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1. [THE 1986 OLIVER WENDELL HOLMES, JR. LECTURE: CONSTITUTIONAL ADJUDICATION AND THE DEATH PENALTY: A VIEW FROM THE COURT., 100 Harv. L. Rev. 313](#)

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THE 1986 OLIVER WENDELL HOLMES, JR. LECTURE: CONSTITUTIONAL ADJUDICATION AND THE DEATH PENALTY: A VIEW FROM THE COURT.

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* The author is the senior Associate Justice of the Supreme Court of the United States and a graduate of the Harvard Law School, Class of 1931. He delivered this address as the Oliver Wendell Holmes, Jr. Lecture on September 5, 1986, and as part of a program celebrating the 350th anniversary of Harvard University.

Text

[*313] IN 1956, the year that I was appointed to the Supreme Court, there were sixty-five executions throughout the country. ¹ In the three decades that I have been on the Court, 484 death penalties have been carried out. ² Last year, 1985, eighteen persons were executed. ³ Thus far this year, eight have died by lethal injection, seven in the electric chair. ⁴ The youngest person to be executed was seventeen years old; the oldest, sixty-six. ⁵

Behind each one of these executions there are many terrible stories. There is the story of the victim and of the victim's family and their pain and suffering and loss. There is the story of the crime itself and the criminal. There is the chronicle of the trial, the appeals, the experience on death row, the plea for clemency. An execution requires an executioner, and they have their stories, as do the prison wardens, the spouses, and the children. There are death row chaplains whose jobs are to minister to the condemned. And of course there is the constitutional backdrop against which all of these stories are set.

In the mid-1960s, lawyers for the NAACP Legal Defense and Education Fund, Inc., began to mount a sustained challenge to the constitutionality of the death penalty in America. By 1968, largely as a result of that effort, the Court was directly facing issues specific to the death penalty. In *Witherspoon v. Illinois*, ⁶ the Court invalidated a practice, then employed in nearly every state, of "death qualifying" juries by excluding for cause members of the

¹ See W. BOWERS, LEGAL HOMICIDE 26 (1984).

² See *Id.*; NAACP LEGAL DEFENSE AND EDUC. FUND, INC., DEATH ROW U.S.A. 4-5 (Oct. 1, 1986).

³ See NAACP LEGAL DEFENSE AND EDUC. FUND, INC., *supra* note 2, at 4.

⁴ See Unpublished statistics (on file at the Supreme Court Library).

⁵ See W. BOWERS, *supra* note 1, at 448, 488.

⁶ [391 U.S. 510 \(1968\)](#).

venire with scruples against the death penalty. ⁷ The following year, 1969, the death penalty for robbery was challenged as "cruel and unusual" under the [*314] eighth amendment ⁸ in *Boykin v. Alabama*, but the Court ultimately decided the case on other grounds and thus did not reach the question of whether the death penalty was cruel and unusual punishment. ⁹ *Boykin* was followed in 1970 by *Maxwell v. Bishop*, ¹⁰ which was followed in 1971 by *McGautha v. California*. ¹¹ It was not until 1972, when we decided *Furman v. Georgia* ¹² and its companion cases, that we squarely addressed whether, and under what circumstances, a state or the federal government can take the life of a citizen for the commission of a crime.

What I want to talk about is that process of constitutional adjudication. But let me be clear. I am not going to attempt a revised historical account of the eighth amendment; I will leave that task to the professional historians. Nor will I offer a new theoretical approach to the jurisprudence of the cruel and unusual clause -- I leave that undertaking to the academics. Nor will I provide an overview of the current constitutional status of the death penalty -- that is probably for the law reviews. And of course I shall not predict what the Court will do in the future -- that is only for the soothsayers among us. What I will do is discuss how I, a sitting judge who must decide cases, have engaged in the process of answering the lawyers' contention that the Constitution prohibits the government from killing men and women for the crimes they commit. You will hear the story as I see it, from the Court.

Prior to 1972, no American court, federal or state, had rendered a decision striking down the death penalty. Where capital punishment had been abolished, it was solely the product of legislative reform. This changed in 1972, when the California Supreme Court, in *People v. Anderson*, ¹³ struck down that state's death penalty on state constitutional grounds, and when the United States Supreme Court, in *Furman v. Georgia*, invalidated the death penalties of every state in the nation. But as is so frequently true of landmark cases, *Furman's* seeds were planted long before the 1971 Term.

In 1963, Justice Goldberg circulated to each of the Justices a memorandum covering six capital cases for which certiorari petitions were pending. The memorandum was highly unusual for several reasons. First, although not unheard of, it was (and still is) most unusual for an individual Justice to take it upon himself or herself to write at length, prior to our conference, about cases which had neither [*315] been argued nor even set for argument, and then to circulate that memorandum to all of his or her colleagues. Second, the subject matter of the memorandum was the constitutionality of the death penalty, a subject that had received relatively little attention from the courts and that was not, at that time, an issue upon which either litigants or the press had begun to focus. (It was not until 1965 that the American Civil Liberties Union officially reversed its position that capital punishment did not present a "civil liberties issue.") ¹⁴ What was particularly unusual about the memorandum was its proposal that the Court address and decide this issue -- especially because in not one of the six cases had any party directly challenged, either before us or in the lower courts, the validity of capital punishment under the eighth amendment.

