In the

Supreme Court of the United States

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EARNEST JAMES AIKENS, JR.,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

No. 68-5027

Washington, D. C.
January 17, 1972

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v.	:	No. 68-5027
STATE OF CALIFORNIA, Respondent.	:	

Washington, D. C.,

Monday, January 17, 1972.

The above-entitled matter came on for argument at 10:09 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

ANTHONY G. AMSTERDAM, ESQ., Stanford University Law School, Stanford, California 94305, for the Petitioner.

RONALD M. GEORGE, ESQ., Deputy Attorney General of California, 500 State Building, 217 West First Street, Los Angeles, California 90012, for the Respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first today in No. 68-5027, Aikens against California.

Mr. Amsterdam, you may proceed whenever you're ready.

ORAL ARGUMENT OF ANTHONY G. AMSTERDAM, ESQ.,

ON BEHALF OF THE PETITIONER

MR. AMSTERDAM: Thank you, Mr. Chief Justice. May it please the Court:

This case and the three cases to follow present the question whether the infliction of the penalty of death on each of the petitioners is a cruel and unusual punishment within the Eighth and Fourteenth Amendments to the Constitution.

The cases present a range of factual situations. In this first Aikens case, the death penalty was inflicted upon a multiple murder for an intentional killing of a particularly atrocious sort.

In the second case, the Furman case, we have a killing in the course of a burglary,murder which may or may not have been intentional which is not attended by the same aggravated circumstances.

And in the third and fourth cases, Jackson and Branch, we have the infliction of the death penalty for the crime of rape.

The briefs of the parties and of the amici canvass a broad range of considerations under the Eighth and Fourteenth

Amendments. But I think there emerges from the briefs the clear impression that the central issue in this case, the real nub of this controversy, is the scope and indeed the propriety of judicial review of legislative, State legislative determinations to use the penalty of death.

The briefs on behalf of the respondents primarily support the death penalty on the ground that it exists on the statute books of 41 States and of the Federal Government. And that it has been put there by the Legislatures of 41 States and the Federal Government; and that those Legislatures are the primary keepers of the national conscience in penal matters; and the elected representatives of the people, whose judgment is entitled to respect.

I agree with all of that.

But, for me, I think that is the beginning and not the end of analysis under the Eighth Amendment. Because judicial review of legislative judgment is just as inevitable as it is difficult under a Constitution which commits to the courts protection of the individual, under guarantees such as cruel and unusual punishment or due process or equal protection of the laws.

Precisely because these guarantees are fundamental statements of the most basic principles of our society, the least confined to the narrow historical circumstances that gave them birth, they're cast in general terms. Their generality

makes them difficult to interpret, and it also creates the risk, which Mr. Justice Frankfurter frequently warned the Court about, that the Court may read its own dispositions into the Constitution.

But, at the same time, these very general proscriptions are the bedrock of a Constitution designed to endure for time. And to give continuing and constant expression to the notion that there are limitations on the power of government to deal with individuals.

Guarantees such as cruel and unusual punishment and due process and equal protection are broad statements in grand form, cast for an unforeseeable future and intended to be construed to give continuing protection to the limitations upon governmental power.

Such protections to the individual are not likely often to be added to the Constitution by the amending process, because when they're most needed they are least likely to command the political approval necessary to add them, and so they're put in general form and they're committed to courts to construe, as times change during the life of the nation as envisaged by the Constitution.

I conclude from that that, although deference and circumspection to legislative judgment is vital, that abnegation of judicial to legislative judgment is impermissible.

Because the very existence of a clause like the

Eighth Amendment prohibition of cruel and unusual punishment belies the idea that legislatures are totally free, in their choice of penalizing methods.

And if one thing is plain, it is that the cruel and unusual punishment clause is a restriction on legislation. In the context of American Government, where penal sanctions are primarily legislative, it can only have meant to limit legislative means. And this Court has, in fact, three times applied it to invalidate legislation in the only cases, in fact, in which it has applied the clause to vindicate any claim.

The question is, what are those limitations on legislative judgment? How stringent are they? And where does this Court get the standards by which to determine?

The problem of standards is critical because of the generality of cruel and unusual punishment that I described. The language is not crystalline, it's not clear, you can't look at a punishment and see whether it's cruel, you can't look at it and see whether it's unusual. And history, although relevant, cannot be controlling, because of the evolutionary nature of the guarantee and its projection into the future, as I've described it.

The State of California, the States of Georgia and Texas to some extent, in their briefs, have all made the point that at the time that the Eighth Amendment was written, capital punishment was widely in use; the Fifth Amendment clearly

envisages that there will be capital cases. The Federal Congress put capital statutes on the books. All this misconceives, I think, our submission to the Court, which is not that when the Eighth Amendment was ratified in 1791 it was intended then and there to do away with capital punishment, any more than it was intended then and there to do away with whippings or brandings or cutting off of ears, or any more than the equal protection clause, when originally put into the Constitution, was intended to give equal right to indigents or to women.

Q In your view, Mr. Amsterdam, would Congress have authority to legislate in this field concerning the States? Under the Eighth Amendment.

MR. AMSTERDAM: Would Congress have the power to prohibit the death penalty under the Eighth Amendment?

Q Yes.

