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THE DEATH PENALTY: LEGAL STATUS SINCE FURMAN

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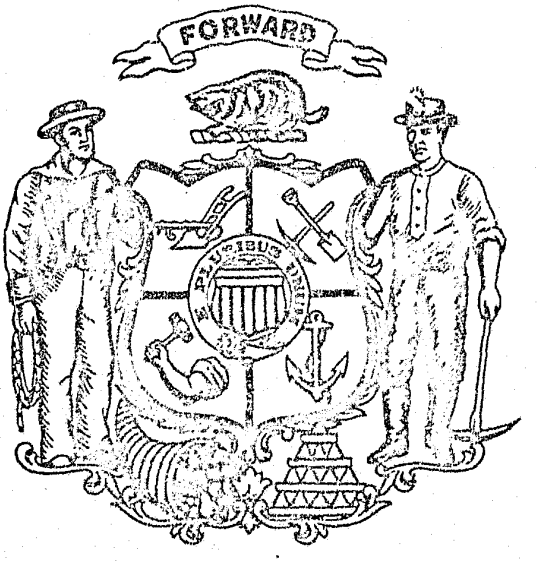

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I. INTRODUCTION

On July 29, 1972, three death penalty sentences were set aside by the United States Supreme Court in *Furman v. Georgia*, 408 U.S. 238. The Court ruled that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments". The *Furman* decision marked a major shift in the Court's position toward the constitutionality of the sanction, for in the Court's 182 year history the penalty of death had several times been implicitly held not to be in violation of the Constitution.

By its *Furman* ruling, the Court virtually overturned every state statute which provided for jury discretion in the imposition of the penalty. The Court did, however, leave the way open for Congress and the state legislatures to enact new legislation, but no one is entirely certain what type of legislation will meet with the approval of a majority of the Court. In an effort to comply with the decision, 16 states have enacted new death penalty statutes.

Wisconsin, abolitionist since 1853, was the third of today's present 13 states to prohibit the ultimate sanction. Mr. M. J. Tappins, Secretary of the State Board of Control in 1912, explained Wisconsin's abolitionist position in a letter to Mr. A. Ross Read, delegate to a 1912 Ohio constitutional convention:

> We do not believe that the number of capital offenses have been increased because of the abolishment of capital punishment, because we do not believe that the infliction of capital punishment is a preventive for the commission of capital crimes. The people of the state of Wisconsin do not believe that the state should legalize the taking of human life, neither do we believe that the mere legalizing of the taking of a human life relieves the person who acts as executioner of the moral responsibility of taking such life. We believe that whenever an execution takes place it has a very demoralizing effect upon the community in which it does take place and that it has a demoralizing effect upon the state generally.

Eighty-four years elapsed before a bill was introduced to reinstate the death penalty in Wisconsin. This measure, 1937 Assembly Bill 122, provided the death penalty for kidnapping. The committee recommended the bill be indefinitely postponed and it was returned to the author. In 1949 an Assembly Joint Resolution called for a referendum vote on whether or not the Legislature shall provide a death penalty for first degree murder. The measure, 1949 Assembly Joint Resolution 43, failed in its house of origin 49 to 33. Six years later, 1955 Assembly Bill 188 sought to provide for capital punishment for first degree murder. This measure was also returned to its author.

Eighteen years have passed since the issue has been before the Wisconsin Legislature, and now in 1973 one bill and two joint resolutions have been introduced to reinstate capital punishment.

1973 Senate Bill 186, patterned after a recently enacted Indiana law, provides for a mandatory death penalty for 9 different kinds of murder in the first degree (see Section IV -- Indiana). 1973 Senate Joint Resolution 37 and Assembly Joint Resolution 33 both call for an advisory referendum on enacting the death penalty. All three measures are awaiting committee action.

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Scope of Study

This study will attempt to explain the present status of the death penalty in the United States in light of the *Furman* decision. Its approach will center attention on four major areas: 1) a brief historical account of the development and use of capital punishment; 2) its legal history from English law to recent United States Supreme Court rulings; 3) an examination of the 1972 Supreme Court decision (*Furman v. Georgia*); and 4) a survey of state legislation re-enacting the penalty since the Court's decision.

Historical Considerations

Death Penalty - Early Development and use

The concept of blood-revenge, man's earliest form of capital punishment, has been present in all primitive and savage societies with its purpose being clearly retaliatory. The essential terrifying theme encompassing this form of personal vengeance was that it made no attempt to qualify or discern if the act was purposeful or accidental. In addition, any blood relative, no matter how far removed in distance or relationship, could be the recipient of the avenger's act of retribution. According to George R. Scott, writing on the *History of Capital Punishment* (1950), "it is evident that, at one time, blood-revenge combined the utmost degree of savagery with an extremely embracive familial scope". Thus, early man had to flee to 'cities of refuge' or form protective alliances to escape the consequences of vengeance.

Due to this haphazard and bizarre behavior, it is no great mystery why various forms of social control and subsequent codes of behavior were devised. "In the task of moderating human violence, promiscuity, and greed", Will Durant tells us in Volume IV of *The Story of Civilization*, "certain instincts, chiefly social, took the lead, and provided a biological basis for civilization." Thus, Durant concludes: "The organized force wielded by chieftain, baron, city, or state circumscribed and largely circumvented the unorganized force of individuals."

Early codes of behavior, exemplified by Hammurabi's *Floruit*, (If a man destroy the eye of another man, they shall destroy his eye.), and *Exodus*, (Eye for eye, tooth for tooth, hand for hand, foot for foot. XXI. 24), embraced the same principles of custom underlying the brutality of retribution. Only now, as William Graham Sumner points out in his *Folkways* (1907), "injuries became crimes and revenge became punishment." This innovation effected a gradual movement away from the personal vendetta to societal retribution on behalf of the wronged, but the change in mode did not correspond with any new view of the underpinnings of *lex talionis* (retribution). Not only did this more organized structure ensure to modify and stabilize the capricious whims of the individual in society, but it became a far superior and expanded method of seeking retribution. In fact, as Scott so clearly points out, the people soon realized that by allowing society to assume "responsibility for exacting revenge by punishing any individual in society, they are providing self-protection against personal injury. In this way, they carry a system of revenge to its ultimate triumph: that is, consciously or unconsciously, they turn it into a system of deterrence."

Abuse of Capital Punishment

As the principle of deterrence became more established, increasing numbers of offenses were added to the list of capital crimes, and methods employing the use of torture first, then death, followed by brutal and public degradation became the ends of punishment. Accordingly, the number of crimes punishable by death rose from eight by the end of the fifteenth century to 223 shortly after 1800.

> "Under the Tudors and Stuarts, many more crimes were included in the capital crime category. By 1688 there were nearly fifty. During the reign of George II, nearly three dozen more were added, and under George III the total was increased by sixty." Hugo Adam Bedau, *The Death Penalty in America* (1964)

This great increase in the number of capital crimes, Scott explains, was due to a change in the reasoning of law which "began to uphold the doctrine of crime being more than a personal affair between the guilty party on the one hand and the injured party on the other, but as something to be recognized as a wrong committed against the nation". This development was not without dangerous

implications, for now, the state, armed with powers of both retaliation and deterrence, served not only to curb personal crimes, but to force an end to many forms of political and religious activity. History clearly details the use of torture by the Romans, the persecution of witches during the Middle Ages and 17th century, the attack against heresy by the Holy Inquisition, and the cruel methods of barbarity employed by the Stuarts against political foes.

Movement towards Reform

With the rise of Renaissance humanism and of democratic political philosophy in the 18th century, a movement towards curbing unrestrained governmental power and excessive brutality began. The effort, however, was painfully slow as Voltaire writes in 1748:

> "But how incredible it seems, that a people, who boasted of their reformation, and of having trampled superstition under their feet, and who flattered themselves that they had brought their reason to perfection; is it not wonderful, I say, that such a people should have believed in witchcraft; should have burnt old women accused of this crime, and that above a hundred years after the pretended reformation of their reason." (Appended letter to Beccaria's *Essay*.)

The writings of men such as Cesare Beccaria, (ESSAY ON CRIME AND PUNISHMENTS - 1764), and Jeremy Bentham, (THE RATIONALE OF PUNISHMENT - 1830), did much to end brutality. In addition to Voltaire, the renowned English jurist, William Blackstone, voiced his opposition to excessive punishments in his COMMENTARIES ON THE LAW OF ENGLAND (1765):

> "For though the end of punishment is to deter men from offending, it never can follow from thence that it is lawful to deter them at any rate and by any means; since there may be unlawful methods of enforcing obedience even to the justest laws."
>
> "But, indeed, were capital punishment proved by experience to be a sure and effective remedy, that would not prove the necessity ... of inflicting them upon all occasions when other expedients fail. I fear this reasoning would extend a great deal too far."

Nineteenth and early twentieth century abolitionists, spurred by the efforts of Dr. Benjamin Rush, Edward Livingston, Horace Greeley, and Clarence Darrow, brought a new awareness to the abuses of capital punishment and a marked decrease in its use in America.

Benjamin Rush (1745-1813), in May of 1774, lecturing at the house of Benjamin Franklin, urged that a "House of Reform" he built "so that criminals could be taken off the streets and detained until purged of their antisocial habits". About a year later, Rush wrote an essay entitled, "Inquiry into the Justice and Policy of Punishing Murder by Death". His argument, based on the earlier work of Cesare Beccaria, stated that "scriptural support of the death penalty was spurious; the threat of hanging does not deter but increases crime; (and) when a government puts one of its citizens to death, it exceeds the powers entrusted to it." Montesquieu had in 1748 voiced similar opposition:

> "Mankind must not be governed with too much severity. If there are other (countries) where men are deterred only by cruel punishments, we may be sure that this must, in a great measure, arise from the violence of the government which has used such penalties for slight transgressions. ...The severity of punishment is fitter for despotic governments, whose principle is terror, than for a monarchy or a republic, whose spring is honor and virtue." THE SPIRIT OF LAWS, Book 6, (1900 ed.).

Another major work was prepared by Edward Livingston, a distinguished American lawyer, in which he proposed the "total abolition of capital punishment". His study, entitled, "Introductory Report to the System of Penal Law Prepared for the State of Louisiana" contained a systematic rebuttal of all arguments favoring capital punishment. This report played a major role in support of abolition for half a century after its publication in 1833. These accumulated efforts finally engaged enough popular support in the 1830's that "the legislatures in several states were besieged each year with petitions on behalf of abolition from their constituents". Bedau, writing of the period in THE DEATH PENALTY IN AMERICA (1964), says,

> "Special legislative committees were formed to receive these messages, hold hearings, and submit recommendations. Anti-gallows societies came into being in every state along the eastern seaboard, and in 1845 an American Society for the Abolition of Capital

Punishment was organized. With the forces arrayed against slavery and saloons, the anti-gallows socicties were among the most prominent groups struggling for social reform in America."

