CAPITAL PUNISHMENT


The Supreme Court this past term decided five cases involving various attempts by states to devise a constitutional form of capital punishment. In Gregg v. Georgia, Proffitt v. Florida, and Jurek v. Texas, the Court held that the respective states had devised statutes permitting capital punishment which could pass constitutional muster. Yet state plans in two other cases, Woodson v. North Carolina and Roberts v. Louisiana, failed to meet the Court's constitutional standards.

The Court heard all five cases in order to consider issues left unresolved by its 1972 decision on capital punishment, Furman v. Georgia. In Furman the Court held that the Georgia death penalty statutes constituted cruel and unusual punishment in violation of the eight and fourteenth amendments. However, because each Justice filed a separate opinion in Furman, and because no one opinion was concurred in by a majority, the exact requirements for a constitutional death penalty remained unarticulated. The statutes in question in Furman gave total

96 S.Ct. 2960 (1976).
96 S.Ct. 2950 (1976).
96 S.Ct. 2978 (1976).
96 S.Ct. 3001 (1976).
408 U.S. 238 (1972).
]

Justice Douglas found that the Georgia plan was "pregnant with discrimination" and thereby incompatible with the concept of equal protection implicit in the ban on cruel and unusual punishment. 408 U.S. at 257 (Douglas, J., concurring). Justice Stewart concluded that the death penalty has been too "wantonly and ... freakishly" applied to be permitted under the eight and fourteenth amendments. Id. at 310 (Stewart, J., concurring). Justice White held that because of the infrequency with which the penalty was imposed, the Georgia penalty failed to further the social ends which capital punishment was meant to serve. Therefore, when it was imposed it constituted the pointless extinction of life resulting in the violation of the eight and fourteenth amendments. Id. at 312 (White, J., concurring). Justices Brennan and Marshall in separate opinions held that the death penalty was per se unconstitutional. Id. at 305 (Brennan, J., concurring), 359 (Marshall, J., concurring).

Discretion to the jury in deciding whether the death penalty would be imposed. Although there was no one opinion of the Court, the Justices of the majority did focus somewhat on this uncontrolled jury discretion and the possibility of arbitrary and capricious imposition of the death penalty as one basis for their opinions. Since all state statutes then in effect contained similar allowances for jury discretion along the lines of the Georgia plan, the practical effect of Furman was to foreclose executions under all state statutes. In addition the language of the decision created some apprehension that the Court might, in the next case before it, totally ban capital punishment.

In the face of this uncertainty several states passed new capital punishment laws and, as would be expected, defendants sentenced under these new laws immediately challenged their constitutionality. Each of the five cases which the Court agreed to hear raised two major issues: 1) Does the penalty of death for the crime of murder constitute a per se violation of the eighth and fourteenth amendments and, 2) if not, does the particular death penalty statute in question create a substantial risk that the death penalty might be inflicted in an arbitrary and capricious manner, thus violating the eighth and fourteenth amendments?

THE DEATH PENALTY AS A PER SE VIOLATION

Seven of the Justices reached the conclusion that capital punishment does not constitute a per se violation of the Constitution. The Court considered each case separately, but the issue of the per se constitutionality of the death penalty was treated largely in Gregg v. Georgia and Roberts v. Louisi-

[Gregg v. Georgia, 96 S.Ct. at 2932 (Stewart, Powell, Stevens, JJ., plurality opinion); Roberts v. Louisiana 96 S.Ct. at 3014 (White, Blackmun, Rehnquist, JJ., Burger, G.J., dissenting).
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[Gregg v. Georgia, 96 S.Ct. at 2922 (Stewart, J., plurality).]
ana. There were two separate plurality opinions on this issue.

In Gregg v. Georgia, Justice Stewart, joined by Justices Powell and Stevens [hereinafter the Stewart plurality] noted that the Court had never before squarely faced the claim that the penalty of death itself is a cruel and unusual punishment in violation of the Constitution, regardless of the crime committed or the sentencing procedure used. On a number of occasions the Court simply assumed the constitutionality of capital punishment, that assumption providing a necessary foundation for its decisions. An examination of prior cases revealed that the Court has never viewed the eighth amendment as a static concept: "The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." Thus in order to determine the constitutionality of the death penalty, the Stewart plurality felt the Court must assess contemporary values regarding capital punishment, looking to objective rather than subjective indicia that would reflect public attitudes. Yet the Stewart plurality recognized that public perceptions of decency would not be conclusive since prior decisions have also emphasized that the basic tenet underlying the eighth amendment is that any penalty must accord with the "dignity of man." Such a standard prescribes that the penalty should not involve "the unnecessary and wanton infliction of pain" and that the "punishment not be grossly out of proportion to the severity of the crime."

The Stewart plurality concluded that capital punishment for murder did not violate that standard. 10

Prior cases had rejected the argument that death itself was cruel and unusual punishment. In an early case dealing with death inflicted by electrocution the Court said:

"The punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something inhuman and barbarous, something more than the . . . extinguishment of life."

The same sentiment was expressed much more recently by Chief Justice Warren:

"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."

The Stewart plurality also noted that the standard must be applied with an awareness of the judiciary's limited role in assessing the constitutionality of a punishment selected by a democratically elected legislature. Caution was urged by the plurality lest:

"Under the aegis of the Cruel and Unusual Punishment Clause, [the Court becomes] the ultimate arbiter of the standards of criminal responsibility . . . throughout the country."

