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In response to the 1976 United States Supreme Court death penalty decisions and the Wyoming Supreme Court's decision in *Kennedy v. State*, the Wyoming legislature enacted a new death penalty provision for certain crimes. In this article, Mr. McCall discusses the development of the interpretation of the cruel and unusual punishments clause of the eighth amendment, emphasizing the 1976 decisions. He then reviews the prior Wyoming death penalty statutes and the *Kennedy* decision. Finally, the author analyzes the new Wyoming statute, concluding that it facially satisfies the eighth amendment but that it contains a number of potential pitfalls.

THE EVOLUTION OF CAPITAL PUNISHMENT IN WYOMING: A RECONCILIATION OF SOCIAL RETRIBUTION AND HUMANE CONCERN?

*Donn J. McCall**

"That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge." Justice Holmes, dissenting in *Abrams v. United States*.

INTRODUCTION

In 1976, one hundred and eighty-five years after the adoption of the eighth amendment of the United States Constitution,¹ the Supreme Court of the United States finally did consider and resolve the question of whether the death penalty constitutes cruel and unusual punishment. The Court had

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1. U.S. CONST. amend. VIII provides, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

assiduously avoided the issue in prior cases by assuming the validity of capital punishment without a specific holding on the merits. In the past decade, however, the Court has been confronted with an unprecedented amount of litigation wherein it was asked initially to consider the constitutionality of the procedures utilized in capital cases and ultimately that of the death penalty itself.² It became obvious that the issue could no longer be sidestepped when the Court in 1971 granted certiorari to consider whether the imposition and execution of the death penalty under the statutes then existing in Georgia and Texas invariably violates the eighth amendment's prohibition against cruel and unusual punishments.³

The Supreme Court's response to this issue was at best ambiguous. In *Furman v. Georgia*,⁴ the Court was constrained to announce its decision in a short *per curiam* opinion⁵ which held that the imposition and carrying out of the death penalty under statutes allowing the judge or jury uncontrolled and unbridled sentencing discretion violated the eighth and fourteenth amendments.⁶ Only Justices Brennan and Marshall would have held that capital punishment is unconstitutional *per se*,⁷ while four justices would have arrived at the opposite conclusion.⁸ Three justices did not reach the question but did agree that the statutes under scrutiny were unconstitutional as applied.⁹

In the aftermath of *Furman*, the legislatures of thirty-five states enacted new statutes authorizing the death penalty for at least some crimes resulting in the death of another per-

2. See White, *Disproportionality and the Death Penalty: Death as a Punishment for Rape*, 38 U. OF PITT. L. REV. 145 (1976).

3. The cases in which certiorari was granted were *Furman v. Georgia*, 403 U.S. 952 (1971); *Jackson v. Georgia*, 403 U.S. 952 (1971); *Branch v. Texas*, 403 U.S. 952 (1971).

4. *Furman v. Georgia*, 408 U.S. 238 (1972).

5. The opinion was accompanied by five separate concurring opinions and four separate dissenting opinions.

6. The eighth amendment's proscription against cruel and unusual punishments is applicable to the states through the fourteenth amendment. *Robinson v. California*, 370 U.S. 660, 667 (1962).

7. *Furman v. Georgia*, *supra* note 4, at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

8. *Id.* at 375 (Burger, C. J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting).

9. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring). Since the Court was not reviewing death sentences under statutes mandatory in its imposition for every person convicted of certain designated criminal conduct, it did not reach the question whether capital punishment is unconstitutional for all crimes and under all circumstances. See *id.* at 256 (Douglas, J., concurring); *id.* at 307-09 (Stewart, J., concurring); *id.* at 310-11 (White, J., concurring).

son.¹⁰ In 1974, the Congress of the United States passed legislation authorizing the death sentence in cases of air piracy that results in death.¹¹ The new laws employed a variety of schemes in an attempt to comply with *Furman's* rejection of unfettered sentencing discretion. The response consisted primarily of statutes which removed all sentencing discretion from the fact finder by mandatorily requiring the death penalty upon conviction of a specified crime, and statutes which prescribed the weighing of aggravating and mitigating circumstances before the sentence may be imposed. The effort by a substantial majority of states to reinstate the death penalty after *Furman* resulted in at least 254 persons being sentenced to death at the close of 1974. By March, 1976, more than 460 persons were awaiting execution throughout the United States.¹²

On July 2, 1976, the Supreme Court reviewed the statutory responses in five cases which considered the constitutionality of five distinctive capital punishment systems.¹³ The Court, almost as fragmented as it was in 1972, was unable to obtain a majority for any one analysis of these laws. The cases, however, represent the first time in this nation's history that all members of the Court were willing to confront and resolve the question whether capital punishment for the crime of murder is, under all circumstances, cruel and unusual punishment in violation of the eighth and fourteenth amendments. Seven justices, with Justices Brennan and Marshall dissenting, agreed that the punishment of death does not invariably violate the Constitution.¹⁴

The present attention of the courts, legislatures and legal commentators is of necessity directed toward the opinions of the Stewart-Powell-Stevens plurality. They wrote the lead opinion announcing the judgment of the Court in each case

10. The statutory citations are set forth in *Gregg v. Georgia*, 428 U.S. 153, 179-80 n.23 (1976).

11. Antihijacking Act of 1974, 49 U.S.C. §§ 1472, 1473 (Supp. V 1975).

12. *Gregg v. Georgia*, *supra* note 10, at 182.

13. See *Gregg v. Georgia*, *supra* note 10; *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

14. *Gregg v. Georgia*, *supra* note 10, at 169 (plurality opinion); *Roberts v. Louisiana*, *supra* note 13, at 337, 350 (White, J., dissenting). The Court did not address the question of whether or not the taking of the criminal's life is constitutional where no victim has been deprived of life, *e.g.*, when capital punishment is imposed for such crimes as rape, kidnapping or armed robbery. *Gregg v. Georgia*, *supra* note 10, at 187 n.35.

and were essential to the sustention of statutorily controlled discretion schemes reviewed in *Gregg v. Georgia*, *Proffitt v. Florida* and *Jurek v. Texas*. They also cast the swing votes in striking down the mandatory laws considered in *Woodson v. North Carolina* and *Roberts v. Louisiana*. Though it must be kept in mind that their opinions are not those of a majority of the Court, they provide the guidelines which a capital punishment statute must presently satisfy in order to successfully withstand constitutional scrutiny.

The purpose of this article is to examine the somewhat confusing and unpredictable development of the eighth amendment and the resultant impact on the recent attempt of the Wyoming legislature to resurrect the death penalty for certain types of first degree murder. The article will suggest that while the new enactment facially satisfies the requirements of *Gregg v. Georgia*¹⁵ and its companion cases, potential pitfalls still remain within the system.

With these objects in mind, this article will examine in Part I the historical development of the cruel and unusual punishments clause of the eighth amendment and the resulting constitutional tests which must be met thereunder. Part II will review in greater detail the procedural defects in the old Wyoming statute which led to its constitutional extinction in *Kennedy v. State*.¹⁶ In Part III, Wyoming's reenacted death penalty statute will be analyzed in light of the guidelines upon which a constitutional law must be patterned.

I. NOR CRUEL AND UNUSUAL PUNISHMENTS INFLICTED: DEVELOPMENT OF THE CONSTITUTIONAL TEST

A. *Historical Background: An Overview*

The eighth amendment's proscription of cruel and unusual punishments is an almost verbatim transcription of the clause that appeared in the final draft of the English Bill of Rights of 1689 which was subsequently ratified by William and Mary.¹⁷ The legislative history of the English version has led one legal commentator to conclude that it not only was a di-

15. *Gregg v. Georgia*, *supra* note 10.

16. *Kennedy v. State*, 559 P.2d 1014 (Wyo. 1977) (per curiam).

17. Granucci, "Nor Cruel and Unusual Punishments Inflicted:" *The Original Meaning*, 57 CALIF. L. REV. 839, 852-53, 855 (1969).

rective against the imposition of punishments unauthorized by statute and in excess of the jurisdiction of the sentencing court, but a reiteration of the policy against punishments disproportionate to the offense.¹⁸ Whether the English prohibition was primarily a reaction to the tortures and barbarities of the Stuarts, it, nevertheless, was the design of the framers of the eighth amendment that the clause serve as a proscription against barbarous methods of punishment.¹⁹

The vague language of the cruel and unusual punishments clause, and the limited meaning ascribed to it by the drafters are the primary factors which explain the snail-paced effort of the Supreme Court to fully articulate its meaning. Earlier decisions focused not on the constitutionality of the death penalty itself, but on whether a particular method of execution involved unnecessary cruelty.²⁰ In each of these cases, the Court repeatedly assumed that capital punishment was valid *per se*.

Wilkerson v. Utah, the first capital case in which the Supreme Court dealt squarely with the issue, affirmed the notion that punishments involving unnecessary cruelty are no more permissible under the eighth amendment than is torture.²¹ The Court, however, unanimously held that a sentence of death by public shooting upon conviction of first degree murder is not invalid.²² The infliction of death by the novel method of electrocution was found not to violate the Constitution in *In re Kemmler*.²³ The significance of that decision was to limit the meaning of unnecessary cruelty to punishments which inflict torture or expose the offender to a lingering death.²⁴ Even though the Court acknowledged the unusualness of electrocution as a method of punishment, it did not view it as excessively cruel.

18. *Id.* at 860.

19. *Id.* at 841-42, 860.

20. *Wilkerson v. Utah*, 99 U.S. 130 (1878); *In re Kemmler*, 136 U.S. 436 (1890); *Louisiana ex rel. Francis v. Resweber*, 329 U.S. 459 (1947).

21. *Wilkerson v. Utah*, *supra* note 20, at 135-36.

22. Justice Clifford, writing for the Court, said:

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.

Id. at 134-35.

23. *In re Kemmler*, *supra* note 20, at 447. This case was not an eighth amendment decision since the Court apparently felt that it was not applicable to the states. The mode of punishment, however, was examined under the due process clause of the fourteenth amendment.

24. *Id.* at 447.

The last of the trilogy of cases which focused upon the mode of punishment was *Louisiana ex rel. Francis v. Resweber*. The defendant had been convicted of murder and sentenced to be executed by the electric chair. The initial execution attempt failed because of a mechanical failure. The Supreme Court said that the "traditional humanity of modern Anglo-American law forbids the infliction of unnecessary pain in the execution of the death sentence,"²⁵ but held that a second attempt at electrocution does not violate the Constitution since the failure of the first attempt was an unforeseeable accident and was not done with a purpose to inflict unnecessary pain.²⁶

Throughout the nineteenth century, efforts to expand the meaning of the cruel and unusual punishments clause under both federal and state prohibitions were rejected by most courts on the theory that such constitutional provisions were limited to a proscription of barbarous methods of punishment employed during the Stuart period.²⁷ It was not until 1910 that the Supreme Court began to articulate new concepts into the clause. In *Weems v. United States*,²⁸ the defendant, a disbursement officer with the Bureau of the Coast Guard and Transportation in the Philippine Islands, was convicted of falsifying a public and official document. Weems was sentenced according to the Hispanic punishment of *cadena temporal* and received fifteen years of hard labor and an unusual loss of civil rights upon release from prison. The Supreme Court held that the entire statutory penalty violated the cruel and unusual punishments clause of the Philippine Bill of Rights.²⁹

The *Weems* decision is justifiably a landmark case for two reasons. First, the Court abandoned precedent holding that the eighth amendment's prohibition is limited to inhuman and tortuous punishments, and adopted the view that a punishment could be cruelly excessive in relation to the crime committed.³⁰ In other words, the sanction for a particular

25. *Louisiana ex rel. Francis v. Resweber*, *supra* note 20, at 463.

26. *Id.* at 464.

27. Note, *The Cruel and Unusual Punishment Clause and the Substantive Criminal Law*, 79 HARV. L. REV. 635, 639 (1966).

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

29. The provision of the Philippine Bill of Rights relevant to *Weems* was taken from the eighth amendment of the United States Constitution and had the same meaning. *Id.* at 367.

