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# The Death Penalty After Furman

By Laurin A. Wollan, Jr.\*

## THE *Furman* DECISION

*Furman v. Georgia*,<sup>1</sup> the Supreme Court's long-awaited ruling on the death penalty, virtually stripped the states and federal government of the power to impose that punishment, a sanction which they had always had before and which few of the states had determined to abolish.<sup>2</sup> Sentiment in support of the death penalty remains strong, however, and suggests that legislative reinstatement of the death penalty is a realistic political possibility in many states.<sup>3</sup> Moreover, reinstatement of the death penalty is theoretically a constitutional possibility as well, since only two of the *Furman* majority, Justices Brennan and Marshall,

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1. 408 U.S. 238 (1972), referred to herein as *Furman*.

2. The *per curiam* opinion stated: "Certiorari was granted limited to the following question: 'Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violations of the Eighth and Fourteenth Amendments?' 403 U.S. 952 (1971). The Court holds 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." (Furman at 239-40). This has been widely taken to mean the abolition of capital punishment. Mr. Justice Blackmun put it this way: "Not only are the capital punishment laws of 39 states and the District of Columbia struck down, but also all those provisions of the federal statutory structure that permit the death penalty apparently are voided." (Furman at 411). The few mandatory death sentencing systems may not, however, have been reached by the decision because the cases before the Court were of discretionary systems and the various opinions spoke only to the discretionary rather than the mandatory systems. See the opinion of Mr. Justice Stewart, Furman at 307. For mandatory death penalties, see the statutes cited at note 204, 47 ST. JOHN'S LAW REVIEW 107, at 139.

3. The voters of Illinois defeated abolition by a two-to-one ratio when it was presented as a separate constitutional provision in 1970. The Chief Justice cited polls showing from 1966 to 1969 an increase from 42% to 51% of those favoring capital punishment and a decline from 47% to 40% of those opposing it. Forty-six states have recently enacted death penalty legislation or are considering it. *Congressional Quarterly*, March 17, 1973, pp. 602-3.

argued that the constitution mandates complete abolition of the death penalty, while the other three of the majority found deficiencies the way in which capital punishment had been administered. Hence, the majority, indeed seven out of nine justices, did not reach the issue of abolition of capital punishment *per se*.<sup>4</sup> Thus, the states and federal government appear to have a choice between perpetuating the *de facto* abolition effected by *Furman* and reinstating the death penalty by legislation in accordance with the requirements of that case. Severe as those requirements are, they appear to accommodate well-conceived sentencing systems of both the mandatory and discretionary variety.<sup>5</sup>

Much less well known than the arguments for and against the death penalty are the principles and mechanisms of such sentencing systems. These alternatives involve certain measures for tightening the decision-making process involved in imposing the penalty, principally the two indicated by the Chief Justice in his invitation to the legislatures:<sup>6</sup>

Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with the Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.

The two "pivotal" opinions are those of Mr. Justice Stewart and Mr. Justice White. They concluded that the system of absolute jury discretion in sentencing had yielded death sentences with such infrequency and irrationality as to be cruel and unusual and therefore in violation of the Eighth Amendment. The Stewart opinion stresses the irrationality of the imposition of the death penalty: "struck by lightning"—"a capriciously selected random handful"—"so wantonly and so freakishly imposed."<sup>7</sup> White opinion the infrequency: "such infrequency that the odds are now very much against imposition and execution"—"so seldom imposed"—"so rarely invoked"—"so seldom invoked"—"seldom-enforced laws"—"so infrequently imposed"—"exactd with great infrequency."<sup>8</sup> An obvious inference of a way to increase the ratio of

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4. Justices Douglas, Stewart and White rested their opinions on the results of the administration of capital punishment; the four dissenting Justices would have permitted the death penalty systems to stand.

5. This is a prediction that not all share. See *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L. SC. 2, which calls for fundamental reforms as the prerequisite to reinstatement of capital punishment, pp. 8-9.

6. *Furman* at 400.

7. *Furman* at 309, 309-10.

8. *Furman* at 311-14, *passim*.

death sentences to convictions and thereby overcome infrequency and irrationality is a mandatory approach by which convictions of capital offenses necessarily lead to death sentences, so that the ratio is one-to-one, or a death sentence for every conviction. Such a system would preclude the infrequency or irregularity that has been yielded by the "untrammelled discretion" permitted by *McGautha v. California* and in effect throughout the nation in the death penalty states and in the federal government.<sup>9</sup>

The Stewart/White position has accordingly been taken to call for a mandatory system. The Chief Justice observed that: ". . . *since Mr. Justice White allows for statutes providing a mandatory death penalty for 'more narrowly defined categories' of crime, it appears that he, too, is more concerned with a regularized sentencing process, than with the aggregate number of death sentences imposed for all crimes.*"<sup>10</sup> Mr. Justice Blackmun similarly reads their opinions: "If the reservations expressed by my Brother Stewart (which, as I read his opinion, my Brother White shares) were to command support, namely, that *capital punishment may not be unconstitutional so long as it be mandatorily imposed . . .*"<sup>11</sup> Likewise, Mr. Justice Powell remarks: "Mr. Justice Stewart . . . indicates that *statutes making capital punishment mandatory* for any category of crime, or providing some other means of assuring against 'wanton' and 'freakish' application . . ., *would present a difficult question that he does not reach today.* Mr. Justice White, for somewhat different reasons, appears to come to the conclusion that *a mandatory system of punishment might prove acceptable.*"<sup>12</sup>

