

August 2015

# Legislative Response to Furman v. Georgia - Ohio Restores the Death Penalty

Jeffrey T. Heintz

Please take a moment to share how this work helps you [through this survey](#). Your feedback will be important as we plan further development of our repository.

Follow this and additional works at: <http://ideaexchange.uakron.edu/akronlawreview>

 Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

---

## Recommended Citation

Heintz, Jeffrey T. (1975) "Legislative Response to Furman v. Georgia - Ohio Restores the Death Penalty," *Akron Law Review*: Vol. 8 : Iss. 1 , Article 10.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol8/iss1/10>

This Article is brought to you for free and open access by Akron Law Journals at IdeaExchange@UAkron, the institutional repository of The University of Akron in Akron, Ohio, USA. It has been accepted for inclusion in Akron Law Review by an authorized administrator of IdeaExchange@UAkron. For more information, please contact [mjon@uakron.edu](mailto:mjon@uakron.edu), [uapress@uakron.edu](mailto:uapress@uakron.edu).

LEGISLATIVE RESPONSE TO  
*FURMAN v. GEORGIA*—  
OHIO RESTORES THE DEATH PENALTY

*For bodilie punishments we allow amongst us  
none that are inhumane Barbarous or cruel.*

NO. 46, MASSACHUSETTS BODY  
OF LIBERTIES, Circa 1641.<sup>1</sup>

THE ABOVE REPRESENTS the first inclusion of a prohibition against cruel and unusual punishments in any charter of any colony in the New World. Believed to be traceable to the Magna Charta, such a prohibition is now embodied in our eighth amendment. It has been the subject of much litigation and construction, most recently in *Furman v. Georgia*,<sup>2</sup> where the death penalty, as then imposed, was declared to be invalid as cruel and unusual. Some states, including Ohio, have responded with new statutes controlling imposition of the death penalty in order to circumvent the *Furman* proscriptions.<sup>3</sup> Only time will tell whether this goal will in fact be accomplished; however some indications may be drawn from examination of the new statutes in light of both the pre-*Furman* and the *Furman* rationale.

THE PRE-FURMAN DECISIONS

A basic difficulty in dealing with the cruel and unusual punishments clause of the eighth amendment is defining what is meant by "cruel and unusual." Such a provision was not considered crucial enough to be placed in the body of the Constitution. Further, the extent of the debates concerning its inclusion in the Bill of Rights leads to a rather one sided conclusion. Mr. Holmes, a delegate to the Massachusetts Convention which considered ratification of the Bill of Rights, spoke of "racks and gibbets."<sup>4</sup> Patrick Henry, at the Virginia Convention, spoke of "barbarous punishments."<sup>5</sup> It is clear then that the framers intended to ban tortuous punishments, but beyond this, the legislative history of the eighth amendment is of little aid. Perhaps because of this expressed intent, the early cases dealing with it were limited in their inquiry to what was cruel and unusual at the time the Bill of Rights was adopted,<sup>6</sup> and as a result,

---

<sup>1</sup> B. SCHWARTZ, *THE BILL OF RIGHTS, A DOCUMENTARY HISTORY* 77 (1971).

<sup>2</sup> 408 U.S. 238 (1972), *rehearing denied*, 409 U.S. 902 (1972) [hereinafter cited as *Furman*].

<sup>3</sup> See text accompanying notes 52-55 *infra*.

<sup>4</sup> 2 J. ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 111 (1888).

<sup>5</sup> 3 J. ELLIOT, *DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION* 447 (1888).

<sup>6</sup> *Wilkerson v. Utah*, 99 U.S. 130, 133 (1870).

placed more emphasis on the fact that tortuous punishments were prohibited.<sup>7</sup> The prohibition was also held to apply only to national legislation, and not to the states.<sup>8</sup>

The first major change in this approach came in *Weems v. United States*.<sup>9</sup> There the court held unconstitutional as cruel and unusual a sentence of 15 years' hard labor for falsification of public documents. The crime involved an amount of 612 pesos.<sup>10</sup> The Court shifted its construction of the eighth amendment by saying "[t]ime works changes, and brings into existence new conditions and purposes. Therefore, a condition, to be vital, must be capable of wider application than the mischief which gave it birth."<sup>11</sup>

