

# *Nova Law Review*

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*Volume 16, Issue 3*

1992

*Article 10*

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## Enactment of the Florida Death Penalty Statute, 1972: History and Analysis

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## Abstract

On June 29, 1972, the United States Supreme Court issued its landmark decision in *Furman v. Georgia*,<sup>1</sup> vacating the death sentences imposed upon capital defendants in Georgia and Texas.

**KEYWORDS:** Florida, death, penalty

# *The Death Penalty*

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### I. INTRODUCTION

On June 29, 1972, the United States Supreme Court issued its landmark decision in *Furman v. Georgia*,<sup>1</sup> vacating the death sentences imposed upon capital defendants in Georgia and Texas. The decision effectively invalidated all state death penalty statutes then in existence, thereby preventing the execution of over 600 inmates incarcerated on various death rows. Though the Court left open the possibility that more narrowly drafted capital sentencing statutes might survive judi-

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The author would like to thank the following people for their helpful comments on earlier drafts of this article: Vikram Amar, John Blum, Robert Burt, Evan Caminker, and Jordan Steiker.

1. 408 U.S. 238 (1972).

cial scrutiny, many observers doubted that states would in fact choose to enact new laws.<sup>2</sup> Within the next six months, however, the Florida legislature passed, and the state's governor signed, a bill authorizing the imposition of the death penalty. By 1976, when the Supreme Court next examined the constitutionality of capital punishment, a total of thirty-five states had enacted capital sentencing statutes designed to comply with the ruling in *Furman*.<sup>3</sup> This article examines the process by which the Florida statute was enacted in 1972.

Although two members of the *Furman* Court argued that capital punishment was *per se* unconstitutional, the other three Justices of the majority stated only that the capital sentencing *procedures* then in place were constitutionally defective. The ensuing debate in Florida centered on the effort to devise a procedural scheme that would survive judicial scrutiny. That debate furnished an enlightening case study of constitutional decision-making by elected representatives. For the most part, the legislature was astute and conscientious in its efforts to parse the nine separate opinions issued by the Supreme Court in *Furman*. The evidence indicates, however, that legislators were motivated by pragmatic concerns rather than by any sense of *obligation* to abide by the Supreme Court's instructions. A bill that would be upheld (and thus could be enforced) was preferable to one that would be struck down; but any bill was preferable to no bill at all.

At the time *Furman* was decided, the case was widely regarded as brazenly undemocratic. In an abrupt and hazily reasoned fashion, it was said, the Court had brought an end to a form of punishment utilized in a large majority of the country. Justice Powell, in dissent, argued that,

[i]t is important to keep in focus the enormity of the step undertaken by the Court today. Not only does it invalidate hundreds of state and federal laws, it deprives those jurisdictions of the power to legislate with respect to capital punishment in the future, except in a manner consistent with the cloudily outlined views of those Justices who do not purport to undertake total abolition. Nothing short of an amendment to the United States Constitution can reverse the Court's judgments. Meanwhile, all flexibility is fore-

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2. For example, NAACP Legal Defense Fund attorney Jack Greenberg asserted that "[t]here will no longer be any more capital punishment in the United States." MICHAEL MELTSNER, *CRUEL AND UNUSUAL* 291 (1986).

3. See *Gregg v. Georgia*, 428 U.S. 153, 179-80 & n.23 (1976) (Stewart, Powell & Stevens, JJ.) (listing statutes).

closed. The normal democratic process . . . is now shut off.<sup>4</sup>

In retrospect, however, it is clear that *Furman* stimulated rather than aborted the national debate over the death penalty. In an important sense the decision was not at all undemocratic. The Court ensured that capital sentencing schemes would not remain in operation simply because of inertial forces within the legislature. Rather, imposition of the death penalty would be allowed to continue only if it could be demonstrated that contemporaneous support for capital punishment remained strong. *Furman* did not simply command that the states adopt new capital sentencing procedures—it invited the states to decide anew whether they wished to have capital punishment at all.

Did *Furman* induce the Florida legislature to undertake a true re-evaluation of the propriety of capital punishment? The record is mixed. Certainly the decision brought an end to the legislature's prior unwillingness to discuss the issue. The burden of going forward was shifted to proponents of the death penalty, and abolition was conceded to be an option genuinely open for consideration. Had opponents of the death penalty been numerous within the legislature, it is quite possible that a thorough re-examination of the subject would have ensued. In the end, however, support for capital punishment was so overwhelming that the inquiry was a cursory one. Although *Furman* ensured that Florida would not retain the death penalty simply through legislative inertia, it did not induce the legislature to put aside its preconceptions and start from scratch.

## II. HISTORY

### A. *Furman v. Georgia*

The vote in *Furman* was 5-4; the five Justices in the majority issued five separate opinions, and no Justice in the majority joined the opinion of any other. Justices Brennan and Marshall concluded that capital punishment was *per se* violative of the Eighth Amendment ban on "cruel and unusual punishments." Justices Douglas, Stewart, and White did not go so far. Their opinions were not models of clarity, and there were differences of emphasis among them; all three Justices, however, appeared to share the view that the Texas and Georgia statutes were unconstitutional because they conferred upon juries unlimited dis-

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4. *Furman*, 408 U.S. at 461-62 (Powell, J., dissenting).

cretion to decide which defendants would live and which would die. Justices Stewart and White placed particular emphasis on the rarity with which capital sentences were actually imposed. Justice Stewart asserted that “[t]hese death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual . . . [T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”<sup>5</sup> Justice White argued that “the death penalty is exacted with great infrequency even for the most atrocious crimes . . . [T]here is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”<sup>6</sup>

Lurking at the edges of the debate was the question of race. Justice White’s opinion did not allude to the issue of racial discrimination, and Justice Stewart mentioned it only obliquely.<sup>7</sup> But, as the concurring opinions of Justices Douglas<sup>8</sup> and Marshall<sup>9</sup> made clear, capital punishment during the previous half-century had been disproportionately imposed upon blacks. That history of discrimination formed the centerpiece of the NAACP Legal Defense Fund’s constitutional challenge to the death penalty.<sup>10</sup> The evil of discretionary capital sentencing, then, was not simply that it could lead to “random” or “arbitrary” results. The absence of any check on the jury’s discretion also increased the danger that the death penalty would be applied in a racially discriminatory fashion. The attempt to develop improved capital sentencing schemes was, in an important sense, an effort to devise procedures

5. *Id.* at 309-10 (Stewart, J., concurring).

6. *Id.* at 313 (White, J., concurring).

7. *Id.* at 310 (Stewart, J., concurring) (“My concurring Brothers have demonstrated that, if any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race. But racial discrimination has not been proved, and I put it to one side.”) (citations omitted).

8. *Id.* at 249-51 (Douglas, J., concurring).

9. Justice Marshall noted that,

[a] total of 3859 persons have been executed since 1930, of whom 1751 were white and 2066 were Negro. Of the executions, 3334 were for murder; 1664 of the executed murderers were white and 1630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape. It is immediately apparent that Negroes were executed far more often than whites in proportion to their percentage of the population.

*Furman*, 408 U.S. at 364 (Marshall, J., concurring) (citations omitted).

10. See, e.g., Eric L. Muller, *The Legal Defense Fund's Capital Punishment Campaign: The Distorting Influence of Death*, 4 YALE L. & POL. REV. 158, 164-70 (1985).

that would reduce the likelihood that race could influence the choice between life and death.<sup>11</sup>

Several Justices, both in the majority and among the dissenters, emphasized that the constitutionality of certain types of capital sentencing laws remained an open question. Justice White noted that “[t]he facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us.”<sup>12</sup> Justice Stewart also reserved judgment as to the constitutionality of laws mandating a death sentence for particular crimes,<sup>13</sup> and Justice Powell observed that the legality of such statutes “remains undecided.”<sup>14</sup>

Mandatory sentencing was not identified as the only method by which states might seek to draft new death penalty laws. Chief Justice Burger suggested that “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 may be imposed.”<sup>15</sup> In the main, however, contemporary observers concluded that mandatory statutes would enjoy the greatest chance of Supreme Court approval. The concerns expressed by Justices Stewart and White—that vesting absolute discretion in the sentencing jury had led to unjustified variations in the treatment of similarly-situated defendants, and that the infrequency with which capital punishment had been imposed rendered it useless as a method of deterrence—seemed to many to be best addressed by a sentencing statute that gave the jury *no* discretion at the sentencing stage and provided that *all* defendants convicted of enumerated crimes would receive the death penalty.

There was a certain irony to the suggestion that the Eighth Amendment prohibition of “cruel and unusual punishments” might require that any capital sentencing statute be mandatory. As the Court had noted only a year prior to *Furman*, mandatory capital sentencing statutes had, in the distant past, been the norm within the United

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11. Controversy over the racially disproportionate impact of the death penalty has not yet abated. See *McCleskey v. Kemp*, 481 U.S. 279 (1987).

12. *Furman*, 408 U.S. at 310.

13. *Id.* at 307 (Stewart, J., concurring).

14. *Id.* at 417 n.2 (Powell, J., dissenting).

15. *Id.* at 400 (Burger, C.J., dissenting).

States.<sup>16</sup> Such statutes had been universally repudiated, however. If juries conscientiously followed their oaths, these laws led to unduly harsh results in cases which fell within the statutory definition of a capital crime but which, due to mitigating factors, seemed not to merit a death sentence. Moreover, juries were frequently tempted to disregard their oaths and acquit the defendant of a capital offense if they regarded him as undeserving of the death penalty.

It was to address these problems that discretionary sentencing schemes were enacted. Legislatures "adopted the method of forthrightly granting juries the discretion which they had been exercising in fact."<sup>17</sup> Indeed, the principal thrust of the *Furman* dissenters' attack lay in their contention that the states might respond to the Court's decision by enacting mandatory capital sentencing statutes, and that such laws would be far more cruel and oppressive than the discretionary schemes struck down in *Furman*. Chief Justice Burger commented that "[i]f [mandatory sentencing] 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."<sup>18</sup> Justice Blackmun agreed: "This approach, it seems to me, encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago."<sup>19</sup>

### B. *The Florida Response*

Within the State of Florida, editorial reaction to *Furman* was mixed. The *St. Petersburg Times* expressed strong support for the decision:

The American civilization reached a new height of respect for human life this week when the U.S. Supreme Court declared the death penalty unconstitutional . . . . Now that the high court has spoken, it is doubtful that the penalty will be revived, despite Chief Justice Warren Burger's attempt to make a place for it.<sup>20</sup>

The *Miami Herald* concluded: "Our own view is that capital punish-

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16. *McGautha v. California*, 402 U.S. 183, 198-201 (1971).

17. *Id.* at 199.

18. *Furman*, 408 U.S. at 401 (Burger, C.J., dissenting).

19. *Id.* at 413 (Blackmun, J., dissenting).

20. ST. PETERSBURG TIMES, July 2, 1972, at 2D.



ment can be (and has been) performed in irreconcilable error and that it is repugnant to take human life in the name of society.”<sup>21</sup> The *Tampa Tribune*, by contrast, excoriated the ruling:

The five Justices [in the majority] let their personal feelings or the emotions aroused by the cases of three members of a minority race lead them astray from a constitutional course . . . . The states’ Constitutional right to impose [capital punishment] ought to be restored—but it will be restored, we think, only by another Nixon appointment to the Supreme Court.<sup>22</sup>

The *Tallahassee Democrat* stated that “[t]he majority opinions give some indication of how far some justices have strayed from the nation’s Constitution.”<sup>23</sup> The paper also decried the ambiguity of the decision:

If the Congress or any State legislature should ever pass such a jumble of separate views and present them as law to be followed by the people, the Supreme Court itself would immediately and very properly rule it out as too vague and arbitrary for a citizen to understand and obey.<sup>24</sup>

The *Florida Times-Union* asserted:

Now, along comes the U.S. Supreme Court with a masterpiece of legal obfuscation which at least severely limits—and perhaps eliminates—use of capital punishment as a deterrent against capital crimes such as murder, kidnapping, and rape. The court has steadily been pulling the teeth of society so that its remaining response capability toward crime is so weak as to be almost laughable to the predatory criminal . . . . [I]n the dire straits in which the United

21. *An End to Death Penalties, More or Less, and Unless . . .*, MIAMI HERALD, June 30, 1972, at 6A.

22. *What Punishment is Usual and Uncruel?*, TAMPA TRIBUNE, June 30, 1972, at 20A. A subsequent *Tribune* letter to the editor was less sanguine about the prospects for the Court should George McGovern be elected President: “The first vacancy would possibly be filled by a female Chicano under age 30, the next by a Yippie earning less than a thousand dollars a year who believed water should be used only for human consumption, the next by an impoverished octogenarian, etc.” John F. King, *Majority Rule Aborted*, TAMPA TRIBUNE, July 2, 1972, at 2C.

23. *Supreme Court Adds Fuel to National Controversy*, TALLAHASSEE DEMOCRAT, July 1, 1972, at 4.

24. Malcolm B. Johnson, *Death Penalty Decision Shows Prime U.S. Conflict*, TALLAHASSEE DEMOCRAT, July 2, 1972, at 2B.

States now finds itself in the battle against crime—to remove its most formidable weapon is cruel and unusual punishment for thousands upon thousands of citizens who will be murdered because the court has held their lives so cheap.<sup>25</sup>

Florida newspapers' initial reactions to *Furman* (whether pro or con) were generally emphatic and unequivocal. By contrast, Governor Reubin Askew's response was cautious and noncommittal:

I'm pleased that the Supreme Court has made a decision on the very difficult question of capital punishment. Apparently, however, the decision is limited in its application and we'll have to carefully review the actual court opinions before we can determine the effect upon those who are now under the death penalty in Florida.<sup>26</sup>

A supporter of capital punishment during his tenure as a state legislator, Askew had become ambivalent about the death penalty. In 1971, he had called upon the legislature to establish a moratorium on executions within the state, and to authorize the appointment of a commission to study the issue. The legislature had rejected both requests. In February 1972 Askew had issued an Executive Order staying all executions in Florida until July 1, 1973;<sup>27</sup> he again appealed to the legislature for the establishment of a study commission, a request that was again denied.

The Supreme Court in *Furman* had not expressly considered the constitutionality of the Florida capital sentencing law. Its holding was limited to the Georgia and Texas statutes. The Florida statute then in effect, however, gave the jury absolute discretion to grant or withhold mercy in a capital case, and therefore clearly fell within the *Furman* rationale.<sup>28</sup> The state conceded that the statute was invalid under *Furman*. The law was quickly declared unconstitutional by the Florida

25. FLORIDA TIMES-UNION, June 30, 1972, at A6.

26. ST. PETERSBURG TIMES, June 30, 1972, at 8A.

27. Executive Order No. 72-8 (1972). The stay order had no immediate effect; a stay order issued in 1967 by a federal district judge already prevented Florida from executing any of its death row inmates. See *Adderly v. Wainwright*, 272 F. Supp. 530 (M.D. Fla. 1967). No one was executed in Florida during Askew's eight years as governor, either prior to *Furman* or after passage of the new statute.

