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Proposed Legislation- Criminal Law-Proposed Revisions of Title 18.1- Designation of Punishment and Capital Punishment (Senate Bill No. 56)

PROPOSED LEGISLATION

CRIMINAL LAW—PROPOSED REVISIONS OF TITLE 18.1—DESIGNATION OF PUNISHMENT AND CAPITAL PUNISHMENT (Senate Bill No. 56).

The Virginia General Assembly, during a Special Session in 1971, directed the Virginia Code Commission to revise Title 18.1, Crimes and Offenses Generally, of the Code of Virginia.[1] Senate Bill No. 56[2] was adopted in essentially the same form as the Code Commission's revisions, however, due to the lack of time, the bill was carried over until the next session. This article will analyze several areas contained in Senate Bill No. 56: Designation of Punishment and Capital Punishment.

Designation of Punishment

In the present Title 18.1, the maximum and minimum sentence are stated as part of the definition of the crime. There appears to be no coherent or logical rationale and gross disparities in the range of possible punishment exist.[3] The proposed revision utilizes a classification of felonies and misdemeanors in an attempt to eliminate these disparities. Six classes of felonies are established and four classes of misdemeanors.[4] Each felony

1. H. Del. J. Res. 41, Virginia General Assembly, Special Session (1971). The Resolution stated in part:

> Resolved by the House of Delegates, the Senate concurring, That the Virginia Code Commission is directed to make a thorough study of . . . the criminal laws of the State and make recommendations for the review and recodification of all statutes of the State relating to crime and criminal procedure. Such review shall include determining whether sections should be deleted or added to the Code, whether changes in the penalty provisions should be made and such other relative changes as the Commission deems appropriate. . . .

2. Substitute for Senate Bill No. 56 (Jan. 15, 1974) [hereinafter cited as S.B. 56].

3. *E.g.*, Abduction with intent to extort money or for immoral purpose, VA. CODE ANN. § 18.1-38 (Cum. Supp. 1974), three years in penitentiary to death; Rape, *Id.* § 18.1-44 (Cum. Supp. 1974), five years in penitentiary to death; Entering dwelling house, etc., with intent to commit larceny, or other felony, *Id.* § 18.1-89 (Cum. Supp. 1974), fine of one thousand dollars to thirty years in penitentiary.

4. S.B. 56, § 18.2-9 provides for felonies to be classified into six classes, class 1 felony to class 6 felony and misdemeanors into four classes, class 1 misdemeanor to class 4 misdemeanor.

S.B. 56, § 18.2-10 provides:

> Punishment for conviction of felony.—The authorized punishments for conviction of a felony are:
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> (a) for class 1 felonies, death.
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> (b) for class 2 felonies, imprisonment for life or for any term not less than twenty years.

class designates the maximum and minimum punishment, while each misdemeanor class specifies only the maximum fine and jail sentence that may be imposed. Besides eliminating the wide range of punishment alternatives, the proposed classification system: 1) eliminates the needless designation of punishment for each and every offense; 2) allows a comparison of the severity of different offenses; 3) allows for new offenses to be placed into an existing class; and 4) narrows the judge's discretionary power.[5]

This classification system has been utilized by other jurisdictions which have recently revised their criminal codes.[6] The proposed designation of punishment revision conforms to the recommendations of the American Bar Association Project on Minimum Standards for Criminal Justice.[7]

(c) for class 3 felonies, a term of imprisonment of not less than five years nor more than twenty years.

(d) for class 4 felonies, a term of imprisonment of not less than two years or more than ten years.

(e) for class 5 felonies, a term of imprisonment of not less than one year nor more than ten years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(f) for class 6 felonies, a term of imprisonment of not less than one year nor more than five years, or in the discretion of the jury or the court trying the case without a jury, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

S.B. 56, § 18.2-11 provides:

Punishment for conviction of misdemeanor.—The authorized punishments for conviction of a misdemeanor are:

(a) for class 1 misdemeanors, confinement in jail for not more than twelve months and a fine of not more than one thousand dollars, either or both.

(b) for class 2 misdemeanors, confinement in jail for not more than six months and a fine of not more than five hundred dollars, either or both.

(c) for class 3 misdemeanors, a fine of not more than five hundred dollars.

(d) for class 4 misdemeanors, a fine of not more than one hundred dollars.

