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## Current Death Penalty Issues

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## INTRODUCTION

In 1976, a divided United States Supreme Court upheld state capital sentencing laws on the assumption that explicit sentencing guidelines, separate sentencing hearings and automatic appellate review of all death sentences would remove the substantial risk of arbitrariness of previous capital punishment sentencing schemes.<sup>1</sup> Eight years later, the premises supporting the constitutionality of the new laws appear to have little practical currency. That a set of scholarly contributions from lawyers, criminologists, and other investigators would uncover flaws in the operation of the death-case legal system is not surprising; earlier research into the operation of the discretionary death penalty systems raised significant doubts about the reliability, fairness, and necessity of capital punishment and contributed to the Court's landmark 1972 decision in *Furman v. Georgia*. But both the depth and bite of recent investigations are startling. Discretionary death sentencing was rejected in *Furman* for a complex of factors amounting to legal arbitrariness—lack of evenhandedness, caprice, discrimination, excessiveness. The statutory schemes approved in 1976 and those adopted thereafter were formulated to avoid unconstitutional arbitrariness in capital sentencing systems.

Rather than attempt a lengthy summary of what follows, we will let Symposium contributions speak for themselves and point out, only generally, some of the more salient conclusions.

Though there may have been a shift in the stage of the system at which arbitrariness occurs, the new laws have not eliminated the disparate treatment of minority group members. Sentencing standards, evidentiary hearings, and appellate review of lower court death sentences have neither screened out racial or economic factors in death sentencing nor reduced to satisfactory levels the system's capacity to produce inconsistent and "freakish" results. Decisions of prosecutors to seek the death penalty are related to the race of the victim and defendant. Wide geographical variations in the imposition of the death penalty mean that the likelihood of receiving the death sentence may depend solely upon the locus of the trial. Appellate courts have not proven themselves capable of rectifying inconsistency in trial court death sentencing and indeed

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<sup>1</sup> See, e.g., Bowers, *The Pervasiveness of Arbitrariness and Discrimination under Post-Furman Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983).

the principles and processes employed by reviewing courts are not designed to produce consistent and evenhanded capital sentencing.

The results of recent research offer little comfort to those who seek to justify the death penalty because it allegedly deters more effectively than prison sentences; there is much evidence which validates previous studies which found the death penalty ineffective as a marginal deterrent. Additionally, recent studies have added to the weight of earlier investigations that found that capital punishment was in fact a spur to murder, the so-called brutalization effect. The legal system has not fared well in attempting to implement a more defensible and even-handed selection of those to be executed. The new laws have raised vexing legal problems; the operation of these laws to date suggests that these problems can be resolved only at the cost of abandoning fundamental due process values.

Though Supreme Court decisions are often characterized as watersheds, the process of constitutional lawmaking is actually marked by gradualism. *Furman* overturned the laws of most death penalty states by a slim margin but the constitutional ruling emerged from years of moratorium, scholarly doubt, public debate, and misuse of the death sentencing apparatus. *Furman* gave the states the choice of whether to continue a regime of capital sentencing, and the states responded by sending a clear message that such a system was desired—at least on the law books. The 1976 decisions may be seen as permitting the states to make the case that a rationally selective, nondiscriminatory, and nonexcessive capital sentencing system might be constitutional. With more than a thousand persons waiting on death row, their numbers growing daily, and a handful of extraordinarily bizarre and troubling executions, researchers have come to grips with the statutory generalizations approved by the Court. On the basis of the scholarship presented here, the judgment must be that the arbitrariness that gave rise to *Furman v. Georgia* remains, and the states have failed to show that a death penalty system can reduce arbitrariness to constitutionally permissible levels.

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