event, it is surely odd to take worldwide condemnation of U.S. practice, as the Roper Court did, as confirmation that our own values have evolved.

B. Arguments from Constitutional Structure

The Court’s inclusion of foreign jurisdictions in its “consensus” calculus alters the ordinary allocation of power between institutions in our constitutional structure. The political branches--the Executive and Congress-- are generally the primary actors in foreign affairs. Yet importing foreign law into the domestic legal system through constitutional interpretation circumvents the institutional mechanisms by which the political branches ordinarily control the interaction between the domestic and the foreign. The sense that the President and Congress have lost some control over American accession to international norms may have contributed to the political outrage that * followed the Court’s citation of foreign sources in cases like Roper, Atkins, and Lawrence.

One way to illustrate this problem is to take seriously the notion that the judgments of courts around the world on common questions of human rights amount to customary international law. Opponents of the juvenile death penalty have long argued that it offends customary norms that bind the United States on the international plane. But even if such norms would trump state law capital punishment regimes, Congress could override such norms simply by enacting a statute permitting the practice. And while the matter is not quite as clear, the Executive would most likely have similar authority to nullify any binding effect that such customary norms would have within the domestic legal system.

A decision like Roper, however, uses exactly the same foreign legal materials--the decisions of foreign jurisdictions to proscribe the juvenile death penalty--but employs them in such a way as to foreclose any ability of the political branches to articulate a different view. Incorporation of foreign practice into constitutional law thus eliminates the political branches’ usual prerogative to dissent from the formation of customary norms or to depart from those norms once they have developed. The Roper Court thus decided that it--not the President, and not the Congress--would control the way in which the American legal system would respond to developments in international law.

The interference with political branch authority in *Roper* was much more blatant than in the example just sketched. The national political branches had not, in fact, sat passively by as the rest of the world staked out positions on the juvenile death penalty. The Court, however, gave these political branch decisions the back of the hand. The majority emphasized Article 37 of the United Nations Convention on the Rights of the Child, which prohibits the juvenile death penalty, notwithstanding that the United States has never ratified this treaty. The majority likewise cited a parallel prohibition in the International Covenant on Civil and Political Rights, notwithstanding that the United States's ratification of the treaty included a reservation denying the binding force of that particular point. The national political * branches had plainly determined that the world's condemnation should not affect our own domestic law. But the Court adopted precisely the opposite course.

A second set of structural imbalances results from the use of foreign law to impose a uniform "consensus" position. Prior to *Roper*, decisions about the juvenile death penalty were left to two sets of decentralized decisionmakers: state legislatures, which determined whether to permit capital punishment as an option for sentencing offenders under the age of eighteen, and juries, which determined whether to impose the death penalty in individual cases. The effect of finding a "consensus" at the national or international level is to displace state-by-state diversity on the question. As voices on both Left and Right are recognizing, however, the best solution to our increasingly divisive "culture wars" may be to let each state define its own course on the "hot-button" issues of the day. Indeed, the very notion of "consensus" as a basis for imposing constitutional restrictions on the States is an odd one. Our system generally requires a series of explicit political acts, rather than simply a confluence of opinion, to impose binding national or international norms on the States.

States retaining the juvenile death penalty relied upon an even more decentralized decisionmaker: the jury in each case. The Court stressed that even states that had kept the penalty as a formal matter actually imposed it only in a very small number of cases. This evidence is perfectly consistent with a "consensus" view that juveniles ought generally not receive the death penalty, but also that juries should retain the authority to impose it in extraordinary circumstances. That view would also respect the central importance of the jury in our constitutional tradition --an emphasis not shared by most of the foreign jurisdictions to which the Court referred. It is unsurprising that jurisdictions without a strong tradition of case-by-case application of moral norms by juries would approach questions like the juvenile death penalty in a more categorical way.

C. Arguments from Institutional Competence

Finally, any approach to constitutional interpretation should be evaluated in terms of its decision costs (the time, effort, and expense * involved in deciding cases in a particular way) and its error costs (the likelihood of making mistakes by pursuing a particular method). Both kinds of costs seem likely to be high for American courts dealing with foreign materials, given language and cultural barriers and most American lawyers' lack of training in comparative analysis. As Professor Ramsey's analysis of the briefs and opinions in *Atkins* and *Lawrence* demonstrates, neither advocates nor judges have yet invested the resources necessary to bring comparative analysis up to the standards of rigor that we demand of arguments grounded in domestic law.

Consider, for example, Justice Breyer's argument in *Printz v. United States* that "commandeering" state officials to enforce federal law poses no threat to federalism because German federal laws are implemented by officials of the *Länder* and European Union directives are implemented by officials of the member states. Daniel Halberstam has demonstrated that Justice Breyer's discussion overlooked critical differences in institutional context such that commandeering might actually enhance decentralized autonomy in Europe while undermining it in the United States. Even in a relatively straightforward case of factual influence like *Printz*, then, the error costs (or the decision costs necessary to avoid them) may be unacceptably high.

To be sure, these competence concerns parallel arguments against the use of history in originalist constitutional interpretation. Although reliance on history has increased research burdens on lawyers and courts, and courts surely get the history wrong in some cases, I think it fair to say that the courts have proved reasonably capable of making sense of historical arguments. Moreover, because law engages virtually the full range of human activity, courts must inevitably dabble in a wide range of disciplines in which they may lack training or expertise--for example, economics in antitrust cases, science and engineering in patent cases, psychology in criminal cases. One should not overstate the disadvantages confronting courts in assessing arguments predicated on a particular discipline. At the same time, the * incremental burdens associated with comparative legal inquiry need to be assessed against the benefits to be gained, and we may reasonably insist that the Court be considerably more careful, articulate, and thorough when it cites foreign law than it has been to date.

A third category of costs--call them "indeterminacy costs"--arises because there are so many foreign jurisdictions to choose from and because the sources of international law (particularly the customary kind) are often so ambiguous that the whole enterprise is profoundly manipulable. We might well compare foreign citation to the classic quip about legislative history: it is like "looking over a crowd and picking out your friends." This additional layer of indeterminacy is particularly troubling for Eighth Amendment jurisprudence, in which the practice component of the analysis is supposed to act as some constraint upon the other component, which simply is the personal moral judgments of the Justices. Such obvious manipulability may, in turn, undermine the legitimacy of the Court's decisions.

Conclusion

References to foreign law in cases like *Roper* are not simply innocuous attempts to "learn something" from the practices of foreign nations. Rather, foreign law becomes part of the binding doctrinal analysis that generates the outcome of the case. More specifically, the addition of foreign jurisdictions to the denominator of the *Roper* fraction made the numerator--those American jurisdictions retaining the juvenile death penalty--seem small and aberrant. It is disingenuous to deny that the foreign law component "matters" in these cases. The decades-long clash over the appropriate size of the denominator in obscenity cases ought to remind us of that fact.

Acknowledging this reality is a necessary predicate to a mature debate about foreign law's place in our legal system. I have suggested several reasons to prefer small denominators over large ones--that is, to confine the normative inquiry in "community standards" cases to the domestic community. Whether or not those reasons ultimately prove persuasive, we cannot have an intelligent discussion about them until we recognize that the subject makes a difference.

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135 S.Ct. 2726
Supreme Court of the United States

Richard E. GLOSSIP, et al., Petitioners
v.
Kevin J. GROSS, et al.

No. 14–7955. | Argued April 29, 2015. |
Decided June 29, 2015

Opinion

Justice ALITO delivered the opinion of the Court.

Prisoners sentenced to death in the State of Oklahoma filed an action in federal court under Rev. Stat. § 1979, 42 U.S.C. § 1983, contending that the method of execution now used by the State violates the Eighth Amendment because it creates an unacceptable risk of severe pain. They argue that midazolam, the first drug employed in the State’s current three-drug protocol, fails to render a person insensate to pain. After holding an evidentiary hearing, the District Court denied four prisoners’ application for a preliminary injunction, finding that they had failed to prove that midazolam is ineffective. The Court of Appeals for the Tenth Circuit affirmed and accepted the District Court’s finding of fact regarding midazolam’s efficacy.

For two independent reasons, we also affirm. First, the prisoners failed to identify a known and available alternative method of execution that entails a lesser risk of pain, a requirement of all Eighth Amendment method-of-execution claims. Second, the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma’s use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.

I

A

The death penalty was an accepted punishment at the time of the adoption of the Constitution and the Bill of Rights. In that era, death sentences were usually carried out by hanging. Hanging remained the standard method of execution through much of the 19th century, but that began to change in the century’s later years. See *Baze, supra*, at 41–42, 128 S.Ct. 1520. In the 1880’s, the Legislature of the State of New York appointed a commission to find “ ‘the most humane and practical method known to modern science of carrying into effect the sentence of death in capital cases.’ ” The commission recommended electrocution, and in 1888, the Legislature enacted a law providing for this method of execution. In subsequent years, other States followed New York’s lead in the “ ‘belief that electrocution is less painful and more humane than hanging.’ ”

In 1921, the Nevada Legislature adopted another new method of execution, lethal gas, after concluding that this was “the most humane manner known to modern science.” The Nevada Supreme Court rejected the argument that the use of lethal gas was unconstitutional, and other States followed Nevada’s lead[.] Nevertheless, hanging and the firing squad were retained in some States, (Delaware, Kansas, Utah) and electrocution remained the predominant method of execution until the 9–year hiatus in executions that ended with our judgment in *Gregg v. Georgia*, 428 U.S. 153 (1976).

After *Gregg* reaffirmed that the death penalty does not violate the Constitution, some States once again sought a more humane way to carry out death sentences. They eventually adopted lethal injection, which today is “by far the most

prevalent method of execution in the United States.” and it eventually settled on a protocol that called for the use of three drugs: (1) sodium thiopental, “a fast-acting barbiturate sedative that induces a deep, comalike unconsciousness when given in the amounts used for lethal injection,” (2) a paralytic agent, which “inhibits all muscular-skeletal movements and, by paralyzing the diaphragm, stops respiration,” and (3) potassium chloride, which “interferes with the electrical signals that stimulate the contractions of the heart, inducing cardiac arrest.” By 2008, at least 30 of the 36 States that used lethal injection employed that particular three-drug protocol.

While methods of execution have changed over the years, “[t]his Court has never invalidated a State’s chosen procedure for carrying out a sentence of death as the infliction of cruel and unusual punishment.” In *Wilkerson v. Utah*, (1879), the Court upheld a sentence of death by firing squad. In *In re Kemmler*, the Court rejected a challenge to the use of the electric chair. And the Court did not retreat from that holding even when presented with a case in which a State’s initial attempt to execute a prisoner by electrocution was unsuccessful. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463–464 (1947) (plurality opinion). Most recently, in *Baze*, seven Justices agreed that the three-drug protocol just discussed does not violate the Eighth Amendment.

Our decisions in this area have been animated in part by the recognition that because it is settled that capital punishment is constitutional, “[i]t necessarily follows that there must be a [constitutional] means of carrying it out.” And because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain. After all, while most humans wish to die a painless death, many do not have that good fortune. Holding that the Eighth Amendment demands the elimination of

essentially all risk of pain would effectively outlaw the death penalty altogether.

B

Baze cleared any legal obstacle to use of the most common three-drug protocol that had enabled States to carry out the death penalty in a quick and painless fashion. But a practical obstacle soon emerged, as anti-death-penalty advocates pressured pharmaceutical companies to refuse to supply the drugs used to carry out death sentences. The sole American manufacturer of sodium thiopental, the first drug used in the standard three-drug protocol, was persuaded to cease production of the drug. After suspending domestic production in 2009, the company planned to resume production in Italy. Activists then pressured both the company and the Italian Government to stop the sale of sodium thiopental for use in lethal injections in this country. That effort proved successful, and in January 2011, the company announced that it would exit the sodium thiopental market entirely.

After other efforts to procure sodium thiopental proved unsuccessful, States sought an alternative, and they eventually replaced sodium thiopental with pentobarbital, another barbiturate. In December 2010, Oklahoma became the first State to execute an inmate using pentobarbital. That execution occurred without incident, and States gradually shifted to pentobarbital as their supplies of sodium thiopental ran out. It is reported that pentobarbital was used in all of the 43 executions carried out in 2012. Petitioners concede that pentobarbital, like sodium thiopental, can “reliably induce and maintain a comalike state that renders a person insensate to pain” caused by administration of the second and third drugs in the protocol. And courts across the country have held that the use of pentobarbital in executions does not violate the

Eighth Amendment.

Before long, however, pentobarbital also became unavailable. Anti-death-penalty advocates lobbied the Danish manufacturer of the drug to stop selling it for use in executions. See Bonner, *supra*. That manufacturer opposed the death penalty and took steps to block the shipment of pentobarbital for use in executions in the United States. Oklahoma eventually became unable to acquire the drug through any means. The District Court below found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma.

C

Unable to acquire either sodium thiopental or pentobarbital, some States have turned to midazolam, a sedative in the benzodiazepine family of drugs. In October 2013, Florida became the first State to substitute midazolam for pentobarbital as part of a three-drug lethal injection protocol. To date, Florida has conducted 11 executions using that protocol, which calls for midazolam followed by a paralytic agent and potassium chloride. In 2014, Oklahoma also substituted midazolam for pentobarbital as part of its three-drug protocol. Oklahoma has already used this three-drug protocol twice: to execute Clayton Lockett in April 2014 and Charles Warner in January 2015. (Warner was one of the four inmates who moved for a preliminary injunction in this case.)

The Lockett execution caused Oklahoma to implement new safety precautions as part of its lethal injection protocol. When Oklahoma executed Lockett, its protocol called for the administration of 100 milligrams of midazolam, as compared to the 500 milligrams that are currently required. On the morning of his execution, Lockett cut himself twice at “the bend of the elbow.” That evening, the execution team spent nearly an hour making at

least one dozen attempts to establish intravenous (IV) access to Lockett’s cardiovascular system, including at his arms and elsewhere on his body. The team eventually believed that it had established intravenous access through Lockett’s right femoral vein, and it covered the injection access point with a sheet, in part to preserve Lockett’s dignity during the execution. After the team administered the midazolam and a physician determined that Lockett was unconscious, the team next administered the paralytic agent (vecuronium bromide) and most of the potassium chloride. Lockett began to move and speak, at which point the physician lifted the sheet and determined that the IV had “infiltrated,” which means that “the IV fluid, rather than entering Lockett’s blood stream, had leaked into the tissue surrounding the IV access point.” The execution team stopped administering the remaining potassium chloride and terminated the execution about 33 minutes after the midazolam was first injected. About 10 minutes later, Lockett was pronounced dead.

An investigation into the Lockett execution concluded that “the viability of the IV access point was the single greatest factor that contributed to the difficulty in administering the execution drugs.” The investigation, which took five months to complete, recommended several changes to Oklahoma’s execution protocol, and Oklahoma adopted a new protocol with an effective date of September 30, 2014. That protocol allows the Oklahoma Department of Corrections to choose among four different drug combinations. The option that Oklahoma plans to use to execute petitioners calls for the administration of 500 milligrams of midazolam followed by a paralytic agent and potassium chloride. The paralytic agent may be pancuronium bromide, vecuronium bromide, or rocuronium bromide, three drugs that, all agree, are functionally equivalent for purposes of this case. The protocol also includes procedural safeguards to help ensure that an inmate remains insensate to any pain caused by the

administration of the paralytic agent and potassium chloride. Those safeguards include: (1) the insertion of both a primary and backup IV catheter, (2) procedures to confirm the viability of the IV site, (3) the option to postpone an execution if viable IV sites cannot be established within an hour, (4) a mandatory pause between administration of the first and second drugs, (5) numerous procedures for monitoring the offender's consciousness, including the use of an electrocardiograph and direct observation, and (6) detailed provisions with respect to the training and preparation of the execution team. In January of this year, Oklahoma executed Warner using these revised procedures and the combination of midazolam, a paralytic agent, and potassium chloride.

II

A

In June 2014, after Oklahoma switched from pentobarbital to midazolam and executed Lockett, 21 Oklahoma death row inmates filed an action under 42 U.S.C. § 1983 challenging the State's new lethal injection protocol. The complaint alleged that Oklahoma's use of midazolam violates the Eighth Amendment's prohibition of cruel and unusual punishment.

In November 2014, four of those plaintiffs—Richard Glossip, Benjamin Cole, John Grant, and Warner—filed a motion for a preliminary injunction. All four men had been convicted of murder and sentenced to death by Oklahoma juries. Glossip hired Justin Sneed to kill his employer, Barry Van Treese. Sneed entered a room where Van Treese was sleeping and beat him to death with a baseball bat. Cole murdered his 9-month-old daughter after she would not stop crying. Cole bent her body backwards until he snapped her spine in half. After the child

died, Cole played video games. Grant, while serving terms of imprisonment totaling 130 years, killed Gay Carter, a prison food service supervisor, by pulling her into a mop closet and stabbing her numerous times with a shank. Warner anally raped and murdered an 11-month-old girl. The child's injuries included two skull fractures, internal brain injuries, two fractures to her jaw, a lacerated liver, and a bruised spleen and lungs.

The Oklahoma Court of Criminal Appeals affirmed the murder conviction and death sentence of each offender. Each of the men then unsuccessfully sought both state postconviction and federal habeas corpus relief. Having exhausted the avenues for challenging their convictions and sentences, they moved for a preliminary injunction against Oklahoma's lethal injection protocol.

B

In December 2014, after discovery, the District Court held a 3-day evidentiary hearing on the preliminary injunction motion. The District Court heard testimony from 17 witnesses and reviewed numerous exhibits. Dr. David Lubarsky, an anesthesiologist, and Dr. Larry Sasich, a doctor of pharmacy, provided expert testimony about midazolam for petitioners, and Dr. Roswell Evans, a doctor of pharmacy, provided expert testimony for respondents.

After reviewing the evidence, the District Court issued an oral ruling denying the motion for a preliminary injunction. The District Court first rejected petitioners' challenge under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), to the testimony of Dr. Evans. It concluded that Dr. Evans, the Dean of Auburn University's School of Pharmacy, was well qualified to testify about midazolam's properties and that he offered reliable testimony. The District Court then held that petitioners failed to

establish a likelihood of success on the merits of their claim that the use of midazolam violates the Eighth Amendment. The court provided two independent reasons for this conclusion. First, the court held that petitioners failed to identify a known and available method of execution that presented a substantially less severe risk of pain than the method that the State proposed to use. Second, the court found that petitioners failed to prove that Oklahoma's protocol "presents a risk that is 'sure or very likely to cause serious illness and needless suffering,' amounting to 'an objectively intolerable risk of harm.'" App. 96 (quoting *Baze*, 553 U.S., at 50). The court emphasized that the Oklahoma protocol featured numerous safeguards, including the establishment of two IV access sites, confirmation of the viability of those sites, and monitoring of the offender's level of consciousness throughout the procedure.

The District Court supported its decision with findings of fact about midazolam. It found that a 500-milligram dose of midazolam "would make it a virtual certainty that any individual will be at a sufficient level of unconsciousness to resist the noxious stimuli which could occur from the application of the second and third drugs." App. 77. Indeed, it found that a 500-milligram dose alone would likely cause death by respiratory arrest within 30 minutes or an hour.

The Court of Appeals for the Tenth Circuit affirmed. The Court of Appeals explained that our decision in *Baze* requires a plaintiff challenging a lethal injection protocol to demonstrate that the risk of severe pain presented by an execution protocol is substantial " 'when compared to the known and available alternatives.' " (quoting *Baze*, *supra*, at 61, 128 S.Ct. 1520). And it agreed with the District Court that petitioners had not identified any such alternative. The Court of Appeals added, however, that this holding was "not outcome-determinative in this case" because petitioners additionally failed to establish that the use of

midazolam creates a demonstrated risk of severe pain. The Court of Appeals found that the District Court did not abuse its discretion by relying on Dr. Evans' testimony, and it concluded that the District Court's factual findings about midazolam were not clearly erroneous. It also held that alleged errors in Dr. Evans' testimony did not render his testimony unreliable or the District Court's findings clearly erroneous.

Oklahoma executed Warner on January 15, 2015, but we subsequently voted to grant review and then stayed the executions of Glossip, Cole, and Grant pending the resolution of this case.

III

"A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008). The parties agree that this case turns on whether petitioners are able to establish a likelihood of success on the merits.

The Eighth Amendment, made applicable to the States through the Fourteenth Amendment, prohibits the infliction of "cruel and unusual punishments." The controlling opinion in *Baze* outlined what a prisoner must establish to succeed on an Eighth Amendment method-of-execution claim. *Baze* involved a challenge by Kentucky death row inmates to that State's three-drug lethal injection protocol of sodium thiopental, pancuronium bromide, and potassium chloride. The inmates conceded that the protocol, if properly administered, would result in a humane and constitutional execution because sodium thiopental would render an inmate oblivious to any pain caused by the second and third drugs. But they argued that

there was an unacceptable risk that sodium thiopental would not be properly administered. The inmates also maintained that a significant risk of harm could be eliminated if Kentucky adopted a one-drug protocol and additional monitoring by trained personnel.

The controlling opinion in *Baze* first concluded that prisoners cannot successfully challenge a method of execution unless they establish that the method presents a risk that is “ ‘sure or very likely to cause serious illness and needless suffering,’ and give rise to ‘sufficiently imminent dangers.’ ” (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)). To prevail on such a claim, “there must be a ‘substantial risk of serious harm,’ an ‘objectively intolerable risk of harm’ that prevents prison officials from pleading that they were ‘subjectively blameless for purposes of the Eighth Amendment.’ ” 553 U.S., at 50 (quoting *Farmer v. Brennan*, 511 U.S. 825, 846, and n. 9 (1994)). The controlling opinion also stated that prisoners “cannot successfully challenge a State’s method of execution merely by showing a slightly or marginally safer alternative.” Instead, prisoners must identify an alternative that is “feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.”

The controlling opinion summarized the requirements of an Eighth Amendment method-of-execution claim as follows: “A stay of execution may not be granted on grounds such as those asserted here unless the condemned prisoner establishes that the State’s lethal injection protocol creates a demonstrated risk of severe pain. [And] [h]e must show that the risk is substantial when compared to the known and available alternatives.” The preliminary injunction posture of the present case thus requires petitioners to establish a likelihood that they can establish both that Oklahoma’s lethal injection protocol creates a demonstrated risk of severe pain and that the risk is substantial when

compared to the known and available alternatives.

The challenge in *Baze* failed both because the Kentucky inmates did not show that the risks they identified were substantial and imminent, and because they did not establish the existence of a known and available alternative method of execution that would entail a significantly less severe risk. Petitioners’ arguments here fail for similar reasons. First, petitioners have not proved that any risk posed by midazolam is substantial when compared to known and available alternative methods of execution. Second, they have failed to establish that the District Court committed clear error when it found that the use of midazolam will not result in severe pain and suffering. We address each reason in turn.

IV

Our first ground for affirmance is based on petitioners’ failure to satisfy their burden of establishing that any risk of harm was substantial when compared to a known and available alternative method of execution. In their amended complaint, petitioners proffered that the State could use sodium thiopental as part of a single-drug protocol. They have since suggested that it might also be constitutional for Oklahoma to use pentobarbital. But the District Court found that both sodium thiopental and pentobarbital are now unavailable to Oklahoma’s Department of Corrections. The Court of Appeals affirmed that finding, and it is not clearly erroneous. On the contrary, the record shows that Oklahoma has been unable to procure those drugs despite a good-faith effort to do so.

Petitioners do not seriously contest this factual finding, and they have not identified any available drug or drugs that could be used in

place of those that Oklahoma is now unable to obtain. Nor have they shown a risk of pain so great that other acceptable, available methods must be used. Instead, they argue that they need not identify a known and available method of execution that presents less risk. But this argument is inconsistent with the controlling opinion in *Baze*, 553 U.S., at 61, which imposed a requirement that the Court now follows.

Petitioners contend that the requirement to identify an alternative method of execution contravenes our pre-*Baze* decision in *Hill v. McDonough* (2006), but they misread that decision. The portion of the opinion in *Hill* on which they rely concerned a question of civil procedure, not a substantive Eighth Amendment question. In *Hill*, the issue was whether a challenge to a method of execution must be brought by means of an application for a writ of habeas corpus or a civil action under § 1983. *Id.*, at 576, 126 S.Ct. 2096. We held that a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence. *Id.*, at 579–580. The United States as *amicus curiae* argued that we should adopt a special pleading requirement to stop inmates from using § 1983 actions to attack, not just a particular means of execution, but the death penalty itself. To achieve this end, the United States proposed that an inmate asserting a method-of-execution claim should be required to plead an acceptable alternative method of execution. *Id.*, at 582. We rejected that argument because “[s]pecific pleading requirements are mandated by the Federal Rules of Civil Procedure, and not, as a general rule, through case-by-case determinations of the federal courts.” *Ibid.* *Hill* thus held that § 1983 alone does not impose a heightened pleading requirement. *Baze*, on the other hand, addressed the substantive elements of an Eighth Amendment method-of-execution claim, and it made clear that the Eighth Amendment requires a prisoner to plead and prove a known and

available alternative. Because petitioners failed to do this, the District Court properly held that they did not establish a likelihood of success on their Eighth Amendment claim.

Readers can judge for themselves how much distance there is between the principal dissent's argument against requiring prisoners to identify an alternative and the view, now announced by Justices BREYER and GINSBURG, that the death penalty is categorically unconstitutional. (BREYER, J., dissenting). The principal dissent goes out of its way to suggest that a State would violate the Eighth Amendment if it used one of the methods of execution employed before the advent of lethal injection. And the principal dissent makes this suggestion even though the Court held in *Wilkerson* that this method (the firing squad) is constitutional and even though, in the words of the principal dissent, “there is some reason to think that it is relatively quick and painless.” Tellingly silent about the methods of execution most commonly used before States switched to lethal injection (the electric chair and gas chamber), the principal dissent implies that it would be unconstitutional to use a method that “could be seen as a devolution to a more primitive era.” If States cannot return to any of the “more primitive” methods used in the past and if no drug that meets with the principal dissent's approval is available for use in carrying out a death sentence, the logical conclusion is clear. But we have time and again reaffirmed that capital punishment is not *per se* unconstitutional. We decline to effectively overrule these decisions.

V

We also affirm for a second reason: The District Court did not commit clear error when it found that midazolam is highly likely to render a person unable to feel pain during an execution. We emphasize four points at the outset of our

analysis.

* * * *

First, we review the District Court’s factual findings under the deferential “clear error” standard. This standard does not entitle us to overturn a finding “simply because [we are] convinced that [we] would have decided the case differently.”

Second, petitioners bear the burden of persuasion on this issue. Although petitioners expend great effort attacking peripheral aspects of Dr. Evans’ testimony, they make little attempt to prove what is critical, *i.e.*, that the evidence they presented to the District Court establishes that the use of midazolam is sure or very likely to result in needless suffering.

Third, numerous courts have concluded that the use of midazolam as the first drug in a three-drug protocol is likely to render an inmate insensate to pain that might result from administration of the paralytic agent and potassium chloride. “Where an intermediate court reviews, and affirms, a trial court’s factual findings, this Court will not ‘lightly overturn’ the concurrent findings of the two lower courts.” Our review is even more deferential where, as here, multiple trial courts have reached the same finding, and multiple appellate courts have affirmed those findings.