⁷ [Id. at 522.](#)

⁸ Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." **U.S. CONST. amend. VIII.**

⁹ See [395 U.S. 238 \(1969\).](#)

¹⁰ [398 U.S. 262 \(1970\).](#)

¹¹ [402 U.S. 183 \(1971\).](#)

¹² [408 U.S. 238 \(1972\).](#)

¹³ [6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152](#), cert. denied, **406 U.S. 958 (1972).**

¹⁴ M. MELTSNER, CRUEL AND UNUSUAL 55 (1973).

The Court eventually denied the petitions in all six cases, and Justice Goldberg wrote a dissent from denial in one of them, *Rudolph v. Alabama*,¹⁵ in which Justice Douglas and I joined. The dissent stated that we should have heard the case to consider whether the Constitution permitted the imposition of death "on a convicted rapist who has neither taken or endangered human life."¹⁶ We quoted from two opinions that suggested that the eighth amendment's prohibition of cruel and unusual punishment required consideration of "evolving standards of decency that mark the progress of [our] maturing society"¹⁷ as well as "standards of decency more or less universally accepted."¹⁸ The dissent also suggested that two other factors should contribute to the eighth amendment analysis: proportionality, that is, whether death for rape constituted a "punishment[] which by [its] excessive . . . severity [was] greatly disproportioned to the offens[e] charged,"¹⁹ and whether the "permissible aims of punishment" could be achieved as effectively by a less severe punishment.²⁰

In one critical sense, the Goldberg memorandum that led to the published dissent was neither unusual nor controversial: it was nothing more than an attempt to suggest a constitutional argument supported by constitutional text, history, and precedent. The memorandum examined contemporary standards and mores because, in Justice Goldberg's view, this was what the eighth amendment required. Implicit in the memorandum was the understanding that in order to fulfill the Court's duty to decide whether a punishment was cruel and unusual, [*316] it was *necessary* to refer to contemporary societal values. This was evident from history. It was the teaching of our precedents. It was the command of the language of the text. It was consistent with the intent of the Framers.

The process of trying to resolve such a momentous constitutional issue is often a dynamic one, with the positions of the justices changing as arguments are made, theories advanced, and authorities marshaled. The path from *Maxwell v. Bishop*, to *McGautha v. California*, to *Furman v. Georgia* weaves and winds as one might expect, given the overriding importance of the issues and the apparent elusiveness of standards with which to decide them.

Following a limited grant of certiorari, *Maxwell* presented two questions. First, there was the issue of whether a unitary trial, including both guilt and sentencing issues, impermissibly penalized the accused's assertion of his constitutional rights by forcing him to choose between remaining silent to protect his innocence and presenting evidence to mitigate his potential punishment. Second, *Maxwell* presented the issue of whether the practice of permitting a jury absolute discretion to impose the death penalty violates due process. Unlike *Boykin v. Alabama*, which was argued the same day, no question was presented as to the ultimate authority of the state to impose death as a penalty for a certain crime.

The conference vote was eight to one to reverse the court of appeals and vacate the sentence of death, but the discussion generated a variety of views, and it was not clear whether there were five votes for any single rationale. Shortly thereafter, Justice Harlan, who had expressed at conference his view that the unitary procedure was, in this context, a violation of due process, circulated a note to all of us suggesting that he was having second thoughts and that perhaps the case should be discussed again at conference. The second conference clarified each Justice's position. Chief Justice Warren, Justice Douglas, and I agreed that the submission to the jury of the question of whether to impose death without also providing the jury preexisting standards to guide its deliberations violates due process. We also agreed, and were joined on this point by Justices Fortas and Marshall, that a bifurcated trial is constitutionally required in a capital case; thus, there was a Court for this position. Although not firmly committed, Justice Harlan was inclined to be a sixth vote on this issue. Justice Stewart, who had written *Witherspoon*, thought

¹⁵ **375 U.S. 889 (1963).**

¹⁶ *Id.* at 889 (Goldberg, J., dissenting from the denial of certiorari).

¹⁷ *Id.* at 890 (quoting [Trop v. Dulles, 356 U.S. 86, 101 \(1958\)](#) (opinion of Warren, C.J.)).

¹⁸ *Id.* (quoting [Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 469 \(1947\)](#) (Frankfurter, J., concurring)).

¹⁹ *Id.* at 891 (quoting [Weems v. United States, 217 U.S. 349, 371 \(1910\)](#)).

²⁰ *Id.*

that *Maxwell* should be disposed of on the basis of *Witherspoon*. Justice White agreed. Justice Black was alone in dissent. The Chief assigned the opinion to Justice Douglas, who soon circulated a draft opinion reversing the lower court judgment on both the standards and bifurcation issues.

Ultimately, it became clear that a majority of the Court would not support that portion of the proposed opinion dealing with standardless [*317] sentencing, and Justice Douglas dropped that section and recirculated a revised draft to the Court. His new opinion reversing the judgment on the unitary trial ground soon garnered five votes, including my own. I, however, had also been persuaded on the standards issue, and wrote separately on that issue, arguing that "the most elementary requirement of due process is that judicial determinations concerning life or liberty must be based on pre-existing standards of law and cannot be left to the unlimited discretion of a judge or jury."²¹ In my circulation, I quoted remarks made by the late Chief Justice Traynor of the California Supreme Court:

"We wouldn't turn it over to a jury [in a child custody case], the determining of whether the father or the mother or whether the grandmother or a sister-in-law got the child, according to the absolute whim or caprice, or . . . the discretion of the jury. We wouldn't turn over to the whim of a jury the determination of whether a fox terrier belonged to the husband or the wife in a separation. We wouldn't let a jury determine that with absolute discretion. Any issue in the whole legal system that you can think of, rights, property rights, personal rights, are [sic] guided by precedents, by standards, and to leave to a jury the absolute discretion to determine whether a person lives or dies, without any guidance, or any compass or standard, principles or anything else, is foreign to the whole basic tradition of the Anglo-Saxon common law."²²

