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COMMENTS

CAPITAL PUNISHMENT: CONSTITUTIONAL PARAMETERS FOR THE ULTIMATE PENALTY

I. INTRODUCTION

Four years after *Furman v. Georgia*,¹ the Supreme Court has resolved the major question left unanswered by that decision — does capital punishment per se constitute cruel and unusual punishment in violation of the eighth amendment?² The Court also announced the statutory standards which satisfy *Furman's* requirement that the death penalty not be imposed arbitrarily or capriciously.³ By a 7-2 vote, the Court held that the imposition of the death penalty for murder did not per se constitute cruel and unusual punishment.⁴ By the same vote, the Court upheld the capital sentencing statutes of Georgia, Florida and Texas,⁵ noting that arbitrary and capricious infliction of the death penalty can be avoided “by a carefully drafted statute that ensures that the sentencing authority is given adequate information and guidance.”⁶ By a 5-4 vote, the Court invalidated North Carolina's and Louisiana's mandatory death penalty statutes, holding that the eighth amendment required consideration of individual char-

1. 408 U.S. 238 (1972).

2. U.S. CONST. amend. VIII provides: “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” The Supreme Court held in *Robinson v. California*, 370 U.S. 660, 666 (1972), that the eighth amendment applies to the states through the fourteenth amendment.

3. The Court's per curiam opinion in *Furman* stated: “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.” 408 U.S. at 239-40. The Court's opinion was followed by five majority opinions—Justices Douglas, Brennan, Stewart, White and Marshall, and four dissenting opinions—Chief Justice Burger, Justices Blackmun, Powell and Rehnquist. Although a consensus was not reached, an expression of the five-man majority's common denominator may be found in Justice White's conclusion in his concurring opinion that the death penalty as imposed was unconstitutional since “there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.” *Id.* at 313. The Court did not hold that capital punishment per se violated the eighth amendment, since three members of the majority dealt only with the discretionary aspects of the challenged statutes.

4. On the same day the Court announced its decisions in five separate cases. *Gregg v. Georgia*, 96 S. Ct. 2909 (1976); *Proffitt v. Florida*, 96 S. Ct. 2960 (1976); *Jurek v. Texas*, 96 S. Ct. 2950 (1976); *Woodson v. North Carolina*, 96 S. Ct. 2978 (1976); *Roberts v. Louisiana*, 96 S. Ct. 3001 (1976).

5. See note 4 *supra*.

6. *Gregg v. Georgia*, 96 S. Ct. at 2935.

acteristics of the offender and the circumstances of the offense.⁷ These decisions also have had the effect of invalidating statutes imposing a mandatory death penalty, including Virginia's current capital punishment statute which was held unconstitutional by the Circuit Court of Loudoun County on October 14, 1976.⁸

For now, the legal debate over the death penalty's constitutionality has been silenced, since the majority in the *Gregg* opinions clearly recognized the penalty's constitutional status. Nevertheless, the inability of capital punishment's constitutional supporters and opponents on the Court, in both *Furman* and *Gregg*, to marshal conclusive arguments to underpin their separate opinions, reflected rightful judicial and societal discomfort in dealing with this unique penalty.⁹ The Court faced the dilemma of delimiting the parameters of the current eighth amendment standard of judicial review¹⁰ and subjecting a penalty with at least professed public acceptance to its judicial scrutiny. The net result was that the penalty's ultimate acceptance or rejection has been left up to those responsible for its infliction. This comment will examine the Court's standards for reviewing the constitutionality of the death penalty, including an examination of the types of capital punishment statutes which now meet those standards.

II. THE *Furman* AND *Gregg* STANDARDS

The five concurring justices in *Furman* concluded that the untrammelled discretion granted to judges and juries in imposing capital sentences resulted in the imposition of the death sentence upon a selected few offenders. Only Justices Brennan and Marshall concluded that capital punishment per se violates the eighth amendment. From previous Supreme Court decisions,¹¹ Justice Brennan in *Furman* reasoned that the eighth amendment principally proscribes penalties that are "degrading to the dignity

7. See note 4 *supra*. Subsequently the Court also overturned Oklahoma's mandatory death penalty statute. *Williams v. Oklahoma*, 96 S. Ct. 3218 (1976); *Justus v. Oklahoma*, 96 S. Ct. 3216 (1976).

8. See VA. CODE ANN. §§ 18.2-10 (Repl. Vol. 1975), -31 (Cum. Supp. 1976). For the text of these sections pertaining directly to the death penalty see note 94 *infra*.

9. The death penalty is unique in its severity and its irrevocability. *Furman v. Georgia*, 408 U.S. at 286-91 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring).

10. As Chief Justice Burger noted in his dissent in *Furman v. Georgia*, 408 U.S. at 375-76: There is no novelty in being called upon to interpret a constitutional provision that is less than self-defining, but, of all our fundamental guarantees, the ban on 'cruel and unusual punishments' is one of the most difficult to translate into judicially manageable terms. The widely divergent views of the Amendment expressed in today's opinions reveal the haze that surrounds this constitutional command.

