

Public Executions: Understanding the "Cruel and Unusual Punishments" Clause

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Introduction

This Article analyzes public executions, which currently occur in certain states and which have been seriously proposed in others, including California. Part I addresses the status of public executions in the United States. It first summarizes the present-day existence of, and sympathy for, public executions, and then briefly reviews the history of public executions, particularly noting their effect on the African-American community. Part II focuses on the function of public executions as a political tactic in totalitarian (specifically fascistic) regimes during the twentieth century. This part notes that fascist governments operate by the rational employment of irrational spectacle, including the use of sadistic public violence (such as public execution), as a crucible for accreting illegitimate power. Part III analyzes a constitutional response to the function and effects of public executions, employing the Cruel and Unusual Punishments Clause of the Eighth Amendment to the United States Constitution. The history of the Eighth Amendment reveals that it operates not so much to protect the rights of the punished but to regulate the activity of the punisher. This part presents an understanding of the Eighth Amendment's place in a constitutional structure that provides for government by rational discourse rather than by phantasm or the use of spectacles that appeal to sadistic and other irrational but popular urges.

I. Public Executions in the United States

A. Public Executions Today

Norman Mailer tells the story of a man who met his death on January 17, 1977. Convicted murderer Gary Gilmore had refused to appeal

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his Utah death sentence and fell to the nation's first execution in a decade.¹ And so we read:

Ron Stanger's first impression was how many people were in the room. God, the number of spectators. Executions must be a spectator sport. . . . [T]here was Gary staring at the crowd with an odd humor in his face. Stanger knew what he was thinking. "Anybody who knows somebody is going to get an invite to the turkey shoot."

. . . .

[Bob] Moody also felt anger at all the people who had been invited. [Warden] Sam Smith had given them such fuss whether it would be five or seven guests. Now there were all these needless people pressed behind the line, and the executioners back of the screen talking. You couldn't hear what they were saying, but you could hear them, and it incensed Bob that Ernie Wright, Director of Corrections, was dancing around greeting people, practically gallivanting with his big white cowboy hat, looking like a Texas bureaucrat.

. . . .

Cline Campbell's first thought when he walked into the room was, "My goodness, do they sell tickets to this?"²

Gilmore's execution could be carried out, before some forty spectators, only after the state prison's warden had consulted a list of volunteers to staff the firing squad. In fact, a number of citizens had called the prison at Draper shortly before the execution, and the newspapers reported:

The callers, more than two dozen of them, were volunteering to shoot [Gilmore] outside the prison gates five days from now. Their names have been added to a file of volunteers that has been untapped since the last execution was held in Utah 16 years ago.

Now, suddenly, Warden Smith today began a review of the list, conscious of the burden of selecting five volunteers who can assume the burden of dispassionately meting out an act of Capital punishment

The warden today said that he would draw the names from the list of volunteers after he had screened those who sought participation for "unhealthy" reasons.

"I can't judge everyone's motive," he said, "and I'm not sure what criteria I should use in evaluation. I'm just looking for solid citizens."³

1. This Article accepts, *arguendo*, the legal premise that executions per se are constitutionally permissible. Such acceptance is only the beginning of the analysis.

2. NORMAN MAILER, *THE EXECUTIONER'S SONG* 980-81 (1979).

3. Jon Nordheimer, *2 Dozen Ask to Join Firing Squad; Warden Tells of Utah Volunteers*, N.Y. TIMES, Nov. 11, 1976, at 14.

Warden Smith chose five solid citizens who wanted to kill Gary Gilmore at Draper, Utah.⁴

In recent years, Florida has had one of the largest death row populations in the nation.⁵ Its executions proceed regularly and there is a waiting list of citizens asking to see condemned men die. The Department of Corrections selects twelve witnesses from a volunteer list to watch each execution alongside clergy, medical personnel, the prisoner's attorneys, and state officials. Currently, there are no policies or guidelines for witness selection, and declared motives for wanting to see an execution vary.⁶

Officials in Florida and Utah can thus carry out public executions; that is, executions that members of the general public may voluntarily attend.⁷ (This Article does not, however, define an execution as "public" merely because the state asks a very limited number of randomly selected passive citizens to agree to witness the event to assure executive accountability.)⁸

4. The Utah firing squad, adopted in 1851, is meant to effectuate the Mormon doctrine of blood atonement. See generally Martin R. 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, 442 (noting that "[t]he doctrine of blood atonement posits that some sins, primarily murder, are so heinous that the atoning sacrifice of Christ is unavailing as an expiation of the sin of the offender").

5. NAACP LEGAL DEFENSE & EDUCATIONAL FUND, DEATH ROW, U.S.A., Jan. 21, 1991, at 11, 15, 31 (indicating that Texas has the largest death row population (332), with Florida (298) and California (296) close behind).

6. *In Florida, A Waiting List to Watch Executions*, N.Y. TIMES, Apr. 27, 1986, § 1, at 33; Telephone interview with Kerry Flack, Florida Dept. of Corrections of Tallahassee, Fla. (Feb. 12, 1987).

7. Negley Teeters suggests a similar definition. See *infra* note 20. Compulsory attendance, it should be noted, would probably violate the potential witness' right to privacy. Cf. *Rochin v. California*, 342 U.S. 165 (1952) (right to be free of certain bodily intrusions); *Griswold v. Connecticut*, 381 U.S. 470 (1965) (women's right to bodily integrity). Even state and federal prison guards cannot be required to perform any duties in furtherance of a federal execution. 21 U.S.C. § 848(r) (1988).

8. This definition of public execution encompasses the morally reprehensible aspect of the event: manifesting the desire to see another human being killed. At the same time, this definition does not deny a requirement of the executioner's public accountability. Under governance by separation of powers, the executioner must be accountable to the people to prevent abuses. Accountability could be achieved by legislative oversight or perhaps even by newspaper reporters, rather than by the public directly.

One can imagine the volunteer witness anticipating a perverse cathartic charge from the execution. By contrast, one can imagine the randomly drafted witness anticipating a solemn, but legally necessary, public task. Public executions have been opposed for other reasons, both normative and positive. In the home of Benjamin Franklin, Dr. Benjamin Rush considered the problems arising when publicity disturbs the solemnity and quiet disgrace that should characterize an execution. Rush reports that during the Revolutionary War, Major Andre told his executioners, "I call upon you to bear witness, gentlemen, that I die like a brave man." Dr. Rush notes that "[t]he spy was lost in the hero; and indignation, everywhere, gave way to

Florida and Utah are not the only states with serious advocates of public execution. In Texas, Roger "Animal" DeGarmo announced that he would auction seats for witnesses to his planned 1986 execution, and he claimed to receive two \$1,500 bids and five \$1,000 bids. Texas Department of Correction officials refused to allow the sales.⁹ The State's Attorney General, however, subsequently agreed that "cameras should be allowed in the death chamber so the public could see how a criminal is put to death."¹⁰ Less than a decade earlier, the Fifth Circuit had rejected a Texas television news cameraman's claim asserting a right to record the State's first execution since 1964 on film for later showing on television news. Although Texas allowed full access to the event by reporters, it denied recording by mechanical means, and the court upheld the Texas policy on the grounds that the First Amendment does not extend to government functions not accessible to the public generally.¹¹ The court reasoned that meeting the reporters' request would amount to conducting a public execution, and noted that in 1890, the Supreme Court upheld the right of a state to restrict attendance at executions.¹²

In 1991, San Francisco's public television station KQED sued the warden of San Quentin State Prison to compel him to permit the videotaping of an execution by a television camera crew. The court rejected the station's argument that First Amendment freedom of speech concerns outweighed the State's interest in securing order by statutorily imposing limits on the types of persons who may attend public executions.¹³ The court held that the warden's decision to exclude the television crew was not irrational, unreasonable, and capricious.¹⁴

admiration and praise. But this is not all—the admiration which fortitude, under suffering, excites, has in some cases excited envy." BENJAMIN RUSH, AN ENQUIRY INTO THE EFFECTS OF PUBLIC PUNISHMENTS UPON CRIMINALS AND UPON SOCIETY 4 (1787).

9. *Texas Slayer Executed; Second Killer Wins Stay*, L.A. DAILY J., Mar. 13, 1986, at 5.

10. *Top Official on Death Row Fears Texas is Shrugging Off Executions*, N.Y. TIMES, July 2, 1987, at A21.

11. *Garrett v. Estelle*, 556 F.2d 1274, 1279 (5th Cir. 1977).

12. *Id.* at 1280 (citing *Holden v. Minnesota*, 137 U.S. 483, 491 (1890)). Members of the public have no inherent right to participate in the criminal justice process. See generally JOAN E. JACOBY, *THE AMERICAN PROSECUTOR: A SEARCH FOR IDENTITY* 3-43 (1980). Nonetheless, South Carolina permits four witnesses to attend an execution, including one who "may be designated by the family of the victim." SOUTH CAROLINA DEPT. OF CORRECTIONS, EXECUTION PROCEDURES 4 (Feb. 5, 1980) (on file with author).

13. See CAL. PENAL CODE § 3605 (Deering Supp. 1991).

14. *KQED, Inc. v. Vasquez*, No. C 90-1383 RHS (N.D. Cal. June 7, 1991) (oral opinion) (on file with author). To the contrary, the court held, "[W]hatever exclusions are appropriate for a public hearing such as a court trial, ought to be more compelling than those that are needed to exclude them from a private execution." The court agreed with the warden's arguments that "the prison population becomes extremely tense, hostile and aggressive during the period surrounding any planned or actual execution." Security becomes a concern, and secur-

Sentiment favoring public displays of state-imposed death and violence continues in other forms.¹⁵ For example, when James D. Raulerson was executed in 1985 for killing a policeman during a 1975 robbery, police officers stood near the execution site in Starke, Florida, "some wearing T-shirts with a drawing of the electric chair and the words 'Crank up Old Sparky,' [and] cheered and clapped when word of the execution reached them."¹⁶ Two weeks earlier, when Joseph Shaw was electrocuted in South Carolina, "[a]bout 75 supporters of the death penalty stood outside the prison and cheered when they learned the execution had been carried out. One carried a sign reading 'Burn, baby, burn.'" ¹⁷ And when South Carolina put James Roach to death one year later, the *New York Times* reported, "When Mr. Roach's death was announced this morning, cheers came from a crowd of more than 200 peo-

ity "has to be left to the people who are responsible for dealing with the problems that arise if security is breached. . . ." The warden is "really not required to trust anybody [and] it's no answer to say that press representatives are all nice people and that they never can do anything irregular or irrational." *Id.*

The court also noted that a heavy object, such as a camera, could strike a glass-enclosed sealed gas chamber when it is filled with lethal gas, resulting in a leak of gas into the witness area. Moreover, prison personnel may want their identities concealed to prevent retaliation from other prisoners or their associates, gangs, or any element of the public that might be "hysterically offended by the fact of the execution." Finally, there was concern that "circulation of a photograph of an execution within the prison even after the time of the execution, and more seriously, the display on television of a live broadcast of the event within the prison, could spark severe prisoner reaction that might be dangerous to the safety of prison personnel." *Id.*

15. A 1976 national survey asked the following question: "If they go back to executing people convicted of murder, would you favor or oppose putting such executions on television?" Eleven percent of respondents were in favor; eighty-six percent were opposed; and three percent were unsure. *CHI. TRIB.*, Jan. 13, 1977 (Harris Survey). *See also TV GUIDE*, Oct. 3-9, 1987, at 31:

MPI [Home Video Company] has made millions through sales of its "Faces of Death" videocassettes: grisly footage of executions, autopsies and other mayhem. The company has withdrawn distribution of the tapes, but not through any sudden attack of good taste. It's just that all the negative press that's been pouring in is giving MPI a bad name. Company president Waleed Ali has reportedly said: "I don't apologize for it. . . . I'm very proud of its sales."

16. *A Cop Killer Dies in Chair*, *S.F. EXAMINER*, Jan. 30, 1985, at A3.

17. *South Carolina Marks Its First Execution in Over Two Decades*, *L.A. DAILY J.*, Jan. 14, 1985, at 3. "And while Shaw died, the TV crews recorded another 'curiosity' of the death penalty—the crowd gathered outside the death house to cheer on the executioner. Whoops of elation greeted the announcement of Shaw's death. Waiting at the penitentiary gates for the appearance of the hearse bearing Shaw's remains, one demonstrator started yelling, 'Where's the beef?'" David Bruck, *NEW REPUBLIC*, May 20, 1985, at 20. ("Where's the beef?" is a phrase taken from a well-known television commercial for Wendy's hamburgers; Walter Mondale used the phrase in his 1980 campaign for the Democratic presidential nomination, implying that there was no substance to fellow Democrat Gary Hart's campaign.)

ple, some carrying signs with messages like 'Let the juice flow.'¹⁸

B. Public Executions in American History

Vestiges of public hangings remain even though England abolished public executions in 1868,¹⁹ and the American states began to restrict or abolish them in the 1830s.²⁰ The history of such public executions shows their intended effect was hardly commendable. As early as 1834, New York considered a bill to end "the vicious assemblages and demoralizing tendencies of public executions,"²¹ but the statutes of several states maintained exceptions giving the sentencing court discretion to order public execution for particular crimes such as rape.²² Only when state governments took control of executions from county sheriffs was this discretion at all curtailed,²³ because the states could then execute prisoners behind penitentiary walls.²⁴

One of the principal effects of these discretionary public executions was to promote racial terror. Black men were often publicly hanged in the South after having been convicted of capital crimes, particularly rap-

18. *South Carolina Executes Killer: Age Stirs Protest*, N.Y. TIMES, Jan. 11, 1986, § 1, at B6.

19. The Capital Punishment Amendment Act, 1868, 31 & 32 Vict., ch. 24, reprinted in 4 HALSBURY'S STATUTES OF ENGLAND 642 (1929). See generally DAVID D. COOPER, THE LESSON OF THE SCAFFOLD: THE PUBLIC EXECUTION CONTROVERSY IN VICTORIAN ENGLAND (1974).