The Court continued in this vein in *Trop v. Dulles*,<sup>12</sup> where it held expatriation, absent allegiance to a foreign power, a cruel and unusual punishment.<sup>13</sup> Plaintiff Trop had been denied a passport on grounds that his 1944 conviction for wartime desertion stripped him of his citizenship. The Court spoke to the death penalty question, since that is the penalty for wartime desertion, although it was not imposed on Trop. The death penalty was rejected as an index of punishment, but dictum in the decision indicated the Court considered such penalty constitutional,<sup>14</sup> on the authority of the cases examined above.<sup>15</sup> The Court did not specifically define "cruel and unusual punishment," holding that the eighth amendment "... must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."<sup>16</sup>

Four years later, in *Robinson v. California*,<sup>17</sup> the Court further explored the question, saying that the definition of cruel and unusual punishment cannot be considered in the abstract,<sup>18</sup> but must be considered in light of the crime and the law involved.<sup>19</sup> Contrary to prior holdings, application of the eighth amendment to the states through the due process clause was apparently presumed.<sup>20</sup>

The modern era in the history of imposition of capital punishment

<sup>7</sup> *In Re Kemmler*, 136 U.S. 436, 447 (1890).

<sup>8</sup> *Pervear v. Massachusetts*, 72 U.S. 475, 480 (1866).

<sup>9</sup> 217 U.S. 349 (1910).

<sup>10</sup> *Id.* at 358.

<sup>11</sup> *Id.* at 373.

<sup>12</sup> 356 U.S. 86 (1958).

<sup>13</sup> *Id.* at 101-102.

<sup>14</sup> *Id.* at 99.

<sup>15</sup> *See* 356 U.S. at 99, n.29.

<sup>16</sup> 356 U.S. at 101.

<sup>17</sup> 370 U.S. 660 (1962).

<sup>18</sup> *Id.* at 667.

<sup>19</sup> *Id.*

<sup>20</sup> *See, e.g., Pervear v. Massachusetts*, 72 U.S. 475, 480 (1886).

began with a reflection of increased concern over its use and abuse. In *Witherspoon v. Illinois*,<sup>21</sup> the Court invalidated an Illinois statute<sup>22</sup> in force at the time of defendant's trial which provided that prospective jurors expressing opposition to, or moral qualms about the imposition of capital punishment could be stricken *for cause*. The Supreme Court reversed *Witherspoon's* conviction on the basis of this statute, finding that it fell short of the impartiality guaranteed by the sixth and fourteenth amendments.<sup>23</sup>

The basis of the modern era of eighth amendment attacks on capital punishment has been discretionary sentencing statutes which allow the trier of fact to impose either imprisonment or the death penalty without statutorily or judicially imposed guidelines. As to this, the *Witherspoon* court said, "a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death."<sup>24</sup> The Court noted:

One of the most important functions any jury can perform in making such an election is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society.<sup>25</sup>

The culmination of the pre-*Furman* era of capital punishment litigation, and the most significant in terms of possible post-*Furman* standards was the Court's reasoning in *McGautha v. California*, and its companion case, *Crampton v. Ohio*.<sup>26</sup>

*McGautha* dealt with an appeal by a California defendant from a felony-murder conviction and sentence of death. He was tried along with a co-defendant who was faced with the same charge. California's original bifurcated trial system<sup>27</sup> was used, whereby guilt or innocence was determined first, without imposition of a penalty. The trier of fact, either judge or jury, was then presented with evidence on the issue of punishment, *i.e.*, circumstances surrounding defendant's background and

<sup>21</sup> 391 U.S. 510 (1968) [hereinafter cited as *Witherspoon*].

<sup>22</sup> 38 ILL. REV. STAT. Ch. 38 § 743 (1959). This provision was held to be incorporated into its successor, ILL. REV. STAT. Ch. 38 § 115(4)(d) (1967), by the Illinois Supreme Court in *People v. Hobbs*, 35 Ill.2d 263, 274, 220 N.E.2d 469, 475 (1966).

<sup>23</sup> 391 U.S. at 518. For a further discussion of challenges of jurors who oppose the death penalty see Comment, *Competency of Jurors Who Have Conscientious Scruples Against Capital Punishment*, 8 WASHBURN L.J. 352 (1969).