11. See, e.g., *Trop v. Dulles*, 356 U.S. 86 (1958).

of human beings.”¹² In determining whether a penalty comported with human dignity, Justice Brennan formulated a cumulative test: (1) “a punishment must not be so severe as to be degrading to the dignity of human beings”;¹³ (2) “the State must not arbitrarily inflict a severe punishment”;¹⁴ (3) “a severe punishment must not be unacceptable to contemporary society”;¹⁵ and (4) “a severe punishment must not be excessive,” excessive meaning “unnecessary.”¹⁶

Justices Stewart and White, in concluding that the discretionary nature of the statutes before the Court in *Furman* rendered them cruel and unusual punishments, measured the statutes at least partially by the standards enunciated by Justices Brennan and Marshall. Justice Stewart concluded that the death sentences, since they were not mandatory, were cruel in the sense that they went beyond the punishments deemed necessary by the legislatures.¹⁷ Justice White reasoned that since the death penalty was imposed so infrequently it had lost any utilitarian value and thus was a “pointless and needless extinction of life.”¹⁸

The dissenting Justices in *Furman* objected to the majority’s assertion that the Court has the authority to examine the efficacy of punishments which the legislatures have deemed necessary.¹⁹ According to the dissenting view, whether or not a given punishment was necessary has no bearing on its constitutionality since this question was a matter of legislative policy. The *Furman* dissenters did not articulate a standard of judicial review in the mode of Justice Brennan’s four-part test. Although they rejected the test of penological necessity as a proper constitutional measure of capital punishment,²⁰ the dissent implicitly embraced the balance of the Brennan test as a proper standard of judicial review by measuring the death penalty against it.²¹

12. *Furman v. Georgia*, 408 U.S. at 271.

13. *Id.*

14. *Id.* at 274.

15. *Id.* at 277.

16. *Id.* at 279. Justice Marshall argued similarly that a punishment is cruel and unusual for any of four distinct reasons: (1) if it “involve[s] so much physical pain and suffering that civilized people cannot tolerate [it]”; (2) if the punishment has been previously unknown; (3) if the punishment “is excessive and serves no valid legislative purpose;” or (4) if “popular sentiment abhors” the punishment. *Id.* at 330-32.

17. *Id.* at 309.

18. *Id.* at 312.

19. *Id.* at 396-97 (Burger, C.J., dissenting); *id.* at 456 (Powell, J., dissenting).

20. Justice Powell did not reject the Court’s power to strike down penalties as excessive but limited the power to cases where the punishment is “grossly excessive” or “greatly disproportionate.” *Id.* at 458 (emphasis in original).

21. While accepting the notion that the cruel and unusual punishments clause “may ac-

In *Gregg*, the plurality opinion was authored by Justices Stewart, Powell and Stevens.²² Using reasoning adopted by the Justices in their separate opinions in *Furman*, the plurality in *Gregg* concluded that the eighth amendment was not a static concept, but rather "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."²³ Thus an objective examination of contemporary standards was relevant to the application of the eighth amendment.²⁴ The plurality made it clear, however, that the public concept of penological decency by itself was an insufficient measure of the eighth amendment's limitations.²⁵ They noted as Justice Brennan had concluded in *Furman*,²⁶ that a basic concept underlying the eighth amendment was that a punishment must accord with "'the dignity of man.'"²⁷ The plurality then reasoned that to comport with human dignity, a punishment must not be excessive, meaning that it may neither be inflicted unnecessarily and wantonly nor may it be grossly out of proportion to the severity of the crime.²⁸

The *Gregg* standard articulated by the plurality synthesized the standards of judicial review which represented the common ground for constitutional debate in *Furman*. Thus, it may be presumed that the *Gregg* yardstick has become the accepted measure of the eighth amendment's judicial limitations. The difficulty with the standard, of course, is that amorphous concepts such as "human dignity" and "evolving standards of decency" frequently require the Court's members to rely upon their own intuitive notions.

quire meaning as public opinion becomes enlightened by a humane justice," (*Weems v. United States*, 217 U.S. 349, 378 (1910); *accord*, *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958)), the dissent still argued that historical judicial acceptance supports capital punishment's present constitutional status. *See, e.g.*, *Furman v. Georgia*, 408 U.S. at 380-82 (Burger, C.J., dissenting); *id.* at 421-28 (Powell, J., dissenting). *See* notes 33-36 *infra* and accompanying text.

22. These three Justices represented the plurality in each of the five cases of the *Gregg* series. Being appointed by President Ford in December, 1975, Mr. Justice Stevens was the only Justice sitting who did not take part in the *Furman* decision.

23. 96 S. Ct. at 2925. This phrase, used by Chief Justice Warren in *Trop v. Dulles*, 356 U.S. 86, 101 (1958), is quoted consistently throughout both *Furman* and *Gregg*.

24. 96 S. Ct. at 2925.

25. The proscription of cruel and unusual punishments was designed to be a judicially enforced limitation on the exercise of legislative power. This judicial limitation would be meaningless if public opinion was the exclusive interpreter of the standards by which the limitation operates. *See The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 82-83 (1972).

26. *See* notes 12-16 *supra* and accompanying text.

27. 96 S. Ct. at 2925, *quoting from* *Trop v. Dulles*, 356 U.S. 86, 100 (1958).

28. The new test provides for greater legislative leeway by the use of the words "greatly disproportionate." *See* note 20 *supra*.

III. THE STANDARD APPLIED

A. *The Role of the Courts*

The *Gregg* plurality asserted the primacy of the judiciary in enforcing the legal restraints of the eighth amendment.²⁹ Nevertheless, the eighth amendment must be enforced with an awareness that the Court's role was circumscribed by the underlying presumption of legislative validity.³⁰ The plurality reasoned that since part of its formulated constitutional test was whether or not the public accepts capital punishment, the legislative judgment should be accorded great weight since it adequately reflected society's attitudes.³¹ This reasoning is suspect, however, since the legislative judgment is merely one indicator, albeit a significant one, of society's moral values. Moreover, the plurality stacked the deck in favor of capital punishment at the outset by granting the legislative judgment a presumption of validity which pervaded the other elements of the plurality's eighth amendment standard. Judging whether a given penalty was abhorrent to current social values or was excessive or disproportionate becomes a meaningless exercise when approached with a presumption that the penalty was none of these things. Further, there was precedent for the Court's subjecting the legislative determination to a relatively strict level of scrutiny. Justice Stone, in his oft-quoted footnote in *United States v. Carolene Products*,³² concluded that deference is not due a legislative determination when a specific prohibition of the Bill of Rights is involved and when the beneficiaries of that protection are unlikely to be able to protect themselves, both of which elements are generally present in death penalty cases.