5. *See* VIRGINIA CODE COMMISSION, REVISION OF TITLE 18.1 OF THE CODE OF VIRGINIA 2 (H. Del. Doc. No. 10, 1973).

6. *See, e.g.*, COL. REV. STAT. §§ 40-1-105, 40-1-106 (Perm. Cum. Supp. 1971); CONN. GEN. STAT. REV. §§ 53a-25(b), 53a-26(b) (1972); FLA. STATS. §§ 775.081(1), 775.081(2) (Cum. Supp. 1974); KAN. STAT. ANN. §§ 21-4501, 21-4502 (Cum. Supp. 1973); KY. REV. STAT. § 435A.1-010 (1974); N.M. STAT. § 40A-1-7 (1972); N.Y. PENAL LAW §§ 55.05, 55.10 (McKinney 1967); OHIO REV. CODE ANN. §§ 2929.11, 2929.12 (Repl. Supp. 1974); TENN. CODE ANN. §§ 39-803, 39-804 (Prop. Crim. Code 1973).

7. AMERICAN BAR ASSOCIATION PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE ADMINISTRATION OF JUSTICE (1974). Section 2.1(a) states:

All crimes should be classified for the purpose of sentencing into categories which reflect substantial differences in gravity. The categories should be very few in number. Each should specify the sentencing alternatives available for offenses which fall within it. The penal codes for each jurisdiction should be revised where necessary to accomplish this result.

Capital Punishment

On June 29, 1972, the Supreme Court of the United States struck down discretionary capital punishment in the case of *Furman v. Georgia*.[8] The immediate impact was twofold. It led to sentence modification of 600 death row inmates and also voided the capital punishment statutes of 40 jurisdictions.[9] Prior to *Furman*, the Virginia Code contained ten discretionary capital punishment statutes[10] and two mandatory capital offenses.[11]

A succint statement of *Furman* is impossible. The five man majority could only agree on a short *per curiam* opinion, which stated: "The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[12] Justices Douglas, Stewart, and White held that the death penalty in the cases at bar, because of the unguided discretion existing in the procedures that imposed it, violated the "cruel and unusual punishment" clause of the eighth amendment.[13] Justices Brennan and Marshall found the death penalty to be unconstitutional per

8. 408 U.S. 238 (1972).

9. *Id.* at 417.

10. A discretionary statute allows the convicted felon to be subjected to a range of punishments, from a term of years to death, the decision being left to the discretion of the judge or the jury. The discretionary statutes were: First degree murder, VA. CODE ANN. § 18.1-22 (Repl. Vol. 1960); Burning or destroying dwelling house, etc., at night, *Id.* § 18.1-75 (Repl. Vol. 1960); Rape, *Id.* § 18.1-44 (Repl. Vol. 1960); Burglary, *Id.* § 18.1-86 (Repl. Vol. 1960); Robbery, *Id.* § 18.1-91 (Repl. Vol. 1960); Attempt to commit a capital offense, *Id.* § 18.1-16 (Repl. Vol. 1960); Abduction, *Id.* § 18.1-38 (Repl. Vol. 1960); Use of machine gun for crime, *Id.* § 18.1-259 (Repl. Vol. 1960); and Possession or use of "sawed-off" shotgun for crime, *Id.* § 18.1-268.2 (Cum. Supp. 1971).

For a history of the evolution of discretionary death penalty statutes in Virginia see Note, *Capital Punishment in Virginia*, 58 VA. L. REV. 97 (1972).

11. The two mandatory death penalty statutes are: Treason, VA. CODE ANN. § 18.1-418 (Repl. Vol. 1960); and murder by a convict, *Id.* § 53-291 (Repl. Vol. 1972).

12. 408 U.S. at 239-40. The *per curiam* opinion was followed by five majority opinions written by the Warren Court "hold-overs" and four dissenting opinions written by the Nixon appointees.

13. Justice Douglas, after examining recent statistics and studies concerning capital punishment, concluded that death penalty statutes violated the fourteenth amendment's equal protection clause. *Id.* at 256-57.

Justice Stewart felt that the death penalty was cruel and unusual punishment, thereby violating the eighth amendment, as applicable to the states through the fourteenth amendment, because those given the sentence of death were "a capriciously selected random handful." *Id.* at 309-13.

