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# The Response to Furman: Can Legislators Breathe Life Back into Death

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*The Response to Furman:  
Can Legislators Breathe Life Back into Death?*

IN THE EIGHTEEN MONTHS since the Supreme Court of the United States struck down capital punishment in *Furman v. Georgia*<sup>1</sup> twenty-three states have reinstated the death penalty. While the Supreme Court has not yet heard arguments concerning the constitutionality of these statutes, their validity will determine the fate of the forty-four persons currently awaiting execution in eight states.<sup>2</sup> It is the purpose of this comment to consider the statutes reinstating capital punishment, in light of *Furman*.

### Capital Punishment and the Eighth Amendment

The Supreme Court first directly attempted to interpret the "cruel and unusual punishment" clause, which is found in the eighth amendment, in 1878 when it considered the validity of a sentence of public execution by shooting in *Wilkerson v. Utah*.<sup>4</sup> While the Court did not seriously consider whether a particular method of execution fell within the ambit of the eighth amendment, it did indicate that execution by shooting was not included in the category of cruel and unusual punishment.<sup>5</sup>

Eleven years later, the Court considered executions by electrocution as possible violations of the eighth and fourteenth amendments in *In re Kemmler*.<sup>6</sup> The Court held that the:

. . . enactment of this statute was in itself within the legitimate sphere of the legislative power of the state . . . ; we cannot perceive that the State has thereby abridged the privileges or immunities of the petitioner or deprived him of due process of law.<sup>7</sup>

*Kemmler* stands primarily for the proposition that a punishment which is unusual may nevertheless be constitutional if the legislature had a humane purpose in selecting it.<sup>8</sup>

<sup>1</sup> 408 U.S. 238 (1972). [Hereinafter cited as *Furman*].

<sup>2</sup> N.Y. Times, Dec. 30, 1973, §1 at 19, col. 1. There are twenty-one persons awaiting execution in North Carolina, eight in Florida, five in Georgia, five in Massachusetts, two in Montana, one in Utah, one in Virginia, and one in Pennsylvania.

<sup>3</sup> 408 U.S. 238, 244 (1972).

<sup>4</sup> 99 U.S. 130 (1878).

<sup>5</sup> *Id.* at 135.

<sup>6</sup> 136 U.S. 436 (1889).

<sup>7</sup> *Id.* at 449.

<sup>8</sup> 408 U.S. 238, 323 (1972).

In *O'Neil v. Vermont*,<sup>9</sup> the majority held the eighth amendment did not apply to the states. But three dissenting Justices would not only have held that it was applicable to the states but also that the inhibition was directed "against all punishments which by their excessive length or severity are greatly disproportionate to the offense charged."<sup>10</sup> Nine years later in *Howard v. Fleming*,<sup>11</sup> the Court essentially followed the approach of the *O'Neil* minority by considering the nature of the crime, the purpose of the law, and the length of the sentence imposed. Utilizing this approach, the Court rejected a claim that a ten year sentence for conspiracy to defraud was cruel and unusual.

In *Weems v. United States*<sup>12</sup> the Court utilized the same approach as earlier enunciated by the *O'Neil* minority when it held that where:

. . . a crime which may cause the loss of many thousands of dollars . . . is not greater than that which may be imposed for falsifying a single item of a public account . . . It condemns the sentence . . . as cruel and unusual.<sup>13</sup>

The *Weems* decision was of paramount importance because it was the first instance where the Supreme Court found a punishment cruel and unusual.

In *Louisiana ex rel. Francis v. Resweber*<sup>14</sup> the electric chair malfunctioned and did not kill a convicted murderer. Appeal was sought to prevent a second attempt at execution on the grounds that it would be cruel and unusual punishment. The entire Court agreed with the *O'Neil* minority that infliction of unnecessary pain was prohibited, but there was a five-to-four split on whether the appellant would be forced to undergo any excessive pain. The majority adhered to *Kemmler*, declaring that the legislative purpose in adopting electrocution was humane and as such should not be thwarted even if it may inadvertently increase pain in one case.<sup>15</sup>

*Trop v. Dulles*<sup>16</sup> considered "whether denationalization is a cruel and unusual punishment within the meaning of the eighth amendment."<sup>17</sup> An amended law had given military authorities "complete discretion to decide who among convicted deserters shall continue to

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<sup>9</sup> 144 U.S. 323 (1892).

<sup>10</sup> *Id.* at 339, 340.

<sup>11</sup> *Howard V. Fleming*, 191 U.S. 126 (1903).

<sup>12</sup> 217 U.S. 349 (1910).

<sup>13</sup> *Id.* at 381.

<sup>14</sup> 329 U.S. 459 (1947).

<sup>15</sup> *Id.*

<sup>16</sup> 356 U.S. 86 (1958).

<sup>17</sup> *Id.* at 99.

be Americans and who shall be stateless.”<sup>18</sup> The flexibility inherent in the words “cruel and unusual” was emphasized by Chief Justice Warren when he indicated that “[t]he Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”<sup>19</sup> Three other members of the Court agreed that loss of citizenship for a conviction of wartime desertion was cruel and unusual. Mr. Justice Brennan concurred on other grounds and the penalty was struck down.

