

The Right to Protection against Cruel and Unusual Punishments



In February 2006, an inmate in California was minutes away from execution when two doctors assigned to monitor his death suddenly refused to participate. They protested the use of a three-drug cocktail designed to put the condemned man to sleep before he received the heart-stopping dose. The method of death was inhumane, the physicians claimed, and because it was not foolproof, they could be required to revive the prisoner in the event of a botched execution. It violated both their Hippocratic oath to do no harm and the Eighth Amendment to the U.S. Constitution, which banned cruel and unusual punishments. Their withdrawal raised the possibility of a statewide moratorium on further executions because other physicians were likely to take the same position.

Even though many people considered lethal injection a humane method of capital punishment, the doctors' objections were not unusual. From the beginning of the republic, the death penalty has always been controversial. The United States uses it far more frequently than most Western nations—indeed, European states today uniformly outlaw death as a punishment—and each execution finds Americans divided over the practice. Advocates of the penalty point to brutal, senseless crimes and believe death is the only appropriate punishment for such wanton violence. Opponents are troubled by the possibility of executing an innocent man or woman. The death penalty is one of the most vexing moral and legal issues in modern American law.

The Eighth Amendment addresses the terms of punishment. It is the last in a series of four amendments dealing with rights of the accused. Its brief text addresses three separate items: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” As was true with other guarantees in the Bill of Rights, the framers drew upon English history and their own experience in drafting this amendment. Various documents limited the king's ability to impose heavy fines, but royal judges often flouted this restriction. They also denied bail, keeping people in jail without trial, and exacted bloody punishments, especially when they wanted to remind the public of the government's power. After a series of harsh punishments was inflicted on participants in a failed uprising in 1685, the Parliament forced a new monarch to accept an English Bill of Rights (1689). One of the provisions contained the language later used in the Eighth Amendment.

The amendment promotes fairness in our system of criminal justice; the prohibition of excessive bails and fines, for example, especially protects poor defendants. But what the words mean in practice is not clear from the text of the amendment. What is an excessive bail or fine? What makes a punishment cruel and unusual? For each guarantee, judges have leeway to consider the circumstances of each case, guided by laws that have developed over two centuries.

“The death penalty cannot be useful, because of the example of barbarity it gives men. . . . It seems to be absurd that the laws, which are an expression of the public will, which detest and punish homicide, should themselves commit it, and that to deter citizens from murder, they order a public one.”

—Cesare Beccaria, *On Crimes and Punishments* (1764)

The law of bails and fines generally has not attracted much attention; the same is not true for cruel and unusual punishments.

Criminal justice throughout history has resorted to physical punishments that we consider inhumane today. Loss of limbs, bodily mutilations, and whippings were common penalties for noncapital crimes, or crimes not punishable by execution, and few people considered death to be a cruel punishment. It certainly was not unusual. European history provided countless examples of what we would consider barbaric punishments, including beheading, burning at the stake, crucifixion, breaking on the rack, dismemberment. The American revolutionaries rejected these brutalities and considered punishment by death to be, in Thomas Jefferson's words, a "last melancholy resource." They accepted the argument of continental reformers that severe codes did little to diminish crime. Experience proved that juries hesitated to send defendants to the gallows, and many condemned prisoners received pardons, so how did the death penalty restrain wrongdoers? The aim of punishment, reformers argued, should be to redeem men and restore them to society. Execution should be reserved only for the most heinous crimes and for incorrigible, or unredeemable, criminals.

In 1786, Pennsylvania restricted capital punishment to cases of treason, murder, rape, and arson, and within two decades most states followed suit. A new institution, the penitentiary, emerged to hold prisoners convicted of serious offenses. The word itself, from the root penitent ("feeling sorrowful"), expressed the hopes of reformers. The belief that even evil people could be redeemed also led to campaigns to abolish the death penalty. In the 1840s, both Michigan and Wisconsin abolished the punishment; in most other states, executions held behind prison walls replaced the spectacle of public hangings. The arguments for and against capital punishment are the ones still heard today. Opponents protest the system's potential for prejudice and the possibility of killing an innocent person; supporters believe the death penalty acts as a deterrent to violent crime, and when it does not serve this purpose, it is a just and proportionate punishment for taking another life, especially for premeditated murder.