In the late 1840's, Horace Greeley, founder of the NEW YORK TRIBUNE, "became one of the leading critics of the death penalty" and his efforts helped bring Michigan in 1847, Rhode Island in 1852, and Wisconsin in 1853 to abolish the death penalty. These were the first three political jurisdictions in the world to abolish capital punishment.

The Progressive Era, "when women got the vote and whisky got the gate", saw another surge in the abolitionist movement and many distinctively American developments: privacy of executions, a redefinition of the crime of murder, new methods of execution, and optional life sentences. Under the leadership of Clarence Darrow and the well-known warden of Sing Sing Prison, Lewis E. Lawes, "eight states -- Kansas (1907), Minnesota (1911), Washington (1913), Oregon (1914), North and South Dakota (1915), Tennessee (1915), and Arizona (1916) -- abolished the death penalty for murder and most other crimes." The final movement of the 1960's was the product of the findings of the ROYAL COMMISSION ON CAPITAL PUNISHMENT (1949), the United Nations debates of the 1950's, and the CANADIAN REPORT ON CAPITAL PUNISHMENT (1956). The results of this movement found six more states, Oregon in 1964; West Virginia, Vermont, Iowa, and New York in 1965; and New Mexico in 1969, abolishing the death penalty with little or no qualifications.

Summary and a Restatement of the Issue

The issue of proper and effective punishment is as old as man. Punishment has been rooted in superstition, tradition, religious doctrine, and political expediency or cruelty. Before the 16th century few questioned the use or value of the death penalty. It was understood and accepted that the infliction of death was not only a justifiable biblical command and an effective deterrent to others, but was also an acceptable venting of revenge and a sure method of removing political and religious opposition.

The United States Supreme Court decision of 1972 laid great stress on the "evc ing standards of human decency that mark the progress of a maturing society" as the criteria upon which to imply that the death sanction is at this time in our history not consistent or compatible with the maturity of American society. This suggestion is worthy of considerable contemplation since Mr. Justice Brennan has termed the death penalty a struggle "between ancient and deeply rooted beliefs in retribution, atonement or vengence on the one hand, and on the other, beliefs in the personal value and dignity of the common man that were born in the democratic movement."

Marvin E. Wolfgang and Marc Riedel writing in the May 1973 issue of *The Annals Of The American Academy Of Political And Social Science* report:

> "Based upon a refined statistical analysis of rape convictions in states where rape has been a capital crime, this study shows that there has been a patterned, systematic, a customary imposition of the death penalty. Far from being "freakish" or capricious, sentences of death have been imposed on blacks, compared to whites, in a way that exceeds any statistical notion of chance or fortuity." "Race, Judicial Discretion, and the Death Penalty"

The issue we face today is not the barbarity and cruelty of the Stuart's or the fanatical persecutions of the Holy Inquisition, but the more subtle barbarity of discrimination exercised by prejudiced judges and juries which is based upon those same deeply implanted archaic remnants of fear, innocence and ignorance that have plagued mankind since the beginning.

Today, the high purpose and function of law is to preserve and enhance mankind's most noble aspirations, protect the inherent dignity of the human spirit, contain the destructive nature of man, and guard against the injustices perpetrated toward the oppressed and innocent. To achieve these grand goals, law tempers passion with reason by replacing vengeance with justice, brutality with humaneness, and senselessness with rationality. It is the result of "the progress of a maturing society".

This maturing process can be seen by comparing legally defined purposes of criminal penalties of an earlier day with those of more recent times. Early English law featured "three clearly defined aims, to wit" (a) the prevention of a repetition of the offence by the murderer, and its imitation by another

person or persons; (b) the provision of a punishment befitting the crime, in accordance with the theory of *lex talionis*; and (c) the indemnification of the deity, of society, and the relatives of the murdered person by a specifically devised form of atonement." (Scott, p. 8.)

Recent judgment of American law has concluded that criminal penalties are designed to serve "one or more of these ends: (1) to discourage and act as a deterrent upon future criminal activity, (2) to confine the offender so that he may not harm society, and (3) to correct and rehabilitate the offender. There is no place in the scheme for punishment for its own sake, the product simply of vengeance or retribution." (*People v. Oliver*, 134 N.E.2d, 197, 201, 1956.)

The basic agrument today emerges from these two legal definitions. Since capital punishment cannot conceivably serve to confine or rehabilitate the offender, then is it in fact a deterrent upon future criminal offenses?

II. THE EIGHTH AMENDMENT

Article VIII, United States Constitution

> "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Historical Origin of the Eighth Amendment

The early seeds of the 1972 *Furman v. Georgia* decision can be found in the great charter of English liberties of 1215 known as Magna Carta.

> "No freeman shall be taken or imprisoned, or disseised, or outlawed, or exiled, or in any way destroyed, nor will we go upon him, except by the lawful judgment of his peers or by the law of the land." *Clause 39.*

Subsequent enactments of the 1689 English Bill of Rights, 1791 American Bill of Rights, and the 1868 ratification of the Fourteenth Amendment to the United States Constitution, laid a firm foundation of legal history guaranteeing that government will not trespass upon individual rights and freedoms.

The Tudor and early Stuart monarchies (1485-1649), ruling under "divine right", were subject to few laws or constitutional checks. Their power allowed them the opportunity to exact brutal and cruel punishments on their subjects. In addition, they exercised their prerogative through the Privy Council, special tribunals, and the Star Chamber on the justification that "exorbitant offenses are not subject to the ordinary course of law." Drawing upon the Romans for methods of torture, as the Inquisition had drawn upon the Roman 'inquisitio', the monarchy employed inhumane measures to extract confessions and inflict punishments. These long abuses of 'divine right' authority and power led to an effort to place the monarchy on a parliamentary and conditional basis and remove both arbitrary punishments and the aura of government from on high. To effect these ends, an "Act declaring the Rights and Liberties of the Subject and Setleing of the Succession of the Crowne" was passed in 1689 upon the retreat of James II from England as a consequence of the landing of William and Mary and their ascension to the throne. This act, known as the English Bill of Rights, contained the following provisions:

> (1) That the pretended Power of Suspending of Laws or the Execution of Laws by Regall Authoritie without Consent of Parlyament is illegal.
>
> (2) That the pretended Power of Dispensing with Laws or the Execution of Laws by Regall Authoritie as it has been assumed and exercised of late is illegal.
>
> (3) That the Commission for erecting the late Court of Commissioners for Ecclesiasticall Causes and all other Commissions and Courts of like nature are Illegall and Pernicious.
>
> (10) That excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.

Our Founding Fathers had carried with them to the New World these fundamental human liberties and had incorporated them into colonial law. Section 10 of the English Bill of Rights was placed into Virginia's 1776 Declaration of Rights, and the Framers enacted the section as Article Eight of the Bill of Rights amendments to the United States Constitution. The Framers were well aware of the cruel practices present in the Old World which had brought the need for the English provision against "cruell and unusuall Punishments", but they were also well aware of the necessity to contain the power of government.

The Bill of Rights to the United States Constitution (amendment Articles I through X) was originally intended to restrain encroachment on the rights of States and citizens by the national government. The Fourteenth Amendment, ratified in 1868, conceived in reaction to the slavery issue further secured the "blessings of liberty" not only for the many but for the few.

ARTICLE XIV, UNITED STATES CONSTITUTION (in part)

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Governor Lucius Fairchild, addressing the Wisconsin Legislature on January 10, 1867, said of the Fourteenth Amendment:

> "Notwithstanding the fact that this amendment will unquestionably be ratified by the legislatures of more than two-thirds of the states whose political relations to the Union have never been suspended, it is the deliberate voice of the loyal masses, that before those who were so lately seeking the nation's life shall be reclothed with the political rights which they forfeited by their treason, they must assent to the proposed amendment with all its guarantees, securing to all men equality before the law ... This demand is not made with a desire to appropriate to ourselves undue political power, or to oppress or humiliate the southern people. It is made because in view of the terrible events of the past five years, we deem these guarantees necessary to the life of the nation, and we insist that those who saved that life have an undeniable right to demand all guarantees essential to its future preservation."

As late as 1947, a great debate was whether the Fourteenth had been intended to make the Bill of Rights applicable to the States. Only one voice, Justice Hugo Black (then considered an 'eccentric exception'), contended in *Adamson v. California*, 332 U.S. 46, that this was "the chief purpose of the Amendment".

Speaking on the meaning of the Amendment regarding the "cruel and unusual" clause, Congressman Bingham, author of the Fourteenth Amendment, had, in 1866 stated:

> "Mr. Speaker, that the scope and meaning of the limitations imposed by the first section, fourteenth amendment of the Constitution may be more fully understood, permit me to say that the privileges and immunities of Citizens of a State, are chiefly defined in the First and Eighth Amendments to the Constitution of the United States ... These eight articles I have shown never were limitations upon the power of the States until made so by the Fourteenth Amendment."
>
> "Contrary to the express letter of your Constitution, 'cruel and unusual punishments' have been inflicted under State laws within this Union upon citizens, not only for crimes committed, but for sacred duty done ... It is an opprobrium to the Republic that for fidelity to the United States they could not by national law be protected against degrading punishment inflicted on slaves and felons by State law. That great want ... is supplied by the first section of this amendment." *Congressional Globe*, 39th Cong., 1st Ses. (May 10, 1866 H.p. 2542)

This question, however, was not settled until 1962 in the case of *Robinson v. California*, 370 U.S. 66 which Mr. Justice Thurgood Marshall says "removes any lingering doubts as to whether the Eigh Amendment's prohibition against cruel and unusual punishments is binding on the States" (*Furm* at 328, footnote 34). The *Robinson* case held the Eighth Amendment was applicable through t 'due process' clause of the Fourteenth.

The Supreme Court And The "Cruel And Unusual" Clause

The meaning of "cruel and unusual punishment" was not intended by either the English Parliament, the Congress, or the authors of the Fourteenth Amendment to be a prohibition against the death penalty. The United States Supreme Court has noted on numerous occasions the problems of interpreting certain "ambiguous phrases" ('freedom of speech' -- 'due process' -- 'equal protection') in the Constitution. Many believe that the use of such phrases in the Constitution was purposeful so as to allow flexibility in interpretation as the needs of society demand (Miller, "Statutory Language and the Purposive Use of Ambiguity", 42 VIRGINIA LAW REVIEW 23). As early as 1878, Justice Clifford observed that 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".