The fact that since Furman thirty-five states and the federal government have enacted new statutes incorporating capital punishment convinced the Stewart plurality that contemporary values had not rejected the penalty. The plurality also relied upon the facts that juries have convicted and sentenced 460 persons to death under these new statutes and that state referenda both before and after Furman have evidenced continued acceptance of the death penalty.

The Stewart plurality found the penological justifications of retribution and deterrence were compatible with the basic dignity of man concept said to be the core of the eighth amendment. While retribution was not viewed as a dominant objective of the criminal law, the plurality found that neither was it a murder and that it reserved judgement on the per se unconstitutionality of the death penalty for crimes that did not encompass the taking of human life.

10Roberts v. Louisiana, 96 S.Ct. at 3014 (White, J., dissenting).
1296 S.Ct. at 2923. While Furman did raise the issue of the per se unconstitutionality of the death penalty, it did not decide the issue. Four Justices in Furman would have held that capital punishment is not unconstitutional per se. 408 U.S. at 375 (Burger, C. J., dissenting), 405 (Blackmun, J., dissenting), 414 (Powell, J., dissenting), 465 (Rehnquist, J., dissenting). Two Justices would have held the death penalty unconstitutional. Id. at 257 (Brennan, J., concurring), 314 (Marshall, J., concurring). The remaining three Justices left the question open. Id. at 240 (Douglas, J., concurring), 306 (Stewart, J., concurring), 310 (White, J., concurring).
14Id. at 100.
15Gregg v. Georgia, 96 S.Ct. at 2925.
16Id. at 2931-32. It is important to note that the Court was only considering capital punishment for the crime of
forbidden one. Furthermore, even though many might find the idea of retribution unappealing, the Stewart plurality felt it was a concept of great importance to the general public, and expressed the view that anarchy would develop if the public sensed that society was unwilling to impose the punishment criminals "deserve."

Concerning the deterrent effect of the death penalty, the Stewart plurality noted that the debate has gone on long, but inconclusively. This inconclusiveness did not invalidate deterrence as a justification of the death penalty, rather it shifted the final determination of that complex issue back to the legislatures which, according to the Stewart plurality, are better equipped to evaluate this question.

The views of the other four Justices who cast their votes to deny the per se unconstitutionality of capital punishment did not come in the principle case, Gregg, but rather in Roberts v. Louisiana in the dissenting opinion of Justice White, joined by Justices Blackmun, Rehnquist, and the Chief Justice (hereinafter the White plurality). The White plurality closely parallels much of the reasoning of the Stewart plurality. It focuses on the longstanding acceptance of capital punishment and the legitimate nature of that penalty as an instrument of retribution and deterrence. According to the White plurality, acceptance of the concept of capital punishment by the Framers of the Constitution is clearly shown by the wording of the fifth amendment:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, . . . [and no person shall be] twice put in jeopardy of life or limb . . . nor be deprived of life . . . without due process of law.

The fourteenth amendment enacted nearly a century later likewise prevents the states from depriving any person of "life" without due process of law. The fourteenth amendment, enacted nearly a century later likewise prevents the states from depriving any person of "life" without due process of law. Furthermore, not only has the death penalty been a part of the criminal justice system of a majority of states ever since the Union was formed, but the plethora of post-Furman capital punishment statutes indicates that the death penalty is still acceptable to a majority of the people of the country. Its "widespread re-enactment . . . answers any claims that life imprisonment is adequate punishment to satisfy the need for reprobation or retribution."

Concerning the death penalty as a deterrent factor, the White plurality, like the Stewart plurality, acknowledges that no clear evidence of deterrence can be shown. The White plurality refused to reject the legislative judgment that the imposition of capital punishment will save innocent lives:

> This concern for life and human values and the sincere efforts of the States to pursue them are matters of the greatest moment with which the judiciary should be most reluctant to interfere.

The Justices are not free to treat the issue before them as if they were legislators voting for or against capital punishment. Rather they must confine their inquiry to the question of whether the eighth amendment requires the Court to interfere with the enforcement of these statutes.

In summary, the seven Justices who voted to deny the per se unconstitutionality of capital punishment agreed that contemporary standards have not rejected the death penalty. The Stewart plurality further concluded that apart from the views expressed by society, the death penalty was not out of proportion to the severity of the crime nor did it constitute the unnecessary infliction of pain.

The views of the two dissenters sharply conflicted with the views of the two pluralities. Justices Brennan and Marshall each wrote dissenting opinions in Gregg, in which both adhered to their positions expressed in Furman that capital punishment is unconstitutional per se. Justice Brennan agreed with the Stewart plurality analysis that the eighth amendment must draw its meaning "from the evolving standards of decency that mark the progress of a maturing society," but he disputed the conclusion that those standards permit the imposition of the death penalty today. Justice Brennan was not con-
cerned with the method by which the penalty might be imposed. He focused entirely on the essence of the death penalty itself. For him whether a state may impose capital punishment is essentially a moral question:

