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BEYOND *FURMAN V. GEORGIA*: THE NEED FOR A MORALLY BASED DECISION ON CAPITAL PUNISHMENT

L. S. Tao*

I. Introduction

Only three years after *Furman v. Georgia*,¹ the constitutionality of the death penalty is again before the Supreme Court. Several reasons explain this renewed attack on capital punishment. On constitutional doctrine, the Court settled very little in *Furman*. It condemned the capricious and discriminatory application of capital punishment and the two justices who favored total elimination of the penalty also shared the view that its application had been capricious.² It can be argued, therefore, that the majority in *Furman* held that capital punishment, applied under the discretion of judges or juries, was unconstitutional. This condemnation on the discriminatory nature of execution, however, left the core issue of its constitutionality unresolved and, ironically, had the effect of providing a justification for imposition of nondiscriminatory sentences. By the end of 1975, 29 states had reinstated capital punishment for specific crimes.

Furman, however, did focus public attention on the constitutionality of capital punishment. For more than a decade, the penalty had been fading away. Certainly then, to the dismay of some observers, instead of eliminating capital punishment altogether, the Supreme Court revived a public debate and generated a considerable degree of legislative enthusiasm for its continued use. If it had been hoped by some justices and attorneys that an attack on the capricious administration of the penalty would cause the various states to abolish capital punishment, such hope proved unrealistic. The debate now, both within the courtroom and in the public forum, must be focused on its merits.

This article will reexamine the justifications for capital punishment in the light of Supreme Court precedent. After a discussion of *Furman* and the decisions preceding it, the various propositions for and against retention of the death penalty will be analyzed. Finally, a tentative prediction will be made on the lines of judicial thought which may be included in a new decision on this issue.

II. An Analysis of *Furman*

A. *Furman* and the Majority Opinions

Three lines of thought have emerged from *Furman*. The first asserts that the death penalty is both improper and unjust for a modern, civilized society;³ it is essentially no longer compatible with our sense of fairness and should be

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1 408 U.S. 238 (1971).

2 *Id.* at 269 (Brennan, J.); *id.* at 330-32 (Marshall, J.).

3 *Id.*

abolished. By focusing attention on the intrinsic value of the penalty, the question becomes whether or not capital punishment is an appropriate means for dealing with criminals. The second strain of thought stresses the discriminatory administration of the sentence⁴ finding the penalty cruel not in its nature but rather in its capricious application. This argument necessarily raises the question of whether the penalty has in fact been arbitrarily executed. Rarity in administration presents one proof; selectiveness in execution among those who have been convicted of capital offenses becomes another ground. Finally, the third line of thought expressed in *Furman* is that the penalty is no longer useful.⁵ As a result, its retention must be reexamined. Such an assessment, by the logic of this argument, has to be made in the light of empirical evidence about its utility. If the utility is minimal then it would be offset by the costs of execution. These costs include the possibility of mistake in sentencing a person to death,⁶ the loss of a human life, deprivation of chances for rehabilitation, and the expenses for the execution. On the other hand, if capital punishment deters then its utility may be enormously increased. Whether or not the penalty is worth retaining, then, depends on how much is known about its deterrent effect. Instead of settling the issue, it raises a factual question which has evoked endless debate.

It is interesting that the utilitarian argument cuts across the two sides of the Court. The "moralist" view, which stresses the abhorrent nature of the punishment, and the criticism of its arbitrary application, find support only among the justices who voted against the statutes challenged in *Furman*. As will be shown later, however, these two views may also be used to support the position for retention of capital punishment.

Justices Brennan and Marshall deal directly with the intrinsic value of the death penalty. Brennan believes that there are four principles "recognized in our cases and inherent in" the eighth amendment, "sufficient to permit a judicial determination whether a challenged punishment" comports with human dignity and therefore is not cruel and unusual. The four principles are: (1) "a punishment must not be so severe as to be degrading to the dignity of human beings"; (2) the government "must not arbitrarily inflict a severe punishment"; (3) "a severe punishment must not be unacceptable to contemporary society"; and (4) "a severe punishment must not be excessive . . . [or] unnecessary."⁸ On the basis of these criteria, Justice Brennan concludes that capital punishment "involves, by its very nature, a denial of the executed person's humanity."⁹ As a result, he "would not hesitate to hold, on that ground alone, that death is today a 'cruel and unusual punishment,' were it not that death is a punishment of longstanding

4 *Id.* at 249-57 (Douglas, J.); *id.* at 309 (Stewart, J.); *id.* at 311 (White, J.).

5 *Id.* at 311-12 (White, J.); *id.* at 347-53 (Marshall, J.); *id.* at 395-96 (Burger, C. J.); *id.* at 395-96 (Powell, J.).

6 Charles L. Black stresses the possibility of mistake as a principal reason for his opposition to the death penalty. C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE (1974). However, Hugo Bedau has asserted that chances for a mistaken execution have been very small on the basis of his re-examination of 74 cases after 1893. Bedau, *The Death Penalty in America*, 35 FEDERAL PROBATION 32 (1971).