Fourth, challenges to lethal injection protocols test the boundaries of the authority and competency of federal courts. Although we must invalidate a lethal injection protocol if it violates the Eighth Amendment, federal courts should not “embroil [themselves] in ongoing scientific controversies beyond their expertise.” Accordingly, an inmate challenging a protocol bears the burden to show, based on evidence presented to the court, that there is a substantial risk of severe pain.

[findings of fact]

Third, petitioners argue that there is no consensus among the States regarding midazolam’s efficacy because only four States (Oklahoma, Arizona, Florida, and Ohio) have used midazolam as part of an execution. Petitioners rely on the plurality’s statement in *Baze* that “it is difficult to regard a practice as ‘objectively intolerable’ when it is in fact widely tolerated,” and the plurality’s emphasis on the fact that 36 States had adopted lethal injection and 30 States used the particular three-drug protocol at issue in that case. But while the near-universal use of the particular protocol at issue in *Baze* supported our conclusion that this protocol did not violate the Eighth Amendment, we did not say that the converse was true, *i.e.*, that other protocols or methods of execution are of doubtful constitutionality. That argument, if accepted, would hamper the adoption of new and potentially more humane methods of execution and would prevent States from adapting to changes in the availability of suitable drugs.

* * * *

Finally, we find it appropriate to respond to the principal dissent’s groundless suggestion that our decision is tantamount to allowing prisoners to be “drawn and quartered, slowly tortured to death, or actually burned at the stake.” That is simply not true, and the principal dissent’s resort to this outlandish rhetoric reveals the weakness of its legal arguments.

VI

For these reasons, the judgment of the Court of Appeals for the Tenth Circuit is affirmed.

It is so ordered.

Justice SCALIA, with whom Justice THOMAS joins, concurring.

I join the opinion of the Court, and write to respond to Justice BREYER's plea for judicial abolition of the death penalty.

Welcome to Groundhog Day. The scene is familiar: Petitioners, sentenced to die for the crimes they committed (including, in the case of one petitioner since put to death, raping and murdering an 11-month-old baby), come before this Court asking us to nullify their sentences as “cruel and unusual” under the Eighth Amendment. They rely on this provision because it is the only provision they *can* rely on. They were charged by a sovereign State with murder. They were afforded counsel and tried before a jury of their peers—tried twice, once to determine whether they were guilty and once to determine whether death was the appropriate sentence. They were duly convicted and sentenced. They were granted the right to appeal and to seek postconviction relief, first in state and then in federal court. And now, acknowledging that their convictions are unassailable, they ask us for clemency, as though clemency were ours to give.

The response is also familiar: A vocal minority of the Court, waving over their heads a ream of the most recent abolitionist studies (a superabundant genre) as though they have discovered the lost folios of Shakespeare, insist that *now*, at long last, the death penalty must be abolished for good. Mind you, not once in the history of the American Republic has this Court ever suggested the death penalty is categorically impermissible. The reason is obvious: It is impossible to hold unconstitutional that which the Constitution explicitly *contemplates*. The Fifth Amendment provides that “[n]o person shall be held to answer for a capital ... crime, unless on a presentment or indictment of a

Grand Jury,” and that no person shall be “deprived of life ... without due process of law.” Nevertheless, today Justice BREYER takes on the role of the abolitionists in this long-running drama, arguing that the text of the Constitution and two centuries of history must yield to his “20 years of experience on this Court,” and inviting full briefing on the continued permissibility of capital punishment.

Historically, the Eighth Amendment was understood to bar only those punishments that added “ ‘terror, pain, or disgrace’ ” to an otherwise permissible capital sentence. Rather than bother with this troubling detail, Justice BREYER elects to contort the constitutional text. Redefining “cruel” to mean “unreliable,” “arbitrary,” or causing “excessive delays,” and “unusual” to include a “decline in use,” he proceeds to offer up a white paper devoid of any meaningful legal argument.

Even accepting Justice BREYER's rewriting of the Eighth Amendment, his argument is full of internal contradictions and (it must be said) gobbledy-gook. He says that the death penalty is cruel because it is unreliable; but it is *convictions*, not *punishments*, that are unreliable. Moreover, the “pressure on police, prosecutors, and jurors to secure a conviction,” which he claims increases the risk of wrongful convictions in capital cases, flows from the nature of the crime, not the punishment that follows its commission. Justice BREYER acknowledges as much: “[T]he crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure.” That same pressure would exist, and the same risk of wrongful convictions, if horrendous death-penalty cases were converted into equally horrendous life-without-parole cases. The reality is that any innocent defendant is infinitely better off appealing a death sentence than a sentence of life imprisonment. (Which, again, Justice BREYER acknowledges: “[C]ourts (or State

Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue.”) The capital convict will obtain endless legal assistance from the abolition lobby (and legal favoritism from abolitionist judges), while the lifer languishes unnoticed behind bars.

Justice BREYER next says that the death penalty is cruel because it is arbitrary. To prove this point, he points to a study of 205 cases that “measured the ‘egregiousness’ of the murderer’s conduct” with “a system of metrics,” and then “compared the egregiousness of the conduct of the 9 defendants sentenced to death with the egregiousness of the conduct of defendants in the remaining 196 cases [who were not sentenced to death].” If only Aristotle, Aquinas, and Hume knew that moral philosophy could be so neatly distilled into a pocket-sized, *vade mecum* “system of metrics.” Of course it cannot: Egregiousness is a moral judgment susceptible of few hard-and-fast rules. More importantly, egregiousness of the crime is only one of several factors that render a punishment condign—culpability, rehabilitative potential, and the need for deterrence also are relevant. That is why this Court has required an individualized consideration of all mitigating circumstances, rather than formulaic application of some egregiousness test.

It is because these questions are contextual and admit of no easy answers that we rely on juries to make judgments about the people and crimes before them. The fact that these judgments may vary across cases is an inevitable consequence of the jury trial, that cornerstone of Anglo-American judicial procedure. But when a punishment is authorized by law—if you kill you are subject to death—the fact that some defendants receive mercy from their jury no more renders the underlying punishment “cruel” than does the fact that some guilty individuals are never apprehended, are never tried, are acquitted, or are pardoned.

Justice BREYER’s third reason that the death penalty is cruel is that it entails delay, thereby (1) subjecting inmates to long periods on death row and (2) undermining the penological justifications of the death penalty. The first point is nonsense. Life without parole is an even lengthier period than the wait on death row; and if the objection is that death row is a more confining environment, the solution should be modifying the environment rather than abolishing the death penalty. As for the argument that delay undermines the penological rationales for the death penalty: In insisting that “the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates.” Justice BREYER apparently forgets that one of the plaintiffs *in this very case* was already in prison when he committed the murder that landed him on death row. Justice BREYER further asserts that “whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole.” My goodness. If he thinks the death penalty not much more harsh (and hence not much more retributive), why is he so keen to get rid of it? With all due respect, whether the death penalty and life imprisonment constitute more-or-less equivalent retribution is a question far above the judiciary’s pay grade. Perhaps Justice BREYER is more forgiving—or more enlightened—than those who, like Kant, believe that death is the only just punishment for taking a life. I would not presume to tell parents whose life has been forever altered by the brutal murder of a child that life imprisonment is punishment enough.

And finally, Justice BREYER speculates that it does not “seem likely” that the death penalty has a “significant” deterrent effect. It seems very likely to me, and there are statistical studies that say so. But we federal judges live in a world apart from the vast majority of Americans. After work, we retire to homes in placid suburbia or to high-rise co-ops with guards at the door. We are

not confronted with the threat of violence that is ever present in many Americans' everyday lives. The suggestion that the incremental deterrent effect of capital punishment does not seem "significant" reflects, it seems to me, a let-them-eat-cake obliviousness to the needs of others. Let the People decide how much incremental deterrence is appropriate.

Of course, this delay is a problem of the Court's own making. As Justice BREYER concedes, for more than 160 years, capital sentences were carried out in an average of two years or less. But by 2014, he tells us, it took an average of 18 years to carry out a death sentence. What happened in the intervening years? Nothing other than the proliferation of labyrinthine restrictions on capital punishment, promulgated by this Court under an interpretation of the Eighth Amendment that empowered it to divine "the evolving standards of decency that mark the progress of a maturing society,"—a task for which we are eminently ill suited. Indeed, for the past two decades, Justice BREYER has been the Drum Major in this parade. His invocation of the resultant delay as grounds for abolishing the death penalty calls to mind the man sentenced to death for killing his parents, who pleads for mercy on the ground that he is an orphan. Amplifying the surrealism of his argument, Justice BREYER uses the fact that many States have abandoned capital punishment—have abandoned it *precisely because of* the costs those suspect decisions have imposed—to conclude that it is now "unusual." (A caution to the reader: Do not use the creative arithmetic that Justice BREYER employs in counting the number of States that use the death penalty when you prepare your next tax return; outside the world of our Eighth Amendment abolitionist-inspired jurisprudence, it will be regarded as more misrepresentation than math.)

If we were to travel down the path that Justice BREYER sets out for us and once again

consider the constitutionality of the death penalty, I would ask that counsel also brief whether our cases that have abandoned the historical understanding of the Eighth Amendment, beginning with *Trop*, should be overruled. That case has caused more mischief to our jurisprudence, to our federal system, and to our society than any other that comes to mind. Justice BREYER's dissent is the living refutation of *Trop*'s assumption that this Court has the capacity to recognize "evolving standards of decency." Time and again, the People have voted to exact the death penalty as punishment for the most serious of crimes. Time and again, this Court has upheld that decision. And time and again, a vocal minority of this Court has insisted that things have "changed radically," and has sought to replace the judgments of the People with their own standards of decency.

Capital punishment presents moral questions that philosophers, theologians, and statesmen have grappled with for millennia. The Framers of our Constitution disagreed bitterly on the matter. For that reason, they handled it the same way they handled many other controversial issues: they left it to the People to decide. By arrogating to himself the power to overturn that decision, Justice BREYER does not just reject the death penalty, he rejects the Enlightenment.

Justice THOMAS, with whom Justice SCALIA joins, concurring.

I agree with the Court that petitioners' Eighth Amendment claim fails. That claim has no foundation in the Eighth Amendment, which prohibits only those "method[s] of execution" that are "deliberately designed to inflict pain." Because petitioners make no allegation that Oklahoma adopted its lethal injection protocol "to add elements of terror, pain, or disgrace to the death penalty," they have no valid claim. That should have been the end of this case, but our precedents have predictably transformed the

federal courts “into boards of inquiry charged with determining the ‘best practices’ for executions,” necessitating the painstaking factual inquiry the Court undertakes today. Although I continue to believe that the broader interpretation of the Eighth Amendment advanced in the plurality opinion in *Baze* is erroneous, I join the Court’s opinion in full because it correctly explains why petitioners’ claim fails even under that controlling opinion.

* * * *

Justice BREYER, with whom Justice GINSBURG joins, dissenting.

For the reasons stated in Justice SOTOMAYOR’s opinion, I dissent from the Court’s holding. But rather than try to patch up the death penalty’s legal wounds one at a time, I would ask for full briefing on a more basic question: whether the death penalty violates the Constitution.

The relevant legal standard is the standard set forth in the Eighth Amendment. The Constitution there forbids the “inflict[ion]” of “cruel and unusual punishments.” The Court has recognized that a “claim that punishment is excessive is judged not by the standards that prevailed in 1685 when Lord Jeffreys presided over the ‘Bloody Assizes’ or when the Bill of Rights was adopted, but rather by those that currently prevail.” Indeed, the Constitution prohibits various gruesome punishments that were common in Blackstone’s day.

Nearly 40 years ago, this Court upheld the death penalty under statutes that, in the Court’s view, contained safeguards sufficient to ensure that the penalty would be applied reliably and not arbitrarily. The circumstances and the evidence of the death penalty’s application have changed radically since then. Given those changes, I believe that it is now time to reopen the

question.

In 1976, the Court thought that the constitutional infirmities in the death penalty could be healed; the Court in effect delegated significant responsibility to the States to develop procedures that would protect against those constitutional problems. Almost 40 years of studies, surveys, and experience strongly indicate, however, that this effort has failed. Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use.

I shall describe each of these considerations, emphasizing changes that have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited “cruel and unusual punishment[t].” U.S. Const., Amdt. 8.

I

“Cruel”—Lack of Reliability

This Court has specified that the finality of death creates a “qualitative difference” between the death penalty and other punishments (including life in prison). That “qualitative difference” creates “a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.” *Ibid.* There is increasing evidence, however, that the death penalty as now applied lacks that requisite reliability.

For one thing, despite the difficulty of investigating the circumstances surrounding an execution for a crime that took place long ago, researchers have found convincing evidence that, in the past three decades, innocent people have been executed.

For another, the evidence that the death penalty has been wrongly *imposed* (whether or not it was carried out), is striking. As of 2002, this Court used the word “disturbing” to describe the number of instances in which individuals had been sentenced to death but later exonerated. At that time, there was evidence of approximately 60 exonerations in capital cases. (I use “exoneration” to refer to relief from *all* legal consequences of a capital conviction through a decision by a prosecutor, a Governor or a court, after new evidence of the defendant’s innocence was discovered.) Since 2002, the number of exonerations in capital cases has risen to 115. Last year, in 2014, six death row inmates were exonerated based on actual innocence. All had been imprisoned for more than 30 years (and one for almost 40 years) at the time of their exonerations.

Furthermore, exonerations occur far more frequently where capital convictions, rather than ordinary criminal convictions, are at issue. Researchers have calculated that courts (or State Governors) are 130 times more likely to exonerate a defendant where a death sentence is at issue. They are nine times more likely to exonerate where a capital murder, rather than a noncapital murder, is at issue.

Why is that so? To some degree, it must be because the law that governs capital cases is more complex. To some degree, it must reflect the fact that courts scrutinize capital cases more closely. But, to some degree, it likely also reflects a *greater likelihood of an initial wrongful conviction*. How could that be so? In

the view of researchers who have conducted these studies, it could be so because the crimes at issue in capital cases are typically horrendous murders, and thus accompanied by intense community pressure on police, prosecutors, and jurors to secure a conviction. This pressure creates a greater likelihood of convicting the wrong person.

Other factors may also play a role. One is the practice of death-qualification; no one can serve on a capital jury who is not willing to impose the death penalty.

Another is the more general problem of flawed forensic testimony. The Federal Bureau of Investigation (FBI), for example, recently found that flawed microscopic hair analysis was used in 33 of 35 capital cases under review; 9 of the 33 had already been executed.

In light of these and other factors, researchers estimate that about 4% of those sentenced to death are actually innocent.

Finally, if we expand our definition of “exoneration” (which we limited to errors suggesting the defendant was actually innocent) and thereby also categorize as “erroneous” instances in which courts failed to follow legally required procedures, the numbers soar. Between 1973 and 1995, courts identified prejudicial errors in 68% of the capital cases before them. State courts on direct and postconviction review overturned 47% of the sentences they reviewed. Federal courts, reviewing capital cases in habeas corpus proceedings, found error in 40% of those cases.

This research and these figures are likely controversial. Full briefing would allow us to scrutinize them with more care. But, at a minimum, they suggest a serious problem of

reliability. They suggest that there are too many instances in which courts sentence defendants to death without complying with the necessary procedures; and they suggest that, in a significant number of cases, the death sentence is imposed on a person who did not commit the crime. Unlike 40 years ago, we now have plausible *evidence* of unreliability that (perhaps due to DNA evidence) is stronger than the evidence we had before. In sum, there is significantly more research-based evidence today indicating that courts sentence to death individuals who may well be actually innocent or whose convictions (in the law's view) do not warrant the death penalty's application.

II

“Cruel”—Arbitrariness

The arbitrary imposition of punishment is the antithesis of the rule of law. For that reason, Justice Potter Stewart (who supplied critical votes for the holdings in *Furman* and *Gregg*) found the death penalty unconstitutional as administered in 1972:

“These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of [death-eligible crimes], many just as reprehensible as these, the[se] petitioners are among a capriciously selected random handful upon which the sentence of death has in fact been imposed.” *Furman*, 408 U.S., at 309–310, 92 S.Ct. 2726 (concurring opinion).

When the death penalty was reinstated in 1976, this Court acknowledged that the death penalty is (and would be) unconstitutional if “inflicted in an arbitrary and capricious manner.”

The Court has consequently sought to make the application of the death penalty less arbitrary by restricting its use to those whom Justice Souter called “‘the worst of the worst.’”

Despite the *Gregg* Court's hope for fair administration of the death penalty, 40 years of further experience make it increasingly clear that the death penalty is imposed arbitrarily, *i.e.*, without the “reasonable consistency” legally necessary to reconcile its use with the Constitution's commands.

Thorough studies of death penalty sentences support this conclusion. A recent study, for example, examined all death penalty sentences imposed between 1973 and 2007 in Connecticut, a State that abolished the death penalty in 2012. The study reviewed treatment of all homicide defendants. It found 205 instances in which Connecticut law made the defendant eligible for a death sentence. Courts imposed a death sentence in 12 of these 205 cases, of which 9 were sustained on appeal. The study then measured the “egregiousness” of the murderer's conduct in those 9 cases, developing a system of metrics designed to do so. It then compared the egregiousness of the conduct of the 9 defendants sentenced to death with the egregiousness of the conduct of defendants in the remaining 196 cases (those in which the defendant, though found guilty of a death-eligible offense, was ultimately not sentenced to death). Application of the studies' metrics made clear that only 1 of those 9 defendants was indeed the “worst of the worst” (or was, at least, within the 15% considered most “egregious”). The remaining eight were not. Their behavior was no worse than the behavior of at least 33 and as many as 170 other defendants (out of a total pool of 205) who had not been sentenced to death.

Such studies indicate that the factors that most clearly ought to affect application of the death penalty—namely, comparative egregiousness of

the crime—often do not. Other studies show that circumstances that ought *not* to affect application of the death penalty, such as race, gender, or geography, often *do*.

Numerous studies, for example, have concluded that individuals accused of murdering white victims, as opposed to black or other minority victims, are more likely to receive the death penalty.

Fewer, but still many, studies have found that the gender of the defendant or the gender of the victim makes a not-otherwise-warranted difference.

Geography also plays an important role in determining who is sentenced to death. And that is not simply because some States permit the death penalty while others do not. Rather *within* a death penalty State, the imposition of the death penalty heavily depends on the county in which a defendant is tried. Between 2004 and 2009, for example, just 29 counties (fewer than 1% of counties in the country) accounted for approximately half of all death sentences imposed nationwide. And in 2012, just 59 counties (fewer than 2% of counties in the country) accounted for *all* death sentences imposed nationwide.

What accounts for this county-by-county disparity? Some studies indicate that the disparity reflects the decisionmaking authority, the legal discretion, and ultimately the power of the local prosecutor.

Others suggest that the availability of resources for defense counsel (or the lack thereof) helps explain geographical differences.

Still others indicate that the racial composition of and distribution within a county plays an important role.

Finally, some studies suggest that political pressures, including pressures on judges who

must stand for election, can make a difference.

Thus, whether one looks at research indicating that irrelevant or improper factors—such as race, gender, local geography, and resources—*do* significantly determine who receives the death penalty, or whether one looks at research indicating that proper factors—such as “egregiousness”—do *not* determine who receives the death penalty, the legal conclusion must be the same: The research strongly suggests that the death penalty is imposed arbitrarily.

Justice THOMAS catalogues the tragic details of various capital cases, *ante*, at 2752 – 2755 (concurring opinion), but this misses my point. Every murder is tragic, but unless we return to the mandatory death penalty struck down in *Woodson*, the constitutionality of capital punishment rests on its limited application to the worst of the worst. And this extensive body of evidence suggests that it is not so limited.

Four decades ago, the Court believed it possible to interpret the Eighth Amendment in ways that would significantly limit the arbitrary application of the death sentence.

The Constitution does not prohibit the use of prosecutorial discretion. It has not proved possible to increase capital defense funding significantly.

Moreover, racial and gender biases may, unfortunately, reflect deeply rooted community biases (conscious or unconscious), which, despite their legal irrelevance, may affect a jury’s evaluation of mitigating evidence. Nevertheless, it remains the jury’s task to make the individualized assessment of whether the defendant’s mitigation evidence entitles him to mercy.

Finally, since this Court held that comparative proportionality review is not constitutionally

required, it seems unlikely that appeals can prevent the arbitrariness I have described.

The studies bear out my own view, reached after considering thousands of death penalty cases and last-minute petitions over the course of more than 20 years. I see discrepancies for which I can find no rational explanations. Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and an after-the-fact robbery), while another defendant does not, despite having kidnapped, raped, and murdered a young mother while leaving her infant baby to die at the scene of the crime. Why does one defendant who committed a single-victim murder receive the death penalty (due to aggravators of a prior felony conviction and acting recklessly with a gun), while another defendant does not, despite having committed a “triple murder” by killing a young man and his pregnant wife? For that matter, why does one defendant who participated in a single-victim murder-for-hire scheme (plus an after-the-fact robbery) receive the death penalty, while another defendant does not, despite having stabbed his wife 60 times and killed his 6-year-old daughter and 3-year-old son while they slept? In each instance, the sentences compared were imposed in the same State at about the same time.

The question raised by these examples (and the many more I could give but do not), as well as by the research to which I have referred, is the same question Justice Stewart, Justice Powell, and others raised over the course of several decades: The imposition and implementation of the death penalty seems capricious, random, indeed, arbitrary. From a defendant’s perspective, to receive that sentence, and certainly to find it implemented, is the equivalent of being struck by lightning. How then can we reconcile the death penalty with the demands of a Constitution that first and foremost insists upon a rule of law?

III

“Cruel”—Excessive Delays

The problems of reliability and unfairness almost inevitably lead to a third independent constitutional problem: excessively long periods of time that individuals typically spend on death row, alive but under sentence of death. That is to say, delay is in part a problem that the Constitution’s own demands create. Given the special need for reliability and fairness in death penalty cases, the Eighth Amendment does, and must, apply to the death penalty “with special force.” Those who face “that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution.” At the same time, the Constitution insists that “every safeguard” be “observed” when “a defendant’s life is at stake.”

These procedural necessities take time to implement. And, unless we abandon the procedural requirements that assure fairness and reliability, we are forced to confront the problem of increasingly lengthy delays in capital cases. Ultimately, though these legal causes may help to explain, they do not mitigate the harms caused by delay itself.

A

Consider first the statistics. In 2014, 35 individuals were executed. Those executions occurred, on average, nearly 18 years after a court initially pronounced its sentence of death. In some death penalty States, the average delay is longer. In an oral argument last year, for example, the State admitted that the last 10 prisoners executed in Florida had spent an average of nearly 25 years on death row before

execution. Tr. of Oral Arg. in *Hall v. Florida*, O.T. 2013, No. 12–10882, p. 46.

The length of the average delay has increased dramatically over the years. In 1960, the average delay between sentencing and execution was two years. Ten years ago (in 2004) the average delay was about 11 years. By last year the average had risen to about 18 years. Nearly half of the 3,000 inmates now on death row have been there for more than 15 years. And, at present execution rates, it would take more than 75 years to carry out those 3,000 death sentences; thus, the average person on death row would spend an additional 37.5 years there before being executed.

I cannot find any reasons to believe the trend will soon be reversed.

B

These lengthy delays create two special constitutional difficulties. First, a lengthy delay in and of itself is especially cruel because it “subjects death row inmates to decades of especially severe, dehumanizing conditions of confinement.” Second, lengthy delay undermines the death penalty’s penological rationale.

1

Turning to the first constitutional difficulty, nearly all death penalty States keep death row inmates in isolation for 22 or more hours per day. This occurs even though the ABA has suggested that death row inmates be housed in conditions similar to the general population, and the United Nations Special Rapporteur on Torture has called for a global ban on solitary confinement longer than 15 days. And it is well documented that such prolonged solitary confinement produces numerous deleterious

harms.

The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out. In 1890, this Court recognized that, “when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it.” The Court was there *describing a delay of a mere four weeks*. In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measured, not in weeks, but in decades.

Moreover, we must consider death warrants that have been issued and revoked, not once, but repeatedly.

Several inmates have come within hours or days of execution before later being exonerated. Willie Manning was *four hours* from his scheduled execution before the Mississippi Supreme Court stayed the execution. Two years later, Manning was exonerated after the evidence against him, including flawed testimony from an FBI hair examiner, was severely undermined.

Furthermore, given the negative effects of confinement and uncertainty, it is not surprising that many inmates volunteer to be executed, abandoning further appeals. Indeed, one death row inmate, who was later exonerated, still said he would have preferred to die rather than to spend years on death row pursuing his exoneration. Nor is it surprising that many inmates consider, or commit, suicide.

Others have written at great length about the constitutional problems that delays create, and, rather than repeat their facts, arguments, and conclusions, * * * .

2

The second constitutional difficulty resulting from lengthy delays is that those delays undermine the death penalty's penological rationale, perhaps irreparably so. The rationale for capital punishment, as for any punishment, classically rests upon society's need to secure deterrence, incapacitation, retribution, or rehabilitation. Capital punishment by definition does not rehabilitate. It does, of course, incapacitate the offender. But the major alternative to capital punishment—namely, life in prison without possibility of parole—also incapacitates.

Thus, as the Court has recognized, the death penalty's penological rationale in fact rests almost exclusively upon a belief in its tendency to deter and upon its ability to satisfy a community's interest in retribution. Many studies have examined the death penalty's deterrent effect; some have found such an effect, whereas others have found a lack of evidence that it deters crime.

Recently, the National Research Council (whose members are drawn from the councils of the National Academy of Sciences, the National Academy of Engineering, and the Institute of Medicine) reviewed 30 years of empirical evidence and concluded that it was insufficient to establish a deterrent effect and thus should "not be used to inform" discussion about the deterrent value of the death penalty.

I recognize that a "lack of evidence" for a proposition does not prove the contrary. But suppose that we add to these studies the fact that, today, very few of those sentenced to death are actually executed, and that even those executions occur, on average, after nearly two decades on death row. Then, does it still seem

likely that the death penalty has a significant deterrent effect?

Consider, for example, what actually happened to the 183 inmates sentenced to death in 1978. As of 2013 (35 years later), 38 (or 21% of them) had been executed; 132 (or 72%) had had their convictions or sentences overturned or commuted; and 7 (or 4%) had died of other (likely natural) causes. Six (or 3%) remained on death row.

The example illustrates a general trend. Of the 8,466 inmates under a death sentence at some point between 1973 and 2013, 16% were executed, 42% had their convictions or sentences overturned or commuted, and 6% died by other causes; the remainder (35%) are still on death row.

Thus an offender who is sentenced to death is two or three times more likely to find his sentence overturned or commuted than to be executed; and he has a good chance of dying from natural causes before any execution (or exoneration) can take place. In a word, executions are *rare*. And an individual contemplating a crime but evaluating the potential punishment would know that, in any event, he faces a potential sentence of life without parole.

