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The Eighth Amendment and Kentucky's New Capital Punishment Provisions--Waiting for the Other Shoe to Drop

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NOTES

THE EIGHTH AMENDMENT AND KENTUCKY'S NEW CAPITAL PUNISHMENT PROVISIONS — WAITING FOR THE OTHER SHOE TO DROP

On June 28, 1972, the predominant form of punishment inflicted throughout the world upon those convicted of very serious crimes was death by execution. A 1962 study[1] of 128 nations revealed that 110 of them retained some form of capital punishment. Although in some nations there had been de facto abolition of the death penalty, (Lichtenstein, for example, while still governed by a death penalty statute, has not experienced an execution since 1792), there had been no discernible world-wide trend toward formal abolition. Rather, during the quarter of a century between 1943 and 1968, as many countries reinstituted capital punishment as abolished it.[2] Thus, the infliction of death by either hanging, shooting, decapitation, electrocution, strangulation, or stoning was deemed an acceptable form of punishment throughout most of the world.[3]

In this country, forty-one states and the District of Columbia were governed by statutes which provided for the infliction of death as the punishment for at least one crime.[4] However, on the final day of its October 1971 Term, the United States Supreme Court announced its 5-to-4 decision in *Furman v. Georgia*[5] and, for the first time, held unconstitutional a death penalty statute. In a terse per curiam opinion, followed by five concurring and four dissenting opinions, the Court wrote simply 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."[6]

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[1] Patrick, *The Status of Capital Punishment: A World Perspective* in CRITICAL ISSUES IN THE STUDY OF CRIME 267 (1968).

[2] *Id.*

[3] *Id.*

[4] Furman v. Georgia, 408 U.S. 238, 384 (1972) (Burger, C.J., dissenting).

[5] 408 U.S. 238 (1972).

[6] *Id.* at 239-40.

The Georgia[7] and Texas[8] statutes challenged in *Furman* and its companion cases,[9] permitted a jury, upon finding the defendant guilty of a capital offense, to impose in its discretion either death or a lesser penalty. The failure of those statutes to provide guidelines or standards to direct the jury's decision, and the resultant potential for arbitrary sentencing, appeared to constitute the crux of the rationale of the majority. However, two Justices, Brennan and Marshall, opined that the infliction of the death penalty, in any form, constitutes cruel and unusual punishment.[10]

The Commonwealth of Kentucky was one of the jurisdictions whose statutory scheme for the administration of the death penalty was interrupted by the *Furman* decision.[11] The Kentucky murder statute, as well as nearly a dozen other Kentucky penal provisions then in effect,[12] permitted the imposition of the death penalty at the discretion of the jury. The murder statute provided: "Any person who commits wilful murder shall be punished by confinement in the penitentiary for life, or by death."[13] Thus, the Kentucky statutes delineated precisely the same mechanism for the selection of the punishment in capital cases—the jury operating without guidelines or directions formulated by the state—which the Court had declared unconstitutional in *Furman*.

Incensed by judicial repeal of a favored and traditional form of punishment reserved for those whose crimes were deemed heinous, and inflamed by a number of post-*Furman* atrocities,[14] public interest focused on the January 1974

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[7] GA. CODE ANN. § 26-1302 (Supp. 1971).

[8] TEX. PENAL CODE ANN. art. 1189 (1961).

[9] Jackson v. Georgia, No. 69-5030; Branch v. Texas, No. 69-5031.

[10] *See* text accompanying notes 25-28 *infra*.

[11] Caine v. Commonwealth, 491 S.W.2d 824, 832 (Ky. 1973).

[12] KY. REV. STAT. § 433.140 [hereinafter cited as KRS] (armed robbery); KRS § 433.150 (assault to rob or with intent to rob); KRS § 433.390 (causing death by train wrecking); KRS § 435.030 (killing during advocacy of criminal syndicalism); KRS § 435.040 (causing death of a woman by abortion); KRS § 435.060 (causing death by obstructing a road); KRS § 435.070 (lynching); KRS § 435.080 (rape of a child under 12); KRS § 435.090 (rape of a female over 12); KRS § 435.140 (kidnapping for ransom); KRS § 435.190 (reckless shooting into train or motor vehicle).

[13] KRS § 435.010. By virtue of KY. R. CRIM. P. 9.84, the jury is required to fix the penalty in all cases involving offenses punishable by death.

[14] These included the brutal slaying of a Lexington minister, his son and daughter, and two others by two escaped convicts in October 1973.

biennial session of the Kentucky General Assembly. The lawmakers, obviously sharing the sentiments of their constituents, voted by an overwhelming margin to enact, as part of the new Penal Code, a provision requiring the imposition of the death sentence upon those convicted of crimes denominated in the statute as "capital offenses."[15]

At this juncture, long after the initial debate generated by *Furman* has faded into history, it seems appropriate not only to study the new law representing the reaction by Kentucky's legislature to the requirements of the *Furman* decision,[16] but also to examine larger issues aroused by the apparent direction of current eighth amendment litigation, such as: 1) the possible development by the Supreme Court of new rules by which to judge the cruelty and unusualness of punishments[17] and 2) the extent to which the death penalty merits retention as an effective and worthwhile implement in the criminal justice system.[18]

I. THE FURMAN DECISION

What did the Supreme Court hold in *Furman v. Georgia*?[19] Through the use of ten separate opinions—one per curiam, five majority concurring, and four dissenting—and two hundred thirty-two pages in the *United States Reports*, the nine Justices approached the capital punishment issue from practically every angle. One commentator[20] has identified a total of six separate tests employed by the five majority Justices to determine whether a particular punishment is "cruel and unusual" under the eighth amendment. Another[21] accurately stated that no two Justices agreed exactly on their reasons for invalidating the Georgia and Texas laws. Thus, one who would attempt to draw broad generalizations from the Court's diverse expositions assumes a precarious position.

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[15] KY. ACTS ch. 406, § 61 (1974).

[16] KRS § 507.020(2) (Special Supp. 1974).

[17] *See* text accompanying notes 106-153 *infra*.

[18] *See* text accompanying notes 154-55 *infra*.

[19] 408 U.S. 238 (1972).

[20] Wheeler, *Toward a Theory of Limited Punishment, II: The Death Penalty After Furman v. Georgia*, 25 STAN. L. REV. 62 (1973) [hereinafter cited as Wheeler].

[21] Reed, *Furman v. Georgia and Kentucky Statutory Law*, 37 KY. B.J. 25 (1973) [hereinafter cited as Reed].

Nevertheless, a review of state court decisions construing *Furman*[22] and a study of the numerous scholarly analyses[23] which have appeared in the two years since that decision lead to this evaluation of the common ground reached by the *Furman* majority: The gravamen of the Georgia and Florida statutes' violation of the eighth amendment's prohibition of cruel and unusual punishments was the *arbitrary* manner in which sentences could be selected and applied. Specifically, the statutory procedures were termed arbitrary because they permitted the imposition of either death or lesser penalties solely in the discretion of a jury operating without standards or guidelines to aid in the sentencing decision.