Interpretations that conclude that the Stewart/White position calls for a mandatory approach are unwarranted, however. Although Justices Stewart and White emphasize the infrequency and irregularity of the death penalty, there is nothing in the phrases quoted above or elsewhere in either of their opinions to suggest that they would be satisfied only by a perfect correspondence of convictions and death sentences. On the contrary, each opinion, taken as a whole or phrase by phrase, indicates only that instead of low frequency or irrationality, a certain degree of rationality will do; as Justice White put it, at least such a

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9. 402 U.S. 182 (1971), hereinafter referred to as *McGautha*. "In light of history, experience, and the present limitations of human knowledge, we find it 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." *McGautha* at 207.

10. *Furman* at 399, n.28 (emphasis added).

11. *Furman* at 413 (emphasis added).

12. *Furman* at 415-16, n.1 (emphasis added).

degree or pattern as will admit of some "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."<sup>13</sup>

Thus, the pivotal opinions of the *Furman* majority do not call for a mandatory approach to the exclusion of the discretionary approach. Moreover, there is manifest in the dissenting opinions a deep hostility to the death penalty, explicitly so in the Blackmun and Burger dissents and by implication in the concurrences in the latter by Justices Powell and Rehnquist. The Chief Justice, in his disavowal of the Court's "legislative" power, said of the death penalty that if the Court had such power to legislate, he would join Justices Brennan and Marshall in abolishing it "or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes." After expressing his doubt as to the efficacy of standards and his consequent expectation that the only "real change" would result from a truly mandatory system (in which jury nullification was precluded), he goes on to say:

If this is the only alternative that the legislatures can safely pursue under today's ruling, I would have preferred that the Court opt for total abolition.

After tracing the history of the movement away from mandatory sen-

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13. *Furman* at 313. The White opinion contains several statements that seem to lend themselves to support of a mandatory system only, but which should not be so taken: "capital punishment statutes under which . . . the legislature does not itself mandate the penalty . . . but delegates to judges or juries the decisions as to those cases, if any, in which the penalty will be utilized"—"this point [of negligible returns] has been reached with respect to capital punishment as it is presently administered . . ."—"the policy of vesting sentencing authority primarily in juries . . . has so effectively achieved its aims that capital punishment as it is presently administered now before us has for all practical purposes run its course." In these and his other statements he has limited his condemnation to the then-present sentencing systems of absolute discretion. Nowhere does he indicate that only a mandatory alternative will do. Justice White's concluding paragraph, which also can be taken erroneously to deal with the merits of the discretionary system, is instead a commentary on the nature of legislative policy, which he says is "necessarily defined not by what juries and judges do in exercising the discretion so regularly conferred upon them." If this is interpreted in the light of his earlier observation that the "legislative will is not frustrated if the penalty is never imposed," his conclusion, that "a jury, in its own discretion and without violating its trust on any statutory policy, may refuse to impose the death penalty no matter what the circumstances of the crime", means that such a manner of implementing policy is ultimately attributable to the legislature, not that discretion is intrinsically fatal to the constitutionality of a death penalty system, apart from any constitutionally defective manner of its implementation.

The "mandatory" interpretation of the pivotal opinions may stem, to some degree, ironically, from the Chief Justice's reading of them, in connection with which he remarks that ". . . since Mr. Justice White allows for statutes providing a mandatory death penalty . . ." But Justice White allows for no such thing: he merely says that such mandatory statutes "would present quite different issues . . . than are posed by the cases before us," namely the issues of mandatory systems and perhaps of the death penalty *per se*. The balance of his opinion is given over to the matter of infrequency.

tences and noting that the argument of the pivotal concurring opinions might imply a reversal of that movement, the Chief Justice stated: "This approach threatens to turn back the progress of penal reform, which has moved until recently at too slow a rate to absorb significant setbacks."<sup>14</sup>

Justice Blackmun expressed even stronger personal revulsion both as to capital punishment itself and the mandatory approach, which he characterized as "regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment." He added, "I thought we had passed beyond that point in our criminology long ago."<sup>15</sup> Justices Powell and Rehnquist concurred in the dissenting opinion of the Chief Justice, thereby indicating that they share to some extent his hostility to capital punishment.