20. Negley Teeters asserts that the traditional distinction between a private execution and a public execution is moot. Executions today, he suggests, "may be too public to suit some people. Objections have been lodged against too many witnesses, reporters, spectators invited by the wardens or sheriffs." He cites the example of Elizabeth Ann "Ma" Duncan, who was gassed to death at San Quentin on August 8, 1962. Some 57 persons "clustered around the glass-enclosed capsule to see the woman gasp her way into eternity." NEGLEY K. TEETERS, HANG BY THE NECK 7 (1967).

21. PHILIP E. MACKEY, HANGING IN THE BALANCE: THE ANTI-CAPITAL PUNISHMENT MOVEMENT IN NEW YORK STATE, 1776-1861, at 116 (1982).

22. G. Mark Mamantov, Note, *The Executioner's Song: Is There a Right to Listen*, 69 VA. L. REV. 373, 377 (1983) (arguing in favor of press access to executions under the First Amendment right to freedom of speech).

23. *Id.* Shortly before New York passed its private execution statute in 1835, a state senator unsuccessfully tried to convince the sheriff of Saratoga County to order a private execution. "The sheriff said that such an order 'would draw down upon him, the ill will of the multitude of grocers and tavern keepers and merchants who always anticipate great profits from these executions.'" MACKEY, *supra* note 21, at 118.

24. The last traditional public hanging under state law probably occurred in 1936 in Owensboro, Kentucky, before some 10,000 witnesses. 10,000 See *Hanging of Kentucky Negro*, N.Y. TIMES, Aug. 15, 1936, at 30. Teeters reports: "The last public hanging (legal) in the United States took place in Owensboro . . . , when a twenty-two-year-old Negro named Ramsey Bethea was executed before an estimated crowd of 20,000 for criminally assaulting a seventy-year-old woman." TEETERS, *supra* note 20, at 6. The discrepancy between the *N.Y. Times* and the Teeters estimates is unresolved.

ing white women.²⁵ At the same time, few whites were publicly hanged in the region for any crimes.²⁶ This practice reinforced a system of racial oppression dating from antebellum times, when slaves' servitude was enforced not only by state law, but also by the fear generated by public punishment of those who attempted to escape.²⁷

In the 1890s, after private execution statutes were in place in nearly all the states, eighty-two percent of the nation's lynchings of black men took place in fourteen Southern states. In the three decades from 1889 to 1918, that proportion increased to eighty-eight percent. According to Joel Williamson,

The sudden and dramatic rise in the lynching of black men in and after 1889 stands out like some giant volcanic eruption on the landscape of Southern race relations. There was indeed something new and horribly palpable on the earth. It was signaled by the mob, the rushing, swelling fury of a mass of struggling men, the bloody and mangled bodies, and the smell of burning flesh. . . .

In the nation . . . from 1889 to 1899, on the average, one person was lynched every other day, and two out of three were black. In the first decade of the twentieth century, a person was lynched approximately every fourth day, and nine out of ten were black, a ratio of black over white that held into the 1930s. In the second decade, one person was lynched every five days, and in the third, one very [sic] nine days. In the 1930s lynching declined significantly. Still, between 1889 and 1946, a year widely accepted as marking the end of the era of lynching, almost 4,000 black[s] . . . had been mobbed to their death.²⁸

25. Petitioner Lucious Jackson, whose brief was before the *Furman* Court, advised that as of 1968,

[t]he racial figures for all men executed in the United States for the crime of rape since 1930 are as follows: 48 white, 405 Negro, 2 other. In Georgia, the figures are: 3 white, 58 Negro. These figures are also clearly not accidental. In Appendix B to this brief, we trace the history of the punishment for rape in Georgia since the days of slavery. Briefly stated, prior to the Civil War rape committed by a white man was never regarded as sufficiently serious to warrant a penalty greater than 20 years imprisonment. Rape committed by a slave or a free person of color upon a white woman was punishable by death. One year after the abolition of slavery, a facially color-blind statute was enacted, giving juries discretion to sentence any man convicted of rape to either death or not more than 20 years imprisonment. It was not until 1960 that the third option of life imprisonment was added to these two alternatives. The objects of the alternatives have been perfectly obvious to Georgia juries, and should be no less obvious to any observer.

Brief for Petitioner at 15-16, *Jackson v. Georgia*, 405 U.S. 912 (1972) (No. 69-5030) (footnotes omitted).

26. *Id.*

27. See *United States v. Bibbs*, 564 F.2d 1165, 1168 (5th Cir. 1977).

28. JOEL WILLIAMSON, *THE CRUCIBLE OF RACE: BLACK-WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* 117-18 (1984) (footnote omitted). "Between 1885 and 1907 there were more persons lynched in the United States than were legally executed, and in the year 1892 twice as many." *Id.* at 185.

Lynching often had the color, if not the imprimatur, of Southern law. Indeed, it would be many years before Southerners as a whole would acknowledge that lynching was a crime.²⁹ One historian tells us:

Bodies were always left in plain sight for some time after death, a deterrent to those who might be deterred. Fingers, toes, ears, teeth, and bones were common souvenirs. A pro-lynching governor of South Carolina, Cole Blese, received the finger of a lynched black in the mail and planted it in the gubernatorial garden. A staunchly anti-lynching governor of Georgia in the early 1890s, William J. Northern, frequently received pictures and fragments of victims to remind him of where the power of life and death in that state ultimately lay.³⁰

In 1891, Governor Benjamin Ryan Tillman of South Carolina congratulated a sheriff who had saved a black prisoner from a lynch mob. He proclaimed, though, "There is only one crime that warrants lynching,' . . . 'and Governor as I am, I would lead a mob to lynch the negro who ravishes a white woman.'"³¹ When, in 1902, a young Emory College classics professor named Sledd wrote in the *Atlantic* that lynchers were murderers, he was forced to resign his post.³²

Although an average of 127 blacks were lynched each year between 1889 and 1899, statistics do not tell the full story. Assuming a black population of six million in 1889, the banal interpretation of the statistic shows an average of 0.00002 lynchings per black per year, indicating that about 99.998% of blacks were not lynched in 1899. Yet the statistics become meaningless in relation to the act of lynching itself, which is a form of social control that cannot be evaluated by simply dividing the number of blacks lynched into the number not lynched. It is the absolute number of lynchings in a given period, and whether that number rose or fell later in time, that is important.³³

Since 1930, at least 3,859 persons have been legally executed; approximately 54.6% of those were black or members of other racial minority groups. Of the 455 executed for rape alone, 89.5% have been nonwhite.³⁴ Currently, about 43% of death row inmates are black.³⁵ If

29. *Id.* at 117.

30. *Id.* at 188.

31. *Id.* at 133 (footnote omitted).

32. *Id.* at 259-61. Sledd's father-in-law, a former president of Emory, was able to arrange an adjustment in the young man's pay, so that he could continue his graduate studies at Yale.

33. *Id.*

34. Marvin E. Wolfgang & Marc Riedel, *Racial Discrimination, Rape, and the Death Penalty*, in *THE DEATH PENALTY IN AMERICA* 194 (Hugo A. Bedau ed., 3d ed. 1982).

35. NAACP LEGAL DEFENSE FUND, INC., *DEATH ROW, U.S.A.* 1 (Aug. 1, 1984) (unpublished compilation). As of 1986, three-quarters of Utah's condemned inmates were black, yet black people constitute less than one percent of the state's population. Every person sen-

blacks are repeatedly subject to public execution more than whites, whatever message emerges from this practice will be magnified in racial terms, particularly when the historical circumstances of racial prejudice are factored in. As the court in the case of "Negro Jack" put it in 1825, the man convicted of rape and murder would be chained to a stake and set afire so the community could "make of him a dreadful example to his race."³⁶ Symbolically at least, lynching has been perceived as an act against the whole black community, not merely the execution of a single "criminal."³⁷ As a result, public execution has been, and remains, a visual statement of great social impact.³⁸

II. The Twentieth-Century Public Execution as a Political Tactic

To appreciate the social impact of public violence, one must turn to the years 1933 to 1945, which remain the contextual reference point for

tenced to death under the current Utah statute has been an impoverished male whose victim was white. *Andrews v. Shulsen*, 802 F.2d 1256, 1269 (10th Cir. 1986).

36. TEETERS, *supra* note 20, at 109.

37. WILLIAMSON, *supra* note 28, at 187. On February 11, 1987, in Mobile, Alabama, witnesses testifying in a \$10 million lawsuit against the Ku Klux Klan said that Klan leader Bennie Jack Hays had "called the sight of a black teenager's hanged body a 'pretty sight.'" The action charged members of the United Klans of America with killing the 19-year-old as part of a pattern of racial intimidation inspired by the top leaders of the United Klans. The victim, Michael Donald, "was beaten to death March 21, 1981, before his body was hanged in a tree in Mobile across the street from apartments owned by Mr. Hays. Two people, including Mr. Hays's son, were convicted in the slaying." *Trial Ends in Alabama Suit Against the Klan*, N.Y. TIMES, Feb. 12, 1987, at A23.

In a recent Florida capital case, on motion of defense counsel, the original trial judge recused himself before the penalty phase. After the guilt phase, the lawyers and the judge had met in chambers to discuss the date when the penalty phase would begin. The judge had commented either, "Since the nigger mom and dad are here anyway, why don't we go ahead and do the penalty phase today instead of having to subpoena them back at cost to the state," or, "Since the niggers are here, maybe we can go ahead with the sentencing phase." (The record is in conflict on this point.) *Peek v. State*, 488 So. 2d 52, 56 (Fla. 1986) (vacating conviction and remanding for a new trial).

38. It has been widely noted that blacks are executed in disproportionate numbers. See *Furman v. Georgia*, 408 U.S. 238, 249-50 (1972) (Douglas, J., concurring); *id.* at 364 (Marshall, J., concurring); *McCleskey v. Kemp*, 481 U.S. 279 (1987). Death penalty abolitionists have made personal equal protection claims on behalf of condemned individuals. But this is the wrong argument to make, since the easy response is that perhaps blacks commit more capital crimes or are more often caught and convicted. The more valid argument is social: when society punishes a black man, it sees more than the punishment of a man; it sees the punishment of a black man. Such is the lot of any visible minority group in a society that has not entirely purged itself of historical racism. The resulting *image* projected to blacks and to society as a whole becomes one of terror against blacks. As we shall see, there is a solution to this sort of problem, but it is not found in the equal protection claim of the condemned man. Instead, it is found in the annals of history and in the Eighth Amendment's rule against arbitrariness.

contemporary Western political life. On one of the final days of that period, April 28, 1945, the world rejoiced as Benito Mussolini's life was extinguished. Ironically, the tyrant's death was consummated by the same kind of political act, public violence, that the Fascists had used as the crucible for their own power. After Mussolini and his mistress were executed by an impulsive accountant named Audisio, a small band of partisans put their bodies in a van and took them away. The following morning, the removal van stopped in Piazzale Loreto and the bodies were unloaded. This is what followed:

Two young men came up and kicked Mussolini repeatedly and savagely on the jaw. When they left him his face was appallingly disfigured. His mouth was open and his upper lip pulled back from his teeth so that he looked as if he were about to speak. Someone put a stick in his hand and squeezed his fingers round it.

By nine o'clock a large crowd had gathered and the people in it were shouting and jumping up and down to get a closer view. Some of them were calling out obscenities and curses, or shooting at the bodies with pistols and shot-guns; others were peering forward silently with a kind of fascinated satisfaction or a pitying disgust; a few were laughing hysterically. One woman fired five shots into Mussolini's body to "avenge her five dead sons." The crowd grew, and those in front were pushed forward so that they trampled over the bodies, and the partisans guarding them fired over the heads of the surging mass and then turned a hose on them in an attempt to drive them back. . . .

Ropes were found and tied round the corpse's ankles. Mussolini was pulled up first His face was the color of putty and splashed with red stains, and his mouth was open still. The crowd cheered wildly, and those in the front row spat at him and threw what filth they could find.³⁹

Thus was Mussolini's body exposed to public execration.

Sixteen other Fascist officials had been arrested the previous day. The Committee for National Liberation had charged Audisio with the task of executing them in the village of Dongo. Audisio accordingly determined to shoot them in the town square. Dongo's Mayor Rubini protested, but Audisio indignantly replied, "Isn't this the way the Germans behave? The execution is to be public, and it will be public."⁴⁰ To no avail the Mayor argued, "Yes, this is the way the Germans behave! But we are Italians. We hate the Nazis just because of their barbarous methods."⁴¹ In the end, the sixteen Fascists were shot down in a wild hail of bullets both by members of the firing squad and by every other armed

39. CHRISTOPHER HIBBERT, *IL DUCE: THE LIFE OF BENITO MUSSOLINI* 333-34 (1962).

40. ROMAN DOMBROWSKI, *MUSSOLINI: TWILIGHT AND FALL* 220 (1956).

41. *Id.* at 221.

man who was present. The Mayor told the partisans, "You have lost an unusual, a unique, opportunity to begin a new period in our country's history by applying principles of civilisation [sic]."42

Contemporaneously, the German Einsatzgruppen, execution squads that followed the Wehrmacht methodically to murder Jews, were carrying out the majority of their killings in relative secrecy. Some executions were carried out in the public squares, but the more workable techniques were mass slaughters in isolated gravesites like Babi Yar and deportation to hermetic ghettos and extermination camps.⁴³ A thin veil of secrecy and mystery was the most effective method for maintaining a government of terror under the Nazi regime.⁴⁴ The method was particularly effective in a regime where the normative basis for legality was dubious, where a consistent moral semblance of public approval—indeed, where any basis for government authority⁴⁵—was not yet clearly established. This brand of secrecy could be nicely complemented by selective instances of conspicuously public terror.⁴⁶

The Italian Fascists and the German Nazis formulated their laws to work in combination with credible threats of violence, effectuating power in anti-democratic fashion.⁴⁷ The Nazis amply used the method of legalized public execution toward at least two ends. The first was to intimidate populations they did not want to destroy altogether. In particular, public execution was an efficient means of reprisal against communities in occupied countries where partisans resisted.⁴⁸ Second, starting in

42. *Id.* at 222.

43. *See, e.g.*, AMERICAN JEWISH CONFERENCE, NAZI GERMANY'S WAR AGAINST THE JEWS I-43, III-398 (1947).

44. E.K. BRAMSTEDT, DICTATORSHIP AND POLITICAL POLICE 176-80 (1945).

45. *See* KARL D. BRACHER, THE AGE OF IDEOLOGIES 45 (1984).