B. *Contemporary Standards of Decency*

In *Furman* and *Gregg*, the Court's proponents of the constitutionality of capital punishment drew upon historical and contemporary evidence to demonstrate that the death penalty comported with current standards of

29. 96 S. Ct. at 2925-26.

30. "Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity." *Id.* at 2926.

31. "[L]egislatures, not courts, are constituted to respond to the will and consequently the moral values of the people." *Id.*, quoting from *Furman v. Georgia*, 408 U.S. at 383 (Burger, C.J., dissenting).

32. 304 U.S. 144 (1938). The Court stated:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the constitution, such as those of the first ten amendments

Id. at 152-53 n.4.

decency.³³ A recurring contention was that in rejecting eighth amendment attacks on particular modes of execution, the Court had implicitly recognized that capital punishment was not cruel and unusual.³⁴ The argument was not one for the application of the principle of stare decisis, since the plurality recognized that the entire Court has "never confronted squarely the fundamental claim that the punishment of death always . . . is cruel and unusual in violation of the Constitution."³⁵ It was simply an attempted refutation of what Chief Justice Burger in *Furman* facetiously characterized as an asserted "instant evolution in the law."³⁶

The plurality was on more solid ground, however, when it noted that there were objective methods for measuring society's reaction to the death penalty and that the result of employing this methodology showed that the death penalty comported with modern standards of decency. First, societal acceptance was deduced from the legislative response to *Furman*.³⁷ The legislatures of over thirty-five states enacted death penalty statutes in one form or another after *Furman*.³⁸ Second, to reinforce the notion that society has accepted capital punishment, the plurality cited the results of both public opinion polls and the statewide California referendum which re-

33. For a history of the prohibition of "cruel and unusual" punishment see Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839 (1969). See also Justice Marshall's opinion in *Furman v. Georgia*, 408 U.S. at 316-28.

34. 96 S. Ct. at 2927. Supreme Court cases in which the mode of execution was dealt with include *McGautha v. California*, 402 U.S. 183, 197-98 (1971); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459, 464 (1947); *In re Kemmler*, 136 U.S. 436, 447 (1890); *Wilkerson v. Utah*, 99 U.S. 130, 134-35 (1878). For a similar discussion see *Furman v. Georgia*, 408 U.S. at 380-82 (Burger, C.J., dissenting).

35. 96 S. Ct. at 2922-23.

36. *Furman v. Georgia*, 408 U.S. at 382 (Burger, C.J., dissenting). The argument is also frequently made that capital punishment should enjoy a measure of current respectability because it was accepted by the framers of the Constitution. 96 S. Ct. at 2927. At the time the eighth amendment was ratified, capital punishment was a common sanction in every state. Further, the explicit language of the fifth amendment contemplates the continued existence of capital punishment with the words ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ." U.S. CONST. amend. V. This argument, however, proves too much. No one would suggest that ear cropping, a perfectly acceptable penalty in 1789, is a legitimate penalty today. Further, the fifth amendment double jeopardy clause uses the words "life or limb," but surely amputation could not be legitimately prescribed as a punishment for crime. *Furman v. Georgia*, 408 U.S. at 283 n.28 (Brennan, J., concurring).

37. 96 S. Ct. at 2928-29.

38. *Id.* See *id.* at 2928 n.23 for a listing of such states and their respective death penalty statutes. The relative provisions of Virginia's mandatory death penalty statute are found in VA. CODE ANN. § 18.2-10 (Repl. Vol. 1975), -31 (Cum. Supp. 1976). See note 94 *infra* for reprint of text. Congress also enacted a death penalty statute in 1974 for aircraft hijacking. Antihijacking Act of 1974, 49 U.S.C.A. §§ 1472(j), (n) (1976).

sulted in negating the Supreme Court of California's ruling that the death penalty violated that state's constitution.³⁹ Finally, borrowing from the language of *Witherspoon v. Illinois*,⁴⁰ that juries " 'maintain a link between contemporary community values and the penal system . . . ,'"⁴¹ the plurality concluded that community values were clearly reflected by the total of 460 persons who were subject to death sentences at the end of March, 1976.⁴²

The dissents of Justices Brennan and Marshall in *Gregg* were but short summaries of their respective *Furman* opinions. Both Justices noted that their *Furman* opinions, for them, had current vitality.⁴³ Justice Brennan adopted the argument which was a mainstay of Professor Anthony G. Amsterdam's brief in *Aikens v. California*⁴⁴ and, subsequently, in both *Furman* and *Gregg*. This persuasive argument was that public acceptance of the death penalty should be measured by how society acts and not simply by what society said either in its legislative enactments or through public opinion polls.⁴⁵ Amsterdam demonstrated that disuse of the death penalty was objective proof that society has progressively rejected the death penalty.⁴⁶ It may still be argued, however, that society has acted, and not just spoken by sentencing to death a significant number of offenders since the 1972 *Furman* decision. However, since no convicted criminal has been executed in this country since 1967, juries during the post-*Furman*

39. 96 S. Ct. at 2929. See also *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972). Commentators have suggested that polls such as the one cited by the plurality, Harris Poll, June 1973, are defective because of their broad questions, and also because when people are asked concrete questions which call for reflection, many of those who nominally approved of the punishment before change their answers. These authors conclude that no data exist which accurately reflect public opinion on the matter. See Vidmar & Ellsworth, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245 (1974).

