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## Bastard or Legitimate Child of Furman - An Analysis of Wyoming's New Capital Punishment Law

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## COMMENT

### BASTARD OR LEGITIMATE CHILD OF FURMAN? AN ANALYSIS OF WYOMING'S NEW CAPITAL PUNISHMENT LAW

My conscience hath a thousand several tongues,  
And every tongue brings in a several tale,  
And every tale condemns me for a villain.  
Perjury, perjury, in the highest degree,  
Murder, stern murder, in the direst degree,  
All several sins, all used in each degree,  
Throng to the bar, crying all, 'Guilty! guilty!'  
I shall despair. There is no creature loves me;  
And if I die, no soul will pity me.

—Shakespeare, *The Tragedy of  
King Richard the Third*, V, iii.

## INTRODUCTION

There is probably no facet of criminal law, and certainly no facet of penology, that attracts as much emotionalism as the death penalty. And understandably so, for whether or not a state should have the power to kill a human being, however base and criminal his acts, is one of the mightiest issues of our time.

This comment, however, is not designed to discuss the pros and cons of capital punishment. Nor is it aimed at a conclusion as to which side of the issue is the "right" one. But in order to provide the framework for an analysis of Wyoming's new capital punishment law, and to begin groping toward answers to the relevant questions (Where are we now? Where do we go from here?), it is necessary to be aware of some of the emotions that cloud the death penalty issue. For these emotions have set the stage for the confusion that prevails today, confusion that led to nine separate opinions in *Furman*, and confusion that followed *Furman*, as the states struggled to find their own answers to the ambivalent decision.

Proponents of the death penalty maintain that it is essential for purposes of deterrence and retribution, among other things, and to rid society of such mass murderers as

Richard Speck and Adolf Eichmann.<sup>1</sup> Abolitionists respond that retribution is not a legitimate goal of criminal justice, and that the death penalty does not deter, pointing to such examples as the assassinations of Robert Kennedy and Martin Luther King in death penalty states.<sup>2</sup>

Both sides are using emotionalism to persuade. Eichmann and Speck are true monsters of modern civilization, but would killing them really improve our world, avenge their victims, or serve justice any more than would imprisoning them for life? And should their monstrosity be put around the necks of more human murderers? On the other hand, does the fact that two assassins were not deterred by the death penalty necessarily mean that no one will be deterred? Does the impotence of revenge make the punishment worthless?

There are no cold, hard answers to such questions. The United States Supreme Court, in *Furman*,<sup>3</sup> held discretionary imposition of the death penalty unconstitutional, but only two Justices, Brennan and Marshall, held the death penalty itself unconstitutional. Two others, Burger and Blackmun (dissenting), defended discretion as vital to a requisite flexibility in the sentencing process, and defended the right of legislatures to establish the death penalty, at the same time observing that they were personally opposed to it and would vote against it if they were legislators.

Some states had abolished capital punishment even before *Furman*, and, whatever "side" one may happen to be on, certainly from the standpoint of simplicity of administration of criminal justice, a statute like Maine's is to be envied: "Whoever unlawfully kills a human being with malice aforethought, either express or implied, is guilty of murder, and

1. See Vance, *The Death Penalty After Furman*, 48 NOTRE DAME LAW 850 (1973).

2. See Meltzner, *Litigating Against the Death Penalty: The Strategy Behind Furman*, 82 YALE L.J. 1111, 1117 (1973). Meltzner says:

"Both murders took place in death penalty states, committed by men who were obviously undeterred. . . . If some dreamed of revenge, the impotence of such feelings to bring back men who were loved for their presence or the hopes they evoked reinforced the disgust with which the lawyers contemplated the prospect of more legal death."

3. *Furman v. Georgia*, 408 U.S. . . ., 92 S.Ct. 2726 (1972). See Part II *infra*, for a discussion of the decision and each Justice's opinion.

shall be punished by imprisonment for life."<sup>4</sup> But other states, including Wyoming, thought the death penalty important enough to warrant complex new post-*Furman* statutes.<sup>5</sup> And so the lines are drawn for what one commentator called "the profound issue of controversy in the 1970's."<sup>6</sup>

Both sides of the capital punishment issue reach the ultimate irresolution in the haunting words of Mr. Justice Blackmun, dissenting in *Furman*:

Cases such as these provide for me an excruciating agony of the spirit. I yield to no one in the depth of my distaste, antipathy, and, indeed, abhorrence, for the death penalty, with all its aspects of physical distress and fear and of moral judgment exercised by finite minds. That distaste is buttressed by a belief that capital punishment serves no useful purpose that can be demonstrated. For me, it violates childhood's training and life's experiences and is not compatible with the philosophical convictions I have been able to develop. It is antagonistic to any sense of 'reverence for life.' Were I a legislator, I would vote against the death penalty. . . .<sup>7</sup>

But Blackmun is not a legislator, and he refuses to call the death penalty a cruel and unusual punishment prohibited by the Eighth Amendment of the Constitution. Perhaps never before in all our history has a Supreme Court Justice so embraced the spirit and philosophy of the majority while aligning himself with the dissent, and thus so encapsulated the problems inherent in the subject of capital punishment.

This paper will examine, in Part I, the nine opinions in *Furman* and the possible effects of *Furman* in the future, some reactions of commentators to *Furman* in Part II, and some reactions of legislatures to *Furman* in Part III. Part IV will attempt to bring all of this information together in the rendering of an in-depth analysis of Wyoming's new capital punishment law.

### I. FURMAN V. GEORGIA

In 1972, the United States Supreme Court, in *Furman v. Georgia*, struck down as unconstitutional most state and fed-

4. ME. REV. STAT. ANN. tit. 17 § 2651 (1964).

5. See Parts III and IV *infra*.

6. Bedau, *The Death Penalty in America*, 35 FED. PROBATION 32, 40 (1971).

7. *Furman v. Georgia*, *supra* note 3, at 2812 (Blackmun, J., dissenting).

eral statutes that prescribed the death penalty, by holding the Texas and Georgia statutes unconstitutional.<sup>8</sup> Each Justice wrote a separate opinion, and no member of the majority participated in the opinion of any other member. Thus *Furman*, in a sense, both creates and exemplifies the confusion surrounding the capital punishment issue. In telling the states what they definitely could *not* do (sentence defendants to death at the jury's discretion and without legislative standards),<sup>9</sup> the decision failed to tell them what they *could* do, if anything. The result is "a flurry of activity on state and federal levels to reinstate capital punishment to whatever degree possible."<sup>10</sup> But what degree is possible? It is necessary to briefly examine the essential points made by each Justice.

