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CAPITAL PUNISHMENT IN THE LIGHT OF CONSTITUTIONAL EVOLUTION: AN ANALYSIS OF DISTINCTIONS BETWEEN *FURMAN* AND *GREGG**

Jane C. England**

I. Introduction

During the last several decades concentrated efforts have been made to set aside the death penalty as unconstitutional under the eighth and fourteenth amendments of the Constitution.¹ The high point in this challenge was reached in *Furman v. Georgia*,² which, although echoing some of the arguments of the opponents of capital punishment, did not take the virtually irreversible step of declaring the death penalty unconstitutional per se.

The death penalty issue was presented to various state courts following *Furman* and ultimately reached the Supreme Court in *Gregg v. Georgia*,³ where the Court issued a rather emphatic "no" to the question of whether the death penalty is cruel and unusual per se, at least for the crime of murder.⁴

The question now arises: Is the *Gregg* decision a logical consequence, or a complete reversal, of the Court's stand in *Furman*? In order to address this issue four areas must be examined: (1) the import of the *Furman* decision, including an analysis of the arguments and plurality opinions; (2) the responses of selected states to *Furman*; (3) the *Gregg* decision in the light of *Furman*; and (4) both *Gregg* and *Furman* in the context of constitutional history. The relevant arguments of both sides will be examined, and an attempt is made to demonstrate that *Gregg* and *Furman* are not only in harmony with each other, but that they fit into the concert of constitutional evolution.

II. The Key Opinions in *Furman v. Georgia*

In *Furman v. Georgia*,⁵ the Court, instead of upholding or outlawing the death penalty per se, sidestepped the question and issued a per curiam opinion, supplemented by five separate concurring opinions in the plurality and four separate dissents. The plurality held, for a variety of reasons, that the "imposition and carrying out of the death penalty in these cases constitute cruel and unusual

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1 For an account of the struggle prior to 1970, see M. MELTSNER, *CRUEL AND UNUSUAL; THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

2 408 U.S. 238 (1972).

3 96 S. Ct. 2909 (1976).

4 Decisions in cases before the Court involving the death penalty for rape were carried over to the Fall 1976 term. One might surmise from this that the Court is not yet firm on the question of whether death for rape is a disproportionate penalty.

5 408 U.S. 238 (1972). *Furman* which involved murder was decided in conjunction with two other death penalty cases involving rape, *Branch v. Texas* and *Jackson v. Georgia*.

punishment in violation of the Eighth and Fourteenth Amendments."⁶

Only two of the justices in the plurality, Mr. Justice Brennan and Mr. Justice Marshall, clearly agreed that the death penalty was cruel and unusual per se. Both of their opinions follow very closely the arguments advanced on behalf of the petitioners in the briefs prepared by the NAACP's Legal Defense Fund.⁷

For example, Mr. Justice Brennan found the death penalty violative of the concept of human dignity on the basis of four principles which were all enunciated in the Legal Defense Fund briefs:

Death is an unusually severe and degrading punishment; there is a strong probability that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.⁸

Mr. Justice Marshall dealt with several arguments including: deterrence, the encouragement of guilty pleas, eugenics and economy.⁹ He reasoned that:

Despite the fact that abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society.¹⁰

...
... If the death penalty is used to encourage guilty pleas and thus deter suspects from exercising their rights under the Sixth Amendment to jury trials, it is unconstitutional.¹¹

... [A]ny suggestions concerning the eugenic benefits of capital punishment are obviously meritless.¹²

...
As for the argument that it is cheaper to execute a capital offender than to imprison him for life, even assuming such an argument, if true, would support a capital sanction, it is simply incorrect.¹³

Justice Marshall also claimed that the death penalty is excessive and unnecessary, as well as immoral; that it is purposeless vengeance which is "imposed

6 *Id.* at 239-40 (emphasis added). The constitutionality of the death penalty for rape was carried over to the 1976 Fall term.

7 In the words of the NAACP lawyers, the issues were:

The death penalty is no part of the regular criminal law machinery of Georgia or of the nation. It is a freakish aberration, a rare extreme act of violence, visibly arbitrary, probably racially discriminatory—a penalty reserved for wholly arbitrary application because, if it were regularly used, it would affront universally shared standards of public decency.

Such a penalty — not Law, but Terror — is the instrument of a totalitarian government. It is a cruel and unusual punishment forbidden under the Eighth Amendment.

Brief for Petitioner, *Furman v. Georgia*, 408 U.S. 238, cited in 73 LANDMARK BRIEFS AND ARGUMENTS TO THE SUPREME COURT OF THE UNITED STATES 375 (P. Kurland & G. Casper, eds. 1975).

8 408 U.S. 305 (Brennan, J., concurring).

9 *Id.* at 342 (Marshall, J., concurring).

10 *Id.* at 353.

11 *Id.* at 355.

12 *Id.* at 356.