30. *Id.* at 366-67. The decision relied on the view of the minority in *O'Neil v. Vermont*, 144 U.S. 323, 337 (1892). Three justices agreed that a prison sentence of over fifty-

crime should graduate in proportion to the offense. In making this assessment, the Court compared the punishment of *cadena temporal* with that authorized in the same or other jurisdictions for both comparable and more serious crimes, and concluded that the former not only was a cruelly excessive sanction but was a sentence unusual in character.

The second signification of *Weems* is embodied in the Supreme Court's recognition that the clause banning cruel and unusual punishments is not a static concept but is "progressive and is not fastened to the obsolete but may acquire meaning as public opinion becomes enlightened by a humane justice."³¹ It is this characterization of the eighth amendment as a dynamic and flexible concept that in the years ahead would be crystallized as the underpinning of its interpretation.

Weems' portrayal of the cruel and unusual punishments clause as an inherently flexible idea was amplified in *Trop v. Dulles*.³² The petitioner in this case contested the forfeiture of his citizenship by reason of his conviction and dishonorable discharge for wanton desertion.³³ Chief Justice Warren, writing for four of the five justices comprising the majority, held that denaturalization as a sanction was cruel and unusual because "it is a form of punishment more primitive than torture, for it destroys for the individual the political existence that was centuries in the development."³⁴

Chief Justice Warren identified the basic concept underlying the eighth amendment's prohibition as human dignity, stating that any mode of punishment outside of traditional criminal sanctions would be constitutionally suspect.³⁵ The standard for making such a determination was stated to be drawn by reference to the "evolving standards of decency that mark the progress of a maturing society."³⁶ Thus, recog-

four years for 307 illegal sales of intoxicating liquors violated the cruel and unusual punishments clause. In his dissenting opinion Justice Field stated that the eighth amendment did not singularly inhibit inhuman and barbarous punishments but was also directed as a prohibition "against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged." *Id.* at 339-40 (Field, J., dissenting).

31. *United States v. Weems*, *supra* note 28, at 378.

32. *Trop v. Dulles*, 356 U.S. 86 (1958) (plurality opinion).

33. The litigation arose when the petitioner was denied on his application for a passport under the provisions of the Nationality Act of 1940, as amended, which declared that an American citizen loses his nationality for wartime desertion. *See* 54 Stat. 1168, 1169 (1940), *as amended*, 58 Stat. 4 (1944).

34. *Trop v. Dulles*, *supra* note 32, at 101.

35. *Id.* at 100.

36. *Id.* at 101.

dition was given to the idea that a form of punishment, though permissible in an earlier day, is not necessarily acceptable to modern society.

The differing interpretations attributed to *Trop v. Dulles* is perhaps the focal point of the Supreme Court's present division over the proper constitutional standard to be applied in measuring the validity of capital punishment of certain types of murder. Even though the plurality opinion in that case was not expressly based upon the concept of whether denaturalization is an excessive punishment in relation to the crime, it did query whether this penalty "subjects an individual to a fate forbidden by the principle of civilized treatment guaranteed by the Eighth Amendment."³⁷ The plurality, nonetheless, utilized the same approach taken by the *Weems*' court in holding that denaturalization is an overly inappropriate penalty for wartime desertion.³⁸ Regardless of the debate stirred by *Trop*, it did place the responsibility on the courts for defining and applying the limits which the eighth amendment places on the sovereign's power to punish. It was only inevitable that the tests expounded in that opinion would lead the Supreme Court on a collision path with the ultimate question it had so studiously avoided in the past: Whether the death penalty is an acceptable punishment in a society which places a supreme value on the dignity of the individual?³⁹

B. *The Attack on Procedural Grounds*

The decade prior to the *Furman* decision was characterized by a number of unprecedented challenges to long-standing procedures used by the states and the federal government to exact the death penalty. Although one commentator⁴⁰ attributes the stepped-up offensive to the dissent of three justices from the denial of certiorari in *Rudolph v. Alabama*,⁴¹ it was

37. *Id.* at 99.

38. The plurality in reaching its conclusion examined the practice of other civilized nations of the world and found an almost unanimous condemnation of involuntary statelessness as a punishment for crime. *Id.* at 102.

39. *Furman v. Georgia*, *supra* note 4, at 257, 296 (Brennan, J., concurring).

40. White, *Disproportionality and the Death Penalty: Death as a Punishment for Rape*, 38 U. OF PRTT. L. REV. 145 (1976).

41. *Rudolph v. Alabama*, 375 U.S. 889 (1963). Justice Goldberg, joined by Justices Douglas and Brennan, would have heard the case to determine whether the eighth and fourteenth amendments "permit the imposition of the death penalty on a convicted rapist who has neither taken nor endangered human life." *Id.* at 889 (Goldberg, J., dissenting).

more likely the result of the increasingly vocal debate that capital punishment had inspired during the decades of the fifties and sixties.⁴²

The procedural attacks surprisingly received a sympathetic hearing from a Supreme Court still unwilling to consider the ultimate question. *United States v. Jackson*⁴³ invalidated the death penalty provisions of the Federal Kidnapping Act⁴⁴ under which an accused could escape the death sentence as a potential punishment if he pled guilty or waived the right to a jury trial. The Court reasoned that since only the jury had the power to impose the death sentence, the effect of the statute was to discourage an accused from pleading not guilty and demanding a jury trial. Such a procedure, said the Court, places an impermissible burden upon the exercise of fifth and sixth amendment rights.⁴⁵ Later, in *Boykin v. Alabama*,⁴⁶ the Court held that it was unconstitutional for the trial judge to accept a guilty plea to a capital offense without an affirmative showing that it was intelligently and voluntarily made. The underlying basis for application of the standard of voluntariness for confessions to cases involving guilty pleas was the majority's concern over the grave consequences to a defendant who waives his constitutional rights and enters a plea of guilty.

One of the effects of vesting sole and standardless sentencing discretion in the jury was considered in *Witherspoon v. Illinois*.⁴⁷ The Court invalidated an Illinois procedure under which a death sentence had been imposed by a jury chosen by automatically excluding veniremen merely because they had conscientious scruples against the death penalty.⁴⁸ The

42. See generally BEDAU, *THE DEATH PENALTY IN AMERICA* (1964).

43. *United States v. Jackson*, 390 U.S. 570 (1968).

44. At that time, 18 U.S.C. § 1201(a) provided that a convicted defendant "shall be punished (1) by death if the kidnapped person has not been liberated unharmed, and if the verdict of the jury shall so recommend, or (2) by imprisonment for any term of years or for life, if the death penalty is not imposed."

45. *United States v. Jackson*, *supra* note 43, at 581.

46. *Boykin v. Alabama*, 395 U.S. 238 (1969).

47. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). Previous Supreme Court cases dealing with standardless jury sentencing in capital cases dealt with the propriety of instructions with respect to recommendation of mercy, *Andres v. United States*, 333 U.S. 740 (1948); *Winston v. United States*, 172 U.S. 303 (1899), and the failure of the trial court to inform the jury of its right to recommend an alternative sentence of life imprisonment at hard labor instead of death. *Calton v. Utah*, 130 U.S. 83 (1889).

48. The Court said that "[w]hatever else might be said of capital punishment, it is at least clear that its imposition by a hanging jury cannot be squared with the [due process clause]." *Witherspoon v. Illinois*, *supra* note 47, at 523.

Court said juries play a significant role in expressing the conscience of the community on the question of life or death. It, therefore, concluded that in a nation where less than half of the people believe in capital punishment, a jury composed exclusively of such people cannot speak for the community.⁴⁹

Three years later, the Supreme Court, in an opinion affirming a death sentence for the first time in twenty-four years,⁵⁰ ushered in a new era in which it would no longer be able to refrain from examining the propriety of the death penalty itself under the eighth amendment. *McGautha v. California*⁵¹ held that the due process clause of the fourteenth amendment was not violated by the employment of sentencing procedures which did not provide the jury any standards in the exercise of its discretion to recommend a death sentence or life imprisonment, and which did not separate the sentencing proceeding from the guilt determining stage.⁵² The holding in *McGautha* was not expressly overruled by *Furman v. Georgia*, decided one year later, since the former was not decided under the eighth amendment. Nevertheless, the holding of *Furman* that the imposition of death sentences under statutes allowing unbridled sentencing discretion in the jury violates the eighth and fourteenth amendments is irreconcilable with *McGautha*. At least three members of the Supreme Court view *Furman* as a repudiation of *McGautha*, if not overruling it *sub silentio*.⁵³

The *McGautha* opinion, though of dubious precedential value to the presently constituted Court, acknowledged the significance of procedural considerations as an integral part of any analysis involving capital punishment laws. It would be shown in subsequent cases that the death penalty would be required to be exacted under procedural schemes guaranteeing its rational and even-handed application.

49. *Id.* at 519-20.

50. The last case was *Louisiana ex rel. Francis v. Resweber*, *supra* note 20.

51. *McGautha v. California*, 402 U.S. 183 (1971).

52. The constitutionality of the unitary trial procedure was decided in the companion case of *Crampton v. Ohio*, 402 U.S. 183 (1971).

53. Justice Stewart, writing for the plurality in *Gregg v. Georgia*, made the following statement:

McGautha was not an Eighth Amendment decision, and to the extent it purported to deal with Eighth Amendment concerns, it must be read in light of the opinions in *Furman v. Georgia*. . . . [I]n view of *Furman*, *McGautha* can be viewed rationally as a precedent only for the proposition that standardless jury sentencing procedures were not employed in the cases there before the Court so as to violate the Due Process Clause.

Gregg v. Georgia, *supra* note 10, at 196 n.47.

C. Furman v. Georgia: The Precursor

The *Furman* Court was unable to resolve the question of whether the infliction of the death penalty is unconstitutional *per se*. Two of the five justices, who separately concurred in the judgment, accepted the view that contemporary standards had evolved to the point where the eighth amendment no longer permits the sovereign to inflict capital punishment for any crime regardless of its malevolence.⁵⁴

Three justices, however, focused on the procedure by which convicted defendants were selected for death rather than on the actual sanction itself. Their primary concern was that under the jury sentencing arrangements which were in force in most states, the death penalty came to be imposed less and less frequently. It was their conclusion that the vesting of standardless discretion in the sentencing authority resulted in juries imposing the death penalty so seldom and so freakishly and arbitrarily that it was no longer serving the ends of justice and thereby had come to be cruel and unusual punishment violative of the eighth and fourteenth amendments.

Justice White was of the view that the imposition of the death penalty, even for the most atrocious crimes, under these sentencing procedures was so infrequent that the punishment failed to contribute to the major goals of deterrence and retribution.⁵⁵ While the analysis seemed to focus upon the needs of society, Justice White was also concerned that "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."⁵⁶

This viewpoint was echoed by Justice Stewart who noted that the sentences imposed under the statutes were cruel and unusual because of their random imposition, much in the same way that being struck by lightning is cruel and unusual.⁵⁷ It was his conclusion:

54. *Furman v. Georgia*, *supra* note 4, at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

55. *Id.* at 311-13. Justice White concluded that the value of retribution is dubious when prison terms are deemed sufficient, and that the goal of deterrence is seldom accomplished when the death penalty is so infrequently imposed that it ceases to be the credible threat necessary to influence the conduct of others.

56. *Id.* at 313.

57. *Id.* at 309 (Stewart, J., concurring).