<sup>24</sup> 391 U.S. at 519-520.

<sup>25</sup> *Id.* at 520, n.15, citing *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

<sup>26</sup> 402 U.S. 183 (1970) [hereinafter cited as *McGautha* and *Crampton*].

<sup>27</sup> *Cal. Penal Code* § 190.1 (West 1970). For further analysis of the bifurcated trial system see Comment, *Due Process and Bifurcated Trials, A Double Edged Sword*, 66 NW. U.L. REV. 327 (1971). See also *Bifurcating Florida's Capital Trials: Two Steps Are Better Than One*, 24 U. FLA. L. REV. 127 (1971).

any other mitigating or aggravating factors, neither of which were statutorily defined. Determination of penalty was left to the discretion of the trier of fact. Pursuant to this procedure, and after both had been found guilty of the crime, McGautha and his co-defendant presented evidence at the penalty hearing. McGautha's co-defendant was sentenced to life imprisonment, McGautha to death. His conviction was unanimously affirmed by the California Supreme Court,<sup>28</sup> and he appealed.

*Crampton* dealt with a defendant indicted for the murder of his wife. Ohio's pre-*Furman* unitary trial procedure<sup>29</sup> was used. The jury found him guilty, made no recommendation of mercy, and he was sentenced to death. His grounds of appeal were first, the unconstitutionality of standardless jury sentencing, and second, that while he had the right against self incrimination, Ohio's unitary trial procedure required that he could exercise this right only by foregoing the right to plead his cause on the issue of punishment, such right having been established in *Townsend v. Burke*.<sup>30</sup> This resulted, *Crampton* argued, in "intolerable tension" between Constitutional rights,<sup>31</sup> and that this tension was prohibited by *Simmons v. United States*.<sup>32</sup>

As to the claim that standardless jury sentencing as allowed in both cases was unconstitutional, the Court said, "[w]e find it quite impossible to say that committing to the untrammelled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."<sup>33</sup> As to the practicality of applying such standards, the Court noted that "[t]he infinite variety of cases and facets to each case would make general standards either meaningless 'boiler-plate' or a statement of the obvious that no jury would need."<sup>34</sup>

As to *Crampton's* allegation of conflicting constitutional rights, the Court distinguished *Simmons* on the ground that the fourth amendment claim there involved was "more sensitive" than *Crampton's*.<sup>35</sup> *Crampton's* forced choice between the fifth amendment rights against self incrimination and his right to be heard on the issue of punishment under *Townsend*, the Court said, was one that is not constitutionally impermissible.<sup>36</sup>

Just one year before *Furman*, then, it appeared that standardless jury

<sup>28</sup> 70 Cal.2d 770, 452 P.2d 650 (1969).

<sup>29</sup> This was the familiar procedure whereby the defendant in a capital case, if found guilty, could be sentenced to death unless the jury recommended mercy. See former OHIO REV. CODE § 2901.01 (repealed 1974).

<sup>30</sup> 334 U.S. 736 (1948).

<sup>31</sup> 402 U.S. at 211.

<sup>32</sup> 390 U.S. 377 (1968) [hereinafter cited as *Simmons*].

<sup>33</sup> 402 U.S. at 207.

<sup>34</sup> *Id.* at 208.

<sup>35</sup> *Id.* at 211-212.

<sup>36</sup> *Id.* at 213.

sentencing, regardless of whether the trial was unitary or bifurcated, was on solid ground. As seen below however, it is precisely this aspect which was objectionable to the *Furman* majority.

### THE FURMAN RATIONALES

In a *per curiam* opinion representing the judgments of five of its members (Brennan, Douglas, Marshall, Stewart, and White), the Supreme Court in *Furman v. Georgia* answered the following question in the affirmative: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?"<sup>37</sup> The fact that each Justice filed a separate opinion, however, made it clear that the actual basis for the decision was not nearly so succinct as a simple yes or no.

