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Capital Punishment: A Review of Recent Supreme Court Decisions

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NOTES

CAPITAL PUNISHMENT: A REVIEW OF RECENT SUPREME COURT DECISIONS

I. Introduction

On July 2, 1976, the United States Supreme Court announced opinions in five cases dealing with the issue of capital punishment.[1] In each of these cases the Court held that the death penalty did not invariably violate the Constitution.[2] Thus, the question left unanswered in *Furman v. Georgia,*[3] the constitutionality of the death penalty *per se,* was finally considered and resolved.

More specifically, in three of the decisions, *Gregg v. Georgia, Proffitt v. Florida,* and *Jurek v. Texas,* the Supreme Court upheld the respective state death penalty provisions. Constitutionality was found primarily because these statutes provided judges and jurors with sufficient standards to adequately guide their discretion in imposing the death sentence. Conversely, in *Woodson v. North Carolina* and *Roberts v. Louisiana* the Court struck down mandatory death statutes as violative of the eighth and fourteenth amendments. Such mandatory death penalty provisions were held unconstitutional because they failed to provide a rationalized sentencing process. The opinions indicated that this rationalized process requires that the sentence procedure be nondiscriminatory; in other words the process must draw a meaningful distinction between a case in which the death sentence is warranted and one in which it is not.

Traditionally the Court has had numerous opportunities to rule on the validity of the death penalty. However, until the decisions rendered this past July, the Court had been noticeably reluctant to consider whether the death penalty, *per se,* violated the eighth and fourteenth amendments.[4] Though avoiding this basic question, the Court, with a single exception, steadfastly refrained from sanctioning imposition of the death penalty. This avoidance was managed by a consistent finding of procedural flaws in the various sentencing processes brought before the Court.

It is the purpose of this note to analyze the history of litigation before the Supreme Court concerning capital punishment as it relates to the "cruel and unusual" clause of the eighth amendment. Particular emphasis will be placed on the most recent cases which are significant because they mark the first time in recent history where the Court upheld the validity of capital punishment *per se.* As the majority of the Justices felt that the Court is not the proper governmental branch to rule on the propriety of this punishment, the significance of the judicial philosophy of a particular Court will be stressed. Additionally, the new pro-

1 The five cases were: Gregg v. Georgia, 96 S. Ct. 2909, Proffitt v. Florida, 96 S. Ct. 2960, Jurek v. Texas, 96 S. Ct. 2950, Woodson v. North Carolina, 96 S. Ct. 2978, Roberts v. Louisiana, 96 S. Ct. 3001 (1976).

2 96 S. Ct. 2923.

3 408 U.S. 238 (1972).

4 It should be noted that the Court had assumed its validity without a specific holding in several cases. However, in the past decade, in those cases where the Court was specifically asked to consider the constitutionality of the death penalty *per se,* it avoided making a determination.

cedural requirements mandated by the Court will be analyzed in an attempt to suggest strategies and considerations which may be useful to attorneys litigating death penalty cases or to legislatures in their efforts to enact legislation comporting with the new standard.

II. Background

A. *Definition of Cruel and Unusual*

The phrase "cruel and unusual punishments" was itself the subject of much judicial controversy in earlier years as an attempt was made to conceive a generally accepted understanding of its scope. The history of Supreme Court litigation concerning capital punishments indicates that the precise contours of the phrase were defined with some difficulty. However, from early on the Court was confident that "unnecessary cruelty" was the underlying concept of the cruel and unusual punishment prohibition.[5] The notion of proscribing unnecessary cruelty is clearly the cornerstone of the eighth amendment's meaning.

As the concept of "cruel and unusual" was further articulated in Supreme Court cases, it became apparent that capital punishment was not among those punishments constitutionally proscribed.[6] Death sentences fell outside the ban because they did not involve torture or lingering death. Furthermore, despite the ultimate nature of the punishment, it was not considered inhuman or barbarous, generally due to its long history of acceptance.[7]

An advanced articulation of this eighth amendment concept was provided in *Weems v. United States*.[8] This case marked the first instance in which the Supreme Court overruled a legislative penalty.[9] In *Weems*, the petitioner was convicted of deceiving and defrauding the United States Government of the Philippine Islands by falsifying a cash book. The minimum prescribed penalty was confinement in a penal institution for twelve years at hard and painful labor. Upon conviction, a defendant was to be constantly bound in chains and stripped of parental and property rights, among others. Furthermore, upon release, the defendant was subjected to lifetime surveillance and perpetual absolute disqualification.[10]

Justice McKenna, writing for the majority, found this punishment to be both cruel and unusual. The significance of this decision stems from its introduction of two new considerations in this area. First, the Court was deeply disturbed by the excessiveness of the punishment in light of the nature of the

5 Wilkerson v. Utah, 99 U.S. 130, 135-36 (1879).

6 In re Kemmler, 136 U.S. 436, 447 (1890). In this context it is somewhat unfortunate that in this case the Court chose to label the extinguishment of life with the adjective "mere." It seems reasonable to conclude that the convicted defendant, the judge who pronounced the sentence, and the executioner who carried it out did not regard the punishment as a "mere" extinguishment of life. It is noteworthy that in more recent decisions the Court has been very careful to avoid similar characterizations.

7 *See* note 20, *infra*.

8 217 U.S. 349 (1910).

9 408 U.S. 238, 325 (Marshall, J., concurring).

10 217 U.S. 349, 364-65. Perpetual disqualification was "the deprivation of office, even though it be held by popular election, the deprivation of the right to vote . . . and the loss of retirement pay. . . ." *Id.*

crime involved.[11] Accordingly, the majority adopted the concept of proportionality as essential to complete compliance with the constitutional demand of the eighth amendment.

Furthermore, though *Weems* did not involve capital punishment, it introduced a characterization of the eighth amendment which would have a significant impact on later death penalty decisions. The Court characterized cruel and unusual as being a dynamic, flexible concept which was subject to modification. The constitutional clause was said to be "progressive, and . . . not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."[12] In later years, this notion was seized upon by several Justices, in the capital punishment context, in arguing that society had progressed to the point where the death penalty had become cruel and unusual.[13]

The eighth amendment's formative phase came to an end in *Weems*. While the accepted meaning of the amendment would subsequently be refined and polished, its basic contours were clearly established. Labelling a punishment cruel and unusual indicated that its infliction was torturous, unnecessary, barbarous or excessive in light of the crime the defendant had perpetrated. More importantly, however, the Supreme Court had determined that the meaning of cruel and unusual was not static, but could acquire new meaning as the values of society changed.

B. *Transitional Developments*

Since factual situations are so diverse, it is virtually impossible for a single legal definition to adequately deal with each situation in which it arises. Therefore, nuances of a definition must be established to allow the judiciary sufficient leeway in rendering decisions. This is particularly true when the concept of cruel and unusual is interpreted. Naturally, the evolution of such a doctrine is marked with anomalies and inconsistencies.

One such inconsistency is the Court's consideration of the role mental suffering plays in the determination of eighth amendment prohibitions. In *Weems,* the Court found the imposition of lifetime surveillance sufficient to render a punishment unconstitutional.[14] As no physical suffering attached to surveillance, the conclusion must have rested upon considerations of mental suffering. In contrast, other contexts exist in which mental suffering has not been deemed to be a valid consideration.[15] For example, mental suffering was found to play only a

11 *Id.* at 377. In so holding the Court adopted the position of the minority in O'Neil v. Vermont, 144 U.S. 323 (1892). In the *O'Neil* decision, Justice Field objected to a punishment for selling intoxicating liquors which was more severe than the prescribed penalties for burglary, highway robbery, manslaughter, forgery or perjury. (*Id.* at 339). Justice Field also stated that the prohibition of the eighth amendment was directed against "all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." (*Id.* at 339-40). This is apparently the first articulation of the notion that the punishment must suit the crime by the Supreme Court. In *Weems,* this became the position of a majority of the Court.

12 *Id.* at 378.

13 See Furman v. Georgia, 408 U.S. 238, 291 (Brennan J., concurring) *see also* 408 U.S. at 360 (Marshall, J., concurring.)

14 Weems v. United States, *supra* note 8 at 381.

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

secondary role when the Court upheld a procedure which twice sent a defendant to the electric chair. Where the first attempt to electrocute a defendant failed due to a mechanical defect the state desired to repeat the process. The Court upheld this scheme as not being cruel and unusual.[16] If any conclusion can be drawn from these cases, it is that mental suffering is a factor which is considered, but only in light of the other facts and circumstances surrounding each particular case.

The case of *Trop v. Dulles*[17] is further evidence of the paradoxical position the Supreme Court has taken in defining the cruel and unusual phrase. Thus, while statutory imposition of death has been consistently upheld, the Court in *Trop* found that Congress was forbidden to impose the penalty of citizenship forfeiture for the crime of wartime desertion.[18] A reconciliation of such definitional applications is difficult to achieve.