In order to demonstrate that punishments selected arbitrarily may be applied in a cruel and unusual manner, four of the Justices cited certain undesirable results brought about by the statutes in question. Justice Douglas found arbitrariness in the allegedly discriminatory application of capital punishment to minority group members, principally Negroes, who have in the past been executed in a proportion far greater than their numbers bear to the population as a whole.[24] Quoting former Attorney General Ramsey Clark to the effect that "[i]t is the poor, the sick, the ignorant, the powerless and the hated who are executed,"[25] Justice Douglas wrote that "[o]ne searches our chronicles in vain for the execution of any member of the affluent strata of this society. The Leopolds and Loebs are given prison terms, not sentenced to death."[26]

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[22] *See, e.g.*, State v. Dixon, 283 So. 2d 1 (Fla. 1973); People v. Fitzpatrick, 300 N.E.2d 139, 346 N.Y.S.2d 793 (1973); State v. Jarrette, 202 S.E.2d 721 (N.C. 1974). An interesting pre-*Furman* case is People v. Anderson, 493 P.2d 880, 100 Cal. Rptr. 152 (1972), in which the Supreme Court of California held that a state constitutional provision prohibiting "cruel *or* unusual" punishments was violated by the death penalty, which, according to the court, is cruel though not necessarily unusual.

[23] *See, e.g.*, *The Supreme Court, 1971 Term*, 86 HARV. L. REV. 1, 76-85 (1973); Ehrhardt, *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L.C. & P.S. 2 (1973); Meltsner, *Cruel and Unusual: The Supreme Court and Capital Punishment*, 82 YALE L. REV. 1111 (1973); Reed, *supra* note 21; Wheeler, *supra* note 20; Comment, *Capital Punishment After Furman*, 64 J. CRIM. L. & CRIM. 281 (1973).

[24] 408 U.S. at 253, 256. For relevant statistics *see* 408 U.S. at 250 n.15. In Kentucky, since the electric chair was installed at Eddyville in 1911, 79 whites and 83 blacks (from a much smaller population) have been executed. Of the 99 persons executed since 1930, only seven were high school graduates, and none attended college. Louisville Courier-Journal, Feb. 5, 1974.

[25] 408 U.S. at 251.

[26] *Id.* at 251-52.

Justices Brennan, White, and Stewart, on the other hand, deemed the questioned procedures arbitrary on the ground that the death penalty had been applied so infrequently that no rational basis could be found to distinguish the circumstances of those few cases in which it was applied from the many, apparently similar situations in which it was not.[27] Justice Marshall, the fifth member of the majority, did not cite arbitrariness as a reason for his invalidation of the statutes. While Justices Douglas, Stewart, and White stopped short of the question of the constitutionality of capital punishment per se, Justices Brennan and Marshall asserted that the imposition of the death penalty, under any circumstances, constitutes cruel and unusual punishment.[28]

The majority opinions in *Furman* thus indicate that in determining whether the new death penalty provisions enacted by Kentucky and various other states in response to *Furman* are valid under the eighth amendment, a question of vital importance may be whether the provisions are free from the defects of infrequent imposition and potentially discriminatory application which rendered arbitrary, and thus cruel and unusual, the Georgia and Texas statutes.

II. EFFECT OF FURMAN ON THE ROLE OF THE JURY

The responsibility for making the momentous decision of whether or not to put a man to death has in America traditionally been vested in a group of his peers, rather than in an agency of the state.[29] Prior to the *Furman* ruling, all states which provided for the imposition of the death penalty required jury participation in the sentencing decision,[30] although only thirteen states provided for jury sentencing in non-capital cases.[31] In nearly all states, the jury was empowered, upon conviction of the defendant in a capital case, to fix his punishment

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[27] *Id.* at 293, 310, 313.

[28] *Id.* at 286.

[29] *See* notes 32-35 *infra*.

[30] AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO SENTENCE ALTERNATIVES AND PROCEDURES 47 (Tent. Draft 1967) [hereinafter cited as ABA STANDARDS].

[31] Note, *Jury Sentencing in Virginia*, 53 VA. L. REV. 968, 969 (1967). *See* the statutes listed at 969 n.2.

at *either* death *or* some lesser punishment.[32] Among the reasons which have been advanced for these alternatives are: 1) the prevention of jury nullification;[33] 2) the belief in the need for such a drastic measure as a death sentence to reflect, insofar as possible, a community consensus;[34] and 3) the understandable reluctance of trial judges to singularly bear the burden of pronouncing so onerous a judgment.[35]

Statutes in various states conferring upon the jury the power to determine punishment typically remain silent as to the manner or extent to which the jury could be aided in its sentencing decision by the introduction at the trial of evidence relevant solely to the issue of punishment.[36] From this dearth of statutory standards there evolved in the United States two contrary lines of state appellate court decisions—one of which held that evidence relevant solely to the issue of punishment could,[37] and the other of which held that such evidence could not,[38] be introduced at trial. In those jurisdictions allowing the introduction of evidence relevant only to the issue of punishment however, a wide variety of evidence has been admitted. Thus, for example, facts concerning the defendant's environment, his motive for the crime, the presence of any mental defect in the defendant, any provocation he may have encountered, his age, and the intoxication of the defendant at the time of the commission of the offense have all been admitted for consideration by the jury.[39] Yet, even upon the introduction of such evidence, the jury has usually retained the power to fix sentences in capital cases without reference to any set of standards or formal guidelines.

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[32] Knowlton, *Problems of Jury Discretion in Capital Cases*, 101 U. PA. L. REV. 1099 (1953) [hereinafter cited as Knowlton].

[33] State v. Molnar, 44 A.2d 197, 202 (N.J. 1945).

[34] *See* ABA STANDARDS at 47.

[35] *Id.*

[36] Knowlton, *supra* note 32, at 1108.

[37] *Id.* at 1109 n.66.

[38] *Id.* at 1108 n.52.

[39] *Id.* at 1116-17. For example, in the Kentucky case of Harris v. Commonwealth, 209 S.W. 509 (Ky. 1919), the Court held that evidence of the accused's drunkenness at the time of the homicide, while not admissible to show lack of malice and thus support an instruction on manslaughter, is admissible to demonstrate that a human frailty influenced the crime and to assist the jury to fix the defendant's punishment at either death or life imprisonment.

Furthermore, appellate courts have manifested an unwillingness to remove the jury's power to finally determine death sentences. In Kentucky, for example, the Court of Appeals has steadfastly refused to overturn its rule that a sentence fixed by the jury, if within the limits prescribed by statute, is valid and may not be reviewed on appeal.[40] The Court has been unwilling to weigh the evidence in each case to determine the reasonableness of the sentence, and has held that the fact that the jury fixes punishment at death rather than at life imprisonment does not authorize an inference of passion or prejudice on the jury's part.[41] The tradition of delegating to the jury final sentencing authority is maintained even under Kentucky's new Penal Code.[42] Although the trial judge may modify an "unduly harsh" jury determination of sentence in a felony case, he is powerless to modify the sentence of death imposed by statute upon the jury's convicting the defendant of a capital offense.[43]

By casting doubt upon the fairness and wisdom of jury sentence determinations, the majority opinions in *Furman* differ fundamentally with the long standing principle which recognizes as valid the reservation of discretion in the jury to impose the death penalty in a given case not under the guidance of a formal set of standards, but rather in accordance with the effect of the evidence upon the sensibilities of the jurors. This principle is reflected in the following statement by the Kentucky Court of Appeals in an opinion rendered less than a year before the decision in *Furman*:

> Jurors have an option upon conviction in murder cases of imposing sentences of life imprisonment or death. We feel certain that most jurors would be reluctant to impose the death penalty and would do so only in aggravated cases and when their duty requires them to do so.[44]

Little imagination is required to perceive that the reactions of twelve "good men and true" to the facts adduced in a given case, and the degree of heinousness each is willing to

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[40] Spurlock v. Commonwealth, 223 S.W.2d 910 (Ky. 1949).

[41] Lane v. Commonwealth, 75 S.W.2d 739 (Ky. 1934); Bryant v. Commonwealth, 259 S.W.2d 1038 (Ky. 1924).

[42] KY. ACTS ch. 406 (1974).

[43] KRS § 532.070, .030.