An increase in crime and violence, both real and perceived, slowed the movement to abolish the death penalty in the nineteenth century. Reformers instead worked to make its application more humane, which led, in part, to the inventions of the electric chair and gas chamber. Both methods were thought to produce speedier deaths than hanging, which could result in slow strangulation.

"[T]he principles of republican governments. . . revive and establish the relations of fellow-citizens, friend, and brother. They appreciate human life, and increase public and private obligations to preserve it. . . . An execution in a republic is like a human sacrifice in religion. It is an offering to monarchy, and to that malignant being, who has been styled a murderer from the beginning, and who delights equally in murder, whether it be perpetuated by the cold, but vindictive arm of the law, or by the angry hand of private revenge."

—Benjamin Rush, "Considerations on the Injustice and Impolicy of Punishing Murder by Death" (1792)

“Section 18. The penal code shall be founded on the principles of reformation, and not of vindictive justice.”

—Indiana Constitution (1851)

Because criminal justice was considered a matter for the states, not the federal government, any attempts to abolish the death penalty had to proceed state by state. The twentieth century, however, introduced a new way to challenge the penalty. Gradually, the Supreme Court accepted the view that the due process clause of the Fourteenth Amendment included provisions of the Bill of Rights and therefore restricted what states could do.

Now, the nation’s highest bench faced the question of how to interpret the phrase “cruel and unusual punishments.” What made this task difficult was the horror of two world wars, and especially the barbarous punishment imposed by the Nazis on people whose only crime was their race, religion, ethnicity, or mental or physical disability. As Americans became more sensitive to the definition of cruelty—and the misuse of the death penalty—the justices faced agonizing choices between moral and democratic claims. Legislative majorities in state after state had enacted death penalty statutes, but experience both at home and abroad had revealed how discriminatory its use could be. Was execution cruel by definition and therefore unconstitutional? If not, when and how does society ensure due process to condemned persons?

Over the past several decades, these questions became central to bitter and divisive public debate. The Supreme Court especially, as the body that considers final appeals from the condemned, has struggled to determine the constitutionality of capital punishment. How difficult this task has been can be seen in a case involving a prisoner who faced the electric chair a second time after his first execution failed. The botched execution raised serious questions about the use of the death penalty and began a new debate over the meaning of the Eighth Amendment that still continues today.

Willie Francis was seventeen years old in 1946 when he was sentenced to die in Louisiana’s electric chair. Two years earlier, the barely literate black youth had killed his boss, a druggist, and stolen his wallet containing four dollars. The discovery of the billfold on Francis ten months later provided the evidence that led to his confession. An all-white jury found him guilty of first-degree murder, which under state law carried a mandatory death sentence. The day before the scheduled execution, prison officers set up the traveling chair in a makeshift death chamber inside the local courthouse. (The chair was portable and was often used in the parish, or county, where the crime had been committed.) Trusted inmates prepared Francis for electrocution by shaving his head and legs to ensure a good connection to the powerful electric current. Witnesses watched as guards strapped the dazed youth to the massive wooden chair and attached electrodes to his body. Francis’s father was present, and he had brought a coffin with him.

When the captain in charge gave the signal, the boy’s body jumped from the massive jolt of electricity. He groaned, his lips protruding from under the hood covering his face, and he strained so violently against the restraints that the chair came off the floor. Twice the executioner threw the switch, and witnesses heard Francis yell, “Take it off. . . . Let me breathe.” The captain called for more juice, but to no avail. Finally, the parish sheriff halted the macabre proceeding, and Francis was returned to the holding cell. He showed no ill effects other than a rapid heartbeat. The execution was rescheduled.

Two new attorneys took the case and appealed to the state board of pardons, which concluded that electricity had never passed through Francis’ body and thus he had not officially received his punishment. This reasoning made no

sense to the inmate's lawyers: "He died mentally. . . . No man should have to go to the chair twice. The voice of humanity and justice cries out against such an outrage. . . . [I]s this an experiment in modern forms of torture. . . . Is the state of Louisiana trying to outdo the caesars, the Nazis?" The board denied the pardon, and Francis appealed to the U.S. Supreme Court. By now, his ordeal was national news.