Before a decision was ready to come down in the case, Justice Fortas resigned, making Justice Harlan the key vote in the case. But Justice Harlan had not rested on the unitary trial issue, despite having written Justice Douglas, shortly after the proposed opinion for the Court circulated, that he continued to think that bifurcation was constitutionally required. Although Justice Harlan had, it develops, begun work on a concurrence in which he accepted that due process required a separate hearing at which a defendant could present mitigating evidence (and in which he expressly rejected the standards argument I had made in my concurrence), he now decided that the best course would be to have the case reargued. Justice Stewart agreed and, having seen his majority disappear, Justice Douglas also finally pushed to have the case argued again.

Following the reargument, Justice Harlan stated in conference that he could not "imagine a more flagrant violation of due process" than the unitary trial.²³ Nonetheless, because it appeared that Justice Blackmun, who had written the court of appeals' decision in *Maxwell*, would not be available to address the question of whether the Constitution [*318] requires bifurcation in capital cases, it was decided to go along with Justice Stewart's proposal to reverse the judgment on *Witherspoon* grounds. A short per curiam was filed.

Maxwell thus went down on the books as a minor footnote to *Witherspoon*, but it also served the critical function of focusing and narrowing the arguments relevant to deciding important issues relating to capital punishment. Justice Douglas had written for the Court on both the unitary trial and standards issues. Justice Fortas, Justice Black, and I had also formally expressed our views to the conference in the form of proposed opinions, and Justice Harlan had begun work on a draft which stated his position and responded to mine. Thus, a Term before *McGautha v. California* was argued, the precise issues to be decided in that case had been the subject of extensive writing by members of the Court.

In *McGautha*, the Court upheld against fourteenth amendment due process challenges both standardless jury sentencing and unitary trials in capital cases. Notwithstanding his statement during the second *Maxwell* conference that he could not "imagine a more flagrant denial of due process" than the unitary trial, Justice Harlan wrote the

²¹ B. SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE WARREN COURT 399, 431 (1985).

²² [Id. at 431-32](#) (quoting Transcript of Proceedings in the Supreme Court of California at 107-08, *In re Anderson* (1968) (Crim. No. 11,572)).

²³ [Id. at 441](#).

opinion for the Court sustaining the validity of such trials. Justice Black issued a separate concurrence in which he complained that the Court should not have considered whether the petitioners' trials were "'fairly conducted.'" ²⁴

Justice Douglas, in dissent, addressed the unitary trial issue and was joined by Justice Marshall and myself. Justices Douglas and Marshall also joined my dissent, which insisted that the delegation to the jury of the unbridled, unguided, and unreviewable power to pronounce death was incompatible with the principles embodied in the due process clause.

In his interesting and perceptive article entitled *Deregulating Death*, ²⁵ Professor Robert Weisberg suggests that the root difference between Justice Harlan's approach and my own in *McGautha* reflects a fundamentally different understanding of the potential of the regime of law. He identifies in Justice Harlan's opinion a perception that "life generally is unfair, and the law need be no fairer," and characterizes this view as "Burkean skepticism." He then characterizes my reaction to Harlan's view as "pedantic idealis[m] -- the Tom Paine to Harlan's Burke." ²⁶ As if that were not enough, my approach is labeled due process "romanticism." ²⁷

In one sense, these are charges to which I would plead no defense, even if I had one. I probably may fairly be adjudged guilty of [*319] bringing a certain idealism to my view of what the law can and must be; no doubt, the view I expressed in *McGautha* -- namely, that the principles of due process and the rule of law insist that the state seek to reduce in the capital sentencing context "merely random or arbitrary choice" ²⁸ -- does necessarily reject the fatalistic sentiment that a trial is a game and the law a pretense because people -- judges and jurors -- do what they want, regardless of what the rules require. Moreover, I think Professor Weisberg is correct to detect in my dear friend John Harlan's jurisprudence a certain lofty conservatism -- Burke may well be an apt model -- premised on both a faith in man's intuitive moral rationality and a conviction that there are limits to what heights we should reasonably expect people and society to ascend if we simply order things "properly." But these are especially abstract concerns. By the time *McGautha* was decided, Justice Harlan and I and Justices Black and Douglas were arguing concretely about how to approach the death cases, and about the reach of the Constitution and the role of the Court in such cases.

Accordingly, after laying out the facts, Justice Harlan's opinion in *McGautha* turned immediately to explaining "the nature of our responsibilities" in judging the issues before the Court. He did this without first identifying what these legal claims are. In his view, our job is "not to impose on the States, *ex cathedra*, what might seem to us a better system for dealing with capital cases. Rather, it is to decide whether the Federal Constitution proscribes" the challenged practices. ²⁹

In his discussion of the merits of the standardless sentencing issue, Justice Harlan began with a detailed examination of the historical record. This was, of course, his way. After reviewing the efforts, through the millennia in biblical lands and in this country and England, to identify before the fact those homicides for which the slayer should die, Justice Harlan took what is to my mind a critical step. He quoted from *Witherspoon*, to the effect that a vital function of the jury 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

²⁴ [402 U.S. at 225](#) (Black, J., concurring) (quoting *id.* at 221).

²⁵ Weisberg, *Deregulating Death*, 1983 S. CT. REV. 305.

²⁶ *Id.* at 310-11.

²⁷ *Id.* at 311.