[44] Fryrear v. Commonwealth, 471 S.W.2d 321, 324 (Ky. 1971).

attribute to the crime, are likely to vary as widely as the backgrounds, experiences, biases, and predilections of the individual jury members. It might be an exaggeration to say that one man's cruelty is another man's kindness; yet it does not appear unreasonable to assume that facts which in the view of some jurors would sufficiently aggravate the offense to necessitate imposition of the death penalty would produce quite a different response in others.

Clearly, then, the fate of a defendant convicted under the pre-*Furman* Kentucky Revised Statutes § 435.010 [hereinafter cited as KRS] and similar statutes was inextricably intertwined with the personae of the jury and their individual sensibilities and attitudes. Apparently, this condition was the gravamen of the evil which, under a variety of pretexts and explanations, the majority of the *Furman* Court sought to eradicate. Statutory schemes by which juries fix punishments in their unfettered discretion permit, according to the members of the Court, the exercise of whim or caprice by the jury. In the view of a majority of the *Furman* Justices, the premise that, under such a scheme, the death penalty may be imposed arbitrarily is demonstrated by the infrequency with which it has been inflicted, and by the discriminatory manner with which, in the belief of some, it has been meted out to the black and the poor. As noted above, the administration of capital punishment in such an arbitrary manner amounts, according to *Furman*, to the infliction of cruel and unusual punishment in violation of the eighth amendment.[45]

An analysis of the *Furman* rationale leads to this question: Is the phenomenon of discretionary sentence determination (i.e., that the selection depends to some extent upon the predilections and sensibilities of the sentence determiner) likely to change under any scheme? It is submitted that only if some means were devised to delegate the task of sentencing to some emotionless entity, such as a computer, could the human characteristics of discrimination, compassion and avarice be completely eliminated. At any rate, the *Furman* decision appears to have cleared the way for a new avenue of inquiry into the role of the jury in our criminal justice system. And, as the

[45] *See* text accompanying notes 22-28, *supra*.

following discussion demonstrates, this inquiry already has produced some tangible results within the penal statutes of Kentucky.

III. THE NEW KENTUCKY DEATH PENALTY PROVISIONS

The shock waves which covered the nation in the months after the *Furman* decision resulted in the passage, in 28 states, of new laws designed to retain the death penalty in a constitutional form by restricting the amount of discretion to impose sentences vested in the jury. One writer[46] has classified each of these statutes into one of four models:

1) The "aggravating (circumstances) only" model, wherein a sentence of death must be imposed by the jury if one or more circumstances attending the criminal act, denominated by statute as "aggravating circumstances," are proved.[47] Statutes of this form have been enacted in Georgia,[48] Illinois,[49] Montana,[50] and Utah.[51]

2) The "aggravating-mitigating (circumstances)" model, in which, following the basic structure of the American Law Institute's Model Penal Code,[52] statutes provide a list of both mitigating and aggravating circumstances which may attend the crime, and permit the imposition of a capital sentence only upon 1) a finding of one or more aggravating circumstances, and 2) a determination that any mitigating circumstances also proved do not "outweigh" the aggravating circumstances present.[53] Arizona,[54] Arkansas,[55] Florida,[56] Nebraska,[57] and Tennessee[58] have enacted such laws.

3) The "quasi-mandatory" model, adopted by five

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[46] Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1699 (1974) [hereinafter cited as *Discretion*].

[47] *Id.* at 1700.

[48] GA. CODE ANN. §§ 26-3102, 27-2528, -2534.1, -2537 (Supp. 1973).

[49] ILL. REV. STAT. ANN. ch., 38 §§ 9-1, 1005-5-3, -8-1A (1973).

[50] MONT. REV. CODES ANN. §§ 94-5-105 (Spec. Crim. Code Supp. 1973).

[51] UTAH CODE ANN. §§ 76-3-207, -5-202 (Supp. 1973).

[52] MODEL PENAL CODE § 210.6 (1962).

[53] *Discretion, supra* note 46, at 1704.

[54] ARIZ. REV. STAT. ANN. § 13-454 (D) to (F) (Supp. 1973).

[55] ARK. STAT. ANN. § 41-4710 to 4712 (Cum. Supp. 1973).

[56] FLA. STAT. ANN. § 921.141 (Cum. Supp. 1974).

[57] NEB. REV. STAT. § 29-2523 (Supp. 1973).

[58] TENN. CODE ANN. § 39-2406 (Cum. Supp. 1973).

states, in which an attempt is made to eliminate the factfinder's exercise of discretion by providing lists of aggravating and mitigating circumstances but permitting the imposition of a death sentence only when it is found that one or more aggravating factors or circumstances, but no mitigating circumstances, attended the crime.[59] California,[60] Connecticut,[61] Ohio,[62] Pennsylvania,[63] and Texas[64] have enacted these so-called "quasi-mandatory" statutes.

4) The "mandatory" model, adopted by either statute or court decision in fourteen states, removes all discretion from the post-conviction sentencing decision by providing death as the mandatory penalty for certain offenses committed under circumstances defined by statute.[65] "Mandatory" states are Delaware,[66] Idaho,[67] Indiana,[68] Kentucky,[69] Louisiana,[70] Mississippi,[71] Nevada,[72] New Hampshire,[73] New Mexico,[74] New York,[75] North Carolina,[76] Oklahoma,[77] Rhode Island,[78] and Wyoming.[79]

As noted, the new Kentucky Penal Code provisions, KRS § 507.020(2)[80] and KRS § 509.040(2),[81] which became effective January 1, 1975, fall into the "mandatory" category and provide as follows:

> § 507.020(2). Murder is a class A felony, except that in the following situations it is a capital offense:

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[59] *Discretion, supra* note 46, at 1709.
[60] CAL. PENAL CODE § 190.1 to .3 (West Supp. 1974).
[61] P.A. 73-137, 4(e) [1973] Conn. Leg. Serv. 184 (West).
[62] OHIO REV. CODE ANN. §§ 2903.01, 2929.02 to .04 (Page Spec. Supp. 1973).
[63] Pa. Act No. 46, 158th General Assembly (March 26, 1974).
[64] TEX. CODE CRIM. PRO. ANN. art. 37.071 (Supp. 1973).
[65] *Id.* at 1710.
[66] Del. ch. 284, 127th General Assembly (March 29, 1974).
[67] IDAHO CODE § 18-4003, -4004 (Supp. 1974).
[68] IND. ANN. STAT. § 10-3401 (Supp. 1973).
[69] KRS §§ 507.020(2); 509.040(2); 532.030(1).
[70] LA. REV. STAT. ANN. § 14:30 (1974).
[71] Miss. ch. 576, 1974 General Assembly (1974).
[72] NEV. REV. STAT. § 200.030 1. (1973).
[73] N.H. ch. 34, 1974 General Court, Spec. Sess. (Apr. 3, 1974).
[74] N.M. STAT. ANN. § 40A-29-2 (Supp. 1973)..
[75] N.Y. ch. 367, 1974 Legislative Assembly (May 6, 1974).
[76] N.C. GEN. STAT. ANN. § 15-176.4 (Cum. Supp. 1974).
[77] OKLA. STAT. ANN. tit. 21, § 701.3 (Supp. 1973).
[78] R.I. GEN. LAWS ANN. § 11-23-2 (Supp. 1973).
[79] WYO. STAT. ANN. § 6-54 (Supp. 1973).
[80] KY. ACTS ch. 406, § 61 (1974).
[81] *Id.* at 76.

