I. FUNDAMENTAL QUESTIONS

Thinking of the Death Penalty as a Cruel and Unusual Punishment*

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INTRODUCTION

Let me begin with an evaluation that some may find surprising — even offensive: The Supreme Court, beginning with its 1976 decision in *Gregg v. Georgia*[1] and allied cases (*Jurek v. Texas*[2] and *Proffitt v. Florida*[3]), in which it upheld several capital statutes and refused to rule that the death penalty is per se a "cruel and unusual punishment," has managed to make the entire subject *uninteresting*. Beginning in the late 1950's[4] and through the next decade or so, scholarly debate[5] and appel-

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[1] 428 U.S. 153 (1976).

[2] 428 U.S. 262 (1976).

[3] 428 U.S. 242 (1976).

[4] Gottlieb, *Testing the Death Penalty*, 34 S. CAL. L. REV. 268 (1961). Modern discussion of the cruel and unusual punishment clause begins with Fellman, *Cruel and Unusual Punishments*, 19 J. POL. 34 (1957); *see also* Sutherland, *Due Process and Cruel Punishment*, 64 HARV. L. REV. 217 (1950).

[5] Bedau, *The Courts, the Constitution, and Capital Punishment*, 1968 UTAH L. REV. 201; Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773 (1970); Greenberg & Himmelstein, *Varieties of Attack on the Death Penalty*, 15 CRIME & DELINQ. 112 (1969); Rubin, *The Supreme Court, Cruel and Unusual Punishment, and the Death Penalty*, 15 CRIME & DELINQ. 121 (1969).

late court rulings[6] showed problems with the death penalty in the neglected arena defined by the eighth amendment's prohibition of "cruel and unusual punishments." The controversy reached an apex with the 1972 decision of *Furman v. Georgia*,[7] in which the Court held that the death penalty violated the eighth and fourteenth amendments. The utter disarray in the opinions of the *Furman* majority[8] and the political opposition to the Court's ruling that quickly spread across the land[9] sowed ample seeds of discontent. They reached full flower in *Gregg*, *Jurek*, and *Proffitt*. The Court's refusal to invalidate the death penalty per se was perfectly suited to the national mood of developing and sustained approval of the death penalty, whether measured by public opinion polls,[10] capital sentences meted out by criminal trial courts,[11] infrequency of commutations,[12] or actual executions.[13] As a result, the

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[6] Ralph v. Warden, 438 F.2d 786 (4th Cir. 1970); *see also* People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

[7] 408 U.S. 238 (1972).

[8] The per curiam decision merely ordered the Georgia courts to resentence the defendant to a penalty other than death, but the obvious effect was to hold that statute and all similar statutes unconstitutional. The best initial discussion of the reach of the holding in *Furman* was provided by the Chief Justice; *Furman*, 408 U.S. at 375, 396-97, 400-01, 403 (Burger, C.J., dissenting). The five Justices constituting the majority wrote separate and non-concurring opinions no two of which had quite the same structure or emphasis; for discussion see Bedau, *Is the Death Penalty "Cruel and Unusual" Punishment?*, in THE DEATH PENALTY IN AMERICA 247, 249-50 (H. Bedau 3d ed. 1982) [hereafter DEATH PENALTY] and sources cited therein; W. WHITE, LIFE IN THE BALANCE: PROCEDURAL SAFEGUARDS IN CAPITAL CASES 21-31 (1984).

[9] The matter has been discussed in detail elsewhere. *See* H. BEDAU, THE COURTS, THE CONSTITUTION, AND CAPITAL PUNISHMENT 91-93, 103-04, 111 (1977); M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT 305-16 (1973).

[10] The latest poll, by Media General-Associated Press, reports that 84% of the American public currently supports the death penalty for murder. Boston Globe, Jan. 29, 1985, at 5, cols. 1-5. A Gallup poll during January 1985 reported that 72% of Americans favor the death penalty for murder. N.Y. Times, Feb. 3, 1985, at 23, cols. 1-4. For analytic survey research, see Ellsworth & Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116 (1983); Tyler & Weber, *Support for the Death Penalty; Instrumental Response to Crime, or Symbolic Attitude?*, 17 LAW & SOC'Y REV. 21 (1982).

[11] During the 12 years between the first death sentences under the post-*Furman* capital statutes through the end of 1984, approximately 1500 persons have been sentenced to death. This estimate is based on the annual totals of persons reported received on death row by the Department of Justice. *See* Bedau, *The Laws, the Crimes, and the Executions*, in DEATH PENALTY, *supra* note 8, at 63 (Table 2-3-4).

[12] One source gives the total of death sentences commuted since January 1, 1973, as 43. NAACP LEGAL DEFENSE FUND, INC., DEATH ROW U.S.A. 1 (May 1, 1985)

jurisprudence of "cruel and unusual punishment" has noticeably languished. Not, to be sure, for want of effort by the minority of the Court itself that still favors abolition of the death penalty per se on eighth amendment grounds,[14] by scholarly commentators on the Court's opinions and decisions,[15] and by sundry other critics of the renewed national embrace of the death penalty.[16] Still, none of this criticism has breathed any life into the primary issue — our understanding of whether the death penalty as historically and currently practiced is a "cruel and unusual punishment."[17] Virtually all of the published discussion during the past two decades has been preoccupied with details of constitutional law, history, interpretation, and litigation. Here as elsewhere, it may be necessary to leave the confines of that debate in order to invigorate the discussion.

An oddity exists in the state of serious thinking and writing on cruel and unusual punishment that directly affects our task. The prohibition

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(unpublished compilation).

[13] Executions since *Furman* through the end of 1984 total 32. N.Y. Times, Jan. 13, 1985, at E4.

[14] See in particular the opinions of Justices Brennan and Marshall, beginning with their separate concurring opinions in *Furman*, 408 U.S. at 257-306, 314-74, respectively. See also their separate dissenting opinions in *Gregg*, 428 U.S. at 227-31, 231-41, respectively. Justices Brennan and Marshall are the only members of the Court who, beginning with *Furman*, have always held that the death penalty is per se a "cruel and unusual punishment."

[15] *See, e.g.*, Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishment Clause*, 126 U. PA. L. REV. 989 (1978).

[16] *See, e.g.*, Amsterdam, *Capital Punishment*, in DEATH PENALTY, *supra* note 8, at 346; Black, *Death Sentences and Our Criminal Justice System*, in DEATH PENALTY, *supra* note 8, at 359; Schwarzschild, *In Opposition to Death Penalty Legislation*, in DEATH PENALTY, *supra* note 8, at 364.

[17] Even a recent book-length attack on the Supreme Court's reasoning in *Furman* and subsequent death penalty cases may not aid our understanding of the broader issues. R. BERGER, DEATH PENALTIES: THE SUPREME COURT'S OBSTACLE COURSE (1982). Several commentators have criticized Berger's analysis. *See* Bedau, *Berger's Defense of the Death Penalty: How Not to Read the Constitution*, 81 MICH. L. REV. 1152 (1983); Gillers, *Berger Redux*, 92 YALE L.J. 731 (1983); Radin, Book Review, 74 J. CRIM. L. & CRIMINOLOGY 1115 (1983); Richards, *Constitutional Interpretation, History, and the Death Penalty: A Book Review*, 71 CALIF. L. REV. 1372 (1983). Berger's arguments will not deepen our grasp of the basic issue because, as his reviewers make abundantly clear, he is fundamentally uninterested in all the substantive issues concerning the death penalty as well as the theoretical issues concerning cruel and unusual punishment. He is solely preoccupied with the authority and scope of federal judical review.

against "cruel and unusual punishments"[18] is the only severity-limiting constitutional constraint on otherwise permissible punishments. Accordingly, this provision has figured prominently in the Supreme Court's evaluation of the constitutional status of criminal penalties generally[19] and, especially since 1972, of the death penalty. Philosophers, however, have said virtually nothing directly about the cruelty and unusualness of punishments, and their theories of punishment allot no explicit role to it.[20] When the eighth amendment became part of the Constitution, the prohibition against "cruel and unusual punishments" was already more than a century old,[21] and so has figured in the Anglo-American constitutional tradition for at least three centuries. During this time English-speaking philosophers had much to say about punishment, its justification, function, and limits. John Locke himself seems to have set a pattern followed unwittingly by all his successors. In the late 1680's, at the very time when the prohibition against "cruel and unusual punishments" became part of the English Bill of Rights,[22] Locke was putting the finishing touches on his *Two Treatises of Government*.[23] There he took the virtually unprecedented and extraordinary step of *defining* the concept of political power as "a right of making laws with penalties of death."[24] The idea that some forms of administering this penalty

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[18] The phrase has various formulations, including "cruel or unusual punishments," CAL. CONST. art. I, § 6; MASS. DECLARATION OF RIGHTS AND LIBERTIES art. 26; and "cruel, inhuman, or degrading punishments," U.N. DECLARATION OF HUMAN RIGHTS art. 5; U.N. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS art. 7.

[19] *See* L. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT (1975); Wheeler, *Toward a Theory of Limited Punishment: An Examination of the Eighth Amendment*, 24 STAN. L. REV. 838 (1972).

[20] *But see* B. LEISER, LIBERTY, JUSTICE, AND MORALS 236-58 (1979); J. MURPHY, RETRIBUTION, JUSTICE AND THERAPY 223-49 (1979); J. MURPHY & J. COLEMAN, THE PHILOSOPHY OF LAW 138-57 (1984); Gerstein, *Capital Punishment — "Cruel and Unusual"?: A Retributivist Response*, 85 ETHICS 75 (1974); Long, *Capital Punishment — 'Cruel and Unusual'?*, 83 ETHICS 214 (1973).

[21] *See* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

[22] The Bill of Rights was enacted in December 1689. SOURCES OF OUR LIBERTIES 222-50 (R. Perry & J. Cooper eds. 1959). For discussion of the history surrounding its enactment, see R. BERGER, *supra* note 17, at 36-39; Granucci, *supra* note 21, at 852-60.

[23] J. LOCKE, TWO TREATISES OF GOVERNMENT (P. Laslett 2d ed. 1963). Laslett argues that Locke wrote most of the *Second Treatise* in 1679-80. *Id.* at 65. Both treatises were published as one volume in 1689, *id.* at 121, although the publication date of the first printing is listed as 1690, *id.* at 3.

[24] *Id.* at 286.

might be morally or constitutionally unacceptable in his own society, or under his own theory of political authority, because they are "cruel and unusual," and that the death penalty itself might be so judged, never remotely figures in any of his discussions in the *Two Treatises*. As with Locke, so with his British successors from David Hume to John Stuart Mill, and with his spiritual heirs in this country from Jonathan Edwards to John Rawls. All these philosophers have left the concept of cruel and unusual punishment entirely out of their published reflections on punishment.[25] Remedying this neglect is not difficult, but whether doing so will prove useful remains to be seen.[26]

I. Two Truisms

We may begin with a pair of generalizations commended to us by common sense and sustained by critical reflection: Not all punishments can be reasonably judged to be cruel and unusual, and not only punishments can be so described.

Not everything that hurts, nor even everything that one person deliberately does to another in order to cause hurt, is a punishment. Punishment is an institution, an act within a certain context of norms and understandings, a practice.[27] Some religious rites and initiation ceremo-

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[25] The general subject of punishment has never received much attention from Anglo-American philosophers. For example, no adequate history of the philosophy of punishment among English-speaking thinkers exists. *But see* J. Heath, Eighteenth Century Penal Theory (1966); M. Ignatieff, A Just Measure of Pain: The Penitentiary in the Industrial Revolution, 1750-1850 (1978); L. Radzinowicz, A History of English Criminal Law and Its Administration from 1750 (1948). For representative discussions during the past century or so, see H. Acton, The Philosophy of Punishment: A Collection of Papers (1969) and G. Ezorsky, Philosophical Perspectives on Punishment (1972).

[26] As the discussion shows, and as will become more evident in what follows, it is necessary to realize that the phrase "cruel and unusual punishments" is more than a term of art within the Anglo-American constitutional tradition. It is also a phrase of ordinary English and fully intelligible as such to any English speaker whether or not familiar with constitutional usage. The problem is that the meaning, usage, and reference of the phrase are not always identical as the context shifts from the ordinary to the constitutional. Accordingly, some of the comments and arguments to be made in this Article bear on cruel and unusual punishments only when the phrase is understood in one and not the other of these two ways. In order to reduce ambiguity, the phrase is hereafter placed inside double quotes ("cruel and unusual punishments") or referred to as "the Clause" always and only when it is used as a term of constitutional art. When used otherwise or when the use is deliberately ambiguous it appears without such marks. In order to mention the phrase or any of its component terms in their ordinary sense the term is placed in single quotes ('cruel and unusual punishments').

[27] For the conception of punishment as an institution or practice, see Rawls, *Two*

nies, some methods of warfare and techniques of medical treatment, even some insults and jokes, as well as some nonpunitive conduct toward animals and children, are cruel and unusual in any ordinary sense of those words. To be sure, the very things done as, say, a method of warfare or as a religious initiation, could also be done as punishment, even by the same persons to the same persons; and if they were cruel and unusual in the first context they might well be so judged in the second. But this is not to say, nor would it show, that such a method of warfare is, or is to be regarded as, a cruel and unusual punishment. Whatever else one may wish to say about warfare or religion, neither can be said to be the same institution or practice as punishment. However closely tied together the history and nature of punishment may be with the history of cruel practices generally,[28] the two must be distinguished and kept distinct. We cannot look to punishments indiscriminately for examples of acts or practices that are cruel and unusual, and we cannot be sure that in seizing on acts or practices that are cruel and unusual we will always find punishment.

Punishments can be, and often are, lenient; for example, when a first offender is given six months probation. Punishments also can be proportionately very mild; for example, when one is fined five dollars for double parking on a busy thoroughfare during the rush hour. Punishments can even be constructive; for example, when a juvenile offender is sentenced to spend four eight-hour days on weekends picking up trash along local highways. These punishments are not cruel and unusual in any plausible sense of the phrase.[29] We might, it is true, imagine circumstances in which, given the offense, the offender, or some other relevant factor, such punishments could be unjustified, impermissible, excessive, or not properly imposed or deserved. However, the punishment would not necessarily be unjustified, impermissible, excessive, or improper *because* it is cruel and unusual. Those who would

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Concepts of Rules, 64 PHIL. REV. 3 (1955). Over the past generation, the standard definition of punishment has been the one provided by H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 4-6 (1967). It could be objected that Hart's definition imperfectly reflects the idea that punishment, especially legal punishment, is an institutional practice first and foremost.

[28] The history of punishment is so closely related to the history of cruel practices generally that some scholars regard the former as virtually a special case of the latter. *See, e.g.*, M. FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 1-69 (1977).

[29] There is no standard contemporary philosophical account of cruelty. *But see* Shklar, *Putting Cruelty First*, in ORDINARY VICES 7 (1984), and P. HALLIE, CRUELTY (1982) (published originally as P. HALLIE, THE PARADOX OF CRUELTY (1969)).

condemn all punishments, no matter what the offense or the offender, go too far when they try to bolster their position by condemning punishment itself as a "crime."[30] They would certainly go even further astray were they to argue that all punishment is morally wrong because it is, by its very nature, cruel. It is possible that every punishment actually imposed under law at the present time in our society is unjustified, a judgment I would not make; it may also be that in most cases the severe punishments imposed on persons do them and the rest of society more harm than good, a position I am inclined to defend. But if either of these generalizations is true, it is not because the punishment itself is always and without exception cruel and unusual. The particular kind of condemnation of a punishment that is expressed by calling it 'cruel and unusual' is simply inappropriate as the condemnation for *all* punishments without qualification and without any reference to their severity, effects, or rationale.

The reason for stressing this point at the outset, even at the risk of belaboring the obvious, is to show the reasonableness of looking for evidence concerning what 'cruelty' means to acts and practices having nothing intrinsically to do with punishment at all. Also, it is wrong to assume that *any* punishment is likely to prove to be cruel, provided only that one scratches a bit below the surface.