From the beginning of our Nation, the punishment of death has stirred acute public controversy. . . . At bottom, the battle has been waged on moral grounds. The country has debated whether a society for which the dignity of the individual is the supreme value can, without a fundamental inconsistency, follow the practice of deliberately putting some of its members to death. In the United States, as in other nations of the western world, “the struggle about this punishment has been one between ancient and deeply rooted beliefs in retribution, atonement, or vengeance on the one hand, and on the other, beliefs in the personal value and dignity of the common man that were born of the democratic movement of the eighteenth century . . . . It is this essentially moral conflict that forms the backdrop for the past changes in and the present operation of our system of imposing death as a punishment for crime.\(^{38}\)

According to Justice Brennan the eighth amendment “embodies in unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws.”\(^{37}\) It forces the state, even as it punishes, to treat its citizens in a manner “consistent with their intrinsic worth as human beings—a punishment must not be so severe as to be degrading to human dignity.”\(^{38}\) Justice Brennan argued that if the rack, the screw, and the wheel are degrading to human dignity as punishments and therefore cruel and unusual punishments, then the extinguishment of a human life on the authority of the State surely can be no longer morally tolerable in our civilized society.\(^{39}\) The fatal constitutional flaw of the death penalty, in Justice Brennan’s opinion, is that:

[I]t treats members of the human race as nonhumans, as objects to be toyed with and discarded. [It is] thus inconsistent with the fundamental premise of the Clause that even the vilest criminal remains a human being possessed of common human dignity.\(^{40}\)

Similarly, Justice Marshall’s dissent in \textit{Gregg} reaffirmed his previous conviction that the death penalty is per se unconstitutional. He took notice of the pluralities’ attack on his \textit{Furman} conclusion that current moral values find capital punishment unacceptable:

I would be less than candid if I did not acknowledge that these developments \(^{41}\) have a significant bearing on a realistic assessment of the moral acceptability of the death penalty to the American people.\(^{42}\)

Yet Justice Marshall refused to accept the notion that an “informed citizenry” would find the death penalty acceptable. He cites a post-\textit{Furman} study\(^{48}\) purporting to show that the American people know little about capital punishment and that the opinion of an informed public would be significantly different from that of an unaware public. But even if the post-\textit{Furman} statutes did reflect the views of an “informed citizenry,” Justice Marshall still contended that the death penalty was excessive and for that reason alone unconstitutional.\(^{44}\)

He took issue with the position of both pluralities that retribution can serve as moral justification for the death penalty. This idea was “the most disturbing aspect” of the pluralities’ opinions as far as Justice Marshall was concerned.\(^{45}\) He found it incredible to suggest that the sanction of death is necessary to prevent Americans from taking the law into their own hands.\(^{46}\) The fact that the community demands the life of the criminal because he “deserves it” cannot be tolerable, concludes Justice Marshall, because “such a penalty has as its very basis the total denial of the wrong-doer’s dignity and worth.”\(^{47}\)

On the deterrent effect of capital punishment as a justification for that penalty, Justice Marshall noted that after a thorough review of the available data, he had concluded in \textit{Furman} that no positive correlation between the two existed. Since that decision a study by Isaac Ehrlich\(^{48}\) supported the contention that the death penalty does deter murder. However, Justice Marshall was convinced that the study was of little

\(^{37}\)\textit{Id.} at 2972.  
\(^{38}\)\textit{Id.}  
\(^{39}\)\textit{Id., quoting} \textit{Furman} v. \textit{Georgia}, 408 U.S. at 273 (Brennan, J., concurring).  
\(^{40}\)\textit{Id.}, \textit{quoting} \textit{Furman} v. \textit{Georgia}, 408 U.S. at 273 (Brennan, J., concurring).  
\(^{41}\)The developments Justice Marshall was referring to are the re-enactment of capital punishment statutes by thirty-five states and Congress.  
\(^{42}\)96 S.Ct. at 2973 (Marshall, J., dissenting).  
\(^{44}\)96 S.Ct. at 2974–75 (Marshall, J., dissenting).  
\(^{45}\)\textit{Id.} at 2976.  
\(^{46}\)\textit{Id.}  
\(^{47}\)\textit{Id.} at 2977.  
assistance in assessing the deterrent impact because of the questionable methodology used in the study.\textsuperscript{49} Justice Marshall remained convinced that the death penalty does not deter crime.\textsuperscript{50}

**Infliction in an Arbitrary or Capricious Manner**

Since a majority of the Justices felt that the imposition of the death penalty was not per se unconstitutional it was necessary to examine each state’s statutory scheme for sentencing. In Furman, as noted earlier, the Court had placed some emphasis on the requirement that the penalty may not be imposed arbitrarily or capriciously. Each statute in the five cases before the Court represented an attempt by the states to comply with this loosely defined directive of Furman.

In the lead case of Gregg v. Georgia,\textsuperscript{51} the Court examined Georgia’s new statutes and found by a 7–2 margin,\textsuperscript{52} that the Georgia legislature had successfully met the requirements of Furman. The Georgia sentencing statutes permit the death penalty for five crimes in addition to murder,\textsuperscript{53} but the sentence attacked by petitioner was for murder alone.\textsuperscript{54} The statutes call for a bifurcated trial. The first stage is devoted to making a determination of guilt. The second stage is to determine the sentence if the defendant is found guilty. At the sentencing stage, considerable latitude is given both the prosecutor and the defense in introducing evidence that might have a bearing on the sentencing authority’s final judgment. The death penalty may only be imposed at the sentencing stage if the jury (or judge, if a bench trial)

