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Can Lightning Strike Twice - Obligations of State Courts after Pulley v. Harris

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CAN LIGHTNING STRIKE TWICE? OBLIGATIONS OF STATE COURTS AFTER *PULLEY V. HARRIS*

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[D]eath sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.[1]

INTRODUCTION

Cleveland Turner, Jr., while engaged in an adulterous relationship, secured a gun and agreed to pay Curtis Lee Henderson $2000 to kill his wife. Henderson killed Mrs. Turner and was sentenced to death; Turner was sentenced to life in prison. Neither man had any prior criminal record. Turner's I.Q. was between 58 and 70; Henderson's was 68. Both were tried by judges and juries in Talladega County, Alabama.[2]

James Floyd Smith, while masked and armed, entered a liquor store in Georgia, pushed a customer to the floor, and began firing at the clerk of the store. The clerk shot back hitting Smith's companion, Jimmy Don Hall. Smith eventually killed the clerk. Both Smith and Hall had prior convictions, but the only aggravating circumstance introduced in either case was that the murder was committed in the course of a robbery. Smith, the triggerman, received a life sentence; Hall was sentenced to death.[3]

Wallace M. Fugate III was convicted of murdering his former wife of twenty years. Fugate claimed the shooting was accidental, but the jury verdict supported a witness's account

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1. Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring).

2. *See* Henderson v. State, 616 So. 2d 348 (Ala. 1992). The Alabama Supreme Court remanded the case to the trial judge for sentencing reconsideration in light of the judge's failure to consider three mitigating circumstances.

3. *See* Hall v. State, 244 S.E.2d 833 (Ga. 1978). The Georgia Supreme Court vacated Hall's death sentence upon proportionality review as mandated in GA. CODE ANN. § 27-2537(c)(3) (1978).

that Fugate intentionally assaulted and shot his wife as he was attempting to remove her from her home. Fugate had no criminal record, but was sentenced to death.[4] Frederick Tokars, a prominent attorney in the same state, hired a man to kill his wife. The hired killer kidnapped Mrs. Tokars and her two children and shot her while the children watched. Tokars received a life sentence.[5] Tokars had previously been convicted in federal court in a case involving drug dealing and racketeering.

Are these cases simply reflective of the aberrational outcomes expected occasionally from any capital scheme?[6] Do they simply demonstrate that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death.'"[7] Or is there, or should there be, a method to address and correct disproportionate death sentences in a manner that would avoid the costly expense of retrial?

The principle of proportionality in sentencing is difficult to define. At its simplest, the principle forbids punishment that is disproportionate to the offense. In order to determine whether punishment is disproportionate to the offense, courts consider society's "current judgment" with respect to the punishment as evidenced by legislative enactments and jury sentences.[8] The severity of the punishment, the probability of arbitrary application, and the accomplishment of legitimate penal objectives are also considered in assessing proportionality.[9] In determining the proportionality of a death sentence,

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4. *See* Fugate v. State, 431 S.E.2d 104 (Ga. 1993).

5. *See Former Prosecutor Spared Death Penalty in Georgia Court*, DAILY REC. (Baltimore), Mar. 14, 1997, at 27; Bill Rankin, *Fairness of the Death Penalty Is Still on Trial: Some Say It's a Matter of Race, Money, Luck*, ATLANTA J. & CONST., June 29, 1997, at 13A.

6. *See* Pulley v. Harris, 465 U.S. 37, 54 (1984).

7. Zant v. Stephens, 462 U.S. 862, 884 (1983) (quoting Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion)).

8. *See* Eberheart v. Georgia, 433 U.S. 917 (1977) (per curiam) (mem.) (holding that the death penalty was unconstitutional for a kidnapping and rape where the victim was not killed), *rev'g* 206 S.E.2d 12 (Ga. 1974); Hooks v. Georgia, 433 U.S. 917 (1977) (per curiam) (mem.) (holding that the death penalty was unconstitutional for robbery where victim was not killed), *rev'g* 210 S.E.2d 668 (Ga. 1974); Coker v. Georgia, 433 U.S. 584 (1977) (holding that the death penalty was per se disproportionate and excessive punishment for the crime of rape of an adult woman).

9. These three principles, in addition to the level of acceptance by contemporary society, were considered essential to the interpretation of the word

however, the "Constitution contemplates that in the end [the Supreme Court's] own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."[10]

A recognition, among other things, that capital punishment in America was being applied arbitrarily led to the United States Supreme Court's declaration in the 1972 case of *Furman v. Georgia*[11] that the death penalty, as it was then being applied by the states, violated the Eighth Amendment of the Constitution.[12] In response, and in an effort to redraft statutes that would not run afoul of the Constitution, death penalty states devised various methods to attempt to make their systems less arbitrary. Most states proposed a bifurcated trial system with separate guilt and penalty phases.[13] Many defined aggravating and mitigating circumstances as a means to guide sentencing discretion,[14] while every state provided for mandatory appellate review of death sentences. As part of

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"excessive" in the Eighth Amendment by Justice Brennan in his opinion in *Furman v. Georgia*, 408 U.S. 238, 270-80 (1972) (Brennan, J., concurring).

10. *Coker*, 433 U.S. at 597.

11. 408 U.S. 238 (1972). *See generally* Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Jack Greenberg, *Capital Punishment as a System*, 91 YALE L.J. 908 (1982); Margaret Jane Radin, *Cruel Punishment and Respect for Persons: Super Due Process for Death*, 53 S. CAL. L. REV. 1143 (1980); Robert Woll, Note, *The Death Penalty and Federalism: Eighth Amendment Constraints on the Allocation of State Decisionmaking Power*, 35 STAN. L. REV. 787 (1983).

12. U.S. CONST. amend. VIII. One year prior to *Furman*, the Court denied relief in a case asserting that Fourteenth Amendment due process standards required guided discretion in death cases. *See* McGautha v. California, 402 U.S. 183, 207 (1971) ("In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."). One month following this pronouncement, the Court granted certiorari in *Furman* and three companion cases to determine if "the imposition and carrying out of the death penalty . . . constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Furman*, 408 U.S. at 239. In later years, the Court's picking and choosing would provide one basis for Justice Blackmun's discontent with capital punishment jurisprudence. *See* Randall Coyne, *Marking the Progress of a Humane Justice: Harry Blackmun's Death Penalty Epiphany*, 43 U. KAN. L. REV. 367, 398-405 (1995). This began the Court's separate treatment of Eighth and Fourteenth Amendment challenges in death penalty cases—a separation that is often not easy to understand. *See* Radin, *supra* note 11, at 1148; John C. Shawde, Comment, *Jurisprudential Confusion in Eighth Amendment Analysis*, 38 U. MIAMI L. REV. 357 (1984).

13. *See infra* note 50 and accompanying text.

14. *See infra* notes 45-49 and accompanying text.

that review, the appellate courts, under some schemes, were obliged to consider whether death sentences were products of bias, passion, or prejudice; and under others, whether the sentences were proportionate to the offenses, considering both the offenses and the offenders.[15]

Each of these methods potentially lessened the likelihood of disproportionate death sentences. Still, none had more potential for eliminating disproportionality than an express provision requiring appellate courts to assess the proportionality of death sentences in every case. Although appellate courts after *Furman* performed this task with varying degrees of scrutiny, each court had within its grasp the ability to assure that the death penalty was administered fairly and that death sentences were proportionate.

Because in the majority of death penalty states juries determine the sentences, this appellate court review is essential. Juries determine the sentences in the cases before them without reference to sentences imposed in similar cases. Thus, dissimilar results are bound to occur. The task of assuring that the dissimilarities do not offend basic principles of fairness must fall on those with knowledge of sentences in similar cases, namely judges.

Through the process known as "proportionality review,"[16] which was created in post-*Furman* statutes,[17] most state appellate courts began to assess proportionality before affirming death sentences.[18] More recently, however, largely because of

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15. Most states that imposed some kind of proportionality review modeled their statutes after the Georgia statute that came before the Court in *Gregg v. Georgia*, 428 U.S. 153 (1976). *See infra* notes 144-65 and accompanying text.

16. A proportionality review generally involves comparing similar cases to ascertain whether the death penalty is an appropriate and proportionate punishment. States that have conducted proportionality review have varied widely on what they choose as "similar cases" as well as in how they conduct the review. *See generally* Lawrence S. Lustberg & Lenora M. Lapidus, *The Importance of Saving the Universe: Keeping Proportionality Review Meaningful*, 26 SETON HALL L. REV. 1423 (1996); Robert M. Carney, Comment, *The Case for Comparative Proportionality Review*, 59 NOTRE DAME L. REV. 1412 (1984); Bruce Gilbert, Comment, *Comparative Proportionality Review: Will the Ends, Will the Means*, 18 SEATTLE U. L. REV. 593 (1995); Gregory M. Stein, Comment, *Distinguishing Among Murders When Assessing the Proportionality of the Death Penalty*, 85 COLUM. L. REV. 1786 (1985).

17. *See infra* notes 144-65 and accompanying text.

18. At one time, at least 30 of the 38 states with capital punishment laws conducted some sort of proportionality review in accordance with statutory or

the Supreme Court decision in *Pulley v. Harris*,[19] which held that proportionality review is not constitutionally mandated, meaningful proportionality review has become increasingly rare. Rather than conducting a meaningful comparison between similar cases, courts all too often simply state that a particular death sentence is proportionate and cite previous decisions without analyzing their similarities and differences, or the appropriateness of the death sentence.[20]

This article surveys that phenomenon and its likely consequence: the return to an arbitrary system of capital punishment. In Part I, the article explores the origin and purposes of comparative proportionality review in capital cases.[21] In Part II, it examines the United States Supreme Court's decision in *Gregg v. Georgia*,[22] which addressed several death penalty schemes developed in the 1970s. The article, in Part III, then focuses on the Supreme Court's conclusion in *Pulley v. Harris* that comparative proportionality review is not required by the Eighth Amendment. Part IV analyzes the effect that the *Pulley* decision had on states that had previously adopted comparative proportionality review by statute or as a matter of judicial policy. In Part V, *Pulley*'s deconstitutionalization is contrasted with the Court's approach to proportionality con-

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judicial mandate before affirming a death sentence. *See infra* note 143 and accompanying text.