For, of all the people convicted of [capital crimes] in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed. . . . [T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.⁵⁸

Justice Douglas was also concerned with the manner in which the death penalty was exacted under statutes which in his view practically left to the untrammelled discretion of the judge or jury "to let an accused live or insist that he die."⁵⁹ It was his conviction that under such a system, the death penalty is selectively applied, feeding prejudices against minorities and the poor while saving those who by virtue of their social position may be in a more protected position. Justice Douglas concluded that the discretionary statutes were pregnant with discrimination which is "not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."⁶⁰

The impact of the *Furman* decision was immediate and resolute. On the day the opinion was delivered, the Supreme Court vacated death sentences exacted under varying statutory schemes of twenty-six states.⁶¹ The overall effect of the decision was to strike down the capital punishments laws of thirty-nine states and of the federal government, resulting in the removal of over 600 persons from death rows throughout the country.⁶² The flurry of activity to reenact death penalty laws, aimed at meeting the guidelines of *Furman*, set off another round of litigation. The constitutional challenges

58. *Id.* at 309-10 (footnotes omitted). The potential of arbitrariness in imposing death sentences was one of a combination of principles relied upon by Justice Brennan in reaching his conclusion that the punishment is unconstitutional *per se*. Although the four dissenters disagreed with the way Justices White and Stewart interpreted the eighth amendment, they did perceive the grievance of the concurring opinions to be the failure of the present system to produce even-handed justice:

[T]he problem is not that too few have been sentenced to die, but that the selection process has followed no rationale pattern.

Id. at 399 (Burger, C. J., dissenting).

59. *Id.* at 248. It was particularly obvious to Justice Douglas that the holding of *McGautha v. California* had sown the seeds of the problems presented by these statutes.

60. *Id.* at 257.

61. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1690 (1974).

62. *Furman v. Georgia*, *supra* note 4, at 411-12 (Blackman, J., dissenting); *id.* at 417 (Powell, J., dissenting).

were concentrated on the procedures whereby convicted persons were selected for death and the actual punishment of death itself. The willingness of six of the nine justices in *Furman* to discuss the latter question obviously encouraged litigants to continue their attack upon the essence of the sanction itself.

D. The Resolution of the Ultimate Question: Is the Death Penalty Constitutional Per Se?

1. The Plurality Opinion

The decision in *Gregg v. Georgia* contains the holding of the pivotal plurality that the sanction of death for the crime of murder is not invariably cruel and unusual under the eighth and fourteenth amendments.⁶³ Justice Stewart, writing for the plurality, examined the several precedents and dicta which have dealt with various forms of punishment under the cruel and unusual punishments clause, and agreed that the eighth amendment not only proscribes the "barbarous" punishments generally outlawed at the time of its adoption, but also punishments which do not comport with the basic concept of "human dignity" at the core of the amendment. He construed the latter concept to mean that a form of punishment in the abstract must not be excessive in relation to the crime committed. Under this test, a sanction is excessive if it (1) involves nothing more than the unnecessary and wanton infliction of pain and suffering, or (2) is grossly disproportionate to the severity of the crime.⁶⁴ A punishment which fails the test on either basis is unconstitutional *per se*.

The plurality opinion embraced the idea expressed in *Trop v. Dulles* that the eighth amendment is not a static concept, and that its applicability may be re-examined in light of an assessment of contemporary values concerning the particular punishment.⁶⁵ In other words, the judgment whether a challenged sanction is excessive should not be a reflection of the subjective views of individual justices, but one informed by objective indicia of societal acceptance of a given form of

63. *Gregg v. Georgia*, *supra* note 10, 428 U.S. at 169.

64. *Id.* at 171, 173.

65. *Id.* at 173. This principle is an adoption of the oft-quoted phrase of Chief Justice Warren in *Trop v. Dulles* that the eighth "amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, *supra* note 32, at 101.

punishment.⁶⁶ The indicators of public attitudes concerning a particular sentence which the plurality found relevant were "history and traditional usage, legislative enactments and jury determinations."⁶⁷ Justice Stewart's analysis led him to conclude that the death penalty "has a long history of acceptance both in the United States and England."⁶⁸ In support of this conclusion, the plurality noted that for nearly two centuries precedent had assumed and often asserted the validity of capital punishment without question.

The plurality, nevertheless, relied most heavily upon the other two indicators in its analysis. In rejecting the petitioner's argument that evolving standards of decency repudiates capital punishment as a valid sanction for any crime, the plurality stated it is now apparent that a large proportion of American society continues to regard the death penalty as an appropriate and necessary criminal sanction. The enactment of death penalty schemes by the legislatures of thirty-five states, and the enactment by Congress in 1974 of a statute authorizing the death sentence for aircraft piracy that results in death were seen as the "most marked indication of society's endorsement of the death penalty for murder."⁶⁹

66. The plurality stated that eighth amendment requirements must be applied with an awareness of the judiciary's limited role in reviewing legislative judgments. This means that in assessing a punishment selected by a democratically-elected legislature, the court must presume its validity, so that anyone challenging a statute must bear a heavy burden of proof. Since legislative enactments did weigh heavily in the Court's assessment of contemporary standards, the strong legislative response to Furman proved to be a significant factor in reaching its holding regarding the validity of the death penalty itself. Justice Stewart, nonetheless, tried to temper the philosophy of judicial restraint. He stated that since the eighth amendment is a restraint upon the exercise of legislative power, this does not portend to abrogate the judge's role for the reason that:

Although legislative measures adopted by the people's chosen representatives provide one important means of ascertaining contemporary values, it is evident that legislative judgments alone cannot be determinative of Eighth Amendment standards since that Amendment was intended to safeguard individuals from the abuse of legislative power.

Gregg v. Georgia, *supra* note 10, at 174 n.19.

67. *Woodson v. North Carolina*, *supra* note 13, at 288; *Gregg v. Georgia*, *supra* note 10, at 176-82.

68. *Gregg v. Georgia*, *supra* note 10, at 176. It was particularly noted that it "is apparent from the text of the Constitution itself that the existence of capital punishment was accepted by the Framers." *Id.* at 177. This conclusion was drawn from the language of the fifth amendment which was adopted at the same time as the eighth as well as from the fact that at the time the eighth amendment was ratified, capital punishment was a common sanction in every state and was legislated as a sanction for specified crimes by the First Congress of the United States. Further, the language of the fourteenth amendment, adopted three-quarters of a century later, was viewed as contemplating the existence of capital punishment.

69. *Id.* at 179. The plurality also referred to a state referendum wherein the people of California adopted a constitutional amendment that authorized capital punishment and, in effect, negated a prior ruling by the California Supreme Court in *People v. Anderson*, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, cert. denied, 406 U.S. 958 (1972), that the death penalty violated the California Constitution.

The assessment of evidence relative to jury determinations was also considered a reliable index of contemporary values because juries are so directly involved. Justice Stewart found the relative reluctance of juries in recent decades to impose the death sentence does not evince a repudiation of capital punishment *per se* because it "may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases."⁷⁰ Nonetheless, the willingness of juries to impose the death penalty in over 460 cases under post-*Furman* statutes was viewed as fully compatible with legislative judgments reflected therein that there is continued utility and necessity for imposing capital punishment in appropriate cases.

While the indicia of public attitudes demonstrated societal acceptance of capital punishment, the plurality did not consider them conclusive. Justice Stewart said that the Court is also required to determine whether the penalty comports with the twofold test of "human dignity" so basic to the application of the eighth amendment. After applying the test, the plurality's judgment was that the death penalty for the crime of premeditated murder is not an excessive penalty and, therefore, is not unconstitutional *per se*.

The first element of the constitutional test requires that a punishment must not be so totally without penological justification that it results in the infliction of needless suffering.⁷¹ In making this determination, the focus was placed upon the two primary social purposes of retribution and deterrence.

Justice Stewart willingly accepted retribution as serving a legitimate social purpose. The acceptability of the concept was premised upon a recognition that capital punishment is an expression of society's moral outrage at particularly offensive conduct. While this function may be unappealing to many, he considered it to be essential in an ordered society that requests its citizens to rely on the legal process rather than on self-help to vindicate their wrongs.⁷²

70. *Gregg v. Georgia*, *supra* note 10, at 182.

71. *Id.* at 183.

72. *Id.*

Justice Stewart also noted that while retribution is no longer the dominant objective of the criminal law, neither is it a forbidden one, nor one inconsistent with a fundamental respect for the individual.⁷³ If certain crimes constitute a grievous affront to humanity, he felt that society's demand for retribution should not be tampered with in the absence of clearly unreasonable circumstances.

The debated question of whether capital punishment serves as a deterrent to crime by potential offenders was acknowledged as remaining unanswered even though a plethora of studies exist on the subject. The plurality, however, assumed that for many potential murderers the death penalty acts as a significant deterrent. Further, it was their opinion that since the value of capital punishment as a deterrent of crime involves a complex factual issue, its resolution properly rests with the legislatures, which can evaluate the empirical data in terms of their local conditions and with a flexibility not readily available to the judicial branch. Justice Stewart, apparently in recognition of considerations dictating judicial restraint, concluded that a judgment of the state legislature that capital punishment is appropriate in some cases cannot be deemed clearly wrong.⁷⁴

In its consideration of the second aspect of the constitutional test regarding excessiveness, the plurality accepted the fact that the death penalty is unique in its severity and its irrevocability. Justice Stewart, nonetheless, concluded that death is not invariably disproportionate for the crime of deliberate murder. His only observation in support of the holding was that death "is an extreme sanction, suitable to the most extreme of crimes."⁷⁵

The deference accorded to legislative judgments played a most critical role in the plurality's holding.⁷⁶ The affirmative

73. *Id.* This represented a shift in the position taken by the Court as early as 1949 that rehabilitation had replaced retribution as the dominant theme of the criminal law. *Williams v. New York*, 337 U.S. 241, 248 (1949); see also *Furman v. Georgia*, *supra* note 4, at 343 (Marshall, J., concurring).

74. Justice Stewart summarized the plurality's position in the following statement: Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular state the moral consensus concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.

Gregg v. Georgia, *supra* note 10, at 186-87.

75. *Id.* at 187.

76. The views of the remaining four justices who took the position that capital punish-

legislative response to *Furman* was heavily relied upon as a barometer of contemporary societal acceptance of the sanction. Moreover, this factor was used as a device to avoid the stalemate over the role of deterrence in justifying its use in modern society. Consequently, the concept of retribution has once again been elevated to a dominant objective to be accomplished by capital punishment.

Even though it held the death penalty is a form of punishment that may at times be imposed, the plurality also adopted the holding in *Furman v. Georgia* that the eighth amendment also proscribes its imposition under sentencing procedures which create a substantial risk that it would be administered in an arbitrary and capricious manner.⁷⁷ The plurality reiterated the mandate in *Furman* that where the sentencing authority is given discretion on a "matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."⁷⁸ Now that the eighth amendment requires capital sentencing procedures to comport with the elements of due process, the reviewing court, under the plurality view, also has the obligation to re-examine such sentencing procedures against "evolving standards of procedural fairness in a civilized society."⁷⁹

The plurality accentuated the desirability of jury sentencing in capital cases as a mechanism to "maintain a link be-

ment is not invariably unconstitutional are most thoroughly set forth in Justice White's dissenting opinion, in *Roberts v. Louisiana*, *supra* note 13, at 337 (1976). The opinion, like that of the plurality, focused on the widespread reenactments of the death penalty following *Furman* and observed that these legislative judgments foreclose the view that capital punishment has become unacceptable to the American people. *Id.* at 353. Noting that the conflicting arguments and materials offered by both sides of the question suggest the issue is one over which reasonable men and reasonable legislators may easily differ, Justice White, nevertheless, opined that it is neither a proper or wise exercise of the power of judicial review to refuse to accept the collective legislative judgment that there are indeed certain circumstances in which capital punishment is the more efficacious deterrent of crimes. *Id.* at 355.

77. *Gregg v. Georgia*, *supra* note 10, at 188. The plurality viewed the holding in *Furman* as the position taken by Justices Stewart and White who concurred in the judgments on the narrowest grounds. *Id.* 169 n.15.

78. *Id.* at 189.

