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## An Historical Analysis of Mandatory Capital Punishment

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## VII. CONCLUSION

The ordinance of New Bern was definitely in the interest of its citizens. The required reports could possibly mean the swift apprehension of dangerous criminals. Thus, it was within the ordinance-making power of the city.<sup>56</sup> However, because of the limitations placed upon that power, local ordinances are not the solution for the problem. A state statute is necessary to achieve the appropriate result. New Hanover and Alamance counties have effectively protected their health care communities from possible serious consequences for well-intentioned actions. New Bern has not been as successful in its attempt to do the same. North Carolina's medical contingent must take the initiative in preparing proposed legislation for consideration by the General Assembly. A state statute, uniform in application and interpretation, and capable of granting immunity to the individual making the report, is necessary for the protection of a segment of the population that is so vital to North Carolina's welfare.

ROBERT A. BRADY

### An Historical Analysis of Mandatory Capital Punishment

The case and statutory history of the death penalty in the United States is well documented.<sup>1</sup> Its continued constitutionality is, however, a matter of debate. In one-hundred and eighty years since the passage of the eighth amendment,<sup>2</sup> the United States Supreme Court has not once held the death penalty unconstitutional;<sup>3</sup> yet there has unquestiona-

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56. N.C. GEN. STAT. § 160A-174 (1972).

1. H. BEDAU, *THE DEATH PENALTY IN AMERICA* (1967 rev. ed.); E. BERKSON, *THE CONCEPT OF CRUEL AND UNUSUAL PUNISHMENT* (1975); DAVIS, *THE MOVEMENT TO ABOLISH CAPITAL PUNISHMENT IN AMERICA, 1787-1861*, 23 (1957); Forman, *Capital Punishment: "Evolving Standards of Decency"*, 19 LOYOLA L. REV., 81 (1972-73); Grannucci, *Nor Cruel and Unusual Punishment Inflicted: The Original Meaning*, 57 CALIF. L. REV., 839 (1969); P. Makcey, *The Inutility of Mandatory Capital Punishment: An Historical Note*, 54 B.U.L. REV., 30 (1974); Passell, *Deterrent Effect of the Death Penalty: A Statistical Test*, 28 STAN. L. REV., 61-80 (1975); Note, *Capital Punishment in Virginia*, 58 VA. L. REV., 97 (1972); Note, *Constitutional Law—Capital Punishment*, 41 FORDHAM L. REV., 671 (1973); Note, *Discretion and the Constitution of the New Death Penalty Statute*, 87 HARV. L. REV., 1690 (1974); Comment, *Supreme Court and Capital Punishment from Wilkerson to Witherspoon*, 14 ST. LOUIS L.J., 463 (1970).

2. U.S. CONST. amend. VIII.

3. *State v. Waddell*, 282 N.C. 431, 194 S.E.2d 19 (1973).

## HISTORICAL ANALYSIS

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bly been a steady erosion of its constitutional underpinnings.<sup>4</sup> Within the limits of that debate, this comment will examine the degree to which the United States Supreme Court is bound by stare decisis and evaluate whether any ruling by the court would weaken the doctrine of separation of powers.

## AN HISTORICAL ANALYSIS OF MANDATORY CAPITAL PUNISHMENT

### I. JURY NULLIFICATION

American penal policy is marked by a "rebellion against"<sup>5</sup> the English common-law rule imposing mandatory death sentences on all convicted murderers. The first Congress of 1789, for example, passed the eighth amendment to prohibit the use of excessive and cruel penalties,<sup>6</sup> a principle that had been stated in the English Magna Carta, but had never been enforced.<sup>7</sup> The penalties included death by torture and by beheading for the crime of murder. Later, during antebellum America, it was reported that ". . . murderers were escaping punishment altogether because of the jurors' reluctance to impose the death penalty."<sup>8</sup> In some jurisdictions,<sup>9</sup> distinctions began to appear between types of murder; the death penalty was completely abolished in still other states.<sup>10</sup>

Following the Civil War, many states vigorously enforced the mandatory death penalty.<sup>11</sup> Simultaneously, the United States Supreme Court

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4. Polsby, *The Death of Capital Punishment?*, *Furman v. Georgia*, 1972 SUPREME COURT REV., 1.

5. McGautha v. California, 402 U.S. 183 (1971).

6. *Id.* at 198.

7. Chapter 14 of the Magna Charta states: "A free man shall be amerced for a trivial offence, and in accordance with the degree of the offence; and for a serious offence he shall be amerced according to its gravity, saving his livelihood; and a merchant likewise saving his merchandise; in the same way a villein will be amerced saving his wainage; if they shall fall into our mercy. And none of the aforesaid amercements shall be imposed except by the testimony of reputable men of the neighborhood." See Grannucci, *Nor Cruel and Unusual Punishment*, at 845-46 (1969). The English Bill of Rights stated that "excessive bail ought not to be required nor excessive fines imposed, nor cruel and unusual punishments inflicted." See 1 W. & M., Sess. 2, c. 2; 8 ENGLISH HISTORICAL DOCUMENTS, 1669-1714, 122 (A. Browning, Ed., 1953).

8. Mackey, *The Inutility of Mandatory Capital Punishment: Historical Note*, 54 B.U.L. REV. 30, 32 (1974). "Antebellum Americans then, whose experience with mandatory capital punishment was extensive, tended to account it a dangerous failure. They were satisfied that mandatory capital punishment indeed has a deterrent effect, it deterred jurors from convicting palpably guilty men."

9. 402 U.S. at 198.

10. The North Carolina Attorney General's office has compiled a detailed report, dated April, 1975, which documents the current status of the death penalty in each state.

11. Davis, *The Movement to Abolish Capital Punishment in America, 1787-1861*, 63 AM. HIS. REV., 23 (1957).

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itself began to recognize the necessity of relaxing mandatory death sentencing as a means of "humanizing" the penalties.<sup>12</sup> For example, it remanded the case of *Calton v. Utah*,<sup>13</sup> where the jury had not been informed of its right to decide whether a murderer ought to receive life imprisonment or an execution. It examined contemporary writings on capital punishment and compared the American scheme of punishments to the practices of other nations.<sup>14</sup> Its dissenters rallied against the excessive and unnecessarily cruel nature of capital punishment.<sup>15</sup>

By the late 1800's, the problem of jury nullification<sup>16</sup> had appeared again. A Congressional Act of 1897 established the right of federal juries to qualify the mandatory imposition of the death penalty, the object of the bill being

. . . to diminish the infliction of the death penalty by limiting the offenses upon which it is denounced and by providing in all cases a latitude in the tribunal which shall try then to withhold the extreme punishment when deemed too severe.<sup>17</sup>

Two years later, in *Winston v. United States*,<sup>18</sup> the Court remarked on the trend in state legislatures to recognize the reluctance of jurors to concur in capital convictions. Legislators, noted the Court, were compensating for their nullification by allowing some cases of murder to be punished by imprisonment, instead of death; by creating degrees of murder, with any crime less than first degree murder requiring imprisonment; and by permitting juries to decide whether murder should be punished by death or imprisonment in certain mitigating circumstances.<sup>19</sup> The Court held in *Winston* that federal juries could sentence a convicted murderer to life imprisonment "at their discretion",<sup>20</sup> rather than in mitigating circumstances only.

The Court's response to jury nullification stemmed from its recognition of the necessity of reducing mandatory death sentencing. Its award of discretion evinced respect for the jury as representing the opinion of the community towards types of punishment and the manner in which they are imposed.<sup>21</sup> Nullification represented the wish of the communi-

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12. *Furman v. Georgia*, 408 U.S. 238, 402 (1972).