> (a) The defendant's act of killing was intentional and was for profit or hire;
> (b) The defendant's act of killing was intentional, and occurred during the commision of arson in the first degree, robbery in the first degree, burglary in the first degree, or rape in the first degree;
> (c) The defendant's act of killing was intentional and the defendant was a prisoner and the victim was a prison employee engaged at the time of the act in the performance of his duties;
> (d) The defendant's act of killing was intentional and the death was caused through the use of a destructive device, as defined in KRS 237.030(1);
> (e) The defendant's act or acts of killing were intentional and resulted in multiple death;
> (f) The defendant's act of killing was intentional and the victim was a police officer, sheriff or deputy sheriff engaged at the time of the act in the lawful performance of his duties.
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> § 509.040(2). Kidnapping is a capital offense unless defendant voluntarily releases the victim alive, substantially unharmed, and in a safe place prior to trial, in which case it is a class B felony.

KRS § 507.020(2) fixes a mandatory penalty of death upon each defendant convicted of intentional murder under one of the six sets of circumstances enumerated in the statute. On its face, the provision removes from the jury the ability either to apply the death penalty discriminatorily or to impose it infrequently, because once a guilty verdict is returned, no possibility exists for jury discretion in the determination of sentence. The same reasoning applies to the kidnapping provision, KRS § 509.040(2).

Nevertheless, some authorities have concluded that even a so-called "mandatory" procedure does not preclude the exercise of some discretion by the jury and other actors at various stages in the criminal justice process.[82] The jury retains discretion in the sense that even though a conviction of a capital offense must result in a death sentence, the jury may, after its deliberation in a given case, convict the defendant of either the

[82] *See The Supreme Court, 1971 Term, supra* note 23, at 85; Comment, 64 J. CRIM. L. & CRIM. 281, *supra* note 23 at 284.

capital offense *or* some lesser included offense. Consider for example, a prosecution for murder. According to the official commentary to the Penal Code,[83] a condition of extreme emotional disturbance in the accused at the time of the killing serves to reduce the crime of murder to that of manslaughter in the first degree, a class B felony punishable by ten-to-twenty years imprisonment. Therefore, upon the introduction by the defendant in a capital case of evidence that the homicide was committed while he was under the influence of some extreme emotional disturbance, the trial judge would be required to give a manslaughter instruction. Thus, in every case in which he is able to introduce mitigating evidence, the jury will retain the power to either put the defendant to death by convicting him of the capital offense, or, if it so chooses, to spare his life by convicting him of a lesser offense.

Clearly, *pre-conviction* jury discretion remains a fixture in the death penalty process. However, since it was *post-conviction* discretion which rendered the statutes invalid in *Furman*, the Court has yet to rule on the question of the extent, if any, to which the eighth amendment permits pre-conviction discretion in capital cases. The Court's ultimate resolution of this issue might depend upon whether there is a significant difference in the two kinds of discretion when tested under the standards employed by four of the majority Justices in *Furman:* 1) the *frequency*, in view of all possible applications, with which capital punishment is imposed and 2) the possibility of *discriminatory* application of the death penalty based upon race or other invalid criteria. However, at least one member of the *Furman* Court indicated his belief that real changes in jury discretion cannot be brought about so long as juries retain the power to render a verdict on a lesser charge.[84]

IV. OTHER DISCRETIONARY ROLES

In addition to the jury's deliberations, discretion can be exercised by other participants at various points in the judicial process. The Commonwealth's Attorney, under KRS §

[83] LEGISLATIVE RESEARCH COMMISSION, THE KENTUCKY PENAL CODE 99 (Nov. 1971 Draft).

[84] 408 U.S. at 401 (Burger, C.J., dissenting).

532.030(1),[85] may, with regard to a given killing, seek an indictment of the defendant either for intentional murder as a capital offense, or for intentional murder as a class A felony punishable by a prison term of from 20 years to life. And, under Section 77 of the State Constitution, the Governor of Kentucky is empowered to commute sentences in all criminal cases. Clearly, these officials must exercise discretion in the performance of their duties, and in neither instance does the applicable statute or constitutional provision establish guidelines or standards for the officials to follow. Thus, even if the jury's role in capital cases under the new Kentucky Penal Code can pass muster under the eighth amendment, questions remain as to the constitutionality of the exercise of discretion by these other actors in the judicial process.

A. *The Prosecutor*

At some point, the prosecutor must evaluate the available evidence and, in his discretion, decide whether to proceed against the accused and, if so, for which degree of the offense to seek an indictment. It is not difficult to visualize the miscarriages of justice which would result if the Kentucky Commonwealth's Attorney were stripped of this discretionary power and were required to prosecute, with equal vigor and in the same fashion, each individual, whether perceived as guilty or innocent by the prosecutor.

As was stated in a recent state court decision:[86]

> The purpose of vesting the power of judgment in an official is to enable him to make different decisions in different cases in the light of what he determines to be materially different factual situations. All governmental actions are based on this delegation of responsibility. The Fourteenth Amendment to the Constitution of the United States does not require a state, in the enforcement of its criminal laws, so to hedge its prosecuting attorney about with "guidelines" that he becomes a mere automaton, acting on the impulse of a computer and treating all persons accused of criminal conduct exactly alike. From the foundation of the country to the present date, the

[85] KY. ACTS ch. 406, § 275 (1974).
[86] State v. Jarrette, 202 S.E.2d 721 (N.C. 1974).

> discretion, now complained of . . . has been vested in prosecuting officers throughout the country. Without it, the greatest injustices would necessarily be inflicted upon innocent persons accused of crime.[87]

B. *The Governor*

In the Anglo-American experience, the chief executive of a jurisdiction traditionally has been vested with the power to commute sentences and grant reprieves and pardons to those convicted of crimes. The clemency power is intended "to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law."[88]

It can be argued that a governor's discretionary power, like that of the prosecutor, could be exercised in an arbitrary manner to grant reprieves in some cases and deny them in others without apparent reason or for invalid reasons. Although one study[89] identified a total of 13 standards applied by American governors in arriving at their clemency decisions, few could doubt that some chief executives have eschewed the use of objective criteria and have relied upon personal views and predilections to monitor their actions.[90]

One commentator[91] has written that the clemency decisions of American governors are examinable to insure that all defendants are treated non-arbitrarily and equally and are provided substantive due process and equal protection of law. Yet, the Supreme Court of the United States has ruled that "[executive clemency] is a check entrusted to the executive for special cases. . . . *[W]hoever is to make it useful must have full discretion* to exercise it."[92]

Is the clemency decision of Kentucky's governor reviewable under the fourteenth amendment by the federal courts? As eighth amendment rights evolve, will the discretion vested

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[87] *Id.* at 742.

[88] *Ex parte* Grossman, 267 U.S. 87, 120 (1925).

[89] H. BURNS, EXECUTIVE COMMUTATION IN CAPITAL CASES 20 (1969).

[90] *See* Rockefeller, *Executive Clemency and the Death Penalty*, 21 CATHOLIC L. REV. 94 (1971); Ringold, *The Dynamics of Executive Clemency*, 52 A.B.A.J. 240, 242 (1966); *Note, Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136 (1964) [hereinafter cited as *Executive Clemency*].

[91] *Executive Clemency, supra* note 90, at 181.

[92] *Ex parte* Grossman, 267 U.S. 87, 120 (1925) (Taft, C.J.) (emphasis added).

by Kentucky's constitution and statutes in the governor and commonwealth's attorneys render this state's death penalty law violative of the prohibition of "cruel and unusual" punishments? Answers to these questions, like the resolution of the issue whether the new law vests excessive "pre-conviction" discretion in juries, must await Supreme Court action in the post-*Furman* era.[93]

V. ALTERNATIVES TO KENTUCKY'S NEW DEATH PENALTY LAW

If the new Kentucky plan for the imposition of the death penalty is held unconstitutional, then it appears that the General Assembly will be faced with the dilemma of: (1) adopting a statute furnishing the jury with some type of circumstance-oriented guidelines to apply in the exercise of its power to determine sentences;[94] (2) enacting a true mandatory death penalty, thereby narrowing the jury's alternatives in a given case to either convicting the defendant of the capital offense or acquitting him; or (3) abolishing the death penalty in Kentucky.