19. 465 U.S. 37 (1984).

20. *See infra* notes 185-87 and accompanying text.

21. Although this article does not discuss different methods of proportionality review, several noteworthy articles have done so. *See, e.g.*, David C. Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582 (1996); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); David C. Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980); 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 (1996); Rhonda Hartman, *Critiquing Pennsylvania's Comparative Proportionality Review in Capital Cases*, 52 U. PITT. L. REV. 871 (1991); Lustberg & Lapidus, *supra* note 16; Carolyn Sievers Reed, *The Evolution of North Carolina's Comparative Proportionality Review in Capital Cases*, 63 N.C. L. REV. 1146 (1985); Carney, *supra* note 16; Gilbert, *supra* note 16; Traci Smith, Note, *The Outlier Case: Proportionality Review in* State v. Rhines, 42 S.D. L. REV. 192 (1997); Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719 (1988); Stein, *supra* note 16.

22. 428 U.S. 153 (1976).

cerns in related contexts, specifically the "excessive fines" and punitive damages contexts, in which the Court has recognized both procedural and substantive due process requirements. A similar constitutional approach, it is suggested, is necessary in death penalty cases unless we are to tolerate a skewed system in which courts are more protective of excesses in the taking of property than in the taking of life. Finally, in Part VI, this article concludes that state appellate courts have an obligation to guard against a return to a system in which the imposition of capital punishment is as random as a lightning strike. It further urges state court judges to assume the important role of guardians of fairness in capital cases by conducting meaningful proportionality review in every capital case and setting aside disproportionate death sentences accordingly.

I. THE PRINCIPLE OF PROPORTIONALITY

A basic principle of sentencing is that the punishment should fit the crime.[23] Proportionate sentences breed respect for the law and its purposes. Implicit in the notion that the punishment should fit the crime is that the character and culpability of the offender should be considered[24] along with the nature of the offense.

The very language of the Eighth Amendment requires proportionality in sentencing: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[25] By definition, the term "excessive" includes a proportionality component.[26] So too does the word

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23. This phrase can be found as far back as Gilbert and Sullivan's THE MIKADO of 1885. *See generally* Andrew Von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6 (1983). As early as 1910, the Supreme Court noted that "it is a precept of justice that punishment for crime should be graduated and proportioned to offense." Weems v. United States, 217 U.S. 349, 367 (1910).

24. In most legislation requiring proportionality review of death sentences, the statutes require that the court consider the sentence in light of the "crime and the defendant." *See, e.g.*, ALA. CODE § 13A-5-53(b)(3) (1994); NEB. REV. STAT. § 29-2522(3) (1995); S.D. CODIFIED LAWS § 23A-27A-12(3) (Michie 1988). *See also infra* notes 144-65.

25. U.S. CONST. amend. VIII. *See generally* Greenberg, *supra* note 11.

26. *Webster's New World Dictionary* defines "excess" as "action or conduct that goes beyond the usual, reasonable, or lawful limit." WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 473 (3d College ed. 1991). In *Furman v. Georgia*, 408 U.S. 238 (1972), Justice Stewart contended that the death sentences

"unusual."[27] Indeed, neither term has meaning absent comparison with something else. Thus, the Eighth Amendment supports the basic notion that in a fair system of criminal justice, the punishment should be commensurate with the circumstances of the offense, the character of the offender, and the nature of the crime.

This notion of proportionality pervaded each of the five separate majority opinions in *Furman v. Georgia*,[28] in which the Court found that capital punishment, as it was being applied, violated the Eighth Amendment. Justice Douglas, for example, concluded that implicit in the prohibition against cruel and unusual punishment is the basic theme of equal protection of the law.[29] Thus, he concluded that the death penalty would be unusual if it was administered in a manner that is arbitrary or discriminatory.[30]

> [W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determi-

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before the Court were "'cruel' in the sense that they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary." *Id.* at 309 (Stewart, J., concurring).

27. "Unusual" is defined as "not usual or common; rare; exceptional." WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1464 (3d College ed. 1991). Similarly, Justice Douglas explained in *Furman* that the death penalty is "'unusual' if it discriminates . . . by reason of . . . race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." 408 U.S. at 242 (Douglas, J., concurring). "A penalty . . . should be considered 'unusually' imposed if it is administered arbitrarily or discriminatorily." Arthur J. Goldberg & Alan M. Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1790 (1970).

28. 408 U.S. 238 (1972). The Court issued a single paragraph per curiam opinion holding 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." *Id.* at 239-40. Each Justice wrote a separate opinion. *See id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring); *id.* at 375 (Burger, C.J., dissenting); *id.* at 405 (Blackmun, J., dissenting); *id.* at 414 (Powell, J., dissenting); *id.* at 465 (Rehnquist, J., dissenting). Notably, both Justices Powell and Blackmun ultimately reversed their positions on the constitutionality of the death penalty. *See* Callins v. Collins, 510 U.S. 1141, 1143 (1994) (Blackmun, J., dissenting from denial of cert.). *Furman* produced a plethora of legal literature. *See, e.g.*, JOHN C. JEFFERIES, JR. & JUSTICE LEWIS F. POWELL, JR., A BIOGRAPHY 451 (1994); Burt, *supra* note 11; Greenberg, *supra* note 11.

29. *See Furman*, 408 U.S. at 244-45, 249 (Douglas, J., concurring).

30. *See id.* at 249.

> nation whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.
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> . . . [The Eighth Amendment requires] legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to *require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.*
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> . . . .
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> . . . [T]hese discretionary statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on "cruel and unusual" punishments.[31]

Justice Brennan also analyzed the Eighth Amendment's use of the word "unusual." Relying on century-old precedent,[32] he concluded that in order to not violate the Eighth Amendment, punishment must be proportionate. Justice Brennan proposed that four principles govern proportionality: (1) the severity of the punishment; (2) the probability of arbitrary application; (3) the level of acceptance by contemporary society; and (4) the accomplishment of legitimate penal purposes.[33] Finding that capital punishment was inconsistent with all four principles,[34] Brennan concluded that its infliction violated the Eighth Amendment.[35]

Similarly, Justice Marshall concluded that the death penalty was per se unconstitutional because it was excessive and

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31. *Id.* at 253, 256-57 (emphasis added).

32. Justice Brennan noted that in *O'Neil v. Vermont*, 144 U.S. 323 (1892), the dissenting Justice Field concluded that the Eighth Amendment's Cruel and Unusual Punishment Clause "is directed, not only against [torturous punishments], but against all punishments which by their excessive length or severity are greatly disproportioned to the offences charged." *Furman*, 408 U.S. at 279-80 (Brennan, J., concurring) (quoting *O'Neil*, 144 U.S. at 339-40).

33. *See Furman*, 408 U.S. at 270-80 (Brennan, J., concurring).

34. Justice Brennan reasoned that the death penalty is the most severe form of punishment, that it is rarely imposed and therefore probably done so arbitrarily, that it has been rejected by society as evidenced by the decline in public executions and the rejection of certain methods of execution previously used, and that there is no reason to believe that it serves any penal purpose more effectively than other forms of punishment. *See id.*

35. *See id.* at 305-06.

morally unacceptable.[36] In applying the "shocks the conscience" test to determine the societal acceptability of the death penalty, Justice Marshall reasoned that the test must be applied to "fully informed" American citizens[37]—that is, those who are fully aware of the purposes and liabilities of capital punishment.[38] A fully informed citizenry, he concluded, would find the death penalty morally unacceptable in light of its arbitrary and discriminatory application.[39]

Justice Stewart found it unnecessary to determine whether capital punishment was per se cruel and unusual punishment. Rather, he focused on the application of capital punishment under the statutes before the Court. Under those statutes, capital punishment was being applied in an arbitrary manner.[40] Consequently, Justice Stewart reasoned that capital punishment, as it was being applied, was cruel and unusual in the same way that lightning strikes are cruel and unusual because a capriciously selected handful of persons are chosen to die.[41] According to Justice Stewart, "the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed."[42]

The fifth member of the majority, Justice White, concluded that the death penalty was not per se unconstitutional. Nonetheless, according to White, its application under the statutes before the Court violated the Eighth Amendment because they had ceased to accomplish the social ends they were intended to serve.[43]

Thus, while each Justice in the five-member majority had separate bases for his conclusion, each consistently focused on the theme of arbitrariness. As a result, when the states enacted new capital punishment statutes in response to *Furman*, they attempted to address the problem of arbitrary and dis-

36. *See id.* at 350-66 (Marshall, J., concurring).
37. *See id.* at 361.
38. *See id.* at 369.
39. *See id.* at 363-66.
40. *See id.* at 310 (Stewart, J., concurring).
41. *See id.* at 309-10.
42. *Id.* at 310.
43. *See id.* at 311-13 (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." *Id.* at 313.

criminatory application in three ways: (1) drafting more specific standards for juries; (2) bifurcating capital proceedings; and (3) implementing appellate-level proportionality review.[44]

First, the new statutes included standards for differentiating between life and death sentences.[45] In the majority of states in which sentencing decisions were left to juries, prior laws required juries to sentence without guidance as to what factors to consider in their decision making.[46] In effect, sentencing decisions were a matter of complete jury discretion. Therefore, to guide juries in the sentencing decisions, many post-*Furman* state statutes defined aggravating and mitigating circumstances and set forth procedures according to which jurors would determine whether defendants should be sentenced to life or death.[47] If a jury determined that the state

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44. *See generally* RANDALL COYNE & LYN ENTZEROTH, CAPITAL PUNISHMENT AND THE JUDICIAL PROCESS 103-27 (1994).

45. Many of the states followed the suggestions of the MODEL PENAL CODE § 201.6 (1980). *See, e.g.*, FLA. STAT. ANN. § 921.141 (West Supp. 1999); GA. CODE ANN. § 17-10-30 (1997); N.C. GEN. STAT. § 15A-2000 (1997); TEX. CODE CRIM. P. ANN. art. 37.071 (West Supp. 1999).

46. *See Furman*, 408 U.S. at 253-57 (Douglas, J., concurring).