13. 130 U.S. 83 (1888).

14. *Wilkerson v. Utah*, 99 U.S. 130 (1879).

15. *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting).

16. "Jury nullification" was the term describing the phenomenon of juries not willing to convict clearly guilty men, because conviction automatically meant execution.

17. S. Rep. # 846, 53 rd. Cong., 3d Sess. (1894).

18. 172 U.S. 303 (1899).

19. *Id.* at 310-11.

20. *Andres v. U.S.*, 333 U.S. 740, 747 (1948).

21. *Furman v. Georgia*, 408 U.S. at 388 (Burger, C.J., dissenting). See FORSYTH, HISTORY OF TRIAL BY JURY, 367-68 (2nd. Ed. 1971). "When in respect of any class of offenses the difficulty of obtaining convictions is at all general in England, we may hold

ty itself to move away from mandatory death sentencing, and, conceivably, away from death sentencing itself. Whichever interpretation one chooses, the Court did act to restrict the use of mandatory death penalties as early as 1899.

## II. THE EVOLVING STANDARDS OF DECENCY TEST

The evolving standards of decency test, developed at the end of the nineteenth century, was used to evaluate the appropriateness of applying certain punishments to certain crimes.<sup>22</sup> The Court had used a similar concept in the case of *Wilkerson v. Utah*.<sup>23</sup> There, the Court examined how "developing thought" should affect its decisions.<sup>24</sup> In 1910, the landmark decision of *Weems v. United States* invalidated a Philippine legislative penalty, imposing fifteen years of hard labor and a \$4,000 fine on a United States public official convicted of falsifying public and official documents, on the grounds that it was cruel and unusual punishment under both United States and Philippine law. The Court held that the eighth amendment ". . . is progressive . . . and not fastened to the obsolete, but may acquire meaning as public opinion becomes enlightened by a humane justice."<sup>25</sup> It then compared the punishments of different jurisdictions, in relation to the offenses, and for the first time invalidated a legislature's prescription of a specific criminal penalty for a certain offense.<sup>26</sup>

The principle of permitting the clauses of the eighth amendment to "acquire meaning as public opinion becomes enlightened by a humane justice" was not applied in *Francis v. Resweber*.<sup>27</sup> The Court in *Francis* interpreted the *Weems* decision as one based on a comparison of punishments. Since only one punishment—death—was involved in *Francis*, the Court said that *Weems* did not apply.<sup>28</sup> In *Francis*, the state's electrical machinery suffered a mechanical difficulty and failed to electrocute the petitioner Francis, a convicted murderer. A new death warrant was issued and Francis appealed on the grounds that a second

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it an axiom that the law require amendment. Such conduct in juries is the silent protest of the people against undue severity. This was strongly exemplified in the case of prosecutions for the forgeries of bank-notes when it was a capital felony. It was in vain that the charge was proved. Juries would not condemn men to the gallows for an offense of which the punishment was out of all proportion to the crime; and as they could not mitigate the sentence, they brought in verdicts of not guilty. The consequence was that the law was changed; and when secondary punishments were substituted for the penalty of death, a forger has no better chance of an acquittal than any other criminal."

22. *Weems v. U.S.*, 217 U.S. 349 (1910).

23. 99 U.S. 180 (1879).

24. *Id.*

25. 217 U.S. at 378.

26. *Id.* at 346-82.

27. 329 U.S. 459 (1947).

28. *Id.* at 463.

execution would violate the cruel and unusual punishment clause of the eighth amendment and deny him his due process rights under the fourteenth amendment.<sup>29</sup>

In ruling against the petitioner's plea, the Court based its decision on what "the traditional humanity of modern Anglo-American law considered cruel and unusual punishment."<sup>30</sup> What was cruel and unusual under the traditional humanity of modern Anglo-American law was the "wanton" infliction of "unnecessary" pain.<sup>31</sup> The infliction of pain that was "inherent in the method of the punishment" was also considered cruel. The Court held that the pain suffered by the petitioner was not inhumane or cruel under the traditional humanity test. *Weems'* principle that the eighth amendment should be interpreted according to modern notions of cruel and unusual was bypassed. How "the traditional humanity" of American law was being measured, or had ever been established, the Court did not discuss. Nor was mention made of "public opinion," one constitutional standard by which the Court has determined whether or not a punishment violates the cruel and unusual clause of the eighth amendment, and which both the Court in *Weems*, and Justice Frankfurter, concurring in *Francis*, emphasized.<sup>32</sup> No authority except the 1889 case of *In Re Kemmler* was cited by the Court to support its holding.<sup>33</sup>

*Trop v. Dulles*<sup>34</sup> explicitly evoked the evolving standards-of-decency test to measure the meaning of the eighth amendment, but applied a predominantly static, not evolving standard. The Court referred to the death penalty as used "throughout our history" and as being "widely accepted".<sup>35</sup> Then the Court held that the death penalty did not violate the eighth amendment's cruel and unusual clause. The mere survival of the death penalty and its longtime use, the Court's reasoning implied, proved that the standards of decency and cruelty had not changed sufficiently to warrant ruling capital punishment unconstitutional. The Court did not indicate whether it knew what were the current standards of decency, or if it did know, how it was measuring those standards.

The Court in *Trop* did note that the "moral and practical" arguments

29. *Id.* at 459.

30. *Id.* at 463.

31. *Id.* at 464.

32. *Id.* at 471.

33. *Id.* at 463.

34. 356 U.S. 86, 101 (1958). "The words of the (Eighth) Amendment are not precise, and . . . their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society . . . . The basic concept underlying the Eighth Amendment is nothing less than the dignity of man. While the state has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards."

35. *Id.* at 99.

against capital punishment were "forceful".<sup>36</sup> That these arguments were recognized by the Court, even if they were not accepted, was indicative of a change in the attitude of the Court toward capital punishment. This recognition also required that the Court assign weight to evidence supporting these arguments. An important example of such an argument is the stance taken by the Court in both *Weems* and *Trop*,<sup>37</sup> that retribution should not be the sole basis for retaining the death penalty. As expressed in *Williams v. New York*,

... retribution is no longer the dominant objective of the criminal law. Reformation and rehabilitation of offenders have become important goals of criminal jurisprudence.<sup>38</sup>

The incorporation of these goals indicated that the standards of decency were changing, despite the reluctance of the Court to admit that the standards had changed sufficiently to make the death penalty unconstitutional. Allowing juries the right to sentence a murderer to prison, rather than to an execution, indicated such a shift in the attitude of the Court, stated or unstated. The life of a person who took another person's life was, according to Court fiat, worth preserving. Murderers were no longer unthinking, unfeeling animals who needed to be put away for their own sake, retribution's sake and for society's sake.<sup>39</sup> More often than not, those sentenced to die were ignorant, poorly-educated men,<sup>40</sup> unable to articulate their response to their execution.<sup>41</sup> But the evolving ideas of rehabilitation, jury discretion, and decency—accepted by the Court—expressed the belief that the deliberate loss of life was for these men not any less agonizing, fearful and horrifying than it would be for the most articulate, learned and wealthy of men.<sup>42</sup>

The evolving standards of decency test and the idea of rehabilitation were revitalized in *Robinson v. California*.<sup>43</sup> There the Court held that a state statute making it a misdemeanor for a person to be addicted to the use of narcotics inflicted a cruel punishment on him, in violation of the eighth amendment and the due process clause of the fourteenth amendment.<sup>44</sup> The Court considered and evaluated "current knowledge" and "changing standards" concerning narcotic addiction, and

36. *Id.*

37. 408 U.S. at 344 (Marshall, J., concurring). See 356 U.S. at 97, 113 (Brennen, J., concurring).