Some modes of punishment do not seem promising candidates for the epithets of cruelty and unusualness. Fines are an example. We can easily imagine excessive fines: $10,000 for overparking, or $50,000 for falsifying a federal income tax return for concealment of any amount of taxable income over five dollars. Consider, however, a crushingly burdensome fine, imposed on someone neither rich nor capable of large earnings, so that paying it off takes a lifetime's labor. Would it not be arguable that such a fine is cruel? Or suppose a judge sentenced a juvenile to five years of collecting rubbish on the weekends along roadsides. Under some circumstances this might be excessive. Suppose, however, the punishment were twenty years on a treadmill for eight hours each day — stupefyingly exhausting drudgery seemingly without end. One may still want to reply, nonetheless, that paying money or doing menial labor are not, even when carried to unfair, unusual, or senseless excess, properly judged to be cruel.[31] Is this because they lack certain qualities *required* of cruelty in punishment that are found only in torture or other physically painful acts? Or is it, instead, because they lack fea-

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[30] K. MENNINGER, THE CRIME OF PUNISHMENT (1968).

[31] In the text, I imply no answer to the question whether the Supreme Court would or should judge such penalties to be "cruel and unusual punishments."

tures merely *typical* of the paradigms of cruel and unusual punishment?[32] Perhaps, on sober consideration, a crushingly burdensome fine or years of labor on a treadmill really are cruel, and thus prove that even punitive fines and menial tasks can embody the excessive severity that is the hallmark of cruel and unusual punishments.

II. Two Properties or One?

Grammatically, the phrase 'cruel and unusual punishment' resembles "cruel and unusual ritual" or "cruel and unusual insult." The compound adjective appears to suggest something (a punishment, ritual, or insult) that simultaneously has two properties: cruelty *and* unusualness. Such properties ought to be able to vary independently of each other, each having its own implicit standards, evidence, and methods of verification. There seems no reason to doubt that 'cruel and unusual punishment' can be and sometimes is used in precisely this way; if the phrase has any ordinary or untechnical meaning, this is probably an aspect of it. However, the Supreme Court apparently does not interpret the eighth amendment use of "cruel and unusual" in this manner.[33] For the Court, "and" in "cruel and unusual punishment" is not regarded as a true conjunction.[34] The Court also does not seem to interpret "cruel and unusual" as though it were equivalent to the adverbial phrase "unusually cruel."[35] If that were the preferred reading, it might appear that there are other, tolerably cruel, or cruel but not *too* cruel, punishments. But because judging a punishment to be cruel is already so much of a condemnation, the idea of a "tolerably cruel punishment" verges on an oxymoron. The converse possibility, that "cruel and unusual" means "cruelly unusual," can also be rejected. There is no evidence the Court ever considered such an interpretation; it would in any case place too much emphasis on the moral justifiability of punitive practices for no other reason than their familiarity or usualness.[36] Instead, the Court seems to write as if this phrase were a ligature, to be

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[32] *See infra* text accompanying notes 58-66.

[33] I have discussed this issue elsewhere; see H. Bedau, *supra* note 9, at 37.

[34] The point has been discussed often and by many courts. *See, e.g.*, Commonwealth v. O'Neal, 369 Mass. 242, 293-94, 339 N.E.2d 676, 696 (1975) (Wilkins, J., concurring).

[35] It is true that the phrases "excessively cruel" and "unnecessary cruelty" do appear in opinions from the Supreme Court, e.g., *Furman*, 408 U.S. at 391-93 (Burger, C.J., dissenting). It is not clear how such language avoids the criticism against it levied in the text.

[36] *Cf. id.* at 378-79 (Burger, C.J., dissenting).

written "cruel-and-unusual-punishments," designating a complex of intertwined and inseparable properties, rather than two separate sets of properties, one correlated with "cruel" and the other with "unusual." Philosophical analysis and moral argument can, of course, side with common speech and surface grammar, and against the Supreme Court's preferred usage, here as elsewhere. But because the phrase has no standard use in philosophical discourse and because of its importance in our constitutional tradition, there is no important reason for quarreling with the Court's usage.[37]

Were we to try to isolate the unusualness of a punishment from its cruelty, we would focus on a property of punishments that has little or nothing to do with moral condemnation. No moral theory (short of the crudest traditionalism) would hold that a mode of punishment, *ceteris paribus*, is morally or legally unjustified merely because it is unusual. Novelty, lack of precedent, deviation from prevailing historic or current practice — none of these marks a property that is morally objectionable in a punishment. They do, however, signal caution to any legislators, administrators, special interest groups, or lobbyists who favor departures from the usual punitive practices. Nevertheless, a morally sensitive and imaginative society needs to consider seriously *any* novel mode of punishment that might be a humane improvement on such well-known methods of punishment as imprisonment,[38] through which hundreds of thousands are deprived daily of their liberty, security, and property.[39] Finally, a mode of punishment may be unusual today even though it was common enough in an earlier, less civilized age. In such cases, describing the punishment as 'unusual' may well imply not only that it is no longer widely used, but that it is now intolerable to use it. What makes it morally unjustifiable now, however, is not the mere fact

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[37] There is no reason here to discuss whether a given punishment might be objectionable because it is cruel even though it is not unusual, or objectionable because it is unusual even though not cruel; similarly, such questions as whether a given punishment is more (or less) cruel than it is unusual, becoming unusual more rapidly than it is ceasing to be cruel, etc., can be ignored here.

[38] Thus, the most charitable view to take of the recent proposal to adopt corporal punishment in the form of electric shock as the legal punishment for offenders guilty of crimes against the person and against property is that it is offered in this spirit. G. NEWMAN, JUST AND PAINFUL: A CASE FOR THE CORPORAL PUNISHMENT OF CRIMINALS 90-94 (1983).

[39] During 1983, over 400,000 persons were serving time in state and federal prisons. U.S. DEP'T JUSTICE, BUREAU OF JUSTICE STATISTICS BULLETIN, PRISONS AT MIDYEAR 1983, at 1 (1983). For accounts of life under confinement in a typical American prison, see G. HAWKINS, THE PRISON: POLICY AND PRACTICE (1976); J. MITFORD, KIND AND USUAL PUNISHMENT: THE PRISON BUSINESS (1973).

that it is an anachronism.

Another way to read the term 'unusual' does make it relevant to moral judgment. Suppose that although two punishments, P_1 and P_2, are traditionally available under law to the sentencer for a given offense, sentencers usually, although not invariably, choose to impose the less severe of the two, P_1. They reserve P_2 for special occasions. However, close scrutiny shows that the use of P_2 on these special occasions does not further any rational objective relevant to the purposes of a system of punishment under law. These uses are prompted, instead, by nothing other than the sentencer's hostile attitude (anger, fear, contempt, disgust) toward the offender. The offenders on whom the sentencer imposes P_2 do not actually *deserve* the more severe punishment. Rather, the sentencer simply *wants* to punish them more severely than would be achieved by imposing P_1. Given such circumstances, an offender sentenced to undergo P_2 might well claim that such a severe punishment was morally objectionable and unfair because it is so unusual: It is not the usual punishment meted out for crimes like hers; or, if — on the contrary — it *is* the usual punishment, this is because sentencers habitually rely on the unfair, objectionable, and irrelevant fact of the sentencer's own dislike for certain kinds of offenders.[40]

This reading of 'unusual' renders it nearly independent of any reference to cruelty. In the foregoing example, P_2 need not be cruel or cruelly excessive relative to the crime for which it is imposed. P_2 need be only both more severe than P_1, and arbitrarily, irrationally, or randomly meted out instead of P_1. Such a reading of 'unusual' helps restore balance and symmetry in the sense of the phrase 'cruel and unusual punishment' by taking some of the stress off of the idea of cruelty.

In the context of the Constitution, this reading of "unusual" seems to coincide with at least part of what is prohibited by the equal protection clause of the fourteenth amendment. Any punishment that is objectionably *unusual* in the manner indicated above is probably also objectionably *unequal*, and thus violates the requirement of "equal protection of the laws."[41] Each of the five Justices in the *Furman* majority wrote an opinion in which he made precisely this connection between the unusual quality of the death penalty and the unequal manner of its ad-

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[40] This is essentially the argument that Justice Douglas used in his concurring opinion in *Furman*, 408 U.S. at 242-45, 249.

[41] "[N]or shall any State . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. xiv, § 1.

ministration under law.[42] In a parallel maneuver, the dissenting Justices in *Furman* avoided, or played down, this reading of "unusual" in the eighth amendment in favor of a reading that allowed them to stress the traditional, familiar, not unusual character of the death penalty.[43]

The remarks above are not offered as an argument in favor of one rather than another way of reading the term "unusual" in the eighth amendment. Rather, their purpose has been to show that there is a possible, even natural, interpretation of this term that gives it some weight in a moral judgment, which cannot be done if 'unusual' is taken to mean merely atypical or novel or no longer practiced.

III. Morally Unjustified Punishments

As noted earlier,[44] the concept of cruel and unusual punishment has played no special role in theories of punishment or in the discussions of punishment by philosophers in the Anglo-American tradition. Only constitutional courts, scholars, and commentators, and the social critics and moralists on their fringes, have challenged punishments by evaluating them as cruel and unusual. Yet from the time of Socrates,[45] philosophers have discussed the conditions under which punishment is morally justified. So it is natural to merge these lines of unconnected investigation and inquire directly how morally unjustified punishments are related to cruel and unusual punishments.

By hypothesis, at one extreme there is the possibility that these two concepts are completely independent of each other; at the other extreme, there is the possibility that the two are identical notwithstanding their apparent linguistic diversity. The first possibility is preposterous. To take it seriously would be like concluding that although someone's conduct is an act of murder, it is still entirely an open question whether the killing is morally objectionable. This is bizarre or unintelligible because "murder" usually is defined as "inexcusable and unjustified criminal homicide" or as "wilful, deliberate and malicious killing of

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[42] 408 U.S. at 249-55 (Douglas, J., concurring); *id.* at 274-77, 291-306 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313-14 (White, J., concurring); *id.* at 363-66 (Marshall, J., concurring).

[43] *Id.* at 378-79 (Burger, C.J., dissenting and joined by Blackmun, Powell, Rehnquist, JJ.).

[44] *See supra* text accompanying notes 19-25.

[45] *See* G. Santas, Socrates: Philosophy in Plato's Early Dialogues 240-42, 251, 242-94 (1979); M. Mackenzie, Plato on Punishment 204-06 (1981). Neither author makes any effort to disentangle Socratic views on punishment from those more properly attributed to Plato.

another." Under such definitions, there is no room to doubt whether an act, having been judged to be murder, is therewith under a severe cloud of moral disapproval.[46]

The other extreme possibility is more plausible. Taken strictly, there are at least two different ways to conceive of the identity of morally unjustified punishments and of punishments that are cruel and unusual. One is to regard the *class* of cruel and unusual punishments as identical with the class of morally unjustified punishments. The other is to hold not only that the two classes are identical, but that the *concepts* of a cruel and unusual punishment and of a morally unjustified punishment are also identical. Each alternative is, of course, incompatible with a third possibility, that there is only some overlap between the two concepts and their coordinate classes.[47]

The argument against identity goes as follows. Assume for the sake of discussion any system of punishment you please so long as it is not uniformly draconian. Under this system there are certain to be lenient or mild punishments in certain cases. The doctrine will also have to decree the appropriate standards of punishment for especially grave offenses, and for unrepentant, recidivist, or dangerous offenders. Suppose that a sentencer in this system imposed a mild punishment on a person convicted of an extremely grave offense. Advocates of the penal system in question would probably conclude (as we would) that this punishment in a case of this sort was too lenient, and for that reason morally unjustified. The objection in this case would not be that such a punishment was cruel and unusual, excessive, too severe, or unduly harsh. But our pre-analytic grasp of the idea of a cruel and unusual punishment assures us that this is the only sort of complaint that can be made about a punishment that is judged to be cruel and unusual: It must be excessive, or too severe, or unreasonably harsh. Thus, we have in this example a punishment that is morally unjustified because it mocks the demand for justice and justification in punishment, quite apart from whether the punishment is cruel, unusual, or excessive. It follows from this that the two classes of punishments — those that are cruel and

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[46] On the extent to which the usual concept of murder has built into it the idea of moral unjustifiability and inexcusability, see G. ANSCOMBE, *The Two Kinds of Error in Action*, in 1 THE COLLECTED PHILOSOPHICAL PAPERS OF G.E.M. ANSCOMBE 3 (1981), and J. FEINBERG, *On Being 'Morally Speaking a Murderer'*, in DOING AND DESERVING 38 (1970).

[47] This third possibility leaves open for further discussion whether the overlap is partial — because some morally unjustified punishments are cruel and unusual, but others are not — or whether it is complete, because one of the two classes is a subclass of the other.

unusual, and those that are morally unjustified — are not coextensive. But if the two *classes* are not coextensive, then the two *concepts* cannot be identical, since coextensiveness of the classes is a necessary (although not sufficient) condition for identity of the coordinate concepts.[48]

In this context, it is appropriate to notice that an appeal to the eighth amendment prohibition of "cruel and unusual punishments" is not the only way to mount an argument against a punishment that is morally and constitutionally objectionable. Suppose that an American state legislature in the 1890's had enacted a penal statute for the crime of aggravated rape of a female by a male, and that the statute provided a mandatory death penalty if the convicted offender was nonwhite and the victim white, but a discretionary death penalty in all other cases. The Supreme Court unquestionably would have condemned this statute long before its 1972 ruling in *Furman*.[49] Rather than rely upon the eighth amendment prohibition against "cruel and unusual punishments," the Court could have applied the equal protection clause of the fourteenth amendment.[50] Such a statute would not be morally unjustified merely because the eighth amendment did not condemn it. We have what amounts to a moral condemnation of the punishment (or of the procedure whereby it is meted out), because we assume that whatever the Bill of Rights prohibits is *ceteris paribus* morally unjusti-

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[48] For a standard account of the logic of classes and concepts, see 1 A. CHURCH, INTRODUCTION TO MATHEMATICAL LOGIC 3-9, 23-31 (1956).

[49] *Furman*, 408 U.S. at 238.

[50] Writing a generation ago, the leading constitutional commentator, E.S. Corwin, observed: "What this clause appears to require today is that . . . there shall be *no* distinction made on the sole basis of race or alienage as to certain rights." E. CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY 268 (12th ed. 1958) (emphasis in original). While the example in the text is useful, it is also improbable because no state legislature since the Civil War would have been so foolish as to enact a statute with such transparent racial bias. A more interesting and relevant question, however, is whether discretionary death penalties were enacted to supersede mandatory death penalties in the aftermath of the Civil War in erstwhile Confederate States in order to permit all-white courts to practice racial discrimination in capital sentencing, or whether existing racial bias merely exploited sentencing discretion in capital cases that had been introduced on other grounds. I have speculated on this issue before; Bedau, *supra* note 17, at 1157. No historical research, to my knowledge, has yet addressed this issue. The major equal protection attack on the death penalty for rape antedated the ruling in *Furman* by several years. Maxwell v. Bishop, 398 F.2d 138 (8th Cir. 1968), *remanded and vacated on other grounds*, 398 U.S. 262 (1970). In *Maxwell*, the issue was not the intention of the Arkansas Legislature or of the trial court to discriminate on grounds of race, but the functional equivalent thereof in outcome. The statute punishing rape with death or life at the unfettered discretion of the trial court was not, of course, racially biased on its face.

fied, whether or not the activity directly violates the eighth amendment prohibition of "cruel and unusual punishments." The point, of course, is not that moral condemnation of a punishment obtains its force from the provisions of a constitution. For a constitution may be fundamentally unjust. It is, rather, that certain provisions of our Constitution, quite apart from the eighth amendment, have a moral weight which allows us to condemn otherwise lawful practices inconsistent with them.

The argument so far comes to this: Morally unjustified punishments are not the same as cruel and unusual punishments. However, cruel and unusual punishments are punishments that are morally unjustified because they are excessively severe. In other words, it appears that cruel and unusual punishments are a proper subclass of morally unjustified punishments. Alas, things are not quite so neat.