MR. AMSTERDAM: Oh, sure, Your Honor.

Q In the States?

MR. AMSTERDAM: In the States, yes, Your Honor. But we go further than that, and --

Q I know you do. But I say would Congress -- has Congress done anything in the past?

MR. AMSTERDAM: With regard to capital punishment in the States?

Q Yes.

MR. AMSTERDAM: No, Your Honor. There has been a bill submitted by Senator Hart and Congressman Celler which would impose a moratorium on executions.

Q But that didn't pass?

MR. AMSTERDAM: It has not even come to committee hearing, Your Honor.

Q Congress's power would be under Section 5 of the Fourteenth Amendment, would it?

MR. AMSTERDAM: That is correct, Mr. Justice Stewart.

The problem of construing the Eighth Amendment emerges, I think, from what I have said: that if the language isn't clear and if history is not controlling, where does the Court get standards? Where does it find the bases for judgment in determining whether legislation is cruel or unusual?

The primary problem with formulations that you frequently find in lower court cases, such as the notion that a punishment may shock the conscience of the court, or be unnecessarily cruel, or some such thing, is that it invokes subjective judgment.

And one thing I think all the parties here agree on is that it is not the purpose of the Constitution to allow the judges to write their own penological reflections into it.

The arguments made by the States in these cases to sustain capital punishment would, I think, equally sustain branding of confidence men on the forehead with the letter C,

or cutting the hands of of pickpockets, or any atrocious punishments. And these punishments, I think, would plainly be condemned by the Eighth Amendment; but it behooves us to ask why: Is it simply because we would be shocked, would be intestinally appalled at those punishments, more than the punishment of death, if we are?

I don't think so. I think it is because there are objective and judicially cognizable bases for making a determination under the Eighth Amendment. And in our brief we have tried to set forth what those standards, what those objective standards for judicial judgment are.

Specifically, we think that the question under the Eighth Amendment is whether the punishment applied to a particular individual would, by all available objective indications, be unacceptable to general contemporary conscience and standards of decency if it were generally and uniformly applied, to any reasonable proportion of persons subject to penalty for that crime.

Q As I understand the statute in the first case, the judge had the discretion to impose it or not to impose it, is that right?

MR. AMSTERDAM: That is true, Mr. Justice Douglas. That is true in all four of these cases, that that penalty is discretionary with either judge or jury, depending on who tries the case.

Q That's true in each of the four?

MR. AMSTERDAM: Each of the four.

Q So there's no statement of State policy in the case you're now arguing that all people who commit murder shall be executed?

MR. AMSTERDAM: No. Indeed, the State policy is simply that the penalty of death be available, not that it be imposed on any particular murderer or any particular class of murderers.

Q Is there anything in this record which shows the kinds of people to which the death penalty -- on which the death penalty is imposed?

MR. AMSTERDAM: There is nothing in this --

Q I mean their annual income, their race, their religion, their social status, or are we just in the dark on that?

MR. AMSTERDAM: There is nothing in this record, nor, indeed, in the record of any of the cases before the Court, which discloses that. Judicially noticeable findings, I believe, set out in our brief reflect with some imprecision those factors, but there is nothing in the record that supports them.

The State of California has thrown into its brief a good deal of material which is neither in the record nor judicially noticeable.

There are some published materials, such as the racial

statistics, which I think are judicially noticeable. But there is nothing in the record, Mr. Justice Douglas, on that.

The reason why we urge that the standard I have just described is the proper standard under the Eighth Amendment, that what this Court must do is to look and see whether the punishment inflicted in a particular case would be tolerable, acceptable to prevailing standards of decency if generally applied.

It is essentially threefold. I think three considerations commend that standard to the Court, and I should say I take the Court's time at this point to talk about the Eighth Amendment standards because this Court has very little developed in the theory and in the concepts of the Eighth Amendment, and the parties are, I think, more in disagreement about the theory of the Eighth Amendment than they are about any other aspect of the case.

I think the three reasons are this: first of all, our conception of the theory of the Eighth Amendment takes a proper count of the different nature and the different roles under the Constitution of legislatures and courts. Legislatures are not primarily concerned with the application of penalties in particular cases.

As Mr. Justice Douglas's question suggests, the legislature, with regard to capital punishment, had simply said that death is an available penalty; it may never be used. It

may rarely and infrequently be used. It is --

Q Are there any States left in which the legislature has said that the death penalty inexorably follows from the conviction of a certain offense? There used to be many. Are there any left?

MR. AMSTERDAM: There are a number of them left. To my knowledge there is only one capital crime in the United States for which there are any men on Death Row. Most of them are obsolete, such as treason against the States, and that sort of thing, Mr. Justice Stewart.

The one crime is the California crime, 4500 of the California Penal Code, is assault by a life-term inmate upon a non-inmate, where the person assaulted dies. That is the only mandatory capital crime as to which I know there is any one on Death Row in this country.

Q But there are other statutes on the books?

MR. AMSTERDAM: There are other statutes, essentially obsolete, which impose this.

Q Well, in many States this used to be true of first-degree murder or deliberate murder.

MR. AMSTERDAM: Oh, yes. It has been a development that the death penalty has been made discretionary.

Q And there's no State left where that is any longer true, except in the exceptional kind of circumstance issue?