7 408 U.S. at 270.

8 *Id.* at 271, 274, 277, 279.

9 *Id.* at 290.

usage and acceptance in this country."¹⁰

Justice Marshall is less firm than Brennan in opposing the "degrading" nature of the penalty. Nevertheless, he finds it abhorrent to currently existing moral values.¹¹ "Whether or not a punishment is cruel or unusual depends," he argues, "not on whether its mere mention 'shocks the conscience and sense of justice of the people,' but on whether people who were fully informed as to the purposes of the penalty and its liabilities would find the penalty shocking, unjust and unacceptable."¹² On this score Marshall seems to rely on the judgment of the "informed people." But since there is no evidence on how they would react to the question, Marshall projects his own "reasonable man," saying that "the average citizen would, in my opinion, find [capital punishment] shocking to his conscience and sense of justice."¹³ "For this reason alone," he concludes, "capital punishment cannot stand."¹⁴

Emphasizing the capricious way in which capital punishment has been administered, Justices Douglas, Stewart and White believe that it should be considered unconstitutional. Douglas argues that

[I]t is "cruel and unusual" to apply the death penalty . . . selectively to minorities whose numbers are few, who are outcasts of society, and who are unpopular, but whom society is willing to see suffer though it would not countenance general application of the same penalty across the boards.¹⁵

Accordingly, the statutes which give judges or juries the discretion to select between the death sentence and a life or term imprisonment "are unconstitutional in their operation."¹⁶ Similarly, Justice Stewart argues that application of the penalty has been "wanton and freakish," making its imposition arbitrary "in the same way of a person being struck by lightning."¹⁷ Since the latter is irrational and entirely unpredictable, capital punishment must also be judged to be capricious and against the Constitution.

Justice White stresses the infrequency in which death is administered, attributing the rarity in imposition to the discretion of juries. "Legislative 'policy,'" he observes, "is . . . necessarily defined not by what is legislatively authorized but by what juries and judges do in exercising the discretion so regularly conferred upon them."¹⁸ In his judgment, this practice violates the Constitution.

B. *The Dissenting Opinions in Furman*

All the dissenting justices perceive the question primarily in utilitarian terms. For Chief Justice Burger, with the rest of the "Nixon Quartet" concurring,¹⁹

10 *Id.* at 291.

11 *Id.* at 360.

12 *Id.* at 361.

13 *Id.* at 369.

14 *Id.*

15 *Id.* at 245.

16 *Id.* at 256.

17 *Id.* at 309.

18 *Id.* at 314.

19 Phillip Kurland seems to have coined the term "Nixon Quartet." Kurland, 1971 Term; *The Year of the Stewart-White Court*, 1972 SUP. CT. REV. 181.

the states' failure to prove its effectiveness is no basis for prohibiting the death penalty.²⁰ Moreover, the claim of arbitrariness lacks empirical support. Rarity is not necessarily capriciousness. The very infrequency of death penalties imposed by juries attests their cautious and discriminating reservation of that penalty for the most extreme cases.²¹ In effect, Burger remains unpersuaded by the statistical evidence relied on by his colleagues on the opposite side of the decision.

It is remarkable that none of the dissenting justices rest judgment on the intrinsic value of capital punishment. In their separate opinions, Justices Blackmun, Powell and Rehnquist all suggest limitations to the Court's role in this matter. Blackmun believes that "elected representatives of the people" have already made a clear and informed choice for maintaining the penalty.²² Powell and Rehnquist stress the need for deferring the matter to the legislature. In Powell's words, "this type of inquiry lies at the periphery . . . of the judicial process in constitutional cases. The assessment of popular opinion is essentially the legislative, not a judicial, function."²³ And Rehnquist concludes that the majority's ruling significantly lacks humility and deference to legislative judgment.²⁴

It seems that a "wait-and-see" approach characterizes the attitudes of the dissenting justices. The death penalty may be cruel, but it was accepted as fit by the society and the court. The punishment may also be ineffective, but that must be proven by its opponents. Before the society expresses a clear and strong consensus against the penalty, and before the critics prove that it does not deter, the Court should not take the lead toward its elimination. In effect, this argument evades the substantive issue of the value of capital punishment and places the burden of proof on its opponents. It reflects a judicial presumption that, in spite of attack on the punishment, public opinion remains unchanged on its acceptability. Before a suitable solution is found, maintaining the *status quo* avoids placing the whole issue "in an uncertain limbo."²⁵

C. Conclusion: Failure to Face the Moral Issue

Several important points can be made about these views. Both Brennan and Marshall criticize the death penalty primarily on the ground of justice. For them, capital punishment is degrading and repugnant to the contemporary sense of fairness. Implicit is the notion that human life should not be taken arbitrarily, either by individuals or by the state, especially in a random and selective manner. But the death sentence may also be defended on the ground of justice: The only appropriate response to a serious crime is imposition of death. It could be argued that some crimes are atrocious because they degrade the value of human life, and that it may indeed offend a sense of fairness if an innocent victim dies while his convicted murderer lives. While this argument sounds retributive, it would

20 408 U.S. at 404.