\textsuperscript{49} 96 S.Ct. at 2975 (Marshall, J., dissenting).
\textsuperscript{50} Id.
\textsuperscript{51} 96 S.Ct. 2909 (1976).
\textsuperscript{52} Justices Stewart, Powell, Stevens, White, Rehnquist, Blackmun, and the Chief Justice voted to uphold the statute. Justices Brennan and Marshall voted against the statute.
\textsuperscript{53} The Georgia statutes, as amended after Furman, retained capital punishment for murder, kidnapping for ransom or where the victim is harmed, armed robbery, rape, treason, and aircraft hijacking. GA. CODE ANN. §§ 26–1101, 26–1311, 26–1902, 26–2001, 26–2201, 26–3301 (1972).
\textsuperscript{54} The petitioner was convicted of armed robbery and murder in the slaying of two men who had picked up Gregg and a companion as they were hitchhiking. Gregg was sentenced to death for both the murder conviction and the armed robbery conviction but the Georgia Supreme Court vacated the sentence for armed robbery as excessive after comparing the sentence to similar cases of armed robbery. Just as the Court reserved judgement on the per se constitutionality of capital punishment for crimes other than murder, here the Court reserved judgement on the constitutionality of statutory death sentences for convictions of crimes other than murder.

finds at least one of the statutory aggravating circumstances\textsuperscript{55} and then elects to impose that sentence. Even if one of the aggravating circumstances

\textsuperscript{55} The aggravating circumstances are set out in GA. CODE ANN. § 27–2534.1 (1975):

(a) The death penalty may be imposed for the offenses of aircraft hijacking or treason, in any case.
(b) In all 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 devise 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 official, former judicial official, 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 himself 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 de-
is found, mitigating circumstances brought out during the sentencing stage may influence the sentencing authority not to impose the death penalty. As an additional safeguard against caprice, the Georgia Supreme Court, under an automatic appeal procedure built into the statute for all death sentences, is required to determine whether the sentence was imposed under the influence of passion or prejudice, whether the evidence supports the finding of an aggravating circumstance, and whether the sentence is disproportionate to sentences imposed in similar cases.

Petitioner Gregg attacked this statutory plan as violative of the Furman requirements. He first attacked the opportunities for discretionary action under the statute, pointing in particular to the unfettered authority of the prosecutor to determine which defendants will be charged with a capital crime and which will not; the discretion of the jury to find the defendant guilty of a lesser included offense; and the discretion of the Governor and the Board of Pardons and Paroles to commute a death sentence. The Stewart plurality noted that these charges were little more than "a veiled contention that Furman indirectly outlawed capital punishment by placing totally unrealistic conditions on its use." According to the Stewart plurality, Furman held only that in order to avert the capricious and arbitrary use of the death penalty the decision of when and how to use it had to be guided by standards focusing attention on the particular offense and offender. Thus the existence of the various discretionary stages inherent in the criminal justice system was not a relevant factor concerning the issues raised before the Court.

Petitioner next charged that the statutes were so vague and broad that they left the juries “free to act as arbitrarily and capriciously” as before in determining a sentence. The Stewart plurality disagreed. It pointed to the restricting interpretations given the statutes by the Georgia Supreme Court and expressed confidence that the Georgia Supreme Court would not adopt open-ended construction of the statutes in the future.

The third flaw the petitioner presented was that the statutes fell short of the requirements of Furman because the juries could refuse to impose the death penalty even if one or more of the aggravating factors were found. The Stewart plurality declared that this attack misinterprets Furman:

Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

Finally, the petitioner objected to the wide scope of evidence and argument that is allowed at the sentencing state of the trial. The plurality quickly disposed of this argument by saying that the more argument and evidence presented, the better the opportunity for the jury to assess whether to impose the death penalty.

In conclusion, the Stewart plurality stated that the basic concern of Furman “centered on those defendants who were being condemned to death capriciously and arbitrarily.” Under the present Georgia plan, the Stewart plurality concluded, a jury could no longer do what it was possible to do under the old Georgia plan; that is, it cannot impose the death penalty “wantonly and freakishly; it is always circumscribed by the legislative guidelines.” Juries are now directed to focus their attention on the nature and circumstances of the wrongdoer. This, along with the review function of the Georgia Supreme Court, assured the Stewart plurality that the concerns that prompted the decision in Furman would not be present under the new state plan.

Justice White, joined by the Chief Justice and Justice Rehnquist, wrote a concurrence that dealt with the question of prosecutorial discretion. Justice White refused to accept the proposition that prosecutors would use their discretion capriciously or unfairly.


GA. CODE ANN. § 27-2537(c) (Supp. 1975).

96 S.Ct. at 2937 n.50.

Id. at 2937.