MR. AMSTERDAM: That is correct, there is no State left which has a mandatory capital punishment for murder or rape, either of the crimes involved here, nor any other of the ordinary crimes that capital punishment is imposed for.

Q It's about ten years ago, isn't it, that Congress abolished the mandatory death penalty for the District of Columbia?

MR. AMSTERDAM: That's about right, Mr. Chief Justice.

Q The Celler-Keating bill.

MR. AMSTERDAM: Pardon me?

Q Under the Celler-Keating bill, I think it was called?

MR. AMSTERDAM: That's correct. The District of Columbia and New York were the last two in the United States to go, the last two mandatory capital sentencing provisions to go.

The second --

Q Are there any standards in any of these cases for the exercise of discretion by the judge or jury?

MR. AMSTERDAM: None, Mr. Justice Douglas. It is entirely optional.

Q As a matter of California law, is the discretion reviewable, exercise of the discretion reviewable?

MR. AMSTERDAM: The Aikens case was tried and sentencing done by a judge. In a jury-tried case in California

the trial judge may set aside the jury's verdict. The California Supreme Court may not review the sentence, whether imposed by a judge or a jury.

The second reason why I think our theory or standard of the Eighth Amendment concept is up to the Court is that it serves a proper function in the Eighth Amendment to the Constitution of a democracy. Because in any democracy it is not at all likely that the legislature will put onto the statute books a penalty which is cruel, which is unacceptable to public conscience in a generally applicable uniform fashion.

A statute which is going to be generally applied, which would be repugnant to public conscience if generally applied, will not command enough public acceptance to get on the statute books in the first place.

The problem in a democracy is that legislation may be enacted in such a form that it can be arbitrarily, selectively, spottily applied to a few outcast priors, whose political position is so weak and whose personal situation is so unpopular, and who are so ugly that public revulsion, which would follow the uniform application of the penalties applied to them,doesn't follow in these few outcast preachers, and they are condemned to that punishment.

What we are saying essentially is that a punishment cast in a form so that it can be used this way comes to the Court suspect under the Eighth Amendment, and that where it is

actually applied, so infrequently, so incredibly rarely, as the death penalty is, that the suspicion materializes and the penalty is identifiable as a cruel or unusual punishment.

This is no new constitutional conception. I'm merely saying nothing more than what Mr. Justice Stone said, in footnote 4 of Caroline Products, which is that: where legislation is cast in a form such as is unlikely to make it politically remediable, such as to stabilize the ordinary political processes that keep the legislature acting decently and keep legislation reflective of the public conscience, then a particular obligation devolves on the Court to assess the constitutionality of that legislation.

The third reason why I think our theory of the Eighth Amendment commends itself to the Court is that it does not invite subjective judicial judgment. It does not ask this Court to put itself in the position of a superlegislature and decide matters of penological policy.

In fact, our theory, I believe, offers the only alternative to subjective judicial judgment, because if one looks for a moment at the grounds on which the States seek to support capital punishment, that it is -- that retribution is a permissible legislative aim and that, in some cases, retribution requires killing people, that deterrances are permissible legislative aim, and a legislature could find that capital punishment had some deterrent efficacy, you immediately

see that the same arguments could and doubtless would be made if the legislature prescribed boiling in oil as a punishment for a crime. The legislature might say: that's a horrible crime; you ought to boil them in oil if they do that. That's the only fit retribution for that crime.

And the legislature might say: Well, that's just an awful thing; we ought to stop that. And the only way to really make it horrible and prevent people from doing it is if we threaten them with boiling in oil. So we're going to boil them in oil if they do it.

And the States would be able to make essentially the same arguments that they are making here against capital punishment -- in favor of capital punishment. Those arguments would not be sustained. But why would they not be sustained? Is it because boiling in oil is somehow more shocking to the digestive system, to the intestinal reaction of people or particular judges?

I don't think so. I think it is because any objective standard which we invite this Court to apply to capital punishment generally would be offended by boiling in oil. And I think it is offended by any form of infliction of the death penalty today.

Q You don't raise the question of the due process clause of the Fourteenth Amendment?

MR. AMSTERDAM: Only in the limited sense, Mr.

Justice Douglas, that the Fourteenth Amendment applies the guarantee of the Eighth Amendment to the States.

Q That I understand.

MR. AMSTERDAM: There is not, within the scope of the grant of certiorari in this case, any independent due process question; and the question was not raised below.

Q At no stage in the proceeding?

MR. AMSTERDAM: No.

Q But now that you're interrupted, with respect to the due process clause of the Fourteenth Amendment, one of the things that bothers me in these cases is -- I think it's more than just a matter of semantics -- is the fact that in that due process clause the deprivation of life is expressly mentioned and, at least by negative implication, is expressly permitted: no State shall deprive any person of his life, liberty, or property without due process of law.

There's another express, almost identical mention in the Fifth Amendment of the United States Constitution, and indeed I think it's in the Fifth Amendment that there's a reference to a capital case, with implicit approval explicitly in the Constitution of the United States.

And this, as I say, to me is more than just a semantic problem. There are at least three, and there may be other places in the Constitution, that do not now occur to me, where the death penalty is mentioned, with implicit approval.