13 *Id.* at 367.

discriminatorily against certain identifiable classes of people"; that "there is evidence that innocent people have been executed before their innocence can be proved"; and that "the death penalty wreaks havoc upon our entire criminal justice system."¹⁴ He concluded that if the average citizen were cognizant of "all the facts presently available regarding capital punishment, [he] . . . would . . . find it shocking to his conscience and sense of justice. For this reason alone capital punishment cannot stand."¹⁵

The opinions of Justices Brennan and Marshall reflect the major arguments of the opponents of capital punishment. But in finding capital punishment unconstitutional *per se*, neither Justice was in harmony with the other three Justices in the plurality.

Mr. Justice Stewart found that although the death penalty "is unique in its total irrevocability . . . in its rejection of rehabilitation of the convict as a basic purpose of criminal justice . . . and . . . in its absolute renunciation of all that is embodied in our concept of humanity . . . [it was] . . . unnecessary to reach the ultimate question" of its constitutionality *per se*.¹⁶ Indeed, he argued that this was precisely so because the statutes under review had "not ordained that death shall be the automatic punishment for murder."¹⁷ In other words, the very fact that the Georgia and Texas laws did not provide for mandatory sentences for particular crimes rendered the question of constitutionality *per se* outside the scope of the issue at bar.

Justice Stewart argued that the death sentences in these cases were arbitrary, *i.e.*, they were cruel and unusual in the same way that "being struck by lightning is cruel and unusual," since, out of the myriad of persons convicted of rapes and murders in 1967 and 1968, "petitioners are among a capriciously selected handful" who received the death sentence.¹⁸ "[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."¹⁹

Although strongly influenced by the ideas contained in petitioners' briefs, Justice Stewart did not totally embrace their position. He concluded that the death penalty was not unconstitutional *per se*, for he recognized society's legitimate need for retribution:

I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channelling 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.

14 *Id.* at 358-69.

15 *Id.* at 369.

16 *Id.* at 306 (Stewart, J., concurring).

17 *Id.* at 308.

18 *Id.* at 309, 310.

19 *Id.* at 310.

The constitutionality of capital punishment in the abstract is not, however, before us in these cases. . . .²⁰

Mr. Justice Douglas reveals in his opinion the influence of the arguments based on discrimination, especially racial discrimination, in the imposition of the death penalty.²¹ Douglas concluded that the discretionary statutes in question were unconstitutional as applied. He implied that a mandatory death sentence might be constitutional but avoided the question since he claimed it was not at issue. The import of *Furman* for Douglas is that it requires

legislatures to write penal laws that are evenhanded, nonselective, and non-arbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.²²

Mr. Justice White also concluded that the question of the unconstitutionality of the death penalty per se was not before the Court, that only the narrower question of the constitutionality of the capital punishment statutes of the states at bar was at issue.²³ In the development of his opinion he appears to be the least influenced, of those in the plurality, by the arguments contained in petitioners' briefs. He seems most concerned with the impact of the infrequency of the imposition of the death penalty and with the practice of resting sentencing authority primarily in juries.

He tacitly affirmed a number of the arguments of the retentionists: that the death penalty may be an appropriate one for certain crimes; that, indeed, it may be deserved by the perpetrator; that society is permanently protected from further crimes perpetrated by those executed; that a general need for retribution exists; and that society's need for specific deterrence might be valid reasons for the death penalty were it not "so rarely invoked."²⁴

With regard to the practice of rare invocation, Justice White concludes:

[S]eldom-enforced laws become ineffective measures for controlling human conduct and . . . the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted.²⁵

Regarding jury discretion, Justice White appears to think that the practice

²⁰ *Id.* at 308.

²¹ It would seem incontestable that the death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudice. . . .

Id. at 242 (Douglas, J., concurring).

In a Nation committed to Equal Protection of the laws there is no permissible "caste" aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the death penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking in political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.

Id. at 255.

²² *Id.* at 256.

²³ *Id.* at 310-11 (White, J., concurring).

²⁴ *Id.* at 311-12.

²⁵ *Id.* at 312.

of vesting sentencing authority in juries, in order to mitigate the law through community involvement, has encouraged in excessive jury leniency, resulting in jury refusals to order the death penalty. Therefore, by implication, decisions on sentencing should be vested elsewhere.

The short of it is that the policy of vesting sentencing authority primarily in juries—a decision largely motivated by the desire to mitigate the harshness of the law and to bring community judgment to bear on the sentence as well as guilt or innocence—has so effectively achieved its aims that capital punishment within the confines of the statutes now before us has for all practical purposes run its course.²⁶

Indeed, although Justice White concurred with the plurality of the Court that in the instant cases the death penalty was constitutionally infirm, a careful reading of his opinion in *Furman* indicates that he would have held existing laws constitutional if two conditions had been met: first, if the death penalty had been imposed more often; secondly, if the decision process had been removed from the jury so as to eliminate the possibility of jury intransigence in refusing “to impose the death penalty no matter what the circumstances of the crime.”²⁷

In general, then, the plurality in *Furman* echo the sentiment of the opponents of the death penalty as contained in petitioners’ briefs, but only Justices Brennan and Marshall adopt the position that capital punishment is per se unconstitutional. Also, if capital punishment is to be allowed in any case, “juries and judges can no longer be permitted to make the sentencing determination in the same manner they have in the past.”²⁸

