Supplementary Material

Chapter 9: Liberalism Divided—Criminal Justice/Punishments/The Death Penalty

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

William Henry Furman shot and killed a homeowner when escaping from a burglary. At his trial Furman plead self-defense and insanity. A Georgia jury rejected these claims, convicted him of first-degree murder and sentenced him to death. The Supreme Court of Georgia affirmed the conviction and Furman appealed to the Supreme Court of the United States. Rather than focus on the particulars of Furman's trial, the justices combined his appeal with two other cases, Jackson v. Georgia *and* Branch v. Texas, *in which defendants had been sentenced to death for rape. Although for that reason* Jackson *and* Branch *might have been distinguished from* Furman*, argument was limited to the constitutionality of capital punishment per se. Justice Powell was the only member of the* Furman *Court that discussed at any length the specific constitutional issues associated with executing rapists (that discussion is omitted).*

Furman *is one of the most controversial decisions handed down by the Supreme Court. As you read the opinions, consider some of the following issues. Justice Marshall claimed that the justices should consider informed public opinion. How does Marshall determine what constitutes informed public opinion? Is his method sound? Is his claim about informed public opinion appropriate? Should the justices have given greater weight to evidence that legislators supported the death penalty for most murders or evidence that very few murderers were executed? If the death penalty is otherwise constitutional, does any constitutional problem exist if the state extends mercy to most people who are legally and constitutionally eligible to be executed?*

Most persons thought Furman *signaled the end of capital punishment in the United States. As the next readings indicate, that prediction was mistaken.*

PER CURIAM.

. . . The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. . . .

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JUSTICE DOUGLAS, concurring.

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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.' . . .

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.

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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 President's Commission on Law Enforcement and Administration of Justice recently concluded:

> . . . 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.'

. . .

One searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death.

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In a Nation committed to equal protection of the laws there is no permissible 'caste' aspect 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, and under that law, '(g)enerally, in the law books, punishment increased in severity as social status diminished.' We have, I fear, taken in practice the same position, partially as a result of making the death penalty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation.

The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are 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.

JUSTICE BRENNAN, concurring.

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Several conclusions . . . emerge from the history of the adoption of the [Eighth Amendment]. We know that the Framers' concern was directed specifically at the exercise of legislative power. They included in the Bill of Rights a prohibition upon 'cruel and unusual punishments' precisely because the legislature would otherwise have had the unfettered power to prescribe punishments for crimes. Yet we cannot now know exactly what the Framers thought 'cruel and unusual punishments' were. Certainly they intended to ban torturous punishments, but the available evidence does not support the further conclusion that only torturous punishments were to be outlawed. . . . Nor did they intend simply to forbid punishments considered 'cruel and unusual' at the time. The 'import' of the Clause is, indeed, 'indefinite,' and for good reason. A constitutional provision 'is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth.' . . .

. . .

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.' *[Trop v. Dulles]*

. . .

At bottom, . . . 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.

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. . . .

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.

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. . . .

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. . . .

The question under this principle . . . 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.

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Since the Bill of Rights was adopted, this Court has adjudged only three punishments to be within the prohibition of the Clause. See *Weems v. United States* (1910) (12 years in chains at hard and painful labor); *Trop v. Dulles* (1958) . . . (expatriation); *Robinson v. California* (1962) . . . (imprisonment for narcotics addition). Each punishment, of course, was degrading to human dignity, but of none could it be said conclusively that it was fatally offensive under one or the other of the principles. Rather, these 'cruel and unusual punishments' seriously implicated several of the principles, and it was the application of the principles in combination that supported the judgment. . . . 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.

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. . . The Fifth Amendment declares that if a particular crime is punishable by death, a person charged with that crime is entitled to certain procedural protections. We can thus infer that the Framers

recognized the existence of 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. . . . [I]t does not advance analysis to insist that the Framers did not believe that adoption of the Bill of Rights would immediately prevent the infliction of the punishment of death; neither did they believe that it would immediately prevent the infliction of other corporal punishments that, although common at the time, . . . are now acknowledged to be impermissible.