These facts, when recurring, must have some offsetting effect on a potential perpetrator's fear of a death penalty. And, even if that effect is no more than slight, it makes it difficult to believe (given the studies of deterrence cited earlier) that such a rare event significantly deters horrendous crimes.

But what about retribution? Retribution is a valid penological goal. I recognize that surviving relatives of victims of a horrendous crime, or perhaps the community itself, may find vindication in an execution. And a community that favors the death penalty has an

understandable interest in representing their voices.

The relevant question here, however, is whether a “community’s sense of retribution” can often find vindication in “a death that comes,” if at all, “only several decades after the crime was committed.” By then the community is a different group of people. The offenders and the victims’ families have grown far older. Feelings of outrage may have subsided. The offender may have found himself a changed human being. And sometimes repentance and even forgiveness can restore meaning to lives once ruined. At the same time, the community and victims’ families will know that, even without a further death, the offender will serve decades in prison under a sentence of life without parole.

I recognize, of course, that this may not always be the case, and that sometimes the community believes that an execution could provide closure. Nevertheless, the delays and low probability of execution must play some role in any calculation that leads a community to insist on death as retribution. As I have already suggested, they may well attenuate the community’s interest in retribution to the point where it cannot by itself amount to a significant justification for the death penalty. In any event, I believe that whatever interest in retribution might be served by the death penalty as currently administered, that interest can be served almost as well by a sentence of life in prison without parole (a sentence that every State now permits).

Finally, the fact of lengthy delays undermines any effort to justify the death penalty in terms of its prevalence when the Founders wrote the Eighth Amendment. When the Founders wrote the Constitution, there were no 20– or 30–year delays. Execution took place soon after sentencing. And, for reasons I shall describe, we cannot return to the quick executions in the founding era.

3

The upshot is that lengthy delays both aggravate the cruelty of the death penalty and undermine its jurisprudential rationale. And this Court has said that, if the death penalty does not fulfill the goals of deterrence or retribution, “it is nothing more than the purposeless and needless imposition of pain and suffering and hence an unconstitutional punishment.”

Indeed, Justice Lewis Powell (who provided a crucial vote in *Gregg*) came to much the same conclusion, albeit after his retirement from this Court. Justice Powell had come to the Court convinced that the Federal Constitution did not outlaw the death penalty but rather left the matter up to individual States to determine.

* * * *

As I have said, today delays are much worse. When Chief Justice Rehnquist appointed Justice Powell to the Committee, the average delay between sentencing and execution was 7 years and 11 months, compared with 17 years and 7 months today.

C

One might ask, why can Congress or the States not deal directly with the delay problem? Why can they not take steps to shorten the time between sentence and execution, and thereby mitigate the problems just raised? The answer is that shortening delay is much more difficult than one might think. And that is in part because efforts to do so risk causing procedural harms that also undermine the death penalty’s constitutionality.

For one thing, delays have helped to make

application of the death penalty more reliable. Recall the case of Henry Lee McCollum, whom DNA evidence exonerated 30 years after his conviction. If McCollum had been executed earlier, he would not have lived to see the day when DNA evidence exonerated him and implicated another man; that man is already serving a life sentence for a rape and murder that he committed just a few weeks after the murder McCollum was convicted of. In fact, this Court had earlier denied review of McCollum's claim over the public dissent of only one Justice. And yet a full 20 years after the Court denied review, McCollum was exonerated by DNA evidence. There are a significant number of similar cases, some of which I have discussed earlier.

In addition to those who are exonerated on the ground that they are innocent, there are other individuals whose sentences or convictions have been overturned for other reasons (as discussed above, state and federal courts found error in 68% of the capital cases they reviewed between 1973 and 1995). In many of these cases, a court will have found that the individual did not merit the death penalty in a special sense—namely, he failed to receive all the procedural protections that the law requires for the death penalty's application. By eliminating some of these protections, one likely could reduce delay. But which protections should we eliminate? Should we eliminate the trial-related protections we have established for capital defendants: that they be able to present to the sentencing judge or jury all mitigating circumstances; that the State provide guidance adequate to reserve the application of the death penalty to particularly serious murders; that the State provide adequate counsel and, where warranted, adequate expert assistance; or that a jury must find the aggravating factors necessary to impose the death penalty? Should we no longer ensure that the State does not execute those who are seriously intellectually disabled? Should we eliminate the requirement that the manner of

execution be constitutional, or the requirement that the inmate be mentally competent at the time of his execution? Or should we get rid of the criminal protections that all criminal defendants receive—for instance, that defendants claiming violation of constitutional guarantees (say “due process of law”) may seek a writ of habeas corpus in federal courts? My answer to these questions is “surely not.”

One might, of course, argue that courts, particularly federal courts providing additional layers of review, apply these and other requirements too strictly, and that causes delay. But, it is difficult for judges, as it would be difficult for anyone, *not* to apply legal requirements punctiliously when the consequence of failing to do so may well be death, particularly the death of an innocent person.

Moreover, review by courts at every level helps to ensure reliability; if this Court had not ordered that Anthony Ray Hinton receive further hearings in state court, he may well have been executed rather than exonerated. In my own view, our legal system's complexity, our federal system with its separate state and federal courts, our constitutional guarantees, our commitment to fair procedure, and, above all, a special need for reliability and fairness in capital cases, combine to make significant procedural “reform” unlikely in practice to reduce delays to an acceptable level.

And that fact creates a dilemma: A death penalty system that seeks procedural fairness and reliability brings with it delays that severely aggravate the cruelty of capital punishment and significantly undermine the rationale for imposing a sentence of death in the first place. But a death penalty system that minimizes delays would undermine the legal system's efforts to secure reliability and procedural fairness.

In this world, or at least in this Nation, we can have a death penalty that at least arguably serves legitimate penological purposes *or* we can have a procedural system that at least arguably seeks reliability and fairness in the death penalty's application. We cannot have both. And that simple fact, demonstrated convincingly over the past 40 years, strongly supports the claim that the death penalty violates the Eighth Amendment. A death penalty system that is unreliable or procedurally unfair would violate the Eighth Amendment. And so would a system that, if reliable and fair in its application of the death penalty, would serve no legitimate penological purpose.

IV

“Unusual”—Decline in Use of the Death Penalty

The Eighth Amendment forbids punishments that are cruel and *unusual*. Last year, in 2014, only seven States carried out an execution. Perhaps more importantly, in the last two decades, the imposition and implementation of the death penalty have increasingly become unusual. I can illustrate the significant decline in the use of the death penalty in several ways.

An appropriate starting point concerns the trajectory of the number of annual death sentences nationwide, from the 1970's to present day. In 1977—just after the Supreme Court made clear that, by modifying their legislation, States could reinstate the death penalty—137 people were sentenced to death. Many States having revised their death penalty laws to meet *Furman*'s requirements, the number of death sentences then increased. But, approximately 15 years ago, the numbers began to decline, and they have declined rapidly ever since.

That trend, a significant decline in the last 15 years, also holds true with respect to the number of annual executions. In 1999, 98 people were executed. Last year, that number was only 35.

Next, one can consider state-level data. Often when deciding whether a punishment practice is, constitutionally speaking, “unusual,” this Court has looked to the number of States engaging in that practice. In this respect, the number of active death penalty States has fallen dramatically. In 1972, when the Court decided *Furman*, the death penalty was lawful in 41 States. Nine States had abolished it. As of today, 19 States have abolished the death penalty (along with the District of Columbia), although some did so prospectively only. In 11 other States that maintain the death penalty on the books, no execution has taken place for more than eight years: Arkansas (last execution 2005); California (2006); Colorado (1997); Kansas (no executions since the death penalty was reinstated in 1976); Montana (2006); Nevada (2006); New Hampshire (no executions since the death penalty was reinstated in 1976); North Carolina (2006); Oregon (1997); Pennsylvania (1999); and Wyoming (1992).

Accordingly, 30 States have either formally abolished the death penalty or have not conducted an execution in more than eight years. Of the 20 States that have conducted at least one execution in the past eight years, 9 have conducted fewer than five in that time, making an execution in those States a fairly rare event. That leaves 11 States in which it is fair to say that capital punishment is not “unusual.” And just three of those States (Texas, Missouri, and Florida) accounted for 80% of the executions nationwide (28 of the 35) in 2014. Indeed, last year, only seven States conducted an execution. In other words, in 43 States, no one was executed.

In terms of population, if we ask how many

Americans live in a State that at least occasionally carries out an execution (at least one within the prior three years), the answer two decades ago was 60% or 70%. Today, that number is 33%.

At the same time, use of the death penalty has become increasingly concentrated geographically. County-by-county figures are relevant, for decisions to impose the death penalty typically take place at a county level. County-level sentencing figures show that, between 1973 and 1997, 66 of America's 3,143 counties accounted for approximately 50% of all death sentences imposed. By the early 2000's, the death penalty was only actively practiced in a very small number of counties: between 2004 and 2009, only 35 counties imposed 5 or more death sentences, *i.e.*, approximately one per year. And more recent data show that the practice has diminished yet further: between 2010 and 2015 (as of June 22), only 15 counties imposed five or more death sentences. In short, the number of active death penalty counties is small and getting smaller. And the overall statistics on county-level executions bear this out. Between 1976 and 2007, there were no executions in 86% of America's counties.

In sum, if we look to States, in more than 60% there is effectively no death penalty, in an additional 18% an execution is rare and unusual, and 6%, *i.e.*, three States, account for 80% of all executions. If we look to population, about 66% of the Nation lives in a State that has not carried out an execution in the last three years. And if we look to counties, in 86% there is effectively no death penalty. It seems fair to say that it is now unusual to find capital punishment in the United States, at least when we consider the Nation as a whole.

Moreover, we have said that it “ ‘is not so much the number of these States that is significant, but the consistency of the direction of change.’ ” Judged in that way, capital punishment has

indeed become unusual. Seven States have abolished the death penalty in the last decade, including (quite recently) Nebraska. And several States have come within a single vote of eliminating the death penalty. And several States have formally stopped executing inmates.

Moreover, the direction of change is consistent. In the past two decades, no State without a death penalty has passed legislation to reinstate the penalty. Indeed, even in many States most associated with the death penalty, remarkable shifts have occurred. In Texas, the State that carries out the most executions, the number of executions fell from 40 in 2000 to 10 in 2014, and the number of death sentences fell from 48 in 1999 to 9 in 2013 (and 0 thus far in 2015).

These circumstances perhaps reflect the fact that a majority of Americans, when asked to choose between the death penalty and life in prison without parole, now choose the latter.

I rely primarily upon domestic, not foreign events, in pointing to changes and circumstances that tend to justify the claim that the death penalty, constitutionally speaking, is “unusual.” Those circumstances are sufficient to warrant our reconsideration of the death penalty's constitutionality. I note, however, that many nations—indeed, 95 of the 193 members of the United Nations—have formally abolished the death penalty and an additional 42 have abolished it in practice. In 2013, only 22 countries in the world carried out an execution. No executions were carried out in Europe or Central Asia, and the United States was the only country in the Americas to execute an inmate in 2013. Only eight countries executed more than 10 individuals (the United States, China, Iran, Iraq, Saudi Arabia, Somalia, Sudan, Yemen). And almost 80% of all known executions took place in three countries: Iran, Iraq, and Saudi Arabia.

I recognize a strong counterargument that favors constitutionality. We are a court. Why should we not leave the matter up to the people acting democratically through legislatures? The Constitution foresees a country that will make most important decisions democratically. Most nations that have abandoned the death penalty have done so through legislation, not judicial decision. And legislators, unlike judges, are free to take account of matters such as monetary costs, which I do not claim are relevant here.

The answer is that the matters I have discussed, such as lack of reliability, the arbitrary application of a serious and irreversible punishment, individual suffering caused by long delays, and lack of penological purpose are quintessentially judicial matters. They concern the infliction—indeed the unfair, cruel, and unusual infliction—of a serious punishment upon an individual. I recognize that in 1972 this Court, in a sense, turned to Congress and the state legislatures in its search for standards that would increase the fairness and reliability of imposing a death penalty. The legislatures responded. But, in the last four decades, considerable evidence has accumulated that those responses have not worked.

Thus we are left with a judicial responsibility. The Eighth Amendment sets forth the relevant law, and we must interpret that law. We have made clear that “ ‘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.’ ”

For the reasons I have set forth in this opinion, I believe it highly likely that the death penalty violates the Eighth Amendment. At the very least, the Court should call for full briefing on the basic question.

With respect, I dissent.

APPENDICES

Justice SOTOMAYOR, with whom Justice GINSBURG, Justice BREYER, and Justice KAGAN join, dissenting.

Petitioners, three inmates on Oklahoma’s death row, challenge the constitutionality of the State’s lethal injection protocol. The State plans to execute petitioners using three drugs: midazolam, rocuronium bromide, and potassium chloride. The latter two drugs are intended to paralyze the inmate and stop his heart. But they do so in a torturous manner, causing burning, searing pain. It is thus critical that the first drug, midazolam, do what it is supposed to do, which is to render and keep the inmate unconscious. Petitioners claim that midazolam cannot be expected to perform that function, and they have presented ample evidence showing that the State’s planned use of this drug poses substantial, constitutionally intolerable risks.

Nevertheless, the Court today turns aside petitioners’ plea that they at least be allowed a stay of execution while they seek to prove midazolam’s inadequacy. The Court achieves this result in two ways: first, by deferring to the District Court’s decision to credit the scientifically unsupported and implausible testimony of a single expert witness; and second, by faulting petitioners for failing to satisfy the wholly novel requirement of proving the availability of an alternative means for their own executions. On both counts the Court errs. As a result, it leaves petitioners exposed to what may well be the chemical equivalent of being burned at the stake.

* * * *

II

I begin with the second of the Court's two holdings: that the District Court properly found that petitioners did not demonstrate a likelihood of showing that Oklahoma's execution protocol poses an unconstitutional risk of pain. In reaching this conclusion, the Court sweeps aside substantial evidence showing that, while midazolam may be able to *induce* unconsciousness, it cannot be utilized to *maintain* unconsciousness in the face of agonizing stimuli. Instead, like the District Court, the Court finds comfort in Dr. Evans' wholly unsupported claims that 500 milligrams of midazolam will "paralyz[e] the brain." In so holding, the Court disregards an objectively intolerable risk of severe pain.

* * * *

III

The Court's determination that the use of midazolam poses no objectively intolerable risk of severe pain is factually wrong. The Court's conclusion that petitioners' challenge also fails because they identified no available alternative means by which the State may kill them is legally indefensible.

A

This Court has long recognized that certain methods of execution are categorically off-limits. The Court first confronted an Eighth Amendment challenge to a method of execution in *Wilkerson v. Utah*, (1879). Although *Wilkerson* approved the particular method at issue—the firing squad—it made clear that “public dissection,” “burning alive,” and other “punishments of torture ... in the same line of unnecessary cruelty, are forbidden by [the Eighth A]mendment to the Constitution.” Eleven years later, in rejecting a challenge to the

first proposed use of the electric chair, the Court again reiterated that “if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition.”

In the more than a century since, the Members of this Court have often had cause to debate the full scope of the Eighth Amendment's prohibition of cruel and unusual punishment. But there has been little dispute that it at the very least precludes the imposition of “barbarous physical punishments.” Nor has there been any question that the Amendment prohibits such “inherently barbaric punishments *under all circumstances*.” Simply stated, the “Eighth Amendment *categorically* prohibits the infliction of cruel and unusual punishments.”

B

The Court today, however, would convert this categorical prohibition into a conditional one. A method of execution that is intolerably painful—even to the point of being the chemical equivalent of burning alive—will, the Court holds, be unconstitutional *if*, and only if, there is a “known and available alternative” method of execution. It deems *Baze* to foreclose any argument to the contrary.

Baze held no such thing. In the first place, the Court cites only the plurality opinion in *Baze* as support for its known-and-available-alternative requirement. Even assuming that the *Baze* plurality set forth such a requirement—which it did not—none of the Members of the Court whose concurrences were necessary to sustain the *Baze* Court's judgment articulated a similar view. In general, “the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” And as the Court

observes, the opinion of Justice THOMAS, joined by Justice SCALIA, took the broadest position with respect to the degree of intent that state officials must have in order to have violated the Eighth Amendment, concluding that only a method of execution deliberately designed to inflict pain, and not one simply designed with deliberate indifference to the risk of severe pain, would be unconstitutional. But this understanding of the Eighth Amendment's intent requirement is unrelated to, and thus not any broader or narrower than, the requirement the Court now divines from *Baze*. Because the position that a plaintiff challenging a method of execution under the Eighth Amendment must prove the availability of an alternative means of execution did not "represent the views of a majority of the Court," it was not the holding of the *Baze* Court.

In any event, even the *Baze* plurality opinion provides no support for the Court's proposition. To be sure, that opinion contains the following sentence: "[The condemned] must show that the risk is substantial when compared to the known and available alternatives." But the meaning of that key sentence and the limits of the requirement it imposed are made clear by the sentence directly preceding it: "A stay of execution may not be granted *on grounds such as those asserted here* unless the condemned prisoner establishes that the State's lethal injection protocol creates a demonstrated risk of severe pain." (emphasis added). In *Baze*, the very premise of the petitioners' Eighth Amendment claim was that they had "identified a significant risk of harm [in Kentucky's protocol] that [could] be eliminated by adopting alternative procedures." Their basic theory was that even if the risk of pain was only, say, 25%, that risk would be objectively intolerable if there was an obvious alternative that would reduce the risk to 5%. Thus, the "grounds ... asserted" for relief in *Baze* were that the State's protocol was intolerably risky given the alternative procedures the State could have

employed.

Addressing this claim, the *Baze* plurality clarified that "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative," instead, to succeed in a challenge of this type, the comparative risk must be "substantial[.]" Nowhere did the plurality suggest that *all* challenges to a State's method of execution would require this sort of comparative-risk analysis. Recognizing the relevance of available alternatives is not at all the same as concluding that their absence precludes a claimant from showing that a chosen method carries objectively intolerable risks. If, for example, prison officials chose a method of execution that has a 99% chance of causing lingering and excruciating pain, certainly that risk would be objectively intolerable whether or not the officials ignored other methods in making this choice. Irrespective of the existence of alternatives, there are some risks "so grave that it violates contemporary standards of decency to expose *anyone* unwillingly to" them.

* * * *

C

In reengineering *Baze* to support its newfound rule, the Court appears to rely on a flawed syllogism. If the death penalty is constitutional, the Court reasons, then there must be a means of accomplishing it, and thus some available method of execution must be constitutional. But even accepting that the death penalty is, in the abstract, consistent with evolving standards of decency, the Court's conclusion does not follow. The constitutionality of the death penalty may inform our conception of the degree of pain that would render a particular method of imposing it unconstitutional. But a

method of execution that is “barbarous,” or “involve[s] torture or a lingering death,” does not become less so just because it is the only method currently available to a State. If all available means of conducting an execution constitute cruel and unusual punishment, then conducting the execution will constitute cruel and usual punishment. Nothing compels a State to perform an execution. It does not get a constitutional free pass simply because it desires to deliver the ultimate penalty; its ends do not justify any and all means. If a State wishes to carry out an execution, it must do so subject to the constraints that our Constitution imposes on it, including the obligation to ensure that its chosen method is not cruel and unusual. Certainly the condemned has no duty to devise or pick a constitutional instrument of his or her own death.

For these reasons, the Court’s available-alternative requirement leads to patently absurd consequences. Petitioners contend that Oklahoma’s current protocol is a barbarous method of punishment—the chemical equivalent of being burned alive. But under the Court’s new rule, it would not matter whether the State intended to use midazolam, or instead to have petitioners drawn and quartered, slowly tortured to death, or actually burned at the stake: because petitioners failed to prove the availability of sodium thiopental or pentobarbital, the State could execute them using whatever means it designated. The Eighth Amendment cannot possibly countenance such a result.

D

In concocting this additional requirement, the Court is motivated by a desire to preserve States’ ability to conduct executions in the face of changing circumstances. It is true, as the Court details, that States have faced “practical obstacle[s]” to obtaining lethal injection drugs

since *Baze* was decided. One study concluded that recent years have seen States change their protocols “with a frequency that is unprecedented among execution methods in this country’s history.”

But why such developments compel the Court’s imposition of further burdens on those facing execution is a mystery. Petitioners here had no part in creating the shortage of execution drugs; it is odd to punish them for the actions of pharmaceutical companies and others who seek to disassociate themselves from the death penalty—actions which are, of course, wholly lawful. Nor, certainly, should these rapidly changing circumstances give us any greater confidence that the execution methods ultimately selected will be sufficiently humane to satisfy the Eighth Amendment. Quite the contrary. The execution protocols States hurriedly devise as they scramble to locate new and untested drugs, are all the more likely to be cruel and unusual—presumably, these drugs would have been the States’ first choice were they in fact more effective. Courts’ review of execution methods should be more, not less, searching when States are engaged in what is in effect human experimentation.

It is also worth noting that some condemned inmates may read the Court’s surreal requirement that they identify the means of their death as an invitation to propose methods of executions less consistent with modern sensibilities. Petitioners here failed to meet the Court’s new test because of their assumption that the alternative drugs to which they pointed, pentobarbital and sodium thiopental, were available to the State. This was perhaps a reasonable assumption, especially given that neighboring Texas and Missouri still to this day continue to use pentobarbital in executions.

In the future, however, condemned inmates might well decline to accept States’ current reliance on lethal injection. In particular, some

inmates may suggest the firing squad as an alternative. Since the 1920's, only Utah has utilized this method of execution. But there is evidence to suggest that the firing squad is significantly more reliable than other methods, including lethal injection using the various combinations of drugs thus far developed. Just as important, there is some reason to think that it is relatively quick and painless.

Certainly, use of the firing squad could be seen as a devolution to a more primitive era. That is not to say, of course, that it would therefore be unconstitutional. But lethal injection represents just the latest iteration of the States' centuries-long search for "neat and non-disfiguring homicidal methods." A return to the firing squad—and the blood and physical violence that comes with it—is a step in the opposite direction. And some might argue that the visible brutality of such a death could conceivably give rise to its own Eighth Amendment concerns. At least from a condemned inmate's perspective, however, such visible yet relatively painless violence may be vastly preferable to an excruciatingly painful death hidden behind a veneer of medication. The States may well be reluctant to pull back the curtain for fear of how the rest of us might react to what we see. But we deserve to know the price of our collective comfort before we blindly allow a State to make condemned inmates pay it in our names.

* * *

"By protecting even those convicted of heinous crimes, the Eighth Amendment reaffirms the duty of the government to respect the dignity of all persons." Today, however, the Court absolves the State of Oklahoma of this duty. It does so by misconstruing and ignoring the record evidence regarding the constitutional insufficiency of midazolam as a sedative in a three-drug lethal injection cocktail, and by imposing a wholly unprecedented obligation on the condemned inmate to identify an available

means for his or her own execution. The contortions necessary to save this particular lethal injection protocol are not worth the price. I dissent.

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Fates Worse Than Death?

Justice Kennedy's own logic shows why he should make the Supreme Court abolish capital punishment.

By Dahlia Lithwick



Is one leading another leftward? Supreme Court Justice Stephen Breyer, left, and Supreme Court Justice Anthony Kennedy.

Photo illustration by Juliana Jiménez. Photos by Alex Wong/Getty Images and Chip Somodevilla/Getty Images

In some ways Justice Anthony Kennedy has spent years chipping away at the death penalty. He has been a leader in the Supreme Court's move to limit some classes of criminal defendants (for instance, juveniles) from being executed for their crimes. Keenly attuned to what the rest of the world thinks about capital punishment, he has been careful to confine the ways it is practiced in this country.



DAHLIA LITHWICK

Dahlia Lithwick writes about the courts and the law for *Slate*.

As a consequence, some have expressed hope that he is **poised to do away with the death penalty altogether**. He probably isn't. Only two weeks ago, he sided with the four other conservative justices in ***Glossip v. Gross***—a case that not only upholds the constitutionality of capital punishment but permits states to use a drug that has almost certainly resulted in a **slew of excruciating botched executions**. The five justices who voted to allow this practice—described in Justice Sonia Sotomayor's dissent as “the chemical equivalent of being burned alive”—did so on the stunning legal theory that because some method of execution must be constitutional, there must be some constitutional means of carrying it out, and thus the use of the drug midazolam as part of the lethal injection cocktail must be constitutional.

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So no, Kennedy is not about to take the position—advanced from the bench for the first time in a long time by Justices Stephen Breyer and Ruth Bader Ginsburg in Breyer's lengthy dissent in *Glossip*—that capital punishment, as it is currently practiced, almost certainly violates the Constitution and should be abolished in the United States. But Kennedy *should* take that position. And if you read a

surprising concurrence he recently wrote in an unrelated case, *Davis v. Ayala*, it's clear that Kennedy's own logic should get him there. His newfound concerns about the practice of ditching prisoners for decades in solitary confinement are in no way unrelated to the concerns about who we execute in America and how.

Of course capital punishment and solitary confinement are apples and oranges. As Justice Antonin Scalia was quick to point out in his concurrence in *Glossip*, the framers of the Constitution explicitly contemplated that executions were permissible. But if you consider the arguments laid out in Kennedy's new, poignant call for Americans to re-examine their current solitary confinement policies, virtually every argument he makes could be applied to the death penalty as well.

The *Ayala* case concerned procedural matters in a capital trial; it actually has nothing directly to do with solitary confinement. But Kennedy used the occasion to write an impassioned concurrence, citing Dickens and British prison reformers, observing that the "condition in which prisoners are kept simply has not been a matter of sufficient public inquiry or interest." He goes on to note, of the capital sentencing system as it currently exists, that "in many cases, it is as if a judge had no choice but to say: 'In imposing this capital sentence, the court is well aware that during the many years you will serve in prison before your execution, the penal system has a solitary confinement regime that will bring you to the edge of madness, perhaps to madness itself.' "

One senses that it's not just the cruelty of decades of solitary confinement that is bothering Kennedy here, but rather the inertia on the part of the American public and the legal community and what he claims to be "society's simple unawareness or indifference." His plea for more research, more vigilance, and more awareness of what he describes as "what comes next" following an adjudication of guilt could just as easily be deployed to ask about what comes next for those who are adjudicated guilty and then executed in ways that are painful and racially and geographically discriminatory, in a system that says more about the quality of your lawyer than the brutality of your crime. It is more than a bit ironic for Kennedy to worry about the ways capital defendants are detained in prison but to be altogether sanguine about the way they are executed.

This is why Breyer's lengthy dissent in *Glossip*, calling for an end to capital punishment, seems all but written to appeal to Kennedy. As Evan Mandery, author of *A Wild Justice: The Death and Resurrection of Capital Punishment in America*, noted in [this post for the Marshall Project](#), "Breyer's tour de force exploration of the failings of the death penalty reads like what George Washington University law professor Jeffrey Rosen calls a 'Kennedy brief'—in which 'lawyers on both sides fall over themselves to court Kennedy's favor by repeatedly citing the opinions of Justice Kennedy.' " Why is Breyer quoting death-penalty-doubter Kennedy back at death-penalty-embracer Kennedy? Because, as Mandery posits, "it seems reasonable to surmise that Breyer thinks (or at least recognizes that people might think he thinks) that Kennedy's vote is available, and that the bar should act while the irons are hot in the fire."

