killings per 100,000 by men 15 through 24 years old in 1987 was 0.3 in Austria and 0.5 in Japan, the figure was 21.9 in the United States and as high as 232 per 100,000 for blacks in some states. The nearest nation to the United States was Scotland, with a 5.0 homicide rate. In some central city areas the rate is 732 times that of men in Austria. In 1994, the rate was 37 per 100,000 men between the ages of 15 and 24.[2] In New York City there were more than 2,000 homicides in 1990. Black males in Harlem are said to have a lower life expectancy than males in Bangladesh. Escalating crime has caused an erosion in the quality of urban living. It is threatening the fabric of our social life.

What is to be done about crime? Improving social conditions, no doubt, is a large part of the answer. But people commit crimes even in good societies. So long as we hold people responsible for their actions, punishment will be a fitting response to crime, and among the modes of punishment to be considered is the death penalty for the most serious crimes.

We begin with Supreme Court Justice Thurgood Marshall's important dissenting opinion in *Gregg v. Georgia* in which he argued that the death penalty violated the Eighth and Fourteenth Ammendments prohibiting cruel and unusual punishments. We then turn to Burton Leiser's defense of the death penalty, and finally to Hugo Adam Bedau's rejection of the death penalty.

NOTES

1. "Jail for Crime that Shocked Even the Jaded," *New York Times* (August 16, 1990).

2. Statistics are from the National Center of Health Statistics and are available from the Center for Disease Control. The National Center for Injury Prevention and Control reports that in 1994 8,116 young people aged 15–24 were victims of homicide. This amounts to an average of 22 youth victims per day in the United States. This homicide rate is 10 times higher than Canada's, 15 times higher than Australia's, and 28 times higher than France's and Germany's. In 1994 in the United States 102,220 rapes and 618,950 robberies were reported.

The Death Penalty Is a Denial of Human Dignity IX.67

THURGOOD MARSHALL

Thurgood Marshall (1908–93), the first African American to be appointed to the United States Supreme Court, was the most outspoken opponent of capital punishment on the Court. He gained national prominence in his role as the counsel for the plaintiff in the landmark civil rights case, *Brown v. Board of Education* (1954).

The following is Justice Marshall's dissenting opinion in *Gregg v. Georgia* (1976), the Supreme Court's decision that capital punishment did not violate the Constitu-

tion. Marshall argued that capital punishment is excessive and that if the American people were fully informed as to the purposes of the death penalty, they would find it morally unacceptable. It is a violation of the Eighth Amendment, which forbids cruel and unusual punishment.

Study Questions

1. Does Justice Marshall believe the U.S. Constitution permits the death penalty?
2. Which amendment does he point to?
3. Does Marshall believe the American public has adequate information about the death penalty?
4. What are the two purposes that sustain the death penalty?
5. What does Marshall say about these two purposes?

IN *FURMAN V. GEORGIA* (1972) (concurring opinion), I set forth at some length my views on the basic issue presented to the Court in [this case]. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view.

I have no intention of retracing the "long and tedious journey" that led to my conclusion in *Furman*. My sole purposes here are to consider the suggestion that my conclusion in *Furman* has been undercut by developments since then, and briefly to evaluate the basis for my Brethren's holding that the extinction of life is a permissible form of punishment under the Cruel and Unusual Punishments Clause.

In *Furman* I concluded that the death penalty is constitutionally invalid for two reasons. First, the death penalty is excessive. And second, the American people, fully informed as to the purposes of the death penalty and its liabilities, would in my view reject it as morally unacceptable.

Since the decision in *Furman*, the legislatures of 35 states have enacted new statutes authorizing the imposition of the death sentence for certain crimes, and Congress has enacted a law providing the death penalty for air piracy resulting in death. I would be less than candid if I did not acknowledge that these developments have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people. But if the constitutionality of the death penalty turns, as I have urged, on the opinion of an *informed* citizenry, then even the enactment of new death statutes cannot be viewed as conclusive. In *Furman*, I observed that the American people are largely unaware of the information critical to a judgment on the morality of the death penalty, and concluded that if they were better informed they would consider it shocking, unjust, and unacceptable. A recent study, conducted after the enactment of the post-*Furman* statutes, has confirmed that the American people know little about the death penalty, and that the opinions of an informed public would differ significantly from those of a public unaware of the consequences and effects of the death penalty.

Even assuming, however, that the post-*Furman* enactment of statutes authorizing the death penalty renders the prediction of the views of an informed citizenry an uncertain basis for a constitutional decision, the enactment of those statutes has no bearing whatsoever on the conclusion that the death penalty is unconstitutional because it is excessive. An excessive penalty is invalid under the Cruel and

United States Supreme Court. 428 U.S. 153 (1976).

Unusual Punishments Clause "even though popular sentiment may favor" it. The inquiry here, then, is simply whether the death penalty is necessary to accomplish the legitimate legislative purposes in punishment, or whether a less severe penalty—life imprisonment—would do as well.