79. *Gardner v. Florida*, 430 U.S. 349 (1977) (plurality opinion). This idea was infused with its first breath in *Williams v. New York*, *supra* note 73, at 247-48, and formed the basis of the guidelines set forth in *Gregg v. Georgia*. The obligation to re-evaluate the procedure employed to select candidates for the death penalty was utilized in *Woodson v. North Carolina*, *supra* note 13, to strike down North Carolina's mandatory death penalty law as violative of the eighth and fourteenth amendments' requirement that the state's power to punish is "exercised within the limits of civilized standards." *Id.* at 301.

tween contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect' " evolving standards of decency.⁸⁰ Notwithstanding the expediency of jury sentencing, Justice Stewart stated that information relevant to the sentencing decision may have no relevancy to the guilt determining process or may be prejudicial to a fair determination of guilt or innocence. The drafters of the Model Penal Code have suggested that the best solution to the problem is a bifurcated procedure wherein the question of sentence is not considered until after the determination of guilt is made.⁸¹ The plurality agreed that when the "jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*." ⁸²

In order to guarantee the proper use of such information in its determination of sentence, the plurality said the jury should be given guidance regarding the particularized nature of the crime and the particularized characteristics of the defendant. Contrary to the suggestion of some authorities,⁸³ the plurality considered it possible to formulate sufficiently precise standards to guide a jury's sentencing deliberations; noting that the Model Penal Code provides for a consideration of circumstances of aggravation and mitigation which must be weighed against each other.⁸⁴ It was not intended, however, to suggest that only a bifurcated system would be permissible under *Furman* or that a sentencing system constructed along these general lines would inevitably satisfy its concerns, for each system must be reviewed on an individual basis.⁸⁵

2. The Dissenting Opinions

Justices Brennan and Marshall wrote separate dissenting

80. *Gregg v. Georgia*, *supra* note 10, at 190, quoting, *Witherspoon v. Illinois*, *supra* note 47, at 519 n.15.

81. MODEL PENAL CODE § 201.6, Comment 5 (Tent. Draft No. 9, 1959).

82. *Gregg v. Georgia*, *supra* note 10, at 191-92.

83. See, e.g., *McGautha v. California*, *supra* note 51, at 204-07; REPORT OF THE ROYAL COMMISSION ON CAPITAL PUNISHMENT, 1949-1953, Cmd. 8932, ¶ 595.

84. See MODEL PENAL CODE, § 201.6 (Tent. Draft No. 9, 1959). The plurality found that two salutary functions are served by the use of such standards. First, in guiding the sentencing authority, they reduce the likelihood that an arbitrary or capricious sentence will be imposed. Second, by requiring the sentencing authority to specify the factors it relied upon in reaching its decision, meaningful appellate review is available as a check on capricious or freakish imposition of death sentences. *Gregg v. Georgia*, *supra* note 10, at 195.

85. *Id.* at 195.

opinions in *Gregg v. Georgia* continuing their adherence to the views expressed in *Furman*. Both reaffirmed their combined position that capital punishment is unconstitutional *per se*.

Justice Brennan was critical of the plurality opinion insofar as it held that "evolving standards of decency" focus primarily upon the procedure selected by the state to single out persons to suffer the death penalty. Instead, it is his opinion that "evolving standards of decency" require a focus solely upon the essence of the death penalty itself, and as a result, there is no reasoned basis for the plurality's holding that statutory schemes requiring the mandatory infliction of death sentences are cruel and unusual whereas controlled discretion schemes are not.

Justice Brennan would cast the issue as to what constitutes cruel and unusual punishment in terms of morality. He would hold that the eighth amendment "under our constitutional system of government embodies in unique degree moral principles restraining the punishments that our civilized society may impose on those persons who transgress its laws."⁸⁶ And the Supreme Court, as the final arbiter of the meaning of the United States Constitution, has the duty to say whether moral concepts require it to hold that the law has progressed to the point whereby capital punishment "like punishments on the rack, the screw and the wheel, is no longer morally tolerable in our civilized society."⁸⁷

The Justice also considered the death penalty to be inconsistent with the concept of human dignity because it fails to more adequately serve the social purpose of punishment than less severe penalties. He opined that the fatal constitutional infirmity is found in its treatment of members of the human race as nonhuman objects to be toyed with and discarded, in which case the penalty is at odds with the fundamental premise of the cruel and unusual punishments clause that even the vilest criminal remains a human being possessed of common dignity.⁸⁸

86. *Id.* at 228-29 (Brennan, J., dissenting).

87. *Id.* at 229.

88. *Id.* at 230. Not only did Justice Brennan premise his conclusion on the finding that capital punishment subjects a person to a fate inconsistent with the eighth amendment's guarantee of civilized treatment but also that it sanctions a new official

Justice Marshall had observed in *Furman v. Georgia* that if the American people were fully informed of the purposes and liabilities of the death penalty, they would reject it as morally unacceptable.⁸⁹ While recognizing that the legislative reaction did have a significant impact on a realistic assessment of the moral acceptability of capital punishment in contemporary society, Justice Marshall replied that if its constitutionality is dependent upon an informed citizenry, then the enactment of capital punishment laws cannot be deemed conclusive.⁹⁰ Even assuming *arguendo* these legislative judgments could be viewed as a public endorsement of capital punishment, Justice Marshall noted that the plurality agreed this could not save an excessive punishment from constitutional extinction.

He would have held that capital punishment neither furthers the social purposes of deterrence or retribution, and is, therefore, an excessive punishment. With regard to the notion of deterrence, he stated that the available evidence reviewed in *Furman* remains convincing that “‘capital punishment is not necessary as a deterrent to crime in our society.’”⁹¹ Pointing out that both pluralities found credence in the idea that

murder which not only offers redress for the offense committed against society, but adds instead, “‘a second defilement to the first.’” *Id.* at 231, quoting from CAMUS, REFLECTIONS ON THE GUILLOTINE, 5-6 (1960).

89. *Furman v. Georgia*, *supra* note 4, 360-69, (Marshall, J., concurring).

90. *Gregg v. Georgia*, *supra* note 10, 232 (Marshall, J., dissenting). Justice Marshall alluded to a recent study which substantiates his assertion in *Furman* that the American people are not informed about capital punishment. See Sarat & Vidmar, *Public Opinion, The Death Penalty, and the Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171 (1976). The study concluded that the “opinions of an informed public would differ significantly from those of a public unaware of the consequences and effect of the death penalty.” *Gregg v. Georgia*, *supra* note 10, at 232.

91. *Id.* at 236. Justice Marshall devoted his argument on the question of deterrence to a criticism of a study by Issac Ehrlich, reported a year after *Furman*, which supported the contention that the death penalty does deter murder. See Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life or Death*, 65 AM. ECON. REV. 395 (1975). The primary criticisms were that the study compares execution and homicide rates on a nationwide, rather than on a state-by-state, basis, and all empirical support for the deterrent effect of capital punishment disappears when the last five years—1965 through 1969—are removed from this time series.

A recent study covering the period between 1960 and 1970 has concluded that the evidence of that period supports the theory that capital punishment does not deter homicide. Forst, *The Deterrent Effect of Capital Punishment: A Cross-State Analysis of the 1960's*, 61 MINN. L. REV. 743 (1977). The analysis, differing from the studies of Ehrlich and others, focuses upon a unique decade during which the homicide rate increased by fifty-three percent and the use of capital punishment ceased, and examines changes in homicides and executions over time and across states. *Id.* at 761. Notwithstanding the increase in the homicide rate during the 1960's, the article concludes that it was the product of factors other than the elimination of the death penalty, the foremost of which were a decline in the rate at which homicide resulted in imprisonment and the increasing affluence of that decade. *Id.* at 762. Even though the study's findings supported the strong deterrent effect of imprisonment on homicides, the finding that capital punishment does not deter murder was robust with respect to the different statistical analyses made.

retribution can serve as a moral justification for the sanction of death, Justice Marshall considered this to be the most disturbing aspect of the Court's decision. The idea that society's expression of moral outrage through the death penalty precludes the citizenry from taking the law into its own hands was described as utilitarian and not retributive in the purest sense. This justification was viewed as inadequate because the death penalty is not necessary to accomplish these results.⁹²

Gregg v. Georgia and its companion cases represent a landmark in the eighth amendment's evolutionary history. It marks the first case in which all members of the Supreme Court were willing to consider and resolve the constitutionality of the death penalty itself. The pivotal plurality opinion also acknowledged the existence of a due process requirement which capital punishment systems must satisfy to meet the requirements of the cruel and unusual punishments clause. That clause presently mandates a twofold analysis of the form of punishment under scrutiny wherein it is determined: (1) whether the punishment is constitutional *per se*; and, (2) if so, whether it is inflicted under procedures which minimize the risk of arbitrary and capricious action. Since the answer of a majority of the Supreme Court is affirmative with regard to the first inquiry, attention is now focused upon the latter requirement.

II. THE VERDICT ON WYOMING'S MANDATORY DEATH PENALTY STATUTE: A BASTARD CHILD OF FURMAN

The Wyoming legislature responded to *Furman* by enacting a first degree murder statute which replaced discretionary jury sentencing in capital cases with a scheme requiring the infliction of a mandatory death penalty in certain factual circumstances.⁹³ The statute provided that a person is guilty of murder in the first degree if he "purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administer-

92. *Gregg v. Georgia*, *supra* note 10, at 238-39. Justice Marshall also considered what is termed the purely retributive justification for capital punishment—the death penalty is appropriate because the taking of the murderer's life is morally good. He concluded that this rationale amounts to a total denial of the wrong-doer's dignity and worth, an objective not consistent with the requirements of the eighth amendment. *Id.* at 240-41.

93. WYO. STAT. § 6-54 (Supp. 1975) (repealed 1977). The law was thoroughly analyzed in Comment, *Bastard or Legitimate Child of Furman? An Analysis of Wyoming's New Capital Punishment Law*, 9 LAND & WATER L. REV. 209 (1974).

ing poison or causing the same to be done, kills any human being.”⁹⁴ When an accused was convicted of first degree murder, the statute required the trier of fact to mandatorily impose a sentence of death upon a finding that the offense involved at least one of the following courses of conduct:

- (1) murder of a police officer, corrections employee or fireman while engaged in the line of duty;
- (2) murder committed for remuneration or by procurement;
- (3) intentional murder by the unlawful and malicious use of an explosive;
- (4) murder committed by a person with a prior first or second degree murder conviction;
- (5) murder committed by a person under a current life sentence;
- (6) felony murder (rape, arson, robbery and burglary) where the accused has previously been convicted of the specified felony;
- (7) murder committed in the course of a kidnapping;
- (8) murder committed in the course of a hijacking;
- (9) murder committed to conceal identify or the fact of the crime or to suppress evidence;
- (10) murder of two or more persons arising out of a series of related events.⁹⁵

If an accused was found guilty of first degree murder, but the crime did not involve one of the statutory enumerated courses of conduct, he was automatically sentenced to life imprisonment.⁹⁶ The judgment of conviction and sentence of death were subject to automatic and expedited review by the Supreme Court of Wyoming, and the court was given the express authority to promulgate rules governing its review function.⁹⁷

94. WYO. STAT. § 6-54(a) (Supp. 1975) (repealed 1977).

95. WYO. STAT. § 6-54(b) (Supp. 1975) (repealed 1977). The Wyoming statute did provide for a bifurcated type proceeding in capital cases involving courses of conduct (4), (5) and (6)—murder by a person with a prior first or second degree murder conviction, murder by a person serving a current life sentence and felony murder where the accused has been previously convicted of the underlying felony. If the defendant was found guilty of first degree murder in either of these cases, the jury in the second stage of the proceeding only determined whether there was an existence of a prior conviction. WYO. STAT. § 6-54(c) (Supp. 1975) (repealed 1977). The procedure, however, did not provide the sentencing authority an opportunity at any stage of the proceeding to hear any evidence in mitigation of the sentence to be imposed. A finding of a prior conviction automatically resulted in a mandatory death sentence. See the text accompanying notes 119-120, *infra*.