### A. The Opinions

Mr. Justice Douglas speaks primarily in terms of violation of equal protection by arbitrary enforcement.<sup>11</sup> He does not go so far as to hold capital punishment unconstitutional *per se*. Rather, he says "the *exaction* of the death penalty does violate the Eighth and Fourteenth Amendments."<sup>12</sup> (emphasis added.) By "exaction" Douglas apparently means "a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned."<sup>13</sup> The key phrase here is "uncontrolled discretion," and some states,<sup>14</sup> including Wyoming,<sup>15</sup> have responded with "controls" which establish mandatory death sentences for specified crimes. But, it should be noted, Douglas also observes that:

Any law which is nondiscriminatory on its face may be applied in such a way as to violate the Equal Protection Clause of the Fourteenth Amendment. . . . Such conceivably might be the fate of a mandatory death penalty. . . . Whether a mandatory death

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8. *Furman*, at 2727.

9. *Id.*

10. 22 CATH. U.L. REV. 651, 664 (1973).

11. *Furman*, *supra* note 3, at 2728 (Douglas, J., concurring).

12. *Id.* at 2727.

13. *Id.* at 2734.

14. See Part III *infra*.

15. See Part IV *infra*.

penalty would otherwise be constitutional is a question I do not reach.<sup>16</sup>

Mr. Justice Brennan, unlike Douglas, holds the death penalty unconstitutional *per se*: "When examined by the principles applicable under the Cruel and Unusual Punishment Clause, death stands condemned as fatally offensive to human dignity. The punishment of death is therefore 'cruel and unusual' and the States may no longer inflict it as a punishment for crimes."<sup>17</sup> Brennan points out that "a punishment is 'cruel and unusual' . . . if it does not comport with human dignity."<sup>18</sup> He says death sentences "treat members of the human race as nonhumans, as objects to be toyed with and discarded."<sup>19</sup> He finds death "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity."<sup>20</sup>

Two of Brennan's strongest arguments weaken any defense of capital punishment on the basis of either deterrence or avenging of community moral outrage. As to deterrence, Brennan says:

the argument can only apply to those who think rationally about the commission of capital crimes. Particularly is that true when the potential criminal . . . must not only consider the risk of punishment, but also distinguish between two possible punishments. The concern, then, is with a particular type of potential criminal, the rational person who will commit a capital crime knowing that the punishment is long-term imprisonment . . . but will not commit the crime knowing that the punishment is death. . . . [T]he assumption that such persons exist is implausible.<sup>21</sup>

As to avenging community moral outrage, Brennan reasons, "if the deliberate extinguishment of human life has any effect at all, it more likely tends to lower our respect for life and brutalize our values."<sup>22</sup>

16. *Furman*, *supra* note 3, at 2735-36 (Douglas, J., concurring).

17. *Id.* at 2760 (Brennan, J., concurring).

18. *Id.* at 2742.

19. *Id.* at 2743.

20. *Id.* at 2751.

21. *Id.* at 2758.

22. *Id.* at 2759.

Mr. Justice Stewart's holding is "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>23</sup> Stewart expresses strong dislike for the death penalty: "It is unique in its total irrevocability. It is unique in its rejection of rehabilitation . . . as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity."<sup>24</sup> But he finds it "unnecessary to reach the ultimate question"<sup>25</sup> whether "infliction of the death penalty is constitutionally impermissible in all circumstances under the Eighth and Fourteenth Amendments,"<sup>26</sup> although he admits that the case presented by Brennan and Marshall "is a strong one."<sup>27</sup>

Mr. Justice White also refuses to reach the question of *per se* unconstitutionality of the death penalty, but he seems to be leaning in the opposite direction from Stewart: "I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment."<sup>28</sup> White explains that the constitutional problem, as he sees it, arises from (1) legislative authorization of the death penalty, followed by (2) standardless delegation of discretion, as to when to impose the death penalty, to judges or juries, and (3) the infrequency with which the death penalty is actually imposed.<sup>29</sup> Despite the overall harshness of White's opinion, he concedes "it is difficult to prove as a general proposition that capital punishment, however administered, more effectively serves the ends of the criminal law than does imprisonment."<sup>30</sup>

Mr. Justice Marshall, like Brennan, finds capital punishment unconstitutional *per se*:

[T]he death penalty is an excessive and unnecessary punishment which violates the Eighth Amendment.

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23. *Id.* at 2763 (Stewart, J., concurring).

24. *Id.* at 2760.

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.* at 2763 (White, J., concurring).

29. *Id.*

30. *Id.* at 2764.

... The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as fact finders, judges, and ultimate arbiters of the Constitution. . . . There is no rational basis for concluding that capital punishment is not excessive. It therefore violates the Eighth Amendment.<sup>81</sup>

Marshall says "[t]here are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy."<sup>82</sup> In disposing of these, Marshall's best argument is against the concept of retribution: "At times a cry is heard that morality requires vengeance to evidence society's abhorrence of the act. But the Eighth Amendment is our insulation from our baser selves. The cruel and unusual language limits the avenues through which vengeance can be channeled."<sup>83</sup>

As to prevention of recidivism, Marshall says "it is critical to note that the jury is never asked to determine whether [defendants] are likely to be recidivists."<sup>84</sup> He adds that, if the death penalty is to be retained, "[o]n the one hand, due process would seem to require that we have some procedure to demonstrate incurability before execution; and, on the other hand, equal protection would then seemingly require that all incurables be executed. . . ."<sup>85</sup> He decides that the only "conclusion that can be drawn from all of this" is that the death penalty is unconstitutional.<sup>86</sup>

The dissenting Justices are little fonder of the death penalty than the majority. But they agree that setting penalties is a legislative function with which the Supreme Court should seldom interfere. Burger, Blackmun, and Powell all indicate that they would prefer abolition of capital punishment but they feel constitutionally compelled to maintain a hands-off policy.

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81. *Id.* at 2787 (Marshall, J., concurring).

82. *Id.* at 2779.

83. *Id.* at 2780.

84. *Id.* at 2785.

85. *Id.* at 2786.

86. *Id.* at 2787.



Mr. Chief Justice Burger says, "If we were possessed of legislative power, I would either join with Mr. Justice Brennan and Mr. Justice Marshall or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes."<sup>37</sup> But he feels that "the primacy of the legislative role narrowly defines the scope of judicial inquiry."<sup>38</sup> The Chief Justice is particularly distressed by White's approach:

This application of the words of the Eighth Amendment suggests that capital punishment can be made to satisfy Eighth Amendment values if its rate of imposition is somehow multiplied; it seemingly follows that the flexible sentencing system created by the legislatures and carried out by juries and judges, has yielded more mercy than the Eighth Amendment can stand. The implications of this approach are mildly ironical.<sup>39</sup>

Burger realized that the states would respond to *Furman* by establishing mandatory death sentences. He addressed this problem in advance, by expressing his disapproval of mandatory sentencing, and in doing so, he sets some minimum standards as guidelines for the legislatures. He says mandatory death sentences should not be provided "in such a way as to deny juries the opportunity to bring in a verdict on a lesser charge; under such a system, the death penalty could only be avoided by a verdict of acquittal. If this is the only alternative . . . I would have preferred that the Court opt for total abolition."<sup>40</sup> He also complains that "[n]ow, after the long process of drawing away from blind imposition of uniform sentences for every person convicted of a particular offense," we seem to be turning back in that direction, and so threatening "the progress of penal reform."<sup>41</sup>

It seems clear, then, that any statute which provides for a mandatory death sentence, but does not allow a lesser included offense instruction or some process for a consideration of mitigating circumstances (to prevent "the blind imposi-

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37. *Id.* at 2797 (Burger, C. J., dissenting).