38. 337 U.S. 241, 248 (1949).

39. H. MATTICK, *THE UNEXAMINED DEATH* (1966).

40. National Criminal Justice Information and Statistics Service, Law Enforcement Assistance Administration, U.S. Dept. of Justice, Capital Punishment 1974, NATIONAL PRISONER STATISTICS BULLETIN, No. SD-NPS-CP-3, (Nov. 1975).

41. G. Gottlieb, *Capital Punishment*, 15 CRIME & DELIN'CY, 1 (Jan. 1969).

42. *Id.*

43. 370 U.S. 660 (1962).

44. *Id.*

concluded that it was a disease.<sup>45</sup> The Court also evaluated the statute in terms of a wide range of alternatives to punishment which it believed were available to the legislature.<sup>46</sup> *Robinson* thus stands for the right of the United States Supreme Court to compare a state's punishment to alternatives to punishment, or to other punishments, and to evaluate a state's penal policy where a statute has been challenged as being unconstitutional. Most of the Court's decisions, following *Robinson* and concerning capital punishment, do not, however, give *Robinson's* precedent as much weight as it might be given.

### III. JURY DISCRETION TO RECOMMEND MERCY

The problem of jury discretion in capital punishment cases of the twentieth century appeared in *McGautha v. California*<sup>47</sup> (the last important capital punishment case before *Furman v. Georgia*<sup>48</sup>). There, the petitioners contended that the jury's right to decide which convicted slayers should live and which should die was discretionary.<sup>49</sup> The petitioners claimed that this sentencing process denied them their fourteenth amendment rights of due process because no rational basis had been established by the state legislature to distinguish those who were chosen to live from those who had been chosen to die. The petitioners contended that discretion occurred more often than it had in the nineteenth century, when it had been first granted, because juries were selecting only a small percentage of those convicted of a capital punishment crime for execution.

The majority admitted that the percentage of convicted murderers selected to die, rather than to live, was smaller than it had been in the past.<sup>50</sup> However, the legislature's inability to account for the distinction between those who lived and those who died was not discussed by the Court. In fact, it has never been discussed. Instead, the Court addressed the question whether the petitioner's rights were infringed by permitting a jury to impose the death penalty without standards to guide them.<sup>51</sup> The *McGautha* Court answered by saying it felt it "beyond human ability" (and thus beyond the legislature's ability) to attempt to select those characteristics of homicides which deserve capital punishment.<sup>52</sup> It also determined it was beyond human ability to translate

45. M. MELSTNER, *CRUEL AND UNUSUAL PUNISHMENT: THE SUPREME COURT AND CAPITAL PUNISHMENT*, 179-80 (1973).

46. *Robinson v. California*, 370 U.S. 660, 665 (1962).

47. 402 U.S. 183 (1971).

48. *Furman v. Georgia*, 408 U.S. 238 (1972).

49. 402 U.S. 183, 196 (1971).

50. *Id.* at 204.

51. *Id.* at 183.

52. *Id.* at 199.



these characteristics into language understandable to the sentencer, whether jury or judge. On this basis, the Court decided that there existed no constitutional reason to upset the settled practice of standardless jury sentencing in capital punishment cases.<sup>53</sup>

## THE EXTENT OF THE COURT'S INTERVENTION IN STATE LEGISLATIVE PUNISHMENT STATUTES

### I. The *Furman v. Georgia* Decision

The per curiam decision in *Furman v. Georgia*<sup>54</sup> held that statutes permitting the jury total discretion to impose or not to impose the death penalty, violated the eighth amendment and the due process and equal protection clauses of the fourteenth amendment. Each of the five majority justices based his decision on a slightly different rationale, even though the effect of the holding remained the same. Two Justices, Marshall and Brennan, concluded that the death penalty, discretionarily or mandatorily applied, was unconstitutional. Justice Brennan found that the state statutes<sup>55</sup> violated the eighth amendment command that the State "may not inflict punishments that do not comport with human dignity."<sup>56</sup> Justice Marshall noted that six purposes could possibly be promoted by the state legislature in its use of the death penalty: retribution; deterrence; prevention of recidivism; encouragement of guilty pleas and confessions; eugenics; and economy. However, Justice Marshall concluded that these legitimate legislative purposes could all be fulfilled by less severe penalties.<sup>57</sup> Justice Marshall noted that retribution has been "denigrated" as a goal of capital punishment, in both case law and by legal scholars.<sup>58</sup> Justice Marshall wrote that statistics do not show any relationship between the murder rate and the presence and use of capital punishment.<sup>59</sup> His main argument, aside from indicating

53. *Id.* at 203.

54. 408 U.S. 238 (1972).

55. One petitioner was convicted of murder in Georgia and was sentenced to death under GA. CODE ANN., § 26-1005 (1969). The second petitioner was convicted of rape in Georgia and was sentenced to death under GA. CODE ANN., § 26-1302 (1969). The third petitioner was convicted of rape in Texas and sentenced to death under TEXAS PENAL CODE, Art. 1189 (1961).

56. *Id.* at 305 (Brennan, J., concurring). Justice Brennan found that "death is an unusually severe and degrading punishment; there is a strong possibility that it is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment."

57. *Id.* at 342 (Marshall, J., concurring).

58. *Id.* at 343.

59. *Id.* at 351.

59. *Id.* at 360, 369, n.163. "Assuming knowledge of all the facts presently available regarding capital punishment, the average citizen would . . . find it shocking to his conscience and his sense of justice. . . ." "Justice Powell suggests that this conclusion is

that capital punishment is excessive, is that it is "morally unacceptable to the people of the United States at this time in their history."<sup>60</sup> Not finding it necessary to settle the question of the constitutionality of the death penalty, Justice Stewart simply held 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 freakishly imposed."<sup>61</sup> He also declined to accept the argument, because "it has not been proved," that those few who are sentenced to die are sentenced because of their race.<sup>62</sup> Justice Douglas also declined to rule on "whether a mandatory death penalty would otherwise be constitutional," or whether a statute, non-discriminatory on its face, may in its application violate the equal protection clause of the fourteenth amendment.<sup>63</sup> Instead, he concluded that the states, because they permitted discretionary sentencing, were discriminatory on their face and in their operation. In that sense, they violated the mandate of the fourteenth amendment's equal protection clause. Finally, Justice White strictly narrowed the context of the question.<sup>64</sup> He held that the infrequent imposition of the death penalty makes it cruel and excessive within the constitutional limitations of the eighth and fourteenth amendments, when it is imposed without serving any social or penal function.<sup>65</sup>

The most immediate effect of the *Furman* decision was to allow legislatures to eliminate the power of juries to recommend mercy. Taken to the extreme, as it has been in a few states,<sup>66</sup> the jury's historical role as maintaining a ". . . link between contemporary, communal values and the penal system,"<sup>67</sup> can be completely nullified. The alterna-

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speculative, and he is certainly correct. But the mere recognition of this truth does not undercut the validity of the conclusion. Mr. Justice Powell himself concedes that judges somehow know that certain punishments are no longer acceptable in our society; for example, he refers to branding and pillorying (as unacceptable). Whence comes this knowledge?"

61. *Id.* at 310 (Stewart, J., concurring).

62. *Id.*

63. *Id.* at 257 (Douglas, J. concurring).