Mr. Justice Douglas based his concurrence on the fact that capital punishment as applied by the states at that time was unconstitutional due to discretionary and discriminatory imposition, particularly as against blacks, who, he pointed out, had a conviction/execution rate of 88.4% while that of whites was 79.8%.<sup>38</sup> He found statutes which left the issue of punishment to the discretion of the triers of fact to be discriminatory in effect, and "not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."<sup>39</sup>

Mr. Justice Stewart followed the same general line of argument, deciding that the eighth and fourteenth amendments "cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."<sup>40</sup> He did point out that the constitutionality of the death penalty *per se* was not before the Court,<sup>41</sup> as did Mr. Justice White,<sup>42</sup> who also based his concurrence on discretionary and infrequent imposition.<sup>43</sup> His basic objection was that "as the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice."<sup>44</sup> Justice White however, came closer than any other in implying what was needed for the future: "more narrowly defined categories" for capital crime.<sup>45</sup>

Mr. Justice Brennan and Mr. Justice Marshall went beyond the

<sup>37</sup> 408 U.S. 238, 239 (1972), *rehearing denied* 409 U.S. 902 (1972).

<sup>38</sup> 408 U.S. at 249-250. For further statistical analysis, see Bedau, *Death Sentences in New Jersey 1907-1960*, 19 RUTGERS L. REV. 1 (1964).

<sup>39</sup> 408 U.S. at 257.

<sup>40</sup> *Id.* at 310.

<sup>41</sup> *Id.* at 306.

<sup>42</sup> *Id.* at 310.

<sup>43</sup> *Id.* at 312.

<sup>44</sup> *Id.* at 314.

<sup>45</sup> *Id.* at 310.

others joining in the majority opinion, and found capital punishment unconstitutional *per se*. Mr. Justice Marshall found that "even if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history."<sup>46</sup> Mr. Justice Brennan found that "[t]he calculated killing of a human by the State involves, by its very nature, a denial of the executed person's humanity," as distinguished from the prisoner who does not lose the "right to have rights."<sup>47</sup>

In dissent, Chief Justice Burger took issue with the argument that the death penalty is arbitrarily imposed, claiming that such an argument lacks "empirical support."<sup>48</sup> All the dissenters (Burger, Blackmun, Powell, and Rehnquist), felt that the Court should not encroach on what is essentially a legislative function.<sup>49</sup>

Of the 40 states which had provisions for capital punishment, 39 were affected by *Furman* to the extent that their statutes were invalidated. In Rhode Island, which has a mandatory death sentence in only one instance, murder in the first degree by one already under a sentence of life imprisonment,<sup>50</sup> *Furman* had no effect. California's State Supreme Court had ruled the death penalty invalid under the California Constitution, which prohibits cruel or unusual punishment,<sup>51</sup> in *People v. Anderson*.<sup>52</sup> *Furman* followed close in point of time, and reinforced this holding.

### THE STATES RESPOND

Predictably, the state legislatures began expressing the intention to reinstitute the death penalty soon after the *Furman* decision was announced. Basically, the legislatures were faced with a choice: either make the penalty mandatory in those instances where the legislators felt it was deserved, or provide some type of workable standards to judges and juries for use in meting out capital punishment such that discretionary imposition could be avoided. Some states, including Ohio, chose the latter approach,<sup>53</sup> while others, such as Georgia, chose a combination.<sup>54</sup>

A feature common to statutes reintroducing the death penalty is use of the bifurcated trial system discussed above.<sup>55</sup> Combined with this is

<sup>46</sup> *Id.* at 360.

<sup>47</sup> *Id.* at 290.

<sup>48</sup> *Id.* at 399.

<sup>49</sup> *Id.* at 405 (Burger, C.J., dissenting), 410 (Blackmun, J., dissenting), 432 (Powell, J., dissenting), 467 (Rehnquist, J., dissenting).

<sup>50</sup> R.I. GEN. LAWS ANN. § 11-23-2 (1969).

<sup>51</sup> CAL. CONST. art. I § 6.

<sup>52</sup> 6 Cal. 3d 628, 100 Cal. Rptr. 152, 493 P.2d 880 (1972).

<sup>53</sup> OHIO REV. CODE ANN. §§ 2929.02, 2929.03 (Page 1973 Supp.).

<sup>54</sup> GA. CODE ANN. § 26-3102 (Supp. 1973).

<sup>55</sup> See text accompanying notes 27-29 *supra*.

a set of criteria generally called "aggravating" and "mitigating" factors. The statutes provide that the death penalty may be imposed only where the defendant is guilty of the capital offense, under aggravating circumstances, and where there are no mitigating factors. Where this situation exists, the death penalty is mandatory. In this way, the statutes seek to avoid the *Furman* discretionary imposition objections.