21 *Id.* at 388-89.

22 *Id.* at 413.

23 *Id.* at 443.

24 *Id.* at 468.

25 The burden of proving the deterrent effect, or lack thereof, of capital punishment, is one of the principal issues in the debate between Hugo Bedau and Ernest van den Haag. Compare Bedau, *Death Penalty as a Deterrent: Argument and Evidence*, 80 *ETHICS* 205 (1970), with van den Haag, *On Deterrence and the Death Penalty*, 78 *ETHICS* 280 (1968).

be hard to deny that retribution is still a psychological response manifested by a fraction of the public (though its proportion to the total population is unknown) to heinous crimes. Criminal sentences often reflect the public's moral concern over the nature of the offense and its standard of human conduct.

It seems illusory to believe that elimination of jury discretion in the sentencing for serious crimes would in turn eliminate discriminatory imposition of the death sentence. The law may make the penalty mandatory, but it is the jury in most capital cases which reaches a verdict of guilt. Conceivably a jury could refuse to convict a person and thereby avoid sending him to death. In addition, discretion is exercised by the police, the prosecutor, the judge and the jury throughout the criminal process. To remove it from one stage does not suggest that it will not reappear, and perhaps play a different role, at another stage of the process.²⁶

If the death penalty's moral acceptability were an explicit issue then the alignment of justices might have been different. There is no doubt that Brennan and Marshall would have remained committed to their views and they might have rallied the support of Justice Powell, who expressed personal pleasure that the penalty was restricted by *Furman*. Justice Stewart might have decided differently, as he indicated that "channeling [the] instinct [of retribution] in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law."²⁷ Both White and Douglas are ambiguous on this score. Despite his criticism of capital punishment *as administered* in the states, Justice Douglas evaded the moral issue entirely. And for his emphasis on unfair administration, it is not inconceivable that Justice White might wish to maintain the penalty in a limited form.

This possible realignment suggests a remarkable fact: The debate in the high court over capital punishment is cast almost entirely in utilitarian terms. Moreover, neither side is likely to convince the other in this debate, both because of a lack of empirical understanding of the "utility" of the death penalty and because of the elusive nature of the problem which has made efforts toward proof largely futile. By the effect of its ruling, however, the moral issue which was avoided in *Furman* is now squarely before the Court.

III. Case Law on Capital Punishment

Although the narrow focus of *Furman* has left unanswered the moral value of capital punishment, it marked a break with a long line of judicial precedents in addressing itself directly to the constitutionality of the punishment. *Furman's* significance cannot be underrated; it clears the way for the Supreme Court to deal directly with the substantive issue.

²⁶ C. BLACK, *supra* note 6, at 37-55.

²⁷ 408 U.S. at 308. Judge Learned Hand has expressed a somewhat similar attitude: . . . [M]ost people have a feeling that "justice" requires a law breaker to suffer, just as they think that sin should entail suffering in the sinner. Personally I do not share that feeling, which is a vestige, I believe, of very ancient primitive and irrational beliefs and emotions. However, it would be unwise, and incidentally impracticable to disregard it as a constituent element; it is extremely strong in most people.

Letter from Learned Hand to the University of Chicago Law Review, 22 U. CHI. L. REV. 319 (1955).

Judicial decisions prior to *Furman* all accepted, explicitly or implicitly, that the death penalty was consistent with the eighth amendment to the Constitution. In these decisions, the Supreme Court typically perceived the issue to be one concerning certain types of punishment rather than the mode of punishment. Capital punishment was held not to be within the type prohibited. Thus, the Court upheld the constitutionality of a Utah statute which authorized the judge to choose between hanging and shooting as the means for putting a convicted prisoner to death.²⁸ Similarly, in *In re Kemmler* the Court ruled that electrocution was consistent with the demands of the eighth amendment.²⁹ Speaking of the death sentence, the Court stated:

Punishments are cruel when they involve torture or a lingering death; but the punishment of death is not cruel, within the meaning of that word as used in the Constitution. It implies there something more inhuman and barbarous; something more than a mere extinguishment of life.³⁰

A further exposition by the Court of the eighth amendment's ban is *Weems v. United States*,³¹ in which a gross disparity existed between a punishment and an offense. The disparity was measured in terms of a comparison of the penalty in question to that for more serious offenses. In addition, the Court objected to an extension of "supervision by authorities" after the prison term expired. In 1958, expatriation was considered by the Court to be against the ban,³² and in 1962, the Court struck down a California law imposing a penalty for an offense of "being addicted to the use of narcotics."³³ These rulings obviously added a new dimension to the meaning of "cruel and unusual" punishment, by extending the eighth amendment prohibition to penalties which by their nature were not barbaric or abhorrent, but rather where their application in specific situations raised questions of fairness.