Indeed, as Mandery astutely observes, it's no accident that Breyer's *Glossip* dissent focuses on arguments about the "cruelty" of solitary confinement, explicitly citing Kennedy's *Ayala* dissent, "even though solitary confinement has not traditionally been a major weapon in the artillery of constitutional arguments against capital punishment." Why does Breyer explicitly connect the two? Because a Kennedy worried about the cruelty inherent in an arbitrary and sordid system of solitary confinement can't be completely blind to the cruelty inherent in the arbitrary and sordid ways we administer capital punishment. Thus, Breyer begins his section on the "cruelty" of the death penalty system by noting that nearly all death penalty states keep death row inmates in isolation for "22 or more hours per day." Breyer goes on to add that the U.N. special rapporteur on torture has called for **bans on solitary confinement** for longer than 15 days. (You can be sure that this citation to the U.N. is *not* for Scalia's benefit).

Breyer then segues to the cruel uncertainty inherent in delaying deaths for years and years while prisoners languish in solitary. The 35 people executed in 2014 spent, on average, nearly 18 years on death row. As Breyer puts it:

The dehumanizing effect of solitary confinement is aggravated by uncertainty as to whether a death sentence will in fact be carried out. In 1890, this Court recognized that, "when a prisoner sentenced by a court to death is confined in the penitentiary awaiting the execution of the sentence, one of the most horrible feelings to which he can be subjected during that time is the uncertainty during the whole of it." The Court was describing a *delay of a mere four weeks*. In the past century and a quarter, little has changed in this respect—except for duration. Today we must describe delays measured not in weeks, but in decades.

In other words, Breyer is saying that if decades of delays in solitary confinement worry the humanitarian in you, then the fact that they end in capital punishment should worry you as well.

In another subtle play for Kennedy’s someday-vote, the rest of Breyer’s opinion in *Glossip* goes to the question of how “unusual” the death penalty has become—and this requires a ritual Counting of the States, a procedure used by Kennedy himself when he attempts to divine whether there is a “national consensus” about whether various punishments violate the cruel-and-unusual restrictions of the Eighth Amendment. When Kennedy has led the court in recent years in finding that certain classes of people (for example, juveniles or the intellectually disabled) can’t be executed because there is a national consensus against it, he has used the state-counting methodology to get there.

So, for instance, in last year’s under-the-radar case of *Hall v. Florida*, a case that was supposed to be about intellectual disability and the death penalty, Kennedy used some interesting math when it came time to count states. As criminal defense lawyer **David Menschel pointed out at the time**, Kennedy counted Oregon as a state that had abolished the death penalty even though it had been done by way of a moratorium from the governor, and he counted states that have the death penalty but don’t use it as examples of “de facto abolitionism.” In this context, Breyer’s painstaking effort to track death penalty abolition states in *Glossip* is a callout to Kennedy. And when Breyer counts the same states Kennedy counted as all but abolishing it in *Hall*, what he is saying is that Kennedy led us here, and Kennedy should finish the job.

It is hardly inconsequential that Breyer and Kennedy are, respectively, the most conservative liberal and the most liberal conservative on the court today, as **David Cole pointed out recently in the New Yorker**. As Cole put it: “the fact that the Court’s two most moderate Justices would, on their own, raise questions about these practices is further evidence not only that the brutality and harshness of the American criminal-justice system is out of hand but also that concern about it has reached the highest levels of government.” Breyer has had enough of the death penalty, and Kennedy has had enough of solitary confinement, and not all that much ground necessarily separates the two. If one accepts that the criminal justice system is hopelessly tainted by arbitrary and cruel policies that torture and dehumanize prisoners for no discernible reason, it’s hard to look at any one policy in isolation without seeing the cruelty and arbitrariness at work in the aggregate. And Kennedy’s principal worries about solitary confinement—that the public isn’t upset enough and that judges’ hands seem to be tied—are also true of capital punishment; the only difference seems to be that Kennedy doesn’t want to drive people mad before we kill them, and Breyer believes that our whole system for killing people is mad.

So Kennedy may not come around on the death penalty. But—after reading his own words in *Ayala*—he probably should. Kennedy closes with the observation that “over 150 years ago, Dostoyevsky wrote, ‘The degree of civilization in a society can be judged by entering its prisons.’ ” But the inhumanity, racial and regional disparities, and madness-inducing cruelties of the criminal justice system hardly stop at what Kennedy describes as a “windowless cell no larger than a typical parking spot.” If we are going to take seriously his call for a harder, clear-eyed look at the flaws in the criminal justice, the road to reform may start with solitary confinement, but it cannot coherently end there.

NEWS & POLITICS

VIDEO

Oklahoma Court Puts Hold On Executions After State Didn't Follow Own Procedures

After finding out late that it had the wrong drugs, Oklahoma's executions will be postponed indefinitely. But if the state had followed its own protocol, the problem would have been noticed much earlier.

Originally posted on Oct. 1, 2015, at 4:07 p.m.

Updated on Oct. 2, 2015, at 12:49 p.m.



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Oklahoma Department of Corrections Director Robert Patton, right, leaves the media center following a statement to reporters at the Oklahoma State Penitentiary. *Sue Ogrocki / AP*

Even when under heightened scrutiny after a botched execution that resulted in an eight-month moratorium on executions in Oklahoma, a review of the state's actions during the past week revealed the Oklahoma Department of Corrections is still not consistently following all of its execution procedures.

After courts signed off on the execution of Richard Glossip on Wednesday, the Oklahoma Department of Corrections and Gov. Mary Fallin had to [announce that a drug mix-up meant they would be unable to carry out his execution](#). Fallin, who has opposed Glossip's attempts to halt his execution, requested a temporary stay Wednesday.

A day later, Oklahoma Attorney General Scott Pruitt asked a state court for an indefinite stay of all upcoming executions — and raising his own questions about the Department of Corrections's ability to carry out its execution protocol.

"Until my office knows more about these circumstances and gains confidence that

DOC can carry out executions in accordance with the execution protocol, I am asking the Oklahoma Court of Criminal Appeals to issue an indefinite stay of all scheduled executions,” Pruitt [said in a statement](#) accompanying his court filing on Thursday.

On Friday, the court granted Pruitt’s request, staying all upcoming executions in the state. The court requested updates on the investigation every 30 days.

It would have been Oklahoma’s second execution since it [botched the execution of Clayton Lockett in April 2014](#). Lockett writhed on a gurney and sat up in an ordeal that lasted 43 minutes. The mistakes that led to yesterday’s delay mimic some of the state’s errors in the Lockett botch.

“What happened yesterday raises the question of whether the Department of Corrections is even competent to carry out the ultimate sanction the state can impose,” Glossip’s attorney, Dale Baich, said. “The state assured the federal court and the public that any problems were fixed, and that it had an improved protocol and a shiny new execution chamber. Now this.”

A review of the state’s execution protocol and the actual implementation of Glossip’s planned execution this week in fact show multiple areas where the state either did not follow the protocol or interpreted it in an unexpected way in order to claim compliance.

After Glossip’s execution warrant had become valid, corrections personnel discovered they didn’t have the right drugs in stock. Oklahoma’s three-drug protocol for lethal injections calls for potassium chloride to be used as the last drug: the one that kills. The state instead received potassium acetate and did not notice the mix-up until the day of the execution.

The Department of Corrections received the drugs in a sealed box on Wednesday and did not open it until that afternoon, saying it is unable to store drugs on site without a DEA license.

But the claim that the Department of Corrections couldn’t obtain the drug before the execution without a DEA license isn’t true.

Both potassium chloride, the third drug Oklahoma *wanted* to receive, and potassium acetate, the drug Oklahoma *did* receive, are not on the DEA’s list of controlled substances. Neither is rocuronium bromide, which is the second drug in the protocol.

Midazolam, the first drug in the protocol, is a controlled substance. The Department of Corrections could have received and stored the potassium chloride and rocuronium bromide at any time and waited for the midazolam.

When approached with this information, Corrections spokesperson Terri Watkins said on Friday “We receive the drugs together.”

When BuzzFeed News pointed out they could have asked for two shipments, Watkins would only say, “No.”

At a press conference Thursday, Department of Corrections Director Robert Patton said the supplier of the drugs, which the state keeps secret, made the decision on its own to switch out the drug after it could not obtain the correct one. According to Patton, [the supplier told state officials that drugs are interchangeable](#).

Oklahoma's execution protocol, which has been approved for use by the courts, specifically calls for potassium chloride as the third drug. No state is known to have tried using potassium acetate as a substitute.

In addition to the matter of the drug itself, the mix-up should have been noticed much earlier under the state's protocol. It specifically requires Warden Anita Trammel to make sure that execution drugs and equipment are on hand two days in advance of an execution.

D. Two Days (2) Prior to the Day of Execution

- 1. Division Manager of West Institutions**
 - a. Schedules and conducts on-site scenario training sessions, modifying practices as warranted.
 - b. Confirms adequate staffing and vehicles are in place for regular operations and the execution.
- 2. Warden of OSP**
 - a. Confirms staff assigned to the Maintenance Response Team (MRT) are scheduled and shall be on-site eight (8) hours prior to the time scheduled for imposition of sentence.
 - b. Restricts access to H Unit to those with expressly assigned duties.
 - c. Verifies execution inventory and equipment checks are completed and open issues resolved in accordance with established protocols.

via Oklahoma Department of Corrections

Fallin's office disagreed that the protocol requires the warden to verify the inventory of drugs, arguing that "execution inventory" instead refers to other things executions require, like syringes. Spokesman Alex Weintz said there is no timeline for checking the inventory of execution drugs.

Attorney General Scott Pruitt's office did not respond to a request for comment. But [in a court filing](#) asking for three executions to be postponed indefinitely, his office admitted proper procedures were not followed.

"The Attorney General needs time to evaluate the events that transpired on September 30, 2015, ODOC's acquisition of a drug contrary to protocol, and internal procedures relative to the protocol," Pruitt's office wrote. "The State has a strong interest in ensuring that the execution protocol is strictly followed."

In a statement, Pruitt said he wasn't notified of the error until shortly before the scheduled execution.

What makes the mix-up more surprising is the state claimed in August that it had all of the necessary drugs.

"I have received confirmation from the Oklahoma Department of Corrections that sufficient drugs to carry out the executions of Richard Glossip, Benjamin Cole and John Grant have been obtained," an assistant attorney general wrote to Glossip's attorneys on August 11. "The drugs are midazolam, rocuronium bromide and potassium chloride."

But Fallin [said at a Wednesday press conference](#) that the state didn't even receive

the drugs until the day of the execution. And it wasn't the warden that noticed the mix-up. It was the doctor.

Asked about the discrepancy, Fallin's spokesman said the Aug. 11 letter had "unclear drafting."

"It says DOC has 'obtained' midazolam and other drugs," Weintz said. "DOC had, or thought they had, 'obtained access' to those drugs. They would never have had them physically present at the penitentiary."

The Department of Corrections and Attorney General Scott Pruitt did not respond to questions.

"The Department of Corrections follows the protocol, except when it doesn't," Baich said. "In August, the DOC said it obtained the drugs to be used in Mr. Glossip's execution. On Monday, the DOC was supposed to verify that it had what it needed to carry out the execution set for Wednesday. We learned yesterday that the DOC did not obtain the drugs until Wednesday morning. DOC's representation in August, which was part of a court filing, is inconsistent with the governor's statement on Wednesday."

According to thousands of pages of interviews conducted by the Oklahoma Department of Public Safety following Lockett's botched execution, obtained by BuzzFeed News, execution personnel complained that the Department of Corrections didn't have the proper equipment — the right size needles — for the execution.

"So I went back into the execution room to get a — to see if I had a 2 ½ inch 14-gauge [needle]," the EMT, a member of the execution team, told investigators afterward. "That's what you're going to need for a femoral. Didn't have one."

"All I had was the inch and a quarter and I told [the doctor] three times, 'All I have is an inch and a quarter [long needle], but I've got a 14 [gauge needle] and I've got a 16 [gauge needle].'"

According to the EMT, the doctor said, "Well, we'll just have to make it work."

2	Well, we'll just have to make it work.
3	
4	CAPTAIN HOLT: That's the doctor who
5	said that?
6	EMT: Yes.

Oklahoma Department of Public Safety

The DPS summary of their investigation stated IV issues were the cause of the botch, and that executioners lacking the correct equipment contributed to it.

"The physician requested a longer needle/catheter for femoral access," the report said. "The paramedic attempted to locate a 2 or 2 ½ inch, 14 gauge needle/catheter, but none were readily available. The physician also asked for an intraosseous infusion needle, but was told the prison did not have those either. Both agreed their preferred needle/catheter would have been 1 ¾ to 2 ½ inches. The physician had never attempted femoral vein access with a 1 ¼ inch needle/catheter; however, it was the longest DOC had readily available."

But on Wednesday, unlike the Lockett execution, state officials called off the

execution when corrections employees realized they didn't have the proper supplies.

The DPS summary of the Lockett botch also criticized other preparations before the execution, namely training.

"The investigation revealed areas of training that need to be addressed. It was noted that there was no formal training process involving the paramedic, the physician or the executioners and their specific roles," the report said, adding that both the warden and the Director of the Department of Corrections both acknowledged training was inadequate.

Right now, Oklahoma has not specified how it hopes to proceed. It could attempt to get a hold of the correct drug, or the attorney general could litigate in favor of allowing the drug it does have — potassium acetate — to be used.

Oklahoma had two executions scheduled for this month, with one taking place next week, although the court has now delayed them indefinitely.

Glossip [faces the death penalty for plotting the murder of his former boss](#), Barry Van Treese, in 1997. He has maintained his innocence and the case against him relies upon the testimony of Justin Sneed, the man who murdered Van Treese and did not receive the death penalty.

By the time new execution dates are set, a new Oklahoma law will have kicked in that allows for death by nitrogen gas if lethal injection drugs are not available. Oklahoma does not currently have a protocol governing the use of nitrogen gas, and the Department of Corrections said it would not use that method anytime soon.

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A Peculiar Institution

Every people, the proverb has it, loves its own form of violence.

CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES*, 1973

As a Philadelphia journalist observed in 1812, "So much has been written and said on the subject of capital punishments that it seems almost like presumptive vanity to pursue the topic any further."¹ Yet after two and a half centuries of moral debate and four decades of constitutional argument, the one thing that seems indisputable is that the death penalty produces an endless stream of discourse. Our bookstore shelves and law library stacks groan under the weight of writing provoked by this institution, and still the ink continues to flow. The rate at which we put offenders to death may have declined over the last few centuries, but there has been no let up in the practice of talking and writing about it. In twenty-first-century America, capital punishment remains a perennial subject of commentary and debate.

Perhaps all this talk should not surprise us. After all, the institution of capital punishment raises profound moral questions and possesses more than its share of controversial characteristics. As one scholar of criminal law noted, "Only someone who is morally obtuse could fail to perceive how charged the issue of capital punishment is with questions of fundamental value."² And it is no doubt true that the death penalty poses, in the starkest form, a deliberate choice between life and death in situations where killing is neither necessary nor unavoidable. Perhaps we ought not to find it strange that it prompts so much discussion.

Perhaps. But bear in mind that American society does not always re-

spond to moral problems by making them topics of prolix discourse and debate. The moral attention of Americans is highly selective. As a society, the United States does not spill so much ink over each individual fatality in war, or each life cut short by poverty, though these deaths are often "unnecessary" and "avoidable," and those who die are certainly no more deserving of their fate than convicted killers. Yet if a murder suspect is capitally charged or a convicted murderer is sentenced to death, Americans somehow contrive to make this headline news, an occasion for a flurry of commentaries, and a rehearsal of all the familiar arguments for and against the institution.

Or compare the endless talk about capital punishment with the relative silence with which American public discourse (and Supreme Court case law) passes over extraordinarily severe prison sentences and the mass imprisonment they produce, even though incarceration affects tens of millions of individuals and families in the United States while death sentences are imposed on fewer than 120 offenders each year. Whatever else capital punishment does or does not do, it certainly functions as an incitement to talk.

The subject of capital punishment seems to invite, even to compel, the repetitive restatement of arguments and counterarguments that are all too familiar. For centuries now, it has given rise to a set-piece debate that contrasts the New Testament with the Old, Enlightenment with Tradition, humanity with justice, and restraint with retribution. There is very little in today's debates that would not be familiar to those who addressed the issue 200 years ago, as a glance at the writings of Cesare Beccaria, Jeremy Bentham, or Benjamin Rush will quickly reveal. And although the emergence of constitutional challenges in the 1960s produced some novel legal arguments—about arbitrary application, "evolving standards of decency," and the unreliability of a sanction that is so rarely used—even these propositions now seem commonplace.³

Yet the recent history of capital punishment has taken a surprising turn that raises a whole new set of questions. Increasingly over the last thirty years, the issue of American capital punishment has taken on a new character and urgency. The familiar moral-political debate continues, of course, with the same arguments being traded back and forth. But recent developments have produced a new challenge for analysis: the need to make sense of the peculiar institution that has emerged in the United States since the 1970s. What was once a familiar moral debate has been reborn as a sociological and historical problem: how to explain the peculiarities of America's twenty-first-century death penalty?

The contemporary American death penalty is, in several respects, a pe-

culiar institution. At the start of the twenty-first century, the federal government and dozens of states continue to use capital punishment at a time when all other Western nations have decisively abandoned it. The "age of abolition"—as we might name the recent decades when abolitionism became standard throughout the West—has made America an anomaly, the last remaining holdout in a historical period that has seen the Western nations embrace abolitionism as a human rights issue and a mark of civilization. Yet paradoxically, several American states abolished capital punishment long before the European nations, and one of them—Michigan—has been continuously abolitionist since 1846, making it a world leader in the abolitionist cause.⁴ Indeed, for the 200 years between the 1770s and the 1970s, America was in lockstep with the other Western nations as they gradually withdrew from the scaffold and disavowed the executioner. Why did America suddenly diverge from the long-term reform trajectory in which it had played such a leading role?⁵

America today practices capital punishment in a peculiar form that is difficult to understand or to justify even for its committed supporters. American legislators continue to pass capital punishment statutes, American courts continue to sentence murderers to death, and on forty or fifty occasions each year, mostly in the Southern states, executions are authorized and convicted offenders are put to death. This is what people mean when they say America is a "retentionist" nation where capital punishment still exists. But most of the thirty-five states with the death penalty rarely carry out their threat to put capital murderers to death, and the vast majority of convicted killers end up serving a life-long prison sentence. Wherever capital proceedings are undertaken, the process is skirted round with procedural, evidentiary, and appellate rules that are much more elaborate than in noncapital cases. And even in the rare instance when a death sentence is imposed—which occurs in less than 1 percent of homicides—the majority of these death sentences are never executed because the sentence is overturned, the prisoner is exonerated, or the authorities refrain from setting an execution date.⁶ The primary cause of death for capital convicted murderers is not judicial execution: it is "natural causes."

Capital punishment in America today is a story of a legal norm combined with its widespread evasion. The law stipulates that convicted capital murderers may be put to death. In practice, most capital murderers are not put to death, and those who are eventually executed go to their deaths after a very long process of legal contestation and uncertainty. The overall picture looks less like the simple "retention" of capital punishment and more like an extreme form of institutional ambivalence, expressed in a uniquely cumbersome and conflicted set of arrangements. As a federal

judge put it in 1995, "[W]e have the worst of all worlds. We have capital punishment, and the enormously expensive machinery to support it, but we don't really have the death penalty."⁷

Another peculiar aspect of the American death penalty is that it continues to operate in a racialized manner, disproportionately targeting black offenders whose victims were white. Before the case of *Furman v Georgia* (1972), in which the Supreme Court ruled that arbitrary imposition of the death penalty constituted cruel and unusual punishment, racial bias was more extensive and more blatant, involving "race-of-defendant" discrimination. (Black defendants were more likely, other things being equal, to be sentenced to death than were white defendants.) Since *Furman*, discrimination has become more subtle—chiefly involving "race of victim"—but it has continued nevertheless.⁸ As Thomas Laqueur observes, "capital punishment in the United States subsists—inescapably—in a miasma of race."⁹ This generally acknowledged fact evokes widespread criticism and has prompted many commentators to view contemporary capital punishment as a continuation of the nation's history of racial violence and lynching.

One hundred years ago, the formerly slave-owning Southern states of America attracted worldwide criticism as the locus of hundreds of spectacular public lynchings and burnings at the stake. At these notorious events, crowds of white townspeople looked on as lynch mobs tortured and burned black men and women accused of heinous crimes. Following the lynching, the dismembered black body would be displayed for all to see, and picture postcards would be mailed to friends and relatives as mementoes of the occasion.¹⁰ Today these same Southern states are once more attracting international criticism, this time for their practice of executing offenders, a disproportionate number of whom are African American and have been sentenced to death without the benefit of adequate legal representation. In the minds of many people, today's death penalty—which is more than ever before an institution of the Southern states—carries clear traces of racial lynching and is inextricably linked to the "peculiar institution" of slavery that lies at the root of this blood-stained history.¹¹ As one observer remarked, "When we think about the death penalty, we think . . . of black victims and white mobs, of black defendants and white juries, of slave codes and public hangings."¹²

But these relationships between past and present are more easily sensed than specified. The vague understanding that there is a connection between nineteenth-century lynchings and twenty-first-century capital punishment has trouble coming to terms with the following facts. Whereas lynchings operated outside state law, as acts of summary justice, today's executions proceed within a legal framework, involving lengthy trials,

multiple appeals, and many years of postconviction process. Whereas spectacle lynchings were designed to maximize ceremonial display, physical pain, and bodily degradation, today's executions are conducted out of sight of the crowd, according to a protocol that aims to avoid physical suffering, leave the prisoner's body unmarked, and prohibit the circulation of photographic images. Whereas lynching was, after the Civil War, concentrated in the Southern states, capital punishment laws operate today in thirty-five states, spread across much of the country. (It is the *execution* of these laws, not the laws themselves, that is heavily concentrated in the South.) And whereas Southern lynch mobs targeted blacks, it is nevertheless true that most of those executed today are in fact white, albeit poor, badly represented whites. The evidence of race discrimination in capital punishment today mostly concerns the more subtle race-of-victim discrimination, rather than the crude race-of-defendant bias.¹³ If there are continuities linking today's death penalty with the popular justice and racial violence of the past—and such continuities seem undeniable—there are also crucial differences that make the nexus between communal lynching and capital punishment less straightforward than is commonly understood.

The American death penalty is *peculiar* insofar as it is the only capital punishment system still in use in the West. It is *peculiar* insofar as the forms through which it is now enacted seem ambivalent and poorly adapted to the stated purposes of criminal justice. And it is *peculiar* insofar as it seems, somehow, to be connected to the South's "peculiar institution" of slavery and its legacy of racial violence, though the precise relationship is by no means clear.¹⁴ Explaining these peculiarities requires a comparative historical analysis, a close study of institutional and cultural forms, and a detailed investigation of the legal legacy of lynching.

The Capital Punishment Complex

To understand today's death penalty we have to think in new ways about an institution that we appear to know all too well. To do so requires us to step outside that institution and view capital punishment from a distance. Instead of engaging with the institution, as everyone feels compelled (and surprisingly competent) to do, the social science strategy is to disengage, to avoid taking positions *within* the field of debate and instead to chart how the institution—and its debates—appear when viewed from the outside.

From this perspective we can regard capital punishment not as a moral dilemma to be addressed or a policy issue to be resolved but as a social fact

to be explained. And we can focus less on the death penalty as a matter of principle and more on the complex field of institutional arrangements, social practices, and cultural forms through which American death penalties are actually administered. The object of study thus ceases to be "the death penalty" as such and becomes instead the "capital punishment complex"—the totality of discursive and nondiscursive practices through which capital punishment is enacted, represented, and experienced in American criminal justice and in American society.

At the start of the twenty-first century, the death penalty remains popular with a majority of Americans and a matter of serious moral commitment for many. But it is also opposed by a substantial minority, making it deeply controversial, within the United States as well as abroad. In penological terms, it is a minor institution, directly affecting a minuscule percentage of criminal cases. But in the public domain it remains highly visible, a subject on which everyone has an opinion. And though its constitutional validity is affirmed by the highest court in the land, its administration closely regulated by law, and its execution undertaken by state officials in a professional, bureaucratic manner, it is nevertheless enveloped in an unmistakable aura of transgression, anxiety, and embarrassment—particularly among those who actually carry out the practice. (In many states outside the South, executions occur only when death row inmates abandon their appeals and "volunteer" to be put to death.) For all these reasons, it is a rich subject for cultural analysis, especially when cultural analysis is understood as a way to get at questions of power and social relations.

Sociology strives for finely detailed description rather than for ethical critique or moral assessment. Its first concern (though not necessarily its final one) is to understand what is really going on, to learn to see things from the point of view of the participants and the social world they occupy, rather than to impose the judgments of the writer and his or her community. So rather than engage in the legal and normative debates that swirl around the death penalty, this approach regards these debates as an intrinsic part of the institution and analyzes them accordingly.

Public engagement with capital punishment—critiques, apologias, exposés, expressed attitudes for and against, opinion polls, and so on—is normally a matter of taking sides, joining the debate, playing the game. Moral criticism and defense, legal arguments for and against, political campaigns for abolition and against abolition, together with the extensive commentary that always accompanies these contests, are not incidental to the institution of capital punishment: they are intrinsic elements of the social fact that needs to be explained. Discourse may sometimes seem insub-

stantial and unimportant, especially when measured against the physicality of putting a person to death. But words, ideas, and images are real forces in the social field and need to be understood as such. If human beings are deliberately put to death by the state in a liberal-democratic society, it is always because certain words, ideas, and images have made this possible. These "forces in the practice of power" form part of the institution that needs to be explained.¹⁵

Viewing the clashing values and arguments of the death penalty debate as integral parts of the object of study rather than as opposing sides between which one has to choose brings certain features more clearly into view. From this vantage point we more readily notice the repetitive nature of death penalty discourse and the excess of talk that characterizes the capital punishment complex. We notice the curious fact that many of the practices deemed "cruel and unusual" by critics are nevertheless remarkably "civilized" in form—lethal injection is a good case in point. Viewing matters in a more detached, historical way, we notice many unacknowledged continuities that link America's death penalty history to that of other Western nations—as we will see, America was long regarded as typical rather than exceptional in this respect. This approach also reveals the historical ironies that connect capital punishment not just to America's most shameful legacies (slavery, lynching, racial violence) but also to its most cherished values (democracy, localism, individual responsibility). Finally, a social science approach makes more apparent the positive uses of capital punishment, the opportunities it offers not just for professional success or political mobilization but also for profit, for cultural consumption, and for certain pleasures such as vengeance, *schadenfreude*, and the vicarious enjoyment of the death of demonized others—uses that are rarely part of today's public discussions but are vital to the institution's contemporary existence. There is plenty of evidence to support each of these observations, but they remain largely unremarked in contemporary debates because they fit poorly with the two moral viewpoints that dominate discussion and structure the field of death penalty debate.