46. At a fundamental level there is no discontinuity between absolutely secret and absolutely open killings. Humans fear that which they can never see, just as they fear that whose sight they can never escape; the feeling persists that what K can never see might always be watching K. Conceptually, the unknown and the omniscient are merged concepts because of the limits on one's observational powers. (A convenient example of this merging is found in the idea of God in the Western World.) In other words, when the self is isolated from others, it is unable to interact and therefore is lost to the world; similarly, when the self is totally merged with others, losing all semblance of self-identity, it is unable to interact and therefore is lost to the world. This phenomenon has been put in psychoanalytic language by Erik Erikson, who defines personal identity as "the accrued confidence that the inner sameness and continuity prepared in the past are matched by the sameness and continuity of one's meaning for others." ERIK H. ERIKSON, CHILDHOOD AND SOCIETY 261 (rev. 2d ed. 1963).

47. ARTHUR SCHWEITZER, THE AGE OF CHARISMA 91-93 (1984).

48. For example, Ukrainian documents report that on October 4, 1942, a fire that probably was caused by the negligence of stable-boys was the pretense for gathering all the male villagers of Lubycza, a district of Rawa Ruska. When the villagers did not name two saboteurs within two minutes, every fifth man was shot. Forty-six villagers were executed in front of their relatives. A month later, another reprisal took place in the nearby towns of Czortkow

1944, the Nazis applied a rule of "Lynch law" against downed and captured allied fliers suspected of attacking German civilian targets. Hangings were carried out locally by the German citizenry itself.⁴⁹ The principal objective was to deter prospective Allied pilots with carefully worded communiques conveying that, if captured, they too would be punished by the people they had been bombing.⁵⁰ Some Nazis feared the nascent implication of either democracy or anarchy from these lynchings because "[i]f the people are given a free hand to use Lynch law, it is hard to establish rules!"⁵¹ However, the Reich Marshal's office was more circumspect when it declared: "We cannot control the reaction of the population [to the captured fliers] anyhow. But if possible the population must be prevented from proceeding also against other enemy fliers [who have not committed the particular acts deemed legally punishable by Lynch law.]"⁵²

The Nazi public executions, then, reflected two significant features: first, terror or deterrence, particularly in the occupied nations; second, an appearance of debased democratic chaos in the German communities where the downed fliers were killed. The Nazis eagerly sought to manifest the first feature, but some in their ranks feared the second, with its democratic import. The characteristic Nazi concern for rules partly ex-

and Lwow, where a German policeman had been shot. Eighty-four executions "were carried out in broad day-light before the eyes of the frightened population." OFFICE OF UNITED STATES CHIEF OF COUNSEL FOR PROSECUTION OF AXIS CRIMINALITY, IV NAZI CONSPIRACY AND AGGRESSION 89-90 (1946) [hereinafter NAZI CONSPIRACY AND AGGRESSION]. Similarly, the Nazis in Northern Italy were ordered to respond to the partisans as follows: "Wherever there is evidence of considerable numbers of partisans [sic] groups, a proportion of the male population of the area will be arrested and in the event of an act of violence being committed, these men will be shot. The population must be informed of this. . . . Perpetrators or the ring leaders will be hanged in public." Order of General Kesselring, Bologna, 14 July 1944, in VIII NAZI CONSPIRACY AND AGGRESSION, *supra*, at 581.

49. "That such lynchings actually took place has since been fully established in a series of American Military Commission proceedings, which resulted in the conviction of German civilians for the murder of Allied fliers." II NAZI CONSPIRACY AND AGGRESSION, *supra* note 48, at 904.

50. *Id.* at 134-35.

51. VIII NAZI CONSPIRACY AND AGGRESSION, *supra* note 48, at 132.

52. *Id.* at 138. The four enumerated acts punishable by lynching were:

1. Attacks on the civilian population (individual persons as well as gatherings) by means of aircraft armament.
2. Shooting at our own (German) aircraft crews, who have been shot down and are hanging from parachutes.
3. Attacks by means of air-craft armament on passenger trains serving public traffic.
4. Attacks by means of aircraft armament on military or civilian hospitals and hospital trains clearly marked with the Red Cross.

Id. at 136.

plains this caution.⁵³ But because of some unexpressed calculus in the mathematics of political terror, the highest Nazi officials could conclusively endorse the public execution; those with a genius for such terror recognized that their monopoly on violence allowed them to harness completely the public execution, and the democratic feature became an illusory phantasm.⁵⁴

III. The Historical Purposes of Public Executions

The Framers of the United States Constitution drew on the inherent flaws in the European model as they built a constitutional society on the liberal ideal of personal dignity rather than political terror. As a matter of natural law, they felt the individual should be free from external power and coercion over his will and conscience.⁵⁵ The liberal conviction is perhaps best understood by juxtaposing it against its historical antithesis, totalitarian iniquity. This requires study of "punitive methods on the basis of a political technology of the [human] body in which might be read a common history of power relations and object relations."⁵⁶ Our

53. See PETER LOEWENBERG, *DECODING THE PAST* 209-39 (1983); HARROLD LASSWELL, *PSYCHOPATHOLOGY AND POLITICS* 75-76 (1960).

54. Hitler's rise to power was occasioned by several important events, including those surrounding the Reichstag fire of 1933. Six innocent men were blamed and finally beheaded on November 29, 1933. Hitler and Göring accused four others of complicity in the burning. In 1934, contemporaries reported the following:

Before an audience of S.A. men in the Berlin Sportpalast on the night of March 4th, 1933, their passions at fever pitch, raged Göring: "If I had my way, we should have set up the gallows on the very same night beside the Reichstag and then and there should have hanged the Communist crooks!" More moderate in tone, Reichschancellor Hitler himself took advantage of the opening of the new Reichstag on March 23rd to say: "Since certain sections of the foreign press have been seeking in some way to identify this monstrous crime with the re-awakening of the German nation, my own determination to avenge this sin in the shortest possible time by the public execution of the incendiary and his accomplices has been greatly strengthened."

WORLD COMMITTEE FOR THE RELIEF OF THE VICTIMS OF GERMAN FASCISM, *THE REICHSTAG FIRE TRIAL: THE SECOND BROWN BOOK OF THE HITLER TERROR* 10 (1934).

Present-day totalitarians have learned from this technique. Newspapers on January 22, 1986 report that in Beijing, 18 persons were convicted, sentenced to death, and executed before a public rally of 13,000 people. *China Holds Mass Execution as a New Year's Resolution*, S.F. CHRON., Jan. 22, 1986, at 11. In China, over 40 offenses carry the death penalty, and people have been executed for forming "a reactionary secret society," "exploiting feudal superstitions," and holding "dance and sex parties." AMNESTY INTERNATIONAL NEWSLETTER, May 1986. On February 17, 1987, Libya televised the execution of nine people. Three were shot by firing squad, and six were hanged. *RECAP Re: Capital Litigation*, CALIFORNIA APPELLATE PROJECT, June 1, 1987.

55. FRANZ NEUMANN, *THE DEMOCRATIC AND THE AUTHORITARIAN STATE* 69-95 (1957); see also ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* 165-67 (1987).

56. MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* 24 (Alan Sheridan trans., 1977).

context, or nexus of situs (*supra* Part I) and time (*supra* Part II), is incomplete without an understanding of function.

Punishment may be used to reaffirm the punisher's power. Such political theorists as Rusche and Kirchheimer, Deleuze and Guattari, Castell, and Foucault have each established the role of punishment as a complex social function, regarding it as a political tactic ("not simply as consequences of legislation or as indicators of social structures, but as techniques possessing their own specificity in the more general field of other ways of exercising power").⁵⁷ In other words, punishment is not merely the deprivation of a right, or a "negative mechanism" designed to repress particular bad acts, but also a positive device intended to serve the polity. Whipping in slave economies and contemporary community service sentences for erring white-collar criminals are but two simple examples. The right to punish, an exercise of power, must be viewed "not as a property, but as a strategy . . . ; one should decipher it in a network of relations, constantly in tension, in activity, rather than a privilege that one might possess; . . . one should take as its model a perpetual battle rather than a contract regulating a transaction or the conquest of a territory."⁵⁸ So viewed, power relationships and their symbol—punishment—become more than the consequences of social compact; they are the seal of the authority that *preceded* the compact.

In the eighteenth century, the European public execution served four special judicial functions. First, it made the condemned man the herald of his own condemnation, attesting to the truth drawn out by the state's inquisitorial proceedings. Second, it established itself as a sort of inquisitorial torture, when the condemned man with nothing to lose could publicly name his accomplices. Third, it expressed poetic justice, relating the barbarity of the punishment to the barbarity of the crime by inflicting the crime on the condemned man. Finally, the public execution, in all its drama, served as the ultimate "proof" marked with unmatched intensity, merging human judgment with the judgment of God.⁵⁹

The political functions of these public executions were even more profound. The punished crime, it was thought, had attacked not only its immediate victim, but also the sovereign personally.⁶⁰ This approach to

57. *Id.* at 23.

58. *Id.* at 26.

59. *Id.* at 43-47.

60. By 1775, the distinction between tort and crime was firmly established. *Atcheson v. Everett*, 98 Eng. Rep. 1142 (K.B. 1775).

A tort is not the same thing as a crime, although the two sometimes have many features in common. The distinction between them lies in the interests affected and

crime remains with us today. Jurisprudes of the eighteenth century determined that a law, "to be in force in this kingdom, . . . must necessarily have emanated directly from the sovereign, or at least been confirmed by the seal of his authority."⁶¹ Punishment therefore takes a pound of flesh for the sovereign, who has rights of governance at stake. The sovereign takes redress for the injury done to his or her kingdom, and for injury done to his or her dignity. (Historically, in the United States, assaults on the President have been treated with more gravity than assaults on an ordinary citizen, for the sovereignty of the nation has been wounded.)⁶² Foucault analyzed the objectives of the eighteenth-century execution ceremony as follows:

The public execution, however hasty and everyday, belongs to a whole series of great rituals in which power is eclipsed and restored (coronation, entry of the king into a conquered city, the submission of rebellious subjects); over and above the crime that has placed the sovereign in contempt, it deploys before all eyes an invincible force. Its aim is not so much to re-establish a balance as to bring into play, as its extreme point, the dissymmetry between the subject who has dared to violate the law and the all-powerful sovereign who displays his strength. Although redress of the private injury occasioned by the offense must be proportionate, although the sentence must be equitable, the punishment is carried out in such a way as to give a spectacle not of measure, but of imbalance and excess; in this liturgy of punishment, there must be an emphatic affirmation of power and of its intrinsic superiority. And this superiority is not simply that of right, but that of the physical strength of the sovereign beating down upon the body of his adversary and mastering it; by breaking the law, the offender has

the remedy afforded by the law. A crime is an offense against the public at large, for which the state, as the representative of the public, will bring proceedings in the form of a criminal prosecution. The purpose of such a proceeding is to protect and vindicate the interests of the public as a whole, by punishing the offender or eliminating him from society, either permanently or for a limited time, by reforming him or teaching him not to repeat the offense, and by deterring others from imitating him. A criminal prosecution is not concerned in any way with compensation of the injured individual against whom the crime is committed, and his only part in it is that of an accuser and a witness for the state. So far as the criminal law is concerned, he will leave the courtroom empty-handed.

WILLIAM PROSSER, *HANDBOOK OF THE LAW OF TORTS* 7 (4th ed. 1971); see also 3 WILLIAM BLACKSTONE, *COMMENTARIES* *3; 1 FRANCIS HILLIARD, *THE LAW OF TORTS* 65 (1859); COURTNEY S. KENNY, *OUTLINES OF CRIMINAL LAW* 542 (16th ed. 1952); IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 49 (1965).

61. FOUCAULT, *supra* note 56, at 47.

62. 18 U.S.C.A. § 1751 (West 1984); see *Furman v. Georgia*, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting). While many states make the murder of certain public officials, including firemen, an aggravating circumstance to be considered in determining punishment, only Ohio specifically provides that the assassination of the President of the United States is such an aggravating circumstance. OHIO REV. CODE ANN. § 2929.04(A)(1) (Anderson 1987).

touched the very person of the prince; and it is the prince—or at least those to whom he has delegated his force—who seizes upon the body of the condemned man and displays it marked beaten broken.⁶³

The specific polity behind the ceremony was intimidation. The general polity behind it was government by terror.⁶⁴ The ritual was explicitly military and it impressed upon all who saw it that punished crime resulted not only in justice, but also in exercise of the sovereign's discretionary power to do acts of violence.⁶⁵

The French Revolutionaries recognized this power, as did the kings they deposed. Thus, Taut de la Bouverie, representative of Parisians in 1791, declared to the National Assembly: "There must be terrible spectacles in order to control the people."⁶⁶ Similarly, Mussolini's execrators, who later enjoyed important political posts in Italy,⁶⁷ also drew upon this tradition of galvanizing the power relationship by displaying its ultimate signifier, public violence.⁶⁸ The execration preserved the battle

63. FOUCAULT, *supra* note 56, at 48-49.

64. The public execution did not re-establish justice; it re-activated power. In the seventeenth century, and even in the early eighteenth century, it was not, therefore, with all its theatre of terror, a lingering hang-over from an earlier age. Its ruthlessness, its spectacle, its physical violence, its unbalanced play of forces, its meticulous ceremonial, its entire apparatus were inscribed in the political functioning of the penal system.

Id.

65. One would expect that death penalties have been imposed more frequently during times of war than during times of peace. This fact, if true, could be explained by a hardening of emotions during times of fighting, by increased crime rates resulting from social dislocation and anxiety, by an increase in the rate of treason, and other various factors. However, each of these possible explanations reinforces the truth of a greater cause: The same sovereign that goes to war must operate just as strongly on the home front; it has long been believed that lax domestic morale and standards will result in the international downfall of any nation. See generally THUCYDIDES, *THE PELOPONNESIAN WAR* (Rex Warner trans., 1954). Justice Marshall has noted that "the Civil War halted much of the abolition furor. One historian has said that '[a]fter the Civil War, men's finer sensibilities, which had once been revolted by the execution of a fellow being, seemed hardened and blunted.'" *Furman*, 408 U.S. at 338-39 (Marshall, J., concurring) (quoting Davis, *The Movement to Abolish Capital Punishment in America, 1787-1861*, 63 AM. HIST. REV. 23, 33 (1957)).