MR. AMSTERDAM: Oh, Mr. Justice Stewart, I think the -- I agree, I think it's more than a semantic problem. I think it's --

Q Now, we're not talking about what was the practice at the time the Constitution was adopted. I'm talking about the words of the Constitution of the United States, which you're invoking in these cases.

MR. AMSTERDAM: Yes, I think that's right, Your Honor. But I think there is a difference between an explicit permission and simply a negative inference from the fact that there are certain guarantees that say that if the death penalty is to be imposed certain procedures must be followed. There must be a grand jury indictment; that there must be due process of law.

I don't think that one can say that the language in the Constitution which, by inference, permits the death penalty is meant to project a continuing permission of it.

I think all that one can say is that so long as the death penalty could be imposed at all, or was imposed at all, it could only be imposed within these restrictions.

And that, I think, takes us back to the initial question. I don't think, and I'm not urging, that when anybody put any of this language into the Constitution they meant to put over capital punishment. I think that what they meant to do was to put in several guarantees of rights: one, a guarantee

against cruel and unusual punishment, which would grow and evolve as society grew and evolved; another is a guarantee of the right to life, liberty, and property, not to have it taken away without due process of law; the right to prosecution by indictment, and that sort of thing.

What they said there was, in describing what a legislature could not do, they said if it seeks to take away rights, the only inference there is is that then it was conceived at that time that the State might take away life. It can only do it by these procedures.

There's no projection forward that the notion of the taking of life is permissible, there is simply a statement that: we know now that the taking of life is permissible, so wherever it is permissible, these guarantees must obtain.

I think there is no consistency in that. If one simply recognizes the historical fact that the cruel and unusual punishment clause does grow and evolve.

Q Thank you.

MR. AMSTERDAM: A last point that I think is of some significance, before I turn to capital punishment itself, is that our theory of the Eighth Amendment is also not without historical support.

The Eighth Amendment seems to have been the result of a confluence of three primary concerns: a concern against excessive punishments, which you see in English law as far

back as the Magna Carta; a concern against the selective imposition of harsh punishments; and a concern with outright barbarity.

The most immediately relevant one I think is the second, the concern against the selective use of harsh criminal punishments, which immediately led to the English Bill of Rights provision in 1689, which is now the language of the Eighth Amendment. The English Bill of Rights provision was put there largely as a result of the trial of Titus Oates. And if you look back at the trial of Oates, what you see is that the actual punishment imposed on Oates was not barbaric. It was that he was to be divested as a clergyman, that he was to be imprisoned for life, and that he was to be pilloried and whipped annually on the occasions of the perjuries that led to his conviction.

And the complaint lodged against that judgment, which led to the Bill of Rights, was not that it was harsh at a time when they were still killing thousands of people; it wasn't that it was intrinsically barbaric, it was that it was selective, that this one fellow was singled out and given an unprecedently harsh punishment.

Now, capital punishment in its functioning today is a precise reflex of what happened to Titus Oates.

And the blinking of the light leads me to mention that since I will be arguing both of the first two cases, I

will have to develop part of my constitutional argument in the second. But will simply state in this first that the essence of our argument, applying this theory to the Eighth Amendment, is that the exceeding contemporary rarity of capital punishment, the fact that the death penalty, although allowed by law in an overwhelming majority of American jurisdictions, is in fact applied more infrequently than any penalty on our books, and against the background of an ideological debate that makes it clear that the attrition and use of the death penalty is a repudiation.

That circumstance presents for us the primary objective indicator by which this Court can say that not only is it no longer true, as the Court suggested in Trop v. Dulles, that the death penalty is still generally accepted, but, to the contrary, the death penalty is virtually unanimously repudiated and condemned by the conscience of contemporary society.

Now, developing that point factually I think is not difficult.

The National Crime Commission, in its study three years ago, pointed out that the most salient characteristic of capital punishment was the infrequency of its use. And every informed commentator who has studied it, perhaps excepting the respondents in these cases, come to the same conclusion.

If I may just read Professor Herbert Wechsler's

description, which I think is a fair one:

There is a striking contrast between the broad extent to which the penalty of death is authorized by law and the relative infrequency with which the sentences actually imposed are carried out. Despite the imperfections in the data, it is clear that capital punishment is executed only in a fraction of the cases where it can be legally imposed. A fraction that is trivial in quantity and has been steadily diminishing in recent years.

I should say that we do not rely on the dwindling to zero of the death penalty in the last few years. That is, of course, in large measure the result of judicial stays.

But what I would point out is that even before the national campaign began, which secured those judicial stays in 1967, during the decade of the Sixties executions in the United States dropped to an average of about 20 a year, down from a high of almost 200 and an ordinary norm of 175 or 150 during previous decades.

I should also point out that the number of death sentences returned by juries during the decade of the Sixties and through 1968 is about 100 a year.

Now, what you're talking about is a country where there are 52 jurisdictions competent to impose capital punishment, and a population of 200 million people; 43 jurisdictions which actually use the death penalty for some crimes. And only

100 people convicted of capital punishment, and only 20 actually executed.

I will, with the Court's pleasure, reserve the continuation of this theme for the argument in the Furman case.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Amsterdam.

Mr. George.

