THE DEATH PENALTY AND THE SUPREME COURT *

Arthur J. Goldberg**

Prior to *Furman v. Georgia*[1] the constitutionality of the death penalty under the eighth amendment had never received explicit consideration by the Supreme Court. Indeed, the eighth amendment itself had been interpreted and discussed at length on only ten occasions in the Court's history.[2] It is my intention to review briefly this history, giving particular attention to the crucial case of *Weems v. United States*,[3] in order to support my conclusion that under any circumstances and under any legislation the death penalty is invalid under the ban against cruel and unusual punishments.

I presented this view in a memorandum circulated to my brethren in the 1963 term. My reasoning was largely inspired by *Weems* and the standards it sets down for applying the cruel and unusual punishments clause. Because of the lack of a majority opinion in *Furman*—three Justices did not address the constitutionality of the death penalty per se but only its validity under the discretionary statutes involved in the cases[4]—the issue appears to be destined for consideration by the courts once again. For this reason I would like to reiterate the *Weems* standards set out in my 1963 memorandum and apply them to the death penalty. I will then briefly discuss the *Furman* opinions and examine their bearing on recent proposals to make the death penalty mandatory in certain situations.

---

* Address delivered for the Arizona Law Review Symposium at the University of Arizona College of Law on February 19, 1973, modified for publication.

** Former Associate Justice of the United States Supreme Court.

1. 408 U.S. 238 (1972).
2. *See* cases cited note 12 *infra*.
3. 217 U.S. 349 (1910).
4. GA. CODE ANN. § 26-1005 (Supp. 1971) (effective prior to July 1, 1969), *codified, id.* § 26-1101 (1972); *id.* § 26-1302 (Supp. 1971) (effective prior to July 1, 1969), *codified, id.* § 26-2001 (1972); TEX. PENAL CODE art. 1189 (1961).

PRIOR DEVELOPMENTS

Prior to *Weems*, courts interpreting the cruel and unusual punishments clause had never explicitly considered the extent to which punishment may be inflicted. The decided cases, by and large, scrutinized not the extent of punishment, but the mode of inflicting assumedly valid punishments, such as death by shooting or electrocution. The first significant case interpreting the eighth amendment was *Wilkerson v. Utah*,[5] decided in 1878. Utah was at that time a federal territory. The accused had been found guilty by a territorial court of "willful, malicious and premeditated murder" and sentenced "to be publicly shot until . . . dead." He did not challenge the death penalty as such. Rather, he argued that the mode of execution was not authorized by the governing statutes. The Court held that it was authorized and that shooting was not cruel and unusual. In arriving at the latter conclusion, the Court said:

> Difficulty would attend the effort to define with exactness the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by that amendment . . . .[6]

The next significant case, *In re Kemmler*,[7] challenged the power of a state to take the life of a murderer by electrocution. It was not then contended, and in the opinion of the Court, "it could not be, that the Eighth Amendment was intended to apply to the States."[8] It was urged, however, that the due process clause of the fourteenth amendment prohibited the states from imposing cruel and unusual punishments. The Court held that reversal would be proper only if the state "had committed an error so gross as to amount in law to a denial . . . of due process,"[9] and that the state's conclusion that electrocution was a most humane mode of execution was not such an error. The Court repeated the paragraph from *Wilkerson* quoted above and added the following dictum: "Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It im-

5. 99 U.S. 130 (1878).
6. *Id.* at 135-36.
7. 136 U.S. 436 (1890).
8. *Id.* at 446. In Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947), it was assumed, and in Robinson v. California, 370 U.S. 660 (1962), it was explicitly decided that the eighth amendment is applicable to the states through the fourteenth amendment. *Robinson* held that criminal punishment for narcotics addiction is prohibited by the eighth amendment.
9. 136 U.S. at 449.

plies there something inhuman and barbarous, something more than the mere extinguishment of life."[10]

Two years after *Kemmler*, in *O'Neil v. Vermont*,[11] the extent of the imposed punishment was challenged in the context of a long prison term and heavy fine, and the Court divided for the first time over the meaning and application of the eighth amendment.[12] A jury had found O'Neil guilty of 307 separate offenses of illegally selling intoxicating liquor, under a statute which made each sale a separate offense. He was sentenced to pay an aggregate fine of $6,140, and if that fine were not paid within a designated period of time, "he should be confined at hard labor, in the house of correction . . . for the term of 19,914 days."[13] The Court declined to consider whether this punishment was cruel and unusual "because as a Federal question, it is not assigned as error, nor even suggested in the brief . . ."[14] and because, in any event, the eighth amendment did not apply to the states.