96. WYO. STAT. § 6-54(e) (Supp. 1975) (repealed 1977).

97. WYO. STAT. § 6-54(d) (Supp. 1975) (repealed 1977).

In *Kennedy v. State*,⁹⁸ the Supreme Court of Wyoming in a *per curiam* opinion held that the mandatory death penalty provisions of Section 6-54(b) of the Wyoming Statutes are unconstitutional. Ronald Leroy Kennedy and Jerry Lee Jenkins were convicted of the crime of first degree murder of Amy Alice Burrige under Section 6-54(b)(ix)⁹⁹ and sentenced to death as mandated by the statute. The defendants challenged the constitutionality of Wyoming's capital punishment law, alleging first the death penalty itself is unconstitutional *per se*, and second the statutory system under which they were sentenced to death violates the Constitution. The court, following the pattern of other state appellate courts,¹⁰⁰ disposed of the appeals under the second contention by application of the procedural requirements set forth by the plurality opinions in *Gregg v. Georgia* and its companion cases.

The court noted that while many states considered the enactment of statutes imposing mandatory death sentences in certain specified circumstances a reasonable response to the admonitions of *Furman*, the opinions in *Woodson v. North Carolina* and *Roberts v. Louisiana*¹⁰¹ held that such statutes are violative of the eighth and fourteenth amendments. It was surmised from *Gregg* and its companion cases that a death penalty statute cannot withstand constitutional scrutiny unless there is provided therein standards which guide and control the exercise of the sentencing authority's discretion in its determination of the propriety of the application of the death sentence or alternatively a term of life imprisonment.¹⁰² The court concluded that the mandatory provisions of Section 6-54(b) fail to meet these requirements.¹⁰³ The court, however,

98. *Kennedy v. State*, *supra* note 16. The death sentences of the remaining three prisoners sentenced under Section 6-54(b) were vacated and remanded for resentencing to life imprisonment in *Flores v. State*, 572 P.2d 746 (1977); *Cloman v. State*, 574 P.2d 410 (Wyo. 1978).

99. The jury specifically found that the offense involved a murder committed to conceal identity or the fact of the commission of the crime, or to suppress evidence. The defendants were also convicted of forcible rape and assault with intent to commit murder upon the victim's step-sister and sentenced to a term of not less than thirty-five years to life and a term of not less than thirteen years nor more than fourteen years respectively. *Kennedy v. State*, *supra* note 16, at 1015 n.1.

100. See note 106, *infra*.

101. *Woodson v. North Carolina*, *supra* note 13; *Roberts v. Louisiana*, *supra* note 13.

102. *Kennedy v. State*, *supra* note 16, at 1016.

103. The State of Wyoming, in apparent recognition of the infirmities extant in the sentencing process in these cases, urged the court to remand them to the district court for rehearing and resentencing under rules to be promulgated by the Supreme Court in compliance with *Gregg v. Georgia* and its companion cases. The State maintained that the court had the power to cure this problem because the statute gave it rulemaking authority to govern its review of all cases wherein a defendant is convicted and sentenced to death for certain categories of first degree murder.

held that the invalidity of the mandatory death sentence provisions of the Wyoming law does not render invalid the defendants' underlying convictions of first degree murder and ordered them to be resentenced to life imprisonment as provided by Section 6-54(e).¹⁰⁴

By the time the opinion in *Kennedy v. State* was rendered, the fate of a variety of mandatory type statutes was sealed. Four days after it struck down the North Carolina and Louisiana statutes, the Supreme Court of the United States in a one paragraph memorandum decision declared Oklahoma's mandatory law unconstitutional in light of *Woodson v. North Carolina* and *Roberts v. Louisiana*, and vacated the six Oklahoma cases before it.¹⁰⁵ The highest courts of California, Maryland, New Mexico and South Carolina soon followed suit and held their respective mandatory death penalty statutes violative of the eighth and fourteenth amendments.¹⁰⁶ It is understandable that the author of the *Kennedy* opinion did not consider it necessary to sketch in detail the deficiencies in the old Wyoming statute, a task more suited to an undertaking of this nature.

It is clear from a reading of *Kennedy v. State* that the primary defect in the Wyoming law was its provision which mandatorily directed the fact finder to impose a sentence of death upon a finding of guilt of first degree murder involving speci-

See WYO. STAT. § 6-54(d) (Supp. 1975) (repealed 1977).

The court was primarily concerned that should it embrace the State's suggestion, it would involve an usurpation or encroachment upon the legislative function. The court said that such a judicial construction would require a judicial repeal and amendment of the statute by reading the word "mandatory" out of the enactment and eliminate therefrom the mandatory penalty which it was clearly the intention of the legislature to provide. Additionally, the court noted that it would be required to add a phrase to the statute modifying the penalty and providing certain guidelines which the court, not the legislature, would be forced to promulgate. *Kennedy v. State*, *supra* note 16, at 1017. Pointing out that the Supreme Court of California in *Rockwell v. Superior Court*, 18 Cal. 3d 420, 556 P.2d 1101, 134 Cal. Rptr. 650 (1976) was faced with an identical suggestion, the Court adopted and approved what the California court considered to be the effect of such an invitation to rewrite its mandatory death penalty law:

Were this court to attempt to devise the necessary procedures and criteria we would not only invade the legislative province, but would also be in the position of having to pass objectively on the constitutionality of procedures of our own design.

Kennedy v. State, *supra* note 16, at 1017.

104. *Id.* at 1018-19.

105. *Green v. Oklahoma*, 428 U.S. 907 (1976); *Justus v. Oklahoma*, 428 U.S. 907 (1976); *Lusty v. Oklahoma*, 428 U.S. 907 (1976); *Davis v. Oklahoma*, 428 U.S. 907 (1976); *Rowbatham v. Oklahoma*, 428 U.S. 907 (1976); *Williams v. Oklahoma*, 428 U.S. 907 (1976).

106. *Rockwell v. Superior Court*, *supra* note 103; *Blackwell v. State*, 278 Md. 466, 365 A. 2d 545 (1976); *State v. Rondeau*, 89 N.M. 408, 553 P.2d 688 (1976); *State v. Rumsey*, 267 S.C. 236, 226 S.E. 2d 894 (1976).

fied circumstances in aggravation of the crime. As the foregoing discussion indicates an assessment of contemporary standards is now essential to the determination of whether the procedure used to select those persons who shall suffer the unique and irreversible sanctions of death is violative of the eighth and fourteenth amendments.¹⁰⁷ Based upon this evaluation, the plurality in *Woodson v. North Carolina* found that the common law practice of imposing death as an automatic punishment for every person convicted of the crime of murder departs markedly from contemporary standards and is thereby violative of the eighth amendment's requirement that "the State's power to punish 'be exercised within the limits of civilized standards.'"¹⁰⁸

In reaching this conclusion, the plurality again placed reliance upon an assessment of the three indicators of societal acceptance discussed in *Gregg v. Georgia* — history and traditional usage, legislative enactments and jury determinations.¹⁰⁹ While Justice Stewart's analysis of the history of capital punishment led him to the conclusion in *Gregg v. Georgia* that the death penalty for the crime of murder has long been accepted in both the United States and England, he concluded that the historical chronicle on mandatory capital punishment reveals that "the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid."¹¹⁰ In addition, the plurality noted that the two crucial indicators of societal val-

107. See the text accompanying notes 77-79, *supra*.

108. *Woodson v. North Carolina*, *supra* note 13, at 301. See also the text accompanying note 79, *supra*.

109. *Id.* at 288.

110. *Id.* at 293. Traversing the path of history, Justice Stewart stated that in 1791, when the eighth amendment was adopted, the states uniformly followed the common law practice of imposing mandatory death sentences for certain specified offenses ranging from murder to sodomy. Juries from the outset reacted unfavorably to the harshness of mandatory death penalty laws. The legislative response of the states was to initially limit the classes of capital offenses and to eventually divide murder into degrees, confining the mandatory death penalty only to first degree murder which encompassed the concepts of willfulness, deliberateness and premeditation. Notwithstanding the widespread acceptance of the latter type of statute, the fundamental weakness of the reform became apparent. Juries still considered the death penalty inappropriate in a significant number of first degree murder cases and refused to return guilty verdicts for that crime rather than to subject offenders to automatic death sentences.

Since the process of distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense was proven inadequate, the states, commencing with Tennessee in 1838, were led to enact statutes conferring sentencing discretion on juries in capital cases. Justice Stewart observed that such statutes remedied the harshness of mandatory statutes by permitting juries to respond to mitigating factors by withholding the death penalty. By 1963, total reform was complete when every jurisdiction had replaced their automatic death penalty statutes or abolished the death penalty altogether.

ues — legislative enactments and jury determinations — point conclusively to the repudiation of mandatory death sentences.

Consistent with its analysis in *Gregg*, the plurality viewed the measures enacted by legislative bodies as weighing most heavily in its evaluation of contemporary values. Retracing the evolving relationship between the problem of jury nullification and subsequent remedial legislation, the Court found that the consistent path charted by the people's chosen representatives demonstrates that the aversion of jurors to mandatory statutes is shared by society at large.¹¹¹ Further evidence attesting to the incompatibility of automatic death sentences with contemporary values was supplied by reference to studies which indicate that even in first degree murder cases, juries with sentencing discretion do not impose the death penalty with any regularity.¹¹²

The Court was not impressed with the notion that the post-*Furman* revival of mandatory statutes evinced a sudden reversal of societal values regarding the imposition of capital punishment. Noting the persistent legislative rejection of mandatory laws for more than 130 years preceding the *Furman* decision, the plurality was firm in its belief that its legislative restoration was attributable to a misguided attempt on the part of some states to avoid the impact of the holding of that case.¹¹³

After concluding that mandatory statutes could not withstand successful scrutiny when measured by the yardstick of

111. *Id.* at 295.

112. *Id.* The plurality also examined several precedents wherein the Supreme Court, while never ruling on the constitutionality of mandatory death penalty statutes, has commented on our society's aversion to automatic death sentences. This viewpoint was perhaps best characterized in *McGautha v. California*, *supra* note 51, wherein the Court said the evolution of discretionary imposition of death sentences in this country was prompted by the American "rebellion against the commonlaw rule imposing a mandatory death sentence on all convicted murderers." *Id.* at 198. The plurality noted that the accuracy of McGautha's assessment of our society's rejection of mandatory death sentences was perhaps the one important factor about evolving social standards of decency respecting capital punishment upon which the members of the *Furman* Court agreed. See *Furman v. Georgia*, *supra* note 4, at 245-46 (Douglas, J., concurring); *id.* at 297-98 (Brennan, J., concurring); *id.* at 339 (Marshall, J., concurring); *id.* at 402-03 (Burger, C. J., with whom Blackmun, Powell and Rehnquist, J. J., joined dissenting); *id.* at 413 (Blackmun, J., dissenting).

113. *Woodson v. North Carolina*, *supra* note 13, at 298-99. The plurality illustrated the background of the North Carolina statute in reaffirmation of its assessment that the reintroduction of the mandatory death penalty in that state was of limited utility as an indicator of contemporary standards. Reference was made to the brief of the State of North Carolina wherein it was argued that the basis of the legislative reenactment was to "remove 'all sentencing discretion [so that] there could be no successful *Furman* based attack on the North Carolina statute.'" *Id.* at 300.

contemporary standards, the plurality held that the sentencing procedures under such laws created a substantial risk of an arbitrary and freakish imposition of the death penalty. Thus, the second shortcoming in the Wyoming statute was its failure to provide a constitutionally tolerable response to *Furman's* mandate that standardless jury discretion be replaced with a procedure which provides safeguards against the administration of capital sentences in an uneven manner.¹¹⁴ It was the opinion of the plurality that even though mandatory laws facially remove all sentencing discretion from the jury, there are no standards provided to guide it in determining those offenders who shall live and those who shall die. As a result, mandatory laws are tainted with the same basic underlying defect of unguided and unchecked jury discretion condemned in *Furman*.