In 1962 a majority did agree that a sentence of 90 days imprisonment for violation of a statute making narcotic *addiction* itself a crime was cruel and unusual.<sup>20</sup> The majority reiterated Warren’s opinion in *Trop* when it indicated that the cruel and unusual punishment clause was not a static concept, but one that must be continually re-examined “in light of contemporary human knowledge.”<sup>21</sup>

A due process alternative to the eighth amendment’s cruel and unusual punishment clause was used to successfully challenge the imposition of a capital sentence by a “death qualified” jury in *Weather-spoon v. Illinois*.<sup>22</sup> In that instance the statute excluded persons who expressed conscientious or religious scruples against capital punishment or opposed it in principle. The Court held that such exclusions denied defendant a trial by a jury which reflected the views of a cross-section of the community.

Subsequently, the “due process” approach was jettisoned when the Court decided *McGautha v. California*.<sup>23</sup> The Court refused to invalidate a death penalty imposed by a bifurcated trial system which had no standards a jury could follow in its determination of whether or not to impose a capital sentence. The Court rejected the contention that there was a violation of due process, saying that it was “. . . quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.”<sup>24</sup> By thus precluding further use of the due process clause argument the Court forced subsequent litigants who opposed capital punishment to rely upon the eighth amendment’s cruel and unusual punishment clause.

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<sup>18</sup> *Id.* at 90.

<sup>19</sup> *Id.* at 101.

<sup>20</sup> *Robinson v. California*, 370 U.S. 660 (1962).

<sup>21</sup> *Id.* at 666.

<sup>22</sup> 391 U.S. 510 (1968).

<sup>23</sup> 402 U.S. 183 (1971).

<sup>24</sup> 402 U.S. 183, 207 (1971).

## The Decision and the Opinions

It was in this context that the Supreme Court heard *Furman v. Georgia*<sup>25</sup> wherein appellants had been convicted of murder and rape, and had been sentenced to death under Georgia and Texas statutes. In reversing the sentences, the majority held that "the imposition and carrying out of the death penalty in these cases constitutes cruel and unusual punishment in violation of the eighth and fourteenth amendments."<sup>26</sup>

Though the majority's decision was but a single paragraph, the Court was far from agreement upon the underlying rationale. Not only did four members of the Court dissent, but each of the five members of the majority wrote a separate opinion in support of the decision.

### *The Majority: Marshall, Brennan, Douglas, Stewart, and White*

For the majority Justices Marshall and Brennan concluded directly that the death penalty is cruel and unusual. Justice Marshall, in a lengthy opinion, indicated that capital punishment is excessive because it does not operate as a deterrent and is morally unacceptable to the people of the United States measured by how they would react if they knew all the statistics concerning capital punishment.<sup>27</sup> Marshall found capital punishment violative of the eighth and fourteenth amendments. He indicated that he found the following punishments cruel and unusual: those involving so much physical pain and suffering that civilized people can not tolerate them; unusual punishments, *i.e.*, ones previously unknown as penalties for a given offense; excessive punishments serving no legitimate legislative purpose; and those punishments abhorrent to public policy although serving a valid legislative purpose and not excessive. Marshall maintained that the death penalty violated the last two criteria and hence was cruel and unusual. Furthermore, he asserted that none of the purposes allegedly served by capital punishment justified its retention. He concluded that punishment solely for the sake of retribution is not permissible under the eighth amendment and that opponents of capital punishment have amply demonstrated that capital punishment is not necessary as a deterrent to crime in our society. Additionally, he indicated that since most murderers are first offenders, capital punishment is clearly excessive as a means of preventing recidivism. Finally, he concluded that there is no merit in the use of capital punishment to encourage guilty pleas and confessions, for eugenics, or to reduce state expenditures.<sup>28</sup> Marshall therefore deter-

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<sup>25</sup> 408 U.S. 238, 402 (1972).

<sup>26</sup> *Id.* at 239-40.

<sup>27</sup> *Id.* at 342-69.

<sup>28</sup> *Id.* at 343-58.

minded that capital punishment has *no* rational basis and that further deference to the legislatures is an abdication of the court's role as the ultimate arbiter of the Constitution. Public opinion polls notwithstanding, he also found capital punishment morally unacceptable to the American people not because capital punishment in the abstract shocks people's conscience or sense of justice, but rather because it is unacceptable to people who are fully informed as to its purposes and liabilities.<sup>29</sup> Since he felt the time in United States history had arrived for the total abolition of capital punishment,<sup>34</sup> it is highly unlikely that he will find capital punishment acceptable in any form.

Justice Brennan reached the same conclusion as Marshall by utilizing the following test to determine whether punishment is cruel and unusual:

The test, then, will ordinarily be a cumulative one: If a punishment is unusually severe, if there is a strong probability that it is inflicted arbitrarily, if it is substantially rejected by contemporary society, and if there is no reason to believe that it serves any penal purpose more effectively than some less severe punishment, then the continued infliction of that punishment violates the command of the Clause that the State may not inflict inhuman and uncivilized punishments upon those convicted of crimes.<sup>30</sup>

Applying this test, he concluded that "death today is a 'cruel and unusual' punishment."<sup>31</sup> In distinguishing the death penalty from other punishments, Justice Brennan noted that severity is based upon several factors, pain being merely one such factor, and that no other punishment so denies the humanity of the persons punished.<sup>32</sup> Furthermore, the strong probability that death is arbitrarily imposed, he maintained, can be seen from the infrequency of its imposition, that it is not an ordinary punishment for any crime, and that it is inflicted only in a few cases when it is available.<sup>33</sup> To buttress his position, Brennan focused upon society's growing opposition to the death penalty as evidenced by the declining number of crimes for which it is a punishment; the fact that executions are no longer being publicly performed; the use of more humane methods of execution; and finally, the abolition of capital punishment in nine states and extreme restriction in five others. Based on these facts he concluded that "Rejection could hardly be more complete without becoming absolute. At the very least, I must conclude that contemporary society views this

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<sup>29</sup> *Id.* at 369-69.

