The New Illinois Death Penalty: Double Constitutional Trouble

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C'est le crime qui fait la honte, et non pas l'échafaud.¹

French legal maxim

In its monumental decision, Furman v. Georgia,² the United States Supreme Court, by a five-to-four vote, held that the imposition and the execution of death sentences under the statutes of Georgia and Texas constituted cruel and unusual punishment in violation of the eighth³ and fourteenth⁴ amendments. Because of the uncertainties associated with the meaning of the Furman decision, capital punishment in the United States rests, for the moment, in a state of constitutional limbo. Opinions across the judicial spectrum run from speculation that the death penalty is now unconstitutional per se to theories that the death penalty may be constitutional if imposed in a less discretionary manner. Following the latter school of thought, many states have rein-stated capital punishment under the guise of new laws which purport to conform with the Furman requirements. Among such states is Illinois, which enacted a new death penalty statute on November 8, 1973.⁵ Until the Supreme Court sees fit to rule more definitively on capital punishment, the constitutionality of this new statute is, at best, a matter of conjecture. Nevertheless, some analysis of its provisions in light of Furman can be made.

1. It is the offense which causes shame, and not the scaffold.
2. 408 U.S. 238 (1972).
3. “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.” U.S. Const. amend. VIII.
4. “No State shall . . . deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV, § 1. In Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 463 (1947), the Supreme Court assumed without deciding that the eighth amendment was applicable to the states through the due process clause of the fourteenth amendment. In Robinson v. California, 370 U.S. 660, 667 (1962), the Supreme Court by reference clearly implied that the eighth amendment prohibition was applicable to the states. In Weems v. United States, 217 U.S. 349, 378-82 (1910), the proscription of cruel and unusual punishment was held to apply to judicial imposition of such punishment as well as legislative.
THE LEGISLATIVE BACKDROP OF THE NEW ILLINOIS STATUTE

The impact of Furman was to invalidate in one fell swoop the capital punishment laws of the District of Columbia and thirty-nine states, including Illinois, as well as the capital punishment provisions of the federal statutory structure. Analytically, the decision invalidated death sentences in seven types of sentencing situations: (1) where the defendant was sentenced to death by a jury which had a choice between death and prison confinement; (2) where the death penalty was mandatory unless the jury recommended mercy; (3) where the defendant was sentenced to life imprisonment, unless the jury recommended death; (4) where the defendant was sentenced to death by a judge following a plea of guilty; (5) where the defendant waived a jury trial, and was tried and sentenced by a judge; (6) where the jury could make a binding recommendation of death, but a recommendation of mercy could be overridden by a judge; and (7) where the jury could make a binding recommendation of mercy, but a recommendation of death could be overridden by a judge.

In Moore v. Illinois, the Supreme Court explicitly invalidated the capital sentencing system in Illinois, a system which corresponded to the last of the categories listed above. Pre-Furman Illinois law un-

6. Furman v. Georgia, 408 U.S. 238, 411 (1972) (Blackmun, J., dissenting). Those states not authorizing the death penalty by statute at the time of Furman were: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia and Wisconsin. Id. at 340 n.79 (Marshall, J., concurring). California had abolished the death penalty by judicial action. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972). It appears as though statutes requiring the imposition of the death penalty for first-degree murder, for narrowly defined categories of murder, and for rape were not affected by the Furman decision. Id. at 310 (White, J., concurring). For a complete listing of mandatory death penalty statutes covering capital crimes other than these, see Comment, Furman v. Georgia—Deathknell For Capital Punishment?, 47 St. John's L. Rev. 107, 139-40 n.294 (1972).

7. Statement of L. Harold Levinson, Professor of Law, University of Florida (Appendix B), before the Subcommittee on Criminal Law and Procedures of the United States Senate Committee on the Judiciary in Hearings on S. 1, S. 1400, and S. 1401 Before the Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary, 93d Cong., 1st Sess., at 123-24 (1973). The appendix contains an analytical listing of memorandum decisions rendered by the United States Supreme Court on June 29, 1972, on the basis of Furman, which was decided the same day, vacating death sentences imposed by numerous state courts. The analysis was prepared by the N.A.A.C.P. Legal Defense and Educational Fund, Inc., and was included in the N.A.A.C.P.'s brief, as amicus curiae, filed in the Supreme Court of Florida, April 1973, in State v. Dixon, 283 So. 2d 1 (Fla. 1973).

8. Id. at 124.
9. Id. at 124-25.
10. Id. at 125.
11. Id.
12. Id.
13. Id.
15. Id. at 800.
nder this system had recognized three capital offenses: murder,$^{16}$ aggravated kidnapping for ransom,$^{17}$ and treason.$^{18}$ In capital trials, if the defendant chose to waive his right to have a jury,$^{19}$ the trial judge, upon a finding of guilt, was free to impose or not to impose the death penalty at the post-trial sentencing hearing.$^{20}$ On the other hand, if the defendant chose to exercise his right to have a jury, upon a finding of guilt the death penalty could be imposed only if the jury so recommended and the judge concurred in that recommendation, this also at the post-trial sentencing hearing.$^{21}$ While the sentencing hearing provided for consideration of evidence in aggravation and mitigation, no specific findings were required, either by the judge or the jury.$^{22}$ Obviously, such a sentencing system, insofar as it risked a highly discretionary imposition of the death penalty, fell squarely within the sights of the Furman decision.

In response, the 1973 Illinois General Assembly passed two pieces of legislation designed to meet the Furman mandate and fill the lacuna left by Moore. The first bill, House Bill 20, required the trier of fact to impose the death sentence upon a finding that the accused's offense corresponded to at least one of the eight capital offense categories for which the bill provided.$^{23}$ By contrast, the second bill, House Bill 18, required a specially convocated three-judge panel to impose sentence in capital cases, with its sentencing determination extending to eleven categories of capital offenses.$^{24}$

Realizing that the procedural differences between the two bills were irreconcilable, and believing that the latter bill was more likely to be upheld by the United States Supreme Court, Governor Walker vetoed House Bill 20.$^{25}$ However, instead of signing House Bill 18, he chose to exercise his amendatory veto power$^{26}$ and returned the bill to the Illinois House of Representatives, with specific recommendations.$^{27}$

17. Id. § 10-2(b)(1).
18. Id. § 30-1(c).
19. Id. § 103-6.
20. Id. § 1005-4-1.
21. Id. § 1005-5-3(b).
22. Id. § 1005-4-1(3).
These specific recommendations eventually won the acceptance of the General Assembly, and the bill, with two last changes by the House itself, was certified into law two months later.

Legislative History

Indeed, the bill which became the new Illinois death penalty statute had survived a rather tortuous legislative experience. House Bill 18 found its genesis in Witherspoon v. Illinois. In that case, the United States Supreme Court had held that the imposition of a death sentence would be precluded if voir dire testimony indicated that the jury which imposed or recommended the sentence was selected by excluding veniremen for cause simply because they had general objections to capital punishment or because they expressed conscientious or religious scruples against its use. The clear implication of Witherspoon was that a state may not promote the impaneling of a jury in a capital trial which is predisposed toward imposition of the death penalty, just as it may not, in a normal trial, promote the impaneling of a jury which is predisposed toward conviction. To circumvent the Witherspoon problem and to comply with the

30. Id. at 521-22. Illinois has had a statutory death penalty since 1840. H. Mattick, The Unexamined Death 23-24 (1966). Juries in Illinois have had the discretion to sentence a defendant to death or life imprisonment in murder cases since 1874. Bedau, General Introduction to Capital Punishment, Capital Punishment 7, 31 (J. McCafferty ed. 1972). Imposition of the death penalty was not deemed to be cruel, excessive, or unusual by the Illinois Supreme Court. People v. Chesnas, 325 Ill. 361, 366-70, 156 N.E. 372, 374-75 (1927) (death sentence upheld in spite of guilty plea by defendant). The scope of a jury's discretion in capital cases was interpreted as quite wide. People v. Dukes, 12 Ill. 2d 334, 339, 146 N.E.2d 14, 17 (1957). A jury was permitted to fix the defendant's penalty from a consideration of all the circumstances in the case before it, including the heinousness, atrocity, and cruelty of the crime. People v. Sullivan, 345 Ill. 87, 95, 177 N.E. 733, 736 (1931). While a separate determination of guilt and punishment was not deemed fundamental to due process in capital trials, People v. Bernette, 30 Ill. 2d 359, 374, 197 N.E.2d 436, 445 (1964), once the legislature established the separate sentencing procedure, judicial discretion to set aside death sentences was given perhaps an even wider scope than jury discretion to impose them. In years shortly preceding Furman, the Illinois Supreme Court set aside death sentences where the defendant demonstrated good character and lacked a criminal record, People v. Crews, 42 Ill. 2d 60, 65, 244 N.E.2d 593, 595 (1969), or where the defendant was an arrant alcoholic, People v. Walcher, 42 Ill. 2d 139, 165-66, 246 N.E.2d 256, 260-61 (1969). Opinions handed down by the Illinois Supreme Court in the wake of Witherspoon indicated that Witherspoon was to be interpreted narrowly. People v. Speck, 41 Ill. 2d 177, 208-15, 242 N.E.2d 208, 225-28 (1968); People v. Moore, 42 Ill. 2d 73, 81-84, 246 N.E.2d 299, 304-06 (1969).
31. 391 U.S. at 521.
32. Fay v. New York, 332 U.S. 261, 294 (1947); cf. Tumey v. Ohio, 273 U.S. 510 (1927), in which the United States Supreme Court held that the establishment of a judicial system which remunerated lower court judges for their services in criminal cases only in cases of conviction and not in cases of acquittal was violative of due process.
Furman mandate, the office of the Illinois Attorney General suggested the use of a special type of bifurcated trial in capital cases. Under such a system, the jury, if not waived by the defendant, would determine guilt, and a three-judge panel, including the trial judge, would impose sentence.  

This idea was incorporated into legislation drafted by the Illinois Legislative Investigating Commission in 1972, which had been requested to study possible ways by which discretion in capital trials might be minimized in the wake of Furman. Specifically, the commission proposed to narrow the number of offenses punishable by death; divide capital trials into two parts: a guilt-finding proceeding and a sentencing proceeding; eliminate the jury from the sentencing proceeding and substitute for it a three-judge panel; make imposition of the death penalty mandatory upon a finding that the subject offense was a capital offense; and place upon the prosecution at the sentencing proceeding the burden of proving beyond a reasonable doubt that the defendant’s offense was in fact a capital offense.

Upon approval, the commission’s proposal found the necessary legislative sponsorship and was submitted to the Illinois General Assembly. In the course of legislative consideration in the General Assembly, the Senate amended the bill by increasing the number of offenses punishable by death; providing for a two-step review of both the con-
viction and the sentence on appeal; and determining the disposition of individuals convicted under the bill's provisions should the bill itself be later held unconstitutional.\textsuperscript{38}

After passage of the amended version by both houses,\textsuperscript{39} the bill was sent to Governor Walker for his signature. The Governor returned the bill to the General Assembly with his specific recommendations that the number of capital crimes be narrowed; the sentencing judges be permitted to temper the mandatory death penalty by imposing a lesser sentence if, in their estimation, there were "compelling reasons" for doing so; and the execution of any individual sentenced under the bill's provisions be precluded until a "final adjudication" of its constitutionality.\textsuperscript{40} The House, while adopting the Governor's recommendations, made two modifications for purposes of clarifying the Governor's intent. First, it changed the Governor's temperance recommendation to read "compelling reasons for mercy," as opposed to merely "compelling reasons." Second, it changed the Governor's final adjudication recommendation by adding a definition of final adjudication.\textsuperscript{41} With these changes included, House Bill 18 passed both

\textsuperscript{38} The amendment was offered by Sen. Philip J. Rock (D.-Chicago) on June 25. The Senate sponsor of House Bill 18 was Sen. John J. Nimrod (R.-Skokie).