Following the *Weems* rationale, the Court frequently noted that the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[19] Despite this admonition for contemporary indicia, history and tradition were openly considered.[20] Both *Trop* and more recent decisions clearly indicate that while the "evolving standards doctrine" is espoused, in actuality the test is two-pronged, with both historical and contemporary societal attitudes playing a role in the decision-making process.[21]

Despite these anomalies, the definition of cruel and unusual became more sophisticated with each interpretation. Early in its development consideration of the dignity of man became a central aspect of eighth amendment litigation.[22] The states' power to punish had to be exercised within the limits of civilized standards.[23] Such civilized standards came to require that whenever a defendant loses "the right to have rights"[24] the punishment must be carefully examined for potential abuses.

Initially, it appears as though these criteria of evolving and civilized standards could readily be utilized to invalidate the death penalty.[25] However, the *Trop* Court, in *dicta,* expressly stated that capital punishment was constitutionally acceptable.[26] It was this anomaly which prompted Justice Frankfurter to pose the following question:

16 *Id.* at 446.
17 356 U.S. 86 (1958).
18 *Id.* at 103.
19 *Id.* at 101.
20 *Id.* at 99-100.
21 The Court's analysis follows:

> 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. *Id.* at 99.

22 *Id.* at 100. The comments of Chief Justice Warren should be read in light of the comment he made indicating that the exact scope of cruel and unusual had not been detailed by the Court. *Id.* at 99.
23 *Id.*
24 *Id.* at 102.
25 As will be discussed later, the Supreme Court of California did use a similar rationale to overrule its state statute calling for the death penalty. People v. Anderson, 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied* 406 U. S. 958 (1972).
26 356 U.S. 86, 99.

> Is constitutional dialectic so empty of reason that it can be seriously urged that the loss of citizenship is a fate worse than death?[27]

The transitional period indicates that although the definition of "cruel and unusual" had acquired general contours, applying its abstract terms to concrete factual circumstances was a difficult task. However, despite these problems, the constitutionality of the death sentence was never in doubt.

C. *Procedural Definition*

The next stage of development in this area witnessed the eighth amendment acquire a new meaning, quite different from prior considerations. The Court remained steadfast in its refusal to consider the basic issue: Does the death penalty *per se* violate the eighth amendment? However, by finding procedural defects in various sentencing processes, the Court skillfully refused to sanction a death sentence while avoiding this ultimate decision. The procedural analysis was wholly unprecedented. Thus it was justifiable to hypothesize that the Court was using the procedural technique as a means of preparing the public for a major policy change.

There are several illustrations of this technique in Supreme Court cases. For example, under the Federal Kidnapping Act,[28] the death penalty was a potential punishment only if the accused demanded a jury trial.[29] The Act was held unconstitutional because it imposed "an impermissible burden upon the exercise of a constitutional right."[30] A statute which interfered with the right to demand a jury trial and plead not guilty could not withstand constitutional scrutiny.

Further eighth amendment protection was provided when the defendant entered a guilty plea. It became unconstitutional for a trial court to accept a guilty plea to a capital offense without an affirmative showing that the guilty plea was entered intelligently and voluntarily.[31] The eighth amendment insured protections greater than examining the nature of the punishment itself. The defendant was provided procedural protection at the pre-trial stage when a plea was entered and when electing to try the case before a judge or a jury.

The eighth amendment was held to embody additional procedural safeguards when a jury trial was chosen. Jurors could not be excluded merely

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27 *Id.* at 125, (Frankfurter, J., dissenting.)

28 At that time the act provided:

> Whoever knowingly transports in interstate . . . commerce, any person who has been unlawfully . . . kidnapped . . . and held for ransom . . . or otherwise . . . shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed.

The Court noted that the statute set forth no procedure for imposing the death penalty upon a defendant who may waive the right to a jury trial or upon one who pleads guilty. 390 U.S. at 570-71.

29 *Id.* at 571.

30 United States v. Jackson, 390 U.S. 570, 572 (1968).

31 Boykin v. Alabama, 395 U.S. 238, 242 (1969).

because they voiced general objections to the death penalty.[32] Apparently, only veniremen who unconditionally opposed capital punishment could successfully be challenged for cause.

Thus, although the pattern was clear it was not without deviation. As each confrontation brought the Court closer to the ultimate issue, further procedural demands could be found which would postpone the final decision. The evasive technique was employed by the Supreme Court for a twenty-three-year period beginning in 1957.[33] In 1970, however, the Court reversed the trend of refusing to affirm a death sentence, in *McGautha v. California,* when it allowed the jury to impose the death penalty in a procedure void of governing standards[34] Such a process was acceptable because it was thought to be impossible to articulate standards which would adequately enable the jury to differentiate between the situations meriting a death sentence and those which did not.[35] The Court's sanc-

32 Witherspoon v. Illinois, 391 U.S. 510 (1968). At the time of the trial the Illinois statute provided:

> In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same. ILL. REV. STAT., c. 38, § 743 (1959). *Id.* at 512.

33 The prior case where the court had sanctioned the death sentence was the Louisiana *ex rel.* Francis case in 1947.

34 McGautha v. California, 402 U.S. 183, 186 (1971). McGautha was convicted of two counts of armed robbery and one count of first-degree murder as charged. During the penalty trial, at that time under California law punishment was determined in a separate proceeding following the trial on the issue of guilt, the jury was instructed in the following language:

> in this part of the trial the law does not forbid you from being influenced by pity for the defendants and you may be governed by mere sentiment and sympathy for the defendants in arriving at a proper penalty in this case; however, the law does not forbid you from being governed by mere conjecture, prejudice, public opinion or public feeling.
>
> The defendants in this case have been found guilty of the offense of murder in the first degree, and it is now your duty to determine which of the penalties provided by law should be imposed on each defendant for that offense. Now, in arriving at this determination you should consider all of the evidence received here in court presented by the people and defendants throughout the trial before this jury. You may also consider all of the evidence of the circumstances surrounding the crime, of each defendant's background and history, and of the facts in aggravation or mitigation of the penalty which have been received here in court. However, it is not essential to your decision that you find mitigating circumstances on the one hand or evidence in aggravation of the offense on the other hand.
>
> . . . Notwithstanding facts, if any, proved in mitigation or aggravation, in determining which punishment shall be inflicted, you are entirely free to act according to your own judgment, conscience, and absolute discretion. That verdict must express the individual opinion of each juror.
>
> Now, beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty, but, rather, commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience, and absolute discretion of the jury. In the determination of that matter, if the jury does agree, it must be unanimous as to which of the two penalties is imposed.

402 U.S. 189-90.

35 *Id.* at 204. The fact that Justice Harlan felt it impossible to articulate adequate standards for the jury to employ is further reflected by the following statement:

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution. The States are entitled to assume that jurors confronted with the truly awesome responsibility of decreeing death for a fellow human will act with due regard for the consequences of their decision and will consider a variety of factors, many of which will have been suggested by the evidence or by the arguments of defense counsel. For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to

tioning of capital punishment for the first time in twenty-three years was noteworthy.

Although the future direction of the Court was uncertain as a result of this change, procedural considerations remained very much a part of eighth amendment analysis. But the relative significance of procedural matters in relation to the punishment itself was less certain. Apparently, the procedures resulting in the death sentence were beginning to overshadow the character of the punishment itself.

D. *A Contrasting State Court Decision:* People v. Anderson

The procedural focus of the United States Supreme Court had not influenced the California Supreme Court. On February 18, 1972, the Supreme Court of California rendered its decision in *People v. Anderson*.[36] The state court deviated from the Supreme Court's approach in that it focused directly on the merits of the death penalty itself. The California court concluded that capital punishment was cruel, unusual and could not be justified as furthering any of the accepted purposes of punishment.[37]

In reaching this conclusion the court stated that capital punishment:

> 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.[38]

It noted that frequency of imposition was the proper barometer to employ in determining whether capital punishment offended contemporary standards of decency.[39] As the death penalty was infrequently used, the court concluded that the punishment was incompatible with current standards. Finally, the court rejected historical justification for the death sentence, stating that incidental references to the penalty in the California constitution merely recognized its existence at the time the constitution was adopted.

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each case would make general standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need. *Id.* at 207-08.

36 6 Cal.3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied* 406 U.S. 958 (1972).

37 *Id.* at 645. It should be noted that the court was interpreting article I, section 6 of the California Constitution (*Id.* at 633) and thus did not resolve the issue of whether capital punishment was also proscribed by the eighth amendment to the United States Constitution. *Id.* at 634.

38 *Id.* at 656.