Justice Field, dissenting, would have applied the eighth amendment to the states through the privileges and immunities clause of the fourteenth amendment. Beyond this, in interpreting the punishments clause he rejected the traditional reading of the eighth amendment which would limit its application to punishments which inflict such torture as "were at one time inflicted in England." He stated that:

> The inhibition is directed, not only against punishments of the character mentioned, but against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged. The whole inhibition is against that which is excessive either in the bail required, or fine imposed, or punishment inflicted.[15]

Justice Field concluded, "[i]t is against the excessive severity of the punishment, as applied to the offenses for which it is inflicted, that the inhibition is directed."[16] Justices Harlan and Brewer would also have applied the eighth amendment to the states, and they too deemed the penalty in issue cruel and unusual.

---

10. *Id.* at 447.
11. 144 U.S. 323 (1892).
12. Indeed, with respect to various types of punishment, the cruel and unusual punishments clause has been discussed—either by the majority or the dissent—on only 11 occasions, including the recent decision in Furman v. Georgia, 408 U.S. 238 (1972). *See* Powell v. Texas, 392 U.S. 514 (1968); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86 (1958); Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947); Badders v. United States, 240 U.S. 391 (1916); Weems v. United States, 217 U.S. 349 (1910); Howard v. Fleming, 191 U.S. 126 (1903); O'Neil v. Vermont, 144 U.S. 323 (1892) (dissenting opinions); *In re* Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1878).
13. 144 U.S. at 330.
14. *Id.* at 331.
15. *Id.* at 339-40.
16. *Id.* at 364.

Weems v. United States

In 1910 in *Weems v. United States*,[17] the Supreme Court adopted the principles of interpretation expressed in Justice Field's dissent in *O'Neil* and stated tests for determining whether a punishment is unconstitutional under the eighth amendment by virtue of its excess or severity. In *Weems*, an officer of the United States Government of the Philippine Islands had been convicted of falsifying a public document and sentenced to 15 years of *cadena temporal*. This ominous sounding punishment of Spanish origin condemned the prisoner to hard and painful labor and to wear chains at the ankles and wrists. In addition, the prisoner was to suffer "civil interdiction" which denied him the rights of "parental authority, guardianship of person or property, participation in the family counsel, marital authority, the administration of property, and the right to dispose of his own property by acts inter vivos." He was also subject to "surveillance" during his entire lifetime.[18]

After a careful analysis of the historical experience which formed the basis for the eighth amendment, the Court, in an opinion written by Justice McKenna, in language harking back to Chief Justice Marshall, said:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necesarily 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. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been but of what may be. Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would

17. 217 U.S. 349 (1910).

18. While the severity of the penalty was not challenged in the lower courts, the Supreme Court considered it under the plain error rule, stating that it has "less reluctance to disregard prior examples in criminal cases than in civil cases, and less reluctance to act under [the plain error rule] when rights are asserted which are of such high character as to find expression and sanction in the Constitution or bill of rights." *Id.* at 362. The provision at issue in *Weems* was the cruel and unusual punishments clause of the Philippine Bill of Rights, which was taken from the Constitution, and the Court stated that they have the same meaning. *Id.* at 367.