Especially attacked were §§ 27-2534.1(b)(1), (3) and(7).
ly to prosecute some defendants on stiffer charges than other defendants. Prosecutors are only motivated by "the strength of the case and the likelihood that the jury would impose the death penalty if it convicts," 67 according to Justice White. The abuse of discretion may be "an indictment of our entire system of justice... [But it] cannot be accepted as a proposition of constitutional law." 68

Justice White's concurring opinion also dealt with the issue of jury discretion. He rejected the contention that because the jury was the sentencing authority, and because the jury is not required to impose the death penalty no matter what circumstances are found, the death penalty will still be imposed in a discretionary and standardless fashion. Justice White concluded that since the Georgia statutes narrowed the scope of murder for which the death penalty can be imposed by requiring a finding of statutory aggravating circumstances, juries will impose the death sentence in a substantial portion of the cases so defined. 69 In such circumstances it could no longer be argued that the penalty of death is being imposed wantonly or freakishly. 70

The statute 71 under scrutiny in Proffitt v. Florida 72 parallels the Georgia statutes in that the Florida statute provides that both aggravating and mitigating circumstances must be taken into account. Like Georgia’s statutes, the Florida statute enumerates the aggravating circumstances. 73 It also provides

67 Id. at 2949 (White, J., concurring).
68 Id.
69 Id. at 2948.
70 Justice Blackmun also voted in favor of the Georgia statutes. Id. at 2971 (Blackmun, J., concurring). He merely concurred in the judgment, citing his dissenting opinion in Furman. Justice Blackmun followed the same procedure in concurring with the Stewart plurality in Proffitt v. Florida, and Jurek v. Texas. His dissent in Woodson v. North Carolina likewise just referred to his Furman opinion. His primary view in Furman expressed apprehension that the states would reenact regressive capital punishment statutes, eliminating the element of mercy in the imposition of the penalty.

72 96 S.Ct. 2960 (1976).
73 Aggravating circumstances are found in FLA. STAT. ANN. § 921.141 (5):
(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, 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.
74 FLA. STAT. ANN. § 921.141 (4).
75 Mitigating circumstances are found in FLA. STAT. ANN. § 921.141 (6):
(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.
76 See note 52 supra.
77 96 S.Ct. at 2968.
78 Halliwell v. State, 323 So.2d 557 (Fla. 1975); Tedder v. State, 322 So.2d 908 (Fla. 1975); Alford v. State, 307 So.2d 433 (Fla. 1975).
guidance to those charged with the duty of recommending or imposing sentences.\textsuperscript{79,79}\textsuperscript{7}

The petitioner next charged that the statute gave no guidance to the judge or jury as to how to weigh the various mitigating and aggravating circumstances. Once again the plurality opinion of Justice Stewart rejected the argument, containing that:

The directions given to judge and jury are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones.\textsuperscript{80}

The Stewart plurality found that while the decision of whether to impose the death penalty may be hard, it is basically the same type of decision that fact finders are routinely required to make. \textit{Furman}'s requirements are satisfied when the judge or jury responsible for sentencing is guided and channeled by special factors that argue for or against the death penalty, thus “eliminating total arbitrariness and discretion in its imposition.”\textsuperscript{81}

The Florida statute does not provide a structured form of review by the state supreme court, thus opening up the process to the petitioner's charge that it is necessarily subjective and unpredictable. However, the Stewart plurality refused to find that the process was necessarily ineffective or arbitrary. On the contrary, they noted that the Florida Supreme Court had undertaken its functions responsibly.\textsuperscript{82}

The brief concurring opinion written by Justice White and joined by the Chief Justice and Justice Rehnquist pointed out that as to the categories of murder where the death penalty could be imposed, there was every reason to believe that the penalty will be imposed with regularity. A potential killer, aware that the penalty would likely be carried out, would be thus deterred. Therefore, it could no longer be said that the death penalty:

has ceased to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system.\textsuperscript{83}

The Court upheld a third state statute by the same 7-2 margin\textsuperscript{84} in \textit{Jurek v. Texas}.\textsuperscript{85} The Texas statute\textsuperscript{86} does not include statutory aggravating circumstances as do the Florida and Georgia statutes. However, the Stewart plurality held that the carefully limited scope of murder for which capital punishment can be imposed serves the same purpose as statutory aggravating circumstances, that is, to guide and channel the jury while eliminating arbitrary discretion in the determination of the sentence.\textsuperscript{87}

This alone would not validate the Texas plan because \textit{Furman} mandates that mitigating circumstances must also be taken into account.\textsuperscript{88} Since the statute does not specifically deal with mitigating circumstances, the Stewart plurality carefully examined the three post-conviction questions\textsuperscript{89} which under the statute the jury must answer affirmatively.

\textsuperscript{79}6 S.Ct. at 2968.
\textsuperscript{80}Id. at 2969.
\textsuperscript{81}Id.
\textsuperscript{82}Id.
\textsuperscript{83}Id. at 2970.
\textsuperscript{84}See note 52 supra.
\textsuperscript{85}96 S.Ct. 2950 (1976).
\textsuperscript{86}Tex. Penal Code Ann. § 19.03 (Vernon 1974).
\textsuperscript{87}6 S.Ct. at 2955. Murder is now defined in Texas by Tex. Penal Code Ann. § 19.02 (a) (Vernon 1974):
A person commits an offense if he:
(1) intentionally or knowingly causes the death of an individual;
(2) intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or
(3) commits or attempts to commit a felony, other than voluntary or involuntary manslaughter, and in the course of and in furtherance of the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.
Texas law defines as a capital offense the commission of murder as defined in § 19.02 (a) (1) if:
(1) the person murders a peace officer or firefighter who is acting in the lawful discharge of an official duty and who the person knows was a peace officer or firefighter;
(2) the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated rape or arson;
(3) the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
(4) the person commits the murder while escaping or attempting to escape from a penal institution;
(5) the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution.

