CARDOZO LAW REVIEW
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FURMAN'S RESURRECTION: PROPORTIONALITY REVIEW AND THE SUPREME COURT'S SECOND CHANCE TO FULFILL *FURMAN*'S PROMISE

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INTRODUCTION

Last term, Justice Stevens' statement respecting the denial of *certiorari* in *Walker v. Georgia*[1] resurrected the specter of *Furman*'s[2] unfulfilled promise—that the Court would not tolerate a death sentence based upon arbitrary or discriminatory factors. Stevens observed that "the likely result of such a truncated [proportionality] review . . . is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment."[3] Not only has this statement sparked renewed interest in an area of death penalty jurisprudence many believed to be a dead letter, but it also may provide capital defendants with the opportunity to present the Court with pervasive evidence that death sentencing today is no less arbitrary than when the Court decided *Furman*.

After briefly revisiting *Furman*'s holding, this article reviews the trajectory of the Court's proportionality review jurisprudence. It then explores how meaningful proportionality review can substantially decrease the risk that criminal defendants will suffer arbitrary death sentences.

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1 129 S. Ct. 453 (2008).

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

3 129 S. Ct. at 457 (Stevens, J., commenting on the denial of writ of certiorari) (noting "the State persuasively argues that petitioner did not raise and litigate these claims in state court").

Finally, it argues that in the face of mounting evidence that the death penalty is as arbitrary now as it was when *Furman* was decided, challenges to deficient proportionality review practices provide the Court with a new and timely opportunity to fulfill a constitutional promise it recognized nearly forty years ago.

I. *FURMAN*'S CONCERNS

The Court in *Furman v. Georgia* held that the death penalty, at least as imposed in Georgia and Texas, violated the Eighth and Fourteenth Amendments. Though each justice wrote separately, the five-member majority agreed that, at a minimum, the death penalty was cruel and unusual because it was arbitrarily and infrequently applied.[4] *Furman* stands for two central principles: (1) death penalty statutes must meaningfully limit the class of offenders eligible for the ultimate punishment;[5] and (2) legislatures must channel the sentencer's discretion to minimize the risk of arbitrary sentences.[6] This 1972 decision—which effectively brought nationwide administration of the death penalty to a halt—did not outlaw the death penalty outright, but rather sought to avert substantively unjust outcomes through procedural regulation. Though *Furman* still stands, the promise of a death penalty free from the influence of arbitrary factors remains unfulfilled.

II. THE *GREGG* EXPERIMENT

Four years after *Furman*, the Court determined the constitutionality of five different revised state death penalty

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4 *See Furman*, 408 U.S. at 310 (Stewart, J., concurring) ("[T]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."); *id.* at 312–13 (White, J., concurring) ("[A]s the statutes before us are now administered, the penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice.").

5 *See Furman*, 408 U.S. at 313 (White, J., concurring) (noting "there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not"); Roper v. Simmons, 543 U.S. 551, 569 (2005); Godfrey v. Georgia, 446 U.S. 420, 427–33 (1980).

6 *See* Gregg v. Georgia, 428 U.S. 153, 189 (1976) (plurality opinion) ("*Furman* mandates that where discretion is afforded a sentencing body on . . . whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

statutes.[7] The Georgia statute—which obtained the Court's approval in *Gregg*—created a mechanism for appellate proportionality review. *Gregg* did not reverse the central tenets of *Furman*, but permitted the states to experiment with procedural safeguards designed to eliminate arbitrary death sentences. In its proportionality review, the Georgia Supreme Court was obligated to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor" and "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[8]

After the *Gregg* Court endorsed the Georgia scheme, other states adopted similar proportionality review requirements.[9] The hope was that proportionality review would ensure that arbitrary and excessive death sentences would be set aside, and the administration of the death penalty would fulfill *Furman*'s promise.