In that early case, *Wilkerson v. Utah*, 99 U.S. 130 (1878), the punishment of shooting as a mode of executing the death penalty for the crime of first degree murder was tested under the guarantee of the Eighth Amendment. The Court held:

> "Cruel and unusual punishments are forbidden by the Constitution, but the authorities are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in this category."

Twelve years later a case tested the constitutionality of providing for punishment of death by electrocution under the Fourteenth Amendment to the Constitution. The Court held *In re Kemmler*, 136 U.S. 436 (1890) that:

> "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 implies there is something inhuman and barbarous -- something more than the mere extinguishment of life."

The first landmark case in which the "cruel and unusual" prohibition was defined was in *Weems v. United States*, 217 U.S. 349 (1910). Under the provisions of the Philippine Penal Code, falsification by a public official of a public and official document was punishable by fine and imprisonment at hard and painful labor for a period ranging from 12 years and a day to 20 years. In addition, the prisoner was to be placed in extreme duress, deprived of civil rights, disqualified from political rights, and upon release be under surveillance by authorities for the remainder of his natural life. The Court held these penalties were in violation of the Eighth Amendment and ruled:

> "It is cruel in its excess of imprisonment and that which accompanies and follows imprisonment. It is unusual in its character. Its punishment comes under the condemnation of the bill of rights, both on account of their degree and kind."

Thirty-seven years later, a convicted murderer was sentenced to be electrocuted. After a first attempt failed due to a mechanical defect in the electric chair, a petition was filed to stop a second attempt on the basis that this constituted "cruel and unusual" punishment, forbidden by the Constitution. In this 1947 *Louisiana ex rel Francis v. Resweber* case (329 U.S. 459), the Court, in upholding the second attempt, ruled:

> "The case before us does not call for an examination into any punishments except that of death ... The traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence."
>
> "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely."

In *Trop v. Dulles*, 356 U.S. 86 (1958), a soldier who had gone 'over the hill' for less than a day was convicted by courts martial of desertion and sentenced to deprivation of citizenship. The sentence was brought before the Court for a ruling on the question of whether punishing this transgression by expatriation was in violation of the "cruel and unusual" clause. The Court, in ruling that the sentence was in violation of the Eighth Amendment, held:

> "The basic concept underlying the 'cruel and unusual punishments' is nothing less than the dignity of man. While the State has the power to punish, the 'cruel and unusual' stands to assure that this power be exercised within the limits of civilized standards."

Once again, in 1969, a form of execution was held not to violate the provisions of the Eighth Amendment. By so ruling in *Boykin v. Alabama*, 395 U.S. 238, the Court, for over 175 years, gave implicit constitutional approval to the use of capital punishment.

The turning point came in 1962 with *Robinson*, which clearly made the Eighth Amendment applicable to the States; however, a major problem still existed. That problem was whether juries could impose the death sentence with unguided direction and discretion. In 1971 the question reached the Court in *McGautha v. California*, 402 U.S. 183. The Court held:

> "We find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."

III. THE FURMAN V. GEORGIA DECISION

Background Summary

The United States Supreme Court, on June 29, 1972, handed down a 5 to 4 decision which overturned the imposition of the death penalty in three cases, two in the State of Georgia and one in the State of Texas. The decision was rendered on petitions for certiorari (review of a lower court decision) of two cases involving petitioners convicted of rape (*Jackson v. Georgia* and *Branch v. Texas*), and one petitioner convicted of the offense of murder (*Furman v. Georgia*). The case is referred to, in abbreviated form, as *Furman v. Georgia*, 408 U.S. 238 (1972). Justices Douglas, Brennan, Stewart, White, and Thurgood Marshall concurred in the majority opinion, while Chief Justice Warren E. Burger and Justices Blackmun, Powell, and Rehnquist dissented. Lengthy separate opinions by each of the nine members of the Court accompanied the decision. It is noteworthy that none of the concurring justices joined together or collaborated in each other's opinion; however, the dissenting Justices joined in each other's opinions (except Justice Blackmun's) but did not collaborate. This is not a common procedure for the Court. It underscores the complexity of evaluating the meaning of the case.

The granted petitions for certiorari were limited to the following question: "Does the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?".

> *Amendment Eight* "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."
>
> *Amendment Fourteen* (in part) "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The operative language of the Court's decision did not deal with, or hold directly, that the death penalty per se was unconstitutional. Only in these three cases, and for other similar state statutes, was the penalty prohibited. Both Georgia and Texas statutes provided that juries, at their discretion, could impose the penalty of death.

Georgia Statutes

> 26-1101. Murder. -- (a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.
>
> (b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.
>
> (c) A person convicted of murder shall be punished by death or by imprisonment for life. (Acts 1968, pp. 1249, 1276.)

> 26-1302. The crime of rape shall be punished by death, unless the jury recommends mercy, in which event punishment shall be imprisonment for life. Provided, however, the jury in all cases may fix the punishment by imprisonment and labor in the penitentiary for not less than one (1) year or more than twenty (20) years. (No. 587, 1960 Laws)

Texas Statutes

> Art. 1189. A person guilty of rape shall be punished by death or by confinement in the penetentiary for life, or for any term of years not less than five.

The Petitioners:

Petitioner Lucious Jackson, Jr., a Black, 21 years old, was convicted of the rape of a white woman. He was described as of average intelligence and education. A psychiatrist had noted that his antisocial behavior traits were the product of environmental influences. He had held a pair of scissors to the neck of his victim demanding money and subsequently raped her. Prior to this offense, he was a convict who had escaped from a work gang while serving a three-year sentence for auto theft. While at large for three days, he had committed several other offenses -- burglary, auto theft, and assault and battery (225 Ga. 790, 171 S.E.2d 501 (1969); *Furman* at 252, Justice Douglas concurring).

Petitioner Elmer Branch, a Black, was convicted of raping a 65 year old white woman in her rural home. In the course of his actions he attempted to burglarize the house. The record indicated the he had previously been convicted of felony theft and was a borderline mentally deficient. He had completed five and one-half years of schooling and was in the lower four percentile of his class (Court of Criminal Appeals of Texas, reported in 447 S.W.2d 932 (1969); *Furman* at 253, Justice Douglas concurring).

Petitioner Henry Furman, a Black, 26 years old, was convicted of killing a householder. He had shot the deceased through a closed door. His education ended with the sixth grade. Mr. Furman was described as being a mild to moderate mentally deficient, unable to cooperate with his counsel in preparation for his defense. He was later reported to be able to tell right from wrong, and able to cooperate with counsel (225 Ga. 253, 167 S.E.2d 628 (1969); *Furman* at 252-253, Justice Douglas concurring).

Decision of the U. S. Supreme Court

The decision of the United States Supreme Court read:

> "The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgement in each case is therefore reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings."

Due to the brevity of the decision, both the supporters and opponents of the death penalty have turned for elucidation of the Court's intent to the nine separate opinions, which total 232 pages in *United States Reports*, 408 U.S. 238-470.

The five individual concurring opinions concerned themselves with uncontrolled discretion by judges and juries; discrimination in the use of the death penalty towards poor, ignorant, and minority citizens; the value of human life and human dignity; tests of necessity and excessiveness; the maturity of American society; changing interpretations of ambiguous phrases; and the issue of morality.

The four dissenting justices argued that the Court had no constitutional foundation for its decision; the Court had exceeded its powers of interpretation, thereby usurping the authority of the legislatures to set the penalty and provide for its execution; the framers never intended that the death penalty was to be prohibited; the Court had no basis to overturn precedent; and, individual morality and views of justice had no place in Constitutional interpretation.

Concurring Opinions

1. *Justice Douglas*:

Mr. Justice Douglas examines the meaning and evolution of the Eighth and Fourteenth Amendments, presents evidence that the death penalty is a discriminatory form of punishment, and concludes that the exercise of discretion by juries and judges has allowed play for discrimination, which is in violation of the "equal protection" clause of the Fourteenth Amendment.

He states that "the requirements of due process ban cruel and unusual punishments", and "that the proscription of cruel and unusual punishments forbids judicial imposition of them as well as their proscription by the legislature". To validate the settlement of these questions, he cites *Louisiana ex rel Francis v. Resweber* at 463, 473-474, and *Weems v. United States* at 378-382.

Turning to an explanation of the meaning and evolution of the Eighth and Fourteenth Amendments, he quotes an 1866 statement from the congressional Fourteenth Amendment debate, by Congressman Bingham:

> "...many instances of State injustice and oppression have already occurred in the State legislation of the Union, of flagrant violations of the guaranteed privileges of citizens of the United States, for which the national Government furnished and could furnish by law no remedy whatever." *Congressional Globe*, May 10, 1866.

The Justice also states that the meaning of the "cruel and unusual" clause has been an evolving one. He cites from *Weems* at 378, and *Trop v. Dulles* at 86, 101, that the meaning of the Eighth Amendment "is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice", and it "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society". The Eighth Amendment, which was drawn from the English Bill of Rights of 1689 by the framers, Mr. Justice Douglas says, was originally intended to prohibit the "selective or irregular application of harsh penalties". To underscore this interpretation, he quotes from, "Nor Cruel and Unusual Punishments Inflicted; The Original Meaning":

> "Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the Blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the People. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime." Granucci, 57 *California Law Review* 839, 845-846 (1969).

In reviewing this history and past interpretations of the Court on the "cruel and unusual" clause, the Justice concludes:

> "But these words, at least when read in the light of the English proscription against selective and irregular use of penalties, suggest that it is cruel and unusual to apply the death penalty -- or any other penalty -- selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the boards."
>
> "It would seem incontestable that the death penalty on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it gives room for play of such prejudices."

Commenting on jury discretion, Mr. Justice Douglas says, "indeed the seeds of the present case are in *McGautha v. California*:, and he quotes from that case:

> "In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution." 402 U.S. 183 (1971)

The Justice questions the validity of the reasoning of this one-year old decision by citing evidence to the contrary from the President's Commission on Law Enforcement and Administration of Justice:

> "Finally there is evidence that the imposition of the death sentence and the exercise of dispensing power by the courts and the executive follow discriminatory patterns. The death sentence is disproportionately imposed and carried out on the poor, the Negro, and members of unpopular groups." *The Challenge of Crime in a Free Society* (1967)

In addition, he cites from Warden Lewis E. Lawes:

> "Not only does capital punishment fail in its justification, but no punishment could be invented with so many inherent defects. It is an unequal punishment in the way it is applied to the rich and to the poor. The defendant of wealth and position never goes to the electric chair or to the gallows." *Life and Death in Sing Sing* (1928)

The substance of Mr. Justice Douglas's opinion is found in the following excerpts:

> "Former Attorney General Ramsey Clark has said, 'It is the poor, the sick, the ignorant, the powerless and the hated who are executed.' We cannot say from the facts disclosed in these records that the defendants were sentenced to death because they were Black. Yet our task is not restricted to an effort to divine what motives impelled these death penalties. Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or 12."
>
> "The high service rendered by the 'cruel and unusual' punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are even-handed, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups."
>
> "Thus, these discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual punishments'."

