

## Death Penalty

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## DEATH PENALTY

In 1972, there were over 600 men in our nation's prisons living on "borrowed" time.<sup>1</sup> All were awaiting execution under death sentences previously imposed. Truly remarkable strategy on the part of lawyers, however, has prevented the execution of any person in this country since June 2, 1967.<sup>2</sup> Then on June 29, 1972, the United States Supreme Court decided *Furman v. Georgia*.<sup>3</sup> That decision was a logical continuation of the strategies that helped produce it. In a decision that required nine separate opinions, the Court held the death penalty, as currently imposed, to be violative of the eighth amendment's ban against cruel and unusual punishment.

Although *Furman* struck down the death penalty in thirty-nine states, the District of Columbia and under the federal statutory structure,<sup>4</sup> the controversy still rages over its exact impact. Some legal scholars believe nothing less than a total restructuring of our entire system of criminal justice will conform to the mandate of *Furman*. Others are convinced a mandatory death penalty that eliminates discretion is still permissible.<sup>5</sup>

Illinois was one of the many states affected by the *Furman* decision. When *Furman* was decided, Illinois law permitted the death penalty for only three offenses: murder,<sup>6</sup> aggravated kidnapping for ransom,<sup>7</sup> and treason.<sup>8</sup> Most notably, under the Illinois provision, unless the defendant chose a jury, the trial judge had complete discretion whether or not to impose the death penalty. If a jury was chosen, death could only be imposed if the jury so recommended, and the judge agreed.<sup>9</sup> The discre-

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1. *Furman v. Georgia*, 408 U.S. 238, 417 (1972) (Powell, J., dissenting).

2. Meltsner, *Litigating Against the Death Penalty: The Strategy Behind Furman*, 82 YALE L.J. 1111 (1973). For an interesting in-depth analysis of the strategies used see M. MELTSNER, *CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT* (1973).

3. 408 U.S. 238 (1972).

4. *Id.* at 411 (Blackmun, J., dissenting).

5. Ehrhardt, *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L.C. & P.S. 2 (1973).

6. ILL. REV. STAT. ch. 38, § 9-1(b) (Supp. 1972).

7. ILL. REV. STAT. ch. 38, § 10-2(b)(1) (Supp. 1972).

8. ILL. REV. STAT. ch. 38, § 30-1(c) (Supp. 1972).

9. ILL. REV. STAT. ch. 38, § 1005-5-3(b) (Supp. 1972).

tion inherent in the Illinois scheme caused it to be specifically voided in *Moore v. Illinois*.<sup>10</sup>

To fill the vacuum created by *Furman* and *Moore*, the Illinois legislature passed two mandatory death penalty provisions for murder in the closing days of its first 1973 session. The first bill, House Bill 20, cleared the legislature on June 27, 1973.<sup>11</sup> As originally introduced, that Bill provided for a mandatory death penalty if a murder fell into one of eight categories.<sup>12</sup> It also provided for automatic review by the Pardon and Parole Board so that a recommendation could be made to the Governor whether to exercise executive clemency. However, due to the pressures affecting all legislation,<sup>13</sup> the Bill underwent major surgery. The result was a bill that provided for the automatic death penalty if the trier of fact finds that the murder is of any peace officer, fireman, or correctional official engaged in the performance of his duties or the murder is committed by a person who has previously been convicted of murder. The provision for review by the Pardon and Parole Board was eliminated.

The Bill required the "trier of fact"<sup>14</sup> upon conviction of murder to make special written findings of fact as to whether the murder falls into either of the two categories mentioned above. If so, the mandatory sentence was death.<sup>15</sup> It is clear that the Bill provided for a mandatory death penalty only for *murder* under certain circumstances. However, the Bill retains language apparently permitting the death penalty, as previously imposed,<sup>16</sup> for other Class 1 felonies.<sup>17</sup> Whether in response

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10. 408 U.S. 786, 800 (1972).

11. H.B. 20, 78th Ill. Gen. Assembly (1973), sponsored by Rep. R.D. Cunningham (R.-Lawrenceville) [hereinafter cited as H.B. 20].

12. *Id.* § 1(b). Murder: 1) of any policeman or fireman; 2) committed for money; 3) of a person during a known public appearance; 4) by a convicted murderer; 5) by someone under life sentence; 6) during a forcible felony; 7) during a kidnapping; and 8) during a hijacking.

13. It was believed that the Governor would not sign an overly broad bill. And the provision explicitly providing for executive clemency smacked too much of the discretion frowned upon in *Furman*.

14. Although the Bill as originally proposed defined such terms as "assassination" and "hijacking," "trier of fact" was not defined in either of the Bills. Problems seem certain to arise if the jury is required to make "special written findings of fact."