> have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality.[19]

After analyzing the earlier authorities, including a case decided in 1689 where the King's Bench struck down a 30,000-pound fine for assault as "excessive and exorbitant, against Magna Charta, the common right of the subject, and the law of the land,"[20] the Court stated that "[t]he clause of the Constitution in the opinion of learned commentators may be therefore progressive, and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[21]

In setting out the standards for applying the cruel and unusual punishments clause, the Court, of course, disclaimed the right

> to assert a judgment against that of the legislature, of the expediency of the laws, or the right to oppose the judicial power to the legislative power to define crimes and fix their punishment . . . [because] for the proper exercise of such power there must be a comprehension of all that the legislature did or could take into account, that is, a consideration of the mischief and the remedy.[22]

The states have a "wide range of power," admitted the Court, "to adapt [their] penal laws to conditions as they may exist and punish the crimes of men according to their forms and frequency."[23]

The Court examined the penalty in question against the evil sought to be mitigated, however, and concluded that the punishment was cruel and unusual. By imposing a less severe sentence, the state would suffer nothing and lose 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."[24]

The *Weems* decision, then, stands as the turning point in the interpretation and application of the cruel and unusual punishments clause. It clearly recognized that not only the *mode* of inflicting punishment but also the *extent* or severity of punishment is subject to scrutiny under the eighth amendment. In light of its antecedents, it may be read as recognizing the following tests for determining the constitutionality of state imposed punishment:

(1) Giving full weight to reasonable legislative findings, a pun-

19. *Id.* at 373.
20. 217 U.S. at 376, *citing* Lord Devonshire's Case, 11 St. Tr. 1354, 1372 (1689).
21. 217 U.S. at 378.
22. *Id.* at 378.
23. *Id.*
24. *Id.* at 381.

ishment is cruel and unusual if a less severe one can as effectively achieve the permissible ends of punishment such as deterrence, isolation, rehabilitation or whatever the contemporary society considers the permissible objective of punishment.[25]

(2) Regardless of its effectiveness in achieving the permissible end of punishment, a punishment is cruel and unusual if it offends the contemporary sense of decency.[26]

(3) Regardless of its effectiveness in achieving the permissible ends of punishment, a punishment is cruel and unusual if the evil it produces is disproportionately higher than the harm it seeks to prevent.[27]

APPLICATION OF THE *Weems* TESTS TO THE DEATH PENALTY

While the Supreme Court up to 1963 had never explicitly considered whether, and under what circumstances, the eighth and fourteenth amendments proscribed the imposition of the death penalty, the Court had, of course, implicitly decided in every case affirming a capital conviction that the death penalty was constitutional. In addition, by way of dicta the Court had expressed the view that the death penalty was constitutional.[28] I thought, under these circumstances, the time was ripe for the Court to request argument and explicitly consider this most important issue in an adversary setting. I was convinced that whatever may be said of times past, the evolving standards of decency that mark the progress of our maturing society now condemned as barbaric and inhuman the deliberate, institutionalized taking of human life by the state.

I therefore circulated a memorandum to my brethren on the subject of capital punishment, in which I stated my conviction that the death penalty is proscribed by the eighth and fourteenth amendments to the United States Constitution. My concern with this important subject was not new; it arose from a study of capital punishment during many years while I was at the bar. This concern was accentuated during my service on the Court by the number of cases on the Court's

25. *See id.* at 371-73, 380-81. *See also* Furman v. Georgia, 408 U.S. 238, 342-45 (1972) (Marshall, J., concurring) (relying on *Weems*, Justice Marshall concludes that retribution or vengeance for its own sake is not a proper goal of the criminal law).

26. *See* quoted text at note 21 *supra*. *See also* 217 U.S. at 375.

27. *See id.* at 367, 385-87 (White, J., dissenting).

28. *See, e.g.*, Trop v. Dulles, 356 U.S. 86, 99 (1958):

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

conference lists seeking review by certiorari of death penalty sentences.[29]

The Supreme Court has long been concerned with the infliction of the death penalty. Years ago, Mr. Justice Jackson writing for the Court in *Stein v. New York* said, "[w]hen the penalty is death, we, like state court judges, are tempted to strain the evidence and, even in close cases, the law in order to give a doubtfully condemned man another chance."[30] As Justice Jackson correctly pointed out, this concern with death penalty cases is not peculiar to the Supreme Court; it is shared by all courts, state and federal, which are charged with the responsibility of imposing and reviewing this awesome sentence.