This seemingly contradictory conclusion was drawn from an examination of the evidence regarding the problem of jury nullification which had historically plagued jurisdictions with mandatory statutes, in that jurors found the statutes easy to circumvent by convicting the defendant of a lesser included offense or by refusing to return a guilty verdict for the crime.¹¹⁵ The plurality found no reason to doubt that juries in mandatory death penalty jurisdictions would continue to consider the grave consequences of conviction in reaching its verdict. The Wyoming procedure was infused with an element of caprice because under Section 6-54(b) the fact finder was given no alternative other than imposing the death sentence upon conviction of capital murder, making the jurors' power to avoid the sanction dependent upon their willingness to disregard the trial judge's instructions.¹¹⁶ While such a procedure may be reasonably expected to increase the number of offenders sentenced to death, it falls short of *Furman's* require-

114. *Id.* at 302; *Roberts v. Louisiana*, *supra* note 13, at 334.

115. See the text accompanying note 110, *supra*.

116. *Woodson v. North Carolina*, *supra* note 13, at 303; *Roberts v. Louisiana*, *supra* note 13, at 335. In Wyoming, a trial judge is not required to instruct the jury regarding any lesser included offense where the evidence shows the defendant either guilty or not guilty of the higher grade of offense. *Oldham v. State*, 534 P.2d 107, 109 (Wyo. 1975); *Ross v. State*, 16 Wyo. 285, 93 P. 299, 303, *reh. denied*, 94 P. 217 (1908). While there is no reported case which has applied this rule to capital murder cases, there is no reason why the same general principle would not be applied in such a case. *Cf. Richmond v. State*, 554 P.2d 1217, 1232 (Wyo. 1976). The Wyoming rule does not contain the express invitation to jury nullification extant in the Louisiana responsive verdict procedure condemned in *Roberts v. Louisiana*. This does not diminish, however, the practical reality that the Wyoming statute did not eliminate *de facto* sentencing discretion in the guilt determining process.

ment that arbitrary and wanton jury discretion be replaced "with objective standards to guide, regularize, and make rationally reviewable the process for imposing a sentence of death."¹¹⁷

The plurality was not simply content to demonstrate how mandatory statutes suffered from the defect of arbitrariness; it also found these statutes to be constitutionally deficient because there is no provision for individualized sentencing determinations. If the reader of *Gregg*, *Proffitt* and *Jurek* was inclined to believe that a concept, previously viewed as reflective of enlightened policy considerations had now become engrafted into a constitutional imperative, then he was not disappointed by *Woodson*. In that case, Justice Stewart held that the eighth and fourteenth amendments require consideration of the circumstances of the particular offense and the character and record of the individual offender as a constitutionally indispensable part of the process for imposing the death penalty.¹¹⁸ In other words, it is now mandated that a capital sentencing procedure allow for consideration of relevant aggravating and mitigating circumstances before a determination of sentence can be made.

In essence, Section 6-54(b) required the fact finder to find the existence of one of ten statutory aggravating circumstances before the death penalty could be inflicted. But it made death a mandatory punishment for the circumstances described therein without allowing for consideration of relevant mitigating circumstances. In *Jurek v. Texas*, Justice Stevens writing for the plurality, cautioned that a sentencing procedure which permitted the sentencing authority to consider only aggravating circumstances of the crime would almost certainly fail to provide the individualized sentencing determination constitutionally mandated in *Woodson*.¹¹⁹ It

117. *Woodson v. North Carolina*, *supra* note 13, at 303. Justice Stewart stated that a process which imparts no significance to such factors "excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." *Id.* at 304. He viewed the treatment of convicted offenders as "members of a faceless, undifferentiated mass" as contrary to the fundamental respect for humanity which underlies the eighth amendment. Thus, since there is a qualitative difference between the death penalty and the sentence of imprisonment, the plurality ascribed to the new requirements the corresponding need for reliability in determining when it is an appropriate punishment in a specific case. *Id.* at 305.

118. *Id.* at 304.

119. *Jurek v. Texas*, *supra* note 13, at 271. The plurality said such a system would take on the attributes of the mandatory laws condemned in *Woodson* and *Roberts*. It

was the opinion of the plurality that the cruel and unusual punishments clause requires a capital sentencing system to allow the sentencing authority to consider factors in mitigation of the ultimate punishment.¹²⁰

Even though the Wyoming statute narrowed the categories of capital murder, it was not purged of the constitutional vice inherent in mandatory statutes — a lack of focus on *both* the circumstances of the particular crime and the character and record of the individual offender.¹²¹ Notwithstanding the opportunity afforded by the procedure to focus on the particularized nature of the offense, the system retained its harsh and inflexible nature by affording the jury no meaningful opportunity for consideration of mitigating factors adduced by circumstances of the particular crime or by the characteristics of the individual defendant.¹²²

The provisions of the Wyoming statute, which authorized automatic and expedited appeal from a judgment imposing a sentence of death, did envision the type of prompt review considered in *Gregg* as an additional safeguard against arbitrariness and capriciousness. While Section 6-54(d) authorized the Supreme Court of Wyoming to define what it considered

was their view that a capital "jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed." *Id.*

120. The Texas death penalty law does not explicitly direct the jury to consider relevant mitigating circumstances in its sentencing decision. The statute provides that in a case where a defendant is found guilty of a capital offense, a separate sentencing hearing is held before the jury used in the guilt determining stage. After presentation of evidence on the question of sentence and before the sentence is determined, the jury must answer two, possibly three, questions. If the jury finds that the answer to any of the questions is negative, then the defendant is spared the death penalty and sentenced instead to life imprisonment. See TEX. CODE CRIM. PROC. ANN. art. 37.071(a), (b), (e) (Vernon Supp. 1978).

The failure of the statute to expressly require consideration of relevant mitigating factors would have been fatal to the statute but for the interpretation given by the Texas Court of Criminal Appeals. One of the questions, which the jury must consider before imposition of sentence, is whether there is a probability that the defendant would constitute a continuing threat to society in the event he is not sentenced to death. TEX. CODE CRIM. PROC. art. 37-071(b)(2) (Vernon Supp. 1978). In *Jurek v. State*, 522 S.W.2d 934, 939-40 (Crim. App. 1975), the Texas Court of Criminal Appeals indicated that it will interpret this question so as to permit a defendant to direct the jury's attention to whatever mitigating circumstances he can bring before it. The plurality was satisfied that the Texas law assures the consideration by the jury of all relevant information about the offender whose fate it must determine. *Jurek v. Texas*, *supra* note 13, at 276.

121. *Roberts v. Louisiana*, *supra* note 13, at 333.

122. The fifth category of the Wyoming capital murder provisions, covering murder committed by a person serving a life sentence, defined the capital crime at least partially in terms of the character or record of the individual defendant. WYO. STAT. § 6-54(b)(5) (Supp. 1975) (repealed 1977). Although this narrowly defined category did not permit the trier of fact to consider relevant mitigating circumstances, the plurality in a footnote to the *Roberts* opinion indicated that "a prisoner serving a life sentence presents a unique problem that may justify such a law." *Roberts v. Louisiana*, *supra* note 13, at 334 n.9.

to be its review function, the procedures governing the sentencing process did not afford the opportunity for a meaningful appellate review extant in the Georgia, Florida and Texas systems. Since the trier of fact was not given adequate standards to guide and regularize its sentencing determination, and there was no provision to preserve a proper record of findings specifying its reasons for inflicting the death sentence, no basis was provided upon which the reviewing court could determine the reasonableness and propriety of such a sentence in any given case.

Wyoming, therefore, became one of the several states which relied to its detriment on what was perceived to be the apparent holding of the *Furman* decision. Chief Justice Burger, in his dissenting opinion in that case, remarked that instead of "providing a final and unambiguous answer on the basic constitutional question, the collective impact of the majority's ruling is to demand an undetermined measure of change from the various state legislatures and the Congress."¹²³ Hindsight has proven that a statute providing for mandatory death sentences would not conform to the reading now ascribed to that decision. But at least for the present, as the Forty-Fourth State Legislature found more to its comfort, the availability of capital punishment through statutory change is more real than theoretical.

III. A NEW PHOENIX ARISES FROM THE ASHES: THE LEGISLATIVE ATTEMPT AT RESTORATION

Two days after the *Kennedy* decision, a bill was introduced in the Wyoming legislature to resurrect the death penalty as an authorized punishment for the crime of first degree murder.¹²⁴ The new statute, which is patterned after portions of the constitutional Georgia and Florida laws,¹²⁵ was approved by that body on February 28, 1976.¹²⁶

The new law provides that persons convicted of murder in the first degree may be sentenced to either death or life

123. *Furman v. Georgia*, *supra* note 4, at 403 (Burger, C. J., dissenting).

124. *Casper Star Tribune*, Jan. 30, 1977, at 1, col. 2.

125. *Casper Star Tribune*, Feb. 22, 1977, at 1, col. 2. A perusal of the new law also reveals that some of its provisions are also taken from the Model Penal Code discussed with approval in *Gregg v. Georgia*. See MODEL PENAL CODE § 201.6 (Tent. Draft No. 9, 1959).

126. 1977 WYO. SESS. LAWS Ch. 122. The new law was effective immediately upon

imprisonment.¹²⁷ In any case in which first degree murder is charged, the statute requires a bifurcated trial. Those persons convicted of capital murder at the guilt determining stage are entitled to a separate evidentiary hearing to determine sentence.¹²⁸ Evidence may be introduced regarding any matter the trial judge deems relevant to sentence and must include matters relating to certain statutorily specified aggravating and mitigating circumstances.¹²⁹ Only such evidence in aggravation of the crime as the state has made known to the accused prior to trial is admissible, and any evidence which the court deems to have probative value may be received even though inadmissible under the exclusionary rules of evidence, provided the defendant is given a fair opportunity to rebut any hearsay statements.

At the conclusion of the sentencing hearing, the judge is required to consider or to include in his instructions to the jury, as the case may be, any aggravating or mitigating circumstances prescribed by statute which are relevant to an assessment of the appropriate sentence to be imposed.¹³⁰ The judge or jury then is directed to determine whether sufficient statu-

completion of all acts necessary for a bill to become law under the provisions of WYO. CONST. art. IV, § 8.

127. WYO. STAT. § 6-4-101(b) (1977). The statute expanded on the definition of first degree murder found in the old Section 6-54(a) to include premeditated murder of any peace officer, corrections employee or fireman acting in the line of duty. WYO. STAT. § 6-4-101(a) (1977). Any person charged with murder in the first degree under this section is a potential candidate for the death penalty since the question of punishment will not be considered until completion of the guilt determining phase of the trial. This provision which tracks the Georgia and Florida laws, will likely require modification of the bail procedures traditionally followed in first degree murder cases. See GA. CODE ANN. § 26-1101 (1972); FLA. STAT. ANN. § 782.04 (Supp. 1976-1977).
128. WYO. STAT. §§ 6-4-102(a), (b) (1977). The hearing is held before the trial judge alone in cases where the defendant is tried by the court, the defendant has pled guilty or the defendant waives a jury with respect to the sentence. In all other cases, the hearing is conducted before the jury which made the determination of guilt unless the trial judge discharges the jury upon a showing of good cause. In the latter instance, a new jury will be impaneled to determine sentence.
129. WYO. STAT. § 6-4-102(c) (1977). Although not expressly provided in this section, subsection (d) implies that the prosecution and the defense may be permitted to present argument regarding the punishment to be imposed. Such a procedure is consistent with the purpose of the presentence hearing as a mechanism to provide the sentencing authority the information essential to a reasoned determination and is expressly provided for in the Georgia and Florida laws. See GA. CODE ANN. § 27-2503 (Supp. 1977); FLA. STAT. § 921.141(1) (1976-1977).
- The wide scope of evidence allowed at the presentence hearing, so long as it does not prejudice the accused, is consistent with the desirability of availing the jury of as much information as possible before it makes the sentencing decision. See *Gregg v. Georgia*, *supra* note 10, at 189-90. It would have been preferable, as a means of protecting the accused's constitutional rights, for the legislature to have expressly provided that the latitude in admissibility of evidence is not to be construed as authorizing the introduction of any evidence secured in violation of the Constitutions of Wyoming or of the United States. See FLA. STAT. § 921.141(1) (Supp. 1976-1977); TEX. CODE CRIM. PROC. ANN. art. 37-071(1) (Vernon Supp. 1978).
130. WYO. STAT. § 6-4-102(d) (1977).