15. Although the Bill does not explicitly provide for executive clemency, that possibility is still present. ILL. CONST. art. V, § 12.

16. ILL. REV. STAT. ch. 38, § 1005-5-3(b) (Supp. 1972).

17. The language of ILL. REV. STAT. ch. 38, § 1005-5-3(b) (Supp. 1972) is retained for offenses other than murder which provide for sentences of death, for example, aggravated kidnapping for ransom and treason.

to their uncertainty about the mandatory death penalty as created, or possibly in response to retention of the death penalty for other offenses, the legislators included provisions in the event that the penalty is declared unconstitutional.<sup>18</sup>

The second death penalty bill, House Bill 18, was sent to the Governor's desk on June 30, 1972.<sup>19</sup> Although this proposal was more comprehensive than House Bill 20 and provided for death in eleven situations,<sup>20</sup> Governor Walker surprised many by approving House Bill 18 and vetoing House Bill 20.<sup>21</sup> House Bill 18, however, did not escape the Governor's scrutiny entirely unscathed. The Governor used his amendatory veto power to incorporate important changes into the Bill.<sup>22</sup> First, he reduced the number of situations requiring death from eleven to seven.<sup>23</sup> He excised four categories claiming they were either too broad or adequately covered by other provisions. Secondly, he delayed the effective date of the Bill until its constitutionality is ruled upon favorably.<sup>24</sup> Thirdly, and most importantly, he altered the actual sentencing procedures. Originally, the Bill had provided that after a finding of guilt on a murder charge, but before sentencing, the Chief Judge of the Circuit Court was to appoint a three-judge panel.<sup>25</sup> The panel was to hear evidence to determine whether the murder fell into any of the eleven specified categories. At the hearing before the three-judge panel, the burden was upon the state to prove beyond a reasonable doubt that the murder fell into one of the eleven categories. If a majority of the

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18. If the death penalty or any death sentence is found to be unconstitutional, the defendant must then be sentenced to a prison term of not less than fourteen years. H.B. 20, § 1(d).

19. H.B. 18, 78th Ill. Gen. Assembly (1973), sponsored by Rep. Henry Hyde (R.-Park Ridge).

20. *Id.* § 5-8-1A. Murder: 1) of an elected official; 2) of a peace officer or fireman; 3) of a correctional official; 4) by a person twice convicted of murder; 5) by tampering with water, gas, electricity, etc.; 6) during a hijacking; 7) for money; 8) by contract; 9) during the course of certain felonies; 10) of a witness; and 11) by a person under a life sentence.

21. Governor Walker vetoed House Bill 20 and approved House Bill 18 on September 12, 1973, although he did so only after making some changes pursuant to his amendatory veto power.

22. See ILL. CONST. art. IV, § 9(d) for the Governor's unique amendatory veto power.

23. He removed four categories from the eleven requiring death. These were murder: 1) of an elected official; 5) by tampering with water, gas, electricity, etc.; 8) by contract; and 10) of a witness.

24. Exactly what this means is unclear. How can a bill be tested until a prosecution is brought under it? How can anyone be prosecuted until it becomes effective?

25. One judge is to be the trial judge if possible.

panel found that the murder fell into any of the specified categories, no discretion was allowed, and the sentence must be death.<sup>26</sup> Governor Walker approved this procedure, but he added one additional factor. Now, the three-judge panel can decide not to impose death even if the murder falls into one of the seven categories—for compelling reasons of mercy. The Governor apparently felt that the Bill as written was too restrictive and did not provide enough flexibility to allow mercy in appropriate cases.<sup>27</sup>

Remaining in the Bill is an interesting provision for a two-stage appellate review. After the normal review for error, the appellate court is then required to conduct an evidentiary hearing to determine if the sentence of death was the result of discrimination based on race, creed, sex or economic status. If discrimination is found, a sentence of life imprisonment is to be imposed. This Bill eliminates the provisions in the Uniform Code of Corrections for a sentence of death for other Class 1 felonies, but does not remove the wording from the offenses themselves.<sup>28</sup> Finally, as in House Bill 20, it contains provisions in case the penalty is declared unconstitutional.<sup>29</sup>

Illinois has not been the only state to rewrite a criminal code to comply with *Furman*. In December, 1972, during a special four day session, Florida became the first state to actually write a mandatory death penalty bill for certain types of murder.<sup>30</sup> Although the Florida statute is similar to House Bills 18 and 20 in many respects, it goes even further and specifically lists aggravating and mitigating circumstances the sentencing court must consider in determining the sentence. If mitigating circumstances exist, the defendant may escape the death penalty. The earlier version of House Bill 20 contained such a feature but was eliminated before passage. The Florida statute may well be the first rewritten

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26. The Bill is not entirely clear on exactly who pronounces sentence. Section 9-1(b) suggests that the trial judge does, while section 5-8-1A(9) suggests that sentencing is up to the three-judge panel. Perhaps the real intent is that the three-judge panel pronounce sentence of death; otherwise, it goes back to the trial court for imposition of a prison sentence. But after hearing lengthy arguments on sentence, should not the three-judge panel pronounce sentence in all cases?