A. *The Aggravation/Mitigation Jury Determination*

The continued constitutional validity of laws of this type is uncertain. Although such statutes enumerate guidelines in the form of mitigating and aggravating circumstances, the jury, in fixing sentence, is still imbued with a broad life-or-death discretion. To illustrate, assume that a statute of the type explained previously prescribes a list of both aggravating and mitigating factors.[95] If in determining the penalty the jury should ascertain the presence at the time of the crime of one or more aggravating factors, the penalty of death must be affixed unless the jury also finds the existence of one or more mitigating factors. In the latter instance, a sentence of life imprisonment must be rendered. Under this type of statute,

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[93] The answers to these and other questions should be forthcoming soon. The Supreme Court is presently faced with a capital punishment case in which the Court must provide some guidance in the area of the eighth amendment. State v. Fowler, 203 S.E.2d 803 (N.C.), *cert. granted sub nom.* Fowler v. North Carolina, 95 S.Ct. 223 (1974) (No. 73-7031); State v. Sparks, 207 S.E.2d 712 (N.C. 1974), *petition for cert. filed*, 43 U.S.L.W. 3332 (U.S. Nov. 29, 1974) (No. 74-669).

[94] *See* text accompanying notes 46-79 *supra*.

[95] *See* text accompanying notes 45-63 *supra*.

the ultimate choice (*i.e.*, the selection of either life or death as the penalty) depends not, as in *Furman*, upon the whim of a jury allowed to exercise its unfettered discretion without standards or guidelines, but instead upon adherence to a rigid formula prescribed by statute. However, the intermediate choices required in order to operate the ultimate-choice formula (*i.e.*, whether or not each of the aggravating or mitigating circumstances exists) must be made by a factfinder operating without statutorily prescribed guidelines for those particular determinations. Thus, such laws commit to the unfettered discretion of the jury the ability to choose the alternatives which, under the operation of the formula, will lead automatically to a choice of sentence of either death or life imprisonment. The effect of the intermediate factor method of sentence selection, of course, has yet to be explored by the Court. But, from all appearances, a plan providing for the mandatory application by the jury of a statutory list of aggravating and mitigating circumstances is only a step removed from the unfettered jury discretion condemned in *Furman*.

B. *The "All-or-Nothing" Statute*

The second alternative, the adoption of an "all-or-nothing" mandatory statute, would probably prove both unwise and unconstitutional. Aside from the obvious undesirability of confronting a jury with the choice of either executing the defendant or freeing him, it is likely that such a law would be invalidated by the United States Supreme Court. Chief Justice Burger[96] and Justice Blackmun,[97] dissenters in the *Furman* decision, clearly expressed their preference to abolish the death penalty rather than subject the jury to such a dilemma. According to the Chief Justice: "[U]nder such a system, the death sentence could only be avoided by a verdict of acquittal. If this is the only alternative that the legislature can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition."[98] Thus, it appears certain that such a scheme, even if enacted, would be avoided by an alli-

[96] 408 U.S. at 401.
[97] *Id.* at 413.
[98] *Id.* at 401 (Burger, C.J., dissenting).

ance of at least these five Justices: Burger, Blackmun, Brennan, Douglas, and Marshall.

It has been suggested by some observers (though disputed by others) that the new Kentucky provision, in the absence of a "lesser included offense" instruction, will in effect require that the jury be confronted with an "all-or-nothing" dilemma. This result follows since KRS § 532.030(1),[99] by requiring the Commonwealth's Attorney to elect at the time of indictment to prosecute the crime as either a capital offense or a class A felony, arguably precludes the Commonwealth from seeking a lesser included offense instruction at the time of trial.

This possibility raises an intriguing question. If, for instance, pursuant to KRS § 532.030, the Commonwealth elects at the time of the indictment to prosecute the homicide as a capital offense, and if such election precludes the Commonwealth from seeking a lesser included offense instruction, must the judge, in the absence of any evidence adduced by the defendant to justify a lesser included offense instruction, instruct the jury to acquit the defendant if there is reasonable doubt as to the existence of any of the elements required by KRS § 507.020(2)? Suppose, for example, that the defendant was indicted for murder as a capital offense, with the indictment charging that the defendant's act of killing "was intentional and was for profit or hire," as proscribed in KRS § 507.020(2)(a). Suppose further that although the proof was irrefutable, and certainly sufficient to satisfy the reasonable doubt standard, that the defendant intentionally murdered his victim, the prosecution was for some reason unable to demonstrate at trial that the killing "was done for profit or hire." Would the "killer" then go free? Apparently so, if one accepts the interpretation that the election required by KRS § 532.030, which must be made contemporaneous with the indictment, precludes the Commonwealth from seeking a lesser included offense instruction at the time of the trial.

It has been suggested[100] that a practical solution to this

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[99] This provision states:
When a person is convicted of a capital offense he shall have his punishment fixed at death. However, any crime classified as a capital offense may at the discretion of the state be prosecuted as a Class A felony, provided such election to so prosecute is made at the time of the indictment.

[100] Interview with State Senator Michael R. Moloney, in Lexington, Aug. 9, 1974.

dilemma will be that the Commonwealth's Attorney, if he doubts his ability in a given case to prove at trial every element of the capital offense, will simply exercise his prerogative under the statute to try the offense as a class A felony, punishable by twenty years-to-life imprisonment. Still, it seems unlikely that prosecutor's pre-trial evaluatons of their cases will always prove accurate enough to forestall jury applications of Kentucky's death penalty statutes in an all-or-nothing fashion. Nor is it reasonable to assume that such a haphazard practical safeguard could long prevent the invalidation of otherwise unconstitutional statutory provisions.

C. *Abolition*

In the event that KRS § 507.020(2) is held unconstitutional, and in the absence of a declaration that the death penalty is invalid per se, there most likely will be a determined effort to re-enact a death penalty statute in Kentucky. Debates in the respective chambers of the Kentucky legislature over reenactment would surely include, in addition to arguments for the adoption of a plan embodying guidelines in the form of mitigating and aggravating circumstances, renewed calls for the complete abolition of capital punishment in this Commonwealth.

A serious abolition movement would appear to require both an inquiry into the effectiveness of capital punishment in achieving the goals of the criminal justice system[101] and a reexamination of the morality of the continued use of the death penalty. The determination of the extent to which the morality of the death penalty should be considered by the legislature alongside its effectiveness, and the selection of standards to be used in the determination of exactly what is and what is not moral, would seem to present vexing problems for any group of legislators. Such questions as whether the social compact envisages a right of the people, collectively through their convenient vehicle, the state, to extinguish the life of one of their number may be incapable of satisfactory answer by statute.