28. Florida law in effect at the time of *Furman* provided that "[a] person who has been convicted of a capital felony shall be punished by death unless the verdict includes a recommendation to mercy by a majority of the jury, in which case the punishment shall be life imprisonment." FLA. STAT. § 775.082(1) (1971).

Supreme Court in *Donaldson v. Sack*,<sup>29</sup> and by the United States Court of Appeals for the Fifth Circuit in *Newman v. Wainwright*.<sup>30</sup> The state's death row inmates were resentenced to terms of imprisonment pursuant to orders issued in *Anderson v. State*<sup>31</sup> and *In re Baker*.<sup>32</sup> A Florida law passed in March 1972, with an effective date of October 1, 1972, provided that if the state's death penalty law were declared unconstitutional, all inmates under sentence of death would be resentenced to life imprisonment without the possibility of parole.<sup>33</sup> Since all the state's death row prisoners were resentenced prior to that law's effective date, however, all remained eligible for parole.

Although *Furman* clearly invalidated the Florida statutory scheme in effect on June 29, 1972, that scheme had in any event already been amended by the Florida legislature. A bill passed in March 1972, with an effective date of October 1, 1972, had established a new procedure for capital sentencing.<sup>34</sup> The statute listed eight aggravating and eight mitigating circumstances.<sup>35</sup> The law also provided for a bifurcated trial: if a defendant was convicted of a capital offense, a separate sentencing hearing would follow, at which both the defendant and the state could present "evidence of the circumstances surrounding the crime, of the defendant's background and history and any facts in aggravation or mitigation including but not limited to those circumstances enumerated in" the statute.<sup>36</sup> The defendant would continue to be sentenced to death unless a majority of the jury recommended mercy. The new law provided some degree of guidance to the penalty jurors, though the jury remained free to base its decision on factors not enumerated in the statute. For the moment, at least, it was unclear whether the new statute sufficiently constrained the jury's discretion to withstand a constitutional challenge.

The first significant step toward enactment of a new death penalty statute occurred on July 7, 1972. At a press conference in Starke, Florida, Attorney General Robert Shevin recommended passage of a new

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29. 265 So. 2d 499 (Fla. 1972).

30. 464 F.2d 615 (5th Cir. 1972).

31. 267 So. 2d 8 (Fla. 1972).

32. 267 So. 2d 331 (Fla. 1972).

33. 1972 Fla. Laws 118.

34. 1972 Fla. Laws 72.

35. The aggravating and mitigating circumstances were taken from the capital sentencing statute included in the Model Penal Code. See MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962).

36. 1972 Fla. Laws 72.

capital punishment law.<sup>37</sup> Shevin expressed the view that “in all likelihood neither Mr. Justice Stewart nor Mr. Justice White would find a statute calling for the *mandatory imposition of death* under certain enumerated circumstances offensive to the Eighth Amendment of the United States Constitution” and that a statute mandating a capital sentence for specified crimes was therefore likely to withstand Supreme Court review.<sup>38</sup> Shevin argued that only a mandatory statute could be upheld and that the Florida law scheduled to take effect in October was therefore a nullity:

The purpose this statute was designed to serve was to permit additional evidence to go before the jury so it could make a more intelligent disposition of its discretionary power to grant or withhold mercy. This was condemned by the Court in *Furman v. [Georgia]*, and as a consequence can no longer form any facet of a determination in a capital case.<sup>39</sup>

Shevin recommended passage of a bill mandating a capital sentence for anyone convicted of a premeditated killing “[o]f any law enforcement officer;” “[o]f any penal institution officer;” “[p]ursuant to a contract for profit;” “[c]ommitted or perpetrated during the commission of any felony directed against another person;” “[b]y an assassin or person taking the life of any state or federal official;” “[c]ommitted by a parolee or probationer previously convicted of first degree murder;” “[o]f a person in connection with the hijacking of an airplane, bus, train, ship or other commercial vehicle.”<sup>40</sup> Shevin further recommended that Governor Askew call a special session of the legislature, either immediately or after the November elections. Passage of a new capital sentencing bill during the April 1973 legislative session would be inadequate, he argued, because “[a]ny extended delay in remedial legislation . . . may unfortunately result in the loss of lives between the present

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37. The Florida Attorney General is an independently elected official who typically exercises considerable autonomy. During the fall of 1972, Shevin also proposed enactment of a sweeping new human rights statute and a strong reporters' shield law. *ST. PETERSBURG TIMES*, Nov. 10, 1972, at B3; *ST. PETERSBURG TIMES*, Nov. 5, 1972, at B1. Shevin served as Attorney General until 1978, when he sought the Democratic nomination for Governor. He won a plurality in the opening primary but was defeated in the runoff by Bob Graham who subsequently won the general election.

38. Memorandum from Robert L. Shevin, Attorney General of Florida 6 (July 7, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

39. *Id.* at 9.

40. *Id.* at 14.

day and the regular session of the Legislature.”<sup>41</sup>

On July 10 Governor Askew announced that he would not call an immediate special session of the legislature but would convene a special session after the November elections. In the meantime, he stated, he would appoint a commission to study both the desirability of capital punishment generally and the specific form that any death penalty statute might take. An immediate session could nevertheless have been called by agreement of the Senate President and House Speaker, or by a three-fifths vote within each chamber.<sup>42</sup> Senate President Jerry Thomas (D-Jupiter) pushed for an immediate session, arguing that “the general public is entitled to optimum protection.”<sup>43</sup> House Speaker Richard Pettigrew (D-Miami) demurred, however, arguing that “[t]his complex and vitally significant decision of sentencing one of our citizens to death deserves dispassionate and deliberative legislative study unfettered by the hectic and emotional demands of campaign time.”<sup>44</sup> Senator Thomas’ attempt to secure the necessary votes within the legislature received negligible support, eliminating the possibility of an immediate special session.<sup>45</sup>

During the late summer and early fall, several ad hoc committees were formed within the state to study the issue of capital punishment. On July 19 Representative Pettigrew appointed a House Select Committee, chaired by Representative Jeff Gautier (D-Miami) and com-

41. *Id.* at 13.

42. Terrell Sessums, who succeeded Richard Pettigrew as Speaker of the House, recalls that,

[i]n 1968 when we revised the Constitution we were so offended by Governor Kirk’s tendency to call special sessions out of the clear blue sky that we—I don’t know that we really put any restrictions on the governor’s ability to call a special session, but we put in a proviso that the President of the Senate and the Speaker of the House could jointly call a special session. And we used that to suggest to the governor that if he was too imperial in calling special sessions without prior legislative consultations, we were going to call special sessions as soon as he left on vacation, or on a trade mission to Europe, or something like that . . . .

Interview with Terrell Sessums in Tampa, Fla. (Dec. 17, 1990).

43. William Mansfield, *Shevin Asks Executions to be Restored*, MIAMI HERALD, July 8, 1972, at 1A, 20A.

44. ST. PETERSBURG TIMES, July 20, 1972, at 1B.

45. Senator Thomas did not seek re-election in 1972; an immediate special session would thus have afforded him his only opportunity to participate directly in the enactment of a new death penalty statute. Senator Thomas switched to the Republican Party in December 1972 and ran unsuccessfully for Governor in 1974.

posed entirely of members of the Florida House. That committee's second session revealed confusion as to the nature of the group's assignment. When Tobias Simon, a Miami attorney appearing as a witness before the committee, commenced a broad, slashing attack on the death penalty, Gautier interrupted him:

Let me say, Mr. Simon, before I call for any questions from the committee members, that our committee was not charged with whether or not to reinstate the death penalty. That is the subject of another committee's deliberations. The Governor of the State of Florida, Reubin Askew, has appointed a committee to do just that. To recommend to the legislature whether or not the death penalty should be reinstated . . . I would suggest that if [the governor's committee] has a separate hearing that you should appear also, because his committee really is making the basic determination that you are alluding to today.<sup>46</sup>

Gautier's apparent impression that the committee's sole task was to draft suitable legislation was soon corrected. A few minutes later Gautier announced: "I received a note from the Speaker that he did not mean to limit the scope of this Committee's work and if, at the conclusion, the Committee feels that an alternative to the death penalty can be imposed, that we're certainly not restricted from recommending it."<sup>47</sup>

Even after this clarification, however, the focus of the Committee's inquiry was remarkably narrow. On August 18 the committee interviewed former death row inmates at the state penitentiary. One inmate characterized the judicial system in the panhandle as a "kangaroo court" and asserted that lies had been told throughout his trial. The possibility that an innocent man would be condemned to death (and, more generally, the fairness of capital trials in Florida) would seem highly relevant to the propriety of reinstating the death penalty—though a single inmate's unsupported claim of innocence might be of small probative value. Chairman Gautier, however, admonished the witness to confine his remarks to the topics before the committee: 1) whether the death penalty should be revived, 2) whether capital punishment deters, and 3) whether life imprisonment without parole

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46. *Hearings of the House Select Committee on the Death Penalty* 29 (Aug. 9, 1972) (unofficial transcript on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464) (hereinafter *House Hearings*—transcript).

47. *Id.* at 44.

would be an adequate alternative.<sup>48</sup> Committee members thereafter contented themselves with asking inmates what punishment would be appropriate if one of their best friends were murdered, or whether they would be “deterred” from resistance if they were robbed at gunpoint.

At the beginning of its fifth session on August 31, the committee voted 5-1 that the death penalty should be reinstated.<sup>49</sup> At no time did the committee discuss or debate the propriety of capital punishment. Gautier then admonished the witnesses that from this time forward their comments should be limited to the merits of particular bills.<sup>50</sup>

In accordance with Shevin’s recommendation, the bill developed by the House Committee attempted to eliminate jury discretion by mandating a sentence of death upon conviction. There were, however, significant differences between the Attorney General’s bill and the bill ultimately drafted by the committee. The Shevin bill mandated the death penalty only for certain categories of premeditated murder. As Assistant Attorney General Ray Marky explained, this limitation was seen as essential, since history had shown that a statute mandating death for all premeditated murders would lead to widespread jury nullification:

Jury nullification came about when the death penalty was geared toward homicides generally . . . . The fact that juries engaged in jury nullification when we were talking about all types of homicides does not mean that we are going to have jury nullification in specification [sic] types of crimes of a very aggravated nature.<sup>51</sup>

Shevin expressed uncertainty about the constitutionality of a bill requiring the death penalty for all first-degree murders:

By saying that all premeditated murders are mandatory death penalty you’re getting into the areas where juries have traditionally been willing to grant mercy . . . . You may be running headlong into another constitutional problem at the U.S. Supreme Court level and . . . you may be, in this instance, providing a punishment

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48. *Hearings of the House Select Committee on the Death Penalty* (Aug. 18, 1972) (tape on file at Florida State Archives, Tallahassee, Fla.) (hereinafter *House Hearings—tape*).

49. The only member of the committee to vote against reinstatement of the death penalty was Representative Gwendolyn Cherry (D-Miami), a longtime foe of capital punishment.

50. *House Hearings—tape*, *supra* note 48 (Aug. 31, 1972).

51. *House Hearings—transcript*, *supra* note 46, at 19 (Aug. 4, 1972).

that perhaps is a little bit too harsh.<sup>52</sup>

The committee, however, was unreceptive to the limitations established by the Shevin bill; committee members argued both that the criminal's punishment should not depend on the status of the victim and that the bill would create disruptive line-drawing problems. Ultimately the committee recommended passage of a bill mandating a sentence of death for five classes of crimes: premeditated murder, felony murder, treason, "[t]hrowing a destructive device which results in the death of a person;" and "[r]ape of a person under the age of thirteen."<sup>53</sup>

Other ad hoc committees meeting during the late summer and fall also recommended that the death penalty be reinstated. The Senate Council on Criminal Justice, appointed by outgoing Senate President Jerry Thomas, with Florida Supreme Court Chief Justice B.K. Roberts acting as honorary chairman, voted 12-2 to recommend a law making the death penalty mandatory for specified categories of murder and for the rape of a child under eleven.<sup>54</sup> Chief Justice Roberts asserted that "[t]here has been no capital punishment for six years and we are living in the greatest crime wave in the history of the world."<sup>55</sup> The presence

52. House Hearings—tape, *supra* note 48 (Aug. 31, 1972).

53. *Final report of the House Select Committee on the Death Penalty* 5 (Nov. 27, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

The bill drafted by the committee did contain a definition of "premeditation" narrower than that which had prevailed under prior Florida law. The bill provided that, [a] premeditated design to kill is a fully formed conscious and deliberate purpose to take human life, formed upon reflection and deliberation and present in the mind at the time of the killing and which was not primarily induced by great and unjustified provocation on the part of the intended victim, nor was committed under a sudden heat of passion or other such condition which precludes the idea of reflection and deliberation.

Fla. HB 1-A § 2 (Spec. Sess. 1972). That definition was intended to ensure that killings committed during barroom brawls or lovers' quarrels would not be capital offenses, despite the fact that they were considered premeditated murders under prior Florida law.

54. ST. PETERSBURG TIMES, October 31, 1972, at 1B.

55. Chief Justice Roberts did not place all the blame on the absence of capital punishment. In the fall of 1972, the Florida Supreme Court briefly rescinded, then reinstated, the state rule requiring unanimous jury verdicts in criminal cases. Roberts dissented from the order reinstating the rule, arguing that "[w]e cannot escape the fact that numerous mistrials are a contributing factor to the greatest crime wave ever existing in this country." *Unanimity Stays in Jury Verdicts*, MIAMI HERALD, Dec. 7, 1972, at 2B (Street Edition).



of a sitting state supreme court justice on such a committee raised the obvious specter of a conflict of interest should a death penalty bill be passed and its constitutionality challenged. Chief Justice Roberts defended his participation on the ground that "I make recommendations to Legislative committees all the time as chairman of the Florida Judicial Council."<sup>56</sup> However, Roberts ultimately recused himself in *State v. Dixon*,<sup>57</sup> the case in which the Florida Supreme Court first passed upon the constitutionality of the state's new death penalty statute. The Florida Judicial Council (chaired by Roberts) also recommended reinstatement of capital punishment,<sup>58</sup> as did the Board of Directors of the Florida State Chamber of Commerce.<sup>59</sup>

The most far-reaching inquiry into the issue was conducted by the study committee appointed by Governor Askew. Chaired by E. Harris Drew, a former Florida Supreme Court Justice, the seventeen-member committee included two former governors of the state, three state Senators and three state Representatives, as well as eminent members of the bench, bar, and public. The committee was provided with a staff and was assisted by an advisory committee and a legal advisory committee.<sup>60</sup> The group held hearings throughout the state, taking testimony from the public, former death row inmates, police and correctional officials, and experts in the field of criminal justice. Governor Askew pledged to withhold judgment on the issue pending the preparation of the committee's report.

On October 20, the committee voted 9-6 to recommend reinstatement of the death penalty. Former Governor LeRoy Collins delivered

56. Tom Raum, *Six Are Winners With 'Walking' Races*, TALLAHASSEE DEMOCRAT, Nov. 15, 1972, at 2.

57. 283 So. 2d 1 (Fla. 1973).

