

# ***Furman v. Georgia* and the Supreme Court's Failure to Apply It**

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## Abstract

In the case *Furman v. Georgia* (1972), the Supreme Court outlawed the death penalty on the grounds that its use constituted cruel and unusual punishment in violation of the Eighth Amendment. No majority opinion was written, but the plurality opinions all agreed that the amount of discretion in death penalty sentencing left too much room for the death penalty to be given arbitrarily. When the death penalty was reinstated in *Gregg v. Georgia* (1976), the Court approved schemes that limited the discretion of sentencing bodies by providing sentencing guidelines, automatically appealing all death penalty cases for review, or taking other steps to ensure there was some methodology determining which death penalty-eligible criminals actually receive it. In this paper, I will make the argument that the Court failed to effectively amend the shortcomings of the *Furman* decision. While the Court addressed discretion to give the death penalty by mandating sentencing guidelines be used and calling for review of all death penalty cases, that is only half of the issue. Sentencing parties also exercise discretion when deciding to give life imprisonment over the death penalty, a discretion that is equally open to arbitrariness. Because arbitrariness and abuse of discretion were the reason the death penalty was ruled unconstitutional in *Furman*, the best solution to the issue is the mandatory death penalty, which allows little to no room for arbitrariness in influencing sentencing.

## Introduction

When the death penalty was deemed unconstitutional in *Furman v. Georgia* (1972), states had the difficult task of reconfiguring their death penalty systems to comply with a ruling that failed to directly define both the problem and the solution. The per curiam decision stated only that the Court had found that the death penalty was cruel and unusual “in these [certain] cases” they had reviewed, leaving the door open for it being ruled constitutional in other situations, and the concurring justices had only limited consensus about why it was unconstitutional.<sup>1</sup> The issue of arbitrariness was present, at least partially, in every one of the concurring opinions. Justices Douglas, Stewart and White held it as the main reason to declare the current system as unconstitutional, while Justices Marshall and Brennan acknowledged it as one of many reasons that the death penalty generally should be ruled unconstitutional.<sup>2</sup> Beginning with the decisions made with *Gregg v. Georgia* (1976), the Supreme Court fleshed out exactly what constituted a constitutional system of capital punishment, citing restructuring sentencing procedures to channel jury discretion and the addition of automatic review as ways to fix the issues brought forth in their review of *Furman*.<sup>3</sup> However, structuring jury discretion does not necessarily reign it in—the Supreme Court ruled in *Lockett v. Ohio* (1978) that a jury must be allowed to hear all relevant mitigating circumstances the defense wishes to present, and that they must be able to use this mitigating evidence to justify giving life imprisonment instead of the death penalty.<sup>4</sup> Thus, while the Supreme Court limited arbitrariness by way of structuring the way juries consider aggravating and mitigating factors, they preserved the jury’s ultimate tool for producing arbitrariness in the capital punishment system—the ability to show mercy to defendants. While it may seem ideal to keep mercy in sentencing, it directly challenges the *Furman* decision and subsequent cases because there will always be a large element of arbitrariness in sentencing so long as the jury can find, by whatever reasoning it chooses, that a sentence of life imprisonment is more appropriate than the death penalty. In order to best comply with

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1 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 162.

2 Ibid, 162-190.

3 Ibid, 200.

4 Ibid, 250-253.

the decision of *Furman* and eliminate arbitrary implementation of the penalty, the mandatory death penalty should be made constitutional.

## The *Furman* Concurrences

The *Furman* concurrences each cited distinct rationale for deeming the death penalty system, as it existed at the time, cruel and unusual under the Eighth Amendment. Justices Brennan and Marshall took the broadest stance against the death penalty, holding that it no longer can be considered constitutional in the United States due to evolving standards of decency, its unparalleled severity, and its unnecessaryness, among other reasons.<sup>5</sup> Though not the central focus of either argument, both justices acknowledge arbitrariness as a factor in their decisions. Justice Brennan ties the argument against arbitrary punishment into his assertion that the death penalty violates basic human dignity, asserting that one way this dignity is violated when states “inflict upon some people a severe punishment that it does not inflict upon others.”<sup>6</sup> Additionally, he emphasizes how the infrequency with which the death penalty is given is a clear indicator of the punishment being inconsistently applied and says that there is little logic regulating who receives the death penalty and who does not, calling the system “little more than a lottery.”<sup>7</sup> Justice Marshall constructs an argument against the death penalty largely independent of arbitrariness, but he still states that the death penalty should be denounced for being discriminatorily imposed against certain groups of people, which he believed most people should find “shocking” to their conscience and sense of justice.<sup>8</sup> Because of their broader stances against the death penalty, the opinions of Justices Brennan and Marshall are not of great use for analysis of how laws should best be amended to comply with the Eighth Amendment—the only way to fully accommodate these opinions is to outlaw the death penalty.

