Capital punishment, also known as the death penalty, refers to the killing of any individual as a form of punishment for previous crimes committed. A topic of debate that still exists in the United States today, the issue of capital punishment specifically relates to two Supreme Court Cases: *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976). Although these two cases—representing the unconstitutionality and legalizing of capital punishment, respectively—are separated by four years in history, they are accompanied by great social and political implications of the 1970s. This was an era in history when United States citizens took two opposing sides in their willingness to "crack down" on criminals; it was also a time when President Richard Nixon adhered to a structured law and order campaign. It is evident through both a historical and social lens, in addition to the contradicting opinions of both *Furman v. Georgia* (1972) and *Gregg v. Georgia* (1976), the reasons for ongoing capital punishment debate both historically and presently.

The case of *Furman v. Georgia* was one of the cases addressing the death penalty in the early 1970s (similar cases include *Jackson v. Georgia, Branch v. Texas* and *Aikens v. California*); this illustrates the debate over capital punishment that was occurring in the United States at the time. The case of *Furman* was established when William Henry Furman was convicted of murder and sentenced to death. Prior to his conviction, Furman was "burglarizing a private home when a family member discovered him" (Oyez.org). Furman attempted to step back to retreat, but tripped over a wire; his gun discharged and sent a bullet through the closed door, striking and killing the homeowner. He was convicted and sentenced to death by the state of Georgia.

Exercising the power of judicial review, the Supreme Court ruled—in a 5 to 4 decision—that the nation's capital punishment laws, both federal and state, were in violation of

the Eighth Amendment. As Harry Henderson discusses in *Library in a Book: Capital Punishment,* the Court declared in a brief general opinion that "the imposition of the death penalty in [this case] would constitute cruel and unusual punishment" (59). Henderson continues to discuss that while many cases up to this point commonly held a majority opinion, there was no majority opinion explaining the Court's reasoning in this particular case.

The five justices who voted the unconstitutionality of the death penalty wrote separate concurring opinions. Justice William Brennan and Justice Thurgood Marshall believed capital punishment in general was prohibited under the Eighth Amendment. The other three justices—Justice Potter Stewart, Justice William Douglas, and Justice Byron White—concurred that "the nation's capital punishment statues resulted in cruel and unusual punishment because of the arbitrary and capricious manner in which the death penalty was imposed" (59). This again indicates the fluctuating opinions and beliefs expressed in pertinence to the overall stance on the death penalty.

The dissenting justices as well issued separate opinions. Justice Warren Burger, Justice Harry Blackmun, Justice Lewis Powell and Justice William Rehnquist came to the general conclusion that the majority were overwrought in their efforts to come to a judicial solution for capital punishment (59). Chief Justice Burger noted in his dissenting opinion that the ruling of *Furman* was unclear: there was a lack of a resounding majority consensus, making it difficult to determine the constitutionality or unconstitutionality pertaining to the issue of capital punishment.

It is evident when looking at the social and political construct of society during the passage of *Furman v. Georgia*, there would soon inevitably follow a legalization of capital punishment. As Henderson explains, "In *Furman,* the Supreme Court stopped short of the

conclusion that capital punishment was inherently unconstitutional. This left open the possibility that death penalty statutes could be designed that would pass judicial scrutiny" (60). In retrospect, it is clear that the Court was simply trying to come to terms with jurisprudential fluctuations, as well as the changing tides in the United States in regards to the pro and anti death penalty critics.

To be sure, the Court was put in a difficult position with this *Furman v. Georgia*: they had to either find some formulation for holding the death penalty unconstitutional or send hundreds to death. As Michael Meltsner argues in his article "Litigating Against the Death Penalty: The Strategy Behind Furman," the court was put into this position "largely because in previous years only a small portion of those convicted had actually been executed" (1111). The overall assumption is that the Court was trying to avoid sentencing hundreds of persons to death with one sole ruling.

The Court received harsh criticism after the passage of this case. President Richard Nixon and California governor Ronald Reagan "were two of the most outspoken of the many political figures across the nation" (Henderson 12). Both Nixon and Reagan declared the ruling in *Furman v. Georgia* as a deliberate intrusion of the powers of the legislative branch of government. Nixon advocated for the death penalty throughout the remainder of his term in office: in March of 1973, "President Richard Nixon in his State of the Union message [backed] the imposition of the death penalty for a number of violent crimes" (103). In 1974, the United States Senate approved legislation to reinstate capital punishment for a variety of serious crimes; the legislation, however, failed to emerge from the House Judiciary Committee.

By 1976 American citizens seemed to have visibly separate opinions toward the death penalty. Thirty-five states had enacted new death penalty statutes since the Supreme Court

struck down capital punishment laws in *Furman v. Georgia,* supporting the death penalty legislation. Still, a Gallup Poll in 1976 showed that "65 percent of Americans [favored] the death penalty for convicted murderers, 28 percent [were] opposed, and seven percent [were] undecided" (103). In 1972—just four years prior—the Gallop Poll found that "fifty-one percent of persons favored the death penalty for persons convicted of murder" (103). This 14 percent increase indicates how powerful a message the legislative and executive branches were sending to the American public; capital punishment was gaining popularity and American people were advocating support for pro death penalty legislation.

With this information in mind, it should come as no surprise that in 1976 the Court readdressed the issues of *Furman v. Georgia,* in the case of *Gregg v. Georgia*. In *Gregg,* the Court declared that capital punishment did not invariably violate the Constitution. The U.S. Supreme Court Justices declared "a punishment of death did not violate the Eighth and Fourteenth Amendments under all circumstances" in a 7-to-2 decision (Oyez.org).