39 *Id.* at 648. The court made the following comments regarding the acceptance of the death sentence:

> Public acceptance of capital punishment is a relevant but not controlling factor in assessing whether it is consonant with contemporary standards of decency. But public acceptance cannot be measured by the existence of death penalty statutes or by the fact that some juries impose death on criminal defendants. Nor are public opinion polls about a process which is far removed from the experience of those responding helpful in determining whether capital punishment would be acceptable to an informed public were it evenhandedly applied to a substantial proportion of the persons potentially subject to execution. Although death penalty statutes do remain on the books of many jurisdictions, and public opinion polls show opinion to be divided as to capital punishment as an abstract proposition, the infrequency of its actual application suggests that among those persons called upon to actually impose or carry out the death penalty it is being repudiated with ever increasing frequency. *Id.*

By denying *certiorari,* the Supreme Court avoided a direct review of this dissimilar method of analyzing capital punishment. However, as *Furman v. Georgia*[40] was pending before the Supreme Court at the time *Anderson* was decided, the Court would have the opportunity to voice its views on the California approach almost immediately.

Thus, state court decisions notwithstanding, by 1972 several aspects of "cruel and unusual" had been fairly well established while others remained uncertain. It was clear that the phrase mandated respect for human dignity in implementing punishments. For punishments to comport with human dignity they could not be inhuman or barbarous, they had to be proportional to the offense committed and had to serve a valid social purpose. However, the significance of the historical acceptance of punishments was uncertain. The Court almost invariably considered whether the punishment in issue had been traditionally accepted, despite the evolving standards doctrine it simultaneously espoused. More importantly, it was not certain whether the practice of reversing death sentences had been abandoned entirely. Whether the procedural definition of cruel and unusual now exceeded the traditional definition in importance was yet to be resolved. Finally, the impact, if any, that the California decision would have on Supreme Court analysis was not determined. As the *Furman* decision was pending it was hoped that some of these unresolved questions would be answered.

III. *Furman v. Georgia*

A. *Background*

At the time *Furman* was decided, 41 states, the District of Columbia, and several federal jurisdictions authorized the death penalty.[41] However, by any standard, the imposition of that penalty was infrequent. In 1970 only 127 people received the death sentence; in 1971 the number dropped to 104 and to a low of 75 in 1972.[42] The infrequency of use prompted some commentators to conclude that the Supreme Court could, and should, declare the death penalty unconstitutional.[43] Thus, the Court was being pressured to finally rule on the constitutionality of the punishment *per se.* It is with this background in mind that *Furman* should be read so as to better understand the full import of this landmark case.

B. *The Decision*

On June 29, 1972 in a *per curiam* opinion, the Supreme Court announced its decision in *Furman v. Georgia.* The opinion is incredibly simple considering the complexity of the issue involved:

40 408 U.S. 238 (1972).
41 *Id.* at 341 (Marshall, J., concurring.) The nine states which did not authorize capital punishment under any circumstances were: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia and Wisconsin. *Id.* at 340, n.79.
42 96 S. Ct. 2909, 2929 n.26.
43 Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional,* 83 HARV. L. REV. 1773, 1818-19 (1970).

> Certiorari was granted limited to the following question: "Does the imposition and carrying out the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" 403 U.S. 952 (1971) The Court holds that the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. The judgment in each case is reversed insofar as it leaves undisturbed the death sentence imposed, and the cases are remanded for further proceedings.[44]

However, nine separate opinions were issued, each Justice expressing his own view on the matter before the Court. This reflects the true nature of the controversy more so than the *per curiam* opinion. Five Justices supported the *per curiam* judgment while four dissented.

1. The Majority Opinions

Of the five Justices who found the death penalty unconstitutional, Justices Stewart and White took the most moderate positions. Both of them indicated it was unnecessary to determine the ultimate constitutionality of capital punishment under any circumstances.[45]

In assessing this punishment for murder, Justice Stewart concluded that the sentences in question were, "cruel and unusual in the same way that being struck by lightning is cruel and unusual."[46] He felt they were unusual "in the sense that the penalty of death is infrequently imposed for murder, and its imposition for rape is extraordinarily rare."[47] Stewart's conclusion rested on a three-part analysis: First, the death penalty was a potential sentence in a large number of cases; second, it was actually imposed in an extraordinarily small number of these cases; and third, there was no rational differentiating factor which separated the cases where it was imposed from those where it was not. Therefore, he concluded its imposition was wanton and freakish.[48]

Justice White also cited the infrequency of imposition as the constitutional flaw of the death penalty. He felt that the societal needs of retribution and deterrence were not adequately served when capital punishment was so infrequently imposed.[49] The utilitarian argument was that the death penalty failed

44 408 U.S. at 239-40.

45 *Id.* at 306, (Stewart, J., concurring.) *Id.* at 311, (White, J., concurring.)

46 *Id.* at 309. Justice Stewart noted that although many people were convicted of rape and murder during the same time period as the petitioners, the petitioners before the Court were among a "capriciously selected random handful" of people who were given the death penalty. *Id.* at 309-10. This observation led him to conclude that, "the 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 freakishly imposed." *Id.* at 310.

47 *Id.* at 309.

48 *Id.* at 310.

49 *Id.* at 311-12. Justice White noted that, "the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not. 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." *Id.* at 313.
He also noted that in delegating sentencing authority to a jury, which could refuse to impose the death sentence regardless of the circumstances, a legislature was allowing its policy to be dictated by juries and judges rather than legislators. *Id.* at 314.

as a credible deterrent when it was not enforced regularly. Furthermore, its value in retributive terms was doubtful when, in the vast majority of instances, a prison term was sufficient.[50] He also indicated there was no discernable distinction between the cases in which the death sentence was imposed and those in which it was not. Justice White thus avoided using the traditional test of cruel and unusual, *i.e.* whether the sentence is inhuman and barbarous.[51]

The position taken by Justice Douglas was more critical of capital punishment. He felt it was important to focus on the statutes as applied, and thus reached the following conclusion:

> [T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.[52]

Noting that the Court was limited by the earlier *McGautha v. California*[53] holding, Justice Douglas was disturbed by the absence of standards for the jury to use in selecting a sentence. A system that allowed, "[p]eople [to] live or die, dependent on the whim of one man or 12"[54] could not withstand constitutional scrutiny.

Justices Brennan and Marshall were most adamant in their objections to capital punishment. Both of them would hold that the death sentence was *per se* a cruel and unusual punishment.[55]

Justice Brennan summarized his position on the constitutionality of capital punishment as follows:

> 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. . . . Death, quite simply, does not comport with human dignity.[56]

He said "[t]he primary principle is that a punishment must not be so severe as to be degrading to the dignity of human beings."[57] If society rejects a punishment, rejection being determined by frequency of use rather than legislative authorization,[58] Justice Brennan would conclude there is a strong probability the punishment does not comport with conceptions of human dignity.[59] Thus,

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50 *Id.*

51 It is also interesting to note that Justice White's analysis focused on the needs of the state rather than the rights of the individual. His analysis led him to believe the value the state received in extracting the death penalty was insufficient to justify its existence. He did not feel that the individual was required to sacrifice too much for the crime committed.

52 *Id.* at 256-57 Justice Douglas devoted a great deal of his consideration to the application of the death penalty to members of minority groups, and concluded from several surveys that the death penalty discriminated against the poor and the Negro. *Id.* at 249-52.

53 402 U.S. 183 (1971).

54 408 U.S. 238, 253.

55 *Id.* at 286 (Brennan, J., concurring.) *Id.* at 359 (Marshall, J., concurring.)

56 *Id.* at 305 (Brennan, J., concurring.)

57 *Id.* at 271.

58 *Id.* at 279.

59 *Id.* at 277.

the infrequent imposition of the death penalty, in light of its rather frequent availability, allowed Justice Brennan to conclude society rejected it because of its incompatibility.[60] Additionally, the Justice viewed the penalty's pattern of imposition as arbitrary infliction and therefore unconstitutional.[61]

The pervasiveness of moral overtones is the hallmark of Justice Marshall's opinion. He felt the members of the Court should balance the penalty of capital punishment with notions of contemporary self-respect.[62] The dynamic nature of "cruel and unusual" was the most important principle to consider in assessing the constitutionality of the death sentence.[63] In this view, Justice Marshall stated the Court could take judicial notice of the fact that "for more than 200 years men have labored to demonstrate that capital punishment serves no useful purpose that life imprisonment could not serve equally well."[64] Ultimately, he concluded that society had evolved to the point where capital punishment could no longer be constitutionally sanctioned.

Hypothesizing that if the citizenry were well informed about capital punishment they would find it immoral,[65] Justice Marshall concluded that at this time in history capital punishment was unacceptable.[66] Justice Marshall was the sole member of the Court to squarely rule on the morality issue. Although both Chief Justice Burger and Justice Blackmun, in their dissenting opinions, expressed their personal abhorrence of the death penalty,[67] they felt personal considerations should not enter into the decision and therefore did not concur in Justice Marshall's conclusion. Had the dissenters felt differently, it is possible *Furman* would have been significant as the case in which capital punishment was abolished on grounds of moral aversion. Furthermore, the vote would have been 7-2 and not likely to face a subsequent challenge.