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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. . . . There has been no national debate about punishment, in general or by imprisonment, comparable to the debate about the punishment of death. . . . And those States that still inflict death reserve it for the most heinous crimes. Juries, of course, have always treated death cases differently, as have governors exercising their commutation powers. Criminal defendants are of the same view. . . .

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. . . . 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. . . .

The unusual severity of death is manifested most clearly in its finality and enormity. Death, in these respects, is in a class by itself. . . . Although death, like expatriation, destroys the individual's 'political existence' and his 'status in organized society,' it does more, for, unlike expatriation, death also destroys '(h)is very existence.' There is, too, at least the possibility that the expatriate will in the future regain 'the right to have rights.' Death forecloses even that possibility.

Death is 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."

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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.

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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?

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. . . 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.

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. . . 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.

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The progressive decline in, and the current rarity of, the infliction of death demonstrate that our society seriously questions the appropriateness of this punishment today. 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.

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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.

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. . . We are not presented with the theoretical question whether under any imaginable circumstances the threat of death might be a greater deterrent to the commission of capital crimes than the threat of imprisonment. We are concerned with the practice of punishing criminals by death as it exists in the United States today. Proponents of this argument necessarily admit that its validity depends upon the existence of a system in which the punishment of death is invariably and swiftly imposed. Our system, of course, satisfies neither condition. A rational person contemplating a murder or rape is confronted, not with the certainty of a speedy death, but with the slightest possibility that he will be executed in the distant future. The risk of death is remote and improbable; in contrast, the risk of 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. Whatever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment.

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. . . There is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders. Surely if there were such a danger, the execution of a handful of criminals each year would not prevent it. . . . If capital crimes require the punishment of death in order to provide moral reinforcement for the basic values of the community, those values can only be undermined when death is so rarely inflicted upon the criminals who commit the crimes. Furthermore, it is certainly doubtful that the infliction of death by the State does in fact strengthen the community's moral code; if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values. That, after all, is why we no longer carry out public executions. . . .

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. . . As administered today, ... 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.

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. . . 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.'. . .

JUSTICE STEWART, concurring.

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. . . I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. 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.

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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.

JUSTICE WHITE, concurring.

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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. . . .

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It is . . . my judgment that this point has been reached with respect to capital punishment as it is presently administered under the statutes involved in these cases. . . . I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice. . . .

JUSTICE MARSHALL, concurring.

. . .

Perhaps the most important principle in analyzing 'cruel and unusual' punishment questions is one that is reiterated again and again in the prior opinions of the Court: i.e., the cruel and unusual language 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' Thus, a penalty that was permissible at one time in our Nation's history is not necessarily permissible today.

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. . . [A] punishment may be deemed cruel and unusual for any one of four distinct reasons.

First, there are certain punishments that inherently involve so much physical pain and suffering that civilized people cannot tolerate them—e.g., use of the rack, the thumbscrew, or other mont. . . .

Second, there are punishments that are unusual, signifying that they were previously unknown as penalties for a given offense. . . . If these punishments are intended to serve a humane purpose, they may be constitutionally permissible. . . .

Third, a penalty may be cruel and unusual because it is excessive and serves no valid legislative purpose. . . .

Fourth, where a punishment is not excessive and serves a valid legislative purpose, it still may be invalid if popular sentiment abhors it. For example, if the evidence clearly demonstrated that capital punishment served valid legislative purposes, such punishment would, nevertheless, be unconstitutional if citizens found it to be morally unacceptable. A general abhorrence on the part of the public would, in effect, equate a modern punishment with those barred since the adoption of the Eighth Amendment. There are no prior cases in this Court striking down a penalty on this ground, but the very notion of changing values requires that we recognize its existence.

It is immediately obvious, then, that since capital punishment is not a recent phenomenon, if it violates the Constitution, it does so because it is excessive or unnecessary, or because it is abhorrent to currently existing moral values.

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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. . . .

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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.