The perspective pursued here develops a detailed description of death penalty practices and an explanatory account of their sources, uses, and meanings. In place of moral and legal argument, it provides historical and sociological analysis. Instead of discussing capital punishment in general it analyzes American capital punishment in particular. And rather than argue for the institution's reform or its retention, it describes exactly how it came to be retained and reformed in its present form. What is offered here, in short, is neither apology nor critique but a sociological history of an institution that forms a puzzling part of our present.

According to Michel Foucault, a "history of the present" focuses on an aspect of our contemporary world that has become somehow problematic, incoherent, or unintelligible.¹⁶ Using historical materials and "genealogical" analysis, such an inquiry seeks to show how the capital punishment complex came to exist in its present form. It seeks to uncover historical processes and political conflicts that are now obscured beneath the day-to-day practices of the institution. In producing such an account, and reconnecting the institution with the values, interests, and power relations out of which it emerged, a history of the present may change our perception of what that institution is and how, in fact, it functions. Paradoxically, then, a historical inquiry that strives to be detached and objective may nevertheless transform our evaluations of the contemporary institution—not by converting others to the writer's viewpoint but by altering the perceived character of the phenomenon in question.

A sociological look at punishment uses the study of society to understand punishment, but it also uses punishment to understand society. Running alongside the primary inquiry about capital punishment is a related inquiry about American society, an inquiry that seeks, however tentatively, to use the peculiar institution of capital punishment as a window onto American culture and social relations. By attending to the ways in which legal, political, and cultural actors have engaged with the death penalty and shaped it into its current form, we catch some glimpses of how America is put together, how it deals with its chronic disagreements, and how it coheres in the face of conflict and contradiction. This is a "law and society" project that works in both directions—studying a social context to better understand a legal institution, but also using a legal institution to better understand a society.

To frame matters this way—to suppose that the death penalty is somehow revealing about America—is not to assume that American culture is especially punitive or bloodthirsty. Capital punishment has been a feature of every nation and is still practiced in most of the world's societies, even in a few developed, democratic ones such as Japan and India. There is no need to posit a more-than-usually punitive culture to explain a practice that continues to hold popular appeal for the publics of virtually every nation.

Large-scale developmental processes have shaped the history of capital punishment throughout the Western world, but every nation nevertheless engages with capital punishment in its own distinctive way. Broad historical processes have transformed the death penalty in similar directions all across the West, but if we look closely, the governmental structures, political struggles, and cultural dynamics of each individual nation (and often of

regions *within* nations) are what shape the particular form of capital punishment that exists in a specific place at a specific time. In analyzing the institution up close, paying regard to its distinctive forms and its multiple meanings, we get a tangible sense of the society and history that produced it as well as of the political and cultural fields in which it is deployed.

The American death penalty has, for the best part of two centuries, been the terrain of continuous political, cultural, moral, and legal struggle. The peculiar institution that has emerged out of these struggles bears clear traces of the interests, values, and processes out of which it has been constructed. By observing the American death penalty up close, we can identify some of the major struggles that have shaped modern America and some of the fault lines that define its social landscape, as well as the diverse localities and regional cultures that compose this complex nation. And by observing it from a distance—placing capital punishment's American history in the broader comparative context of its Western history as a whole—we can trace the ways in which this nation both is and is not similar to the other nations that compose the Western world.

Against Conventional Wisdom

The conventional wisdom that shapes the way we think about the death penalty consists of a set of received ideas generated, in large part, from the debate that surrounds the institution. These ideas are rarely plain wrong or totally unfounded, but they are mostly half-truths that are partial in their perceptions and partisan in their judgments. Let us look at these familiar ideas more closely, using a critique of their misperceptions to move toward a more appropriate analytical perspective:

Today's death penalty is a vestige of a former age, an anachronistic hold-over from a previous era. Contemporary capital punishment is often characterized as an archaic institution that inexplicably survives in a modern environment to which it is fundamentally ill suited and from which it will soon become extinct. Supreme Court Justice John Paul Stevens refers to it as "more and more anachronistic." Charles Black calls it a "vestigial cruelty." Hugo Bedau says that "the death penalty may at last be generally recognized for the anachronism it is—a vestigial survivor from an earlier era." Sunil Dutta supposes it to be "no less than a vestige of medievalism," and says that "when it comes to capital punishment we are still mired in the Dark Ages." And Thorsten Sellin long ago concluded that it is "an archaic custom of primitive origin." This death-penalty-as-dinosaur concep-

tion is spelled out explicitly by the cultural historian Thomas Laqueur: "The death penalty as it is carried into practice today is like an endangered species brought back from the brink of extinction, a creature from an earlier age making its way in a very different time from when it ruled the earth."¹⁷

Important truths are contained within this recurring characterization. Capital punishment is indeed a long-standing practice that has been rendered problematic by the evolving social structures and cultural commitments of modern liberal-democratic states. The death penalty was more widely used, less contested, and more fully integrated in earlier times and in less developed societies. The American institution has persisted for decades after it disappeared elsewhere in the Western world, and this survival is to some extent a matter of contingent historical events.

These are valid insights, but what is misleading here is the idea that the institution lacks a contemporary habitat and support system, and is maladapted to its current environment. This assumption prompts us to think about the death penalty in a manner in which we never would think about other contemporary institutions—that is, by means of models and exemplars drawn from a much earlier historical period. The dominant theoretical account—largely derived from the work of Michel Foucault—views today's death penalty as a contradiction: an archaic, sovereign punishment surviving in a modern welfare state, the ancient power to kill mixed up with the modern politics of life. When sociologists discuss capital punishment in contemporary America, the accounts they typically invoke—those of Foucault, Durkheim, Gatrell, or Hay—are based on the workings of capital punishment in eighteenth-century Europe and not on the distinctive practices of twenty-first-century America. For this standard account, the death penalty is a practice standing out of time, a poorly adapted institution without roots in contemporary forms of life.

A corrective to this standard account is the more valid picture of an institution that has been remade and effectively adapted to its late-modern American environment. Most of its forms and arrangements are of recent origin and have been crafted to fit the culture and sensibilities of the present. Far from being an atavistic survival, doomed to disappear, American capital punishment has adapted in order to survive. The adoption of lethal injections to replace more openly violent and painful execution methods is a case in point, as is the recent abolition of capital punishment for juvenile and mentally deficient offenders. And in that process of adaptation, the death penalty has developed new forms, new functions, and new social meanings—few of which are well captured by the standard account.

We need to think about capital punishment not as a lumbering dinosaur

with an ancient physiology but instead as a mobile assemblage of practices, discourses, rituals, and representations that has evolved over time in response to the demands of the social environment and the pressure of competing forces. Doing so reminds us that capital punishment has a history that shapes its forms as well as its uses. And it obliges us to take account of its contemporary incarnation—the institutional arrangements, legal procedures, discursive figures, and dramatic forms that actually exist today.

The arrangements through which American capital punishment is currently enacted undermine the death penalty's objectives. Today's death penalty serves no identifiable function and accomplishes nothing. It is, in the usual phrase, "merely symbolic." This familiar claim was put precisely by the sociologist Thorsten Sellin when he said that, "as now used, capital punishment performs none of the utilitarian functions claimed by its supporters, nor can it ever be made to serve such functions." The historian Gary Wills says the same thing when he describes how the death penalty has ceased to be a vital instrument of state power and penal justice and has become, instead, a hollowed-out shell, devoid of positive meaning and social purpose. Wills lists more than a dozen functions traditionally associated with the death penalty—a grim catalogue of utilities he takes from Nietzsche—before going on to show that most of these purposes are no longer credible in contemporary Western society, and that the American institution is so constructed as to undermine those few objectives (such as deterrence and retribution) that continue to make sense.¹⁸

Wills's points are well taken, and it is easy to show that the criminal justice functions of deterrence and retribution are poorly served by present-day arrangements.¹⁹ But it would be a mistake to end the analysis there. Capital punishment's forms and functions have always been in motion, adapting to the various social environments in which the institution has been deployed. What we now think of as its "core" criminal justice functions (above all, crime control) were once peripheral, just as the forms we assume to be traditional (elaborate public ceremonies, for example) were once new and innovative. We would thus do better to assume that today's system does in fact serve specific functions, even if these are not the ones historians lead us to expect. Instead of rushing to judge the death penalty dysfunctional, we should take the trouble to look for its positive uses and functions, even when these are not officially declared or acknowledged.

We ought to consider the possibility that today's capital punishment is organized and oriented differently from its predecessors—that it is a different social form, not a degenerate one. Instead of supposing that this is a

traditional institution that is now rarely used because it serves no purpose, we ought to ask whether its new forms and modes of deployment actually meet specific needs and serve specific functions in today's society. We need a positive theory of what the late-modern death penalty is and does.

The related charge that the death penalty is now "mere symbolism," "illusion," or "gesture" is one that recurs over and over again in the literature, made by frustrated death penalty supporters as well as by abolitionist opponents.²⁰ The implicit claim that underlies these charges is that because capital punishment appears to lack an instrumental crime-control rationale it must therefore be a mere symbol lacking in substance. But this argument misunderstands the nature of symbolic communication as well as the effectiveness of modern death penalty discourse. The idea that "symbolic" is necessarily "noninstrumental" relies on a distinction that makes little sense when penal rituals routinely use symbols of condemnation as instruments of marking, degradation, and control. Worse, this misleading distinction prevents users of the term from following through with a positive analysis of important issues—such as the specific meanings being symbolically communicated; the rhetorical means by which they are being communicated; the audience to whom they are directed; and the effects that these communications produce. To understand the forms and functions of the death penalty today, we have to take communication seriously. We have to regard symbolic measures as effective actions, not as empty gestures or mere talk.

Today's death penalty is an instance of American Exceptionalism: an exception to the international norm that is explained by the fact that America, its history, its people, and its culture are constituted differently from other nations and driven by different dynamics. When commentators try to explain why America retains capital punishment in the context of comprehensive abolition in other Western nations, a popular notion quickly comes to mind. The conventional way they think about this question is to pose a simple opposition between abolition and retention—"the West" (or, more often, "Europe") has abolished the death penalty, while America has retained it—and then to suggest an explanation that accounts for this stark contrast. The trouble is that if the phenomenon to be explained is presented as a simple, binary contrast, the explanations that come to mind tend also to be simplified, binary ones: "Americans" are punitive and "Europeans" are not. Americans are Puritan, or vigilante, or racist, or individualistic, and Europeans are not. These, of course, are the preferred simplicities of the system's critics. But supporters have simplicities of their own:

for them, the explanation is that America is truly democratic and Europe is not, or that Americans continue to be God-fearing while Europeans have lost their faith.²¹

Such oppositions are misleading, quite apart from the dubious explanations that they propose. By aggregating "America" and "Europe," they collapse important internal distinctions, for example, between states such as Michigan, Wisconsin, or Rhode Island, which have been abolitionist since the mid-nineteenth century, and others such as Texas, Oklahoma, or Virginia, which still regularly put offenders to death. Likewise, they fail to distinguish between European nations such as Portugal, which first abolished capital punishment for ordinary crimes in 1867, and others such as France and Britain, which did not repeal their death penalty laws until more than a century later.²²

The opposition between American retention and European abolition also collapses historical time, relying on a snapshot comparison at a particular moment that may be misleading. In 1972, for example, the U.S. Supreme Court ruled all existing capital statutes unconstitutional while the French authorities decapitated Claude Buffet and Roger Bontems in the courtyard of the Santé Prison.²³ Or consider that "abolition" usually occurs, when it does, not as the abrupt cessation of an unquestioned policy of routine executions but instead as the final stage of a long-term historical process in which the death penalty is incrementally restricted and restrained and displaced by other sanctions such as banishment, galley slavery, transportation, or life imprisonment.²⁴

Major historical change usually takes the form of a process rather than an event. It is therefore a mistake to juxtapose "abolition" and "retention"—a binary opposition better suited to moral argument than to historical analysis. This too-stark dichotomy prompts us to think of the American institution as the *opposite* of Western abolition, as if America is altogether unrestrained in its use of the death penalty, like the Stuart monarchs of seventeenth-century Britain or Nazi Germany's criminal courts. But if we view the American system of capital punishment historically and comparatively, on a continuum of death penalty practices that ranges from the most spectacular, widespread, and intense to the most restricted, reformed, and restrained, then it seems clear that the contemporary United States is much closer to the minimalist pole than to the maximalist pole.²⁵

American jurisdictions still permit the death penalty, and this is, of course, a significant moral and political fact that properly commands our attention and shapes our debates. But the actual execution of this penalty is comparatively infrequent; its use is subject to close regulation and re-

straint; and its existence is a matter of legal and political controversy. Such facts ought not to be ignored. Taken together, the point of view of the present and the rhetoric of popular debate are powerful influences, and they push us to regard the U.S. situation as diametrically opposed to that of Europe. But a more historical perspective suggests that, in many important respects, the two continents are not so far apart. If we visualize the full range of death penalty practices as a line of continuous variation, we would picture the European nations (and other Western countries such as Canada, Australia, and New Zealand) as having gradually moved to the minimalist end of the continuum and then finally stepped off altogether, while the United States hovers close to that same end.

These comparative and historical points do not aim to make America's death penalty disappear or to deny its distinctiveness. In the Western world, contemporary America is clearly an outlier in terms of the death penalty as well as other aspects of penal policy. Other Western nations, most notably the United Kingdom, share much of the punitive trajectory and culture of control that emerged in late twentieth-century America, but no other Western nation exhibits the harsh sentencing tariffs, mass imprisonment, or capital punishment that now characterize the United States.²⁶ So America is different from other Western nations in important respects, and a central aim of current research is to explain these differences, not deny their existence. That there are differences is not at issue. The question is, how best to frame an inquiry that can explain them?

Talk of American Exceptionalism usefully reminds us of the need for a comparative perspective and of the distinctive institutional structures and cultures of which the American polity consists. It reminds us that Americans often think of themselves as "exceptional" and care little for international opinion. But in their conventional usage, notions of "American Exceptionalism" can be unhelpful, particularly when the explanations they offer rely on undifferentiated, ahistorical conceptions of "American culture" or the "American condition."²⁷ America is not a single place for penological purposes, any more than is "Europe" or "the West." There are major regional and state-level differences within the United States (including differences among the thirty-five so-called death penalty states) which make talk of "American" capital punishment somewhat misleading. Until recently there were also major differences between the capital punishment practices of the European nations, though the fact that all of them are now abolitionist has obliterated these contrasts. Like Tolstoy's families, abolitionist nations all seem alike, but every death penalty nation is retentionist in its own way. The European Union's contemporary abolitionism hides a variety of different histories. Each of the European nations was previously

retentionist, and each deployed the death penalty using distinctive national forms in a context of specific local meanings.

In comparative terms, there is no all-encompassing international standard against which the United States is an "exception," no single norm from which America deviates. Nor is there a constant difference between America and other Western nations that persists through time. If the comparisons were made in the 1830s or 1840s (when the mildness of American punishments impressed European visitors such as Charles Dickens and Alexis de Tocqueville); or in the early 1940s (when American executions began a sharp decline and Nazi Germany moved toward "assembly line" executions); or even in the mid-1970s (at which point the United States had gone nearly ten years without a single execution), the ratios would look quite different.²⁸ Instead of a constant contrast, the historical record shows commonalities and differences, generic developments and distinctive variants. America is in historical motion, as are each of the European nations with which it is being compared, and its relationship to them varies over time, growing now closer, now further apart.

American Exceptionalism is a theory developed to explain a long-term, widespread, and persistent phenomenon—classically, the weakness of the American labor movement and socialist parties—by reference to structural and cultural features of the American nation that are also long-term and persistent.²⁹ An analytical framework of that kind cannot plausibly be applied to a phenomenon (America's retention of the death penalty following abolition in all other Western nations) that is less than forty years old, is unevenly distributed across the nation's states and regions, and may yet prove to be transient rather than persistent over the long term.

If we replace the conventional dichotomy (capital punishment retained and capital punishment abolished) with a more refined sense of variation along a continuum, then the causal picture alters accordingly. Instead of supposing that qualitatively different effects must have qualitatively different causes, we can think in terms of general causal processes producing varied outcomes in different settings and circumstances. We might then hypothesize that the reasons for death penalty abolition in Europe are much the same as those for death penalty reform in the United States—except that America's anti-death penalty movement, the social forces that propelled it, and the political processes that gave it legal expression were somehow weakened, countered, or constrained in their operation, particularly in the final stages of the movement toward abolition. Instead of thinking in conventional terms of an "exceptional" history and all that this entails, we ought to think of America as a specific variant within a general set: an outlier on some dimensions, in the central tendency on oth-

ers, but not different in kind. This approach leads away from myopic talk about "exceptions" toward more detailed and more nuanced historical comparisons.

Capital punishment is an exercise of sovereign state power, a top-down display of might, imposed by an all-powerful state authority that monopolizes violence and reserves to itself the power to kill. This final piece of conventional wisdom is the tendency to think about today's American death penalty using a model designed to describe the capital punishments of absolutist states in early-modern Europe. The explanation for this misleading habit of thought lies in the enormous influence exerted by the work of the French philosopher and historian Michel Foucault, whose writings have become a central reference point in academic discussions of the power to punish.³⁰

Foucault's unforgettable account of Robert Damiens's execution in 1757 presents a searing image of capital punishment—an archetype that has shaped much thinking about the subject ever since. Here is the passage with which Foucault opens *Discipline and Punish*:

On 2 March 1757 Damiens the regicide was condemned to "make the *amende honorable* before the main door of the Church of Paris," where he was to be "taken and conveyed in a cart, wearing nothing but a shirt, holding a torch of burning wax weighing more than two pounds"; then, "in the said cart, to the Place de Greve where, on a scaffold that will be erected there, the flesh will be torn from his breasts, arms, thighs and calves with red-hot pincers, his right hand, holding the knife with which he committed the said parricide, burnt with sulphur, and, on those places where the flesh will be torn away, poured molten lead, boiling oil, burning resin, wax and sulphur melted together and then his body drawn and quartered by four horses and his limbs and body consumed by fire, reduced to ashes and his ashes drawn to the winds."³¹

Many readers will know this passage. It is fixed in the theoretical imagination and has shaped much of our thinking about capital punishment in the thirty-odd years since it was first published. If there is a standard account of the meaning and purposes of capital punishment, then this is it.

In his painstaking analysis of Damiens's destruction, Foucault theorizes capital punishment as a ritual of "sovereign state power," a public ceremony in which state actors utilize spectacular violence to display the force and majesty of the sovereign's power. Capital punishment is a means used by the sovereign to create submission, obedience, and social order: a demonstrative act that asserts a monopoly claim over violence in a specific territory. As Foucault explains, "The public execution . . . has a juridico-

political function. It is a ceremonial by which a momentarily injured sovereignty is reconstituted. It restores that sovereignty by manifesting it at its most spectacular. The public execution, however hasty and everyday, belongs to a whole series of great rituals in which power is eclipsed and restored."³²

In this account, the sovereign state is the principal actor in a theater of cruelty. It is the unmoved mover, provoked by the insult of the criminal's offense, but obedient to no one outside of itself. "The people" have merely an auxiliary part in this drama, as onlookers and consumers. They may be supporters, but they are in no way essential to the process. As Foucault puts it, "The vengeance of the people was called upon to become an unobtrusive part of the vengeance of the sovereign. Not that it was in any way fundamental, or that the king had to express in his own way the people's revenge; it was rather that the people had to bring its assistance to the king."³³

Foucault's account of capital punishment and its political meaning is embedded in a definite political milieu—a predemocratic absolutist monarchy that has little in common with contemporary America. But such is the power of his thought that this conception is frequently viewed as a general theory, applicable to capital punishment wherever it exists.³⁴ Whenever the death penalty is discussed, especially in academic settings, Foucault's analyses are there in the background, shaping conversations and conceptualizations. The result, in relation to American capital punishment at least, is a serious misunderstanding.

It is certainly true that capital punishment in twenty-first-century America is a state-administered process, conducted in accordance with state and federal law, and carried out by state functionaries. The authority of state law and the force of state power are what guarantee the sanction and render it valid. In that formal-legal sense, the American practice fits the Foucaultian model. But in more substantive respects, Foucault's "sovereign state" model does not fit well at all with American practices and institutions.³⁵ The American death penalty is never a straightforward assertion of untrammelled sovereign power—there is no such power in the United States. The process of producing an execution in America is always conflicted, with competing authorities pressing against one another. Sovereignty is not "expressed" in these processes, it is asserted, contested, and divided, and there is no single sovereign state that expresses its imperious will. In contrast to Foucault's Eurocentric conception, the American state is a divided, pluralistic entity. In terms of the death penalty, the American state is a self-effacing one, preferring to disappear into the concepts of "the people" and "the law" rather than execute offenders in its own name.

In enacting and administering the death penalty, American state officials point to the jury, the victims, the public, the electorate, *the people*, as the real principals of the action. They represent themselves as the servants of the people, doing the voters' bidding, taking care to observe the due process of law, dutifully carrying out a democratic legal mandate. As the U.S. government declared in 2000, "[W]e believe that in democratic societies the criminal justice system—including the punishment for the most serious and aggravated crimes—should reflect the will of the people freely expressed and appropriately implemented through their elected representatives."³⁶

Let me be clear: Foucault is correct to insist that sovereignty and capital punishment are related. For centuries a deep historical association existed between the claim of sovereignty and the power to impose a penalty of death—an association that dates from the formation of the first nation states. And today, in situations where sovereignty is in question, the death penalty can still function as a demonstrative marker of sovereign power.³⁷ But most liberal democratic governments nowadays have no need of death penalties to demonstrate their autonomy and sovereign command, which suggests that the association is now contingent rather than essential, largely historical rather than contemporary.

If the Foucaultian account misleads when it depicts sovereignty and death as essential corollaries, it also misleads, in the American context, when it characterizes "sovereignty" as an unreconstructed, absolutist phenomenon. Foucault's account leads us to think about sovereignty as a given rather than as an ongoing contest, to associate it with the imperious state and not with its constituent elements and subdivisions (the people, subnational "states," local counties), and to suggest that wherever sovereignty exists, the death penalty must, too.

In modern America, it is a mistake to view capital punishment as a relationship between a sovereign state and a disobedient subject. If we think of capital punishment as an exercise of sovereign state power, we lose any sense of the political processes and popular forces that drive American decision-making at the various levels of local, state, and federal government. We lose sight of the political arrangements that reflect group conflicts and racial hierarchies. And we neglect the energy, the passions, the values, and the pleasures that popular culture injects into the politics of capital punishment. Foucault's account gives us no sense of any of this. To follow this conventional academic wisdom is to move away from most of the important action.

Foucault's framework is instructive in reminding us that the imposition of the death penalty is always, at its core, an exercise of power—and in in-

sisting, more generally, that punishment is "a complex social function" that produces positive effects.³⁸ But its uneasy relationship with the American case—where the state was never so singular, so sovereign, or so differentiated from the people as it was in eighteenth-century France—makes it unsuitable in the U.S. context. For an understanding of the American case, we need a different way of approaching capital punishment, its use, and its historical development, one in which power is more contested, legal authority less secure, and "the voice of the people" more prominently represented.³⁹

We have seen how Foucault's analysis began with the image of Robert Damiens being put to death in the Paris square in 1757. Let us see how a rather different conception might be constructed, moving from a more distinctively American point of departure: not a grand state ceremony but an act of local "popular justice," conducted not in Paris, the capital of France, but in Paris, a small town in Texas.

The Lynching of Henry Smith

An eyewitness account of the lynching of Henry Smith was published in the *New York Times* on February 2, 1893. The lynching had taken place the day before in Paris, Texas. Smith, a black man and former slave, was alleged to have sexually assaulted and murdered a four-year-old white child, the daughter of a local police officer:

Paris, Texas, Feb 1.—Henry Smith, the negro assailant of four-year-old Myrtle Vance, has expiated, in part, his crime by death at the stake. Ever since the perpetration of his crime this city and the entire surrounding country has been in a frenzy of excitement. When the news came last night that he had been captured, that he had been identified by B. B. Sturgeon, James T. Hicks, and many others of the Paris searching party, the city was joyful over the apprehension of the brute.

Hundreds of people poured into the city from the adjoining country, and the word passed from lip to lip that the punishment should fit the crime, and that death by fire was the penalty that Smith should pay for the most atrocious murder and outrage in Texas history. Curious and sympathizing alike came on trains and wagons, on horse and foot, to see what was to be done. Whisky shops were closed, and unruly mobs were dispersed. Schools were dismissed by a proclamation from the Mayor, and every thing was done in a business-like manner. Officers saw the futility of checking the passions of the mob, so the law was laid aside, and the citi-

zens took into their own hands the law and burned the prisoner at the stake.

The story of the crime is as follows: On Thursday last Henry Smith, a burly negro, picked up little Myrtle Vance, aged three and a half years, near her father's residence, and, giving her candy to allay her fears, carried her through the central portion of the city to Gibson's pasture, just within the corporate limits. . . .

Arriving at the pasture he first assaulted the babe, and then, taking a little leg in either hand, he literally tore her asunder. He covered the body with leaves and brush, and lay down and slept through the night by the side of his victim. . . .

Upon being questioned, he denied everything. He was kept under heavy guard at Hope last night and later confessed to the crime. This morning he was brought through Texarkana, where 5,000 people awaited the train. Speeches were made by prominent Paris citizens, who asked that the prisoner be not molested by Texarkana people, but that the guard be allowed to deliver him up to the outraged and indignant citizens of Paris. Along the road the forces gathered strength from the various towns, the people crowding upon the platforms and on top of coaches, anxious to see the lynching and the negro who was soon to be delivered to an infuriated mob.

Arriving here at 12 o'clock, the train was met by a surging mass of humanity 10,000 strong. The negro was placed upon a carnival float in mockery of a king upon his throne, and, followed by the immense crowd, was escorted through the city so that all might see. The line of march was up Main Street to the square, down Clarksville Street to Church Street, thence to the open prairie, about three hundred yards from the Texas and Pacific depot. Here Smith was placed upon a scaffold six feet square and ten feet high, securely bound, within the view of all beholders. Here the victim was tortured for fifty minutes by red-hot irons being thrust against his quivering body. Commencing at the foot, the brands were placed against him inch by inch until they were thrust against his face. Then, being apparently dead, kerosene was poured over him, cottonseed hulls placed beneath him, and he was set on fire. Curiosity seekers have carried away already what was left after the memorable event, even to pieces of charcoal.

The negro for a long time after starting on the journey to Paris did not realize his plight. At last, when he was told that he must die by torture, he begged for protection. He was willing to be shot and wanted Marshal Shanklin of Paris to do it. Scarcely had the train reached Paris when his torture began. His clothes were torn off and scattered to the crowd, peo-

ple catching the shreds and putting them away as mementos. The child's father, her brother, and two uncles then gathered about the Negro as he lay fastened to the torture platform and thrust hot irons into his quivering flesh. Every groan from the fiend, every contortion of his body was cheered by the crowd. . . .