²⁸ [402 U.S. at 248](#) (Brennan, J., dissenting).

²⁹ [Id. at 195](#) (opinion of Harlan, J.).

maturing society.' The inner quotation is from an opinion of Mr. Chief Justice Warren for four members of the Court in [Trop v. Dulles, 356 U.S. 86, 101 \(1958\)](#).³⁰

What is noteworthy is that Justice Harlan approvingly cited -- "endorsed" may not be too strong a word -- the Warren view, stated [*320] in *Trop v. Dulles*, that the eighth amendment necessarily requires consideration of the "evolving standards of decency." Although he was careful to note that *Trop* had only four votes (I did not join it and it did not command a Court), the fact is, as he knew, that *Witherspoon* relied on *Trop* and that Justice Stewart's opinion in *Witherspoon* did command a Court. In rejecting the claims of the petitioners in *McGautha*, Justice Harlan noted that in recent years, many similar claims had been presented to many state and federal courts, and not one had been sustained. He concluded, "it requires a strong showing to upset this settled practice of the Nation on constitutional grounds"³¹ and told us that this holding is based on "history, experience, and the present limitations of human knowledge."³²

The significance of this approach to the case, and in particular its express invocation of experience and the present state of human knowledge, should not be missed. Justice Harlan, it seems to me, recognized that as we learn more about trials and juries and legal processes, the rules that we have inherited may have to give way. His opinion in *McGautha* expressed his view that he had not yet been persuaded, but it does not suggest that he would not be moved. Certainly, Justice Black did not overlook this implication; as I mentioned, he refused to join Justice Harlan's opinion. In his own separate opinion, Justice Black wrote that although he agreed with substantially all of the Court's opinion, he could not accept that the Court was entitled to ask whether state criminal proceedings were fairly conducted.³³ He continued, in words reminiscent of many similar statements from his pen:

The Eighth Amendment forbids 'cruel and unusual punishments.' In my view, these words cannot be read to outlaw capital punishment because that penalty was in common use and authorized by law here and in the countries from which our ancestors came at the time the Amendment was adopted Although some people have urged that this Court should amend the Constitution by interpretation to keep it abreast of modern ideas, I have never believed that lifetime judges in our system have any such legislative power.³⁴

Of course we dissenters responded to the intimation -- perhaps accusation is not too strong a word -- that what we advocated was an amendment to the Constitution by judicial fiat, guided by reference to little more than our own personal views. In his dissent, Justice Douglas chided that the Court had "history on its side -- but history [*321] alone."³⁵ Douglas first made his point that the Constitution must be read in light of evolving standards by questioning "[w]ho today would say that it was not 'cruel and unusual punishment' within the meaning of the Eighth Amendment to impose the death sentence on a man who stole a loaf of bread, or in modern parlance, a sheet of food stamps?"³⁶ And he quoted the 1884 case of *Hurtado v. California* for the proposition that due process was not frozen in content as of one point in time: "[T]o hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and

³⁰ [Id. at 202](#) (quoting [Witherspoon, 391 U.S. at 519 n.15](#) (citation omitted)).

³¹ [Id.](#) at 203.

³² [Id.](#) at 207.

³³ See [id.](#) at 225 (Black, J., concurring).

³⁴ [Id.](#) at 226.

³⁵ [Id.](#) at 241 (Douglas, J., dissenting).

³⁶ [Id.](#) at 242.

Persians." ³⁷ Justice Douglas noted additionally that "the peculiar boast and excellence of the common law" was its "flexibility and capacity for growth and adaptation" and that *Hurtado* had taught that "the generalities of our Constitution should be treated the same way." ³⁸

McGautha was, of course, a due process case and did not raise any eighth amendment issues. Nonetheless, the question of whether and under what circumstances, if any, the death penalty was constitutional was clearly lurking in that case, as it had been in *Witherspoon* and *Maxwell* and other cases. We were clearly itching toward resolving what Justice Black had prematurely addressed in his *McGautha* concurrence -- namely, the meaning of "cruel and unusual punishments" in the context of the death penalty and more fundamentally, the way that the Court should approach that constitutional proscription. ³⁹

Many petitions for certiorari had been held for disposition pending resolution of *McGautha*, and when that case came down, we debated at conference how to dispose of those that directly challenged the death penalty on eighth amendment grounds. In candor, I must admit that when *McGautha* was decided, I was convinced that it was not just a lost skirmish, but rather the end of any hope that the Court would hold capital punishment to be unconstitutional. At conference, I therefore suggested that because I was the only one who had come to believe that capital punishment was under all circumstances prohibited by the eighth amendment, we should simply deny certiorari in the held cases, and I would write a dissent expressing my views on the subject. Justices Douglas and Marshall were not with me, having stated that they were certainly *not* going to hold capital punishment unconstitutional under the eighth amendment and that they [*322] therefore agreed with my suggestion that certiorari be denied in the held cases. Justice Black, however, would not agree to deny certiorari. He had put himself on record in *McGautha* and argued that we should hear a case and decide the eighth amendment issue once and for all. A majority of the conference finally agreed, and Justice Stewart and I were delegated the job of finding clean cases. Cases were found, and certiorari granted in *Furman v. Georgia*, *Jackson v. Georgia*, *Branch v. Texas*, and *Aikens v. California*. ⁴⁰ The date was June 28, 1971.

Before leaving for the summer vacation, I directed my law clerks to begin research for what I fully expected would be a lone dissent. In the fall, however, there were signs that I might not be alone. Justice White remarked to me that he was not sure how he would come out, and Justice Douglas was heard to say that he had not yet made up his mind. I became hopeful that my dissent might persuade the two of them.