Far more useful for guidance are the opinions of Justices Douglas, White, and Stewart, who chose to only reject the death penalty as it was applied

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5 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 165-172, 174-179.

6 *Ibid.*, 166.

7 *Ibid.*, 168.

8 *Ibid.*, 178.

in *Furman*, and not as a whole; each with independent reasoning behind their conclusion. Justice Douglas' opinion focuses on arbitrariness as an offshoot of discriminatory practices due to unbridled discretion on the part of juries and justices. He states that laws generally qualify as unusual, and thus inconsistent with the Eighth Amendment, if they discriminate against certain groups of people intentionally, or if they are administered under a system that is subject to bias.<sup>9</sup> He outlines that the Eighth Amendment mandates "legislators...write penal laws that are...nonselective and nonarbitrary," and holds that in the death penalty scenario, it is the job of justices to ensure those laws are not selectively applied to certain groups.<sup>10</sup> Justice Douglas holds that the death penalty scheme on trial in *Furman* did not fit these requirements, because judges and juries had discretion in imposing the death penalty, enabling it to be applied in a discriminatory fashion.<sup>11</sup> Thus, for Justice Douglas, it is the potential for and presence of discrimination in sentencing that renders the death penalty unconstitutional.

Justice Stewart denounces the death penalty on the sole basis that there is proof of its arbitrary imposition. Although he seems to agree with Justices Brennan and Marshall in that the death penalty needs to be evaluated differently than other available punishments because of its unique nature, he focuses solely on the death penalty as applied in the case at hand instead of addressing its general use, and thus avoids making broad prescriptions about the use of the punishment.<sup>12</sup> In an often-quoted line, Justice Stewart likens the death sentences given by the current system as "cruel and unusual in the same way that being struck by lightning is cruel and unusual" because the death penalty is "so wantonly and so freakishly imposed."<sup>13</sup> He holds that those who receive the death penalty are "a capriciously selected random handful" of those convicted of murder, and rules the death penalty unconstitutional on these grounds.<sup>14</sup> Justice Stewart alludes to racial discrimination possibly

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9 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 163.

10 Ibid, 164.

11 Ibid.

12 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 172.

13 Ibid.

14 Ibid.

being present in the system, but chooses not to base his argument for unconstitutionality on it, as he considers it yet to be proven that sentencing is influenced by race.<sup>15</sup> The evident arbitrariness of the penalty's use in the system is enough for Justice Stewart to deign its unconstitutionality.

Justice White argues its unconstitutionality because of the death penalty's infrequent and erratic use. He contends that the death penalty is used too seldom to significantly service retribution or deterrence, and thus "its imposition would then be pointless and needless extinction of life with only marginal contributions to any discernible social or public purpose" making it "patently excessive and cruel and unusual punishment violative of the Eighth Amendment."<sup>16</sup> Justice White does leave the door open for the future imposition of the death penalty, however—making sure to clarify that it is the way the death penalty is currently administered, and not the death penalty system as a whole, that is problematic. He cites issues with the amount of discretion wielded by juries and judges as the largest problem in current administration; he observes "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," noting that legislator's choice to delegate so much power to the jury in deciding whether to give a death sentence ultimately renders the death penalty unconstitutional.<sup>17</sup> Thus, Justice White holds the death penalty is unconstitutional in that it no longer serves the ends that once justified it because of the system's dependence on discretion.

### ***Gregg's Conflicts with Furman***

The majority opinion in *Gregg v. Georgia*, written by Justice Stewart, holds that Georgia made significant enough changes to its death penalty scheme to warrant its constitutionality. Justice Stewart reaffirms the majority belief that "the punishment of death does not invariably violate the Constitution," based on the history of the death penalty in America, its potential service to retribution and deterrence, and the judgment that as a penalty, is not disproportionate to the crimes for which it is given.<sup>18</sup> He

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15 Ibid.