47. For example, the Georgia legislation, upon which many other statutes are based, sets out 10 aggravating circumstances, provides that the jury can consider any mitigating circumstance, and provides for a death sentence only if the jury decides unanimously that the death penalty should be imposed. *See* GA. CODE ANN. § 17-10-30 (1997). The 10 aggravating circumstances are:

> (1) The offense of murder, rape, armed robbery, or kidnapping was committed by a person with a prior record of conviction for a capital felony;
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> (2) The offense of murder, rape, armed robbery, or kidnapping was committed while the offender was engaged in the commission of another capital felony or aggravated battery, or the offense of murder was committed while the offender was engaged in the commission of burglary or arson in the first degree;
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> (3) The offender, by his act of murder, armed robbery, or kidnapping, knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person;
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> (4) The offender committed the offense of murder for himself or another person, for the purpose of receiving money or any other thing of monetary value;
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> (5) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;
>
> (6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

had established at least one enumerated aggravating circumstance by the requisite burden of proof, the jury would then consider any mitigating circumstances.[48] Thereafter, the jury would weigh the aggravating and mitigating circumstances to determine the appropriate sentence.[49]

Second, most of the states bifurcated capital proceedings so that issues of punishment could be easily separated from those of guilt.[50] In the first phase of the trial, the guilt phase, the jury would determine whether the state had established guilt of a capital offense beyond a reasonable doubt. If the jury unanimously found guilt, the case would proceed to the penalty phase.

The third method employed to eliminate arbitrariness in the new statutes focused on appeal rights. Even when jury instructions defined the circumstances supporting a death sentence, jurors, whose job it was to decide single cases, had no yardstick for measuring the appropriateness of capital punishment. In other words, they had no clear sense of proportionality. To address this concern, many statutes enacted after *Furman* required appellate courts, as part of mandatory appellate review, to determine whether death sentences were "excessive or disproportionate to the penalty imposed in similar cases."[51]

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(7) The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;
(8) The offense of murder was committed against any peace officer, corrections employee, or fireman while engaged in the performance of his official duties;
(9) The offense of murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or
(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement, of himself or another.

Id. Florida provides a specific list of both aggravating and mitigating circumstances in FLA. STAT. ANN. § 921.141 (West Supp. 1999).

48. *See, e.g.*, GA. CODE ANN. § 17-10-30.

49. *See, e.g., id.*

50. *See, e.g.*, GA. CODE ANN. § 17-10-2(C).

51. *See, e.g.*, ALA. CODE § 13A-5-53(b)(3) (1994) ("Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases . . . ."); CONN. GEN. STAT. § 53a-46b(b)(3) (1994) (repealed 1995) ("The supreme court shall affirm . . . unless it determines that . . . the sentence is excessive or disproportionate to the penalty imposed in similar cases . . . ."); DEL.

Although appellate review provisions utilized in death penalty states following *Furman* were directed at removing arbitrariness, they additionally addressed the need for heightened reliability that is so important in capital cases. From as early as 1932, the Court had noted the distinct difference between a death sentence and a life sentence.[52] That difference, premised primarily on the absolute finality of death as a punishment, demanded heightened reliability in capital cases:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[53]

This so-called heightened reliability required, among other things, "searching appellate review,"[54] which was indeed provided in post-*Furman* statutes.

II. THE PROPORTIONALITY PRINCIPLE IN PRACTICE

Four years after *Furman*, several of the revised death penalty statutes made their way to the United States Supreme Court under Eighth Amendment challenges. In five consoli-

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CODE ANN. tit. 11, § 4209(g)(2)(a) (1995) ("Whether . . . the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty recommended or imposed in similar cases . . . .").

52. In *Powell v. Alabama*, 287 U.S. 45 (1932), the Court deemed counsel to be a constitutional requirement for indigents charged with capital offenses. When the Court created a "special circumstances" approach to the issue of counsel for indigent defendants, *see* Betts v. Brady, 316 U.S. 455 (1942), being charged with a capital offense was deemed a per se special circumstance. It was not until 1963, in *Gideon v. Wainwright*, 372 U.S. 335 (1963), that counsel was provided for noncapital indigent defendants.

53. Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

54. Coyne, *supra* note 12, at 411; *see also* Gardner v. Florida, 430 U.S. 349, 357 (1977). For a discussion of the "death is different" concept, see Burt, *supra* note 11, at 1743-44.

dated cases,[55] the Court determined the success of the states' efforts to constitutionalize their capital punishment schemes.[56]

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55. *See* Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Roberts v. Louisiana, 428 U.S. 325 (1976).

56. Again, the lead case came from Georgia. *See* Gregg v. Georgia, 428 U.S. 153 (1976). The Georgia statute at issue in the case, GA. CODE ANN. § 27-2503 (Supp. 1975), after which many states modeled their statutory revisions, required a bifurcated jury proceeding in which the issues of guilt and punishment were separated. The sentencer was free to consider all mitigating facts and circumstances, but only the aggravating circumstances that the state had informed the sentencer of prior to trial. *See id.* § 27-2534.1(b). The death penalty could be imposed only if at least one aggravating circumstance was proven beyond a reasonable doubt. *See id.* § 27-2534.1(c).

A defendant sentenced to death was entitled to a mandatory appeal. *See id.* § 27-2537(c). On appeal, the Georgia Supreme Court was required to review the transcript of the evidence, compare the evidence and sentence to those in similar cases (a function that the jury was not equipped to accomplish), and determine affirmatively whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor," *id.* § 27-2537(c)(1), and whether the sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," *id.* § 27-2537(c)(3).

To facilitate this review, the statute required the trial court to report in detail its observations as to guilt and punishment and whether race played a role in the case. The Georgia Supreme Court was required to review the transcript and report. If the court decided to affirm the death sentence, it was required to list the "similar" cases considered in its decision. *See id.* § 27-2537(e).

The Florida statute at issue in the companion case, *Proffitt v. Florida*, 428 U.S. 242 (1976), was similar. In Florida, the jury recommended a sentence, which the trial judge could either accept or reject. *See* FLA. STAT. ANN. § 921.141(2) (West Supp. 1976-77). Notwithstanding this difference, the case was still bifurcated. At the penalty phase, the jury was required to find the existence of at least one enumerated aggravating circumstance by clear and convincing evidence to recommend a sentence of death. *See id.* § 921.141(3). In accepting or rejecting the jury's recommended sentence, the trial judge was required to make written findings. *See id.*

Although the Florida legislation was less specific about the requirements of appellate review, it did require that the death penalty be reviewed to ensure that it was not imposed on a "capriciously selected group." *Proffitt*, 428 U.S. at 258. In fulfilling this obligation, the Florida Supreme Court deemed it its own responsibility to assure that similar results were reached in cases with similar facts. Thus, in its review, the court determined whether the sentence was appropriate in light of other similar cases. *See id.* at 258-59. To do so, the court reweighed the mitigating and aggravating circumstances and independently assessed the appropriateness of the death penalty. *See id.* at 253. This helped to remove arbitrariness in the imposition of the death penalty. Thus, although not statutorily mandated, the Florida Supreme Court was conducting the same kind of proportionality review as that required in Georgia. At the time of *Proffitt*, the Florida Supreme Court had vacated 8 out of 21 death sentences reviewed. *See id.*

Conversely, the Texas death penalty statute before the Court in the companion case, *Jurek v. Texas*, 428 U.S. 262 (1976), had no mandatory appellate review aimed at discovering disproportionate or arbitrary death sentences. *See*

The three statutes at issue in *Gregg v. Georgia*, *Proffitt v. Florida*, and *Jurek v. Texas* were illustrative of the states' methods of appellate review adopted after *Furman*. All states allowed appellate review of death sentences, and the majority of the states followed Georgia in statutorily requiring their appellate courts to conduct comparative proportionality reviews.[57] In other states, such as Florida, the statutes were general and did not mandate proportionality review; but many courts nonetheless conducted proportionality review as a matter of policy.[58] A few states, such as Texas, did not conduct propor-

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TEX. CODE CRIM. P. ANN. art. 37.071 (West Supp. 1975-76). Further, the Texas appellate courts imposed no review requirement. Like Georgia and Florida, the Texas statute required a bifurcated proceeding, but the similarities ended there. Rather than listing aggravating and mitigating circumstances to consider in sentencing, the Texas statute posed questions to the jury after a finding of guilt on a death-eligible offense. *See id.* If the questions were unanimously answered in the affirmative, a death sentence was imposed. *See id.* Appellate review in the Texas Court of Criminal Appeals did not require proportionality review. *See id.* art. 37.071(f). Nonetheless, in upholding the Texas statute, the United States Supreme Court emphasized that the Texas statute "greatly narrowed" the number of death-eligible defendants by its narrowed provisions for death and that appellate review was in a court of statewide jurisdiction. *See* 428 U.S. at 268-70.

57. For example, Alabama, Connecticut, Delaware, Georgia, Idaho, Kentucky, Louisiana, Maryland, Missouri, Mississippi, Montana, North Carolina, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wyoming all required proportionality review by statute. *See infra* notes 144-65 and accompanying text.

58. In addition to Florida, other states like Arizona, Arkansas, Indiana, and on occasion, Illinois conducted proportionality review as a matter of judicial policy. Although the review began as a matter of judicial policy in Florida, in time the Florida Supreme Court deemed it a matter of state constitutional mandate. In *Tillman v. State*, 591 So. 2d 167 (Fla. 1991), the court reasoned:

> The requirement that death be administered proportionately has a variety of sources in Florida law, including the Florida Constitution's express prohibition against unusual punishments. It clearly is "unusual" to impose death based on facts similar to those in cases in which death previously was deemed improper. Moreover, proportionality review in death cases rests at least in part on the recognition that death is a uniquely irrevocable penalty, requiring a more intensive level of judicial scrutiny or process than would lesser penalties.
>
> Proportionality review also arises in part by necessary implication from the mandatory, exclusive jurisdiction this Court has over death appeals. The obvious purpose of this special grant of jurisdiction is to ensure the uniformity of death-penalty law by preventing the disagreement over controlling points of law that may arise when the district courts of appeal are the only appellate courts with mandatory appellate jurisdiction. Thus, proportionality review is a unique and

tionality review at all.[59]

In finding that the Georgia, Florida, and Texas statutes[60] passed constitutional muster, the Supreme Court held that a death sentence for the crime of murder was not per se disproportionate.[61] *Furman* had mandated that the death penalty, because of its uniqueness, could not be imposed under sentencing procedures that created a substantial risk that death would be inflicted in an arbitrary or capricious manner.[62] Thus, the Court focused on the need to suitably direct and limit the discretion given to the sentencing body.[63]

The Court acknowledged that a bifurcated proceeding reduces arbitrariness and capriciousness by eliminating prejudicial evidence relevant only to sentencing from the guilt phase.[64] Nonetheless, a bifurcated proceeding alone cannot ensure fairness.[65] Likewise, definite sentencing procedures and specified

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highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law.