The men of the Vance family having wreaked vengeance, the crowd set at the fire. The negro rolled and wriggled and tossed out of the mass only to be pushed back by the people nearest him. He tossed out again, and was roped and pulled back. Hundreds of people turned away, but the vast crowd still looked calmly on. People were there from Dallas, Fort Worth, Sherman, Dennison, Bonham, Texarkana, Fort Smith, Ark. And a party of fifteen came from Hempstead County, Ark., where he was captured. When the news was flashed over the wire at every town, anvils boomed forth the announcement.⁴⁰

The public lynching of Henry Smith, appalling as it was, was by no means a unique event. Between three and four hundred spectacle lynchings of this kind took place in the South between 1890 and 1940, along with several thousand other lynchings that proceeded with less cruelty, smaller crowds, and little ceremony.⁴¹ These lynchings were not summary killings undertaken for want of a functioning criminal justice system. Public torture lynchings were a preferred alternative to "official" justice rather than a necessary substitute for it. All the "crimes"—they were, of course, merely *alleged* crimes—that were punished this way were inter-racial atrocities. They were, in every case, crimes that would have been subject to the death penalty had the accused been tried and convicted within the official state process. But for Southern mobs, regular hangings were too good for these "offenders," regular justice too respectful and too dignified.⁴² By reviving the ancient penalties—of torture, burning, dismemberment, and display—the lynchers created an aggravated form of capital punishment, more terrible than official justice, and more nearly proportionate to the outrage they sought to express.

Nor was this a "traditional" or long-standing practice. The public torture lynching was invented at the turn of the twentieth century to communicate impassioned sentiments that could no longer be expressed in the official idiom of the criminal law, and to inflict a level of suffering that had long since been officially disavowed. The penal excess of these lynchings was not an accidental effect of a crowd getting carried away—it was at the very core of the event's penal purpose and political meaning. This characteristic, together with several other elements of these complex events, provide valuable points of departure for thinking about today's death penalty.

As the *New York Times* report shows, these lynchings were enjoyed as good days out, as entertainments—both by the crowds who were there and by readers of the newspaper reports that later appeared. The report describes a “frenzy of excitement,” a surging crowd that was alternately “curious,” “sympathetic,” and “joyful” as it watched the “infuriated” mob do its work. Here we see what Emile Durkheim might describe as a “collective effervescence” provoked by the prospect of the reckoning: an unabashed pleasure in punishment and its associated festivities.

These spectacle lynchings were open, public, communicative events—and the modern media were immediately drawn to them. Newspaper reports like the one above appeared all across the country, carrying photographs as well as eyewitness accounts. They were what we would now call “media events,” putting death into discourse, circulating images of dead black bodies, exploiting the tremendous entertainment potential that these lethal dramas possessed. Professional photographers set up shop at the scene and did a brisk business selling photo-souvenirs. Picture postcards, showing black-and-white images of the lynchings and their victims, were purchased by locals and kept as mementoes or else sent to friends and relatives who had missed out on the excitement.⁴³ On the reverse side of cards featuring photographs of lynching victims and watching crowds were messages such as the following:

Well John—This is a token of a great day we had in Dallas, March 3rd [1910], a Negro was hung for an assault on a three year old girl. I saw this on my noon hour. I was very much in the bunch. You can see the Negro hanging on a telephone pole.

This is the Barbecue we had last night my picture is to the left with a cross over it Your son Joe.

This was made in the court yard, In Center, Texas, he is a 16 year old Black boy, He killed Earl's Grandma, She was Florence's mother. Give this to Bud. From Aunt Myrtle.⁴⁴

These lynchings gave a prominent role to the white victim of the alleged crime and to his or her kin and supporters—a role defined by the customary rules of honor and revenge. The “men of the Vance family” were allowed to “wreak vengeance.” The right to exact vengeance also belonged to the local community where the crime occurred. The Texarkana people were asked to exercise restraint and deliver the prisoner “unmolested” to the proper parties. The offense involved remained essentially personal, a private wrong to be directly and locally avenged, not a legal violation to be impersonally sanctioned by state officials elsewhere.

At the same time, the object of punishment, Henry Smith, was perceived by the crowd as a "brute," a "fiend," the perpetrator of an inhuman atrocity against an innocent white child. His alleged acts, his inferior status as a black man, and the sympathetic, well-connected good character of his victim converged to put him outside the law, beyond its protection. His punishment was dictated not by the legal code—"the law was laid aside"—but by the collective passions his act had aroused. His fate was determined not by the rule of law but by the will of the people. Far from regarding him as a citizen and a legal subject, the mob granted Smith neither personhood nor human dignity. His humanity having been denied, he became a body to be destroyed, flesh to be tormented, a living screen onto which the crowd's furious power might be projected. Smith's broken body was displayed—at the event and in the photographic images that circulated subsequently—as a trophy and a warning.

The atrocious, inter-racial crimes that these public lynchings sought to avenge—like the rape and murder of Myrtle Vance—provided important occasions for political mobilization. They helped forge alliances: between "race radicals"—who sought to undo the civil rights granted to blacks by Reconstruction—and lower-class Southern whites and, elsewhere, between Northern blacks and civil rights activists. They created ideological associations, forging a link between black males and violent crime; between community justice and the right to kill. They legitimated racial violence by representing it as criminal punishment. They empowered some groups *vis-à-vis* others within the white community. They generated political opportunities—not just for white against black but for white against white.⁴⁵

In these lynchings there is no strong state asserting its power, but rather a group of local people defying it. Such defiance could occur precisely because local law officials were not subject to the controlling power of their state's government, let alone of the federal government in Washington. The Paris lynching is a story not of state sovereignty *affirmed* but rather of state sovereignty *contested*—by "the people," the mob, the county—in the name of popular justice and white supremacy. Throughout the early decades of the twentieth century, federal and state authorities struggled in vain to gain control of a power to punish that local Southern communities arrogated to themselves. Even as late as the 1960s, federal and state control sometimes remained tenuous.

By their actions, and in the subsequent statements of their apologists, the lynch mobs made clear their insistence that these particular "criminals" and these specific "crimes" should be accorded harsher treatment than the criminal law allowed. The state's official criminal justice was

deemed too lenient, too slow, too uncertain, and altogether too respectful of the "criminal" and his so-called rights. As a recent historian of lynching observes:

Whites who collectively murdered African Americans . . . in the late nineteenth and early twentieth centuries not only made a statement about racial hierarchy but also a statement about law. Law was too capricious, too unpredictable, too formal, too abstract, and too concerned with process and at least the procedures of fairness to regulate the crucial social distinctions of the color line . . . the criminal justice system, in its maddening variability could not be entrusted with the sacred responsibility of performatively reenacting white supremacy when it was challenged.⁴⁶

The spectacle lynching was not an official ceremony but a popular carnival—a "lynching bee," a "negro barbecue." It took place not in the centers of national power but in the rural counties of the South far from the seat of federal or state government. Its mode was not rule-bound legal process but passionate, popular expression. These lynchings were explicitly violent and self-consciously uncivilized. The mob insisted on punishments—torture, burning, dismemberment, and display—that were widely regarded outside the South as anachronistic and barbaric, the better to maximize terror and degradation. They defiled and dismembered the human body in defiance of a modern humanist culture that regarded it as sacrosanct. And of course they were openly and unashamedly racist: utterly rejecting the law's commitment to equality and affirming local norms of caste superiority. That they scandalized liberal opinion elsewhere was an important part of the event's local appeal.

Lynching and Capital Punishment

Conventional wisdom views the death penalty as an exercise of sovereign state power and conjures up Foucaultian images of Damians on the scaffold. But when it comes to American capital punishment, it is more appropriate to think in terms of local popular justice and remember Henry Smith's fate at the hands of the Texas lynch mob. The historical image of the lynch mob sheds light on contemporary capital punishment in a number of important respects. The savage, carnivalesque character of the public lynching displays some of the passions and pleasures that the punishment of hated enemies can evoke—passions that are now buried beneath the "civilized" restraint with which the death penalty is publicly discussed and administered. Lynch mob behavior conveys disturbing truths about

the potential for raw violence that resides in American race relations and traditions of popular justice. Reflecting on these events also reminds us that, as late as the mid-twentieth century, American federal and state authorities were far from sovereign in their command of violence and their capacity to do justice. Like capital punishment today, these lynchings were occasions for many kinds of action and display—most notably dominance, defiance, contempt, and degradation—and worked as symbolic vehicles for transactions unfolding on many different levels. But above all, this historic legacy is instructive because the specter of these lynchings has long haunted the American legal system and played a crucial role in shaping the reinvented death penalty that emerged at the end of the twentieth century.

Public lynchings also prompt us to think about the entertainment aspects of lethal punishments and the communicative action that these events generate—important aspects of the capital punishment complex that are too often neglected. Here the lynching postcards are particularly revealing. These brief letters suggest the pleasure of narrating such events and the possibility of using transgressive narratives of this kind as tokens of solidarity to bond with like-minded others. The postcards, photographs, and newspaper reports generated by the lynchings were ways of putting death into discourse, circulating images of the killing, and thus extending the event over time and space. The very different reactions that these communications produced—among Southern whites, Southern blacks, and Northern liberals—help us keep in mind that practices such as lynchings and executions are always unruly public texts with which different groups of people engage and whose meanings are caught up in power struggles and cultural conflicts.

Henry Smith's destruction reminds us of the raw power of the American mob and the furious demands of "popular justice" that emerge when local majority sentiment is outraged by crime, empowered by normative codes, and untrammelled by legal restraint. The self-righteous power of "the people," emboldened by ideologies of popular democracy and myths of self-rule, is an incendiary force in American politics that is less actively mobilized in European nations, at least outside of warfare or revolutionary situations. And popular justice is one of the key forms of its expression. The image of a lynching also reminds us of an important respect in which America's penal history diverges from the developmental pattern of the other Western nations and from the process of "civilization" that characterized it—a divergence embodied in popular practices that were on the margins of the law, were regional, and, though they were short-lived, were nevertheless symptomatic. To a greater or lesser degree, these same characteristics remain part of the institutional and social fabric of the American

polity—long-term structural features that made lynchings possible a century ago and make capital punishment more likely today.

Should we infer from these observations that capital punishment in contemporary America is, in fact, some kind of lynching? A "modern lynching" perhaps? Or a "legal lynching"?⁴⁷ Not at all: quite the contrary, in fact. If we think about the distinctive forms of contemporary American capital punishment in relation to the lynching model, we discover that these forms, taken together, embody a strikingly precise mirror image of those we see in the lynchings.

Today's capital punishment process is administered by state officials and regulated by federal law. It provides the defendant with multiple opportunities to contest the court's finding and to appeal his sentence, taking considerable trouble to uphold his rights and ensure the observance of due process and proper procedure. Executions, if they actually occur, take place not in the local town square but instead at a great distance from the crime, both in time and in space. Execution methods are avowedly "non-violent," designed to minimize bodily injury and degradation. Bureaucratic protocols dictate a dispassionate administrative routine with crowds, ceremony, and cruelty reduced to a minimum. If lynching is "the very essence" of open, full-throated, retributive violence, as George Herbert Mead suggested, then the modern American death penalty is, in some key respects, its essential opposite: a punishment overlaid with ambivalence, anxiety, and embarrassment, striving hard to appear lawful and nonviolent.⁴⁸

Viewed alongside the lynching, today's death penalty suggests a radical inversion of form, a mirror image, a reformed present that vehemently rejects its past. This negative symmetry is so striking that we must suppose that the contemporary American death penalty has, in important respects, been *designed* to be an antilynching—and that is precisely the hypothesis that will be pursued here. The American archetype of a lynching will guide our analysis of the social meaning of today's death penalty as we explore the historical and political processes that forged such remarkably close, inverted symmetries between these two institutions.

Despite extensive, ongoing efforts by the federal courts to ensure that the American death penalty does not resemble a lynching, has none of the appearance of a lynching, and is not understood to be a lynching, many of the same social and political dynamics that produced lynchings in the early twentieth century continue to produce death penalties now. In other words, the relationship between these peculiar American institutions is more complex than it initially appears. What at first sight seems to be a stark and simple contrast, a mirror image, turns out, on closer inspection, to have underlying continuities and connections. For all the inversion of

form, the social forces and political processes that enabled lynchings, mobilized lynch mobs, and made lynchings useful for political actors have somehow persisted and continue to structure the modern death penalty's deployment and utility.

Contemporary capital punishment continues to have many substantive features in common with those lynchings that it does its best to disavow.⁴⁹ It continues, where executions are concerned, to be concentrated in the South. It continues to be driven by local politics and populist politicians. It continues to be imposed by leaders and lay people claiming to represent the local community. It continues to give a special place to victims' kin. It continues disproportionately to target poorly represented blacks, convicted of atrocious crimes against white victims.⁵⁰ The passions aroused by heinous crimes, together with racial hatreds and caste distinctions, still provide much of its energy.⁵¹ Its supporters still insist that regular punishment is too good for the perpetrators of atrocities and that only death can sufficiently mark the enormity of their crimes. It continues to produce false accusations and racialized outcomes. It continues to provide drama and casual pleasure for masses of curious onlookers. Finally, the collective killing of hated criminals (or merely the assertion of the right to do so) remains one of the ways in which groups of people express their autonomy, invoke their traditional values, and assert their local identity.

Considered in formal terms, today's death penalty may be a mirror image of a public torture lynching—an inverse institution, a disavowal, calculated to resist and deny any such association. But if we look beyond forms and consider the practice substantively, many of the same social forces that once prompted lynchings nowadays prompt capital punishment; many of the same social functions performed by lynchings then are performed by capital punishment now; and many of the same political structures that permitted lynchings at the start of the twentieth century enable capital punishment at the start of the twenty-first.

The image of the lynching offers a powerful tool with which to think about this question comparatively and historically. It trains our attention on the question of governmental power in the United States, bringing into focus the weakness of the American state and the fragmented character of governmental authority. It points us to the ways in which the right to kill and the assertion of sovereignty are bound up with regional conflicts and power structures, as well as with questions of justice and the constitution of penal authority. It points to the tradition of popular, communal justice and the cultural expectation—still strong in some American regions—that local people will be allowed to shape how justice is done. It shows how group conflicts—between black and white, rich and poor, conservative and

liberal, Northerner and Southerner—can be played out around the scaffold and over the body of the condemned.

In all these ways the lynching model prompts us to focus on the structural conditions that enable collective violence—the limits of state power, incomplete pacification, popular sovereignty, and the power of local actors—as well as the situational ones, including group relations, racial divisions, levels of violence, and despised low-status outsiders accused of atrocious crimes against higher-status victims, that mobilize and direct it.

Local Power and Abolition

The archetypal Southern lynching scene will serve to orient this study of American capital punishment and its peculiar characteristics. But what if we had used a different image, a different starting point? Would the analysis have turned out very differently, thereby raising questions about the approach suggested here? Let us test that proposition by considering a very different point of departure—namely, the path-breaking abolition that occurred in Michigan in the middle of the nineteenth century—to see how that might have reoriented the investigation.

In 1846, a small group of reformers in the Michigan legislature succeeded, after several attempts, in passing a law abolishing capital punishment for ordinary crimes. The 1846 Act retained the death penalty for treason against the state, but in the 164 years since then, no death sentences have been imposed and no state executions have taken place. The last execution prior to the reform occurred in 1830, and the reformers argued that the death penalty had long been a “dead letter,” quite inessential for crime control—though they took the precaution of stipulating solitary confinement for life with hard labor as the punishment for anyone convicted of murder.⁵² Michigan, at that time, had comparatively low levels of crime, no black slave population, and no sharp racial or class divisions giving rise to insecurity on the part of the dominant groups.

A legislative committee report of 1844 stated that capital punishment was illiberal (“a usurped power of government”), bad for the wealth of the state (“to punish an offender with death destroys . . . both his life and his usefulness”), uncivilized, and inhumane.⁵³ It also stressed the “fallibility” of the punishment (“innocent men have been convicted, sentenced and executed”); in fact, it appears that the reform may have been triggered by a case in neighboring Canada in which the authorities executed an innocent man in error.⁵⁴ The senator who introduced the bill, Daniel Quakenbass,

had himself presided over the execution of an innocent person while serving as a sheriff in New York.

The 1844 report stated that "public opinion is against the infliction of the penalty of death," but there is reason to doubt the basis of that claim.⁵⁵ The committee had no survey evidence, nor had the issue been put to the electorate, and in 1850, when considering whether to write a death penalty prohibition into the state constitution, legislators objected that "a large proportion of the people of the state are in direct hostility to the principle," so its inclusion would "array a hostile feeling against the constitution itself."⁵⁶ It seems, in fact, that the 1846 abolition was the work of a small group of liberal reformers, drawn from Puritan Yankee New England backgrounds, sympathetic to the antislavery and antigallows causes, suspicious of state power, and unmoved by the arguments for retention put to them by ministers of religion who opposed abolition.⁵⁷ ("Your committee do not consider the abolition of capital punishment as a theological question. They see no necessity or propriety in making it a matter of scriptural controversy.") The reformers—acting in the relative openness of the state's early stage of political development—took advantage of Michigan's autonomous police power and its independence from the control imperatives of the larger nation to press home their reform agenda. Having taken up the mantle of pioneering reformers ("the eyes of the people of the Union are upon us to see whether we will sustain the advance we have made"), the abolitionists resisted all subsequent attempts to undo their historic act, even as the state's demographics changed and homicide rates rose.⁵⁸ A prohibition on capital punishment was eventually written into the state constitution in 1963.

Michigan's pioneering abolitionism—soon followed by that of Wisconsin and Rhode Island—placed America, or at least its Northern states, in the vanguard of the world's abolitionist movement.⁵⁹ The event's status, to its admirers, is that of a noble, progressive undertaking, altogether different from the regressive barbarism suggested by the public torture lynching. An account oriented by the Michigan experience would come at the American death penalty from a very different angle and might seem to give rise to a very different analysis.

But on closer examination, we see that the Southern lynching and the Michigan abolition do not lead to two entirely different and incompatible analyses. On the contrary: they suggest a consistent causal account that points to the importance of certain structural features shared by all American states, and to the role of situational processes in determining how these structural properties are played out in social action and events. The

most important structural features of the Michigan case—the state's relative autonomy from the national state, the local control of the power to punish, the political dominance of small groups—are in fact shared by the Southern lynching, even if the situational features (group relations, racial demographics, violence rates, symbolic associations of the death penalty) are altogether different. Both stories are versions of an American narrative: not a grand narrative of abolition or retention, nobility or barbarism, but a detailed story of local democratic politics in all its varieties.

The American public is not a lynch mob, nor is it more than usually punitive, or racist, or given to vigilante justice. But the American polity devolves decision-making about punishment (and much else) to the local level, thereby empowering local political actors in ways that have had major consequences for the history of the death penalty. The effect of this devolution depends on local political structures and relations; on the orientation of local elites and their capacity to exert leadership; on group and race relations; on homicide and violence levels; on events and contingencies. The Michigan example shows how the empowerment of local actors could produce a politics of liberal reform giving rise to a pioneering abolition. The lynching example shows the opposite. The vanguard abolitions of capital punishment that characterized America then, and the laggard survivals that characterize it now, may be explained within one and the same framework.

The American Way of Death

For us, what the Americans are doing is completely
incomprehensible.

HENRI LECLERC, PRESIDENT OF THE LIGUE DES
DROITS DE L'HOMME, 2000

Widespread puzzlement surrounds the death penalty in America today. Henri LeClerc, the president of the Human Rights League in Paris, was speaking on behalf of European abolitionists when he expressed disbelief at America's continued use of the death penalty, but his sense of incomprehension could also describe much of the critical literature on the other side of the Atlantic. If commentators abroad wonder why America retains capital punishment when other nations have abandoned it, commentators at home—whether supporters or opponents—wonder why the current system is so painfully slow, so prone to error, and so ill adapted to its ostensible purposes. As a prominent supporter of capital punishment remarked, "Whatever purposes the death penalty is said to serve—deterrence, retribution, assuaging the pain suffered by victims' families—these purposes are not served by the system as it now operates."¹

Why, for example, do states take such trouble to enact death penalty laws when they mostly fail to enforce them? (Or, as a *New York Post* columnist exclaimed, "Please tell me why in bloody hell we have a so-called death penalty on the books if we never use it?"²) Why, when death sentences are imposed at trial, are they so seldom subsequently executed? And why, if the aim is to produce deterrence or retribution or victim satisfaction, are executions held in private, often decades after the crime, with such a minimum of display and so much concern to ensure that the condemned feels no pain?

No less puzzling than the institutional forms of today's death penalty are its cultural status and political meaning. Why so much talk about a punishment so infrequently used? Why would the people of a liberal nation, famously suspicious of state power, grant states the right to kill? Why is the country's most government-phobic region also the most execution-prone?

These puzzles prompt us to focus not just on the big fact of capital punishment's survival but also on the more finely grained questions of its institutional forms, cultural status, and political meanings. They push us beyond broad-gauge comparisons between "retentionist" and "abolitionist" nations to more detailed investigations of capital punishment's contemporary forms and meanings, probing the histories out of which they emerged, the dramas through which they are performed, and the discourses in which they are represented. They move us to consider capital punishment not as an abstract issue but as a set of practices through which America's death penalty is enacted and experienced. And they suggest that any study of capital punishment ought to include not just legal and administrative arrangements but also the social practices that engage with the institution and connect it with America's circuits of political exchange and cultural consumption. Instead of regarding capital punishment simply as a penal measure we need to view it as a complex institution with legal, political, and cultural dimensions.

The Law and Practice of Capital Punishment

Capital punishment is always enacted in and through specific legal and administrative arrangements that determine why, where, how, and which persons will be put to death. Such arrangements have varied enormously in different historical periods, from one society to another, and in the American case, from one region, state, or county to the next.

In the contemporary era—the period from 1976 to the present—capital punishment arrangements have differed greatly from state to state, existing sometimes as no more than a law on the books, sometimes as a sentencing practice, and sometimes as a full-fledged practice of death sentences followed by executions. The state of New Hampshire had the law on the books for decades after 1976 but imposed no death sentences and carried out no executions; states like Kansas impose sentences but have not carried out an execution since the 1960s; states like California impose many death sentences but execute very few of them; and states like Texas or Oklahoma or Virginia have the law, impose sentences, and carry

Death penalty states (35)

State	Executions since 1976 (1,193)	Death row inmates (3,279)
<i>Northeast</i>		
Connecticut	1	10
New Hampshire*	0	1
Pennsylvania	3	225
<i>South</i>		
Alabama	44	200
Arkansas	27	43
Delaware	14	19
Florida	68	403
Georgia	46	108
Kentucky	3	36
Louisiana	28	84
Maryland	5	5
Mississippi	10	60
Missouri	67	52
North Carolina	43	169
Oklahoma	91	86
South Carolina	42	63
Tennessee	6	92
Texas	449	342
Virginia	105	16
<i>West</i>		
Arizona	23	129
California	13	690
Colorado	1	3
Idaho	1	18
Nevada	12	78
Oregon	2	33
Washington	4	9
Wyoming	1	1
<i>Midwest</i>		
Illinois	12	15
Indiana	20	17
Kansas*	0	10
Montana	3	2
Nebraska	3	11
Ohio	34	176
South Dakota	1	3
Utah	6	10
U.S. government	3	58
U.S. military*	0	8

Source: Death Penalty Information Center, January 31, 2010.

* No executions since 1976.

Abolitionist states (15 plus District of Columbia)

State	Date of abolition
<i>Northeast</i>	
Maine	1887
Massachusetts*	1984
Michigan	1846
New Jersey	2007
New York*	2004
Rhode Island	1984
Vermont	1964
<i>South</i>	
District of Columbia	1981
West Virginia	1965
<i>West</i>	
Alaska	1957
Hawaii	1957
New Mexico**	2009
<i>Midwest</i>	
Iowa	1965
Minnesota	1911
North Dakota	1973
Wisconsin	1853

Source: Death Penalty Information Center, January 31, 2010.

* Abolished by judicial decision.

** Statute effective July 1, 2009, but two people left on death row as statute not retroactive.

out frequent executions.³ Then there are the fifteen states (and the District of Columbia) in which capital punishment does not exist as a legally available sanction. In short, remarkable variation exists *within* the United States in terms of capital punishment law and practice.

Of the thirty-five states in which the death penalty is a legal punishment, roughly one-third—Colorado, Connecticut, Idaho, Kansas, New Hampshire, South Dakota, and Wyoming (and the U.S. military)—make minimal use of the sanction, having few capital trials, small death row populations, and few or no executions. Another third—California, Illinois, Indiana, Kentucky, Maryland, Mississippi, Montana, Nebraska, Nevada, Ohio, Oregon, Pennsylvania, Tennessee, Utah, and Washington (and the U.S. government)—use the death penalty at the trial level and have large death row populations but make more limited use of executions. The final third—Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Louisiana, Missouri, North Carolina, Oklahoma, South Carolina, Texas, and Virginia—regularly impose death sentences and carry out executions.⁴

This pattern is distinctive and revealing. As a comparative matter, sub-

national variation of this kind is highly unusual. Outside the United States, few modern nations contain local jurisdictions in which capital punishment is lawfully executed alongside others where it is prohibited.⁵ And although some writers proceed as if capital punishment only really exists when it is carried through to an executed death sentence and talk of "*de facto* abolition," the continued existence of unexecuted laws and sentences—and the political energy invested in maintaining and extending them—suggests that even death penalty practices that stop short of death have political meaning and social uses.

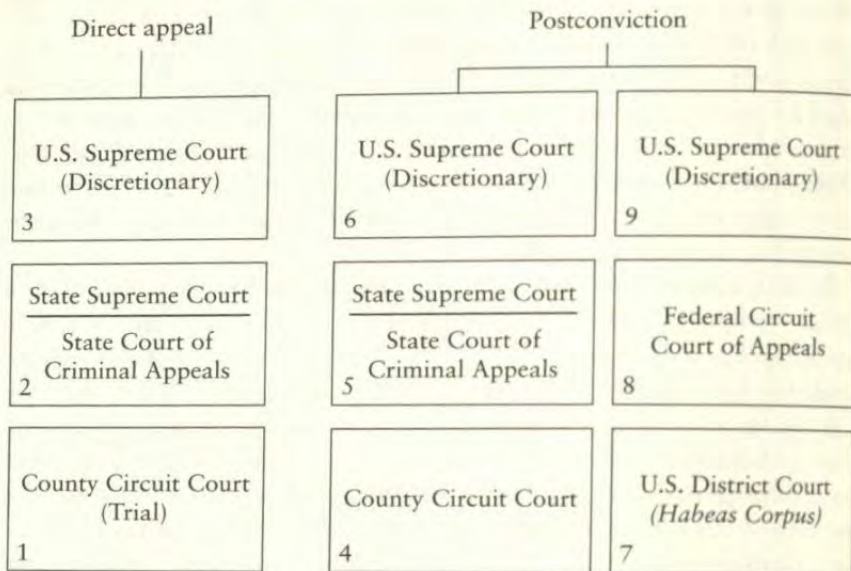
The different varieties of American capital punishment map onto a definite geography. Abolitionist states are concentrated in the Northern tier of the country (especially the Northeastern and North Central region), mixed states in the middle tier (the mid-Atlantic and Midwestern regions), and execution states are heavily concentrated in the South. In the period since the Supreme Court revalidated capital punishment in 1976, Southern states have carried out about 83 percent of all American executions, with the state of Texas accounting for more than one-third of the 1,193 executions that have taken place. This North/South disparity is even more pronounced considering that as many as 40 percent of non-Southern executions have been of "volunteers"—that is, of death row inmates who have given up their appeals process and encouraged state authorities to put them to death. The proportion of "volunteers" in the South is much lower, at 8 percent.⁶

These geographical patterns have changed over time with the distribution of executions becoming much more skewed between North and South in the late twentieth century. In sharp contrast to the contemporary period, between 1930 and 1964 the Northern states of Ohio, Pennsylvania, and New York were consistently among the country's top nine executing states. The increasing "Southernness" of the death penalty—at least in terms of executions—is a relatively new phenomenon that needs to be explained.