<sup>30</sup> *Id.* at 282.

<sup>31</sup> *Id.* at 286.

<sup>32</sup> *Id.* at 287-90.

<sup>33</sup> *Id.* at 291-95.

punishment with substantial doubt.”<sup>34</sup> Brennan also utilized the same deterrence approach as Marshall, noting that there is no evidence that the threat of death is a greater deterrent than the possibility of imprisonment especially since its infrequent use has substantially diluted its threat.<sup>35</sup>

It is thus apparent that Brennan presented strong factual evidence to support the presence of all four elements of the test he outlined for use in determining whether a punishment is prohibited by the cruel and unusual punishment clause.<sup>36</sup> The refutation of at least one of these factual patterns would be necessary to change his opinion in a subsequent capital punishment restoration appeal.

Justices Douglas, Stewart, and White did not reach a decision as to the constitutionality of capital punishment itself. Rather, they focused their attention upon, and found objection in, its application.

Justice Douglas found the death penalty cruel and unusual when “. . . it discriminates against [any person] by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.”<sup>37</sup> Furthermore, Douglas implied that a nondiscriminatory application of capital punishment would pass constitutional muster when he indicated that:

The high service rendered by the “cruel and unusual” punishment clause of the eighth amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively and spottily to unpopular groups.<sup>38</sup>

Similarly, Justice Stewart found it “unnecessary to reach the ultimate question [other Justices] would decide”<sup>39</sup> as to the constitutionality of capital punishment. He, too, found objection to the death penalty in its arbitrary administration.

I simply conclude that the 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 freakishly imposed.<sup>40</sup>

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<sup>34</sup> *Id.* at 300.

<sup>35</sup> *Id.* at 302.

<sup>36</sup> *Id.* at 282-306.

<sup>37</sup> *Id.* at 242.

<sup>38</sup> *Id.* at 256.

<sup>39</sup> *Id.* at 306.

<sup>40</sup> *Id.* at 310.

Justice Stewart's opinion implies that a nondiscriminatory, mandatory death penalty would not be constitutionally prohibited as long as society's interest in retribution and deterrence outweighed considerations of reform and rehabilitation of the criminal.<sup>41</sup> Stewart acknowledged the strength of Brennan's and Marshall's arguments against capital punishment but indicated that such arguments were premature since none of the cases at bar involved a statute with a mandatory death penalty.<sup>42</sup>

Taking a slightly different approach, Justice White concurred largely on the basis of his observations that the death penalty is so infrequently imposed that it has lost its value both for deterrent and retributive purposes. He indicated that while Brennan's and Marshall's arguments were able, he could not reach the conclusion in this case that capital punishment itself was unconstitutional or that there is no system of capital punishment that could comport with the eighth amendment.<sup>43</sup>

*The Dissent: Burger, Blackmun, Powell and Rehnquist*

Like the majority, each of the dissenting members of the Court wrote a separate opinion analyzing the constitutional questions involved in capital punishment. Chief Justice Burger viewed infrequent imposition of the death penalty by juries as a *refinement* rather than as a repudiation of capital punishment.<sup>44</sup> In his dissent, the Chief Justice briefly considered possible legislative reaction to the decision. The determination of meaningful standards for the imposition of capital punishment was thought impossible in *McGautha*, he asserted, and even if standards could be devised, "there is little reason to believe that [they] . . . will substantially alter the discretionary character of the prevailing system of sentencing in capital cases."<sup>45</sup> The only real change would be brought under a system having death or acquittal as the only alternatives and Burger indicated that such a system would be so arbitrary and doctrinaire as to be unconstitutional.<sup>46</sup>

A different approach is taken by Justice Blackmun. His dissent is somewhat qualified: "Were I legislator, I would vote against the death penalty."<sup>47</sup> His dissent is founded upon his objection to abolition of capital punishment for such crimes as treason, assassination, and aircraft piracy.<sup>48</sup>

<sup>41</sup> *Id.* at 307.

<sup>42</sup> *Id.* at 306-07.

<sup>43</sup> *Id.* at 310-314.

<sup>44</sup> *Id.* at 387.

<sup>45</sup> *Id.* at 401.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 406.

<sup>48</sup> *Id.* at 405-14.



