

*Gregg v. Georgia*

**MR. JUSTICE BRENNAN, dissenting. \***

The Cruel and Unusual Punishments Clause "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." [Footnote 3/1] The opinions of MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS today hold that "evolving standards of decency" require focus not on the essence of the death penalty itself, but primarily upon the procedures employed by the State to single out persons to suffer the penalty of death. Those opinions hold further that, so viewed, the Clause invalidates the mandatory infliction of the death penalty, but not its infliction under sentencing procedures that MR. JUSTICE STEWART, MR. JUSTICE POWELL, and MR. JUSTICE STEVENS conclude adequately safeguard against the risk that the death penalty was imposed in an arbitrary and capricious manner.

In *Furman v. Georgia*, [408 U. S. 238](#), [408 U. S. 257](#) (1972) (concurring opinion), I read "evolving standards of decency" as requiring focus upon the essence of the death penalty itself, and not primarily or solely upon the procedures [Page 428 U. S. 228](#) under which the determination to inflict the penalty upon a particular person was made. I there said: "From the beginning of our Nation, the punishment of death has stirred acute public controversy. Although pragmatic arguments for and against the punishment have been frequently advanced, this longstanding and heated controversy cannot be explained solely as the result of differences over the practical wisdom of a particular government policy. At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world," "the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement or vengeance, on the one hand, and, on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century, as well as beliefs in the scientific approach to an understanding of the motive forces of human conduct, which are the result of the growth of the sciences of behavior during the nineteenth and twentieth centuries."

"It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime."

*Id.* at [408 U. S. 296](#). [Footnote 3/2] That continues to be my view. For the Clause forbidding cruel and unusual punishments under our constitutional [Page 428 U. S. 229](#) system of government embodies in unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws. Thus, I too say:

"For myself, I do not hesitate to assert the proposition that the only way the law has progressed from the days of the rack, the screw and the wheel is the development of moral concepts, or, as stated by the Supreme Court . . . the application of 'evolving standards of decency.' . . . [Footnote 3/3]"

This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments on the rack, the screw, and the wheel, is no longer morally tolerable in our civilized society. [\[Footnote 3/4\]](#) My opinion in *Furman v. Georgia* concluded that our civilization and the law had progressed to this point, and that, therefore, the punishment of death, for whatever crime and under all circumstances, is "cruel and unusual" in violation of the Eighth and Fourteenth Amendments of the Constitution. I shall not again canvass the reasons that led to that conclusion. I emphasize only that foremost among the "moral concepts" recognized in our cases and inherent in the Clause is the primary moral principle that the State, even as it punishes, must treat its citizens in a manner consistent with their intrinsic worth as human beings -- a punishment must not be so severe as to be degrading to human dignity. A judicial determination [Page 428 U. S. 230](#) whether the punishment of death comports with human dignity is therefore not only permitted, but compelled, by the Clause. 408 U.S. at [408 U. S. 270](#).

I do not understand that the Court disagrees that, "[i]n comparison to all other punishments today . . . , the deliberate extinguishment of human life by the State is uniquely degrading to human dignity."

*Id.* at [408 U. S. 291](#). For three of my Brethren hold today that mandatory infliction of the death penalty constitutes the penalty cruel and unusual punishment. I perceive no principled basis for this limitation. Death, for whatever crime and under all circumstances, "is truly an awesome punishment. The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have rights.'"

*Id.* at [408 U. S. 290](#). Death is not only an unusually severe punishment, unusual in its pain, in its finality, and in its enormity, but it serves no penal purpose more effectively than a less severe punishment; therefore the principle inherent in the Clause that prohibits pointless infliction of excessive punishment when less severe punishment can adequately achieve the same purposes invalidates the punishment. *Id.* at [408 U. S. 279](#).

The fatal constitutional infirmity in the punishment of death is that it treats "members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity."

*Id.* at [408 U. S. 273](#). As such, it is a penalty that "subjects the individual to a fate forbidden by the principle of civilized treatment guaranteed by the [ Clause]." [\[Footnote 3/5\]](#) I therefore would hold, [Page 428 U. S. 231](#) on that ground alone, that death is today a cruel and unusual punishment prohibited by the Clause.

"Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first. [\[Footnote 3/6\]](#)"

I dissent from the judgments in No. 74-6257, *Gregg v. Georgia*, No. 75-5706, *Proffitt v. Florida*, and No. 75-5394, *Jurek v. Texas*, insofar as each upholds the death sentences challenged in those cases. I would set aside the death sentences imposed in those cases as violative of the Eighth and Fourteenth Amendments.

\* [This opinion applies also to No. 75-5706, *Proffitt v. Florida*, *post*, p. [428 U. S. 242](#), and No. 75-5394, *Jurek v. Texas*, *post*, p.[428 U. S. 262](#).]

[\[Footnote 3/1\]](#)

*Trop v. Dulles*, [356 U. S. 86](#), [356 U. S. 101](#) (1958) (plurality opinion of Warren, C.J.).

[\[Footnote 3/2\]](#)

Quoting T. Sellin, *The Death Penalty, A Report for the Model Penal Code Project of the American Law Institute* 15 (1959).

[\[Footnote 3/3\]](#)

*Novak v. Beto*, 453 F.2d 661, 672 (CA5 1971) (Tuttle, J., concurring in part and dissenting in part).

[\[Footnote 3/4\]](#)

Tao, *Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment*, 51 *Notre Dame Law.* 722, 736 (1976).

[\[Footnote 3/5\]](#)

*Trop v. Dulles*, 356 U.S. at [356 U. S. 99](#) (plurality opinion of Warren, C.J.).

[\[Footnote 3/6\]](#)

A. Camus, *Reflections on the Guillotine* 5-6 (Fridtjof-Karla Pub.1960).