Id. at 169 (citations omitted).

59. In addition to Texas, neither California nor Utah conducted proportionality review, while Illinois did so only sparingly.

60. The death penalty statutes of Louisiana, *see* Roberts v. Louisiana, 428 U.S. 325 (1976), and North Carolina, *see* Woodson v. North Carolina, 428 U.S. 280 (1976), were also under consideration by the Court. Both imposed mandatory death sentences on individuals convicted of designated offenses. The Court concluded that a mandatory death sentence designed to treat all people convicted of a designated offense as "a faceless, undifferentiated mass" did nothing to eliminate the constitutional deficiency of standardless sentencing. *Woodson*, 428 U.S. at 304.

61. In the Georgia case, the jury imposed a death sentence for robbery and murder. The Georgia Supreme Court set aside the death sentence for the robbery conviction. *See Gregg*, 428 U.S. at 162, 187 n.35 (1976).

62. *See id.* at 195.

63. *See id.* at 192-93.

64. *See id.* at 191-92.

65. In the companion case to *McGautha v. California*, 402 U.S. 183 (1971), the Court rejected a claim that the Eighth Amendment required bifurcated trials:

> It may well be . . . that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds, or that accord with the most enlightened ideas of students of the infant science of criminology, or even those that measure up to the individual predilections of members of this Court. The Constitution requires no more than that trials be fairly conducted and that guaranteed rights of defendants be scrupulously respected. From a constitutional standpoint we cannot conclude that it is impermissible for a State to consider that

aggravating and mitigating circumstances narrow discretion, but do not assure proportionate sentencing. Juries, unskilled in sentencing,[66] might still impose death sentences in inappropriate cases.

As a check against that likelihood, the Court noted that appellate courts, experienced in sentencing, can review each case to assure that the death penalty is not freakishly imposed.[67] Turning specifically to the Georgia scheme at issue in *Gregg*, the Court lauded Georgia's appellate review procedure, which required mandatory proportionality review: "The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty [and] substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."[68] Similarly, in *Proffitt*, the Court noted that Florida had "in effect adopted the type of proportionality review mandated by the Georgia statute."[69] Although Texas had no similar statutory or court-imposed system, the Court noted in *Jurek* that "[b]y providing prompt judicial review . . . in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law."[70]

This reliance on appellate review to remove arbitrariness was emphasized by the concurring Justice White in *Gregg* as well.[71] Specifically, White emphasized that the Georgia statutory procedure purportedly assured that the proportionality review would be meaningful. As the majority elaborated, trial judges were statutorily required to prepare reports "designed to elicit information about the defendant, the crime, and the

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> the compassionate purposes of jury sentencing in capital cases are better served by having the issues of guilt and punishment determined in a single trial than by focusing the jury's attention solely on punishment after the issue of guilt has been determined.

Id. at 221 (citation omitted). Neither *Furman* nor any other Supreme Court decision has held otherwise.

66. *See Gregg*, 428 U.S. at 190-92.

67. *See id.* at 195.

68. *Id.* at 206. This review of similar cases was first dubbed "proportionality review" by Justice Stewart in *Gregg*. *See id.*

69. 428 U.S. 242, 259 (1976).

70. *Id.* at 276. For one author's view that the statute in *Jurek* did not even approximate a carefully drafted statute aimed at eliminating disparity and arbitrariness, see Burt, *supra* note 11, at 1777.

71. *See* 428 U.S. at 222-24 (White, J., concurring).

circumstances of the trial."[72] Those reports, in the opinion of the concurrence, required characterizations by the trial judge that were "designed to test for arbitrariness and disproportionality of sentence."[73] Because the statute also required the Supreme Court of Georgia to preserve the record in all capital cases, it authorized the appointment of an assistant and the hiring of staff members to assist the court in accumulating and preserving the records.[74]

III. A PRINCIPLE TURNED OPTION: *PULLEY V. HARRIS*

Eight years after the Supreme Court approved the systems at work in Georgia, Florida, and Texas, and emphasized that guided discretion and meaningful appellate review made state death penalty statutes constitutionally satisfactory, the Court faced the issue of whether comparative proportionality review was a constitutional prerequisite to meaningful appellate review. In the 1984 case of *Pulley v. Harris*,[75] a California petitioner challenged the constitutionality of his death sentence under the California capital punishment scheme, which did not require proportionality review. Justice Powell, writing for the Court, concluded that the California statute was nonetheless constitutional since the Eighth Amendment did not require mandatory appellate proportionality review.[76]

A. *The Precursors to* Pulley v. Harris

Traditionally, the concept of proportionality refers to an "abstract evaluation of the appropriateness of a sentence for a particular crime."[77] In determining proportionality in that con-

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72. *Id.* at 167 (majority opinion citing GA. CODE ANN. § 27-2537(a) (Supp. 1975)). The report was required to be served upon defense counsel. *See id.* at 168.

73. *Id.* at 167.

74. *See id.* at 167 n.10.

75. 465 U.S. 37 (1984). The Court of Appeals for the Ninth Circuit had previously granted Harris habeas relief, finding that comparative proportionality review was constitutionally required. *See id.* at 40. The Supreme Court granted the state's petition for certiorari, which argued that comparative proportionality review was not required by the Eighth Amendment of the United States Constitution. *See id.* at 41.

76. *See id.* at 45.

77. *Id.* at 42-43. The Connecticut Supreme Court, in wrestling with a definition, has suggested that "traditional proportionality" involves

text, the *Pulley* Court said that an examination of the gravity of the offense, the severity of the penalty, and the sentencing practices in other jurisdictions must be probed. Based on those factors, the Court had previously stricken sentences as being disproportionate to the crime under the Eighth Amendment.[78]

Those Eighth Amendment proportionality challenges, however, had not always arisen in capital contexts. In only one murder case,[79] *Enmund v. Florida*,[80] which was decided two years before *Pulley*, had the Court assessed the proportionality of a death sentence. In *Enmund*, the Court recognized explicitly that the Eighth Amendment's Cruel and Unusual Punishment Clause is "directed, in part, 'against all punishments which by their excessive length or severity are greatly disproportioned to the offenses charged.'"[81]

Enmund had been convicted and sentenced to death under a Florida law that imposed the death penalty on a "constructive aider and abettor" in a first degree murder case.[82] The two victims, an elderly couple, were killed by two individuals who came to the couple's farmhouse door and requested water for an overheated car.[83] The strongest evidence against Enmund

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> [l]ooking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions . . . . [It] is simply another term for analysis under either the eighth amendment's prohibition against cruel and unusual punishment or under our state constitutional counterpart . . . .

State v. Webb, 680 A.2d 147, 208 (Conn. 1996) (citations omitted).

78. *See Pulley*, 465 U.S. at 43. The post-*Furman*, pre-*Pulley* Court had on limited occasions faced an Eighth Amendment proportionality challenge to death and nondeath sentences. In the nondeath context, the Court reviewed the imposition of a life sentence for obtaining money by false pretenses in *Rummel v. Estelle*, 445 U.S. 263 (1980). Rummell was convicted of obtaining $120.75 by false pretenses. Because he was a repeat offender, having previously been convicted for fraudulent use of a credit card and passing a forged check, a life sentence was mandated by Texas law. *See id.* at 266. Noting that the defendant would be eligible for parole in approximately 12 years, *see id.* at 280, the Court upheld the sentence against the constitutional challenge, *see id.* at 285. It reasoned that as a recidivist, Rummel had demonstrated a disregard for conforming to the laws of society. *See id.* at 284. The Court, therefore, found no merit to petitioner's Eighth or Fourteenth Amendment claims. *See id.* at 285.

79. The Court had concluded that a death sentence was disproportionate punishment for the crime of rape. *See* Coker v. Georgia, 433 U.S. 584 (1977).

80. 458 U.S. 782 (1982).

81. *Id.* at 788 (quoting Weems v. United States, 217 U.S. 349, 371 (1910) (quoting O'Neil v. Vermont, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting))).

82. *See id.* at 788.

83. *See id.* at 784.

supported an inference that he was sitting in a car at the side of the road approximately 200 yards from the farmhouse at the time of the killing.[84]

The Court analyzed the punishment in the case by looking to the "historical development of the punishment at issue, legislative judgments, international opinion, and the sentencing decisions juries have made."[85] That review led the Court to conclude that imposition of the death penalty on an accomplice who did not kill and had no intention of killing the two victims "does not measurably contribute to the retributive end of ensuring that the criminal gets his just deserts."[86] Because the state court treated the defendants, who intentionally caused harm, the same as it treated Enmund, who did not intentionally cause harm, thereby attributing their culpability to him, the Court overturned the Florida death sentence as a violation of the Eighth Amendment.[87]

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84. *See id.* at 786 (citing Enmund v. State, 399 So. 2d 1362, 1370 (Fla. 1981)).

85. *Id.* at 788. Only eight of the states that imposed the death penalty would have allowed a death sentence for a defendant in Enmund's circumstances. Furthermore, none of the eight jurisdictions that had authorized capital punishment by new legislation after *Furman*, would have allowed the imposition of the death penalty under similar circumstances. Thus, the Court concluded that the status of legislative judgment weighed against capital punishment in the case. *See id.* at 789-93. Furthermore, the Court found that jury decisions were in accord with the majority of legislative judgments and that juries had "repudiated imposition of the death penalty for crimes such as petitioner's." *Id.* at 794. Finally, turning to explore its own convictions about the imposition of the death penalty in this case, the majority stressed that the "focus must be on [the defendant's] culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence,' which means that we must focus on 'relevant facets of the character and record of the individualized offender.'" *Id.* at 798 (citations omitted).