III. *PULLEY V. HARRIS*: PRACTICING WITHOUT A SAFETY NET

Only eight years after *Gregg*—during which restraint led to only thirty-two executions[10]—the Court decided *Pulley v. Harris*.[11] In *Harris*, the Court held that the California death penalty statute did not necessarily violate the Eighth Amendment just because it did not provide for proportionality review: "There is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed . . . . We are not persuaded that the Eighth Amendment requires us to take that course."[12] Though the *Harris* decision only decided the constitutionality of the unique California statute, many states interpreted the holding broadly. They quickly abandoned robust proportionality

7 *See id.*; Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

8 *Gregg*, 428 U.S. at 212.

9 *See* Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only "the Appearance of Justice"*, 87 J. CRIM. L. & CRIMINOLOGY 130, 140 (1996) ("Over thirty states almost immediately enacted proportionality review procedures similar to those upheld in *Gregg*.").

10 *See* Searchable Execution Database, http://www.deathpenaltyinfo.org/executions (last visited Sept. 8, 2009).

11 465 U.S. 37 (1984).

12 *Harris*, 465 U.S. at 50–51.

review—formally or informally.[13]

Today, many state courts have rendered proportionality review a hollow exercise. For example, some simply assert that the instant death sentence is not disproportionate because a cursory review reveals that other juries have sentenced defendants to death with similar aggravating circumstances.[14] At least one expert observes that courts have undermined proportionality review in a variety of ways. Some courts "chang[ed] the definition of cases which would be considered similar," others "changed the character" of the review, and some "limited proportionality review to a very narrow comparison between the sentences of codefendants in the same case."[15]

IV. THE POTENTIAL BENEFITS OF MEANINGFUL PROPORTIONALITY REVIEW

Proportionality review, done well, has the potential to ensure that death sentences comport with Eighth Amendment requirements. The benefits are far-reaching. A meaningful proportionality review can:

- Identify and overturn jury verdicts based on prejudice, passion, or arbitrary discrimination;[16]
- Ensure only the most culpable offenders of the worst crimes receive the death penalty[17] (because appellate courts can look to the universe of first-degree murder outcomes and evaluate if the sentence at issue appears disproportionate to what most juries decide in similar cases[18]);
- Compare the relative culpability of codefendants (appellate courts can strike disproportionate outcomes when a less culpable codefendant receives a harsher sentence than a more culpable codefendant);[19]
- Determine whether the death penalty resulted from

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13 *See* Bienen, *supra* note 9, at 150–51.

14 *See* State v. Anderson, 996 So. 2d 973, 1018–19 (La. 2008).

15 *See* Bienen, *supra* note 9, at 155.

16 *See* Henry v. State, 647 S.W.2d 419, 425 (Ark. 1983).

17 *See* Roper v. Simmons, 543 U.S. 551, 568 ("Capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" (internal citation omitted)).

18 *See* Kramer v. State, 619 So. 2d 274, 278 (Fla. 1993).

19 *See* State v. Sonnier, 380 So.2d 1 (La. 1979).

racial bias;[20]
- Determine whether the death penalty is unfair based on geographic disparities within a state;[21] and
- Ensure that mitigating circumstances are given meaningful effect when looking at the sentence.[22]

Unfortunately, the state courts' move away from robust proportionality review means that the vast majority of disproportionate sentences are not rectified.

V. THE NEED TO RESTORE PROPORTIONALITY REVIEW & FULFILL *FURMAN*'S PROMISE

Almost forty years have passed since *Furman*, and nobody seriously argues that the Court's decision to regulate procedure has solved the constitutional problem of arbitrariness.[23] In fact, evidence indicates that the application of the death penalty is just as arbitrary today as it was when the Court decided *Furman*.[24] If *Furman* inspired positive changes in its immediate wake, those changes have been all but eviscerated in the past two decades.

For example, states across-the-board have dramatically increased the number[25] and expanded the breadth[26] of aggravating circumstances that render an offender eligible for the death penalty—in some instances making almost all first-degree murders death-eligible. Moreover, the Court has

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20 *Cf.* Turner v. Murray, 476 U.S. 28, 35 (1986) (plurality opinion) ("Because of the range of discretion entrusted to a jury in a capital sentencing hearing, there is a unique opportunity for racial prejudice to operate but remain undetected.").