Justice Powell, on the other hand, found the majority's opinion on capital punishment to be an invasion of the legislative prerogative.<sup>49</sup> He also concluded that there is nothing in the death penalty which is offensive to the fifth, fourteenth, or eighth amendments. He rejected Douglas's discrimination arguments, indicating that the lower classes have always made up a high percentage of those committing crimes and that if the death penalty discriminates against the lower classes, so does every other criminal sentence.<sup>50</sup>

Similarly, Justice Rehnquist believed the majority had made an unwarranted extension of the fourteenth amendment and had seriously invaded the federal checks and balances system by failing to exercise judicial restraint.<sup>51</sup>

Thus, while there was a majority of five willing to reverse the death sentences in *Furman*, there were only two Justices, Marshall and Brennan, who concluded that capital punishment itself was unconstitutional because it was a violation of the eighth amendment's prohibition against cruel and unusual punishment. The three remaining members of the majority, Stewart, Douglas, and White, found that capital punishment was being applied in a discriminatory fashion and hence was a violation of the eighth amendment, leaving open the possibility that a non-discriminatory application of the capital punishment statutes would not be prohibited by the constitution. The dissenting members of the court reached a contrary conclusion, with Justice Burger finding no invidious discrimination in the application of the death penalty, and Justices Blackmun, Powell, and Rehnquist indicating that the decisions as to the abolition of capital punishment was a matter for the legislative branch of government.

### The Aftermath

As Justice Powell indicated in his dissent, the effect of *Furman* was to invalidate the capital punishment laws of about thirty-nine states, the District of Columbia, and numerous provisions of the United States Criminal Code and the Uniform Code of Military Justice.<sup>52</sup> In *People v. Fitzpatrick*,<sup>53</sup> the New York Court of Appeals found that under *Furman* that state's Penal Laws 125.35, subd. 5, which gave the jury sole discretion to impose the death penalty if the defendant was found guilty of killing a police officer or other peace officer in the performance of his official duty, was invalid. Similarly, the Ohio Supreme Court held that death sentences for all capital crimes, except those found under §2901.09 and §2901.10 of the Ohio Revised

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<sup>49</sup> *Id.* at 418.

<sup>50</sup> *Id.* at 447.

<sup>51</sup> *Id.* at 465-70.

<sup>52</sup> *Id.* at 417-18.

<sup>53</sup> 32 N.Y.2d 499, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1972).

Code which impose a mandatory death sentence, were cruel and unusual and in violation of the eighth and fourteenth amendments to the United States Constitution.<sup>54</sup> In an unconventional approach to *Furman*, the North Carolina Supreme Court held unconstitutional the mercy provision of that state's rape statute which allowed jurors to impose a penalty less than death for first degree rape. In so doing, they made the death penalty mandatory in all such cases and for first degree murder, burglary, and arson as well.<sup>55</sup>

### The Legislative Response

In *Donaldson v. Sack*,<sup>56</sup> the Florida Supreme Court held that *Furman* eliminated capital punishment from Florida law unless new legislation revived it. The legislation was quickly forthcoming and on December 8, 1972, Governor Askew signed a bill reviving the death penalty, making Florida the first state to pass a post-*Furman* capital punishment statute.<sup>57</sup> The law, a compromise between the state's House and Senate bills, was passed by a special session of the legislature convened on November 28, 1972 to consider the reinstatement of capital punishment.<sup>58</sup> It provides for a bifurcated trial with the separate sentencing proceeding to be conducted as soon as practicable by the trial judge before the trial jury, or if there were no trial jury, one empanelled for that purpose unless the defendant waives it. The regular rules of evidence were suspended as both the prosecutor and the defendant or his counsel argue for or against the sentence of death. The jury, by majority vote, renders a sentence of life imprisonment or death, basing its decision upon the existence or non-existence of the enumerated aggravating and mitigating circumstances.<sup>59</sup> The trial judge has the discretion to follow the jury's sentence or not, but if he imposes death, he must render a written opinion stating the specific aggravating circumstances found to exist, and the absence of mitigating circumstances or that they were insufficient to

<sup>54</sup> *State v. Johnson*, 31 Ohio St.2d 106, 285 N.E.2d 751 (1972).

<sup>55</sup> *State v. Waddell*, 28 N.C. 431, 194 S.E.2d 19 (1973). *See also* *State v. Talbert*, 28 N.C. 718, 194 S.E.2d 822 (1973). *But see* Chief Justice Burger's dissent in *Furman*, 408 U.S. at 401, regarding possible unconstitutionality of this approach.

<sup>56</sup> 265 So.2d 499 (Fla. 1972).

<sup>57</sup> FLA. STATS. ANN. §921.141 (West 1973) (hereinafter cited as Fla. Capital Punishment Act).

<sup>58</sup> Ehrhardt and Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L.C. 10, 13-15 (1973).

<sup>59</sup> Fla. Capital Punishment Act §9 Aggravating circumstances found at §9(6), Mitigating circumstances found at §9(7); they are similar to those found in Model Penal Code §210.6 Proposed Official Draft, 1962) [hereinafter cited as MPC].

Fla. Capital Punishment Act:

Aggravating circumstances — Aggravating circumstances shall be limited to the following:

- a. The capital felony was committed by a person under sentence of imprisonment;
- b. The defendant was previously convicted of another capital felony involving the use or threat of violence to the person;

(Continued on next page)

outweigh the aggravating circumstances.<sup>60</sup> Both the judgment of conviction and the sentence of death are automatically reviewed by the Florida Supreme Court.<sup>61</sup>

The language of the statutory list of aggravating and mitigating circumstances, such as: "the capital felony was *especially heinous*,

(Continued from preceding page)

- c. The defendant knowingly created a great risk of death to many persons;
- d. The capital felony 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, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;
- e. The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;
- f. The capital felony was committed for pecuniary gain;
- g. The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;
- h. The capital felony was especially heinous, atrocious or cruel.