64. *Id.* at 311 (White, J., concurring). Justice White's questions concerned ". . . the constitutionality of the capital punishment statutes under which (1) the legislature authorizes the imposition of the death penalty for murder or rape; (2) the legislature does not itself mandate the penalty in any particular class or kind of case . . . but delegates to judges and juries the decisions as to those cases, if any, in which the penalty will be utilized; and (3) judges and juries have ordered the death penalty with such infrequency that the odds are now very much against imposition and execution of the penalty with respect to any convicted murderer or rapist." The Supreme Court had originally granted certiorari on the question "does the imposition and carrying out of the death penalty in (these cases) constitute cruel and unusual punishment in violation of the 8th and 14th Amendments."

65. *Id.* at 312.

66. See N.C. GEN. STAT. § 14-17 (1974).

67. *Witherspoon v. U.S.*, 391 U.S. 510, 519 (1968). See note 19 *supra*.

tive of a lesser punishment is not possible, as historically it has been, where the imposition of the death penalty is mandatory.<sup>68</sup> Most commentators report the *Furman* decision as holding that statutes which are discretionary on their face are unconstitutional.<sup>69</sup> The question of what the Court will do when faced with a statute non-discretionary or non-discriminatory on its face, but still discretionary, arbitrary, or discriminatory in its application, cannot be answered until such a case appears before the Court.

The second effect was to thoroughly establish a precedent for the Court. The Court's treatment of the case was clearly an examination of whether the legislature's capital punishment policy was appropriate for judicial evaluation. In lieu of the final holding that the policy was unconstitutional, the decision is a precedent in favor of the Court's right to conduct such an examination.<sup>70</sup> The discussion of the merits of such intervention has been a part of the Supreme Court's history in capital punishment as well as other areas of the law.

## II. THE LEGISLATURE'S RIGHT TO DETERMINE CAPITAL PUNISHMENT POLICY

Supporting the legislature's right to determine the limits and scope of state capital punishment policy are three ideas broadly advanced by the dissent in *Furman*. First, the states have always had the right to impose restrictions on behavior in order to protect its citizens. This right has been otherwise referred to as police power.<sup>71</sup> The state also has a legitimate interest in protecting its citizens; that interest is to protect their lives and to keep their economic and social interests located in the state.<sup>72</sup> Secondly, the legislature, which determines these restrictions, more immediately responds to society's "standards of decency".<sup>73</sup> Theoretically, the public can change the legislative decision that offends its sense of decency by electing new representatives. But, there can be no such response or social dissent to a United States Supreme Court decision altering legislative policy or statutory law. Thirdly, the Court has only infrequently invalidated a legislatively prescribed punishment. As

68. 408 U.S. at 413 (Blackmun, J., dissenting). Justice Blackmun emphatically states that a death penalty for specific crimes without any alternative of lesser punishment "... encourages legislation that is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of the punishment."

69. Comment, *The Supreme Judicial Court and the Death Penalty: The Effect of Judicial Choice on Legislative Options*, 54 B.U.L. REV., 158, 164 (1974).

70. Ehrhardt, Hubbard, Levinson, Smiley and Wills, *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L. & CRIMINOLOGY, 2, 3 (1973).

71. *Lochner v. New York*, 198 U.S. 45 (1905).

72. 408 U.S. at 418 (Powell, J., dissenting).

73. *Id.* at 383 (Burger, C.J., dissenting).

the holdings of *Trop*, *Francis*, *Weems*, and *In Re Kemmler*<sup>74</sup> indicate, the Court grants legislative standards in the area of capital punishment a presumption of validity.<sup>75</sup> This presumption is based on what dissenting Justice Powell describes as the legislature's "special competency."<sup>76</sup> Justice Powell earlier stated that where the Court decides to intervene and enforce the Constitution, it should do so understanding its action to be, in the words of Justice Holmes, ". . . the gravest and most delicate duty that the court is called on to perform."<sup>77</sup> Emphasizing that the legislature is presumed to embody society's standards of decency, ". . . whether or not provable and whether or not true at all times . . .," Chief Justice Burger writes that the presumption could only be ". . . negated by unambiguous and compelling evidence of legislative default."<sup>78</sup>

### III. JUDICIAL RIGHT TO INTERVENE

#### a. *Protection of Constitutional Rights*

The United States Supreme Court's right and willingness to intervene are defined and limited by the Constitution. For example, a petitioner, on trial for committing a capital crime, claims his due process rights under the eighth and fourteenth amendment are being violated by a state that imposes the death penalty for certain categories of homicides. Where such a claim has been raised, the cruel and unusual punishment clause of the eighth amendment imposes upon the Court a duty to intervene, or critically analyze legislative judgment, and ". . . determine the constitutional validity of a challenged punishment".<sup>79</sup> When the Court decides that the power of the legislature is in conflict with a constitutional prohibition, it has the right to judge the conflict.<sup>80</sup> If necessary, the Court can then override legislative classifications of certain behavior as criminal, and overrule legislative prescription of certain punishments to curb that behavior.<sup>81</sup> Evaluating state punishment procedures in terms of the Constitution is also recognized as the Court's duty.<sup>82</sup> Implicit in this duty, as described in *Weems* and *McGautha*, is the determination of whether the defendants have been denied rights

74. 136 U.S. 436, 447 (1890).

75. 408 U.S. at 451 (Powell, J., dissenting).

76. *Id.*

77. *Id.* at 431.

78. *Id.* at 384 (Burger, C.J., dissenting).

79. *Id.* at 258 (Brennen, J., concurring).

80. *Weems v. U.S.*, 217 U.S. 378 (1899).

81. *Id.* at 378-80. The majority further stated that "in such case, not our discretion but our legal duty, strictly defined and imperative in its direction, is invoked. Then the legislative power (to define crimes and punishments) is brought to the judgment of a power superior to it for that instant."

82. 402 U.S. at 195.

guaranteed by the Constitution.<sup>83</sup> Such rights are the rights that the Court is mandated to protect, and their existence provides the essential motivation behind *Weems*.

*b. The Bill of Rights and Fundamental Fairness Doctrines*

The Bill of Rights and "fundamental-rights" tests have served as guidelines for judicial evaluation of legislative enactments. These tests are implicitly a part of the *Furman* discussion of the application of the evolving-standards-of-decency test of the death penalty's constitutionality. The fundamental fairness test established a gradual process of "judicial inclusion and exclusion" based on the Justices' determination of how fundamentally fair the state laws were according to present-day standards.<sup>84</sup> The doctrine was criticized for

. . . proscribing no specific and clearly ascertainable constitutional command that judges must obey in interpreting the Constitution.<sup>85</sup>

Said one Justice, it left ". . . judges free to decide at any particular time whether a particular rule or judicial formulation embodies an 'immutable principle(s) of free government', or is 'implicit in the concept of ordered liberty', or whether certain conduct 'shocks the judges conscience' or runs counter to some other similar, undefined and undefinable standard."<sup>86</sup> Such freedom would permit the Justices to strike down any state laws they did not like.<sup>87</sup>

The second test selectively incorporates many of the Bill of Rights' protections into the fourteenth amendment and therefore applies them to the states.<sup>88</sup> Among these are the right to trial by jury, the right against compelled self-incrimination, the right to counsel, the right to compulsory due process for witnesses, the right to confront witnesses, the right to a speedy and public trial, the right to be free from unreasonable searches and seizures, and the right to be free from cruel and unusual punishment.<sup>89</sup>

83. *Id.* at 226 (Black, J., separate opinion). See also 408 U.S. at 313-14 (White, J., concurring).

84. *Twining v. New Jersey*, 211 U.S. 78 (1908).

85. *Duncan v. Louisiana*, 391 U.S. 145, 168 (Black, J., with Douglas, J., concurring).

86. *Id.* at 168.

87. *Id.* at 176-79 (Harlan, J., dissenting). Justice Harlan presents the positive aspects of the evolving rights test.