ORAL ARGUMENT OF RONALD M. GEORGE, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. GEORGE: I will try to anticipate the remainder of Professor Amsterdam's argument to follow in the next case.

The basic issue before the Court is, of course, not whether the death penalty is socially, morally, or politically desirable or advantageous, but instead whether there is some specific provision in the Federal Constitution that bars the people of the State of California in this case from determining through their elected representatives that the death penalty should be available as a possible form of punishment for the offense of murder.

Q Do you have any information as to the kind of people that California executes?

MR. GEORGE: Yes, I certainly do. In the Appendix to our brief we have summarized in very short manner the cases that have reached the California Supreme Court in the last six years -- well, since 1965. We also have certain tables in our brief indicating the racial makeup of the persons receiving

death sentences, or, rather, who are on Death Row now, and also some data regarding their socio-economic status, and I will get into that in some detail.

The petitioner comes here bearing indeed a heavy burden, that of establishing that the California Legislature lacks any permissible basis upon which to conclude that the protection of society requires the availability of the death penalty for the most serious of crimes, the willful and malicious taking of human life. That is that punishment of death, the form of punishment is as old as the history of man itself.

Now, Professor Amsterdam takes the position, or at least he did ten days ago when he and I were before the California Supreme Court on the very same issue here, that even if it could conclusively be established that the death penalty does deter and save innocent people's lives thereby that the death penalty would still be cruel and unusual punishment, that it would be an impermissible form of punishment.

Q Well, certainly you would agree, I should suppose, with that argument insofar as it says that deterrence is not the sole criteria of whether a punishment is cruel or unusual?

MR. GEORGE: Well --

Q So, in other words, I suppose that disemboweling,

burning at the stake, drawing and quartering might all be -- serve as deterrents. And even if you imposed them for petty larceny. But that wouldn't answer the question, would it?

MR. GEORGE: Well, the one qualification on my remark, or the one explanation would be that of course the execution would have to be done in a humane manner. What I would like to develop at some length is this Court's treatment of the concept of cruel and unusual punishment.

I think one of the key aspects of that term, as defined from the Wilkerson case, through Francis vs. Resweber, is the definition of cruelty in terms of unnecessary cruelty, unnecessary pain, the wanton infliction of pain.

Q Well, then, is it your submission that if it can be shown that a punishment serves as a deterrent and if, in a rational person's judgment, that is the appropriate deterrent, and then if no more pain or torture is inflicted in imposing that deterrent than is necessary, then it's automatically constitutionally valid?

MR. GEORGE: Yes.

Q And this would therefore be true of horse-whipping or --

MR. GEORGE: No. Unnecessary cruelty, I think, --

Q No. No. But I -- if rational people could conclude that the best deterrent for petty larceny was 50 lashes, then it would not be cruel and unusual, so long as 51

lashes were not imposed. That's as I understand what your argument is.

MR. GEORGE: If rational people could so conclude, I think that the enactment of the Eighth Amendment was intended to bar certain torturous punishments. And I don't think that capital punishments and tortures have to stand or fall together, just because they both existed in 1791.

And I think we start with the proposition that the death penalty was clearly constitutional during the period in which the Eighth Amendment was adopted; as Your Honor pointed out, there is specific mention in the Fifth Amendment of the taking of life, of capital offenses, and of course there were many capital offenses enacted both in the Federal Government and the State Legislatures immediately preceding and following the adoption of the cruel and unusual punishment.

So one must ask rhetorically: Can the Constitution be unconstitutional in its recognition of capital offenses and the taking of life?

And that for years --

Q Do you think that "unusual" means what it meant then or what it means now? The word "unusual"?

MR. GEORGE: Some scholars, particularly the article we've cited by Mr. Granucci, seem to indicate that there was a very definite lack of precision in the use of the term, and that they might have meant something different at the time that

they were first adopted in Britain, and might have been mistaken to mean something different at the time they were used in this country.

Q What do you think?

MR. GEORGE: I think that "cruel and unusual" means two things, basically, as defined by this Court's opinions, trying to synthesize the various opinions from Wilkerson in 1878 to Francis vs. Resweber in 1947; and that is as follows:

That a punishment will be held unconstitutional if it is both cruel and unusual either as, first, a punishment inherently cruel and inherently unusual in its form.

Now, Wilkerson, as I stated, speaks in terms of punishments of torture and all others involving unnecessary cruelty. Now, this was cited with approval in In re Kemmler, which decision added the definition that punishments are cruel where they involve torture or a lingering death, but the punishment of death is not itself cruel; cruelty implies something barbarous, more than the extinguishment of life.

Now, in Weems this Court quoted with approval both the Wilkerson definition and the language from Kemmler, and then in Francis vs. Resweber proceeded to define cruelty in terms of the infliction of wanton or unnecessary pain, and said:

"The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punish-

ment, not the necessary suffering involved in any method employed to extinguish life humanely."

So --

Q With all due respect, Mr. George, I was talking about the word "unusual".

MR. GEORGE: In "unusual", I think what we --

Q Not the word "cruel".

MR. GEORGE: -- mean in "unusual" is something that is not customary for that type of offense.

Q As of then or as of now?

MR. GEORGE: As of 1791.

I would like to, in some detail, deal with this argument of Professor Amsterdam's, that the words somehow change their meaning from year to year.