It might be argued that the utilization of the death penalty is merely an exercise in nature's first law, that of survival, since

[101] *See* text accompanying notes 154-164 *infra*.

it is ostensibly through capital punishment that society is protected by the rational elimination of those whose continued existence would pose an intolerable threat to their fellow men. In this sense, capital punishment might be said to effect one of the criminal justice system's commonly accepted goals—isolation.[102] Yet, it cannot be denied that the death penalty, at least when inflicted for murder, assumes many of the attributes of revenge. It has been written that: "We do not arrange for rapists to be sexually assaulted, nor burn down the house of arsonists. Yet we think it natural . . . to insist on killing the man who has killed."[103]

The seeming futility of an attempt in a paper such as this, or in even a volume, to capture the essence of the requisites of a morality determination should not, of course, discourage inquiry upon the subject. Indeed, it may be argued that in the coming years the issue of the morality of the death penalty may arise not only upon the consideration by legislative bodies of the sanction's desirability, but also upon the examination of its constitutionality by the judiciary. For, as the Supreme Court has written, the range of reference within which is determined a punishment's cruelty and unusualness must include those "evolving standards of decency that mark the progress of a maturing society."[104]

VI. THE FUTURE OF THE SUPREME COURT'S INTERPRETATION OF THE EIGHTH AMENDMENT

The discussion of whether the new Kentucky statute comports with the guidelines which may be devined from the *Furman* decision will, of course, be rendered moot if in *Fowler v. North Carolina*[105] the Supreme Court declares the death penalty unconstitutional per se. It has been suggested that the *Furman* decision portends the eventual demise of the penalty in all forms. Although only two Justices, Brennan and Marshall, stated flatly their belief that the punishment of death is,

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[102] *See* note 149 *infra*.

[103] L. BLOM-COOPER, THE HANGING QUESTION 6 (1969).

[104] Trop v. Dulles, 356 U.S. 86, 101 (1958).

[105] State v. Fowler, 203 S.E.2d 803 (N.C.), *cert. granted sub nom.* Fowler v. North Carolina, 95 S.Ct. 223 (1974) (No. 73-7031); State v. Sparks, 207 S.E.2d 712 (N.C. 1974), *petition for cert. filed*, 43 U.S.L.W. 3332 (U.S. Nov. 29, 1974) (No. 74-669).

in and of itself, cruel and unusual, Justice Douglas implied as much and several others expressed a possible personal preference for abolition.

In forecasting the future route of the Supreme Court's interpretation of the eighth amendment, it is necessary to examine the law as it has evolved to this time. The decision in *Furman* represents the first direct ruling by the United States Supreme Court on the question of whether the death penalty amounts to a cruel and unusual punishment prohibited by the eighth amendment to the Constitution.[106] The scope of the decision[107] was limited to proscription of the arbitrary manner of sentence selection as provided by the Georgia and Texas laws and did not include an examination by the Court as a whole of the question of whether the death penalty is inherently cruel and unusual. Although the Court heard arguments on that issue on one previous occasion, it decided that case, *Boykin v. Alabama*,[108] on other grounds. However, by its decisions during the past century declaring constitutionally valid the use of a number of particular means of execution, the Court has, of course, tacitly sanctioned the use of death as a penalty.[109]

Fundamental to a discussion of the prospects for the retention of the death penalty in the United States is an examination of the standards or tests which the Supreme Court may choose to employ in order to determine whether capital punishment is per se cruel and unusual. The myriad of concepts discussed in the various opinions in *Furman* clouded rather than cleared the air of doubts as to the tests to be applied under the eighth amendment. One or more of the five majority Justices employed six separate tests[110] to determine a punishment's validity. Public abhorrence,[111] degradation of human dignity,[112] inherently excessive pain and suffering,[113] excessiveness in rela-

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[106] *The Supreme Court, 1971 Term, supra* note 23, at 76.

[107] 408 U.S. at 238.

[108] 395 U.S. 238, 249 n.3 (1969) (Harlan, J., dissenting).

[109] *See* cases cited in *The Supreme Court, 1971 Term, supra* note 23, at 76 n.2.

[110] Wheeler, *supra* note 20, 63.

[111] 408 U.S. at 332. "Public abhorrence" and the other five labels for the six tests were attached by Wheeler, *supra* note 20, at 64-80.

[112] 408 U.S. at 271.

[113] *Id.* at 330.

tion to purpose,[114] unusualness,[115] and arbitrariness,[116] all were enunciated by at least one Justice. Only as to the use of arbitrariness did four of the five majority Justices agree.[117]

It is submitted that although the promise of "arbitrariness" as an eighth amendment test would seem to be a panacea in view of the fact of its near-universal acceptance by the *Furman* majority, a limitation upon its future use, with regard to the issue of the constitutionality per se of the death penalty, lies in its narrow scope. Apparently, arbitrariness refers merely to the manner in which a penalty is applied rather than to the inherent nature of the penalty itself. Therefore, the determination of whether a punishment is constitutional per se would appear to require a test which can be employed under the assumption that the process whereby the penalty is selected or administered is valid.

The potential for use of an arbitrariness test is further diminished by the fact that although four of the majority Justices concluded that the death penalty was applied in an arbitrary manner in the cases under review, each cited a different reason for his conclusions.[118] In short, it appears that to discover the tests which the Court may develop to judge the constitutionality per se of a given penalty, one must look back, past the clouded opinions in the *Furman* decision, to other major junctures in the history of the eighth amendment.

The debate in Congress in 1789 on the meaning of the eighth amendment was miniscule and hardly indicative of that body's legislative intent.[119] Thus, the two most likely sources of direction for a future Court's interpretation of the amendment's language appear to be: 1) the intent of the nearly identical passage found in the eighth amendment's precursor, the English Bill of Rights of 1689, and 2) the tests previously enunciated by the Court in both capital and non-capital cases.[120]

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[114] *Id.* at 279.

[115] *Id.* at 331.

[116] *Id.* at 240, 260-69, 310, 312.

[117] Wheeler, *supra* note 20, at 80.

[118] *Id.*

[119] Mr. Justice Douglas noted that the entire debate in Congress on the eighth amendment consisted of one transcribed page in the *Annals of Congress*. 408 U.S. at 244 (Douglas, J., concurring).

[120] Granucci, *"Nor Cruel and Unusual Punishments Inflicted": The Original Meaning*, 57 CAL. L. REV. 839, 855 (1969).

A. *The English Bill of Rights of 1689*

In the wake of the infamous Bloody Assizes, a series of "pseudo trials that followed Monmouth's feeble attempt to seize the throne"[121] of England during the reigns of Charles II and James II in the latter part of the 17th Century,[122] and at a time when the penalty for treason in England consisted of the following torturous chain of events:

> 1. That the offender be drawn to the gallows. . . . 2. That he be hanged by the neck, and then cut down alive. 3. That his entrails be taken out and burned while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the King's disposal[;][123]

there was enacted by Parliament on December 16, 1689, a declaration "for the vindication of and asserting . . . ancient rights and liberties"[124] including "[t]hat excessive bail ought not to be required; nor excessive fines imposed; nor cruel and unusual punishments inflicted."[125] This passage, written into the Virginia Declaration of Rights of 1776, and adopted nearly verbatim as the eighth amendment to the Constitution of the United States,[126] has been said to constitute, in view of the events which led up to it, ". . . first, an objection to the imposition of punishments which were unauthorized by statute, and second, a reiteration of the English policy against disproportionate penalties."[127]

It has been urged that the eighth amendment must, because of its nearly identical language, be read in the light of the foregoing passage of the English Bill of Rights.[128] Furthermore, it has been said that, when properly interpreted, the eighth amendment proscribes more than merely those specific punishments which may be identified as intended by it for prohibi-

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[121] 408 U.S. at 254 (Douglas, J., concurring), *quoting from* I. BRANT, THE BILL OF RIGHTS 154 (1965).

[122] 408 U.S. at 254 (Douglas, J., concurring).

[123] 4 W. BLACKSTONE, COMMENTARIES *92.

[124] Granucci, *supra* note 120, at 855.

[125] *Id.*

[126] *Id.* at 853.

[127] *Id.* at 860.