2. The Dissenting Opinions

The Nixon appointees all disagreed with the Court's resolution of the issue. However, it should be noted that their opinions were stated with less conviction than those of the majority. It would certainly be an error to say that the dis-

60 Mr. Justice Brennan said, "In comparison to all other punishments today . . . the deliberate extinguishment of human life by the State is uniquely degrading to human dignity." *Id.* at 291. He further noted that death remained the only punishment that involved conscious infliction of physical pain and that a tremendous amount of mental pain attached to the imposition of the death penalty. *Id.* at 288.

61 *Id.* at 293.

62 *Id.* at 315, (Marshall, J., concurring.)

63 *Id.* at 329.

64 *Id.* at 359.

65 *Id.* at 363.

66 *Id.* at 360. Justice Marshall cites the cases of United States v. Rosenberg, 195 F.2d 583, 608 (2d Cir.), *cert. denied*, 344 U.S. 838 (1952); Kasper v. Brittain, 245 F.2d 92, 96 (6th Cir.) *cert. denied* 355 U.S. 834 (1957) and People v. Morris, 80 Mich. 634, 639, 45 N.W. 591, 592 (1890) as supporting the principle that a punishment is valid unless it shocks the conscience and sense of justice of the people.

67 Chief Justice Burger stated, "If we were possessed of legislative power, I would either join with Mr. Justice Brennan or Mr. Justice Marshall or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes." *Id.* at 375, (Burger, C.J., dissenting). Justice Blackmun remarked, "I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated." *Id.* at 405, (Blackmun, J., dissenting.)

senters strongly advocated the use of capital punishment. Rather, they felt that it was not the Court's province to overrule legislative pronouncements. Thus, the major disagreement was reflected by a difference in perception of the Court's role in the constitutional scheme of government.[68]

Despite personal feelings, Chief Justice Burger was compelled to dissent because he felt "constitutional inquiry . . . must be divorced from personal feelings as to the morality and efficacy of the death penalty."[69] He acknowledged that the eighth amendment was not a static concept[70] but found no evidence indicating that a punishment explicitly authorized in the Constitution was "suddenly" offensive to the conscience of society.[71] He disagreed with the majority position that the limited use of the death sentence reflected society's distaste of capital punishment. Instead, it attested to the juror's "cautious and discriminating reservation of that penalty for the most extreme cases."[72] In any event, the efficacy of the punishment was not a proper consideration.[73]

The heart of the Chief Justice's disagreement with the majority concerned the propriety of the Court's involvement in this area, noting that this matter was better suited for legislative resolution.[74] He spoke with prophetic accuracy making the following suggestion regarding future legislative action:

> [L]egislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.[75]

This comment is justifiably read as inviting state legislatures to pass the appropriate legislation to satisfy the majority of the Court. In this sense, the Chief

68 Although a thorough and comprehensive analysis of this problem is beyond the scope of this note, the jurisprudential issue of whether judges should discard their moral convictions when they are on the bench is of particular significance in this area. This recent series of holdings does not represent the moral position of the Court. Rather, it reflects the impact of the judicial restraint doctrine since most of the Court's members felt they could not interfere with legislative determinations concerning capital punishment. Thus, it would be a gross distortion of reality to say that the Court has held that capital punishment is morally justifiable. More accurately, the majority's position is that if state legislatures deem the death sentence to be morally acceptable, the Court is without power or authority to interject a contrary moral conclusion and declare the state provision unconstitutional.

In an article which appeared in an earlier edition of the *Notre Dame Lawyer*, L. S. Tao noted the need for a morally based decision on capital punishment. *Tao,* Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment, 51 NOTRE DAME LAW. 722 (1976). Tao pointed out that in *Furman,* Justice Powell noted his personal approval of the new restrictions which were being imposed on the death sentence. *Id.* at 726. Thus, if the recent decisions had turned on purely moral grounds, it is possible that Chief Justice Burger and Justice Blackmun, who had each expressed their personal dislike of the punishment, would have joined Justice Powell in support of the position taken by Justices Stewart and Marshall. In short, the decision could have been much different if the focus of the decision was concerned with moral considerations. As such a contrary result was a distinct possibility, perhaps a further examination of the propriety of abandoning moral convictions is warranted.

69 *Id.* at 375.

70 *Id.* at 382-83.

71 *Id.* at 381-82. It appears as though "suddenly" is an unfortunate choice of adverbs as nearly 200 years have elapsed since the Constitution was adopted.

72 *Id.* at 402.

73 "The Eighth Amendment . . . was included in the Bill of Rights to guard against the use of torturous and inhuman punishments, not those of limited efficacy." *Id.* at 391.

74 *Id.* at 403

75 *Id.* at 400.

Justice was engaged in judicial legislating, a practice he clearly did not favor.

Justice Powell also dissented, but more on the basis of the Court's role in our governmental scheme than the substantive merits of capital punishment. This position is summarized by the following comment:

> *Stare decisis,* if it is a doctrine founded on principle, surely applies where there exists a long line of cases endorsing or necessarily assuming the validity of a particular matter of constitutional interpretation.[76]

Judicial restraint, reasoned Justice Powell, prohibited the Court from reading its concept of "cruel and unusual" into the Constitution.[77] As the legislature, not the judiciary, is the proper assessor of public opinion, its judgment should not be overturned unless extremely ill-conceived.[78] It would be inaccurate to suggest that Justice Powell took no position on the merits, but the clear thrust of his reasoning focused on the scope of judicial review.

"Although personally I may rejoice at the Court's result," said Justice Blackmun, "I find it difficult to accept or to justify as a matter of history, of law, or of constitutional pronouncement."[79] The Court, in his view, could not justify the suddenness with which it struck down capital punishment, having upheld it only one year earlier in *McGautha.*[80]

Justice Rehnquist also voiced his dissent, essentially for the same basic reasons as the others. He noted that the Court did not possess the power to strike down laws it found morally unacceptable.[81] He characterized the decision as an act of will rather than an act of judgment.[82]

In rendering this decision the Supreme Court invalidated the death penalty statutes of over three-fourths of the states along with various federal statutes. However, as Chief Justice Burger pointed out in his dissenting opinion, the Court had left the door open for legislatures to cure the deficiencies five Justices found fatal in deciding the case.

IV. Assessment of Contemporary Standards

A. *Initial Reaction to* Furman v. Georgia: *Legislative Action*

Reaction to the Court's decision was immediate, mixed and intense.[83] Proponents of capital punishment were naturally disappointed. However, op-

76 *Id.* at 428 (Powell, J., dissenting.)
77 *Id.* at 458.
78 *Id.* at 443.
79 *Id.* at 414, (Blackmun, J., dissenting.)
80 *Id.* at 408.
81 *Id.* at 467 (Rehnquist, J., dissenting.)
82 *Id.* at 468.
83 Perhaps the intensity of the reaction among proponents of capital punishment was best reflected by the action taken by New Hampshire representative, Louis C. Wyman. Wyman introduced a proposed amendment permitting state legislatures to impose capital punishment "in cases involving deliberate and willful taking of human life." Capital Times (Madison, Wisconsin), June 30, 1972, at 26. Favorable reaction to the decision is typified by the remarks of Senator Edward Kennedy. He said the decision was one of the great judicial milestones in American history. See L. C. BERKSON, THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT 49 (1975).

ponents of the death sentence were not totally satisfied either, as many of them felt the Court should have found the punishment to be *per se* violative of the eighth and fourteenth amendments.

There is no doubt that legislative action regarding any issue has an impact on judicial determinations. This is particularly true when a concept such as "evolving standards of society" is espoused as an important factor in a Court's analysis. Therefore, it would have been reasonable to conclude that the legislative response to *Furman* would weigh heavily on a subsequent decision of the Court for two reasons. First, the *Furman* majority had forced legislatures to enact new statutes in order to reinstate the death penalty. Should the legislatures reconsider the issue and conclude that the death penalty merited revitalization, the majority of the Court would likely be bound to strongly reconsider their respective positions. If, in light of *Furman,* state legislatures had deemed reinstatement of capital punishment a worthwhile effort, it would indicate the possibility of a judicial misreading of then current opinion. Second, the four dissenters felt it unwise to intrude into legislative decisions. Therefore, if only a small number of legislatures were to reinstate the death penalty, it is possible the dissenters would feel justified in overruling these few states; for clearly the predominant legislative opinion would be opposed to capital punishment.

Following *Furman,* state legislatures passed capital punishment provisions in unprecedented volume. By 1976, 35 states passed death sentence statutes.[84] In 1974, Congress itself enacted a statute providing for the death penalty when aircraft piracy resulted in death.[85] Clearly, a majority of states were willing to test the Court's conviction.

This responding legislation is of two major types. First, the majority of state statutes provide for a mandatory death sentence upon conviction of a specified crime. Second, a smaller number of statutes call for a balancing of aggravating and mitigating circumstances before the sentence is imposed. The states of Arizona, Connecticut, Florida, Georgia, Nebraska, Ohio and Utah specifically provide for an aggravating-mitigating circumstances test.[86]

As a result of this new legislation, 254 persons were sentenced to death in the years following *Furman.* By March, 1976, 460 persons in all were awaiting execution.[87] Thus, the stage was set for the Court to once again hear argument on the issue of cruel and unusual punishment as it applied to capital punishment.