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

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[Thorsten] Sellin's[1] statistics demonstrate that there is no correlation between the murder rate and the presence or absence of the capital sanction. He compares States that have similar characteristics and

[1] Thorsten Sellin was a leading opponent of capital punishment. Marshall is summarizing the findings of his, *The Death Penalty: A Report for the Model Penal Code Project of the American Law Institute* (Philadelphia, PA American Law Institute, 1959).

finds that irrespective of their position on capital punishment, they have similar murder rates. In the New England States, for example, there is no correlation between executions and homicide rates. The same is true for Midwestern States, and for all others studied. . . .

Sellin also concludes that abolition and/or reintroduction of the death penalty had no effect on the homicide rates of the various States involved. This conclusion is borne out by others who have made similar inquiries and by the experience of other countries. . . .

Statistics also show that the deterrent effect of capital punishment is no greater in those communities where executions take place than in other communities. In fact, there is some evidence that imposition of capital punishment may actually encourage crime, rather than deter it. And, while police and law enforcement officers are the strongest advocates of capital punishment, the evidence is overwhelming that police are no safer in communities that retain the sanction than in those that have abolished it.

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Much of what must be said about the death penalty as a device to prevent recidivism is obvious—if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or upon their release. For the most part, they are first offenders, and when released from prison they are known to become model citizens. . . .

. . . 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. . . .

. . . [T]his Nation has never formally professed eugenic goals, and the history of the world does not look kindly on them. If eugenics is one of our purposes, then the legislatures should say so forthrightly and design procedures to serve this goal. Until such time, I can only conclude, as has virtually everyone else who has looked at the problem, that capital punishment cannot be defended on the basis of any eugenic purposes.

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.

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. . . .'

. . . [T]he 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 law-abiding 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.

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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.

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

CHIEF JUSTICE BURGER, with whom JUSTICE BLACKMUN, JUSTICE POWELL, and JUSTICE REHNQUIST join, dissenting.

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If we were possessed of legislative power, I would either join with Justice BRENNAN and 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.

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. . . [W]here, 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.'

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.' . . . .

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.

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. . . [I]t 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. . . .

. . . [T]he 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. . . . 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. . . .

. . .

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.

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. . . . 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.

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. . . 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.

. . .

. . . 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. . . . 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 . . . of choosing between life and death in individual cases according to the dictates of community values.

. . .

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.

. . .

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. . . . 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. . . . 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.

. . .

. . . [T]he 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 decisive grievance of the [Stewart and White] opinions . . . 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.

. . .

. . . 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)' 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.

JUSTICE BLACKMUN, dissenting.

. . . 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.

. . .

The several concurring opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional per se under the Eighth Amendment or the Fourteenth Amendment. This is either the flat or the implicit holding of a unanimous Court in *Wilkerson v. Utah* . . .(1879); of a unanimous Court in *In re Kemmler* . . . (1890); of the Court in *Weems v. United States* . . . (1910); of all those members of the Court, a majority, who addressed the issue in Louisiana ex rel. *Francis v. Resweber* . . . (1947); of Mr. Chief Justice Warren, speaking for himself and three others (Justices Black, Douglas, and Whittaker) in *Trop v. Dulles* . . . (1958); in the denial of certiorari in *Rudolph v. Alabama*

. . . (1963) (where, however, Justices Douglas, Brennan, and Goldberg would have heard argument with respect to the imposition of the ultimate penalty on a convicted rapist who had 'neither taken nor endangered human life'); and of Justice Black in *McGautha v. California* . . . (1971).

. . . Suddenly, however, the course of decision is now the opposite way, with the Court evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook. The argument, plausible and high-sounding as it may be, is not persuasive, for it is only one year since *McGautha*, only eight and one-half years since *Rudolph*, 14 years since *Trop*, and 25 years since *Francis*, and we have been presented with nothing that demonstrates a significant movement of any kind in these brief periods. The Court has just decided that it is time to strike down the death penalty. There would have been as much reason to do this when any of the cited cases were decided. But the Court refrained from that action on each of those occasions.

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.

. . .

It is of passing interest to note a few voting facts with respect to recent federal death penalty legislation . . . [Justice Blackmun then discussed three death penalty provisions that were passed unanimously].