40. 391 U.S. 510 (1968).

41. 96 S. Ct. at 2929, quoting from *Witherspoon v. Illinois*, 391 U.S. at 519 n.15.

42. *Id.* at 2929.

43. *Id.* at 2971 (Brennan, J., concurring); *id.* at 2973 (Marshall, J., concurring).

44. 406 U.S. 813 (1972). *Aikens* was dismissed by the Supreme Court due to the intervening decision by the Supreme Court of California in *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972), invalidating California's death penalty statute. See note 39 *supra*.

45. As Justice Brennan noted in *Furman*, "[t]he acceptability of a severe punishment is measured, not by its availability, for it might become so offensive to society as never to be inflicted, but by its use." 408 U.S. at 279.

46. Brief for Petitioner at 26-39, *Aikens v. California*, 406 U.S. 813 (1972). The statistics bear out Professor Amsterdam's contention that society no longer finds the death penalty palatable. This country's last execution took place in 1967. The following figures are from U.S. DEPARTMENT OF JUSTICE, EXECUTIONS 1930-1967 (National Prisoner Statistics Bull. No. 42, 1968):

period may have perceived the death penalty as something which in fact was often imposed but never inflicted. Certainly, informed juries were aware that the death penalty was under constitutional attack. Finally, since the capital punishment system diffused the responsibility for the death penalty decision, it may not have been as difficult for a jury to impose the death sentence as it would have been under a system of concentrated responsibility.⁴⁷

The plurality in *Gregg* measured societal acceptance of the death penalty by a count of inmates subject to execution since *Furman*. However, in determining whether a system of capital punishment is in violation of the eighth amendment, the Court should examine results produced by that system in the nation as a whole rather than in any one particular state or group of states.⁴⁸ While most of the states which have retained capital sentencing statutes have inmates awaiting execution, the plurality's conclusion that the death penalty was uniformly accepted in this country was somewhat undermined by the fact that of the 611 persons on death row as of the day of the *Gregg* decision, approximately 81% were in the prisons of just ten states.⁴⁹

In *Gregg*, Justice Marshall repeated his *Furman* argument that the public sentiment concerning the death penalty can only be gauged by what the public would accept if it was fully informed as to the penalty's conse-

<u>Year(s)</u>		<u>Executions</u>
1930-1939	annual average	165
1940-1949	annual average	127
1950-1959	annual average	71
1960		56
1961		42
1962		47
1963		21
1964		15
1965		7
1966		1
1967		2

47. C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 93 (1974). The author suggests that the responsibility to execute is shared by grand juries, prosecutors, juries and judges, courts of appeal and the executive. The awesome decision is more easily made when each participant in the process perceives that the decision in fact will not ultimately be made, or, if it will be made, it will be made by someone else.

48. White, *The Role of the Social Sciences in Determining the Constitutionality of Capital Punishment*, 13 DUQUESNE L. REV. 279, 290 n.3 (1974).

49. N.Y. TIMES, July 3, 1976, at 7, col. 7. The ten states were California, Florida, Georgia, Louisiana, Mississippi, North Carolina, Ohio, Oklahoma, Tennessee and Texas.

quences.⁵⁰ In *Furman*, Justice Marshall was criticized for positing a constitutional argument based upon such speculative assumptions.⁵¹ Realizing that post-*Furman* events “render[ed] the prediction of the views of an informed citizenry an uncertain basis for a constitutional decision . . .,”⁵² Justice Marshall rejected the test of popular sentiment and declared that the ultimate inquiry should be whether the death penalty was necessary to accomplish legitimate legislative goals.⁵³ Judicial intuition most likely compelled Justice Marshall to finally reject any notion of public sentiment being the arbiter of constitutional standards. Nevertheless, by its wording, the eighth amendment peculiarly mandates a judicial determination of what those words popularly mean.⁵⁴

C. *Excessiveness*

The burden of showing that the death penalty is unnecessary and, therefore, unconstitutional is a heavy one, since the plurality in *Gregg* would invalidate a penalty only if it is “totally without penological justification.”⁵⁵ The plurality stated that the death penalty was popularly regarded as serving two principal social purposes: retribution and deterrence of capital crimes by prospective offenders.⁵⁶

50. 96 S. Ct. at 2973. A recent study has found that the American public is not well-informed about the death penalty and that the opinions of an informed public would differ from those of a public unaware of the consequences and effects of the death penalty. *Id.* See Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 Wisc. L. Rev. 171.

51. *Furman v. Georgia*, 408 U.S. at 444 (Powell, J., dissenting).

52. 96 S. Ct. at 2973-74.

53. *Id.* at 2974.

54. The adjectives found in the eighth amendment to describe the prohibited punishments — “excessive,” “cruel” and “unusual” — can be construed in almost limitless fashion. These are, however, the limiting terms employed by the amendment. See note 2 *supra* for the text of the eighth amendment. Since these words can be construed so differently, the Court is faced with interpreting them as it views their meaning or using their popular definitions. This dilemma perhaps explains why the eighth amendment has been determined to draw its meaning from evolving standards of decency (see *Trop v. Dulles*, 356 U.S. 86 (1958)), for this standard, while requiring judicial review, also takes into account nonjudicial factors. See notes 23-25 *supra* and accompanying text.

55. 96 S. Ct. at 2929-30.