The case of *Gregg v. Georgia* was established after Troy Gregg was convicted of murder. Prior to conviction, Gregg and sixteen-year-old companion Floyd Allen had been hitchhiking from Florida to North Carolina. Along the way, driver Fred Simmons and accompanying passenger Bob Moore saw both Gregg and Allen and offered them a ride. Eventually, Gregg shot both Simmons and Moore; he also robbed them of "$107, a new stereo, a new car stereo, the car that Simmons owned and the gun that had been used to kill both victims" (Gershman 63). After being taken into custody, "when asked why he killed [both Simmons and Moore], Gregg said, 'By God, I wanted them dead'" (63).

Though Gregg pleaded self-defense, a jury found Gregg guilty of armed robbery and murder; he was sentenced to death on both accounts. Gregg appealed the decision to the Georgia

Supreme Court. The Georgia Supreme Court "affirmed the death sentence except as to its imposition for the robbery conviction" (Oyez.org). Challenging the remaining death sentence for murder, Gregg took the case to the Supreme Court: he claimed that his sentencing was an act of cruel and unusual punishment, which violated the Eighth and Fourteenth Amendments.

In a near-unanimous decision, the Supreme Court struck down the nation's capital punishment laws in a 7-2 decision, arguing that the punishment of death did not violate the prohibition of cruel and unusual punishment. This decision indicated an unlikelihood of capital punishment laws being modified or overturned throughout future Supreme Court cases. Despite this decision, the majority was unable to agree on one resounding opinion. Justice Potter Stewart, joined by Justice Lewis F. Powell Jr. and Justice John Paul Stevens, noted in their opinion that the punishment of death for the crime of murder under no circumstances violated the Eighth and Fourteenth Amendments. They also argued that the "fact that thirty-five states and the Congress had enacted new legislation to abide by the dictates of *Furman"* undermined the argument that society no longer endorsed the sanction of prohibiting capital punishment (Gershman 66).

Justice Byron White, Justice William Rehnquist, and Chief Justice Warren E. Burger wrote a concurring judgment (the remaining Justice Blackmun concurred but did not elaborate). In their concurrence, the justices argued that the death penalty was acceptable as long as the procedure followed by the State Supreme Court was correct. Justice White "rejected the idea that the death penalty was cruel and unusual"; he brought to surface the notion that juries always had the option of choosing life imprisonment, and also the idea that capital punishment could not be mandated in an arbitrary fashion (Gershman 67).

Both Justices William Brennan Jr. and Thurgood Marshall dissented. Just as Justice Brennan had discussed in the *Furman* case, he believed that there was a moral issue at question; he explained that capital punishment violated the Eighth Amendment guarantees and violated the intrinsic and humane rights persons had as human beings. In addition, Brennan explained that the Court should realize that the death penalty compromised human decency and morality. Justice Marshall also repeated his doubts from *Furman*, explaining that the death penalty was unconstitutional and "an excessive form of punishment" (68). Marshall discussed that the only reasons that could make the death penalty acceptable "were deterrence and retribution" (69). Marshall argued that persons needed to question if capital punishment had anything to do with deterrence (for it really does not prevent cold-blooded murders from committing acts of murder), and retribution—for it was difficult to conclude whether or not capital punishment was a morally justified consequence.

Although *Gregg v. Georgia* is a widely known case for the overturning of capital punishment laws, it "is one of the five 'Death Penalty Cases' along with *Jurek v. Texas*, *Roberts v. Louisiana*, *Proffitt v. Florida*, and *Woodson v. North Carolina"* (Oyez.org). In both *Jurek* and *Proffitt*, the Court upheld the constitutionality of the new statues of the death penalty. In *Woodson v. North Carolina*, the Court ruled "that mandatory death penalty laws that do not allow for difference in defendants and circumstances are unconstitutional" (Henderson 103). In *Roberts*, the Court struck down state's mandatory death penalty statute for similar reasons.

The various Supreme Court rulings on capital punishment—in just a four years period—have created a lasting effect on American jurisprudence: the death penalty has endured great jurisprudential fluctuations, which reflect the changing tides in American ideologies. Still, it seems that by the Supreme Court recognizing and modifying the death penalty laws throughout

the four specific years of 1972-1976, more modern American death penalty jurisprudence has been established. As Kenneth Haas explains in his article, "The Emerging Death Penalty Jurisprudence of the Roberts Court," Chief Justice John Roberts and respective Supreme Court Justices have "loosened the standards for evaluating the competence of capital defense attorneys, strengthened the hands of capital prosecutors, and upheld strict and constitutionally vulnerable statutory and procedural roadblocks to the appellate review of capital sentences" (388). With this in mind, it is quite evident that the 1970s Supreme Court cases set new standards for evaluating law and capital punishment, which are still being newly addressed and readdressed today.

It is evident that capital punishment is not only a divisive debate in our nation's history, it has endured great reservation and deliberation. Although the reinstatement of the death penalty seemed inevitable in both a historical and social context, it must also be noted that the legalizing of capital punishment *was* met with some doubt. To be sure, persons—both United States citizens and Supreme Court Justices alike—will continue the dispute as to whether the death penalty is a hypocritical approach to the consequence of hard crimes, or a pragmatic way to control evil and merciless criminals.

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