Ohio has seven aggravating factors. They are (1) assassination of the President, Vice President, Governor, or Lieutenant Governor, or a candidate for one of those offices, (2) murder for hire, (3) murder to escape accountability for another crime, (4) murder by a prisoner, (5) murder by one with a previous conviction for murder or where the conduct involved mass murder or attempted mass murder (two or more people), (6) murder of a police officer, and (7) felony murder.<sup>56</sup>

Ohio lists three mitigating factors, and a finding of any one precludes imposition of the death penalty: (1) where the victim of the offense induced or facilitated it, (2) where it is unlikely that the offense would have been committed but for the fact that the offender was under duress, coercion, or strong provocation, and (3) where the offense was the product of the offender's psychosis or mental deficiency, though such condition would be insufficient to establish the defense of insanity.<sup>57</sup>

Under Ohio law, the prosecution of an offender for a capital offense involving the possible imposition of the death penalty proceeds as follows. The indictment must specify one of the seven aggravating circumstances, or the death penalty is precluded.<sup>58</sup> Where the indictment contains such specification, the bifurcated trial begins. In the first phase, the jury considers *only* guilt or innocence. The offender must be found guilty of both the offense and the aggravating factor or factors beyond a reasonable doubt.<sup>59</sup> If the verdict is guilty on the offense and not guilty on the specification, the sentence is life imprisonment.<sup>60</sup> If the verdict is guilty on both the specification and the offense, the jury is dismissed and the second phase of the bifurcated trial begins. The penalty is determined by either the trial judge who presided over the guilt-innocence hearing, or the three-judge panel who determined guilt or innocence upon defendant's waiver of his right to trial by jury.<sup>61</sup> This phase consists of a presentence investigation, psychiatric examination, and most importantly, a hearing at which evidence is received as to whether any of the mitigating factors exist.<sup>62</sup> Establishing a mitigating factor is

<sup>56</sup> OHIO REV. CODE ANN. § 2929.04 (1-7) (Page Supp. 1973).

<sup>57</sup> *Id.* § 2929.04(b)(1-3).

<sup>58</sup> *Id.* § 2929.03(a).

<sup>59</sup> *Id.* § 2929.03(b).

<sup>60</sup> *Id.* § 2929.03(c).

<sup>61</sup> *Id.* § 2929.03(c)(1-2).

<sup>62</sup> *Id.* § 2929.03(d).

accomplished by a preponderance of the evidence.<sup>63</sup> In addition, the offender may make a statement in his own behalf, as to punishment, and he is subject to cross-examination only if he consents to make such statement under oath.<sup>64</sup> Where existence of one or more mitigating factors is not shown by a preponderance of the evidence, the death penalty is mandatory.<sup>65</sup> Where the penalty hearing is presided over by a three-judge panel, the determination that there are no mitigating factors must be unanimous.<sup>66</sup>

By this procedure, Ohio seeks to avoid the proscriptions of *Furman*. Its approach is similar to, but not identical with, that of other states. California, for example, provides that the jury decide guilt or innocence separately from its verdict as to aggravating circumstances.<sup>67</sup> More significantly however, is the fact that the only mitigating circumstances in California are (1) if the defendant is under 18, and (2) where the offender was not personally present during commission of the act (except where the aggravating factor is murder for hire).<sup>68</sup>

Georgia makes the death penalty mandatory in cases of treason and aircraft hijacking, regardless of whether aggravating or mitigating circumstances exist.<sup>69</sup> It provides further for the death penalty in cases where no murder occurred, viz., rape, armed robbery and kidnaping, where an aggravating factor is found by the jury.<sup>70</sup> The death penalty is mandatory where the aggravating factor is found, and the jury recommends death, and it is precluded where the jury either finds no aggravating factor, or fails to recommend death.<sup>71</sup> The Georgia statute lists aggravating factors,<sup>72</sup> but while it provides that mitigating factors may be considered by the jury<sup>73</sup> (presumably in consideration of whether to recommend death) none are listed. Automatic review of all death sentences by the Georgia Supreme Court is provided.<sup>74</sup>

Florida provides that where the jury finds the defendant guilty of a capital felony, a separate hearing as to penalty is to be conducted with

<sup>63</sup> *Id.* § 2929.03(e).