Today's capital punishment process is overlaid by a web of rules and procedures that is more complex and elaborate than that of any other area of criminal law. A dense skein of substantive rules and procedural requirements regulates every stage of the capital trial from jury selection to sentence choice, as well as the complicated process of appeal and post-conviction review that each capital case undergoes.⁷

If a convicted murderer is to be put to death, the imposition of a death sentence is only the beginning of a long, involved process. In the wake of a capital conviction the case must proceed on direct appeal to the state courts—sometimes to an intermediate court of appeals as well as to the

The appeal process



Source: Bryan Stevenson.

state supreme court. Thereafter, several further obstacles must be surmounted before an execution can occur. The case will await the resolution of legal challenges in state postconviction proceedings; then the resolution of challenges in federal court via federal *habeas corpus* review; then the decision of the state authority (usually the governor) in any clemency proceedings; and finally the setting of an execution date, which is usually done by the state's supreme court or the governor.⁸ Of these obstacles, the most complex and time-consuming are the appeals and federal *habeas* challenges. Capital cases typically go through nine stages of direct appeal, postconviction appeal, and federal *habeas* review as the case makes its way up and down and back and forth between the state and federal court hierarchies.

Given these procedural possibilities, a good defense lawyer with sufficient resources can keep his client alive for many years. Take the case of Robert Alton Harris, who was sentenced to death on March 9, 1979, for the murder of two teenage boys and executed more than thirteen years later by the state of California. In the years between sentence and execution, Harris first exercised his federal constitutional right to lodge a direct appeal to the supreme court of California. When that failed, he petitioned the U.S. Supreme Court to hear his appeal, again without success. He then

lodged two unsuccessful *habeas corpus* petitions in the California state system, followed by a federal *habeas* petition that was unsuccessful in the federal district court, successful in the Ninth Circuit Federal Court of Appeals, and ultimately denied by the U.S. Supreme Court.⁹ Next he launched a second federal *habeas* petition, which was filed in 1982 and finally denied in 1988; a further effort to reverse the denial, which was also denied; and a third federal petition that was filed on March 26, 1990. This petition persuaded a federal court to stop Harris's scheduled execution on April 3, 1990, but the court subsequently voted to deny Harris's claim. Thereafter, Harris's lawyers lodged a series of increasingly desperate petitions to the federal courts, until eventually the U.S. Supreme Court brought the saga to an end on April 21, 1992, on which date Harris was executed.¹⁰

In the period since *Furman v Georgia* in 1972, this lengthy and elaborate legal process has become a central feature of American capital punishment. Long years of slow-moving appeals and rulings are often followed by a frantic time crunch at the very end as the case moves toward its execution date. Defense lawyers file flurries of last-minute petitions and applications for stays of execution, which federal and Supreme Court justices have to decide, sometimes convening middle-of-the-night conferences to do so. By the 1980s, the Supreme Court had appointed a "death clerk" whose job it is to handle last-minute filings and coordinate with any local execution team about to carry out a sentence.¹¹

Significant consequences flow from these labyrinthine legal processes, the most obvious being the temporal extension of death sentences. The legal process ensures that years and sometimes decades go by before the sentence of the court is finally executed, during which time the case travels from state court to federal court and back again in search of review. In 2007, the average time elapsed between sentencing and execution was just over twelve years.¹² Several executions have occurred after more than twenty years, and some prisoners currently have been awaiting their execution for more than three decades. In this process the punishment of death is suspended and effectively transformed into something else—a decades-long incarceration during which the prisoner awaits a final decision as to execution or reprieve.

Such delays do not just undermine the death penalty's deterrent effect; they also spoil its capacity for satisfying retribution. As one legal scholar put it, "Even a five or six year delay in killing is enough to gut the meaning of revenge. The man you wanted to kill was the abusive robber, high on crack, who pistol-whipped and shot two customers at a Seven-Eleven store in 1984. Instead, in 1990, the state electrocutes a balding, religious, model

prisoner in a neat blue-denim uniform.”¹³ Sometimes, in the process, a death row inmate will become an object of sympathy for those who oppose capital punishment, redefining the convicted murderer as the victim of a cruel and unusual system.

The legal process and its inherent delays have also led to the expansion and consolidation of the modern institution of “death row”—that special form of imprisonment whereby thousands of condemned prisoners spend many years in solitary confinement awaiting the outcome of appeals and hearings that will decide whether they live or die. Imprisonment on death row—lengthy confinement under sentence of death, in a special enclosure, subject to greater than usual deprivation—is an administrative arrangement with no specific legal authority, but it has become the punishment experienced by thousands of convicted capital offenders.¹⁴

Although America’s lengthy waiting periods are not unique, they contrast sharply with earlier practices. Before the 1960s, the average time that American inmates spent awaiting execution was much shorter than it is today—measured in weeks and months rather than in years and decades—and death row populations were much smaller.¹⁵ At the start of 2010, more than 3,000 prisoners were being held in “death rows” and “condemned units” around the country.

Doctrinal and procedural complexity also increase the importance—and the relative scarcity—of competent death penalty lawyering. As Federal Court of Appeals Judge Alex Kozinski comments, “The jurisprudence of death is so complex, so esoteric, so harrowing, this is the one area where there aren’t nearly enough lawyers willing and able to handle the current cases.” Most states with the death penalty tightly restrict expenditure on counsel for indigent capital defendants, with the result that “inadequate assistance of counsel” has become a central basis for contesting death sentences. Except in rare cases in which a defendant can afford experienced trial counsel—and such people, as Supreme Court Justice Ruth Ginsburg notes, “do not get the death penalty”—defendants mostly rely on the *pro bono* services of appellate litigators who typically become involved only when cases near an execution date.¹⁶

The existence of complex laws together with the involvement of motivated, competent appellate counsel (in those cases where such counsel do become involved) ensures that a very high proportion of all capital sentences are reversed prior to execution: as many as 66 percent, according to the leading study. As Justice John Paul Stevens remarked, “The reversible error in capital trials is staggering.” “Exonerations” (whereby condemned individuals are found to be innocent and are released from custody) have also become a recurring feature of the system; indeed, since 1973, more

than 130 people have been exonerated and freed from death row, more than a dozen of them on the basis of DNA evidence.¹⁷

These reversals and exonerations are, like every aspect of the system, subject to competing interpretations. For critics, they are proof that the system is dangerously fallible, that inappropriate death sentences are often imposed and that innocent individuals may have been put to death. For supporters, they have a different significance: "Reversal of an erroneous conviction on appeal or on habeas, or the pardoning of an innocent condemnee through executive clemency, demonstrates not the failure of the system but its success."¹⁸ But even for supporters, such a high rate of error is difficult to justify.

As a consequence of all this, completed death sentences are relatively rare. Since executions resumed in 1977, the highest number carried out in any one year was 98, which was the national total for 1999. In subsequent years, annual figures have trended downward, with an average of around 60, this, in a nation where more than 14,000 murders occur every year.

The lengthy legal process ensures that each capital case is expensive, whether or not it results in execution. In New York between 1995 and 2005, the state spent \$170 million on capital prosecutions, none of which produced an executed death sentence. According to an Urban Institute study, the state of Maryland has spent \$187 million on capital cases since 1976, which averages out to \$37.2 million for each of the five executions that the state has carried out. Even in a high-volume execution state such as Texas, the costs of a capital case are reported to be twice as high as the total costs of a case resulting in life imprisonment. These figures do not reflect the costs of the time that corporate litigators devoted *pro bono*, an amount that often reaches hundreds of thousands of dollars per case (not including the cost of corporate litigation fees forgone), nor do they include the cost of the extensive docket time taken up by capital cases in state and federal courts.¹⁹

The legal process put in place since *Furman v Georgia* in 1972 has brought with it many costs and difficulties. The question is, how did such a system emerge and why have its problems been allowed to persist?

IN THE great majority of cases, the decision to mount a capital indictment is made not by professional, nonpartisan civil servants but by elected county prosecutors whose discretionary decisions are largely unsupervised by state or federal authorities.²⁰ The decision to bring death penalty charges—like the decision to accept a plea or to press for a death sentence following conviction—is a choice rather than a legal requirement. That choice is subject to whatever subjective prejudices, political incentives, and

situational pressures are brought to bear, including the expressed wishes of the murder victim's family. And it is made by individual prosecutors, 97 percent of whom are white, though the racial composition of most death penalty states is much more mixed, and a majority of murder defendants are people of color.²¹

For the most part, the state judges who preside over trials and hear appeals are, like the elected prosecutors, "politicians who must run for office." Judicial elections take place in thirty-one out of thirty-five death penalty states, and judges have sometimes been deselected because their capital appeals decisions were out of line with the views of their constituents. In states where judges were until recently empowered to override jury sentences, elected judges typically used this power to impose death rather than life. In Alabama the death-to-life ratio of these judicial overrides was ten to one. The exception was Delaware, where judges are not subject to election; in that state judicial decisions more often benefited the defense.²²

State governors also make death penalty decisions in the context of electoral competition, and the views of gubernatorial candidates on capital punishment have sometimes played a prominent role in electoral contests—for example, when George Pataki defeated New York Governor Mario Cuomo in 1994. The political salience of the issue goes a long way toward explaining why governors more often authorize executions in election years than in nonelection years, and why the power to grant mercy is rarely exercised except by governors who are no longer running for office.²³

This tight connection between legal decision-making and local politics produces regional disparity and an obvious risk of bias in capital cases.²⁴ The local ties and electoral accountability of criminal justice decision-makers can also give the American process a raw, emotive character, since an aroused community is more directly involved and legal decisions are more responsive to its promptings. Politicization and localization of this kind are unknown in other Western democracies. European judges and prosecutors are typically tenured civil servants not directly accountable to voters. And the political officials who used to exercise the power to grant clemency in European nations were high-ranking officials in the national government—the British home secretary, the French president, the German chancellor—who were less susceptible to local opinion. In the United States, by contrast, all politics are local. How, we might ask, did a modern nation state permit the power to kill to become a matter of local politics?

Although locally elected officials make key decisions in the capital punishment process, the most important of these decisions is made not by the community's officials but by twelve of its lay members. The choice to im-

pose a death sentence—which is quite separate from the decision to convict the defendant of capital murder—is made in America today not by a judge, or even by application of a legal rule, but by a jury of lay people who exercise a discretionary and unreviewable sentencing power.²⁵

If the idea of the jury as the capital sentencing authority has come to seem natural in the American context—if Americans “believe instinctively” that the jury is best suited to this task—it is worth noting that, except in a very few states, jury sentencing occurs in no other area of American criminal law. Nor does it exist in most other countries.²⁶ When the idea of jury sentencing was tentatively raised by the Royal Commission on Capital Punishment in Britain in the 1950s, it was roundly condemned by the press as well as by members of both houses of Parliament. Why, the *Times* editors asked, should a “random group” of “chance-met people,” “ordinary people who know nothing,” be regarded as competent or reliable? Moreover, why ought a group of lay people be made to shoulder this “dread obligation”?²⁷

Only in the last few years has jury sentencing become an essential feature of American capital proceedings. Until recently, a few states retained the judge as the sentencing authority or allowed the judge to override the jury’s decision, but recent Supreme Court cases have made jury sentencing a constitutional requirement of capital cases. Before they may settle on a death sentence, juries in most states are instructed that they must find that the murder of which the offender was convicted was accompanied by at least one statutorily specified aggravating factor—for example, the murder was especially heinous, atrocious, cruel, or depraved, or was committed in the course of another felony, such as robbery, kidnapping, or rape.²⁸ Having made this finding, they are then required to “weigh” aggravating factors against any mitigation (such as mental or emotional distress, or previous good character) adduced by the defense, and to decide, on balance, whether a death sentence is appropriate. Given the absence of any controls beyond this “weighing” requirement, the jury has a virtually untrammelled power to choose between life and death. As Justice Stevens observed, “in the final analysis, capital punishment rests not on a legal but an ethical judgment—an assessment of . . . the ‘moral guilt’ of the defendant.”²⁹ As with Roman emperors, the fateful choice between thumbs up or down is theirs and theirs alone.

Given this decision-making power, the composition of juries and the views of individual jurors become crucial determinants of sentencing outcomes. If capital punishment is justified because it “expresses the community’s moral sensibility”—and the Supreme Court has identified that as the fundamental rationale for today’s institution—then it follows that “a rep-

representative cross-section of the community must be given the responsibility for making that decision."³⁰ As a consequence, attorneys have a long history of challenging state practices of jury selection, many of them concerned with racialized selection processes, peremptory challenges to members of ethnic minorities, and the "death qualification" of jurors—a selection process that excludes those who have principled objections (or "scruples") about capital punishment.³¹ Questions of who exactly constitutes "the people" or "represents the community" are contentious matters of local politics and federal law.

Following the Supreme Court's 1991 decision in *Payne v Tennessee*, it became constitutionally permissible for victims' relatives to present "victim-impact statements" to the jury. The practice, which is established in most death penalty states, is part of the penalty phase, that is, the adversarial sentencing trial that takes place after the jury has rendered a guilty verdict in a capital trial.³² This reinsertion of the victim's supporters into the sentencing process has been criticized for increasing the emotional temperature of an already highly charged process and exerting additional pressure on the jury to return a death sentence.

Together with the prosecutor's practice of consulting the victim's relatives about the decision to bring a capital indictment, and recent attempts by some officials to represent capital punishment as a form of "closure" for relatives of murder victims, the victim-impact statement is the product of the new victim-centered politics that dominated crime policy in the 1990s. Islamic jurisdictions allow victims' relatives to choose an offender's punishment and sometimes to participate in its administration, as did the revenge cultures of medieval Iceland and the lynching practices of the Jim Crow South.³³ But the involvement of victims' kin in capital sentencing is a new and distinctive phenomenon in the American context, with no equivalent in U.S. capital punishment proceedings prior to 1991 nor, indeed, in the capital processes of other common law nations.³⁴

The 1960s litigation that eventually produced the *Furman v Georgia* decision in 1972 was initially brought to challenge the racism and lynchlike practices that characterized the death penalty in some regions before the federal courts' intervention. *Furman*'s historic decision deemed such practices to be a violation of constitutional rights and invalidated every one of the nation's capital statutes to bring these practices to an end. In *Gregg v Georgia* (1976) and its companion cases, the Court upheld a new set of capital statutes because it found that the states had resolved these problems. In subsequent decades, the Court has emphasized the importance of due process safeguards to ensure that death sentences are not imposed summarily, arbitrarily, or on the basis of race. In the contemporary cap-

ital process, then, race discrimination is strictly prohibited and all capital defendants are entitled to due process and effective assistance of legal counsel.

It is surprising, therefore, to discover that racially disparate outcomes, summary trials, and ineffective assistance of counsel in capital cases are routine features of the contemporary, post-*Furman* death penalty process. Even more surprising is that these facts are widely known and officially recognized—with organizations such as the U.S. General Accounting Office and the American Bar Association publishing widely cited reports acknowledging these problems.³⁵

Decades after *Furman*, research still consistently shows that race (above all, the race of the victim), social class, and the quality of legal counsel are the chief factors that structure outcomes, with the result that poorly represented blacks convicted of atrocious crimes against white victims are the group most likely to be sentenced to death.³⁶ These findings show that the racial hierarchy that the Yale law professor Charles Black identified in 1982 still operates today. That hierarchy is, in a "steep descending order of death sentence probability," ranked as follows: "(1) Black kills white (2) White kills white (3) Black kills black (4) White kills black," a pattern that is strongly suggestive of racial attitudes that value the human worth of whites above that of blacks. When critics today describe the death penalty processes of various states, with more or less exaggeration, as "legal lynchings," these are the characteristics they have in mind.³⁷

These phenomena are all too familiar, but they are surprising nevertheless. That these discriminatory patterns should persist, despite decades of federal law reform intended to end arbitrary decision-making and to ensure equal due process and protection of law, is certainly a scandal. But it is also a puzzle that needs to be explained.

The Cultural Contradictions of Capital Punishment

The death penalty is delivered by a legal process, but it is also a cultural performance. It is enacted by means of legal and administrative arrangements but also through dramatic forms and cultural figures. And if the legal forms determine capital punishment's application and constitutional validity, the cultural forms shape its broader social meanings, its popular authority, and its emotional appeal.³⁸ In accounting for the authority of the capital punishment system, neither one is more nor less important. As the sociologist John Lofland notes, "The world is ruled perhaps as much by the dramaturgic encasement of actions as by the actions encased."³⁹

Historically, the dramatic character of the death penalty has always been most apparent at the moment of execution. The traditional death ritual of the condemned man, with its elaborate procession, staging, ceremonial, and speeches, was a cultural event *par excellence*, shaped by social and religious beliefs as well as by the exigencies of bringing about the death of a living, breathing person. That performative moment is organized very differently today.

American executions no longer take place in the public square as in previous centuries, nor in the jail yard, as with the hangings of more recent times. They occur instead in a specialized enclosure—a death chamber—inside a state or federal prison, largely hidden from the public gaze. The protocols of today's low-visibility executions owe less to the conventions of dramatic ritual than to the principles of management science.

Commentators often talk of today's execution as a "ritual," but that description is misleading. Properly speaking, a ritual is a formal social practice that is standardized, repetitive, and conducted in a symbolic fashion. In today's execution process, communicative, symbolic, and ceremonial elements have been reduced to a minimum. Theatrical staging has largely been abandoned, and in its place is a more technical sensibility. Instead of performing a ritual, today's execution officials approach their task in an instrumental manner. Speed and effectiveness are the key concerns rather than signaling or display. What gets performed is nonperformance.⁴⁰

This sensibility is also apparent in the execution method that has become the new American standard. The lethal injection, the execution technique used today by all the states, is the fifth execution method to be used in rapid succession in the United States. Since 1976, states have made use of firing squads, hanging, electric chairs, and gas chambers before settling on the lethal injection as the technology of choice. All the modern methods of execution have been represented by their proponents as painless, humane, and instantaneous. But the lethal injection—which kills by means of the intravenous injection of poisons ("execution medications") into the body of the condemned while he or she lies strapped to a gurney—takes this one stage further, modeling the execution as a medical procedure.⁴¹ Here the projected sensibility is a therapeutic one, with the death chamber redesigned as a hospital ward and the infamous figure of the hangman replaced by paramedics and nurses. According to Federal Circuit Judge Stephen Reinhardt, this medicalization is now seen as a requirement of the Constitution, which obliges states to "eliminate the degrading, brutal, and violent aspects of an execution" and to put in their place "a scientifically developed and approved method of terminating life through appropriate medical procedures in a neutral, medical environment."⁴²

The result is a strange hybrid. The tools of modern medicine (the gurney, the syringe, the IV, the sedatives, the paramedics) are merged with the ancient act of putting a person to death to create a procedure that makes little reference to the retributive, condemnatory nature of the sentence being carried out. As death penalty proponent Robert Blecker complains, "The final scene in the execution chamber too nearly resembles the final scene at hospices. . . . Doctors should not be involved with lethal injection. How we kill the people we hate should never resemble easing excruciating pain for those we love."⁴³ One Texas journalist, who has witnessed more executions than any other, remarks, "The act is very clinical, almost anticlimactic."⁴⁴

Whereas the execution itself is now medicalized, the process through which it is undertaken is thoroughly bureaucratized. Every stage of the procedure is precisely specified in advance and then logged and recorded as the process unfolds. As the execution protocol of the Federal Bureau of Prisons states: "The log will reflect . . . the time each of the following events occurs: The condemned individual removed from Inmate Holding Cell; The condemned individual strapped to gurney; Last statement by condemned individual; Reading of Judgment and Commitment Order by Warden; Signal by Executioner(s) that lethal substances have been administered; Determination of condemned individual's death through the EKG readout by designated qualified person," and so on.⁴⁵

The primary aims of today's execution arrangements, which are by no means always realized, are to minimize the sights, sounds, and smells of suffering and to carry out the court's death sentence in a manner that is professional, efficient, and humane. As a spokesman for the Arkansas Department of Corrections told the *New York Times*, "The people that are involved in this are very concerned that what they do is proper, done professionally, and with decorum. They want this to go well."⁴⁶ The same priorities are apparent in the execution protocol of the Federal Bureau of Prisons: "It is the policy of the BOP that the execution of a person sentenced to death under Federal law by a court of competent authority and jurisdiction be carried out in an efficient and humane manner."

Today's executions place a premium on speed and no-nonsense efficiency. They are viewed not by a crowd or an audience but by authorized "witnesses"—typically about a dozen people including state officials, journalists, and relatives of the condemned and his or her victim—who see nothing at all of the execution process until a curtain is pulled back to reveal the prisoner, prone on a gurney, intravenous lines already inserted, ready to die.⁴⁷ Federal authorities require execution witnesses to sign an agreement "not to photograph or make any other visual or audio record-

ing of the execution" and threaten arrest and prosecution for any persons who "violate prohibitions against filming, taping, broadcasting, or otherwise electronically documenting the death of the condemned individual."⁴⁸ In the aftermath of the event, officials issue brief, pro-forma statements that supply the press with much of the copy for the reports they will publish. The story is extended only if something goes wrong. Otherwise there is a minimum of publicity and all of it controlled.

A journalist's comments following the execution of Timothy McVeigh, America's most notorious mass murderer, give a sense of this new standard:

Timothy McVeigh died yesterday with the whole world watching, but few actually seeing. Eight television networks broadcast reports about his execution live from Terre Haute, Ind., though none came within a mile of it . . . Barred by prison officials from being anywhere near the death chamber, most reporters relayed what news they could from a nearby media encampment . . . In all, the tone of what was the most widely covered execution in history was downbeat, restrained, almost funereal.⁴⁹

Today's authorities do what they can to de-dramatize executions, carefully avoiding the sensational or the spectacular: "The point is to make what you see as uneventful as possible," as a spokesman for Florida's Department of Corrections put it. But this aim is often subverted by the drama inherent in the act of putting a man to death, however much we dress it up as something else. As the Louisiana director of executions admits, "Like it or not, you are putting on a show."⁵⁰

If we pause to reflect on the execution, it quickly becomes apparent that we have here another instance of a peculiar institution. Americans have become used to this arrangement, only occasionally protesting that the event ought to be more public. But for all its familiarity, the low-visibility character of executions is surprising because it would seem to undermine the institution's avowed purposes of deterrence and retribution. As Jeremy Bentham put it, "A real punishment, which is not an apparent punishment, is lost to the public."⁵¹ If the motivating idea is to deter potential offenders or to express public sentiment, we would expect the punishment to be given maximum publicity, not the reverse.

But all this hush and secrecy is also surprising because it is completely at odds with the proliferation of discussion and excitement that characterizes all the earlier stages of the capital process.⁵² It seems paradoxical that in a capital punishment process that generates public energy, excitement, and conversation at every stage leading up to the execution, the actual execution itself should be designed to do the opposite. Why is it that at the very last moment, when the much-proclaimed sentence is about to be carried

out, the official strategy suddenly shifts to one of concealment and containment?

This arrangement also seems oddly out of place in our televised, mass-mediated society, where the dominant urge is to reveal backstage behavior, to show images, to render things transparent. The logic of today's open, democratic, confessional culture is to give access, to let the cameras in, to reveal backstage conduct, to maximize transparency, accountability, and inside knowledge. Voyeurism is nurtured and catered to, not sternly denied. In an age when most mysteries of state have been exposed, when we know who has slept in the Lincoln bedroom and what sexual activities took place in the Oval Office, state executions have become *arcana imperii*, state secrets to which the public must be denied access. Despite the intense public interest in capital punishment and the prolix nature of death penalty discourse, despite its potential for sensational mass media impact, the contemporary execution takes place behind closed doors, hidden away from television cameras and the public eye. It is a "forbidden spectacle," a "dirty little secret."⁵³

Executions were once occasions on which rulers communicated to subjects about the larger political and cosmic forces at work in state justice. Today's officials represent the execution, in symbolic terms, as a nonevent: as merely the dutiful execution of a court order by bureaucrats. Instead of a ceremony in which power is sacralized, we have a procedure in which power is made minimally visible, its character coded as the inevitable unfolding of legal mandates and bureaucratic processes. Whereas executions once loudly proclaimed the sovereign state's might, they now present a silent tableau in which prison employees carry out the law's command in accordance with the will of the people. An event that once expressed the grandeur of a sovereign state now represents that state as nothing other than a law-abiding servant of the people.

Although executions continue to evoke elements of the sacred, the religious, and the transcendental in the minds of some onlookers—and images of state power, communal vengeance, and racial violence in others—such considerations form no part of the authorities' intent. The most striking aspect of today's execution protocol is, in fact, the opposite: the extent to which it has become an instrumental process, devoid of staged drama or deliberate symbolic communication. If the execution contains larger meanings today it is because others insist on projecting them onto the event and interpreting it accordingly.

AMERICAN capital punishment throws a long cultural shadow, producing an extent of political, cultural, and legal engagement that seems quite out of proportion to the institution's actual use or penological importance.

Whereas discussion of the pros and cons of other criminal punishments is mostly restricted to experts, the American death penalty is a perennial subject of political and public concern. Far from a technical issue of criminal justice, capital punishment has come to be tangled up in dense webs of political and cultural associations connecting the death penalty to all sorts of issues, many of which seem quite remote from the punishment of criminals or the control of crime.

Death penalty discourse also exhibits some curious contradictions. The prolix public conversation generated by capital punishment today seems strange in a culture that usually shies away from talking of death. Why, we might ask, does the death penalty excite so much interest, release so much energy, and find so much resonance?