58. ST. PETERSBURG TIMES, Nov. 5, 1972, at 1B.

59. ST. PETERSBURG TIMES, Sept. 15, 1972, at 4B.

60. The legal advisory committee was composed of five professors from Florida law schools. Its report concluded that "no constitutional basis can justify any attempt to reinstate capital punishment without an accompanying fundamental change in our system of criminal justice." *Final Report of the Governor's Committee To Study Capital Punishment* 114 (Nov. 21, 1972) (hereinafter Governor's Committee Report). A slightly revised version of the legal advisory committee's report has been published as Charles W. Ehrhardt et al., *The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. CRIM. L. & CRIMINOLOGY 2 (1973). Two members of the committee have written a short article describing the legislative debate over reinstatement of the death penalty in Florida. See Charles W. Ehrhardt & L. Harold Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. CRIM. L. & CRIMINOLOGY 10 (1973).

an impassioned statement in opposition to reinstatement of the death penalty, asserting that capital punishment,

degrades us all and runs counter to values I have believed in and sought to uphold over my lifetime. In future years, I believe people will look back on the hangman's noose, the electric chair, and the gas chamber, as we now view the barbarous instruments and trappings of torture utilized by our ancestors.<sup>61</sup>

After reviewing in detail the statistical evidence presented to the committee, Collins concluded that the use of capital punishment bore no verifiable relationship to the rate of crime. He conceded that public support for the death penalty was substantial, but argued that public demand for executions "is due in large part to frustration over our failures in law enforcement and will go away in my judgment if our methods of dealing with criminals and potential criminals are made more effective and certain."<sup>62</sup> Recalling his tenure as governor, Collins stated that "I signed death warrants of twenty-nine men in my six years as governor. And I can still almost call each name, it caused such a traumatic experience for me."<sup>63</sup>

Chairman Drew, also opposing reinstatement, asserted that "I am as firmly convinced, as I am sitting here at this table, that this country has witnessed its last execution."<sup>64</sup> He found it "inconceivable," he explained, that the United States Supreme Court "could one day turn loose 600 people who had the shadow of death hanging over them, and in a short time turn around and say it's okay to execute others."<sup>65</sup> Despite his fervent opposition to reinstatement of the death penalty, Drew argued that *Furman* had been wrongly decided, characterizing it as "a flagrant usurpation of the power of the legislative branch of government."<sup>66</sup> In opposing reinstatement of the death penalty, he identified a diverse range of concerns: his belief that, "statistically, there is no evidence that its imposition contributes to the prevention of murder or other crimes;" the fact that "once such sentence is carried out, there is no way to effectively correct an error;" his perception that "intermina-

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61. Governor's Committee Report, *supra* note 60, at 126.

62. *Id.* at 129.

63. *Askew Study Group Backs Death Penalty*, TAMPA TRIBUNE, Oct. 21, 1972, at 1A, 20A.

64. ST. PETERSBURG TIMES, Oct. 21, 1972, at 1B.

65. *Id.*

66. Governor's Committee Report, *supra* note 60, at 122.

ble delays in the disposition of capital cases in the courts creates disrespect for all criminal laws;" and, perhaps most important, his conviction that reinstatement would be pointless given the likelihood that any new statute would be struck down by the United States Supreme Court.<sup>67</sup> Drew retained that conviction throughout the debate; after a statute was ultimately passed, he labeled it an "exercise in futility."<sup>68</sup>

In the end, the margin of support for reinstatement of the death penalty came from the state legislators on the committee, who voted 4-1 in favor.<sup>69</sup> That result seems unsurprising since advocates and opponents of capital punishment agreed that public support for the death penalty was overwhelming. One committee member, Representative Eugene Brown (D-Tavares), stated that an informal poll of his constituents showed 1100 in favor of the death penalty and fifty-two opposed.<sup>70</sup> Representative Brown noted that "[t]here's a message there, at least to one who's seeking public office."<sup>71</sup>

After the vote of the Governor's Committee, passage of a new death penalty statute appeared almost certain. There remained considerable controversy, however, concerning the form that such a statute should take. Attorney General Shevin, interpreting *Furman* to require the elimination of jury discretion in capital sentencing, had recommended that death be mandatory upon conviction for specified crimes. The House and Senate committees had agreed, though they had broadened the range of crimes for which death would be mandated. The

67. *Id.* at 123.

68. ST. PETERSBURG TIMES, Dec. 3, 1972, at 11A.

69. Voting in favor were Sens. Jim Williams (D-Ocala) and Louis de la Parte (D-Tampa), and Reps. Robert Johnson (R-Sarasota) and Eugene Brown (D-Tavares). Representative Cherry was the only legislator on the Governor's Committee who voted against reinstatement. Governor's Committee Report, *supra* note 60, at 142.

In the view of Hugh McMillan, Jr., Askew's assistant for legislative affairs, the most significant aspect of the Committee's vote was that "neither de la Parte nor Williams wanted to follow the senior statesmen [Collins and Drew] . . . . At that point they were both highly ethical, highly effective members of the state Senate." Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990). Their support for capital punishment was significant both because of Askew's respect for their views and because it suggested that any effort to block reinstatement would meet with opposition from Senate leaders.

70. Harold Stahmer, another member of the committee, recalls that Representative Brown "wheeled in on a dolly a pile of letters" as a visible symbol of his constituents' support for the death penalty. Interview with Harold Stahmer in Gainesville, Fla. (Dec. 12, 1990).

71. ST. PETERSBURG TIMES, Oct. 22, 1972, at 9B.

Governor's Committee, by contrast, preferred a statute similar to the one passed the previous March, which required a bifurcated trial and consideration of aggravating and mitigating circumstances. The staff report of the committee argued that a mandatory sentencing law would not eliminate the potential for arbitrariness identified in *Furman*:

The jury's discretion to convict or not convict a defendant of a capital felony remains intact in the guilt or innocence phase of the trial. It is entirely conceivable that the jury will continue to send minority defendants to the electric chair by convicting them of the capital offense and that the more affluent majority will be spared by an arbitrary jury finding of guilt of a lesser-included offense, not capital.<sup>72</sup>

The bill ultimately recommended by the Governor's Committee was drafted by a subcommittee headed by Representative Robert Johnson (R-Sarasota).<sup>73</sup> That bill was modeled after the March statute but differed from it in two significant respects. First, the sentencing determination was to be based exclusively upon the statutory aggravating and mitigating circumstances, and the finding of at least one aggravating factor was a prerequisite to a sentence of death. Second, the choice between imprisonment and death was to be made not by a jury, but by a special panel made up of the judge who had presided at trial and two other circuit judges assigned by the Chief Justice of the Florida Supreme Court. The three-judge sentencing scheme, inspired by European trial procedure,<sup>74</sup> was defended as a means of reducing the likelihood of arbitrariness by utilizing sentencers who would be free from the passions of the local community in which the crime had occurred.<sup>75</sup>

Surprisingly little attention was paid to the possibility that the bill passed the previous March (with an effective date of October 1) itself

72. ST. PETERSBURG TIMES, Nov. 21, 1972, at 1B.

73. Governor's Committee Report, *supra* note 60, at 146.

74. Defending the bill on the House floor, Johnson stated that "I got this frankly out of reading extensively on capital punishment and found that it's being used in France, West Germany, Scandinavia, and most of South America." Tape of Florida House of Representatives Floor Debate (Nov. 29, 1972) (on file at Florida State Archives, Tallahassee, Fla.).

75. On the House floor, Representative Johnson noted that the two additional judges would be appointed from outside the circuit where the crime occurred "because they don't stand election in that circuit. They don't have to face the emotional trauma of the people of that circuit every day, and they would be totally objective and unbiased in their decision." *Id.*

imposed sufficient constraints on the jury's discretion to meet constitutional requirements.<sup>76</sup> A special committee of the Florida Bar took the position that the March statute was constitutional,<sup>77</sup> as did Senator David McClain (R-St. Petersburg), the sponsor of the bill.<sup>78</sup> The legal advisory staff to the Governor's Committee disagreed, arguing that,

the statute apparently contains constitutional infirmities, since it does not require a finding of the presence of an aggravating circumstance prior to the imposition of the death penalty but rather allows the jury the same discretion in determining when the death penalty should be imposed that was condemned in *Furman*.<sup>79</sup>

The Attorney General's office, of course, had condemned the bill on the ground that any non-mandatory sentencing scheme would be constitutionally deficient. The Florida Supreme Court's enigmatic decision in *State v. Whalen*,<sup>80</sup> rendered on November 22, 1972, appeared to fore-

76. Robert Johnson recalls that "[t]he feeling was that that bill . . . was a band-aid type approach" that would not survive judicial scrutiny. Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990).

77. ST. PETERSBURG TIMES, Oct. 20, 1972, at 6B.

78. ST. PETERSBURG TIMES, Oct. 24, 1972, at 12B.

79. Governor's Committee Report, *supra* note 60, at 146.

80. 269 So. 2d 678 (Fla. 1972). *Whalen* involved a defendant who pleaded guilty to first degree murder shortly after the decision in *Furman*. The trial judge certified to the Florida Supreme Court the following question: "Does a trial court sitting as the sole trier of fact after accepting a plea of guilty to first degree murder and holding an evidentiary hearing on the issue of the extent of the penalty, have the power to impose the death sentence?" *Id.* at 679. Apparently the judge sought to invoke the provisions of the bifurcated trial law. The Florida Supreme Court, relying on *Donaldson v. Sack*, 265 So. 2d 499 (Fla. 1972), held that "[t]his question concerning bifurcated trials is moot since at the present time capital punishment may not be imposed. This Court has held that there are currently no capital offenses in the State of Florida. If there is no capital offense, there can be no capital penalty." *Whalen*, 269 So. 2d at 679.

That is odd reasoning. In stating that there were no capital offenses in Florida, the *Donaldson* court meant simply that on the date of its decision (July 17, 1972), Florida had no constitutionally adequate *procedure* for capital sentencing. If the bifurcated trial law passed in March was sufficient to comply with *Furman*, then when the new law became effective on October 1, capital offenses would once again have existed. It therefore made no sense to say that the absence of capital offenses rendered moot the issue of the new law's constitutionality. The effect of *Whalen* was to remove all doubt that a new statute was required, while giving no indication as to the Florida Supreme Court's views on the constitutionality of non-mandatory capital sentencing.

Of course, even if the bifurcated trial law was constitutional, its retroactive application to a crime committed before its effective date might have been problematic,

close the possibility that the March statute could be constitutionally applied.

On November 20, Governor Askew broke his silence, announcing that he would recommend passage of a bill to restore capital punishment.<sup>81</sup> Two days later, in a twelve-page letter to the legislature, Askew placed his support behind the bill drafted by the Governor's Committee, calling it "the only proposal which, in my judgment, can pass constitutional muster."<sup>82</sup> Askew noted that "[i]n essence, this procedure is a modification of the state's 'bifurcated trial' law, which I recommended and the Legislature adopted at the last Regular Session, except that the list of aggravating and mitigating circumstances is made 'obligatory rather than advisory,' in order to limit discretion."<sup>83</sup>

On November 27 the House Select Committee on the Death Penalty held its first meeting of the new legislative session. Chairman Gauthier began by admonishing the witnesses to concern themselves only with the "technical aspects" of the various bills before the committee, and not to speak to the desirability of capital punishment.<sup>84</sup> A series of witnesses spoke in favor of the Governor's Committee bill, arguing primarily that it had the greatest chance of withstanding the scrutiny of the United States Supreme Court. Assistant Attorneys General George Georgieff and Ray Marky, arguing in favor of a mandatory sentencing law, were outspoken in their condemnation of the bifurcated sentencing scheme. Georgieff, reading *Furman* to require that the legislature rather than individual sentencers must decide precisely which crimes merit a sentence of death, stated:

I put it to you very plainly: if you put in *any* system that vests discretion in the people as to whether this individual should live or die and takes it out of *your* hands, which is what they condemned in *Furman*, I promise you that the result has to be the same, they'll strike it down. When *you* decide that an individual must die if he

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particularly if the sentencing was artificially delayed in order that the new law might be applied. *But see* *Dobbert v. Florida*, 432 U.S. 282, 297-98 (1977). The *Whalen* court, however, did not suggest that its holding was influenced by retroactivity concerns.

81. ST. PETERSBURG TIMES, Nov. 21, 1972, at 1B.

82. Letter from Reubin Askew to Senate President Mallory Horne, and House Speaker Terrell Sessums 3 (Nov. 22, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11).

83. *Id.*

84. House Hearings—tape, *supra* note 48 (Nov. 27, 1972).

commits crime A or crime B, . . . then that is all that's necessary.<sup>85</sup>

Marky attacked the concept of a discretionary sentencing scheme, and also ridiculed the particular aggravating and mitigating factors used in the Governor's bill: "These standards are so nebulous, so vague . . . that I can fit them in every death case that I've ever handled . . . . The standards are ludicrous. They're vague, they're ambiguous, and they exist both pro and con in every death case . . . . That's the height of arbitrariness."<sup>86</sup> Indeed, Marky, who had previously stated that the Askew bill "absolutely defies" the ruling in *Furman*, suggested that the bill might be a ploy to scuttle capital punishment entirely: "Some people may be trying to pass a bill that is patently unconstitutional. Opponents of a bill have done that before, you know."<sup>87</sup> Ultimately the vote was 6-5 to report to the floor the mandatory sentencing bill drafted by the House Select Committee.

On November 28, the governor addressed the legislature at the special session. Governor Askew called for passage of a death penalty statute,<sup>88</sup> though he acknowledged that "I continue to have mixed feelings as to the necessity, the rightness, and even the legality of capital punishment in any form."<sup>89</sup> Askew again stressed his support for the bill recommended by his committee, arguing that a mandatory sentencing law was unsound as a matter of policy and unlikely to gain the approval of the United States Supreme Court:

I'm convinced that a law providing for mandatory imposition of the death penalty, with no opportunities for mercy, would merely prompt juries to convict on lesser charges. And the discrimination to which the court so clearly objected would still be present. It merely would take place sooner . . . in the conviction itself. The same groups discriminated against in the past would draw convictions of premeditated murder—and therefore die; while others

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85. *Id.*

86. *Id.*

87. Jere Moore, Jr., *Rift Develops over Capital Punishment*, TALLAHASSEE DEMOCRAT, Nov. 27, 1972, at 15.

88. Although the special session was initially scheduled for the purpose of debating a capital punishment bill, the session was not limited to that issue. The Governor's Proclamation convening the session also requested action on eight other topics, including ratification of the Equal Rights Amendment (on which the legislature ultimately declined to act). Fla. J. Senate 1 (Nov. 28, 1972).

89. *Id.* at 7.

would be convicted of lesser crimes, and therefore live. I think it's obvious the court would reject such a system and therefore render your efforts counter-productive.<sup>90</sup>

In arguing that the United States Supreme Court would strike down a mandatory sentencing statute, Askew emphasized the *Furman* dissenters' disapproval of such laws<sup>91</sup>—a tack also taken by his supporters in the legislature. Askew's speech was interpreted by many as a threat to veto any mandatory sentencing bill passed by the legislature—an implication that the governor would neither confirm nor deny.<sup>92</sup>

The debate over mandatory versus discretionary capital sentencing revealed a tension between the goals of consistency and individualized consideration that subsequent jurisprudence has not successfully resolved. On the one hand, fairness seems to require that all capital defendants (at least within a given state) should be judged by uniform criteria rather than by the idiosyncrasies of a randomly selected jury, and that race in particular should play no part in the sentencing decision. On the other hand, it may cogently be argued that no person should be put to death without an individualized assessment of his crime and of any evidence that he may proffer in mitigation.<sup>93</sup> Advocates of the mandatory approach essentially argued that the values of consistency and individualized treatment were irreconcilably in conflict and that, of the two, consistency was more important.