\textsuperscript{40} Letter from Governor Daniel Walker to the Members of the Illinois House of Representatives, September 12, 1973. In Illinois, the governor is endowed with an amendatory veto power: The Governor may return a bill together with specific recommendations for change to the house in which it originated. The bill shall be considered in the same manner as a vetoed bill but the specific recommendations may be accepted by a record vote of a majority of the members elected to each house. Such bill shall be presented again to the Governor and if he certifies that such acceptance conforms to his specific recommendations, the bill shall become law. If he does not so certify, he shall return it as a vetoed bill to the house in which it originated.

\textsuperscript{41} Letter from Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating
the House\(^{42}\) and the Senate,\(^{48}\) and on November 8, it was signed into law.\(^{44}\)
Statutory Provisions

The new Illinois death penalty statute represents an attempt to comply with the constitutional dictates of *Furman* by reducing the discretion which formerly permeated capital offense proceedings. To label the new Illinois statute as a mandatory approach to capital punishment would be to ignore its mercy provision as well as the remaining discretion pervasive at all levels of criminal proceedings. However, the new statute is certainly more mandatory in its operation than its invalidated counterpart. A summary of its basic features follows.

The new statute narrows the range of capital offenses to a number of specific instances of murder, including murder of a policeman, fireman, or correctional officer in the course of his official duties; murder of a licensee or an invitee on correctional facility premises; murder by a person twice convicted of murder; murder committed during the hijacking of an airplane, train, ship, bus or other public conveyance; murder perpetrated by a hired killer; murder committed in the course of a rape, robbery, aggravated kidnapping, or an arson; and murder incident to the indecent molestation of a child.45

If the 3 judge court sentences the defendant to death and an appeal is taken by the defendant, the appellate court shall consider the appeal in two separate stages. In the first stage, the case shall be considered as are all other criminal appeals and the court shall determine whether there were errors occurring at the trial of the case which require that the findings of the trial court be reversed or modified. If the appellate court finds there were no errors justifying modification or reversal of the findings of the trial court, the appellate court shall conduct an evidentiary hearing to determine whether the sentence of death by the 3 judge court was the result of discrimination. If the appellate court, in the second stage of the appeal, finds any evidence that the sentence of death was the result of discrimination, the appellate court shall modify the sentence to life imprisonment.

In determining whether there is evidence of discrimination in sentencing the defendant to death, the appellate court shall consider whether the death sentence, considering both the crime and the defendant was disproportionate or the result of discrimination based on race, creed, sex or economic status.

In the event that the death penalty in this Act is held to be unconstitutional by the Supreme Court of the United States or of the State of Illinois, any person convicted of murder shall be sentenced to imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years.

In the event that any death sentence pursuant to the sentencing provisions of this Section is declared unconstitutional by the Supreme Court of the United States or the State of Illinois, the court having jurisdiction over a person previously sentenced to death shall cause such person to be brought before the court, and the court shall sentence such person to imprisonment in the penitentiary for any indeterminate term with a minimum of not less than 14 years.

No sentence of death imposed under this Section shall be executed unless there has been a final adjudication that the sentence is constitutional. For purposes of this Section, “final adjudication” means the completion of the ordinary appellate process in a single case and does not contemplate the exhaustion of all available remedies.

45. ILL. REV. STAT. ch. 38, §§ 1005-8-1A(1)-(6) (1973).
The statute bifurcates the trial of any defendant in a capital proceeding into a guilt-finding hearing and a sentencing hearing. Guilt is determined by the jury, unless the defendant waives his right to have a jury trial. Sentence is imposed by a three-judge panel appointed by the chief judge of the circuit court, which panel is to include, if possible, the judge who presided over the guilt-finding hearing.\footnote{46} Upon a murder conviction at the guilt-finding hearing, the prosecution, if it wishes to pursue a death sentence, must move for a special capital sentencing hearing.\footnote{47} Thereupon the trial judge, before imposing sentence, must notify the chief judge of the circuit court to assign the three judges who are to preside over the special sentencing hearing.\footnote{48}

The function of the three-judge panel at the hearing is to consider evidence presented by both prosecution and defendant as to whether the murder is one that is subsumed under any of the capital offense categories defined by the statute. On this point, the prosecution must prove its contention beyond a reasonable doubt.\footnote{49} Imposition of the death sentence is to be based upon the vote of the three-judge panel, each member having one vote, with a simple majority sufficient to impose such sentence.\footnote{50}

Upon a determination by the three-judge panel that the murder is one of a capital nature, the death sentence is mandatory. However, such a determination notwithstanding, the three-judge panel may, again by a simple majority vote, refrain from imposing the death sentence if in a specific case it feels there are "compelling reasons for mercy."\footnote{51} The determination of the three-judge panel as to sentence is to be made in writing and submitted to the trial judge, who then enters the sentence accordingly.\footnote{52}

In the event that the three-judge panel opts for imposition of the death penalty, and the defendant appeals, the statute provides for a special two-stage appellate review. In the first stage, the case is to be considered as other criminal appeals, with a view toward finding errors at trial which would warrant reversal or modification of the trial

\footnote{46} Id. § 9-1(b); id. § 1005-8-1A.  
\footnote{47} There is a minority view that if the prosecution fails to move for such a hearing and the trial judge feels that such a hearing is warranted, the trial judge may, in his own discretion, so move. Telephone interview with Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating Commission, February 22, 1974.  
\footnote{49} Id.  
\footnote{50} Id.  
\footnote{51} Id.  
\footnote{52} Id.; id. § 9-1(b).
court's findings on the issue of guilt. If no such errors are found, the appellate court, in the second stage, is to determine whether the sentence imposed by the three-judge panel involved any discrimination on the basis of race, creed, sex, or economic status. A finding of such discrimination at the sentencing hearing, given the offense and the defendant, modifies the sentence from death to life imprisonment.

The execution of any defendant sentenced to death under the new statute is to be stayed until a final adjudication of the statute's constitutionality. Final adjudication is deemed to mean completion of the ordinary appellate process in a single case and not necessarily the exhaustion of all available remedies. In the event the statute is invalidated on constitutional grounds, either by the United States Supreme Court or the Illinois Supreme Court, the defendant's sentence is to be modified to imprisonment for at least fourteen years.

The Legislative Ramifications of Furman

Furman v. Georgia, together with its companion cases, Jackson v. Georgia and Branch v. Texas, brought to the constitutional fore the issue of discrimination in capital trials. Furman, Jackson, and Branch were all blacks. All three were sentenced to death by juries, Furman for murder, Jackson and Branch for rape. The facts in each situation made their respective criminal acts particularly "ugly, vicious, [and] reprehensible": the shooting of a father of five through a closed door, a rape effected while the rapist held the pointed ends of scissors at the victim's throat, and a rape committed at the victim's home by physical force and threats.

The gravamen of Furman was that any capital sentencing system which gives free rein to discrimination against a defendant by reason of his race, religion, wealth, social position, or class is unconstitutional. Indeed, at least one study previous to Furman had indicated that application of the death penalty was unequal and that most of

53. Id. § 1005-8-1A.
54. Id.
55. Id.
61. Id. at 315 (Marshall, J., concurring); id. at 252 (Douglas, J., concurring).
62. Id. at 315 (Marshall, J., concurring).
63. Id.
64. Id. at 242 (Douglas, J., concurring).
those executed were poor, young, and ignorant. Another study had shown that blacks were executed more often and had their death sentences commuted less often than whites in similar situations.

Analytically, Furman was not so much one Supreme Court decision as it was a group of decisions. Perhaps the most noteworthy aspect of the case was that only two members of the Court, Justices Brennan and Marshall, concluded that the eighth amendment prohibits capital punishment for all crimes and under all circumstances. In their majority opinions, both Justices Brennan and Marshall offered the persu-


Seventy-five of the 460 cases involved co-defendants, who, under Texas law, were given separate trials. In several instances where a white and a Negro were co-defendants, the white was sentenced to life imprisonment or a term of years, and the Negro was given the death penalty.

Another ethnic disparity is found in the type of sentence imposed for rape. The Negro convicted of rape is far more likely to get the death penalty than a term sentence, whereas whites and Latins are far more likely to get a term sentence than the death penalty.

66. Wolfgang, Kelly, & Nolde, Executions and Communications in Pennsylvania. The Death Penalty in America 464, 474 (H. Bedau ed. 1967). The study provided the following statistical breakdown:

<table>
<thead>
<tr>
<th>Race of Offender</th>
<th>Final Disposition</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Negro</td>
<td>White</td>
</tr>
<tr>
<td></td>
<td>N</td>
<td>%</td>
</tr>
<tr>
<td>Executed</td>
<td>130</td>
<td>88.4</td>
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<tr>
<td>Commuted</td>
<td>17</td>
<td>11.6</td>
</tr>
<tr>
<td>Total</td>
<td>147</td>
<td>100.0</td>
</tr>
</tbody>
</table>

These statistics concerned individuals on death row in Pennsylvania during the years 1914-58. The authors of the study attempted an analysis of the higher rate of execution among blacks:

Although there may be a host of factors other than race involved in this frequency distribution, something more than chance has operated over the years to produce this racial difference. On the basis of this study it is not possible to indict the judicial and other public processes prior to the death row as responsible for the association between Negroes and higher frequency of executions; nor is it entirely correct to assume that from the time of their appearance on death row Negroes are discriminated against by the Pardon Board. Too many unknown or presently immeasurable factors prevent our making definitive statements about the relationship. Nevertheless, some suspicion of racial discrimination can hardly be avoided. If such a relationship had not appeared, this kind of suspicion could have been allayed; the existence of the relationship, although not "proving" differential bias by the Pardon Boards over the years since 1914, strongly suggests that such bias has existed.

While there is no evidence comparable to that of the Pennsylvania study on a national level, there is evidence that 53.6% of the 3,849 individuals executed in the United States during the period 1930-64 were non-white. H. Mattick, The Unexamined Death 5 (1966). In Illinois, during the years 1930-57, approximately 33.7% of the 86 individuals executed were blacks. See Sellin, The Death Penalty: A Report for the Model Penal Code Project of the American Law Institute, Model Penal Code, Appendix 6 & 8-9 (Tent. Draft No. 9, 1959). Likewise, during the more proximate pre-Furman period of 1945-58, thirteen persons were executed in Illinois, of whom eight, or 61.5%, were non-white. H. Mattick, The Unexamined Death 16 (1966).
sive rationale that capital punishment stood condemned by enlightened public opinion.\textsuperscript{67}

While three other members of the majority, Justices Douglas, Stewart and White, struck down death penalty laws as then applied in most of the states, their opinions did not evince an intention to abolish capital punishment as unconstitutional per se. Rather, these three Justices concerned themselves with the discretion granted to the judge and the jury under death penalty statutes then in effect. Justice Douglas stressed the disproportionate imposition of the death penalty on minorities.\textsuperscript{68} Justice Stewart emphasized the great irrationality in the imposition of the death penalty.\textsuperscript{69} For Justice White, the infrequent execution of the death penalty was crucial.\textsuperscript{70} Both Justices Stewart and White agreed that there was need for a more rational sentencing system in capital cases.