#### THE IMPORT OF THE DECISION

Capital punishment and its mandatory imposition thus have no defenders on the *Furman* Court. The significance of this is that standing between the death penalty and its unconstitutionality is not a preference for the death penalty as a policy, but instead, the room for it implicit in the pivotal opinions, coupled with the devotion of the dissenters to certain canons of constitutional jurisprudence, along with their preference for the discretionary rather than the mandatory approach. The prudent legislative course would therefore seem to be to design a system that at least four members of the Court, the dissenters, have looked upon with some favor, namely the discretionary approach, so long as it will meet the requirements implicit in the Stewart and White opinions. In other words that discretion must be so stringently constrained that the death sentences it yields will be sufficiently frequent and rational in their imposition. The other course would be the mandatory approach, so long as it will meet the requirements explicit in the dissenting opinions, that is to say, that it be narrowly applicable. These options pose the fundamental choices that face the legislative policy-maker, choices best made in the light of certain devices consistent with both approaches, which will tighten the decision-making process of sentencing.

In addition, the pattern of consequences on which the *Furman* majority relied for its inferences of infrequency and irrationality are of little or no use to the Court for purposes of dealing with death penalty

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14. *Furman* at 375, 401, 403.

15. *Furman* at 413.

schemes in the future.<sup>16</sup> The next capital punishment case to reach the Court will come accompanied only by a prospect of consequences, not an extensive, historical pattern such as the one that served the Court's analytical purposes in *Furman*. Thus, a retentionist alternative, to be constitutional, must be one that promises in its administration either greater frequency of death sentences or a "meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not." In the absence of results, the conceptual qualities of the retentionist alternatives are of the utmost importance.<sup>17</sup>

One approach to lessen the infrequency of the death sentence is narrowing the range of offenses subject to the death penalty, so as to remove from its scope certain crimes, such as rape, in which it is most infrequently imposed, and felony murder, in which there are serious difficulties posed by the unintended quality of the homicide and the vicarious liability of co-felons. This will have the effect of increasing the frequency and rationality of death sentences for the remaining capital offenses.<sup>18</sup>

Narrowing the range of capital offenses can be done by scaling down offenses to subcategories, to narrower redefinitions, according to circumstances of the case, and to abolition of the death penalty as to certain capital offenses, as illustrated above. In Illinois, for other examples, the capital offenses are Murder, Treason, and Aggravated Kidnapping. Murder could be narrowed by limiting the death penalty to its first two categories, thus abolishing it as to felony murder; treason could be scaled down by redefining its capital aspect to wartime; and aggravated kidnapping could be scaled down by complete abolition.<sup>19</sup>

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16. The statistics appear at note 15 of Mr. Justice Douglas' opinion, notes 40-47 of Mr. Justice Brennan's opinion, notes 149-151 and the appendices to Mr. Justice Marshall's opinion. They are not without limitations, as the Chief Justice pointed out. *Furman* at 389-90, n.12.

17. Ideally, the alternatives to abolition would be developed after the sort of comprehensive study suggested by the Florida Governor's Committee to Study Capital Punishment, see note 15 *supra*, a study which was not made in Florida itself prior to enactment of a death penalty system. See Ehrhardt and Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility*, 64 J. CRIM. L. SC. 10 (1973). Short of such studies and under the political pressures to enact such legislation, conceiving the retentionist alternatives requires a coupling of the best of what has gone before with considerable speculation as to how the alternatives will work.

18. This will be so provided that such offenses as these have yielded relatively few death sentences in proportion to the total. By eliminating the offenses in which the death sentence is so infrequently imposed, the death sentences imposed in the remaining offenses will be higher in frequency.

19. In Illinois, the provision on murder is as follows:

A person who kills an individual without lawful justification commits murder if, in performing the acts which cause the death:

(1) He either intends to kill or do great bodily harm to that individual or another, or knows that such acts will cause death to that individual or another; or

Redefinitions could further narrow murder to such specific varieties as skyjack-murder, murder-for-hire, and so forth.<sup>20</sup> If such methods could substantially narrow the scope of offenses now subject to the death penalty, the frequency of imposition of the sentence should increase under a discretionary system and the mandatory approach would be more acceptable than if the death penalty were simply mandated for all present capital offenses. Of this approach the Chief Justice said, "If . . . the crimes can be more meticulously defined, the result cannot be detrimental."<sup>21</sup>

This is so at least up to the point at which the "narrowing" method reduces the range of capital crimes to the rarest kinds, such as assassination of the President. At such a point, the death penalty comes to have at most a symbolic value because its deterrent value is so limited, and its imposition would partake of ritual in which its deterrent function is sacrificed to form. It would cease to be an operative part of the criminal justice system. At such point it may well be, as Mr. Justice White said, that "the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."<sup>22</sup> Where to locate the point along the spectrum from blanket mandate to virtual abolition depends ultimately on the sensitivity of the citizenry to the sanctions of the criminal justice system, in particular to the power for the public of a nearly symbolic sanction, and thus requires careful consideration of the jurisdiction's criminal law institutions, judicial traditions, capital punishment experience and public sentiment, among other things—very nearly its entire culture—in the light of the *Furman* case.<sup>23</sup> So long as the point is short of atten-

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(2) He knows that such acts create a strong probability of death or great bodily harm to that individual or another; or

(3) He is attempting or committing a forcible felony other than voluntary manslaughter. (Ill. Rev. Stat. Ch. 38, Section 9-1(a)).