III. State Response to *Furman*

The most perplexing question facing those who attempted to analyze and respond to *Furman* was this: what made the death penalty unconstitutional in those particular cases? In attempting to answer this question, there were three ways to perceive the Court’s ruling in *Furman*. First, capital punishment was unconstitutional per se; second, existing capital punishment statutes providing for discretion of judge or jury in determining sentences were unconstitutional; third, existing capital punishment statutes providing for unguided discretion of judge or jury in determining sentences were unconstitutional. Accordingly, the following alternatives were available to various state legislatures. First, abolish capital punishment; second, enact new capital punishment laws providing for mandatory death sentences for specific categories of crimes; third, enact new capital punishment laws providing for objective guidelines to aid the judge or jury in determining if, in a given case, capital punishment is justified.

Significantly, very few of the jurisdictions affected by *Furman* chose to exercise the first option. At the time of *Furman*, nine states had abolished the death penalty, generally through legislative action, the last taking place in 1965.²⁹

26 *Id.* at 313.

27 *Id.* at 314.

28 *Id.* at 397 (Burger, C. J., dissenting).

29 The following states have abolished the death penalty prior to *Furman*: Alaska (1957), Hawaii (1957), Iowa (1965), Maine (1887), Michigan (1847), Minnesota (1911), Oregon (1964), West Virginia (1965) and Wisconsin (1853). See *California Legislative Report* 38-40 (March 9, 1960).

In addition, during the legal process which culminated in the *Furman* decision, California, one of the states involved in the cases at bar, abolished capital punishment by action of the state supreme court.³⁰ Following *Furman*, thirty-five states, as well as Congress, redrafted capital punishment statutes. Discounting the nine states, which prior to *Furman* had legislatively prohibited capital punishment, there were six jurisdictions without capital punishment statutes as of the *Gregg* decision. One of these statutes has been declared unconstitutional by the state supreme court.³¹ Two passed death penalty legislation in 1973, only to be vetoed by executive action.³² And the post-*Furman* action of two states was still uncertain.³³

Following *Furman*, a majority of the affected jurisdictions enacted new death penalty legislation. These states chose to take one of three forms of legislative action: impose mandatory death penalties for certain categories of crimes;³⁴ draft statutes which offer guidelines for sentencing;³⁵ or enact "quasi-mandatory" statutes.³⁶

Fifteen to nineteen states adopted "mandatory" statutes.³⁷ At least five states adopted "quasi-mandatory" statutes, which attempted to reduce the discretion involved in weighing aggravating and mitigating circumstances, requiring death sentences only when there were aggravating but no mitigating circumstances

30 *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 405 U.S. 983 (1972). This holding was short-lived, however, as the California Constitution was soon amended through the initiative referendum process to authorize capital punishment. See Rand, *Death — California Style: Reviewing the Constitutionality of the State's New Capital Punishment Law*, 3 U. SAN FERNANDO VALLEY L. REV. 145 (1974).

31 N.J. STAT. ANN. § 2A: 113-4 (1969).

32 Massachusetts and South Dakota.

33 These states are Kansas and North Dakota. See KAN. STAT. § 21-4501 (1974); N.D. CENT. CODE § 12.1-32-01 (Special Supp. 1975). North Dakota is sometimes listed as an abolitionist state as of 1915, but does retain the death penalty for murder by a lifeer. See Haller, *Capital Punishment Statutes after Furman*, 35 OHIO ST. L.J. 670 n.85 (1974); *California Legislative Report*, supra note 29, at 38-40; New York Times, July 3, 1976, § 1, at 7, col. 7, 8.

Even in the nine states which had prohibited capital punishment, six had post-*Furman* capital punishment bills introduced into their legislatures. None, however, became law. These states were: Alaska, Hawaii, Iowa, Maine, Minnesota, and West Virginia.

34 These statutes have been declared unconstitutional by *Woodson v. North Carolina*, 96 S. Ct. 2978 (1976); *Roberts v. Louisiana*, 96 S. Ct. 3001 (1976).

35 See, e.g., AMERICAN BAR ASSOCIATION'S PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, PROPOSED MODEL PENAL CODE (1974). This has been recently upheld in *Gregg v. Georgia*, 96 S. Ct. 2909 (1976); *Proffitt v. Florida*, 96 S. Ct. 2960 (1976).