56. *Id.* at 2930. In *Furman*, Justice Marshall listed four additional purposes conceivably served by the death penalty: prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics and economy. 408 U.S. at 342. Justice Brennan in *Furman* dealt with recidivism by noting that techniques of isolation can insure that a criminal does not get free to reinfect crime on society. *Id.* at 300-01. Further, Justice Marshall noted that data show “that murderers are extremely unlikely to commit other crimes either in prison or upon their release.” *Id.* at 355. He also concluded that eugenics and encouragement of guilty pleas through the death penalty were constitutionally impermissible purposes. *Id.* at 355-56.

The *Gregg* plurality noted that "capital punishment was an expression of society's moral outrage"⁵⁷ at particularly heinous conduct and recognized retribution by itself as a legitimate penological goal.⁵⁸ The goal of retribution for its own sake is questionable, since almost any form of punishment could be acceptable if it is an expression of society's moral outrage.⁵⁹ In fact, the plurality, as Justice Marshall noted,⁶⁰ was making a utilitarian argument in asserting that retribution was a legitimate goal. First, retribution was said to be necessary to prevent a society which perceives that the legal system has been unwilling to impose upon criminals the punishment they deserve from taking the law into its own hands.⁶¹ The possibility of "vigilante justice,"⁶² however, was remote, as evidenced by its nonoccurrence in the nine years since any capital offender was put to death.⁶³ Second, the plurality suggested that the death penalty expressed society's belief that certain crimes were intolerable, thereby reinforcing moral values.⁶⁴ Justice Marshall reasoned that in reality this goal was not effectively served by the death penalty, since it was unlikely that a citizen concerned about conforming his conduct to society's standards would be led to believe that murder was acceptable if the penalty was life imprisonment.⁶⁵

The debate over the deterrent value of the death penalty continued after *Furman* and undoubtedly has not been silenced by the *Gregg* opinions.⁶⁶

Finally, Justice Marshall stated that the argument that it was cheaper to execute a capital offender than to imprison him for life supports a capital sanction was fallacious, for it was factually incorrect. *Id.* at 357.

57. 96 S. Ct. at 2930.

58. *Id.*

59. Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1797 (1970).

60. 96 S. Ct. at 2976.

61. *Id.* at 2930.

62. *Id.*

63. See note 46 *supra*.

64. 96 S. Ct. at 2930.

65. *Id.* at 2976.

66. Several studies figured prominently in the Court's debate in *Furman*. Principally among them were studies conducted by one of the leading authorities on capital punishment, Thorsten Sellin. See, e.g., T. SELLIN, *THE DEATH PENALTY* (1959); T. Sellin, *Does the Death Penalty in America Protect Municipal Police?*, in *THE DEATH PENALTY IN AMERICA* 284, 301 (H. Bedau ed. 1968); T. Sellin, *THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE (ALI)* (1959).

Since *Furman*, further studies have been completed on the death penalty's deterrent value. See, e.g., Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*,

Since the plurality has accorded a presumption of validity to legislative determinations that the death penalty was necessary to deter crime, naturally it was not predisposed to debate the merits of statistical data and results which it asserted were thus far inconclusive.⁶⁷ The plurality's approach is unfortunate in several respects. First, while unwilling to examine in detail the results of the studies, the plurality nevertheless was willing to assume that for many the death penalty was "undoubtedly . . . a significant deterrent."⁶⁸ Second, by not requiring a more exact correlation between punishment and purpose, the Court has forever relegated the debate over deterrence, insofar as its usefulness to the judiciary is concerned, to an academic exercise.

Finally, the *Gregg* plurality stated what probably was popularly felt to be the ultimately irrefutable justification for the legal infliction of death, namely, "when a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime."⁶⁹ The notion that the offender should suffer the same fate as his victim was, essentially, one of retribution and is, therefore, a questionable constitutional concept.⁷⁰ Obviously, making an offender suffer to the same degree that his victim has suffered in the case of murder by torture would be constitutionally impermissible. Yet, it has been frequently noted that inmates suffer a torturous psychological existence while awaiting the outcome of lengthy appellate proceedings.⁷¹

D. *Discretionary and Mandatory Statutes*

The *Furman* mandate was that death sentences could not be imposed under sentencing procedures which created a risk that they would be inflicted arbitrarily or capriciously.⁷² The *Furman* majority concluded that the lack of sentencing standards in capital cases resulted in arbitrary sent-

65 AM. ECON. REV. 397 (1975); Peck, *The Deterrent Effect of Capital Punishment: Ehrlich and His Critics*, 85 YALE L.J. 359 (1976).

67. 96 S. Ct. at 2930-31.

68. *Id.* at 2931.

69. *Id.* at 2932. Importantly, the plurality noted that it was not addressing itself to the question of whether capital punishment is a proportionate sanction where no victim has been deprived of life. *Id.* at 2932 n.35.

70. Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1349-54 (1968).

71. This fact led the Supreme Court of California to conclude that the length of time between the sentence and the execution "had in fact become the 'lingering death' which the *Kemmler* Court conceded would be cruel in the constitutional sense." *People v. Anderson*, 6 Cal. 3d 628, 646, 493 P.2d 880, 892, 100 Cal. Rptr. 152, 164, cert. denied, 406 U.S. 958 (1972). See also Note, *Mental Suffering Under the Sentence of Death: A Cruel and Unusual Punishment*, 57 IOWA L. REV. 814 (1972).

72. 96 S. Ct. at 2932.

encing.⁷³ The *Gregg* response was a validation of sentencing statutes which give the sentencing authority adequate information and guidance and which compel the consideration of individual characteristics of the offender and the circumstances of the crime.