Justice White considered the infrequent and the arbitrary infliction of the death penalty as the constitutional infirmity and stated: "[T]here is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.* at 313.

se, each basing their opinion on a separate and different rationale.[14] The dissenting justices felt that the death penalty did not violate the eighth amendment and that the majority was usurping the power of the legislature.[15]

Furman is subject to one of three possible interpretations. If interpreted narrowly, the constitutional defect present in the statutes before the Court was the existence of potential discretion on the face of the statutes. Following this rationale, statutes not discretionary on their face will be constitutional.[16] Whereas, if *Furman* is given a broad interpretation, the constitutional infirmity of the statutes before the Court becomes the discriminatory and arbitrary results achieved in the sentencing process.[17] At least one commentator has given *Furman* a third interpretation arguing

14. Justice Brennan formulated a cumulative test composed of four principles: If a punishment is so severe as to be degrading; if it is inflicted arbitrarily; if it is substantially rejected by society; and, if it serves a valid penal purpose less effectively than some less severe punishment, then the challenged punishment violates the cruel and unusual punishment clause of the eighth amendment. Justice Brennan concluded that the death penalty failed under all of these principles and therefore was unconstitutional. *Id.* at 282-305.

Justice Marshall focused his analysis on two questions: whether the death penalty is excessive considering the penal purposes it is to serve, and whether it is abhorrent to currently existing moral values. He found that the death penalty was excessive and contrary to current moral values and in his opinion no statutory revision would change his findings. He therefore concluded that the death penalty was unconstitutional per se. *Id.* at 332-33, 371.

15. Chief Justice Burger first demonstrated that capital punishment was not unusual and then addressed himself to what he felt to be the real question: Whether the death penalty was cruel. He determined that two permissible goals of capital punishment, retribution and deterrence, had not been established invalid by the petitioners. He then concluded that legislatures, by providing sentence guidelines to be used by judges and juries, or by narrowly defining capital crimes, could eliminate unconstitutional discretion. *Id.* at 394-403.

Justice Blackmun, after analyzing the majority opinions, examined several federal statutes, and concluded that the majority's position was difficult to accept. He concluded that the Court had "sought and achieved an end" and in his opinion capital punishment was constitutionally acceptable. *Id.* at 405-14.

Justice Powell began by discussing the history of capital punishment in the United States. After examining the attitudes of state legislatures, juries and the public, he concluded that the public did not find capital punishment unacceptable and commented, "this is a classic case for judicial restraint" and the majority had overstepped this restraint. *Id.* at 414-65.

Justice Rehnquist stated the proposition that the Court should defer matters of policy and morality to the legislative judgment of the individual states. In his opinion, the invalidation of capital punishment is a policy matter and the majority with their action had therefore disregarded their proper role. *Id.* at 467-68.

16. Statutes not discretionary on their face are mandatory capital punishment statutes and statutes providing guidelines.

17. Under this guideline, the Court's examination of a statute will not stop with an examination of the statutory language, but will go further and determine whether the statute in question operates in an arbitrary manner.

that capital punishment is unconstitutional per se.[18] However, that interpretation has been regarded as tenuous at best.[19]

The Virginia Supreme Court has had several opportunities to address itself to *Furman*. In *Hodges v. Commonwealth*,[20] the appellant was found guilty of first degree murder and sentenced to death.[21] In a review of the death sentence, the court gave full effect to the *Furman* decision, and stated: "[T]he death penalty imposed . . . has been rendered invalid . . . as cruel and unusual punishment violative of Hodges' rights under the Eighth Amendment to the United States Constitution."[22] In *Jefferson v. Commonwealth*,[23] the defendant was found guilty of killing a prison guard while an inmate of a Virginia penal institution.[24] He appealed the judgment of the trial court imposing the death penalty made mandatory by statute.[25] The court decided that a *mandatory* death penalty was constitutional, thereby rejecting the defendant's argument that a statute imposing the death penalty is constitutionally infirm if any discretion can be exercised by any authority at any time.[26] The court stated: "We do not so construe *Furman*. The constitutional infirmity there was found in the discretion exercised in fixing punishment, be it by a jury or a judge. *Furman's* application is thus limited to statutes which permit such discretion to be exercised."[27] Thus, the Virginia Supreme Court has given *Furman* a narrow interpretation and only requires a statute to be free from discretion on its face.