38. *Id.* at 2801.

39. *Id.* at 2808.

40. *Id.* at 2810.

41. *Id.* at 2810-11.

tion of uniform sentences'') will be unlikely to receive Burger's support.

Mr. Justice Blackmun's feelings about the death penalty were quoted in the introduction.<sup>42</sup> He, too, is worried about the reaction of the states to *Furman*:

[T]he result, I fear, will be that statutes stricken down today will be reenacted by state legislatures to prescribe the death penalty for specified crimes without any alternative for the imposition of a lesser punishment in the discretion of the judge or jury. . . . This approach . . . encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago.<sup>43</sup>

Due to Blackmun's intense personal opposition to the death penalty in any form, and his expressed fears that a mandatory death penalty will effectively remove what little mercy there may have been left in the old discretionary system, he is almost certain to refuse to support any capital punishment law that totally "eliminates the element of mercy."

Mr. Justice Powell feels that "legislative judgments as to the efficacy of particular punishments are presumptively rational and may not be struck down under the Eighth Amendment because this Court may think that some alternate sanction would be more appropriate."<sup>44</sup> He expresses his agreement with the report of the President's Commission on Law Enforcement and Administration of Justice, which he helped to write, and which said that the death penalty "clearly has an undesirable impact on the administration of criminal justice."<sup>45</sup> But he insists that this is not a decision that "could or should be made by the judicial branch."<sup>46</sup>

Mr. Justice Rehnquist agrees with the reasoning relied on by the other dissenters, and concludes "that this decision

42. See INTRODUCTION *supra*.

43. *Furman*, *supra* note 3, at 2816 (Blackmun, J., dissenting).

44. *Id.* at 2837 (Powell, J., dissenting).

45. *Id.* at 2841 n.63. President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) (chaired by Nicholas Katzenbach, then Attorney General of the United States).

46. *Id.* at 2841.

holding unconstitutional capital punishment is not an act of judgment, but rather an act of will.’<sup>47</sup>

#### B. The Future Effect of *Furman*

It is obvious that the new post-*Furman* death penalty statutes enacted by Wyoming<sup>48</sup> and other states<sup>49</sup> will not be upheld by either Mr. Justice Brennan or Mr. Justice Marshall, both of whom have held the death penalty unconstitutional *per se*. The states must look for support in the future from a majority of different membership than that in *Furman*. If the states assume that mandatory statutes will be easily upheld by the four dissenters in *Furman* and one Justice, or more, from the *Furman* majority, they are probably mistaken. The sharp division between the White approach and the Burger-Blackmun approach should not be overlooked.<sup>50</sup> It would be difficult, if not impossible, to draft a statute that would meet the approval of both White, on the one hand, and Burger and Blackmun, on the other.

Powell and Rehnquist can be expected to support any reasonable statute, since their language is very strong in favor of the presumptive validity of legislative action with respect to setting penalties. Apart from abolishing capital punishment, then, or limiting it to one or two of the most heinous crimes, such as murder by a life-sentence convict, the states were left with two logical alternatives after *Furman*: (1) They could draft a statute in conjunction with White’s approach, hoping that Douglas, Stewart, Powell, and Rehnquist would form a majority in support of such a statute; or (2) they could draft an essentially mandatory death penalty statute, but one which allows a lesser included offense instruction, hoping for a majority of support from Burger, Blackmun, Powell, Rehnquist, and Douglas or Stewart.

Which course of action is preferable? Neither seems entirely satisfactory, and both must rely on a strange coalition

47. *Id.* at 2843 (Rehnquist, J., dissenting).

48. See Part IV *infra*.

49. See Part III *infra*.

50. A lesser included offense instruction, demanded by Burger and Blackmun, is obviously inconsistent with the removal of jury discretion, demanded by White. In addition, Burger and Blackmun want some flexibility to remain in the sentencing process, while White wants the death sentence to be inflexible and pre-established.

of Justices. A major unknown factor in both alternatives is how Stewart and Douglas will be likely to vote in the future.<sup>51</sup> It is uncertain whether either Justice would ultimately decide in favor of a mandatory death penalty statute. Douglas is careful to say, in *Furman*, that he will not support a mandatory death penalty which might be capable of discriminatory administration.<sup>52</sup> Stewart is equally careful to say that he thinks Brennan and Marshall present a strong case for *per se* unconstitutionality of the death penalty.<sup>53</sup> These are the only hints given by Stewart and Douglas with respect to potential future death penalty cases, and they hold little promise for those states which desire to retain capital punishment.

If, however, a state is determined to at least make the attempt to enact a constitutional death penalty statute, it is submitted that the preferable alternative is to incorporate the Burger-Blackmun criteria. A statute designed to please White must have the support of both Stewart *and* Douglas, while one designed to please Burger and Blackmun will need the support of Stewart *or* Douglas. Obviously, to get the support of one of the two cannot be as difficult a task as getting the support of both would be. But it is still a very difficult task, and only the most carefully drawn statute has even the slightest chance of success. For example, a simple provision in the statute allowing the giving of a lesser included offense instruction would satisfy Burger; but in order to satisfy Douglas, who is worried about discriminatory enforcement, there would have to be, at very least, an additional provision that such instruction must be given uniformly in every case in which it is conceivably warranted by the evidence. And even this would not be enough for Douglas, if juries take advantage of the instruction to find the more appealing defendants guilty of the lesser offense, while finding the less appealing defendants guilty of the capital crime. Thus the statute would also have to provide an automatic, impartial re-

51. White, like Stewart and Douglas, states that he does not reach the issue of *per se* unconstitutionality of the death penalty. However, since White is the majority Justice who most meticulously spells out what he considers to be wrong with the old statutes, presumably he will feel compelled to support a statute that has been carefully devised to overcome his specific objections.

52. See discussion of Douglas' opinion in Part I, A.

53. See discussion of Stewart's opinion in Part I, A.

view of both the giving of the instruction (or failure to give it) and the jury's use of the instruction.