36 See, e.g., Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1710 (1974).

37 See DEL. CODE tit. 11, § 4209 (Supp. 1976); IDAHO CODE § 18-4004 (Supp. 1976); IND. CODE § 35-13-4-1 (1975); KY. REV. STAT. § 507.020 (1976); LA. REV. STAT. ANN. § 14:30 (West Supp. 1977); MD. PENAL CODE ANN. Art. 27, § 413 (Supp. 1976); MISS. CODE ANN. §§ 97-3-19, 97-3-21, 97-25-55, 99-17-20 (Supp. 1975); MONT. REV. CODES ANN. § 94-5-105 (Special Supp. 1975); NEV. REV. STAT. § 200.030 (1973); N.H. REV. STAT. ANN. § 630:1 (Special Supp. 1973); N.M. STAT. ANN. § 40A-29-2 (Supp. 1975); N.Y. PENAL LAW § 60.06 (McKinney 1975); N.C. GEN. STAT. § 14-17 (Supp. 1975); OKLA. STAT. tit. 21 §§ 701.1-701.3 (1976-77) (repealed); R.I. GEN. LAWS § 11-23-2 (Supp. 1976); S.C. CODE § 16-52 (Supp. 1975); TENN. CODE ANN. §§ 39-2402, -2406 (1975); VA. CODE §§ 18.2-10, -31 (1975); WYO. STAT. § 6-54 (Supp. 1975). See also 35 OHIO ST. L.J. 670, 671 n.86; 87 HARV. L. REV. 1710 n.140, 1711 nn.143-50; Washington Post, July 3, 1976, § 1, at 1, col. 7. However, Montana, Nevada, Tennessee and Wyoming are described as having based their laws on the Model Penal Code, which allows guided discretion. See Thornton, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. U.L. REV. 109 (1974). The variation in count is due partly to the differing interpretations of "quasi mandatory" and partly to incomplete data available.

present.³⁸ In general, however, the majority of the states chose some form of mandatory sentencing procedure despite the fact that *Furman* perhaps gave hints that this might not be an acceptable solution.

Ignored by those states which opted for mandatory statutes was Justice Douglas' focus in his opinion in *Furman* on the phrase "untrammelled discretion" of juries, as opposed to discretion per se. In addition, these states pushed aside the commonsense argument that discretion is inherent in the system and the attempted elimination of jury discretion would not remove "random selection" and/or "caprice" from the system. Indeed, discretion is an integral part of the criminal justice system from arrest to post-sentence executive action, including review by the United States Supreme Court.³⁹

In addition, these states ignored the Chief Justice's comment which exposed the dichotomy inherent in "all out" mandatory provisions:

I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution.⁴⁰

The Chief Justice, in line with traditional perceptions of criminal justice, reasoned that while in theory murder is a capital crime deserving of death in every instance, in the practical application of the law accommodation must be made to varying circumstances by allowing for the possibility of differing sentences tailored to the criminal as well as to the crime. Thus, while mandatory laws have been instituted in an effort to eliminate arbitrariness and caprice, these laws have the contrary effect of insuring arbitrariness by failing to allow for the necessary exercise of proper discretion.

Those states which perceived *Furman* as calling for guided discretion, on the other hand, drafted statutes designed to eliminate "untrammelled" discretion. This proved to be a more enlightened interpretation of *Furman* as evidenced by the recent *Gregg* decision.

IV. The Consistency of *Gregg* with *Furman*

Justice Stewart, joined by Justices Powell and Stevens, delivered the opinion for the Court in *Gregg v. Georgia*.⁴¹ The Court held that capital punishment for murder is not unconstitutional per se;⁴² on the contrary, it may be imposed under the eighth and fourteenth amendments if appropriate safeguards are

38 See CAL. PENAL CODE §§ 190.1, 209, 219 (West Supp. 1976); CONN. GEN. STAT. §§ 53a-25, -35(b), -46a, -54b (Supp. 1977); OHIO REV. CODE ANN. §§ 2929.02-2929.04 (Page 1975); PA. STAT. ANN. tit. 19, § 1121 (Purdon 1964); TEX. PENAL CODE ANN. § 19-03(a) (1974). See also LeMaster, *The Eighth Amendment and Kentucky's New Capital Punishment Provisions—Waiting for the Other Shoe to Drop*, 63 KY. L.J. 408 (1975); 87 HARV. L. REV. 1709 n.132.

39 See, e.g., Ehrhardt, *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L. & CRIMINOLOGY, 284 (1975); LeMaster, *supra* note 38, at 409-13; Mackey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV. 30 (1974); Weyl, *Supreme Judicial Court and the Death Penalty: The Effects of Judicial Choice on Legislative Options*, 54 B.U.L. REV. 181 (1974).

40 408 U.S. at 402 (Burger, C.J., dissenting).

41 96 S. Ct. 2909 (1976).

42 *Id.* at 2923. In the interest of clarity this tri-partite opinion will generally be attributed to Justice Stewart.

established. The Court advanced some fundamental premises in support of its decision.

First, capital punishment is not "excessive" if it does not involve unnecessary or wanton pain, nor can it be disproportionate to the crime if it is to comport with the evolving standards of decency implicit in the eighth amendment.⁴³

Second, the legislature properly has the burden of selecting punishments for various crimes and the Court found that it is not required to choose the least harsh penalties possible in each case.⁴⁴

Third, constitutional history of the United States supports the retention of capital punishment per se.⁴⁵

Fourth, contemporary standards of decency are perhaps best measured by legislative action. The argument that current standards under the eighth amendment require the abolishment of capital punishment per se has been eroded by the fact that since *Furman*, Congress and 35 states have reinstated the death penalty and juries have imposed death sentences on some 460 persons since *Furman*.⁴⁶