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18. Ehrhardt, Hubbart, Levinson, Smiley and Wills, *The Future of Capital Punishment in Florida: Analysis and Recommendations*, 64 J. CRIM. L. & CRIM. 2 (1973). Four considerations led to this conclusion: 1) some of the dissenting justices may, out of respect for precedent, change their votes in future cases, 2) legislatures may be unwilling to formulate statutes which conform to the requirements of *Furman* as it would be too time consuming and expensive, 3) the three majority justices who did not hold capital punishment unconstitutional per se may do so in the future, and 4) after the drastic measure of releasing 600 death-row inmates the Supreme Court may be unwilling to permit reinstatement of the death penalty.

19. Comment, *The Supreme Judicial Court and the Death Penalty: The Effects of Judicial Choice on Legislative Options*, 54 BOSTON U.L. REV. 158, n. 1 (1974).

20. 213 Va. 316, 191 S.E.2d 794 (1972).

21. *Id.* at 317, 191 S.E.2d at 795.

22. *Id.* at 320, 191 S.E.2d at 797. The case was remanded for a new trial on the issue of punishment. *Id.* at 321, 191 S.E.2d at 798. *See also* Evans v. Commonwealth, 214 Va. 694, 204 S.E.2d 413 (1974); Wood v. Commonwealth, 213 Va. 346, 192 S.E.2d 808 (1972); Huggins v. Commonwealth, 213 Va. 327, 191 S.E.2d 734 (1972).

23. 214 Va. 747, 204 S.E.2d 258 (1974).

24. *Id.* at 748, 204 S.E.2d at 260.

25. *Id.*

26. *Id.* at 749, 204 S.E.2d at 261.

27. *Id.*

The Virginia General Assembly must carefully consider the proposed alternatives to replace pre-*Furman* discretionary statutes. There are three basic alternatives utilized by other state legislatures: 1) the elimination of the death penalty; 2) the approach advocated by the Model Penal Code of creating precise guidelines for judges and juries to follow in determining sentences; and 3) a mandatory death penalty.

The first alternative, the elimination of the death penalty, is a policy decision, properly left to the legislature which must weigh the alternatives.[28] There is no question as to the constitutional validity of such a statute.

The second alternative,[29] establishes precise sentencing guidelines for a judge and jury to follow.[30] If an accused is found guilty of a capital offense there is a second trial to determine the penalty[31] in which the court consid-

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28. An excellent discussion of the merits and disadvantages of the death penalty can be found in H. BEDAU, THE DEATH PENALTY IN AMERICA (rev. ed. 1967).

29. MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962) [hereinafter cited as MPC].

30. MPC § 210.6(1) provides:

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

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

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

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

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

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

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

31. MPC § 210.6(2) provides:

Determination by Court or by Court and Jury.

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

. . . .

The determination whether sentence of death shall be imposed shall be in the discretion of the Court, except that when the proceeding is conducted before the Court sitting with a jury, the Court shall not impose sentence of death unless it submits to the jury

ers enumerated aggravating[32] and mitigating[33] circumstances. Before the death penalty may be imposed the presence of one of the aggravating circumstances must be found, and a further finding, by a judge under one view, and by a judge and a jury under another, that there are no mitigating

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the issue whether the defendant should be sentenced to death or to imprisonment and the jury returns a verdict that the sentence should be death. If the jury is unable to reach a unanimous verdict, the Court shall dismiss the jury and impose sentence for a felony of the first degree.

. . . .

Alternative formulation of Subsection (2):

(2) *Determination by Court.* Unless the Court imposes sentence under Subsection (1) of this Section, it shall conduct a separate proceeding to determine whether the defendant should be sentenced for a felony of the first degree or sentenced to death. In the proceeding, the Court . . . shall consider the report of the pre-sentence investigation and, if a psychiatric examination has been ordered, the report of such examination. In addition, evidence may be presented as to any matter that the Court deems relevant to sentence, including but not limited to the nature and circumstances of the crime, the defendant's character, background, history, mental and physical condition and any of the aggravating or mitigating circumstances enumerated in Subsections (3) and (4) of this Section. . . .

The determination whether sentence of death shall be imposed shall be in the discretion of the Court. In exercising such discretion, the Court shall take into account the aggravating and mitigating circumstances enumerated in Subsections (3) and (4) and any other facts that it deems relevant but shall not impose sentence of death unless it finds one of the aggravating circumstances enumerated in Subsection (3) and further finds that there are no mitigating circumstances sufficiently substantial to call for leniency.