\textsuperscript{88}Tex. Penal Code Ann., tit. 5, § 19.03 (a) (Vernon 1974).
\textsuperscript{89}6 S.Ct. at 2956.
\textsuperscript{89}The questions the jury must answer are these:
(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
before the death sentence can be imposed.

The Stewart plurality found that the Texas Criminal Court of Appeals had indicated in its decision of the petitioner's case that it would interpret the second question so as to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show. Thus, accepting the Texas court's interpretation of the second question, the Stewart plurality concluded that the Texas statute is consistent with the requirements of Furman. It provides for rational, even, and consistent imposition of the death penalty and is therefore constitutional.

Justice White, joined by the Chief Justice and Justice Rehnquist, filed a concurring opinion once more making the point that the discretion inherent in the criminal justice system during the course of any prosecution does not mean that the penalty of death would be "arbitrarily and freakishly" imposed. In Woodson v. North Carolina, a 5-4 majority held that the state plan failed to provide a constitutionally tolerable response to Furman. The North Carolina plan called for mandatory death if convicted of first degree murder as that was defined in the statute. With the Stewart plurality again writing the main opinion, the history of mandatory death penalties was examined. It was the plurality's impression that such penalties have been rejected as "unduly harsh and unworkably rigid." One factor was the behavior of juries confronted with mandatory penalties. Many juries, finding the death penalty too severe in a significant number of cases, refused to return guilty verdicts, since such verdicts would automatically have sentenced the defendants to death. In response to this reluctance to return guilty verdicts, legislatures began to enact laws which would allow juries to distinguish between murderers, to exercise discretion, and to take mitigating circumstances into account in sentencing for capital cases. By the time the Court decided Furman in 1972, mandatory sentences were widely disfavored by both legislatures and juries, which the plurality concluded was evidence that evolving standards of decency had come to reject such penalties as violating societal standards.

In light of this widespread rejection of mandatory death sentences, the Stewart plurality reasoned that the states enacting mandatory penalties after Furman must have done so in an attempt to respond to the confusion generated by the Furman opinion, and not because of any renewed social acceptance of mandatory death sentences. The severity of the only penalty available upon a finding of guilty will encourage juries to violate their oaths to return a verdict supported by the evidence. Mandatory death penalties continue to be inconsistent with contemporary standards respecting the imposition of death and therefore, according to the Stewart plurality, the eighth amendment prohibits their use.

Finally, the Stewart plurality held the North Carolina plan invalid for failing to allow mitigating circumstances to be considered before the sentence of death is imposed. Because of the qualitative difference between the death penalty and prison sentences, the Stewart plurality concluded that the fundamental respect for human dignity underlying the eighth amendment requires factors relating to the defendant to be taken into account during sentencing. Without the opportunity to present relevant facts to the sentencing authority, the sentencing procedure:

(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.


81 Id. at 2958.
82 Id. at 2959 (White, J., concurring). The Chief Justice concurred separately in the judgment without opinion.
83 Id. at 2990-60.
84 96 S.Ct. 2978 (1976).
85 Concurrences in the opinion were: Stewart, Powell, Stevens, JJ., id. at 2981; Brennan, J., id. at 2992; Marshall, J., id. Dissenting were: Burger, C.J., White, Rehnquist, JJ., id. Blackmun, J., id. at 2993.
86 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.
87 96 S.Ct. at 2986 (Stewart, J., plurality).
88 Id. at 2988.
89 Id. at 2988-89.
100 Id. at 2990.
101 Id. at 2991-92.
102 Id. at 2991.

Therefore, concluded the Stewart plurality, the
North Carolina statutory plan failed totally to meet the requirements set out in Furman.

Justices Brennan and Marshall found the statute invalid, but did so on the basis of their belief that capital punishment is per se unconstitutional.\(^{108}\)

Four Justices dissented, but the major dissenting opinion was filed by Justice Rehnquist.\(^{104}\) In a long opinion, Justice Rehnquist, adhering to his opinion in Furman, rejected every argument of the Stewart plurality.\(^{108}\)

He first questioned whether these cases raised an eighth amendment issue at all. In his view the prohibition against cruel and unusual punishment was limited to those punishments deemed cruel and unusual at the time of the adoption of the amendment.\(^{106}\)

Justice Rehnquist took issue with the assertion of the Stewart plurality that the history of mandatory death penalties revealed that those penalties had been rejected as “unduly harsh and unworkably rigid.”\(^{107}\) In essence he argued that the legislative decisions to move away from mandatory death penalties in no way reflected a rejection of that form of punishment. Rather, the legislatures reasoned that if a jury could return a sentence other than death upon a conviction for murder, fewer guilty criminals would go completely free. Justice Rehnquist attributed the problem of juries acquitting obviously guilty defendants to a small minority of jurors who could defeat the majority by casting a single vote to acquit. Thus, the problem was due to the requirement of unanimity of verdicts and not to societal rejection of mandatory death penalties.\(^{108}\)

Justice Rehnquist could see no constitutional difference between the type of discretion approved in the Georgia, Florida and Texas statutes and the type of discretion disapproved in the North Carolina statute. He stated that the proper inquiry of the Court, once the determination was made that capital punishment was not per se unconstitutional, should be limited to whether the defendant received a fair trial.