The death penalty is justified today, by the Supreme Court among others, as an expression of retributive community sentiment that demands an appropriately punitive response to the most serious crimes. Capital punishment is intended to express harsh condemnation and to deliver fitting retribution—both of which are morally respectable responses to serious crime. But powerful unwritten rules govern how such sentiments may be respectably voiced and represented. In particular, there is a strict prohibition on the expression of vengeful emotion and on any suggestion of pleasure in contemplating the death of capital offenders. Assemblyman Eric Vitaliano acknowledged these norms when, after presenting his capital punishment bill to the New York State Assembly, he immediately declared, "You haven't heard vengeance from me!"⁵⁴ So, too, did Solicitor General Robert Bork when he insisted in his pleadings in *Gregg v Georgia* that retribution is a "vital social function" but quickly added that such retribution must be "stripped of its vindictiveness."⁵⁵

This prohibition on vengefulness allows an exception for the family and friends of murder victims, who are generally permitted, even expected, to express such sentiments. But the victim exception is one that proves the rule. The public functionaries who legislate and administer America's capital punishment system are obliged to avoid any suggestion that their actions are motivated by vengeful impulses. As one commentator puts it, "We are willing to kill murderers, but we do not want anyone to derive satisfaction from doing it."⁵⁶

We see these same norms articulated in official discourse about capital punishment, in which a dispassionate retribution is embraced but vengeful sentiments are emphatically denied and disavowed.⁵⁷ Likewise, many legislators, prosecutors, judges, and prison officials take care to discuss the issue in solemn tones, carefully distinguishing dutiful, dispassionate retribution from pleasurable, passionate revenge, referring to the death penalty as

a necessary evil, and protesting repeatedly that they take no personal pleasure in the act. Here is a sampling of commentary:

A New York state legislator, in the act of passing a capital statute: "I don't get any pleasure out of the death penalty and never have."⁵⁸

A state attorney general, announcing an execution: "Even though justice was served, the State takes no joy in fulfilling its obligation"; and, following another execution: "there is no joy in taking the life of another human being."⁵⁹

A prison warden, addressing an inmate about to be put to death: "I take no pleasure in carrying out this duty, son."⁶⁰

Members of an execution team, describing their work: "no one enjoys putting a man to death"; "We're not a bunch of redneck backwoods hicks killing people. I don't look forward to [executions]."⁶¹

State governors, stressing that their support for the institution does not amount to inappropriate enthusiasm: "It's a necessity, but an unpleasant necessity"; "capital punishment is never pleasant to contemplate"; "some crimes deserve it, but that doesn't mean I like it."⁶²

A pro-death-penalty activist, commenting on the resumption of executions following a moratorium: "I'm not shouting with glee, but I think that the gas chamber is going to be busy."⁶³

We can accept these denials as authentic and made in good faith. But the need of so many officials to deny that they enjoy state killing seems curious. After all, insisting that there is no pleasure to be had in imposing capital punishment is not an obvious response to the situation. Officials in hospitals and at funerals feel no need to assure their audiences that the deaths at which they officiate bring them no pleasure. Nor do soldiers in warfare. But many legislators who enact capital punishment statutes, wardens who oversee executions, victims who view them, judges who uphold them, and supporters who welcome them all make a point of doing so. They seem, in short, embarrassed, as if caught in a transgression.

Prohibitive norms and linguistic taboos exist only where there is a continuing need to repress and restrain. If vengefulness and bloodlust had disappeared altogether, contemporary culture would not expend energy repressing them. Indeed, newspaper reports, congressional records, and legal opinions often reveal instances when the prohibitions of propriety and proper speech have to struggle with an undercurrent of vindictive, vengeful sentiment that pulls in a different direction. So when the *New York Post* greets the imposition of a death sentence with the headline, "Fry Baby!" the journalist is connecting to primitive, aggressive sentiments that

gleefully flout the official rules of decency and decorum. And when Florida's attorney general reacts to news of a botched electrocution—the inmate's face mask had burst into flames and the smell of burnt flesh filled the witness room—by commenting, "People who wish to commit murder, they better not do it in the state of Florida because we may have a problem with our electric chair," he too is violating the rules of solemn restraint, while giving a knowing nod to voters who have no qualms about killing killers.⁶⁴ If we look beyond the prison where the execution occurs to the parking lot where locals stage carnival celebrations of the event, the persistence of vengeful pleasures can hardly be in doubt:

Glee, outrage, hatred: A cheer went up from the more than 200 people waiting in the early morning cold. They were carrying signs expressing glee, outrage or hatred for Bundy—"Bundy BBQ," "Burn Bundy Burn," "Roast in Peace" and "Hey Ted, This Buzz is For You."⁶⁵

High fives and cigars: One of the Neal brothers shouted to the heavens as he left the witness chamber. "Alleluia!" . . . Ronnie, Raymond and Darryl Neal were less subdued after watching the execution of the man who confessed to killing [their] sister Ramona. They high-fived and puffed cigars as reporters converged on them outside Florida State Prison.⁶⁶

Official representations of the execution are solemn and subdued, taking care to stress humanity and minimize suffering. That is the official line, the declarative norm. But there is a subterranean current, a sentiment of righteous revenge and punitive pleasure that continues to flow beneath the surface. America's halls of justice and legislative assemblies may protest that vengeance, sadism, and *shadenfreude* have no place in death penalty discourse. But the crowds in the parking lot tell a different story.

A similar disconnect affects the ambience surrounding executions. The enormity of taking a human life, even in societies that are far from liberal or humane, has usually ensured that executions evoke an air of respectful solemnity and awe—even if unruly hanging-day crowds sometimes disrupt this atmosphere.⁶⁷ But in America today the execution is often marked by a different emotional tone—one of embarrassment, anxiety, and even guilt. Far from being self-confident, assertive, and assured of the righteousness of their actions, those who carry out executions find the imposition of this legal sentence problematic in a way that other punishments are not. Critics argue that too many people are sent to prison and that conditions of confinement are often inhumane, but the state can nevertheless deploy imprisonment in a positive, confident manner. Not so the death penalty. Even for the worst offenders, the imposition of a death penalty always evokes ambivalence and anxiety.

The executioner has always been an infamous figure, but at least in some parts of America today, the whole process has the feel of dirty work, tainting not just the executioners but everyone else as well. Death work is surrounded by euphemisms. Few people in public life speak out with unbridled enthusiasm on its behalf, and it is rare to hear suggestions that we need many more death sentences or many more executions.⁶⁸ In today's debates there is no equivalent of the famous eighteenth-century pamphlet "Hanging Not Punishment Enough." There are certainly sections of the public who confidently hold that capital punishment for murderers is simply the right thing, or the traditional thing, and that's an end of it. But the institution's more elite supporters—the politicians, the judges, the op ed writers—represent capital punishment as a tragic necessity, an unpleasant duty that we must be prepared to carry out, however distasteful it may be. There is an awkwardness, an anxiety, and sometimes a palpable embarrassment of the kind that arises when a moral rule is broken or a taboo violated. "Botched" executions have always been problematic, as have executions of sympathetic individuals. But even when today's executions are properly administered and involve prisoners who are universally detested, they often have an air of shamefulness—particularly in Northern states, where executions are rare events and often involve "volunteers" such as Connecticut's Michael Ross in 2005.

Michael Bruce Ross had been convicted of the rape and murder of eight women and was sentenced to death in 1987.⁶⁹ On January 26, 2005, after eighteen years on death row and three attempts at suicide, Ross abandoned his appeals, fired his attorneys, and requested that his death sentence be executed. Ross's insistent request caused consternation among officials and the Northeastern legal community. His defense attorney resisted, claiming that Ross was mentally incompetent to waive his appeals, but subsequently acceded to his request. A federal district judge then threatened to disbar Ross's attorney for acceding to his client's wish to abandon his appeals. "We're not in this profession to help people get killed," he is reported to have said. After a postponement of three months, during which a new attorney was appointed by the court to ensure that Ross's mental state was fully examined, Ross was eventually executed on May 13. That day, Connecticut Governor Jodi Rell, a supporter of the death penalty, said, "Today is a day no one truly looked forward to," describing the lead-up to the event as "a protracted ordeal for the entire state." This is not how executions were regarded in their early-modern heyday. Nor is it how they are typically regarded in the more execution-prone Southern states, where fifteen executions were carried out in the three-month period that Ross was made to wait. But for certain parts of

the country, and for certain of the groups involved, the meaning of the death penalty is caught up in a web of conflicts and ambivalence.

This ambivalence is apparent in the statements of judges who express discomfort at being a part of law's "machinery of death." Think of Justice Blackmun (who coined that phrase) describing the "agonies of the spirit" he suffered when dealing with capital cases, or the lengthy confessions of Ninth Circuit Court of Appeal Judges John T. Noonan and Stephen Reinhardt, or the frustration and rage sometimes expressed by Justices Rehnquist and Scalia when the question of capital punishment is addressed. As James Liebman has documented, capital case opinions display an unusually frequent use of double negatives, expressions of anger, passionate dissents, personalization, inflexibility, defensiveness, over-rationalization, efforts at detachment, and the later expression of regrets.⁷⁰

These difficulties are most pronounced at the point of execution and least apparent at the earlier stages of the process. The awkwardness intensifies as we come closer to the actual killing. American officials continue to enact, evoke, and impose the death penalty in an emphatic, confident tone, but when it comes to taking the life of a living, breathing human being their confidence slips. The result is that executions often seem on the verge of violating propriety and decency. The all-important sense of decorum at these events is fragile and easily breached—by a nose bleed, trouble finding a vein, an inmate too heavy to be hanged, or an aged inmate who has to be wheeled into the death chamber in a wheelchair.

The furtive, behind-the-curtain nature of the execution preliminaries, the suppression of communication, the contorted speech, the air of embarrassment and anxiety—all these suggest an institution that is peculiarly troubled and problematic. The case for the death penalty may seem uncontestable to unapologetic traditionalists and unabashed retributivists. But the practice of capital punishment in America today places officials and their supporters in a cultural contradiction, obliging them to behave in ways that are at once lawful and transgressive. It traps them in the uncomfortable space between the cultural norms of liberal humanism and the legal practice of putting offenders to death.

Narratives and Metaphors

Capital punishment must make sense in the culture in which it operates. It has to be made intelligible, legitimate, and, if possible, compelling. This task is accomplished through narrative. Cultural actors—which is to say officials, activists, commentators, journalists, and artists—tell stories

about the death penalty that give it sense and meaning, invoking metaphors and associations that anchor it in familiar cultural scripts and established forms of authority. Since these narratives are always controversial and contested, its supporters connect it to positive values, institutions, and outcomes, while its critics make it a part of different stories that reveal its problems and its corrosive qualities.

These stories, repeated over time and given the imprimatur of courts and state officials, shape perception, accord significance, and fix associations. By invoking certain metaphors and symbols, and by offering a ready-made structure for discussion and debate, these narrative frames shape thinking and help form attitudes. They prompt people to think of the death penalty in this way rather than that, to adopt one perspective rather than another, to make particular associations and inferences rather than others that would be equally possible. They are, in short, a rhetoric of motives.⁷¹

The active creation and reproduction of these frames is always a politically consequential act. It is no surprise then, that state officials and their supporters take care to present the death penalty using frames that maximize its legitimacy and appeal, while critics do their best to challenge such reasoning, dispute its rationales, and subvert its meanings.

In the abundant discourse that surrounds today's death penalty, five basic metaphors supply the institution with its dominant meanings. These are the metaphors of rules, of war, of order and balance, of healing, and of the people's will. Each of these metaphors is challenged by critics who propose counternarratives with which to frame the practice. But taken together, these five frameworks structure much of what gets said about the institution in the mainstream media and the political process. If capital punishment is a public text, these are the narratives that give that text its standard meanings.

The metaphor of rules frames the death penalty as a constitutionally approved undertaking, a matter of legal determinations rather than personal decisions, an outcome of painstaking procedural safeguards that amount to "super due process." It is capital punishment represented as law.

In today's newspaper reports, law reviews, court decisions, and statements by officials, the American death penalty is represented first and foremost as a lawful procedure, validated by the Constitution, regulated by rules, and supervised by the courts. Capital punishment as law is the dominant frame in America today, and the Constitution is used by both supporters and opponents to supply chapter-and-verse textual support for their claims in much the same way that Scripture was deployed in earlier centuries.⁷²

Litigation campaigns and Supreme Court cases from the 1960s to the present have ensured that the metaphor of rules sets the terms in which the issue is presented to the American public. All the talk about constitutional rights, procedural proprieties, legal appeals, *habeas* hearings, and court-ordered stays of execution—dutifully reported by the news media—has a definite cultural effect. Long before he is put to death, the capital defendant is made over as the judicial subject *par excellence*.⁷³ An illustrative example is a public statement by President George W. Bush following the execution of Timothy McVeigh in 2001: “Due process ruled. The case was proved. The verdict was calmly reached. And the rights of the accused were protected and observed to the full and to the end. Under the laws of our country, the matter is concluded.”⁷⁴

The “capital punishment is law” frame is attacked head on by the institution’s opponents. For much of the last thirty years, the central challenge to the death penalty in America has been that it is, in fact, *not* lawful. Critics charge that it is, on the contrary, arbitrarily, cruelly, or unequally imposed in ways that violate the Eighth and Fourteenth Amendments. The counternarrative of capital punishment’s opponents depicts an institution driven by arbitrariness, racism, and collective emotion. Law professor Robert Weisberg turns the official frame on its head by arguing that the metaphor of rules propounded by the Supreme Court is just that—a metaphor—and that the most important decisions in the capital process (made by prosecutors, jurors, and governors) are discretionary, subjective, and not liable to external review. To the metaphor “capital punishment as the rule of law” the critics respond “capital punishment as a legal lynching.”⁷⁵

A second metaphor depicts the death penalty as a weapon of self-defense in a war on crime; a lethal response needed to deter or incapacitate the enemy while raising our side’s morale; an effective means of fighting back against armed criminals who are dangerous or monstrous individuals impervious to lesser punishments: a vital protection for an endangered public.

The negativity of the death penalty presents a problem for liberal states in welfare-oriented societies. How can governments, committed to promoting “life, liberty, and the pursuit of happiness,” legitimately put citizens to death? One answer is to represent capital punishment not as the imposition of death but as the saving of lives—a paradox that becomes more plausible if we assume that the death penalty can operate as a deterrent to dissuade potential murderers. This was the argument presented recently by the legal academics Cass Sunstein and Adrian Vermeule, who argued that utilitarian considerations should persuade liberals that the death penalty is morally sound if research into deterrence showed that capital

punishment would reduce future lives lost. (The authors acknowledged that such an empirical claim is highly controversial.) This same framework was more unconditionally invoked by Texas Governor George W. Bush when he insisted, "When the death penalty is administered in a . . . sure and fair way, it will save lives. It will save lives." His brother, Governor Jeb Bush of Florida, argued much the same: "Floridians believe in the death penalty because they know it saves innocent lives." So did Republican Governor George Pataki, as he signed New York state's 1995 Death Penalty Act: "I know that by restoring the death penalty we have saved lives."⁷⁶

The metaphor of a war on crime has been prominent in American political discourse since at least the 1960s and was especially prominent in the early 1990s, when homicide rates and public fear of crime reached historic highs.⁷⁷ This frame depicts capital punishment not as a policy choice but as a necessary act of public self-defense. As Vice President George H. W. Bush put it, "I say that some crimes are so heinous, so outrageous, so brutal that the death penalty is warranted. . . . If this is a war, then let's treat it like a war." And when New York Governor George Pataki signed the death penalty into law in 1995, he described it not as a punishment but as a defensive weapon in the war on crime: "I must and do appreciate my duty: to provide the maximum possible protection to all persons in New York . . . from vicious and ruthless acts of murder."⁷⁸ Once the argument is framed in this way, it becomes possible to ask of any politician or public official, "Whose side are you on? The public's or the murderer's?" A policy position on the death penalty is thereby transformed into a litmus test of one's concern about public welfare, even of one's patriotism.

The war metaphor makes its way into the courts as well. In their pursuit of a capital sentence, prosecutors identify the defendant as a public enemy, enlist the jurors in the war effort, and encourage them to do their civic duty: "I say to you we're in a war again in this country, except it's not a foreign nation, it's against the criminal element in this country. [The defendant, William Brooks, is a] member of the criminal element, and he's our enemy."⁷⁹

In other cases the defendant is depicted not as an enemy but as a monster. And if the war metaphor is designed to evoke fear, the monstrosity trope aims to evoke horror and repulsion. Here is Federal Judge Alex Kozinski, depicting the monstrous evils against which the death penalty is directed:

Take for example Jacob Dougan, who brutally murdered an eighteen-year-old boy and then sent a tape to the boy's mother bragging about the crime.

Dougan told the victim's mother, "He was stabbed in the back, in the chest, and the stomach, it was beautiful. You should have seen it. I enjoyed every minute of it. I loved watching blood gush from his eyes." Other examples abound: Robert Alton Harris, who abducted two young boys from a McDonald's, and after shooting them down in cold blood calmly finished off the burgers they had been eating and laughed about how the bullets had dismembered them; Thomas Schiro, who drugged, raped, beat and ultimately strangled a woman, then mutilated and sexually assaulted her corpse; and there are many more. . . . John Wayne Gacy, Juan Corona, Theodore Frank, Ted Bundy, Charles Manson . . . Jeffery Dahmer . . .⁸⁰

Faced with these grotesque atrocities—and such graphic depictions are a standard feature of pro-death discourse—jurors or members of the public are likely to recoil in horror and incomprehension. They are also more likely to embrace capital punishment as a necessary bulwark of public safety, as well as a proper retributive response to appalling acts of wickedness.

Death penalty opponents challenge this framework in several ways. They argue that life imprisonment without parole provides equally effective protection; that the war metaphor mischaracterizes the relationship between a state and its law-breaking citizens; and that even the most heinous offenders are potentially redeemable human beings not reducible to their worst acts. Their counternarrative is that the death penalty is a weapon of *choice*, not of necessity, imposed not against monsters or enemies but against individuals—often mentally damaged individuals—who are fellow human beings.

A third metaphor—that of order and balance—depicts the death penalty as morally appropriate, as just desert, as a repayment in kind. It is the restoration of order following the disruption of a murderous act, a balancing response to a horrific crime. The death of the murderer is construed as a necessary means to reestablish equilibrium; a way of honoring a dishonored victim; a vindication of violated rights. This is capital punishment as retributive justice.

This framework, with its metaphors of weighing, balancing, and proportionality, or of reckoning and equivalence, represents the death penalty as a moral counterweight to the wrong of murder. The scales of justice—but also the community's retributive passions—demand a life for a life, the ultimate punishment for the ultimate crime. What is important here is not so much the moral demand for retributive punishment, since this could be satisfied by severe punishment of a nonlethal kind, such as the sentences of life imprisonment with which other Western nations punish murderers. What is important, rather, is payment in kind, the equivalent exchange of

death for death. Once again, capital punishment is represented not as a choice but as a duty. It is a necessary expression of community outrage, a correct and essential response, a morally required avengement. As Justice Potter Stewart put it, there are "crimes so gross, so heinous, so cold-blooded that anything short of death seems inadequate."⁸¹

When prosecutors press jurors to bring in a sentence of death, or explain a capital sentence to the viewing public, they rarely describe it as a deterrent or as incapacitation. They present it as a moral imperative. As Alabama Attorney General Troy King declared to the jury judging Westley Harris, "This case cried out for a sanction commensurate with the wickedness and brutality of his actions, and the penalty of death is the only just and proper answer to the evil Harris unleashed on August 26, 2002."⁸²

Politicians also represent the issue as a matter of justice, a solemn duty rather than a political choice or policy preference. According to Governor Jeb Bush of Florida, "The citizens of Florida have decided that the death penalty is an appropriate form of justice for those who have committed the most heinous crimes against innocent victims."⁸³ His brother, President George W. Bush, following the execution of Timothy McVeigh, solemnly proclaimed, "The victims of the Oklahoma City bombing have been given not vengeance, but justice. . . . Today every living person who was hurt by the evil done in Oklahoma City can rest in the knowledge that there has been a reckoning."⁸⁴

Unlike the utilitarian rationales for capital punishment (deterrence, denunciation, incapacitation, and so on), which are open to empirical challenge or admit of alternative means to the same end, the claims of retributive justice are absolute.⁸⁵ This may explain why retributive justice is now the major justification offered by the institution's supporters. Scott Turow, who served on an Illinois state commission on capital punishment, observes that this was the central rationale that featured in the language of the system's supporters: "Sometimes a crime is so horrible that killing its perpetrator is the only correct response." In the insistent rhetoric of this perspective, the community is *obliged*, the murder *demand*s, duty *must be done*. Like the metaphor of war and patriotic duty, the moral obligation to do justice is one that binds us and may not be shirked because the prospect of killing an offender is an unpleasant one. This sense of obligation is vividly expressed by Judge Alex Kozinski, who says that he hears "the tortured voices of the victims crying out to me for vindication." The felt need to respond to this cry and let haunting spirits finally find peace is why, "despite the qualms, despite the queasiness," Kozinski believes "that society is entitled to take the life of those who have shown utter contempt for the lives of others."⁸⁶

There is, in this understanding of capital punishment, a clear echo of the traditional rules of vengeance, a definite sense that the death penalty is a way to honor the deceased and recognize the worth and status of his or her kin. Wherever this understanding prevails, a failure to demand death can be taken to mean that the worth of the deceased is being undervalued, his or her memory slighted.

Critics respond that morality demands no such thing: that nothing is gained by further killing; that there are other, more appropriate ways of doing justice, the most important being life imprisonment. The counternarrative here is forward-looking and redemptive. It strives to depict backward-looking, payment-in-kind retribution as little more than mindless vengeance.

A more surprising means of representing the death penalty is the metaphor of healing. This frame depicts the death penalty as a way of restoring a community's well-being and providing psychological closure for traumatized victims. The same metaphor shapes our perception of the execution as a medical procedure. The lethal injection protocol's evocations of medical solicitude and humane concern suggest that we respect the person of the condemned even as we put him to death. Capital punishment, this frame would have us believe, is humane treatment.

The old idea of murder as moral pollution points in the same direction. If murder is a bloodstain on the community, the killer's death can be viewed as a cathartic act of cleansing, a way of ridding the community of moral contamination and restoring social health. David Gelernter's statement that "a deliberate murder embodies evil so terrible that it defiles the community" contains precisely this idea.⁸⁷ These metaphors of cleansing, restoration, and cure represent the death penalty as promoting social health. They use the imagery of the welfare state to justify an act that might otherwise seem to have no place in liberal government. This inversion is especially important when it comes to the execution itself, where the contradiction between the state's politics of life and its punishment of death is at its most intense, and where the practice has greatest need of legitimization.

The metaphor of healing also shapes recent attempts to justify capital punishment by reference to its therapeutic effects for relatives of the victim. As Texas Attorney General John Cornyn remarked after the execution of Gary Graham, "Graham's victims and their families have had to live with the consequences of his crimes. It is now time for them to have the closure and the justice our system provides." Attorney General John Ashcroft had the same therapeutic goals in mind when he authorized a closed-circuit telecast that allowed victims and victims' families to witness

the execution of Timothy McVeigh. In Ashcroft's words, witnessing the execution was intended to "help them meet their need to close this chapter in their lives."⁸⁸ As McVeigh's attorney noted, "We have made killing a part of the healing process."⁸⁹

Capital punishment's opponents regard this way of framing the issue as an appalling misrepresentation. Deliberately killing a healthy person who represents no immediate danger to others is, they insist, a travesty of the medical vocation and a violation of the Hippocratic Oath. They point to the American Medical Association's refusal to allow its members to take any part in executions; to the amateurish, unsafe fashion in which lethal injections are sometimes administered; and to the possibility that the current protocol entails unseen pain and suffering on the part of the condemned. They present the death penalty not as humane treatment but as human sacrifice.

Finally, we have the recurring metaphor of the people's will. Here the death penalty is depicted as a vital expression of local community sentiment, as moral outrage authentically expressed, as collective choice and community justice. Death sentences express the will of the people dutifully carried out by their lawful representatives. This is capital punishment represented as democracy in action.

In the United States there are few claims more powerful than that of the democratic will. A social practice that can claim the support of a popular majority avails itself of an authority that is hard to challenge, whatever criticisms can be made of the way the practice is carried out. Until quite recently, death penalty supporters justified the practice by reference to the benefits it brought, the purposes it served, and the traditional justice it expressed. Today, when these benefits and purposes are more often in doubt, and when other nations have turned away from that tradition, we see a new emphasis on the institution's democratic credentials and its popular support. Courts point to opinion polls, legislators point to electorates, prosecutors point to communities, and appellate judges point to jury decisions, each time as evidence that the death penalty, whatever its practical shortcomings, represents the will of the people. As a Texas prosecutor put it, "No prosecutor gives the death penalty, only people do."⁹⁰

When President George W. Bush addressed a foreign press corps, defending America's retention against European criticism, he talked not about the death penalty's effectiveness or utility but instead about its democratic credentials: "The death penalty is the will of the people in the United States." The same justification is heard in every state legislature where capital legislation is considered. As a New York state assemblyman put it in 1995, "You know what the bottom line is here, ladies and gentle-

men? The people of New York want the death penalty, and it's about time we gave them the death penalty."⁹¹

The same political rationale is offered by Texas officials, who explain that the state's remarkably high volume of death penalty indictments simply reflects "the will of the people in a democratic society." They respond to critics by invoking "the people" and "the voters" as the higher authority behind their acts. "The people of Harris County believe in the death penalty," according to a prosecutor in the nation's leading capital punishment county, "and those same people employ the district attorney and his staff. All these people in New York say something is wrong with Harris County and its prosecutors. We're rabid and zealous, they say. Those folks need to come down here and listen to these voters."⁹²

Notice that "the voters" to whom the Texas prosecutor refers for her death-dispensing authority are not the voters of the United States, nor even those of the state electorate of Texas, but the voters of Harris County. America allocates penal law-making powers to the fifty states, but decisions about the enforcement of these laws are made at a lower level still—by county prosecutors who are accountable to county voters.

Most arguments for the death penalty come with ready-made counterarguments, but in the United States it is difficult to challenge an argument grounded in the will of the people—especially when the issue is a matter of morality and political preference. Some death penalty opponents—such as Supreme Court Justices William Brennan and Thurgood Marshall and the Legal Defense Fund litigators who brought suit in the *Furman* case—have tried to claim the people's authority for *their* cause, arguing that opinion polls, jury decisions, and enforcement patterns (at least in the 1960s) indicated that the American people did not truly support capital punishment.⁹³ Others argue that majority preferences ought not to be allowed to trample individual rights, that popular opinion is superficial and based on misunderstandings, and that community sentiment is too volatile to be allowed to control such momentous matters. But the obvious counternarrative, that popular judgment is untrustworthy in these matters and ought to give way to more educated, expert opinion—a position that we might call "the European view"—is virtually unavailable. Such a view would be deemed elitist and un-American, contemptuous of the populist democratic sentiment at the core of American culture.

THESE, then, are the institutional forms, cultural figures, and narrative frames that characterize the capital punishment system in the United States today—the American way of death. None of the institutional arrangements is "irrational" or "senseless," as critics allege, but nor do any of

them appear well adapted to their ostensible purposes. None of the cultural forms is incoherent or unintelligible, but they are sometimes odd or contradictory in important respects. None of the narrative frames that legitimate capital punishment is especially novel, though it seems revealing that America's death penalty is increasingly represented not as an instrumental policy but as an expressive act of local people's will.

In thinking about these distinctive forms we should begin from the premise that none of them is accidental nor arbitrary. They emerged out of a specific history in the context of definite power relations and institutional constraints. America's capital punishment arrangements correspond to specific social structures and cultural sensibilities. They crystallize the balances of power and contending interests that define the social field in which they exist.⁹⁴ Like any social fact, today's capital punishment complex bears witness to the social organization, cultural patterns, and conflicting interests of the people who produced it.