Mitigating circumstances — Mitigating Circumstances shall be the following:

- a. The defendant has no significant history of prior criminal activity.
- b. The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance;
- c. The victim was a participant in the defendant's conduct or consented to the act.
- d. The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor;
- e. The defendant acted under extreme duress or under the substantial domination of another person;
- f. 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;
- g. The age of the defendant at the time of the crime.

MPC:

Aggravating Circumstances.

- a. The murder was committed by a convict under sentence of imprisonment.
- b. The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.
- c. At the time the murder was committed the defendant also committed another murder.
- d. The defendant knowingly created a great risk of death to many persons.
- e. 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 robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.
- f. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.
- g. The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

Mitigating Circumstances.

- a. The defendant has no significant history of prior criminal activity.
- b. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- c. The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
- d. The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
- e. The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
- f. The defendant acted under duress or under the domination of another person.
- g. At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
- h. The youth of the defendant at the time of the crime.

<sup>60</sup> *Id.* at §9 (3).

<sup>61</sup> *Id.* at §9 (5).

atrocious or cruel,"<sup>62</sup> and "the defendant has no significant history of prior criminal activity,"<sup>63</sup> has been criticized as being too vague. Furthermore, both the jury and the judge are required to determine if "sufficient aggravating circumstances exist" and "whether sufficient mitigating circumstances exist which outweigh aggravating circumstances found to exist."<sup>64</sup> In the opinion of two members of the legal staff of the Governor's Committee to Study Capital Punishment, this allows a considerable amount of discretion in the sentencing process which is aggravated by the failure to specify the burden of proof needed to establish the existence of an aggravating or mitigating factor and the weight which the judge should give the jury's recommendation.<sup>65</sup> The effect of this statute appears to be that the judge now has the ultimate sentencing authority that the jury used to have and while the United States Supreme Court in 1949<sup>66</sup> did approve a New York statute which authorized a trial judge to impose death even though the jury recommended mercy, a Delaware<sup>67</sup> Supreme Court has held such a transfer does nothing to enable a system to pass muster under *Furman*.

A majority of the Florida Supreme Court has nevertheless upheld this statute.<sup>68</sup> The court interpreted *Furman* as not condemning the mere presence of discretion but rather the quality of that discretion and the manner in which it was used. It refuted the contention that the aggravating and mitigating circumstances were vague, finding that they "are reasonable and easily understood by the average man."<sup>69</sup> The dissent argued that the use of standards was rejected in *McGartha* and the standards themselves are vague. They also found a degree of discretion in every stage of a criminal proceeding and that the discretion formerly resting in the jury was merely transferred to the judge.<sup>70</sup> The ultimate answer to this controversy, undoubtedly, will be provided by the United States Supreme Court.<sup>71</sup>

Florida's statute uses standards which appear to be largely based upon those of the Model Penal Code to guide the jury and the judge in their determination of the applicability of imposing capital punish-

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<sup>62</sup> *Id.* at §9(6)(h); this is similar to M.P.C. §210.6(3)(h).

<sup>63</sup> *Id.* at §9(7)(a); this is similar to M.P.C. §210.6(4)(a).

<sup>64</sup> *Id.* at §9(5) for the jury and §9(3) for the judge.

<sup>65</sup> Ehrhardt and Levinson, *supra* at 17-18.

<sup>66</sup> *Williams v. New York*, 337 U.S. 241 (1949).

<sup>67</sup> *State v. Dickerson*, 298 A.2d 761 (Del. 1972).

<sup>68</sup> *State v. Dixon*, 283 So.2d 1 (Fla. 1973).

<sup>69</sup> *Id.* at 9.

<sup>70</sup> *Id.* at 17-19.

<sup>71</sup> See N.Y. Times, Dec. 30, 1973 §1 at 19 Col. 1.

ment.<sup>72</sup> The use of such standards has been recommended as a possible means of eliminating the discretion found unconstitutional in *Furman*.<sup>73</sup> As Chief Justice Burger's dissent in *Furman* suggests, the inclusion of standards may not provide a satisfactory answer to the problem of discretion in sentencing.<sup>74</sup> Mr. Justice Harlan, writing for the majority in *McGautha v. California* indicated that:

To identify before the fact those characteristics of criminal homicide and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.<sup>75</sup>

He went on to state that:

The infinite variety of cases and facets to each case would make general standards either meaningless 'boilerplate' or a statement of the obvious that no jury would need.<sup>76</sup>

Therefore, it can be argued that in *McGautha* standards were determined to be meaningless and the use of them will not eliminate the discretion found to be offensive to the eighth amendment in *Furman*. In opposition, it could be argued that *McGautha* was decided on due process grounds and concerned the minimum requirement needed to give the accused a fundamentally fair trial. *Furman*, on the other hand, was decided on cruel and unusual punishment grounds and at least three of the five opinions were based upon a showing that the death penalty was imposed in an arbitrary manner. Consequently, it may be found that the standards which were determined unnecessary under due process may nevertheless alter the results of trials enough to eliminate the arbitrariness condemned by White and Stewart.<sup>77</sup> Where, as in the Model Penal Code and the Florida Statute, the death penalty can be imposed only if it is determined that at least one aggravating circumstance exists and it is not outweighed by any mitigating circumstances, the use of standards *may* be found unconstitutional. But if the standards are merely to be considered by the trier of fact, as in the new Georgia statute, S-1 (the Senate's McClellan

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<sup>72</sup> See note 64 *supra*.