Similarly, the flexibility which Burger wants, to prevent "the blind imposition of uniform sentences" could result in the arbitrary enforcement which Douglas fears, particularly if it is provided at the trial stage of the proceedings. Both Justices may be willing to go along with a statute which removes all flexibility at the trial level (with the unavoidable exception of trier of fact discretion to determine whether or not the offense falls within the statutory definition of capital murder) and reinstalls some flexibility at the appellate level, complete with statutory guidelines which the appellate court must follow to the letter in every case. This would give the appellate court a certain degree of discretion, but only within the statutorily established limits—it would provide the control that Douglas seems to demand when he complains about "uncontrolled discretion." Of course, the legislative standards would have to be very narrow and unambiguous, in order to hold this discretion to an absolute minimum.

As one commentator observed:

Whether or not the Supreme Court will approve mandatory death penalties remains to be seen. However, no Justice presently sitting on the Court has stated that he would do so. Those who did speculate on the matter in *Furman v. Georgia* either inferred that they would not, or categorically stated they would oppose the death penalty under any circumstances.<sup>54</sup>

The one thing that is clear after *Furman* is that reviving capital punishment may be an insurmountable difficulty. For those states which find it worth the effort, the utmost care must be taken in writing the statute—anything less is certain to end in defeat.

## II. REACTIONS OF COMMENTATORS TO *FURMAN*

Those commentators who have written articles on the status of the death penalty after *Furman* seem to agree that the decision created more confusion than it resolved. Polsby,

54. McDonald, *Capital Punishment in South Carolina: The End of an Era*, 24 S.C.L. REV. 762, 771 (1972).

writing for the Supreme Court Review, said, "The long-term impact of *Furman* may be limited,"<sup>55</sup> and found the decision "of dubious value as a precedent when, for example, a state decides to enact a compulsory death penalty for first degree murder or rape or kidnapping."<sup>56</sup>

Most of the commentators, after examining *Furman*, decided that the decision puts an end to our history of capital punishment. Junker said: "My hunch is that *Furman* spells the complete end of capital punishment in this country, not because its logic requires it, but because the moral authority of the Court will command it."<sup>57</sup>

McDonald argued for the futility of passing mandatory death penalty statutes:

As long as the grand jury has the prerogative to indict or not to indict, the prosecutor the authority to determine when, how and what to prosecute, the jury the right to convict or acquit and the governor the power to grant or withhold clemency, the death penalty remains part of a discretionary sentencing structure.<sup>58</sup>

He concluded, "the time has now come for the state frankly to acknowledge that the death penalty has been relegated to our history."<sup>59</sup>

The legal staff of the Governor's Committee to Study Capital Punishment in Florida<sup>60</sup> agreed with McDonald. They observed: "Now that the Court's role has been established by the *Furman* precedent, some or all of the four dissenters in *Furman* are likely to consider the question on its merits, and some or all of these Justices are likely to vote for abolition of capital punishment. . . ."<sup>61</sup> They also pointed out that "Justices Douglas, Stewart and White may, . . . in future cases, be prepared to vote against capital punishment, regard-

55. Polsby, *The Death of Capital Punishment? Furman v. Georgia*, SUP. CT. REV. 1972: 1, 40 (1972).

56. *Id.* at 40.

57. Junker, *The Death Penalty Cases: A Preliminary Comment*, 48 WASH. L. REV. 95, 109 (1972).

58. *Supra* note 54, at 768-69.

59. *Id.* at 794.

60. The Committee legal staff consisted of law professors Ehrhardt, Hubbart, Levinson, Smiley, and Wills.

61. Ehrhardt *et. al.*, *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L. & C. 2, 3 (1973).

less of the system under which it may be administered. . . .'<sup>62</sup> They, too, noted "other areas of unfettered discretion," including executive clemency, jury discretion to convict on a lesser offense charge, and plea bargaining to lesser offenses:

Since these areas of discretion would remain intact under a system which eliminated jury discretion to recommend mercy, it is highly unlikely that such a system would reduce the risk of arbitrariness sufficiently to satisfy the basic constitutional objections of Justices Stewart and White. Furthermore, any effort to eliminate these critical areas of discretion would fortify the position of the four dissenting Justices in *Furman* who observed that such a system would be so regressive as to be unconstitutional, making total abolition the only alternative.<sup>63</sup>

The Committee legal staff concluded that, "while *Furman* on its face appears to leave the door open to the enactment of valid capital punishment statutes, the decision strongly implies that capital punishment in the United States is a thing of the past."<sup>64</sup>

### III. REACTIONS OF LEGISLATURES TO *FURMAN*

Despite the advice of the Florida committee legal staff, the Florida legislature enacted a new death penalty statute,<sup>65</sup> which Professors Ehrhardt and Levinson criticized as "An Exercise in Futility."<sup>66</sup> McDonald agreed:

The new Florida death law and its provisions for separate trial as to sentence, findings of fact by the court based upon aggravating and mitigating circumstances in each case in which death is imposed, and automatic review by the Supreme Court marks an attempt to make sentencing visible and rational. It does not, however, avoid what was condemned in *Furman v. Georgia*—discretion and the arbitrariness which inevitably flows from it.<sup>67</sup>

62. *Id.* at 7.

63. *Id.* at 5.

64. *Id.* at 7.

65. FLA. STAT. ANN. § 775.082 and § 921.141 (1972). The latter section sets forth Florida's procedure for imposition of the death penalty.

66. Ehrhardt and Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?* 64 J. CRIM. L. & C. 2, 3 (1973).

67. *Supra* note 54, at 768.

Of those state legislatures that have responded to *Furman*,<sup>68</sup> the great majority have responded by enacting new death penalty statutes.<sup>69</sup> The scope of this comment does not permit an analysis of each of the new death penalty statutes. The statutes of Arizona and Utah will be discussed as two variations on the most common type of statute,<sup>70</sup> and Ohio's statute will be discussed as the best version of this type of statute. The Oklahoma statute will be discussed separately, and Wyoming's statute will be analyzed in Part IV.

#### A. The Statutes of Arizona, Utah, and Ohio

Arizona's procedure for imposing capital punishment<sup>71</sup> provides for a separate sentencing hearing before the trial judge alone to determine whether any of the statutory aggravating or mitigating circumstances exist. Arizona enumerates six aggravating and four mitigating circumstances:

*Aggravating*—(1) prior conviction of a life imprisonment or death penalty felony, (2) prior conviction of a violent felony, (3) knowing creation of a "grave risk of death to others in addition to the victim," (4) procurement of the murder by payment, (5) commission of the murder for gain, (6) commission of the murder "in an especially heinous, cruel or depraved manner."<sup>72</sup>