[128] *Id.*; Wheeler, *supra* note 20, at 64 n.7.

tion. Under this theory, the amendment forbids any punishment which, though not specifically the target of its framers, is found to run contrary to the spirit of either of the two principles of the English Bill of Rights—(1) punishments unauthorized by statute or (2) punishments disproportionate to the offense for which they are inflicted.[129]

If this interpretation of the function of the eighth amendment is correct, it is clear that since the death penalty is in fact authorized by the statute of 28 states, it is constitutionally valid, unless its effect is to punish to an extent disproportionate to the offense for which it is inflicted. This view finds support in *Weems v. United States*,[130] where the Supreme Court wrote: "It is a precept of justice that punishment for crime should be graduated and proportioned to the offense".[131] The Court's opinion in *Weems* thus apparently adopted the view expressed earlier in Justice Field's dissent in *O'Neil v. Vermont*[132] that the eighth amendment prohibits "punishments which by their excessive length or severity are greatly disproportionate to the offense charged."[133]

A further examination of the Court's interpretation of the eighth amendment prior to *Furman*, in response to challenges to both the manner of carrying out the death penalty[134] and to the inherent qualities of certain non-capital punishments,[135] reveals that while the Court has never clearly, concisely, and exhaustively set forth the standards required to determine a given punishment's constitutionality, it has enunciated several broad concepts which have guided its actions in particular cases. By dicta, "unnecessary" pain[136] and cruelty[137] have been proscribed, as has "inhumane and barbarous" treatment.[138] Punishments which are not "graduated and proportioned to the offense" were proscribed in *Weems*,[139] and those which vio-

[129] *Id.*
[130] 217 U.S. 349 (1910).
[131] *Id.* at 367.
[132] 144 U.S. 323, 337 (1892) (Field, J., dissenting).
[133] *Id.* at 339-40.
[134] *See* notes 136-38 *infra*.
[135] *See* notes 139-43 *infra*.
[136] Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459 (1947).
[137] Wilkerson v. Utah, 99 U.S. 130 (1878).
[138] *In re* Kemmler, 136 U.S. 436 (1890).
[139] Weems v. United States, 217 U.S. 349 (1910).

late the "dignity of man" according to the "evolving standards of decency" of society were said to be cruel and unusual in *Trop v. Dulles*.[140] Moreover, the Court in *Robinson v. California*[141] voided a punishment because it was "universally thought"[142] in "the light of contemporary human knowledge"[143] to be cruel and unusual.

One commentator has complained that although *Weems* and *Trop* established ". . . the [Eighth] Amendment restricts both the amount and nature of permissible punishment, . . . neither case . . . clearly established the tests to be applied in examining the amount or nature of the challenged punishment."[144]

On the other hand, these and other cases *do* indicate that the Court may negate punishments (1) to which public attitudes are sufficiently adverse, and (2) which exact too great a toll when compared with the harm of the offenses for which they are inflicted.

B. *Analysis of Various Eighth Amendment Tests*

It is readily apparent from an examination of the Supreme Court's eighth amendment cases that some enormously difficult questions are raised and left unanswered by the Court's sparse and enigmatic interpretations. For example, it might be asked: What, exactly, is meant by the Court's use of the term "disproportionate"? How can it be determined whether a given punishment is disproportionate to the offense for which it is imposed? Also, when may it be proclaimed that our society's "standards of decency" have evolved, or that public opinion has, indeed, become "enlightened by a humane justice," to the point of abhorrence of the death penalty?

1. *The Standards of Decency Test*

It is submitted that one of the reasons for the Court's failure thus far to enunciate tests by which to determine

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[140] Trop v. Dulles, 356 U.S. 86 (1958).

[141] 370 U.S. 660 (1962).

[142] *Id.* at 666.

[143] *Id.*

[144] Wheeler, *Toward a Theory of Limited Punishment*, 24 STAN. L. REV. 838, 841 (1972).

whether the "dignity of man" or his sense of "humane justice" suffer due to the infliction of the death penalty may be that judges are no more able than anyone else to feel the pulse of a nation of 212 million people, much less to monitor so complicated a psychological and emotional response as "dignity." While it might be true, as Mr. Jefferson wrote, that "[w]e might as well require a man to wear still the coat which fitted him when a boy, as civilized society to remain ever under the regimen of their barbarous ancestors,"[145] it is doubtless also correct that affronts to the "standards of decency" of our society or to the "dignity of man" are probably more susceptible to identification and application in the treatises of clerics or philosophers, or better still by every individual at his own leisure, than by a poll of nine judges in a conference room. At any rate, even if public opinion is a valid constitutional consideration, surveys during the past decade have demonstrated a steadily increasing approval by Americans of the use of the death penalty.

The concept that public attitudes should form a basis for determining what is cruel and unusual is by now a well-ingrained principle of constitutional law, having been recognized in *Weems*, *Francis*, *Robinson*, and *Trop*.[146] It appears to provide a sufficient rejoinder for those who assert, as did Justice Black in his concurrence to *McGuatha v. California*,[147] that the infliction of death does not violate the eighth amendment for the reason that it must be assumed that the framers of the amendment did not intend to prohibit capital punishment as "cruel and unusual" since it was in common use at that time and they did not specifically condemn it. Even so, the determination of *how* those attitudes shall be ascertained or measured has never been definitively made by the Court. Nevertheless, any concept predicated upon the assumption that ad hoc calibrations of public opinion by the Supreme Court are superior to legislative enactments as a means of monitoring public attitudes ought to be discarded.

The Court's role in the determination of policy, and the deference it should observe toward its co-equal branch, the

[145] 408 U.S. at 409 n.7 (Blackmun, J., dissenting).
[146] *See* text accompanying notes 136-141 *supra*.
[147] 402 U.S. 183, 226 (1971).

legislature, were enunciated in Justice Blackmun's dissent in *Furman*.

> Our task here, as must so frequently be emphasized and re-emphasized, is to pass upon the constitutionality of legislation that has been enacted and that is challenged. This is the sole task for judges. We should not allow our personal preferences as to the wisdom of legislative and congressional action, or our distaste for such action, to guide our judicial decision in cases such as these. The temptations to cross that policy line are very great. In fact, as today's decision reveals, they are almost irresistible.[148]

Thus, the prompt action by legislatures in 28 states to re-enact the death penalty after *Furman* should demonstrate that, at least in those states, public opinion has *not* evolved to the point of abhorrence of the death penalty.

2. *The Disproportionateness Test*

What is meant by the term "disproportionate"? Although Justice Field's dissent in *O'Neil* seemed to define disproportionate as "excessive in length or severity,"[149] Justices Brennan and Marshall in *Furman* expressed the view that "disproportionateness" and "excessiveness" are not synonymous terms.[150] They asserted that a punishment, although it is excessive if it is disproportionate to the offense for which it is imposed, may *also* be excessive if it serves no purpose more effectively than would some less severe punishment.[151] For example, a punishment of death for the theft of a chicken would undoubtedly be considered by reasonable minds to be excessive because it is disproportionate to the offense. However, a punishment of one year in prison, even if not disproportionate to the offense of chicken stealing, nevertheless would be considered excessive in the view of Justices Brennan and Marshall if it were the case that a sentence of only six months in jail would serve equally well the goals of the criminal justice system.

At this point, it might be added that a simple reading of

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[148] 408 U.S. at 411.

[149] 144 U.S. at 340 (Field, J., dissenting).

[150] 408 U.S. at 280.