Under the Georgia statute challenged in *Gregg*, a convicted capital offender would be sentenced to life imprisonment unless the jury at a separate evidentiary proceeding, following the verdict, found unanimously at least one statutorily defined "aggravating circumstance."⁷⁴ Even if the jury found an aggravating circumstance, it could still refrain from imposing the death penalty after consideration of "any mitigating circumstances . . . otherwise authorized by law . . ."⁷⁵ Upon conviction, prompt review by the Georgia Supreme Court was required in every case in which the death penalty was imposed. The Georgia Supreme Court was supplied with a report from the trial court in the form of a questionnaire designed to disclose whether there was any doubt about the defendant's guilt, or whether race played a role in the determination of guilt and sentencing.⁷⁶ Finally, in deciding whether the death penalty should be carried out in a given case, the court was required to examine whether the death sentence was excessive in light of its use or disuse in similar cases.⁷⁷

The *Gregg* plurality recognized that some jury discretion will still exist under the Georgia statute, yet the level of discretion was acceptable since it was controlled by "'clear and objective standards.'"⁷⁸ It rejected the petitioner's assertion that the statute failed to meet *Furman*'s require-

73. In *Furman*, the majority's reliance on the discretionary nature of the statutes was severely criticized by Chief Justice Burger and Justice Rehnquist in light of the Court's decision in *McGautha v. California*, 402 U.S. 183 (1971). The Court in *McGautha* held that a jury's imposition of the death penalty did not violate due process because the jury was given discretion to decide between life and death. Some have found the cases distinguishable, however, since *McGautha* focused on the imposition of death as a matter of legal process, whereas *Furman* examined the impact of that process upon the defendant. *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 79 n.17 (1972). The distinction has been criticized as too technical to be of significance. L. LEVY, *AGAINST THE LAW* 384 (1974).

74. The plurality did not compel but rather praised a bifurcated procedure as the "best answer." 96 S. Ct. at 2933. Under this procedure, the offender is not sentenced until the determination of guilt has been made. Otherwise information relevant to the question of sentencing alone may prejudice the separate question of guilt.

75. GA. CODE ANN. § 27-2534.1(b) (Cum. Supp. 1975).

76. *Id.* § 27-2537.

77. *Id.* The plurality felt that the provision for appellate review would serve as a check on the random or arbitrary imposition of the death penalty. If juries generally do not impose the death penalty for a given crime, the appellate review assures that no defendant convicted for that crime will suffer the death sentence. 96 S. Ct. at 2939-40.

78. 96 S. Ct. at 2936, quoting from *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974).

ments, since the "jury has the power to decline to impose the death penalty even if it finds one or more statutory aggravating circumstances. . . ."79 The plurality noted that this misinterprets *Furman*, since all *Furman* required was that if the decision to execute an offender were made, it must be done so in a noncapricious manner.⁸⁰

Since it may be presumed that *Furman* was not a disguised attempt to outlaw capital punishment "by placing totally unrealistic conditions on its use,"⁸¹ the Georgia statute, for the most part, was an adequate response to that decision.⁸² As long as a capital sentencing statute requires consideration of a discrete list of unambiguous factors, appellate review will assure consistent non-arbitrary results.

In addition to validating Georgia's capital sentencing statute, the Court also approved the death penalty statutes of Florida⁸³ and Texas.⁸⁴ Under Florida's statute, the trial judge, who was the sentencing authority, must weigh eight statutory aggravating and seven statutory mitigating circumstances before determining whether the death penalty should be imposed.⁸⁵ The Florida statute differed from the Georgia law in that the sentence was determined by the trial judge rather than by the jury. The Texas capital sentencing procedure may have represented the greatest degree of discretion which could be granted a capital sentencing jury without running afoul of *Furman*. In Texas, the jury was required to answer but three questions in a proceeding that took place after a verdict finding a person guilty of one of the specified categories of murder.⁸⁶ The plurality con-

79. *Id.* at 2939.

80. *Id.*

81. *Id.* at 2937 n.50.

82. The petitioner in *Gregg* argued that the use of the words "outrageously or wantonly vile, horrible or inhuman in that it involved torture or depravity of mind," GA. CODE ANN. § 27-2534.1(b)(7) (Cum. Supp. 1975), to characterize one of the aggravating circumstances permits the jury such a broad range of discretion that the death sentence could be imposed in any case. 96 S. Ct. at 2938. The plurality countered that the language need not be read so broadly and that there is no reason to assume the Supreme Court of Georgia will adopt such an open-ended construction. *Id.* The plurality's reasoning with respect to this provision of the statute is tenuous, since *Furman* appears to have condemned capital sentencing statutes which are both arbitrary in their application and on their face. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1696 (1974).

83. *Proffitt v. Florida*, 96 S. Ct. 2960 (1976).

84. *Jurek v. Texas*, 96 S. Ct. 2950 (1976).

85. FLA. STAT. ANN. § 921.141(6) (Cum. Supp. 1976).

86. TEXAS CODE CRIM. PROC., art. 37.071(b) (Cum. Supp. 1975). The three questions are: (1) whether the conduct of the defendant [causing] the death . . . was committed deliberately and with the reasonable expectation that the death of the deceased or another would result; (2) whether [it is probable] that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and (3)

cluded that although Texas has not adopted a list of statutory aggravating circumstances, its action in narrowing the categories of murders for which the death sentence could be imposed had the same effect.⁸⁷

Both North Carolina's⁸⁸ and Louisiana's⁸⁹ mandatory death penalty statutes were held in *Woodson v. North Carolina*⁹⁰ and *Roberts v. Louisiana*⁹¹ to fall short of the eighth amendment imperative that in capital cases the character and record of the offender and the circumstances of the particular offense should be considered prior to sentencing.⁹² The North Carolina statute imposed a mandatory death sentence upon any defendant convicted of first degree murder.⁹³ The Louisiana statute mandated a death penalty whenever a conviction was obtained for any one of five categories of homicide, regardless of any mercy recommendation by the jury.⁹⁴

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.