V. The 1976 Cases

A. *Non-Mandatory Death Sentences*

1. *Gregg v. Georgia*

Troy Gregg was charged with committing armed robbery and murder. In accordance with Georgia procedure in capital cases, the trial proceeded in a

84 *See* 96 S. Ct. 2909, 2928, n.23.
85 Antihijacking Act of 1974, 49 U.S.C. §§ 1472(i), (n) (Supp. IV 1974).
86 *See* note 84, *supra* for reference to the specific statutes. An indication of the types of aggravating and mitigating circumstances which state legislatures have deemed appropriate for the sentencing authority to consider will be found in the Georgia and Florida statutes considered in part V of this note.
87 Gregg v. Georgia, 96 S. Ct. 2909, 2929 (1976).

bifurcated manner: the determination of guilt was followed by a separate sentencing stage. The jury found Gregg guilty of two counts of armed robbery and two counts of murder.[88]

The penalty stage took place before the same jury. The judge instructed the jury that it could recommend either the death penalty or life imprisonment, but it could not authorize the imposition of the death sentence unless it found, beyond a reasonable doubt, one of the following aggravating circumstances:

> One—that the offense of murder was committed while the offender was engaged in the commission of two other capital felonies, to-wit the armed robbery of Simmons and Moore.
> Two—that the offender committed the offense of murder for the purpose of receiving money and the automobile . . .
> Three—the offense of murder was outrageously and wantonly vile, horrible and inhuman, in that they [sic] involved the depravity of the mind of the defendant.[89]

The jury ultimately found the first and second of these circumstances to exist and returned a sentence of death on each count.

The Supreme Court of Georgia affirmed the convictions and the imposition of the death sentences for each of the murder counts.[90] The court determined that the sentences were not the result of prejudice or any other arbitrary factor. Additionally, as to the murder convictions, it concluded that the penalties were not excessive or disproportionate to the penalty ordinarily applied in similar cases, considering the nature of the crime and the defendant. However, because capital punishment was rarely applied for such a crime, the court vacated the death sentences imposed for robbery.[91]

Following *Furman*, Georgia retained the death penalty for six categories of crime: murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason and aircraft hijacking.[92] After a verdict, finding or plea of guilty to one of these capital crimes, a presentencing hearing is conducted before whoever made the guilt determination. At the hearing:

> the judge [or jury] shall hear additional evidence in extenuation, mitigation, and aggravation of punishment. . . . [The judge or jury shall hear arguments by the prosecutor and the defendant.] . . . [T]he jury shall retire to determine whether any mitigating or aggravating circumstances . . . exist and whether to recommend mercy for the defendant.[93]

The judge or jury must find beyond a reasonable doubt that one of ten specified

88 The evidence at the guilt trial established that on November 21, 1973 Gregg and a travelling companion, Floyd Allen, were picked up by Fred Simmons and Bob Moore. Allen later told the authorities that Simmons and Moore were shot by Gregg when they were returning to the car. Gregg signed a statement admitting he had shot them but, unike Allen, who said Gregg had robbed them of their valuables, Gregg indicated he had shot them because of fear and self-defense claiming that Simmons and Moore had attacked him and Allen with a pipe and a knife. *Id.* at 2918-19.

89 *Id.* at 2919.

90 Gregg v. State, 233 Ga. 117, 210 S.E.2d 659 (1974).

91 96 S. Ct. 2909, 2919.

92 *Id.* at 2920.

93 GA. CODE ANN. § 27-2503 (Supp. 1976).

aggravating circumstances exists.[94] Although the statute refers to consideration of mitigating circumstances, it does not enumerate any such circumstances, nor does it indicate the relative weight such factors are to be given. Thus it is less than clear whether the finding of a single mitigating circumstance precludes imposition of the death sentence.

The Georgia statute also provides for a special expedited review directly to the Georgia Supreme Court.[95] In affirming any death sentence, that court must

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94 G.S.A. 27-2534.1 provides as follows:

27-2534.1 Mitigating and aggravating circumstances; death penalty

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.

(b) In all cases of other offenses 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 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 arrest or custody in a place of lawful confinement, of himslf or another.

(c) The statutory instructions as determined by the trial judge to be warranted by the evidence shall be given in charge and in writing to the jury for its deliberation . The jury, if its verdict be a recommendation of death, shall designate in writing, signed by the foreman of the jury, the aggravating circumstance or circumstances which it found beyond a reasonable doubt. In non-jury cases the judge shall make such designation. Except in cases of treason or aircraft hijacking, unless at least one of the statutory aggravating circumstances enumerated in section 27-2534.1(b) is so found, the death penalty shall not be imposed. GA. CODE ANN. § 27-2503 (Supp. 1976).

95 Section 27-2537 governs this appeal process and provides as follows:

27-2537 Review of death sentences

(a) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Supreme Court of Georgia. The clerk of the trial court, within 10 days after receiving the transcript, shall transmit the entire record and transcript to the Supreme Court of Georgia together with a notice prepared by the clerk and a report prepared by the trial judge. The notice shall set forth the title and docket number of the case, the name of the defendant and the name and address of his attorney, a narrative statement of the judgment, the offense, and the punishment prescribed. The report shall be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Georgia.

(b) The Supreme Court of Georgia shall consider the punishment as well as any errors enumerated by way of appeal.

(c) With regard to the sentence, the court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor, and

(2) Whether, in cases other than treason or aircraft hijacking, the evidence supports the

express reference to similar cases it has considered in determining the appropriateness of the death penalty.[96]

This scheme was specifically devised to avoid the *Furman* infirmities. The legislature curtailed judge and juror discretion by establishing the aggravating-mitigating guidelines. Additionally, procedural rights of the defendant were to be further assured by providing automatic appeal directly to the state Supreme Court.

Throughout the opinion the Supreme Court noted its general reluctance to find the death penalty unconstitutional. Two factors in particular colored the Court's opinion of its proper role concerning this highly controversial issue. First, the Court expressed concern over the ramifications of finding capital punishment to be unconstitutional, noting that only a constitutional amendment could reinstate the punishment. Secondly, as contemporary community standards were integrally related to constitutionality and better reflected through legislative enactments than judicial decisions, the Court considered the elected branch particularly well suited to determine the validity of the death penalty.

It was in this perspective that the Court addressed itself to the ultimate issue of whether the punishment of death was, under all circumstances, "cruel and unusual" in violation of the eighth and fourteenth amendments. As in *Furman*, the holding on this issue was succinctly stated.

> We hold that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it.[97]

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jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 27-2534.1 (b), and

(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(d) Both the defendant and the State shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.

(e) The court shall include in its decision a reference to those similar cases which it took into consideration. In addition to its authority regarding correction of errors, the court, with regard to review of death sentences, shall be authorized to:

(1) Affirm the sentence of death; or

(2) Set the sentence aside and remand the case for resentencing by the trial judge based on the record and argument of counsel. The records of those similar cases referred to by the Supreme Court of Georgia in its decision, and the extracts prepared as hereinafter provided for, shall be provided to the resentencing judge for his consideration.

(f) There shall be an Assistant to the Supreme Court, who shall be an attorney appointed by the Chief Justice of Georgia and who shall serve at the pleasure of the court. The court shall accumulate the records of all capital felony cases in which sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. The Assistant shall provide the court with whatever extracted information it desires with respect thereto, including but not limited to a synopsis or brief of the facts in the record concerning the crime and the defendant.

(g) The court shall be authorized to employ an appropriate staff and such methods to compile such data as are deemed by the Chief Justice to be appropriate and relevant to the statutory questions concerning the validity of the sentence.

(h) The office of the Assistant shall be attached to the office of the Clerk of the Supreme Court of Georgia for administrative purposes.

(i) The sentence review shall be in addition to direct appeal, if taken, and the review and appeal shall be consolidated for consideration. The court shall render its decision on legal errors enumerated, the factual substantiation of the verdict, and the validity of the sentence. GA. CODE ANN. § 27-2537 (Supp. 1976).

96 *See* note 95 *supra.*

97 96 S. Ct. 2909, 2932.

The finding of constitutionality rested upon four major considerations: (1) the long history of judicial acceptance; (2) contemporary societal acceptance of the punishment; (3) the useful social purposes served by the sentence; and (4) proportionality of the punishment to the particular crimes considered.[98]

Although the plurality recognized that the eighth amendment should be interpreted in a flexible and dynamic manner,[99] they noted that history and precedent supported the constitutionality of capital punishment.[100] Justice Stewart pointed out that the death sentence was accepted by the Framers, at the time the fourteenth amendment was adopted and in Supreme Court cases of more recent vintage.[101] Thus the plurality strictly adhered to the two-pronged test of *Trop*. While verbally espousing a dynamic interpretation of "cruel and unusual," the Court nevertheless appeared inextricably bound to consider historical acceptance as well. If the evolving standards approach was the sole test, reference to the Framers would be unnecessary. It is evident that, regardless of formal nomenclature, the Court was most sensitive to the concepts of *stare decisis* and precedent, and made its ruling accordingly.