tory mitigating factors exist which outweigh one or more of the statutory aggravating circumstances found to exist, and based upon these considerations recommend whether the accused should be sentenced to death or life imprisonment.¹³¹ The statute limits the aggravating circumstances to whether:

(i) The murder was committed by a person under sentence of imprisonment;

(ii) The defendant was previously convicted of another murder in the first degree or a felony involving the use or threat of violence to the person;

(iii) The defendant knowingly created a great risk of death to two (2) or more persons;

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

(v) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

(vi) The murder was committed for pecuniary gain;

(vii) The murder was especially heinous, atrocious or cruel;

(viii) The murder of a judicial officer, former judicial officer, county attorney, or former county attorney, during or because of the exercise of his official duty.¹³²

Mitigating circumstances include whether:

(i) The defendant has no significant history of prior criminal activity;

(ii) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

(iii) The victim was a participant in the defendant's conduct or consented to the act;

(iv) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor;

131. WYO. STAT. § 6-4-102(d)(i), (ii) (1977).

132. WYO. STAT. § 6-4-102(h) (1977).

(v) The defendant acted under extreme duress or under the substantial domination of another person;

(vi) 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;

(vii) The age of the defendant at the time of the crime.¹³³

A death sentence can never be imposed unless the jury or judge finds at least one of the statutory aggravating circumstances to exist, and then elects to impose that sentence. If the verdict is a recommendation of death, the sentencing authority must specify in writing the aggravating circumstance(s) found to exist *beyond a reasonable doubt*.¹³⁴ The trial judge is always bound by the jury's recommended sentence.¹³⁵

The judgment of conviction and sentence of death are subject to automatic review by the Supreme Court of Wyoming within sixty days after certification of the record by the sentencing court and shall have priority over all other cases.¹³⁶ A transcript and complete record of the trial, as well as a notice prepared by the clerk of the trial court and a report by the trial judge, must be transmitted to the reviewing court within ten days after receipt of the transcript by the clerk.¹³⁷

In addition to consideration of any errors enumerated in the appeal, the Supreme Court must consider the appropriateness of the punishment as determined by application of the following standards:

133. WYO. STAT. § 6-4-102(j) (1977).

134. WYO. STAT. § 6-4-102(e) (1977). In situations where the jury is deadlocked on the question of sentence, the court must impose a life sentence if the deadlock cannot be broken within a reasonable time.

135. WYO. STAT. § 6-4-102(f) (1977).

136. WYO. STAT. § 6-4-103(a) (1977).

137. WYO. STAT. § 6-4-103(b) (1977). The notice prepared by the clerk must include the title and docket number of the case, the name of the defendant and the name and address of his attorney and the offense and punishment prescribed. The report to be prepared by the trial judge is in the form of a standard questionnaire prepared and supplied by the Wyoming Supreme Court. The section does not specify what is includible in the questionnaire, but the form used by the Georgia trial courts is designed to elicit information regarding the defendant, the crime and the trial. In the latter instance, the trial judge must characterize the trial in several ways to test for arbitrariness and disproportionality of sentence. The report includes, *inter alia*, detailed questions concerning the quality of the defendant's representation, the role race played in the trial, if any, and the existence of any doubt in the trial court's judgment about the defendant's guilt or the appropriateness of the sentence. See *Gregg v. Georgia*, *supra* note 10, at 167-68.

(i) The sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;

(ii) The evidence supports the jury's or judge's finding of an aggravating circumstance as enumerated in W. S. 6-54.2 [§ 6-4-102] and a lack of sufficient mitigating circumstances which outweigh the aggravating circumstances;

(iii) The sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.¹³⁸

The court is required to incorporate into its decision reference to similar cases that it has taken into consideration in performing its review function.¹³⁹ Under this special review authority, the court may affirm the sentence of death, set aside the sentence and impose a sentence of life imprisonment or remand the case for resentencing by the trial court based upon the record and argument of counsel.¹⁴⁰

The new Wyoming statute represents an attempt to employ the guided and controlled sentencing discretion mandated by *Gregg* and *Woodson*. By providing the sentencing authority adequate information and guidance at the sentencing stage of a bifurcated trial, the Wyoming procedure now requires a consideration of the circumstances of the crime and the individual character of the defendant before a final determination of the appropriate sentence is made. While the new sentencing procedures constitute the most acceptable means of removing the danger that the death penalty will be arbitrarily and wantonly imposed, such a system does not necessarily alleviate these concerns and must be examined on an independent basis.¹⁴¹ It is the opinion of this writer that Wyoming's new statute is constitutional on its face, but contains some potential pitfalls of constitutional dimension. This article does not presume to identify every problem area but will attempt to provide guidance with regard to those most likely to arise in future capital murder cases.

Instead of mandatorily imposing a death sentence upon a finding of capital murder, the jury or judge, as sentencing au-

138. WYO. STAT. § 6-4-103(d) (1977).

139. WYO. STAT. § 6-4-103(e) (1977).

140. WYO. STAT. § 6-4-103(e)(i)-(iii) (1977).

141. See the text accompanying note 85, *supra*.

thority, must weigh eight aggravating factors against seven mitigating factors to determine whether such a sentence is appropriate. Not only does the new procedure narrow the categories of first degree murder for which the death penalty may be inflicted, it also requires the sentencing authority to focus upon the specific circumstances of the crime and the characteristics of the person who committed it.¹⁴² Discretion, therefore, is still a part of the sentencing determination but its exercise is controlled by objective standards to minimize the potential of discriminatory application.¹⁴³ The facial acceptability of these sentencing procedures, however, does not totally remove the potential for prejudice in their application.

First, the attempt to identify the characteristics of criminal homicides which justify the sanction of death necessarily creates the possibility of overbroad and vague expression when reduced to words. This contention was advanced in both *Gregg v. Georgia* and *Proffitt v. Florida*, and there is no reason why such an assertion will not be levied against the new Wyoming statute.¹⁴⁴ Some of the attacks in these cases were aimed at factors of aggravation similar to the third and seventh statutory aggravating circumstances in Section 6-4-102 (h), which authorize the death penalty in cases where the defendant "knowingly created a great risk of death to two (2) or more persons" or where the crime was "especially heinous, atrocious or cruel."¹⁴⁵ Even though provisions such as these are potentially overbroad or subject to varying interpretations, the plurality held they have been construed by the Georgia or Florida Supreme Courts to provide adequate guidance to those charged with the sentencing determination.¹⁴⁶ The Wyoming provisions, unlike those of Georgia and Florida,

142. *Gregg v. Georgia*, *supra* note 10, at 197; and *Proffitt v. Florida*, *supra* note 13, at 251. See the text accompanying notes 132-33, *supra*.

143. *Gregg v. Georgia*, *supra* note 10, at 197-98.

144. The petitioner in *Gregg* argued that Georgia's statutory aggravating circumstances suffered from overbreadth and vagueness because the jury is left free to make arbitrary grants of mercy. The petitioner in *Proffitt*, arguing the obverse, maintained the enumerated aggravating and mitigating circumstances in the Florida law were so overbroad and vague that virtually anyone convicted of first degree murder is a candidate for the death penalty.

145. WYO. STAT. § 6-4-102(h)(iii), (vii) (1977).

146. See generally *Gregg v. Georgia*, *supra* note 10, at 200-03; *Proffitt v. Florida*, *supra* note 13, at 254-56. The preciseness of the mitigating circumstances enumerated in the Florida statute were also not immune from attack. The plurality, however, said that even though these questions and decisions may be difficult, they require no more line-drawing than is usually demanded of a fact finder in any lawsuit. The Court alluded to the example provided by criminal defenses such as insanity and reduced capacity whereupon juries must engage in the same consideration as required by some of the questioned mitigating circumstances. *Id.* at 257-58.

have yet to be construed by the Supreme Court of Wyoming, but it is presumed that when the time comes, the court will not give them open-ended constructions. Until a more definite reading is given to the statutory language, the potential for arbitrariness and capriciousness in the sentencing process is a reality. Prosecuting attorneys and trial judges must be acutely aware that the purpose of the new procedures is to provide guidance to juries, and that attempts to force *any* first degree murder into one of the broadly worded statutory aggravating circumstances will create a substantial risk of leaving juries to act as freely as they wish in deciding the appropriate punishment and of subsequent reversal on appeal.

A second problem area is that Section 6-4-102(d), like its Florida counterpart, does not provide any guidance in assigning the weight to be given the aggravating and mitigating factors in any given case. The assignment of numerical weights to the various factors to be considered by the sentencing authority is unnecessary since the requirements of *Furman* are satisfied when its sentencing discretion is guided and channeled by requiring an examination of specific factors that argue in favor of or against the imposition of death.¹⁴⁷ Nevertheless, insofar as it may affect the regularity of sentencing proceedings, it is necessary to clarify the standard of proof which must be met before a death sentence may be imposed.

In jury tried cases, the Wyoming statute, in language similar to Florida's,¹⁴⁸ directs the jury to consider whether sufficient enumerated mitigating circumstances exist which outweigh one or more of the enumerated aggravating circumstances found to exist, and based on those considerations, whether the defendant should be sentenced to death or life imprisonment.¹⁴⁹ Under the Florida law, however, the jury's recommendation is only advisory to the trial judge who determines the actual sentence notwithstanding the jury's verdict. The Florida statute also directs the trial judge to weigh the statutory mitigating and aggravating factors in determination of sentence and requires him to justify any sentence of death by written findings showing that it was based upon facts proving "(a) [t]hat sufficient [statutory] aggravating

147. *Id.* at 258.

148. FLA. STAT. ANN. § 921.141(2) (Supp. 1976-1977).

149. WYO. STAT. § 6-4-102(d)(i) (1977).

circumstances exist . . . and (b) [t]hat there are insufficient [statutory] mitigating circumstances . . . to outweigh the aggravating circumstances."¹⁵⁰ It is implied that this standard of proof, which the trial judge as sentencing authority must satisfy in Florida, would seem to be required under the Wyoming statute. But, it was omitted from the final legislative enactment.

The legislature, not content to stop at that point, also adopted the standard of proof required by the Georgia statute. Thus, the Wyoming procedure additionally does not permit the imposition of the death penalty unless at least one of the statutory aggravating circumstances is found to exist, and requires, in cases where death is imposed, written findings of proof beyond a reasonable doubt of the aggravating circumstance(s) found.¹⁵¹ The Georgia statutory counterpart, in contradistinction to Florida, does not require that aggravating circumstances outweigh mitigating factors before a death penalty can be justified.¹⁵²

The statutory intermingling of the standard of proof provisions of the Florida and Georgia statutes create an ambiguity concerning the appropriate standard to apply under the Wyoming statute. For example, can a death sentence be justified upon a written finding by the sentencing authority of a statutory aggravating circumstance beyond a reasonable doubt, but without an corollary finding with regard to the weighing of circumstances of aggravation and mitigation? Or must a written finding of an aggravating factor beyond a reasonable doubt be accompanied by a finding that there are insufficient mitigating factors to outweigh the aggravating factors before a death sentence can be justified? The potential for differing interpretations regarding the proper standard of proof raises a serious question over whether the Wyoming sentencing procedures can be applied in the uniform and even-handed manner mandated by the eighth and fourteenth amendments. A satisfactory solution, consistent with the requirements of the constitution, would be to deliver a standardized instruction to the jury, along with other instructions at the pre-sentence hearing, requiring it to ascertain (1) whether at least one stat-

150. FLA. STAT. ANN. § 921.141(3) (Supp. 1977).

151. WYO. STAT. § 6-4-102(e) (1977).

152. GA. CODE ANN. § 27-2534.1 (Supp. 1977).

utory aggravating circumstance exists beyond a reasonable doubt, and (2) whether there are insufficient statutory mitigating factors to outweigh the statutory aggravating factors found to exist. The jury would be advised further that a sentence of death may be justified only upon an affirmative written finding with regard to both questions.¹⁵³

A third area of concern is whether the substantial latitude accorded the scope of evidence allowed at the presentence hearing under Section 6-4-102(c) contemplates the consideration of nonstatutory aggravating circumstances. It is unlikely that a death sentence resting entirely upon nonstatutory aggravating factors would be able to successfully withstand appellate review. The capital sentencing procedures expressly limit the consideration of aggravating circumstances to eight specified factors.¹⁵⁴ Moreover, the preceding discussion indicates that the death penalty cannot be imposed unless at least one of the statutory aggravating factors is found beyond a reasonable doubt.