87. 96 S. Ct at 2955. As the plurality noted, each of the five classes of murders made capital offenses by the Texas statute was included as a statutory aggravating offense in Florida and Georgia. *Id.* The plurality also concluded that a statute which allowed a sentencing authority to consider only aggravating circumstances would fall short of providing the necessary individualized sentencing determination. The Texas statute was saved, however, by the Texas Court of Criminal Appeals' interpretation of the second of the three questions which, as interpreted, permitted a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show. *Id.* at 2956-57.

88. N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975). The statute reads:

Murder in the first and second degree defined; punishment.—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 murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

89. LA. STAT. ANN. § 14:30 (Cum. Supp. 1976).

90. 96 S. Ct. 2978 (1976).

91. 96 S. Ct. 3001 (1976).

92. 96 S. Ct. at 2991.

93. See note 88 *supra*.

94. See note 89 *supra*. The statute defined first degree murder, for which the death penalty was mandatory, as 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

The plurality's arguments in *Woodson* were twofold. First, it was said that contemporary standards have evolved to the point that mandatory death sentences were no longer morally tolerable. Second, even if mandatory death sentencing was acceptable to society, it would fail to meet the requirements of *Furman*. Mandatory statutes "have simply papered over the problem of unguided and unchecked jury discretion,"⁹⁵ by permitting juries to convict or acquit based upon the same vague criteria that the *Furman* majority found unacceptable to eighth amendment standards.

After sketching a history of mandatory capital punishment in America, the *Woodson* plurality concluded that both jury nullification⁹⁶ and legislative enactments prior to *Furman* pointed to the repudiation of automatic

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; [or]

(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 attorney's investigator.

LA. STAT. ANN. § 14:30 (Cum. Supp. 1976)

Virginia's death penalty statute is similar to that of Louisiana in that it prescribes death in VA. CODE ANN. § 18.2-10 (Repl. Vol. 1975) for anyone who commits a Class 1 felony. Class 1 felonies are defined in VA. CODE ANN. § 18.2-31 (Cum. Supp. 1976) as:

(a) The wilful, deliberate and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money, or a pecuniary benefit;

(b) The wilful, deliberate and premeditated killing of a human being by another for hire; and

(c) The wilful, deliberate and premeditated killing by an inmate in a penal institution as defined in § 53-19.18, or while in the custody of an employee thereof.

VA. CODE ANN. § 18.2-31 (Cum. Supp. 1976).

For a history of the evolution of death penalty statutes in Virginia see Note, *Capital Punishment in Virginia*, 58 VA. L. REV. 97 (1972). For a discussion of proposed death penalty legislation in Virginia after *Furman* see 9 U. RICH. L. REV. 415 (1975).

Virginia's current capital punishment statute, as Louisiana's statute, contains no provisions for the consideration of either aggravating or mitigating circumstances. On this basis, the statute is most likely unconstitutional. While neither the Supreme Court nor the Supreme Court of Virginia has been presented with the issue since *Gregg*, one circuit court in Virginia held in October that Virginia's death penalty statute did violate the Constitution, a view shared by the state's Attorney General. On Oct. 14, 1976, Judge Carleton Penn issued the appropriate order in the companion cases of *Commonwealth v. Szafranski*, No. 2328 (Loudoun Co. Cir. Ct., filed Oct. 14, 1976), and *Commonwealth v. Julian*, No. 2317 (Loudoun Co. Cir. Ct., filed Oct. 14, 1976).

95. 96 S. Ct. at 2990.

96. Jury nullification is refusal by a jury to convict a defendant of a crime which carries with it an automatic death sentence.

death sentences.⁹⁷ It noted that with one exception no state prior to *Furman* ever returned to a mandatory sentencing scheme after enacting discretionary sentencing.⁹⁸ Rather than ascribing their enactment to a "renewed societal acceptance"⁹⁹ of mandatory death sentencing, the plurality reasoned that the post-*Furman* mandatory statutes were attributable to diverse readings of the Court's "multi-opinioned decision" in *Furman*.¹⁰⁰

The plurality's conclusion in *Woodson* that society has rejected mandatory sentencing did not square with its willingness in the *Gregg* opinions to defer to the states' legislative determinations concerning capital punishment. As Justice White noted in his dissent, the fact that legislatures before *Furman* chose jury sentencing to avoid the problems of jury nullification was not a legislative judgment that mandatory punishments were excessively cruel.¹⁰¹ While the states thus showed a preference for discretionary sentencing, it was also true that they preferred mandatory penalties to no death sentences at all.¹⁰² Further, while the plurality found proof of societal rejection of mandatory sentencing through jury nullification, it did not adequately deal with the incontrovertible fact that since *Furman* the death penalty has regularly been imposed under mandatory statutes.¹⁰³ Finally, it is not clear why the requirement that the individual characteristics of the criminal and the crime be considered before sentencing may not be satisfied by a legislative judgment that the commission of certain especially heinous crimes conclusively establishes the criminal's character.¹⁰⁴ The plurality seriously undermined its position in this regard by noting in *Roberts* that murder by a prisoner serving a life sentence was a "unique problem" that could justify a mandatory death sentence.¹⁰⁵

The plurality's assertion in *Woodson* that the challenged North Carolina statute was only cosmetically mandatory was well-founded. Juries in such cases were permitted to base their decision as to guilt, and thereby as to the death sentence, upon such amorphous concepts as premeditation and deliberation.¹⁰⁶ The effect of this was to grant to juries the same level of discretion that was condemned in *Furman*. The Louisiana statute narrowed the categories of crime for which a death sentence must be imposed,¹⁰⁷ thus eliminating the problem of vague and broad wording. Never-

97. 96 S. Ct. at 2986.