2. *Justice Brennan*:

The central theme of Mr. Justice Brennan's opinion rests upon the "dignity of man". In a lengthy discourse, he sets forth the intent of the "cruel and unusual" clause by citing many versions of thought from the time of enactment of the Eighth Amendment. Subsequently, he discusses the changing interpretation of that "somewhat ambiguous phrase", which sets his argument in a framework of the death penalty being out of step with the times. To prove and support his conclusion, Mr. Justice Brennan sets forth four tests of measurement or principles: Is the penalty degrading to the dignity of man, is it arbitrarily inflicted, is it unacceptable to contemporary American society, and is it excessive? In an extensive examination, he elaborates on his opinion that the death penalty is in violation of all these principles and therefore in violation of an enlightened meaning of the Eighth Amendment.

Mr. Justice Brennan, in his opening remarks, states the following question that was before the Court, "Whether death is today a punishment for crime that is 'cruel and unusual' and consequently, by virtue of the Eighth and Fourteenth Amendments, beyond the power of the State to inflict."

At the outset, he notes that the definition of the "cruel and unusual" clause is difficult to ascertain and that it has not previously been done by the Court. Furthermore, he states that the phrase is not susceptible to precise definition, *Wilkerson v. Utah* at 130, 135-136, and *Trop* at 99. "Yet", the Justice says, "we know that the values and ideals it embodies are basic to our scheme of government."

In an effort to ascertain the intent of the "cruel and unusual" clause, he cites the words of Mr. Holmes at the Massachusetts ratifying convention in 1787:

> "What gives an additional glare of horror to these gloomy circumstances is the consideration, that Congress have to ascertain, point out, and determine, what kinds of punishments shall be inflicted on persons convicted of crimes. They are nowhere restrained from inventing the most cruel and unheard-of punishments, and annexing them to crimes; and there is no constitutional check on them..." 2 *Elliot's Debates* 111 (2nd Edition, 1876)

And again, the remarks of Patrick Henry at the Virginia convention:

"Congress, from their general powers, may fully go into the business of human legislation. They may legislate, in criminal cases, from treason to the lowest offense -- petty larceny. They may define crimes and prescribe punishments."

"But when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives. What says our (Virginia) bill of rights? -- 'that excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted'. Are you not, therefore, now calling on those gentlemen who are to compose Congress, to ... define punishments without this control? Will they find sentiments there similar to this bill of rights? You let them lose; you do more -- you depart from the genius of your country."

"In this business of legislation, your members of Congress will lose the restriction of not imposing excessive fines, demanding excessive bail, and inflicting cruel and unusual punishments. These are prohibited by your (Virginia) declaration of rights. What has distinguished our ancestors? -- That they would not admit of tortures, or cruel and barbarous punishment." 3 *Elliot's Debates* 447 (2nd Edition, 1876)

From these and other statements, Mr. Justice Brennan concludes that the intent was not so much to limit punishment, but to restrain legislative power in determining penalties.

Despite the fact that we can derive some of the intent of the Framers with regard to the Eighth Amendment, Mr. Justice Brennan says, "Yet, we cannot know exactly what the Framers thought cruel and unusual punishments were." But he replies to his own conclusion, "the Clause is, indeed, 'indefinite', and for good reason". And this reason he draws from *Weems* at 373.

"The constitutional provision 'is enacted, it is true from an experience of evils', but its general language should not therefore, be necessarily confined to the form that evil had therefore 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."

Earlier decisions on the meaning of "cruel and unusual" were based on a strict constructionist view of the Constitution, that is, the Court prohibited punishments that were considered barbarous at the time the Amendment was enacted. The Court had earlier held that these punishments would consist of "burning at the stake, crucifixion, breaking on the wheel and the like", *Wilkerson* at 99, and *In re Kemmler* at 446. "The difficulty arises", says the Justice, "in formulating the legal principles to be applied by the courts when a legislatively prescribed punishment is challenged as 'cruel and unusual'." Justice Brennan notes that one cannot judge on the basis of individual wisdom the validity of the punishment, but, he says,

"...yet, we must not, in the guise of 'judicial restraint', abdicate our fundamental responsibility to enforce the Bill of Rights. Were we to do so, the 'Constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality'. The Clause would then 'become, in short, little more than good advice." ' *Weems* at 379, and *Trop* at 104 (quoted)

From this point, Justice Brennan extends his opinion into the central issue of the "evolving standards of decency". He cites again from *Trop* at 100: "The basic concept underlying the (Clause) is nothing less than the dignity of man. While the State has the power to punish, the (Clause) stands to assure that this power is exercised within the limits of civilized standards." The Justice then states the axiom he is to carry to the end of his remarks:

"The primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings...even the vilest criminal remains a human being possessed of common dignity."

Justice Brennan then sets forth the four tests or principles of measurement that should be applied to the question of what constitutes "cruel and unusual".

Is the penalty degrading to the dignity of man?

Is the penalty arbitrarily inflicted?

Is the punishment unacceptable to contemporary American society?

Is the penalty excessive?

If the punishment exceeds these principles, then, he concludes: "...the continued infliction of the punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes."

Proceeding with great care and detail, Justice Brennan applies each test, in a cumulative manner, to the death penalty. He notes that it is the highest penalty. "All practicing lawyers know", he quotes, "who have defended persons charged with capital offenses, often the only goal possible is to avoid the death penalty." (*Griffen v. Illinois*, 351 U.S. 12.) He says, "Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." From *People v. Anderson*, 6 Cal.3d 628, he notes that the "process of carrying out the verdict of death is degrading and brutalizing to the human spirit and constitutes psychological torture". Turning to the words of Justice Frankfurter, he quotes: "...the onset of insanity while awaiting execution ... is not rare." "Death", Justice Frankfurter says, "denies one the right to have rights, and forecloses all possibilities."

Moving on to the second principle, "arbitrarily inflicted," Justice Brennan brings forth massive statistical evidence and Court data to show the continued decrease in the use of the penalty, and the capricious application of it by juries. At length, he turns attention to the third test, "unacceptable to contemporary society." He states, "The acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use." He then concludes:

"The progressive decline in the current rarity of the infliction of death demonstrates that our society seriously questions the appropriateness of this punishment today. Indeed, the likelihood is great that the punishment is tolerated only because of its disuse. Rejection could hardly be more complete without becoming absolute."

The fourth measurement, "excessive", he examines from the standpoint of deterrence. To the effect of deterrence, he says, "probably most crimes cannot be deterred by the threat of punishment." He further states, "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values."

In conclusion, Mr. Justice Brennan's theme is embodied in the following excepts from his opinion:

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

"Today death is a uniquely and unusually severe punishment. When examined by the principles under the Cruel and Unusual Punishments Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual' and the States may no longer inflict it as a punishment for crimes."

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

3. *Justice Stewart*:

Mr. Justice Stewart, concurring with a relatively short opinion, does not consider whether the death penalty is unconstitutional under the Eighth and Fourteenth Amendments, but argues that discretion in the imposition of the penalty, coupled with its infrequency, makes it 'cruel and unusual' and in violation of the constitutional guarantee. His position is based on the fact the legislatures have not determined that the penalty of death should be mandatory, and is, therefore, excessive, "not in degree but in kind".

The following excerpts from his opinion summarize Mr. Justice Stewart's reasoning and position:

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

"The death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments."

"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 death sentence under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."

4. *Justice White*:

Mr. Justice White, in a very short concurring opinion, does not choose to extend his position beyond three narrow limits. He concerns himself with the constitutionality of statutes under which legislatures authorize the imposition of the penalty of death for murder and rape. The three questions he takes issue on are: the legislatures do not mandate the penalty, they authorize judges and juries to make the decision of death, and the verdict of death has appeared with such infrequency that the odds are against anyone being given the penalty for murder or rape.

A few excerpts from his opinion are sufficient to illustrate Mr. Justice White's position on these issues.

"The imposition of the death penalty is obviously cruel in a dictionary sense. But the penalty has not been considered cruel and unusual in a constitutional sense because it was thought justified by the social ends it was deemed to serve. At the moment that it ceases realistically to further these purposes, however, the emerging question is whether its imposition in such circumstances would violate the Eighth Amendment. In my view it would."

"I cannot avoid the conclusion that as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."

5. *Justice Thurgood Marshall*:

Mr. Justice Thurgood Marshall sets forth the most detailed and lengthy of the individual opinions. The question Mr. Justice Marshall poses for inquiry is "whether the death penalty is a cruel and unusual punishment prohibited by the Eighth Amendment to the United States Constitution". He concludes: "...the death penalty is an excessive and unnecessary punishment which violates the Eighth Amendment."

Mr. Justice Marshall, in his opening remarks, states precisely why such an ambitious effort must be expended.

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

He then immediately proceeds to examine the historical meaning of the 'cruel and unusual' clause by noting that "In 1583, John Whitgift, Archbishop of Canterbury, turned the High Commission into a permanent ecclesiastical court, and the Commission began to use torture to extract confessions from persons suspected of various offenses." He also notes that "Blackstone described in ghastly detail the myriad of inhumane forms of punishment imposed on persons found guilty of any of a large number of offenses." Then, the Justice turns attention to the "treason trials of 1685 -- the 'Bloody Assizes' -- which followed an abortive rebellion by the Duke of Monmouth." These trials, he says,

"...marked the culmination of the parade of horrors, and most historians believe it was this event which finally spurred the adoption of the English Bill of Rights containing the progenitor of our prohibition against cruel and unusual punishments."

After William and Mary came to the throne, Parliament was summoned to draft general statements containing "such things that are absolutely necessary to be considered for the better securing of our religion, laws and liberties". This initial draft of the English Bill of Rights referred to the infliction of torture by James II; however, it is thought, says Mr. Justice Marshall quoting from *'Nor Cruel and Unusual Punishments Inflicted"; The Original Meaning*:

"...that the cruel and unusual punishments clause in the Bill of Rights of 1689 was first, an objection to the imposition of punishments which were unauthorized by statute and outside the jurisdiction of the sentencing courts, and second, reiteration of the English policy against disproportionate penalties." Granucci, p. 848.

Mr. Justice Marshall comments, if the cruel and unusual clause:

"...is properly read as a response to excessive or illegal punishments, as a reaction to barbaric and objectionable modes of punishment, or as both, there is no doubt whatever that in borrowing the language and including it in the Eighth Amendment, our Founding Fathers intended to outlaw torture and other cruel punishments."