Wartime espionage in the United States has been more severely punished than peacetime espionage. See *Cramer v. United States*, 325 U.S. 1, 15 n.21, 45 n.53 (1945). For an impressive survey of Civil War era cases, see TEETERS, *supra* note 20, at 373-90.

66. ALBERT CAMÚS, *REFLECTIONS ON THE GUILLOTINE* 10 (1959).

67. See RICHARD COLLIER, *DUCE! THE RISE AND FALL OF BENITO MUSSOLINI* 420-33 (1971); DOMBROWSKI, *supra* note 40, at 236-41.

68. Compare Mussolini's execration with—as it is described by Foucault—the celebrated torture and execution of Massola, which took place at Avignon and which was one of the first to arouse the indignation of contemporaries. This was an apparently paradoxical ceremony, since it took place almost entirely after death, and since justice did little more than deploy its magnificent theatre, the ritual praise of its force, on a corpse.

they had won. Concomitantly, the method of execution traditionally has been more severe for cases of treason than for simple murder.⁶⁹ In the United States, sovereignty was affirmed by the military, in the necessarily public execution of Abraham Lincoln's assassins, after the Civil War.⁷⁰ That particular execution has been deeply impressed on the nation—not least through the photographs of Matthew Brady⁷¹—for over a century. Its vestiges remain with us today in the American public execution.

A public execution is the ultimate act of asserting authority by terror. It is violent and not secret. It is the most extraordinary form of public violence, at once gritty-real and transcendent in character.⁷² The

FOUCAULT, *supra* note 56, at 50-51. After Massola was dead,

the *mortis exactor*, who had a large knife, then cut his throat, which spattered him with blood; it was a horrible sight to see; he severed the sinews near the two heels, and then opened up the belly from which he drew the heart, liver, spleen and lungs, which he stuck on an iron hook, and cut and dissected into pieces, which he then stuck on the other hooks as he cut them, as one does with an animal.

Id. at 51.

69. JOHN LAURANCE, *A HISTORY OF CAPITAL PUNISHMENT* 12 (1960). In England, "[i]t was asserted, when Sir Roger Casement was sentenced to death in 1917 for treason, that he must be executed in public, as the Act abolishing public executions did not apply to treason. In any case, however, the Act of 1887 authorised [sic] Sheriffs to execute any death sentence in a prison under their jurisdiction." *Id.* at 26.

70. About 200 spectators and several hundred soldiers attended the execution. REPORTERS OF THE PHILADELPHIA INQUIRER, *THE TRIAL OF THE LINCOLN ASSASSINS AND CONSPIRATORS AT WASHINGTON, D.C., MAY AND JUNE 1865, FOR THE MURDER OF PRESIDENT ABRAHAM LINCOLN* 208-09 (1865). For photographs, see GUY W. MOORE, *THE CASE OF MRS. SURRATT: HER CONTROVERSIAL TRIAL AND EXECUTION FOR CONSPIRACY IN THE LINCOLN ASSASSINATION* (1954). A military tribunal tried the conspirators; soldiers executed them. The Attorney General issued an extraordinary opinion approving of this procedure, noting that John Wilkes Booth and his associates were not acting out of private malice, but as public enemies. Attorney General James Sneed, *Opinion on the Constitutional Power of the Military to Try and Execute the Assassins of the President*, in *THE ASSASSINATION OF PRESIDENT LINCOLN AND THE TRIAL OF THE CONSPIRATORS* 403-09 (Benn Pitman ed., 1865). "It is well known that the conspirators . . . were hanged at Washington, D.C., July 7, 1865. What is not generally known is the feeling of national hysteria or the speed of imposed justice that characterized the times and the trial." TEETERS, *supra* note 20, at 4. One of Mussolini's execrators, a Communist named Serini, when challenged with the remark that the event was obscene, replied, "History is made that way—some people must not only die, but die in shame." COLLIER, *supra* note 67, at 366.

71. Matthew Brady, an American pioneer photographer, was known for his daguerreotypes of President Lincoln and the Civil War. *THE NEW COLUMBIA ENCYCLOPEDIA* 353 (William H. Harris et al. eds., 4th ed. 1975).

72. Albert Camus tells the story of his father, an upstanding citizen who was so outraged by a particular murder that he decided to attend the execution with a great crowd of spectators:

He never told what he saw that morning. My mother could only report that he rushed wildly into the house, refused to speak, threw himself on the bed, and suddenly began to vomit. He had just discovered the reality concealed beneath the great formulas that ordinarily serve to mask it. Instead of thinking of the [prisoner's victims], he could recall only the trembling body he had seen thrown on the board to

application of public violence by modern politicians surely is no less sophisticated than it was by their eighteenth-century counterparts.

Focus upon the modern totalitarian. The operative, necessary feature of fascist movements has been "the public display of a potential for organized violence" focused on a target, generally a racial target—although a member of the "criminal" or "sociopathic" class will do almost as well. What is perhaps the predominant theory of fascist power has held, not surprisingly, that "[c]onstant resort to violence arises from the very nature of fascist movements, which weld together diverse social strata . . . [by their] stress on action and violence [that] tends both to impose some form of unity, . . . and to temper it for the bigger confrontations to which its leaders aspire."⁷³ No one can match the expressive force of formalized or statutory violence with anything short of violent rebellion; public execution is paramount in the hierarchy of public political expression. Thus, in politically centralized and hierarchical communities, the public executioner has a monopoly on the most potent form of public political expression.⁷⁴

The ideological inspiration for European fascism, found in the works of Gobineau, Nietzsche, and Sorel, exhorts action through violence.⁷⁵ Sorel's important book, *Reflections on Violence*, urged gaining authority through violence rather than waiting for changes in social and economic conditions.⁷⁶ Building on this thesis, Mussolini declared: "It is to Sorel that I owe most."⁷⁷ Gobineau's *Essay on the Inequality of Human Races* advocated organizing in terms of the body rather than the spirit.⁷⁸ This highly influential work has been "a basic source of Fascist opposition to the sentimental humanism of an earlier day."⁷⁹ Gobineau's core lesson was that power should be founded not on universal values of human dignity, but upon specific factors of biology: race, nation, and

have its head chopped off. . . . This ritual act must indeed be horrible if it can subvert the indignation of a simple, upright man; if the punishment which he regarded as deserved a hundred times over had no other effect on him than to turn his stomach. When the supreme act of justice merely nauseates the honest citizen it is supposed to protect, it seems difficult to maintain that this act is intended . . . to confer a greater degree of peace and order upon the city.

CAMUS, *supra* note 66, at 5.

73. Alex Callinicos, *Repressive Toleration Revisited: Mill, Marcuse, MacIntyre*, in ASPECTS OF TOLERATION 53, 69-70 (John Horton & Susan Mendus eds., 1985) (footnote omitted).

74. *Cf.* Greer v. Spock, 424 U.S. 828, 838 (1976) (regulations restricting politicians from campaigning on military bases do not offend the First Amendment).

75. EUGEN WEBER, VARIETIES OF FASCISM 32 (1964).

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.* at 33.

caste. One must justify aspirations to total control by biological considerations, defining "order" by the coincidence of political and selected biological realities. One must gain power by violence, for violence is "the highest or, at any rate, the most obvious form of the social energy and the will to power which *create* history."⁸⁰

The popular violent spectacle is a magnetic basis for the fascists' cult of charismatic leadership. Modern leaders like Mussolini, Hitler, Eva Peron, and Degrelle concentrated power by focusing the public's emotion and affection on themselves. The fascists employ terror in a passion for unanimity. Although fascism is distinctly anti-rational in ideology and appeal, fascists use the tools and by-products of rationality to be efficient. In so doing, fascists employ a highly rational understanding of the power of the irrational. The deliberate use of the plebiscite, for instance, has been an important feature of such totalitarians as Napoleon and Cromwell, the Nazis and the Soviets.⁸¹

The fascists appeal to irrationality by applying a particular aesthetic. Public violence, particularly public death, has extraordinary powers of suggestion, extending beyond the act itself. In recent years, artists, writers, and filmmakers have used this aesthetic to re-elaborate Nazism. This appeal extends to many supermarket checkout lines, where several swastikas may meet consumers of paperback novels.⁸² An understanding of the aesthetic is important, because any analysis of fascism must look to the non-rational and to the irrational; it must extend beyond ideology, economics, and sociology. Too often our understanding of human experience has been limited by explanatory categories concerning the utilitarian, materialistic, or intellectual rationality of motives. This limitation is especially true of American legal analysis,⁸³ which is still conducted as though people had no feelings, no emotional ties, no bodily senses. Recognizing the problem, Saul Friedlander, one of our leading historians of the Holocaust has determined that "Nazism's attraction lay less in any explicit ideology than in the power of emotion, images, and phantasms. Both left and right were susceptible to them—at least during that crucial period from around 1930 until the German defeats midway through the

80. *Id.* at 34 (emphasis in original).

81. CARL J. FRIEDRICH & ZBIGNIEW K. BRZEZINSKI, *TOTALITARIAN DICTATORSHIP AND AUTOCRACY* 161-69 (2d ed. 1966).

82. See generally MATEI CALINESCU, *FACES OF MODERNITY* (1977).

83. See Joseph Goldstein, *Psychoanalysis and Jurisprudence*, 77 *YALE L.J.* 1053 (1968); Allan A. Stone, *Psychoanalysis and Jurisprudence: Revisited*, 10 *AM. CRIM. L. REV.* 357 (1972); Albert A. Ehrenzweig, *Psychoanalytical Jurisprudence: A Common Language for Babylon*, 65 *COLUM. L. REV.* 1331 (1965); 7 *THE WRITINGS OF ANNA FREUD: PROBLEMS OF PSYCHOANALYTIC TRAINING, DIAGNOSIS, AND THE TECHNIQUE OF THERAPY*, 1966-1970, at 258 (1971).

war.”⁸⁴

The power of which Friedlander spoke has influenced pop-cultural representations of Nazism. They no longer take a detached and condemnatory view of Nazism, but rather provide a more empathetic (though not necessarily sympathetic) perspective on it. Through this empathy, the crowd experiences order amidst the chaos. Friedlander’s classic analysis finds “the beginnings of a frisson, the presence of a desire, the workings of an exorcism.”⁸⁵ This is what happens in the new discourse:

At the heart of each of the zones of meanings, profound contradictions emerge: an aesthetic frisson, created by the opposition between the harmony of kitsch⁸⁶ . . . and the constant evocation of themes of death and destruction; a desire aroused by the eroticization of the Leader as Everyman, close to everyone’s heart and a total power of destruction flung into nothingness; an exorcism, finally, whose total endeavor, in the past and in the present, in—in the face of Nazi criminality and extermination policies—to maintain distance by means of language, to affirm the existence of another reality by inverting the signs of this one, and finally to appease by showing that all the chaos and horror is, after all, coherent and explainable.⁸⁷

Thus pop-cultural representations of Nazism, like Nazism itself, transform ordinary human longings for aesthetic balance and beauty into a cult of death.

Representing death—especially horrible death—with kitsch is a way of making death sensible, a way of creating order from chaos. The juxtaposition of kitsch and death represents “the foundation of a certain reli-

84. SAUL FRIEDLANDER, REFLECTIONS OF NAZISM: AN ESSAY ON KITSCH AND DEATH 14 (1984).

85. *Id.* at 18.

86. Kitsch, in this context, is explained as follows: “There is a kitsch of death. For example, . . . any child in a school yard who mimics the death of a cowboy or Indian, cop or thief, Mafioso or incorruptible gives a kitsch performance of death.” *Id.* at 18.

In ordinary kitsch there is an equivalence between the representation of reality and what could exist in reality: Lovers actually do lie under a fir tree like two turtledoves; a cottage from whose chimney a thin tendril of smoke rises could indeed harbor a happy family; a Swiss landscape does resemble a picture postcard. But faced with a kitsch representation of death, everyone knows that here two contradictory elements are amalgamated: on the one hand, an appeal to harmony, to emotional communion at the simplest and most immediate level [kitsch]; on the other, solitude and terror [death]. . . . [O]ne of the characteristics of kitsch is precisely the neutralization of ‘extreme situations,’ particularly death, by turning them into some sentimental idyll. . . . Basically, at the level of individual experience, kitsch and death remain incompatible. The juxtaposition of these two contradictory elements represents the foundation of a certain religious aesthetic, and, in my opinion, the bedrock of Nazi aesthetics as well as the new evocation of Nazism.

Id. at 26-27.

87. *Id.* at 18-19.

gious aesthetic, and . . . the bedrock of Nazi aesthetics as well as the new evocation of Nazism.”⁸⁸ And yet, a death by execution should be understood as anything but orderly. It is a messy struggle. Though the punisher draws veracity from imposing order, such order is *inherently impossible*.⁸⁹

The Nazi extermination camps, with their bureaucratic orderliness, drew millions to their deaths while millions of others stood by with a certain horrible glee. The ceremony of public execution, with its mask of stately order, does not work at all differently. Death, and nostalgia that looks backward to the lost pre-modern world, are “particularly powerful

88. *Id.* at 27. See *supra*, note 86, for an explanation of why kitsch and death are incompatible in a logical world of rational discourse.

89. An amicus brief filed in *Furman* by several former prison wardens who witnessed executions offered detailed descriptions:

The hanging itself, whether the prisoner is dropped through a trap, after climbing the traditional 13 steps, or whether he is Jerked from the floor after having been strapped, blackcapped and noosed, is a very gruesome spectacle. Generally, three men in a small enclosure on the gallows cut taut strings, one of these springs the trap, while the other two are attached to dummy ropes. This somewhat bizarre procedure is designed to give the three officers some feeling of non-responsibility for the death of their victim. The prison guard stands at the feet of the hanged person and holds his body steady, because during the first few minutes there is usually considerable struggling by the condemned man as he tries to breathe. Sometimes his neck does not break and he strangles to death. His eyes pop almost out of his head, his tongue swells and protrudes from his mouth, his neck may be broken and the rope may rip large portions of his skin and flesh from the side of his face on which the noose is set. He urinates, he defecates, and his droppings fall to the floor while the witnesses look on. In almost all executions at least one witness faints or has to be helped out of the witness room. The prisoner remains dangling from the end of the rope from 8 to 14 minutes before the attending doctor climbs up a small ladder and listens to his heart-beat [sic] with a stethoscope and pronounces him dead.