88. *Id.* at 176 (Harlan, J., dissenting). *Distinguish Palko v. Connecticut*, 302 U.S. 319 (1937). The court in *Palko* indicated that it considered the privileges and immunities of the Federal Bill of Rights to have originally applied only in cases involving claims against the federal government. Only subsequently has the court begun to see if provisions and protections in the Federal Bill of Rights could be absorbed into the Fourteenth Amendment and apply to the states where as the majority explained, the state law violated a fundamental principle of liberty and justice expressed in the Bill of Rights.

89. *Id.* at 166 (Black, J., with Douglas, J., concurring).

The purpose for applying these tests is to protect the rights of state citizens, particularly at trial, as the Magna Carta had attempted to do during the times when English citizens were liable ". . . to sudden arrest and summary conviction in the courts and by judicial commissions with no sure and definite procedural protections and under laws that might have been improvised to try their particular cases."<sup>90</sup> The tests provide the Court with a dilemma. The Justices can choose to strictly limit the test protecting the rights expressly stated in the Bill of Rights. State laws, which overtly infringe upon a citizen's rights not expressly stated in the Bill, cannot therefore be struck down. On the other hand, the Justices can choose to invalidate any law that, according to the Justices' experience, unfairly infringes upon the citizen's right to his liberty or property. This choice risks the possibility of imposing an arbitrary and subjective judgment of what is proper criminal policy upon the states.

The Court has, in fact, chosen to protect substantive and procedural due process rights in a manner related to its handling of capital punishment; where the state, in defining the legitimate interests it is trying to protect, has clearly infringed upon a constitutionally protected right. The Court has not directly ruled on whether it should more carefully evaluate legislation which limits the "political process" in a way that prevents the elimination or rewriting of unwanted state laws. It has, however, specifically limited restrictions on the right to vote, on the dissemination of information, on interference with political organizations, and on peaceable assembly.<sup>91</sup> It has been urged that equally careful scrutiny be given state laws which prevent an "insular" minority from being able to use the political processes to change the law.<sup>92</sup>

Similarly, the Court in *Furman* cautioned against allowing legislatures unlimited freedom in their use of punishment. The Court commented that the founding fathers passed the eighth amendment to prevent this freedom from being used for cruel and tyrannical ends and for purposes both "honest and sinister".<sup>93</sup> The potential of a state government to usurp the rights of citizens and impose upon them cruel and unusual punishments was also one important reason why the fourteenth amend-

90. *Id.* at 169.

91. *U.S. v. Carolene Products Co.*, 304 U.S. 144, 153, n.4 (1938). See *Near v. Minnesota*, 283 U.S. 697, 708-9 (1931) where a state statute, which permitted newspapers considered scandalous or defamatory by the court, was used to enjoin the petitioner's paper from printing further stories on the corruption of city government officials. The court said that ". . . the statute must be tested by its operation and effect . . . . It is thus important to note precisely the purpose and effect of the statute as the state court had construed it."

92. 304 U.S. 144, 153, n.4 (1938).

93. 217 U.S. at 373-74.

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ment was proposed.<sup>94</sup> In *Furman*, the states were held to have discriminated in their death penalty.<sup>95</sup> The states were also not able to show a sufficiently legitimate interest to warrant a law depriving one of their citizens of his fundamental right to life.<sup>96</sup>

### c. Legislative Default

Aside from intervening to protect individual constitutional rights infringed upon by state statutory law, the Court has intervened to protect constitutional rights where legislatures have been guilty of default. Such intervention has been accomplished where there exists, as in *Robinson v. California*, less restrictive alternatives. The Court can then be expected to examine these alternatives and to determine whether any of them can serve to uphold or protect the state's legitimate interests as adequately as does the legislature's statutory law.<sup>97</sup> Where the legislature has been hesitant to enact effective legislation, the Court has intervened to fill legislative default, as in the civil rights laws of the late 1950's and 1960's, or in instances of labor-securities case law.<sup>98</sup> Issues that may arise after legislation has passed and are not settled by subsequent legislation, or that are not fully discussed at the time of passage because of public pressure demanding immediately operable and "statistically more successful law enforcement",<sup>99</sup> will be subject to court scrutiny and determination. The failure of a legislature to consider the death penalty in light of contemporary thought regarding its imposition and the meaning of "cruel" and "unusual" has also required the Court, as in *Furman*, to fill legislative voids.<sup>100</sup> The question remaining to be answered is the scope of judicial review of state legislation that imposes the death penalty for certain crimes.

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94. 408 U.S. at 241 (Douglas, J., concurring).

95. *Id.* at 245. Justice Douglas pays particular attention to the equal protection cases of *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1961) and *Yick Wo v. Hopkins*, 118 U.S. 356 (1886). *Gomillion* states the court's reaction to the unconstitutional use of absolute state power. "When a state exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right . . . (This principle) has long been recognized in cases which have prohibited a state from exploiting a power acknowledged to be absolute in an isolated context to justify the imposition of an "unconstitutional imposition."

96. *Id.* at 359 (Marshall, J., concurring).

97. D. Victor, *Furman v. Georgia; The Burger Court Looks at Judicial Review*, LAW & SOC. ORD., 393, 398 (1972).

98. *Id.* at 397.

99. There is case law showing that if a particular set of facts, upon which the constitutionality of a state statute rests, do not exist anymore, the statute's constitutionality can be challenged. 304 U.S. at 153.

100. See also Meltsner, *supra* note 45 at 269, n.29.

## NORTH CAROLINA: FROM MERCY TO MANDATORY

## I. EARLY HISTORY

The common law rule of death for any person convicted of murder was codified in North Carolina in 1778.<sup>101</sup> Earlier, in 1774, the legislature enacted an act that prevented the "willful and malicious" killing of slaves, and assigned a punishment of one year for the second conviction if the person was convicted of murder.<sup>102</sup> In 1791, the legislature attempted, in the preamble of another enactment, to make the killing of a slave punishable, if adjudged to be murder, by death. The court in *State v. Boon*, ruling on such a situation, held the defendant could not be sentenced to death on the basis of the enactment, because it was a preamble, and not effective law.<sup>103</sup> By 1837, according to the revised North Carolina Chapter 34, murder, rape, statutory rape, arson, castration, burglary, highway robbery, stealing bank notes, slave stealing, burning a public building, breaking out of jail if under a capital indictment, concealing a slave with the intent to free him, mayhem, and accessory to murder, robbery, arson or mayhem, were, among others, punishable by death.<sup>104</sup> Prior to 1893, there were no degrees of murder in North Carolina. Murder was defined generally as the killing of a human being with "malice aforethought", express or implied, and was punishable by death.<sup>105</sup> Malice aforethought meant ". . . an intent at the moment to do, without lawful authority and without the pressure of necessity, that which the law forbids."<sup>106</sup>

As of the enactment of Chapter 85, North Carolina Public Law of 1893, murder was redefined to include, among other acts, first degree murder that was caused by means of poison, lying in wait, imprisonment, starving, torture or any kind of willful, deliberate or premeditated killing. All other kinds of murder were designated as murders in the second degree.<sup>107</sup> Death, retained for first degree murder under Chap-

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101. *State v. Boon*, 1 N.C. 191, 192 (1801).

102. *Id.*

103. *Id.* at 193. The court in *State v. Boon*, in determining what the 1791 enactment meant by saying that any person convicted of killing a slave was to be punished "as if he had killed a free man", stated there were further questions to be asked. "In case the person had killed a free man, what punishment would the law have inflicted on him? Before this question can be solved another must be asked because upon that, solution of the first depends. What sort of killing was it, or what circumstances of aggravation or mitigation attended the name of murder, and were they such as justified it?"