The morning that the death cases were to be argued, Justice Marshall handed to me a typed draft of an opinion concluding that the death penalty was unconstitutional on the grounds that it served no legitimate purpose and was repugnant to contemporary standards of decency. Justice Marshall told me that he was also delivering a copy of the opinion to Justice Stewart. This was most encouraging; if Justice Stewart should agree that the death penalty was constitutionally invalid, a majority might be mustered for that view.

At 10:09 a.m. on Monday, January 17, 1972, Professor Anthony G. Amsterdam commenced his argument in *Aikens v. California*, ⁴¹ the first of four death cases (which included, of course, *Furman*) to be argued that day. His was clearly an uphill battle, as *McGautha* signified, and at least it was clear that his first task would be to persuade at least five Justices that what he was asking of the Court was not illegitimate in an institutional sense. As he said that morning, "the central issue in this case, the real nub of the controversy, is the scope and indeed the propriety of

³⁷ *Id.* at 243 (quoting [Hurtado v. California, 110 U.S. 516, 529 \(1884\)](#)).

³⁸ *Id.* (quoting [Hurtado, 110 U.S. at 529-30](#)).

³⁹ *Id.* at 226 (Black, J., concurring).

⁴⁰ **403 U.S. 952 (1971)** (granting certiorari).

⁴¹ [406 U.S. 813 \(1972\)](#).

judicial review of . . . State legislative determinations to use the penalty of death." ⁴² Counsel for the state of California submitted that the issue in the case was not whether the death penalty was moral, but rather whether there was a constitutional prohibition of the practice. ⁴³ Although a reading of the transcripts of the oral arguments in the four cases reveals a somewhat unfocused discussion between the bench and bar -- no doubt attributable in part to the different concerns and questions the nine of us had -- it is clear that the difficult issue for everyone was how the [*323] Court could responsibly interpret the broadly worded prohibition against "cruel and unusual punishments."

I will not replay for you the Court's work in *Furman*. Each Justice filed a separate opinion. Collectively, we wrote over 230 pages, some 50,000 words -- more than the Court has written in any other case -- and all of this ostensibly to interpret four words: "cruel and unusual punishments." Were I to attempt comprehensively to explain and explore all of those words, I would probably require at least an additional 50,000 words, and we would be here until Harvard's 400th birthday. Hence I will only discuss how some of my colleagues and I approached "first principles" in that case, and how those broad approaches to the constitutional text and the role of the Court were reflected in the more narrow, doctrinal product.

I began my opinion in *Furman* by noting that since it had first struggled to interpret the eighth amendment, the Court had had to recognize the difficulty of attempting "to define with exactness" the meaning of the words "cruel and unusual." ⁴⁴ I noted that we had precious little evidence of the Framers' intent in including the clause among those restraints upon the government enumerated in the bill of rights. ⁴⁵ We know that the language of the eighth amendment was taken from the English Bill of Rights of 1689, ⁴⁶ but we do not know why the Framers were particularly attracted to that language or, for that matter, exactly what the language signified to the English. The debates in the first Congress on the adoption of the Bill of Rights included observations by two opponents of the clause, William L. Smith of South Carolina and Samuel Livermore of New Hampshire. The former complained that the "import of [the words cruel and unusual was] too indefinite," ⁴⁷ while the latter objected to adopting a clause that might prohibit the legislature from hanging a man, or from prescribing whipping or ear-cropping for certain offenders. It seems fair to say that we simply cannot know exactly or with certitude what punishments the Framers thought were cruel and unusual. We are thus confronted with the far more difficult tasks of ascertaining the broader principles and values of the clause within the context of our constitutional framework.

Now there is a response to this, and as unconvincing as I believe it to be, it has been made by some distinguished authorities. The response is that even if we do not know *exactly* what the Framers meant by cruel and unusual we do know with certainty that they did not regard capital punishment as impermissible, because it was common [*324] practice at the time the Bill of Rights was ratified. Moreover, "capital . . . crime[s]" are specifically mentioned in the fifth amendment (which states that they carry with them the right to indictment by a grand jury); ⁴⁸ the fact that the Framers prohibited government from taking life *only* when the state did not afford due process proves, it is contended, that they approved the constitutionality of the death penalty. Justice Black took this view in

⁴² Transcript of Oral Argument at 4, [Aikens, 406 U.S. 813](#).

⁴³ *See id.* at 23

⁴⁴ [408 U.S. at 258](#) (Brennan, J., concurring) (quoting [Wilkerson v. Utah, 99 U.S. 130, 135-36 \(1879\)](#)).

⁴⁵ *See id.*

⁴⁶ *See id.* at 319 (Marshall, J., concurring).

⁴⁷ 1 ANNALS OF CONGRESS 754 (1789).

⁴⁸ No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury." **U.S. CONST. amend. V.**

McGautha.⁴⁹ Justice Powell made this point in conference following *Furman*, and Chief Justice Burger has embraced it on occasion.⁵⁰ What is wrong with it, then? Why isn't the answer to the entire fuss over the constitutionality of the death penalty the fact that the Framers did not believe it to be cruel and unusual? In my view, the reason that the majority of judges and academics have rejected this superficially attractive position is that the argument is, in fact, superficial.