Proponents of the bifurcated trial approach believed that the two values could be accommodated. By drafting precise sentencing standards, the legislature could provide for an individualized assessment in

90. *Id.* at 7-8.

91. Askew noted that "Chief Justice Burger, who dissented from the court's recent decision regarding capital punishment, nevertheless condemned the mandatory approach as archaic. And the other members of the court who also dissented from the majority, concurred with the Chief Justice on that point." *Id.* at 8.

92. ST. PETERSBURG TIMES, Nov. 29, 1972, at 1B.

93. See *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), where the Court opined that an individualized sentencing determination is required in order to treat each defendant in a capital case with that degree of respect due the uniqueness of the individual and, in addition, because,

a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

*Id.* at 605.



every capital case while ensuring that all capital defendants would be judged by the same criteria.<sup>94</sup> To put it another way, the advocates of this approach argued that a system of “guided discretion” could strike a balance between the extremes of mandatory sentencing and standardless jury discretion that would be preferable to either.<sup>96</sup>

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94. The drafting of such statutes was not an enterprise that the Supreme Court had encouraged. In *McGautha v. California*, 402 U.S. 183 (1971), the Court had suggested that the effort was doomed to failure:

Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by history . . . . To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

*Id.* at 204. Indeed, the *McGautha* Court cited the Model Penal Code’s capital sentencing statute—which has served as the model for most post-*Furman* laws—as an example of the futility of such an exercise. *See id.* at 207 (“It is apparent that such criteria do not purport to provide more than the most minimal control over the sentencing authority’s exercise of discretion.”).

95. The Supreme Court’s capital sentencing jurisprudence has proceeded along two largely independent tracks. Decisions involving constitutional limitations on the states’ freedom to define aggravating factors have stressed the *Furman* principle that the sentencer may not be given unfettered discretion. *See, e.g.*, *Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) (“Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer’s discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.”). In discussing the states’ obligation to permit consideration of mitigating factors, however, the Court has stressed the need for an individualized sentencing determination. *See, e.g.*, *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982) (“By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.”). The uneasy coexistence between these two lines of authority has in turn spawned a vigorous counterattack, articulated most recently, and at greatest length, in Justice Scalia’s concurring opinion in *Walton v. Arizona*, 110 S. Ct. 3047, 3058 (1990).

Justice Scalia appears to overstate his case when he refers to “[t]he simultaneous pursuit of contradictory objectives,” *Id.* at 3064, and argues that the Court’s invalidation of mandatory capital sentencing in *Woodson v. North Carolina* was “rationally irreconcilable with *Furman*.” *Id.* at 3067. There is nothing incoherent or self-contradictory about the view that some medium between mandatory sentencing and unconstrained discretion is preferable to either extreme. Justice Scalia appears correct, however, in arguing that the individual sentencer’s *absolute* discretion to decide what factors are and are not mitigating cannot be squared with *Furman*. The quest for consistency requires that the legislature place *some* limitations on the factors which the judge or jury may consider in making its sentencing determination; the evil of unguided

The mandatory statute reported by the committee initially attracted "seventy or eighty co-sponsors" in the House.<sup>96</sup> In the end, however, supporters of the Governor's bill prevailed. The mandatory sentencing bill approved by the House committee was reported to the House floor on November 29. Representative Gautier, arguing in favor of the bill, circulated a memorandum from Attorney General Shevin. That memorandum stated that the Askew bill "flies into the teeth of that which was condemned in *Furman v. Georgia*"<sup>97</sup> and that "it continues to be my view that the more nearly legislation approaches the status of mandatorily imposing death, the more likely the chance of surviving [Supreme Court] scrutiny."<sup>98</sup>

Representative Johnson offered the Askew bill as an amendment. In contending that the Supreme Court would strike down a mandatory sentencing scheme, Johnson placed heavy emphasis on Chief Justice Burger's condemnation of a mandatory death penalty. The four *Furman* dissenters<sup>99</sup> would vote against such a statute, he argued, as

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discretion, after all, was that different sentencers might have widely varying notions as to the concerns that are relevant to the decision between life and death. The fact that this arbitrariness might be thought to work in favor of the defendant (by expanding the range of factors that might cause a jury not to impose a capital sentence) does not make the system consistent with *Furman*. The sentencing schemes condemned in *Furman* were struck down, it should be recalled, partly because of the *infrequency* with which capital sentences were imposed. The central premise underlying the opinions of Justices Stewart and White in *Furman* was that an otherwise lawful sentence of death could be rendered unconstitutional if other, similarly-situated defendants were spared due to the idiosyncrasies of local juries.

96. Robert Johnson asserts that Democrats "wanted their name on a bill—they wanted their name on a program, there's no question about that. They didn't want a bill passed that was under a Republican banner or Republican sponsorship." Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990). In light of Askew's support for the bifurcated trial approach, it seems more accurate to describe that bill as a bipartisan, rather than a Republican, measure. Johnson is surely correct, however, in suggesting that the mandatory sentencing bill was strictly a Democratic product. Democrat Robert Shevin had first advanced the idea of mandatory sentencing; the bill itself was drafted by the House Select Committee, composed entirely of Democrats, that met during the fall of 1972.

97. Memorandum from Robert L. Shevin, Attorney General 2 (Nov. 27, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

98. *Id.* at 4.

99. Representative Johnson's conclusion that all four *Furman* dissenters would oppose a mandatory sentencing scheme was presumably based on the fact that Justices Blackmun, Powell, and Rehnquist had joined Chief Justice Burger's dissent. Although Justice Blackmun's dissent (with which no other Justice joined) expressed abhorrence for mandatory death penalties, the dissents of Justices Powell and Rehnquist took no

would Justices Brennan and Marshall: "Now that's four men who say they will not accept mandatory death, and you have two more that say they will not accept anything. And that's six to three, no matter how you cut the pie."<sup>100</sup> Johnson also noted that sentencing is traditionally performed by judges and asserted that,

[w]e [on the Governor's Committee] read *Furman v. Georgia* to say that juries cannot play a part in sentencing . . . . We believed that if you have a bifurcated trial with a jury you still have the same subjection to arbitrary, capricious, and discriminating judgment in sentencing, and it would not be upheld. So we said, can we use one judge? And we felt that the Supreme Court would say one judge alone would have the same possibility of whimsical, freakish application . . . .<sup>101</sup>

Johnson concluded that "I really feel that what we have done is credible and it has the best chance of any to be upheld under *Furman v. Georgia*. I do know that mandatory death has none."<sup>102</sup>

The motion to amend passed by a vote of 70-47. Despite Governor Askew's emphatic support for the nonmandatory bill, Democrats voted 38-36 against the amendment; Republicans, perhaps swayed by Johnson's presentation, supported the Governor's position 34-9.<sup>103</sup> Proponents of the Governor's bill, moreover, were far more successful in rallying support outside the legislature than were advocates of mandatory sentencing. A long list of witnesses appeared in support of the Askew bill at the House Select Committee hearing on November 27; only Marky and Georgieff testified in favor of the mandatory bill. The pub-

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position on the issue.

100. Tape of Florida House of Representatives Floor Debate (Nov. 29, 1972) (on file at Florida State Archives, Tallahassee, Fla.).

101. *Id.*

102. *Id.*

103. ST. PETERSBURG TIMES, Nov. 30, 1972, at 5B. Johnson's persuasiveness was due in part to his evident familiarity with the issue:

I personally had read everything there was at that time, the most recent studies on capital punishment . . . . I wrote about a sixty page document on capital punishment out of all the reports that I had read and out of the studies of the commission and I gave it to every member of the body, and when I stood and debated for several hours I think they believed that I . . . had some idea what I was talking about.

Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990). A copy of Johnson's paper is on file at the Florida State Archives, Tallahassee, Fla., Series 757, Box 11.

lic defenders from all twenty Florida judicial circuits expressed a preference for the Governor's bill,<sup>104</sup> as did a statement issued on behalf of the Florida Prosecuting Attorneys Association.<sup>105</sup>

The question of *which* bill to pass was the only subject of contention on the House floor. After the successful motion to substitute the Askew bill for the measure approved by the Committee, the bill was approved by the astounding margin of 119-0. Representative Cherry, an adamant opponent of capital punishment in previous years, explained her vote on the ground that the Governor's Committee bill was "the best we can come up with" and maintained that sentiment within the legislature was "just like a steamroller . . . . Everybody wants to kill somebody . . . . They think they must do this in order to go home."<sup>106</sup>

Within the Senate there was general agreement with the use of an aggravation-mitigation hearing as opposed to a mandatory sentencing scheme.<sup>107</sup> The Senate, however, was unreceptive to the proposal for three-judge sentencing. Opposition to that feature of the Askew bill was based on several grounds: the state's tradition of jury sentencing in

104. The public defenders recommended that capital punishment not be reinstated but expressed support for the Askew bill in the event that a law was passed. (Telefax on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11).

105. On behalf of the Florida Prosecuting Attorneys Association, James T. Russell, President, stated that,

the Association believes that the bifurcated trial approach as set forth in the Governor's proposal has the best chance to be sustained in the United States Supreme Court and is the most realistic and practical procedure for eliminating the evils condemned by the U.S. Supreme Court in the Furman decision.

Statement on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11.

Representative Johnson argued on the House floor that "when you can come up with a bill that the state attorneys say is just, and fair, and reasonable in every manner, and the defenders say the same thing about [it], then I think that we have done a very credible job." Tape of Florida House of Representatives Floor Debate (Nov. 29, 1972) (on file at Florida State Archives, Tallahassee, Fla.).

106. ST. PETERSBURG TIMES, Nov. 30, 1972, at 5B.

107. Senators Dempsey Barron (D-Panama City), Louis de la Parte (D-Tampa), and Jim Williams (D-Ocala) were particularly influential within the Senate on this point. Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990); Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990); Interview with Edgar Dunn in Daytona Beach, Fla. (Dec. 12, 1990); Interview with Richard Pettigrew in Miami, Fla. (Dec. 19, 1990). Senators de la Parte and Williams had served on the Governor's Committee.

capital cases;<sup>108</sup> the fact that the two additional judges would be assigned only after a conviction and thus would not have heard the evidence at trial;<sup>109</sup> the fear that three-judge sentencing would impose a strain on judicial resources;<sup>110</sup> and the possibility that the assignment of circuit judges would be subject to manipulation by the Chief Justice of the Florida Supreme Court.<sup>111</sup> The Senate bill placed the initial sentencing recommendation in the hands of the trial jury. If the jury recommended life, that recommendation was binding on the judge; but if the jury recommended death the judge could nevertheless sentence the defendant to life. The bill passed by a vote of 39-1. The lone opponent was freshman Senator Jack Gordon (D-Miami).<sup>112</sup> Gordon acknowledged that the bill had “refined” prior law but argued: “However refined a process, it is still a barbaric process. Refined barbarism is no way to preserve a social order that values the sanctity of human

108. FLORIDA TIMES-UNION, Dec. 1, 1972, at 14A.

109. *A Fair System to Punish Murderers*, TAMPA TRIBUNE, Dec. 2, 1972, at 14A.

110. William Cotterell, *Gov. Askew Not Likely to Get What He Wants*, TALLAHASSEE DEMOCRAT, Nov. 28, 1972, at 13.

111. Senator Dempsey Barron (D-Panama City) argued: “Suppose the chief justice was against capital punishment? His choice of the judges would be influenced by his own feelings. Or he might be a hanging chief justice which would be unfair to the defendant.” FLORIDA TIMES-UNION, Dec. 1, 1972, at 11A.

Robert Johnson recalls that “Dempsey Barron took the lead on the Senate side. He was adamantly against the three-judge [panel] . . . [Barron] was a very strong defense lawyer and believed very strongly in the jury system” Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990).

112. Gordon explains that,

I had no intention of speaking on anything certainly the day I was sworn in. I figured I'd be patient until . . . April . . . On the other hand, I also expected that there'd be some opposition. I figured that it would probably pass, but there'd maybe be ten, twelve votes against it, primarily on religious grounds . . . So when the debate started, I just sort of waited for somebody else to say something, and nobody did.

Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990).

Gordon's opposition to capital punishment was based on his religious convictions rather than on civil liberties concerns:

From a Jewish theological perspective, [capital punishment] is not something you should be for . . . Even though there's an eye for an eye and a tooth for a tooth in the Bible, the history of Jewish jurisprudence, Talmudically, is that if the court sentences . . . someone to death more frequently than every sixty or seventy years, then they're supposed to get a new court.

*Id.*

life."<sup>113</sup>

The conference committee met on November 30 until well after midnight and then reconvened before 8:00 A.M.<sup>114</sup> The committee appeared ready to accept a compromise offered by Representative William Rish (D-Port St. Joe) under which each defendant would be given the choice between jury sentencing, three-judge sentencing, or sentencing by the trial court alone.<sup>115</sup> Edgar Dunn, Askew's general counsel, indicated that this arrangement was unacceptable to the Governor, and negotiations continued. Ultimately, the committee agreed upon a system whereby the jury would recommend a sentence of either death or life imprisonment and the trial judge, based upon his assessment of aggravating and mitigating factors, would make the final decision. The system approved by the conference committee thus permitted a single individual to sentence a defendant to death—a result that both the House and Senate sentencing schemes were designed to avoid.

The ultimate impact of Florida's "jury override" provision has proved anomalous. The initial decision to involve the trial judge in the sentencing process was intended as a protection for the defendant and was based on the belief that judges would be less prone to an emotional response than would a jury. The bill that emerged from the conference committee, however, permitted the judge to impose a capital sentence despite the jury's recommendation of mercy. That change stemmed from the conferees' belief that an "asymmetrical" sentencing scheme would be invalid under *Furman*.<sup>116</sup>

In practice, however, the jury override provision has furnished minimal protection to defendants. In only a small number of cases since the statute's enactment have trial judges overridden jury recommendations of death. Life recommendations, by contrast, have quite frequently been overridden.<sup>117</sup> As United States Supreme Court Justice

113. ST. PETERSBURG TIMES, Dec. 1, 1972, at 1A.

114. For a very interesting article describing the frenzied nature of the conference committee's work, see ST. PETERSBURG TIMES, Dec. 3, 1972, at 12B.

115. John Van Gieson, *House Approves Death Penalty*, TALLAHASSEE DEMOCRAT, Dec. 1, 1972, at 1.

116. Interview with Edgar Dunn in Daytona Beach, Fla. (Dec. 12, 1990); Michael Mello & Ruthann Robson, *Judge Over Jury: Florida's Practice of Imposing Death Over Life in Capital Cases*, 13 FLA. ST. U. L. REV. 31, 70 (1985).