Fifth, capital punishment comports with human dignity, a concept vital to the eighth amendment, so long as it satisfies basic penological justifications, viz., retribution coupled with the further possibility of deterrence of capital crimes by potential offenders. Both are constitutionally permissible considerations for legislatures in devising capital punishment statutes.⁴⁷

Sixth, the death penalty for murder is not invariably a disproportionate penalty.⁴⁸

Justice Stewart relied on the arguments put forth by the dissent in *Furman*, specifically those articulated by Justice Powell and Chief Justice Burger.⁴⁹ Justice Stewart concedes that retribution is a legitimate goal of penology,⁵⁰ a position he strongly supported in *Furman*.⁵¹ Similarly, Justice White had indicated in *Furman* that retribution is a legitimate goal of society, though he believed that the infrequent imposition of the death penalty impedes the attainment of that end.⁵²

Justice Stewart, however, reemphasized that the severity and irrevocability inherent in the death penalty demand special precautions by the Court.⁵³ Justice White, moreover, implicitly recognized in *Furman* the awesome nature of the death penalty, and apparently agreed that the eighth amendment imposes some special obligations to protect against constitutional abuse.⁵⁴ Justice White's

43 *Id.* at 2925.

44 *Id.* at 2926.

45 *Id.* at 2927.

46 *Id.* at 2928-29. These were the statistics as of March 1976. At the time *Gregg* was handed down, 611 persons in 30 states were under sentence of death. See New York Times, July 2, 1976, § 1, at 7, col. 7-8.

47 96 S. Ct. at 2930-32.

48 *Id.* at 2932.

49 In the body of the relevant section of the opinion, Justice Powell's *Furman* opinion is cited six times, Chief Justice Burger's five times, Justices Stewart and White are each cited three times and Justices Brennan and Marshall each once.

50 96 S. Ct. 2930.

51 See 408 U.S. at 452-54 (Stewart, J., concurring).

52 See *Id.* at 311 (White, J., concurring).

53 96 S. Ct. at 2932-33. See 408 U.S. at 306 (Stewart, J., concurring).

54 See 408 U.S. at 313-14 (White, J., concurring).

emphasis on the judicial obligation of supervision was explicitly adopted in *Gregg* and is presumably the basis for the refusal to declare the death penalty unconstitutional per se.⁵⁵

Gregg also deals with the concern expressed in *Furman* that jury discretion could allow for arbitrary and capricious imposition of the death penalty. *Gregg* interpreted these concerns to mean that this constitutional infirmity could be met by a carefully drafted statute ensuring that the sentencing authority, preferably in a bifurcated proceeding, is presented with adequate information which focuses on the circumstances of the specific crime and the character of the individual defendant.⁵⁶

Gregg cites from *Furman* the opinions of Justices White and Stewart in pointing out the difficulty of guiding jury decisions on whether to impose the death penalty.⁵⁷ The lack of adequate guidelines in the statutes under examination in *Furman* resulted in arbitrariness and caprice in the sentence selection process.⁵⁸

Justice Stewart adamantly focused on the arbitrary nature of pre-*Furman* death penalty imposition while Justice White did so implicitly, stressing the infrequency of imposition and execution. What distinguishes *Gregg* from *Furman* in this respect is that the statute under examination in *Gregg* had devised an adequate means of controlling the necessary exercise of jury discretion.⁵⁹ The

55 96 S. Ct. 2925-26.

56 *Id.* at 2935. This was amplified by *Proffitt v. Florida*, 96 S. Ct. 2960, 2969 (1976).

57 See 408 U.S. at 313 (White, J., concurring); *id.* at 309-10 (Stewart, J., concurring).

58 96 S. Ct. 2932. In *Furman* both Justice Douglas (concurring) and Chief Justice Burger (dissenting) discussed the holding in *McGautha v. California*, 402 U.S. 183 (1971), that the time-honored practice of allowing a jury in a capital case to impose the death penalty without any governing standards was not a denial of due process under the fifth and fourteenth amendments. *Furman*, however, held that such "untrammelled" jury discretion was a violation of the due process clause of the fourteenth amendment incorporating the eighth amendment.

59 Since the Georgia capital punishment statute that was upheld in *Gregg* is likely to become a model for other states, an analysis is appropriate. The new act reestablished the bifurcated trial which was in effect at the time of *Furman*. In addition, it provided that at the pre-sentence hearing

the judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or pleas of nolo contendere . . . or the absence of any such prior convictions and pleas; [p]rovided, however, that only such evidence in aggravation as the State has made known to the defendant prior to his trial shall be admissible. The judge [or jury] shall also hear arguments by the defendant or his counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed.

GA. CODE ANN. § 27-25503 (Supp. 1976).

Section 3 of the Georgia statute provides for the "mitigating and aggravating" circumstances to be included in the judge's charge to the jury, prior to its deliberation on sentence. Also, these circumstances may be considered by the judge himself in case of a bench trial.

In all cases of other offenses [not including aircraft hijacking or treason in which the death penalty is mandatory] for which the death penalty may be authorized, the judge shall consider, or he shall include in his instructions to the jury for it to consider, any mitigating circumstances or aggravating circumstances otherwise authorized by law and any of the following statutory aggravating circumstances which may be supported by the evidence:

(1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony, or the offense of murder was committed by a person who has a substantial history of serious assaultive criminal convictions.