The argument before the highest court was straightforward: the Fourteenth Amendment made the Eighth Amendment binding on the states, and making Francis face the chair again was cruel and unusual punishment. "How many times does the state get," his attorney asked, "before the due process clause of the Fourteenth Amendment can be used to protect the petitioner from torture?" Louisiana countered that Francis had never suffered the punishment his conviction required.

Two months later, the justices decided narrowly, 5 to 4, against Willie Francis. Four of the justices agreed that the Fourteenth Amendment incorporated, or included, the Eighth Amendment's ban on cruel and unusual punishments, but they did not believe sending the condemned man back to the chair was cruel. Four other justices believed that repeated attempts to execute were cruel by definition. It was a form of torture, one justice wrote, akin to burning at the stake. The fifth and deciding vote to deny Francis's appeal came from a justice who believed it was improper for federal judges to impose standards of fairness on the states unless the Constitution required it—and in this instance, he believed, it did not prohibit the state's action, even though he considered the punishment in this instance to be inhumane and lobbied the governor for a pardon.

The attorneys would not give up, however, and twice more filed appeals to the Supreme Court. Both times, the justices refused to hear their arguments but the last time the appeal was dismissed without prejudice, which meant the Court might reconsider in the light of new evidence that one of the executioners had been drunk and abusive toward Francis before bungling the job. But Willie Francis was tired of fighting. More than a year after his earlier date with death, he sat in the chair again. This time, his body went to an unmarked grave in the coffin his father had bought for his first execution.

From the time Willie Francis took his second walk to the chair until 1972, the Supreme Court heard many cases that challenged the constitutionality of executions. During this time, it overturned the death penalty in numerous individual cases, although the justices never declared capital punishment itself to be unconstitutional. It had only been misapplied in the particular cases before them.

During the 1970s, the Supreme Court set new standards for capital punishment. In *Furman v. Georgia* (1972), by a slim 5-to-4 majority, the justices decided that executions as practiced were unconstitutional because the judge and jury lacked specific guidelines to ensure fairness in sentencing. States responded by establishing a twostage process for capital cases. One stage decided guilt or innocence, and the second stage allowed juries to consider aggravating or mitigating circumstances that would lead to a more informed decision about punishment. This change won Supreme Court approval in *Gregg v. Georgia* (1976), and most death-penalty states use this process today. Mandatory death sentences, that is, convictions that automatically require executions, are unconstitutional; the punishment should fit the crime.

The 1980s and 1990s brought further guidelines: states could not execute

inmates who became, or remained, insane while on death row (although they could be executed if they regained their sanity); states could not mandate death for murders committed in prison; states could exclude opponents of the death penalty from serving in capital cases; and the list continued. Unwilling to declare the death penalty unconstitutional—after all, it was mentioned in the Fifth Amendment, passed at the same time as the Eighth Amendment, so the framers clearly considered it an acceptable punishment—the justices sought ways to ensure its fair application, if not limit its use. One method was to look to what states permitted as punishment to learn whether a consensus of opinion existed as to which punishments were cruel and unusual. By this standard, the justices decided in 2002 that executing mentally retarded inmates was unconstitutional; in 2005, they reached the same conclusion for juveniles who committed a capital crime while younger than eighteen.

We as a society are still deciding whether capital punishment remains morally acceptable and, if so, under what circumstances. The United States is one of only four countries—the other three are China, Saudi Arabia, and Iran—that uses execution regularly, but we are no longer as convinced of its appropriateness as we once were. Currently, twelve states and the District of Columbia have abolished the death penalty. Five states account for the overwhelming majority of executions in the United States—slightly more than one thousand from 1976 through 2005. Texas tops the list, with more than 360 executions since 1976. Recently, the successful use of DNA evidence to challenge the accuracy of convictions has led some states—Illinois, Maryland, and Indiana, among others—to review capital sentences. The Illinois governor was so disturbed by the number of errors—at least thirteen men wrongly convicted since 1976—and the potential for more mistakes that he pardoned four men and commuted all other capital sentences to life imprisonment before he left office in 2003. Since 1977, more than 110 inmates nationally have been released from death row after new evidence revealed they were convicted wrongly. Although support for capital punishment remains strong, recent surveys reveal that six in ten Americans now favor a moratorium on executions until questions about fairness are resolved.