86. *Id.* at 801. The culpability limitations set forth in *Enmund* were altered in *Tison v. Arizona*, 481 U.S. 137 (1987), in which the Court held that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." *Id.* at 158 (footnote omitted). The Tison brothers assisted their father and another convict in breaking out of an Arizona prison. *See id.* at 137. After the prison break, they encountered automobile problems and commandeered the car of a family of four. *See id.* at 139-40. During the course of the robbery, the father and his fellow convict brutally murdered the four victims while the brothers watched. *See id.* at 141. Although the brothers testified that the shooting "surprised" them, they did nothing to stop it or assist the victims. *See id.*

87. *See Enmund*, 458 U.S. at 801.

In the year following *Enmund*, and one year prior to *Pulley*, the Court addressed proportionality again, albeit in a non-capital context. In *Solem v. Helm*,[88] a defendant was sentenced to life imprisonment without the possibility of parole for committing a seventh nonviolent felony.[89] Before applying the *Enmund* proportionality test, the Court traced the origins of the proportionality principle to the Magna Carta and noted that its provisions and those of the First Statute of Westminister had been used to invalidate disproportionate punishments.[90] Noting that the principle had been recognized for almost a century in this country,[91] the Court proclaimed that the Eighth Amendment "prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."[92] The Court stated: "We hold as a matter of principle that a criminal sentence must be proportionate to the crime for which the defendant has been convicted."[93] According to the Court, Solem's life sentence was disproportionate to the offense and thus ran afoul of the Eighth Amendment.

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88. 463 U.S. 277 (1983). In the case, Helm was sentenced to life imprisonment as a result of his recidivist status in South Dakota. *See id.* at 282. He had been convicted of six nonviolent felonies consisting of three burglaries, one grand larceny, one obtaining money under false pretenses, and a third offense of driving under the influence. *See id.* at 279-80. His instant offense, which yielded the life sentence, was for uttering a bad check for $100, an offense which would ordinarily carry a five-year prison sentence. *See id.* at 281.

89. Helm challenged his sentence solely on Eighth Amendment grounds. *See id.* at 283-84.

90. *See id.* at 284-85. The Magna Carta's requirement that "'amercements' may not be excessive" was deemed to be the root of the principle. *Id.* (footnotes omitted). For the specific language of the provisions, see *id.* at 284 n.9.

91. The *Solem* Court noted that proportionality review was first recognized and employed by a Court minority in 1892 in the case of *O'Neil v. Vermont*, 144 U.S. 323, 339-40 (1892) (Field, J., dissenting) (finding a sentence of 19,914 days for selling liquor without a license to be excessive). *See Solem*, 463 U.S. at 286 n.11. The Court, however, then went on to describe *Weems v. United States*, 217 U.S. 349 (1910), as the leading case recognizing proportionality review. *See Solem*, 463 U.S. at 286-87.

92. *Solem*, 463 U.S. at 284.

93. *Id.* at 290. In *Solem*, Justice Powell, who delivered the opinion for a five-member majority, steered away from the notion that the Eighth Amendment proportionality analysis was applicable only in capital cases because "death is different." Citing a 1615 case of the King's Bench, Justice Powell found that the Eighth Amendment principle "clearly applied to prison terms." *Id.* at 289 (citing Hodges v. Humkin, 80 Eng. Rep. 1015 (K.B. 1615)). He likewise found support for the proposition in prior cases of the Supreme Court. *See id.* at 290 (citing Weems v. United States, 217 U.S. 349 (1910)).

Although neither *Solem* nor *Enmund* raised the issue of comparative proportionality review by name, the identification of the "objective criteria" for proportionality review clearly established that the Court was not writing on a blank slate when *Pulley* arose. The Court had explicitly recognized that the Constitution required proportionate sentences and that proportionality was to be assessed by, among other things, reviewing sentencing decisions in similar cases. In *Enmund*, the Court's review included a comparison of Enmund's culpability with those of his codefendants,[94] as well as a comparison of his sentence with those available in other jurisdictions.[95] Likewise, in *Solem*, the Court compared the South Dakota sentence to sentences in similar cases from other jurisdictions.[96] Thus, the concept of comparative[97] proportionality review was implicit in the constitutional principle the Court recognized in both of those cases and in the tests the Court employed. Nonetheless, when the issue of the constitutionality of comparative proportionality review was squarely presented in *Pulley*, the Court chose to separate the proportionality principle into two separate notions: traditional proportionality and comparative proportionality.

B. Dividing the Proportionality Principle: Traditional and Comparative Proportionality

After reviewing its proportionality jurisprudence in capital and noncapital contexts,[98] the Court attempted to distinguish the sort of proportionality review sought in *Pulley* from that previously engaged in by the Court.[99] The "traditional" kind of proportionality review in which a court asks whether the sentence is disproportionate to the offense was not at issue in *Pulley*. Rather, at issue was "comparative" proportionality in

94. *See Enmund*, 458 U.S. at 798.
95. *See id.* at 789-95.
96. *See Solem*, 463 U.S. at 291-92.
97. To determine proportionality, a court *must* compare.
98. In addition to citing *Enmund* and *Solem*, the Court cited *Coker v. Georgia*, 433 U.S. 584 (1977), a case that deemed death a disproportionate penalty for rape. *See* Pulley v. Harris, 465 U.S. 37, 43 (1984).
99. *See Pulley*, 465 U.S. at 43.

which the sentence imposed is compared to sentences of others convicted of the same crime.[100]

It is easy to understand why the Court divided the proportionality principle at issue in *Pulley*. Had it not done so, the Court would have been limited to two unattractive choices. First, a decision that comparative proportionality review was constitutionally mandated would have called the death penalty and dozens of death sentences in several states into question. On the other hand, a decision that the Eighth Amendment had no proportionality component at all would have required reversal of precedent and would have been historically and intellectually indefensible.

Although the reason for the division is understandable, it is not intellectually sound. Both *Solem* and *Enmund* included considerations of comparative proportionality. In *Solem*, for example, the Court noted that "it may be helpful to compare the sentences imposed on other criminals in the same jurisdiction. If more serious crimes are subject to the same penalty, or to less serious penalties, that is some indication that the punishment at issue may be excessive."[101] In *Enmund*, the Court compared the culpability of all death row inmates in the nation with the culpability of Enmund.[102] Both cases recognized that the Eighth Amendment forbids the imposition not only of barbaric or torturous punishments, but of disproportionate punishments as well.[103] Thus, although a part of the proportionality inquiry focused on the nature of the crime and the culpability of the defendant and would thus be tagged "traditional" proportionality, the Court in both pre-*Pulley* cases also compared the sentences with those imposed for similar crimes in other jurisdictions. By doing so, the Court accepted the reality that determining proportionality requires more than a consideration of the particular offense and the offender. To truly determine proportionality, a sentence must be viewed

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100. This is just the type of proportionality review required by step three of the *Solem* analysis and, in fact, engaged in by the Court in *Solem* when it concluded that "Helm was treated more severely than he would have been in any other State." *Solem*, 463 U.S. at 300.

101. *Id.* at 291.

102. *See Enmund*, 458 U.S. at 795-96.

103. *See Solem*, 463 U.S. at 284; *Enmund*, 458 U.S. at 788.

in light of other sentences; in other words, it must be compared.[104]

C. A Retreat from Proportionality Precedent

Thus, before *Pulley*, the Court had not only acknowledged that the Constitution required proportionality in sentencing, but also had recognized that assuring proportionality required comparing sentences in similar cases.[105] The issue in *Pulley* was whether a state system that did not include comparative proportionality review was constitutional, not the constitutionality of a particular disproportionate sentence. In resolving that issue, the Court retreated from its prior solid commitment to the constitutional principle of proportionality and foreshadowed where some Justices would try to take the Court a few years later.[106]

In justifying its conclusion that the Constitution did not mandate comparative proportionality review, Justice White, writing for the *Pulley* majority, first revisited *Gregg*, *Proffitt*, and *Jurek*, and concluded that the decisions in those consolidated cases soundly resolved the issue before the Court.[107] Downplaying the emphasis on appellate proportionality review in Georgia (by statute) and in Florida (by court decision), White concluded that the Court's approval of the Texas capital scheme in *Jurek*, which had no statutory or court-imposed proportionality review, established that comparative proportionality review was not a constitutional requirement.[108]

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104. Although it is true that the Court conducted its comparative proportionality review in *Solem* by comparing the South Dakota sentence to sentences in all the other states, the nature of the case before it (mandatory sentencing under South Dakota law) rendered that method the only appropriate comparison. *See Solem*, 463 U.S. at 298-300.

105. *See id.* at 291; *Enmund*, 458 U.S. at 795-96. Interestingly, in a much earlier traditional proportionality decision, *Weems v. United States*, 217 U.S. 349 (1910), in which the Court deemed a sentence of 15 years of hard labor and expatriation as cruel and unusual, the Court compared the sentence in Weems's case to sentences for more serious crimes. *See id.* at 380-81.

106. In 1991, in an opinion penned by Justice Scalia, two members of the Court concluded that "*Solem* was simply wrong; the Eighth Amendment contains no proportionality guarantee." Harmelin v. Michigan, 501 U.S. 957, 965 (1991).

107. *See Pulley*, 465 U.S. at 45-50.

108. *See id.* at 50-51. White failed to mention the Court's emphasis in *Jurek* on the very narrow application of the death penalty given the statutory definition of capital murder, or the Court's applauding of "prompt judicial review . . . in a court of statewide jurisdiction [as a means of] promot[ing] the evenhanded,

Secondly, Justice White deemed the petitioner's reliance on *Zant v. Stephens*[109] to be misplaced. In *Zant*, the Court had upheld a death sentence even though one of the aggravating circumstances found by the jury was held to be unconstitutionally vague.[110] In upholding the death sentence, the *Zant* Court relied on the "mandatory appellate review," which assured proportionality.[111] The *Zant* Court emphasized:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure proportionality.... As we noted in *Gregg*, we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances.[112]

In true revisionist style, this strong language in *Zant* endorsing the importance of proportionality review was reduced to nothingness in *Pulley*. It was, according to the *Pulley* Court, the finding of other aggravating circumstances in *Zant*, not the appellate court finding of proportionality, that "adequately differentiated [the] case in an objective, evenhanded, and substantively rational way."[113]

This reading of *Zant* is particularly troublesome because many years prior to *Zant* the Court, in *Stromberg v. California*,[114] held that a general verdict relying on either of two aggravating circumstances must be set aside if either

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rational, and consistent imposition of the death sentences under law." Jurek v. Texas, 428 U.S. 262, 276 (1984).