The Court did not, however, neglect the contemporary standards aspect of the constitutionality test and, in fact, concluded that capital punishment was acceptable to society. As a basis for this conclusion, the plurality noted that both legislatures and juries had recently expressed approval of the death penalty.

In expressly relying on the post-*Furman* statutes, the Court illustrated its perception of the legislature's role in this area. Justice Stewart pointed out that recent legislative enactments made it clear that elected representatives had not rejected capital punishment.[102] Deeming the legislative branch to be a more appropriate sounding board of public opinion than the judiciary, the Court therefore concluded a similar popular acceptance of the penalty.

The plurality also viewed the jury as a "significant and reliable objective index of contemporary values. . . ."[103] Justice Stewart was not convinced that the infrequent imposition of the death sentence was caused by rejection of capital punishment *per se*. Rather, he felt it indicated that jurors selected only the most atrocious crimes as meriting the ultimate sanction.[104] Combining jury and legislative acceptance, the Court concluded that contemporary society was not offended by capital punishment.

In reference to earlier cruel and unusual decisions, the Court noted the necessity for any penalty to comport with human dignity. The plurality indicated that to do so a punishment must serve a useful social purpose and thereby avoid infliction of needless suffering.[105] It was concluded that two social purposes were served by capital punishment: retribution and deterrence. Justice Stewart held that while retribution was no longer the dominant objective of the criminal

98 *Id.*
99 *Id.* at 2924. The Court cited Weems v. United States, 217 U.S. 349, Trop v. Dulles, 356 U.S. 86, and Furman v. Georgia as support for this interpretation. Clearly, such an interpretation is mandated by those cases as indicated previously.
100 *Id.* at 2927.
101 *Id.* at 2927-28.
102 *Id.* at 2928.
103 *Id.* at 2929.
104 *Id.*
105 *Id.* at 2929-30.

law, it was still consistent with respect for the dignity of man.[106] If, for particular crimes, society demanded retribution in the form of the death penalty, absent a clearly unreasonable situation, the plurality would not interfere.

Justice Stewart also opined that the social purpose of deterrence was fulfilled by capital punishment. Noting that empirical evidence neither supported nor refuted a deterrent effect, he felt it safe to assume that for some crimes the penalty did provide significant deterrence.[107] Furthermore, since legislatures deemed the death penalty to have such a deterrent effect, Stewart would not dispute that conclusion and on that basis hold the death penalty unconstitutional.

Justice Stewart's reasoning leads to an uncomfortable conclusion. The state may take a criminal's life merely because society believes the death penalty has a significant deterrent effect. This belief, in itself, justifies imposition of the ultimate punishment despite the fact that the empirical evidence is inconclusive. If cruel and unusual means that life is not to be taken without actual social justification, logic would require the State to prove a deterrent effect before implementing the death penalty. Clearly, then, notions of human dignity require that when the deterrent effect is inconclusive, convicted defendants should not receive the ultimate penalty.

The plurality's strongest argument in upholding the death penalty is the affirmative legislative response immediately following *Furman*. Even assuming that public opinion favors the death penalty, under the eighth amendment such a factor is not determinative. If this were the case, the eighth amendment would be a hollow protection, as it would provide no greater protection than what prevailing attitudes would allow.[108] Clearly, the protections set out in the Bill of Rights were meant to secure more than that which society is willing to allow at any given point in time. The pitfall of relying too heavily on legislative action is the strong possibility that there will be a resultant weakening of individual rights.

The plurality admitted that there are a great many uncertainties in this area. The more notable of these include the deterrent effect of capital punishment, the reasons jurors seldom impose the sanction and the degree to which retributive purposes should be allowed to influence the decision to demand the death sentence. Therefore, the plurality rested its emphasis on the one indisputable certainty in this area, the strong legislative response to *Furman*. Consequently, it is accurate to conclude that protection of a defendant's eighth amendment rights rests more with the legislature than the Supreme Court. Had the Court taken a more active view of its role, a different result may well have been forthcoming.

Having determined that the death penalty was not unconstitutional *per se*, the Court proceeded to consider the validity of the particular Georgia statute before it. The plurality approved of Georgia's bifurcated procedure, noting it

106 *Id.* at 2930.
107 *Id.* at 2931.
108 Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355, 362 (1973).

diminished the possibility of arbitrarily imposed sentences.[109] Furthermore, requiring the judge or jury to specify the aggravating circumstances present as a prerequisite to imposing the death penalty rectified the infirmities struck down by the Court in *Furman*. Finally, the plurality approved of the appellate review provisions, noting that they served as a check against "random or arbitrary imposition of the death penalty."[110] For these reasons the Georgia scheme was upheld.

Although Georgia has made an effort to provide adequate safeguards for those who face the death sentence, the statutory scheme is far from a defendant's panacea. Neither this scheme nor any other the Court considered attempted to deal with non-courtroom discretion. No standards are established for the prosecutor to employ in reaching certain key decisions inherent in the process. Indeed, the prosecutor's discretion is virtually unlimited in determining which crime the defendant will be charged with, and which alternative sentence the state shall seek. Although the Court expressly indicated that it would not deal with this issue, the deficiency exists and is potentially a difficult problem which must be resolved.

Perhaps the most significant deficiency in the Georgia statutory scheme is that the jury is not adequately appraised of the manner in which mitigating circumstances are to be considered. It is far from clear whether the presence of a mitigating circumstance automatically precludes imposition of the death sentence. Additionally, while aggravating circumstances are specifically enumerated in the statute, mitigating circumstances are only generally mentioned. Accordingly, it is likely that jurors will focus an inordinate amount of attention on aggravating circumstances at the expense of fully considering mitigating circumstances of equal significance.

2. *Proffitt v. Florida* and *Jurek v. Texas*

In *Proffitt v. Florida* the petitioner, Charles Proffitt, was tried, found guilty and sentenced to death for first degree murder. The statutory scheme in Florida differs from the Georgia scheme in only a few particulars. The jury's verdict,

109 *Id.* at 2935. The plurality opinion reads as follows:

> In summary, the concerns expressed in *Furman* that the penalty of death not be imposed in an arbitrary or capricious manner can be met by a carefully drafted statute that insures that the sentencing authority is given adequate information and guidance. As a general proposition these concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information. *Id.*

The plurality went on to caution against reading too much into the foregoing comment by issuing this caveat:

> We do not intend to suggest that only the above-described procedures would be permissible under *Furman* or that any sentencing system constructed along these general lines would inevitably satisfy the concerns of *Furman*, for each distinct system must be examined on an individual basis. *Id.*

110 *Id.* at 2940. The plurality went on to state with greater elaboration why it found the automatic appeal an adequate safeguard.

> In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedure assures that no defendant convicted under such circumstances will suffer a sentence of death. *Id.*

determined by a majority vote, is only advisory; final determination rests with the trial judge.[111] In addition, the Florida statute expressly provides for both mitigating and aggravating circumstances.[112] Finally, the statute provides greater guid-

111 Proffitt v. Florida, 96 S. Ct. 2960, 2965 (1976).

112 *Id.* The Florida statute is set out in its entirety below.

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence

(1) Separate proceedings on issue of penalty.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by § 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in Chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (6) and (7). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the constitutions of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) Advisory sentence by the jury.—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating cricumstances exist as enumerated in subsection (6);

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) Findings in support of sentence of death.—Notwithstanding the recommendation of a majority of the jury, the court after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection (6), and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection (7), to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (6) and (7) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with section 775.082.

(4) Review of judgment and sentence.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within sixty (60) days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed thirty (30) days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) Aggravating circumstances.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

ance to both the judge and the jury regarding the importance of these circumstances:

> [T]he jury [and the judge] is directed to consider '[w]hether sufficient mitigating circumstances exist which outweigh aggravating circumstances found to exist'; and . . . [b]ased on those considerations, whether the defendant should be sentenced to life [imprisonment] or death.[113]

By a 7-2 vote the Florida statute was upheld for basically the same reasons set forth in *Gregg v. Georgia.*

In *Jurek v. Texas,* Jerry Jurek was convicted of murder in the course of committing and attempting to commit kidnapping and forcible rape upon a ten year old girl.[114] The Texas statutory scheme differs significantly from the previous two discussed. Of significance was the fact that Texas severely limits the categories of murder for which the death sentence may be imposed. The situations include intentional and knowing murders of peace officers and prison employees, murders for remuneration, murders committed in the course of carrying out particular felonies, and murders committed during an escape from a penal institution.[115]

The statutory procedure calls for the jury to answer three questions. Essentially the questions require the jury to consider: whether the defendant acted deliberately and with the reasonable expectation that death would result; whether the defendant would constitute a continuing threat to society; and whether the conduct of the defendant was unreasonable in response to any provocation which may have existed.[116] If the jury finds that the State has proved beyond a reasonable doubt that the answer to each of the three specified questions is yes, the death sentence is imposed. However, if the jury finds the answer to any one of the questions to be no, a sentence of life imprisonment will be imposed.[117]

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(6) Mitigating circumstances.—Mitigating circumstances shall be the following:
(a) The defendant has no significant history of prior criminal activity.
(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
(c) The victim was a participant in the defendant's conduct or consented to the act.
(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
(e) The defendant acted under extreme duress or under the substantial domination of another person.
(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.
(g) The age of the defendant at the time of the crime.
FLA. STAT. ANN. § 921.141 (Cum.Supp. 1976-1977).