A "scaling down" was apparently contemplated by some of the draftsmen of this section:

There was some feeling in the Committee that the death penalty should be applied only to the most heinous types of murder, which are provided for in subsection (a). In fact, one of the prime reasons for differentiating between the various types of murder in the three subsections was to permit a variation in the penalty. (Committee Comments, Ch. 38, § 9-1, p. 12).

20. An example, cast in the form of a standard, however, is the following provision of H.R. 18, 78th General Assembly, State of Illinois (1973): "the murdered individual was killed as a result of the intentional destruction, alteration, disruption or adulteration of community water, electric, gas, sewage or transportation facilities, or the contamination of liquid or solid food products intended for community consumption . . . ."

21. *Furman* at 400-1.

22. *Furman* at 313. Its retributive and incapacitating functions are not necessarily affected by narrowing the range to such a point.

23. Such an analysis, touching upon the dimensions of the problem illustrated by the following report, is beyond the present article: Kenya adopted a mandatory death penalty for armed robbery, about which it was said, "In a sense the law also seems to



uation of its functions, however, "the result cannot be detrimental."

So, too, the bifurcated trial should have an effect not necessarily of increasing the frequency of death sentences, but of making its imposition more rational.<sup>24</sup> Such a system would work to rationalize sentencing and its patterns, other things being equal, by putting over to the second stage the sentencing decision, thus reducing the distortion that can result from the hard choice (made by some but not all defendants) in the conventional trial of disclosing or not disclosing the circumstances relevant to sentence but not necessarily relevant to guilt. The two-stage trial permits the jury to decide the question of guilt or innocence, with reference to evidence pertinent only to that question, rather than with reference as well to evidence introduced to influence the sentencing decision. Evidence of the latter kind, germane to the sentence, would be reserved for introduction by prosecution and defense in the second stage of the trial when it does not concern—or jeopardize—acquittal. By posing this choice and keeping certain information out of consideration, at least with the unevenness that results from the exercise of the choice by some defendants and not others and never by the prosecution, the conventional trial has surely resulted in a degree of irrationality in death sentences, a degree that can be reduced by the two-stage trial.

Another rationalizing mechanism is a system of screening out certain cases for which the death penalty is generally agreed to be inappropriate, as when the accused is too young to be so sentenced, but which might fail to influence the judge or jury in the circumstances of a particular case. Accordingly, the judge would have to impose a life sentence if the accused were under eighteen years of age when the offense was committed. Similarly, mental or physical condition could be a basis for leniency, as could be the mitigating factors revealed by evidence at the first stage of trial, if incontrovertible.<sup>25</sup>

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reflect widespread anger toward thieves and robbers across much of the African continent . . . . However, it is not so much concern about tourists as deeply rooted cultural patterns that fix African attitudes toward crime . . . . As people from different tribes have crowded into the cities in the last decade, old social patterns and sanctions have weakened, resulting in 'modern' types of crime. So deep-seated are old attitudes toward theft that the urban poor have not accepted such crime with the resignation characteristics of American ghettos." N.Y. Times, April 6, 1973, at 9, col. 1.

24. According to the Model Penal Code's formulation:

Unless the Court imposes sentence [under the provision for exclusion of the death sentence], it shall conduct a separate proceeding to determine whether the defendant shall be sentenced for a felony of the first degree or sentenced to death. American Law Institute, Model Penal Code, Proposed Official Draft, 1962, Section 210.6(2).

25. According to the Model Penal Code's formulation:

When a defendant is found guilty of murder, the Court shall impose sen-

There are certain other ways to tighten the decision-making process, such as requiring a written explanation of reasons when the court imposes the sentence, sentence by a panel of judges, and automatic appeal, to mention a few.<sup>26</sup>

#### THE STANDARDS APPROACH

The most important way to tighten the decision-making process of sentencing, however, is by the use of standards to control the deliberations of the jury or the judge or both. Such standards would indicate the aggravating circumstances under which the death sentence is considered proper, such as previous conviction of murder or violent felony, a history of violent criminal conduct, commission of a contemporaneous murder, creation of great risk of death to several persons in addition to the victim, felony murder, murder-for-hire, murder of a law enforcement officer, and murder of a police official. Mitigating circumstances under which the death sentence is considered improper, such as youth, mental condition, necessity, and complicity with slight participation would be enunciated as well.<sup>27</sup>

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tence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances . . . was established by the evidence at the trial or will be established if further proceedings are initiated [under the provision for a second-stage trial]; or

(b) substantial mitigating circumstances, established by the evidence at the trial, call for leniency; or

(c) the defendant, with the consent of the prosecuting attorney and the approval of the Court, pleaded guilty to murder as a felony of the first degree; or

(d) the defendant was under 18 years of age at the time of the commission of the crime; or

(e) the defendant's physical or mental condition calls for lenience; or

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt. American Law Institute, Model Penal Code, Proposed Official Draft, 1962, Section 210.6(1).