The same 5-4 majority that struck down the North Carolina plan also struck down the Louisiana plan for mandatory death sentences in Roberts v. Louisiana.\(^{109}\) Although the Louisiana statute limits those cases where capital punishment is possible and employed a responsive verdict system, those limitations were held insufficient to overcome the constitutional infirmities of mandatory death sentences.\(^{111}\) The problem with the mandatory approach is that society has rejected the belief that “every offense in a like legal category calls for identical punishment without regard to the past life and habits of a particular offender.”\(^{112}\)

The plan was also found insufficient by the Stewart plurality in failing to provide standards for the jury to follow in sentencing. The responsive verdict system employed in the statute allows the jury to pick from a number of alternative verdicts given to it ranging from not guilty, to manslaughter, to second degree murder, to first degree murder. The Stewart plurality concluded that there were no guidelines for the jury to follow and that the plan invited the jurors to disregard their oaths and choose a verdict for a lesser offense whenever they felt the penalty of death was inappropriate.\(^{113}\)

Justice White’s dissent,\(^{114}\) joined by the Chief Justice, Justice Blackmun and Justice Rehnquist, charged that the mere possibility that the jury might violate its oath and refuse to convict for first degree murder is not sufficient to equate the Louisiana plan with the unlimited discretion found unconstitutional in Furman. Juries should be trusted to do what they are supposed to do, otherwise no jury system could be found constitutional. The same is true regarding the discretion exercised by prosecutors in performing their wide ranging duties, Justice White asserted. The exercise of discretion by the jury and the prosecutor in the course of their duties is nothing more than the “rational enforcement of the State’s criminal law . . . system.”\(^{115}\)

The dissenters also disagreed with the Stewart plurality’s holding that a separate proceeding must be held at which the sentencing authority must take into consideration the character and record of the defendant. Justice White could find no reason why a state could not decide that the commission of certain crimes conclusively established the character of the defendant. In addition, he felt that a state should be

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\(^{102}\) Id. (Brennan, J., concurring), 2992 (Marshall, J., concurring).

\(^{103}\) Id. at 2993 (Rehnquist, J., dissenting).

\(^{104}\) 1096 U.S. 238, 465 (Rehnquist, J., dissenting).

\(^{105}\) 96 S.Ct. at 3001 (1976).

\(^{106}\) LA. REV. STAT. ANN. § 14:30 (West 1974).

\(^{107}\) Id. at 3006.


\(^{109}\) Id. at 3007.

\(^{110}\) Id. at 3008 (1976) (White, J., dissenting).

\(^{111}\) Id. at 3013.
able to conclude that the need to deter certain crimes and the likelihood that the death penalty will succeed in deterring them is such that the penalty should be mandatory for all who commit those crimes. 116

Justice White was concerned that the Stewart plurality was taking a position in Roberts and Woodson which disregarded past Court decisions. He pointed in particular to the case of McGautha v. California, 117 in which the Court held that permitting a jury to impose the death sentence without governing standards was constitutionally permissible. Justice White, finding no reason to reconsider the holding of McGautha, stated that he “would not invalidate the Louisiana statute for its failure to provide what McGautha held it need not provide.” 118 Finally, the dissenters took issue with the plurality’s conclusion that the history of mandatory death penalties revealed society’s rejection of them. While state legislatures may have preferred discretionary sentencing to mandatory penalties, this did not suggest to Justice White the total rejection of mandatory plans. It simply meant that the state legislatures had indicated a preference from two alternatives, neither type of sentencing being wholly rejected in the sense that the Stewart plurality implied.

CONCLUSION

As the numerous opinions filed in these cases indicate, the Court still does not speak with one voice on the issues raised by capital punishment. However, in contrast to Furman, in which the Court was so badly fragmented that no one could be quite sure of what decision was actually handed down, the Court in these cases not only answers the basic question of the constitutionality of the death penalty, but also gives considerable guidance to states which wish to employ capital punishment as part of their criminal justice system. Since the Stewart plurality is the narrowest position a majority of the Court adheres to, if a state legislature follows their guidelines it will in all probability have achieved a constitutional capital punishment statute. 119 By including statutory aggravating circumstances, it will ensure that the sentencing authority articulate exactly why a given defendant is to be put to death for his crime. The requirement of consideration of mitigating circumstances by the sentencing authority will focus the attention of the judge or jury on the individual offense and on the offender, who will be given an opportunity to persuade the sentencing authority that death is not an appropriate penalty. While this does leave some discretion with the sentencing authority, it is at least guided and channeled so that an evenhanded administration of capital punishment is clearly more possible than under a system which provides no such guidance. Given the fundamental proposition that capital punishment is not per se cruel and unusual, the safeguards set forth in these cases may provide as much protection against arbitrariness and capriciousness as is possible.

Because of the multi-opinioned Furman decision, it is difficult to state categorically that Gregg and its companion cases represent a total departure from that case, but the tone of these cases is significantly different from Furman. Undertones in Furman suggested that factors of racial and economic prejudices permeated the state capital punishment plans. 120 There was also a definite moral tone to the opinions, ranging from Justice Brennan’s and Justice Marshall’s conclusion that capital punishment is immoral 121 to Justice White’s more cautious assertion that if the death penalty could not be shown to be a deterrent force, it should be held unconstitutional as the “needless extinction of life.” 122 Gregg and its companion cases are concerned more with the procedures set forth in the statutes than with the racial or class characteristics of those against whom they are being applied.