16 Ibid, 173.

17 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 174.

18 Ibid, 193-195.

then proceeds to analyze the *Furman* decision, asserting that in *Furman*, the death penalty “could not be imposed under sentencing procedures that created a substantial risk that it would be inflicted in an arbitrary and capricious manner.”<sup>19</sup> To reduce the risk of arbitrary assignment of the death penalty over life imprisonment, “discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary” decision making.<sup>20</sup> Justice Stewart identifies two specific ways in which legislators could go about channeling jury discretion: bifurcation of trials and presenting juries with guidelines of aggravating and mitigating circumstances to consider when making decisions.<sup>21</sup> In bifurcating trials, the Court ensures that the defense has the ability at the sentencing trial to present information either not relevant at the guilt trial or even “prejudicial to a fair determination” of guilt that may serve to mitigate the crime once the defendant has been convicted of it.<sup>22</sup> Moreso related to arbitrariness is the recommendation for jury sentencing guidelines. Justice Stewart asserts that presenting the jury with state-made aggregating and mitigating circumstances to consider would “provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary.”<sup>23</sup> Further, he proposes that having the jury list what “factors they relied upon in reaching [their] decision” will aid when the state reviews the sentence and compares it to like cases.<sup>24</sup> Justice Stewart leaves the door open for other possibly constitutional death penalty schemes, stating that each state’s chosen scheme needs to be examined individually; he evaluates the reconfigured system in Georgia, and determines that it has created enough of a structure to limit undue juror discretion to be considered constitutional.<sup>25</sup> In conclusion, Justice Stewart identifies the main issue of *Furman* to be the fact that “defendants...were being condemned to death capriciously and arbitrarily,” and holds that the once “freakish” imposition of the death penalty has been fixed by channeling of jury discretion

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19 Ibid, 196.

20 Ibid.

21 Ibid, 196-197.

22 Ibid, 196.

23 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 197.

24 Ibid.

25 Ibid.

and the addition of automatic judicial review of all death penalty convictions in Georgia.<sup>26</sup>

While the argument presented by the majority in *Gregg* succeeds in demonstrating how juror discretion can be shaped by the state in requiring jurors to justify their decision to give a sentence of death based on the aggravating circumstances found, the opinion fails to properly address the fact that discretion is also exercised when a jury decides to give a life sentence when a death sentence would be well justified. In subsequent cases such as *Woodson v. North Carolina* (1976) and *Lockett v. Ohio* (1978), the Court took action to ensure that the jury maintained the discretion to choose life imprisonment over death no matter the reason they chose to do so. As put by Justice Scalia in his concurrence in the case *Walton v. Arizona* (1990), the Court thus embarked on creating a “counter doctrine” advocating for the protection of a sentencer’s “discretion to ‘decline’ to impose” a death sentence.<sup>27</sup> It is clear why this is inconsistent with the decision in *Furman*; arbitrariness is inherently increased when states were barred from having mandatory death sentences by *Woodson*, as well as when states were prevented from limiting the possible mitigating evidence able to be presented during sentencing in *Lockett*. Justice Scalia holds that “it is impossible to understand why the Constitution demands that the aggravating standards and mitigating standards be accorded opposite treatment,” since both can be equal relevant for creating arbitrary decisions. This difference allows those making sentencing decisions to justify giving different sentences to perpetrators of comparable crimes, with any reason they see fit.<sup>28</sup> It is in this way that allowing sentencing parties unbridled discretion to not impose death can open the door for discrimination—when all mitigating circumstances are permitted at trial, and all it takes is one juror defecting to lead to a sentence of life imprisonment instead of death, each juror has the power to choose life over death for any reason they see fit.<sup>29</sup> It was held in *McCoy v. North Carolina* (1990) that a unanimity requirement for juries in finding mitigating factors “violate[d] the Constitution by preventing the sentence from considering all mitigating evidence,” therefore all it takes is one juror deciding to find

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26 *Ibid*, 200.

27 *Walton v. Arizona*, 497 U.S. 639, 661 (1990).

28 *Ibid*, 666.