27. The Governor felt that the state must provide a procedure for even that one case where death would be legally required but not morally justified (e.g., father of daughter raped by two men finds and kills both men). Perhaps a manslaughter instruction would be the appropriate remedy. In any event, executive clemency is available.

28. ILL. REV. STAT. ch. 38, §§ 10-2(b)(1), and 30-1(c) (Supp. 1972).

29. See note 18, *supra*.

30. FLA. STAT. ANN. § 921.141 (1973). See also Ehrhardt & Levinson, *Florida's Legislative Response To Furman: An Exercise in Futility*, 64 J. CRIM. L.C. & P.S. 10 (1973).

mandatory death penalty bill to come before the United States Supreme Court. In July, 1973, the Florida Supreme Court upheld the constitutionality of their new statute.<sup>81</sup>

As the result of an interesting judicial interpretation, both Delaware<sup>82</sup> and North Carolina<sup>83</sup> also have mandatory death penalty bills. Both states had the customary two part death penalty provision in their statutes. One part called for a sentence of death for certain crimes and the second provided that a recommendation of mercy by the jury would reduce the sentence to life imprisonment. In both cases, the state supreme courts held the mercy provisions invalid in light of *Furman* but went on to hold that the statutes were severable and thus a mandatory death penalty resulted—for all capital offenses.

Altogether, seventeen states have redrafted their laws to conform to *Furman*. Montana has already sentenced two jail escapees to be hanged for murder. California, which had more men on death row than any other state when *Furman* was decided, has just enacted a capital punishment bill. In perhaps the most bizarre of all cases, a Pennsylvania judge sentenced a man to death even though that state has no provision for capital punishment.

In spite of the apparent tremendous popular support for death penalty legislation, whether any of the attempts will be successful in light of *Furman* is a subject of much debate. There is language in *Furman* to the effect that mandatory death penalties would be sustained;<sup>84</sup> and there is also language that they would not.<sup>85</sup> Senators have questioned the

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31. *State v. Dixon*, 13 CRIM. L. RPTR. 2495 (July 18, 1973).

32. *State v. Dickerson*, 298 A.2d 761 (Del. 1972).

33. *State v. Waddell*, 194 S.E.2d 19 (N.C. 1973).

34. Justice Stewart, concurring in *Furman*, stated: "[I] cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment." 408 U.S. 238, 308 (1972). Justice White, also concurring, announced:

[I] do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the eighth amendment.

*Id.* at 310-11.

35. Justice Douglas in a concurring opinion in *Furman*, stated:

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment.

Such conceivably might be the fate of a mandatory death penalty. . . . 408 U.S. 238, 257 (1972). And Justice Powell, dissenting, said that "Nothing short of an amendment to the United States Constitution can reverse the Court's judgments." *Id.* at 462. See 118 CONG. REC. H 6477 (daily ed. June 30, 1972), for just such a reaction.

constitutionality of such new measures,<sup>36</sup> as have legal scholars.<sup>37</sup> It is worth noting that the dissenting justices in *Furman* may find a mandatory death penalty offensive.<sup>38</sup> Interestingly, *Stewart v. Massachusetts*,<sup>39</sup> which followed *Furman* and similarly struck down a sentence of death was a per curiam opinion with no dissents. The dissenting justices in *Furman* were troubled with the break from the long line of cases upholding the death penalty.<sup>40</sup> But now that the break has been made, they too may join the present majority when further cases arise.

Notwithstanding the doubts voiced by many scholars, the *Furman* opinion leaves the distinct impression that death may be imposed if discretion is eliminated.<sup>41</sup> The present rash of mandatory death penalty bills is ample proof of that. The Bill signed by Governor Walker eliminated the kind of obvious jury discretion struck down by *Furman*. Whether it eliminated the discretion inherent in our whole system of criminal justice is another question.<sup>42</sup> Some scholars believe the mandate of *Furman* cannot be met until discretion is removed at every level.<sup>43</sup> But even if such a sweeping change is not required, House Bill 18 is open to attack on many fronts.