. . .

It is impossible for me to believe that the many lawyer-members of the House and Senate—including, I might add, outstanding leaders and prominent candidates for higher office—were callously unaware and insensitive of constitutional overtones in legislation of this type. The answer, of course, is that in 1961, in 1965, and in 1970 these elected representatives of the people—far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity, than are we who sit cloistered on this Court—took it as settled that the death penalty then, as it always had been, was not in itself unconstitutional. Some of those Members of Congress, I suspect, will be surprised at this Court's giant stride today.

If the reservations expressed by my Brother Stewart . . . were to command support, namely, that capital punishment may not be unconstitutional so long as it be mandatorily imposed, the result, I fear, will be that statutes struck down today will be re-enacted by state legislatures to prescribe the death penalty for specified crimes without any alternative for the imposition of a lesser punishment in the discretion of the judge or jury, as the case may be. This approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. . . .

. . .

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

. . .

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. The capital punishment laws of no less than 39 States and the District of Columbia are nullified. . . .

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. . . . 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. . . .

. . .

[T]he Court is not free to read into the Constitution a meaning that is plainly at variance with its language. Both the language of the Fifth and Fourteenth Amendments and the history of the Eighth Amendment confirm beyond doubt that the death penalty was considered to be a constitutionally permissible punishment. it is, however, within the historic process of constitutional adjudication to challenge the imposition of the death penalty in some barbaric manner or as a penalty wholly disproportionate to a particular criminal act. And in making such a judgment in a case before it, a court may consider contemporary standards to the extent they are relevant. While this weighing of a punishment against the Eighth Amendment standard on a case-by-case basis is consonant with history and precedent, it is not what petitioners demand in these cases. They seek nothing less than the total abolition of capital punishment by judicial fiat.

. . .

. . . On virtually every occasion that any opinion has touched on the question of the constitutionality of the death penalty, it has been asserted affirmatively, or tacitly assumed, that the Constitution does not prohibit the penalty. No Justice of the Court, until today, has dissented from this consistent reading of the Constitution. The petitioners in these cases now before the Court cannot fairly avoid the weight of this substantial body of precedent merely by asserting that there is no prior decision precisely in point. . . . While these oft-repeated expressions of unchallenged belief in the constitutionality of capital punishment may not justify a summary disposition of the constitutional question before us, they are views expressed and joined in over the years by no less than 29 Justices of this Court and therefore merit the greatest respect. Those who now resolve to set those views aside indeed have a heavy burden.

. . .

. . .The designation of punishments for crimes is a matter peculiarly within the sphere of the state and federal legislative bodies. . . . When asked to encroach on the legislative prerogative we are well counseled to proceed with the utmost reticence. . . .

. . .

. . . In a democracy the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives. . . . Forty States, the District of Columbia, and the Federal Government still authorize the death penalty for a wide variety of crimes. That number has remained relatively static since the end of World War I. . . .

. . .

. . . In four States the penalty has been put to a vote of the people through public referenda—a means likely to supply objective evidence of community standards. In Oregon a referendum seeking abolition of capital punishment failed in 1958 but was subsequently approved in 1964. Two years later the penalty was approved in Colorado by a wide margin. In Massachusetts in 1968, in an advisory referendum, the voters there likewise recommended retention of the penalty. In 1970, approximately 64% of the voters in Illinois approved the penalty. . . .

. . . During the 1960's juries returned in excess of a thousand death sentences, a rate of approximately two per week. Whether it is true that death sentences were returned in less than 10% of the cases as petitioners estimate or whether some higher percentage is more accurate, these totals simply do not support petitioners' assertion at oral argument that 'the death penalty is virtually unanimously repudiated and condemned by the conscience of contemporary society.' . . .