<sup>73</sup> Note, 22 DE PAUL L. REV. 481, 494 (1972).

<sup>74</sup> See text at note 40 *supra*.

<sup>75</sup> 402 U.S. 183, 204 (1971).

<sup>76</sup> *Id.* at 208.

<sup>77</sup> *Supra* note 73.

Bill), and the original Ohio Proposed Criminal Code,<sup>78</sup> it would appear that there would be little or no effect upon the discretionary sentencing process and the statute *would* be found unconstitutional.

Because three of the five members of the majority in *Furman* based their decision upon the infrequency and capricious imposition of the death penalty, it might be concluded that a statute with a mandatory death penalty provision would be constitutional.<sup>79</sup> However, the constitutionality of such a statute is open to question because of its severity.<sup>80</sup> For example, Chief Justice Burger considers mandatory death sentences too arbitrary and doctrinaire,<sup>81</sup> and to Mr. Justice Blackmun, they are regressive and of an antique mold.<sup>82</sup>

The new Ohio Criminal Code<sup>83</sup> and the Nixon administration's version of the proposed federal criminal code revision<sup>84</sup> (S. 1400) provide a procedure for the imposition of capital punishment which combines discretionary and mandatory features.<sup>85</sup> In both, the decision to impose death must follow from the determination of the existence of an enumerated aggravating circumstance and the non-existence of any of the enumerated mitigating circumstances.<sup>86</sup> The Ohio statute completely eliminates a jury determination of the death penalty. It requires that the indictment, or a count in the indictment, contain one or more specifications alleging the existence of one or more listed aggravating circumstances.<sup>87</sup> The trier of fact then must find the defendant guilty beyond a reasonable doubt of both the charge and one or more of the specifications or the sentence automatically will be life imprisonment. If a verdict of guilty to the specification is returned, the penalty to be imposed is to be determined by either the trial judge or the three-judge panel which tried the defendant upon his waiver of jury trial. Disclosure of the mandatory pre-sentence in-

<sup>78</sup> GA. LAWS 1973, Act. No. 74 (Committee substitute to H.H. 12); Final report of the Technical Committee to study Ohio Criminal Laws and procedures, proposed Ohio Criminal Code §2929.02 (1971). See Comment, 24 MERCER L. REV. 930 (1973) for an evaluation of the Georgia Statute.

<sup>79</sup> See 408 U.S. 238, 308 (Stewart, J. concurring).

<sup>80</sup> See 13 CR. L. 2357, (1973) testimony of Asst. Atty. Gen. Robert G. Dixon before Senate Subcommittee on Criminal Laws and Procedures.

<sup>81</sup> 408 U.S. at 404 (Burger, C.J., dissenting).

<sup>82</sup> 408 U.S. at 413 (Blackmun, J., dissenting).

<sup>83</sup> OHIO REV. CODE ANN. §2929.02-04 (Page Supp. 1973).

<sup>84</sup> S. 1400, 93rd Congress, 1st Sess. §2401-02 (1973).

<sup>85</sup> See 13 CR. L. 2357 (1973).

<sup>86</sup> OHIO REV. CODE ANN. 2929.03 (Page Supp. 1973).

<sup>87</sup> OHIO REV. CODE ANN. §2929.03 (Page Supp. 1973); Aggravating Circumstances as listed in OHIO REV. CODE §2929.04(a).

A. Imposition of the Death Penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to Section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

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vestigation and psychiatric examination is required and there is a hearing at which the prosecutor and the accused or his counsel may present testimony and other evidence and argue which penalty should be imposed. If the trial judge or panel determines that none of the mitigating circumstances have been determined to exist by a preponderance of the evidence, the sentence is death.<sup>88</sup> S. 1400 provides for a separate sentencing hearing before the trial jury, a jury empanelled for the hearing, or before the court alone. The government and the defendant are given the opportunity to present evidence (under liberal admission standards), refute information received, and argue as to the adequacy of information. The jury or the court is then to return a special verdict as to the existence or non-existence of aggravating or precluding (mitigating) factors.<sup>89</sup> If, by a preponderance

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1. The offense was the assassination of the President of the United States or person in line of succession to the Presidency, or of the Governor or Lieutenant Governor of this State, or of the President-Elect or Vice President-Elect of the United States, or of the Governor-Elect or Lieutenant Governor-Elect of this State, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.
2. The offense was committed for hire.
3. The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
4. The offense was committed while the offender was a prisoner in a detention facility as defined in Section 2921.01 of the Revised Code.
5. The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.
6. The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.
7. The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

<sup>88</sup> OHIO REV. CODE ANN. §2929.03 (Page Supp. 1973), Mitigating Circumstances listed in §2929.04.

B. Regardless of whether one or more of the Aggravating Circumstances listed in division (A) of this Section is specified in the indictment and proved beyond a reasonable doubt, the death penalty for aggravated murder is precluded when considering the nature and circumstances of the offense and the history, character, and condition of the offender. One or more of the following is established by a preponderance of the evidence:

1. The victim of the offense induced or facilitated it.
2. It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation.
3. The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

<sup>89</sup> S. 1400 §2401.