109. 462 U.S. 862 (1983). Petitioner argued that *Zant* supported a holding that proportionality review was constitutionally mandated.

110. At sentencing, the State had urged the jury to find three aggravating circumstances: (1) an offense committed by one with "substantial history of serious assaultive criminal convictions"; (2) murder that was "outrageously or wantonly vile, horrible or inhuman"; and (3) murder that was committed by one who had escaped from lawful custody. *Id.* at 865 n.1 (quoting GA. CODE ANN. § 27-2534.1(b) (1978)). The jury found the first and third circumstances, but made no finding on the second. While the appeal was pending, the state supreme court held the first circumstance to be unconstitutionally vague. *See* Arnold v. State, 224 S.E.2d 386 (Ga. 1976).

111. *Zant*, 462 U.S. at 890.

112. *Id.* at 890 (footnote omitted) (citations omitted).

113. *Pulley*, 465 U.S. at 50 n.12 (quoting *Zant*, 462 U.S. at 879).

114. 283 U.S. 359 (1931).

circumstance is insufficient. In distinguishing the situation presented in *Zant*, in which one of the aggravating circumstances supporting the death penalty was set aside, the *Zant* Court relied specifically on the presence of proportionality review as a safeguard against an inappropriate sentence.[115] Yet, when relied upon in *Pulley*, the *Zant* decision was recast as one which focused instead on the validity of the remaining aggravating circumstance.

At his third level of inquiry, Justice White looked to the California statute at issue in *Pulley*.[116] That statute narrowed the number of death-eligible defendants by its definition of capital murder. It further provided guided discretion on sentencing, which controlled arbitrariness. Thus, Justice White concluded, "[a]ssuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review, the 1977 California statute is not of that sort."[117] Noting that all capital sentencing schemes might produce aberrational outcomes, White concluded that such "inconsistencies are a far cry from the major systemic defects identified in *Furman*."[118] Furthermore, because no perfect procedure for determining who should be sentenced to death could be devised, White concluded that California's capital scheme was wholly acceptable even without appellate proportionality review.

D. The Remnants of Comparative Proportionality Review

After *Pulley*,[119] a number of conclusions regarding proportionality review are certain. First, traditional proportionality

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115. *See Zant*, 462 U.S. at 890.

116. *See* CAL. PENAL CODE § 190 (West 1977).

117. *Pulley*, 465 U.S. at 51.

118. *Id.* at 54.

119. In the few years after the *Pulley* decision, the Court found Eighth Amendment bars to the implementation of the death penalty in two other contexts. First, in *Ford v. Wainwright*, 477 U.S. 399 (1986), the Court held that the Eighth Amendment would not tolerate the execution of one proven to be insane at the time of the execution. *See id.* at 408-10. Later, in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), and *Stanford v. Kentucky*, 492 U.S. 361 (1989), the Court concluded "that the Eighth and Fourteenth Amendments prohibit the execution of a person who was under 16 years of age at the time of his or her offense," *Thompson*, 487 U.S. at 838 (footnote omitted), but that "the imposition of capital punishment on any person who murders at 16 or 17 years of age . . .

review is still a constitutional mandate, but its application is very narrow.[120] Indeed, in distinguishing between traditional proportionality review and the comparative proportionality review sought in *Pulley*, the *Pulley* Court only recognized the constitutional underpinnings of the former.[121] Seven years later, in the fractured *Harmelin v. Michigan*[122] decision, Justice Scalia, writing for a plurality, would deem traditional proportionality review to exist only as part of the "death is different" jurisprudence.[123] Although Justice Scalia's opinion commanded a majority for purposes of upholding the sentence as proportionate, three Justices, concurring in result only, noted their contrary position that the Eighth Amendment "for-

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does not offend the Eighth Amendment's prohibition against cruel and unusual punishment," *Stanford*, 492 U.S. at 380.

In another case alleging an Eighth Amendment violation due to lack of sufficient culpability, the Court adjusted the *Enmund* "intent to kill" standard to authorize the death penalty for anyone who was a major participant in the felony and who had reckless indifference to human life. *See* Tison v. Arizona, 481 U.S. 137 (1987); *see also supra* note 86.

120. After *Pulley*, the Court further retreated in the area of proportionality review in the case of *McCleskey v. Kemp*, 481 U.S. 279 (1987). There, despite evidence that established a significant disparity in the imposition of the death penalty in Georgia based on the race of the victim, the Court denied relief and held that in order to prevail on the claim, a petitioner would have to prove that the decision makers acted with a discriminatory purpose. Because of the stringency of this test, state courts may feel less inclined to take racial discrimination challenges seriously. *See generally* Samuel R. Cross & Robert Mauro, *Patterns of Death: An Anlaysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984); Frederick J. Bendremer et al., Comment, McCleskey v. Kemp*: Constitutional Tolerance for Racially Disparate Capital Sentencing*, 41 U. MIAMI L. REV. 295 (1986); Jacqueline Cook, Note, McCleskey v. Kemp *Coming Full Circle: A Return to Arbitrary Sentencing Patterns in Capital Punishment Cases*, 56 UMKC L. REV. 387 (1988).

121. *See Pulley*, 465 U.S. at 43.

122. 501 U.S. 957 (1991) (plurality opinion).

123. In *Harmelin*, the defendant argued that his life sentence without parole for possessing 627 grams of cocaine violated the Eighth Amendment. After examining the application of the *Solem* factors to *Harmelin*, Justice Scalia concluded that "[p]roportionality review is one of several respects in which we have held that 'death is different,' and have imposed protections that the Constitution nowhere else provides." *Id.* at 994; *see also supra* note 106 and accompanying text. Justices Kennedy, O'Connor, and Souter concurred with the result in the case, but maintained that the "Eighth Amendment does not require strict proportionality between crime and sentence. Rather it forbids only extreme sentences that are 'grossly disproportionate' to the crime." *Harmelin*, 501 U.S. at 1001 (quoting *Solem*, 463 U.S. at 288, 303). In dissent, Justice White, joined by Justices Blackmun and Stevens, defended the application of the *Solem* factors and assailed Justice Scalia's attempt to remove proportionality as an element of general Eighth Amendment jurisprudence. *See id.* at 1009.

bids . . . extreme sentences that are 'grossly disproportionate' to the crime."[124] Thus, what has been named "traditional" proportionality still exists as a constitutional prerequisite to valid criminal sentences, including a death sentence.[125]

Perhaps less absolute, but extremely significant, is the conclusion that *Pulley* did not foreclose Eighth Amendment attacks on death sentences that are comparatively disproportionate. Even more important, it did not remove the Eighth Amendment as the basis for relief from a comparatively disproportionate death sentence. Whether the Constitution mandates a particular type of appellate review and whether the Constitution forbids disproportionate sentences are two very different issues. A holding that the Constitution does not require a state to undergo a particular type of appellate review differs substantially from a holding that the Constitution does not provide relief for one whose sentence, by definition, is grossly disproportionate to sentences from similar cases. Indeed, were *Pulley* to be read to foreclose the latter proposition, much of the Court's past heightened reliability jurisprudence would be undermined.[126]

In addition to not foreclosing viable Eighth Amendment challenges, *Pulley* did not discuss nor foreclose a Fourteenth Amendment due process analysis.[127] Since *Pulley* involved a challenge to a state court judgment, the Eighth Amendment was applicable only as incorporated through the Fourteenth Amendment;[128] however, it was the substantive Eighth Amendment limitations that were addressed in the case. In fact, the Eighth Amendment prohibition against cruel and un-

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124. *Harmelin*, 501 U.S. at 1001 (Kennedy, J., concurring in part & in judgment) (quoting *Solem*, 463 U.S. at 288, 303).

125. The change since *Pulley* in the composition of the Court further complicates an assessment of the Court's present view on traditional proportionality review under the Eighth Amendment.

126. *See* Coyne, *supra* note 12, at 411 (stating that because death is different, "[s]earching appellate review of death sentences and their underlying convictions [are] indispensable components of a constitutional death penalty scheme" (quoting Gardner v. Florida, 430 U.S. 349, 357 (1977) (footnote omitted))).

127. Nor did *Pulley* address or foreclose an equal protection challenge. *But see* McCleskey v. Kemp, 481 U.S. 279 (1987); *supra* note 120.

128. The protections of the Eighth Amendment apply to the states by virtue of the Due Process Clause of the Fourteenth Amendment. *See* Robinson v. California, 370 U.S. 660 (1962); *see also* Furman v. Georgia, 408 U.S. 238, 257 n.1 (1972).

usual punishment was the sole basis of the *Pulley* decision. The Court did not address the substantive or procedural due process limitations on sentences. Nonetheless, the Court's more than a decade long trek through both substantive and procedural due process analyses related to excessive punitive damages awards, and its recent first journey into the Excessive Fines Clause suggest that a due process analysis is not only applicable to capital cases, but is in fact essential.[129]

Another certainty of *Pulley* is that statutory provisions, like those in Georgia requiring that appellate review include comparative proportionality review, are not required by the United States Constitution.[130] That diminution in the status of comparative proportionality review has led to a reduction in the incentive for state appellate courts to review capital cases to assure proportionality,[131] and arguably to an increase in the number of affirmed disproportionate death sentences.[132]

Although *Pulley* disavowed a particular appellate system, it nonetheless acknowledged that capital sentencing schemes must include "checks on arbitrariness."[133] Thus, a system with insufficient checks on either the narrowing of capital offenses or on death eligibility might be unconstitutional without appellate proportionality review. Finally, while *Pulley* established that a system similar to that prescribed in the 1977 California statute[134] was not a system devoid of sufficient

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129. *See infra* Part V.

130. *See Pulley*, 465 U.S. at 50-51.

131. *See infra* text accompanying notes 185-92.