If the four dissenters are added to the group composed of Justices Douglas, Stewart, and White, a core of seven Court members declining to invalidate capital punishment on a per se basis emerges. Any legislative strategy to formulate a constitutionally acceptable death penalty statute would attempt to persuade favorably at least five members of this core, assuming no change in present Court membership.

\textit{Furman v. Georgia} was also one of the rare cases in the history of the Supreme Court to have evoked nine separate opinions from the Court's members.\textsuperscript{71} The five separate opinions filed by the members of the majority, opinions in which no one majority Justice joined another, evidenced a clear inability of the majority to arrive at a consensus regarding the exact rationale of its decision. Consequently, only a per curiam opinion for the Court was tendered. On the other hand, three of the dissenting Justices, Chief Justice Burger, Justice Powell, Justice Stewart, and Justice White, each filed a separate opinion further explaining their reasons for dissenting.

\textsuperscript{67} 408 U.S. at 296-300 (1972) (Brennan, J., concurring); \textit{id.} at 360-69 (Marshall, J., concurring).
\textsuperscript{68} \textit{id.} at 255 (Douglas, J., concurring).
\textsuperscript{69} \textit{id.} at 309-10 (Stewart, J., concurring).
\textsuperscript{70} \textit{id.} at 311-14 \textit{passim} (White, J., concurring). In Illinois, empirical evidence indicates that the frequency of execution before \textit{Furman} was quite low. During the years 1945-58, 1,045 Illinois defendants were convicted of capital offenses (1,022 for murder). Of these, only thirteen were executed. Glaser, \textit{Survey Shows Death Sentence Rare and Haphazard in Illinois}, John Howard Association (mimeo.), Chicago, Illinois, February 1959, \textit{cited in H. Mattick, The Unexamined Death} 16 (1966). Accordingly, the chances were one in eighty-three during this period that an individual convicted of a capital offense in Illinois would be executed. H. Mattick, \textit{The Unexamined Death} 16 (1966). Thus, arguments pointing to the desuetude of the death penalty before \textit{Furman} find some support in Illinois. See text accompanying notes 170-72 \textit{supra}.
\textsuperscript{71} The only recent example of this phenomenon is \textit{New York Times Co. v. United States}, 403 U.S. 713 (1970).
and Justice Rehnquist, won concurrence in their opinions from all four of the dissenter. Thus it is clear that the threads of the dissenting opinions reflected a more uniformly woven rationale than did the threads of the majority opinions.

In general, the value of a Supreme Court decision as precedent turns on a myriad of factors, including the force and clarity of its rationale, the degree of unanimity among its deciding members, and its longevity and durability as authority. Given these factors, the five-to-four per curiam decision in *Furman v. Georgia*, bereft of any clear *ratio decidendi*, can never assume the same precedential position as, for example, *Marbury v. Madison* or *Gideon v. Wainwright*. Nevertheless, the *Furman* decision is binding on its exact facts as to all American courts, just as is in any other Supreme Court decision.

In the absence of a consensus as to the rationale supporting the decision in *Furman*, legislatures must analyze the individual concurring and dissenting opinions of the Court's members in attempting to draft a constitutionally acceptable statute. While legislatures need not accept any one opinion as binding upon them, they may use any of the opinions as a guideline in their drafting efforts. Obviously, the decision, if nothing else, precludes them from developing statutes like those invalidated by *Furman* and its progeny.

*Furman*'s value depends to a great extent on the degree to which each Justice, in the future, remains consistent with his own opinion and with those in which he concurred. Indeed, while Justices are not necessarily obliged to follow their concurring opinions, it is considered likely that each Justice will continue to adhere to those views he has previously expressed. In sum, the opinions filed in *Furman* constitute the best judicial weather vane by which future treatment of capital punishment might be forecast.

It was Chief Justice Burger who, in his dissenting opinion, recognized the equivocal nature of the *Furman* ruling as precedent and reproved the majority for its per curiam disposition of the case, intimating that the majority was in dereliction of its duty to articulate

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72. 5 U.S. (1 Cranch) 137 (1803).
74. Letter from Robert G. Dixon, Jr., Assistant Attorney General, United States Department of Justice, to G. Robert Blakely, Chief Counsel, Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary, in *Hearings S. 1, S. 1400, and S. 1401 Before the Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary*, 93d Cong., 1st Sess., at 60 (1973) [hereinafter referred to as Dixon letter].
75. *Id.* at 60-61.
76. *Id.* at 61.
definitive guidelines on basic constitutional questions.\textsuperscript{77} It was also the
Chief Justice who threw down the gauntlet to the state legislatures and to Congress for a return to the legislative blackboard\textsuperscript{78} and indeed an entire reassessment of capital punishment.\textsuperscript{79} Specifically, the
Burger opinion has been construed to delimit three possible legislative approaches to reinstatement of the death penalty: (1) mandatory sentences, requiring imposition of the death penalty as an automatic consequence of conviction of the offense; (2) discretionary standards, providing criteria for the discretionary imposition of the penalty; or (3) a combination of these approaches.\textsuperscript{80}

Legislative implementation of any of these three approaches embodies an implicit belief that at least one of the “swing” Justices, either Justices Stewart, White, or Douglas, will be persuaded to support a less discretionary death penalty statute and that the four dissenters in \textit{Furman} will not deviate from their previous positions. This belief perhaps assumes too much.

First, Justice Douglas’ opinion in \textit{Furman} points up a singular precedential difficulty. He indicated that the constitutional infirmity of the death penalty lay not in the death penalty itself but in the arbitrariness of the sentencing system;\textsuperscript{81} yet he considered the sentencing system to be locked into its arbitrary status by virtue of stare decisis,\textsuperscript{82} adverti\textsuperscript{83} ing specifically to \textit{McGautha v. California}.\textsuperscript{84} \textit{McGautha} had held that a standardless sentencing proceeding at which a jury, in its full and unguided discretion, might choose to impose or not to impose the death penalty was not unduly arbitrary and was not violative of the Constitution.\textsuperscript{85} Given the quandary of a capital sentencing system proclaimed as arbitrary by \textit{Furman} set against an inability to effect its removal because of \textit{McGautha}’s binding precedent, Justice Douglas

\begin{itemize}
  \item \textsuperscript{77} 408 U.S. at 403 (Burger, C.J., dissenting).
  \item \textsuperscript{78} Id. at 400.
  \item \textsuperscript{79} Id. at 403.
  \item \textsuperscript{80} Statement of Robert G. Dixon, Jr., Assistant Attorney General, United States Department of Justice, before the Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary in \textit{Hearings on S. 1, S. 1400, and S. 1401 Before the Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary, 93d Cong., 1st Sess., at 43 (1973) [hereinafter referred to as Dixon statement].}
  \item \textsuperscript{81} 408 U.S. at 255 (Douglas, J., concurring).
  \item \textsuperscript{82} Id. at 248 (Douglas, J., concurring).
  \item \textsuperscript{83} 402 U.S. 183 (1971). As Justice Douglas tellingly phrased the problem, “We are now imprisoned in the \textit{McGautha} holding.” \textit{Furman v. Georgia}, 408 U.S. 238, 248 (1972) (Douglas, J., concurring). However, it should be noted that Justice Douglas is no advocate of unremitting devotion to stare decisis. Almost a quarter century ago, he stated, “So far as constitutional law is concerned stare decisis must give way before the dynamic component of history. . . .” \textit{Douglas, \textit{Stare Decisis}, 49 Colum. L. Rev.} 735, 737 (1949).
  \item \textsuperscript{84} 402 U.S. at 207-08.
\end{itemize}
would seemingly have difficulty upholding a new, less discretionary sentencing system unless *McGautha* were explicitly overruled, something the *Furman* majority did in effect but not in fact.

Second, some or all of the Justices who dissented in *Furman* may change their votes in future death penalty cases in conformance with the precedent established in *Furman*, even though that precedent is weak. That is, some or all of the dissenters may choose to disregard their previous predilection toward judicial restraint and their deference to the legislative prerogative anent the death penalty, and may reach the constitutional issue on its merits.\(^8\) However, there is no indication in their opinions that this change might occur.

It is significant, though, that no dissenter stated a personal preference for capital punishment. Indeed, to the contrary, Justice Blackmun opined, "Were I a legislator, I would vote against the death penalty. . . ."\(^6\) Likewise, Chief Justice Burger asseverated:\(^7\)

> If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall [who held capital punishment unconstitutional per se] or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes.

Moreover, the tradition established by the late Justice Harlan lends credence to the belief that the dissenting Justices may change their votes in a future death penalty case. It was not unusual for Justice Harlan to dissent from "landmark" decisions but to change his vote when similar issues again came before the Court so as to align himself with the precedent established by the majority.\(^8\) Whether the *Furman* dissents adopt this tradition depends, to some extent, on their view of *Furman* as a landmark case.

Third, it is unclear at what point on the continuum of sentencing discretion a more rational sentencing system for the death penalty

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86. 408 U.S. at 406 (Blackmun, J., dissenting).
87. Id. at 375 (Burger, C.J., dissenting).

will pass for Justices Stewart and White from being unacceptable to being acceptable. Although their two "pivotal" opinions were interpreted by some of the dissenters as countenancing only a mandatory approach to reinstatement of capital punishment, a more reasonable reading of their opinions indicates that a certain degree of rationality, not necessarily a perfect correspondence of convictions to death sentences, will suffice to assuage their reservations. The degree of rationality is only speculative at this juncture, but at the very least it must be great enough to provide "some meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

Working within the uncertainty of these judicial parameters, a significant number of states have nonetheless reinstated the death sentence by the passage of new death penalty statutes. Among the first of these states was Florida, which enacted its new statute in the latter part of 1972. The statute was challenged, and in July 1973, the Supreme Court of Florida upheld its constitutionality. In its ruling, the court determined that "if the judicial discretion possible and necessary in imposing the death penalty . . . can be shown to be reasonable and controlled, rather than capricious and discriminatory, the test of Furman v. Georgia has been met."

89. The word "pivotal" is that of the Chief Justice. 408 U.S. at 400 (Burger, C.J., dissenting).
90. Chief Justice Burger so interpreted the opinion of Justice White. Id. at 399 n.28 (Burger, C.J., dissenting). Justice Blackmun interpreted likewise the opinion of Justice Stewart. Id. at 413 (Blackmun, J., dissenting). Justice Powell arrived at the same conclusion as to the opinions of both Justices Stewart and White. Id. at 415-16 n.1 (Powell, J., dissenting).
92. 408 U.S. at 313 (White, J., concurring).
93. To date, twenty-two states have enacted post-Furman death penalty statutes. TIME, Mar. 25, 1974, at 10. Among them are the following: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Georgia, Idaho, Illinois, Indiana, Louisiana, Montana, Nebraska, Nevada, New Mexico, Ohio, Oklahoma, Rhode Island, Tennessee, Texas, Utah, and Wyoming. Subsequent to the Time article, Pennsylvania became the twenty-third state to adopt a post-Furman death penalty statute. Philadelphia Inquirer, March 27, 1974, § A, at 1, col. 4; Pittsburgh Post-Gazette, March 27, 1974, § I, at 1, col. 1.
94. FLA. STAT. ANN. §§ 775.082, 782.04, 921.141 (Supp. 1972). The Florida statute differs from the new Illinois statute insofar as it provides for some jury input in the sentencing proceeding and for specific aggravating and mitigating circumstances. Upon a murder conviction, the jury is to weigh statutorily prescribed aggravating and mitigating circumstances at the sentencing hearing and, in consideration of such circumstances as they relate to the subject offense, is to render an advisory opinion to the sentencing judge on imposition of the death penalty. Taking cognizance of the jury's opinion, the sentencing judge, after his own weighing of the aggravating and mitigating circumstances, is to decide to impose or not to impose the death penalty. Only then may the death penalty be imposed.
96. Id. at 7.
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court envisaged the task of meeting Furman as one of refining judi-
cial discretion, and not necessarily eliminating it.