117. As of 1985, trial judges had overridden jury recommendations of life on 84 occasions. Michael L. Radelet, *Rejecting the Jury: The Imposition of the Death Penalty in Florida*, 18 U.C. DAVIS L. REV. 1409, 1413 (1985). Precise figures on overrides of death recommendations are unavailable. Professor Radelet states, however, that

John Paul Stevens has noted, "a procedure that was probably intended by the legislature to provide the defendant with two chances to obtain mercy seems actually to have provided the prosecutor with two opportunities to obtain the death penalty."<sup>118</sup> Efforts to amend or repeal the jury override provision have been rebuffed by the legislature, largely out of fear that any change in the statute will furnish new grounds for appeal for defendants previously sentenced.<sup>119</sup>

The bill as amended by the conference committee placed the final sentencing decision in the hands of the trial judge but did not indicate what deference, if any, was owed to the jury's recommendation.<sup>120</sup> Similar uncertainty characterized the statutory provision governing the Florida Supreme Court's review. The statute provided that "[t]he judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida . . . . Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court."<sup>121</sup> The statute does not otherwise define the scope of the appellate court's review—whether it is limited to claims of legal error, for example, or whether it includes *de novo* reconsideration of the propriety of the capital sentence. Prior Florida law provided no guidance, since under the old death penalty statute, the Florida Supreme Court could not overturn a sentence of death unless it reversed the underlying conviction.<sup>122</sup>

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"[n]umerous inquiries to several criminal attorneys and state officials . . . make us confident that less than a dozen such cases have occurred [as of 1985] since the current statute was enacted." *Id.*

118. John Paul Stevens, *Legal Questions in Perspective*, 13 FLA. ST. U. L. REV. 1, 4 (1985).

119. Interview with Edgar Dunn in Daytona Beach, Fla. (Dec. 12, 1990); Mello & Robson, *supra* note 119, at 68, 71; interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990). Johnson states:

I am not willing to vote to change one comma on the Florida capital punishment act. Period. If you change one comma, you open up every avenue of appeal that ever existed all over again . . . . They said it's constitutional, and until they change their minds, we're not going to change the law.

*Id.*

120. The bill stated only that "[n]otwithstanding the recommendation of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." 1973 Fla. Laws 724 § 9, *codified at* FLA. STAT. § 921.141(3) (1972).

121. FLA. STAT. § 921.141(4) (1972).

122. Ehrhardt & Levinson, *supra* note 60, at 11.

The statute thus established a “trifurcated sentencing procedure”<sup>123</sup> which divided power among judge, jury, and appellate court, but the law gave no indication as to the proper allocation of responsibility among the three sentencing authorities.<sup>124</sup>

The Florida legislature was anxious to adjourn, and debate on the

123. *Alvord v. State*, 322 So. 2d 533, 542 (Fla. 1975) (England, J., concurring in part and dissenting in part).

124. The Florida Supreme Court’s efforts to resolve these issues have not been entirely successful. Early on, the court held that “[a] jury recommendation under our trifurcated death penalty statute should be given great weight. In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.” *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). The Florida Supreme Court’s application of the *Tedder* standard has been erratic, however. *See Grossman v. State*, 525 So. 2d 833, 851 (Fla. 1988) (Shaw, J., concurring) (“During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent.”).

Similar inconsistency has characterized the Florida Supreme Court’s discussions of its own authority; compare *Songer v. State*, 322 So. 2d 481, 484 (Fla. 1975), where the court stated: “When the death penalty is imposed, this Court has a separate responsibility to determine independently whether the imposition of the ultimate penalty is warranted” with *Brown v. Wainwright*, 392 So. 2d 1327, 1331 (Fla. 1981) where the court stated:

Florida’s death penalty statute . . . directs that a jury and judge, not this Court, must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence . . . . This Court’s role after a death sentence has been imposed is “review,” a process qualitatively different from sentence “imposition.” It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude . . . . After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great . . . . Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury’s recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court’s sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.



amended bill was minimal. The vote was 116-2 in the House and 39-1 in the Senate.<sup>125</sup> Governor Askew signed the bill a week later, describing it as a “good product of the legislative process;”<sup>126</sup> the Governor had previously explained that “I still prefer a panel of three judges, but I’m primarily concerned with the fact that the death sentence shouldn’t be mandatory.”<sup>127</sup> One legislator referred to the bill as “a model piece of legislation that all the other states will look at with a great deal of envy.”<sup>128</sup> Editorial reaction was generally favorable. The *Tampa Tribune* stated:

Justices of the Supreme Court in their readiness to bend the Constitution to fit their own sentiments may find the new Florida law as invalid as the old. But, if so, some of the responsibility for future callous killings of innocent citizens will rest with the Court, not with Governor Askew and the Legislature. They have fashioned a fair method for punishing the guilty and deterring the potential killer.<sup>129</sup>

The *Florida Times-Union* took the view that the death penalty is “in the opinion of many, including us, a deterrent to heinous crime. It is a protective device sorely needed by a society which has been stripped of many of its former protections against rampant crime.”<sup>130</sup> Only the *St. Petersburg Times* dissented:

Askew . . . should, but probably won’t, veto the compromise death penalty bill which fails to fully conform to standards he proposed. If Florida must bear the stigma of being the first state to try to restore capital punishment, it should be with a system less barbaric than the Legislature’s final product.<sup>131</sup>

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125. Representative Cherry and Representative Eugene Tubbs (R-Merritt Island) voted against the bill in the House, though two days earlier they had supported the bill which provided for three-judge sentencing. Senator Gordon again cast the lone negative vote in the Senate.

126. ST. PETERSBURG TIMES, Dec. 7, 1972, at 4B.

127. *Death Penalty Hits a Snag in Senate*, TALLAHASSEE DEMOCRAT, Nov. 30, 1972, at 14.

128. John Van Gieson, *Legislature Approves Death Sentence Bill*, TALLAHASSEE DEMOCRAT, Dec. 2, 1972, at 14 (quoting Representative George Williamson (R-Fort Lauderdale)).

129. *A Fair System to Punish Murderers*, TAMPA TRIBUNE, Dec. 2, 1972, at 14A.

130. FLORIDA TIMES-UNION, Nov. 24, 1972, at A8.

131. ST. PETERSBURG TIMES, Dec. 2, 1972, at 16A.

Significant misgivings remained, however, even among supporters of capital punishment. Several legislators expressed dissatisfaction that so important an issue had been debated and resolved in the frenzied setting of a special session. Senate President Mallory Horne (D-Tallahassee), for example, stated: "We all got caught up in the commitment to have a session. None of it really passed muster on the question of absolute emergency. I think we handled too much too fast."<sup>132</sup> Senator Louis de la Parte (D-Tampa) asserted: "If we're going to decide whether to have something as important as the death penalty in Florida, I don't think we should have to do it on a rush-rush-rush basis."<sup>133</sup> Governor Askew defended his decision to schedule a special session on the ground that "[h]ad I not indicated last summer that I would call a special session in the fall, the chances would have been better than average that the Legislature, in the middle of the campaign, might have called themselves back into session. This is better."<sup>134</sup> Also, many of the bill's proponents expressed serious doubts as to the prospects for a favorable decision in the United States Supreme Court. Senator Dempsey Barron (D-Panama City) stated that "it's very unlikely any bill we pass will have a great deal of influence on the Supreme Court."<sup>135</sup> Senator Jim Williams (D-Ocala), a supporter of the death penalty on the Governor's Committee and in the legislature, asserted that "[t]he next person executed will be in another generation, not ours. It's over. It's over."<sup>136</sup>

### III. ANALYSIS

#### A. *Public Attitudes Towards Capital Punishment*

No referendum was taken in Florida on the issue of capital punishment in 1972. No statewide polls were published. And, because legislative candidates were virtually unanimous in their support for the death penalty, the results of the November elections provide few clues as to popular sentiment on the issue. The available evidence indicates,

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132. Bill Purvis, *Legislature Passes Death Penalty Bill*, TAMPA TRIBUNE, Dec. 2, 1972, at 12A.

133. Tom Raum, *De La Parte Criticizes Special Session*, TALLAHASSEE DEMOCRAT, Nov. 29, 1972, at 24.

134. ST. PETERSBURG TIMES, Nov. 21, 1972, at 1B.

135. ST. PETERSBURG TIMES, Dec. 3, 1972, at 11A.

136. ST. PETERSBURG TIMES, Dec. 2, 1972, at 1A.

however, that a sizeable majority of the Florida electorate supported the enactment of a new capital sentencing bill. A poll of Pinellas County residents showed seventy-three percent in favor of reinstatement.<sup>137</sup> Letters to the editors of Florida newspapers ran heavily in favor of capital punishment.<sup>138</sup> The dearth of candidates who expressed opposition to the death penalty is itself an indication—albeit an indirect one—of the strength of popular feeling.

Perhaps the most compelling indication of the strength of public support for capital punishment in the fall of 1972 may be found in the arguments of those who opposed the death penalty. Those who argued against passage of a new capital sentencing statute did not claim to represent the views of a majority of Floridians. Instead, they expressly acknowledged their minority status and urged legislators to resist the pressures of public opinion. LeRoy Collins, for example, stated that “I know most people in the state want the death penalty, but I dissent.”<sup>139</sup> Miami attorney Tobias Simon, testifying before a legislative committee, referred to Florida abolitionists as “the silent minority.”<sup>140</sup> Virgil Mayo, president of the Florida Public Defenders Association, told the House Select Committee that he opposed capital punishment but acknowledged that “I say in all fairness if I sat in your position I’d vote for capital punishment . . . because I think that [representing the views of one’s constituents] is the duty of the elected representative.”<sup>141</sup>

In part, the public’s attitude reflected tradition. Participants in the 1972 debates suggest various explanations for the state’s history of support for the death penalty. James Aphthorp, Governor Askew’s chief of staff in 1972, states:

I think that the more rural parts of our state are no different from other parts of the South, and they generally support capital punish-

137. ST. PETERSBURG TIMES, Nov. 23, 1972, at 1B.

138. A *St. Petersburg Times*’ request for letters pro and con elicited 461 letters in favor of reinstatement and 142 against. ST. PETERSBURG TIMES, Nov. 30, 1972, at 23A. That result is especially striking in light of the *Times*’s fervent opposition to capital punishment and its status as Florida’s leading liberal newspaper.

The most poignant expression of support for capital punishment that my research has revealed is a letter to the editor from “A.C.” which concludes: “If some one [sic] were to murder me, my last wish would be that the one that did it hangs. And with my last breath I would condemn the Supreme Court.” A.C., *Letters*, TAMPA TRIBUNE, Dec. 6, 1972, at 23A.

139. *Reaction Favors Decision*, TALLAHASSEE DEMOCRAT, Dec. 2, 1972, at 14.

140. House Hearings—transcript, *supra* note 46, at 21 (Aug. 9, 1972).

141. House Hearings—tape, *supra* note 48 (Oct. 27, 1972).

ment. I think the . . . retirement areas of our state, where we have an older population, tend to support capital punishment; it's the view of older people, and people who are frightened at times about their personal safety . . . . Maybe the combination of those two things . . . .<sup>142</sup>

Richard Pettigrew notes that "Florida's always been . . . a state that's almost like a frontier state, in that there's a huge movement of new people in all the time,"<sup>143</sup> and argues that the influx of new residents creates a sense of instability and a consequent desire for strong measures to combat crime. Jack Gordon perceives a connection to the religious makeup of the state, arguing that support for capital punishment is rooted in the belief "that people ought to be punished for their sins—a very Calvinistic way of looking at the world."<sup>144</sup> Whatever its roots, in 1972 that tradition was well-established; at the time that *Furman* was decided, Florida's death row was by far the nation's largest.<sup>145</sup>

Other factors were significant as well. Sharply rising crime rates during the years prior to *Furman* created the impression of a society that was careening out of control.<sup>146</sup> Controversy over busing during

142. Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991).

143. Interview with Richard Pettigrew in Miami, Fla. (Dec. 18, 1990).

144. Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990). Participants on both sides of the debate frequently invoked religious principles in justification of their positions. However, Harold Stahmer, a professor of religion who served on the Governor's Committee, states that the connection between religious affiliation and attitudes towards the death penalty turned out to be less predictable than he had anticipated:

Collins and I sat next to each other, and he's a pillar of his Episcopal church. We started—we'd get a list of people who had asked to appear before us. And there'd be a clergyman, and initially if they came from what I would call established denominations—Lutherans, Methodists, Presbyterians—I would assume they'd be opposed to the reinstatement of the death penalty. Didn't work that way. [Collins] and I sort of gave up guessing . . . . Sometimes the Baptists, the Fundamentalists who normally come on hard for retribution, they were kind of split. Some of them were high on retribution, and reinstatement, and others were opposed to it.

Interview with Harold Stahmer in Gainesville, Fla. (Dec. 12, 1990).

145. Florida had 99 inmates on death row; Ohio was second with 55. ST. PETERSBURG TIMES, June 30, 1972, at 8A.

146. As LeRoy Collins pointed out, however, the incidence of non-capital crimes in Florida rose far more dramatically during the 1960s than did the rate of capital crimes. See Governor's Committee Report, *supra* note 60, at 127, 130.

the spring of 1972, and the disastrous performance of George McGovern's presidential campaign,<sup>147</sup> stirred distrust of "liberalism" in any form. Lingering public resentment at the campus and urban unrest of the previous decade, coupled, perhaps, with disgruntlement over the Warren Court's innovations in the field of criminal procedure, increased the electorate's impatience with those who appeared overly concerned with protecting the rights of society's "deviant" members and insufficiently committed to the maintenance of public order.<sup>148</sup> Any attempt to assess the relative importance of these various factors can only be a matter of speculation. It seems safe to say, however, both that elimination of capital punishment in Florida would have been a very difficult task in any year, and that 1972 was an extraordinarily unpropitious time to make the attempt.

Among proponents of the death penalty, there was no consensus as to the primary justification for capital punishment. Some advocates relied on retributionist arguments;<sup>149</sup> many expressed distrust of the state's parole commission and argued that murderers sentenced to life imprisonment would be released to kill again.<sup>150</sup> Supporters of the death penalty relied most heavily on the argument that the threat of capital punishment would deter potential murderers. These proponents rarely contended that the death penalty's deterrent effect could be demonstrated by statistical evidence.<sup>151</sup> They relied instead on anecdote-

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147. In 1972, Richard Nixon carried 72 percent of the Florida vote. *ST. PETERSBURG TIMES*, Nov. 12, 1972, at 17A.

148. Retired Circuit Judge Ernest Mason, a member of the Governor's Committee, stated: "I am of the opinion that of late too much emphasis has been placed upon the so-called humanitarian rights of the criminal at the expense of the victims of homicides or their relatives." Governor's Committee Report, *supra* note 60, at 125.

149. Stella Thayer, a Tampa lawyer who served on the Governor's Committee, recalls that Dr. Vernon Fox of Florida State University "was quite persuasive as a proponent. He had a concept of social aggression, and that if a society didn't ensure swift, prompt, and honest justice, then he felt that that deterioration continued down through all of society." Interview with Stella Thayer, in Tampa, Fla. (Dec. 17, 1990).