In States which practice electrocution, the body of the condemned man is prepared beforehand with a fastening, and one of his pants legs is split in order that an electric plate can be placed against his leg. When the electrocutioner throws the switch that propels the electric current through the body of the prisoner, the victim cringes from torture, his flesh swells and his skin stretches to the point of breaking. He defecates, he urinates, his tongue swells and his eyes pop out. In some cases his eyeballs rest on his cheeks; his flesh is burned and smells of cooked meat; sometimes a spiral of smoke rises from his head.

When a firing squad is the method of death, several rifle shots are fired, all but one of which is effective. As in the case of hanging and electrocution, shooting disfigures the body of the prisoner.

In administering death by lethal gas, . . . [the prisoner] is dressed in blue jeans and a white shirt as other garments might hold a pocket of gas. He is accompanied 10 or 12 steps to the gas chamber by two officers, quickly strapped in a metal chair, a stethoscope applied and the door sealed. Out of sight of the witnesses the executioner, on a signal from the warden, presses the lever which allows cyanide gas eggs to mix with the distilled water and sulfuric acid. At first there is extreme evidence of horror, pain and strangling. The prisoner’s eyes pop, they turn purple, they drool. Soon the prisoner is unconscious. It is a horrible sight, at which witnesses frequently faint.

Amicus brief filed on behalf of James V. Bennett, at 12-14, *Furman v. Georgia*, 408 U.S. 238 (1972) (Nos. 69-5003, 69-5030, 69-5031).

in fascism in general and in Nazism in particular.”⁹⁰ So are death and nostalgia the essence of the modern public execution, which looks backward to primitive urges for revenge, to eye-for-an-eye justice, the days of yore when we did see spies hanged, kings decapitated, witches burned, and rapists gibbeted. Here is a kind of negative transcendence, a blinding spectacle of destruction. Longings for the aesthetic balance of justice have produced a similar cult of death among victims’ rights movements in our own day.⁹¹

The public execution gives the public its momentary hero and its momentary God. The hero is the condemned man.⁹² The God is the governor who signs the death warrant, proclaiming to his constituents that justice is served. People ascribe collective parental power to their leaders. The sovereign’s power is mythologized.

Even more, the power is eroticized. “Power carries an erotic charge,” says Foucault:

This poses a historical problem: How could Nazism, which was represented by lamentable, shabby, puritan young men, by a species of Victorian spinsters, have become everywhere today—in France, in Germany, in the United States—in all the pornographic literature of the whole world, the absolute reference of eroticism? All the shoddiest aspects of the erotic imagination are now put under the sign of Nazism.⁹³

“Nazism,” he says, “never gave a pound of butter to the people, it never gave anything but power.”⁹⁴

Today, even in the democratic American state, officials proclaim a death penalty, debate it eternally, enforce it with great ceremony, and occasionally grant a reprieve, filling the heart of the body public with relief. Sometimes officials enforce the execution, showing awesome power and the discretionary capacity to give or withhold love.⁹⁵ When

90. FRIEDLANDER, *supra* note 84, at 39.

91. See amicus brief filed in support of the state, *Booth v. Maryland*, 482 U.S. 496 (1987) (No. 86-5020) (victim impact statement in capital sentencing in violation of Cruel and Unusual Punishments Clause).

92. See, e.g., EDWARD LIVINGSTON, *THE COMPLETE WORKS OF EDWARD LIVINGSTON ON CRIMINAL JURISPRUDENCE* 44 (1873); 2 *CORRESPONDENT* 93-94 (1873).

93. FRIEDLANDER, *supra* note 84, at 74 (quoting interview with Michel Foucault, *CAHIERS DU CINEMA*, July-Aug. 1974, at 10).

94. *Id.*

95. The Supreme Court, per Justice Stewart, quoted: “The division [between proponents and opponents of hanging] is not between rich and poor, highbrow and lowbrow, Christians and atheists; it is between those who have charity and those who have not . . .” *Witherspoon v. Illinois*, 391 U.S. 510, 520 n.17 (1968) (quoting ARTHUR KOESTLER, *REFLECTIONS ON HANGING* 166-67 (1956)). See also Richard E. Meyer, *Governor Calls Practice “Anti-God”*; *Anaya Sparing All Inmates on New Mexico Death Row*, L.A. TIMES, Nov. 27, 1986, at 1 (New Mexico Governor Toney Anaya commuted state’s entire Death Row to life imprisonment).

they do the latter publicly, the public perceives the eroticization of leadership. "The twentieth century has experienced the gross magnification of political and personal irrationality correlative to the exponential increment in the power of modern technology."⁹⁶ In contemporary American society, one may find evidence that attachment to distant leaders has increased as family structures break down and the level of human transience increases.⁹⁷ A gang leader named Daniel Thomas uttered a simple truth when he was taken to his Florida execution in 1986:

"We are human tools and political pawns for human sacrifice," Thomas said, blaming his death on "politicians seeking the highest office in the state."

"Governor Bob Graham has opened the doors to a new wave of politicking that says the best way to win political races is to boast that 'I'll carry out the execution of every prisoner on Florida's death row,'" said Thomas.⁹⁸

The gang leader could perceive how state officials trade on the irrational demands of sadism.⁹⁹ And clearly such officials do have a

"Prisoners and their families thanked him for his mercy, but most other reaction was sharply negative. . . . Anaya's commutation won praise from church groups Anaya, a Roman Catholic, stood firm on his promise to stay executions. 'I believe that only God can give life and only he can take it away,' he said. 'For the state to presume to kill is barbarous, as murderous as the common criminal.'")

96. LOEWENBERG, *supra* note 53, at 242.

97. *See generally id.*

98. Denny Hamilton, *Murderer-Rapist Lays Execution to 'Politicians Seeking Office,'* L.A. DAILY J., Apr. 16, 1986, at 5.

99. If officials avoid these pressures, the price can be high.

Former Gov. Edmund G. 'Pat' Brown revealed Wednesday that he almost resigned as California's chief executive in 1980 after he granted a 60-day reprieve to 'Redlight Bandit' Caryl Chessman. At a reunion luncheon with Capitol reporters, Brown recalled that after he delayed Chessman's execution he was booed everywhere he went.

SACRAMENTO BEE, Jan. 11, 1985; *see also* ST. PETERSBURG TIMES, May 19, 1986 (Leroy Collins, governor of Florida, 1955-1961, writes, "The death penalty is Florida's gutter of shame.").

So long as executions in public were allowed in England, these sordid, sadistic performances were apparently looked upon by the majority of spectators as entertainments on a par with the modern boxing contest or football match. From far and near, the public in its thousands flocked to the places of execution, the wealthy paying high prices for positions ensuring a particularly intimate view of the execution. Indeed, many wealthy sadists made a practice of witnessing every execution possible. One such was Horace Walpole's close friend, George Selwyn, of whom it was said that his greatest pleasure in life was to see a man put to death. Another noted character who took pleasure in witnessing the death throes of criminals was Samuel Johnson's biographer, Boswell. He rarely missed an execution at Newgate.

It is a noteworthy point, which has been remarked upon again and again by contemporary historians, that in those days when social distinctions were in all circumstances of normalcy most sharply defined and clearly drawn, at these spectacles of torture and cruelty such distinctions were, for the moment, totally forgotten. Peers and peasants mixed with each other on terms of equality; they exchanged jests and jokes with the greatest of good humor. This, more perhaps than anything else,

constituency.¹⁰⁰

Nazi power expressed a flow of ideas, emotions, and phantasms that are kept separate in all liberal Western societies.¹⁰¹ And the Eighth Amendment, which prohibits cruel and unusual punishment,¹⁰² should separate this flow, for

[w]e know that the dream of total power is always present, though dammed up, repressed by the Law. Also constant is the temptation to break the Law, even at the risk of destruction. With this difference—which perhaps tempers, or on the contrary exacerbates, the apocalyptic dreams: This time, to reach for total power is to assure oneself, and all of mankind as well, of being engulfed in total and irremediable destruction.¹⁰³

If exposure to destruction and death causes emotion to become cathartic at one level, it deadens emotion at another, making us more willing to accept death as a matter of course, replacing outrage with a soothing banality. Social scientists have concluded that public execution brutalizes the community,¹⁰⁴ especially if conducted locally. “Instead of instilling respect for life, it prompts disrespect; instead of creating a fear of violence, it promotes a fascination with it; and ultimately, instead of deterring violence, it encourages a fatalistic acceptance of it.”¹⁰⁵ As early as 1787, Dr. Benjamin Rush expressed the effects of public executions:

Now, as the distress which the criminals suffer, is the effect of a law of the state, which cannot be resisted, the sympathy of the spectator is rendered abortive, and returns empty to the bosom in which it was awakened. . . . [This sympathy] is the vicegerent of

indicates how great an effect on the emotions had these inhuman, revolting and barbaric spectacles.

GEORGE R. SCOTT, *THE HISTORY OF CORPORAL PUNISHMENT* 226-27 (1938).

See also MAILER, *supra* note 2, at 952 (describing spectators at Gary Gilmore's execution: “Any cop or bureaucrat who had a little pull had gotten in. . . . Here were all these Sheriffs and County Troopers Stanger had never seen before, come right out of the woodwork—how could you be respected in your profession if you weren't here.”).

100. Social scientists have found that “persons who favor the death penalty are more likely than opponents to score high on various psychological measures of authoritarianism, dogmatism and conservatism in legal, social, and political views.” Neil Vidmar & Phoebe C. Ellsworth, *Research on Attitudes Toward Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 68, 78-79 (Hugo A. Bedau ed., 3d ed. 1982) (footnote omitted). They are also “more likely to be willing to endorse attitude statements supporting such things as discrimination against minority groups, restrictions on civil liberties, and violence for achieving social goals” than are persons opposed or neutral to the death penalty. *Id.* at 79.

101. FRIEDLANDER, *supra* note 84, at 134.

102. U.S. CONST. amend. VIII.

103. FRIEDLANDER, *supra* note 84, at 136.

104. See, e.g., Gail Largey, *The Hanging*, 18 *SOCIETY* 73-75 (1981).

105. *Id.*

the divine benevolence in our world. It is intended to bind up all the wounds which sin and death have made among mankind. . . .

If such are the advantages of [sympathetic] sensibility, now what must be the consequences to society of extirpating or weakening it in the human breast? But public punishments are calculated to produce this effect.¹⁰⁶

He concluded that public punishments make room in the heart to accept evil:

The principle of sympathy, after being opposed by the law of the state, which forbids it to relieve the distress it commiserates, will cease to act altogether; and, from this defect of action, and the habit arising from it, [sympathy] will soon lose its place in the human breast. Misery of every kind will then be contemplated without emotion or sympathy. . . . [A]nd what is worse than all, when the centennial of our moral faculty is removed, there is nothing to guard the mind from the inroads of every positive vice.¹⁰⁷

For this reason, asserted Rush, the Jewish law commands against spectators in these words: “[T]hine eye shall not pity him.”¹⁰⁸

The contrary claim of death penalty abolitionists that public executions will disgust people and move them to oppose the death penalty is short-sighted because, if Rush is correct, over time most witnesses would become inured and jaded. Moreover, the claim is intellectually dishonest, because if the abolitionists are correct, then they would have to abandon their principal moral argument against the death penalty—that it has no deterrent impact. Detailed research in the United States and other countries has provided no evidence that the death penalty deters crime more effectively than other punishments.¹⁰⁹

IV. The Structural Response of Law: Values of the Eighth Amendment

This Article has suggested that totalitarianism and human degradation describe, respectively, the purpose and effect of public executions. Under any reasonable interpretation of our common history and Constitution, totalitarianism and human degradation are two undesirable characteristics of political and social life. The values that find expression in the Eighth Amendment may serve as a comfortable starting point for this simple assertion. The only Supreme Court Justice ever to mention the

106. RUSH, *supra* note 8, at 5.

107. *Id.* at 6.

108. *Id.* The word “pity” poetically suggests viewing (by the “eye”); that viewing will result in a hardening of the heart.

109. AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA: THE DEATH PENALTY 162-66 (1987).

problem of public executions was examining the Cruel and Unusual Punishments Clause when he wrote: "No longer does our society countenance the spectacle of public executions, once thought desirable as a deterrent to criminal behavior by others. Today we reject public executions as debasing and brutalizing to us all."¹¹⁰ The Eighth Amendment is also a convenient starting point because it explicitly limits punishment, which has been deemed necessary for social ordering.

The Supreme Court has long held that the test for prohibiting punishment as cruel and unusual "may acquire meaning as public opinion becomes enlightened by a humane justice."¹¹¹ The test is one of social morality and conscience. The appropriate standard for "cruel and unusual" must transcend the concerns of the prisoner, since it is axiological to Eighth Amendment jurisprudence that the Clause serves not only the prisoner, but society's attempt at humane self-governance. Although the language of the Cruel and Unusual Punishments Clause historically has been invoked to address personal due process claims, the Clause should be understood to have a life of its own, embracing matters of social concern. The Clause is useful in examining a particular structure of natural law values: to protect the workings of a democracy based on rational discourse and human dignity; and to keep society from degrading, debasing, and brutalizing itself.¹¹²

110. *Furman v. Georgia*, 408 U.S. 238, 297 (1972) (Brennan, J., concurring). Justice Brennan made the point in passing to support an argument against capital punishment, apparently because all courts would accept without dispute the unconstitutionality of public executions.

111. *United States v. Weems*, 217 U.S. 349, 378 (1910).

112. I am suggesting that the Cruel and Unusual Punishments Clause has three aspects. The first aspect embodies a personal or private right: to protect the prisoner from certain hardships. This is a requirement of personal due process, and thus applicable to the states under the Fourteenth Amendment. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 463 (1947); *Robinson v. California*, 370 U.S. 660, 667 (1962). The second and third aspects embody public rights: the right to protect the workings of democracy based on rational discourse, and the right to protect society from degrading, debasing, and brutalizing itself. The ban on cruel and unusual punishment, thus far applicable to the states, cannot be bifurcated according to its private and public aspects. If one aspect of the Eighth Amendment applies, then all aspects of it must apply. To hold otherwise would require a paradoxical jurisprudence.