In my memorandum to the conference, I reviewed the history of the death penalty in our country and expressed certain observations relating to its constitutionality, many of which were influenced and inspired by *Weems*. Research disclosed that many nations of the Western world had abolished the death penalty, and that even where not abolished, it was not generally practiced.[31] Those that had abolished it rarely, if ever, restored it, and the trend at that time was unmistakably in the direction of abolition. Moreover, even in this country, several states had abolished the death penalty.[32]

Public opinion polls did not show strong feelings in favor of retaining the death penalty, although there was a close division among the public in the polls taken on the subject.[33] I found unpersuasive the argument that since the death penalty is a mode of punishment about which opinion is fairly divided, a state does not violate the Constitution when it inflicts that punishment. In certain matters, espe-

29. It should be reassuring, particularly in light of the present debate as to whether the Supreme Court is so overburdened that it cannot give adequate consideration to its docket, that death cases are specially noted for discussion at the Court's conference and, in light of the severity of this punishment, receive the closest scrutiny by the justices. *Cf.* ADMINISTRATIVE OFFICE OF U.S. COURTS FOR THE FEDERAL JUDICIAL CENTER, REPORT OF THE STUDY GROUP ON THE CASELOAD OF THE SUPREME COURT (1972).

30. 346 U.S. 156, 196 (1953).

31. *See* T. SELLIN, THE DEATH PENALTY 1, 38-49 (1959) (Report for the Model Penal Code Project of the American Law Institute); ROYAL COMM'N REPORT ON CAPITAL PUNISHMENT 340, Table 12 (1953). *See also* Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970); Gottlieb, *Testing the Death Penalty*, 34 S. CAL. L. REV. 268 (1961); Packer, *Making the Punishment Fit the Crime*, 77 HARV. L. REV. 1071 (1964); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

32. States that have abolished capital punishment by statute are Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia and Wisconsin. BUREAU OF PRISONS, U.S. DEPT. OF JUSTICE, NATIONAL PRISONER STATISTICS, No. 46, at 50 (Aug. 1971). *See also* People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, *cert. denied*, 406 U.S. 958 (1972) (capital punishment held to be "cruel or unusual" under the California constitution).

33. *See* American Institute of Public Opinion, *Public Opinion and the Death Penalty*, in THE DEATH PENALTY IN AMERICA 236-41 (H. Bedau ed. 1964).

cially those relating to fair procedures in criminal trials, the Supreme Court has led rather than followed public opinion in the process of articulating and establishing progressively civilized standards of decency.

It seemed to me then, as it does now, that if only punishment which is overwhelmingly condemned by public opinion came within the cruel and unusual punishments proscriptions, the eighth amendment would be a hollow protection, for such punishment would presumably be abolished by the legislature or suffer desuetude. The eighth amendment, like the others in the Bill of Rights, was intended as a counter-majoritarian limitation on government action to be applied to nurture rather than to retard our "evolving standards of decency." As the Court recognized in *Weems*, "our contemplation cannot be only of what has been but of what may be."[34]

The finality of the death penalty is another factor which entered into my thinking on this subject. Whenever capital punishment is imposed, there is always the possibility of mistakenly and irredeemably executing an "innocent" man. The concept of innocence has, of course, at least two meanings when used by a court. A person is innocent if he is not the one who committed the crime; a person is also innocent, regardless of whether or not he is the one who committed the crime, if a conviction was improperly secured. The thought of innocent persons—in the first sense—being executed would certainly be enough in the eyes of many people to condemn the penalty of death. But the courts are necessarily concerned with the possibility of innocent persons—in the second sense—being executed. Our evolving concepts of constitutional law have required the Supreme Court frequently to hold that what was considered permissible yesterday is prohibited today; that what was viewed as a limitation solely on the federal government yesterday is a limitation also on the states today; that what the Supreme Court itself felt precluded from reviewing yesterday, it may review today. Moreover, these same considerations have frequently required the Supreme Court to reverse and vacate criminal convictions which were deemed constitutional when secured. But when such convictions result in the penalty of death, the dead cannot be restored to life.[35]

34. 217 U.S. at 373.