IV. Are Punitive Cruelties Ever Justifiable?

To be sure that cruel and unusual punishments are a subclass of morally unjustified punishments, we must exclude the remaining possibility — that the two classes partially overlap. So let us examine the unsettling possibility that some cruel and unusual punishments are morally justified.

Consider first the most extreme position. Could it make sense to assert that under certain circumstances a given punishment for a given offender is morally justified just because it is cruel and unusual? Of course, no Anglo-American appellate court would say this because it would obviously flout the constitutional prohibition against "cruel and unusual punishments." But an ordinary English speaker might think a horrifying punishment justifiable when an offender commits a particularly horrible crime. Any such punishment might well be described as cruel and unusual — unusual, in the sense of rare or even hitherto unheard of, and cruel, in the sense of inflicting exquisite agonies on the offender. For example, some might conclude that the only morally justified punishments for the Adolph Eichmanns, Josef Mengeles, and Klaus Barbies of the world would be some especially cruel and unusual punishment.[51] The issue is not whether such a position is persuasive. The point is only that it could make sense to formulate a position in

[51] For comments in this vein, prompted by the arrest and extradition of Klaus Barbie from the United States to France, see N.Y. Times, Feb. 8, 1983, at A8, col. 3 ("The crimes of this man are such that there is no penalty equal to them."). One might assert that the punishments actually meted out to these horrible criminals were pallid and meager (for Eichmann, it was death by hanging). H. Arendt, Eichmann in Jerusalem 248-52 (1964).

support of a punishment that is judged to be both cruel and unusual and nevertheless morally justifiable. In some cases, given the nature and quality of the criminal act, it certainly does make sense to insist that the offender deserves a cruel and unusual punishment.

There is, nevertheless, something troubling and slightly perverse in this reasoning. It is as though one were to say: "Since this crime is particularly heinous, society may impose what would ordinarily and quite properly be regarded as a morally unjustified punishment. The kind of punishment suitable on this occasion is precisely the kind normally regarded as cruel and unusual and for that reason forsworn." Insofar as this makes sense to us, it shows that the usual morally condemnatory use of the phrase 'cruel and unusual punishment' need not invariably be the use to which the phrase is put.

The careers of some of the most notoriously cruel tyrants in history shed further light on this theme. Attila the Hun, Vlad the Impaler, and Ivan the Terrible are all reputed to have been responsible for some remarkably severe and ingenious punishments, not to mention other crimes and horrors they authorized to be inflicted on the innocent. It may be worthwhile to try for a moment to stand in their shoes and consider their punitive acts and policies as they might have viewed them. Suppose they were imbued with the same sensibilities as other political leaders, but faced (or believed they faced) agonizing choices that most political leaders are spared. Perhaps these tyrants believed they could resolve these choices only, as Machiavelli coolly advised, by learning to be cruel.[52] Perhaps the judgment of history vindicates them, by showing that they suffered no squeamishness, which would have been the undoing of lesser leaders, and that they thereby averted much greater calamities than those they caused.

Whether or not such an interpretation is historically correct, it needs to be taken seriously. It suggests that a punishment may be cruel and unusual without also being morally unjustified. If this is possible, then there is no more than a partial overlap between cruel and unusual punishments and morally unjustified punishments. The earlier and initially more plausible hypothesis, that the former class is a subclass of the latter, turns out to be false.

This conclusion has an impact on the paradigms of cruel and unusual punishment to be discussed below.[53] The moral status of punishments is not free of social context, a priori justified or not by their very nature in all times and climes, independent of their socio-historical mi-

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[52] N. MACHIAVELLI, THE PRINCE 96, 101, 105 (J.P. Baricelli ed. 1975).

[53] *See infra* text accompanying notes 58-66.

lieu. Even if we assume that human nature and the human body have not changed over the course of recorded civilization, and believe, for example, that death by stoning in 1500 B.C. was no less painful than such a death would be today, we must grant that the place of cruelty, terror, and violent death in our society is not the same as it was in societies centuries ago. Even if a painful death is what it always was, cruelty in human life is not. Cruelty, and hence any cruel and unusual punishment, and the excessiveness (by whatever standard and in whatever manner) it implies take their moral discoloration from a context that is not fixed for all time. The concept of cruelty is social, moral, and cultural, rather than physiological, organic, or in some other manner essentially unhistorical. The moral condemnation that cruel and unusual punishments deserve depends on tacit reference to standards that are subject to revision because they are influenced and shaped by changing socio-historical and cultural factors.[54]

One way to express this is to say that our conception of cruel and unusual punishment is not static, rigidly fixed over time, and so the moral status of the class of acts and practices to which the term applies also changes, even if the concept of cruel and unusual punishment is relatively fixed.[55] The Supreme Court's own views may be understood in this manner. In a 1910 opinion, the Court observed that "cruel and unusual punishment . . . is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by humane justice."[56] Four decades later, the Court advised that the cruel and unusual punishments Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[57] Thus, as history will attest, some awful punishments may have been justifiable because they were (or were reasonably believed to be) the best thing to do in the circumstances. To concede this is not to imply

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[54] "Cruelty itself is a social phenomenon which can be understood only in terms of the social relationships prevailing in any given period." G. RUSCHE & O. KIRCHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 23 (1939); *see* P. HALLIE, *supra* note 29; *see also* E. FROMM, THE ANATOMY OF HUMAN DESTRUCTIVENESS 129-81, 218-68 (1973); S. JACOBY, WILD JUSTICE: THE EVOLUTION OF REVENGE (1983); B. MOORE, JR., REFLECTIONS ON THE CAUSES OF HUMAN MISERY AND UPON CERTAIN PROPOSALS TO ELIMINATE THEM 1-77 (1972).

[55] For the distinction between a conception and a concept, see J. RAWLS, A THEORY OF JUSTICE 5, 10 (1971) and R. DWORKIN, TAKING RIGHTS SERIOUSLY 128, 134-36, 147, 226 (1977). The distinction has already been employed in the controversy over determining the "original intention of the Framers" of the "cruel and unusual punishments" clause. Radin, *supra* note 17, at 1118.

[56] Weems v. United States, 217 U.S. 349, 378 (1910).

[57] Trop v. Dulles, 356 U.S. 86, 101 (1958).

that it would be morally justifiable or constitutionally permissible for a legislature to do such things today. It is to imply, rather, that the assignment of a given punishment to the class of cruel and unusual punishments is sensitive because the class is inescapably defined by reference to standards of fair, just, and justified punishment that are not fixed and rigid across culture and history.

V. Paradigms and Meaning

Some punishments seem clearly and incontestably cruel and unusual. Boiling in oil, death by a thousand cuts, impalement, and burying alive are all acts that have been authorized by governments in the past as punishment.[58] Unquestionably, it would be cruel and unusual to impose any of them in our society today, no matter who the offender or what the crime.[59] The Supreme Court's favorite examples of "cruel and unusual punishments" (torture, disembowelment, beheading, and dissection)[60] reflect an awareness of history and invite the inference that these modes of punishment have served and continue to serve the Court as its paradigms of "cruel and unusual punishments," just as they do for the rest of us.

Such paradigms (or, more cautiously, the possibility that there are such paradigms) prompt several questions. What do they tell us about the meaning of the phrase "cruel and unusual punishments"? Do they explain the Clause's reference, the class of things each member of which can be said to be a cruel and unusual punishment? Do they provide the basis for how the term is or should be correctly used?[61]

First of all, let us be clear about what a paradigm case is in gen-

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[58] *See* J. Laurence, A History of Capital Punishment (1932); G. Scott, The History of Capital Punishment (1950); P. Spierenburg, The Spectacle of Suffering: Executions and the Evolution of Repression from a Pre-industrial Metropolis to the European Experience (1984); P. Walker, Punishment: An Illustrated History (1972).

[59] Other examples from European and American history of a few centuries ago — crucifixion of rebellious slaves, burning of witches, disembowelment of traitors — also come readily to mind. *See* sources cited *supra* note 54.

[60] *See* Weems v. United States, 217 U.S. 349, 368 (1910); O'Neil v. Vermont, 144 U.S. 323, 339 (1892) (Field, J., dissenting); *In re* Kemmler, 136 U.S. 436, 446 (1890) (burning at the stake, crucifixion, breaking on the wheel); Wilkerson v. Utah, 99 U.S. 130, 136 (1878).

[61] For an introductory account of the relations among the meaning, reference, and use of words in a natural language, see W. Alston, Philosophy of Language (1964); A. Lehrer & K. Lehrer, Theory of Meaning (1970).

eral.[62] A paradigm of a term or phrase is an example of the reference of that term or phrase. Moreover, it is an instance of the reference to which anyone who understands the term or phrase would unhesitatingly assent. Hence, a paradigm is suitable for citation as a case of the thing under discussion and serves as a benchmark to which contested cases can be compared and contrasted. Specification of one or more paradigm cases is also useful as a way of focusing attention and fixing ideas, so that analysis and argument can proceed from an agreed baseline presumably neutral to the borderline cases over which controversy arises. Insofar as the meaning of a phrase involves certain standards or principles (as the meaning of "cruel and unusual punishments" does), a paradigm case of the reference of such a phrase would manifest those standards in a particularly conspicuous and uncontroversial manner.

A paradigm case of cruel and unusual punishment, therefore, would be an example that would force anyone who understands the term to acknowledge it without reflection as a punitive act or practice to which that term applies. The typical borderline case of cruel and unusual punishment has some, even many, but not all of the traits that a paradigm case has. Consequently, it is possible to discover the meaning of the phrase "cruel and unusual punishments" by a careful scrutiny of the paradigm cases, since they (and they alone) exhibit all the requisite properties. Of course, each may also exhibit some superfluous and adventitious properties. For example, crucifixion typically occurred on a cross of *wood*, but that is not part of the meaning of "cruel and unusual punishment," and so one does not refer to this property when one judges that crucifixion is a paradigm cruel and unusual punishment.[63]

Some of the foregoing comments about paradigm cases can be recast by reference to the semantics of the phrase "cruel and unusual punishment," in particular its meaning and its reference. The *reference* of the phrase is the class of punitive acts and practices that are cruel and unusual. The term of course refers to its paradigm cases, but these do not exhaust the reference. Furthermore, the reference of this term is inexhaustible; we cannot write out a finite list mentioning each and every cruel and unusual punishment. The possibility always exists that

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[62] On the general idea of a paradigm case of a concept, see P. ZIFF, SEMANTIC ANALYSIS 194-95 (1960). The idea originates with Wittgenstein; *see* L. WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 50 (1953).

[63] The question of the pertinent properties of cruel and unusual punishment needs to be understood now that the death penalty is inflicted by lethal injection: Is painful-to-undergo an essential or an adventitious property of cruel and unusual punishments? If adventitious, is it yet enough to make death penalties administered in this way borderline cases of cruel and unusual punishments?

some punishment hitherto never practiced or never thought about turns out, under analysis, to qualify for membership in the class of cruel and unusual punishments. This results from the fact that the term "cruel and unusual punishment" is not the name of any one punitive act or practice or even of several; it is a general term, and like all general terms, its reference is in principle inexhaustible. The most we can hope to do, therefore, is to exemplify the reference of this term, cite representative (paradigm) cases, or provide an illustrative partial list.

Thus, the logical relation between the paradigm cases of cruel and unusual punishment and the reference of the term is that of indefinite subclass to infinite class. The logical relation between the paradigm cases of this term and the *meaning* of the term is much more complex and subtle. As we have seen, a paradigm case of any general term is an instance of the term's reference, such that once one sees why it is a member of the class in question, one has grasped what the term means. One has some inkling of the meaning (or sense) of the term 'cruel and unusual punishment,' and so one may correctly apply or withhold that term from other cases. Error, of course, is possible; there is no guarantee of infallibility. One can grasp the sense of a term and employ it by and large correctly, that is, according to the criterion of its use shared by the linguistic community that understands it, without being immune from error.

Quite apart from error, there is no reason to assume that the sense of the term is and will remain fixed. Such Platonism in semantic theory is only one among several options.[64] 'Cruel and unusual punishment' is also not a rigidly designative term, in the way it has been argued that names of naturally occurring species (for example, "tiger") or inert natural kinds (for example, "diamond") are.[65] The sense of 'cruel and unusual punishment,' whatever it is, is taken from the properties of

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[64] The idea that the meanings of some (especially mathematical and logical terms), if not all, terms are fixed eternal abstract objects, reminiscent of Plato's ideal forms, was defended by Frege, Russell, and other anti-idealist philosophers of roughly a century ago. G. FREGE, THE FOUNDATIONS OF ARITHMETIC i-xi (1950); G. FREGE, TRANSLATIONS FROM THE PHILOSOPHICAL WRITINGS OF GOTTLOB FREGE 56-78 (P. Geach & M. Black trans. 1952); B. RUSSELL, THE PRINCIPLES OF MATHEMATICS iv-x, xv, 37, 42-52 (1937). For discussion of very different theories recently in favor, *see* W. ALSTON, *supra* note 61, at 10-49; M. BLACK, THE LABYRINTH OF LANGUAGE (1968); S. BLACKBURN, SPREADING THE WORD: GROUNDINGS IN THE PHILOSOPHY OF LANGUAGE 39-109 (1984); G. PARKINSON, THE THEORY OF MEANING (1968); M. PLATTS, WAYS OF MEANING: AN INTRODUCTION TO A PHILOSOPHY OF LANGUAGE 1-94, 133-60 (1979); P. ZIFF, *supra* note 62, at 146-99.

[65] On the semantics of rigid designators, see S. KRIPKE, NAMING AND NECESSITY (1980).

those punitive acts and practices that have been judged to be morally unacceptable in a particular historic time and culture.[66] Thus, by contrast with the relative simplicities in the sense-formation factors in proper names and rigidly designative general terms, the sense-formation factors in a term like 'cruel and unusual punishment' are many, complex, and subject to change over time.

VI. The Original Intention of the Constitutional Framers

Constitutional fundamentalists typically link the role of paradigm cases of "cruel and unusual punishments" to the "original intentions" of the several framers, founders, and ratifiers of the Constitution and the Bill of Rights. The point of this linkage is to force all contemporary interpretations of the "cruel and unusual punishments" Clause into inferences by strict analogy with a very short list of paradigm cruel and unusual punishments taken from English and American history of the sixteenth and seventeenth centuries.[67]

Presumably, no one who makes such an appeal wants it to be regarded as a surreptitious ad hoc strategy to win debates. Rather, it is to be viewed as a generally applicable consideration whenever constitutional interpretation is at issue. This approach has two purposes: One is to find neutral ground on which all can stand and debate the substantive issue, for example, whether the death penalty for rape is a "cruel and unusual punishment." The other is to constrain interpretation of the written Constitution by reference to an objective criterion for what is meant by the words being construed. This guarantees that any alternative and incompatible meanings, even if shared by all members of the Court at a given time, are irrelevant.[68] The underlying thesis, rarely formulated and never defended, is that (a) the meaning or sense of constitutional words and phrases, such as the "cruel and unusual

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[66] *See supra* text accompanying notes 53-57.

[67] *See* W. Berns, For Capital Punishment: Crime and Morality of the Death Penalty 31-40 (1979); E. van den Haag, Punishing Criminals 225-28 (1975); van den Haag, *In Defense of the Death Penalty: A Legal — Practical — Moral Analysis*, 14 Crim. L. Bull. 51 (1978). R. Berger, *supra* note 17, at 43-58, interprets and rests his argument upon "the minds of the Founders." *Id.* at 44. He concludes that "the Framers did not intend 'cruel and unusual' to exclude death penalties." *Id.* at 47. The idea of the original intention of the framers, of course, can be and has been used by those who have no intention of relying on it to settle the meaning of the clause, e.g., as in the examination of "the Framers' intent" by Justice Brennan in *Furman*, 408 U.S. at 258-69.

[68] *See* MacDowell, Book Review, 51 Geo. Wash. L. Rev. 624, 627 (1983).

punishments" Clause, derives from the original intention with which it was used by those who introduced it into the Constitution, and (b) the sense of the term "cruel and unusual punishment," insofar as this Clause applies to the death penalty, is entirely provided by the paradigm cases that the framers intended the Clause to prohibit.

