man.[79] Divisions among the Justices, however, made it difficult to ascertain the form that permissible statutory schemes may take.[80]

Because the three Justices in the majority in *Furman* who did not altogether reject the death penalty thought the problems with the system revolved about discriminatory and arbitrary imposition,[81] legislatures turned to enactment of statutes that purported to do away with these difficulties. One approach was to provide for automatic imposition of the death penalty upon conviction for certain forms of murder. More commonly, states established special procedures to follow in capital cases, and specified aggravating and mitigating factors that the sentencing authority must consider in imposing sentence. In five cases in 1976, the Court rejected automatic sentencing, but approved other statutes specifying factors for jury consideration.[82]

First, the Court concluded that the death penalty as a punishment for murder does not itself constitute cruel and unusual punishment. Although there were differences of degree among the seven Justices in the majority on this point, they all seemed to concur that reenactment of capital punishment statutes by 35 states precluded the Court from concluding that this form of penalty was no longer acceptable to a majority of the American people. Rather, they concluded, a large proportion of American society continued to regard it as an appropriate and necessary criminal sanction. Neither is it possible, the Court continued, to rule that the death penalty does not comport with the basic concept of human dignity at the core of the Eighth Amendment. Courts are not free to substitute

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[79] Justices Brennan and Marshall adhered to the view that the death penalty is per se unconstitutional. *E.g.*, Coker v. Georgia, 433 U.S. 584, 600 (1977); Lockett v. Ohio, 438 U.S. 586, 619 (1978); Enmund v. Florida, 458 U.S. 782, 801 (1982).

[80] A comprehensive evaluation of the multiple approaches followed in *Furman*-era cases may be found in Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978).

[81] Thus, Justice Douglas thought the penalty had been applied discriminatorily, Furman v. Georgia, 408 U.S. 238 (1972), Justice Stewart thought it "wantonly and . . . freakishly imposed," id. at 310, and Justice White thought it had been applied so infrequently that it served no justifying end. Id. at 313.

[82] The principal opinion was in Gregg v. Georgia, 428 U.S. 153 (1976) (upholding statute providing for a bifurcated proceeding separating the guilt and sentencing phases, requiring the jury to find at least one of ten statutory aggravating factors before imposing death, and providing for review of death sentences by the Georgia Supreme Court). Statutes of two other states were similarly sustained, Proffitt v. Florida, 428 U.S. 242 (1976) (statute generally similar to Georgia's, with the exception that the trial judge, rather than jury, was directed to weigh statutory aggravating factors against statutory mitigating factors), and Jurek v. Texas, 428 U.S. 262 (1976) (statute construed as narrowing death-eligible class, and lumping mitigating factors into consideration of future dangerousness), while those of two other states were invalidated, Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976) (both mandating death penalty for first-degree murder).