68. New death penalty statutes were enacted by Arizona, California, Connecticut, Delaware, Florida, Illinois, Indiana, New York, Ohio, Oklahoma, Utah, and Wyoming. See ARIZ. REV. STAT. ANN. §§ 13-452 to 54 (Supp. 1972-73); For California, see *The Denver Post*, Sept. 9, 1973; Pub. L. No. 73-137, §§ 1 to 4 [Jan. 1973] CONN. SESS. LAWS 184; DEL. CODE ANN. tit. 11 § 4209 (Supp. 1972); ILL. UNIFIED CODE OF CORRECTIONS §§ 1005-2-3 to 1005-5-3 (1972); IND. ACTS 1973, Pub. L. No. 328, § 1 (1973); N. Y. PENAL LAW, § 125.30 (McKinney Supp. 1972); OHIO CRIM. CODE § 2903.01, §§ 2929.02 to .04 (1974); ch. 167, §§ 1-6 [1973] OKLA. SESS. LAWS 240; UTAH CODE ANN. § 76-5-202, §§ 76-3-206-207 (Supp. 1973); WYO. STAT. § 6-54 (Supp. 1973). The North Carolina supreme court reinstated the death penalty for certain crimes in *State v. Waddell*, 41 U.S.L.W. 2398 (N.C. 1973). The New Jersey Supreme Court abolished the death penalty in *State v. Funicello*, 286 A.2d 55 (N.J. 1972). Colorado's death penalty statute appears to be inoperative, as attempted corrective legislation was defeated. Letter from Earl E. Thaxton, Senior Analyst, Colorado Legislative Council, to Lynn Cobb, Sept. 11, 1973, on file in Univ. of Wyo. Law Library.

The following states have either no death penalty or a death penalty limited to one or two crimes: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, North Dakota, Oregon, Rhode Island, Wisconsin, Vermont, and West Virginia, as indicated in Appendix I of *Furman*, *supra* note 3 at 2794.

69. Only Texas responded to *Furman* with a legislative abolition of capital punishment. TEX. PENAL CODE §§ 19.02 and 12.31 (Vernon 1973).

70. The statutes of Connecticut, Delaware, Florida, Illinois, and New York may all be considered similar to the statutes of Arizona, Utah, and Ohio in their listings of aggravating and mitigating circumstances and their provisions for a separate sentencing hearing at the trial court level.

71. ARIZ. REV. STAT. ANN. §§ 13-452 to 54 (Supp. 1972-73).

72. ARIZ. REV. STAT. ANN. § 13-454(E) (Supp. 1972-73).



*Mitigating*—(1) “impaired capacity to appreciate the wrongfulness” of the act, even though “not so impaired as to be a defense to prosecution,” (2) commission of the murder “under unusual and substantial duress,” though “not so much as to be a defense to prosecution,” (3) “relatively slight” participation as a “principal in the offense committed by another,” (4) it was not reasonably foreseeable that his act “would create a grave risk of death to another person.”<sup>73</sup>

The burden of proof of aggravating circumstances rests with the state and traditional rules of evidence apply; the burden of proof of mitigating circumstances rests with the defendant, and admission of evidence with respect to these is not governed by traditional rules of evidence. The court must “return a special verdict setting forth its findings,” and it “shall impose the death sentence if it finds one or more of the aggravating circumstances and no mitigating circumstances sufficiently substantial to call for leniency.”<sup>74</sup>

The problems with the Arizona statute are manifold. Nothing is said about a lesser included offense charge, so presumably the statute is designed to satisfy Mr. Justice White. If so, it fails miserably. Although all discretion has been taken away from the jury, great discretion remains with the trial judge, who makes the ultimate determination in the sentencing hearing. The legislative guidelines in the form of aggravating and mitigating circumstances are impossibly vague in places. For example, aggravating factors #3 and #6 could probably not be determined without the exercise of a great deal of discretion. The same can be said of all the listed mitigating circumstances. The “reasonable foreseeability” test adopted from tort law in #4 allows total subjectivity on the part of the trial judge. The trial judge also has great discretion to decide, in a case where mitigating factors exist, whether these are “sufficiently substantial to call for leniency,” a phrase so vague as to hardly merit being called a legislative standard.

The Utah statute<sup>75</sup> is more carefully drawn than the Arizona statute, but it has some of the same inherent problems.

73. ARIZ. REV. STAT. ANN. § 13-454(F) (Supp. 1972-73).

74. ARIZ. REV. STAT. ANN. § 14-454(B) (Supp. 1972-73).

75. UTAH CODE ANN. §§ 76-5-202, 76-3-206 to 207 (Supp. 1973).

Utah has eight aggravating factors, which are listed in its new definition of capital murder. These are: (1) murder by a convict, (2) another murder at the same time, (3) knowing creation of "a great risk of death" to another besides the victim, (4) felony murder, (5) "murder to avoid arrest or effect escape," (6) murder for gain, (7) prior murder conviction, (8) "murder of a child under 12 as a result of physical abuse or neglect."<sup>76</sup>

Utah provides for a separate sentencing hearing after the defendant has been found guilty of capital murder, to determine whether the sentence shall be death or life imprisonment.<sup>77</sup> Utah's proceedings, unlike Arizona's, are conducted before the jury which found the defendant guilty. Utah specifies that "evidence may be presented as to any matter the court deems relevant to sentence," and rules of admissibility of evidence do not apply.<sup>78</sup> Utah lists five statutory mitigating circumstances: (1) "no significant history of prior criminal activity," (2) "extreme mental or emotional disturbance," (3) "extreme duress or domination," (4) impairment of capacity to appreciate criminality of conduct "as a result of mental disease, intoxication or influence of drugs," (5) youth, and adds (6) "any other fact in mitigation of the penalty."<sup>79</sup>

After all evidence has been presented, the jury is instructed that the death penalty will be imposed upon a unanimous verdict for death, and that if a unanimous verdict for death is not reached, a sentence of life imprisonment will be imposed.<sup>80</sup> The Utah Supreme Court may review the death penalty at the defendant's request, and may set it aside only "if it finds prejudicial error in the sentencing proceeding."<sup>81</sup>

The Utah and Arizona statutes both lack the assurance of statewide uniformity because they do not provide automatic review by the state supreme court. The Utah statute, like the Arizona statute, fails to remove the discretion which the *Furman* majority called unconstitutional. With the exception

76. UTAH CODE ANN. § 76-5-202(1) (Supp. 1973).

77. UTAH CODE ANN. § 76-3-206 (Supp. 1973).

78. UTAH CODE ANN. § 76-3-207(1) (Supp. 1973).

79. UTAH CODE ANN. § 76-3-207(1)(a) (Supp. 1973).

80. UTAH CODE ANN. § 76-3-207(2) (Supp. 1973).

81. UTAH CODE ANN. § 76-3-207(3) (Supp. 1973).

of #3, Utah's aggravating factors are clearer than Arizona's. But the mitigating factors are just as obscure. The trial judge has the discretion to decide what evidence is "relevant" to the sentence. And the jury is free to exercise its discretion in determining whether or not any mitigating circumstances exist, knowing that this determination is one of life or death for the defendant.

The Utah and Arizona statutes are unlikely to be upheld by the United States Supreme Court. Their lack of provision for a lesser included offense charge may not be fatal to Burger and Blackmun, because a finding that mitigating factors exist (or that there are no aggravating factors) would be, in essence, a finding that the defendant is guilty of the lesser included offense of non-capital first degree murder. However, both statutes allow too much room for discretion and arbitrary enforcement to satisfy Douglas, Stewart, or White. At best, then, these statutes would receive no more support than did the statutes struck down in *Furman*.