113 *Id.* Quoted portions are taken from Sections 921.141 (2)(b)-(c) (Supp. 1976-1977) of the Florida Statutes Annotated.

114 Jurek v. Texas, 96 S. Ct. 2950, 2953-54 (1976).

115 *Id.* at 2955. See TEX. PENAL CODE ANN. tit. 5, § 19.03 (Vernon 1974).

116 *See* note 117 *infra.*

117 Article 37.071 in its entirety reads as follows:
Art. 37.071. Procedure in capital case
(a) Upon a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment. The proceeding shall be conducted in the trial court before the trial jury as soon as practicable. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United

This scheme was also upheld by the Court. In announcing the plurality opinion, Justice Stewart noted that although Texas did not adopt the aggravating-mitigating circumstances approach, an identical purpose was served by narrowing the categories of crime for which the death penalty could be imposed.[118]

The significance of this particular case is that a new concept was introduced to the capital punishment issue. Justice Stewart stated that constitutional considerations required the jury to consider mitigating circumstances.[119] As the defendant was allowed to introduce evidence of mitigating circumstances in aiding the jury's determination of the second question, the plurality concluded that the Texas procedure adequately complied with this new demand. This was held despite the absence of explicit reference to mitigating circumstances in the statute.[120]

These landmark cases indicate that *McGautha* was not an anomaly in an otherwise consistent trend of cases. The Court did not refuse to rule on the death penalty *per se* and it did not use a procedural defect to reverse a sentence of death. Rather, the *Jackson* line of cases is now obsolete and once again the death sentence is a viable sentencing alternative. The impact of these decisions is significant because, given the reluctance of the present Court to intervene in legislative determinations, it is highly unlikely the Court will grant certiorari on the issue of capital punishment *per se* in the immediate future. Thus, any relief sought must be accomplished through either the executive or legislative branch of government.

States or of the State of Texas. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(b) On conclusion of the presentation of the evidence, the court shall submit the following issues to the jury:

(1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and

(3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

(c) The state must prove each issue submitted beyond a reasonable doubt, and the jury shall return a special verdict of "yes" or "no" on each issue submitted.

(d) The court shall charge the jury that:

(1) it may not answer any issue "yes" unless it agrees unanimously; and

(2) it may not answer any issue "no" unless 10 or more jurors agree.

(e) If the jury returns an affirmative finding on each issue submitted under this article, the court shall sentence the defendant to death. If the jury returns a negative finding on any issue submitted under this article, the court shall sentence the defendant to confinement in the Texas Department of Corrections for life.

(f) The judgment of conviction and sentence of death shall be subject to automatic review by the Court of Criminal Appeals within 60 days after certification by the sentencing court of the entire record unless time is extended an additional period not to exceed 30 days by the Court of Criminal Appeals for good cause shown. Such review by the Court of Criminal Appeals shall have priority over all other cases, and shall be heard in accordance with rules promulgated by the Court of Criminal Appeals.

TEX. PENAL CODE ANN. tit. 8 § 37.071 (Vernon 1974).

118 96 S. Ct. 2950 Justice Stewart went on to state that "in essence, the Texas statute requires that the jury find the existence of a statutory aggravating circumstance before the death penalty may be imposed." 96 S. Ct. at 2955-56.

119 *Id.* at 2956. Justice Stewart amplified the statement in stating:

> A jury must be allowed to consider on the basis of all the evidence not only why a death sentence should be imposed, but also why it should not be imposed. *Id.*

120 *Id.* at 2957.

3. Dissenting Opinions in *Gregg, Jurek* and *Proffitt*

Justices Brennan and Marshall continued to adhere to their *Furman* positions. Both of them would continue to hold the death penalty *per se* violative of the eighth amendment. The dissenting opinions are of importance in that they address issues the majority deemed less than noteworthy. By examining the issues discussed by the dissenters, it is possible to observe the significant but subtle impact judicial philosophy had on these cases.

The remarks of Justice Brennan directly address the Court's preoccupation with the procedural aspects of capital punishment.[121] The eighth amendment, in his mind, calls for analysis of the nature of the punishment itself. Furthermore, he indicated that the Court is required to make a moral decision. Brennan's forceful comments in this regard were as follows:

> [The cruel and unusual punishments clause] embodies in unique degree moral principles. . . . This Court inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether, when individuals condemned to death stand before our Bar, "moral concepts" require us to hold that the law has progressed to the point where we should declare that the punishment of death, like punishments of the rack, the screw and the wheel, is no longer morally tolerable in our civilized society.[122]

As the majority felt the Court could not make moral decisions, the disagreement concerned the proper role of the judiciary rather than personal acceptance of the punishment.

Philosophical differences, however, were not the only basis of disagreement. Justice Stewart found that the death penalty is inconsistent with human dignity and that it fails to serve a useful social purpose. The sentence was inconsistent with the fundamental premise that even the most vile criminal is a human being possessed of human dignity.[123] Furthermore, as the penalty treated humans as nonhumans,[124] it could not withstand constitutional scrutiny. The death sentence was a pointless infliction of excessive punishment when it did not more adequately achieve social purposes than less severe sanctions.[125] As empirical evidence did not prove death to be a greater deterrent than imprisonment it was "pointlessly inflicted." As such, it was excessive and therefore prohibited by the eighth amendment.

Justice Marshall also felt that the punishment failed to further legitimate social goals. However, the significance of his opinion lies in his ability to

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121 *Id.* at 2971, (Brennan, J., dissenting.) Justice Brennan reiterated the position he took in *Furman,* making the following remarks:

> In Furman v. Georgia, . . . I read "evolving standards of decency" as requiring focus upon the essence of the death penalty itself and not primarily or solely upon the procedures under which the determination to inflict the penalty upon a particular person was made. *Id.*

122 *Id.* at 2972.

123 *Id.* Quoting from his dissenting opinion in *Furman.* At another point in his opinion Justice Brennan said, "The calculated killing of a human being by the State involves, by its very nature, a denial of the executed person's humanity. . . . An executed person has indeed 'lost the right to have right.'" *Id.*

124 *Id.*

125 *Id.*

minimize the importance of legislative reaction to *Furman*. Pointing out that the majority conceded that public endorsement could not save an excessive penalty, he noted that the intrinsic nature of the punishment should be examined for constitutional flaws before proceeding to consider the acceptability factor. Thus, in this regard, the passage of statutes had no bearing whatsoever on the resolution of the issue before the Court.[126]

It could be argued that the seven Justices who ruled in favor of the death sentence had abdicated their responsibility to interpret the Constitution in favor of legislatures. Less dramatically, by allowing legislatures to heavily influence its decision, the Court left itself vulnerable to charges that it had rendered the eighth amendment a "hollow protection" for American citizens.

B. *Mandatory Death Sentences:* Woodson *and* Roberts

In *Woodson v. North Carolina* the Court considered the constitutionality of mandatory death statutes for the first time.[127] The petitioners in *Woodson* were convicted of first degree murder and, as the statute required, sentenced to death.[128] By a narrow 5-4 margin, the Court held that the mandatory death penalty statute[129] was violative of the eighth and fourteenth amendments.[130]

Without examining the particular statute, Justice Stewart identified the constitutional deficiency common to all mandatory provisions. He concluded that such statutes depart markedly from contemporary standards.[131] Thus, they fail to meet one of the primary tests of constitutionality, comporting with evolving standards. He noted that the passage of mandatory death statutes did not indicate acceptance of the practice. The apparent inconsistency in refusing to accept this particular legislative decision was avoided by concluding that the states had enacted mandatory provisions only to satisfy the *Furman* standard.[132] If the legislatures had not misread *Furman,* the Court felt they would have avoided mandatory death penalty statutes altogether.

Thus, the North Carolina statute was held violative of the Constitution. Under that scheme, no standards had been promulgated to guide the jury's sentencing determination. Furthermore, there was a failure to provide assurance that death sentences were not being imposed arbitrarily or capriciously by

126 *Id.* at 2974, (Marshall, J., dissenting.)
127 Woodson v. North Carolina, 96 S. Ct. 2978, 2987 (1976).
128 *Id.* at 2981-82.
129 *Id.* at 2982. The applicable North Carolina statute read in part:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary or other felony, shall be deemed to be punished with death.