[151] *Id.*

the eighth amendment itself should allay the notion that "excessiveness" is the key to a demonstration of the invalidity of a punishment under the eighth amendment. Indeed, if its framers had intended that the constitutionality of a punishment should turn upon whether it could be deemed "excessive," such a result could have been achieved simply by providing that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor *excessive* punishments inflicted."[152]

One is led to inquire: Is a particular punishment cruel and unusual (even though it cannot be said to be disproportionate to the offense) simply because it fails to better achieve the purposes of the criminal justice system than would a lesser penalty? In other words, must the Court, to find a punishment constitutional, conclude that it is the least severe punishment that will achieve a given set of criminal justice system goals? These questions, although not yet definitively answered by the Supreme Court, beget yet another inquiry: Even accepting the commonly asserted goals of our penal system—punishment through retribution, and the prevention of further criminal conduct through isolation, rehabilitation, and deterrence[153]—are our courts equipped to handle the difficulties which would beset their efforts to draw fine distinctions between the relative effects—especially the deterrent effect—of the death penalty and life imprisonment?

In a very real sense, the issue of the comparative deterrence of the death penalty and life imprisonment is the focus of the capital punishment debate. The question is not whether the death penalty, in an absolute sense, deters proscribed behavior. Rather, the question "is that of marginal deterrence—whether it is a more effective deterrent than the sanction of long imprisonment."[154]

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[152] Instead, the eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

[153] Wheeler, *supra* note 144, at 845 states:

> The commonly accepted justifications for the punishment of criminals are retribution for wrongdoing and prevention of undesired conduct. The latter, generally referred to as the utilitarian theory of punishment, is often subdivided into the categories deterrence, rehabilitation, and isolation.

[154] F. ZIMRIG AND G. HAWKINS, DETERRENCE 14 (1973) [hereinafter cited as DETERRENCE].

On the relation between the severity of a threatened penalty and its deterrent effect, it has been written that:

> It seems reasonable to conclude . . . that as a general rule, though not without exceptions, the general preventative effect of the criminal law increases with the growing severity of penalties. The theory of increased penalties as a marginal deterrent is simple and straightforward: all other things being equal, an increase in the severity of consequences threatened should reduce the number of people willing to run the risk of committing a particular criminal act, in much the same way that increases in the price of a product will decrease the public demand for it.[155]

However, the price-theory analogy contains a built-in weakness:

> An important difference between penalty and price is that a potential buyer will presumably know the price of a product before making a purchase decision. No such assumption can be made about the potential criminal's knowledge of the consequences threatened for a particular behavior. Ignorance about penalties, which is widespread among potential criminals, may lead to irrational conduct and negate the possibility that change in penalties will operate as a marginal deterrent for the ignorant.[156]

The same difficulties which have puzzled and divided criminologists would beset judges attempting to measure the death penalty's deterrent effect. Almost all commentators have agreed that no empirical data has yet been assembled to demonstrate that the existence of a law authorizing the death penalty operates to deter the commission of those offenses. It has been suggested that such a compilation seems impossible for even the most astute statistician, since it would appear to require the enumeration of passive events—namely, decisions to refrain from criminal activity because of the fear of the death penalty.[157] Some authorities, with a minimum of statistical support, assert the absence of a death penalty deterrent effect. For example, Justices Brennan and Marshall intimated their

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[155] *Id.* at 194-95.

[156] *Id.* at 195.

[157] D. LeMaster, Issues Confronting the 1974 Kentucky General Assembly 11 (Ky. Leg. Research Comm'n Infor. Bull. No. 105, 1973).

beliefs that capital punishment does not serve as a deterrent.[158] Others contend that comparative homicide rates for years when laws did, and did not, respectively, authorize capital punishment for murder demonstrate the absence of a deterrent effect of the death penalty, since some comparisons reveal lower homicide rates in years *after* the repeal of the death penalty than in those years in which the death penalty was in force.[159] One enormous gap in these studies, however, is the lack of any explanation of the effect of the myriad of other factors which affect, to a greater or lesser extent, changes in the homicide rate.

Some commentators view the ascertainment of the deterrent effect of the death penalty as a necessary step in the determination by the courts of its "excessiveness," on the ground that plausible reasons may exist to gauge severity in terms of deterrence as well as retribution.[160] "Since the needless infliction of pain is more cruel than the necessary infliction of pain, the efficacy of a particular punishment is an issue the court cannot avoid."[161] In any event, it seems clear that a totally satisfactory calculation of the death penalty's deterrent effect is presently unavailable. Furthermore, even if the penological effect of a given punishment, like the precise nature of the public's opinion on a given subject, were susceptible of precise measurement, such determinations are among those which courts are not as well suited as legislatures to make.

While it is doubtless true, as Chief Justice Burger wrote in his *Furman* dissent, that a "sober analysis" of current sentencing and correctional procedures in our criminal justice system is long overdue,[162] he is equally correct in his assertion that the eighth amendment "is not addressed to social utility and does not command that enlightened principles of penology always be followed."[163] The eighth amendment prescribes a minimum standard for punishments; they must not be "cruel and unusual." It does not place upon the legislature the affirmative

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[158] 408 U.S. at 301 (Brennan, J., concurring); 408 U.S. at 349 (Marshall, J., concurring).

[159] DETERRENCE, *supra* note 154, at 189.

[160] *The Supreme Court, 1971 Term, supra* note 23, at 81.

[161] *Id.* at 82.

[162] 408 U.S. at 402.

[163] *Id.* at 394.

duty to provide only those penalties which, in penological theory, are currently deemed the most effective.

It is submitted that, because the relative deterrent effects of capital punishment and protracted imprisonment apparently cannot be ascertained by reference to judicially manageable standards, and because judges cannot be presumed to be, ipso facto, criminologists, the Supreme Court should reject the view espoused by Justices Brennan and Marshall in *Furman* that the punishment for a given offense may be excessive and unconstitutional simply because some penalty of lesser magnitude than the prescribed punishment would serve equally well both the aim of deterrence and the other commonly accepted goals of the criminal justice system. If "excessiveness" is to be employed at all as a test of the constitutionality of punishments under the eighth amendment, then the Court should retain, as a point of departure in the development of any new rules, Justice Field's classic concept that views a punishment as excessive, and thus cruel and unusual, only if it can be said to be disproportionate to the offense for which it is imposed.

VII. CONCLUSION

The foregoing constitutes an attempt to measure the impact of *Furman v. Georgia* upon the previously existing capital punishment laws of Kentucky and other states; to catalogue the subsequent enactment by the legislatures of 28 states of laws designed to restore the death penalty, ostensibly within the guidelines established by the *Furman* decision; and to evaluate *Furman*, prior eighth amendment decisions by the Supreme Court and the background of the eighth amendment itself. This has been done with a view toward determining whether the nine separate opinions by the Justices in the *Furman* case represent only the first step toward an absolute judicial abolition of the death penalty. While it may be true, as predicted[164] by former Justice Tom Clark, that the Supreme Court will delay action for as long as it conveniently can in the hope that either the Congress or the state legislatures will satis-

[164] Interview with former Associate Justice Tom Clark, Oct. 24, 1974.

factorily resolve the eighth amendment questions surrounding the retention of the death penalty, it is clear that if "the other shoe falls" and the Court eventually holds that the death penalty is, in itself, unconstitutional, then the Court will have turned its back on history, and mankind will have moved into a new era. It remains to be seen, however, whether (to adopt Mr. Jefferson's analogy),[165] in changing from "the jacket which fitted him as a boy," mankind will have changed to a garment which is, perhaps, too large.

David LeMaster

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[165] *See* Letter from Thomas Jefferson to Samuel Kevcheval, July 12, 1816 in 15 THE WRITINGS OF THOMAS JEFFERSON 40-42 (Memorial ed. 1904) (quoted by Blackmun, J.), 408 U.S. at 409 n.7.