29 *Ibid*, 667.

a mitigating circumstance to get a life sentence for a criminal who would otherwise receive the death penalty.<sup>30</sup> Thus, arbitrariness persists in the death penalty sentencing system, encouraged by the Supreme Court; if the Court truly wishes to adhere to the *Furman* decision, this arbitrariness must be reduced.

## The Benefits of a Mandatory Death Penalty

The best way to remove discrimination from death penalty sentencing is through the instatement of a mandatory death penalty for a clearly described class of crimes, perhaps with a very narrow class of mitigating circumstances permitted for consideration. When constructed correctly, the mandatory death penalty would address both directions of discretion in sentencing: the power of a sentencing body to choose to give death and the power of the body to give life imprisonment. Discretion would be channeled as it was in *Gregg v. Georgia* by providing the sentencing body with very clear descriptions of what constitutes a death penalty-eligible crime and requiring the sentencing body to report on what aggravators it found so that “discretion [is] suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.”<sup>31</sup> The possibility for discretion to give life imprisonment this is entirely eliminated, as the choice no longer remains with the sentencing body. While this discretion may seem innocuous, it provides room for discrimination and seemingly arbitrary decisions to be produced by sentencing bodies. It is in this way that allowing juries unlimited discretion in the way of giving life imprisonment over death goes against the principles introduced in *Furman v. Georgia*. The potential for discrimination comes to light in *McCleskey v. Kemp* (1987).

### *McCleskey v. Kemp*

In *McCleskey v. Kemp*, the petitioner argued that the capital punishment system in Georgia was “administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendment” because results found in a statistical study known as the Baldus study showed that the

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30 *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990).

31 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 196.

death penalty was given significantly more to black defendants who killed white victims than it was given in cases with other race distributions.<sup>32</sup> The Court of Appeals who handled the case in its early stages held that since “each result [of life or death] was in the range of discretion, all are correct in the eyes of the law.”<sup>33</sup> While this may be true, it seems inherently unfair that discretion can be wielded in such a manner to produce racial disparities between those who are chosen to live and who are chosen to die for their crimes. A mandatory death penalty would resolve the claim made by McCleskey that racial considerations made black murderers more likely to receive the death penalty than white murderers, and that those who murder whites are more likely to be put to death than those who murder blacks.<sup>34</sup> When death is the automatic punishment for *all* first-degree murders, this problem will disappear—the race of the perpetrator and victim have no weight whatsoever, even if it was unconscious bias that caused the racial disparity in the first place. McCleskey’s claim is valid when applied to every stage of the criminal justice system where discrimination was possible, and while it may be difficult to prove intent to discriminate in the system, discrimination in sentencing can be addressed. Justice Powell holds that the burden of proof falls on McCleskey to prove that “purposeful discrimination” occurred in the Georgia sentencing system.<sup>35</sup> But even unintended discrimination warrants some sort of addressing. Even if the Baldus study’s results do not completely prove the unconstitutionality of the Georgia death penalty sentencing scheme on the grounds that it racially discriminates, as put by Justice Brennan in his dissent, “the risk that race influenced McCleskey’s sentence is intolerable by any imaginable standard,” and surely shows enough of an arbitrariness problem to warrant some sort of action on the part of legislators.<sup>36</sup> Justice Powell defends the discretion wielded by juries as playing a “fundamental role...in our criminal justice system,” giving jurors “final and unreviewable” “[exercise] of leniency.”<sup>37</sup> Justice Brennan addresses this point, stating that “our desire for individualized moral judgments may lead us to accept some inconsistencies in sentencing outcomes,” but

32 Ibid, 385-386.

33 Ibid, 387.

34 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 357.

35 Ibid, 388.

36 Ibid, 395.

37 Ibid, 391.

this desire does not justify the “reject[ion] of evidence” of discrimination “drawn from the most sophisticated capital sentencing analysis ever performed.”<sup>38</sup> If states are truly concerned with implementing the death penalty in a non-arbitrary, non-discriminatory fashion, the best means to do it is through a mandatory death penalty, where potential bias can be eliminated or at least addressed. To facilitate this, however, the Supreme Court would need to reverse its ruling in *Woodson v. North Carolina*.