98. *Id.* at 2986 n.30.

99. *Id.* at 2989 (Rehnquist, J., dissenting).

100. *Id.*

101. *Id.* at 3019 (White J., dissenting).

102. *Id.* at 2996 (Rehnquist, J., dissenting).

103. *Id.* at 3019 (White, J., dissenting).

104. *Id.* at 3018 (White, J., dissenting).

105. *Id.* at 3006-07 n.9.

106. See note 88 *supra*.

107. See note 94 *supra*.

theless, the plurality found that since juries were permitted to convict capital defendants of lesser included offenses even though not warranted by the evidence, they were effectively given the unbridled discretion which the *Furman* majority condemned.¹⁰⁸ Practically, it is difficult to mark the distinction between this and guided discretionary statutes in which juries are permitted to recommend mercy if they find the mitigating outweigh the aggravating circumstances.

Justice Rehnquist argued that the plurality's insistence that there be particularized consideration of relevant aspects of the defendant's character was not buttressed by case authority.¹⁰⁹ Whatever the merits of that argument,¹¹⁰ the plurality is to be commended for finding that the "fundamental respect for humanity underlying the Eighth Amendment"¹¹¹ required that juries carefully consider all relevant factors before embarking upon their awesome duty.

E. Systemic Discretion

Furman outlawed unfettered discretion in the capital sentencing process. Many commentators have suggested that the discretion which was condemned may be seen as extending beyond the jury phase into other phases of the capital punishment system.¹¹² The plurality dealt briefly with the petitioner's contention in *Gregg* that systemic discretion rendered any imposition of a death sentence invalid by noting that *Furman* dealt with the decision to impose the death sentence on a specific individual who had been convicted of an offense, not with the decision to remove a defendant from his inexorable march through the system to execution.¹¹³ The decision to render mercy in such cases, through executive clemency for example, was not precluded by the *Furman* holding.¹¹⁴ In practice, the weakness of the plurality's position in *Gregg* is that some defendants may be removed from the system due to decidedly arbitrary factors. For example, a prosecu-

108. 96 S. Ct. at 3007.

109. *Id.* at 2999 (Rehnquist, J., dissenting).

110. For authority the plurality cited among others *Pennsylvania v. Ashe*, 302 U.S. 51, 55 (1937), in which the Court noted:

For the determination of sentences, justice generally requires consideration of more than the particular acts by which the crime was committed and that there be taken into account the circumstances of the offense together with the character and propensities of the offender.

96 S. Ct. at 2991.

111. *Id.*

112. See, e.g., C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974); Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L. REV. 651 (1974).

113. 96 S. Ct. at 2937.

114. *Id.*

tor's decision to plea bargain with a capital offender may well depend on his backlog of pending cases. Since under this system some defendants may be executed for the same crimes for which other defendants have plea bargained, the condemned defendant may perceive that he has been arbitrarily selected to die, and a perception of arbitrary selection by an individual defendant was condemned in *Furman* as cruel and unusual.

IV. CONCLUSION

The Supreme Court in the *Gregg v. Georgia* series of opinions adopted an eighth amendment standard which encompassed the notion of judicial analysis of public opinion and penological necessity. By assuming that the legislatures adequately reflected the public's attitude toward the death penalty and by granting a presumption of validity to the legislative judgment as to capital punishment's necessity, the Court placed an overwhelming burden upon the death penalty's opponents. Professor Amsterdam's thesis that the true test of society's attitude was to be found in its acts and not its enactments was rejected by the Court. Yet, with the sanction of state judicial review of death sentencing to ensure that the death penalty was not being imposed inconsistently, the Amsterdam thesis has in essence been adopted for future death penalty cases. As to penological necessity, legislatures should carefully examine recent data on deterrence before revamping unconstitutional statutes or permitting existing capital punishment statutes to continue in effect. In the future, evolving standards of decency may find that death is not a sufficient deterrent to outweigh a distaste for retribution.

In the final analysis, the *Gregg* plurality reached a conclusion which combined the desire to keep the death penalty as a viable punishment with a fear of arbitrariness. The result was a capital sentencing standard which fell within the outer parameters of a mandatory penalty on one hand and a completely discretionary penalty on the other, but which combines elements of both. A statute cannot require the death penalty for it must permit sentencers to take into account the nature of the crime and the

circumstances of the offense. Yet, this discretion must be guided so that its application is as uniform as possible.¹¹⁵

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115. The Virginia capital sentencing statute fails not because it grants sentencing authorities unfettered discretion but because it does not permit sentencers to weigh aggravating and mitigating circumstances before determining sentence. The approved Georgia statute has the salient feature of including statute-defined aggravating circumstances, one of which must be found before sentencing a defendant to death. While Virginia's mandatory approach may appear on the surface to represent a harsher alternative, the Virginia statute does not sanction, as does the Georgia statute, the death penalty for the offense of murder unless it is by abduction, for hire or by a penal inmate. Since the legislature has already determined that these are the only offenses for which the death penalty is appropriate, the new Virginia capital sentencing statute should define these types of murder as statutory aggravating circumstances. To comply with the Court's opinion in *Gregg*, it would be necessary to permit the defendant to demonstrate that mitigating circumstances outweigh any aggravating circumstances which may be found. Alternatively, Virginia may follow the Texas approach and define these types of murders as the only offenses for which the death penalty may be imposed, again permitting a showing of mitigating circumstances. In either case, a bifurcated trial and sentencing procedure is preferable to a procedure in which both guilt and punishment are determined simultaneously.