Ohio's new capital punishment law<sup>82</sup> is the best version of the type of statute that establishes a separate sentencing hearing and provides a statutory listing of mitigating circumstances, as Ohio lays out the procedure to be followed more thoroughly than the other states do.

Under the Ohio law, aggravated murder consists of premeditated murder or felony murder,<sup>83</sup> and the penalty could be death, life imprisonment, or one of these plus a fine not to exceed \$25,000.<sup>84</sup> If the count does not charge any of the statutorily listed aggravating circumstances, a life sentence must be imposed by the trial judge upon a guilty verdict.<sup>85</sup> If the count does charge any aggravating circumstances, the verdict must state separately "whether the accused is found guilty or not guilty of the principal charge, and, if guilty, whether the offender is guilty or not guilty of each specification." The jury is instructed that a specification must be proved beyond a reasonable doubt, but is not told what penalty

82. OHIO REV. CODE ANN. § 2903.01, §§ 2929.02 to .04 (1974).

83. OHIO REV. CODE ANN. § 2903.01 (1974).

84. OHIO REV. CODE ANN. § 2929.02(A) (1974).

85. OHIO REV. CODE ANN. § 2929.03(A) (1974).

will result from its findings on any charge or specification.<sup>86</sup> If the jury renders a verdict of guilty on the charge but not guilty on the specifications, a life sentence is imposed. If, however, the jury finds the defendant guilty of the charge and any aggravating factor, the trial judge must determine the penalty.<sup>87</sup>

In deciding whether the penalty should be life or death after a jury verdict of guilty of the crime charged and of an aggravating factor, the judge considers evidence of a statutorily provided presentence investigation, a psychiatric examination, arguments of counsel relevant to sentence, and other evidence.<sup>88</sup> If the court finds that none of the listed mitigating circumstances "is established by a preponderance of the evidence" it shall impose the death sentence. Otherwise, it imposes a life sentence.<sup>89</sup> Ohio specifies that, even if an aggravating circumstance is proved beyond reasonable doubt, the death penalty is precluded when any mitigating circumstance is established by a preponderance of the evidence.<sup>90</sup> Ohio's aggravating factors are similar to Utah's, with the addition of political assassination.<sup>91</sup> The mitigating factors are: (1) the victim "induced or facilitated" the offense, (2) duress, coercion, or strong provocation, (3) psychosis or mental deficiency, though "insufficient to establish the defense of insanity."<sup>92</sup>

The Ohio statute has a better chance of success than the Arizona and Utah statutes. The separate sentencing hearing and provision for consideration of mitigating factors probably provide enough flexibility to win the support of the *Furman* dissenters. But the problem is still whether Stewart, Douglas, or White would support such a statute. Ohio's provision that the jury is not to be told the consequences of their findings is an attempt to eliminate the possibility of jury discretion and so to get the acceptance of at least one of the three *Furman* majority Justices. In reality, however, this may be

86. OHIO REV. CODE ANN. § 2929.03 (B) (1974).

87. OHIO REV. CODE ANN. § 2929.03 (C) (1974).

88. OHIO REV. CODE ANN. § 2929.03 (D) (1974).

89. OHIO REV. CODE ANN. § 2929.03 (F) (1974).

90. OHIO REV. CODE ANN. § 2929.04 (B) (1974).

91. OHIO REV. CODE ANN. § 2929.04 (A) (1974).

92. OHIO REV. CODE ANN. § 2929.04 (B) (1974).

mere lip service—most jurors are likely either to know about the new Ohio statute in advance, or to figure out at the trial what the consequences of their findings would be. Additionally, Ohio's mitigating factors are not much clearer, if any, than Utah's and Arizona's, and Ohio's "preponderance of the evidence" standard set as the burden of proof for these mitigating factors allows the trial judge about as much discretion as the "reasonable foreseeability" test of Arizona and the "relevance" test of Utah.

### B. The Statute of Oklahoma

Oklahoma's new capital punishment law<sup>93</sup> is of a different, and harsher, variety than Arizona's, Utah's, and Ohio's, in that there is no separate sentencing hearing and no provision for consideration of mitigating circumstances. Oklahoma enumerates ten capital offenses: (1) murder of a peace officer or fireman in the line of duty, (2) felony murder (rape, arson, armed robbery, kidnapping, sexual molestation of a child), (3) victim was to be a witness against the accused, (4) political assassination, (5) hijack murder, (6) murder for hire or by procurement, (7) murder by a life-sentence convict, (8) murder of two or more persons "arising out of the same transaction," (9) murder of a child, (10) murder by "malicious use of an explosive."<sup>94</sup>

Oklahoma provides that "[e]very person convicted of murder in the first degree shall suffer death. [A]nd upon a finding of guilty (the jury) shall . . . state affirmatively in their verdict that the defendant shall suffer death."<sup>95</sup> It also specifies that the trial judge may instruct the jury as to lesser included offenses "if the evidence warrants such instructions." If so, he must put the reasons in writing.<sup>96</sup>

No sentencing hearing comparable to those provided by Arizona, Utah, and Ohio, is found in the Oklahoma statute. An evidentiary hearing is established on the appellate level, which allows the Oklahoma criminal court of appeals to determine, after a finding that there were no errors of law, whether

93. Ch. 167, §§ 1-6, [1973] OKLA. SESS. LAWS 240.

94. Ch. 167, § 6, [1973] OKLA. SESS. LAWS 240.

95. Ch. 167, § 3, [1973] OKLA. SESS. LAWS 240.

96. Ch. 167, § 3, [1973] OKLA. SESS. LAWS 240.

"the sentence of death comports with the principles of due process and equal protection of the law."<sup>97</sup> Specifically, the legislature asks the court to determine:

whether the sentence of death was a result of discrimination based on race, creed, economic condition, social position, class or sex of the defendant or any other arbitrary fact; and . . . whether the sentence of death is substantially disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.<sup>98</sup>

If the court finds the death penalty to be discriminatorily or arbitrarily imposed, it shall commute the sentence of death to one of life imprisonment.<sup>99</sup>

The Oklahoma capital punishment law merits praise for its very careful and clever draftsmanship. It has been designed to overcome most of the objections stated by Justices Stewart and Douglas in *Furman*.<sup>100</sup> It also provides for a lesser included offense instruction, the major criteria set by Justice Blackmun and Chief Justice Burger, at the same time attempting to insure that this instruction cannot be so arbitrarily administered as to make the statute unacceptable to Douglas and Stewart. And, at least arguably, the appellate evidentiary hearing provided for by Oklahoma prevents both "the blind imposition of uniform sentences" which Burger feared, and the arbitrary enforcement which Douglas feared, for a proper use of this proceeding would command both fairness and statewide uniformity in the imposition of the death penalty. If Junker, McDonald, and the Florida committee