132. *See* Burt, *supra* note 11, at 1784 (suggesting that *Pulley* was the Court's signal to state courts that state death cases would no longer be strictly scrutinized in the federal courts).

133. *Pulley*, 465 U.S. at 51.

134. See Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for* Furman*?*, 72 N.Y.U. L. REV. 1283 (1997), for a thorough discussion of the California death penalty statutes. The "other safeguards against arbitrariness" present in the California statute included a statutory requirement that trial judges independently review and weigh the evidence in death cases to determine if the weight of the evidence supports the jury's findings; that trial judges state the reasons for their findings on the record; and that appellate judges conduct mandatory appellate review of the evidence "assur[ing] thoughtful and effective appellate review, focusing upon the circumstances present in each particular case." *Pulley*, 465 U.S. at 52-53 (quoting People v. Frierson, 599 P.2d 587, 609 (Cal. 1979)).

checks on arbitrariness, it failed to address which components' absence would result in an insufficient system.[135]

IV. COMPARATIVE PROPORTIONALITY REVIEW: PRE- AND POST-*PULLEY*

After the Supreme Court removed the constitutional mandate for comparative proportionality review in *Pulley*,[136] the imposition of disproportionate death sentences continued and, indeed, may have increased. One need look no further than the factual scenarios detailed in the introduction of this article for proof that the death penalty continued to be meted out in arbitrary, disproportionate ways after *Pulley* was decided. Examples of cases in which codefendants are treated disproportionately with the least culpable receiving the death sentence are not rare. Similarly, there are many cases in which almost identical defendants commit almost identical crimes, but are sentenced differently. Indeed, within the reported decisions of most death penalty states are examples of cases in which the fact finder, be it judge or jury, imposed a disproportionate death sentence.[137] On occasion before *Pulley*, the appellate courts in most states (when their statutes mandated) would step in and correct what would otherwise have been a tragic injustice by reducing a disproportionate death sentence to life imprisonment.[138] However, *Pulley*'s removal of what was believed to be proportionality's constitutional underpinning,[139] coupled with the politically charged climate that surrounds

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135. For example, it has been suggested that New Jersey's appellate system "contains no appellate review safeguards whatsoever [other than discretionary proportionality review]." Lustberg & Lapidus, *supra* note 16, at 1461.

136. The Court acknowledged that a system otherwise lacking in meaningful checks on arbitrariness might require comparative proportionality review. *See* discussion *infra* Part VI.B.

137. *See infra* note 170 and accompanying text.

138. *See infra* note 170.

139. *See* State v. Webb, 680 A.2d 147, 205 (Conn. 1996) (noting that "until 1984, it was generally believed that any capital punishment statute that did not provide for proportionality review was constitutionally vulnerable" (quoting State v. Cobb, 663 A.2d 948, 954 (Conn. 1995))).

most capital cases[140] are undermining *Furman*'s mandate for nonarbitrary, nondiscriminatory death penalty schemes.[141]

A. *Pre-*Pulley *State Court Comparative Proportionality Review*

The overarching theme of *Furman*—that the death penalty as it was then being administered was cruel and unusual because of its arbitrary and capricious application—coupled with the Court's applauding of the revised systems in *Gregg*, *Proffitt*, and *Jurek*,[142] led most states to follow Georgia's lead after *Furman* and impose comparative proportionality review as a mandatory appellate procedure.[143] For most states, the requirement was statutorily imposed. The pertinent statutory language often tracked Georgia's requirement that an appellate court determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[144] In

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140. *See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759 (1995).

141. The situation is worsened by the fact that the Supreme Court has sanctioned cavalier approaches to capital cases in general. *See generally* Herrera v. Collins, 506 U.S. 390 (1993) (finding that relief for one who claims actual innocence though sentenced to death is through state executive clemency); Coleman v. Thompson, 501 U.S. 722, 758-59 (1993) (Blackmun, J., dissenting) (characterizing the Court's approach as "erect[ing] petty procedural barriers" to state prisoners who assert federal constitutional claims, "creating a Byzantine morass of arbitrary, unnecessary, and unjustifiable impediments to the vindication of federal rights"); Barclay v. Florida, 463 U.S. 939, 990 (1983) (allowing state courts to apply harmless error doctrine in capital cases in which clear error is found).

142. As previously noted, even though Texas had no comparative proportionality review provision, the Court stressed that appeals were handled by a court with statewide jurisdiction, which promoted the "evenhanded, rational and consistent imposition of death sentences under law." Jurek v. Texas, 428 U.S. 262, 276 (1976).

143. At the time of *Pulley*, Alabama, Connecticut, Delaware, Georgia, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wyoming had statutes or constitutional provisions that provided for proportionality review. *See infra* notes 144-65 and accompanying text. Arkansas, Florida, and Arizona conducted reviews, but without statutory mandate. *See infra* notes 166-67 and accompanying text; *see also supra* note 58.

144. GA. CODE ANN. § 17-10-35 (1997).

fact, almost that precise language was adopted in Alabama,[145] Idaho,[146] Kentucky,[147] Louisiana,[148] Maryland,[149] Mississippi,[150] Nebraska,[151] Nevada,[152] New Hampshire,[153] New Jersey,[154] New Mexico,[155] North Carolina,[156] Ohio,[157] Oklahoma,[158] South Carolina,[159] South Dakota,[160] Tennessee,[161] Virginia,[162] Washington,[163] and Wyoming,[164] while a few other states used somewhat different language with the same effect.[165]

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145. *See* ALA. CODE § 13A-5-53(b)(3) (1994); Beck v. State, 396 So. 2d 645 (Ala. 1980).

146. *See* IDAHO CODE § 19-2827(c)(3) (1987) (amended in 1994 to eliminate disproportionate language); State v. Creech, 670 P.2d 463 (Idaho 1983).

147. *See* KY. REV. STAT. ANN. § 532.075(3)(c) (Michie 1990); Matthews v. Commonwealth, 709 S.W.2d 414 (Ky. 1986).

148. *See* LA. CODE CRIM. PROC. ANN. art. 905.9.1(c) (West 1997); State v. Martin, 376 So. 2d 300 (La. 1979).

149. *See* MD. ANN. CODE, art. 27, § 414(e) (1978) (repealed 1992); Tichnell v. State, 468 A.2d 1 (Md. 1983).

150. *See* MISS. CODE ANN. § 99-19-105(3)(c) (Supp. 1998); Coleman v. State, 378 So. 2d 640 (Miss. 1979).

151. *See* NEB. REV. STAT. § 29-2522(3) (1995).

152. *See* NEV. REV. STAT. § 177.055(2)(d) (1984) (amended in 1985 to eliminate disproportionate language); Harvey v. State, 682 P.2d 1384 (Nev. 1984).

153. *See* N.H. REV. STAT. ANN. § 630:5.XI(c) (1996).

154. *See* N.J. STAT. ANN. § 2C:11-3(e)(6) (West 1995).

155. *See* N.M. STAT. ANN. § 31-20A-4C (Michie Supp. 1994); State v. Garcia, 664 P.2d 969 (N.M. 1983).

156. *See* N.C. GEN. STAT. § 15A-2000(d)(2) (1997); State v. Lawson, 314 S.E.2d 493 (N.C. 1984).

157. *See* OHIO REV. CODE ANN. § 2929.05(A) (Anderson 1996); State v. Steffen, 509 N.E.2d 383 (Ohio 1987).

158. *See* OKLA. STAT. tit. 21, § 701.13(C)(3) (1983) (repealed 1985); Foster v. State, 714 P.2d 1031 (Okla. Crim. App. 1986).

159. *See* S.C. CODE ANN. § 16-3-25(c)(3) (Law Co-op. 1985); State v. Copeland, 300 S.E.2d 63 (S.C. 1982).

160. *See* S.D. CODIFIED LAWS § 23A-27A-12(3) (Michie 1988).

161. *See* TENN. CODE ANN. § 39-13-206(2)(c)(1)(D) (1997); State v. Barber, 753 S.W.2d 659 (Tenn. 1988).

162. *See* VA. CODE ANN. § 17-110.1(C)(2) (Michie 1996) (repealed 1998); Stamper v. Commonwealth, 257 S.E.2d 808 (Va. 1979).

163. *See* WASH. REV. CODE ANN. § 10.95.130(2)(b) (West 1995); State v. Harris, 725 P.2d 975 (Wash. 1986).

164. *See* WYO. STAT. ANN. § 6-4-103(d)(iii) (Michie 1977) (changed to § 6-2-103(d)(iii) and repealed in 1989); Hopkinson v. State, 664 P.2d 43 (Wyo. 1983).

165. *See* CONN. GEN. STAT. § 53a-46b(b)(3) (1994) (repealed 1995) (providing that a court "shall affirm . . . unless it determines that . . . the sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant"); State v. Webb, 680 A.2d 147 (Conn. 1996); DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (1995) (providing that a court shall consider "[w]hether, considering the totality of evidence . . . the death penalty was either arbitrarily or capriciously imposed or recommended, or disproportionate to the penalty

Still other states, such as Arkansas and Arizona, followed Florida's lead in judicially adopting a policy of conducting comparative proportionality review. Although those states' capital punishment statutes[166] did not require any particular type of appellate review, the courts engaged in comparative proportionality review nonetheless "to assure evenhandedness in the application of the death penalty."[167]

Despite specific statutory language in some states, most states conducted comparative proportionality review by comparing the circumstances of the case before a court with the circumstances of other murder cases in which either a death sentence or a life sentence had been imposed.[168] Although

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recommended or imposed in similar cases arising under this section"); Flamer v. State, 490 A.2d 104 (Del. 1984); MO. ANN. STAT. § 565.035(3) (West Supp. 1999) (providing that a court shall consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime, the strength of the evidence and the defendant"); State v. Griffin, 756 S.W.2d 475 (Mo. 1988); MONT. CODE ANN. § 46-18-310(c) (Supp. 1998) (providing that a court shall consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in other cases in which a sentencing hearing was held"); State v. Coleman, 605 P.2d 1000 (Mont. 1979); PA. STAT. ANN. tit. 42, § 9711(h)(3)(iii) (West 1982) (deleted 1997) (providing that a court "must affirm . . . unless . . . the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant"); Commonwealth v. Zettimoyer, 454 A.2d 937 (Pa. 1982). Indiana's Constitution provides that "[a]ll penalties shall be proportioned to the nature of the offense." IND. CONST. art. I, § 16. *See, e.g.*, Saylor v. State, 686 N.E.2d 80, 88-89 (Ind. 1997); Bivins v. State, 642 N.E.2d 928 (Ind. 1994); Johnson v. State, 584 N.E.2d 1092 (Ind. 1992); Games v. State, 535 N.E.2d 530 (Ind. 1989). *But see* Baird v. State, 604 N.E.2d 1170 (Ind. 1992).