104. N.C. Rev'd Stat. Vol. 1, ch. 34, sec. 5 (1837). In 1869 the General Assembly reenacted death as the punishment for rape in the Public Law of 1868-69, ch. 167, sec. 2, to give the penalty more than a common law base. *State v. Waddell*, *supra*, at n.2, for a more complete outline of death penalty enactments particularly with regard to rape.

105. *State v. Benton*, 276 N.C. 641, 657, 174 S.E.2d 793 (1970).

106. *State v. Crawford*, 13 N.C. 425 (1828).

107. N.C. GEN. STAT. Ch. 85 (1893).



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ter 85, remained mandatory until 1949. At that time, the legislature voted to amend the statute so that when rendering a verdict of guilty in a case charging the defendant with murder, the jury could recommend mercy and life imprisonment if it chose to do so.<sup>108</sup> The mercy recommendation applied in cases involving first degree murder, burglary, rape and arson.

II. COURT REACTION TO *Furman*

In 1973, following the *Furman* decision, the North Carolina Supreme Court wrote an opinion in the case of *State v. Waddell* that clearly affected North Carolina's capital punishment law.<sup>109</sup> The defendant was charged with rape. He was convicted in the lower court, and appealed to the supreme court on the grounds that the death penalty constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. Interpreting the holding in *Furman*, the supreme court said that the ". . . death sentence may not be inflicted if either judge or jury is permitted to impose that sentence as a matter of discretion."<sup>110</sup> This wording characterized the holdings of many state supreme courts, who also ruled on the constitutionality of their state's statutes.<sup>111</sup> The North Carolina Supreme Court took *Furman's* holding a step further. It held that the *Furman* holding applied to sever the mercy recommendation from the remainder of North Carolina General Statutes § 14-17, and ruled the death penalty mandatory.

Though not admitting to have infringed upon the separation-of-powers protection of the North Carolina Constitution,<sup>112</sup> the court said that "the matter of retention, modification or abolition of the death penalty is a question for the lawmaking authority rather than the courts."<sup>113</sup> The legislature, the court noted, "responds to public opinion and, by legislative enactment, reflects society's standards."<sup>114</sup> Justice Lake also referred to Article XI, sec. 2 of the North Carolina Constitution, under which only the legislature has the power to enact death penalty legislation<sup>115</sup> as he reemphasized the idea that it is the legislature that determines crimes and their punishments.<sup>116</sup>

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108. N.C. GEN. STAT. Ch. 299 (1949).

109. 282 N.C. at 431.

110. *Id.*

111. *Id.* at 461-72 (Bobbitt, J., concurring in part, dissenting in part).

112. See N.C. CONST., art. 1, § 6.

113. *Id.* at 445.

114. *Id.*

115. N.C. CONST., art. 10, § 2. "The object of the punishments being not only to satisfy justice, but also to reform the offender and thus prevent crime, murder, arson, burglary and rape, and these only, may be punishable with death, if the General Assembly shall so enact."

116. 282 N.C. at 449 (Lake, J., concurring).

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To support its intrusion, the court cites its conclusion that its study of the history of the death penalty in North Carolina shows a "constant intent" on the part of the people and the representatives to maintain the death penalty,<sup>117</sup> with or without a mercy recommendation provision. The court also cites seventeen bills which were brought before the North Carolina House of Representatives between 1949 and 1971 to abolish or limit the death penalty, [and were either tabled or defeated], as supporting its conclusion that the people are in support of mandatory capital punishment. However, subsequent to the 1949 Amendment to General Statutes § 14-17, and prior to *Furman*, the North Carolina Supreme Court never held that any constitutionally protected rights were violated by the North Carolina statutes authorizing the jury to recommend mercy for a convicted murderer.<sup>118</sup>

The effect of the North Carolina Supreme Court's decision on the legislature's enactment of a mandatory death sentence can only be estimated. The court insisted that only the legislature was legally authorized to respond to public opinion and can "give expression to what it perceives to be the public will".<sup>119</sup> But, the court had already decided that the public supported capital punishment, and had based a section of its reasoning upon that support. Thus, the legislature would have countermanded judicial authority if it had perceived the public's will as anything less than in full support of capital punishment.

Having eliminated all mercy recommendations, and any participation by the jury until the legislature acted, the court's ruling resulted in a wave of new death sentences that may have reinforced any legislative belief in the concept that the mandatory death penalty was necessary to curb the growing number of murders. If the court's opinion did not specifically limit legislative options, the decision encouraged the legislature to make little effort to explore alternatives to mandatory death.<sup>120</sup> This response differed from the response of a number of other state legislatures enacting new death penalty legislation following the *Furman* decision. These enactments provided that a man could be sentenced to life imprisonment rather than death where the homicide involved certain "mitigating"<sup>121</sup> circumstances.

### III. LEGISLATIVE REACTION TO *Furman* AND *Waddell*

On record, the legislature did not make any attempt to perceive the

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117. *Id.* at 442.

118. *Id.* at 454 (Bobbitt, J., concurring in part, dissenting in part).

119. *Id.*

120. Raleigh News & Observer, Jan. 26, 1974, at 4, Col. 1.

121. C. Ehrhardt, H. Levinson, *The Florida Experience*, 64 J. CRIM. L. & CRIMINOLOGY 10, 16 (1973). Florida's statutory scheme for capital punishment is particularly thorough.

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public will, evaluate in a systematic way the deterrent value of capital punishment, or otherwise seriously consider alternatives to the mandatory death penalty. What appears to have happened over the course of the discussions for the final amendment of North Carolina General Statutes § 14-17, is what one commentator calls "a gradual realization" that the death penalty was needed to protect the society.<sup>122</sup> On January 10, 1973, twenty-seven senators went on record in favor of an "in-depth study" of legislation proposing deterrents to crime, including legislation concerning capital punishment.<sup>123</sup> However, none of the legislation that was actually proposed was based on the studies of a task force.<sup>124</sup> The first bills introduced in both the House and the Senate asked for the mandatory death penalty in all possible categories of first degree murder, rape, first degree burglary and arson.<sup>125</sup> House members proceeded to introduce a bill in favor of life imprisonment, without parole, for all categories;<sup>126</sup> a bill in favor of imprisonment for life for all categories, with some provision for parole;<sup>127</sup> and one bill, which the House passed, creating a three member panel of psychiatrists to commute death sentences for certain mitigating circumstances.<sup>128</sup> In the Senate, a bill calling for a mandatory death penalty, and a bill calling for life imprisonment for the crime of rape (in certain instances) and arson, were introduced on the same day.<sup>129</sup> The rest of the Senate's bills proposed mandatory death. Death for bombing,<sup>130</sup> rape,<sup>131</sup> burglary,<sup>132</sup> and arson,<sup>133</sup> was proposed in separate bills. One bill<sup>134</sup> specified certain instances of premeditated murder that were to be punished by death.<sup>135</sup> The Senate bill which was finally ratified by both houses was introduced on January 30, 1973, and ratified April 8, 1974.<sup>136</sup>

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122. C. Patrick, *Capital Punishment*, 6 WAKE FOR. INT. L. REV. 417 (1970).

123. S. Res. 9, 1973 N.C. General Assembly.

124. Letter from Paul H. Stock, Legislative Services Office, N.C. Gen. Assembly, to John W. Poulos, Sept. 19, 1974.

125. H.B. 17, 1973 Gen. Assembly of N.C. (proposed but not passed). S. Res. 31, 1973 Gen. Assembly of N.C. (proposed but not passed).