The use of community standards was one of the strengths of the Stewart plurality’s opinions. In looking to the legislative response to Furman, the Stewart plurality made a reasonable assumption that the response would be a fair barometer of current social standards. Furthermore, the fact that a relatively large number of people have been sentenced to death under post-Furman statutes in a relatively short time added to the permissible conclusion that society has not rejected capital punishment.

The strength of the Stewart plurality was the weakness of Justice Marshall’s opinion. He attempted to base part of his decision against capital punishment in Furman on the theory that contempo-

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116 Id. at 3018.
118 Roberts v. Louisiana, 96 S.Ct. at 3008 (White, J., dissenting).
119 Enactment of a statute like the Texas statute would require state courts to interpret the statute in a similar fashion as the Texas courts did.
121 Id. at 296 (Brennan, J., concurring), 369 (Marshall, J., concurring).
122 Id. at 312 (White, J., concurring).
rary values had rejected death penalties. That argument has apparently been emasculated in the years following Furman by the legislative response to Furman and the number of defendants sentenced to death under new statutes. Justice Marshall acknowledged these developments, yet explained that he intended only to consider the opinion of an informed citizenry. Such a citizenry would exist when all the information which was relevant to the issue was disseminated and understood by the public. It is unlikely that any such state of affairs will come to pass soon, if for no other reason than the tremendous amount and complexity of the relevant data. Given the general acceptance of capital punishment reflected in the legislative response to Furman, the number of defendants sentenced to death under these statutes, and the various referendums cited by the Stewart plurality one would have to agree with the majority that society has not yet rejected the ultimate penalty of death.

More must be found in order to uphold capital punishment against an eighth amendment challenge however, according to the Stewart plurality. The second prong of the test is that the penalty must not be excessive. Both the Stewart and White pluralities’ opinions continue to rely on public opinion as an indicator of what constitutes excessive punishment. But simply because a community demands the life of an individual for breaking the community’s law does not necessarily mean that the penalty is not excessive or that life should be sacrificed. As Justice Marshall points out, it is difficult to believe that without capital punishment, the nation would turn to “self-help, vigilante justice, and lynch law” as feared by the plurality.

The White plurality acknowledges that no specific deterrent factor can be identified involving capital punishment, yet prefers to accept the legislative judgment that there is some deterrent effect in the penalty of death. But while there is much to be said for not allowing the judiciary to act legislatively, it is the Court that has the responsibility for determining in the final analysis whether the penalty is excessive. The legislatures have already made at least the implicit determination that the death penalty is not excessive by their enactment of capital punishment statutes. If the Court is unwilling to examine those legislative justifications for capital punishment, then it will have no basis for determining whether the penalty is excessive.

This refusal to go behind the legislative justifications will! create problems for the Court in deciding whether capital punishment is excessive for crimes other than murder, such as armed robbery, rape, or kidnapping. If the Court follows the analysis set forth by the Stewart and White pluralities, the fact that the states have enacted such penalties will be given great weight in determination of whether the penalty is excessive. However, the focus of the second prong of the eighth amendment test should not be concerned with popular acceptance as much as with other values, such as whether the penalty does in fact fit the crime and whether it is an unnecessary infliction of pain and suffering.

Although the Stewart plurality purports to build on prior case history, it had to selectively ignore significant holdings of cases recently decided in order to arrive at some of its conclusions. One prominent example is the case of McGautha v. California. Even though the McGautha case is liberally cited throughout the Stewart plurality’s opinions, its holding is clearly in conflict with the approach taken by the plurality, since in McGautha the Court held that it is constitutionally permissible to impose death without governing standards. The Stewart plurality attempted to explain away the problem in a footnote, stating that McGautha was not an eighth amendment but a fourteenth amendment case and that while Furman did not overrule McGautha it is clearly in substantial tension with a broad reading of McGautha’s holding. In view of Furman, McGautha can be rationally viewed as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases before the Court so as to violate the Due Process Clause.

Another example of this same problem is the treatment of Spencer v. Texas. Spencer held that a bifurcated trial is not constitutionally mandated, yet the Stewart plurality held that the state must provide a separate procedure under which the sentencing authority must consider any mitigating circumstances along with the character and record of the defendant. While this does not have to be done in

130Id. at 2925.
131Id. at 2976 (Marshall, J., dissenting).
133Id. at 183.
134Gregg v. Georgia, 96 S.Ct. at 2929 (Stewart, J., plurality).
135385 U.S. 554 (1967).
136Id. at 568-69.
a formalized bifurcated trial, the intent of the plurality is that there be a two stage process: guilt finding and sentencing. One can speculate that the same reasoning applied to distinguish *McGautha* would also be used to distinguish *Spencer* from *Gregg* and its companion cases.

**SUMMARY**

In summary, a majority of the Court squarely upheld the constitutionality of capital punishment. There was no majority opinion, but with regard to the constitutionality of particular statutes one can look to the Stewart plurality as the narrowest position upholding death penalty statutes and conclude that a statute imposing the death penalty will be upheld if (1) there are sentencing guides, usually expressed in terms of aggravating circumstances, to aid the sentencing authority in making the decision whether to impose the death penalty and if (2) there is a separate procedure by which the defendant has an opportunity to bring any mitigating circumstances to the attention of the sentencing authority. Because of the relative clarity and substantial agreement between the pluralities in these cases, *Gregg* and its companion cases should settle for some time the fundamental questions involving the constitutionality of capital punishment for the crime of murder.