<sup>64</sup> *Id.* § 2929.03(d).

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> CAL. PENAL CODE § 190.1 (West Supp. 1974).

<sup>68</sup> *Id.* § 190.3.

<sup>69</sup> GA. CODE ANN. § 27-2534.1(a) (Supp. 1973).

<sup>70</sup> *Id.* § 27-2534.1(b) (1,2,3,7).

<sup>71</sup> *Id.* § 26-3102.

<sup>72</sup> *Id.* § 27-2534.1(b) (1-10).

<sup>73</sup> *Id.* § 27-2534.1(b).

<sup>74</sup> *Id.* § 27-2537. For further analysis of Georgia's capital punishment provisions, see Comment, *Constitutional Law—Capital Punishment—Furman v. Georgia and Georgia's Statutory Response*, 24 MERCER L. REV. 891 (1973).

the jury passing on the questions of aggravating or mitigating factors,<sup>75</sup> both of which are listed.<sup>76</sup> The verdict of the jury is not binding on the court however, which may weigh the evidence itself, and enter sentence accordingly.<sup>77</sup> As in Georgia, automatic appeal to the state supreme court is provided,<sup>78</sup> and that court recently upheld the constitutionality of the new law in *State v. Dixon*.<sup>79</sup>

### VIABILITY OF THE NEW STATE LAWS

Both the Florida and Georgia statutes seem more vulnerable to the *Furman* proscriptions than does the Ohio provision. Georgia avoids discretion completely in two instances, treason and aircraft hijacking, but provides no mitigating factors as to the other capital offenses, some of which do not involve murder.<sup>80</sup> Florida's provision leaves the judge free to impose sentence as he chooses, regardless of the jury's decision as to mitigation and aggravation. Both Florida<sup>81</sup> and Georgia<sup>82</sup> provide as an aggravating factor the situation where the capital felony was especially heinous or cruel, or exhibited extreme depravity. These nebulous terms seem to invite the very type of discretion that *Furman* finds objectionable.

The entire spectrum of the new Florida law was attacked in *State v. Dixon*.<sup>83</sup> The Florida Supreme Court found all aspects of it constitutional, and a discussion of parts of the opinion serves a useful purpose here in that it demonstrates the problems other courts may encounter when construing statutes drafted along similar lines.<sup>84</sup> As pointed out above, two of the most questionable aspects of the Florida statute are (1) the fact that the trial court is not bound by the determination of the jury as to aggravation and mitigation, and (2) the fact that one of the aggravating specifications is couched in terms of whether the capital crime was heinous or cruel. As to the former, the *Dixon* court found that it was to the advantage of the defendant, in that the experienced trial judge

... possesses the requisite knowledge to balance the facts of the case against the standard of criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the

<sup>75</sup> FLA. STAT. ANN. § 921.141(1) (1973), as amended (Supp. 1974).

<sup>76</sup> *Id.* §§ 921.141(5), 921.141(6).

<sup>77</sup> *Id.* § 921.141(3).

<sup>78</sup> *Id.* § 921.141(4).

<sup>79</sup> 283 So. 2d 1 (Fla. 1973).

<sup>80</sup> *E.g.*, aggravated rape, GA. CODE ANN. § 27-2534.1(b) (7) (1973).

<sup>81</sup> FLA. STAT. ANN. § 921.141(5) (h) (1973), as amended (Supp. 1974).

<sup>82</sup> GA. CODE ANN. § 27-2534.1(b) (7) (Supp. 1973); see also MODEL PENAL CODE § 210.6(3)(h) (proposed draft, 1963).

<sup>83</sup> 283 So. 2d 1 (Fla. 1973).