The Justice further notes that the precise language of the Eighth Amendment first appeared in "America on June 12, 1776, in Virginia's Declaration of Rights", and that it was drawn verbatim from the Engligh Bill of Rights. He then proceeds to cover the same historical background as Justices Douglas and Brennan using the words of the Framers and others. In addition, Mr. Justice Marshall examines the major cases dealing with the interpretation of the "cruel and unusual" clause.

At length, Mr. Justice Marshall says, "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." In turn, he considers each. Retribution, he notes, "has been condemned by scholars for centuries, and the Eighth Amendment itself was adopted to prevent punishment from becoming synonymous with vengeance." From *Weems* at 381 he notes that by not punishing by death,

"The State thereby suffers nothing and loses no power. The purpose of punishment is fulfilled, crime is repressed by penalties of just, not tormenting severity, its repetition is prevented, and hope is given for the reformation of the criminal."

With regards retribution, he concludes: "The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper."

On deterrence, he quotes from the Royal Commission on Capital Punishment (1949-1953): "Capital punishment has obviously failed as a deterrent when a murder is committed. We can number its failures." He notes other studies by recognized scholars such as H.A. Bedau, George Ryley Scott, and T. Sellin, which have attempted to prove that there is no correlation between the death penalty and its effect as a deterrent. From these studies, Mr. Justice Marshall says,

"In light of the massive amount of evidence before us, I see no alternative but to conclude that capital punishment cannot be justified on the basis of its deterrent effect. In fact, there is evidence that imposition of capital punishment may actually encourage crime, rather than deter it."

Moving on to the third reason, repetition, he says, "...the death penalty as a device to prevent recidivism is obvious -- if a murderer is executed, he cannot possibly commit another offense". But he is not satisfied with this answer and continues,

"The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or on their release. For the most part, they are first offenders, and when released from prison they are known to become model citizens."

The three final reasons, encouraging guilty pleas and confessions, eugenics, and reducing state expenditures, he discusses together. His conclusions are:

"...to the extent that capital punishment is used to encourage confessions and guilty pleas, it is not being used for punishment purposes. A State that justified capital punishment on its utility as part of the conviction process could not profess to rely on capital punishment as a deterrent."

"In light of the previous discussion on deterrence, any suggestions concerning the eugenic benefits of capital punishment are obviously meritless. I can only conclude, as has virtually everyone else who has looked at the problem, that capital punishment cannot be defended on the basis of any eugenic purposes."

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

To underscore all that he has previously said, the Justice cites statistics which he says are "evidence of racial discrimination."

"A total of 3,859 persons have been executed since 1930, of which 1,151 were White and 2,066 were Negro. 3,334 of the executions were for murder; 1,664 of the executed murderers were White and 1,630 were Negro. 455 persons, including 48 Whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than Whites in proportion to their percentage of the population."

"It is also evident that the burden of capital punishment falls upon the poor, the ignorant, and the underprivileged of society. It is the poor who are lease able to voice their complaints against capital punishment. Their impotence leaves them victims of a sanction which the wealthier, better represented, just as guilty person can escape."

In addition, he notes that American citizens know almost nothing about capital punishment, and if they were aware of the facts and complexities of the penalty, this "information would almost surely convince the average citizen that the death penalty was unwise."

Several extracts from Mr. Justice Marshall's individual opinion will identify his numerous reasons for concurrence, and summarize his views.

"Death is irrevocable; life imprisonment is not. Death, of course, makes rehabilitation impossible; life imprisonment does not. In short, death has always been viewed as the ultimate sanction, and it seems perfectly reasonable to continue to view it as such."

"The statistical evidence is not convincing beyond all doubt, but it is persuasive ... It is not improper at this point to take judicial notice of the fact that for more than 200 years men have labored to demonstrate that capital punishment serves no purpose that life imprisonment could not serve equally well. And they have done so with great success. Little if any evidence has been adduced to prove the contrary."

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

"In 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 achievement. 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."

Dissenting Opinions

1. *The Chief Justice*:

Chief Justice Warren E. Burger, joined by Mr. Justice Blackmun, Mr. Justice Powell, and Mr. Justice Rehnquist, dissents on the basis that the majority opinion "fundamentally misconceives the nature of the Eighth Amendment guarantee and flies directly in the face of controlling authority of extremely recent vintage." His position is argued from the premise that the framers never intended capital punishment to be unconstitutional and that the Eighth Amendment was not to be construed as such. In addition, the Chief Justice maintained that it is not the duty of the Court to make a presumption that time had changed the meaning, and in fact, by so doing, usurped the authority of the legislatures, and surpassed the Court's constitutional powers.

In his opening remarks, Chief Justice Burger says if he had legislative power, he would join the majority. However, he says,

"Our constitutional inquiry ... must be divorced from personal feelings as to the morality and efficacy of the death penalty and be confined to the meaning and applicability of the uncertain language of the Eighth Amendment."

"...we should not seize upon the enigmatic character of the guarantee as an invitation to enact our personal predilections into law."

The justification for his position, the Chief Justice says, is in past interpretations of the Court. He believes the Eighth Amendment guarantee against cruel and unusual punishments was to prohibit torture and other acts of barbarity, but never intended to imply that capital punishment could not be imposed. He objects to the logic of the majority by saying,

"I am unpersuaded by the facile argument that since capital punishment has always been cruel in the everyday sense of the word, and has become unusual due to decreased use, it is, therefore, now 'cruel and unusual'."

Chief Justice Burger notes that in the 181 year history of the Court, "not a single decision...has cast the slightest shadow of a doubt on the constitutionality of capital punishment". From *Trop* at 99, he cites former Chief Justice Warren:

"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 widely accepted, it cannot be said to violate the constitutional concept of cruelty."

Arguing in favor of the will of the legislatures, Chief Justice Burger says,

"The Court's quiescence in this area can be attributed to the fact that in a democratic society, legislatures, not courts, are constituted to respond to the will and consequently the moral values of the people."

"...in a democracy the legislative judgement is presumed to embody the basic standards of decency prevailing in society."

Turning next to the majority's argument that the penalty offends the conscience of society, he says, "...the rate of imposition does not impel the conclusion that capital punishment is now regarded as intolerably cruel or uncivilized". He argues from *McGautha* at 208 that juries, "will act with due regard for the consequences of their decision", and from *Witherspoon v. Illinois*, 391 U.S. 510, 88:

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

Next, the Chief Justice explains the intent and ramifications of the majority opinion. The Chief Justice says,

"The actual scope of the Court's ruling, which I take to be embodied in these concurring opinions (referring to Justice Stewart and Justice White) is not entirely clear. This much, however, seems apparent: if the legislatures are to continue to authorize capital punishment for some crimes, juries and judges can no longer be permitted to make sentencing determination in the same manner they have in the past."

He argues that this may not be a welcome change by using the logic of the majority.

> "To be sure, there is a recitation cast in Eighth Amendment terms: petitioners' sentences are 'cruel' because they exceed that which the legislatures have deemed necessary for all cases; petitioners' sentences are 'unusual' because they exceed that which is imposed in most cases. This application of the Eighth Amendment suggests that capital punishment can be made to satisfy Eighth Amendment values if its rate of imposition is somehow multiplied; it seemingly follows that the flexible sentencing system created by the legislatures, and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand. The implications of this approach are mildly ironical."

Despite the complexity of the various concurring opinions, the Chief Justice provides suggestions to the legislatures. He advises:

> "...legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed."
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> "Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislature can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition."

The closing remarks of Chief Justice Burger underline his hopes and concerns.

> "Since there is no majority of the Court on the ultimate issue presented in these cases, the future of capital punishment in this country has been left in an uncertain limbo. Rather than providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress."
>
> "While I cannot endorse the process of decision-making that has yielded today's result and the restraints which that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment."
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> "The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside those limits."

2. *Mr. Justice Blackmun*:

Mr. Justice Blackmun, dissenting with a short individual opinion, wrote: "Although personally I may rejoice at the Court's result, I find it difficult to accept or to justify as a matter of history, law, or of constitutional pronouncement. I fear the Court has overstepped." In a "somewhat personal" opinion, Mr. Justice Blackmun emphatically denounced capital punishment, but felt the Court had failed to recognize its limits of judicial power. Several extracts from his opinion follow.

> "Cases such as these provide for me an excrutiating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgement exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences, and it is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of 'reverence for life'. Were I a legislator, I would vote against the death penalty for the policy reasons argued by counsel for the representative petitioners and expressed and adopted in the several opinions filed by the Justices who vote to reverse these convictions."
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> "The several majority opinions acknowledge, as they must, that until today capital punishment was accepted and assumed as not unconstitutional per se under the Eighth Amendment or the Fourteenth Amendment...Suddenly, however, the course is now the opposite way, with the Court evidently persuaded that somehow the passage of time has taken us to a place of greater maturity and outlook. The argument, plausable and high sounding as it may be, is not persuasive, for it is only one year from *McGautha*, only 14 years since *Trop*, and 25 years since *Francis*, and we have been presented with nothing that demonstrates a significant movement of any kind in these brief periods."

> "To reverse the judgements in these cases is, of course, the easy choice. It is easier to strike the balance in favor of life and against death. It is comforting to relax in the thoughts -- perhaps the rationalizations -- that this is the compassionate decision for a maturing society; that this is the 'right' thing to do; that thereby we convince ourselves that we are moving down the road toward human decency."
>
> "I do not sit on these cases, however, as a legislator, responsive, at least in part, to the will of constituents. Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged."
>
> "We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible."
>
> "There -- on the Legislative Branch of the State or the Federal Government, and secondly, on the Executive Branch -- is where the authority for this kind of action lies...these elected representatives of the people -- far more conscious of the temper of the times, of the maturing of society, and of the contemporary demands for man's dignity, than are we who sit cloistered on this Court -- took it as settled that the death penalty then, as it always has been, was not in itself unconstitutional."

3. *Mr. Justice Powell*:

Mr. Justice Powell, wrote the lengthiest separate dissenting opinion. He argues that none of the five concurring opinions "provides a constitutionally adequate foundation for the Court's decision". Furthermore, he states his concern for "the shattering effect this collection of views has on the root principles of *stare decisis* (precedent), federalism, judicial restraint and -- most importantly - separation of powers". He believes that the Court has rejected "as not decisive the clearest evidence that the Framers of the Constitution and the authors of the Fourteenth Amendment believed that those documents posed no barrier to the death penalty". He says, "The Court also brushes aside an unbroken line of precedent reaffirming the heretofore virtually unquestioned constitutionality of capital punishment."