The public aspects must apply just as do the private aspects. The Court's approach in applying the incorporation doctrine has been to incorporate those amendments, including the Eighth Amendment, that embody " 'principle[s] of justice so rooted in the tradition and conscience of our people as to be ranked as fundamental' and thus 'implicit in the concept of ordered liberty.' " LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 11-2, at 773 (2d ed. 1988) (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J.)). Avoiding totalitarianism and human degradation appears to be a goal that is "implicit in the concept of ordered liberty." The Court's decisions drawing on the Bill of Rights to restrict state action have not been limited to personal procedural matters; the Court has repeatedly applied the Bill of Rights to substantive law ("the permissible substance of state law," *id.*). *See, e.g., Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897) (just compensation); *Grosjean v. American*

There is no statement in the Constitution about *why* cruel and unusual punishment cannot be inflicted. It is prohibited, simply and plainly. The values that undergird the Eighth Amendment are not susceptible to a simple linguistic decoding. One should look, then, for a pattern in the holdings in order to discover a positive structure that builds on values of human dignity.¹¹³ We begin with the 1958 case of *Trop v. Dulles*,¹¹⁴ in which Chief Justice Warren found that “[t]he basic concept underlying the [Clause] is nothing less than the dignity of man. While the State has the power to punish, the [Clause] stands to assure that this power be exercised within the limits of civilized standards.”¹¹⁵ The Court held that it is cruel and unusual punishment to expatriate a soldier for deserting the armed services during war. Beyond its literal language, the decision’s very approach—searching for the limits of civilized standards—implicitly recognizes human dignity, enunciating the profoundly social quality of the Eighth Amendment. Both the words and the holding against expatriation strongly imply a concern that society, viewed through the Cruel and Unusual Punishments Clause, must not disintegrate itself into a mere amalgamation of lone wolves (even lone wolves with personal rights).

Chief Justice Warren’s plurality opinion declared that the Eighth Amendment will not allow a citizen to be deprived of citizenship merely because the citizen shirked a duty of citizenship.¹¹⁶ Yet something more

Press Co., 297 U.S. 233 (1936) (freedom of press); *DeJonge v. Oregon*, 299 U.S. 353 (1937) (freedom of assembly); *Shelton v. Tucker*, 364 U.S. 479 (1960) (freedom of association); *Stanley v. Georgia*, 394 U.S. 557 (1969) (right to possess obscene literature).

Obviously, the Constitution must be concerned not only with the rights of the individual but with the rights of society. That is why the Constitution is in the nature of a social compact. See e.g., *Barker v. Wingo*, 407 U.S. 514, 519 (1972) (“In addition to the general concern that all accused persons be treated according to decent and fair procedures, there is a societal interest in providing a speedy trial which exists separate from, and at times in opposition to, the interests of the accused.”); see also ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 130-33 (1974).

In the context of the Sixth Amendment, Justice Black has observed that “the people as a whole, or as they are usually called, ‘society’ or ‘the state,’ have as much right to an impartial jury as do criminal defendants. This Court itself has made that quite clear: ‘It is to be remembered that such impartiality requires not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.’” *Witherspoon v. Illinois*, 391 U.S. 510, 535 (1968) (Black, J., dissenting) (citing *Hayes v. Missouri*, 120 U.S. 68, 70 (1887)).

113. My approach is not to deconstruct a system of decision by tossing to the side the values it upholds. Such a method, while entertaining, seems incompatible with a constructive approach to society. See generally Owen M. Fiss, *Conventionalism*, 58 S. CAL. L. REV. 177 (1985); Owen M. Fiss, *Objectivity and Interpretation*, 34 STAN. L. REV. 739 (1982).

114. 356 U.S. 86 (1958).

115. *Id.* at 100.

116. *Id.* at 92.

than the rights of prisoner Albert Trop was at stake: The values of a civilized society. The Court could not have considered expatriation disproportionately severe in relation to the gravity of the crime, since wartime desertion like Trop's was punishable by death.¹¹⁷ Similarly, a court could not impose a punishment of torture on a capital offender who, as a personal matter, might very well prefer it to a punishment of death. "[T]he [constitutionally permissible] existence of the death penalty is not a license to the Government to devise any punishment short of death within the limit of its imagination."¹¹⁸

The structure of civilized society is the issue. Expatriation results in the specter of the individual who has lost the ability to have rights.¹¹⁹ It results in the spectacle of a nation so uncivilized or socially unstructured that it punishes its citizens by thrusting them into the open world in a manner unacceptable to the international community of nations.¹²⁰ *Trop* suggests that in asking whether social values are degraded by the punishment, the Court is not merely testing some larger principle; it is addressing the ultimate value at stake. Indeed, whether punishments are "cruel and unusual" constitutionally tests whether society has fallen from the human dignity essential to competent democratic government.

We should look backwards from *Trop* to see how the Eighth Amendment developed its meaning.¹²¹ In 1878, the Court approved a Utah territorial statute that authorized the death penalty for first-degree murder.¹²² The Court examined prisoner Wilkerson's only objection, that where the mode of execution is not specified by statute, no court is entitled on its own authority to pass a sentence of death.¹²³ The sentencing court had ordered that Wilkerson be publicly shot.¹²⁴ The prisoner raised no objection to this public mode as cruel and unusual, nor did the Supreme Court sua sponte address itself to the issue. Rather, the Court decided only that the Eighth Amendment is limited in scope to punishments like torture, that are unnecessarily cruel.¹²⁵ The Court defined

117. *Id.* at 99. The dissenters apparently understood "Cruel and Unusual" to include only those punishments that were disproportionately excessive. *Id.* at 124-25.

118. *Id.* at 99.

119. *Id.* at 102.

120. *Id.*; see Steven A. Blum, *Intervention for the Purpose of Restoring Anarchy with Public Order: Trends Toward a Developing Norm*, 11 ILSA J. INT'L L. 1 (1987).

121. See MARK BLOCH, *THE HISTORIAN'S CRAFT* 45-46 (1953) (The "prudently retrogressive" method of looking at the outcome first, and then tracking down the beginnings or "causes" of the phenomenon).

122. *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878).

123. *Id.* at 136-37.

124. *Id.* at 130.

125. *Id.* at 136.

cruelty by historical reference. It looked to the custom of war, to military laws, to rules prevailing in other countries, and to the common law.¹²⁶ Execution by public shooting was traditionally permissible; it did not violate the Eighth Amendment, so the sentencing court had authority to prescribe the mode of death.

From *Wilkerson*, the Court moved forward to *In re Kemmler*,¹²⁷ a case for the beginnings of modernism. *Kemmler* held that death by electrocution was constitutionally permissible.¹²⁸ This new penalty was the result of a concerted effort by New York's governor and legislature to provide a means for execution less barbarous than hanging.¹²⁹ Resting on *Wilkerson*, the Court declared torture impermissible, but took an important step further when it said that "[p]unishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel within the meaning of that word as used in the constitution. It implies there something inhuman and barbarous—something more than the mere extinguishment of life."¹³⁰ The *mode* of execution thus became an issue of constitutional law rather than common law. The Court took great care to note the findings of the state courts, focusing on the state's intent, when it declared "that it was for the legislature to say in what manner sentence of death should be executed; that this act was passed in the effort to devise a more humane method of reaching the result; . . . [and that] the legislature had attained by the act the object [it] had in view by its passage."¹³¹ The Court here emphasized the state's intent to be more humane. It saw that the term "cruel" does not imply hurt as much as sadism; that "cruel" describes the punisher more than it does the punishment; and that as a constitutional matter, the punishment is relevant principally insofar as it manifests the intent or the feeling of the punisher. This conclusion also follows from the postulate that constitutions are plans for the living (the punishers), not for the dead (the punished).

A generation later, in 1910, the Court's cruel and unusual punishment doctrine took on a view of the social values at stake that was consistent with *Kemmler* but more powerfully stated.¹³² Paul Weems, a U.S. Government official in the Philippines, was convicted of falsifying documents. Weems was sentenced to the draconian term of fifteen years of

126. *Id.* at 133-36.

127. 136 U.S. 436 (1890).

128. *Id.* at 437, 449.

129. *Id.* at 445.

130. *Id.* at 447.

131. *Id.*

132. *Weems v. United States*, 217 U.S. 349 (1910).

“labor for the benefit of the State. [He] shall always carry a chain on his ankle, hanging from the wrists; [he] shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution.”¹³³ The Supreme Court found that

No circumstance of degradation is omitted. It may be that even the cruelty of pain is not omitted. He must bear a chain night and day. He is condemned to painful as well as hard labor. What painful labor may mean we have no exact measure. It must be something more than hard labor. It may be hard labor pressed to the point of pain.¹³⁴

The Court held that “it is a precept of justice that punishment for crime should be graduated and proportioned to the offense.”¹³⁵ Citing the President’s report on the Philippines, the Court reasoned that there are “certain practical rules of government which we have found to be essential to the preservation of those great principles of liberty and law.”¹³⁶

This vision of disparate sentencing extended the Clause’s meaning. It recognized that the constitutional prohibition has extraordinary structural importance as a broad limitation on government, extending beyond the imposition of what is literally “cruel” and what is literally “unusual” to prohibit the tools of totalitarianism. While torture was clearly wrong, said the Court, “We cannot think that the possibility of a coercive cruelty being exercised through other forms of punishment was overlooked. We say ‘coercive cruelty,’ because . . . [c]ruelty might become an instrument of tyranny; of zeal for a purpose, either honest or sinister.”¹³⁷ The Court looked to the *potential* results of cruelty, particularly of penalties that require more than is essential adequately to punish the crime.

The Framers’ objective, said the Court, was to ensure that the kind of abuses of power that took place under the Stuart monarchies would not recur. The Court related Justice Story’s observation that the Eighth Amendment was deliberately copied from England’s Bill of Rights of 1688 and “adopted as an admonition to all departments of the national government, to warn them against such violent proceedings as had taken

133. *Id.* at 364. The Supreme Court quoted the following language, which had been used by the sentencing court to justify its punishment:

“[I]n public documents the law takes into consideration not only private interests, but also the interests of the community . . . to protect the interests of society by the most strict faithfulness on the part of a public official in the administration of the office intrusted to him,” and thereby fulfill the “responsibility of the State to the community for the official or public documents under the safeguard of the state.”

Id. at 363.

134. *Id.* at 366.

135. *Id.* at 367.

136. *Id.*

137. *Id.* at 373.

place in England in the arbitrary reigns of some of [the] Stuarts.”¹³⁸ Yet the Court assured us that we need not confine “cruel and unusual” to only those methods of terror used by the Stuarts. If in the modern age we see evils and punishments that have no precedent, we may condemn them. If government officials devise novel uses for common law punishments to practice authoritarian terror, these officials would be stopped. The Court continued:

Patrick Henry said that there was danger in the adoption of the Constitution without a Bill of Rights . . . Henry and those who believed, as he did would take no chances. Their predominant political impulse was distrust of power[,] and they insisted on constitutional limitations against its abuse. But surely they intended more than to register a fear of the forms of abuse that went out of practice with the Stuarts. Surely, their jealousy of power had a saner justification than that. They were men of action, practical and sagacious, not beset with vain imagining, and it must have come to them that there could be exercises of cruelty by laws other than those which inflicted bodily pain or mutilation.¹³⁹

The body in pain and the personal right of a particular prisoner are not the only issues at stake. To limit the Eighth Amendment to protecting something utterly personal is to disregard the value of social health and, ultimately, political prophylaxis to safeguard that health. While the evil potential of mental or psychological structures remains constant throughout the generations, the historical conditions under which the evil operates cannot precisely repeat themselves.¹⁴⁰ It became axiological to the Justices that the Framers believed that

power might be tempted to cruelty. This was the motive of the clause, and if we are to attribute an intelligent providence to its advocates we cannot think that it was intended to prohibit only practices like [those of] the Stuarts, or to prevent only an exact repetition of history.¹⁴¹

In its sweeping structural approach, the *Weems* Court cited Chief Justice Marshall and several constitutional theorists to set out what must inhere in the Eighth Amendment.¹⁴² The Court declared that

[l]egislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not,

138. *Id.* at 371-72 (citing 2 JOSEPH STORY, ON THE CONSTITUTION § 1903 (5th ed. 1891)).

139. *Id.* at 372.

140. LOEWENBERG, *supra* note 53, at 22.

141. *Weems*, 217 U.S. at 373.

142. The Court cited *Calder v. Bull*, 3 U.S. 386 (1798), *The Slaughterhouse Cases*, 83 U.S. 36 (1873), and *Gibbons v. Ogden*, 22 U.S. 1 (1823), to make the point that structural reasoning is the appropriate means to understand the Cruel and Unusual Punishments Clause, and pointed out that “[t]here are many illustrations of resistance to narrow constructions of the grants of power to the national government.” *Weems*, 217 U.S. at 374.

therefore, be necessarily confirmed to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle to be vital must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. . . . Under any other rule a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.¹⁴³

The substratum of this declaration is evident: The Court refers to a social dynamic, to changes in social life that require changes in social response and in government. While the social structure is diachronic, the structure of the (abstract) individual remains essentially synchronic; therefore, remedies must be tailored responsively by giving attention to the social forces at work when any punishment is meted out.¹⁴⁴

After *Wilkerson*, *Kemmler*, and *Weems*, the Court was prepared to take up the freakish case of Willie Francis, who twice faced the State of Louisiana's electric chair. (The first time Francis sat in the chair it malfunctioned and he remained alive.) Francis sought a writ on the grounds that facing imminent death twice would constitute a cruel and unusual punishment.¹⁴⁵ In this, the first cruel and unusual punishment case to reach the Court after the end of World War II, the Court stressed the accidental nature of the incident and the obvious lack of intent to abuse governmental power: "As nothing has been brought to our attention to suggest the contrary, we must and do assume that the state officials carried out their duties under the death warrant in a careful and humane manner. Accidents happen for which no man is to blame."¹⁴⁶ Insofar as one believes that death itself is the penalty, this is an easy case. On the other hand, if it is true that "it is not death, but dying which is terrible,"¹⁴⁷ then forcing Francis to face the chair twice would mean permitting the state to enforce a gratuitous punishment. This would be unacceptable, for "[o]ur minds rebel against permitting the same sovereignty to punish an accused twice for the same offense."¹⁴⁸

143. *Weems*, 217 U.S. at 373.