<sup>84</sup> For a further critique of the Florida law, see Ehrhardt, et al, *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. LAW 2 (1973).

inflamed emotions of jurors can no longer sentence a man to die; the sentence is viewed in the light of judicial experience.<sup>85</sup>

This seems to be a rather one-sided analysis. Aside from the fact that a trial judge is also potentially subject to his emotions, the court seems to be ratifying the addition of a step in the criminal process heretofore not extant. No longer does the defendant have the clear-cut choice of a trial before a jury of his peers or before the court. Rather the Florida defendant is faced with a judicial mutant; he is tried by *both* the jury and the judge. It is submitted that this places an additional burden on the defendant, particularly in light of the fact that the trial judge is exposed to all evidence proffered by the state, admissible or not, while the jury is exposed only to that evidence which meets the tests set out by law. It appears that the axiom, the jury decides the facts and the judge decides the law, is no longer applicable in Florida, with resulting detriment to the accused.

As to the second questionable area of the Florida law, viz., the nebulous terminology of one of the aggravating circumstances,<sup>86</sup> the *Dixon* court applied the following rationale. "Heinous" was defined by the court as "extremely wicked or shockingly evil," "atrocious" as "outrageously wicked and vile," and "cruel" as "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others."<sup>87</sup> It is submitted that this type of literary legerdemain confuses rather than clarifies the issue. The court's contention that the above terms are "a matter of common knowledge, so that an ordinary man would not have to guess at what was intended,"<sup>88</sup> in reality begs the question, and does little to meet the discretion-free requirements of *Furman*.

As to the Ohio statute, several questions arise, both as to the Ohio provision specifically, and as to the aggravating/mitigating factor/bifurcated trial reaction to *Furman* in general.

One objection to the Ohio statute specifically is its provision that during the penalty hearing, the offender may make a statement, subjecting himself to cross examination only if he chooses to make such statement under oath. However, the Court in *McGautha* held that one who testifies in his own behalf cannot later avoid cross examination on matters reasonably related to the subject of his direct testimony.<sup>89</sup> Given the present atmosphere of the Court, it is questionable whether this oath-no oath distinction will be permitted to stand.

Similar to the Florida situation, the most basic objection to the Ohio

<sup>85</sup> 283 So. 2d at 8.

<sup>86</sup> FLA. STAT. ANN. § 921.141(5)(h) (1973), as amended (Supp. 1974) states "The capital felony was especially heinous, atrocious, or cruel."

<sup>87</sup> 283 So. 2d at 9.

<sup>88</sup> *Id.*

<sup>89</sup> 402 U.S. at 215.

provision deals with one of the aggravating factors. While Ohio did not include the nebulous "heinous, atrocious, or cruel" specification, questions do arise concerning the one which provides for the death penalty when "... the offense at bar was part of a course of conduct involving the purposeful killing or attempt to kill two or more people."<sup>90</sup>

The most obvious objection is that it opens the door for imposition of the death penalty where no murder has in fact occurred, though admittedly such use of the statute would be unusual. Far more important to the practitioner, however, is the use to which this section has been put since the law became effective in January, 1974. Of the cases which have arisen under the new law, the mass murder aggravating factor has often been specified,<sup>91</sup> yet in at least two instances, the crime involved the actual killing of only one person,<sup>92</sup> and in one of these cases there is some question as to whether there was in fact a bona fide attempt to kill the others present.<sup>93</sup>

The impact of possible misuse of this aggravating factor is twofold. First is the obvious effect on the plea bargaining process. Where the defendant is originally charged with aggravated murder, as opposed to a lesser included offense, simply because there was more than one person present at the incident the relative bargaining positions of the prosecutor and defense counsel are further apart. More importantly, while an obvious misuse of the mass murder aggravating factor can be dismissed at trial for lack of proof, the jury has already been exposed to the possibility of the death penalty, and has begun to think of punishment at a higher level than would ordinarily be the case. Where plea bargaining is not a viable possibility then, it is to the obvious advantage of defense counsel to attempt dismissal of the aggravating specification at the pre-trial stage.

As to the post-*Furman* approach in general, more serious questions arise. First, the aggravating/mitigating factors set up by the new laws call to mind the system which was rejected in *McGautha* as "meaningless boiler-plate."<sup>94</sup> It can be argued that the jury is still free to interpret the standards as they please, with the result that there is no meaningful change from the pre-*Furman* situation.

Further, none of the new laws deal with one area of discretion which

<sup>90</sup> OHIO REV. CODE ANN. § 2929.04(A) (5) (Page Supp. 1973).