Q Well, my question is: You say that whatever was not unusual in 1791 is not unusual today?

MR. GEORGE: I'm saying that whatever was not unusual and cruel. There might have been certain things that were usual in 1791 that were cruel.

Q Well, you just will not stick with "unusual"; you have to tie "cruel" with it all the time.

MR. GEORGE: I think that the two concepts are intermeshed.

Q Well, why is the word "unusual" in there?

MR. GEORGE: I get "unusual" in there because I think

that if it was not a customary punishment, such as Weems, that's a very good example, it was a punishment less than life, perhaps one might call it cruel, but the Court seemed to stress that it was highly unusual; something totally out of keeping with our concept of common-law punishments. It involved certain civil disabilities and fine, while a white-collar crime,in chains for 15 years.

Q To get back to the word "unusual", is there any State that still has hanging?

MR. GEORGE: I believe that that's an option in the State of Utah.

Q Any other States?

MR. GEORGE: I'm not sure which States do have it. I think Utah even has shooting as an option.

Q Of course you didn't have gas chambers in 1791.

MR. GEORGE: That's right. And I think that the term --

Q Well, how am I going to measure the gas chamber?

MR. GEORGE: Pardon me?

Q How am I going to measure the gas chamber? Because it wasn't -- you said I have to consider what was not unusual in 1791. I can't do that with gas chambers.

MR. GEORGE: We're not talking, I think, about methods of execution, we're talking about a certain kind of proportionality. Now, there may be certain types of tortures

that were not available either in 1791, and that doesn't mean that they aren't covered.

But I think basically the Eighth Amendment was intended to apply against the same types of things in 1791 as it is today. And in fact, as recently as 1958, this Court, in Trop vs. Dulles, regarded that the death penalty has been employed throughout our history and in a day in which it is still widely accepted it cannot be said to violate the constitutional concept of cruelty.

The Court noted the imprecision, certainly, in the use of those words. But I think that through its opinions it has come up with this definition. I gave the first part of it. The second principle, I think, as far as cruel and unusual is concerned, would involve punishment that is not inherently cruel and unusual in its form, but it is unconstitutional as grossly excessive as applied either in relationship to the seriousness of a particular offense or in relationship to a status which is not involved in uncompelled acts, such as was involved in the Robinson vs. California case.

And I think if these tests are applied to the offense of murder it's clear that there is no cruel and unusual punishment. Certainly not under our humane method. There's no intentional cruelty. In fact, the death that comes to such a prisoner is perhaps frequently less cruel than the death by natural causes that comes to us all eventually.

So --

Q Except nobody knows.

MR. GEORGE: Nobody knows, but with the state of our medical knowledge today I think that we can assume that since death comes within a matter of seconds, that whatever might be the physical reflex actions that Professor Amsterdam has chosen to --

Q Is the gas chamber faster than a bullet? Which was the way they used to do it.

MR. GEORGE: I don't think speed is the only criterion. Apparently, according to medical authorities, it does involve less pain that any other method. And this Court has certainly found that in the past. And I don't think there is anything that petitioner has been able to show that leads us to believe that there is involved some necessary, intentional torturing.

The test is whether there's any cruelty beyond the -- perhaps all punishment is cruel. Putting a man behind bars might be cruel, especially for life. But that's not the test; the test is unnecessary cruelty.

Now, although this Court in Trop vs. Dulles went out of its way to uphold the constitutionality of the death penalty, petitioner seizes upon certain language in that opinion -- the evolving standards of decency that mark the progress of a maturing society -- as some sort of talismanic death knell for 300 years of capital punishment in this

country.

Those words did represent the opinion of four members of this Court at that time, one member of whom makes up part of the constituency of the present Court.

Certainly the meaning of cruel and unusual is not static. But we emphasize that these words cannot change from year to year. I don't know if Professor Amsterdam has in mind the meaning of cruel and unusual in 1962 or '65, when petitioner committed his crimes, or 1969, when the judgment of the California Supreme Court below was affirmed, or in 1972.

But we vigorously reject the notion that these terms "cruel and unusual" can change ephemerally from year to year. Were this the case, indeed, our evolving standards of decency might regress, as they did in Germany in the 1940's and '50's.

What if burning in oil or some other tortures did in fact become a popular vogue in the minds of our populace; would that mean that there were suddenly constitutional under a fluid and meaningless Eighth Amendment? I don't think so.

And just because some rather primitive corporal punishments were in use at the time the Eighth Amendment was enacted does not mean that they and capital punishment must stand or fall together. The framers of the Eighth Amendment may very well have intended to outlaw some of those punishments, and, indeed, those punishments, although they might have survived some time after the enactment of the Eighth Amendment,

were never sanctified as constitutional by any decision of this Court, unlike capital punishment, whose methods of infliction at least have been sanctified.

And there was never any sanctifying of tortures in the Constitution as there is of capital punishment in the Fifth Amendment's use of capital offenses and its uses of taking life.

Q Of course, the Fifth Amendment also talks about jeopardy of limb, in the double jeopardy provision: a person shall be twice put in jeopardy "of life or limb". And I suppose you wouldn't use that to argue that today government could cut off the arm of a thief, would you? And without violating the Eighth Amendment?