26. A bill introduced in Illinois contains the following provision:

After a sentence of death has been imposed for a conviction under this Section, there shall be an automatic review of that sentence by the Parole and Pardon Board following all judicial review for the purpose of such Board making a recommendation to the Governor for his executive clemency reducing such death sentence to life imprisonment if by a majority vote such Board so recommends. . . . No sentence of death under this Section shall be executed until the Parole and Pardon Board has held its automatic review of sentence, made its recommendations to the Governor either for or against such executive clemency and the Governor has acted on such recommendations by written acceptance or denial of them . . . . H.B. 20, 78th General Assembly, State of Illinois, 1973, P.3.

27. According to the Model Penal Code formulation:

In the proceeding [of the second stage], evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime. The defendant's character, background, history, mental and physical condition any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) . . . .

(3) Aggravating Circumstances.

The standards approach is in some respects the same as the redefinition or classification of murder. Justice Harlan once said, and the Chief Justice quoted him approvingly, that "there is no fundamental distinction" between the standards approach and those traditional ways of accommodating murder to jury nullification, to what juries do in defiance of the law, in other words.<sup>28</sup> But that is fully true only with respect to the objective kind of jury-guidance standard that sets apart certain murders according to fairly definite factors such as the status of the victim (public official, police officer, prison guard); the kind, as distinguished from the nature, of the transaction (skyjacking, murder-for-hire); the quantity of the killing (multiple murders); the murderer's background (previously convicted murderer); or the murderer's status (life term).

These standards constitute a redefinition; they thereby suggest the problem the Royal Commission put this way:<sup>29</sup>

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(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 committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

(4) 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.

28. McGautha at 206, n.16; Furman at 400, n.30.

29. Royal Commission on Capital Punishment, 1949-1953, *Report*, ¶ 498, p. 173.

There are strong reasons for believing that it must inevitably be found impracticable to define a class of murders in which alone the infliction of the death penalty is appropriate. The crux of the matter is that any legal definition must be expressed in terms of objective characteristics of the offence, whereas the choice of the appropriate penalty must be based on a much wider range of considerations, which cannot be defined but are essentially a matter for the exercise of discretion.

The objective standards listed above are in the realm of legal definition. Standards having to do with the quality or nature of a murder, on the other hand, are in the realm of the "much wider range of considerations, which cannot be defined." These are matters of brutality, viciousness, and the Model Penal Code's aggravating circumstance that "the murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity." Thus, the sentencing decision under standards of these two different kinds is in reality a finding of guilt or innocence of a further-defined murder for which the death sentence is appropriate by definition, under the objective standards; or a finding that the death penalty is appropriate or not, under the subjective standards. Troublesome is the limitation inherent in any attempt to articulate all bases for decision in that procedure. For it is surely true, as the Royal Commission declared, that, "No formula is possible that would provide a reasonable criterion for the infinite variety of circumstances that may affect the gravity of the crime of murder."<sup>30</sup> But that, even as qualified by the lawyerlike "reasonable", is an ideal of the sort the law is seldom if ever called upon to achieve. Measured by such an ideal—a formula to cover every circumstance—the standards merit Justice Harlan's disparaging observation that:<sup>31</sup>

They do not purport to give an exhaustive list of the relevant considerations or the way in which they may be affected by the presence or absence of other circumstances. . . . In short, they do no more than suggest some subjects for the jury to consider during its deliberations, and they bear witness to the intractable nature of the problem of "standards" which the history of capital punishment has from the beginning reflected.

But if the standards are conceived more modestly as guidelines, rather than legislative redefinitions, it can be said, as the Model Penal Code Reporter put it, that ". . . it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation . . . .

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30. Royal Commission, ¶ 595, p. 208.

31. McGautha at 207.

Such an enumeration is desirable, we submit, if only as guidelines to the exercise of sound discretion by the court or jury . . . ."<sup>32</sup>

The results of following the objective standards would be anything but necessarily more rational, because their definiteness must leave the judge or jury doubtless that the offense before it is either within or without the kind specified by the standard. Of these standards, if not of the indefinite kind, it cannot be said so absolutely as Justice Harlan put it, that "[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need."<sup>33</sup> A jury might very well need such standards to direct it to decide that the murder of a prison guard, for example, is deemed by the community to be distinct from other murders and more serious, other things being equal. The sentencing authority should gain guidance as well, if not such clear direction, from the less specific, subjective standards, which have more to do with the conscience of the community.