THE NEW ILLINOIS STATUTE IN THE PALE OF THE FEDERAL
CONSTITUTION

Indeed, the same judicial underpinning which guided Florida was
the basis upon which the new Illinois death penalty statute was pre-
mised. The Illinois legislators construed Furman to indicate that the
death sentence could still be an appropriate and constitutional penalty,
but that its imposition in the future could not remain pervaded with
the same potentialities for abuse of discretion that had previously been
condoned.\textsuperscript{97} In most cases such abuse, it was felt, disadvantaged the
poor, non-whites, and those inadequately represented by counsel.\textsuperscript{98}
In other words, the discretion of which Furman spoke was not dis-
cretion per se, but was the invidious discrimination resulting from
\textit{abuse} of discretion at the sentencing stage of a trial.\textsuperscript{99}

\textit{Mandatory Sentencing}

Accordingly, the obvious answer to the consistent abuse of discre-
tion was to remove all discretion in the sentencing of potential capital
offenders\textsuperscript{100} by the adoption of a mandatory statute warranting auto-
matic imposition of the death penalty upon conviction. This was, of
course, one of the legislative avenues left open by Furman pursuant
to the Chief Justice's dissenting opinion.\textsuperscript{101} It was also a subject of
discussion in the concurring opinions of Justices Stewart,\textsuperscript{102} White,\textsuperscript{103}
and Douglas,\textsuperscript{104} but none of these three specifically reached the ques-
tion of a mandatory statute's constitutionality.

From a historical standpoint, the mandatory death penalty is not
novel. At common law it was applicable to all convicted murderers.\textsuperscript{105}
However, because the murder standard for capital offenses seemed
to encompass such a wide range of crimes, the sagacity of the manda-
tory death penalty was challenged. The phenomenon known as jury

\textsuperscript{97} Hyde, \textit{Should death penalty be mandatory?}, Chicago Tribune, August 21, 1973, § 1, at 10, col. 3.
\textsuperscript{98} Hyde interview, supra note 35.
\textsuperscript{99} Hyde, \textit{Should death penalty be mandatory?}, Chicago Tribune, August 21, 1973, § 1, at 10, col. 3.
\textsuperscript{100} Id.
\textsuperscript{101} 408 U.S. at 401 (Burger, C.J., dissenting).
\textsuperscript{102} Id. at 307-09 (Stewart, J., concurring).
\textsuperscript{103} Id. at 310-11 (White, J., concurring).
\textsuperscript{104} Id. at 257 (Douglas, J., concurring).
\textsuperscript{105} McGautha v. California, 402 U.S. 183, 198 (1971).
nullification saw many juries, moved by compassion, acquitting criminals altogether. That is, in appropriate cases calling for mercy, juries failed to convict, not because they believed the defendant to be innocent, but because they believed the punishment to exceed the offense. Consequently, most states abolished the mandatory death penalty between 1830 and 1900.\(^{106}\) In its stead, state legislatures proceeded to give juries the discretion which juries had been exercising in fact, permitting them to sentence the defendant to death or imprisonment.\(^{107}\) *Furman*, by reawakening interest in mandatory statutes, brings the criminal justice system full circle.\(^{108}\)

In reality, there exists no such animal as the mandatory death penalty. Discretion permeates the entire criminal justice system, from police detection and arrest, through prosecutorial charging and plea negotiation, to jury deliberation, appellate reconsideration, and executive pardon.\(^{109}\)

The same discretion exists in the Illinois system and will no doubt affect the operation of the new death penalty statute. Thus, to call the new statute mandatory in the strict sense of the word is to overlook the discretion which subsists in traditionally discretionary areas beyond judicial cognizance. The new statute does not purport to make the death penalty mandatory in the image of a Kafkaesque death-force, but only more mandatory than before *Furman* as to a more restricted category of offenses.

The prosecution will continue to have its traditional discretionary functions. It may choose not to bring a charge or to bring a lesser charge, and it may choose to present or not to present certain evi-

\(^{106}\) Id. at 198-200.


\(^{109}\) Wollan, *The Death Penalty After Furman*, 4 LOYOLA CHI. L.J. 339, 341 (1973). The elimination of such pervasive discretion has been propounded as a precondition to the reinstatement of capital punishment in Florida. Ehhardt, Hubbart, Levinson, Smiley, Jr., & Wills, *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L.C. & P.S. 2, 3 (1973). In fairness, this is a somewhat extreme position, and it is perhaps unreasonable to expect legislation alone to eliminate something as elusive as discretion. Note, 23 De Paul L. REV. 517, 522 n.42 (1973). A more fundamental consideration in assessing the validity of a mandatory sentencing system is determining which discretion in the criminal justice system is within judicial cognizance. Dixon letter, *supra* note 74, at 61. For example, at least one lower federal court has held that the prerogative of a prosecutor not to bring a charge is committed to his discretion, and not the court's, under the doctrine of separation of powers. United States v. Cox, 342 F.2d 167 (5th Cir.), cert. denied, 381 U.S. 935 (1965). A plausible argument along an analogous line of reasoning could be made for executive clemency as well. Dixon letter, *supra* note 74, at 61.
dence, either at the trial or more importantly, at the sentencing hearing. Further, there is the discretion vested in the prosecution not to move for a special sentencing hearing. The jury, for its part, will continue to have the discretion not to convict or to convict on a lesser charge. Significantly, pursuant to the statute, the three-judge sentencing panel will have the discretion to set aside a death sentence if it feels there are "compelling reasons for mercy." At the appellate level, discretion exists to reverse the conviction and/or the sentence. Finally, the governor's discretion of granting executive pardon remains unscathed.

It is thus clear that the new Illinois death penalty statute does not eliminate discretion, but merely minimizes it at the most critical stage of a capital proceeding—the sentencing—by divorcing what Furman assumed to be one of the most aberrant discretionary variables in a trial—the jury—from the sentencing function.

Whether this type of statute, as opposed to a strict mandatory type, might command the support of a majority of the Court is uncertain. Two members of the dissent, Chief Justice Burger and Justice

110. Zagel interview, supra note 33.
111. ILL. REV. STAT. ch. 38, § 1005-8-1A (1973).
112. Id.

The Governor may grant reprieves, commutations and pardons, after conviction, for all offenses on such terms as he thinks proper. The manner of applying therefore may be regulated by law.

On the statutory side of the coin, it is provided:

(a) Petitions seeking pardon, commutation or reprieve shall be addressed to the Governor and filed with the Parole and Pardon Board. The petition shall be in writing and signed by the person under conviction or by a person on his behalf. It shall contain a brief history of the case and the reasons for executive clemency.

(d) The Governor shall decide each application and communicate his decision to the [Parole and Pardon] Board.

ILL. REV. STAT. ch. 38, § 1003-3-13(a), (d) (1973).
114. See Memorandum from Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating Commission, to Charles Siragusa, Executive Director, Illinois Legislative Investigating Commission, November 15, 1972. Mr. Nauert, who was primarily responsible for the drafting of the new Illinois statute, prefaced his legislative proposal with the following statement:

[When capital punishment is imposed at the discretion of juries in individual cases, it must be assumed that the state legislatures have determined that in each of [the] . . . cases [in which the jury may recommend life imprisonment or the death penalty] imprisonment is as adequate as capital punishment, and therefore death is an excessive penalty.]

The implication to be drawn from these narrower opinions [in Furman] is that capital punishment is constitutionally permissible if the legislature determines that it is the most effective and most necessary sanction which can be applied to a particular offense. The death penalty must be mandatory in these cases, and completely taken away from the discretion of juries. In Illinois, this means that the current provisions allowing juries in capital cases to recommend the death penalty must be abandoned. . . .

115. 408 U.S. at 401-03 (Burger, C.J., dissenting).
Blackmun,\textsuperscript{116} expressed antipathy toward the latter type, viewing it as regressive. Indeed, Justice Blackmun recognized the desirability of mercy in the imposition of punishment, a quality not absent from the new Illinois statute.\textsuperscript{117} Such considerations notwithstanding, it is more likely that the new statute risks being too discretionary than it does being too mandatory.\textsuperscript{118}

\textit{Narrowing of Capital Offenses}

The spectrum of \textit{potential} capital offenses is vast. If nothing else, \textit{Furman} indicates that the choice of \textit{actual} capital offenses should be one for the legislature and not for the jury. The experience of jury nullification demonstrated that juries, when asked to consider a potentially capital offense, made discretionary distinctions as to its capital nature on the basis of circumstances surrounding the crime. Conceptually, the band of the criminal spectrum designated as the potential capital offense zone was too broad, in view of every crime's uniqueness, to warrant imposition of the death penalty in every instance. Perhaps this conflict between the legislative will and the popular will derived from the legislature's intent to be comprehensive and the jury's wish to be humane.

With the renaissance of mandatory or semi-mandatory systems, the torch must pass from the jury to the legislature to select capital offenses. In essence, the legislature must predetermine with relative certainty "those offenses which are so reprehensible that the death pen-

\textsuperscript{116} \textit{Id.} at 413 (Blackmun, J., dissenting).

\textsuperscript{117} \textit{Id.} If, as Justice White points out in his \textit{Furman} opinion, \textit{id.} at 311-14 \textit{passim} (White, J., concurring), frequency of execution is a concern, it is possible that a system which retains some discretion may result in more executions than one which is completely mandatory. \textit{See} Reidel, \textit{The Effect of Mandatory and Discretionary Death Sentences on Commutations and Executions in Pennsylvania, Report of the [Penn.] Governor's Study Commission on Capital Punishment} 86, 95 (1973). The study compared the effects of using a discretionary sentencing system as opposed to a mandatory sentencing system in Pennsylvania and arrived at the following conclusion:

Our results indicate that offenders under discretionary sentences were significantly more frequently executed than offenders with mandatory sentences; contrawise, more offenders were commuted under mandatory sentences than under discretionary sentences.

\textit{Id.} If a shift toward a more mandatory sentencing system includes the possibility of greater use of executive pardon on the part of governors, then it may be desirable, in view of \textit{Furman's} stress on rationality, to formulate some standards to guide governors in their exercise of clemency. Statement of L. Harold Levinson, Law Center, University of Florida, before the Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary in \textit{Hearings on S. 1, S. 1400, and S. 1401 Before the Subcommittee on Criminal Laws and Procedures of the United States Senate Committee on the Judiciary, 93d Cong., 1st Sess., at 154-55 (1973).} See Illinois provisions, constitutional and statutory, on executive clemency in note 113 supra.

\textsuperscript{118} \textit{See} text accompanying notes 187-99 \textit{infra}.