MR. GEORGE: No. But I don't think that's what the framers of the Eighth Amendment intended to sanctify, either. I think they were just --

Q What do you think the word "limb" meant?

MR. GEORGE: I think they were speaking broadly of corporal punishment. I don't think they would necessarily mean the taking off of a limb. I think they would mean perhaps certain corporal punishments that did survive and that might survive today, really.

I don't think that --

Q Such as what? Such as what?

Under the "limb" part, what was your --

MR. GEORGE: I'm not convinced that, let's say, any form of whipping would necessarily be unconstitutional. You know, 20 lashes for maybe murdering somebody. That might not be cruel and unusual today. I certainly don't think it would be. And that's perhaps what they had in mind.

I think that petitioner therefore is quite incorrect in stating that if we say that the death penalty is all right, that means that burning in oil and other tortures are necessarily all right too.

Now, I'd like to take a second tack, though. Even if we assume that the meaning of cruel and unusual can change from decade to decade, progress and perhaps regress, I would submit that our standards have not evolved to the point where the imposition of the death penalty for the offense of murder is inconsistent with our standards.

I don't know what's changed since 1791 or since the 1958 decision of this Court in Trop vs. Dulles to alter the fact that capital punishment is part of our moral and religious and philosophical heritage, and has always been recognized as such.

And, indeed, Professor Amsterdam's fixation with that phrase, "evolving standards", is quite understandable. It provides the only arguable escape from the historical reality of capital punishment being recognized as a legitimate form of punishment, for 300 years in this nation; and for thousands of

years in our heritage.

It's not clear again which point petitioner wants us to focus on in determining these standards, but one thing is clear: he conveniently chooses to ignore the fact that 41 of our 50 States have capital punishment, that the Federal Government does, that 8 States have experimented with abolition of the death penalty and rejected it.

The fact that there is widespread support for the death penalty. It's not confined to bloodthirsty prosecutors or vengeful police officers. We cited religious authorities who think that capital punishment is permissible. The polls certainly show a majority of our population in favor of it.

Also ignored is the almost annual ritual in the California Legislature by which a bill is introduced to abolish the death penalty and it's then defeated, usually in committee, sometimes on the floor. Also ignored is the fact that the California Legislature in 1970 added a new capital offense; the Federal Government did in 1961 and '65.

So what does Professor Amsterdam choose to focus his attention on? He cites at great length in his brief what Mozambique and Liechtenstein are doing.

What relevance does this have to determine what our provision, adopted in 1791, means with reference to cruel and unusual punishment? Different countries have different social conditions necessitating different forms of punishment,

keeping in mind their own needs for the protection of their societies. And, most significantly, none of those nations have abolished the death penalty judicially, none to my knowledge.

And petitioner fails to even show any trend in this regard. There haven't been in recent years a great flurry of jurisdictions rejecting capital punishment. To quote Professor Packer, this is not a time "for due process by head count".

And what is particularly ridiculous is for petitioner in his brief, although I notice he sort of abandons the position here today, to focus upon the small number of executions as a supposed indication of the declining popular acceptance of the death penalty.

Now, at most, the number of executions, which has been declining, is an indicator perhaps of the evolving standards of our judiciary who have chosen to issue stays, but it is not an indication of the popular feeling. A much more accurate barometer of the evolving standards of our times are the juries who consistently, steadily, and even increasingly in California are returning death penalty verdicts.

And I think this is keyed, because -- and there were 36 in 1970 sentenced to State prison under sentence of death in California. And the key thing here is as Witherspoon teaches us: one of the most important functions any jury can perform in making a selection between life and death is to

maintain a link between contemporary community values and the penal system, and that is what our jury system is doing.

Q It is suggested some place in these briefs, which I read over the weekend, that one reason juries these days are imposing the death penalty with a little more liberality is that they think that the penalty will not be carried out. It's a statement of a prosecutor in New Jersey or Pennsylvania, I think. Did you read that in the brief?

MR. GEORGE: I read that some place, too, in the plethora of briefs. I don't agree with that at all. I don't think -- I think that has to assume that the juries violate their oaths, and I don't think that there is any basis in fact for that.

There are a lot of allegations made by Professor Amsterdam to that effect and other effects that I think do not support --

Q This is some prosecutor who said that.

MR. GEORGE: I don't agree with his observation on that. And neither my own experience nor anything I've read supports that.

And I think the key flaw in this whole approach of petitioner to the evolving standards problem is this: if there is this great trend, this great movement away from capital punishment, as far as our values are concerned, why is that not reflected in our democratically enacted legislation?

Why is it that 41 States have chosen to keep it?

Now, Professor Amsterdam would have you believe that these people are so unpopular that nobody is going to act on their behalf. Well, I don't think that's the case. Bills are introduced to abolish the death penalty all the time. In fact, Congress will often act at the behest of one single individual, perhaps an alien subject to deportation, without any great resources, and will enact special legislation allowing that alien to stay in the country. We all know of such bills.

So there isn't any such situation that these people are so unpopular they have no --

Q You certainly aren't going to put this on that level, are you?

MR. GEORGE: I will with respect to the --

Q You would put the right of a man to live on the level of a private bill to let an alien stay in the country? You don't have to go that far.