Moreover, intuition and empirical study suggest that the standards approach will generally produce more frequent or more rational capital sentencing. Of the *McGautha* murders, Justice Harlan said, "The ability of juries, unassisted by standards, to distinguish between those defendants for whom the death penalty is appropriate punishment and those for whom imprisonment is sufficient is indeed illustrated by the discriminating verdict of the jury in McGautha's case . . . ."<sup>34</sup> This evaluation by an experienced judge has been borne out by an intensive study of the two-trial system in California operating without standards. The study yielded the following finding: "The juries . . . definitely followed a system of standards, a large percentage of which are 'rational' . . . ."<sup>35</sup>

If standardless sentencing worked so well in California, from the standpoint of rational decision-making, it would seem to go nearly without saying that standards would not only not be detrimental but would be positively beneficial. For if California's capital juries, unguided by standards, "acted neither in a completely rational and constitutionally permissible manner nor in a completely irrational and con-

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32. American Law Institute, Model Penal Code, Tentative Draft No. 9, May 8, 1959, p. 71.

33. *McGautha* at 208.

34. *McGautha* at 221.

35. Comment, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297, 1307 (1969). The study did indicate an economic bias but remarkably no racial bias. Of the former finding, Harry Kalven, Jr., observed, "I am not persuaded that this is an expression of simple class bias and not a reflection of a more subtle concern with personality and character." *Id.* at 1301.

stitutionally impermissible manner,"<sup>36</sup> standards would surely shift the results towards the former end of the spectrum, close enough—if standardless sentencing is not close enough already—to provide some “meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.” It is probable, also, that the results of the objective standards would displace enough of what would otherwise be infrequent or irrational results, that the range of the subjective standards results would be much less vis-à-vis the total number of murders than would result from sentencing in the same cases with “untrammelled discretion.”

#### MANDATORY V. DISCRIMINATORY SENTENCING

If the standards approach, coupled with other measures to tighten the sentencing procedure, holds promise for substantially higher frequency or rationality in the sentencing pattern, the remaining questions are whether or not the finding of circumstances should lead to mandatory or discretionary sentencing and by which agent, jury, or judge or a combination of the two.

First, however, it is important to put the mandatory-discretionary issue into a context broader than the sentencing decision itself; for there, in such a context, the mandatory and discretionary approaches are not diametrically different in effect, however different they are in principle. The mandatory approach may indeed not make much of a practical difference and therefore may be in its consequences more like than unlike the discretionary approach, at least if it and the certainty of its effects are confined to the sentencing phase of the system. This is because there is discretion throughout the criminal procedure, from the charging of crimes (a discretion in which prosecutor and grand jury share) and plea negotiation, through jury nullification, to appellate reconsideration and executive clemency, to say nothing of the discretion of those who determine insanity at any point in the process, let alone the discretion of the accused to shape to some degree his own fate—to cheat the hangman, as it were.<sup>37</sup> Therefore, the certainty of death sentences thought to be achieved by a mandatory approach may be illusory. Complete certainty can be achieved only by measures, at each discretionary point in the procedure, like the one suggested by

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36. *Id.* at 1431.

37. “The importance of the exercise of discretionary power is so obvious that it would not warrant emphasis were it not for the fact that it has commonly been ignored.” Remington, “Editor’s Foreword,” *SENTENCING* (Chicago, 1969), p. XIX. See Davis, *DISCRETIONARY JUSTICE—A PRELIMINARY INQUIRY* (1971).

the Chief Justice with respect to one such point, jury nullification:<sup>38</sup>

Real change could clearly be brought about if legislatures provided mandatory death sentences in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death sentence could only be avoided by a verdict of acquittal.

And thoroughgoing change, or perfect correspondence of *murders* and *executions* (if that is the real issue), can be achieved only by making such acquittals, and every other discretionary step, impossible.<sup>39</sup> This, however, need not mean that it is futile to employ the mandatory approach. *Furman*, after all, is but part of a pattern of constitutional change that is gradually reducing the pervasive discretion by subjecting decision-making to increasingly strict rules which mandate a certainty where there was uncertainty before.<sup>40</sup>

The trouble with mandatory sentencing is nullification, and the trouble with discretionary sentencing is that discretion is exercised. Both phenomena grow out of the sentencing authority's proclivity to express "the conscience of the community," especially if the authority is a jury, which by design and collegial disposition will do so.<sup>41</sup>

The *Furman* dissents grew out of an understanding of the American experience with capital sentencing. One after another, the states drew away from mandatory death sentences because juries refused to "co-operate" with the legislatures and implement policies of mandatory sentencing, and instead found defendants not guilty or guilty of lesser included offenses, depending upon which options were available. The present judicial resistance to standards is rooted in the expectation that juries will respond similarly to a structure of aggravating and mitigating circumstances; that the sentencing authority will find or not find the circumstances according to its perception and understanding of the case and not necessarily according to statute or instruction; and

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38. *Furman* at 401.

39. This notion has no currency as yet but it hovers over the literature nonetheless, as if waiting to come to roost.

40. The due process "revolution" in the administration of criminal justice over the past two decades can be viewed as a displacement of discretionary decision-making by decision-making controlled by rules, with each step—*Escobedo*, *Miranda*, and so forth—constituting a tightening of the procedures.