Sentence of Death

(a) In General — Except as otherwise provided in subsection (b), a person who has been found guilty of a Class A felony under section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), or 1601 (Murder), shall be sentenced to death if:

(1) the offense is under section 1101 (Treason), 1111 (Sabotage), or 1121 (Espionage) and:

(A) the defendant has been convicted of another offense involving treason, sabotage, or espionage, committed before the time of the offense, for which a sentence of life imprisonment or death was impossible;

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of the evidence, they determine that an aggravating factor exists and that no precluding factor exists, the penalty is death.<sup>90</sup> Since both of the systems automatically impose death upon the determination that certain conditions exist or do not exist, it appears that the "discretionary imposition" objection of Douglas, Stewart, and White in *Furman* has been answered without a return to the regressive antique model of Blackmun's fears. This, at least, is the opinion of Assistant Attorney General Robert G. Dixon, Jr., when he claimed before the Senate Subcommittee on Criminal Laws and Procedures that S. 1400 was "consistent with seven of the nine *Furman* opinions."<sup>91</sup>

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- (B) the defendant, in the commission of the offense knowingly created a grave risk of substantial danger to the national security; or
- (C) the defendant, in the commission of the offense, knowingly created a grave risk of death to any person; or
- (2) the offense is under section 1601 (Murder) and;
  - (A) the defendant committed the offense during the commission and attempted commission, of, or during the immediate flight from the commission or attempted commission of, an offense described in section 1101 (Treason), 1111 (Sabotage), 1121 (Espionage), 1314(a) (1) (Escape), 1621 (Kidnapping), 1625 (Aircraft Hijacking), or 1701 (Arson);
  - (B) the defendant has been convicted of another federal or state offense, committed either before or at the time of the offense, for which a sentence of life imprisonment or death was imposable;
  - (C) the defendant has been convicted of two or more federal or state felonies, committed on different occasions before the time of the offense, involving the infliction of serious bodily injury upon another person;
  - (D) the defendant, in the commission of the offense, knowingly created a grave risk of death to another person in addition to the victim of the offense;
  - (E) the defendant committed the offense in an especially heinous, cruel or depraved manner;
  - (F) the defendant procured the commission of the offense by payment, or promise of payment, of anything of pecuniary value;
  - (G) the defendant committed the offense as consideration for the receipt, or in expectation of the receipt, of anything of pecuniary value; or
  - (H) the defendant committed the offense against:
    - (i) the President or a successor to the presidency;
    - (ii) a chief of state, head of government, or the political equivalent, of a foreign nation; or a foreign dignitary who is in the United States on account of the performance of his official duties; or
    - (iii) a United States official, a law enforcement officer, an employee of a United States penal or correctional institution, or a federal public servant outside the United States for the purpose of performing diplomatic duties, while performing his official duties or on account of the performance of his official duties or because of his status as a public servant.
- (b) Imposition Precluded — Notwithstanding the existence of one or more of the factors set forth in subsection (a) (1) or (2), the court shall not sentence the defendant to death if, at the time of the offense:
  - (1) the defendant was under the age of eighteen;
  - (2) the defendant's mental capacity was significantly impaired as to constitute a defense to prosecution;
  - (3) the defendant was under unusual and substantial duress, although not such duress as would constitute a defense to prosecution;
  - (4) the defendant was an accomplice in the offense, which was committed by another person, and his participation was relatively minor; or
  - (5) the defendant could not reasonably have foreseen that his conduct in the course of the murder for which he was convicted would cause, or would create a grave risk of causing, death to any person.

<sup>90</sup> S. 1400 §2402 (d).

<sup>91</sup> *Supra* note 85.



On the other hand, Louis B. Schwartz, Director of the National Commission of Reform of Federal Criminal Law, believes that the listed aggravating circumstances are arbitrary and vague.<sup>92</sup> Schwartz also feels that the "mandatory" scheme will merely shift the discretion from the judge and jury to the prosecutor and the president (or governor) who has the power to commute sentences or pardon. He fears that prosecutors may use this discretion as a club to force deals in plea bargaining.<sup>93</sup> In *United States v. Jackson*,<sup>94</sup> the Supreme Court struck down the *Federal Kidnapping Act*<sup>95</sup> which provided no procedure for imposing the death penalty upon one who waived jury trial or plead guilty. They claimed that it had an unnecessarily chilling effect on the fifth amendment right not to plead guilty and the sixth amendment right to a jury trial. It could be argued that by encouraging guilty pleas with the threat of death, the effect of these statutes is the same and therefore they are unconstitutional. However, the court has upheld guilty pleas made by an individual charged under the same or similar statutes<sup>96</sup> from collateral attack contesting their voluntariness. In *Brady*, the court, per Mr. Justice White, held:

Plainly, it seems to us, *Jackson* ruled neither that all pleas of guilty encouraged by the fear of a possible death sentence are involuntary pleas nor that such encouraged pleas are invalid whether involuntary or not.<sup>97</sup>

The Court went on to interpret *Jackson* as merely prohibiting the imposition of the death penalty under that type of statute. With the Burger Court's strong support for the practice of "plea bargaining"<sup>98</sup> it would appear that the best approach would be to argue that the effect of the new "mandatory" capital punishment statutes is merely to transfer the discretion from the jury to the prosecutor and that this is not enough to comply with *Furman*.<sup>99</sup>

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<sup>92</sup> Schwartz, *The Proposed Federal Criminal Code*, 13 CRIM. L. REP. 3271. E. 1400 provides that murder is a capital offense if committed in the course of espionage, kidnapping, arson, or in a specially heinous, cruel, or depraved manner, but that it is not capital when committed in the course of robbery, burglary, or rape.