The history of the Eighth Amendment makes clear that its meaning is continually evolving. The Constitution, with its Bill of Rights, is a living document. It did not fix our rights as they existed in times long past; it gave them room to grow. Oliver Wendell Holmes, Jr., appointed to the Supreme Court in 1902, wrote in 1884 that the “life of law is not logic but experience.” Time brings changes, and the Constitution, like our other institutions, must adapt to new conditions. The framers of the Bill of Rights did not define excessive or cruel and unusual punishments because they knew these concepts would take their meaning from the changing conditions of society. They also trusted us, “We the People,” to ensure that our society would be true to the words we pledged to live by. They expected us to judge in each election whether our government meets a high standard of morality and justice, as well as whether our laws express an acceptable balance between order and freedom. In this way, we continually give fresh meaning to the rights that guard our liberty.

Striking Down Capital Punishment

In Furman v. Georgia (1972), by a 5-to-4 vote, the Supreme Court ruled for the first time that the death penalty violated the Eighth Amendment's ban on cruel and unusual punishment. All the justices for the majority and minority wrote opinions, making it difficult to know what standards states should use to judge whether or not capital punishment could ever be constitutional. Justice Thurgood Marshall, who concurred with the decision, concluded in a separate opinion that the death penalty, although acceptable earlier in the nation's history, no longer was consistent with public morality in the 1970s.

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. . . .

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

There are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy. . . . It is not improper at this point to take judicial notice of the fact that for more than 200 years men have labored to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally well. And they have done so with great success. Little, if any, evidence has been adduced to prove the contrary. The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that at some point the presumption of consti-

tutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine, not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting. We have this evidence before us now. There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment. . . .

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

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

Public Support for the Death Penalty

In his dissenting opinion in Furman v. Georgia (1972), Chief Justice Warren Burger was joined by Harry Blackmun, Lewis Powell, and William Rehnquist. The four dissenting justices argued that support of the death penalty in state legislatures was proof of its support by the public.

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

There are no obvious indications that capital punishment offends the conscience of society to such a degree that our traditional deference to the legislative judgment must be abandoned. It is not a punishment such as burning at the stake that everyone would ineffably find to be repugnant to all civilized standards. Nor is it a punishment so roundly condemned that only a few aberrant legislatures have retained it on the statute books. Capital punishment is authorized by statute in 40 States, the District of Columbia, and in the federal courts for the commission of certain crimes. On four occasions in the last

11 years Congress has added to the list of federal crimes punishable by death. In looking for reliable indicia of contemporary attitude, none more trustworthy has been advanced.

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

The Death Penalty Is Not without Justification

Four years after its decision in Furman v. Georgia (1972), the Supreme Court once again considered the constitutionality of the death penalty. In the earlier case, the justices, by a vote of 5 to 4, struck down capital punishment for the first time as “cruel and unusual punishment” prohibited by the Eighth Amendment. Their reasons differed, but the opinions left open the possibility that states could enact constitutional death penalty statutes if they developed standards to guide jury decisions to impose a capital sentence. In Gregg v. Georgia (1976), Justice Potter Stewart, for the 7-to-2 majority, upheld a Georgia death penalty law because it required jurors to consider the unique circumstances of each case before imposing a death sentence. The decision reflected the Court’s recognition of public support for the death penalty, as expressed in new state laws, and effectively overruled the earlier Furman decision.

The petitioners in the capital cases before the Court today renew the “standards of decency” argument, but developments during the four years since Furman have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction.

The most marked indication of society’s endorsement of the death penalty for murder is the legislative response to Furman. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty for at least some crimes that result in the death of another person. And the Congress of the United States, in 1974, enacted a statute providing the death penalty for aircraft piracy that results in death. These recently adopted statutes have attempted to address the concerns expressed by the Court in Furman primarily (i) by specifying the factors to be weighed and the procedures to be followed in deciding when to impose a capital sentence, or (ii) by making the death penalty mandatory

for specified crimes. But all of the post-Furman statutes make clear that capital punishment itself has not been rejected by the elected representatives of the people. . . .

[T]he actions of juries in many States since Furman are fully compatible with the legislative judgments, reflected in the new statutes, as to the continued utility and necessity of capital punishment in appropriate cases. At the close of 1974 at least 254 persons had been sentenced to death since Furman, and by the end of March 1976, more than 460 persons were subject to death sentences. . . .

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