97. Ch. 167, § 5, [1973] OKLA. SESS. LAWS 240.

98. Ch. 167, § 5, [1973] OKLA. SESS. LAWS 240.

99. Ch. 167, § 5, [1973] OKLA. SESS. LAWS 240.

100. The only discretion left to the jury is the discretion to convict or acquit, which is unavoidable, and, if a lesser included offense instruction is given, the discretion to find the accused guilty of the lesser offense. Although, as has been pointed out, this latter discretion gives the jury more leeway than Stewart, Douglas, and White wanted them to have, it is absolutely essential to the support of Burger and Blackmun. Further, it provides that in each case in which the judge gives the instruction, he must put in writing why he gave it based on the evidence. This should prevent arbitrary administration on the part of the trial judge. The only discretion left to the trial judge by the Oklahoma statute is the discretion whether or not to give the lesser included offense instruction, and that discretion is narrowly restricted by the statutory rule that he must put his reasons in writing, and by the appellate review. The Oklahoma prosecutor has the discretion whether or not to bring the capital charge, but the statute unambiguously defines capital murder and, in a close case, the appellate review should correct any errors.

legal staff are correct in their assessment of *Furman* as spelling the complete end of capital punishment, which they may well be, then of course, the Oklahoma statute is an "exercise in futility."<sup>101</sup> But if there is hope left in a post-*Furman* resurrection of a death penalty that is fairly broad in scope, the Oklahoma statute serves as the most likely model.<sup>102</sup>

#### IV. WYOMING'S NEW CAPITAL PUNISHMENT LAW

##### A. The Statute

Wyoming's new § 6-54(a) is identical to the first four lines of the old § 6-54:

Whoever purposely and with premeditated malice, or in the perpetration of, or attempt to perpetrate any rape, arson, robbery, or burglary, or by administering poison or causing the same to be done, kills any human being, is guilty of murder in the first degree.<sup>103</sup>

The words allowing the exercise of jury discretion in the old statute<sup>104</sup> are eliminated in the new statute. The new § 6-54(b) states:

Upon conviction of murder in the first degree, a mandatory sentence of death in the manner provided by law shall be imposed if the trier of fact finds the offense involves the following course of conduct:<sup>105</sup>

Then follows a list of ten aggravating situations: (1) "murder of any peace officer, corrections employee or fireman

101. See Part II *supra*.

102. There may be no problem with a statute such as Rhode Island's. R.I. GEN. LAWS ANN. § 11-23-2 (1969) provides a mandatory sentence of life imprisonment for persons convicted of first degree murder, unless it was committed by a convict already under sentence of life imprisonment, in which case there is a mandatory death sentence. Indiana's new statute, IND. ACTS 1973, Pub. L. No. 328, § 1 (1973), is somewhat similar to Oklahoma's (no separate sentencing hearing, no consideration of mitigating factors), but it is deficient in that it provides no uniform and automatic appellate review. It specifically precludes charging a lesser included offense but specifically allows the trier of fact to convict of a lesser included offense where the facts are insufficient to convict of the capital crime charged. The Indiana Criminal Law Study Commission hopes to eliminate the part of the statute allowing conviction on lesser offenses in 1974. Letter from W. F. Conour, Research Analyst, Ind. Crim. Law Study Comm'n, to Lynn Cobb, Sept. 21, 1973, on file in Univ. of Wyo. Law Library.

103. WYO. STAT. § 6-54(a) (Supp. 1973).

104. WYO. STAT. § 6-54 (1957). This added "[B]ut the jury may qualify their verdict by adding thereto, 'without capital punishment' and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment, at hard labor, for life."

105. WYO. STAT. § 6-54(b) (Supp. 1973).

acting in the line of duty," (2) murder for hire or by procurement, (3) murder by malicious use of an explosive, (4) murder after a prior murder conviction, (5) murder by a life-sentence convict, (6) felony murder (The statute lists rape, arson, robbery, and burglary, but limits capital felony murder to the situation where the accused has previously been convicted of the specified felony; thus, apparently, a defendant convicted of robbery-murder with a previous conviction of rape would not come within this subsection.), (7) kidnapping murder, (8) hijack murder, (9) murder to conceal crime or identity or to suppress evidence, and (10) multiple murders.<sup>106</sup>

A bifurcated trial is provided in the event of a capital charge under aggravating factors #4, #5, and #6, with "the determination of prior conviction" made "by the jury after the jury has returned its verdict of conviction."<sup>107</sup> If no aggravating factor is found to exist, the defendant is sentenced to life imprisonment.<sup>108</sup> Where the death sentence is imposed, the statute provides for automatic review by the Wyoming Supreme Court of both "[t]he judgment of conviction and sentence of death."<sup>109</sup>

### B. Wyoming's Statute—A Comparison

Wyoming's statute is not of the same variety as the statutes of Arizona, Utah, and Ohio, because Wyoming provides no separate sentencing hearing and no consideration of mitigating factors. Therefore, most of the problems inherent in those statutes are avoided by Wyoming's § 6-54.

On its face, the Wyoming statute would appear to be of the same breed as the Oklahoma statute. There is a crucial difference, however. Whereas Oklahoma enacted a death penalty law that would be suitable to Burger and Blackmun and yet at the same time one that would not necessarily preclude the support of Stewart or Douglas, Wyoming ignored the Burger-Blackmun criteria, and enacted a death penalty law aimed at the support of Stewart, White, Douglas, Powell, and Rehnquist.

106. WYO. STAT. § 6-54(b) (i-x) (Supp. 1973).

107. WYO. STAT. § 6-54(c) (Supp. 1973).

108. WYO. STAT. § 6-54(e) (Supp. 1973).

109. WYO. STAT. § 6-54(d) (Supp. 1973).



Wyoming's aggravating circumstances are almost identical to Oklahoma's, although Wyoming does not include assassination (Oklahoma #4) or murder of a child (Oklahoma #9), and Wyoming's capital felony murder is not as harsh as Oklahoma's, for the reasons stated above in conjunction with Wyoming #6.

The automatic review by the Wyoming Supreme Court provided in the Wyoming statute is not at all similar to the evidentiary hearing by the Court of Criminal Appeals provided in the Oklahoma statute. Oklahoma sets statutory guidelines for its appellate evidentiary hearing, but Wyoming does nothing of the kind for its supreme court review. On the contrary, Wyoming allows the supreme court discretion to conduct the review "in accordance with rules promulgated by the supreme court."<sup>110</sup> Since the Wyoming statute demands no appellate consideration of whether the death sentence was discriminatorily or arbitrarily imposed, and the Oklahoma statute does, Wyoming puts the burden of proving discrimination and arbitrary enforcement on the defendant, while Oklahoma puts the burden of proving the opposite on the state.