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alty is singularly appropriate in all cases.\textsuperscript{110} Under the new Illinois statute, capital offenses are limited to types of murder, to murders committed under prescribed aggravating circumstances. This is only reasonable, since the varieties of murder are many, and since some murders are less premeditated than others.\textsuperscript{120}

In designating capital offenses, attention was directed by the drafters of the Illinois statute to the requirements of \textit{Furman}, to the Illinois Constitution, and to general principles of due process so that the classes of offenses which warranted the death penalty would be drawn narrowly and with great specificity. The legislative intent was to list only those crimes which required the death penalty for maximum deterrence.\textsuperscript{121} Since such crimes would comprise only an infinitesimal part of the total number of killings, it was recognized that imposition of the death penalty would remain a relatively rare occurrence.\textsuperscript{122}

By applying various factors to the general murder standard, the statute's drafters arrived at a dichotomy between capital and non-capital murders. To the extent that these factors serve to qualify murders as capital or non-capital, aggravating circumstances under the new statute become, for purposes of statutory analysis, synonymous with capital murder categories,\textsuperscript{123} and further, for purposes of statutory interpretation, the ambit of each category warrants delimitation.

First, the terms "peace officer" and "fireman" in the statute's provision making the murder of a peace officer or a fireman a capital offense envisage the protection of not only salaried\textsuperscript{124} members of those classes but volunteer and part-time workers as well. Since the focus of the provision was functional, and not administrative, the drafters felt that the latter group of workers were entitled to a degree of protection no lower than that afforded the former. Moreover, since many of the workers in the volunteer and part-time group receive pensions and benefits, a distinction on the basis of remuneration becomes

\textsuperscript{119} Memorandum from Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating Commission, to Charles Siragusa, Executive Director, Illinois Legislative Investigating Commission, November 15, 1972. See the observation of Justice Powell on this point, indicating this to be a legislative determination of which circumstances warrant retention of capital punishment in the public interest. 408 U.S. at 437-38 (Powell, J., dissenting).
\textsuperscript{120} Hyde, \textit{Should death penalty be mandatory?}, Chicago Tribune, August 21, 1973, § 1, at 10, col. 3.
\textsuperscript{121} Memorandum from Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating Commission, to Charles Siragusa, Executive Director, Illinois Legislative Investigating Commission, November 15, 1972.
\textsuperscript{122} Id.
\textsuperscript{124} \textit{ILL. REV. STAT.} ch. 24, §§ 10-3-1 to 2 (1973).
irrelevant.\textsuperscript{125}

The provision covering the murder of prison personnel is intended to extend to prison visitors and invitees as well. Its purpose is to deter inmates from taking such individuals as hostages in the event of a disturbance or an escape attempt.\textsuperscript{126}

The provision concerning multiple murders is intended to apply to two types of offenders: mass killers (as in the Speck case, or as in the case of an arsonist) and repeat offenders. Accordingly, any individual convicted of murdering two or more persons, at any time, stands to receive the death penalty.\textsuperscript{127}

The provision dealing with hijacking murders purposes to serve the economic and social necessity of facilitating free access to public transportation.\textsuperscript{128} It envisions the application of normal conflicts rules, which exclude criminal laws from choice-of-law concern,\textsuperscript{129} to troublesome interstate situations.\textsuperscript{130} Thus, in the case of a hijacking murder committed on a public conveyance in transit from Illinois to another state without capital punishment, a court of the other state which had concurrent jurisdiction over the defendant with an appropriate Illinois court\textsuperscript{131} and which had obtained its jurisdiction before the Illinois court

\textsuperscript{125} Memorandum from Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating Commission, to Charles Siragusa, Executive Director, Illinois Legislative Investigating Commission, November 15, 1972. See exact wording of statute at note 44 supra.

\textsuperscript{126} Id. See exact wording of statute at note 44 supra.

\textsuperscript{127} Id. See exact wording of statute at note 44 supra.

\textsuperscript{128} Id. See exact wording of statute at note 44 supra.

\textsuperscript{129} R. Crampton & D. Currie, Conflict of Laws 46 (1968).


\textsuperscript{131} Ill. Rev. Stat. ch. 38, §§ 1-5(a)(1), (b) (1973). For example, a hijacker might assemble a bomb in Illinois, setting it to explode sometime during an interstate trip from Illinois to another state. If the bomb exploded in the other state, killing at least one other person aboard the public conveyance, both Illinois and the other state would conceivably have jurisdiction over the defendant. The Illinois criminal jurisdictional statute provides:

\begin{verbatim}
(Ch. 38, par. 1-5)

Sec. 1-5. State Criminal Jurisdiction. (a) A person is subject to prosecution in this State for an offense which he commits, while either within or outside the State, by his own conduct or that of another for which he is legally accountable, if:

(1) The offense is committed either wholly or partly within the State;

(b) An offense is committed partly within this State, if either the conduct which is an element of the offense, or the result which is such an element, occurs within the State. In homicide, the “result” is either the physical contact which causes death, or the death itself; and if the body of a homicide victim is found within the State, the death is presumed to have occurred within the State.

Id. The drafters of the jurisdictional statute were aware of the interests to be served by the statute:

The purpose of Section 1-5 of the Code is to establish a broad jurisdictional basis for the prosecution in Illinois of offenses involving persons, property,
would apply the substantive criminal law of the forum, without reference to Illinois law.\textsuperscript{132} Further, the hijacking provision envisions the application of the Illinois double jeopardy statute.\textsuperscript{133} Thus, if the prosecution in the other state as to the murder offense resulted in either a conviction or an acquittal, the Illinois court would be barred from further prosecution of the defendant for the same offense.\textsuperscript{134}

The contract murder provision making the act of killing for hire a capital offense is to be restricted in its application to those situations in which some consideration has passed to the murderer for committing the act. It was thought that, among all the categories covered by the statute, deterrence would be highest in this category.\textsuperscript{135} This provision does not extend to the person giving the consideration for committing the act.

The provision making murder incident to the commission of a felony a capital offense follows the definitions of robbery,\textsuperscript{136} rape,\textsuperscript{137} aggravated kidnapping,\textsuperscript{138} arson,\textsuperscript{139} and the indecent molestation of a child\textsuperscript{140} used in the Illinois Criminal Code.\textsuperscript{141} The drafters were care-

\begin{thebibliography}{9}
\bibitem{132} R. Crampton \& D. Currie, \textit{Conflict of Laws} 46 (1968).
\bibitem{133} \textit{Ill. Rev. Stat.} ch. 38, § 3-4(c) (1973). The drafters of the double jeopardy statute made an interesting observation:
\begin{quote}
Section 3-4(c). A third application of the doctrine of double jeopardy involves the recognition of a former prosecution in another jurisdiction, such as a Federal court or a court of another state. This application is statutory, not required by constitutional guaranty or common-law rules. . . .
\end{quote}
\bibitem{135} Memorandum from Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating Commission, to Charles Siragusa, Executive Director, Illinois Legislative Investigating Commission, November 14, 1972. See exact wording of statute at note 44 \textit{supra}.
\bibitem{137} Id. § 11-1(a)-(b).
\bibitem{138} Id. § 10-2(a).
\bibitem{139} Id. § 20-1(a)-(b).
\bibitem{140} Id. § 11-4(a).
\end{thebibliography}
ful to include in this provision only those felonies which the perpetra-
tor could reasonably expect to result in fatalities.\textsuperscript{142}

\textit{The Bifurcated Trial}

Once capital offense categories have been established by the legis-
lature, it becomes important to develop a process for determination
of the existence of the aggravating circumstances by which the cat-
egories are defined. For this, the statute provides a special sen-
tencing hearing conducted by a three-judge panel, one of whom shall
be, if possible, the trial judge.\textsuperscript{143} The drafters were concerned about
the possibility that the death of the trial judge in the hiatus between
the guilt-finding hearing and the sentencing hearing might preclude
the continuation of the trial and the imposition of sentence. Accord-
ingly, provision was made for the possibility of a sentencing hearing
without the participation of the trial judge.

The statute's provision for a bifurcated trial, dividing a capital pro-
ceeding into a guilt phase and a punishment phase, is not novel. Illi-
nois boasted of such a system before \textit{Furman},\textsuperscript{144} as did other states.\textsuperscript{145} The advantage of the bifurcated trial as opposed to the unitary trial
is that the bifurcated trial affords the defendant greater flexibility in
the presentation of his case. Thus, he may choose to invoke the fifth
amendment on the issue of his guilt and, upon a verdict of guilty, may
yet present evidence on the issue of punishment without jeopardizing
his chances for acquittal.

On the other hand, under a unitary system, the defendant must
make a more difficult choice. By remaining silent to protect himself
on the issue of guilt, he surrenders any chance to plead his case on
the issue of punishment. But should he chance to offer character evi-
dence through his own testimony in order to influence the jury on
the issue of punishment, he risks the likelihood that the prosecution
will introduce evidence of past crimes and bad character that might
seriously prejudice his case on the issue of guilt.\textsuperscript{146} Pressed between
these alternatives, the defendant finds himself impaled on the horns
of a dilemma.\textsuperscript{147}

\textsuperscript{142} Letter from Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating
\textsuperscript{143} \textit{I.LL. REV. STAT.} ch. 38, § 1005-8-1A (1973).
\textsuperscript{144} \textit{Id.} § 1005-4-1.
\textsuperscript{145} See \textit{Note, Bifurcating Florida's Capital Trials: Two Steps Are Better Than
\textsuperscript{146} See Handler, \textit{Background Evidence in Murder Cases}, 51 \textit{J. CRIM. L.C. & P.S.
\textsuperscript{147} The unitary system and the difficult choice it poses have not evaded constitu-
If *Furman* stresses the need for a more rational imposition of capital punishment, the adoption of a bifurcated trial procedure seems consistent with that need. Certainly, a rational distinction can be drawn between evidence bearing on guilt and evidence bearing on punishment. In the wake of *Furman*, some states have in fact adopted the bifurcated system. However, the sentencing hearings under these new statutes are not necessarily the same as those under pre-*Furman* statutes. In some states, indeed in Illinois, at the hearing in capital cases the evidence is to be restricted to circumstances related to the offense which warrant or preclude imposition of the death penalty. In other states, the hearing is to include consideration of such circumstances and, in addition, consideration of any other evidence relevant to the issue of punishment. At least one federal proposal admits both evidence of the circumstances surrounding the crime and any other relevant evidence at the hearing, while another limits admission to mitigating and aggravating factors, dropping the hearsay restriction as to the defendant, but keeping it as to the prosecution.

Under the new Illinois statute, there is not only a hearsay restriction as to both the prosecution and the defendant, but a restriction as to evidence of circumstances surrounding the crime as well. While most post-*Furman* statutes provide for consideration of both aggravating and mitigating factors, the new Illinois statute provides for consideration of aggravating factors only, subject to the exercise of the mercy provision in extraordinary cases. The restricted scope of the evidential scrutiny. In *Spencer v. Texas*, 385 U.S. 554, 564 (1967), the United States Supreme Court held that the possibility of some collateral prejudice to the defendant under a unitary system did not violate due process. In the more recent case on this question, *McGautha v. California*, 402 U.S. 183, 213-14 (1971), the petitioner Crampston contended that the unitary procedure in Ohio forced him to waive his right not to be a witness against himself in order to assert his right to be heard on the punishment issue. The Court rejected this argument by comparing the defendant's position to other constitutionally accepted procedures that require defendants to make difficult choices at trial. *E.g.*, United States v. Calderon, 348 U.S. 160, 164 & n.1 (1954) (defendant whose motion for acquittal at close of prosecution's case is denied must decide whether to put on a defense and risk strengthening the government's case).
dence at the sentencing hearing issues from a legislative intent to direct the legal focus to "the nature of the crime or the identity of the victim" and away from the defendant.\(^{155}\) This evidentiary restriction was made in a spirit of compliance with *Furman*, since character evidence, extraneous to the circumstances of the offense, invites the exercise of unwanted discretion.