(2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony, or aggravated battery, or the offense of murder was committed while the offender was engaged in the

Court cites constitutional history as the main justification:

We have long recognized that "[f]or the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender."⁶⁰

Jury sentencing evolved as a response to the conviction that decisions on

commission of burglary or arson in the first degree.

(3) The offender by his act of murder, armed robbery, or kidnapping knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person.

(4) The offender committed the offense of murder for himself or another, for the purpose of receiving money or any other thing of monetary value.

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor or former district attorney or solicitor during or because of the exercise of his official duty.

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person.

(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim.

(8) The offense of murder was committed against any peace officer, corrections employee or fireman while engaged in the performance of his official duties.

(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement.

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful confinement, of himself or another.

GA. CODE ANN. § 27-2534.1(b) (Supp. 1976).

The Georgia legislature and the Georgia courts focused on the *Furman* decision's emphasis on discretion and arbitrariness and inferred that the proper alternative was discretion that was not "untrammelled" but rather was guided as objectively as is humanly possible. In judging the constitutionality of the statute, the Georgia Supreme Court said:

The essential question is not whether our new death statute permits the use of some discretion, because admittedly it does, but, rather, whether the discretion to be exercised is controlled by clear and objective standards so as to produce non-discriminatory application. After all, some discretion is inherent in any system of justice, from arrest to final review . . . Logically, it is not discretion per se which must be condemned, but it is unguided discretion that does not produce "evenhanded justice."

Coley v. State, 231 Ga. 829, 834, 204 S.E.2d 612, 615-16 (1974). *Coley* involved challenges to Georgia's rape statute. However, in *House v. State*, 232 Ga. 140, 265 S.E.2d 217 (1974), the Georgia Supreme Court upheld the constitutionality of the post-*Furman* murder statute with reference to the grounds delineated in *Coley*.

The state supreme court further stated that Georgia's new capital punishment laws were designed to overcome the "arbitrariness" assailed in the *Furman* opinions. The Court articulated four aims of the statute tailored to this end. The statute:

(1) substantially narrows and guides the discretion of the sentencing authority to impose the death penalty and allows it only for the most outrageous crimes and those offenses against persons who place themselves in great danger as public servants.

(2) provides for automatic and swift appellate review to insure that the death penalty will not be carried out unless the evidence supports the finding of one of the serious crimes specified in the statute.

(3) requires comparative sentencing so that if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts, it will be set aside as excessive.

(4) [requires the Georgia Supreme Court] to make certain the record does not indicate that arbitrariness or discrimination was used in the imposition of the death sentence.

231 Ga. at 834, 204 S.E.2d at 616. The Georgia Supreme Court also noted that the Supreme Court of Florida in a five to two decision reached the same conclusion respecting the constitutionality of Florida's new death statute, which, as drawn, is remarkably similar to that of Georgia. *State v. Dixon*, 283 So. 2d 1 (Fla. 1973). On Florida's response to *Furman*, see Note, *Florida Death Penalty: A Lack of Discretion?*, 28 U. MIAMI L. REV. 723 (1974); 2 FLA. ST. U.L. REV. 108 (1974).

60 96 S. Ct. 2932, quoting *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937).

punishment, especially in capital cases, should reflect the feeling of the community. Prior to *Furman*, juries were traditionally charged by the judge as to sentencing procedures, and this often involved no more than outlining the possible penalties.

Gregg took particular note that the *Furman* concerns were satisfied in that capital punishment can only be imposed after a separate hearing after guilt has been decided, in which there must be specific findings by the jury regarding the circumstances of the crime and the character of the defendant. In addition, there was provision in the Georgia statute for mandatory review of death sentences by the state's supreme court. The review is designed to protect against error by the jury in determining aggravation, and to insure comparability of each death sentence with similar cases.⁶¹ This should ensure that a particular death sentence is not disproportionate to the circumstances involved in the case.

These procedures are envisioned by the Court as providing a remedy for Justice White's objection in *Furman* that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."⁶² It might also satisfy his implied objection that too few death penalties are returned too seldom.

In the pre-*Furman* years, aggravating circumstances were brought out in the course of the testimony, in the district attorney's summary, or in the pre-sentence hearing. But now, relevant circumstances, some of which, prior to the bifurcated trial, would not have been admissible, will be included in the judge's charge to the jury on sentencing. In that way pertinent aggravating circumstances will be before the jury in written form, a medium that is more concrete and more graphic than mere collective memory.

It was also contended in *Gregg* that the "arbitrariness and capriciousness condemned by *Furman* continue to exist in Georgia—both in traditional practices that still remain and in the new sentencing procedures . . ."⁶³ In other words, if that statute was not unconstitutional on its face, it was at least unconstitutional in its application.