150. For example, a statement issued by the Florida State Chamber of Commerce's Board of Directors argued that "a life sentence does not mean a life sentence, as all convicted persons are entitled to be considered for parole after six months in Florida." (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

151. Indeed, proponents of capital punishment generally conceded that the empirical evidence failed to establish a deterrent effect. Robert Johnson states that the empirical evidence presented to the Governor's Committee "certainly raised various questions, the questions were debated very heavily. . . . But it certainly didn't sway the commission, obviously." Interview with Robert Johnson in Sarasota, Florida (Dec.

tal evidence,<sup>152</sup> or on the intuitive notion that an increase in the penalty for a given activity would reduce the frequency with which that activity occurred.

Due to the dearth of candidates who opposed reinstatement, newspaper coverage of the 1972 legislative campaign includes little discussion of the death penalty, and the elections themselves provided little opportunity to test the strength of public sentiment on the issue. It nevertheless appears to have been an article of faith among Florida lawmakers that any elected official who opposed capital punishment would risk political ruin. Mallory Horne, for example, recalls that,

I'd been Speaker of the House already, and had the pledges at the time to be President of the Senate, and I knew going into that debate . . . that if I didn't assume a comfortable consensus position, that I would give up the presidency of the Senate . . . . [I]t was that volatile a political issue . . . . You could not say that you were against the death penalty and survive politically.<sup>153</sup>

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18, 1990). Ernest Mason's response to the available statistical evidence was typical: "In spite of all the so-called expert testimony that we have heard, I am of the opinion that the death penalty is a deterrent to homicides and that it should be restored as such." Governor's Committee Report, *supra* note 60, at 125.

152. Anecdotal evidence of very dubious reliability was frequently treated with extraordinary seriousness. Senator Thomas, for example, read a statement provided by Palm Beach County sheriff's deputies which quoted a recently-arrested murder suspect as saying, "I should have killed two or three more people that I didn't like because according to the new Supreme Court ruling I can only get life imprisonment no matter how many I kill." ST. PETERSBURG TIMES, July 29, 1972, at 1B. Shevin recounted the tale of a New York bank robber who told his terrorized victims that "You have to have the death penalty, otherwise this can happen every day." House Hearings—tape, *supra* note 48 (Aug. 31, 1972). Representative Gautier stated that to him the most convincing evidence of the death penalty's deterrent value was the statement of one Florida prison inmate that without capital punishment his mother would be unable to walk safely to church on Sunday. *Id.*

153. Interview with Mallory Horne in Tallahassee, Fla. (Feb. 13, 1991).

Horne himself expresses substantial reservations about the wisdom of capital punishment—reservations based primarily on a general dissatisfaction with the criminal justice system:

I worry not so much about the death penalty as I do it in conjunction with the trial system itself. I worry about somebody being electrocuted that wasn't really guilty . . . . [T]here's just enough of a motivation on the part of prosecutors to succeed that I've just seen so many shortcuts by them—withholding evidence from the defendant, withholding knowledge of big, major doubt, and going ahead with the case nonetheless because the death itself was grisly. That's what worries me, and I can't separate that

Hugh McMillan, Jr., Askew's legislative assistant during 1972, states that "everybody was a little bit relieved that it was probably mainly a technical, legal, constitutional issue and not a political issue, 'cause the common wisdom was that on the political side, there's only one side; there's no political future to being against it."<sup>154</sup>

The fate of Senator Gordon—the only member of the 1972 Florida legislature who expressed an absolute opposition to the death penalty—is therefore illuminating. One might expect that the freshman Senator, having characterized capital punishment as "refined barbarism" during his first week in office, would suffer the ire of both his constituents and his colleagues. Gordon states, however, that his stance has never hurt him electorally<sup>155</sup> and that it significantly enhanced his stature within the legislative body:

[There were a] number of the north Florida legislators[] who were sort of in control of the Senate at the time . . . [and upon whom] it made a very positive impression . . . that somebody would be willing to take the unpopular position and take the heat and not let it bother him. So they came to rely on me and my word, and it was a strange alliance; we're not sharing too much political philosophy, 'cause they're pretty conservative, but the way legislatures work, being able to count on somebody when they tell you something is exceptionally important . . . I've twice been the Appropriations [Committee] chairman . . . from a [Senate] President I didn't support, because the north Florida gang wanted me there . . . So that's my estimate of what effect it had on me politically.<sup>156</sup>

The experience of a single official is admittedly a paltry basis upon which to draw conclusions as to the political climate in 1972. Gordon's experience at least suggests, however, that other assessments of the political costs of opposing the death penalty may have been overstated.

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out from any punishment.

*Id.*

154. Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990).

155. Although the issue has sometimes arisen in campaigns, Gordon states that "I've generally answered it simply by saying it's just a matter of personal conscience." Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990).

156. *Id.*

## B. *The Legislature and the Court*

Commenting upon the bifurcated sentencing bill soon after its final passage, Robert Shevin stated: "Since the Legislature passed what may be a more socially acceptable bill, rather than constitutionally acceptable, it becomes our job to defend it and hope that I am wrong."<sup>157</sup> In defending the statute before the Supreme Court, Shevin characterized the legislature's actions in much the same way:

[W]hen I went to the legislative committees, the expression of the legislative body was this: We would rather pass a good law, a fair law that might be suspect, than to pass a mandatory death penalty, even if it's allowed by *Furman*, because it is harsh. And that's the kind of legislation the Florida legislature passed.<sup>158</sup>

There is a certain self-serving quality to these statements. Having lost the argument over mandatory sentencing, Shevin sought to convince the public that the legislature had not rejected his constitutional position at all, but had simply elevated policy over constitutional concerns. Shevin's statements nevertheless raise extremely important issues. How did the Florida legislature view its relationship to the United States Supreme Court? How conscientiously did the legislature consider its constitutional obligations? How ably did individual legislators, and other participants in the legislative debate, articulate the constitutional arguments on either side of the issue?

Participants in the committee debates did occasionally express the view that the legislature should pass the bill it deemed superior as a matter of policy rather than attempt to divine the preferences of the

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157. FLORIDA TIMES-UNION, Dec. 2, 1972, at A1. In light of the position taken by Shevin (and his assistants Ray Marky and George Georgieff) during the 1972 debate, the state's brief in the United States Supreme Court is illuminating. The brief—signed by Shevin, Marky, Georgieff, and one other attorney—was openly contemptuous of the petitioner's challenge: "[T]he positions advanced by Petitioner . . . whether measured in *Furman's* scale or that of any other rational thought process are lacking in any merit whatever . . . Respondent is at a total loss as to just how the Petitioner could conclude that the newly created Florida system violates *Furman v. Georgia*." Brief for Respondent at 85-86, 94, *Proffitt v. Florida*, 428 U.S. 242 (1976) (No. 75-5706). It was of course entirely ethical for Shevin and his assistants to defend the statute in the courts despite their misgivings as to its constitutional status; but the contrast between their pre-and post-enactment rhetoric is surely striking.

158. Transcript of Oral Argument at 16, *Proffitt v. Florida*, 428 U.S. 242 (1976) (No. 75-5706).



United States Supreme Court. Representative Brown, for example, argued that,

no one has the ability to predict what the next decision of the United States Supreme Court will be. So don't you believe that we're better off doing what we think is right within that framework rather than trying to make a decision based on what we don't know they're going to do?<sup>159</sup>

As a characterization of the legislature's principal motivation, however, Shevin's statements are simply insupportable. Presumably, the legislature did prefer a bifurcated sentencing bill to a mandatory statute as a matter of policy—after all, a quite similar bill had been passed in March, when constitutional concerns were not at issue. But advocates of a nonmandatory bill also argued throughout the debate that such a statute was more likely to withstand Supreme Court scrutiny than was a mandatory sentencing scheme. Governor Askew emphasized this point; witness after witness made the argument at the House Committee hearing on November 27, and Representative Johnson, leading the fight on the floor, made this the focus of his attack.

The debate over which bill should be enacted was thus, to a very large extent, a constitutional debate—a colloquy over the proper interpretation of the various opinions in *Furman*. That debate, it should also be stated, generally proceeded at a high level. Few legislators spoke on the floor, and there is no way of knowing how thoroughly the rank-and-file assimilated the arguments on either side. But the central arguments were accurately identified and skillfully articulated by the leading participants—Governor Askew and Representative Johnson in the one camp, Representative Gautier and the Attorney General's office on the other.

Despite the high quality of the debate, the ultimate vindication of the Florida statute was, in an important sense, fortuitous. Those who predicted that the Court would sustain a bifurcated sentencing law, but reject a mandatory statute, were proved correct: the Florida law was upheld, while mandatory laws were struck down in *Woodson v. North Carolina*<sup>160</sup> and *Roberts v. Louisiana*.<sup>161</sup> But their heavy reliance on the votes of the *Furman* dissenters proved to be unwarranted. Of the

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159. House Hearings—tape, *supra* note 48 (Aug. 31, 1972).

160. 428 U.S. 280 (1976).

161. 428 U.S. 325 (1976).

four Justices who dissented in *Furman*, only Justice Powell subsequently voted to strike down mandatory sentencing laws. Chief Justice Burger and Justice Blackmun, who in *Furman* expressed vehement disapproval of mandatory death penalty measures, voted to uphold the statutes at issue in *Woodson* and *Roberts*.

It is of course quite common for Supreme Court Justices to argue that a particular state policy should be upheld lest the government respond to its invalidation by adopting an even more retrograde approach.<sup>162</sup> And the Justice who employs such an argument does not thereby suggest that the feared alternative would be *unconstitutional*. On this point Robert Marky was more prescient than his opponents: while conceding that the dissenting Justices had expressed distaste for a mandatory death penalty, he insisted that "I don't think Burger and Blackmun will cross over the line of judicial restraint . . . I mean, that's the foundation of their judicial attitude."<sup>163</sup> Some state legislatures, it appears, adopted mandatory sentencing schemes in the mistaken belief that such action was required by the opinions of Justices Stewart and White. Florida lawmakers avoided that fate, at least in part, because of their misreading of two dissents.

In deciding *which* death penalty bill to support, I have argued that Florida legislators were heavily if not primarily influenced by constitutional concerns. Constitutional scruples appeared notably absent, however, when legislators decided whether to vote for any capital sentencing bill at all. Forty-seven members of the House, for example, voted against the proposal to substitute the Askew bill for the mandatory sentencing bill reported by the House Committee. Many of these legislators presumably acted in the belief that *Furman* required mandatory sentencing—indeed, that was the only argument advanced in favor of the mandatory approach. Yet all forty-seven voted "yea" on the next vote, when the choice was between a bifurcated sentencing scheme and no death penalty bill. Nor is there any evidence that these legislators perceived themselves (or were perceived by the public) to be on the horns of an ethical dilemma. The record suggests that the Florida legislature was acutely aware of the limitations placed upon it by the United States Supreme Court, but that legislators saw their relation-

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162. See, e.g., *Greenholtz v. Inmates of Neb. Penal Complex*, 442 U.S. 1, 13 (1979) ("if parole determinations are encumbered by [judicially mandated] procedures that states regard as burdensome and unwarranted, they may abandon or curtail parole").

163. House Hearings—tape, *supra* note 48 (Nov. 27, 1972).

ship to the Court as one of *power* rather than of *duty*. These lawmakers were serious and conscientious in their efforts to understand the Supreme Court's instructions because they recognized that without Supreme Court approval no executions could take place. But they acknowledged no *obligation* to support only those measures which they believed would satisfy the standards announced by the Court.<sup>164</sup> Freshman Senator Bruce Smathers (D-Jacksonville) no doubt spoke for many legislators when he inserted into the Senate Journal the following explanation for his vote:

I am voting yea because of the necessity to reinstate capital punishment in Florida. I have many reservations as to the constitutionality as well as the content of many sections. However, the special session did not allow the necessary time for open hearings, nor careful consideration that a bill of this magnitude deserves. Rather than have no bill at all—I support this compromise.<sup>165</sup>

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164. A single legislator did state that, despite his support for the death penalty, constitutional scruples prevented him from supporting the bill drafted by the conference committee. Representative F. Eugene Tubbs (R-Merritt Island) inserted into the House Journal the following explanation for his vote:

I voted negative on the Capital Punishment Conference Committee report for the following reasons:

1. I do not feel that this legislation overcomes the objections raised by the nine Justices of the U.S. Supreme Court.
2. In the unlikely event that the U.S. Supreme Court finds this legislation constitutional, I have serious doubts that the death penalty will be utilized by the courts of Florida.

As I favor the death penalty and as I favor the three judge tribunal concept for sentencing, I cannot in good conscience vote for this bill.

Fla. J. House Rep., Dec. 1, 1972, at 51.

165. Fla. Sen. J. 40 (Dec. 1, 1972).

The argument here is that many legislators voted in favor of the Florida death penalty bill despite their serious doubts as to its constitutionality. One scholar has advanced the more disturbing suggestion that some state legislatures may have enacted death penalty statutes in the wake of *Furman* because they believed that the Supreme Court would strike them down:

Rather than inhibiting legislative action, the constitutional rhetoric had created an atmosphere in which legislators could have it both ways. They could satisfy some constituents by voting for capital punishment and yet explain their votes, to themselves and to their anti-death law constituents, on the plausible grounds that the law would never be applied.

GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 27 (1982). At least in Florida, the evidence does not support this theory. All the evidence indicates that a very large majority of the legislature supported capital punishment, believed that their

Two eminent students of the death penalty have recently argued that the explosion of post-*Furman* capital sentencing statutes was primarily the product of resentment at the United States Supreme Court's intrusion into an area traditionally reserved to the states. Noting that the great majority of post-*Furman* executions have occurred in southern states, these scholars contend that,

[r]ather than a resurgent national perception of capital punishment as the solution to the criminal homicide, what this pattern illustrates is a *state* response to a *federal* slight that was seen as arbitrary and unwarranted. There is, after all, a long history of disagreement with, and of political and legislative challenge to, the Supreme Court's antimajoritarian rulings.<sup>166</sup>

At least as to Florida, the evidence does not support this view. The meticulous efforts to decipher the various opinions in *Furman*, and thereby to divine the Supreme Court's instructions, bespeak an attitude very different from defiance. Some proponents of capital punishment did accuse the Supreme Court of overreaching, but no one appears to have urged that the desire to assert state autonomy furnished a sufficient reason for passage of a new statute. Representative Johnson, for example, argued that,

*Furman v. Georgia* was a very harsh case, in my opinion, and one which should never have been rendered. It was a great injustice to our nation . . . . But we can't argue with that now. I would say this to you, that whether or not *Furman v. Georgia* was ever decided, we should be here today anyway, deciding whether or not we can come up with a better system of justice for the state of Florida.<sup>167</sup>

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constituents supported it, and would have voted for a death penalty bill even if they had known that it would lead to executions. Moreover, the lengthy and often acrimonious debate over *which* sentencing statute should be enacted would have been altogether pointless if legislators had in fact assumed that no bill would survive judicial review. It is surely possible that *some* lawmakers who might otherwise have opposed the bill declined to do so in the belief that the courts would intervene, but there is no reason to suppose that these members formed a sizeable percentage of the legislature.

166. FRANKLIN ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 44 (1986).

167. Tape of Florida House of Representatives Floor Debate (Nov. 29, 1972) (on file at Florida State Archives, Tallahassee, Fla.).