However, we face substantial obstacles to ascertaining the original intention in this instance: (a) we have no text or document in which the framers stated their shared intention (if they even had one) in including the Clause in the eighth amendment; (b) the framers left no statement telling us what they understood the language of this Clause to mean; (c) we have no list prepared by the framers specifying the properties a punishment must have to be prohibited under the Clause; (d) they provided no exhaustive catalogue of the punishments they regarded as prohibited under this Clause. Since we have no explicit indication in any of these four ways of what they understood by the Clause, any knowledge that we claim of their intention in using it must be based on very indirect evidence.[69]

When confronted with these facts about our ignorance, some will respond that it is probably hopeless to attempt to establish the original intention, because the indirect evidence is too inconclusive. Although an original intention exists (so these critics would insist), thus far we have not discovered it, and so cannot use it in contemporary disputes over the proper interpretation of the Clause.[70] Radical skeptics will argue that the very idea of an original intention is a myth. The inconsistencies in policymaking, in public reasoning regarding the adoption of the Clause, and in the behavior of the framers and their immediate predecessors and successors, all demonstrate the absence of any such original intention.[71] Still other critics (among whom I would include myself) will argue more cautiously and elaborately that even if it is reasonable to assume or postulate an original intention, and even if there were evidence sufficient to tell us with reasonable clarity what the original in-

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[69] This predicament in trying to establish the framers' intentions is not, of course, unusual in interpreting central clauses in the Constitution and the Bill of Rights; in fact, it is typical. Unfortunately, those who rely on the original intention to reach a correct interpretation of what the Clause originally meant or means today fail to alert their audience neutral to substantive controversies over what is and is not an unconstitutionally "cruel and unusual punishment" to the awkward evidentiary predicament we are in.

[70] Among Berger's critics, perhaps Radin comes closest to this view; *see* Radin, *supra* note 17, at 1117.

[71] None of Berger's critics (so far as I know) addresses this issue, much less embraces the position suggested in the text.

tention was, we cannot appeal to it today to settle what the Clause means or should mean. The essential subjectivity of mere intentions, even shared intentions such as the original intention, makes them the wrong sort of thing on which to rest construction of the governing clauses in the fundamental charter of a free and rational society.[72]

There are, then, several different kinds of objections to the appeal to the original intention underlying the Clause. As for the scholarly debate itself, it convinces me that it is impossible to decide, on the evidence presently available, whether there was any such intention, or what it was if there was one. Nor am I convinced by any argument that the very assumption of an original constitutional intention is a necessary condition of correct constitutional interpretation. Future scholarship, of course, may possibly shed further light on these issues and enable us to decide more rationally among alternative possibilities than we can at present. If, however, I am right and the underlying assumptions of the controversy are wrong, then nothing of importance turns on what future scholarship reveals. On my view, sound epistemology rather than semantic bad faith undermines constitutional fundamentalism and any deference to the elusive original intention it counsels.[73]

Some scholars insist that the evidence is at least clear enough to show that it was not part of the original intention of the framers that the death penalty would ever be found to violate the Clause.[74] They point to passages elsewhere in the Constitution and the Bill of Rights in which the death penalty is mentioned[75] in a manner that presupposes

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[72] Richards best expresses this critical interpretation of Berger. *See* Richards, *supra* note 17, at 1378-80. Others approach but do not quite embrace this alternative so openly. *See* Gillers, *supra* note 17, at 748; Radin, *supra* note 17, at 1117-18.

[73] The desperate search for the original intention, when seen against the background of the previous discussion, is merely a special version of the semantic doctrine criticized there, i.e., that (i) for words, terms, and phrases whose essential use is to express the moral judgments of the user and the community in which such judgments are made, the *meaning* of these words is fixed by identifying the *intention* with which certain initial or politically authoritative utterers (the framers, founders, and ratifiers) used these expressions; (ii) the best way to do this in the absence of other evidence (of the sort alluded to in (a) through (d) in the text) is to identify the cases (the paradigm cases) to which they referred in the course of their use of these expressions.

[74] R. BERGER, *supra* note 17, at 47; E. VAN DEN HAAG & J. CONRAD, THE DEATH PENALTY: A DEBATE 157 (1983). The same scholars argue that it was *not* part of the original intention that the Supreme Court, under the pretense of interpreting the Clause, should be the arbiter of punishments duly enacted by state legislatures. R. BERGER, *supra* note 17, at 9; *cf.* van den Haag, *supra* note 67, at 52.

[75] See amendments V (1791) and XIV (1868), both of which allude to the deprivation under "due process of law" of a person's "life."

its consistency with the eighth amendment. Pointing to capital statutes enacted by the First Congress,[76] they imply that this legislature must have believed it was acting in accord with the Clause. They could also point to prosecutions, convictions, and executions of capital offenders at the end of the eighteenth century[77] as further evidence of general belief two centuries ago that the death penalty and the Clause were not inconsistent. All this must be granted, but it fails to prove the central point — that it was part of the original intention that the death penalty as such could *never* be incompatible with the eighth amendment.[78] Even more to the point, it fails to prove the underlying semantic thesis that really motivates the appeal to the original intention, that is, that the meaning of the Clause is essentially connected with the intention with which its framers first used it. The reason it fails is because until we know the standards and criteria, principles and assumptions that are built into the general language of the Clause, no one knows what the Clause means and therefore what it truly permits and prohibits. Since all interpreters of the scholarly record agree that the framers left no account of what they thought these standards and principles were, we cannot infer straightaway that all their actions and their intentions, as well as their beliefs and their expectations, were in fact consistent with those principles; it is possible that they were not.

Quite apart from these considerations is another, more fundamental, objection to any purely historical account of what makes a punishment violate the Clause. Suppose we knew that three modes of punishment, or three modes of inflicting a given punishment — P_1, P_2, P_3 — exhausted the list of punishments in 1790 that were deemed to violate the Clause. Thus, we are assuming these three punishments are the only "cruel and unusual punishments," according to the explicit original intention. What rationale or justification is there for the framers having such an original intention and proposing the Clause to express and pre-

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[76] Act of Apr. 30, 1790, ch. 9, 1 Stat. 115, providing the death penalty for murder, forgery of public securities, robbery, and rape, *cited in* R. BERGER, *supra* note 17, at 47; and *cited in* W. BERNS, *supra* note 67, at 31.

[77] Apparently the first execution under federal law was on June 25, 1790, in Portland, Maine, for the crime of murder. Cumberland [Maine] Gazette, June 28, 1790 (no date or page available). Also, in 1793, four sailors were hanged in Oracoke Island, North Carolina, under federal law for mutiny. Coastland Times [Manteo, North Carolina; no page available]. I am grateful to Mr. Watt Espy for this information.

[78] In my review of R. BERGER, *supra* note 17, at 1162-64, I show how an argument can be constructed that makes a contemporary ruling against the death penalty as per se a "cruel and unusual punishment" fully within the scope of the original intention of the Framers.

serve it? Either their intention includes no such rationale at all — the prohibition of P_1, P_2, and P_3 is completely whimsical or utterly arbitrary — or their intention does include such a rationale. The first alternative is simply too irrational to be taken seriously. Only the second alternative commends itself to our attention. There must be a rational explanation for the conclusion that P_1, P_2, and P_3 are "cruel and unusual punishments," and that no other punishments are. That explanation is bound to have two features: (a) it will refer to certain properties, traits, or characteristics shared by P_1, P_2, and P_3, and lacking in all other punishments; and (b) it will refer also to certain standards and principles that show why punishments with these properties are morally wrong and should be barred by constitutional law. However, once these two features constituting the rationale have been acknowledged, the way is open for a later argument that some other punishment, P_4, also shares these properties. It does not matter that in the initial survey of punishments canvassed for their compatibility with the Clause, P_4 was judged consistent with it. Any of us may err in deciding whether a given punishment violates the principles implicit in the Clause, just as we may err in the classification of anything else. This is necessarily part of what it means to recognize that the term "cruel and unusual" is a general term, that its typical use in evaluation of punishments is to express moral condemnation, and that at least one standard or principle is implicit in its meaning.

Disagreement may well arise about the properties common to P_1, P_2, and P_3 that cause them to violate the Clause, and whether some other punishment, such as P_4, has enough of these properties to warrant being added to the list. Borderline cases will be difficult to resolve even under conditions of ideal observation. The principles that connect the abstract language of the Clause with the concrete features of the several punishments deemed prohibited by it will also be controversial.[79] What is needed to resolve such disagreements is not armchair archeology into the unarticulated and elusive intentions of the framers. We need instead a rational reconstruction[80] of the values to be protected by the Clause in light of the history, conditions, and aspirations of the society whose Constitution contains the Clause. This task cannot be carried out pri-

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[79] The careful study of these principles is too large a task to undertake here. The best preliminary survey is still the quartet of principles proposed by Justice Brennan in *Furman*, 408 U.S. at 270-81 (Brennan, J., concurring).

[80] The term is borrowed from Carnap, although not used in quite his sense. *See* R. CARNAP, THE LOGICAL STRUCTURE OF THE WORLD AND PSEUDO PROBLEMS IN PHILOSOPHY (1967).

marily by history and social science; it preeminently requires moral theory.[81]

History, however, does have its contribution to make, and any attempt to characterize the original intention would be bereft of context and thus incomplete without attention to that history. A study of the views of the eighteenth century liberal penal reformers (whether Continental or English), jurists (such as Beccaria and Montesquieu), and philosophers (such as Voltaire and Bentham) shows that they believed there was neither necessity nor justice in the time-honored practices of aggravated physical torture, maiming, and savage bodily abuse commonly part of the infliction of the death penalty.[82] They concluded and persuasively advocated that these practices, cruel by any standard in their own time, must be stopped. This was the ideological context in which the Clause barring "cruel and unusual punishments" was introduced into our Bill of Rights.[83] The counterpart to their reasoning, applicable to us today, goes like this: There is neither necessity nor justice in the time-honored practice of putting criminals to death. Therefore, this practice, severe in any case by the standards of our time, is excessive and cruel and must be stopped. Just as the eighteenth century concluded that hanging is sufficient punishment, so our century must conclude that imprisonment is enough.

VII. The Role of Feasible Alternatives

One might argue that a given punishment is cruel and unusual (excessively severe) while conceding that there is no feasible alternative punishment. Accordingly, the society that practices this punishment must either continue to use a punishment condemned as excessive, or refuse to use any punishment at all for the particular offense. Under such circumstances, how could any responsible government condemn the punishment and cease to impose it? Would it not verge on the pointless to mount an argument aimed at showing a given punishment

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[81] This general approach to constitutional interpretation has been argued broadly during the past decade by Dworkin and Richards. *See* R. Dworkin, *supra* note 55; R. Dworkin, A Matter of Principle (1985); Richards, *Human Rights and the Moral Foundations of the Substantive Criminal*, 13 Ga. L. Rev. 1395 (1979).

[82] *See generally* M. Foucault, *supra* note 28; M. Ignatieff, *supra* note 25; J. McManners, Death and the Enlightenment: Changing Attitudes to Death Among Christians and Unbelievers in Eighteenth-century France 368-408 (1981).

[83] *See* Comment, *The Eighth Amendment, Beccaria, and the Enlightenment: An Historical Justification for the* Weems v. United States *Excessive Punishment Doctrine*, 24 Buffalo L. Rev. 783, 806-30 (1975).

to be cruel and unusual, all the while knowing that society has no alternative? These questions may seem trivial and easy to dispose of because there is always some feasible alternative punishment that is available to any society, whatever the offense and whoever the offender. After all, "feasible" does not mean "preferable," or "adequate," much less "effective." While we can trivialize the problem in this manner, it is undesirable to do so because it diverts our attention from the role played by feasible alternative punishments in judgments that condemn a given punishment as cruel and unusual and invites us to ignore the serious task of identifying some criteria for feasibility in this context. Let us concentrate initially on the first of these two matters; several different approaches warrant brief exploration.

The first and least plausible is that the availability of a feasible alternative punishment is part of the *meaning* of any judgment that a given punishment is cruel and unusual. This seems plainly false and can be seen as false if one contemplates the paradigms of cruel and unusual punishment discussed above.[84] It seemed quite possible to regard crucifixion, for example, as a cruel and unusual punishment without also having in mind either a general idea of an alternative punishment or some particular alternative punishment that is not cruel and unusual. So there seems no good reason to insist on any semantic connection between judgments of cruel and unusual punishment and prior or concurrent tacit judgments about alternative feasible punishments.[85]

A second possibility is that the existence of a feasible alternative punishment is a *necessary condition* for the truth of a judgment that condemns a given punishment as cruel and unusual. This is also incorrect. The reasons given earlier[86] that suggest what is required to support the claim that a given practice is a paradigm of cruel and unusual punishment do not show that the truth of such a claim depends on the truth of another judgment to the effect that there is a feasible alternative. More precisely, it is not true that a given punishment, P_1, is cruel and unusual only if some other punishment, P_2, is a feasible alternative to P_1. Someone may conclude that P_1 is cruel and unusual without first or concurrently believing or knowing that another punishment, P_2, is not

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[84] *See supra* text accompanying notes 58-66.

[85] There may be such a semantic connection, however, if the concept of a cruel and unusual punishment is identified with the concept of an excessively severe punishment. In this case, "excessively severe" may well be taken to mean "more severe than another available punishment." Excessive severity need not be understood in this fashion. *See supra* text accompanying notes 31-43.

[86] *See supra* text accompanying notes 58-66.

cruel and unusual and that it is a feasible alternative to P_1 There is simply no connection between the truth of "P_1 is cruel and unusual" and the truth of "P_2 is a feasible alternative to P_1." Thus, there is no epistemological connection between judgments of cruel and unusual punishment and judgments about feasible alternatives.

Nevertheless, a typical feature of arguments that the death penalty is a cruel and unusual punishment is that society does have a feasible alternative — a functioning system of penitentiaries that administers long-term incarceration for persons not sentenced to death and executed. Thus, it is plausible to insist on the following constraint: No punishment, P_1, is cruel and unusual in a given society at a given time unless there is at least one feasible alternative punishment, P_2. If this constraint is not either semantic or epistemological, then what is its nature?

The best answer may be that this constraint is *forensic.* It is crucial to the persuasive political effect that judgments of cruel and unusual punishment are normally intended to have. It would be unreasonable to expect a society to cease to use a given mode of punishment on the ground that it is cruel and unusual if everyone were to concede that society has no feasible alternative. Thus, any complete argument that hopes to achieve political effect against a given punishment on grounds of its excessive severity must include reference to an alternative punishment that is specified with sufficient detail to explain what is involved in institutionalizing it as a practice. Furthermore, this alternative punishment must not have the traits that make the condemned punishment cruel and unusual; it must be a feasible alternative. If this, or something like it, is correct, then feasible alternative punishments play a central role in judgments that condemn other punishments as cruel and unusual.

VIII. What is Feasibility?

Let us now consider what we mean by "feasible" in the present context and identify, if we can, appropriate criteria of reasonable alternatives in punishment. The easiest way to proceed is to consider what is generally (even if not necessarily or universally) regarded as the only feasible alternative to the death penalty in our society today: long-term incarceration.[87]

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[87] "Long-term incarceration" is obviously vague and becomes clearer only when it is further specified whether it involves such features as solitary confinement and ineligibility for release. *See, e.g.*, Bureau of Justice Statistics, U.S. Dep't of Justice, Sentencing Practices in 13 States (1984). My own preferred alternative version

As a constraint, "feasibility" means only that it is possible to make the practice work, given enough time, money, patience, and cooperation. Somewhat more narrowly, a feasible alternative must also be possible to put into practice given the actual resources in money, personnel, and physical plant, available at a given time in a given social situation. No punishment is a feasible punishment, many would argue, unless it meets this latter condition. It is also possible to narrow further the concept of feasible alternative punishments by reference to the adequacy of the alternative, as though to say: A punishment, P_2, is not a feasible alternative to another punishment, P_1, unless P_2 satisfies the goals or purposes of P_1 as well as P_1. Once "feasible alternative punishments" is understood in the latter manner, a dispute over whether a given punishment is a feasible alternative to another punishment turns both on what these goals or purposes are (or ought to be), on the degree to which each of the two punishments achieves them, and on how to weigh the relative success of each of the punishments in satisfying these goals.