Mr. Justice Powell, stressing again his objections, reiterates:

> "In terms of the constitutional role of this Court, the impact of the majority's ruling is all the greater because the decision encroaches upon an area squarely within the historic preogative of the legislative branch...I can recall no case in which, in the name of deciding constitutional questions, this Court has subordinated national and local democratic processes to such an extent."

Mr. Justice Powell's opening remarks redefines the intent of the Eighth and Fourteenth Amendments, and speaks to the Court's clear precedence in their interpretation of the meaning of the two articles. He notes that

> "While flexibility in the application of these broad concepts is one of the hallmarks of our system of government, the Court is not free to read into the Constitution a meaning that is plainly at variance with its language."
>
> "I do not believe that the case law can be so easily cast aside. The Court on numerous occasions has both assumed and asserted the constitutionality of capital punishment."

Pointing to the precedent of the Court, the Justice examines *Wilkerson*, *In re Kremmler*, *Francis*, *Trop*, and *McGautha*. Case by case, item by item, he argues and questions the validity and logic of the majority opinion. In drawing its "meaning from the evolving standards of decency", he says, "It is too easy to propound our subjective standards of wise policy under the rubic of more or less universally held standards of decency." Arguing from *Trop* at 119-120 that the Court had not applied proper judicial restraint, Mr. Justice Powell quotes Justice Frankfurter:

"When the power of Congress to pass a statute is challenged, the function of this Court is to determine whether legislative action lies clearly outside the constitutional grant of power to which it has been, or may fairly be, referred."

"It is not easy to stand aloof and allow want of wisdom to prevail, to disregard one's own strongly held view of what is wise in the conduct of affairs. But it is not the business of this Court to pronounce policy."

"That self-restraint is of the essence in the observance of judicial oath, for the Constitution has not authorized the judges to sit in judgment on the wisdom of what Congress and the Executive Branch do."

Summarizing this argument with the majority on the "contemporary standards of decency", he says, "In a democracy the first indicator of the public's attitude must always be found in the legislative judgments of the people's chosen representatives."

Continuing, Mr. Justice Powell questions the proposition that only the "poor, the ignorant, and the underprivileged" are sentenced to death and that if the average American knew the complexities of the death penalty he would find it "shocking to his conscience and sense of justice". To both these arguments, he says,

"The 'have-nots' in every society always have been subject to greater pressure to commit crimes and to fewer constraints than their more affluent citizens. This is, indeed, a tragic by-product of social and economic deprivation, but it is not an argument of constitutional proportions under the Eighth and Fourteenth Amendments."

"The basic problem results not from the penalties imposed for criminal conduct but from social and economic factors that have plagued humanity since the beginning of recorded history, frustrating all efforts to create in any country at any time the perfect society in which there are no 'poor', no 'minorities' and no 'underprivileged'. The causes underlying this problem are unrelated to the constitutional issue before the Court."

Taking issue with the concurring views on the effect of deterrence, Mr. Justice Powell quotes from the British Royal Commission on Capital Punishment:

"Many are inclined to test the efficacy of punishment solely by its value as a deterrent; but this is too narrow a view ... The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not."

In his final remarks, the Justice returns once again to judicial restraint and the purpose of the democratic process.

"This Court is not empowered to sit as a court of sentencing review, implementing the personal views of its members on the proper role of penology. To do so is to usurp a function committed to the Legislative Branch and beyond the power and competency of this Court ... impatience with the slowness, and even the unresponsiveness, of the legislatures is no justification for judicial intrusion upon their historic powers."

"I know of no case in which greater gravity and delicacy have attached to the duty that this Court is called upon to perform whenever legislation -- state or federal -- is challenged on constitutional grounds. It seems to me that the sweeping judicial action undertaken today reflects a basic lack of faith and confidence in the democratic process."

In conclusion, Mr. Justice Powell's argument and objections may be summed with the following excerpt.

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

4. *Mr. Justice Rehnquist:*

In a short dissenting opinion, Mr. Justice Rehnquist argues that the majority opinion has violated the intent of the framers, the Constitution, and the principles of judicial review.

His opinion begins:

"The Court's judgment today strikes down a penalty that our Nation's legislators have thought necessary since our country was founded."

"Whatever its precise rationale, today's holding necessarily brings into sharp relief the fundamental question of the role of judicial review in a democratic society. How can government by the elected representatives of the people co-exist with the power of the federal judiciary, whose members are constitutionally insulated from responsiveness to the popular will, to declare invalid laws duly enacted by the popular branches of government."

He supports his argument by turning to Alexander Hamilton's *Federalist*, No. 78., which he realizes is "an oft-told story" but feels "it bears summarization once again".

"Sovereignty resides ultimately in the people as a whole, and by adopting through their States a written Constitution for the Nation, and subsequently adding amendments to that instrument, they have both guaranteed certain powers to the national Government and denied other powers to the national and state governments."

"For the theory is that the people themselves have spoken in the Constitution, and therefore its commands are superior to the commands of the legislature, which is merely an agent of the people."

He continues, "But just because courts in general, and this Court in particular, do have the last word, the admonition of Mr. Justice Stone in *United States v. Butler* must be constantly borne in mind:

"(W)hile unconstitutional exercise of power by the executive and legislative branches of government is subject to judicial restraint, the only check upon our own exercise of power is our own self-restraint." 297 U.S.1, 78-79 (1936)

Rephrasing his argument, Mr. Justice Rehnquist wrote:

"Rigorous attention to the limits of this Court's authority is likewise enjoined because of the natural desire that beguiles judges along with other human beings into imposing their own views of goodness, truth and justice upon others."

"The most expansive reading of the leading constitutional cases does not remotely suggest that this Court has been given a roving commission, either by the Founding Fathers or by the framers of the Fourteenth Amendment, to strike down laws that are based upon notions of policy and morality suddenly found unacceptable by the majority of this Court."

To underscore his opinion, he quotes from John Stuart Mill:

"The disposition of mankind, whether as rulers or as fellow-citizens, to impose their own opinions and inclinations as a rule of conduct on others, is so energetically supported by some of the best and by some of the worst feelings incident to human nature, that it is hardly ever kept under restraint by anything but want of power." ON LIBERTY (1885)

Pursuing this line of argument, the Justice concludes:

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

"I conclude that this decision ... is not an act of judgment, but rather an act of will."

In summation, Mr. Justice Rehnquist quotes from Mr. Justice Holmes and James Madison.

Justice Holmes -- "I have not yet adequately expressed the more than anxiety that I feel at the ever increasing scope given to the Fourteenth Amendment in cutting down what I believe to be the constitutional rights of the States. As the decisions now stand I see hardly any limit but the sky to the invalidating of those rights if they happen to strike a majority of this Court as for any reason undesirable. I cannot believe that the Amendment was intended to give us *carte blanche* to embody our economic or moral beliefs in its prohibitions." *Baldwin v. Missouri*, 281 U.S. 586, 595 (1930)

James Madison -- "In framing a government which is to be administered by men over men, the greatest difficulty lies in this: you must first enable the government to controul the governed; and in the next place, oblige it to controul itself." *Federalist* No. 51.

Mr. Justice Rehnquist's final sentence reads: "The Court's hold in these cases has been reached, I believe, in complete disregard of that implied condition."

IV. STATE LEGISLATIVE ACTION SINCE FURMAN

Summary of State Action

1. *No death penalty prior to Furman.* (13)
   Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, New York, North Dakota, Oregon, Rhode Island, Vermont, West Virginia, Wisconsin.
2. *Death penalty abolished since Furman.*
   None.
3. *New laws since Furman.* (16)
   Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Montana, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Tennessee, Utah, Wyoming.
4. *No new laws since Furman.* (21)
   Alabama, California, Colorado, Delaware, Illinois, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, South Dakota, Texas, Virginia, Washington.

Summary of New Laws

Six of the 16 states enacting new laws have provided for mandatory death penalties. These states -- Idaho, Indiana, Nevada, New Mexico, Oklahoma, and Wyoming -- have eliminated any possibility of jury discretion in the imposition of the sanction. Four of the six states define in detail which forms of murder will be subject to the mandatory law.

The remaining 10 states have written laws which define the crimes punishable by death, provide for special sentencing procedures, and define which aggravating and mitigating circumstances would be considered.

As reported in STATE GOVERNMENT NEWS (August 1973), the new death penalty statute of Florida "was upheld by the Florida Supreme Court July 26. The 1972 law was the first passed after the U.S. Supreme Court effectively voided most previous capital punishment laws. The Florida law provides for separate trials for determination of guilt and sentencing. The judge decides whether a sentence of death or life imprisonment should be imposed."

ARIZONA -- Chapter 138, Senate Bill 1005, 1973. A *capital felony* is murder in the first degree, which is defined as a murder perpetuated by means of lying in wait, torture or by any other kind of wilful, deliberate and premeditated killing, or which is committed in avoiding or preventing lawful arrest or effecting an escape from legal custody, or in the perpetration of, or attempt to perpetrate, arson, rape in the first degree, robbery, burglary, kidnapping, or mayhem, or sexual molestation of a child under the age of thirteen years. All other kinds of murder are of the second degree. Punishment for murder in the first degree shall be death or imprisonment in the state prison for life, without possibility of parole until the completion of the service of 25 calendar years in the state prison. When a defendant is found guilty of or pleads guilty of first degree murder, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a *separate sentencing* hearing to determine the existence or nonexistence of aggravating and mitigating circumstances, and the court shall return a special verdict setting forth its findings. *Aggravating* circumstances shall be if the defendant has been convicted of another offense in the United States for which under Arizona law a sentence of life imprisonment or death was imposable; the defendant was previously convicted of a felony in the United States involving the threat of violence on another person; in the commission of the offense the defendant knowingly created a grave risk to another person or persons in addition to the victim of the offense; the defendant procured the commission of the offense by payment, or

promise of payment, of anything of pecuniary value; the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, or anything of pecuniary value; or if the defendant committed the offense in an especially heinous, cruel, or depraved manner. *Mitigating* circumstances shall be if his capacity to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of law was significantly impaired, but not so impaired as to constitute a defense to prosecution; he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution; he was a principal, in the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution; or he could not reasonably have foreseen that his conduct in the course of the commission of the offense for which he was convicted would cause, or would create a grave risk of causing, death to another person.