With these cases in the background, the Court in 1971 decided *McGautha v. California*.³⁴ A California statute allowing the jury to exercise discretion in imposing the death penalty for first-degree murder in a separate proceeding and in the absence of specific standards was challenged as a violation of the eighth amendment. Speaking for the Court, Justice Harlan stated that it was not impermissible for a state to consider "that the compassionate purposes of jury sentencing in capital cases are better served by having the issue of guilt and punishment determined in a single trial than by focusing the jury's attention solely on punishment after guilt has been determined."³⁵ Thus, procedural considerations and deference to the state legislature diverted the Court's attention from the question on the constitutionality of the death penalty. Yet these two criteria do not give rise to an adequate constitutional standard by which the question can be answered.

28 *Wilkerson v. Utah*, 99 U.S. 130 (1878).

29 136 U.S. 436 (1890).

30 *Id.* at 447.

31 217 U.S. 349 (1910).

32 *Trop v. Dulles*, 356 U.S. 86 (1958).

33 *Robinson v. Dulles*, 370 U.S. 660 (1962).

34 402 U.S. 183 (1970).

35 *Id.* at 183.

Clearly, then, when the Court in *Furman* finally addressed itself to the death penalty and struck it from discretionary statutes, it laid an historic landmark. Judicial precedents, however, provide legitimacy for this apparent break. For years a flexible concept of "cruel and unusual" had manifested itself in the Court's decisions. It was held in *Weems*, for example, that the Constitution casts upon the judiciary the duty of determining whether punishments have been properly apportioned in a particular statute, and if not, to decline to enforce it.³⁶ The same Court observed that the eighth amendment would be "progressive, and is not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."³⁷ Half a century later, the Court held in *Trop v. Dulles* that "[w]hile the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."³⁸ As the Court implied, determining these standards was within the domain of the Supreme Court.

In light of these decisions, *Furman* represented a break with the tradition of putting capital punishment in a category deemed consistent with the demands of the eighth amendment. Nonetheless, the *Furman* approach to the merits of the penalty on the basis of contemporary humane standards stood in line with an evolving concept of "cruel and unusual" punishment which had already found its way in several leading decisions.

IV. Rarity and Capriciousness

The point which apparently has been accepted by all of the justices in the *Furman* majority is that the death penalty is rarely administered, and that therefore its execution against a prisoner would be unfair and arbitrary. The first statement in this argument raises a factual question which can be proved. The second point, however, is a question of judgment, which, logically, may not follow from the first.

The death sentence had almost run its course by 1972. In 1930, 155 persons were executed and during the next decade the number increased to about 200 annually, as the country passed through the social and economic trauma associated with the Depression. Subsequently, executions steadily declined with none occurring since the end of 1967. Of the 3,859 executions from 1930 to 1967, the overwhelming majority, 3,335, were for murder, followed by 435 for rape. Of all the executions, only 33 were for the violation of federal laws (eight of these for espionage), while 160 executions were administered in the armed forces. Throughout the entire decade of the 1960's, only one execution was carried out in the federal jurisdiction.³⁹ Clearly, capital punishment was in the main a phenomenon of the state judiciary.

When *Furman* was decided, capital punishment was part of the law in 39

36 217 U.S. at 378-79.

37 *Id.* at 378. The eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Trop v. Dulles*, 356 U.S. 86, 101 (1958).

38 356 U.S. 98, 100 (1958).

39 BUREAU OF PRISONS, DEP'T OF JUSTICE, NAT'L PRISONER STAT. BULL. NO. 45, CAPITAL PUNISHMENT 1930-1968. 28 (1969).

states. Except for Ohio, Massachusetts, Rhode Island and Alabama, however, none of these states, and only ten states overall, had mandatory death penalties for any crime. By 1972, then, the death penalty had dwindled to a point of extinction, and in law the trend had drifted toward its elimination. It is an irony that *Furman* not only revived the debate but, in addition, stimulated almost 40 states to the adoption of mandatory death penalties.

Even though death has rarely been imposed on convicted offenders, does it follow that, where prisoners were executed, certain kinds of people suffered disproportionately? The *Furman* majority seems to have accepted this assumption. Justice Douglas implies that blacks were singled out for execution.⁴⁰ The extent of differentiation on the basis of color could be determined, if evidence showed that a greater number of blacks were executed relative to the total population of the blacks convicted of capital offenses, than that of whites to the population of whites sentenced to death. In this formulation, it becomes an empirical question, for which a few studies are available for consideration. In a comprehensive study, Marvin Wolfgang examined 439 persons sentenced to death for murder in Philadelphia between 1914 and 1958. Although the absolute figure shows that death was administered against more blacks than whites, this does not indicate discriminatory application of the penalty because, in fact, more blacks were convicted than whites. Proportionately, 88 percent of blacks on death row were executed, as compared with 80 percent of whites.⁴¹ In a separate study, Wolfgang also found that in Philadelphia, 73 percent of the homicide victims and 75 percent of the offenders were black, even though blacks comprised only 20 percent of the city's population during the period under investigation.⁴² On the basis of this evidence, one could argue that blacks were more likely to commit homicide, or, on the other hand, that they were more likely to be convicted of homicide. If the latter is true, it cannot be corrected by merely insisting that the death penalty be uniformly applied.