If we confine the issue to whether long-term incarceration is a feasible alternative to the death penalty, it is indisputably feasible under the first two of the above three criteria.[88] Dispute intelligibly arises today only under the third criterion. This is more controversial, because of the normative and factual questions that must be resolved in order to establish that a given alternative punishment really is or is not feasible.

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of this may be found in Bedau, *Deterrence: Problems, Doctrines, and Evidence*, in DEATH PENALTY, *supra* note 8, at 100 n.15. For the history of incarceration in the United States, see D. ROTHMAN, CONSCIENCE AND CONVENIENCE: THE ASYLUM AND ITS ALTERNATIVES IN PROGRESSIVE AMERICA (1980); D. ROTHMAN, THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC (1971).

Some have argued that long-term incarceration is a more severe punishment than death. *See* C. BECCARIA, ON CRIMES AND PUNISHMENT 47 (H. Paolucci trans. 1963) ("[T]he long and painful example of a man deprived of liberty . . . is the strongest curb against crimes."). Whereas this belief led Beccaria to oppose the death penalty, it has led some recent thinkers, such as Barzun, to favor the death penalty. *See* Barzun, *In Favor of Capital Punishment, reprinted in* H. BEDAU, THE DEATH PENALTY IN AMERICA 163 (rev. ed. 1968) (". . . I *feel* that imprisonment is worse than death.") (emphasis in original). For criticism of the view that imprisonment is "worse" than the death penalty, see Bedau, *Capital Punishment*, in MATTERS OF LIFE AND DEATH 148, 173-79 (T. Regan ed. 1980).

[88] Feasibility in these respects is demonstrated by the decades of experience in those jurisdictions with no punishment more severe than imprisonment, beginning with such states as Michigan (death penalty abolished in 1847) and including the entire nation between 1967 and 1977 (executions suspended), not to mention foreign countries that long ago abolished the death penalty. For a list of abolition jurisdictions, nationally and internationally, see DEATH PENALTY, *supra* note 8, at 23, 27.

The arguments on both sides proceed down familiar paths. Defenders of the death penalty can argue their position in either or both of two ways. Their first argument holds that (1) protection of society is the central goal or purpose of punishment; (2) the deterrent and incapacitative efficacy of a punishment is the dominant factor in its capacity to protect society; (3) the more severe a punishment is, *ceteris paribus*, the better it provides deterrence and incapacitation; therefore (4) the death penalty provides better protection to society than long-term imprisonment, a less severe punishment; and so (5) long-term imprisonment is not a feasible alternative to the death penalty. Opponents of the death penalty have typically conceded the first premise, ignored the second, and attacked the third and fourth propositions. There is no need here to review once again the current, much less the historical, state of the evidence as it bears on the truth of these two propositions.[89] Suffice it to say that whereas the third proposition verges on triviality,[90] there is no adequate reason to believe the fourth proposition on the evidence available. Even if the third proposition were nontrivially true, the conclusion in the fifth proposition would not be established by this argument.

The second argument has the same outcome, but caters to a completely different outlook on the purpose and goals (perhaps even the

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[89] For discussions of the deterrent, incapacitative, and preventive effects of the death penalty, *see, e.g.*, Bedau, *Deterrence: Problems, Doctrines, and Evidence*, in DEATH PENALTY, *supra* note 8, at 93; Bedau, *Recidivism, Parole, and Deterrence*, in DEATH PENALTY, *supra* note 8, at 173 [hereafter Bedau, *Recidivism*]; Gibbs, *Preventive Effects of Capital Punishment Other than Deterrence*, in DEATH PENALTY, *supra* note 8, at 103; Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Evidence*, in DEATH PENALTY, *supra* note 8, at 138; Thornton, *Terrorism and the Death Penalty*, in DEATH PENALTY, *supra* note 8, at 181; Wolfson, *The Deterrent Effect of the Death Penalty Upon Prison Murder*, in DEATH PENALTY, *supra* note 8, at 159; Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faith*, in DEATH PENALTY, *supra* note 8, at 116. A more recent discussion is Lempert, *The Effect of Executions on Homicides: A New Look in an Old Light*, 29 CRIME & DELINQ. 88 (1983). Lempert concludes that "within historically given parameters the death penalty in general and executions in particular do not deter homicide." *Id.* at 114. As his essay makes clear, however, his actual conclusion is: There is no evidence within historically given parameters that the death penalty in general and executions in particular are a better deterrent of homicide than the alternative sanction of imprisonment. For a discussion of the difference between these two conclusions, and why the latter and not the former is the only one worth arguing, see Bedau, *The Death Penalty as a Deterrent: Argument and Evidence*, 80 ETHICS 205 (1970); Bedau, *A Concluding Note*, 81 ETHICS 76 (1970).

[90] The third proposition, that a punishment provides better deterrence and incapacitation the more severe it is, is only true because of the *ceteris paribus* clause. When other things are not equal, the proposition will clearly be false.

nature) of punishment. It holds that (1) vindication of just laws and political authority are the central goals or purposes of punishment; (2) imposing punishments that are appropriate to the nature of the offense is the controlling factor in achieving these goals; (3) for the gravest crimes, notably murder, the death penalty achieves these goals markedly better than long-term imprisonment; therefore (4) long-term imprisonment is not a feasible alternative to the death penalty. Opponents of the death penalty have challenged all three premises to this argument and in effect have conceded that even if it is a valid argument, it fails to prove its claim because one or more of the premises is false. Again, we need not review here the well-worn lines of criticism against these premises.[91]

In the present context, what is primarily at stake is not whether each of these arguments establishes their common conclusion. Rather, it is whether the stringent criterion of feasibility on which both rely is appropriate. The criterion permits one to consider the purposes of punishment in deciding whether a given punishment (long-term incarceration) is a feasible alternative to another punishment (the death penalty). My own view is that nothing crucial to the fundamental question of a punishment's cruelty and unusualness turns on whether feasibility is defined so as to exclude or include this criterion. It is reasonable, however, to try to keep separate the concepts of *feasible* alternative punishments and *desirable* alternative punishments. Since adding this stringent criterion to the other criteria of feasibility obviously makes this impossible, for this reason alone "feasibility" should be defined solely in terms of the other criteria.[92]

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[91] Elsewhere I have discussed the proper conception of retribution in general and of its application to the death penalty in particular. *See* Bedau, *Retribution and the Theory of Punishment*, 75 J. PHIL. 601 (1979); *see also* Bedau, *Recidivism*, *supra* note 90, at 173-79; Bedau, Gregg v. Georgia *and the 'New' Death Penalty*, 4 CRIM. JUST. ETHICS (1985) (forthcoming) [hereafter Bedau, *'New' Death Penalty*]. Premise (1) in the text does not express a purely retributive outlook. Rather, it involves what has been called "the Vindictive Theory of Punishment." *See* PHILOSOPHY OF LAW 519 (J. Feinberg & H. Gross eds. 1980). Berns has used this theory in defending the death penalty. *See* W. BERNS *supra* note 67, at 139-76.

[92] In addition to the role played by alternative feasible punishments from a purely logical point of view, such punishments could play, and in a few instances already have played, an even more central role in appellate litigation. During the past decade at least one appellate court has explicitly argued that the death penalty is a "cruel and unusual punishment" today because it is not the least restrictive mode of punitive constraint available to government in pursuit of valid state objectives. *See* Opinion of the Justices, 372 Mass. 912, 917, 364 N.E.2d 184, 186-87 (1977) (citing Commonwealth v. O'Neal, 369 Mass. 242, 251-63, 339 N.E.2d 676, 681-88 (1975)). This test was already applied

IX. Dimensions of Excessive Severity

As noted earlier,[93] cruel and unusual punishments are typically excessively severe punishments. But there are several possible dimensions on which to judge the excessive severity of a given punishment. Each standard relies on a legitimate application of the concept of cruel and unusual punishment but does so by means of a different argument in each case. Indeed, not only the arguments differ but the points of the arguments differ, even though the conclusion in each case — the punishment in question is judged to be cruel and unusual — remains the same. There is no likelihood that agreement can be reached that a given punishment is to be condemned as cruel and unusual unless there is prior agreement over the dimension in which the punishment is to be assessed and thus over the sort of argument that is relevant.

First, it might be argued that a punishment is cruel and unusual in relation to the offender because it is excessively severe to impose it, say,

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in *Furman* by Justice Brennan, 408 U.S. at 342, 359 n.141 (Brennan, J., concurring). However, Justice Brennan did not rely upon the test to the extent that the Supreme Judicial Court of Massachusetts did. The New York State Defenders Association also relied in part on this test in its brief *amicus curiae* in People v. Smith, Amicus Curiae Brief of the N.Y. State Defenders Ass'n at 112-30, People v. Smith, 63 N.Y.2d 41, 468 N.E.2d 879, 479 N.Y.S.2d 706 (1984), although it did not show why this was an appropriate (much less a preemptive) test.

The test is also popular among philosophers quite apart from discussions of punishment and without explicit reliance on exclusively utilitarian assumptions. *See* Philosophy of Law, *supra* note 91, at 239, 596. For an application of this principle to punishment generally, see Gardner, *The Renaissance of Retribution — An Examination of Doing Justice*, 1976 Wis. L. Rev. 781, 787; Murphy, *Retributivism and the State's Interest in Punishment*, in Nomos XXVII: Criminal Justice 156, 157-58 (R. Pennock & J. Chapman eds. 1985). For an application to the decision to incarcerate, see N. Morris, The Future of Imprisonment 59-62 (1974); for an application to the death penalty controversy, see J. Murphy & J. Coleman, *supra* note 20, at 142-43; Hurka, *Rights and Capital Punishment*, 21 Dialogue 647-59 (1982). *See generally* Bedau, *supra* note 87, at 166-67.

Commentators have questioned the appropriateness of the least-restrictive-means-to-a-valid-state-interest test, chiefly because it leads to endless judicial reexamination of the legislative judgments that traditionally establish a jurisdiction's penal policy. *See, e.g.*, *Furman*, 408 U.S. at 395-96 (Burger, C.J., dissenting); *O'Neal*, 369 Mass. at 288-93, 339 N.E.2d at 700-04 (Reardon, J., dissenting). For further discussion see J. Nowak, R. Rotunda & J. Young, Constitutional Law 590-99 (2d ed. 1983). This is not the setting in which to attempt to evaluate either the merit of this test or of the objections to it. However, in light of the previous discussion, and quite apart from questions of constitutional interpretation, it is undeniable that the availability of a feasible alternative to the death penalty is and will remain a central consideration in all arguments over whether it is an excessively severe punishment.

[93] *See supra* text accompanying notes 31-32, 47-48, & 50-51.

on a juvenile or a first offender. This may be called an *offender-relative* argument. Alternatively, it might be argued that the punishment is cruel and unusual in relation to the offense because it is an excessively severe punishment given the gravity of the particular crime. This is an *offense-relative* argument. Instead of either of these, it might be argued that the punishment, in relation to the usual punishment for such an offense, is cruel and unusual because it is more severe than the way such offenses are punished in the vast majority of similar cases with similar offenders. This argument is *frequency-relative.*

All three of these arguments rely upon comparisons to punitive practices for other offenses or offenders. Thus, any conclusion that a particular punishment is cruel and unusual that rests on one of the above three arguments tacitly refers to a class of other punishments and other offenders that serve as a morally acceptable baseline. Interesting differences among the arguments emerge when we examine possible lines of attack on each. Judgments condemning a punishment on offender- or offense-relative grounds must rely on standards of appropriate punitive severity that refer to the nature of the offender or the nature of the offense, respectively. Consequently, such arguments can be rebutted by appeal to standards deemed more appropriate than those relied on in the argument itself. If these other standards are indeed more appropriate, then the punishment in question cannot be excessively severe. Frequency-relative arguments are virtually free of such necessary appeal to standards. Any conclusion based on such grounds that a punishment is cruel and unusual is properly supported by evidence about current punitive practices that are, at least arguendo, morally acceptable. Consequently, the way to rebut a frequency-relative argument is to refer to evidence that shows the alleged deviations from normal practice are either nonexistent or defensible. For example, it may turn out that the usual punishment for the offenses or offenders in question really is not very different from the punishment meted out in the case under attack, because there are special features about the offense or the offender that have been overlooked, but which when recognized make the seemingly excessive punishment suitable after all. Frequency-relative arguments can also be defeated in another way. One may concede that, under current conditions, the punishment under attack is, indeed, unusually severe — and then go on to argue that it is equally feasible and rational to increase the severity of the normal practice instead of abolishing (as the critic proposes) the unusually severe punishment in dispute.[94]

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[94] This is van den Haag's preferred style of rebuttal when challenged by evidence supporting the claim of racial discrimination in the use of the death penalty. *See* E.

In addition to the above three dimensions along which to assess punishments as cruel and unusual, there are at least two others. It might be argued that the punishment, in relation to the purpose for its imposition, is cruel and unusual, because it is excessively severe when measured by the requirements of retribution (even if not by the purpose of deterrence), or deterrence (even if not by the purpose of retribution). This may be called a *purpose-relative* argument. Finally, it might be argued that the punishment, in virtue of its very nature, is cruel and unusual because it is excessively severe when measured by its impact upon the person of the offender, insofar as the offender is a person, quite apart from any other consideration. An argument of this kind is *essence-relative.*

These latter two arguments are not like the first three, because they do not require comparative judgments to other offenses and other offenders; there is no tacit reference class on which these arguments rely. Purpose-relative arguments require specification of some purpose or purposes that the practice of punishment is fairly judged to serve, the implication being that the condemned punishment is unnecessarily severe as a means to achieve that purpose. Essence-relative arguments require both a characterization of the nature of the punishment in more abstract terms and also a specification of some conception of the personhood of the offender which it is assumed that organized society is morally bound to respect; the implication is that inflicting the condemned punishment would not be consistent with acknowledging this respect. Purpose- and offense-relative arguments obviously are more abstract than those of the first three types, since conceptions of the purpose and nature of a punishment and of the person are more speculative and less readily verifiable than the factors at the center of the other arguments.[95]

VAN DEN HAAG, *supra* note 67, at 221; *see also* E. VAN DEN HAAG & J. CONRAD, *supra* note 74, at 223-25.

[95] It is, of course, possible to finesse the challenge to propose alternative standards by arguing that, according to the Constitution, it is not the Supreme Court's business to intervene in state criminal practices except in the clearest possible cases. This maneuver is exploited by many commentators, chief among whom is Berger. *See* R. BERGER, *supra* note 17, at 77-111. Even so, the best known recent defenders of the death penalty have not rested with this consideration. Insofar as they address the question directly at all, they evidently believe that whatever standards are implicit in the constitutional clause barring "cruel and unusual punishments," these standards are not and have not been violated by the death penalty in the United States, either prior to *Furman* or subsequently, for any crime for which it has been lawfully imposed in this century, whether under a mandatory or discretionary statute. *Id.* at 29-58, 112-52; W. BERNS, *supra* note 67, at 31-35, 124-27, 177-89; E. VAN DEN HAAG, *supra* note 67, at

X. The Fundamental Arguments

Given these five types of argument to establish that a punishment is cruel and unusual, which are the most important and why? I want to suggest two kinds of convergent answers to this question, one that is purely conceptual or logical and the other that is constitutional and forensic.

A full exploration of the logical relations among the five types of arguments is tempting, but three comments will suffice for the present discussion. First, these five arguments are obviously not mutually exclusive. For instance, if a given punishment is judged to be cruel and unusual according to an offender-relative argument, the same judgment may be reached by relying on an offense-relative argument. Second, the five arguments are somewhat independent. Thus, a given punishment may be cruel and unusual when imposed on juveniles, or for crimes against property, and thus condemned both on offender-relative and on offense-relative grounds. But it does not follow that this punishment must also be condemned on frequency- or purpose-relative grounds.