ARKANSAS -- Act 438, 1973. A *capital felony* is defined as the unlawful killing of a human being when committed by a person engaged in the perpetration of or in the attempt to perpetrate arson, rape, burglary, kidnapping, or mass transit piracy; any person convicted of treason as now defined by law; the unlawful killing of a policeman or any other law enforcement officer, jailer, prison guard or any other prison official, fireman, a judge or any other court official, probation officer, parole officer, military personnel, when any such person so killed is acting in the line of duty, and when such killing is perpetrated from a premeditated design to effect the death of the person killed or of any other human being; the unlawful killing of two or more human beings when perpetrated from a premeditated design in the course of the same act to effect the death of the persons killed or any other human being; the unlawful killing of any public official or any candidate for public office from a premeditated design to effect the death of the person killed or any other human being; and the unlawful killing of any person by a person who is already under sentence of death or of life in the penitentiary. If the jury finds the defendant guilty of a capital felony, the *same jury* shall sit again to determine whether the defendant shall be sentenced to death or life imprisonment without parole. The jury will render the sentence based upon whether beyond a reasonable doubt sufficient aggravating circumstances exist to justify a sentence of death or whether sufficient mitigating circumstances exist to justify a sentence of life imprisonment. If the jury determines the sentence of death a unanimous verdict is required. *Aggravating* circumstances shall be limited to the following: The capital felony was committed by a person under sentence of imprisonment; the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; the defendant in the commission of the capital felony knowingly created a great risk of death to one or more persons in addition to the victim; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; the capital felony was committed for pecuniary gain; and the capital felony was committed for the purpose of disrupting or hindering the lawful exercise of any governmental function, political function, or the enforcement of the laws. *Mitigating* circumstances shall be the following: the capital felony was committed while the defendant was under extreme mental or emotional disturbance; the capital felony was committed while the defendant was acting under unusual pressures or influences, or under the domination of another person; the capital felony was committed while the capacity of the defendant to appreciate the wrongfulness of his conduct, or to conform his conduct to the requirements of the law was impaired as a result of mental disease or defect, intoxication or drug use; the youth of the defendant at the time of the commission of the capital felony; or the capital felony was committed by another person and the defendant was an accomplice or his participation relatively minor.

CONNECTICUT -- Public Act No. 73-137. *Capital felony* is defined as murder of a member of the state police department or any local police department, a county detective, a sheriff or deputy sheriff, a constable who performs criminal law enforcement duties, a special policeman, an official of the department of corrections authorized by the commissioner of corrections to make arrests in a correctional institution or facility, or of any fireman, while such victim was acting within the scope of his duties; murder committed by a defendant who is hired to commit the same for pecuniary gain; murder by one who has previously been convicted of intentional murder or murder committed in the course of commission of a felony; murder committed by one who was, at the time of commission of the murder, under sentence of life imprisonment; murder by a kidnapper of a kidnapped person during the course of the kidnapping or before such person is able to return or be returned to safety; the illegal sale, for gain, of cocaine, heroin, or methadone to a person who dies as a direct result of the use by him of such cocaine, heroin or methadone, provided such seller was not, at the time of the sale, a drug-dependent person. When a defendant is convicted of or pleads guilty to a capital felony, the judge or jduges who presided at the trial or before whom the guilty plea was entered shall conduct a

separate hearing to determine the existence of nonexistence of aggravating or mitigating circumstances for the purpose of determining the sentence to be imposed. Such hearing shall not be held if the state stipulates that none of the aggravating factors set forth exists, or that one or more of the mitigating factors set forth exists. If the jury or, if there is no jury, the court finds that one or more of the factors set forth as aggravating exist and none of the mitigating factors exists, the court shall sentence the defendant to death. *Mitigating* circumstances are present if the defendant was under the age of 18, or his mental capacity was significantly impaired, or his ability to conform his conduct to the requirements of law was significantly impaired but not so impaired in either case as to constitute a defense to prosecution; or he was under unusual and substantial duress, although not such duress as to constitute a defense to prosecution, or he was criminally liable for the offense, which was committed by another, but his participation was relatively minor, although not so minor as to constitute a defense to prosecution, or he could not reasonably have foreseen that his conduct in the course of the commission of the offense of which he was convicted would case, or would create a grave risk of causing, death to another person. *Aggravating* circumstances are present if the defendant committed the offense during the commission or attempted commission of, or during the immediate flight from the commission or attempted commission of, a felony and he had previously been convicted of the same felony; or if the defendant committed the offense after having been convicted of two or more state offenses or two or more federal offenses or of one or more state offenses and one or more federal offenses for each of which a penalty of more than one year imprisonment may be imposed, which offenses were committed on different occasions and which involved the infliction of serious bodily injury upon another person; or the defendant committed the offense and in such commission knowingly created a grave risk of death to another person in addition to the victim of the offense; or the defendant committed the offense in a especially heinous, cruel or depraved manner; or the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value; or the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value.

FLORIDA -- Chapter 72-724 (1972). *Capital felony* is defined as the unlawful killing of a human being, when perpetrated from a premeditated design to effect the death of the person killed or any human being, or when committed by a person engaged in the perpetration of or in the attempt to perpetrate arson, rape, robbery, burglary, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb, or which resulted from the unlawful distribution of heroin by a person over the age of 17 years when such drug is proven to be the proximate cause of the death of the user. A person convicted of a capital felony shall be punished by life imprisonment and shall be required to serve no less than 25 calendar years before becoming eligible for parole unless the proceedings held to determine sentencing results in findings by the court that such person shall be punished by death, and in the latter event such person shall be punished by death. Upon conviction or adjudication of guilt of a defendant of a capital felony the court shall conduct a *separate sentencing* procedure to determine whether the defendant should be sentenced to death or life imprisonment, which shall be based on aggravating and mitigating circumstances. The judgement of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida. *Aggravating* circumstances shall be limited to the following: The capital felony was committed by a person under sentence of imprisonment; the defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; the defendant knowingly created a great risk of death to many persons; the capital felony was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb; the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody; the capital felony was committed for pecuniary gain; the capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; or the capital felony was especially heinous, atrocious or cruel. *Mitigating* circumstances shall be if the defendant had not significant history of prior criminal activity; the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance; the victim was a participant in the defendant's conduct or consented to the act; the defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor; the defendant acted under extreme duress or under the substantial domination of another person; the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; and the age of the defendant at the time of the crime.

GEORGIA -- Act No. 74, 1973. The penalty of death is prescribed for the offenses of aircraft hijacking, treason, and if at least one aggravating circumstance is present in the commission of murder, rape, armed robbery, and kidnapping. Upon a verdict of guilty a *pre-sentence hearing* considering aggravating and mitigating circumstances will be held to determine punishment. Whenever the death penalty is imposed a review to the Supreme Court of Georgia will be automatic. The Supreme Court shall determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; whether, in cases other than treason or aircraft hijacking, the evidence supports the jury's or judge's finding of a statutory aggravating circumstance; or whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant. *Aggravating* circumstances shall be present if the offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense was committed by a person who has a substantial history of serious assaultive criminal convictions; the offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree; the offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person; the offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value; the murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of his official duty; the offender caused or directed another to commit murder or committed murder as an agent or employe of another person; the offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim; the offense of murder was committed against any peace officer, corrections employe or fireman while engaged in the performance of his official duties; the offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement of himself or another.

IDAHO -- A new law effective July 1, 1973, requires *mandatory* death penalty for first degree murder defined as murder by poison, lying in wait, torture or other wilful and deliberate killings; or murder of an on-duty law enforcement officer; or if the defendant was under sentence for murder. Aircraft hijacking was made punishable by life imprisonment and boarding a federally certified airplane with a deadly weapon was deemed a felony. A passenger who refuses to be searched or screened can be refused the right to board.

INDIANA -- Senate Enrolled Act No. 9. A *mandatory* death penalty is required for whoever is convicted of killing purposely and with premeditated malice a police officer, corrections employe, or fireman acting in the line of duty; killing a human being by the unlawful and malicious detonation of an explosive; killing a human being while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary by a person who has had a prior unrelated conviction of rape, arson, robbery, or burglary; killing a human being while perpetrating or attempting to perpetrate a kidnapping; killing a human being while perpetrating or attempting to perpetrate any seizure or exercise of control, by force or violence or threat of force or violence and with wrongful intent, of an aircraft, train, bus, ship, or other commercial vehicle; or the killing of a human being purposely and with premeditated malice by a person lying in wait, by a person hired to kill, by a person who has previously been convicted of murder, or by a person serving a life sentence. The law also provides for *life imprisonment* for whoever kills a human being either purposely and with premeditated malice or while perpetrating or attempting to perpetrate rape, arson, robbery, or burglary. An indictment under the mandatory death penalty provisions may not be reduced to a lesser charge, but in all situations the jury or the judge may find the defendant guilty of second degree murder or voluntary or involuntary manslaughter, if the facts proven are insufficient to convict the defendant of the offense charged.

MONTANA -- Senate Bill 109, 1973. *Death penalty* may be imposed for deliberate homicide, which is defined as murder committed purposely or knowingly, or if it is committed while the offender is engaged in or is an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual intercourse without consent, arson, burglary, kidnapping, felonious escape or any other felony which involves the use or threat of physical force or violence against any individual. A person convicted of the offense of deliberate homicide

shall be punished by death or imprisonment for a term not to exceed 100 years. *Sentencing* procedure is by the same court and death shall be mandatory under aggravating circumstances unless there are mitigating circumstances. *Aggravating* circumstances consist of the deliberate homicide committed by a person serving a sentence of imprisonment in the state prison; or the defendant was previously convicted of another deliberate homicide; or the victim of the deliberate homicide was a peace officer killed while performing his duty; or the deliberate homicide was committed by means of torture; or by a person lying in wait or ambush; or as a part of a scheme or operation which, if completed, would result in the death of more than one person.

NEBRASKA -- A 1973 law provides death penalty for premeditated murder or death in the course of rape, arson, robbery, kidnapping, hijacking or burglary. *Sentencing* is by a judge or three-judge panel to consider specified aggravating or mitigating circumstances.

NEVADA, Chapter 798, 1973. *Mandatory* death penalty is imposed on all persons convicted of *capital murder*, which is defined as the killing of a peace officer or fireman while in an official capacity and with the knowledge that the victim was a peace officer or fireman; murder by a person under life imprisonment without possibility of parole; executing a contract to kill; use or detonation of a bomb or explosive device; and killing more than one person as the result of a common plan, scheme or design. *First degree murder* is punishable by death or imprisonment for life without parole and is defined as a murder which is perpetrated by means of poison, or lying in wait, torture, or by any other kind of wilful, deliberate and premeditated killing; a murder committed in the perpetration or attempted perpetration of rape, kidnapping, arson, robbery, burglary or sexual molestation of a child under 14 years; or committed to prevent the lawful arrest of any person by a peace officer to effect the escape of any person from legal custody.

NEW MEXICO -- Chapter 109, 1973. *First degree murder*, defined as wilful and deliberate killing by lying in wait, torture, or perpetrated during an attempt to commit a felony; by an act endangering the lives of others; and by kidnapping when the victim suffers great bodily harm, is punishable by a *mandatory* death penalty. When a person is convicted of first degree murder, the judge shall sentence the offender to death.