144. ROLAND BARTHES, *WRITING DEGREE ZERO* 9-12 (Annette Lavers & Colin Smith trans., 1967).

145. *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 461 (1947).

146. *Id.* at 462.

147. HENRY FIELDING, *AMELIA*, book III, ch. 4 (1751).

148. *Francis*, 329 U.S. at 462.

Thus, it is “unnecessary” and “wanton” infliction of pain that is prohibited. Indeed, the Court focused on the *objective* nature of the Eighth Amendment, discounting subjective or personal due process qualities, when it held, “The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.”¹⁴⁹ Inescapably, the Court must look to the cruelty of the punisher rather than the hurt suffered by the punished.¹⁵⁰

The Court did entertain the suggestion that a punishment could conceivably rise to an undefined “level of hardship” that is unacceptable from the prisoner’s point of view. How that level could be identified remained an open question.¹⁵¹ Presumably, the Court was thinking about the *Weems* result and analysis. The Court nonetheless stuck to its predominantly objective focus on the punisher.¹⁵²

The four dissenters agreed with the premise that the nexus of decision should be the standards of civilization,¹⁵³ but they determined that no civilized society would countenance the re-application of unsuccessfully administered electrocutions. The State’s intent remained an important issue. But the question became: Intent at *what stage* of the process? The dissenters wrote:

If the state officials deliberately and intentionally had placed the relator in the electric chair five times and, each time, had applied electric current to his body in a manner not sufficient, until the final time, to kill him, such a form of torture would rival that of burning at the stake. Although the failure of the first attempt, in the present case, was unintended, the reapplication of the electric current will be intentional. How many deliberate and intentional reapplications of electric current does it take to produce a cruel, unusual and unconstitutional punishment? . . . If five attempts would be “cruel and unusual,” it would be difficult to draw the line

149. *Id.* at 464.

150. The fact that an unforeseeable accident prevented the prompt consummation of the sentence cannot, it seems to us, add an element of cruelty to a subsequent execution. There is no purpose to inflict unnecessary pain nor any unnecessary pain involved in the proposed execution. The situation of the unfortunate victim of this accident is just as though he had suffered the identical amount of mental anguish and physical pain in any other [accidental] occurrence, such as, for example, a fire in the cell block.

Id.

151. *Id.*

152. It is not too flippant, I believe, to observe here that the Constitution prohibits “cruel and unusual punishments” rather than “painful and unusual punishments.” Cruelty describes the punisher; the punished experiences pain.

153. *Francis*, 329 U.S. at 473 (Burton, J., joined by Douglas, Murphy, and Rutledge, JJ., dissenting).

between two, three, four and five.¹⁵⁴

In essence, the dissenters recognized that governmental intent is often hard to find until it is too late.

The trend of Eighth Amendment analysis takes us to the two Georgia cases, *Furman v. Georgia*¹⁵⁵ and *Gregg v. Georgia*,¹⁵⁶ which are noteworthy primarily for their lack of coherence. Without significant consensus in these opinions, the state of death penalty law became fundamentally deficient. Pronouncements of law are legitimate only if they result in a fair measure of predictability and understanding.¹⁵⁷ Thus the Court's diffusive application of the Eighth Amendment to the death penalty is less informative to one who seeks to understand an edifice of law than it is to one who seeks to tear it apart. The Georgia opinions themselves surely do not give the law meaning. This is shown by the numerous efforts of legal scholars to create external meaning from texts that should themselves provide sufficient meaning.¹⁵⁸

Using *Furman* and *Gregg* as the most authoritative historical texts to date,¹⁵⁹ however, it is helpful to consider the historical answer to the problems of totalitarianism and human degradation. England proclaimed its answer in its Bill of Rights of 1689, from which the Eighth Amendment takes its language.¹⁶⁰ The values of the Amendment are rooted in the common law's experience with totalitarian government. Justice Douglas's history, in *Furman*, directed attention to the Bloody Assizes, the terror marking the interregnum between Charles II and James II. Lord Chief Justice Jeffreys sentenced hundreds to death "in

154. *Id.* at 476.

155. 408 U.S. 238 (1972).

156. 428 U.S. 153 (1976).

157. LON L. FULLER, *THE MORALITY OF LAW* 33-44 (1967).

158. *See, e.g.*, Robert Burt, *Disorder in the Court: The Death Penalty and the Constitution* (unpublished paper, presented to the Yale Law School Faculty Workshop, Sept. 29, 1986), and articles cited therein. The *Georgia* opinions are mostly dicta. They are best read as authoritative history, disregarding the specific aim toward which they were intended, that is, to decide the constitutionality of the death penalty. This approach is at once both useful and distorting: useful because the Justices' reasons should be governing or neutral principles applicable to all cases; distorting because one can easily lose track of the context that gives these principles life. The test of a good analysis, then, is to remain conscious of context while rebuilding a Clause that the Court has nearly deconstructed to death. Judicial understanding of the Eighth Amendment has disintegrated, particularly as social standards and expectations have become more heterogenous; our response should be to adapt to this heterogeneity by explicitly considering form of government, not to abandon the Eighth Amendment's values altogether.

159. There is, of course, some danger in reading the government's view of history. *Cf.* MILAN KUNDERA, *THE BOOK OF LAUGHTER AND FORGETTING* (1980) (people erased from history by their government).

160. *Furman v. Georgia*, 408 U.S. 238, 243 (1972) (Douglas, J., concurring).

the pseudo trials that followed Monmouth's feeble and stupid attempt to seize the throne."¹⁶¹ Justice Marshall described the manner in which the accused rebels were executed:

Mere death was considered much too mild for the villagers and farms rounded up in these raids. The directions to a high sheriff were to provide an ax, a cleaver, "a furnace or cauldron to boil their heads and quarters, and soil to boil therewith, half a bushel to each traitor, and tar to tar them with, and a sufficient number of spears and poles to fix their heads and quarters" along the highways. One could have crossed a good part of northern England by their guidance.¹⁶²

"The story of the Bloody Assizes," wrote Brant, "widely known to Americans, helped to place constitutional limitations on the crime of treason and to produce a bar against cruel and unusual punishments."¹⁶³ And according to Justice Marshall, most historians believe it was the Bloody Assizes

that finally spurred the adoption of the English Bill of Rights containing the progenitor of our prohibition against cruel and unusual punishments. The conduct of Lord Chief Justice Jeffreys at those trials has been described as an "insane lust for cruelty" which was "stimulated by orders from the King" (James II). The Assizes received wide publicity from Puritan pamphleteers and doubtless had some influence on the adoption of a cruel and unusual punishments clause.¹⁶⁴

More recent scholarship suggests that the British reacted not out of revulsion to torture and egregiously public displays of violence, but rather in response to the trial of Titus Oates, who was sentenced by a court of questionable jurisdiction to a disproportionately harsh punishment.¹⁶⁵ But what the British actually intended is significantly less important than what the American Framers thought the British had intended. Unquestionably, the Framers had the Bloody Assizes in mind. Accordingly, Justice Douglas authoritatively concluded,

Those who wrote the Eighth Amendment knew what price their forebears had paid for a system based, not on equal justice, but on discrimination. In those days the target was not the blacks or the poor, but the dissenters, those who opposed absolutism in government, who struggled for a parliamentary regime, and who opposed governments' recurring efforts to foist a particular religion on the

161. *Id.* at 254 (Douglas, J., concurring) (quoting IRVING BRANT, *THE BILL OF RIGHTS* 154-55 (1965)).

162. *Id.*

163. *Id.*

164. *Id.* at 317 (Marshall, J., concurring) (footnotes omitted).

165. Anthony F. Grannucci, "Nor Cruel and Unusual Punishment Inflicted": *The Original Meaning*, 57 CAL. L. REV. 839, 862-65 (1969).

people. But the tool of capital punishment was used with vengeance against the opposition and those unpopular with the regime. One cannot read this history without realizing that the desire for equality was reflected in the ban against "cruel and unusual punishments" contained in the Eighth Amendment.¹⁶⁶

At the Virginia Convention, where the States debated the provisions of the Constitution, Patrick Henry eloquently and forthrightly questioned whether state officials could be trusted to refrain from sadistic impulses and concluded that "no latitude ought to be left, nor dependence put on the virtue of representatives."¹⁶⁷ If "[y]ou let them loose," he suggested, "you depart from the genius of your country."¹⁶⁸ Although Justice Marshall did not read the statement for this end, it is clear evidence that Henry's strongest point was that the *manner* of punishment—punitive or inquisitorial—has been a factor critical to the form of government which imposes it.

Physical punishment is perhaps the ultimate sanction imposed by power. It has the indelible mark of that power; whether the government belongs to the people, or the people to their government, can be determined by the mark that punishment leaves on the punished.¹⁶⁹ Patrick Henry, therefore, said that without the Cruel and Unusual Punishments Clause,

Congress may introduce the practice of the civil law, in preference to that of the common law. They may introduce the practice of France, Spain, and Germany—of torturing, to extort a confession of the crime. They will say that they might as well draw examples from those countries as from Great Britain, and they will tell you that there is such a necessity of strengthening the arm of government, that they must have a criminal equity, and extort confession

166. *Furman*, 408 U.S. at 255 (Douglas, J., concurring) (citation omitted).

167. *Id.* at 259 (Brennan, J., concurring) (quoting 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION AS RECOMMENDED BY THE GENERAL CONVENTION AT PHILADELPHIA IN 1787, at 447 (Jonathon Elliot ed., 2d ed. 1876) [hereinafter 3 DEBATES]).

168. *Id.* at 320 (Marshall, J., concurring) (quoting 3 DEBATES, *supra* note 167, at 446-48).

169. Raul Hilberg tells of the literal and figurative marks left on Nazi extermination camp inmates:

Another internal control measure was marking. In the concentration camp, too, the Jewish inmate had to wear the six-pointed Star of David. In addition, his registration number was tattooed on his arm. Still another precaution was taken in the form of daily roll calls which sometimes lasted hours. The roll calls kept track of all prisoners and prevented hiding within the camp. The prisoners were not dismissed until everyone was accounted for, dead or alive. As a last means the Germans also resorted to reprisal, usually a public hanging. They thus sought to frustrate the formation of an internal resistance movement

RAUL HILBERG, THE DESTRUCTION OF THE EUROPEAN JEWS 584 (1961). For an interesting literary interpretation of punishment, see Franz Kafka's *The Penal Colony*, in which the punishment was literally inscribed on the prisoner's body.

by torture, in order to punish with still more relentless severity.
We are then lost and undone.¹⁷⁰

Henry referred not to due process, but to punishment. He was concerned with the rights of citizens to monitor their government's punishments—more with the conduct of the punishers than the rights of the punished.

In the debates of the First Congress on the Bill of Rights, only one statement appears about the Cruel and Unusual Punishments Clause:

Mr. SMITH, of South Carolina, objected to the words "nor cruel and unusual punishments"; the import of them being too indefinite.

Mr. LIVERMORE: The clause seems to express a great deal of humanity, on which account I have no objection to it; but as it seems to have no meaning in it, I do not think it necessary. What is meant by the terms excessive bail? Who are to be the judges? What is understood by excessive fines? It lies with the court to determine. No cruel and unusual punishment is to be inflicted; it is sometimes necessary to hang a man; villains, often deserve whipping, and perhaps having their ears cut off; but are we in future to be prevented from inflicting these punishments because they are cruel? If a more lenient mode of correcting vice and deterring others from the commission of it could be invented, it would be very prudent in the Legislature to adopt it; but until we have some security that this will be done, we ought not to be restrained from making necessary laws by any declaration of this kind.¹⁷¹

This statement has been read to make different points.¹⁷² But one point is so obvious that no one bothers to mention it: Even the Clause's opponents such as Livermore agreed that a punishment should not be imposed unless it is necessary to achieve justice against guilty prisoners ("villains" who "deserve" punishment).¹⁷³

Eighth Amendment decisions revolve not around the punished but around the punisher. Debating the abolition of capital punishment in England, Lord Chancellor Gardiner reminded the House of Lords that

When we abolished the punishment for treason that you should be hanged, and then cut down while still alive, and then disembowelled while still alive, and then quartered, we did not abolish that punishment because we sympathized with traitors, but because we took the view that it was a punishment no longer consistent with

170. *Furman*, 408 U.S. at 321 (Marshall, J., concurring) (quoting 3 DEBATES, *supra* note 167, at 446-48).

171. 1 ANNALS OF CONG. 754 (1789).

172. *Furman*, 408 U.S. at 244-45 (Douglas, J., concurring); *id.* at 262-63 (Brennan, J., concurring); Hugo A. Bedau, *Berger's Defense of the Death Penalty: How Not to Read the Constitution*, 81 MICH. L. REV. 1152, 1159-60 (1983).

173. See 1 ANNALS OF CONG. 754 (1789).

our self respect.¹⁷⁴

If the Cruel and Unusual Punishments Clause should not be viewed as a personalized protection for the prisoner, it must follow that any citizen should have legal standing to protect himself or herself from being governed by a state that draws power by inflicting cruel and unusual punishments; the citizen should be able *not* to participate in a governmental process that is sadistic, morally draining, or in furtherance of a banal totalitarian regime.¹⁷⁵ This cannot be a question left to the discretion of elected legislatures, because their members benefit from the accretion to power that results from prescribing impermissible punishment. The courts must tell the legislatures that they may *not* benefit from demagoguery, sadism, and phantasm.¹⁷⁶ Here the case of *Gilmore v. Utah*¹⁷⁷

174. 268 PARL. DEB., H.L. (5th ser.) 703 (1965), cited in *People v. Anderson*, 493 P.2d 880, 899 (Cal. 1972). In *Anderson*, the California Supreme Court concluded

that capital punishment is impermissibly cruel. It degrades and dehumanizes all who participate in its processes. It is unnecessary to any legitimate goal of the state and is incompatible with the dignity of man and the judicial process. Our conclusion that the death penalty may no longer be exacted in California consistently with article I, section 6, of our Constitution [cruel and unusual punishments] is not grounded in sympathy for those who would commit crimes of violence, but in concern for the society that diminishes itself whenever it takes the life of one of its members.