### ***Woodson v. North Carolina***

Released with the bundle of decisions that reaffirmed the use of the death penalty in the United States in 1976, *Woodson v. North Carolina* focused on the death penalty scheme created by North Carolina in the aftermath of *Furman*. The North Carolina General Assembly amended their death penalty statute by removing jury discretion wholly, holding that when a jury found a defendant guilty of first-degree murder, the automatic punishment would be death.<sup>39</sup> The majority opinion rules that the mandatory death penalty is unconstitutional on the grounds that there is a national consensus against it, it fails to properly address *Furman*, and that it denies the jury consideration of mitigating circumstances, such as diminished capacity to understand the weight of the crime or a history of abuse. However, none of these claims can stand up to scrutiny.

Just as he did in the *Gregg vs. Georgia* decision, Justice Stewart opens with the facts of the North Carolina death sentencing statute, which defines first-degree murders and assigns the punishment of death for this “broad category of homicidal offenses.”<sup>40</sup> He then moves into his denunciation of the death penalty, beginning with how he holds it is against contemporary standards of decency. Justice Stewart details the history of the mandatory death penalty, asserting that its transformation from widespread use in colonial times to total elimination in the United States in the present day was due to the widespread “expression of public dissatisfaction” with it.<sup>41</sup> Even before legislators passed new death penalty schemes,

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38 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 397-398.

39 Ibid, 238.

40 Ibid.

41 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 239.

Justice Stewart mentions a way in which individuals could personally express their stance against the mandatory death penalty—jury nullification. He notes a “significant number of first-degree murder cases” ended in verdicts of not guilty despite the apparent guilt of the defendant because juries “[found] the death penalty inappropriate” in these cases.<sup>42</sup> The issues with Justice Stewart’s argument against the mandatory death penalty are examined thoroughly in Justice Rehnquist’s dissent, where he describes how both the reduction of crimes committed for which the death penalty could be given as well as the legislative action increasing the prevalence of jury discretion—both of which Justice Stewart calls upon as evidence of evolving standards of decency both—have “virtually no relevance” to *Woodson* and the constitutionality of the mandatory death penalty.<sup>43</sup> He holds that the narrowing of punishments receiving death is irrelevant, as the case considers only first-degree murder, which has remained a crime for which death can be deemed the appropriate punishment.<sup>44</sup> As for the historical pattern of mandatory sentencing giving way to jury discretion, Justice Rehnquist holds that the shift away from the mandatory death penalty could be in part due to a general dissatisfaction not with the mandatory death penalty, but instead with jury nullification that sometimes results from it.<sup>45</sup> Thus, discretionary sentencing received wider support than just those against the mandatory death penalty because some people reasoned that by giving juries sentencing discretion, “fewer guilty defendants would be acquitted,” and society would overall be better off this way.<sup>46</sup> Further, he observes that jury nullification can distort the unpopularity of the mandatory death penalty, since only “a single juror [can] prevent a jury from returning a verdict of conviction,” and concludes that given legislative support for the mandatory death penalty, jury nullifications “[do] not indicate that society as a whole reject[s] mandatory punishment.”<sup>47</sup> While Justice Stewart is correct in asserting that the mandatory death penalty had fallen out of favor before *Furman*, it cannot be ignored that ten states reacted to *Furman* by creating mandatory death

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42 Ibid.

43 Ibid, 242.

44 Ibid, 243.

45 Ibid.

46 Ibid.

47 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 243.

penalty schemes.<sup>48</sup> Justice Stewart describes this newfound favor of the mandatory death penalty as a desire to retain the death penalty in any way possible, and thus not evidence of “a sudden reversal of societal values” favoring the mandatory death penalty. However, these states certainly did not have to adopt this specific scheme to address the issues in *Furman*, as evidenced by the fact that many states took other approaches.<sup>49</sup> Justice Rehnquist asserts that the majority’s choice to ignore the decision of these states is a choice to assert the Court’s opinion on the mandatory death penalty rather “than a conscientious effort to ascertain the content of any ‘evolving standard of decency’” regarding the mandatory death penalty.<sup>50</sup>