First, there is a narrow textual response to the proposition that the language of the fifth amendment demonstrates dispositively that the Framers intended to sanction the death penalty. That amendment does not, after all, declare that the right of the Congress to punish capitally shall be inviolable; it merely requires that when and if death is a possible punishment, the defendant shall enjoy certain procedural safeguards, such as indictment by a grand jury and, of course, due process.⁵¹ The assertion that the Constitution shows that the Framers *intended* that there be capital punishment is, in my view, untenable; what one can fairly say is that they sought to ensure that *if* there was capital punishment, the process by which the accused was to be convicted would be especially reliable. Indeed, the Court has always recognized that death cases are special and that every effort must be made to ensure that the death penalty is not imposed unlawfully.⁵² We then turn to the eighth amendment and its prohibition of cruel and unusual punishments. There is, of course, no language in that amendment which suggests that death was to be regarded for all time as presumptively *not* cruel and unusual. In other words, the section of the Constitution which deals *specifically* with limitations on the legislatures' power to impose punishment does *not* indicate that death is or is not cruel and unusual. Thus, the assertion that capital punishment must be constitutional because the "intent of the Framers" was clearly to retain it turns out to be based on little more than assumption and negative implication. The tenuousness of the negative [*325] implication is especially apparent given Livermore's objection during the first Congress's debate (which I quoted above)⁵³ that the eighth amendment would limit the Congress's power to impose death, or ear-cropping. In other words, what is clear from the text of the Constitution and its legislative history is *not* that the Framers considered and approved of the legality of the death penalty as a matter of constitutional law; rather what is clear is that at the time of its submission to the Assembly that included the Framers, the more likely understanding was that the eighth amendment was understood potentially to *bar* -- not approve -- capital punishment.⁵⁴ That is why I cautioned a year ago that the view that the Constitution could be definitively interpreted by reference to the "intention of the Framers" was nothing more than "arrogance cloaked as humility."⁵⁵

Nor does the eighth amendment tell us that the definition of "cruel and unusual" is to be static over time, and of course this is the important point. It seems inescapable to me that the choice by the Framers to employ general and relativistic words was a deliberate one. The Constitution includes, after all, a number of provisions which are not general but, on the contrary, are particular and specific. For example, no one, the Framers instruct, may serve as President until attaining the age of 35;⁵⁶ the Constitution does not say that no one may be President until

⁴⁹ See [402 U.S. at 226](#) (Black, J., concurring).

⁵⁰ See, e.g., [Furman, 408 U.S. at 380](#) (Burger, C.J., dissenting).

⁵¹ See *id.* at 283 (Brennan, J., concurring).

⁵² See [Eddings v. Oklahoma, 455 U.S. 104, 117-18 \(1982\)](#) (O'Connor, J., concurring); [Beck v. Alabama, 447 U.S. 625, 637-38 \(1980\)](#).

⁵³ See *supra* p. 323.

⁵⁴ See [Furman, 408 U.S. at 283](#) (Brennan, J., concurring).

⁵⁵ W. Brennan, *The Constitution of the United States: Contemporary Ratification* (lecture presented at the Text and Teaching Symposium, Georgetown University, Wash., D.C. (Oct. 12, 1985)).

⁵⁶ [U.S. CONST. art. II, § 1, cl. 5](#).

attaining sufficient maturity or character. Elections for the House of Representatives are to be every two years,⁵⁷ those for the Senate every six,⁵⁸ not "periodically" or "regularly." This degree of specificity exists in the Bill of Rights as well as in the unamended Constitution. The Framers told us that "in suits at common law, where the value in controversy shall exceed twenty dollars," the right to a jury trial shall be preserved."⁵⁹ We are not told in the seventh amendment that the parties may insist on a jury only in those lawsuits that are "substantial." My point is simply that our Framers knew what they were doing. They were careful draftsmen. They clearly communicated a decision respecting the minimum age that is to be a necessary qualification for the Presidency. We respect that choice. But they also clearly communicated in the eighth amendment that "cruel and unusual punishments" are not to be imposed, fully understanding that this language was *not* specific and could be interpreted [***326**] in any number of ways, and this choice to employ a broad principle must be similarly respected. No doubt it is easier for judges to apply specific and simple legal rules than to struggle first to interpret and then to apply broadly worded principles to circumstances that perhaps were not contemplated when those principles were first articulated. Indeed, if it were possible to find answers to all constitutional questions by reference to historical practices, we would not need judges. Courts could be staffed by professional historians who could be instructed to compile a comprehensive master list of life in 1791. Cases could be decided based on whether a challenged practice or rule or procedure could be located on that great list. If the historians worked hard enough, they could "solve" constitutional law for now and for all time. But of course this is not possible, and the relative ease of the task is no measure of the correctness of the approach. The Framers surely understood that judging would not be easy or straightforward: no doubt that is why they took such great pains to ensure the independence of judges by providing life tenure and protecting against diminution of sitting judges' compensation.

I want to emphasize just one more time that what I am urging is respect for what I believe the Framers insisted of judges: namely, to accept the responsibility and burden and challenge of working with the majestic generalities of their magnificent Constitution. Those who would have the eighth amendment read today to bar only what was considered cruel and unusual in 1791 would, it seems to me, do violence to what they purport to embrace, namely the intent of the Framers. Does it not seem apparent that if the Framers really did intend the clause to prohibit only a closed set of brutal practices, they would have told us so? Were not these men capable of communicating specific mandates when that was their intention and desire? I think they were.