Unlike the Oklahoma statute, Wyoming's statute is silent on the subject of a lesser included offense instruction. Presumably, therefore, a capital jury in Wyoming can avoid the death penalty only by a verdict of acquittal, a feature which is certain to preclude the support of Burger and Blackmun, who foresaw this problem and said that it would demand "a rigidity in capital cases which, if possible of achievement, cannot be regarded as a welcome change."<sup>111</sup>

#### C. Should Wyoming § 6-54 Succeed or Fail?

Wyoming § 6-54 must be examined from the point of view of whether it is likely to be held constitutional by White,

110. WYO. STAT. § 6-54(d) (Supp. 1973).

111. Furman, *supra* note 3, at 2808 (Burger, C. J., dissenting). If the Wyoming statute is administered so as to allow a finding of guilt on lesser included offenses, Burger and Blackmun would probably go along with it. But the state would have to show that indeed this *is* its intent, which might be difficult in the first few cases brought under the statute. Additionally, Douglas could use this to hold the statute unconstitutional, saying that since the statute fails to provide standards for a lesser included offense instruction, it is capable of arbitrary enforcement.

Douglas, Stewart, Powell, and Rehnquist, the majority obviously sought by the Wyoming legislature in enacting the statute. As has already been observed (discussion, *supra*, Part I, B), it is quite risky to count on the support of Douglas or Stewart, and even riskier to count on the support of both. Essentially, what Douglas and Stewart seem to be demanding in *Furman* is fairness in the imposition of the death penalty—they do not want the statute to leave any room, either on its face or in the way it could conceivably be administered, for discriminatory or arbitrary enforcement. On the other hand, White, whose language is somewhat similar to that of Stewart and Douglas, seems to want more of a pre-established rigidity, whether this achieves “fairness” or not.

Should Wyoming's new § 6-54 be acceptable to Justice White? It may be—the Wyoming statute does overcome most of White's major objections. The Wyoming legislature has authorized the death penalty for specified crimes. It has, in fact, commanded that the death penalty be imposed for these crimes. The legislative enumeration of the crimes provides standards which Wyoming judges and juries must follow in imposing the death penalty, and which considerably limit the amount of discretion that can be exercised. Further, § 6-54 allows very little laxity for infrequency of imposition within each capital murder classification (with the exception of #9, which may not be fatal to White but would be to Douglas—see discussion *infra*) or overall within the legislative scheme. White should find Wyoming's statute more satisfactory than the statutes of Arizona, Utah, Ohio, or Oklahoma.

Should § 6-54 be acceptable to Stewart and Douglas? This is a more difficult problem, but the only reasonable answer is that it is extremely improbable that § 6-54 would be found satisfactory by both Justices. Even assuming that Douglas and Stewart will not be overly concerned by the remaining presence of such areas of discretion as plea bargaining and executive clemency,<sup>112</sup> some defects within the statute itself will work to preclude their support.

112. See Part II *supra*. This is a legitimate assumption, for it is arguable that under a mandatory death penalty system, the prosecuting and defense attorneys would have no right to engage in plea negotiations, nor would the governor be entitled to grant clemency, both of which would violate legislative intent.

One defect is the standardless discretion granted to the Wyoming Supreme Court by § 6-54(d). This may be too much for Douglas and/or Stewart. It would be difficult to show that this procedure is necessarily conducive to fairness in the sentencing process, where there are no legislative standards to insure fairness.

The most obvious defect, however, is aggravating factor #9 (murder to conceal crime or identity or to suppress evidence). This must be seen as a catch-all section, for *any* murder could, at the discretion of the prosecutor, be charged as capital murder under this section. A catch-all section is *per se* inconsistent with the *Furman* majority's demands that clear legislative standards be set and excessive jury/judge discretion be eliminated, as well as with Burger's suggestion that, at the least, the death penalty should be limited to the most heinous crimes. The fact that the Wyoming legislature made a weak effort to disguise the catch-all qualities of #9 by its wording is unlikely to fool Stewart or Douglas, particularly Douglas, who has already vowed to look beyond the wording to the possible application.

A hypothesis will suffice for purposes of an illustration. A man accosts two girls. He kills one girl and *subsequently* robs and rapes the other girl. He then attempts to kill her, too, but she survives and identifies him. § 6-54 (10) cannot apply, since one girl lived. Assuming that the man has no prior felony convictions, neither #4 nor #6 would apply, leaving the prosecutor with the choice of bringing the capital charge under #9, or not bringing it at all. But can it be murder to *conceal* crime when the crime to be concealed has not yet been committed? Undoubtedly, the prosecutor would bring the charge under #9. The crime is despicable, and the desire to bring the capital charge is understandable, but the connection with the wording of #9 is, at best, nebulous and demonstrates that #9 can be used to cover the situations that are not covered by the other sub-sections. It can easily be seen that, in addition to giving the prosecutor an inordinate amount of discretion, #9 also gives the trier of fact great discretion to decide whether or not a wide variety of situations, of more or less tenuous connection with the ordinary meaning of the

words, fall within #9. To hope that this would escape the attention and disapproval of Stewart and Douglas would be naive.

Without the support of Brennan and Marshall, who have called the death penalty unconstitutional, without the support of Burger and Blackmun, who want a lesser included offense instruction, and without the support of Stewart and Douglas, who want a statute incapable of arbitrary administration, Wyoming § 6-54 cannot succeed.

### CONCLUSION

Confusion still dominates the subject of capital punishment, more after *Furman* than before. Although Justices Brennan and Marshall for the majority, and Burger and Blackmun for the dissent, did a commendable job of showing the states why they should abolish the death penalty, most of the states chose to ignore their arguments and enact new death penalty statutes. The reason for this is clear—the states believe their citizens want the death penalty. At one time, this was enough to justify any reasonable death penalty statute. But *Furman* leaves no doubt that, constitutionally, it will not be enough in the future.

What will be enough can be surmised but not predicted. Whether the new death penalty statutes spawned by *Furman* are bastards or legitimate children remains to be seen. The Oklahoma statute has the best chance of success, but even that can only be called a fair chance, not a good one. The Wyoming statute is almost certain to fail. The major problems in the Wyoming statute should be corrected at the earliest opportunity, and § 6-54 should be remodeled after Oklahoma's capital punishment law. In the meantime, the statute should be administered by the courts so as to eliminate these problems whenever possible. Lesser included offense instructions should be given where warranted, and capital charges brought under #9 should not be accepted unless the facts clearly coincide with the plain meaning of the words.

Above all, Wyoming, as a state and as a people, should brace itself for the apparently inevitable end of capital pun-

ishment as a feature of our legal system, and start thinking about acceptable alternatives. The emotional aspects of capital punishment may never satisfactorily be resolved, but the ultimate issue of controversy is on the threshold of resolution. And all signs point to the impending death of capital punishment.

LYNN COBB