Many of the leading participants in the debate, moreover, did not quarrel with *Furman* at all, but expressly acknowledged the capriciousness of pre-*Furman* capital sentencing in Florida. When Governor Askew finally recommended passage of a new death penalty statute, he deplored the,

unbridled use of discretion in the sentencing process by which we have applied capital punishment, which has resulted in discrimination. This I found to be particularly true in Florida at the time the *Furman* decision was handed down, where out of twenty-six (26) inmates on death row for rape, nineteen (19) were black. I find it of paramount importance, therefore, both from a legal and moral standpoint, to recommend legislation to you which substantially improves the process.<sup>168</sup>

Ray Marky, testifying before a legislative committee, stated:

We must discern the difference between the jury reaching a competing conclusion of fact predicated upon reasonably accurate instructions from a jury whim because there was no instructions for them to follow whatever, which is what you had in *Furman*. See, in *Furman*, the judge just says, "It's up to you." . . . [W]e just said [to the jurors], "Here, go and have your fun, decide what you want to do with this human." So there was no real frustration of the legislative determination.<sup>169</sup>

Indeed, one of the most emphatic (and persuasive) denunciations of pre-*Furman* capital sentencing is set forth in Florida's brief to the United States Supreme Court in *Proffitt v. Florida*:

It is not surprising that sentences determined under the "system" condemned by *Furman* produced *uninformed, irrational, and freakish results* . . . . The legal "system," was not a "system" at all! It had none of the attributes of a "system" designed to achieve any degree of uniformity. Indeed, the "system" was such that the ultimate question was presented to twelve citizens without any guidance whatsoever who were told that they and they alone could determine the question within their unbridled and unfettered dis-

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168. Letter from Reubin Askew to Senate President Mallory Horne and House Speaker Terrell Sessums 2 (Nov. 22, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11).

169. House Hearings—tape, *supra* note 48 (Aug. 31, 1972).

cretion. Such a method is about as rational as submitting the issue of the defendant's *guilt* to a jury without instructing them as to applicable law and letting them wonder in utter speculation as to whether the accused committed any "crime." Such was the system which was finally found wanting by this Court because it conferred upon juries and/or judges the power to indiscriminately sentence a person to death and *actual experience* has demonstrated contradictory sentences were returned in cases involving similar crimes.<sup>170</sup>

At least in Florida, support for a new capital sentencing statute in the fall of 1972 cannot persuasively be portrayed as a means of defying the United States Supreme Court's decision in *Furman*.

### C. *Furman as a Remand to the Legislature*

Public officials at the time *Furman* was decided, and commentators then and since, have deplored the ambiguity of the Court's decision.<sup>171</sup> That ambiguity—which stemmed both from the opaque quality of the individual opinions and from the fact that each Justice in the majority wrote separately—unquestionably had significant costs. In Florida, for example, the legislature enacted the jury override provision in the mistaken belief that such action was required by *Furman*. If the Court's goal was to force legislatures to adopt new and more reliable

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170. Brief for Respondent at 89-91, *Proffitt v. Florida*, 428 U.S. 242 (1976) (No. 75-5706). Tactical considerations might of course have induced the state's attorneys to refrain from a challenge to *Furman* when they defended the new statute before the United States Supreme Court. The state's brief, however, did not simply *assume* or even *concede* the correctness of *Furman*: it articulated the *strongest possible argument* in favor of that decision. Moreover, the state set forth the same argument in its brief to the Florida Supreme Court—a tribunal that would hardly have been flattered by references to the inequities of pre-*Furman* capital sentencing. See Brief for State of Florida at 14-15, *State v. Dixon*, 283 So. 2d 1 (Fla. 1973) (No. 43,521).

171. See, e.g., Robert A. Burt, *Disorder in the Court: The Constitution and the Death Penalty*, 85 MICH. L. REV. 1741, 1758 (1987) ("*Furman* so starkly deviated from the traditional format that it can be characterized as a decision in which there was not only no Court opinion but no Court—only a confederation of individual, even separately sovereign, Justices."); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 315 (*Furman* "is not so much a case as a badly orchestrated opera, with nine characters taking turns to offer their own arias."); Daniel D. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, 1972 SUP. CT. REV. 1, 40 ("[T]he way that the *Furman* majority presented itself to the world—five separate opinions with none commanding the concurrence of any Justice other than its author—seemed almost deliberately calculated to make this judgment of dubious value as a precedent.").

capital sentencing schemes, the argument goes, why did the Court not clearly state what procedures would survive constitutional scrutiny? It may be, however, that *Furman* is best understood not as a failure to provide guidance, but as an effort to provoke debate. More precisely, *Furman* may be read as holding that death penalty statutes then in place were void on the ground of desuetude.

Alexander Bickel recognized that some rarely-enforced statutes may remain on the books even though they no longer embody the public will—partly because it is always more difficult politically to repeal a statute than to prevent its enactment, and partly because non-enforcement (or selective enforcement) may itself reduce the likelihood of a public outcry for repeal. “When [such a statute] is resurrected and enforced,” Bickel recognized, “it represents the *ad hoc* decision of the prosecutor, unrelated to anything that may realistically be taken as present legislative policy.”<sup>172</sup> The opinions of Justices Stewart and White—which argued that the infrequency with which capital punishment was imposed had transformed the death penalty from an instrument of policy to one of caprice—sounded a similar theme. These Justices employed the Eighth Amendment ban on “unusual” punishments as a textual basis for striking down the Texas and Georgia laws on a ground that was functionally indistinguishable from reliance on desuetude.<sup>173</sup>

By invalidating an infrequently used statute on the ground of desuetude, Bickel argued, the Court can shift to the statute’s proponents the burden of demonstrating that contemporaneous public and legislative support for the law still exists, while leaving open the possibility of re-enactment if such support can be gathered.<sup>174</sup> In a somewhat similar vein Chief Justice Burger, dissenting in *Furman*, acknowledged that he was,

not altogether displeased that legislative bodies have been given the opportunity, and indeed the unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment . . . . The legislatures can and should make an assessment of the deterrent influence of capital punishment, both generally and as af-

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172. Alexander M. Bickel, *Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 61-64 (1961).

173. At least one scholar has previously noted a possible connection between the Court’s decision in *Furman* and the jurisprudential theories of Bickel. See GUIDO CALABRESI, *A COMMON LAW FOR THE AGE OF STATUTES* 26 (1982).

174. *Id.* at 63.

fecting the commission of specific crimes.<sup>175</sup>

It is at least plausible to suppose that some members of the *Furman* majority were influenced to vote as they did not simply by their perception that capital sentencing *procedures* were deficient, but by their desire to ensure that capital punishment would continue only if contemporaneous public support for the death penalty was sufficient to achieve the passage of new statutes.

It is clear, moreover, that when the Court revisited the issue in 1976, it assumed that a wide-ranging public debate over capital punishment had occurred in the four years since *Furman*. The opinion of Justices Stewart, Powell, and Stevens in *Gregg v. Georgia*<sup>176</sup> stated:

The petitioners in the capital cases before the Court today renew the "standards of decency" argument, but developments during the four years since *Furman* have undercut substantially the assumptions upon which their argument rested. Despite the continuing debate, dating back to the 19th century, over the morality and utility of capital punishment, it is now evident that a large proportion of American society continues to regard it as an appropriate and necessary criminal sanction. The most marked indication of society's endorsement of the death penalty for murder is the legislative response to *Furman*. The legislatures of at least 35 States have enacted new statutes that provide for the death penalty . . .<sup>177</sup>

In a companion case, Justice White, joined by Chief Justice Burger and Justices Blackmun and Rehnquist, also relied on the legislative activity as dispositive evidence "that capital punishment is acceptable to the contemporary community as just punishment for at least some intentional killings."<sup>178</sup> Each of the thirty-five states listed, however, had a death penalty statute on the books in 1972 when *Furman* was

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175. *Furman*, 408 U.S. at 403 (Burger, C.J., dissenting).

176. 428 U.S. 153 (1976).

177. *Id.* at 179-80.

178. *Roberts v. Louisiana*, 428 U.S. 325, 353 (1976) (White, J., dissenting).

Ray Marky had anticipated the possibility that the legislative reaction to *Furman* might influence the Supreme Court's conclusions as to the propriety of capital punishment. Testifying before the House Select Committee in 1972, Marky stated that "the contemporary notions [of decency] predicted by the Supreme Court in June of '72 after a lot of referendums and a lot of committees meet may be different." House Hearings—tape, *supra* note 48 (Nov. 27, 1972).



decided.<sup>179</sup> The legislative activity cited by these seven Justices can be regarded as “new evidence” only if we assume that the recent passage of a statute is a more accurate indicator of public sentiment than is the failure to repeal a law enacted in the distant past. That assumption seems reasonable enough; but it surely reflects Bickelian ideas of legislative inertia rather than the Supreme Court’s ordinary view that statutes of whatever vintage are presumed to embody the majority will.

The *Gregg* plurality’s reliance on recent legislative developments reflects another unspoken premise as well: that the process of enacting new capital sentencing *procedures* will in some way involve a debate as to the propriety of capital punishment *vel non*. That this premise is not necessarily accurate may be seen by considering the United States Supreme Court’s decision in *Spaziano v. Florida*.<sup>180</sup> In *Spaziano*, the Court upheld Florida’s jury override provision, which allows the trial judge to sentence a defendant to death despite the jury’s recommendation of life imprisonment. Suppose, however, that *Spaziano* had prevailed. Many Florida inmates would have been removed from death row, of course, but it hardly seems likely that a broad debate over the propriety of capital punishment would have ensued. The legislature would simply have repealed, quickly and with little discussion, the jury override provision. Much the same result could have been expected, it seems to me, if the *Furman* Court had clearly announced that the arbitrariness of prior capital sentencing could be prevented by the adoption of the standards articulated in the Model Penal Code.<sup>181</sup> It was the very *ambiguity* of the *Furman* decision which, by creating the sense that nothing could be taken for granted and that every aspect of the problem must therefore be explored, increased the likelihood of a debate which would include the wisdom of the death penalty itself.

For present purposes, my concern is not with whether the *Furman* Court actually sought to produce the “thorough re-evaluation of the entire subject of capital punishment” forecast by the Chief Justice, nor with whether the effort to produce such a re-evaluation would be an

179. Compare *Gregg* 428 U.S. at 179-80 n.23 (opinion of Stewart, Powell & Stevens, JJ.) with *Furman*, 408 U.S. at 340 n.79 (Marshall, J., concurring).

180. 468 U.S. 447 (1984).

181. Indeed, the Florida legislature’s actions during the spring of 1972 should dispel the notion that revision of capital sentencing procedures is necessarily accompanied by a re-examination of the propriety of capital punishment. In March 1972, the state enacted its bifurcated trial law, yet the legislature rebuffed Governor Askew’s request for the establishment of a commission to study the death penalty.

appropriate use of federal judicial power.<sup>182</sup> I am concerned instead with whether such a re-evaluation did in fact take place in Florida. Insofar as the legislature is concerned, the record is mixed. Certainly no meaningful deliberations occurred at the special session itself: Representative Gautier, in fact, began the November 27 meeting of the House Select Committee by admonishing the witnesses that their comments should be limited to the "technical aspects" of the various bills under consideration and that discussion of the propriety of capital punishment would be inappropriate. On the eve of the legislative session, passage of *some* death penalty bill was universally presumed to be inevitable, and controversy centered entirely on the nature of the statute to be drafted. Indeed, the sense of inevitability was so great as to induce "lesser-of-evils" reasoning even among those not ordinarily inclined towards moral relativism. Florida's Catholic bishops asserted:

It is certainly our hope that the time is not far distant when capital punishment will be abolished altogether. Many men of goodwill nevertheless remain since convinced that the death penalty serves as a strong deterrent of the more heinous crimes. For this reason alone it would be unrealistic to assume that capital punishment will not be restored on a very limited basis in Florida.<sup>183</sup>

The statement then went on to stress the importance of safeguards to prevent arbitrariness in capital sentencing.

To what extent did the legislative committees which met during the summer and fall provide a substitute for plenary consideration of the issue at the special session? The Senate Council on Criminal Justice, appointed by outgoing Senate President Jerry Thomas, drafted a proposed statute which established a mandatory death penalty; but the Council included only two Senators, held no hearings,<sup>184</sup> and offered no

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182. See Gerald Gunther, *The Subtle Vices of the 'Passive Virtues'—A Comment on Principle and Expediency in Judicial Review*, 64 COLUM. L. REV. 1 (1964).

183. Statement issued by the Catholic Bishops of Florida on Capital Punishment (Nov. 29, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 757, Box 11).

184. The Council explained that "[s]ince public hearings have been held by the Governor's Committee to Study Capital Punishment and by the House Select Committee on the Death Penalty, it would be an unnecessary expenditure of public funds for this Council to duplicate that procedure . . . ." Letter from Senate Council on Criminal Justice to Senate President Mallory Horne 1 (Nov. 20, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

explanation for its conclusions.<sup>185</sup> The House Committee conducted far more extensive deliberations, but its attention was focused primarily on the question of what sort of bill should be drafted. Nor did the House Committee function effectively in its role as an assimilator of information and ideas on which other legislators could draw. Addressing the committee soon after its formation, outgoing House Speaker Richard Pettigrew cautioned the committee that much of the legislature in the special session would be new and that the committee's report should therefore be comprehensive.<sup>186</sup> Pettigrew stated: "I think you should have an in-depth majority and minority report or a series of minority reports, if need be, so that every viewpoint is available to the Legislature as a whole, come November."<sup>187</sup> The committee's final report, however, was only six pages long; the final four pages discussed the debate between mandatory and nonmandatory sentencing, and the only argument advanced in favor of enacting a new death penalty statute was that "[i]n reviewing the testimony received, there was actually very little opposition to the reenactment of capital punishment."<sup>188</sup>

To say all this is not to say that *Furman* accomplished nothing, or that the legislative response to the decision was reflexive or uninformed. The need to pass a law served to ensure that there existed a contemporaneous majority within the state favoring capital punishment; representatives were given ample time and opportunity to ascertain and act upon the wishes of their constituents. That is hardly an insignificant point: a principal aim of Bickelian jurisprudential techniques is to combat the inertial forces that often prevent the repeal of statutes that lack contemporary support. Moreover, *Furman* at least helped to create a climate in which abolition of the death penalty was deemed to be among the options "on the table." This was due largely, I have argued,

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185. The Council's final report included findings that "[t]he death penalty is a deterrent to homicide, and there is a place in the field of law enforcement for capital punishment; so the death penalty should be reinstated" and that "[t]he mandatory death penalty is the proper method to follow in reinstatement." *Id.* at 3. The only statement as to the basis for these conclusions was that "[t]he Council, in its deliberations, was able to draw upon the experiences of its members, the report of the Attorney General, and the reports of the Governor's Committee to Study Capital Punishment and the House Select Committee on the Death Penalty." *Id.* at 2-3.

186. House Hearings—transcript, *supra* note 46, at 3-4 (Aug. 9, 1972).

187. *Id.* at 6.