41. The phrase is Justice Harlan's from *Witherspoon v. Illinois*, 319 U.S. at 519, quoted by Chief Justice Burger in *Furman* at 88. Kalven and Zeisel concluded that "The jury, in the guise of resolving doubts about the issues of fact, gives reign to its sense of values . . . . It is not fundamentally defendant-prone, rather it is non-rule minded; it will move where the equities are. And where the equities are at any given time will depend on both the state of the law and the climate of public opinion." ". . . it must rank as a daring effort in human arrangement to work out a solution to the tensions between law and equity and anarchy." *The American Jury* (Phoenix Ed., 1971), at 495, 499.

further, that as juries come to know the consequences of their finding, they will surely exercise their prerogative of nullification in cases where mercy is called for, as they have before.

#### THE RANGE OF CAPITAL OFFENSES

This is surely because the jury or judge appreciate, as Harry Kalven, Jr., once observed, “. . . how extraordinary must be the decision as to who among those eligible for death is to die.”<sup>42</sup> As a class of those eligible for death broadens to include potentially more and more of such extraordinary—indeed unique—decisions, under a mandatory system the pressure to nullify must increase and under a discretionary system the same pressure must yield a decreasing degree of frequency of sentences. The pattern under both systems would probably not be dissimilar, although somewhat more frequency can be expected under a mandatory system. If there is a rule, it may be that the pressure to nullify is proportional to the breadth of the class of cases eligible for the death sentence.

Thus, if the community wishes to broaden the range of capital offenses, it must do so in the expectation of increasing frequency of nullification and a corresponding infrequency of death sentences as the range extends. As nullification increases in frequency, there will come the appearance and perhaps the fact of irrational patterns. So the community, if it prefers the mandatory approach with minimal nullification, must elect to narrow the range of capital offenses. Conversely, if it prefers the discretionary approach, it can elect a broader range of capital offenses, but as a consequence it will have a less-than-perfect correspondence of convictions and sentences.

If the community wishes as well to meet the expectations implicit in the Stewart/White position, it will tend towards the mandatory approach, with the corollary narrowing of the range of capital offenses. If it wishes to meet the expectations explicit in the dissents, it will tend towards the discretionary approach, which may or may not be accompanied by widening of the range of capital offenses. The community will of course wish to meet both sets of expectations. Thus, there is, in sum, an interplay of the spectrum of capital offenses, on the one hand, and the portions of it sustaining the mandatory and discretionary approaches, on the other hand, there is an interplay by which each approach will accommodate a range of capital offenses to differing

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42. 21 STAN. L. REV. 1297, at 1300-1.



extents in proportion to the degree of frequency that is required or tolerable. It is as if the range of capital offenses were balanced on a fulcrum with the discretionary and mandatory range of each represented by the portion on either side of the point. The discretionary range can be more extensive because it bears the lesser intensity of lower frequency, and the mandatory range must be less extensive because it bears the greater intensity of higher frequency. The shift of the weight of the frequency or the extent of the range will cause a corresponding adjustment in the other interrelated elements of the total system.

An illustration of a range of capital offenses subject to mandatory sentencing is that of a bill recently introduced in the Illinois General Assembly. The range embraces:<sup>43</sup>

. . . murders [as elsewhere defined in general terms] in any of the following instances . . . : (1) Murder of any peace officer or fireman engaged in the performance of his official duties; (2) Murder committed for pecuniary gain pursuant to a contract with, or employment by, a co-defendant; (3) Murder committed by assassination of a person at the place of, or in the course of, such person's public appearance pursuant to a known schedule therefor; (4) Murder committed by a person who had been previously convicted of another murder; (5) Murder committed by a person under a sentence of life imprisonment; (6) Murder committed in the perpetuation of any forcible felony, other than voluntary manslaughter or kidnapping, where the defendant has been previously convicted of another such forcible felony; (7) Murder perpetrated in the course of any kidnapping; (8) Murder resulting from the hijacking of an airplane, train, bus, ship or other commercial vehicle.

These are reasonably objective murders in their definition. The potential cases falling within this range is not so slight as to extenuate the effect of the death penalty. The murders are serious enough to promise relatively infrequent nullification. Likewise, if sentencing were discretionary, the frequency or rationality of its imposition would not likely be different.

Cut back the range by any four or five of the "instances," however, and the system approaches the point of extenuation that troubled Mr. Justice White. Add a subjective standard (that the "murder was especially heinous, atrocious or cruel, manifesting exceptional depravity") and the pressure to nullify must begin to build. Broaden the range of capital offenses and the pressure will increase more.<sup>44</sup> At

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43. H.B. 20, 78th General Assembly, State of Illinois, 1973, p. 2.

44. In both of these ways the proposed federal criminal codes are broader but the effect of the jurisdictional difference between the federal and state systems makes

the point where the range or standards are as broad as in the Model Penal Code (in which, in addition to the "depravity" circumstance, there is the circumstance that "the defendant knowingly created a great risk of death to many persons"), the prospect of nullification and infrequency may well be great enough to warrant a shift from the mandatory to the discretionary approach. This is not so much because the degree of infrequency could become constitutionally fatal but because at a certain degree of prospective nullifications, it is more forthright to acknowledge the extraordinary nature of the decision to sentence to death and to permit the sentencing authority to do what it must do.