There is, however, pre-*Furman* authority to the contrary. In one instance, the Supreme Court, in upholding as consistent with due process a death sentence imposed by a judge on the basis of hearsay information following a jury recommendation of life imprisonment, observed, "Highly relevant—if not essential—to the judge's selection of an appropriate sentence is the possession of the fullest information possible concerning the defendant's life and characteristics.\(^{156}\)

Set against the sentencing philosophy which espouses fullest information concerning the defendant is the new Illinois statute, which envisages a doubly restricted evidentiary scope at capital sentencing hearings. While such restrictions increase sentencing rationality, they decrease the scope of evidence which a defendant may present. Due process may require that a defendant, when confronted with the potentiality of a death sentence, be permitted to present hearsay evidence and evidence of mitigating factors surrounding his crime.\(^{157}\) Moreover, the new Illinois statute creates the anomalous situation of permitting a broader evidentiary scope at non-capital sentencing hearings than it does at capital sentencing hearings, since the former allows "evidence . . . offered . . . in . . . mitigation,"\(^{158}\) including hearsay, while the latter is limited to evidence of a non-hearsay nature regarding the aggravating circumstances only. In short, the new Illinois statute presents the question of due process countervailed by sentencing rationality. Indeed, if increased rationality in the capital sentencing process is mandated by *Furman*, the restricted evidentiary scope at the sentencing hearing under the new statute may have to be part of the constitutional price exacted for achieving such rationality.

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157. *McGautha v. California*, 402 U.S. 183, 218 (1971). This threshold question was never answered by *McGautha* because the Court was able to decide the case without considering it.
158. *ILL. REV. STAT. ch. 38, § 1005-4-1(a)(3) (1973).*
New Death Penalty

Judicial Imposition of Sentences

At common law, the sentencing power was reposed in the judiciary, and in the judiciary alone. However, bad experiences with the royal juries in England and the absence of "substantial difference[s] in training, competence, experience or intelligence between judge and jury" motivated the American colonists to make their criminal juries a more integral part of the sentencing process. This evolution continued until juries came to assume primary responsibility for the imposition of capital punishment in most states, including Illinois. In jury cases in Illinois before Furman, the death penalty could be visited upon the defendant only if the jury gave to the court an initial recommendation to that effect.

Because Furman explicitly recognized the abuse to which juries are prone when exercising their sentencing discretion, a logical alternative is to lower overall sentencing discretion and to transfer sentencing authority to the judiciary in capital cases. This assumes, however, that judges are, in the main, less arbitrary than juries. It is generally believed, for example, that judges, because of their experience and training, are less influenced by emotion and prejudice than are juries. Moreover, it is also believed that judicial determinations are apt to be more uniform than those of juries.

By contrast, from a penological perspective, there are equally compelling arguments for jury imposition of the death sentence. Advocates of a jury sentencing system contend that capital punishment "should reflect the judgment of a cross section of the public" and that one individual should not "bear the sole responsibility for making this

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163. 408 U.S. at 313 (White, J., concurring).
165. Model Penal Code § 201.6, Comment 4 (Tent. Draft No. 9, 1959). This is not to derogate the qualifications of juries to impose sentence. Justice Frankfurter, for one, has stated, "I do not understand the view that juries are not qualified to discriminate between situations calling for mitigated sentences." F. Frankfurter, Of Law and Men 87 (1956).
grave decision." It is also contended that "jurors do not become calloused to the fate of defendants" as easily as judges and that jurors are less susceptible of bowing to political and public pressures. These arguments are attenuated, however, by the recognition that many of the best qualified members of the community, e.g., doctors, lawyers, and clergymen, are accorded statutory exclusions from jury service which deprive the average jury of members whose education and experience are desirable in the sentencing process.

Justice White, in his concurring opinion in Furman, observed that the death penalty, to be an effective deterrent, must be imposed with frequency sufficient at least to pose a credible threat to criminals. Otherwise, it is relegated to a mere symbolic sanction. If frequency of imposition is a legitimate concern, then the new Illinois statute, which places sentencing authority in capital cases in the exclusive realm of the judiciary, may very well serve to allay frequency disquietude by increasing the incidence of death sentences to a point where the death penalty deterrent is credible. Available evidence indicates that under systems in which the judge determines the sentence, the death penalty is imposed with a slightly greater frequency than under systems in which the jury makes the determination.

But while concern for the frequency of imposition is one of the topics to which Furman addressed itself, there are other concerns as well. The mere transfer of sentencing authority from the jury to the judge does not magically metamorphose an otherwise arbitrary system into a rational one. One concern not immune from criticism is the sentencing discretion of judges. Significantly, there is evi-

170. 408 U.S. at 312 (White, J., concurring).
173. See, e.g., the opinion of Justice Stewart in Furman. Justice Stewart, on this point, remarked: "It is equally clear these sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare."
174. Id. at 397-98 (Burger, C.J., dissenting) (the Stewart and White opinions con-
dence to support the contention that variations in judges may cause variations in sentences.\textsuperscript{176} As one former judge declared, " Judges, I think, tend to be like people, perhaps even some cuts above the mine run but, unfortunately, less than gods or angels."\textsuperscript{176} If this be true, the delegation of sentencing authority in capital trials to a three-judge panel, as proposed in the new Illinois statute, may not serve to reduce judicial discretion as much as might be supposed.

However, in defense of the new statute, certain aspects of its provisions should be noted. First, the panel's discretion is tightly circumscribed by the sentencing hearing's evidentiary scope, limited as it is to the aggravating circumstances of the offense.\textsuperscript{177} Further, there is perhaps some safety in numbers: Three judges pronouncing sentence are better than one. A comparable death penalty statute in Ohio vests complete sentencing authority in jury cases in only the single trial judge.\textsuperscript{178} On the other hand, in non-jury cases the Ohio statute requires a three-judge panel, which must furthermore vote unanimously for the death sentence if such sentence is to be imposed.\textsuperscript{179} By contrast, the new Illinois statute, in either a jury or a non-jury case, requires the concurrence of only two of the three judges on the panel for imposition of the death penalty.\textsuperscript{180} While unanimous verdicts may not be constitutionally required in sentencing, they may be desirable in capital cases, given the stakes. Admittedly, once unanimity is required, frequency of imposition is potentially reduced.

In further defense of the statute it should be noted that the drafters included two provisions which are intended to render the three-judge

\textsuperscript{175} M. Frankel, Criminal Sentences: Law without Order 21 (1973). Frankel, in his critique, ventures a number of legislative proposals for rationalizing the sentencing function, \textit{inter alia}: the articulation of a legislative definition of sentencing objectives; a quantified codification of weights and measures to be utilized in assessing the gravity of a crime; appellate review of sentences; the convocation of judicial sentencing councils; the permanent establishment of a commission on sentencing. \textit{Id.} at 103 et seq.

\textsuperscript{176} \textit{Id.} at 12.

\textsuperscript{177} ILL. REV. STAT. ch. 38, \$ 1005-8-1A (1973).

\textsuperscript{178} OHIO REV. CODE \$ 2929.03(C)(2) (Supp. 1973).

\textsuperscript{179} \textit{Id.} \$ 2929.03(C)(1), (E).

\textsuperscript{180} ILL. REV. STAT. ch. 38, \$ 1005-8-1A (1973).
panel accountable for its actions: the two-part appellate process\textsuperscript{181} and the writing requirement.\textsuperscript{182} As to the first, there are prescribed criteria by which the panel's actions may be reviewed.\textsuperscript{183} As to the second, there are admittedly no prescribed criteria, but the purpose is to encourage the panel to express the reasons for its actions.\textsuperscript{184} In addition, the prosecution still has its burden of proving the aggravating circumstances beyond a reasonable doubt.\textsuperscript{185} Finally, the use of a three-judge sentencing panel greatly facilitates the selection of a jury in capital cases, since potential Witherspoon problems are avoided.\textsuperscript{186}

\textit{The Mercy Provision}

If the new Illinois statute contains an Achilles heel vulnerable to constitutional attack, it is the provision permitting the three-judge panel to refrain from imposing the death sentence if it determines there are "compelling reasons for mercy."\textsuperscript{187} At first blush, this provision seems to encompass the type of unbridled discretion which Furman denounced.\textsuperscript{188} However, analysis of legislative intent reveals that the inclusion of such a provision derives from a desire to furnish a safety valve in the mandatory operation of the statute, and not from a desire to revert to a pre-Furman discretionary standard.\textsuperscript{189} In 1959, the draftsmen of the Model Penal Code attempted to define those criteria which a jury might apply in deciding to exercise or not to exercise mercy in a capital case. They conceded the impossibility of drafting a strict formula, but they did feel that it was possible to isolate "the main circumstances of aggravation and of mitigation that should

\begin{footnotes}
\item[181] \textit{Id.}
\item[182] \textit{Id.} § 9-1(b).
\item[183] These criteria are race, creed, sex or economic status. \textit{Id.} § 1005-8-1A.
\item[184] The statute merely provides:
\begin{quote}
After such determination [as to whether sentence should be imposed under Section 5-5-3 (non-capital crimes) or Section 5-8-1A (capital crimes) of the Unified Code of Corrections] by a majority of the 3 judge court and notice to the trial judge of their decision \textit{in writing} the trial judge shall enter sentence accordingly.
\end{quote}
\item[185] \textit{Id.} § 9-1(b) (emphasis added).
\item[186] \textit{Id.} § 1005-8-1A.
\item[187] See text accompanying notes 29-35 \textit{supra}.
\item[188] \textit{Id.} § 1005-8-1A (1973). See note 44 \textit{supra} for full wording of statute.
\item[189] See Note, 23 De Paul L. Rev. 517, 523 (1973).
\end{footnotes}
be weighed and weighed against each other when they are presented in a concrete [capital] case.”

190. Model Penal Code § 201.6, Comment 3 (Tent. Draft No. 9, 1959). The draftsmen of the Model Penal Code arrived at a formulation of aggravating and mitigating circumstances which was not intended to be exhaustive:


(1) Death Sentence Excluded. When a defendant is found guilty of murder, the Court shall impose sentence for a felony of the first degree if it is satisfied that:

(a) none of the aggravating circumstances enumerated in Subsection (3) of this Section was established by the evidence at the trial or will be established if further proceedings are initiated under Subsection (2) of this Section; or

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

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

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

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

(f) although the evidence suffices to sustain the verdict, it does not foreclose all doubt respecting the defendant's guilt.

(2) Determination by Court or by Court and Jury. Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. The proceeding shall be conducted before the Court alone if the defendant was convicted by a Court sitting without a jury or upon his plea of guilty or if the prosecuting attorney and the defendant waive a jury with respect to sentence. In other cases it shall be conducted before the Court sitting with the jury which determined the defendant's guilt or, if the Court for good cause shown discharges that jury, with a new jury empanelled for the purpose.

In the proceeding, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. Any such evidence, not legally privileged, which the court deems to have probative force, may be received, regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant's counsel is accorded a fair opportunity to rebut such evidence. The prosecuting attorney and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

The Court, in exercising its discretion as to sentence, and the jury, in determining upon its verdict, shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant, but it shall not impose or recommend sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency. When the issue is submitted to the jury, the Court shall so instruct and also shall inform the jury of the nature of the sentence of imprisonment that may be imposed, including its implication with respect to possible release upon parole, if the jury verdict is against sentence...
There was subsequent support for adoption of the Model Penal Code's formulation of aggravating and mitigating circumstances in connection with capital cases. In *McGautha v. California* the Supreme Court had the opportunity of determining the constitutional necessity of providing a jury in a capital case with some reasonable guide similar to the Model Penal Code's proposal to aid the jury in its sentencing deliberations. On this point, the Court firmly held that the due process clause of the fourteenth amendment did not require that juries be given judicially articulated formulae by which to determine whether to impose the death penalty.\(^{191}\)

With the advent of *Furman*, *McGautha* was seemingly overruled,\(^ {192}\) and some states began to incorporate the Model Penal Code's stand-
ards into their new death penalty statutes. Illinois' new statute is unique, inasmuch as it adopts the Code's aggravating circumstances, but not its mitigating circumstances, as a sentencing guide.