126. H.B. 160, 1973 Gen. Assembly of N.C. (proposed but not passed).

127. H.B. 412, 1973 Gen. Assembly of N.C. (proposed but not passed).

128. Raleigh News and Observer, April 12, 1973, at 27, col. 1.

129. S. Res. 31 and S. 32, 1973 Gen. Assembly of N.C. (proposed but not passed).

130. S. Res. 33, 1973 Gen. Assembly of N.C. (proposed but not passed).

131. S. Res. 34, 1973 Gen. Assembly of N.C. (proposed but not passed).

132. S. Res. 433, 1973 Gen. Assembly of N.C. (proposed but not passed).

133. S. Res. 434, 1973 Gen. Assembly of N.C. (proposed but not passed).

134. S. Res. 37, 1973 Gen. Assembly of N.C. (proposed but not passed).

135. *Id.*

136. S. Res. 157, 1973 Gen. Assembly of N.C. The ratified bill reduced the number of capital offenses to two—first degree murder which applies to a range of homicides, and first degree rape (rape of a virtuous female under twelve by a person over sixteen, or rape of a female over twelve where a deadly weapon is used or serious bodily harm is

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Throughout the period during which these bills were being proposed, either Judiciary Committee I or Judiciary Committee II, composed of members from the Senate and the House, evaluated each of the bills as they were referred to them. There is no evidence that either committee used or conducted any study of the use of alternatives to mandatory capital punishment.<sup>137</sup> Rather, the mandate of *State v. Waddell*, and the history of the use of the death penalty in North Carolina were drawn upon to strengthen the mandatory death penalty arguments and language. The only study of policy for the general area of sentencing conducted subsequent to the passage of the bill by the Commission on Sentencing, Criminal Punishment and Rehabilitation, made the following policy recommendations:

The North Carolina judiciary in exercising its considerable discretion in the sentencing of individual offenders should impose the minimum amount of custody or confinement, which is consistent with the protection of the public, the gravity of the offense and the rehabilitation needs of the defendant.<sup>138</sup>

These recommendations encourage policies which are in direct opposition to the use of strict mandatory death penalty sentencing as a means to curb crime—increased discretion, minimum custody and confinement, rehabilitation, and particular allowance for mitigating circumstances, within the sentencing process.

## THE COURT'S RESPONSIBILITY

Whether the death penalty is cruel and unusual punishment and, therefore, unconstitutional per se, in violation of the eighth amendment, is the question that the United States Supreme Court must answer in ruling on the North Carolina case of *North Carolina v. Woodson and Waxton*,<sup>139</sup> one of five cases currently before it. Four particular ap-

inflicted). The penalty upon conviction of burglary or arson was reduced from mandatory death to life imprisonment.

137. See 408 U.S. at 403 (Burger, C.J., dissenting). "While I cannot endorse the process of decisionmaking that has yielded today's result and the restraint that that result imposes on legislative action, I am not altogether displeased that legislative bodies have been given the opportunity, and indeed unavoidable responsibility, to make a thorough re-evaluation of the entire subject of capital punishment."

138. Report, North Carolina Commission on Sentencing, Criminal Punishment and Rehabilitation, April 15, 1975.

139. 287 N.C. 578, 215 S.E.2d 607 (1975). A full hearing of a second more important and complex case, *North Carolina v. Fowler*, has been temporarily postponed. 285 N.C. 90, 203 S.E.2d 803 (1974). The defendant in *Fowler* was charged with and convicted of killing a "longtime" acquaintance and former roommate because of an altercation over a gambling debt. In this case, North Carolina bottoms its right to execute the defendant on the constitutionally retained right of state sovereignty, and on the implicit acknowledgement under the fifth and fourteenth amendments of the power to deprive a person of his life. See Respondent's Brief for Certiorari at 23, 43, *North Carolina v. Fowler*, 419 U.S. 963 (1974). From this sovereignty and this power, the State

proaches to the problem presented by capital punishment are predominant among a number of other answers which the Court may consider.

### I. DISCRETIONARY DEATH PENALTY SENTENCING FOR JURIES

The Court could weaken or, more drastically, overrule the five to four decision against capital punishment in *Furman v. Georgia*. The majority's decision could be interpreted as vague; its vagueness reflected in the various ways that state legislatures chose to interpret it and vague in the Court's hesitancy to set standards for a state's sentencing of capital offenders. Once characterized as vague, confusing or scattered, the decision is subject to judicial disembowelment. In *Furman*, Chief Justice Burger suggested three grounds for dismissing the concepts of judicially imposed standards and discretion in jury sentencing procedures: 1) that the Supreme Court has traditionally not interfered with the legislative policymaking power; 2) that such standards were impossible to set without further burdening the sentencer at a time when he was trying to decide whether or not to approve the taking of a human life; and 3) that the sentencing process has always and always will be discretionary.<sup>140</sup>

The persuasive complacency of this approach, with its generalized truths, is to be guarded against. Not having themselves set standards for the elimination of jury or judicial discretion, the Court has no basis for believing or insisting that such standards would fail. Instead, the Court defers to legislative judgment. The result is that legislatures are permitted to establish their own standards, spoken or unspoken, written or unwritten, for jury or judge. These standards, such as they are (for example, statutory limitations on the use of the death penalty can be classified as standards), are ones by which it is determined that men lose their lives. The state's interest in setting these standards has been the protection of the lives and welfare of its citizens. This interest has been held a legitimate state interest for the purpose of enacting death-penalty

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claims the right to choose any alternative method for achieving the ends of criminal justice, the right to insure domestic tranquility, and the right to have its judgments of other states and the federal government, i.e., the right not to have the evolving-standards test of decency applied to them. The petitioners argue against the State's right to impose the death penalty on traditional grounds. See Petitioner's Brief at 102. *North Carolina v. Fowler*, 419 U.S. 963 (1974). In addition, they show how North Carolina prosecutors, attorneys, juries and governor, determine, in their discretion, who receives the death penalty. The petitioners argue that an accused is thus sentenced to death because one of these officials, in carrying out his professional duty, has chosen not to spare him. By contending that discretion, found by the *Furman* Court to render jury sentencing unconstitutional, pervades the entire criminal justice system, the petitioners seek to show that death sentencing even without juries violates the due process clause of the fourteenth amendment and the cruel and unusual clause of the eighth amendment, and is therefore unconstitutional.

140. 408 U.S. at 375-405.

laws. Beyond stating this rationale, state legislatures have never had to justify the death penalty as a method of protection. It has never had to prove conclusively, or even slightly, that the death penalty deters homicide better or more effectively than any other form of punishment.<sup>141</sup> Consequently the state's method of punishment is allowed to stand by itself, supported only by the very general arguments of public support, deterrence and retribution. As a result, the basis on which the state legislature or state court system has decided that each defendant is not fit to live is never stated or justified. As the state relieves a criminal of his final right to life, which has been held to be fundamental,<sup>142</sup> in the name of an ill-defined public interest, the Court spectates in silence and condones this development.

## II. MANDATORY DEATH PENALTY

The history of capital punishment in the United States is the history of a movement away from mandatory capital punishment. A return to mandatory execution, even for certain specified crimes, would emasculate the changes that have occurred in the use of the penalty. It would ignore the significance of the decline in the penalty's use, and imply that increased use will make the punishment constitutionally less cruel and unusual. It would bypass the issue of discretion among prosecutors, policemen, judges and governors. It would eliminate mercy and it would not account for the death penalty being any more effective than other forms of punishment to eliminate, under mandatory death penalty statutes, certain specific crimes.