Philadelphia, however, is certainly not representative of Southern cities. In another study, Anthony Amsterdam and Marvin Wolfgang examined more than 3,000 rape convictions in eleven Southern States between 1945 and 1965.⁴³ They found that 13 percent of the blacks convicted of rape were executed, while approximately only 2 percent of the white rape offenders were put to death. This obviously indicates disproportionate administration of the sentence. Moreover, Southern juries seemed particularly sensitive to cases involving a rape by a black man against a white woman. If convicted, a black defendant would be eighteen times more likely to be executed as all other prisoners sentenced to death, regardless of racial combinations.⁴⁴

Empirical evidence, then, supports only part of the argument of discriminatory execution. While the evidence does suggest that the Southern practice was discriminatory, it appears invalid to contend that the death penalty has been

40 408 U.S. at 251.

41 Wolfgang, Kelley & Nolde, *Comparison of the Executed and Committed Among Admissions to Death Row*, 53 J. CRIM. L. C. & P. S. 301 (1962).

42 M. WOLFGANG, PATTERNS OF CRIMINAL HOMICIDE 185-89, 202-22 (1958).

43 Wolfgang & Riedel, *Race, Judicial Discretion, and the Death Penalty*, 407 ANNALS OF AM. ACADEMY OF POL. & SOC. SCIENCES 119 (1973).

44 *Id.*

administered disproportionately against a particular ethnic minority group in the states out of the South.

It is important to understand the implications of these facts. It seems a fair assumption that in the South blacks are more likely than whites to be apprehended by police, charged by prosecutors and convicted by juries for most crimes. Perhaps blacks also suffer from heavier penalties across the board. If this is true, should we also abolish all penalties because they have been imposed discriminatorily in the South? It is clear that making the death penalty mandatory will not end discrimination which is inherent in the criminal justice system as administered in certain states. If the current situation continues, then one could conceivably find evidence in the future that more blacks than whites were convicted of crimes under statutes with mandatory death sentence. Discrimination lies in the use of discretion, and discretion is inevitable in the administration of justice.

One might argue, however, that because the system operates unjustly in the South, this makes it all the more imperative for the Supreme Court to intervene by putting an end to the death penalty. Capital punishment may not have been capriciously applied in the North, but that does not make it morally acceptable. Furthermore, in areas where the administration of justice is less than fair, the death sentence is even more unfit as a response to crime. This argument, in effect, questions the moral appropriateness of capital punishment which, as will be shown later, should be the focal point of current discussions.

V. Measuring the Effect of the Death Sentence

Whether the death penalty deters potential criminals from committing capital offenses is an elusive question. Despite this problem, however, contemporary debates almost always have centered on deterrence. Often, easy assumptions are made and sweeping generalizations are offered on the deterrent effect of capital punishment.

The debate was joined in *Furman* between Justice Marshall and Chief Justice Burger. The former argues that, "in light of the massive amount of evidence before us," the punishment "cannot be justified on the basis of its deterrent effect. . . . The statistical evidence is not convincing beyond all doubts, but it is persuasive."⁴⁵ Chief Justice Burger, on the other hand, questions whether the states should be required to prove deterrent effect in order to retain the penalty, or whether it should be the burden of its opponents to produce convincing evidence on its lack of deterrence. The burden of proof seemed crucial to Burger, since he suggests that if the burden were put on the states, one might as well challenge "all punishments" as "suspect of being 'cruel and unusual' within the meaning of the Constitution."⁴⁶

For other justices in the majority, an assumption cuts across their opinions that the sentence lacks significant deterrent effect. For those on the dissenting side, however, the issue is as much one concerning the burden of proof, as con-

⁴⁵ 408 U.S. at 354-59.

⁴⁶ *Id.* at 396.

cerning the weight of evidence. It appears, nonetheless, that the dissenting justices held no strong belief in the deterrent effect of the penalty.

Since deterrence is factual, available empirical studies may provide an answer. Some of the studies to be discussed below have lent support to the justices on either side. But a close examination indicates that they are of dubious validity.

One of the questions to be asked and tested concerns the correlation between the rates of murder and the death penalty. Since police often respond with rigorous campaigns against suspects of murderous assaults on policemen, this type of confrontation provides a good case for measuring the deterrent effect of capital punishment. Donald R. Campion examined the rate at which police were shot and killed in states that had prescribed capital punishment for this type of offense, and states that did not have such a law. He reached the conclusion that the rates were about the same, that is, there was no positive correlation.⁴⁷

Another test is on the variation in homicide rates in a given state or city, before and after the convicts were executed and such executions were publicized. William Graves has found that in California there was no significant correlation at all. Interestingly, Graves controlled the variable of publication about executions, and then found that the rates of homicide on the days preceding the executions increased.⁴⁸ Either this was a mere coincidence caused by other uncontrolled (or uncontrollable) variables, or it indicates that publicity about executions gave impetus to some persons for killing.