<sup>93</sup> *Supra* note 92.

<sup>94</sup> 390 U.S. 570 (1968).

<sup>95</sup> Act of June 22, 1932, Ch. 271, §1, 3, 47 Stat. 326; Act of May 18, 1934, Ch. 301, 48 Stat. 782. The currently in force Federal Kidnapping Statute which does not authorize any death penalty is found in 18 U.S.C. §1201 (1972).

<sup>96</sup> *Brady v. United States*, 398 U.S. 742 (1970), defendant charged under 18 U.S.C. §1201; *Parker v. North Carolina*, 397 U.S. 790 (1970), defendant charged under state statute which permitted imposition of the death penalty only after not guilty plea and trial.

<sup>97</sup> 397 U.S. 742, 747.

<sup>98</sup> See *Santabello v. New York*, 404 U.S. 257, 260-1 (1971); *McMann v. Richardson*, 397 U.S. 759 (1970).

<sup>99</sup> *Cf. State v. Dickerson*, 298 A.2d 761, 770 (Del. 1973) (dictum).

The Chief Justice, dissenting in *Furman*, concluded the use of standards will not alter the discretionary character of a capital punishment system.<sup>100</sup> The development of usable standards was considered beyond present human ability in *McGautha*.<sup>101</sup> Therefore, the requirement that the death penalty must follow the finding of the existence of an aggravating circumstance and the nonexistence of any mitigating circumstance may not satisfy the requirements of *Furman*. The problem of "jury nullification" (where a jury refuses to return a conviction no matter what evidence is introduced if it disagrees with the punishment) has long been recognized.<sup>102</sup> The jury may, under both the Ohio statute and the proposed Federal statute, arbitrarily refuse to find the existence of aggravating circumstances, and under S. 1400 declare the existence of a mitigating circumstance for reasons of its own. Jury nullification will occur even under the most carefully constructed statute. In the Ohio statute, the legislature seems to be using insufficient criminal defenses as mitigating circumstances.<sup>103</sup> For example, even though provocation in a given instance may not be great enough to reduce the charges to manslaughter, it may be a mitigating factor which would result in a sentence of life imprisonment rather than death for a conviction of murder.

Both statutes may circuitously work their way back into the objections of Douglas, White and Stewart in *Furman*. It may be possible to show that the pattern of the imposition of capital sentences has not been greatly changed under these statutes. Justice Brennan considered infrequency of imposition as strong evidence of arbitrariness;<sup>104</sup> White found that a seldom-inflicted punishment as severe as death would be unjustified by the social ends it was deemed to serve.<sup>105</sup> For these and other reasons<sup>106</sup>, a statute which appears to satisfy *Furman* may in its application fail to pass constitutional muster.<sup>107</sup>

Finally, the constitutionality of capital punishment itself may be attacked. Brennan and Marshall found it unconstitutional in all

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<sup>100</sup> See text at note 45 *supra*.

<sup>101</sup> See text at note 75 *supra*.

<sup>102</sup> See *McGautha v. California*, 402 U.S. 183, 198-99 (1971).

<sup>103</sup> See mitigating circumstances at note 88, *supra*.

<sup>104</sup> 408 U.S. 238, 290-95 (1972).

<sup>105</sup> *Id.* at 311-12.

<sup>106</sup> See, e.g., Douglas' argument that a penalty which is imposed on the poor, the sick, the ignorant, the powerless, and the hated may violate the equal protection clause of the fourteenth amendment. *Furman v. Georgia*, 408 U.S. 238, 240-56 (1972) (Douglas, J., concurring).

<sup>107</sup> See, e.g., *Yick Wo v. Hopkins* 118 U.S. 356 (1886) where a statute which was valid on its face was found to violate the equal protection clause of the fourteenth amendment.

circumstances, and Stewart<sup>108</sup> and White<sup>109</sup> both indicated that the arguments advanced by Brennan and Marshall were strong. The opinion of Mr. Justice Douglas seems to condemn the sentencing system rather than the punishment. However, Mr. Justice Rehnquist in his dissenting opinion included Douglas with Brennan and Marshall as one who would find all capital punishment laws unconstitutional.<sup>110</sup>

Some commentators have indicated that Douglas, Stewart, and White wrote their opinions in *Furman* with the intent to condemn and to focus upon arbitrary, freakish, or discriminatory exercises of discretion within the entire criminal justice system, and that in the future each of these three justices may be prepared to vote against capital punishment irrespective of the system under which it is administered.

It has been suggested that some of the dissenters may, in a future case, bend to the precedent of *Furman* and vote against any new imposition of capital punishment; moreover, it does seem unlikely that the Supreme Court, after releasing over six hundred prisoners from death row, would permit the reinstatement of capital punishment in any form.<sup>111</sup>

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<sup>108</sup> 408 U.S. 238, 306 (1972) "For these and other reasons, at least two of my Brothers have concluded that the infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments. *Their case is a strong one.*" (Emphasis added.)

<sup>110</sup> *Id.* at 465.

<sup>111</sup> Ehrhart, Hubbard, Levinson, Smiley, Wills, *The Future of Capital Punishment in Florida: An Analysis and Recommendations*, 64 J. CRIM. L.C. & P.S. 2, 7 (1973).

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