I also believe that anyone who reflects seriously on the doctrinal or practical consequences of a narrow historical approach to the clause will reject such a reading. Indeed, all of the dissenters in *Furman* joined the opinion of Chief Justice Burger, who wrote that "the Eighth Amendment prohibition cannot fairly be limited to those punishments thought excessively cruel and barbarous at the time of the adoption of the the Eighth Amendment."⁶⁰ Chief Justice Burger in *Furman* expressly embraced the progressive interpretation of the cruel and unusual clause articulated by the Court in *Weems* and again in *Trop*, stating that in his view, "[a] punishment is inordinately cruel . . . chiefly as perceived by the society so characterizing it. The standard of extreme cruelty is not merely descriptive, but necessarily embodies [***327**] a moral judgment. *The standard itself remains the same, but its applicability must change as the basic mores of society change.*"⁶¹

Given this language (which, as I noted a moment ago, all of the dissenters in *Furman* joined), perhaps I should leave well and good alone. After all, it would appear that the entire Court agreed, in the context of a deeply fractured case, on the fundamental point that the eighth amendment should not, as a matter of construction, be frozen in time and its applications confined to practices barred two centuries ago. The reason I do not rest is that

⁵⁷ *Id.* art. I, § 2, cl. 1.

⁵⁸ *Id.* art. I, § 3, cl. 1.

⁵⁹ *Id.* amend. VII.

⁶⁰ [408 U.S. at 382](#) (Burger, C.J., dissenting).

⁶¹ *Id.* (emphasis added).

this lesson is not an easy one. Not only do judges forget it on occasion, but it is especially difficult for those who have not struggled professionally to understand the delicate relations between our three branches of government and ourselves.

Turning again, specifically, to the eighth amendment context for illustrative purposes, we know, as Justice Powell reminded us in his opinion in *Furman*,⁶² that during colonial times, pillorying, branding, and cropping and nailing of the ears were practiced in this country.⁶³ Thus, if we were to turn blindly to history for answers to troubling constitutional questions, we would have to conclude that these practices would withstand challenge under the cruel and unusual clause of the eighth amendment. Yet I would be very surprised were any court in this country *not* to strike down a sanction such as ear-cropping were such a case to be presented. Indeed, Justice Powell had no difficulty asserting in his *Furman* opinion that were such a punishment to be prescribed, "the courts would certainly enjoin its execution."⁶⁴ The point is that although we have much to learn from history, we often have much to gain by rejecting historical practices and by learning through the mistakes of others. This seems to me especially true when we look at the death penalty. Look at the various ways that authorities have executed men and women over time: by stoning, by hurling from great heights or towers, by drowning, by burning, by cutting in two while still alive, by boiling, by crucifixion, by pressing to death, by drawing and quartering, by breaking on the wheel, by shooting, gassing, hanging, electrocuting, by injecting poison. Let us look at the crimes for which societies have seen fit to prescribe death by authority of law: false prophesy, witchcraft, the gathering of sticks on the Sabbath day, gluttony, adultery, incest, prostitution. Let us examine the historical record. In England, in the sixteenth century, a man was drown for stealing a lamb. Joan of Arc was burned at the stake in 1555. In 1789, a woman named Christian [*328] Murphy was burned at the stake for "coining." In 1662, in New Haven, Connecticut, a sixty-year-old man was executed for committing bestiality. In eighteenth-century England, one could be executed for shooting a rabbit, forging a birth certificate, stealing a pocket handkerchief, adopting a disguise, or damaging a public building. In 1814, a generation after the Bill of Rights was ratified, a man was hanged for cutting down a tree. In 1750, a woman was executed for stripping a child; another woman was executed for forging a seaman's ticket; and still another for robbing her master. In 1810 in England, there were no fewer than 222 capital offenses. Public executions were not abolished in England until 1868. There is, indeed, much to learn from history.⁶⁵

So far I have explained why I -- and my colleagues, I hasten to add -- have rejected a narrow historical approach to the intent of the Framers as the controlling source for the cruel and unusual clause. I have also sought to explain why I believe that the best way to effectuate the intent of the Framers is to allow the constitutional prohibition of cruel and unusual punishment to *breathe*, as William James might have said, by deriving and then applying the principles and values that underlie the clause. Thus, as the Court has repeated on numerous occasions, and established firmly as a principle of eighth amendment jurisprudence, we must turn to evolving standards of decency in order to determine what the clause permits and what it prohibits. As the Court said in *Weems v. United States*, the clause "may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."⁶⁶

Of course, this is not the end of the inquiry but only the beginning. To reject the easy answers provided by a quick look at history is to invite much harder work. Many problems arise. First and foremost, the "elasticity," as Justice Marshall said in *Furman*, of the language of the eighth amendment "presents dangers of too little . . . self-restraint"

⁶² See *id.* at 414 (Powell, J., dissenting).

⁶³ See, e.g., [Ex parte Wilson, 114 U.S. 417, 427-28 \(1885\)](#).

⁶⁴ [408 U.S. at 430](#) (Powell, J., dissenting).

⁶⁵ See G. R. SCOTT, *THE HISTORY OF CAPITAL PUNISHMENT* 33-58 (1950).

⁶⁶ [217 U.S. 349, 378 \(1910\)](#).

on the part of the bench. ⁶⁷ What do we do to derive the principles and values that are to be enforced by us, the unelected judges, and in particular, by us the unelected and unreviewable Supreme Court Justices? What are these evolving standards and how do we know what they are?