32. MPC § 210.6(3) provides:

Aggravating Circumstances.

(a) The murder was committed by a convict under sentence of imprisonment.

(b) The defendant was previously convicted of another murder or of a felony involving the use or threat of violence to the person.

(c) At the time the murder was committed the defendant also committed another murder.

(d) The defendant knowingly created a great risk of death to many persons.

(e) The murder was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary or kidnapping.

(f) The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from lawful custody.

(g) The murder was committed for pecuniary gain.

(h) The murder was especially heinous, atrocious or cruel, manifesting exceptional depravity.

33. MPC § 210.6(4) provides:

Mitigating Circumstances.

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

circumstances.[34] The findings made at the penalty trial, and the sentence imposed would be subject to appellate review.[35] Several states have enacted capital punishment statutes based on this format.[36] The main problem with this approach is that the guidelines *must* be precise to eliminate discretion.[37]

In the last alternative, the mandatory death penalty is imposed in narrowly defined crimes in an attempt to eliminate unconstitutional discretion. States utilizing this approach[38] usually limit the death penalty to specified offenses, which the legislature has deemed particularly heinous.

(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.

(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.

(f) The defendant acted under duress or under the domination of another person.

(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.

(h) The youth of the defendant at the time of the crime.

34. MPC § 210.6(1)(a).

35. This provision should allow a body of case law to develop with regard to the sentencing procedure. A judge would have something of substance to guide him in his decision.

36. *See* CONN. GEN. STAT. REV. § 53a-45 (Supp. 1974); FLA. STAT. ANN. §§ 782.04, 921.141 (Supp. 1974).

37. States passing statutes based on the suggested Model Penal Code form have been faced with the serious problem of how to eliminate unconstitutional discretion from a capital offense statute and still leave the decision to the judge or jury whether the offender should be given the death penalty or life imprisonment. The solution is to formulate precise guidelines for judges and juries to follow. If the guidelines are not precise, a legislature may find itself with a system as discretionary as that which existed prior to *Furman*. There have been several scholarly discussions concerning that particular problem. *See, e.g.*, Ehrhardt, Hubbart, Levinson, Smiley & Wills, *The Aftermath of Furman: The Florida Experience*, 64 J. CRIM. L. & CRIM. 2, 10 (1973) [hereinafter cited as Ehrhardt]; Comment, *The Response to Furman: Can Legislators Breathe Life Back into Death?*, 23 CLEV. ST. L. REV. 172 (1974); Note, *Florida's Legislative and Judicial Responses to Furman v. Georgia: An Analysis and Criticism*, 2 FLA. ST. U. L. REV. 108 (1974); Comment, *Furman v. Georgia and Georgia's Statutory Response*, 24 MERCER L. REV. 891 (1973).

38. *See, e.g.*, IDAHO CODE § 18-4004 (Cum. Supp. 1973); LA. REV. STAT. § 14:30 (1974); NEV. REV. STAT. § 200.030(5) (1973); N.M. STAT. §§ 40A-2-1, 40A-29-2 (Supp. 1973); N.D. CENT. CODE § 12-27-13 (1960); OKLA. STAT. ANN. tit. 21, § 701.3 (Cum. Supp. 1974); WYO. STAT. ANN. § 6-54(b) (Cum. Supp. 1973).

Several student articles have analyzed the mandatory death penalty statute. *See, e.g.*, Comment, *The Supreme Judicial Court and the Death Penalty: The Effects of Judicial Choice on Legislative Options*, 54 BOSTON U.L. REV. 158 (1974); Comment, *House Bill 200: The Legislative Attempt to Reinstate Capital Punishment in Texas*, 11 HOUSTON L. REV. 410 (1974).