House Bill 18 attempts to comply with *Furman* by narrowly defining the offenses for which death is the sentence. But recently a New York court struck down a statute that allowed death only for the murder of a policeman engaged in the performance of his duty.<sup>44</sup> The narrow scope of the statute did not save it because death was not required in every instance. Apparently House Bill 18 will not be able to rely only on its carefully drawn categories in the court test sure to come.

House Bill 18 also leaves some technical questions unanswered. Nowhere does it state what type of evidence will be admitted at the sentencing hearing before the three-judge panel. Will all rules of evidence

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36. 118 CONG. REC. S 15631-32 (daily ed. Sept. 21, 1972).

37. See text accompanying note 5, *supra*.

38. 408 U.S. at 401 (Burger, C.J., dissenting).

39. 408 U.S. 845 (1972).

40. 408 U.S. 238, 380-82, 407-08, 417, 467 (Burger, C.J., Blackmun, Powell and Rehnquist, J.J., dissenting).

41. See Note, 22 DEPAUL L. REV. 481, 497-98 (1972); Note, 47 ST. JOHN'S L. REV. 107, 140-41, 146-47 (1972).

42. Discretion is pervasive at all levels: executive clemency, plea bargaining, lesser and included verdicts, state's initial decision to prosecute, grand jury function, and quality of defense counsel. Perhaps it is unreasonable to expect legislation alone to eliminate this degree of discretion.

43. See note 5, *supra*.

44. *People v. Fitzpatrick*, 13 CRIM. L. RPTR. 2277 (June 27, 1973).

apply, or just some? Exactly who pronounces sentence, the three-judge panel or the trial court?<sup>45</sup> There also seems to be an inconsistency in the Bill itself. If the Bill is declared unconstitutional, or the murder does not fall into one of the specified categories, the defendant is sentenced to a term of imprisonment of not less than fourteen years. If the appellate court finds discrimination in the sentencing procedure, the defendant is sentenced to life imprisonment. Is the remedy for discrimination more discrimination? Additionally the Bill is not clear on which court an appeal is to be taken. If the Bill requires an appeal to the Illinois Appellate Court, then this provision conflicts with Supreme Court Rule 603<sup>46</sup> which provides for direct appeal to the Illinois Supreme Court in cases imposing the death penalty. Moreover, the question arises as to whether an evidentiary hearing on discrimination is to be held by all appellate courts, or just the first one. In any event, how will the Illinois Supreme Court find time for what will surely be a lengthy evidentiary hearing on discrimination?<sup>47</sup>

Perhaps the most important challenge facing the Bill will center on the provision permitting the three-judge panel not to impose death for "compelling reasons of mercy." Originally, death was mandatory if the murder fell into one of the specified categories. Governor Walker then added this element of discretion that may well lead to the Bill being declared unconstitutional. If *Furman* did nothing else, it struck down discretion in applying the death penalty. Some states have attempted to avoid this problem by explicitly stating the aggravating and mitigating circumstances a sentencing court may consider.<sup>48</sup> Governor Walker apparently decided this approach would be too restrictive and inserted some discretion but omitted listing any standard.<sup>49</sup> With no express standard to apply, each three-judge panel is thus left to determine and apply its own standard in deciding what constitutes compelling reasons of mercy. Whether this is a higher degree of discretion or a kind of discretion that is different from that struck down by *Furman* is a question that will only be answered by future court tests.

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45. See note 26 and accompanying text, *supra*.

46. ILL. REV. STAT. ch. 110A, § 603 (1971).

47. The wording of the bill would not seem to allow the use of a "master" to conduct the hearing.

48. See FLA. STAT. ANN. §§ 921.141(3) & (4) (1973); MODEL PENAL CODE §§ 201.6(3) & (4) (Final Draft No. 1, 1961). For an explanation of a proposed federal bill see 13 CRIM. L. RPT. 2357 (July 18, 1973).

49. Furthermore, such an approach is apparently needless in light of executive clemency. See note 27, *supra*.



However, even if the discretion allowed by House Bill 18 is found to be permitted under *Furman*, the host of other questions presented by that Bill may well tie up any prosecution under it for years to come.<sup>50</sup> In spite of its technical deficiencies, the legislators are aware that in a 1970 constitutional referendum, Illinois voters favored retention of the death penalty by over two to one. With that kind of a popular mandate and the confusion of *Furman*, Illinois is one of the many states awaiting the Supreme Court's next word on the death penalty.<sup>51</sup>

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50. This assumes that the confusion surrounding its effective date is ended. See note 24, *supra*.

51. A constitutional majority was needed to pass the bill as amended. A three-fifths majority was needed to pass the bill as originally written. ILL. CONST. art. IV, § 9. On October 31, 1973, House Bill 18 as amended by Governor Walker was overwhelmingly approved by the legislature.