At the outset, it seems to me beyond dispute that we should not permit the legislature to define for us the scope of permissible punishment. As we said in *West Virginia State Board of Education v. Barnette*, "[t]he very purpose of a Bill of Rights was to withdraw [*329] certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." ⁶⁸ It would effectively write the clause out of the Bill of Rights were we to permit legislatures to police themselves by having the last word on the scope of the protection that the clause is intended to secure against their own overreaching. "If the judicial conclusion that a punishment is 'cruel and unusual' 'depended[ed] upon virtually unanimous condemnation of the penalty at issue,' then, '[i]ike no other constitutional provision, [the clause's] only function would be to legitimize advances already made by the other departments and opinions already the conventional wisdom.'" ⁶⁹ As I noted in *Furman*, "[j]udicial enforcement of the Clause, then, cannot be evaded by invoking the obvious truth that legislatures have the power to prescribe punishments for crimes." ⁷⁰

But merely because we do not allow the political branches of government to decide constitutional questions finally does not mean that the judiciary's search for standards need be unbounded by principles. There are guidelines. There is a judicial process that is principled and meaningful and that goes well beyond what the cynics describe as the imposition of the judge's personal views of morality or policy. There are many different kinds of checks that limit the judicial process. Some of the institutional checks have been described by such scholars as Alexander Bickel. But the "control" that I believe is most pronounced and significant is the responsibility that judges have to proceed and to persuade by reasoned argument in a public context.

Thus, in *Furman* and subsequent death cases I have attempted to explain my understanding that, at bottom, the eighth amendment "prohibits the infliction of uncivilized and inhuman punishments." ⁷¹ I will not repeat today all that I said there, but I do want to review briefly the argument I made. As I read them, the Bill of Rights generally, and the eighth amendment specifically, insist that the state treat its members with respect for their intrinsic worth as human beings, and this is true even as the state punishes the commission of the most brutal crimes. Why do I say this, and how can I make this claim? When we consider *why* various punishments have been condemned by history as barbaric, we appreciate that they generally involve the infliction of great pain. But *why* do we, and why did the Framers, care so much about pain? This is not a simple question, [*330] and it does not answer itself. The true significance of the thumbscrew, of the iron boot, of the stretching of limbs, is that they treat members of the human race as nonhumans, as objects to be hurt and then discarded. ⁷² This, I imagine, was the insight that led to the nearly universal rejection of public executions, which make tragically manifest that the condemned has become merely an object, rather than a person. Mutilations and tortures are not unconstitutional merely because they are painful -- they would not, I submit, be saved from unconstitutionality by having the convicted person sufficiently anesthetized such that no physical pain were felt; rather, they are unconstitutional because they are inconsistent with the fundamental premise of the eighth amendment that "even the vilest criminal remains a human being

⁶⁷ [408 U.S. at 315.](#)

⁶⁸ [319 U.S. 624, 638 \(1943\).](#)

⁶⁹ [408 U.S. at 268](#) (Brennan, J., concurring) (quoting Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970)).

⁷⁰ *Id.* at 269.

⁷¹ *Id.* at 270.

⁷² *See id.* at 272-73.

possessed of common human dignity." ⁷³ A punishment is "cruel and unusual" if it does not comport with human dignity. The calculated killing of a human being by the state involves, by its very nature, an absolute denial of the executed person's humanity and thus violates the command of the eighth amendment. ⁷⁴

In his *Furman* dissent, Chief Justice Burger distinguished capital punishment from "a punishment such as burning at the stake that everyone would ineffably find to be repugnant to all civilized standards." ⁷⁵ In my view, this is not an argument; this is simply the view of a single judge. Think about it: burning at the stake *is* capital punishment. It is simply one way of graphically describing one particular method of execution. Why did the Chief Justice think it different? Death by electrocution could be described in equally graphic terms. As I described in a dissent in a case called *Glass v. Louisiana* in 1985, the flesh does burn when the electric chair is used, just as it might burn at the stake. ⁷⁶ *Furman* might have been characterized not as a case about the death penalty, but rather as a case about death by electrocution, which might fairly be described as "frying in a chair." How would frying in a chair be distinguished from burning at a stake? In my view, the dissenters in *Furman* failed adequately to make arguments and to respond to arguments. They failed to explore what values underlie their feelings and what values the eighth amendment was intended to serve. I have lived with arguments supporting and opposing the constitutionality of capital punishment. They are made every Term in case after case, in argued cases, applications for stays, and petitions for certiorari. I have read countless briefs and listened to innumerable oral presentations. I have been persuaded that death is unconstitutional by the arguments of lawyers **[*331]** who, I am convinced, have made the better -- and I mean the better reasoned -- case. This is not to suggest that underneath the robes, I am not, that we are each not, a human being with personal views and moral sensibilities and religious scruples. But it is to say that above all, I am a judge.

I am convinced that law can be a vital engine not merely of change but of other civilizing change. That is because law, when it merits the synonym justice, is based on reason and insight. Decisional law evolves as litigants and judges develop a better understanding of the world in which we live. Sometimes, these insights appear pedestrian, such as when we recognize, for example, that a suitcase is more like a home than it is like a car. On occasion, these insights are momentous, such as when we finally understand that separate can never be equal. I believe that these steps, which are the building blocks of progress, are fashioned from a great deal more than the changing views of judges over time. I believe that problems are susceptible to rational solution if we work hard at making and understanding arguments that are based on reason and experience. With respect to the death penalty, I believe that a majority of the Supreme Court will one day accept that when the state punishes with death, it denies the humanity and dignity of the victim and transgress the prohibition against cruel and unusual punishment. That day will be a great day for our country, for it will be a great day for our Constitution.

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⁷³ *Id.* at 273.

⁷⁴ *See id.* at 290.

⁷⁵ *Id.* at 385 (Burger, C.J., dissenting).

⁷⁶ *See* [105 S. Ct. 2159, 2164-65 \(1985\)](#) (Brennan, J., dissenting from the denial of certiorari).