of the validity of capital punishment under the Cruel and Unusual Punishments Clause, and, to considerable surprise, the Court held in *Furman v. Georgia* [70] that the death penalty, at least as administered, violated the Eighth Amendment. There was no unifying opinion of the Court in *Furman*; the five Justices in the majority each approached the matter from a different angle in a separate concurring opinion. Two Justices concluded that the death penalty was "cruel and unusual" *per se* because the imposition of capital punishment "does not comport with human dignity" [71] or because it is "morally unacceptable" and "excessive." [72] One Justice concluded that because death is a penalty inflicted on the poor and hapless defendant but not the affluent and socially better defendant, it violates the implicit requirement of equality of treatment found within the Eighth Amendment.[73] Two Justices concluded that capital punishment was both "cruel" and "unusual" because it was applied in an arbitrary, "wanton," and "freakish" manner [74] and so infrequently that it served no justifying end.[75]

Because only two of the Justices in *Furman* thought the death penalty to be invalid in all circumstances, those who wished to reinstate the penalty concentrated upon drafting statutes that would correct the faults identified in the other three majority opinions.[76] Enactment of death penalty statutes by 35 states following *Furman* led to renewed litigation, but not to the elucidation one might

---

to impose the death penalty were determined in a unitary proceeding. Justice Harlan for the Court held that standards were not required because, ultimately, it was impossible to define with any degree of specificity which defendant should live and which die; although bifurcated proceedings might be desirable, they were not required by due process.

[70] 408 U.S. 238 (1972). The change in the Court's approach was occasioned by the shift of Justices Stewart and White, who had voted with the majority in *McGautha*.

[71] 408 U.S. at 257 (Justice Brennan).

[72] 408 U.S. at 314 (Justice Marshall).

[73] 408 U.S. at 240 (Justice Douglas).

[74] 408 U.S. at 306 (Justice Stewart).

[75] 408 U.S. at 310 (Justice White). The four dissenters, in four separate opinions, argued with different emphases that the Constitution itself recognized capital punishment in the Fifth and Fourteenth Amendments, that the death penalty was not "cruel and unusual" when the Eighth and Fourteenth Amendments were proposed and ratified, that the Court was engaging in a legislative act to strike it down now, and that even under modern standards it could not be considered "cruel and unusual." Id. at 375 (Chief Justice Burger), 405 (Justice Blackmun), 414 (Justice Powell), 465 (Justice Rehnquist). Each of the dissenters joined each of the opinions of the others.

[76] Collectors of judicial "put downs" of colleagues should note Justice Rehnquist's characterization of the many expressions of faults in the system and their correction as "glossolalial." Woodson v. North Carolina, 428 U.S. 280, 317 (1976) (dissenting).