<sup>91</sup> See, e.g., *State v. Samples*, No. 74-2-133 (Summit County C.P. 1974); *State v. Bayless*, No. 74-3-244 (Summit County C.P. 1974); *State v. Pileggi*, No. 74-4190 (Stark County C.P. 1974).

<sup>92</sup> *State v. Samples*, No. 74-2-133 (Summit County C.P. 1974); *State v. Pileggi*, No. 74-4190 (Stark County C.P. 1974).

<sup>93</sup> In *Samples* the other person present was defendant's estranged wife, with whom he claimed he wanted a reconciliation.

<sup>94</sup> 402 U.S. at 208.

is still unchecked, *i.e.*, the prosecutorial discretion as to original charge in the pre-trial stage. This line of reasoning was not advanced to the Court in *Furman*. However, a firm position as to discretionary imposition was taken in that case, and should a significant correlation be shown, for example between race and indictment under the new laws, the Court will be faced with the effects of the same type of discretion it found objectionable when in the hands of the jury. This point is of particular significance in Ohio, where, in order for capital punishment to be in issue, the indictment *must* specify one or more aggravating factors,<sup>95</sup> at least one of which is subject to abuse as discussed above. Likewise under the new laws, the judge, while not free to impose the death penalty, may, in his discretion, *withhold* it depending on his construction of the mitigating factors involved.<sup>96</sup>

The answer to all three of these arguments is of course, that discretion is an inextricable element of the law. This was in fact the position taken by the Florida Supreme Court in holding the Florida statute constitutional in *Dixon*, where it said, "[d]iscretion and judgement are essential to the judicial process at all stages of its progression—arrest, arraignment, trial, verdict, and onward through final appeal."<sup>97</sup> In light of *Furman* however, it cannot be assumed that areas of discretion of such magnitude as to have the same effect as the prohibited jury discretion will be sustained by the Court.

Perhaps then, the only acceptable form of capital punishment is where it is mandatory, as in California, where there are no mitigating factors save age and absence from the scene of the crime (and only then when murder for hire is not involved),<sup>98</sup> and in Georgia as to treason and aircraft hijacking.<sup>99</sup> This is a harsh result however, and would still be unacceptable to those who view capital punishment as unconstitutional *per se*. Two members of the Court are already of this view. Further, Chief Justice Burger, in his dissent in *Furman*, stated that if the death sentence could be avoided only by a verdict of acquittal of the capital offense, "I would have preferred that the Court opt for total abolition."<sup>100</sup> Thus one inference for the future is that should the Court find that the

<sup>95</sup> OHIO REV. CODE ANN. § 2929.03(A) (Page Supp. 1973).

<sup>96</sup> These arguments were rejected by the Supreme Court of Virginia in *Jefferson v. Commonwealth*, ..... Va. ...., 204 S.E.2d 258 (1974), on the grounds that *Furman* applies only to the exercise of discretion in fixing punishment. *But see* Douglas, J., concurring, 408 U.S. at 251, and Stewart, J., concurring, 408 U.S. at 310, as to constitutional impermissibility of the imposition of capital punishment on the basis of race; *see also* Marshall, J., concurring, 408 U.S. at 358-59, and Brennan, J., concurring, 408 U.S. at 290, as to the *per se* unconstitutionality of capital punishment. <sup>97</sup> 283 So. 2d at 16.

<sup>98</sup> CAL. PENAL CODE § 190.3 (West Supp. 1974).

<sup>99</sup> GA. CODE ANN. § 27-2534.1 (Supp. 1973).

<sup>100</sup> 408 U.S. at 401 (Burger, C.J., dissenting).

systems of standards enacted by the states do not result in less discretionary imposition, leaving mandatory imposition the only alternative, total abolition, except for such offenses as assassination, is a probable result.

Ohio will not have long to wait for the answer. Several cases involving aggravated murder under the new Code are now pending.<sup>101</sup> If one thing is clear however, it is that *Furman v. Georgia* is not the final word on capital punishment. It appears to be only the beginning of yet another era in the history of the eighth amendment's prohibition against cruel and unusual punishment.

JEFFREY T. HEINTZ

---

<sup>101</sup> Several of the cases arising under the new Ohio law have resulted in imposition of the death sentence on the defendant. *See, e.g.*, *State v. Bayless*, No. 74-3-244 (Summit County C.P. 1974).