MR. GEORGE: I would put it on this level, with all due respect, Your Honor, as far as the ability of a solitary individual, whether it is for his right to remain in the country or his right to remain alive, to get legislation enacted for his benefit under our democratic process of government.

I think that basically what Professor Amsterdam chooses to do here in ignoring all these indicia of the popular

acceptance of the death penalty, he seeks to consider himself some sort of self-appointed guardian of the evolving standards of decency. He and his co-counsel, they know what the truth is and we're wrong. They have the truth, the evolving standards, and all these other indications should be disregarded, I think, in his opinion.

Now, I also object, when it comes to the issue of burden of proof, to petitioner's attitude that somehow the State has an obligation to establish affirmatively that there is some aim of punishment accomplished by the death penalty that would not be served equally well by the imposition of a life term. I don't think that this is the question. I think if you get into that thicket, you will have the problem of deciding: can a State justify that a life term without possibility of parole accomplishes something that life will not? Does life accomplish something that a fixed term of years will not? Does prison accomplish something that jail won't? And a fine that probation won't?

I think this is really asking this Court to become a superlegislature, on a Federal-State relationship to boot.

Now, the basis of petitioner's argument must be, indeed, that there is no permissible reason for the legislature to conclude that there is a permissible aim of punishment served by the death penalty. And I think that it's clear that a reasonable basis does exist. I won't belabor at length the

matter that we've set forth in our brief in great detail.

Obviously, the first aim of punishment,rehabilitation, is not served; but those persons had been found unrehabilitatable as Aikens is, according to the unanimous testimony of the psychiatrists.

We have set forth evidence of deterrence. Our burden isn't to establish deterrence, but we have shown that there is a reasonable basis upon which the legislature can conclude that the death penalty does deter. Prisoners have made statements, not only to police officers but to reporters or to each other; defendants have said, one to the other, during a holdup: "Don't shoot the victim, you'll get us both fried."

Well, there's a man who is alive today because of the death penalty.

And the legislature has considered these things, and the opinion of the State Supreme Court, the dissenting justices in the Love opinion, which we cite, relies very much on these important statistical figures which Professor Amsterdam condescendingly refers to as anecdotal impressions of law enforcement.

He would like to have you believe his authorities, professors perhaps who have a certain bias to air, but who disregard some of this pragmatic information.

Now, I would submit, of course, that the death penalty would be a greater deterrent if executions were being

carried out. In fact, the rise in crime rates since executions stopped might bear that out, although I don't choose to rest our position on statistics.

It's clear that the third aim of punishment, incapacitation or isolation, is not served by a life term. Prisoners kill fellow prisoners, guards, they escape, they are out on parole. And I think that retribution is something that can be considered as well.

Now, I'd like to briefly point out to the Court that our briefs do graphically repute these statements by petitioner that there is discrimination in the imposition of the death penalty against the mentally deficient, the uneducated, the poor, racial minorities; our figures show very graphically that 38 percent of the first-degree murder convictions were for Negroes and only 25 percent of those who got first-degree murder convictions who received the death penalty were Negroes.

So there is no discrimination.

It's difficult to understand anything discriminatory in what Professor Amsterdam says, that only a small portion of condemned murderers receive the death penalty. Would he prefer that they all do, if discretion were abolished? I can't see how it's unfair that mass killers like the Manson family, political assassins like Sirhan, and a three-time killer like Aikens receives the death penalty and some people do not, and receive only life.

Now, in conclusion, I'd like to state that petitioner has offered us no objective standards for what is cruel and unusual. He would have this Court become a superlegislature to enact his own personal views of what the evolving standards of our society should be. He's made no showing regarding the supposed lack of protection afforded by the death penalty. And if his argument were to prevail, indeed many persons might lose their lives innocently because of the removal of the protection of the death penalty.

I don't have to dwell at length upon Mr. Aikens' crimes. They are, concededly by petitioner, terrible brutal, no remorse, no mental problem. He was intelligent, had an education; but he committed three brutal murders.

So, in effect, what I would close with is the statement of Justice Holmes in the Jackman case: "If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."

And respondent submits that petitioner has not made a strong case, he has made no case at all.

Respondent joins the comment that we've quoted of Justice Schauer, former Justice of the California Supreme Court, that all of us involved in the whole process of the death penalty, even at the appellate level, devoutly wish that the death penalty were no longer necessary; but we've not yet

reached that Utopian state.

Meanwhile, putting aside whatever personal feelings we might have, nothing has happened in the 180-year history of our Constitution or the 300-year history of capital punishment in this country which would preclude the people of the various States from even considering the question, from concluding that society's protection requires the availability of the death penalty as a permissible form of punishment in certain of our most aggravated offenses.

And, indeed, the cases that we've set forth here indicate that it is the aggravated offense that receives the death penalty; juries are being discriminating, not discriminatory. And petitioner is really seeking to have this Court relitigate what was decided only last year in the McGautha issue.

So, with that plea that we consider things on a constitutional level, without the emotional rhetoric of political, personal, or moral feelings as to the desirability of the death penalty, we would submit that the judgment should be affirmed in this case, and that the death penalty is clearly not cruel and unusual punishment.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. George.

Thank you, Mr. Amsterdam.

The case is submitted.

[Whereupon, at 11:08 a.m., the case was submitted.]