A more comprehensive work is Thorsten Sellin's *Capital Punishment*.⁴⁹ Sellin compared homicide rates in four ways. The first may be called the "horizontal comparison," where several adjacent states were studied. The hypothesis was that if the death penalty had a deterrent effect, then homicide rates in these states with the penalty should be lower than in those without it. Yet this hypothesis was disconfirmed. Variations in the rates among these states appear to have taken place in the same way, regardless of the presence or absence of the death penalty in the law codes.

Sellin's second test may be called the "vertical comparison," where homicide rates were studied before and after capital punishment was abolished within the state. In some states where the death penalty had been abolished, the rates were examined before and after the punishment was restored. Again, there was no evidence that significant change in rates occurred in accord with the status of capital punishment.

Turning to the effect of publicity about executions, a problem already taken up by William Graves and other observers, Sellin confirmed their findings; publicity about executions did not make much difference in homicide activities in a state or city. Finally, Sellin's work also suggests that the rate of murderous attacks on police officers in states with the death penalty for that offense was no lower than in states without it. This result is in line with Campion's finding noted above.

47 Campion, *Does the Death Penalty Protect State Police?* in *THE DEATH PENALTY IN AMERICA* 301 (H. Bedau ed. 1964).

48 Graves, *A Doctor Looks at Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 322 (H. Bedau ed. 1964).

49 T. SELLIN, *CAPITAL PUNISHMENT* (1967).

Sellin's work obviously influenced Justice Marshall in *Furman*.⁵⁰ One serious problem, however, lies in his broad category of "homicide rates." Statistical data compiled by most states and the FBI does not indicate the proportion of murders among "homicides." While manslaughter is a homicide it is not punishable by death. Thus, Sellin's data included homicide activities for which death was not prescribed by the law. Assuming that the adjacent states chosen by Sellin were capable of being matched, it is quite possible that the lack of change in homicide rates conceals some variations if capital offenses were singled out from the data.

Another problem is illustrated by the very case of *Furman*, where the issue arose out of the death penalty imposed for rape and robbery, but not for homicide. The penalty is prescribed for a number of nonhomicidal crimes (kidnaping, etc.) in various states. The use of homicide rates, then, excluded data that might be relevant.

One point articulated by several justices in *Furman* suggests a further problem with Sellin's findings. Capital punishment has been imposed so infrequently that it may have ceased to be an active factor in the decisions of those criminals who chose to think rationally. Since 1967, as noted above, no death sentence has been administered. For an informed person, then, what exists in the legal codes may not constitute a substantial threat. The odds of being put to death are so small that he may well choose to ignore them in a criminal decision.

In order to better understand the implications of deterrence, it would be useful to take an analytic look at the decisional process for a crime. Murder may be committed by four types of persons with differing mental states. The first is the insane; a person who either could not control his impulse to kill or did not know what he was doing. The second type includes persons whose intentional crimes were not designed to kill, yet death of another person resulted incidentally. For this type of person, capital punishment would not have entered into the mind before his act since he had not thought of killing a man in the first place. The third type is passionate killers, for whom murder was a successful assault. A casual encounter developed into a rage, which then escalated into violence. The resulting homicide was primarily an extension of the brawl, accomplished with a weapon in most cases. While in law, a person who has knowingly killed another person would be regarded as having committed an intentional crime, the "split second" decision might be made without going through a rational process. To be a deterrent, however, the death penalty must become a decisional factor for a person's action.

It seems clear, then, that capital punishment should be an effective deterrent against only the fourth type, a "rational," cold-blooded killer. In a well-calculated decisional process, the penalty would play the following role:

$$[(1-P) V_g - P(V_p)] - V_n > 0$$

where: V_g is the value of gain by committing the crime;

V_p is the value of punishment;

V_n is the value of not committing the crime and hence staying clear of the law; and

P is the probability that punishment will be imposed on the offender.

50 408 U.S. at 349-51.

For a rational person, the gain of crime offset by the cost of punishment *if inflicted on him* would have to be greater than the gain from remaining a law-abiding citizen. In situations involving capital offenses, where the death penalty is prescribed by law, the value for committing crime should be the most negative relative to any other form of punishment. If the probability of infliction (P) is a certainty, then it is most likely that the offender would be deterred by the penalty. His choice would be between committing the crime with resultant execution, and refraining from the crime. The choice, unfortunately, is not always so clear. Although the law prescribes the death sentence, often it is not the only punishment. Even when it is the only punishment, the probability of its imposition is far from certain. One may never be caught by police; if arrested and prosecuted, one may plead to a less serious offense; one may be acquitted on trial. If convicted the judge or jury may impose life imprisonment rather than the death sentence; and even if the court should sentence the offender to death, the punishment may not be administered. In short, the whole criminal process intervenes between the variable of the death penalty and that of committing a capital crime, making the intended deterrence of the punishment a rather unimportant factor in a decisional process.