21 *See* Andrew Ditchfield, Note, *Challenging the Intrastate Disparities in the Application of Capital Punishment Statutes*, 95 GEO. L.J. 801 (2007).

22 *See, e.g.*, State v. Kemmerlin, 573 S.E.2d 870, 897–99 (N.C. 2002); People v. Carlson, 404 N.E.2d 233, 245 (Ill. 1980).

23 *See, e.g.*, Kennedy v. Louisiana, 128 S. Ct. 2641, 2658–59 (noting that the Court's regulation has "produced results not all together satisfactory"); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355 (1995).

24 *See* Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari) ("The basic question—does the system accurately and consistently determine which defendants 'deserve' to die?—cannot be answered in the affirmative."); David McCord, *Lightning Still Strikes: Evidence from the Popular Press that Death Sentencing Continues to be Unconstitutionally Arbitrary More Than Three Decades After* Furman, 71 BROOK. L. REV. 797 (2005).

25 *See generally* Jeffrey L. Kirchmeier, *Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States*, 34 PEPP. L. REV. 1 (2006).

26 *See* Arave v. Creech, 507 U.S. 463 (1993) (upholding Idaho's "utter disregard for human life" aggravating circumstance).

authorized an expansion of the types and scope of evidence that can be considered against the defendant at the penalty phase.[27] Combined with the relaxed protection of other constitutional rights in the penalty phase,[28] these changes contravene *Furman*'s mandates to narrow the class of offenders eligible and limit and channel the sentencer's discretion.

CONCLUSION

Now is the time for the Court to reconsider the procedural approach it spawned in *Furman*. Challenges to the conduct of state courts' proportionality review provide the Supreme Court with the ideal vehicle to blaze a new path. Where procedural regulations have failed to curb arbitrary death sentences, penetrating appellate review of the fairness and propriety of substantive outcomes can succeed. With at least four independent petitions for certiorari seeking review of proportionality review before it,[29] the Court has an opportunity to acknowledge and address rampant arbitrariness in capital sentencing. It should grant certiorari, clarify that its holding in *Harris* was limited and has become outdated, and decide that meaningful proportionality review is constitutionally required. If it does, it will finally acknowledge that *Furman*'s promise has not been fulfilled, and propose a real solution.

Preferred Citation

Bidish Sarma, Furman*'s Resurrection: Proportionality Review and the Supreme Court's Second Chance to Fulfill* Furman*'s Promise*, 2009 CARDOZO L. REV. DE NOVO 238, *available at* http://cardozolawreview.com/index.php?option=com_content&view=article&id=124:sarma2009238&catid=18:other-de-novo-articles&Itemid=20.

27 *See* Payne v. Tennessee, 501 U.S. 808 (1991) (allowing the introduction of victim impact evidence).

28 *See, e.g.*, John G. Douglass, *Confronting Death: Sixth Amendment Rights at Capital Sentencing*, 105 COLUM. L. REV. 1967 (2005); G. Ben Cohen et al., *A Cold Day in* Apprendi*-land:* Oregon v. Ice *Brings Unknown Forecast for* Apprendi*'s Continued Vitality in the Capital Sentencing Context*, 3 HARV. L. & POL'Y REV. (Online) (2009), http://www.hlpronline.com/Smith_HLPR_042409.pdf.

29 *See* Petition for Writ of Certiorari, Fields v. Kentucky, No. 09-5389 (filed July 14, 2009); Petition for Writ of Certiorari, O'Kelley v. Hall, No. 08-10451 (filed May 15, 2009); Petition for Writ of Certiorari, Holmes v. Louisiana, No. 08-1358 (filed Apr. 30, 2009); Petition for Writ of Certiorari, Furnish v. Kentucky, No. 08-10046 (filed Apr. 24, 2009).