35. *Compare* Williams v. Georgia, 349 U.S. 375 (1955), *with* Fay v. Noia, 372 U.S. 391 (1963). In each case, the accused was convicted for first degree murder by a process which was not deemed unconstitutional at the time it was followed; in each case, the accused did not properly raise constitutional objections to the process. The tragic difference was that Williams was sentenced to death and executed, while Fay was first sentenced to life imprisonment and later freed as a result of his appeal. Undoubtedly, Williams would have been freed also (after the decision in *Fay v. Noia*, which would have permitted Williams to collaterally attack his conviction) but for the finality of his sentence.

There were other considerations which reinforced my view, inspired largely by the *Weems* decision. Giving full weight to reasonable legislative findings, a punishment, nevertheless, is cruel and unusual if one less severe can as effectively achieve the permissible ends of justice. While it would be out of place to discuss here all of the permissible ends of punishment, all decisions and commentators agree that deterrence is a principal one. A critical question to me, therefore, was whether capital punishment had any greater deterrent effect upon potential criminals than did a less severe punishment, such as life imprisonment. If a less severe punishment would as effectively deter, it would follow that the death penalty is unconstitutional under the above test.

There has been much research conducted in an effort to learn whether capital punishment is a unique deterrent to capital crime.[36] The most that can be said, however, is that "there is no clear evidence in any of the figures . . . that the abolition of capital punishment has led to an increase in the homicide rate, or that its reintroduction has led to a fall."[37] Whatever standards are generally applicable in passing on legislative findings based on conflicting evidence, the state must, under prevailing doctrine, show an overriding necessity before it can take human life.[38] The Supreme Court has frequently held that doubts should always be resolved against the application of the death sentence.[39]

Finally, I found disturbing evidence that the imposition of the death penalty was arbitrary, haphazard, capricious and discriminatory.[40] The impact of the death penalty was demonstrably greatest among disadvantaged minorities.

I concluded that since there was no persuasive evidence that capital punishment uniquely deters capital crime, since doubts should be resolved against the death penalty and on the basis of the other reasons mentioned, this penalty runs afoul of the constitutional principles articulated in *Weems*. I felt then that the death penalty was unconstitutional per se under the eighth amendment, and I have not departed from this conviction.

Recognizing, however, that my brethren on the Court might not agree that capital punishment, as such, is unconstitutional, I submitted

36. *See* THE DEATH PENALTY IN AMERICA 258-332 (H. Bedau ed. 1964).
37. ROYAL COMM'N REPORT ON CAPITAL PUNISHMENT 23 (1953).
38. *See* Goldberg & Dershowitz, *supra* note 31, at 1784-98.
39. *See, e.g.*, Andres v. United States, 333 U.S. 740, 752 (1948).
40. *See* THE PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 143 (1967); Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953).

for consideration the alternative proposition that the infliction of death for certain crimes and in the case of certain offenders, violates the eighth and fourteenth amendments. I questioned, for example, the constitutionality of death as a penalty for crimes which do not endanger life. I put this question, since it is posed by the third test derived from the *Weems* case: May human life constitutionally be taken by the state to protect a value other than human life? Under the *Weems* test, a punishment can create no greater evil than the harm which is sought to be deterred. Therefore, if the crime did not involve the taking of a human life, the punishment cannot be death.

I also urged the Court to consider the constitutionality of death as a penalty for certain offenders, such as those incapable of exercising any volition or control over their conduct and who are, consequently, non-deterrable themselves and not likely to serve as models for other potential offenders who might be deterrable. I submitted the latter question because, in reviewing death cases in the Supreme Court, I found evidence in the record in many of these cases that the defendant to some degree was mentally incapacitated. To be sure, the degree of incapacity judicially did not satisfy the test required to constitute a legal defense, whatever that test may be. Nevertheless, it was apparent from these records, at least to me, that the convicted defendants were not fully "responsible" in the ordinary sense of the word.

Rudolph v. Alabama

It is apparent from the record that my views at the time did not prevail. Proof of this is the Court's denial of certiorari in *Rudolph v. Alabama*, from which I dissented. My opinion, joined by Justices Douglas and Brennan, argued that the Court should review a death sentence for a convicton of rape.