This is the approach under consideration by the Virginia General Assembly.[39]

There are several criticisms that can be made regarding mandatory capital punishment statutes. The main criticisms are that mandatory death penalties are regressive, and furthermore, they may be unconstitutional. Capital punishment has been an aspect of criminal law since the beginnings of our civilization.[40] During the mid 1700's, there were almost 140 capital offenses in English common law.[41] However, anti-capital punishment feelings grew during the early 1800's,[42] and in 1846 Michigan became the first state to abolish capital punishment.[43] During the next 125 years this feeling grew in intensity and at the time of *Furman* nine states did not authorize capital punishment under any circumstances[44] while the other states had greatly reduced their number of capital crimes.[45] One great success of this movement was the almost complete elimination of mandatory capital punishment.[46] Movement away from mandatory death sentences "marked an enlightened introduction of flexibility into the sentencing process"[47] and, according to Chief Justice Burger, should be viewed as a humanizing development.[48] Many believe that reintroduction of a mandatory death penalty would be a step backward in the area of sentencing.[49]

This regressive movement would present policy problems not associated

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39. *See* S.B. No. 56 § 18.2-31.

40. Furman v. Georgia, 408 U.S. at 335 (1972) (Marshall, J., concurring).

41. H. BEDAU, *The Death Penalty in America* 1 (rev. ed. 1967).

42. *Id.* at 9.

43. *Id.*

44. 408 U.S. at 298 n. 52. The nine states were: Alaska, Hawaii, Iowa, Maine, Michigan, Minnesota, Oregon, West Virginia, and Wisconsin. Since *Furman* at least one state has legislatively eliminated the death penalty. *See* N.H. REV. STAT. ANN. §§ 651:12 to 651:14 (Supp. 1973). California judicially eliminated the death penalty in People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152 (1972).

45. H. BEDAU, THE DEATH PENALTY IN AMERICA 9-10 (rev. ed. 1967).

46. *Id.*

47. 408 U.S. at 402 (Burger, C.J., dissenting).

48. Chief Justice Burger commented in dissent:

> As a general matter, the evolution of penal concepts in this country has not been marked by great progress, nor have the results up to now been crowned with significant success. If anywhere in the whole spectrum of criminal justice fresh ideas deserve sober analysis, the sentencing and correctional area ranks high on the list. But it has been widely accepted that mandatory sentences for crimes do not best serve the ends of the criminal justice system. *Id.* at 402-03.

49. Chief Justice Burger stated: "As the concurring opinion of MR. JUSTICE MARSHALL shows . . . the 19th century movement away from mandatory death sentences marked an enlightened introduction of flexibility into the sentencing process." *Id.* at 402.

with the present system. One example is jury nullification.[50] Jurors could utilize this to prevent results which, in their minds, are harsh. Nullification could reflect their belief that not all those found guilty of a capital offense should be executed, and that legislatures should not classify what types of offenders should always be subjected to the death penalty.[51]

The proposed revision of Title 18.1 found in Senate Bill No. 56, utilizes this approach.[52] The death penalty is the sole punishment for the offenses of capital murder, aggravated rape, and treason.[53]

The Virginia Code Commission counters the argument that mandatory

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50. H. KALVEN & H. ZEISEL, THE AMERICAN JURY 435 (1966).

51. *Id.*

52. S.B. 56, *supra* note 2 §§ 18.2-31, to -61; VIRGINIA CODE COMMISSION REPORT, *supra* note 5, § 18-2-31.

53. Senate Bill No. 56 contains substantively the same provisions as the Code Commission's revisions; however the Senate bill did add some provisions to the Code Commissioner's definition of capital murder. VIRGINIA CODE COMMISSION REPORT defines capital murder in § 18.2-31 as:

> Murder by extreme torture, starving, or in the commission of, or attempt to commit, rape, or in the commission of, or attempt to commit, abduction . . . shall be capital murder, punishable as a class 1 felony.
>
> If an inmate in a penal institution as defined in § 53-9 of this Code or while in the custody of an employee thereof:
>
> (a) kills, other than accidentally, an employee thereof, or
>
> (b) kills, other than accidentally, any other person lawfully admitted to such institution, except another inmate, or
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> (c) kills, other than accidentally, any person who is supervising or working with inmates, or
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> (d) injures any such employee or other person while such inmate is committing any act in violation of § 53-291 of this Code and death results therefrom to such employee or other person.