Furman v. Georgia and the legislative reinstatement of the penalty in various states, of course, have removed discretion from the judge or jury. But from a rational point of view, the very "humane" reluctance, noted by Chief Justice Burger, to execute a convict, the inefficiency in law enforcement and availability of "diversions" in the system such as plea bargaining, have all seemed to diminish the deterrent effect of capital punishment.

VI. Deterrence—Some Further Thoughts

Criminal law textbooks often assume that deterrence is a major function of the law.⁵¹ This assumption is not unreasonable; common sense dictates that one would not commit a crime in front of a policeman. Yet the necessary presence of a policeman underlies the vital role of effective law enforcement. Efficacy is essential for the law to serve its deterrent function. In April 1965, for example, New York City deployed a large number of police patrols in the subways, assigning one policeman to every subway train and at every station between 8:00 p.m. and 4:00 a.m. This policy continued to be implemented for more than eight years. In an analysis of its effect on subway robberies, it was found that although the rate of robbery continued to rise (in 1970 the rate increased by six times over that in 1965), it fell during the hours when the extra policeman was present.⁵²

Where law enforcement is effective, the law could be a deterrent against crime. In the studies which have attempted to measure the deterrent effect of capital punishment, however, factors involved in the criminal process often are either ignored or not taken into account because of the impossibility of measurement. Most of the problems with the findings, as suggested above, arise from

51 *E.g.*, J. KAPLAN, CRIMINAL JUSTICE (1973). For a nontextbook example, see A. GOLDSTEIN, THE INSANITY DEFENSE 11-15 (1967).

52 J. CHAIKEN, M. LAWLESS & K. STEVENSON, THE IMPACT OF POLICE ACTIVITY ON CRIME: ROBBERIES IN THE NEW YORK CITY SUBWAY SYSTEM (1974).

the remote distance between the two controlled variables—the penalty in the statutes, and rates of certain crimes. “Deterrence” is so elusive largely because it is impossible to know exactly how many people have chosen not to violate the law for fear of punishment. It is possible, however, to test the responses of selected groups of people. Surveys conducted on persons who have already been arrested for offenses are unreliable, since the sample is biased as it excludes those who may have been deterred. For example, answers given by prisoners tend to indicate that they were not afraid of the electric chair.⁵³

Difficulty in measuring deterrent effect does not mean that deterrence does not work. It may be a key notion to measure effectiveness in police strategy. A few years ago, on the assumption that uniformed police may deter criminals from committing crime in their presence, the New York City Police Department assigned one thousand officers dressed in plain clothes to streets in high crime areas. By 1973, they had made over 18 percent of the city’s total felony arrests, even though these officers represented only 5 percent of the city’s police forces.⁵⁴ Clearly, uniformed police do deter, but the deterrence takes effect only in their presence or vicinity.

Evidence like this suggests that although deterrence may work, it operates only in limited situations. The study on subway robberies, noted above, indicates that criminal behavior often reflects reasoned choice by individuals. Presence of the police often works merely to divert criminal activities, rather than eliminate them. If calculation of benefits and costs is behind the commission of some capital offenses (deterrence assumes this calculation), then the likelihood of arrest, the probability of a plea bargaining, the possibility of acquittal because of questionable police conduct or evidence, the odds against execution if one is convicted, are all key factors to be weighed by the person facing the choice. In light of all this, death as a punishment may become a relatively slight factor.

If, on the other hand, calculation is not the way of criminal decision-making, either because the person is incapable of thinking rationally or because he never intends to commit a capital offense, then deterrence by the death penalty is irrelevant. The society should face the fact that some persons are undeterrable. One is confronted with the question, which the Supreme Court escaped in *Furman*, what should we do about these persons? Would capital punishment be appropriate and fitting for those criminals who have made wrong calculations about the law, who don’t believe that the death penalty will be imposed on them, or who simply are not clear about the course of their own behavior?

VII. Do We Want Capital Punishment?

It seems clear that, in discussing the status of the death penalty, a debate on its utility in terms of deterrence will not get us very far. Data will probably continue to be cited by either side to support an argument, but no solution will automatically emerge from this utilitarian debate. Since too much is unknown

⁵³ F. SIMRING & G. HAWKINS, *DETERRENCE* 30-32 (1973).

⁵⁴ Data reported in Wilson, *Do the Police Prevent Crime?*, N.Y. Times, Oct. 6, 1974 (Magazine), at 18.