The concern with arbitrariness and capriciousness in the application of the pre-*Furman* law was a fundamental concern of Justice Stewart in that case. In meeting petitioner's objections to traditional discretion in the Georgia judicial process, at the prosecutorial, jury, and executive levels, the Court held that *Furman* was aimed at limiting arbitrariness at a specific point of procedure, not in eliminating it altogether.⁶⁴ Regarding the possibility of arbitrariness or caprice involved in jury determinations, the Court held that in any case where the defendant might be adversely affected, the determinations of the jury were subject to efficacious check by review of the Georgia Supreme Court, which review "serves as a check against the random or arbitrary imposition of the death penalty."⁶⁵

61 *Id.* at 2937.

62 408 U.S. at 313 (White, J., concurring).

63 96 S. Ct. at 2937.

64 *Id.*

65 *Id.* at 2940. Justice White's concurring opinion substantially supports the Court's opinion, dwelling in more detail on the inherent necessity of discretion in the system and on the invalidity of petitioner's claims. *See id.* at 2947-49. The Court apparently ignored petitioner's contentions with regard to discretionary arbitrariness in executive action.

The constitutionality of Georgia's post-*Furman* capital murder statute demonstrates that the pivotal justices in *Furman* (especially Justices Stewart and White, who had indicated their opposition to infrequent, arbitrary, and discriminatory imposition of capital sentencing procedures) were opposed to unguided jury determinations, not to jury discretion in and of itself. In *Gregg*, Justices Stewart and White, along with the majority, found these objections were successfully overcome by the precautions built into the Georgia law which limited jury discretion but did not purport to remove it entirely. Thus, an examination of *Gregg v. Georgia* in light of *Furman v. Georgia* demonstrates that there is no appreciable inconsistency between them.

V. *Furman*, *Gregg* and Constitutional Evolution

One last question to be addressed is the consistency of *Furman* and *Gregg* with prior constitutional evolution. Two separate, but closely related issues are involved: first, the Court's pronouncements on the State's right to take life as a punishment; second, the Court's holdings as to what constitutes cruel and unusual punishment.⁶⁶

Until *Gregg*, the question of per se constitutionality of capital punishment under the eighth and fourteenth amendments had not been addressed by the Court. As we have seen, the Court sidestepped the issue in *Furman*, ultimately to decide it in *Gregg*. However, these are not the only cases in which the Court has spoken on this point.

In the past the Court has employed a number of devices to avoid the question of constitutionality per se, which had been raised in several cases. In *Rudolph v. State*,⁶⁷ it denied certiorari. In *Witherspoon v. Illinois*,⁶⁸ *McGautha v. California*,⁶⁹ and *Furman*, it effectively limited certiorari to issues which did not raise the question of constitutionality per se; and in *Boykin v. Alabama*⁷⁰ it found other grounds on which to reverse. However, whatever the method employed to avoid the issue, the Court had implicitly upheld the constitutionality of the death penalty.

In addition, in those cases in which the Court upheld the constitutionality of various methods of execution,⁷¹ the justices sanctioned *sub silentio* the principle that the state has the ultimate right to take life. Moreover, the Court specifically held in *Williams v. Oklahoma* that the death penalty was not a violation of the due process clause.⁷²

In some fairly recent decisions various members of the Court have expressed approval of capital punishment. In *Trop v. Dulles*,⁷³ the plurality opinion written by Chief Justice Warren and joined by four other justices, stated in *dictum*:

66 A third issue, that of jury discretion, has such a brief constitutional history that it is dealt with in connection with the analysis of *Furman* and *Gregg*, see notes 8-65 *supra* and accompanying text.

67 275 Ala. 115, 152 So. 2d 662, cert. denied, 375 U.S. 889 (1963).

68 391 U.S. 510 (1968).

69 402 U.S. 183 (1971).

70 395 U.S. 238 (1969).

71 See, e.g., *Wilkinson v. Utah*, 99 U.S. 130 (1878); *In re Kemmler*, 136 U.S. 436 (1890). See also *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

72 358 U.S. 576, 586, 587 (1959). See Note, *The Death Penalty—The Alternatives Left After Furman v. Georgia*, 37 ALB. L. REV. 344, 349 (1973).

73 356 U.S. 86 (1958).

Whatever the arguments may be against capital punishment, both on moral grounds and in terms of accomplishing the purposes of punishment—and they are forceful—the death penalty has been employed throughout our history, and, in a day when it is still widely accepted, it cannot be said to violate the constitutional concept of cruelty.⁷⁴

Again, in *McGautha v. California*, Justice Black expressed recognition of the constitutionality of capital punishment in a concurring opinion:

The Eighth Amendment forbids "cruel and unusual punishments." In my view, these words cannot be read to outlaw capital punishment because that punishment was in common use and authorized by law here and in other countries from which our ancestors came at the time the Amendment was adopted.⁷⁵

This long-term approval, both implicit and explicit, was summed up succinctly in *Furman* by Chief Justice Burger:

In the 181 years since the enactment of the Eighth Amendment, not a single decision of this Court has cast the slightest shadow of a doubt on the constitutionality of a capital punishment.⁷⁶

Those who hailed *Furman* as outlawing the death penalty were obviously wrong, and those who were confident that *Gregg* would declare it unconstitutional per se were also disappointed. In the march of constitutional history, however, *Furman* and *Gregg* were right in line. Whatever hopes of abolition still exist,⁷⁷ one should not expect that the constitutionality per se of the death penalty will be reversed in the near future.