The third and most important point is that the five arguments are noticeably different in their logical power or scope. If the logical power of an argument can be measured by the number of nontrivial conclusions it entails, then purpose- and essence-relative arguments are considerably more powerful than others. If a punishment is cruel and unusual by virtue of the appropriate purpose(s) of punishment, then the punishment is cruel and unusual for *all* offenders and for *all* offenses, even if it is not also excessively severe on any frequency- or essence-relative ground. Likewise, if a punishment is excessively severe by virtue of its very nature and the nature of persons, then it also must be cruel and unusual for all offenders and all offenses, no matter what the purpose or frequency of application of the punishment.

These considerations underlie some of the Supreme Court's own responses to criticisms of the death penalty as a "cruel and unusual punishment."[96] Consider first such a challenge when based on an offender-relative argument. This type of judgment must focus on one or both of two sorts of properties: (a) natural properties, such as the sex, age, or race of the offender; and (b) social properties, such as the offender's

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157-62, 180-83, 213-15.

[96] It would be a useful if elementary exercise, and in any case not one undertaken here, to use this taxonomy to reconstruct the arguments presented since 1970 to the Supreme Court as well as those used in the opinions of the Court itself, beginning with *Furman*, to show that the death penalty is (or is not) a "cruel and unusual punishment."

vocation, class, or wealth. Of all such possibilities, the most attractively relevant is the property of *age*. The obvious reason is that a strong natural inverse correlation exists between youth and both criminal culpability and ordinary responsibility for the conditions of the life lived up to the age of 16 or 18, at least by comparison with those over 18. No such strong correlation obtains between any of the other properties (natural or social) and culpability-cum-responsibility. Accordingly, it seems quite appropriate to reason that a certain mode of punishment (for example, strict solitary confinement for one week) may be morally permissible for an adult but cruelly excessive for a child or a juvenile. As a type of argument directed against the death penalty, however, it is largely futile, since jurisdiction over juveniles is preempted by courts not empowered to invoke this penalty.[97] Nevertheless, on those rare occasions when someone under 18 at the time of the crime has been convicted of a capital offense and sentenced to death and appellate courts have intervened, it is not clear whether they have done so solely on the ground that the death penalty for such an offender would be a "cruel and unusual punishment" in violation of the Constitution.[98]

What is unsatisfactory about offender-relative arguments, even at their best, can be brought out by a dilemma: All such arguments must proceed by assuming either that death for an adult convicted of the same offense is a "cruel and unusual punishment" or that it is not. If the argument takes the latter route, then it forecloses or jeopardizes important possibilities raised by other kinds of arguments (such as frequency- or purpose-relative arguments) that might attack the same punishment as applied to any person regardless of age, sex, or other characteristics. If the argument takes the former route, it must take for granted the soundness of some such additional arguments. Inevitably, therefore, arguments that attack the death penalty by reference solely to

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[97] *See* Streib, *Death Penalty for Children: The American Experience With Capital Punishment for Crimes Committed While Under Age Eighteen*, 36 OKLA. L. REV. 613, 613 n.6 (1983); Bruck, *Executing Juveniles for Crime*, N.Y. Times, June 16, 1984, at 23, col. 1. In 1983, the American Bar Association voted to oppose "in principle, the imposition of capital punishment upon any person for any offense committed while under the age of eighteen (18)." ABA, HOUSE OF DELEGATES, SUMMARY OF ACTION 17 (Aug. 1983) (approving Criminal Justice Report No. 117A).

[98] For a recent case in which an appellate court refused to overturn a death sentence on grounds of the youth of the offender, see Trimble v. Maryland, 300 Md. 387, 478 A.2d 1143 (1984). Boston Globe, Aug. 23, 1984, at 14, cols. 1-2; *see also* Eddings v. Oklahoma, 455 U.S. 104 (1982); Streib, *supra* note 97, at 633-34; Comment, *Eighth Amendment—Minors and the Death Penalty: Decision and Avoidance*, 73 J. CRIM. L. & CRIMINOLOGY 1525 (1983).

some special quality about the offender, such as age, are importantly incomplete and to that extent unsatisfactory.

This reasoning is illustrated and confirmed in the Court's rulings in *Woodson v. North Carolina*[99] and related cases,[100] in which the Court has held that certain mandatory capital statutes violate the eighth and fourteenth amendments because they prevent the sentencer from "individualizing"[101] the punishment to the offender. This is an implicit requirement of *Furman v. Georgia*[102] and thus perhaps of all capital sentencing.[103] Seen in the present context, the requirement of "individualization" in capital sentencing is simply the recognition that offender-relative factors must not be excluded by statute from the sentencer's consideration and that, once they are taken into account in particular cases, they may well provide an adequate ground for a noncapital sentence. *Woodson* and its progeny, which overturned many death sentences,[104] were understandably greeted with acclaim by opponents of the death penalty. Yet the Court found no difficulty in ruling against the death penalty in *Woodson* and in refusing on the very same day to rule against it per se in *Gregg*,[105] *Jurek*,[106] and *Proffitt*,[107] as though to say: The death penalty may well be a "cruel and unusual punishment" insofar as it is imposed by a sentencer precluded by statute from considering offender-relative factors; but it is not a "cruel and unusual punishment" insofar as the nature of the person or the nature and purpose of punishment are concerned. This nicely illustrates the dilemma, discussed above, for the opponents of the death penalty.

Much the same sort of problem arises with judgments that focus only on issues of disproportionality or arbitrariness and discrimination and thus rely on offense-relative and frequency-relative arguments. It is these two sorts of arguments against the death penalty that the Supreme Court has viewed with cautious favor. In *Furman*, insofar as

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[99] 428 U.S. 280 (1976).

[100] *See, e.g.*, Roberts v. Louisiana, 431 U.S. 633 (1977).

[101] *Woodson*, 428 U.S. at 304 (Stewart, Powell, Stevens, JJ., plurality opinion).

[102] *Id.* at 302-05.

[103] In *Woodson*, the Court did not rule on the mandatory death penalty for certain non-homicidal crimes nor for homicide by a prisoner serving a life term for murder. *Id.* at 287 n.7, 292 n.25.

[104] The exact number of death sentences reversed under the ruling in *Woodson* is unclear. It is reported that "[b]etween July, 1976, and October, 1979, *Gregg* and *Woodson* resulted in the vacating of approximately 414 capital sentences." Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908, 916 (1982).

[105] 428 U.S. 153 (1976).

[106] 428 U.S. 262 (1976).

[107] 428 U.S. 242 (1976).

there was any common ground among the five Justices constituting the majority, the Court ruled against all nonmandatory capital statutes on the ground that their actual execution was "freakishly rare" and thus in any given case unusually severe.[108] This was, in effect, to accept an argument that the death penalty can be a frequency-relative "cruel and unusual punishment." As *Gregg, Proffitt,* and *Jurek* showed four years later,[109] however, there was no logical inconsistency between such frequency-relative reasoning and subsequent decisions that found the death penalty not to be a purpose-relative or an essence-relative "cruel and unusual punishment." Furthermore, as events have shown, judicial and legislative friends of the death penalty can always argue that administrative defects in application of this penalty (which are the source of its "freakish" or "racially sensitive" use, condemned in *Furman*)[110] can be remedied administratively; the defects are not inherent in this mode of punishment or in capital statutes themselves.[111] It is, of course, crucial to face the complex questions of fact that this continuing debate has raised, and it is easy to argue[112] that during the past decade the Supreme Court has been insufficiently sensitive to the evidence that casts grave doubt on the possibility of a death penalty system in this country free of racial and class bias.[113] Nevertheless, the limitations inherent in the logic of this type of argument require us to look elsewhere for the most fundamental objections to the death penalty on the ground that it is a "cruel and unusual punishment."

In other post-*Gregg* death penalty cases, the Court has ruled that a death sentence, even if imposed by a sentencer under an optional capital statute that fully permits an "individualized" determination of sentence, is still a "cruel and unusual punishment" if the crime for which

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[108] *Furman*, 408 U.S. at 249-56 (Douglas, J., concurring); *id.* at 291-95 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 363-66 (Marshall, J., concurring).

[109] *Gregg,* 428 U.S. 153 (1976); *Proffitt*, 428 U.S. 262 (1976); *Jurek*, 428 U.S. 242 (1976).

[110] *Furman*, 408 U.S. 238 (1972).

[111] *Id.* at 386-90, 398-99 (Burger, C.J., dissenting); *see also supra* notes 9 & 15.

[112] Bedau, *'New' Death Penalty, supra* note 91.

[113] For a general survey, see W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982, at 67-102, 193-270 (1984). The complexity of reaching reliable judgment on racial discrimination in capital sentencing is discussed in Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985). For criticism of earlier research purporting to show racial discrimination in capital sentencing and executions, see A. BLUMSTEIN, 1 RESEARCH ON SENTENCING: THE SEARCH FOR REFORM 13, 88-110 (1983).

it is imposed is non-homicidal, such as rape[114] or kidnapping.[115] The death penalty is always "disproportionate" in its severity for such an offense, however grave the offense may be. This is, in effect, to accept an argument that the death penalty can be an offense-relative "cruel and unusual punishment," without retracting the prior conclusion that it is not "cruel and unusual" on purpose- or essence-relative grounds.[116] Thus, the Court continues to resist the most powerful arguments against the death penalty (that is, those that are purpose- or essence-relative) even as it has granted, in one form or another, that the death penalty may well be a "cruel and unusual punishment" insofar as offense-, offender-, or frequency-relative grounds are concerned.

From both a constitutional and a philosophical point of view, therefore, by far the most interesting types of judgments that a punishment is cruel and unusual are those relating to the proper purposes of punishment or to the real nature of persons. Let us turn, therefore, to a closer scrutiny of these types of arguments.

XI. The Purposes of Punishment

The punishment of one person by another has as few or as many purposes as the punisher can sincerely claim. But the purposes of the practice of punishment, insofar as it is morally defensible, must be more strictly limited. Punishments must be controlled by the assumption that society imposes penalties only upon guilty offenders in the pursuit of protecting and vindicating justice as defined in part by compliance with the criminal law. Thus, forward-looking purposes — rehabilitation, incapacitation, deterrence, and the prevention of crime generally — as well as backward-looking purposes — vindication, condemnation, and desert — have a place in any rational understanding of the practice of punishment.[117] Accordingly, a punishment can be judged

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[114] Coker v. Georgia, 433 U.S. 584 (1977).

[115] Eberheart v. Georgia, 433 U.S. 917 (1977).

[116] How broadly the Court is prepared to extend this offense-relative argument against the death penalty will be known in part only when it rules whether the death penalty for treason and other non-homicidal offenses is a "cruel and unusual punishment;" this is not likely to happen soon. *See* Wilson, *Chaining the Leviathan: The Unconstitutionality of Executing Those Convicted of Treason*, 45 U. Pitt. L. Rev. 99 (1983).

[117] There is no canonical list of the "purposes" of punishment, or of the intention(s) with which a sentencer must sentence a guilty person to punishment. A century ago Nietzsche identified a dozen "meanings" [*Sinnen*] of punishment. F. Nietzsche, On the Geneology of Morals 80-81 (W. Kaufmann & R. Hollingdale trans. 1969). Gross identifies six "theories" of punishment. H. Gross, A Theory of Criminal

to be cruel and unusual, or excessively severe, if it imposes more pain, suffering, loss of rights, or other deprivation than is necessary to serve these purposes. One way to conclude that the death penalty is excessively severe, therefore, is to conclude that no matter what the offense or the offender, and no matter what its pattern or frequency of administration, it imposes more deprivation than is needed to secure these appropriate punitive purposes.

We may note straightaway that if punitive purposes are narrowly specified, it is possible to settle the substantive question before us with dispatch. If one believes that utilitarian purposes in punishment should generally prevail over all nonutilitarian purposes, and that the best way to achieve them is to provide rehabilitation for all convicted offenders, no matter what the crime or who the criminal,[118] then the death penalty so thoroughly frustrates this purpose that it must be judged excessive without further ado. However, this argument has its dual: If one believes that retributive purposes should generally prevail over all nonretributive purposes, and that the criterion for appropriate punitive severity is a strict *lex talionis* — making the punishment "fit" the crime by ensuring that it imitates or reproduces that crime's characteristic feature — then the death penalty cannot be cruelly excessive. Rather, it is uniquely appropriate in all those cases where the offender is convicted of murder. The distinctive premises of these two arguments cannot both be true; they obviously lead to the contradictory conclusion that the death penalty for the offense of murder both is and is not cruelly excessive. At least one of these premises, therefore, must be rejected. Actually we should reject them both. *Lex talionis*, if understood as above,[119] is a

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JUSTICE 385-400 (1979). Yesterday's "meanings" of punishment and today's "theories" of punishment are essentially indistinguishable from each other, as are the "purposes," "reasons," and "justifications" of punishment. Thus, Justice Marshall identifies "six purposes conceivably served by capital punishment: retribution, deterrence, prevention, . . . encouragement of guilty pleas and confessions, eugenics, and economy." *Furman*, 408 U.S. at 342. All six can be readily grouped under the pair of categories proposed in the text; all but the first of these "purposes" are forward-looking or consequentialist in nature.

[118] It is, of course, possible to defend rehabilitation on grounds other than as a means to the end of crime prevention. It can be defended also as an end in itself, on the ground that society ought to undertake the moral regeneration of convicted offenders for their own good. Even more so than when rehabilitation is placed within a utilitarian framework, this view eliminates any possible recourse to the death penalty. For a recent development of such a theory, without any mention of its application to the death penalty, see Morris, *A Paternalistic Theory of Punishment*, 18 AM. PHIL. Q. 263 (1981).

[119] Historically, the Biblical *lex talionis* ("life for life, eye for eye, tooth for tooth," *Exodus* 21:23-24) does not consist of such an imitative principle as proposed in the

notoriously unacceptable principle of proportionate severity,[120] and few if any serious defenders of retributivism today (and there are many)[121] incorporate it into their theory. As for rehabilitation, even if it is false (as it is) that "nothing works"[122] there is no empirical or moral basis for supposing that it could or ought to supplant all competing utilitarian considerations in the pursuit of crime prevention and law compliance.[123] Therefore, the easy repudiation of the death penalty as a cruel and unusual punishment, or its equally facile vindication, comes to nothing.

Yet another possibility of comparably sweeping effect should be noticed, not least because it has proved somewhat attractive in the past. Some thinkers might argue that one (although not both) of the two

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text. *See* D. DAUBE, STUDIES IN BIBLICAL LAW 102-53 (1947). For Kant's doctrine of *jus talionis* and his conception of the death penalty therein, see I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99-107, 131-33 (J. Ladd trans. 1965).

[120] Blackstone was one of the first to attack *lex talionis* understood as in the text. *See* W. BLACKSTONE, 4 COMMENTARIES ch. 1, § ii.3, *cited in* H.L.A. HART, *supra* note 27, at 161 n.3.

[121] Several independent defenses of retribution in punishment have been provided during the past decade; none of them defends *lex talionis*. S. JACOBY, *supra* note 54; R. NOZICK, PHILOSOPHICAL EXPLANATIONS 363-97 (1981); R. SINGER, JUST DESERTS: SENTENCING BASED ON EQUITY AND DESERT (1979); A. VON HIRSCH, DOING JUSTICE: THE CHOICE OF PUNISHMENTS (1976); Card, *Retributive Penal Liability*, 7 AM. PHIL. Q. MONOGRAPHS 17 (1973); Day, *Retributive Punishment*, 87 MIND 498 (1978); Finnis, *The Restoration of Retribution*, 32 ANALYSIS 131 (1972); Gendin, *A Plausible Theory of Retribution*, 1 J. VALUE INQUIRY 1 (1970); Pugsley, *Retributivism: A Just Basis for Criminal Sentences*, 7 HOFSTRA L. REV. 379 (1979); Sterba, *Retributive Justice*, 5 POL. THEORY 349 (1977); Wertheimer, *Understanding Retribution*, 2 CRIM. JUST. ETHICS 19 (1983); Wittman, *Punishment as Retribution*, 4 THEORY & DECISION 209 (1974). A version of *lex talionis* is defended, however, in Davis, *How to Make the Punishment Fit the Crime*, 93 ETHICS 726 (1983); Primorac, *Life for Life: Arguments Against Capital Punishment*, 29 PHIL. STUD. [DUBLIN] 186, 188 (1982); and Primorac, *On Capital Punishment*, 17 ISRAEL L. REV. 133 (1982). I do not find the reasoning of Davis and Primorac persuasive insofar as it involves a defense of the view that retributive principles *require* the death penalty for murder.