One must conclude, contrary to petitioners' submission, that the indicators most likely to reflect the public's view—legislative bodies, state referenda and the juries which have the actual responsibility—do not support the contention that evolving standards of decency require total abolition of capital punishment. Indeed, the weight of the evidence indicates that the public generally has not accepted either the morality or the social merit of the views so passionately advocated by the articulate spokesmen for

abolition. But however one may assess the amorphous ebb and flow of public opinion generally on this volatile issue, this type of inquiry lies at the periphery—not the core—of the judicial process in constitutional cases. The assessment of popular opinion is essentially a legislative, not a judicial, function.

. . .

. . . [B]rutish and revolting murders continue to occur with disquieting frequency. . . . It could hardly be suggested that in any of these highly publicized murder cases—the several senseless assassinations or the too numerous shocking multiple murders that have stained this country's recent history—the public has exhibited any signs of 'revulsion' at the thought of executing the convicted murderers. . . . Nor is there any rational basis for arguing that the public reaction to any of these crimes would be muted if the murderer were 'rich and powerful.' The demand for the ultimate sanction might well be greater, as a wealthy killer is hardly a sympathetic figure. . . .

. . .

Certainly the claim is justified that this criminal sanction falls more heavily on the relatively impoverished and underprivileged elements of society. The 'have-nots' in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent fellow citizens. This is, indeed, a tragic byproduct of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth or Fourteenth Amendment. The same discriminatory impact argument could be made with equal force and logic with respect to those sentenced to prison terms. The Due Process Clause admits of no distinction between the deprivation of 'life' and the deprivation of 'liberty.' If discriminatory impact renders capital punishment cruel and unusual, it likewise renders invalid most of the prescribed penalties for crimes of violence. . . .

. . .

. . . [D]iscriminatory application of the death penalty in the past, admittedly indefensible, is no justification for holding today that capital punishment is invalid in all cases in which sentences were handed out to members of the class discriminated against. . . .

. . . The possibility of racial bias in the trial and sentencing process has diminished in recent years. The segregation of our society in decades past, which contributed substantially to the severity of punishment for interracial crimes, is now no longer prevalent in this country. Likewise, the day is past when juries do not represent the minority group elements of the community. The assurance of fair trials for all citizens is greater today than at any previous time in our history. Because standards of criminal justice have 'evolved' in a manner favorable to the accused, discriminatory imposition of capital punishment is far less likely today than in the past.

. . .

. . . I find no support—in the language of the Constitution, in its history, or in the cases arising under it—for the view that this Court may invalidate a category of penalties because we deem less severe penalties adequate to serve the ends of penology. . . .

. . . [I]f we were free to question the justifications for the use of capital punishment, a heavy burden would rest on those who attack the legislatures' judgments to prove the lack of rational justifications. This Court has long held that legislative decisions in this area, which lie within the special competency of that branch, are entitled to a presumption of validity. . . .

. . . While retribution alone may seem an unworthy justification in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized. Lord Justice Denning, now Master of the Rolls of the Court of Appeal in England, testified:

> Many are inclined to test the efficacy of punishment solely by its value as a deterrent: but this is too narrow a view. Punishment is the way in which society expresses its denunciation of wrong doing; and, in order to maintain respect for law, it is essential that the punishment inflicted for grave crimes should adequately reflect the revulsion felt by the great majority of citizens for them. . . . The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.

. . .

Deterrence is a more appealing justification, although opinions again differ widely. . . . I find myself in a agreement with the conclusions drawn by the Royal Commission following its exhaustive study of this issue:

> . . . Prima facie the penalty of death is likely to have a stronger effect as a deterrent to normal human beings than any other form of punishment, and there is some evidence (though no convincing statistical evidence) that this is in fact so. But this effect does not operate universally or uniformly, not operate universally or uniformly, and there are many offenders on whom it is limited and may often be negligible. . . .

. . .

. . . It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process. Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness. Many might decry their failure either to abolish the penalty entirely or selectively, or to establish standards for its enforcement. But impatience with the slowness, and even the unresponsiveness, of legislatures is no justification for judicial intrusion upon their historic powers. . . .

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

. . .

Rigorous attention to the limits of this Court's authority is . . . 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. . . . 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. . . . [T]his decision holding unconstitutional capital punishment is not an act of judgment, but rather an act of will. . . .