Justice Stewart’s claim that the North Carolina statute fails to adequately address the issue of jury discretion is ungrounded. He argues that “the long and consistent American experience with the death penalty” demonstrates that North Carolina has merely “papered over the problem of unguided and unchecked jury discretion,” citing sources of this discretion as potential jury decisions to nullify as well as a failure on the part of the state to offer “standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die,” and the lack of judicial review for death sentences produced by the scheme.<sup>51</sup> These assertions are riddled with problems. The mandatory death penalty handles the issue of discretion fully, by eliminating it as much as a legislature can hope to—as soon as someone is found to be guilty of first-degree murder, they are sentenced to death. Justice Stewart’s assertion of a lack of guidance is unfounded, as the North Carolinian statute outlines very clearly what types of murder qualify as first-degree and stipulates that the punishment for all of these murders is death.<sup>52</sup> It is not clear what Justice Stewart is referring to when he mentions the decision a jury must make in deciding whether to assign a first-degree murderer to life or death, since this choice has been removed from the system, unless he is addressing the potential for jury nullification.<sup>53</sup> Jury

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48 Ibid, 244.

49 Ibid, 240.

50 Ibid, 244.

51 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 241.

52 Ibid, 238.

53 Ibid, 238, 241.

nullification would undoubtedly be a problem with the mandatory death penalty, but as noted by Justice Rehnquist, it is not enough of an issue to affect the *constitutionality* of the mandatory death penalty.<sup>54</sup> He holds that there is no reason to “conclude that the North Carolina system is bad because juror discretion may permit jury discretion while concluding that the Georgia and Florida systems are sound because they *require* this same discretion.”<sup>55</sup> Additionally, it is not illogical that North Carolina does not require automatic appeals for all death sentences, because juries can only find someone guilty of first-degree murder if their crime fits the bill outlined in the statute, which clearly defines what crimes are appropriate for a death sentence.<sup>56</sup> Thus, Justice Stewart’s argument for the inadequacy of the mandatory death penalty on the grounds that it does not address *Furman* falls apart under careful consideration.

Lastly, Justice Stewart’s premise that the mandatory death penalty is unconstitutional in that it prevents jurors from considering relevant mitigating evidence demonstrates great tension with the *Furman* decision. There is a certain appeal to Justice Stewart’s argument on the grounds that mercy in capital punishment sentencing is “a constitutionally indispensable part of the process,” but there is no constitutional support for his claim.<sup>57</sup> His criticism that the mandatory death penalty, in not allowing for mitigating evidence to be properly weighted, reduces those convicted “not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death” sufficiently sums up how many feel about mandatory sentencing—that it makes the criminal justice system intolerant of individual circumstances of a crime that may make a defendant seemingly less culpable than others who committed like crimes.<sup>58</sup> But as Justice Rehnquist points out in his dissent, there is no basis for the claim that this removal of mercy violates the Eighth Amendment. He cites that historically the Cruel and Unusual Punishments Clause has not been read to include a safeguard for individual considerations of circumstances beyond the facts of the crime, and holds that the “plurality opinion has...

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54 Ibid, 244.

55 Ibid, 245.

56 Ibid, 238.

57 Mandery, Evan J. *Capital Punishment: A Balanced Examination* (Sudbury, MA: Jones and Bartlett Publishers, 2005), 242.

58 Ibid, 241.

import[ed] into the Due Process Clause of the Fourteenth Amendment what it considers to be desirable procedural guarantees” that have no solid constitutional grounds, and are contrary to the will of legislatures.<sup>59</sup> Death may be different than other punishments available in the criminal justice system, but the constitution does not mandate the inclusion of mitigating evidence for sentencing death.

## Conclusion

Although it may seem harsh, the mandatory death penalty is the best means with which to achieve the goals set out in *Furman v. Georgia*—namely, to reduce arbitrariness in death penalty sentencing. *Gregg v. Georgia* and its accompanying decisions do well to address the issue of unchecked jury discretion to sentence someone to death, but they do not address the potential for arbitrariness that comes from jurors making the decision to give life imprisonment instead of death. Later decisions reaffirm jury discretion and hold that the defense must be able to present all relevant mitigating evidence they wish to at sentencing, preserving and even further opening the door for unchecked jury discretion to give life imprisonment. This power gives room for mercy, but that mercy is ultimately arbitrary. If the Court wishes to hold true to *Furman*, the *Woodson v. North Carolina* decision should be overturned, and checks should be placed on jury discretion.

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<sup>59</sup> *Ibid*, 246.