On the general question of what constitutes "cruel and unusual" punishment, the Court has made a number of rulings. Punishments must not inflict unnecessary "cruelty"⁷⁸ or "pain";⁷⁹ nor must they involve treatment that is "in-

74 *Id.* at 99.

75 402 U.S. at 226 (1971).

76 408 U.S. at 380 (Burger, C.J., dissenting).

77 One of the latest expressions, stimulated by Justice Powell's issuance of stays of execution regarding the *Gregg* case and its companion cases, was by columnist Tom Wicker. He claimed the people really do not support the "repugnant means" of execution even though they might say they favor capital punishment and, incidentally, the United States will suffer from adverse international public opinion if it resumes executions, especially of the "poor and black." N. Y. Times, July 25, 1976, § 4, at 7, col. 1.

If an editorial comment is permitted, Wicker and others of his view, might better understand why the majority of the people of Georgia support the death penalty, as evidenced through their laws and the actions of their juries and courts, if they would familiarize themselves with even the bare recital of the facts in these types of cases as contained in the Georgia Reports. I especially recommend, *McCorquodale v. State*, 233 Ga. 369, 211 S.E.2d 577 (1974), even though some of the facts are missing. The means used by McCoquodale to execute his victim, who enjoyed none of the protection of due process of law, were far more "repugnant" than any means ever devised by the state.

The Georgia Supreme Court said of this case:

In no case we have reviewed has the depravity of the defendant and the torture of the victim exceeded that established by the evidence . . . in this case.

Id. at 377-78, 211 S.E.2d at 583.

The United States Supreme Court, which recently denied certiorari in this case, called it "a horrifying torture-murder." 96 S. Ct. 2909, 2938 (1976).

78 *Wilkinson v. Utah*, 99 U.S. 130 (1878).

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

humane and barbarous."⁸⁰ Each punishment should be "graduated and proportioned to the offense."⁸¹ No punishment should violate the "dignity of man" as it is defined by the "evolving standards of decency" of society.⁸² Moreover, a punishment which was "universally thought" in the "light of contemporary knowledge" to be cruel and unusual has been voided.⁸³

The import of these rulings is that the Court will strike down the application of punishments which are contrary to the public consensus or which are disproportionate to the offense.

Robinson v. California explicitly made the eighth amendment applicable to the States through the fourteenth amendment,⁸⁴ but it was not until nearly ten years later that the Court accepted and ruled on the issue of the death penalty's constitutionality under the eighth amendment, limited to questions of procedure in *Furman*, but per se in *Gregg*.

Much of the dicta from the rulings cited appear in the briefs for petitioners and in the opinions in *Furman* and *Gregg*. In these and other cases, opponents made a concentrated effort to prove that the death penalty was cruel and unusual under each and every one of these standards. In this battle, opponents employed statistical "proof," logical and illogical arguments, propaganda techniques and whatever other means they could devise. In *Furman* their goal appeared in sight, as Justices Brennan and Marshall virtually adopted their arguments and other justices leaned toward them. But ultimately, all but Justices Brennan and Marshall retreated, and in *Gregg*, the Court held that capital punishment for murder was not per se disproportionate to the crime and that the death penalty for murder was consistent with the presently evolved standards of decency, as indicated by overwhelming public support.

In sum, then, *Gregg* follows *Furman* and both fit logically into the patterns of constitutional history with regard to the question of per se constitutionality of the death penalty and the issue of what constitutes cruel and unusual punishment.

V. Conclusion

This analysis of whether *Gregg* and *Furman* are compatible with each other and with precedent has centered on the related questions of the State's inherent right to take the life of a convicted murderer, the constitutionality of the death sentence per se, and the issue of jury discretion.

It appears from hindsight that *Furman* implicitly upheld the State's power. Furthermore, *Furman* was interpreted as not condemning capital punishment by the overwhelming majority of the states affected. Moreover, *Gregg* specifically upheld, at least for the crime of murder, what *Furman* had only implied for both murder and rape. Lastly, both *Gregg* and *Furman*, in the main, are consistent with constitutional precedents.

In dealing with the problem of jury discretion, *Furman* held that the prac-

80 *In re Kemmler*, 136 U.S. 436 (1890).

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

82 *Trop v. Dulles*, 356 U.S. 86 (1958).

83 *Robinson v. California*, 370 U.S. 660 (1962).

84 *Id.* See *Gideon v. Wainwright*, 372 U.S. 335, 341-42 (1963).

tice of allowing juries in capital cases to determine sentence with virtually complete freedom was unconstitutional. This was ruled a violation of the due process clause of the fourteenth amendment incorporating the eighth amendment.

In responding to this, the majority of the states misinterpreted the rather confusing opinions in *Furman* and adopted mandatory statutes. A minority of the states, perhaps more sensitive to the implications in *Furman* that mandatory sentence laws would be acceptable, drew up limited discretion statutes. Georgia, exemplary of this, has had its interpretation vindicated in the *Gregg* decision.