> I would grant certiorari in this case and in . . . *Snider v. Cunningham* . . . to consider whether the eighth and fourteenth amendments to the United States Constitution permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life.
>
> The following questions, *inter alia*, seem relevant and worthy of argument and consideration:
>
> (1) In light of the trend both in this country and throughout the world against punishing rape by death, does the imposition of the death penalty by those States which retain it for rape violate . . . 'standards of decency more or less universally accepted?'
>
> (2) Is the taking of human life to protect a value other than human life consistent with the constitutional proscription against

'punishments which by their excessive . . . severity are greatly disproportioned to the offenses charged?'

(3) Can the permissible aims of punishment (e.g., deterrence, isolation, rehabilitation) be achieved as effectively by punishing rape less severely than by death (e.g., by life imprisonment); if so, does the imposition of the death penalty for rape constitute 'unnecessary cruelty?'[41]

Although certiorari was not granted, the immediate effect of the published *Rudolph* opinion, which for the first time expressed my views on this subject and those of my brothers who joined in dissent, was to stimulate what had been lacking: well-documented and well-reasoned appeals and arguments both for and against the claim that the eighth amendment broadly or under limited circumstances barred the death penalty as cruel and unusual punishment. Following the *Rudolph* dissent, a large number of cases were brought to the Supreme Court squarely presenting the issue of the constitutionality of the death penalty which, as indicated, had never been explicitly presented to the Court or even raised in the lower courts. And since June 2, 1967, the date of the last electrocution in Colorado, there has been a moratorium on the execution of death sentences.

Furman v. Georgia

On June 29, 1972, the last day of the term, the Supreme Court decided *Furman v. Georgia*.[42] After obviously profound consideration, and by a five to four vote, the Court held that the imposition and execution of the death penalty in the three cases argued and decided constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. As Justice McKenna said in *Weems*, truly "time works changes."

Furman is a unique decision, not only on its merits, but in its form. Although there is a brief per curiam opinion announcing the decision, there is no opinion of the Court. Rather, each of the nine Justices expressed his view in a separate opinion, and the opinions together total 253 pages. Among the Justices of the majority, Justices Brennan and Marshall concluded that capital punishment is unconstitutional per se under the eighth amendment. Justice Douglas rested his vote in support of the unconstitutionality of the death penalty on the ground that capital punishment, as practiced in recent times, has discriminated against minorities and, in effect, has violated the con-

41. 375 U.S. 889 (1962) (Goldberg, J., dissenting from denial of certiorari) (citations omitted).
42. 408 U.S. 238 (1972).

cept of equal protection that he found implicit in the cruel and unusual punishments clause. Justices Stewart and White based their conclusions on the arbitrariness and infrequency with which the death penalty is actually imposed in relation to those sentenced for capital crimes. Their votes are perhaps best explained by Justice Stewart in these words:

> 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 . . . . 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.[43]

The four dissenters, Chief Justice Burger, Justices Blackmun, Powell and Rhenquist, expressed the view that the death penalty was constitutional and that if it were to be eliminated this should be done by the legislatures and not the courts.

The Court's decision in *Furman* invalidates the 40 state statutes and the federal legislation which permit sentencing guilty offenders to death on an overall "discretionary," "arbitrary," "infrequent" and "discriminatory" basis. This "discretionary" element in existing laws supplied the votes essential to the Court's majority. This follows from the opinions of the majority justices and particularly the opinions of Justices Douglas, Stewart and White.

Furman is a great step forward in the Court's and our country's history. This is true despite the limitations of the case. More than 600 persons on death row will not be executed. Our country will not have to endure the barbarism of mass hangings, gassings and electrocutions carried out by the state under the auspices of law enforcement. The Court made a great contribution to what Camus has termed "the great civilizing step."