OHIO -- Amended House Bill No. 511, 1972. The death penalty may be prescribed for a person convicted of *aggravated murder*, which is defined as purposely causing the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated burglary or burglary, or escape. *Sentencing* to death or life imprisonment will be determined by the presence of aggravating or mitigating circumstances. When death may be imposed as a penalty for aggravated murder, the court shall require a *presentence* investigation and a *psychiatric examination* to be made, and reports submitted to the court. If the court finds that none of the mitigating circumstances listed is established by a preponderance of the evidence, it shall impose sentence of death. Otherwise it shall impose a sentence of life imprisonment. *Aggravating* circumstances are the assassination of the President of the United States or person in line of succession to the Presidency, or of the Governor or Lieutenant Governor of Ohio, or of the President-elect or Vice President-elect of the United States, or of the Governor-elect or Lieutenant Governor-elect, or of a candidate for any of the foregoing offices; if the offense was committed for hire; for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender; if the offense was committed while the offender was a prisoner in a detention facility; if the offender had previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender; if the victim was a law enforcement officer whom the offer knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer; and if the offense was committed while the offender was committing or attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary. *Mitigating* circumstances would be present if the victim induced or facilitated the murder; that it is unlikely the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; the offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity. The penalty of death is precluded if one or more of these mitigating circumstances are present.

OKLAHOMA -- Enrolled House Bill No. 1101, 1973. *Mandatory* death penalty for every person convicted of first degree murder is defined as the premeditated killing of any peace officer, prosecuting attorney, corrections employe or fireman while engaged in the performance of his official duties; when perpetrated by one committing or attempting to commit rape, kidnapping for the purpose of extortion, arson in the first degree, armed robbery or when death occurs following the sexual molestation of a child under the age of 16; when perpetrated against any witness subpoenaed to testify at any preliminary hearing, trial or grand jury proceeding against the defendant who kills or procures the killing of the witness, or when perpetrated against any human being while intending to kill a witness; when perpetrated against the President or Vice President of the United States of America, any official in line of succession to the Presidency of the United States of America, the Governor or Lieutenant Governor of this state, a judge of any appellate court or court of record of this state, or any person actively engaged in a campaign for the office of the Presidency or Vice Presidency of the United States of America; when perpetrated by any person engaged in the pirating of an aircraft, train, bus or other commercial vehicle for hire which regularly transports passengers; when perpetrated by a person who effects the death of a human being in exchange for money or any other thing of value, or by the person procuring the killing; murder by a person under a sentence of life imprisonment in the penitentiary; when perpetrated against two or more persons arising out of the same transaction or occurrence or series of events closely related in time and location; when perpetrated against a child; and intentional murder by the unlawful and malicious use of a bomb or of any similar explosive. Upon a death sentence conviction the *Court of Criminal Appeals* shall determine whether the sentence was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and the Court shall specifically determine whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

TENNESSEE -- Public Chapter 192, 1973. Death penalty may be prescribed for an individual who commits murder in the first degree, which is defined as the wilful, deliberate, malicious killing or murder of an employee of the Department of Correction having custody of the actor, a prison inmate in custody with the actor, if the victim is known to the actor to be a peace officer or fireman acting in the course of his employment, if the victim is a judge acting in the course of his judicial duties, if the victim is a popularly elected public official, or if the offense is committed for hire. If the offender hires another to commit a wilful, deliberate, malicious and premeditated killing or murder, and such hiring causes the death of the victim; if the offender commits a wilful, deliberate and malicious killing or murder during the perpetration of any arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing, or discharging of a destructive device or bomb; or if the person is the recipient of a controlled substance and dies as a result of such controlled substance. Upon conviction of guilt of murder in the first degree the court shall conduct a *separate sentencing proceeding* to determine whether the defendant shall be sentenced to death or imprisonment for life or for a period over 25 years. The court shall consider any aggravating or mitigating circumstances as defined by law, and a judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Tennessee. *Aggravating* circumstances shall be limited to the following: the murder was committed by a person under sentence of imprisonment; the defendant was previously convicted of another murder or of a felony involving the use or threat of violence; the defendant knowingly created a great risk of death to many persons; the murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting escape from custody; the murder was committed for pecuniary gain; the murder was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the laws; and the murder was especially heinous, atrocious or cruel. *Mitigating* circumstances shall be limited to the following: the defendant has no significant history of prior criminal activity; the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance; the victim was a participant in the defendant's conduct or consented to the act; the murder was committed under circumstances which the defendant believed to provide moral justification for his conduct; the defendant was an accomplice in the murder committed by another person and his participation was relatively minor; the defendant acted under extreme duress or under the substantial domination of another person; the capacity of the defendant to appreciate the criminality of his conduct to conform his conduct to the requirements of law was substantially impaired as a result of mental disease or defect or intoxication; the youth of the defendant at the time of the crime; the defendant was acting in the heat of passion; and the evidence against the defendant was entirely circumstantial.

UTAH -- House Bill No. 162, 1973. Death penalty may be prescribed for first degree murder, defined as murder by a prisoner; two murders; creation of great risk of death to others than the victim; murder committed in connection with robbery, rape, arson, burglary, kidnapping, aggravated sexual assault or forcible sodomy; to escape or prevent custody; for profit; by a person previously convicted of murder; and physical abuse or neglect of a child under 12 resulting in death. *Sentencing* is by the same jury, with unanimous verdict required to impose the penalty of death. The court shall consider aggravating and mitigating circumstances.

WYOMING -- Enrolled Act No. 50, Senate, 1973. *Mandatory* death penalty is imposed for first degree murder of any peace officer, corrections employee or fireman acting in the line of duty; a murder committed for profit or reward of any kind by a defendant after being hired by any person, or the employment or inducement of another to commit murder; intentional murder by the unlawful and malicious use or detonation of any explosive; murder committed by a person who had previously been convicted of murder in the first or second degree; murder committed by a defendant while under the sentence of life imprisonment; murder committed in the perpetration of or attempt to perpetrate rape where the defendant had previously been convicted of rape; murder committed in the perpetration of or attempt to perpetrate arson where the defendant had previously been convicted of arson; murder committed in the perpetration of or attempt to perpetrate robbery where the defendant had previously been convicted of a robbery; murder committed in the perpetration of or attempt to perpetrate a burglary where the defendant had previously been convicted of a burglary; murder of any person perpetrated in the course of a kidnapping; murder in the course of the hijacking of a commercial airplane, train, bus, boat, or other commercial vehicle; murder committed by a defendant to conceal his identity or to conceal the fact of the commission of a crime, or to suppress evidence; or murder of two or more persons in one series of related events. The judgement of conviction and sentence of death shall be subject to *automatic review* by the Supreme Court of Wyoming.

V. SOURCES

AMERICAN BAR ASSOCIATION JOURNAL, "Five-to-Four Vote Kill Capital Punishment - Almost", Vol. 58, 1972.

Antieau, Chester J., MODERN CONSTITUTIONAL LAW, Vol. I, "The Individual and the Government", 1969.

Bedau, Hugo A., THE DEATH PENALTY IN AMERICA, 1964.

Brant, Irving, THE BILL OF RIGHTS, 1965.

CONGRESSIONAL DIGEST, "Controversy Over Capital Punishment", January 1973 (365.48/C761).

Council of State Governments, STATE GOVERNMENT NEWS, May 1973 (029/St2b).

Darrow, Clarence, CRIME: ITS CAUSE AND TREATMENT, 1922.

Durant, Will, THE STORY OF CIVILIZATION, Vol. IV.

ENCYCLOPEDIA BRITANNICA, 1967 ed.
"Bill of Rights, English", Vol. 3.
"Bill of Rights, United States", Vol. 3.
"Capital Punishment", Vol. 4.
"Hammurabi", Vol. 11.
"Inquisition", Vol. 12.
"Magna Carta", Vol. 14.
"Torture", Vol. 22.

FEDERALIST PAPERS

Ferguson, John H., & McHenry, Dean E., THE AMERICAN FEDERAL GOVERNMENT, 1965.

HARVARD LAW REVIEW, "Declaring the Death Penalty Unconstitutional", 83:1773 (1970); "Cruel and Unusual Punishments", Vol. 86, 1972.

Laurence, John A., A HISTORY OF CAPITAL PUNISHMENT, 1960.

Rosen, Paul L., THE SUPREME COURT AND SOCIAL SCIENCE, 1972.

Scott, George R., THE HISTORY OF CAPITAL PUNISHMENTS, 1950.

Sumner, William G., FOLKWAYS, 1907.

United States Congress, House Committee on Judiciary Subcommittee No. 3, hearings: CAPITAL PUNISHMENT, 1972 (365.48/X2).

UNITED STATES REPORTS, Vol. 408, 238-563, Part 2.

Virginia Commission on Constitutional Government, THE RECONSTRUCTION AMENDMENT DEBATES, 1967.

Wisconsin Legislative Reference Bureau, CLIPPINGS: CAPITAL PUNISHMENT (365.48/Z).

Wolfgang, Marvin E., & Riedel, Marc, "Race, Judicial Discretion, and the Death Penalty", THE ANNALS OF THE AMERICAN ACADEMY, May 1973 (326.6/An7a).

LIST OF CASES

U.S. Supreme Court

Adamson v. California, 332 U.S. 46 (1947)
Baldwin v. Missouri, 281 U.S. 586 (1930)
Boykin v. Alabama, 395 U.S. 238 (1969)
Branch v. Texas, 408 U.S. 238 (1972); 447 S.W.2d 932 (1971)
Brown v. Board of Education of Topeka, 347 U.S. 483 (1954)
Furman v. Georgia, 408 U.S. 238 (1972); 225 GA. 253 (1971)
Griffen v. Illinois, 351 U.S. 12.
In re Kemmler, 136 U.S. 436 (1890)

Jackson v. Georgia, 408 U.S. 238 (1972); 225 Ga. 790 (1971)
Louisiana ex rel Francis v. Resweber, 329 U.S. 459 (1947)
McGautha v. California, 402 U.S. 183 (1971)
Robinson v. California, 370 U.S. 660 (1962)
Trop v. Dulles, 356 U.S. 86 (1958)
United States v. Butler, 297 U.S. 1 (1936)
Weems v. United States, 217 U.S. 349 (1910)
Wilkerson v. Utah, 99 U.S. 130 (1878)
Witherspoon v. Illinois, 391 U.S. 510.

Others
People v. Anderson, 6 Cal.3d 628.
People v. Oliver, 134 N.E.2d. 197 (1956)

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