Finally, the petitioners in *Gregg* and *Proffitt* challenged the opportunity for discretionary action, inherent in the processing of any murder case under any system, as authorizing arbitrary grants of mercy. In particular, attention was directed to the unfettered authority of the prosecutor to select those persons whom he wishes to charge with a capital offense and to plea bargain with them, the jury's option to convict an accused of a lesser included offense rather than find him guilty of a capital offense even if the evidence is supportive of a capital verdict and the authority of the executive branch to commute the sentence of a defendant convicted and sentenced to die. The plurality in *Gregg v. Georgia* did not view the existence of these discretionary stages as determinative of the issues before the court. Justice Stewart said *Furman* did not proscribe the authority of those persons at each stage of a prosecution to decide to remove a defendant from consideration as a candidate for the death penalty, but, in contrast, dealt with the decision to impose such a sentence on a specific

153. The recommended standard of proof is also consistent with the standard of review under Section 6-4-103(d)(ii) wherein the Supreme Court is required to determine whether the evidence supports the finding of any statutory aggravating circumstances and a lack of sufficient mitigating circumstances which outweigh the aggravating circumstances. See note 158, *infra*.

154. There are no such words of limitation introducing the list of statutory mitigating circumstances. See WYO. STAT. § 6-4-102(j) (1977).

individual who had been convicted of a capital offense.¹⁵⁵ Although the Court indicated that such decisions to afford an individual mercy does not violate the Constitution, the exercise of prosecutorial discretion to waive the death penalty for whatever reason after conviction of capital murder and prior to the presentence hearing should be approached with circumspection.¹⁵⁶

The drafters of Wyoming's new law duplicated in large measure the Georgia sentence review procedures,¹⁵⁷ which the Supreme Court lauded for providing an additional safeguard against arbitrariness and caprice. The new statute mandates expedited review by the Supreme Court of Wyoming in every case in which the death penalty is exacted. In addition to review of errors alleged to have occurred during the prosecution of the case, the Court must determine whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor, whether the evidence supports the finding of a statutory aggravating circumstance as required by Section 6-4-102 and a lack of sufficient mitigating circumstances which outweigh the aggravating circumstances and whether the sentence of death is excessive or disproportionate to those imposed in similar cases, considering both the crime and the defendant.¹⁵⁸

The first standard of review requires the Court to make certain the record is not indicative of any arbitrariness or discrimination in the sentencing process. This provision, as originally drafted by the Georgia legislature, most obviously was

155. *Gregg v. Georgia*, *supra* note 10, at 199.

156. Arkansas' death penalty law bears many similarities to that of Georgia and Florida. The United States Supreme Court, however, vacated the death penalties imposed thereunder and remanded them to the Arkansas Supreme Court with directions to re-examine its decisions upholding the statute in light of the *Gregg* line of cases. *Collins v. Arkansas*, 429 U.S. 808 (1976); and *Neal v. Arkansas*, 429 U.S. 808 (1976).

The Arkansas statute contains a provision conferring discretion in the prosecutor to waive the death penalty after the jury returns a verdict of guilty of the capital offense, in which case the trial court is required to sentence the offender to life imprisonment without parole. ARK. STAT. ANN. § 41-1301(3) (1976). Upon re-examination, the Supreme Court of Arkansas upheld its death penalty statute and reinstated the death sentences imposed, but did not discuss this particular aspect of the statute. See *Collins v. State*, 548 S.W.2d 106 (Ark. 1977); *Neal v. State*, 548 S.W.2d 135 (Ark. 1977). The question remains, however, whether a broad grant of prosecutorial discretion to waive the death penalty in this limited circumstance would be prohibited by *Gregg v. Georgia*. The Arkansas Criminal Code Revision did acknowledge that in granting such discretion, § 41-1301(3) tended to increase the potential for the type of arbitrary disposition of capital offenders condemned by *Furman v. Georgia*. See Commentary to ARK. STAT. ANN. § 41-1301(3) (1976).

157. See GA. STAT. ANN. § 27-2537 (Supp. 1977).

158. WYO. STAT. § 6-4-103(d)(i)-(iii) (1977).

designed to satisfy the basic concerns of *Furman* which focused upon those defendants who were being condemned to death in an arbitrary and freakish fashion. Since the Georgia and the new Wyoming systems, unlike the mercy statutes existing at the time of *Furman*, are structured to minimize the risk of passion and prejudice, it is difficult for an appellate court to ascertain the existence of these factors from a cold transcript. The legislature, however, did follow Georgia in requiring the trial judge to file a special written report as part of the record on appeal. If the report, which is to be based upon a questionnaire prepared by the Supreme Court, is designed to test for arbitrariness, then this review standard may be given some teeth.¹⁵⁹

The second review standard provides an effective mechanism to minimize the risk that the sentencing authority will exercise its discretion in an arbitrary manner. This provision insures that death sentences will not be carried out unless the evidence supports the finding of at least one aggravating factor specified in the statute and the finding that insufficient mitigating factors exist which outweigh the aggravating circumstances. By reviewing and reweighing the evidence of aggravation and mitigation, the Wyoming Supreme Court must make an independent determination of whether the sentencing authority's imposition of the ultimate penalty is warranted.¹⁶⁰

The plurality opinion in *Gregg v. Georgia* underscored the viability of the third standard of sentence review which requires the reviewing court to draw a comparison of each death sentence with sentences imposed on similarly situated defendants to ensure that it is not disproportionately or excessively inflicted in any particular case. The Supreme Court of Georgia has construed this standard of review to mean that "if the death penalty is only rarely imposed for an act or it is substantially out of line with sentences imposed for other acts[,] it will be set aside as excessive."¹⁶¹

In *Ross v. State*,¹⁶² the Supreme Court of Georgia considered the question whether the comparative sentencing review

159. The report required to be filed by the trial judge in Georgia is drafted in this fashion. See the text accompanying note 137, *supra*.

160. Proffitt v. Florida, *supra* note 13, at 253.

161. Coley v. State, 231 Ga. 829, 204 S.E.2d 612, 616 (1974) [bracketed matter supplied].

162. Ross v. State, 233 Ga. 361, 211 S.E.2d 356 (1974).

procedure provided an adequate basis for measuring the proportionality of the sentence in a particular case. The Court said the purpose of the standard was ably served by reference to appealed capital cases where either death or life imprisonment has been imposed inasmuch as they represent a sufficient cross-section of similar cases upon which adequate comparative review can be made. The Court also noted that nothing in this section forecloses a court during the course of its independent review from making an examination of nonappealed cases and those in which the defendant pleaded guilty to a lesser offense.¹⁶³ In response to attacks levied at the practice of using cases decided prior to *Furman* in its comparative examination, it said that the disproportionality standard of review is designed to aid in comparing the reaction of how prior sentencers have responded to acts similar to those committed by the defendant whose case is being reviewed. The Court concluded that the primary emphasis is with the reactions of the judge or jury to the evidence before it, and when such a reaction is substantially out of line with those of prior sentencers, before or after *Furman*, then the death penalty must be set aside as excessive.¹⁶⁴

The *Ross* opinion offers guidance in selecting the types of cases which the Supreme Court of Wyoming will have to consider in performing its review function. But given the population and caseload variance between Wyoming and Georgia, the Wyoming court may encounter some difficulty in finding cases sufficient in number and similarity to that being reviewed.¹⁶⁵ The problem is not significant because even in cases involving evidence not appearing in previous ones, the comparative review function still has a prophylactic effect. It substantially eliminates the potential that an offender will be sentenced to die by the action of an aberrant jury. If there comes a time when juries or judges in this state do not impose the death sentence in a certain type of murder case, the review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.¹⁶⁶

163. *Id.* 211 at 359.

164. *Id.* 211 at 360.

165. The Georgia counterpart to Section 6-4-103 also provides for staff assistance to enable the Supreme Court of Georgia to compile data deemed appropriate and relevant to its consideration of the validity of a particular sentence. GA. STAT. ANN. § 27-2537(f)-(h) (Supp. 1977).

166. *Gregg v. Georgia*, *supra* note 10, at 206.

The appellate review procedures serve a salutary function because they require the court to assume the responsibility for assuring the even-handed operation of the death penalty law. If this function is properly performed, many of the potential trouble spots within the Wyoming system can be alleviated. The provision for meaningful appellate review is perhaps the most important aspect of any capital punishment schema, for it substantially reduces the risk that there will be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."¹⁶⁷

CONCLUSION

The chosen representatives of the people of Wyoming have reinforced their endorsement of capital punishment as a valid criminal sanction at least for certain aggravated and unmitigated types of first degree murder. The legislature, not faced with the aura of uncertainty which clouded its judgment in the aftermath of *Furman*, has enacted a capital sentencing procedure which will withstand constitutional scrutiny provided it is administered in a fair and rational manner. Even though the lessons of *Gregg* and its companion cases demonstrate that the availability of capital punishment through statutory change is still a reality in modern society, the ultimate fate of this unique and irreversible sanction in Wyoming and the rest of the country inextricably rests on the courts and their perception of the eighth amendment.

Students of constitutional law must be vigilant against overreading Supreme Court opinions. The holdings of *Gregg* and its companion cases do not represent an end to the rapid growth and development which the eighth amendment has undergone in the last decade, but they signify a landmark upon which future evolutionary change will continue. Although these cases refused to address the question of whether the taking of a criminal's life is an excessive sanction where no victim has been deprived of life, they were relied upon in a recent opinion holding that the death penalty for the crime of rape is an excessively cruel punishment and thereby un-

167. *Furman v. Georgia*, *supra* note 4, at 313 (White, J., concurring).

constitutional *per se*.¹⁶⁸ And the time will come when the eighth amendment will no longer tolerate capital punishment for murder. The question of when is dependent largely upon the attitudes of society.

A comparison of the plurality's views with those of Justices Brennan and Marshall reveal that they would be similar but for the deference the former accords to public sentiment reflected in the legislative popularity of capital punishment. How else can the plurality's emphasis on human dignity be reconciled with its corresponding concern that society's need for retribution be fulfilled? By equating the concern for human dignity with procedural fairness in the sentencing process, the plurality has satisfied itself that condemned murderers have been accorded civilized treatment. This is only one step removed from the concept of Justices Brennan and Marshall that capital punishment represents a total denial of even a convicted murderer's worth as a human being, a defilement which a civilized society cannot sanction. It seems that however long the public is willing to accept the need for capital punishment for murder, as recent polls would indicate,¹⁶⁹ the plurality's position will remain unchanged. The question left unanswered is whether societal acceptance in the abstract will continue when the citizenry becomes informed of its consequences and effects though the executions of the Gary Gilmore's. In any event, the evolution of the cruel and unusual punishments clause is not complete.

168. *Coker v. Georgia*, 429 U.S. 815 (1977).

169. The April 1978 Gallup Poll indicates that sixty-two percent of its respondents support the death penalty for the crime of murder. While this represents a three percent decrease since the April 1976 poll, it is substantially greater than the forty-two percent approval of the sanction in 1966. *Denver Post*, Apr. 13, 1978, at 5, col. 1.