188. *Final Report of the House Select Committee on the Death Penalty 2* (Nov. 27, 1972) (copy on file at Florida State Archives, Tallahassee, Fla., Series 19, Carton 464).

to the ambiguity of the *Furman* opinions. Had the Supreme Court clearly identified the sort of sentencing scheme that would withstand its review, it is unlikely that the propriety of capital punishment would have been considered a legitimate subject for debate.

*Furman* did not, however, at least in Florida, produce the "thorough re-evaluation" more optimistically forecast by the Chief Justice: the legislature undertook no systematic study of the issue beyond its effort to determine the will of the people. This is not to say that legislators acquiesced in a policy of which they did not approve. There is every reason to believe that most lawmakers shared the public's view as to the morality and the efficacy of capital punishment. The point is that *Furman* did not induce either the public or the legislature to rid itself of its preconceptions and start from scratch; society did not so much "re-evaluate" the issue as simply "re-affirm" that it continued to adhere to its former view. Legislators *did* thoroughly and astutely debate the issue of mandatory versus nonmandatory sentencing; but in other respects the details of the statute ultimately passed did not reflect any special expertise as to the mores and problems of Floridians. The aggravating and mitigating factors were taken directly from the Model Penal Code; the jury override provision (the only feature of the statute that is distinctive to Florida) was an accidental feature that no one actually wanted and that has plainly failed to serve its intended function.

#### D. *The Role of the Governor*

Of all the participants in the Florida debate, the most enigmatic was surely Governor Reubin Askew. Governor Askew was, for most of the debate, a non-participant; he expressed no view on the issue until November 20, a week before the special session convened. His ultimate recommendation that a statute be enacted was accompanied by expressions of doubt as to the wisdom of his chosen course. Yet in the end, Askew must be deemed the most influential actor of all, in the sense that he, and he alone, might single-handedly have changed the outcome. Whether Askew's opposition could have prevented the enactment of a new death penalty statute remains a matter of conjecture.<sup>189</sup> Un-

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189. The question whether Askew's opposition could have prevented the enactment of a death penalty statute evoked widely varying reactions from those I interviewed. Mallory Horne states that "[i]f he had absolutely in the trenches opposed it—in the first place I don't believe it would have passed, but if it had passed, his veto

questionably, though, no other individual could have done so.

In the end, of course, Governor Askew recommended that a death penalty statute be enacted. Harold Stahmer, a professor of religion at the University of Florida who served on the Governor's Committee, states: "I sized [Askew] up that he'd stick his neck out on race, on integration, but he wasn't going to stick his neck out on the death penalty."<sup>190</sup> Jack Gordon notes that "Askew, like most governors—they don't like to be beaten. And so, they kind of use that veto pretty judiciously . . . . I don't think that Askew was overridden in eight years, on anything—a product of very careful choosing."<sup>191</sup> Political considerations surely cannot be discounted. It seems clear that Askew would have had nothing to gain and much to lose by opposing the reinstatement of capital punishment, particularly if his opposition had ultimately proved unsuccessful. But it is at least equally plausible that the governor acted out of a sincere belief, after a period of exhaustive deliberation, that enactment of a new death penalty statute was in the best interests of the state. Governor Askew, after all, did not have the issue thrust upon him against his will; even prior to *Furman*, the governor had unsuccessfully urged the legislature to re-examine the propriety of capital punishment. Askew's aides (themselves adamant opponents of the death penalty) insist that political calculations played an inconsequential role in his decision.<sup>192</sup> Askew had shown himself willing

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would have been sustained. He was a very popular governor at the time." Interview with Mallory Horne in Tallahassee, Fla. (Feb. 13, 1991). Edgar Dunn expresses the view that Askew could have sustained a veto if he had put his weight behind it. Interview with Edgar Dunn in Daytona Beach, Fla. (Dec. 12, 1990). James Apthorp is more doubtful: "I don't think he could have changed the majority opinion in the legislature. It's possible he could have sustained a veto—maybe; that would have been hard, too. There was very strong support—still is—in the Florida legislature." Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991). Robert Johnson states unequivocally that "I have no doubt that if [Askew] had come out against capital punishment, we would have passed a bill and we would have overridden a veto." Interview with Robert Johnson in Sarasota, Fla. (Dec. 18, 1990).

190. Interview with Harold Stahmer in Gainesville, Fla. (Dec. 12, 1990).

191. Interview with Jack Gordon in Miami Beach, Fla. (Dec. 20, 1990).

192. James Apthorp states:

I don't think he engaged in a lot of political considerations in thinking about the issue. I mean, it was there, there was the specter of doing something unpopular, but that didn't bother him a lot on other issues. He was . . . pretty courageous in taking public positions that didn't enjoy public support . . . . He was never really afraid of public opinion as long as he felt good about what he was doing.

Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991).

to buck popular sentiment, particularly in the busing controversy that erupted earlier that year.

Throughout his years as a legislator, Askew had consistently supported capital punishment. As Hugh McMillan, Jr. (Askew's legislative assistant during 1972) explains, that position reflected the governor's professional background and his instinctive reluctance to break sharply from the past:

The governor as a young lawyer had been a prosecutor, and he's basically a very compassionate person, but he comes out of a pretty classically conservative value system. The few points where he really broke from that would be in his absolutely total commitment to racial justice . . . . His background would be the background of an essentially conservative person, which doesn't necessarily mean you'd be for or against capital punishment, but he's basically not looking for new ways to develop bold new approaches to things.<sup>193</sup>

Though no one was executed during his two terms as governor, Askew's perception of the unique responsibilities of his office appears to have led him to re-evaluate his position. As one of his closest aides puts it, "[i]t's a lot easier to favor capital punishment on some theoretical level than it is to have to sign a death warrant."<sup>194</sup> The same aide states that Askew,

started out and wound up in the same position, but he really had a struggle in between . . . . I think it was a real struggle between his religious beliefs and his civic duty . . . . He sort of came from the law enforcement, prosecutorial mindset at this issue. And he never quite got beyond that, in my view, except that he was nagged, and

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Hugh McMillan, Jr. agrees:

On an issue like this, he would be mostly trying to do what he thought was the right thing to do; and by mostly I mean like about ninety-nine percent . . . . I compare him to Lincoln in some ways, in that he wasn't necessarily looking for trouble, he wasn't necessarily looking for a chance to be a great leader, or a political hero, but he would absolutely not flinch from doing what he thought was the right thing to do.

Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990). Both Apthorp and McMillan recall that they attempted to persuade Askew to oppose capital punishment during the fall of 1972.

193. Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990).

194. Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991).

bothered, and almost brought down by his religious beliefs.<sup>195</sup>

McMillan notes that “[p]articularly any suggestions that there was any racial bias or an economic class bias in the way it was either applied or administered—Askew would have a sensitivity to those kinds of concerns.”<sup>196</sup> That assessment is borne out by the governor’s emphatic denunciation of pre-*Furman* capital sentencing, in which Askew focused on the disproportionate frequency with which blacks had been sentenced to death. Askew may ultimately have become convinced—though not without lingering qualms<sup>197</sup>—that the sentencing procedure devised by the Governor’s Committee could alleviate the discriminatory aspects of the prior system, and that narrowly targeted use of capital punishment could be an effective deterrent to violent crime.

In the end, the precise mix of factors that led to Askew’s decision must remain unknowable—even to the man himself. But if any true re-evaluation of the issue took place in Florida during 1972, it took place in the office of the governor. It was the Governor’s Committee that undertook the most thorough and systematic inquiry into the issue. Only the Governor’s Committee, for example, made any effort to grapple with the empirical evidence concerning the deterrent value of capital punishment. The governor himself, almost alone among Florida public officials, appears to have made a genuine effort to set aside his preconceptions and think through the problem anew.

#### IV. CONCLUSION

The Florida legislature’s debate over the death penalty in 1972 furnishes a highly instructive example of the interaction between the

195. *Id.*

196. Interview with Hugh McMillan, Jr. in West Palm Beach, Fla. (Dec. 21, 1990).

197. James Apthorp indicates that Askew remained troubled by the issue throughout his tenure as governor:

The things he did between 1972 and 1978, when he left—I mean it was six years that . . . he could have been faced with this issue, but he avoided it right down to the end. He stretched ‘em out, he sent ‘em back, he’d want to know more about ‘em; I mean, he’d ask for another report. He really had a hard time facing this issue . . . . He spent the whole six years struggling with it, and worrying about it, and trying to avoid having to do it, and all the time he maintained this public position in favor of having capital punishment, but it was really difficult for him.

Interview with James Apthorp in Tampa, Fla. (Feb. 15, 1991).

United States Supreme Court and the elected representatives of the people. The most obvious aspect of that interaction lay in the legislature's efforts to devise capital sentencing procedures that would withstand judicial scrutiny in the future. The debate within the legislature furnished an odd species of constitutional discourse. The aim was not to discover unifying principles shared by the Court generally. Rather, the legislature's technique was to examine each of the *Furman* opinions individually in order to determine each Justice's likely attitude towards the bills under consideration, and the preferences of the *Furman* dissenters consequently assumed as much importance as did the views of the majority. Given the disjointed nature of the *Furman* decision, however, no other method of constitutional inquiry would seem to have been possible; and it should be said that leaders on both sides of the debate were astute and careful in their parsing of the Supreme Court's "instructions." At the same time, however, legislators acknowledged no *obligation* to withhold their support from any bill that they believed the Court would disapprove. Legislators sought to pass the bill that enjoyed the greatest chance of Supreme Court approval; but virtually all members of the body deemed it preferable to support a bill of doubtful constitutionality rather than to support no bill at all.

The interaction between Court and legislature, however, went beyond lawmakers' efforts to devise capital sentencing *procedures* that would satisfy the Court's concerns. The Supreme Court's decision in *Furman*, I have argued, was not simply a command that new procedures be developed to determine which individuals would be condemned to die. The decision was, in addition, an invitation to renewed debate on the question whether capital punishment should be employed at all. An evaluation of the Florida legislature's performance during the fall of 1972 must ultimately depend on one's conception of the proper relationship between the people of a democracy and their elected representatives.

One version of democratic theory holds that the elected representative should act solely as a proxy whose duty is to determine, and then to advocate, the views of his constituents. Adherents of this position could have no quarrel with the Florida legislature's disposition of the death penalty issue. Insofar as the legislature's proper role is to give effect to the values and preferences of its constituents, the decision to reinstate the death penalty cannot be faulted. In concluding that capital punishment was not *per se* violative of the Eighth Amendment, the Supreme Court in 1976 was heavily influenced by the spate of legislative activity that had occurred in the four years since *Furman*. Passage



of new death penalty statutes, the Court concluded, was persuasive evidence that public support for capital punishment remained strong. At least as to Florida, that inference appears justified. Capital punishment was not foisted upon the public through parliamentary machinations. It was not the brainchild of a single charismatic individual. It was not a means of asserting state autonomy in defiance of the United States Supreme Court. The simplest explanation for the passage of the statute appears also to be the correct one; capital punishment was reinstated in Florida because a sizeable majority of the Florida public believed reinstatement to be a wise policy.

A second view of the legislative function emphasizes the need for independence on the part of individual lawmakers. Although the legislator's duty is to seek the public good, the argument goes, the premise of a *representative* democracy is that the people should elect officials who possess a heightened understanding of political issues. The legislator's responsibility, on this view, is to act upon his own conception of the common good. His decisions should be informed but not controlled by the opinions of his constituents. Judged against this model also, the performance of the Florida legislature in 1972 is difficult to criticize. Had every legislator voted his conscience, there would presumably have been more than one vote against the death penalty; but there is every reason to believe that a sizeable majority of Florida lawmakers sincerely shared their constituents' support for capital punishment.

A third model of legislative action stresses the importance of the lawmaking *process*. This view holds that legislatures can improve upon the wishes of the electorate—not because individual lawmakers necessarily possess superior insights into public problems, but because the fact-finding capabilities of the legislature, combined with the increased understanding that emerges through collective deliberation and debate, can enable the lawmaking *body* to develop solutions that no individual member could achieve on his own. Those who believe that the legislature is obligated to engage in a process of deliberation that goes beyond the ascertainment of public sentiment may be more troubled by the performance of Florida's lawmakers. Individual legislators may have thoroughly studied the issue of capital punishment; but the legislature, as a collective body, engaged in no meaningful deliberation before voting in favor of reinstatement.

Even a theorist who generally adheres to this conception of the legislative process, however, might be cautious about applying it to the issue of capital punishment. Some aspects of the issue may be incapable of resolution by means of deliberation and debate. Whether retribu-

tion is a legitimate function of the criminal justice system; whether it is inherently wrong for the state to kill individuals in service of public ends—these are questions which appear simply unsuited to rational argument.<sup>198</sup> To a significant extent capital punishment is one issue—abortion is another—on which the most committed members of the opposing camps may share so few common premises as to make a fruitful debate almost impossible. As to some of the moral issues implicated by the death penalty, it is doubtful that a legislative resolution can ever be more than a poll.

The question whether capital punishment acts as a deterrent to crime, however, would seem to be well-suited for elucidation through the fact-finding mechanisms of the legislature. As to this aspect of the problem, the Florida legislature's performance is more difficult to approve. Some individual legislators may have studied the available empirical evidence. But neither the House nor the Senate committee, nor the legislature as a body, made even a cursory effort to accumulate or consider the data bearing on this issue.

Models of legislative behavior tend to focus on individual issues viewed in isolation. Implicitly they ask how an ideal legislature would resolve a particular problem if it had no other business before it. Viewed against this version of the deliberative process theory, the enactment of the Florida death penalty is easy to criticize. The deliberations conducted by the Florida legislature did not remotely resemble the sort of inquiry one would expect from decisionmakers who deemed the issue important and regarded the propriety of capital punishment as a truly open question. At the same time, however, it seems unlikely that any other measure which attracted the opposition of only one legislator would have been more thoroughly discussed. The cursory nature of the legislative debate was to a large extent the result of the virtual unanimity of the Florida legislature. Though prolonged deliberation and debate might seem desirable as to any issue viewed in isolation, the truth is that a productive legislature has neither the time nor the resources to give exhaustive consideration to more than a small number of questions. These are almost certain to be issues which are perceived as both significant *and* hotly contested. When legislators believe that

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198. Jesse McCrary, Jr., a member of the Governor's Committee who opposed reinstatement, asserts that "any time you start talking about capital punishment, if one has dealt with it any at all, people have a mindset about it, and it's very difficult to change people about that. It's a very emotional problem . . ." Interview with Jesse McCrary, Jr. in Miami, Fla. (Dec. 20, 1990).

their intuitions about a public problem are universally shared, there is little reason to move beyond intuition.

It seems likely that some "critical mass" of opposition to a state's prevailing practice is necessary before the legislature can realistically be expected to undertake a true re-evaluation of the issue. The aftermath of *Furman* in Florida thus demonstrates both the potential and the limitations of Bickelian jurisprudential techniques. The Court's decision ensured that capital punishment would not remain in place unless contemporaneous public support could be demonstrated. It even created an atmosphere in which opposition to reinstatement was regarded as an alternative that was legitimately on the table. The Court could not, however, create a genuine clash of views where none had previously existed; and without disagreement there is unlikely to be debate.