RECENT DEVELOPMENTS

My first reaction to the *Furman* decision was that while it might permit the imposition of the death penalty if imposed less arbitrarily than in the pre-*Furman* system, it was extremely doubtful that the death penalty would be legislatively reviewed on the mandatory and even-handed basis which might meet the objections of Justices Douglas, Stewart and White. Recent developments, however, may prove my

43. *Id.* at 309-10 (Stewart, J., concurring) (citations omitted).

initial reaction overly sanguine. In California, for example, by a referendum held on November 8, 1972, voters approved by a two-to-one margin a constitutional amendment to reinstate capital punishment.[44] Many state legislatures are now considering legislation to restore the death penalty on a mandatory basis for specified crimes.[45] In several states such legislation has been enacted,[46] and in others, the claim is being advanced that under existing legislation, mandatory sentences may be imposed. The National Association of Attorneys General has recommended that the death penalty be reinstated for heinous crimes. The Attorney General of the United States has advised Congress that the Department of Justice is proposing legislation which would restore the death penalty for selective use in a small number of very serious and premeditated federal crimes. There have even been proposals for a constitutional amendment nullifying the *Furman* decision. A Gallup Poll, published on November 23, 1972, reports 57 percent of those polled in favor of the death penalty for persons convicted of murder, 32 percent opposed and 11 percent with no opinion.[47]

The thrust of the proposed new legislation is to make the death penalty mandatory rather than discretionary with respect to specified crimes. Proponents of such legislation apparently read Justices Stewart's and White's concurring opinions to endorse mandatory rather than discretionary application of death sentences. While there is language in both opinions which can be argued in support of this view, it does not necessarily follow that Justices Stewart and White, who unlike Justices Brennan and Marshall, refrained from endorsing the complete outlawing of the death penalty, will not do so if and when a mandatory death penalty case is squarely presented to the Court. It is an established tradition of the Supreme Court to confine its holdings to the fact situations presented in the case being decided. Justices Stewart's and White's opinion can be read in this light. Thus, the most that now can be said of the outcome of any future death case in the Supreme Court is that the Court's decision is highly problematic.

In view of legislative reconsideration of the matter, it is pertinent to note that a decisive majority of the Court expressed personal abhorrence of the death penalty. This distaste is apparent from the opin-

44. N.Y. Times, Nov. 9, 1972, § 1, at 40, col. 3.

45. *See* H.B. 2005, H.B. 2196, S.B. 1005, 31st Ariz. Leg., 1st Reg. Sess. (1973). For other states where legislation is either pending or under consideration, see CONGRESSIONAL QUARTERLY WEEKLY 602-03 (Mar. 17, 1973). President Nixon has called for federal imposition of the death penalty in certain instances. *Id.* at 601.

46. Arkansas, Connecticut, Florida, Georgia, Nebraska, New Mexico, Ohio, South Dakota and Wyoming have passed legislation reinstating the death penalty. New York Times, May 10, 1973, § 1, at 18 col. 3-5.

47. N.Y. Times, Nov. 23, 1972, § 1, at 18, col. 3 (poll taken Nov. 10-13, 1972).

ions and holdings of the majority Justices. With respect to the dissenters, Justice Blackmun said:

> I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital puishment serves no useful purpose that can be demonstrated.[48]

Chief Justice Burger stated, "If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes."[49] While Justice Powell was more restrained in his expression of personal views on the subject, there is nevertheless a clear intimation of his opposition to the imposition of the death penalty as a legislative matter in his sentence: "Many may regret, as I do, the failure of some legislative bodies to address the capital punishment issue with greater frankness or effectiveness."[50]

CONCLUSION

I conclude by reaffirming my view that the death penalty is unconstitutional under the eighth and fourteenth amendments for the reasons stated in *Weems* and in my memorandum to my brethren in 1963. And I hope that Congress and state legislatures, after careful consideration of the subject, will not revive the death penalty in what would be its most inhumanitarian aspect—mandatory imposition without considerations of mercy warranted by the given circumstances and the human condition. The rack, thumbscrew, chains, branding, cutting off of ears and the stretching of limbs, everyone would now agree, are not permissible under the eighth amendment. Under "the evolving standards of decency that mark the progress of [our] maturing society,"[51] the deliberate, institutionalized taking of human life by the State is the greatest conceivable degradation to the dignity of the human personality. Surely, this generation of Americans has experienced enough killing.

48. 408 U.S. at 405.
49. *Id.* at 375.
50. *Id.* at 465.
51. Trop v. Dulles, 356 U.S. 86, 101 (1958).