When consideration was being given by the Illinois statute's drafters to the possible codification of mitigating circumstances, which usually include factors such as youth, mental condition, necessity, and complicity with slight participation, it was determined that the Model Penal Code's formulation did not comprehend every conceivable situation that might arise under the statute and was therefore, in the judicial sense, unacceptable. Thus the Penal Code's formulation of mitigating circumstances was deliberately omitted from the new Illinois statute out of a desire on the part of the statute's drafters to avoid potential injustices arising from a rigid and exclusive listing of such circumstances. Such a listing, it was thought, would only result in the Procrustean exercise of attempting to fit infinitely varied factors into uniform categories. It was deemed far better to formulate a mitigating standard broad enough to subsume every conceivable factual situation yet narrow enough to meet the emphasis of Furman on rationality.

The resulting omnibus standard, which permits judicial consideration of "compelling reasons for mercy," was intended to add a humane element to the statute which would come into play only in the extraordinary case. Such an extraordinary case might arise in a situation where the facts fell within the ambit of the statute—that is, where the aggravating circumstances warranting the death penalty were present—but where factors relating to the aggravating circumstances indi-

193. E.g., FLA. STAT. ANN. § 921.141(3)-(4) (Supp. 1972); ANN. CAL. [PENAL] CODE § 190.2-3 (Supp. 1974); cf. S. 1, 93d Cong., 1st Sess. § 1-4E[1(b)](1)-(3) (1973); S. 1400, 93d Cong., 1st Sess. § 2401(a)-(b) (1973). The adoption of these standards is in compliance with Chief Justice Burger's invitation to the state legislatures and to Congress in Furman. 408 U.S. at 400 (Burger, C.J., dissenting). S. 1401, which consists of the death penalty provisions of S. 1400 segregated from the latter's omnibus criminal code reform provisions, was passed by the United States Senate on March 13, 1974 by a vote of 54-33 after the adoption of several amendments. CONGRESSIONAL QUARTERLY, March 16, 1974, at 708. One of these amendments required that aggravating factors under the bill's provisions be proved to exist "beyond a reasonable doubt," not merely "by a preponderance of the evidence." Id. at 705. For the provision of the new Illinois statute on this point, see text accompanying notes 49 and 185 supra. For a complete record of Senate debate concerning amendments to and passage of S. 1401, see 120 Cong. Rec. S 3506 (daily ed. March 12, 1974) and 120 Cong. Rec. S 3658 (daily ed. March 13, 1974). Interestingly, the United States House of Representatives passed its own death penalty bill, H.R. 3858, which, although more restrictive than the Senate bill, provides for imposition of the death penalty in connection with defined hijacking crimes, on March 13, 1974 by a vote of 361-47. CONGRESSIONAL QUARTERLY, March 16, 1974, at 709-10.

194. Hyde interview, supra note 35. As the McGautha court stated, "The infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need." McGautha v. California, 402 U.S. 183, 208 (1971).
cated the crime to be utterly beyond the scope of possible situations envisaged by the drafters. The omnibus standard does not contemplate the consideration of factors remotely related to the aggravating circumstances, but only those of a proximate nexus, such as events immediately preceding the capital offense murder.

Whether this mercy provision will pass constitutional muster in the context of Furman is questionable. Much depends on how narrowly the provision is interpreted. It can be argued that there is less need for tightly defined standards where three judges are responsible for sentencing than where juries play a part in sentencing, since the judges’ experience might obviate the need for such statutory precision. On the other hand, due process in the wake of Furman may require that a defendant be able to determine through specific and unambiguous statutory formulations those circumstances which might preclude imposition of the death penalty, just as he should, by the same token, be able to determine those circumstances which might warrant it. Of course, the writing requirement prescribed in the statute may com-

195. Hyde interview, supra note 35.
196. An example of an extraordinary situation to which the drafters had reference was the murder of an on-duty policeman by his wife subsequent to an altercation at his home before the policeman went on duty. Governor Walker made reference to this extraordinary situation in his amendatory veto of House Bill 18. Letter from Governor Daniel Walker to the Members of the Illinois House of Representatives, September 12, 1973.
197. Zagel interview, supra note 33. The drafters’ interpretation of the mercy provision is less than pellucid, primarily because the provision is, by its very nature, an omnibus standard not susceptible to easy definition. The drafters did discuss the meaning of the provision in the context of their efforts to clarify Governor Walker’s specific recommendations for changes in House Bill 18, which recommendations accompanied his amendatory veto:

My first recommendation concerns the Governor’s wish that the three judge panel have the discretion to impose a prison term rather than the death penalty. As intimated in the Governor’s message, there will always be cases where fundamental fairness and justice require a term of years rather than capital punishment—even in the most heinous forms of murder which HB 18 has isolated. I endorse this concept and applaud the Governor’s wisdom in calling for its inclusion.

My difficulty is in the terminology recommended by the Governor. His suggested amendment would grant the three judge panel the authority to divert capital punishment where a majority finds “compelling reasons” for doing so. I believe that this term, standing alone, is unconstitutionally vague.

It should be noted that we are delimiting the sentencing powers of the panel only with regard to the traditional exercise of judicial clemency. Since that is the limit of the court’s discretion, I think it would be wise to say so.

Thus I would suggest modifying the Governor’s wording to grant the sentencing judges the discretion to not impose the death penalty where a majority found “compelling reasons for mercy.” In my opinion the phrase “for mercy” would remove any vagueness or ambiguities that might otherwise result.

Letter from Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating Commission, to William Goldberg, Counsel to the Governor of Illinois, September 24, 1973 (first emphasis added).

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pel the three-judge panel to articulate such mitigating and aggravating considerations, but there is no specific assurance on this point.

In the final analysis, if the mercy provision suffers from vagueness, there are perhaps more Gargantuan problems associated with the vagueness inherent in legislatively prescribed mitigating circumstances. Standards such as youth, duress, necessity, complicity with slight participation, and absence of a significant history of prior criminal activity do not lend themselves to easy legal definition.\textsuperscript{199} Any attempt to close one Pandora's box by more precisely defining mitigating circumstances may well open another of greater dimensions. This is perhaps the dilemma of any post-\textit{Furman} death penalty statute.

\textbf{Final Adjudication}

The statute provides that any individual sentenced to death may not be executed until there has been a final adjudication of the statute's constitutionality. Moreover, the new statute declares that final adjudication means merely the completion of the appellate process in a single case and not necessarily the exhaustion of available remedies.\textsuperscript{200} Even if the defendant has not availed himself of such extraordinary remedies as \textit{coram nobis} or habeas corpus, the adjudication will be deemed final.\textsuperscript{201}

Under the new statute, there seems to be one inconsistency in connection with sentencing where the death sentence is overturned on appeal. If the statute is found unconstitutional, the defendant is sentenced to a term of imprisonment of not less than fourteen years.\textsuperscript{202} Likewise, if the specific murder of which the defendant is convicted is deemed to fall outside the enumerated capital offense categories, he is sentenced to a minimum of fourteen years imprisonment.\textsuperscript{203} On the other hand, if the appellate court concludes that the sentencing procedure in a particular case was infected with discrimination on the basis of race, creed, sex, or economic status, the defendant is sentenced to life imprisonment.\textsuperscript{204} This inconsistency may be violative of the equal protection clause.\textsuperscript{205} It is suggested that a better sentencing alternative would be to make the respective sentences uniform.

\begin{footnotes}
\footnote{199. See \textit{State v. Dixon}, 83 So. 2d 1, 17-18 (Fla. 1973) (Ervin, J., dissenting).}
\footnote{200. ILL. REV. STAT. ch. 38, § 1005-8-1A (1973).}
\footnote{201. Telephone interview with Roger C. Nauert, Chief Counsel, Illinois Legislative Investigating Commission, February 22, 1974.}
\footnote{202. ILL. REV. STAT. ch. 38, § 1005-8-1A (1973).}
\footnote{203. \textit{Id.}}
\footnote{204. \textit{Id.}}
\footnote{205. Note, 23 \textit{De Paul L. Rev.} 517, 523 (1973).}
\end{footnotes}
in all cases where the death penalty is commuted to a lesser sentence.

THE NEW ILLINOIS STATUTE IN THE PALE OF THE ILLINOIS CONSTITUTION

For most death penalty statutes, passing constitutional muster is a two-hurdled affair. There is the Federal Constitution, and there is the state constitution. Even if the new Illinois statute, for its part, survives federal constitutional scrutiny, it remains prey to attack on the state constitutional level.

Historically, the authority of the state to impose the punishment of death under the 1870 Illinois Constitution was accorded an expansive interpretation. The Illinois Supreme Court had adhered to the general position that an objection to a penalty established by the legislature would not be sustained unless it was a cruel and degrading punishment unknown to the common law, or so "wholly disproportionate to the nature of the offense as to shock the moral sense of the community." Today, under the 1970 Illinois Constitution, an attack on the new death penalty statute would, in all likelihood, be two-pronged: a substantive attack in connection with the new constitution's rehabilitation provision and a procedural attack in connection with the Illinois General Assembly's constitutional authority to change the composition of circuit courts and to provide for appellate court review in capital cases.

The Rehabilitation Provision

While there is no express protection in the 1970 Illinois Constitution against "cruel and unusual punishment" in the terms of the Federal Constitution, there is a related protection which stipulates:

All penalties shall be determined both according to the seriousness of the offense and with the objective of restoring the offender to useful citizenship.

It is generally agreed that this penalty protection and its analogue in the 1870 Illinois Constitution are lineal descendants of the federal prohibition contained in the eighth amendment. In comparing the two

constitutions, a significant concern is whether the Illinois Constitution may provide a higher standard of protection against cruel and unusual punishment than its federal counterpart. Indeed, the provision concerning rehabilitation contained in the penalty protection of the Illinois Constitution may arguably preclude the imposition of any death sentence, since the idea of rehabilitation is seemingly antithetical to the idea of capital punishment.

On a constitutional level, it is quite possible that state protections could be interpreted to be greater than federal. Those federally protected rights which have been held applicable to the states by virtue of the fourteenth amendment are not an exhaustive compendium of all the citizens' rights which a state may wish to protect. For example, the California Supreme Court, previous to the Furman decision, had held that imposition of the death penalty violated the California constitutional prohibition against cruel or unusual punishment. The disjunctive formulation of the prohibition in the California Constitution as opposed to its conjunctive formulation in the Federal Constitution was interpreted to prescribe a more extensive prohibition than that prescribed by the Founding Fathers. In the same way, the Illinois Supreme Court may give the penalty protection of the Illinois Constitution a reach that surpasses the interpretation given the eighth amendment by the United States Supreme Court.