[122] "Nothing works" is the anti-rehabilitative slogan bruited about by cynics and conservatives alike during the past decade, in the aftermath of the review of evaluation studies by Martinson. *See* Martinson, *What Works? Questions and Answers About Penal Reform*, 10 PUB. INTEREST 22 (1974). Less frequently noted is the fact that within a few years Martinson changed his mind: "[N]ew evidence leads me to reject my original conclusion . . . ." Martinson, *New Findings: A Note of Caution Regarding Sentencing Reform*, 7 HOFSTRA L. REV. 243 (1979). For criticism, see F. CULLEN & K. GILBERT, REAFFIRMING REHABILITATION 111-12, 170-73 (1982); *see also* L. SECHREST, S. WHITE & E. BROWN, THE REHABILITATION OF CRIMINAL OFFENDERS: PROBLEMS AND PROSPECTS (1979).

[123] *See, e.g.*, N. MORRIS, *supra* note 92.

purposes of punishment so far identified — roughly, the retributive and the utilitarian — is entirely illegitimate. This position, in conjunction with other considerations, could yield a decisive judgment on the death penalty as an excessively severe punishment. If it could be shown both that it is morally unjustified to let retributive purposes play any role in the practice of punishment in a just society,[124] and that the only defense of the death penalty (even without appeal to *lex talionis*) were to be found within these purposes, then repudiating them would pave the way for showing that the death penalty is excessively severe. Parallel considerations apply to the utilitarian purposes of punishment: If it could be shown that it is morally unjustified to let these purposes play any role[125] and that only they provide a basis for attack on the death penalty, then we must conclude that the death penalty is not excessively severe. However, I see no way to advance the major premise of either of these arguments (quite apart from the implausibility that also attaches to the secondary premises). Although the point cannot be thoroughly defended here, any theory that shows punishment to be legitimate by reference to its role in securing general compliance with roughly just laws cannot be formulated entirely free of retributive and utilitarian considerations.[126] Moreover, the best way to integrate these backward- and forward-looking considerations[127] does not materially

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[124] Bentham might be understood to have held such a position. *See* Bedau, *Bentham's Utilitarian Critique of the Death Penalty*, 74 J. CRIM. L. & CRIMINOLOGY 1033, 1042-43 (1983).

[125] Kant is usually thought to have believed this. However, this conventional view is disputed in Scheid, *Kant's Retributivism*, 93 ETHICS 262 (1983).

[126] Thus, A. VON HIRSCH, *supra* note 121, relies on both. *See also* H. BEDAU, *supra* note 87; H. GROSS, *supra* note 117, at 375-412; H.L.A. HART, *supra* note 27; N. MORRIS, *supra* note 92; N. WALKER, PUNISHMENT, DANGER AND STIGMA: THE MORALITY OF CRIMINAL JUSTICE 24-45, 138-39 (1980).

[127] Philosophers still disagree about this integration. Some writers have argued that the conjunction of utilitarian and retributive principles is contradictory or paradoxical. *See, e.g.*, Goldman, *The Paradox of Punishment*, 9 PHIL. & PUB. AFF. 42 (1979). Others, for example, A. VON HIRSCH, *supra* note 121, see no such difficulties. I am convinced that the best way to start to fit the two together is to follow H.L.A. HART, *supra* note 27, at 8-13. On this view, the "general justifying aim" of a system of punishment is broadly utilitarian (reducing the incidence of crime within the framework of a roughly just system of laws), and its "distribution" is broadly retributive (punishment should be visited on all and only those found guilty by a fair procedure). Utilitarian concerns thus answer the question, "Why have a system of punishment at all?" Retributive concerns answer the quite different question, "Who is properly punished and why?" Both answers, however, must rely on some theory of social justice in terms of which it is reasonable to use and threaten force for non-compliance with the law. The best such theory is that in J. RAWLS, *supra* note 55.

advantage either side in the death penalty controversy. Supporters and opponents of the death penalty are thus engaged in a debate whose rational resolution turns less on the particular role allotted to each of these punitive purposes and more on the various factual considerations enlisted on behalf of the relevant retributive principles and utilitarian generalizations. In sum, no argument that the death penalty is a cruel and unusual punishment, nor any argument designed to prevent that conclusion, can succeed if it repudiates outright either all utilitarian or all retributive purposes in the practice of punishment in a just society.

Once arguments of the above two sorts are put aside, it immediately becomes doubtful whether there is any legitimate purpose of punishment that, by itself, either requires or forbids the death penalty. At most, it appears, the purposes of punishment are consistent with this penalty, and accepting or rejecting it will turn on other considerations. Thus, in regard to retributivism, once we repudiate *lex talionis* in favor of some more plausible alternative principle,[128] the death penalty may well be consistent with this principle. Whether it is nonetheless excessive in its severity would now turn on other considerations, either internal to the theory of retribution itself (such as the considerations that govern the general construction of the penalty scale) or external to it.[129]

Parallel considerations apply if we start instead with any of several utilitarian purposes. Once it is conceded, as it must be, that crime prevention and law compliance are always probably better secured by relatively severe penalties, then it is not inconsistent in principle to adopt the death penalty. Whether the penalty is nonetheless excessively severe would then depend either on internal factors, all of which involve ques-

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[128] An example of a more plausible alternative principle is one that requires the severity of punishments to be proportional to the gravity of the offense, where "gravity of offense" is determined according to the offender's fault and the harm caused by the offense. For attempts at formulating such a principle of proportionality, or proportionate desert, see A. VON HIRSCH, *supra* note 121, at 66-76, and R. NOZICK, *supra* note 121, at 363-65.

[129] Retributivists who ignore or repudiate the death penalty, *see supra* note 121, do not make it clear why they do so. In particular, they do not show that it is owing to some feature *internal* to their retributive theory. It has been argued that retributivism itself can preclude the death penalty. E. VAN DEN HAAG & J. CONRAD, *supra* note 74, at 17-28; Gerstein, *supra* note 20, at 78-79; Pugsley, *A Retributivist Argument Against Capital Punishment*, 9 HOFSTRA L. REV. 1501 (1981). This is distinctly a minority view. Retributivist theorists typically argue otherwise. *See, e.g.*, W. BERNS, *supra* note 67. Berns' vindictive-retributive argument in general is unconvincing if only because it rests on intuitive grounds and picks and chooses among penalties for crimes, as I have explained elsewhere. *See* Bedau, Book Review, 90 ETHICS 450 (1980); *see also* Hughes, Book Rev., N.Y. REV. BOOKS, June 28, 1979, at 22.

tions of fact,[130] or on external factors that rely on nonutilitarian considerations. In the nature of the case, there is no guarantee that the facts in question remain constant over time and under varied conditions. Thus, holding constant the retributive or utilitarian purposes of punishment (but trimmed of their talionic and rehabilitative features, respectively, and each prevented from ousting the other on grounds of general illegitimacy), one might easily conclude that, given the facts as they currently are and as they have been for some decades, the death penalty in this nation for all crimes and all offenders has become excessively severe, even if at an earlier time this was not true. In fact, the briefest possible characterization of the argument against the death penalty during the past quarter century in this country is precisely of this nature: Neither utilitarian nor retributive considerations require us to use the death penalty, and so no rational purpose of punishment in a just society is more effectively served by the death penalty than by the less severe punishment of long-term imprisonment. To continue to use the death penalty is to persevere in using an excessively severe punishment.

It is not necessary here to present this argument in detail, revealing its fine structure, premise by premise, whether in terms suitable to the present discussion or in language appropriate to constitutional interpretation of the Clause forbidding "cruel and unusual punishments." One can readily see it at work, not only in the brief initially presented to the Supreme Court in *Furman*,[131] and in the concurring opinions in that case by Justice Brennan[132] and Justice Marshall,[133] but also in the writings of several previous[134] and subsequent[135] commentators. It is true, however, that in none of these sources is the present purpose-relative argument kept distinct from other arguments, notably those discussed previously that rely primarily on frequency-relative considera-

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[130] An example of internal considerations is whether the putative increase in the severity of the punishment to death yields any genuine increase in crime prevention through greater incapacitation and greater net deterrence.

[131] *See Attorneys for the NAACP Legal Defense and Educational Fund*, in VOICES AGAINST DEATH: AMERICAN OPPOSITION TO CAPITAL PUNISHMENT, 1787-1975, at 264-88 (P. Mackey ed. 1976).

[132] *Furman*, 408 U.S. at 257-306.

[133] *Id.* at 314-74; *see also* Justice Marshall's and Justice Brennan's subsequent concurring and dissenting opinions in death penalty cases, *Gregg*, 428 U.S. at 227-31 (Brennan, J., dissenting); *id.* at 231-41 (Marshall, J., dissenting).

[134] *See, e.g.*, Goldberg & Dershowitz, *supra* note 5; Gottlieb, *supra* note 4.

[135] *See, e.g.*, Radin, *supra* note 15.

tions.[136] Rather, these logically distinguishable arguments are usually found inseparably intertwined. Whether isolating these different types of argument would add to their separate or joint persuasiveness in any judicial or legislative forum is open to question; in any case, it is desirable to keep them distinct in the present discussion.

Distinguishable though they are, they share a certain difficulty. Both the frequency-relative and purpose-relative arguments rely heavily on several factual claims about social behavior. These behaviors and their best description and explanation are subject to change and are vulnerable to controversy over their verification — as the struggle by social scientists to settle issues of racial discrimination[137] and deterrent efficacy[138] convincingly shows. Thus, even though purpose-relative arguments have a greater logical power than do frequency-relative arguments,[139] the former are no more immune from the vagaries of empirical data than are the latter. Even though the rational policy planner (as distinct from politically vulnerable legislators) would be guided by arguments as plainly empirical as these, many constitutional interpreters would not. The factual support required by these arguments runs counter to the reasoning relied upon by those strict reconstructionists who would explain the "cruel and unusual punishments" Clause by reference and deference to the original intention of the framers.[140]

XII. Persons and Punishment

The strongest argument against the death penalty as an excessively severe punishment must, therefore, take its direction from two main cues: It must subordinate wherever possible local or transitory empirical considerations, which frequency- and purpose-relative arguments cannot do; and it must elevate to primary importance the more timeless and universal aspects of the nature of the death penalty, on the one hand, and of the person, on the other. In addition, these factors must be deployed against the proper background of a system of just laws in a society of persons with rights who recognize and respect the rights of others equally with their own. Without this setting, violation of the law cannot be morally condemned and force cannot be morally defended when used to secure compliance with it. And, of course, a feasible alter-

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[136] *See supra* text accompanying notes 93-95 & 108-13.
[137] *See supra* note 113.
[138] *See supra* note 89.
[139] *See supra* text accompanying notes 95-96.
[140] *See supra* text accompanying notes 67-83.

native punishment to the death penalty must be available.[141]

It is convenient to begin by examining a recent account of cruelty inspired by the great eighteenth century French opponents of the cruelties of their day.[142] According to this account, "cruelty" is "the willful infliction of physical pain on a weaker being in order to cause anguish and fear."[143] The very ambiguity of this definition may enhance its attractiveness: In whom are the "anguish and fear" of "cruelty" willfully caused — the victim or the witnesses, or both? When this concept of cruelty is used to judge the death penalty, it certainly fits classic paradigms of cruel execution: Roman crucifixion, Tudor disembowelments, tearing asunder by *L'ancien régime*. Perhaps even the fusillade of rifle bullets that cut down Gilmore in Mormon Utah[144] or the repeated jolts of high-voltage electric current used recently by sovereign Georgia to broil Stephens[145] — these too might fall under the scope of cruelty as defined above. But capital punishment as such? Never. Where the death inflicted is not "physically" painful, it apparently cannot be cruel. Where the intention is not to cause anyone "anguish and fear" — not the condemned offender or the official witnesses or the general public — but merely to blot out the criminal once and for all, cruelty evaporates. What emerges from this plausible definition is exactly what modern friends of the death penalty have always insisted: Capital punishment is not, per se, an excessively severe, "cruel and unusual punishment," even if (as all sensible persons agree) some of its historic modes of infliction were.[146]

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[141] *See supra* text accompanying notes 84-92.

[142] Shklar, *supra* note 29, at 7-44.

[143] *Id.* at 8. The author mentions the death penalty, *id.* at 23-24, but does not discuss whether its use was or is cruel.

[144] I have discussed aspects of this case elsewhere. *See* H. BEDAU, *supra* note 9, at 121-25; *see also* N. MAILER, THE EXECUTIONER'S SONG 973-92 (1979); Gardner, *Illicit Legislative Motivation as a Sufficient Condition for Unconstitutionality Under the Establishment Clause — A Case for Consideration: The Utah Firing Squad*, 1979 WASH. U.L.Q. 435; Gardner, *Executions and Indignities — An Eighth Amendment Assessment of Methods of Inflicting Capital Punishment*, 39 OHIO ST. L.J. 96 (1978).

[145] N.Y. Times, Dec. 13, 1984, at A18; *see also* Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947) (second attempt at carrying out death sentence by electrocution not a "cruel and unusual punishment"); Miller & Bowman, *"Slow Dance on the Killing Ground": The Willie Francis Case Revisited*, 32 DE PAUL L. REV. 1 (1982).

[146] Thus, Berns concedes that carrying out the death penalty by "[d]rawing and quartering and disemboweling" is a "cruel and unusual punishment." W. BERNS, *supra* note 67, at 32. Similarly, Berger allows that carrying out the death penalty by "crucifixion or boiling in oil" was, in 1689, and would be today, a "cruel and unusual punishment." R. BERGER, *supra* note 17, at 41. Van den Haag, so far as I can see,

But cruelty as defined above is only the first, not the last, word on the subject. Another thoughtful recent writer, equally steeped in the seminal thinking of the eighteenth century about cruelty as well as in the widespread horrors of our own time, invites us to think about the subject in a more imaginative, thematic fashion,[147] and thus to go beyond what any typical dictionary will tell us about human cruelty. If we do this, we will see that the very "heart of cruelty" is best described as "total activity smashing total passivity."[148] Cruelty, on this view, consists of "subordination, subjection to a superior power whose will becomes the victim's law."[149] Where cruelty reigns, therefore, there is a "power-relationship between two parties," one of whom is "active, comparatively powerful," and the other of whom, the victim, is "passive, comparatively powerless."[150] These penetrating observations, proposed originally without any explicit or tacit reference to punishment under law, much less the death penalty, nonetheless are appropriate to it. They reveal the very essence of capital punishment to be cruelty. Whether carried out by impalement or electrocution, crucifixion or the gas chamber, firing squad or hanging, with or without "due process" and "equal protection" of the law, there is always present that "total activity" of the executioner and the "total passivity" of the condemned. The state, acting through its local representatives in the execution chamber, smashes the convicted criminal into oblivion. The one annihilates — reduces to inert lifeless matter — the other. If this is a fair characterization of cruelty, then the death penalty was, is, and always will be a cruel punishment.

What is most compelling about the concept of cruelty understood as a "power-relationship" in the foregoing manner is that it focuses our attention on the salient common factor in all situations where the death penalty is inflicted, however painlessly and whatever the condemned

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nowhere has conceded that any mode of inflicting the death penalty that a duly elected legislature enacts is "cruel and unusual punishment," but he seems to allow that this would be the proper judgment to reach regarding "the death penalty [today?] for pickpockets or car thieves." E. VAN DEN HAAG & J. CONRAD, *supra* note 74, at 203. He also observes that "death being the ultimate penalty, it should be inflicted only for the gravest crimes, in their most aggravated form, e.g., not for rape, but for rape-murder." E. VAN DEN HAAG, *supra* note 67, at 227.