#### RELATIONSHIP OF JUDGE AND JURY

What it must do will vary according to the range of offenses. When the range is broad or the standards subjective, the conscience of the community will come into play. It is best formulated by the jury, in the American experience. Most would rely, as traditionally we have, on the jury in capital sentencing, agreeing with Justice Frankfurter's testimonial to the jury:<sup>45</sup>

. . . if the jury system has this social advantage of being a participating influence in the administration of justice, I should want to use it here in this type of case [capital punishment]. On the whole, not only do they express a rough kind of popular feeling about conduct, but for the most part I think we can trust twelve people on a jury at least as well as judges as to motives, for judges are rather removed from everyday actualities and on the whole are bound to be so by their calling.

As the range narrows as to the definitions, for example, in the Illinois bill, or as the standards become objective, the special qualities of the jury tend to become less and less appropriate. Indeed, as in technical fact-finding, the judge is more fit than the jury. So in the mandatory range, the judge may make the findings as well as the jury.

Specifically, the roles of the judge and jury may be shaped into differing procedures. In descending degrees of restrictiveness, the jury: (1) must make a specific finding, in the nature of a special verdict, that the requisite circumstances are present or not; (2) must make such a finding and then a recommendation of a sentence; (3) must consider the circumstances, then make a recommendation of a sen-

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the federal system more selective, its offenses more deliberative and its deterrent effect more efficacious; so it can afford to extend somewhat further in its range and in its standards than a system of general jurisdiction and yet be mandatory. S.1 and S.1400, 93d Cong., 1st Sess. (1973).

45. THE PROBLEM OF CAPITAL PUNISHMENT, OF LAW AND MEN (1956), at 82.

tence; (4) may consider the circumstances, if it wishes, then make a recommendation of a sentence; and finally (5) may make a recommendation of a sentence with neither a finding nor a consideration of the circumstances of a sentence. In descending degree of restrictiveness, the court: (1) must impose the death sentence upon the jury's finding of the circumstances or its recommendation; (2) must consider the circumstances, upon which it may impose the death sentence; and (3) may consider the circumstances, upon which it may impose the death sentence. Moreover, these may be combined; for example, the jury must consider the circumstances and make a recommendation of the death penalty, whereupon the judge must consider the circumstances and then follow the jury's recommendation or, in effect, set it aside. Such a combination as this would be appropriate where the range of capital offenses is broader than that of the Illinois bill and under standards that include subjective as well as objective standards.

This combination of jury recommendation and judicial power to set it aside in sentencing was struck in Illinois a decade ago.<sup>46</sup> The Model Penal Code arrived at the same balance not long afterward.<sup>47</sup> Its advantages are that the jury must consider the circumstances but need not articulate its findings, which are reflected, however, in its recommendation. It thus has a certain amount of leeway. This combination puts a premium on the jury's function of expressing the conscience of the community. It obliges the judge to consider the circumstances but permits him to override the recommendation, but only in the direction of life, not death; hence, the initial burden of the decision to sentence to death falls to the jury but the judge is free to refuse to concur. The value of the judge's participation was stated by the Model Penal Code Reporter as follows:<sup>48</sup>

Judicial determinations are likely to be less emotional or prejudiced than those of juries; the continuity of judicial personnel tends to promote equality in such decisions; the court might be persuaded

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46. S.H.A., ch. 38, § 1-7(c)(1).

47. According to the Model Penal Code formulation:

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. American Law Institute, Model Penal Code, Proposed Official Draft, 1962, § 210.6(1) at 129-30.

48. Model Penal Code, Tentative Draft No. 9, May 8, 1959, p. 73. See Togman, *The Two-Trial System in Capital Cases*, 39 N.Y.U.L. REV. 50, 53: "If the sentence were the verdict of both judge and jury, it would preserve the sanction as one issued by the community and at the same time embody the benefits of judicial expertise."

to give reasons for determinations, further promoting their responsibility and rationality.

#### CONCLUSION

No arrangement of institutions like judge and jury, and no systems such as those described herein, can be absolutely fit for such an "extraordinary" and awful decision as imposition of the death penalty. Indeed, as the analysis deepens and goes, as it must, beyond that assayed here, it may come to be clear to all, as it is to Professors Kalven and Zeisel, that whatever the differences on which hinge the decision as to who among those convicted of capital crimes is to die, "they [the differences] remain demeaningly trivial compared to the stakes."<sup>49</sup> But until and unless there is such a culmination of the country's effort to understand and cope with the death penalty, there must be careful policy analysis and design, not just to meet the requirements of *Furman* but to match the heightened expectations in this area of criminal justice. For it is here, the Chief Justice said with some understatement, that "fresh ideas deserve sober analysis."<sup>50</sup>

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49. 21 STAN. L. REV. 1297, 1301.

50. *Furman* at 402.

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