(or perhaps unknowable), the Court may have to base its judgment on moral principles rather than on "scientific evidence." After *Furman*, it would be difficult for the Court to avoid a decision on the issue of justice. *Furman* seems to have settled the question whether the Court should intervene in such a case, or defer it to the state legislatures. Despite the criticism by Justices Powell and Rehnquist that the Court in *Furman* acted against the "democratic process," the majority chose to strike down all the statutes which gave discretion to judges or juries in imposing the death sentence. In theory at least, capricious administration has been negated by *Furman*. It is now appropriate to make a decision on the intrinsic value and moral acceptability of the penalty.

If the "democratic process" is at issue then it may be useful to look at two factors. The first is the will expressed by the state legislatures. While the fact that 29 states have reinstated the death penalty for specific crimes is relevant, it does not necessarily suggest that the "representatives of the people" believe that the penalty is useful as a deterrent. It may well be the articulation of a moral concern over the commission of certain atrocious crimes or that a large number of elected officials believe that, for crimes that are especially heinous, "an eye for an eye" still would be an appropriate societal response.

Public opinion on the issue is ambivalent. Prior to 1966 only 42 percent favored the death penalty and support for it then declined markedly. In 1969, however, endorsement of the penalty had increased, reaching 51 percent.⁵⁵ Little can be derived from the polls, therefore, except that the society is evenly divided on the issue.

The Court will also be divided. On the basis of the opinions expressed in *Furman*, one would expect a division between Brennan and Marshall on the one hand, and Burger, Blackmun, Powell and Rehnquist if deterrence (or the burden for its proving or disproving) should be the issue. The attitudes of Justices Stewart, White and Stevens are unclear. Any one of them could tilt the balance toward the *status quo*. If, however, moral acceptability is the issue, which it should be, one might anticipate a division between Burger, Brennan and Marshall on one side, and Stewart, White, Blackmun, Powell and Rehnquist on the other side. Despite public speculation, Justice Stevens might not cast the decisive "swing" vote.

VIII. Conclusions

Among several problems posed by the death penalty, the Supreme Court in *Furman* chose to attack the one concerning its discriminatory administration. As a result, not only was the core issue of the penalty's constitutionality left unresolved but, in addition, the *Furman* ruling seems unconvincing in its rationale. For one thing, the death sentence had virtually disappeared from practice, and thus its "capricious" administration, if any, could be regarded as part of recent history. What Justice Stewart considered as the striking by lightning appeared to have not struck for nearly a decade. For another, rarity may not reflect capriciousness. Instead, it seemed to indicate the "humaneness" of the judge or jury

55 Erskine, *The Polls: Capital Punishment*, 34 PUBLIC OPINION QUARTERLY 290 (1970).

who had discretion on whether to impose a death sentence. Moreover, no strong evidence can be derived from available empirical studies to show that minority groups have been sentenced to death selectively or disproportionately. While it seems true that in the South Negroes were more likely to be sentenced to death than whites, the phenomenon reflects as much capricious imposition of capital punishment as discrimination against Negroes at other stages of the criminal process. Removing the death penalty from the process of discretionary sentencing does not solve the broader problem of discrimination.

While the *Furman* ruling attacks discriminatory practice, its debate revolves around the deterrent effect or utilitarian value of the death penalty. Capital punishment either deters or it does not: an issue that is clearly an empirical question. However, although empirical questions often can be answered on the basis of facts and data, this one is particularly difficult. No one knows how many persons chose not to commit a crime because of capital punishment. Some studies tend to focus on the motivations of those who have violated the law; but many of these people certainly have not been deterred. Other studies compare the rates of crime in various situations, concluding that the death penalty has made no difference in crime rates. Aside from the many theoretical problems which tend to undermine the validity of these studies, a distinctive weakness lies in their inability to bridge the remote distance between capital punishment in the law codes and a criminal decision made by an individual. Diversions in the criminal process which intervene between criminal behavior and the imposition of death are so numerous that measurement of correlations between the death sentence and its impact on criminal conduct seems unrealistic. As is shown in this commentary, for those persons on whom capital punishment should have a deterrent effect (not to mention those who are basically undeterrable), the penalty may play a slight role in their decisional process.

Furman suggests the futility of the utilitarian debate. The problem of deterrence has many uncontrollable variables. Despite the claim that evidence was "persuasive,"⁵⁶ it is time to admit that our knowledge about the deterrent effect of the death penalty lacks sufficient certainty. The debate may continue, but it will not carry us very far.

The constitutionality of capital punishment, then, should be resolved on moral value of the penalty. Does it fit our society? Do we consider it an appropriate response to serious crimes? Public opinion polls indicate that the society seems evenly divided. Thus, reference to the "democratic process" does not contribute to a decisive solution. Legislators, in any case, are ill-equipped to announce and elaborate on first moral principles. Accordingly, the Supreme Court not only seems most fit to solve the problem on moral grounds in the context of the Constitution, but will find it difficult again to evade the issue of the intrinsic value of capital punishment. As on so many previous occasions where the Court had to deal with a problem without clear solutions, it should face the moral acceptability of capital punishment in its forthcoming decision, and provide a nonevasive, unambiguous answer to the question.

56 408 U.S. at 359 (Marshall, J.).