S.B. 56 defines capital murder in VA. CODE ANN. § 18.2-31 as:

> Murder by extreme torture, starving, or in the commission of, or attempt to commit, rape, or in the commission of, or attempt to commit, abduction as defined in § 18.2-48, shall be capital murder, punishable as a class 1 felony.
>
> The following offenses shall also constitute capital murder, punishable as a class 1 felony:
>
> (a) The willful, deliberate and premeditated killing of a police officer, sheriff, deputy sheriff or fireman, while engaged in the proper performance of his official duties and the killing is for the purpose of interfering with him in the performance of his duties;
>
> (b) Any willful, deliberate and premeditated killing by a person of any witness under subpoena to testify against a person charged with a crime for the purpose of preventing his testifying;
>
> (c) Killing by a person who kills another human being in exchange for money or other thing of value; and
>
> (d) Any willful, deliberate and premeditated killing by an inmate in a penal institution as defined in § 53-9 of this Code or while in the custody of an employee thereof.

death penalties are regressive with the doctrine of the lesser included offense. "It should be pointed out that in a prosecution for a capital offense where the sole penalty is death, this will not necessarily mean conviction with the death penalty or acquittal. The jury will be instructed and be at liberty to convict the accused of any lesser noncapital degree of the offense or of a noncapital offense included in the alleged acts of the accused."[54] If this were in fact true, the capital offense statutes considered by the General Assembly would not be mandatory. Therefore the possibility would exist for discretion to be present in practice under the proposed statute, as it was in the days before *Furman*.

However, this assumption by the Virginia Code Commission is false. According to Justice Harmon in *Jefferson v. Commonwealth*:[55]

> The defendant would also have us apply *Furman* on the ground that the jury could have found the defendant guilty of a lesser included offense and could have fixed a penalty other than death. This claim must fail for [Virginia] Code § 53-291 provides but one grade of offense and one penalty for the slaying of a prison guard, no lesser included offenses being embraced within that facet of the statute.[56]

Section 53-291 of the Virginia Code[57] and § 18.131 of Senate Bill No. 56[58] are of the same structure, in that they both specify the instance when a capital murder has been committed. Therefore it appears that the lesser included offense doctrine will not be available under the proposed statutes and Virginia will have a truly mandatory death penalty.[59]

The criticism has been raised that a mandatory death penalty is unconsititutional.[60] Invalidation of such a statute would have to result from a broad interpretation of *Furman* and a determination that the statute operates in an arbitrary manner. There is no doubt that a majority of the nine justices of the United States Supreme Court may be inclined to hold such

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54. VIRGINIA CODE COMMISSION REPORT, *supra* note 5, at 3.

55. 214 Va. 747, 204 S.E.2d 258 (1974).

56. *Id.* at 749, 204 S.E.2d at 261.

57. VA. CODE ANN. § 53-291 (Repl. Vol. 1972) provides in part:

> It shall be unlawful for an inmate in a penal institution as defined in § 53-9 or in the custody of an employee thereof to do any of the following:
>
> (1) To kill, wound or inflict bodily injury upon (a) such employee or (b) any other person lawfully admitted to such penal institution, except another inmate, or (c) who is supervising or working with inmates. . . .

58. See note 50, *supra*.

59. Some states have statutes specifically addressed to the position of the doctrine of lesser included offense in regard to a mandatory death penalty statute. Oklahoma has made the doctrine available in a trial for murder in the first degree by statute. OKLA. STAT. ANN. tit. 21, § 701.3 (Cum. Supp. 1974).

60. See note 18 infra.

a statute unconstitutional.[61] However, such a wholesale invalidation from the bench could be interpreted as an act of legislative authority.

The Virginia General Assembly appears to be heading toward the passage of a mandatory death penalty. If a legislator were forced to decide whether such a statute would be better suited than one which provided guidelines, he would be faced with a difficult decision. However, all things considered, a statute which would provide guidelines to judges and juries would be the wiser selection. A properly drafted statute providing such guidelines could accomplish the same results as a mandatory death statute but it would allow a jury to render mercy. In addition, it appears to be an insurmountable task to ascertain beforehand what crimes deserve the death penalty and which do not. The more logical procedure would be to make the determination on a case by case basis using prescribed guidelines. Therefore the solution is the drafting of a statute which allows "guided" discretion similar to that found in the Model Penal Code.

D.I.B.

61. Chief Justice Burger in his dissent joined by Justice Blackmum, Powell and Rehnquist stated:

> If we were possessed of legislative power, I would either join with MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL [who held capital punishment unconstitutional per se] or, at the very least, restrict the use of capital punishment to a small category of the most heinous crimes. 408 U.S. at 375.