[147] P. HALLIE, *supra* note 29. The death penalty is mentioned once, *id.* at 97, but only in passing; the author makes no attempt to decide whether the death penalty was or is a cruel punishment.

[148] *Id.* at 90.

[149] *Id.* at 34.

[150] *Id.*

has done. For western philosophy, the classic example of capital punishment is provided by the case of Socrates, whose death (if we may believe Plato[151] and Xenophon[152]) was painless and administered by his own hand from the cup of hemlock, which he drank by order of the Athenian court that sentenced him to death. If such a method of execution were revived today it could not easily be condemned as "undignified" and thus an assault on "the dignity of man," said to be the central value protected by the constitutional prohibition of "cruel and unusual punishments."[153] Today, with the growing use of lethal injection, and when even more acceptable modes of execution are invented and adopted in the future, the same difficulty arises. With death carried out by the state in a manner that does not disfigure the offender's body, apparently causes no pain whatever, and brings about death within a few minutes, it is extremely difficult and maybe even impossible to construct a convincing argument that condemns the practice based on its "indignity." These are awkward facts for those who oppose capital punishment. But they are completely outflanked when cruelty is viewed as a "power-relationship" in the manner indicated. Cruelty seen in this fashion enables us to recognize that the death penalty is and will remain cruel no matter how or on whom it is inflicted.

The idea of such total obliteration offends our moral imagination, however, only if we grant that using the death penalty destroys something of value. We must explain what is wrong about cruel punishments and why it matters so much. The only kind of answer worth seeking is one that reveals the worth to us (and not only or even primarily to the person cruelly punished) of what cruelty destroys. But what value is there in a deservedly condemned criminal? It does not suffice to say, even if it is true, that "there is a nonwaivable, nonforfeitable, nonrelinquishable right — the right to one's status as a

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[151] Plato, *Phaedo*, in PLATO: THE COLLECTED DIALOGUES 40-98 (E. Hamilton & H. Cairns eds. 1961).

[152] Xenophon, *Memorabilia*, in XENOPHON, RECOLLECTIONS OF SOCRATES AND SOCRATES' DEFENSE BEFORE THE JURY 138-41 (A. Benjamin trans. 1965).

[153] Trop v. Dulles, 356 U.S. 86, 100 (1958), *quoted in Furman*, 408 U.S. at 270 (Brennan, J., concurring). While I do not wish to rely in my argument on this concept, I do not wish to hold it up to contempt, either, as some have done, *see, e.g.*, R. BERGER, *supra* note 17, at 118 ("empty rhetoric"); *id.* at 118 n.30 ("arrant nonsense"), nor repeat the pusillanimities of others. *See, e.g.*, E. VAN DEN HAAG & J. CONRAD, *supra* note 74, at 262, 276, 297-98. Much the most serious treatment of this concept is given in W. BERNS, *supra* note 67, at 24-28, 162-63. However, Berns balks (rhetorically?) at the idea that even "the vilest criminal" retains *some* "human dignity." *Id.* at 189.

moral being, a right that is implied in one's being a possessor of any rights at all."[154] Traditional theories of "natural rights" in the seventeenth and eighteenth centuries fully acknowledged that a person's "natural rights" included a "right to life."[155] But according to these theories this right is "forfeited" by any act of killing another person without excuse or justification.[156] There are, to be sure, difficulties with the idea of forfeiture of natural rights.[157] Whether they are any graver than the difficulties in the alternative is not obvious. The alternative holds that there is nothing a person can do or become by virtue of which the person loses the status of a moral agent. This is one way to express the underlying conception of the person as shielded by fundamental rights, including the right to life. The essence-relative argument against the death penalty as a "cruel and unusual punishment" turns on it. Without such a conception, we cannot resist the obvious inference: Once a person is fairly found guilty of a ghastly crime (for example, mass or serial murder, or genocidal murder), then the offender has no moral "worth" or residual "dignity," and deserves no minimal "respect" from society. Only with such a conception of fixed rights can we avoid such an inference.

The argument can be advanced from each of three directions. The first draws upon familiar constitutional principles. According to these principles, even the persons convicted of the gravest crimes retain their fundamental rights of "due process of law" and "equal protection of the laws." These rights are not forfeitable and cannot be waived. If government officials violate them, that is sufficient to nullify whatever legal burdens were placed on the person arising out of that violation and quite apart from whatever consequences may ensue. What this shows is that our society already has in place, and fully acknowledges, the principle that the individual *cannot* do anything that utterly nullifies his or her "moral worth" and standing as a person. The essence-

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[154] Morris, *supra* note 118, at 270.

[155] There is no adequate study of the historical sources and content of the "natural right to life." It is, for instance, virtually unmentioned in the otherwise valuable monograph by R. TUCK, NATURAL RIGHTS THEORIES: THEIR ORIGIN AND DEVELOPMENT (1979). For discussion of current themes and references to the standard sources, from Hobbes to Kant, see M. WHITE, THE PHILOSOPHY OF THE AMERICAN REVOLUTION 185-228 (1981); Bedau, *The Right to Life*, 52 THE MONIST 550 (1968); Fletcher, *The Right to Life*, 63 THE MONIST 135 (1980).

[156] *See, e.g.*, J. LOCKE, *supra* note 23, at 172.

[157] I have discussed some of them in Bedau, *Capital Punishment*, in MATTERS OF LIFE AND DEATH (T. Regan 2d ed. 1985), and in Bedau, *supra* note 155, at 567-70. *See also* Fletcher, *supra* note 155, at 142.

relative argument against the death penalty thus does not aim to invent an unfamiliar type of reasoning and then inject it into constitutional thinking. It merely extends something that has long been done into the area of the substantive constitutional law of punishments.

The second line of reasoning draws upon quotidian experience. This assures us that those persons actually condemned by law to die for their crimes are not merely living members of *homo sapiens* but are also persons capable of the full range of moral action and passion indigenous to moral creatures. However dangerous, irrational, self-centered, stupid, or beyond improvement such a person may in fact be, these deficiencies do not overwhelm all capacity for moral agency — for responsible action, thought, and judgment, in solitude and in relationship with other persons.[158] In particular, none of these capacities vanishes as a result of the person's being at fault for causing wilful, deliberate homicide. The act of murder does not cause the varying moral capacities of murderers that experience amply reveals.[159] No plausible empirical argument can support an alleged loss of moral agency in a convicted murderer as a result of the act of murder. Even more to the point, so far as moral agency is concerned, there is no evidence to show that convicted murderers are different from other convicts.[160] So the doctrine that certain persons, who had basic human rights prior to any criminal acts, forfeit or relinquish all those rights by such acts and thereby cease to be moral persons, receives no support from experience.

The third direction in which to look for support is more obscure and

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[158] Anyone who doubts the claims in the text will put doubt aside after reading recent accounts of men on America's "death rows." *See* R. JOHNSON, CONDEMNED TO DIE: LIFE UNDER SENTENCE OF DEATH (1981). For a discussion of this and other recent studies of life on death row, see Bedau, Book Review, 28 CRIM. & DELINQ. 482 (1982).

[159] *See, e.g.*, Danto, *A Psychiatric View of Those Who Kill*, in THE HUMAN SIDE OF HOMICIDE 3-20 (B. Danto, J. Bruhns & A. Kutscher eds. 1982), and the extensive literature cited therein. No doubt, as Danto notes, "murderers have defective super egos, that is, they have defective consciences," *id.* at 7, inconstestably proved by their criminal acts. But he cites no evidence in the research he surveys to contradict the claims in the text.

[160] Whether the issue has ever been tested directly is not clear, but it is clear that some of those who have studied convicted murderers agree with the statement in the text. *See, e.g.*, A. MORRIS, HOMICIDE: AN APPROACH TO THE PROBLEM OF CRIME 18-19 (1955) ("[T]he murderer's mental processes are those common to all of us."). Other research shows that the murderer is typically male, young, and in other ways like those who commit non-homicidal crimes of violence against the person. STUDIES IN HOMICIDE 3-4 (M. Wolfgang ed. 1967). Thus, murderers as a class may well be like other violent offenders and unlike most non-violent offenders.

controversial; it concerns moral theory and the nature of the person. Despite recent remarks from the federal bench [161] expressing hostility to all such theories, they cannot be ignored. Human beings are not merely biological specimens of the species *homo sapiens*; nor are we merely self-motivating information-processing creatures. We are moral beings; the meaning of this proposition cannot be intuitively grasped or read off from any value-neutral set of descriptions about our behavioral capacities.[162] It can be understood only as the product of reflective thought about our own capacities as agents and patients, and any remotely adequate account will embody or rely upon moral theory. As a consequence, the nature of the person (as well as any account of that nature) itself changes over time as a result of changes in our self-perceptions. History assures us that we are permanently engaged in our own progressive self-understanding as individuals and as societies. For several centuries — and in particular, since the Age of Enlightenment — philosophers have struggled to enunciate a conception of the person as fundamentally social, rational, and autonomous, and as immune to change in these respects by virtue of any contingencies of history or circumstance. Such personal traits and capacities are no guarantee against immorality in private or public conduct. Nor do they protect us from mortality; they decay with senescence and can vanish prior to biological death. It is also true that in particular cases illness, abnormality, and other misfortunes can prevent their normal development in otherwise "normal" persons. Yet these capacities are not, and cannot be thought of as, vulnerable to destruction by the agent's own acts that are deliberate, intentional, responsible — the very qualities properly deemed nec-

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[161] Thus, Judge Robert R. Bork declared that "contractarian . . . philosophy" (along with others) is unsuitable as a "constitutional ideolog[y]" because it is "abstract," lacks "democratic legitimacy," and because "[o]ur constitutional liberties . . . do not rest on any general theory." N.Y. Times, Jan. 4, 1985, at A16, col. 5. "Contractarian philosophy" is a generic term the best specific instance of which is the moral philosophy of J. RAWLS, *supra* note 55. Judge Bork also condemned what he described as the attempt to "substitute" the "abstractions of moral philosophy" for "our constitutional freedoms." N.Y. Times, Jan. 4, 1985, at A16, col. 5. Rawls and other contractarians do not argue for such a "substitution"; they do argue that the best theory of these "freedoms" is to be found in their "moral philosophy" — a very different thesis.

[162] It has become standard practice to distinguish several concepts of the person, the most primitive of which is that of a biological member of *homo sapiens* and the most complex of which is that of an autonomous rational claimer of rights. *See* J. ROSENBERG, THINKING CLEARLY ABOUT DEATH 108-23 (1984). Various commentators believe that a moral dimension to personhood is necessary to any adequate account of the person. *See, e.g.*, Dennett, *Conditions of Personhood*, in THE IDENTITIES OF PERSONS 175-196 (A. Rorty ed. 1976); *see also* S. HAMPSHIRE, THOUGHT AND ACTION (1959).

essary in a person's conduct before the criminal law subjects a person's harmful conduct to judgment, condemnation, and punishment. On such a theory, even the worst and most dangerous murderer is not a fit subject for annihilation by others. Not even the convicted criminal is a mere object, a thing, to be disposed of by the decision of others, as though there were no alternative. Society has no authority to create and sustain any institution whose nature and purpose is to destroy some of its own members. So cruelty, which does this, matters — because our own status as moral creatures matters. Accordingly, deliberate, institutionalized, lethally punitive cruelty matters too. Bringing it to an end in all human affairs heads the list of desiderata for any society of persons who understand themselves as moral agents.

Why a theory with the consequences sketched above should be accepted in preference to alternative theories of the person is far too large a question to try to answer here. Until it is answered satisfactorily, however, its conception of the person will not convince the unconverted. Today's handful of literate friends of the death penalty are unaware or unpersuaded by it;[163] one can only speculate about what they would offer in its place. Fortunately, during the past decade or so (indeed, coincident with but wholly independent of the Supreme Court's death penalty cases beginning with *Furman*) several philosophers have begun thorough and systematic work toward developing versions of this theory,[164] including versions that connect it with our constitutional tradition in general and with the concepts employed in the Bill of Rights and fourteenth amendment in particular.[165] It must suffice here to point

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[163] E. VAN DEN HAAG, *supra* note 68, at 196-206, discusses the topic with irony and ambivalence. Berger and Berns neglect it completely. Kant, of course, not only defended the death penalty but also did more than any other classic philosopher to develop the concept of the person in the manner continuous with current thought. Thus, he is the classic exception, apparently, to the line of argument sketched in the text. It would take the present discussion too far afield to show how this apparent contradiction can be resolved.

[164] B. ACKERMAN, SOCIAL JUSTICE AND THE LIBERAL STATE (1980); A. GEWIRTH, REASON AND MORALITY (1978); A.I. MELDEN, RIGHTS AND PERSONS (1977); J. RAWLS, *supra* note 55; D. RICHARDS, A THEORY OF REASONS FOR ACTIONS (1971).

[165] H. GROSS, *supra* note 117; R. DWORKIN, *supra* note 55; D. RICHARDS, THE MORAL CRITICISM OF LAW (1977); D. RICHARDS, SEX, DRUGS, DEATH AND THE LAW (1982); Richards, *supra* note 81. Hart has rightly pointed out that Dworkin "does not appeal to any theory of human nature" to ground his defense of unwritten constitutional rights. H.L.A. HART, ESSAYS IN JURISPRUDENCE AND PHILOSOPHY 210 (1983). Nevertheless, there is no way to explain Dworkin's position without eventually appealing to a "theory" of precisely this sort. *See also Respect for Persons*, 31 TULANE STUDIES IN PHILOSOPHY (O. Green ed. 1982).

in this direction and leave to others and for other occasions the detailed characterization and evaluation of this theory.[166]

If the death penalty is an excessively severe punishment, as I believe, then it is in part because the best conception of the person is the one sketched above. According to that conception of the person, given the familiar facts of our society in this century, and given the unalterable nature of the death penalty itself, this kind of punishment — even when carried out in the most dignified fashion, on the most hardened offenders, for the most heinous crimes — exceeds the severity that society acting through its government may employ. Translated into the terms of the severity-limiting language of the Constitution, the death penalty thus is a "cruel and unusual punishment."

CONCLUSION

The investigation has taken us, as philosophical inquiry typically will, from the commonplace to the uncertain, to the perplexing, and even to the mysterious. To analyze what it is for a punishment to be excessively severe, we must avail ourselves of hypotheses and principles supplied from theories and conceptions having nothing directly to do with punishment at all. A theory of punishment, in the end, is no better than the theory of society, of morality, and of the person out of which it grows (if one thinks organically) or from which it is deduced (if one thinks axiomatically) or into which it is placed (if one thinks contextually). I have tried to show through various lines of inquiry that we can sensibly challenge the death penalty quite apart from attending centrally to the issues as they have been shaped during the past decade or so by the Supreme Court's own pronouncements, rulings, and tergiversations.[167] At present, the Court is hardly more receptive to these theo-

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[166] The central figure around whose thought these reflections focus is Rawls. *See* J. RAWLS, *supra* note 55. His work has received extensive and varied criticism. *See* B. BARRY, THE LIBERAL THEORY OF JUSTICE: A CRITICAL EXAMINATION OF THE PRINCIPAL DOCTRINES IN A THEORY OF JUSTICE BY JOHN RAWLS (1973); H. BLOCKER & E. SMITH, JOHN RAWLS' THEORY OF SOCIAL JUSTICE: AN INTRODUCTION (1980); N. DANIELS, READING RAWLS: CRITICAL STUDIES ON RAWLS' A THEORY OF JUSTICE (1975); R. WOLFF, UNDERSTANDING RAWLS (1977). However, little or none of this criticism is aimed at or touches the conception of the person central to Rawls' (and allied) moral theory. For an exploration of some of the issues here, see Daniels, *Moral Theory and the Plasticity of Persons*, 62 THE MONIST 265 (1979).

[167] For a criticism of the Court's reasoning in support of the death penalty, beginning with *Gregg* see Bedau, *'New' Death Penalty*, *supra* note 91. A much more elaborate critique will be found in Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305 and W. WHITE, *supra* note 8.

ries than is the general public. We may not even take for granted the agreement of other humanists and philosophers. No matter. Time will tell whether these reflections are right, or at least on the right track, and others can be counted on to straighten them out where they need to be put right.