493 P.2d at 899.

175. This is why citizenship, the *right* to participate in government, is of such value. Anyone, whether a citizen or not, can bring a due process claim; but only a citizen can direct how his government will function. Note also the instructive words of Justice Marshall in *Furman*:

[T]he Eighth Amendment is our insulation from our baser selves. The "cruel and unusual" language limits the avenues through which vengeance can be channeled. Were this not so, the language would be empty and a return to the rack and other tortures would be possible in a given case.

Mr. Justice Story wrote that the Eighth Amendment's limitation on punishment "would seem to be wholly unnecessary in a free government, since it is scarcely possible that any department of such a government should authorize or justify such atrocious conduct."

I would reach an opposite conclusion—that only in a free society would men recognize their inherent weaknesses and seek to compensate for them by means of a Constitution.

The history of the Eighth Amendment supports only the conclusion that retribution for its own sake is improper.

Furman, 408 U.S. at 345 (Marshall, J., concurring) (footnote omitted).

176. Justice Brennan wrote in *Furman*:

In short, this Court [in *Weems*] finally adopted the Framers' view of the Clause as a "constitutional check" to ensure that "when we come to punishments, no latitude ought to be left, nor dependence put on the virtue of representatives." That, indeed, is the only view consonant with our constitutional form of government. If the judicial conclusion that a punishment is "cruel and unusual" "depend[ed] upon virtually unanimous condemnation of the penalty at issue," then, "[l]ike no other constitutional provision, [the Clause's] only function would be to legitimize advances already made by other departments and opinions already the conventional wisdom." We know that the Framers did not envision "so narrow a role for this basic guaranty of human rights." Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1782 (1970). The right to be free of cruel and un-

is instructive, particularly because Gary Gilmore was publicly executed, in accordance with his express wishes, by the State of Utah. Gilmore waived his personal due process rights and refused to appeal his case. Under the present analysis of the Cruel and Unusual Punishments Clause, the result was inappropriate. One may not consent to cruel and unusual punishment. For example, even if given the choice of punishments between torture and death, the prisoner could not choose torture.¹⁷⁸ This is true not because the prisoner has any rights at stake, but because other citizens have a greater right not to live under a government that sanctions torture as one of its defining structural features. Indeed, convicted prisoners' rights are negligible, their comfort subject only to public grace; they are *prisoners*. Due process becomes irrelevant. The condemned have "rights" only because their rights are convenient, relatively inexpensive carriers of society's values. It is *presumed* that prisoners have personal stakes quantitatively as great as those held by society, even though their stakes and society's are by no means qualitatively identical. Similarly, and by way of analogy, the exclusionary rule concerning illegal searches and seizures has little to do with the prisoner's inherent or natural rights; it is merely an inexpensive way to prevent our society from becoming a police state. It is cheaper and inherently more humane than introducing a new cycle of punishment against the police officers who violate the Search and Seizure Clause.¹⁷⁹

But Gary Gilmore did not follow the normal presumption of a self-interested prisoner seeking to further the life-affirming goal to live at all costs and die (if one must) with dignity and privacy. Gilmore did not

sual punishments, like the other guarantees of the Bill of Rights, "may not be submitted to vote; [it] depend[s] on the outcome of no elections." "The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 638 (1943).

Furman, 408 U.S. at 268-69 (Brennan, J., concurring).

It is essential, said Justice Brennan, that the judiciary not abdicate to the legislature, otherwise the Cruel and Unusual Punishments Clause would become "little more than good advice." *Id.* at 269 (Brennan, J., concurring) (citing *Trop v. Dulles*, 356 U.S. 104 (1958)). *But cf. Furman*, 408 U.S. at 384 (Burger, C.J., dissenting) ("Whether or not provable, and whether or not true at all times, in a democracy the legislative judgment is presumed to embody the basic standards of decency prevailing in the society. This presumption can only be negated by unambiguous and compelling evidence of legislative default."). This Article posits the likelihood of such default, both in purpose and in effect, with respect to public executions. See *supra* Part III.

177. 429 U.S. 1012 (1976).

178. See Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1387 (1984).

179. *United States v. Leon*, 468 U.S. 897 (1984).

want to live at all costs. So, too, does the classic martyr defy social "rationality,"¹⁸⁰ or perhaps transcend it.¹⁸¹

In the case of *Biddle v. Perovich*, the prisoner was convicted of murder and sentenced to death. President Taft then commuted the sentence to life imprisonment. Perovich petitioned for release from prison on the grounds that the President's order was without his consent and without legal authority. A unanimous Supreme Court, per Justice Holmes, rejected this argument in a sweeping declaration on the nature of punishment. According to Justice Holmes, early cases in England and the United States held that where "the felon pleads not guilty and waives the pardon, he shall not be hanged."¹⁸² He continued:

A pardon in our days is not a private act of grace from an individual happening to possess power. It is part of the Constitutional scheme. When granted it is the determination of the ultimate authority that the public welfare will be better served by inflicting less than what the judgment fixed. . . . Just as the original punishment would be imposed without regard to the prisoner's consent and in the teeth of his will, whether he liked it or not, the public welfare, not his consent, determines what shall be done.¹⁸³

Here the Court admits that punishment is not at all a matter of individual rights, but of social regulation.

The *Gilmore* Court faced a systemically similar problem. On December 3, 1976, Gilmore's mother filed an application for a stay of execution. She claimed to act as his "next friend" on his behalf. The Court rejected her application. Chief Justice Burger, concurring, instructed that Gilmore's mother could have "next friend" standing only if Gilmore was unable to seek relief on his own behalf. It was inappropriate for her to assert Gilmore's right because he was capable of filing an appeal if he wanted one.¹⁸⁴ This decision was unquestionably correct if only Gilmore's rights were at stake. (Gilmore waived his appeal, not his rights under the Eighth Amendment.) However, if a third-party citizen such as the defendant's mother refuses to consent to the form of government that

180. *But see* *Lenhard v. Wolff*, 443 U.S. 1306, 1312-13 (Rehnquist, Circuit Justice 1979):

The idea that the deliberate decision of one under sentence of death to abandon possible additional legal avenues of attack on that sentence cannot be a rational decision, regardless of its motive, suggests that the preservation of one's own life at whatever cost is the *summum bonum*, a proposition with respect to which the greatest philosophers and theologians have not agreed and with respect to which the United States Constitution by its terms does not speak.

181. *See generally* STEPHEN B. OATES, *LET THE TRUMPET SOUND: THE LIFE OF MARTIN LUTHER KING, JR.* (1982).

182. *Biddle v. Perovich*, 274 U.S. 480, 486 (1927).

183. *Id.*

184. *Gilmore v. Utah*, 429 U.S. 1012, 1014 (1976) (Burger, C.J., with Powell, J., concurring).

is the punisher, that is a different issue altogether. The question should not have been whether Bessie Gilmore could bring an action on behalf of her son, but whether she could bring an action on her own behalf to protect her rights as a citizen entitled to live in a society in which cruel and unusual punishments are forbidden by a Constitution that establishes principles of humane and rational governance.¹⁸⁵

Chief Justice Burger correctly concluded that the Court was not presented with a question that would allow it to exercise jurisdiction, because “[Gary] Gilmore, duly found to be competent by the Utah courts, has had available meaningful access to this Court and has declined expressly to assert any claim here other than his explicit repudiation of Bessie Gilmore’s effort to speak for him as next friend.”¹⁸⁶ Similarly, Justices Stevens and Rehnquist were right in concluding that “a third party has no standing to litigate an Eighth Amendment claim—or indeed any claim—on his [Gilmore’s] behalf.”¹⁸⁷ The application suffered, in theory, largely because of its form. Bessie Gilmore could have brought her action as a disinterested citizen unwilling to be subjected to, or associated with, a government that abused its constitutional grant of power. Justice Marshall, dissenting, clearly acknowledged the possibility of this solution when he wrote, “I believe that the Eighth Amendment not only protects the right of individuals not to be victims of cruel and unusual punishment, but that it also expresses a fundamental interest of society in ensuring that state authority is not used to administer barbaric punishments.”¹⁸⁸ And Justice White, dissenting, joined by Justices Brennan and Marshall, declared a belief that the protections of the Eighth Amendment are not waivable.¹⁸⁹ If the rest of the Court understood the

185. Note that I am referring to a non-due-process aspect that exists in what has traditionally been a due-process-oriented amendment. Consider whether: (1) The Eighth Amendment should not be incorporated under the Due Process Clause; or (2) The Eighth Amendment is really a direction for how to structure a government, that is applied *sub silentio* to the states, uniting their respective forms of government more than the states think they are united. The second alternative raises a question of federalism, but more importantly, it suggests that the political question doctrine, which prohibits the federal courts from interfering in the affairs of a coordinate branch of government, is, as a matter of structure, severely restricted. The Cruel and Unusual Punishments Clause, while not guaranteeing a republican form of government via the courts, surely prohibits a fascist government. See *Luther v. Borden*, 48 U.S. 1 (1849) (Court refuses to resolve Dorr’s Rebellion, which attempted to establish a “people’s” government in Rhode Island).

186. *Gilmore*, 429 U.S. at 1017 (Burger, C.J., with Powell, J., concurring).

187. *Id.* (Stevens, J., with Rehnquist, J., concurring).

188. *Id.* at 1019 (Marshall, J., dissenting).

189. As Justice Wilkins said in dissent below, there are substantial questions under *Furman v. Georgia* . . . , about the constitutionality of the Utah death penalty statute. Because of Gary Gilmore’s purported waiver of his right to challenge the statute, none of these questions was resolved in the Utah courts. I believe, however, that the

Eighth Amendment as presented in this Article, they could not object to Bessie Gilmore's standing, whether or not she was her son's "next friend." Standing should be available to circumvent the martyr, even if one must ultimately depend on the subterfuge of taxpayer standing or a wide range of other arcane doctrines.¹⁹⁰

Conclusion

In *Furman* and *Gregg*, the Supreme Court moved from a natural law test of decency to one of public opinion. In both cases, Justices voting both with the majority and with the minority rested on their conceptions of what a democratically represented public would decide. Those voting against the death penalty postulated that a "fully informed" public would abhor executions.¹⁹¹ Particularly in *Gregg v. Georgia*, the Court abdicated all responsibility for the death penalty in favor of the dynamics of popular government, by a legislature or a jury.¹⁹²

The Justices have approached the "indefinite" Cruel and Unusual Punishments Clause with a synchronic mode of analysis: What is the current community standard and what does due process require? The Clause, standing alone, might suggest this approach. But to fully understand the Clause, one must read it diachronically, as supported by the whole Constitution and its principled foundation of humane dignity and rational government. Simply because a clause standing alone is "indefinite," it does not follow that the only source of interpretive authority is the actual instinctive behavior of the body public. It is a constitution, a coherent *plan* to constitute a government, that we read; our concern is

consent of a convicted defendant in a criminal case does not privilege a State to impose a punishment otherwise forbidden by the Eighth Amendment.

Id. at 1017-18 (White, J., joined by Brennan and Marshall, JJ., dissenting) (footnotes omitted). See also *Lenhard v. Wolff*, 444 U.S. 807, 810 (1979) (Marshall, J., dissenting) (condemned person's consent does not authorize constitutionally questionable imposition of death penalty). One commentator maintains that societal interests in the Eighth Amendment protections afforded by post-sentencing appellate review of death sentences are so great that courts should not permit capital defendants to waive appellate review. Tim Kane, Comment, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483, 512-15 (1983). More recently, on September 13, 1986, the California State Bar Conference of Delegates passed Substitute Resolution 3-1-86, recommending sponsorship of an amendment to the state constitution: "The Supreme Court shall review the decision of a court of appeal in all cases where a judgment of death has been affirmed."

190. See Martin R. 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, 438 n.15.

191. See, e.g., *Furman*, 408 U.S. at 278 (Brennan, J., concurring); *id.* at 333 (Marshall, J., concurring).

192. 428 U.S. 153, 174-77 (1976).

not merely six random words: "nor cruel and unusual punishments inflicted."¹⁹³ To say that the Clause is "indefinite" should only mean that it draws support from varied sources of authority, which should not be limited to unrefined public opinion or instinct. These sources include experience and goals. They also include the dignity of individuals, measured by the constitutional structure that places high value on privacy, a realm of individual thought and action that must remain free from governmental interference. The Bill of Rights works to restrict government from operating by means of intimidation or terror, imagery or phantasm; and the Bill of Rights works to prevent the irrational eroticization of leadership. The Constitution mandates a government whose source of authority must remain in the people rather than in incumbents whose offices are strengthened by public displays of death and destruction.

Since the image of death is most powerful,¹⁹⁴ government and its officials must take a specifically neutral, private approach to death, without exciting anything like catharsis.¹⁹⁵ The executions must have the dignity of *gravitas*,¹⁹⁶ perhaps resting on the classical ideals of the Roman Republic that the Framers so admired. This approach is consistent with the First Amendment and its prohibition against restrictions on the freedom of speech; the First Amendment encourages government by rational discourse, and discourages government by phantasm. The Framers knew nothing of television and film, but the religion clauses of the First Amendment show that the Framers did know that good democratic government could not survive under the kind of irrationality which results from a religious aesthetic.

We must return to the inevitable problem of the death penalty itself, whose constitutional legitimacy this Article has assumed. The analysis suggests a new question: Will there ever be a true private execution? Or is the executioner—even a state employee—a member of the public whom the state permits to manifest a dark wish to see another person die? This Article presents no satisfactory answer to this question, but it is a question worth asking.

193. U.S. CONST. amend. VIII.

194. District Atty. for Suffolk Dist. v. James Watson, 411 N.E.2d 1274, 1291-92 (Mass. 1980) (Liacos, J., concurring).

195. See SIGMUND FREUD, THE EGO AND THE ID (1927).

196. Cf. ROBERT MIDDLEKAUF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789, at 133 (1982) (American revolutionary ideology inspired by Cato, the Roman republican).