A return to mandatory death penalties would also substantially undermine the role of the public in determining the need for, and proper application of, the death penalty. With juries eliminated (jury discretion being an important constitutional reason for returning to mandatory death penalties), public opinion about the death penalty would no longer be registered. In fact it could be ignored completely. This is substantially the case now. The United States Supreme Court cannot decide where the public stands on the issue of capital punishment, whether public opinion polls validly depict public opinion about the death penalty, and to what extent public opinion, if ever determined, determines in itself "contemporary standards of decency".<sup>143</sup> The

141. *Id.*, at 396 (Burger, C.J., dissenting). The Chief Justice writes that requiring the legislature to justify the imposition of the death penalty could result in requiring the legislature to justify all its punishments.

142. *Johnson v. Zerbst*, 304 U.S. 358, 462 (1938). See also *Reid v. Covert*, 354 U.S. 1, 77 (1957).

143. P. Ellsworth, N. Vidmar, *Public Opinion and the Death Penalty*, 26 STAN. L. REV. 1245, 1246 (1974).

Court often quotes the evolving-standards-of-decency test as a method of evaluating public opinion, but never uses it systematically.

The dissent in *Furman* acknowledges the test's existence and supposed use. One dissenter states that the eighth amendment forbids the imposition of punishments that are so cruel and inhuman as to violate society's standards of civilized conduct.<sup>144</sup> At the same time, the dissenters' (or those who are in favor of some sort of capital punishment) perspective on the death penalty excludes an in-depth application of the decency test. The dissenters view the history of the death penalty as supporting the death penalty, a self-enforcing analysis by which the use of the death penalty provides its history while its history provides the rational for its continued use. This view of the history provides the death penalty with its presumption of validity. The dissenters also support judicial restraint, which curbs judicial examination of such information as public opinion polls and legislative policy reports. Finally the dissenters' means of measuring present-day standards are wholly unable to describe the final stage of the evolving standard—ie., that which has evolved.<sup>145</sup>

### III. JURY SENTENCING FOR CERTAIN CRIMES

A third approach might suggest guidelines for jury sentencing with regard to certain crimes, as established by the legislature. This approach would straddle the first two.

### IV. DEATH PENALTY UNCONSTITUTIONAL PER SE

This alternative requires and is in need of the most penetrating analysis. Every question must be weighed carefully. To accomplish this, the Justices must drop their individual perspectives, and their conservative or liberal biases.

Many factors, if not influenced by the death penalty's presumption of validity, point to abolishment. Standards of decency and cruelty have

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144. 408 U.S. at 442 (Powell, J., dissenting).

145. *Id.* at 442, n.37. Justice Powell selects state referendum, jury sentencing patterns, legislatures and state courts as indicators of public opinion about the death penalty. He refers to four state referenda. The final vote in one of these referendum actually abolished the death penalty; another was only advisory in nature. As already indicated, the legislatures, Justice Powell's second indicator, are not required to use the evolving-standards test themselves when deciding on capital punishment. There is no reason to believe that the legislators will distinguish between the state's interests and the evolved standards of decency. The state courts, the third indicator of public opinion, rarely explain their findings or their reasons for imposing the death penalty in certain situations, and rarely use the evolving-standards test. Not only do state courts not provide any opportunity for legislative acceptance or rejection, as the voice of the public will, of their own capital punishment policy as applied, but they also do not systematically provide any kind of measurement of public opinion.

changed, although, notwithstanding the death penalty, homicide rates have not. Juries have been increasingly less able to agree on imposing the death penalty, even though prosecutors attempt to keep people opposing the death penalty from becoming jurors in capital cases. Rehabilitation, not retribution, is the aim and goal of criminal correction systems.<sup>146</sup> The death penalty has been shown to have been used indiscriminately against blacks, and not applied in an evenhanded manner.<sup>147</sup> Discretion at every level of the criminal justice system—from the sentencing system to the Governor's office—affects who gets sentenced to death and who gets sentenced to prison,<sup>148</sup> and violates the accused's due process rights under the fourteenth amendment. There exist no studies which definitively show that the existence of the death penalty deters a man from committing a capital crime any more effectively than any other alternative. State legislatures have thinned their death penalty statutes, in many instances, to apply to one or two special crimes.<sup>149</sup> Each of these factors waits to be weighed by the Court. Each contention contributes to the final weighing of the constitutionality or unconstitutionality of the death penalty—discretionary, arbitrary, discriminatory, unusual, cruel and unnecessary; all antithetical to the “traditional humanity of the Anglo-American law”.

### CONCLUSION

The Court must decide between total unconstitutionality and some alternative decision which will prevent a state, by itself, from taking a man's life on the basis of an unexamined mandatory death policy. Deciding the constitutionality of a mandatory-death-sentence statute is an unavoidable duty. The Court can attack that duty, not by deferring to legislative judgment and the concept that the legislature represents the wishes of the people, but by critically evaluating the merits of the legislature's policy rationale and establishing standards—out of what the Court itself has used in its long history—by which such rationales are to be evaluated in the future.<sup>150</sup> More importantly, the Court must examine its own silent support of capital punishment, as attacks on the constitutionality of the death penalty multiply, so that it may itself not be guilty of default. Morality and discrimination aside, the strongest

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146. *Williams v. New York*, 337 U.S. 241, 248 (1949).

147. M. Wolfgang, M. Riedel, *Race, Judicial Discretion and the Death Penalty*, 407 ANNALS, 119 (May. 1973). See also G. Johnson, *THE NEGRO AND CRIME*, ANNALS, 217 (Sept. 1941); E. Johnson, *Selective Factors in Capital Punishment*, 36 SOCIAL FORCES, 165 (Dec. 1957).

148. *State v. Jarette*, 284 N.C. 625, 202 S.E.2d 721 (1974).

149. *Capital Punishment Statutes, Litigation and Inmates Sentenced*, COAG, Office of N.C. Atty. Gen. (1975).

150. 284 N.C. 625, 659, 202 S.E.2d 721 (1974).



argument against the death penalty is that the modern American criminal justice system is too imprecise a system to use capital punishment as a surgical tool to excise the tumor of crime and violence.

JAMES T. BRYAN III

### **Music The Universal Healer:**

### **First Amendment Protection—Real or Illusory?**

#### **I. INTRODUCTION**

The central importance of musical expression in civilized society has long been proclaimed. Longfellow said, "Music is the universal language of mankind." Milton said "Such sweet compulsion doth in music lie." Shakespeare said, "The man that hath no music in himself, nor is not moved with concord of sweet sounds is fit for treasons, stratagems and spoils." Carlyle said:

Music is well said to be the speech of angels; in fact, nothing among the utterances allowed to man, is felt to be so Divine. It brings us near to the Infinite; we look for moments across the cloudy elements into the eternal light, when song leads and inspires us. Serious nations, all nations that can listen to the mandate of nature, have prized song and music as a vehicle for worship, for prophecy, and for whatsoever in them was Divine.

Surely judicial notice can be taken of the fact that not one of these men could ever seriously have contemplated the seemingly inexorable entanglement that has evolved and presently exists concerning our first amendment guaranty of freedom of speech and musical expression in the broadcast media. This article will examine musical expression and how it is viewed by the Federal Communications Commission, as well as the relationship between music and the first amendment's freedom of speech. More specifically, this discussion will focus on three areas: (1) a general history and background of the FCC and the broadcast media; (2) the FCC's involvement with musical expression in the broadcast media; and (3) first amendment protection of musical expression.

#### **II. THE FCC AND THE BROADCAST MEDIA:**

##### **A GENERAL BACKGROUND**

At the turn of the century, radio was confined to wireless telegraphy (largely for marine purposes), and code communication was possible