The penalty protection was indeed a topic of discussion at the 1970 Illinois Constitutional Convention which was considered in the context of the entire sentencing process. Animated debate among the delegates had arisen on the question of adding to the 1870 constitution's penalty protection, which provided only that penalties be "proportioned to the nature of the offense," some provision articulating the concept of rehabilitation as an objective of sentencing. There was

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213. Record of Proceedings, Sixth Illinois Constitutional Convention: Verbatim Transcripts 1391, 1391-96 (June 2, 1970). The addition, proposed by Leonard N. Foster, would have changed Article I, § 11 of the Illinois Constitution to read:

All penalties shall be proportioned both to the nature of the offense and to
concern among many of the delegates that adoption of this addition to the penalty protection would in effect abolish capital punishment in Illinois. However, during the debate, the drafter of the rehabilitation provision declared that incorporation of this addition into the Illinois Constitution's penalty protection would not preclude capital punishment as a legislatively prescribed penalty for certain crimes "if the offense[s] were considered so overwhelmingly outrageous that the General Assembly wanted to impose the death penalty." With this assurance, the delegates voted to adopt the rehabilitation provision.

Subsequently, there was debate on a proposed addition to the penalty protection calling for explicit abolition of capital punishment. Many delegates favored abolition of capital punishment but felt that the matter was one for a legislature, not for a constitutional convention, to pass on. In the final vote, the proposal narrowly missed adoption. Still unsatisfied, some delegates felt the matter to be of sufficient importance to warrant its submission to the voters as a constitutional amendment, separate from adoption of the entire constitution. This proposal carried.

the objective of restoring the offender to useful citizenship, and the basis of such penalties shall be explained by the court and subject to review.

It is interesting to note that the convention was considering the idea of reviewability of sentencing decisions even before Furman, and indeed was seeking to curb the arbitrary sentencing power of judges. Mr. Foster's suggestion that sentences be reviewed was not adopted, however, because of the feeling that this was an area of judicial discretion, and that sentencing standards were a legislative prerogative.

the comments of the drafters of the Illinois Criminal Code in this regard:

Subsection (c) [of ch. 38, § 1-7, dealing with capital offenses] reflects the Committee's policy decision not to recommend the abolition of capital punishment in the Code. In view of the controversial and highly emotional aspects of capital punishment the Committee felt that its total or partial abolition should be considered on its own merits by the General Assembly and not in the context of a new Criminal Code.

ILLINOIS CRIMINAL CODE § 1-7, Committee Comments 34 (1961) (emphasis added).

214. Id. at 1391.
215. Id. at 1399 (June 2, 1970); 3636 (August 5, 1970).
216. Id. at 1396 (June 2, 1970).
217. Id. at 1414-26.
218. See, e.g., the remarks of Clifford L. Downen, id. at 1424-25 (June 2, 1970); Dendell Durr, id. at 1425 (June 2, 1970); William L. Fay, id. at 1425 (June 2, 1970); Ray H. Garrison, id. at 1425 (June 2, 1970); John L. Knuppel, id. at 1425 (June 2, 1970); Mary A. Pappas, id. at 1425 (June 2, 1970); Martin Ozinga, id. at 1425 (June 2, 1970).

219. Id. at 1426 (June 2, 1970). The final vote was 50 ayes, 54 nays, 1 pass, and 1 present. For the member proposals to abolish capital punishment which failed in the Bill of Rights Committee, see RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION: COMMITTEE PROPOSALS [cont.]/MEMBER PROPOSALS (1970) at 2937 (member proposal no. 222), 2964-65 (member proposal no. 277) and at 3012 (member proposal no. 387). For the majority proposal issuing from the Bill of Rights Committee, see RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION: COMMITTEE PROPOSALS 45 (1970).

221. Id. at 3651.
On December 15, 1970, by popular referendum, the new Illinois Constitution was adopted by the state's voters. More significantly, by slightly less than a two-to-one margin, the state's voters in the same referendum rejected the abolition of the death penalty. Thus, many of the voters approved the new constitution's general provisions, including the rehabilitation provision, but rejected any specific abolition of the death penalty.

In light of this constitutional history, it is difficult to find support for the contention that the Illinois Constitution's rehabilitation provision renders the new Illinois death penalty statute constitutionally defective. The drafters of the new statute were well aware of the possible conflict but, after consultation with a convention delegate, dismissed it. On balance, the overwhelming weight of authority indicates that the rehabilitation provision does not preclude imposition of capital punishment, but it may require a finding by the new statute's sentencing panel that the offender cannot be restored to useful citizenship. To remove any possibility for constitutional doubt, it is suggested that the General Assembly consider submitting for public approval an amended version of the new constitution's penalty protection, providing:

All penalties shall be determined both according to the seriousness of the offense and, excluding capital cases, with the objective of restoring the offender to useful citizenship . . . .

Legislative Authority to Change the Illinois Courts

A more serious constitutional infirmity on the state level appears

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222. ILLINOIS CONSTITUTION OF 1970 15 (Secretary of State 1971). It is also significant that the Constitution was adopted by a positive vote, and that abolition of the death penalty required a positive vote. For the adoption of the constitution to carry and the abolition of the death penalty to fail, it was necessary that a voter deliberately switch his vote from "yes" on the first question to "no" on the second question. The voting result indicates the weakness of any contention that voters were not cognizant of, or failed to reflect upon, the issues presented in the referendum:

| Total number of electors voting at the election: | 2,017,717 |
| Do you approve the proposed 1970 Constitution?: | |
| Yes | 1,122,425 |
| No | 838,168 |
| [Do you approve] [a]bolishing the death penalty?: | |
| Yes | 676,302 |
| No | 1,218,791 |

Id. at 15.

223. Governor Walker was one who felt that it was difficult reconciling the new Illinois death penalty statute with the Illinois Constitution's rehabilitation provision. Letter from Governor Daniel Walker to the Members of the Illinois House of Representatives, September 12, 1973.


in the statute's establishment of a three-judge panel for imposition of
the death sentence in cases of capital offense murder. The legislature
may lack the constitutional authority to change the composition of
the Illinois courts, and if it lacks the authority to change the courts,
then a priori it lacks the authority to establish a circuit court consist-
ing of more than one judge. 226

In this regard the 1970 Illinois Constitution makes specific provision
for the number of judges on the Illinois Supreme Court227 and the
number of judges in each appellate district,228 but, by contrast, it
makes no provision for a circuit court of more than one judge.229 Histori-
cally, under the 1870 Illinois Constitution, one-judge circuit courts
were the courts of general jurisdiction,230 and the Illinois Supreme
Court, in regulating their operation, had declared that it was error for
more than one judge to participate in the proceedings of a given
case.231

In 1962 there was an attempt to provide the legislature with the
constitutional power to create a three-judge circuit court for important
cases of unusual public interest. The proposal aimed at engrafting
such a provision onto the 1962 Judicial Amendment to the 1870 con-
stitution, which amendment became the basis for the judicial section
in the 1970 constitution. This proposal was rejected, and was not
resubmitted at the time the new constitution was drafted. 232 Accord-
ingly, the absence of such a provision in the new constitution and
the historical pre-eminence of one-judge circuit courts under the old
constitution are strong indications that the three-judge panel estab-
lished by the new Illinois death penalty statute is the product of an
unconstitutional enactment on the part of the legislature.

This view is well supported by authority, for it was held under the

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228. Id. § 5.
230. Id.
231. Wayland v. City of Chicago, 369 Ill. 43, 47, 15 N.E.2d 516, 518 (1938); Har-
vey v. Van DeMark, 71 Ill. 117, 120 (1873).
55 CHICAGO BAR RECORD 186, 186-87 (1974). Constitutionally, the judiciary derives
its powers from Article VI of the Illinois Constitution:
The judicial power is vested in a Supreme Court, an Appellate Court and
Circuit Courts.
ILL. CONST. art. VI, § 1 (1970). The legislature derives its powers from Article IV:
The legislative power is vested in a General Assembly consisting of a Sen-
ate and a House of Representatives elected by the electors from 59 Legisla-
tive Districts.
1870 constitution that the General Assembly could enact laws regulating judicial practice only where such laws did not impinge on the inherent powers of the judiciary. Thus, an act regulating the power of the courts to render a judgment of dismissal was invalidated. In *People ex rel. Stamos v. Jones*, the Illinois Supreme Court struck down a statutory provision regarding bail pending appeal because the scope of the provision exceeded the legislative authority granted to the General Assembly.

Moreover, the Illinois Constitution and the Illinois Supreme Court Rules may render the new statute's appellate provisions invalid. Under the new statute, appeal from a death sentence imposed by the trial court may be taken to an appropriate Illinois appellate court. By contrast, under the Illinois Constitution and the Illinois Supreme Court Rules, appeal from a death sentence imposed by a lower Illinois court is to be taken directly to the Illinois Supreme Court without the need to pursue any remedy on the appellate level. Further, as a general principle, those rules promulgated by the Illinois Supreme Court on the subject of appeals are expressly ordained as superseding any statutory provision inconsistent with such rules and as governing all appeals. In view of this procedural conflict between the new statute on the one hand and the Illinois Constitution and the Illinois Supreme Court Rules on the other hand, it seems unquestionable that the Illinois Supreme Court's power to review death sentences preempts the field of appellate review in capital cases by virtue of appellate primacy.
Accordingly, it is clear that the new Illinois death penalty statute does not comport with legal precedent, the Illinois Constitution, and the Illinois Supreme Court Rules. To rectify this situation, the General Assembly, at the very least, should (1) repeal the provision creating the three-judge panel as such, without abandoning the idea of a special sentencing hearing; (2) designate the trial judge as the sentencing judge, barring a case of incapacity; (3) explicitly limit the conduct of the special sentencing hearing to one judge; and (4) clarify the appellate procedure as a direct appeal to the Illinois Supreme Court. Another option for the General Assembly is to submit the proposal for a three-judge sentencing panel and appellate court review in capital cases to the Illinois Supreme Court for consideration and possible adoption into the Illinois Supreme Court Rules.

CONCLUSION

The new Illinois death penalty statute faces a constitutional Armageddon. There are serious constitutional questions to be resolved on both the federal level and on the state level. Since the Furman decision was shrouded with such uncertainty, some legislative groping for the constitutional answers is to be expected. Hopefully, much of the haze surrounding the issue of capital punishment in the United States will be removed when the United States Supreme Court grapples with post-Furman death penalty statutes.

There are the self-styled Cassandras who predict that the Court is moving inexorably toward the abolition of capital punishment,240 and there are those who see Furman as merely a step in the direction of increased rationality in the criminal justice system—an episode in the context of the due process "revolution."241 Undoubtedly, the great uncertainty associated with Furman is rooted in the even greater uncertainty concerning capital punishment itself. For every study lending support to the concept of capital punishment, there is another study arguing for its abolition. Public opinion is equally divided.

In the search for a rational answer, however, it is perhaps irrational to throw the burdens of the search onto the judiciary. The capital punishment debate is a factual dialectic, not a legal one.242 Accordingly, an exhaustive determination of capital punishment's efficacy can

only be made by the legislature, which, unlike the judiciary, has been endowed with the attributes of flexibility and public responsiveness. There is no binding precedent in the legislature.

The new Illinois statute is one legislature's resolution of the issue. Other legislatures in states which were abolitionist before *Furman* have chosen not to reinstate capital punishment. In any case, if capital punishment is to be reinstated, retained, or abolished, the impetus should come from popular sentiment, and not from the judiciary. As Chief Justice Burger declared in his *Furman* opinion:\footnote{243}{243. *Id.* at 405.}

The highest judicial duty is to recognize the limits on judicial power and to permit the democratic processes to deal with matters falling outside of those limits.

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