The two purposes that sustain the death penalty as nonexcessive in the Court's view are general deterrence and retribution. In *Furman*, I canvassed the relevant data on the deterrent effect of capital punishment. The state of knowledge at that point, after literally centuries of debate, was summarized as follows by a United Nations Committee:

> It is generally agreed between the retentionists and abolitionists, whatever their opinions about the validity of comparative studies of deterrence, that the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime.

The available evidence, I concluded in *Furman*, was convincing that "capital punishment is not necessary as a deterrent to crime in our society."

. . .

. . . The evidence I reviewed in *Furman* remains convincing, in my view, that "capital punishment is not necessary as a deterrent to crime in our society." The justification for the death penalty must be found elsewhere.

The other principal purpose said to be served by the death penalty is retribution. The notion that retribution can serve as a moral justification for the sanction of death finds credence in the opinion of my Brothers Stewart, Powell, and Stevens. . . . It is this notion that I find to be the most disturbing aspect of today's unfortunate [decision].

The concept of retribution is a multifaceted one, and any discussion of its role in the criminal law must be undertaken with caution. On one level, it can be said that the notion of retribution or reprobation is the basis of our insistence that only those who have broken the law be punished, and in this sense the notion is quite obviously central to a just system of criminal sanctions. But our recognition that retribution plays a crucial role in determining who may be punished by no means requires approval of retribution as a general justification for punishment. It is the question whether retribution can provide a moral justification for punishment—in particular, capital punishment—that we must consider.

My Brothers Stewart, Powell, and Stevens offer the following explanation of the retributive justification for capital punishment:

> The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they "deserve," then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law.

This statement is wholly inadequate to justify the death penalty. As my Brother Brennan stated in *Furman*, "[t]here is no evidence whatever that utilization of imprisonment rather than death encourages private blood feuds and other disorders." It simply defies belief to suggest that the death penalty is necessary to prevent the American people from taking the law into their own hands.

In a related vein, it may be suggested that the expression of moral outrage through the imposition of the death penalty serves to reinforce basic moral values—that it marks some crimes as particularly offensive and therefore to be avoided. The argument is akin to a deterrence argument, but differs in that it contemplates the individual's shrinking from antisocial conduct, not because he fears punishment, but because he has been told in the strongest possible way that the conduct is wrong. This contention, like the previous one, provides no support for the death penalty. It is inconceivable that any individual concerned about conforming his conduct to what society says is "right" would fail to realize

that murder is "wrong" if the penalty were simply life imprisonment.

The foregoing contentions—that society's expression of moral outrage through the imposition of the death penalty pre-empts the citizenry from taking the law into its own hands and reinforces moral values—are not retributive in the purest sense. They are essentially utilitarian in that they portray the death penalty as valuable because of its beneficial results. These justifications for the death penalty are inadequate because the penalty is, quite clearly I think, not necessary to the accomplishment of those results.

There remains for consideration, however, what might be termed the purely retributive justification for the death penalty—that the death penalty is appropriate, not because of its beneficial effect on society, but because the taking of the murderer's life is itself morally good. Some of the language of the opinion of my Brothers Stewart, Powell, and Stevens . . . appears positively to embrace this notion of retribution for its own sake as a justification for capital punishment. They state:

> [T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

They then quote with approval from Lord Justice Denning's remarks before the British Royal Commission on Capital Punishment:

> The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.

Of course, it may be that these statements are intended as no more than observations as to the popular demands that it is thought must be responded to in order to prevent anarchy. But the implication of the statements appears to me to be quite different—namely, that society's judgment that the murderer "deserves" death must be respected not simply because the preservation of order requires it, but because it is appropriate that society make the judgment and carry it out. It is this latter notion, in particular, that I consider to be fundamentally at odds with the Eighth Amendment. The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty, for as Justices Stewart, Powell, and Stevens remind us, "the Eighth Amendment demands more than that a challenged punishment be acceptable to contemporary society." To be sustained under the Eighth Amendment, the death penalty must "compor[t] with the basic concept of human dignity at the core of the Amendment"; the objective in imposing it must be "[consistent] with our respect for the dignity of [other] men." Under these standards, the taking of life "because the wrongdoer deserves it" surely must fail, for such a punishment has as its very basis the total denial of the wrongdoer's dignity and worth.

The death penalty, unnecessary to promote the goal of deterrence or to further any legitimate notion of retribution, is an excessive penalty forbidden by the Eighth and Fourteenth Amendments. I respectfully dissent from the Court's judgment upholding the [sentence] of death imposed upon the [petitioner in this case].

For Further Reflection

1. What are Marshall's arguments against the death penalty? Do you think he is correct?
2. Do you agree with Marshall's statement that the American people, if fully informed, would find the death penalty morally unacceptable?