N.C. GEN. STAT. §§ 14-17 (Cum. Supp. 1975).
130 The Court was divided as follows: Justice Stewart announced the judgment of the Court, along with Justices Powell and Stevens. Justices Brennan and Marshall concurred in the judgment for the reasons set out in their dissenting opinion. Chief Justice Burger, and Justices Blackmun, White and Rehnquist dissented.
131 96 S. Ct. at 2990. In this regard Justice Stewart noted that the history of mandatory death penalty statutes illustrated that the punishment was unduly harsh and unworkably rigid. *Id.* at 2986. He indicated that both jurors and legislatures joined in their aversion toward capital punishment. *Id.* at 2984, 2987.
132 *Id.* at 2988-89.

providing for appellate review.[133] As the system did not allow for particularized consideration of each defendant and the nature of each crime,[134] it was deemed inconsistent with respect for humanity.[135]

Roberts v. Louisiana, the second mandatory death sentence case heard that day, was nearly identical to *Woodson* and was decided on the same grounds. Justice Stewart noted that although Louisiana adopted a more narrow definition of first degree murder than North Carolina, the statute nevertheless failed to provide adequate sentencing standards.[136] Obviously, then, expressed standards rather than narrow definitions of offenses are the primary safeguards the Court looks to in its ultimate decision.

These cases clearly indicate that mandatory death sentences cannot survive constitutional scrutiny. This is due primarily to the fact that opposition to mandatory death sentence has been relatively strong throughout this century and remains strong today. Again, though, such an analysis further emphasizes the heavy reliance the Court places on historical acceptance of particular punishments.

VI. Dealing With the Death Penalty After *Gregg v. Georgia*

Similar to the post-*Furman* situation, the 1976 cases will undoubtedly precipitate much new legislation. At the very least, those states which currently have mandatory death statutes must modify them, or enact new provisions, in order to meet the standards set forth in *Gregg* and the other 1976 cases. Furthermore, those statutes which possess both mandatory and non-mandatory characteristics are likely to be challenged in the courts or modified by state legislatures. For these reasons, an articulation of the minimum constitutional requirements death statutes must possess is useful in order to competently advise legis-

133 *Id.* at 2991. In summarizing his view of the statute, Justice Stewart said the statute did not fulfill *Furman's* basic requirement of "replacing arbitrary and wanton jury discretion with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death." *Id.*

134 *Id.*

135 *Id.* More specifically, the plurality opinion reads as follows.

> ". . . in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.*

136 At this time the Louisiana statute provides as follows:

§ 30. First degree murder

First degree murder is the killing of a human being:

(1) When the offender has a specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated rape, aggravated burglary, or armed robbery; or

(2) When the offender has a specific intent to kill, or to inflict great bodily harm upon, a fireman or a peace officer who was engaged in the performance of his lawful duties; or

(3) Where the offender has a specific intent to kill or to inflict great bodily harm and has previously been convicted of an unrelated murder or is serving a life sentence; or

(4) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person;

(5) When the offender has specific intent to commit murder and has been offered or has received anything of value for committing the murder.

For the purposes of Paragraph (2) hereof, the term peace officer shall be defined and include any constable, sheriff, deputy sheriff, local or state policeman, game warden, federal law enforcement officer, jail or prison guard, parole officer, probation officer, judge, district attorney, assistant district attorney, or district attorneys' investigator.

Whoever commits the crime of first degree murder shall be punished by death. LA. REV. STAT. ANN. § 14.30 (West Supp. 1976).

latures or litigate death penalty cases. As a result of *Gregg* and the others, four basic criteria must be considered in determining whether a statute will be held constitutional.

Initially, the statutory penalty must comport with civilized standards of human dignity. Considering the doctrines employed in *Weems, Trop, Furman* and the 1976 cases, the test appears to be three-pronged. First, the historical and traditional use of a punishment must be considered. The contemporary statutory penalty should be similar to the traditional punishment imposed for the offense involved. Second, legislative enactments in other states should parallel the new statute. To a limited extent, a legislature can use its own enactment to indicate society's acceptance. However, the likelihood of validity is enhanced when the legislature can direct the court's attention to similar statutes in other jurisdictions. Conversely, if the new statute departs significantly from prior statutes within the jurisdiction or current statutes in other states, the penalty appears suspect and may not be upheld. Finally, examining the penalty most frequently prescribed by jurors for similar offenses is a worthwhile endeavor. The "human dignity" test requires courts to determine whether jurors accept the statutory penalty. Thus, prior jury behavior should be considered before establishing the maximum punishment for a particular offense.

The Supreme Court recently announced that during the upcoming term it will reconsider the validity of imposing the death sentence for rape.[137] The resolution of the issue will rest almost entirely on human dignity considerations. It would not be surprising to find the Court striking down the death sentence for a rape conviction on the ground that jurors and legislatures have traditionally found that such a penalty is, for this crime, socially unacceptable.

Legislatures must construct sentencing standards which prohibit judges and juries from arbitrarily or capriciously imposing the death penalty. The opportunity for imposing arbitrary sentences is reduced when the judge and jury are provided with adequate information. Therefore, no unnecessary restrictions should be placed on the introduction of evidence pertaining to the sentence.[138] The Court intimated that providing for a bifurcated procedure is the best method of assuring that the jury is given adequate guidance and information.[139] Although this procedure is not mandatory, it should receive careful consideration.

The sentencing authority should be directed to consider the specific circumstances of the crime and the individual characteristics of the defendant. The aggravating-mitigating circumstances approach fulfills this requirement. A knowledge of eighth amendment history will aid in determining which circumstances to include. Historically, the eighth amendment has proscribed barbarous and inhuman punishments as well as those which are disproportionate to the crime committed. Naturally, the death penalty must be justified in these terms. Therefore, the mitigating and aggravating circumstances should aid in explaining the reasons why the death sentence is humane and proportional to the crime which was perpetrated.

137 Coker v. Georgia, *cert. granted,* 45 U.S.L.W. 3249 (U.S. Oct. 5, 1976).
138 96 S. Ct. 2909, 2939.
139 *Id.* at 2933.

The statute clearly must allow the judge or jury to consider both the aggravating and mitigating circumstances. However, it is not essential that the statute specifically enumerate both types. Rather, the constitutional requirement is met if, somewhere in the sentencing process, be it by way of jury instructions, the answers to specific questions, or other means, due consideration is given to the reasons the death penalty should not be imposed.[140] In *Jurek,* the Court mentioned that the defendant must be provided with the opportunity to present evidence of mitigating circumstances. The Court failed, however, to state whether the defendant must affirmatively demonstrate this right is being waived voluntarily and intelligently, should he not present such evidence. Therefore, whether the aggravating-mitigating test requires such a showing is an open question. In drafting new legislation this problem should be addressed if the satute is to be adequately insulated from constitutional attack. This problem can be obviated by specifically enumerating both types of circumstances, providing that the defendant was advised of his right to introduce evidence regarding these circumstances, and offering a means for the defendant to indicate he waived his right to introduce such evidence.

Finally, in *Woodson v. North Carolina* the Court implied that judicial review of death sentences is mandated by the eighth amendment.[141] Automatic appellate review serves two useful purposes: first, it checks the arbitrary and capricious exercise of the sentencing power;[142] and second, it can serve to articulate the meaning of standards which might otherwise be unconstitutionally vague. Thus, new statutes should provide for automatic review as it standardizes sentences and helps insure constitutionality for the statute.

More generally, in either the legislative or judicial context, it is well to note the evils the eighth amendment is designed to curb. The eighth amendment, as interpreted by the Court, prevents two primary abuses. Clearly, it prohibits inhuman and barbarous punishments. Additionally, though, it minimizes the possibility of irrational and inconsistent imposition of the death penalty. With these considerations in mind, statutes and litigating strategy can be formulated which adequately deal with the recent Supreme Court rulings.

VII. Conclusion

In the final analysis, capital punishment is valid today because the Court was reluctant to intercede in legislative determinations. No fewer than four Supreme Court Justices publicly expressed their personal aversion to the death sentence. Additionally, two other Justices, Stewart and White, have held the death penalty unconstitutional under certain circumstances. The issue is extremely controversial and emotional; its visibility is not likely to diminish merely as a result of the decisions of this past July.

The notion that the eighth amendment primarily embodies procedural safeguards is of recent vintage. Quite possibly that device was employed by the Court as a means of avoiding the ultimate issue. Inexplicably, the procedural

140 *Id.* at 2956.
141 *Id.* at 2991.
142 *Id.* at 2939.

doctrine has now become the heart of the Court's analysis. However, given the Court's unenthusiastic support of capital punishment, it is possible that they have constructed elaborate procedural safeguards to ameliorate the impact of legislative pronouncements the Court finds personally distasteful.

The utility of the death sentence is subject to several uncertainties. Discussions of the deterrent effect of capital punishment all lead to the same inconclusive result. The proper role of retribution in the sentencing process has yet to be firmly established. Although the death penalty is not *per se* unconstitutional, and it is possible to promulgate statutes which will survive constitutional analysis, the Court's pronouncements cannot squelch the heated controversy which surrounds this emotional subject.

Bruce J. Meagher