166. *See supra* note 56 (discussing the Florida statute).

167. Wilson v. State, 751 S.W.2d 734 (Ark. 1988). Arkansas adopted proportionality review in *Collins v. State*, 548 S.W.2d 106 (Ark. 1977). Arizona adopted proportionality review in *State v. Richmond*, 560 P.2d 41 (Ariz. 1976). Indiana occasionally conducted proportionality review based on its own constitution. *See supra* note 165.

168. The method of conducting proportionality review has been seriously debated by the state courts. *See, e.g.*, State v. Webb, 680 A.2d 147 (Conn. 1996); State v. Cobb, 663 A.2d 948 (Conn. 1995); State v. Webb, 657 A.2d 711 (Conn. 1995) (cases in which the court considered and adjusted the class of cases considered "similar" for proportionality review). *See also* Tichnell v. State, 468 A.2d 1 (Md. 1983); State v. DiFrisco, 662 A.2d 442 (N.J. 1995); State v. Bland, 958 S.W.2d 651 (Tenn. 1997); Peterson v. Commonwealth, 302 S.E.2d 520 (Va. 1983); State v. Lord, 822 P.2d 177 (Wash. 1992). Some argue that the case before a court should be compared to similar cases in which the death penalty has been imposed. Others suggest that the case should be compared with all others in which the death sentence was sought, regardless of the eventual sentence. The majority of states used the former approach. Evaluating the methods of

there was much debate among courts and judges as to the appropriate method of comparison,[169] comparative proportionality review led courts on several occasions to conclude that death sentences were disproportionate to sentences in similar cases and to set those death sentences aside.[170]

For example, the Arkansas Supreme Court judicially adopted comparative proportionality review in 1977 in *Collins v. State*.[171] In *Collins*, the court described its appellate review as including a determination of whether the death sentence was the result of passion, prejudice, or any arbitrary factor and whether the sentence was excessive. The "freak" or disparate death sentence, according to the court, would certainly warrant reversal or reduction on account of its shock to our sense of justice. The court stated, "There is no specific requirement that this court compare sentences in other cases; however, the scope of permissible review of the sentence on appeal would necessarily require that we consult prior cases as precedent . . . ."[172] Notwithstanding its recognition that no "specific requirement" mandated the comparison of the death sentence in *Collins* to other similar cases, the Arkansas Supreme Court did apply this judicially created review to other cases to invalidate death sentences on comparative proportionality grounds.[173]

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comparative proportionality review is beyond the scope of this article. *But see* sources cited *supra* note 21.

169. *See generally* Baldus, *supra* note 21; Bienen, *supra* note 21; Gilbert, *supra* note 16; Lustberg & Lapidus, *supra* note 16.

170. *See Ex parte* Henderson, 616 So. 2d 348 (Ala. 1992); Henry v. State, 647 S.W.2d 419 (Ark. 1981); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Caruthers v. State, 465 So. 2d 496 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981); Hall v. State, 244 S.E.2d 833 (Ga. 1978); State v. Pratt, 873 P.2d 800 (Idaho 1993); State v. Windsor, 716 P.2d 1182 (Idaho 1985); State v. Scroggins, 716 P.2d 1152 (Idaho 1985); People v. Glecker, 411 N.E.2d 849 (Ill. 1980); State v. Weiland, 505 So. 2d 702 (La. 1987); State v. Sonnier, 380 So. 2d 1 (La. 1979); Reddix v. State, 547 So. 2d 792 (Miss. 1989); State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982); Haynes v. State, 739 P.2d 497 (Nev. 1987); Biondi v. State, 699 P.2d 1062 (Nev. 1985); Harvey v. State, 682 P.2d 1384 (Nev. 1984); State v. Stokes, 352 S.E.2d 653 (N.C. 1987); State v. Rogers, 341 S.E.2d 713 (N.C. 1986); Munn v. State, 658 P.2d 482 (Okla. Crim. App. 1983); *see also* State v. Wood, 648 P.2d 71 (Utah 1982) (holding death penalty inappropriate where reasonable doubt and briefly mentioning proportionality review).

171. 548 S.W.2d 106 (Ark. 1977).

172. *Id.* at 121.

173. *See* Henry v. State, 647 S.W.2d 419, 488-89 (Ark. 1983) (modifying death sentence to life of accomplice to capital murder whose codefendant was killed by police after comparing sentence to other cases with death sentences and

In a similar line of cases, the Arizona Supreme Court judicially adopted comparative proportionality review in 1976 in *State v. Richmond*.[174] Five years later, in holding that "the death penalty should be reserved for only the most aggravating of circumstances, circumstances that are so shocking or repugnant that the murder stands out above the norm of first degree murders, or the background of the defendant sets him [or her] apart from the usual murderer,"[175] the court actually determined that a death sentence was disproportionate to that imposed in similar cases.[176]

The Florida Supreme Court's experience with proportionality review proved that comparative proportionality review eliminated inappropriate death sentences.[177] "Because death is a unique punishment, it is necessary in each case to engage in a thoughtful, deliberate proportionality review to consider the totality of circumstances in a case, and to compare it with other capital cases."[178] Thus, the Florida Supreme Court, even after *Pulley*, reduced numerous death sentences on the sole and specific basis that the sentences were disproportionate to sentences imposed on defendants in other similar cases.[179] In

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with sentences to life without parole); *see also* Wilson v. State, 751 S.W.2d 734, 738 (Ark. 1988) (suggesting that an appropriate system requiring sufficient findings of aggravating circumstances that outweigh mitigating circumstances and that support the death penalty would replace the need for comparative review); Ruiz v. State, 655 S.W.2d 441 (Ark. 1983) (Hickman, J., concurring) (reviewing court's disposition of all death cases); Sumlin v. State, 617 S.W.2d 372 (Ark. 1981) (reducing sentence after comparison with similar cases in which sentence was life without parole).

174. 560 P.2d 41 (Ariz. 1976).

175. State v. Watson, 628 P.2d 943, 946 (Ariz. 1981).

176. *See id.* at 947-48. In *Watson*, the court declared the death sentence to be inappropriate in light of the defendant's age, his efforts at rehabilitation, and the codefendant's life sentences.

177. *See* Curtis v. State, 685 So. 2d 1234 (Fla. 1996); Terry v. State, 668 So. 2d 954 (Fla. 1996); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Besaraba v. State, 656 So. 2d 441 (Fla. 1995); Chaky v. State, 651 So. 2d 1169 (Fla. 1995); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Santos v. State, 629 So. 2d 838 (Fla. 1994); Deangelo v. State, 616 So. 2d 440 (Fla. 1993); White v. State, 616 So. 2d 21 (Fla. 1993); Tillman v. State, 591 So. 2d 167 (Fla. 1991); McKinney v. State, 579 So. 2d 80 (Fla. 1991); Nibert v. State, 574 So. 2d 1059 (Fla. 1990); Farinas v. State, 569 So. 2d 425 (Fla. 1990); Blakely v. State, 561 So. 2d 560 (Fla. 1990); Lloyd v. State, 524 So. 2d 396 (Fla. 1988); Proffitt v. State, 510 So. 2d 896 (Fla. 1987); Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross v. State, 474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981).

178. Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995) (quoting Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990)) (emphasis omitted).

179. *See supra* note 177.

Florida's experience, utilizing proportionality review was not "false science,"[180] but rather true justice: "Our review process in capital cases insures proportionality among death sentences, and it is an inherent part of our review . . . ."[181]

Interestingly, a few states professing to engage in scrupulous proportionality review have never found a death sentence to be disproportionate.[182] In Virginia, for example, the state supreme court has never reversed a death penalty case on any grounds, while in Tennessee, notwithstanding the vigorous voice of dissenters, the supreme court has consistently applied a proportionality test that eliminated compelling cases from effective consideration.[183]

Still, like Florida, most other states that scrupulously applied comparative proportionality review pre-*Pulley* found that it had its desired effect. High courts in the majority of the states with either statutorily or judicially mandated comparative proportionality review encountered death sentences that needed correcting. The use of comparative proportionality review thus provided a barrier against the arbitrary and discriminatory application of the death penalty.[184]

B. Pulley*'s Impact on State Court Comparative Proportionality Review*

Pulley's impact on state court proportionality review was dramatic. Indeed, the level of proportionality review since *Pulley* has declined significantly in the majority of states.[185] Six

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180. *See infra* note 192 and accompanying text.

181. Caruthers v. State, 465 So. 2d 496, 499 (Fla. 1985).

182. Neither Tennessee nor Virginia has ever set aside a death sentence on proportionality grounds. Georgia has done so only once. *See* Hall v. State, 244 S.E.2d 833 (Ga. 1978).

183. In virtually every death penalty case in Tennessee between 1990 and 1998, members of the Tennessee Supreme Court criticized the superficial comparative proportionality review. *See, e.g.*, State v. Smith, 868 S.W.2d 561 (Tenn. 1993); State v. Howell, 868 S.W.2d 238 (Tenn. 1993); State v. Van Tran, 864 S.W.2d 465 (Tenn. 1993). In *State v. Bland*, 958 S.W.2d 651 (Tenn. 1997), the court, in a divided opinion, established the manner in which it would continue to conduct reviews virtually assuring that no case will ever be set aside on comparative proportionality grounds.

184. *See supra* notes 170, 177.

185. A few states, notably Alabama, Florida, Idaho, and New Jersey, continue to approach the task as they had pre-*Pulley*, setting aside disproportionate death sentences.

states with statutorily mandated proportionality review repealed their proportionality review provisions.[186] And even in those states in which the legislatures did not act to repeal the mandatory statutory provisions, state courts evidenced an understanding that these proportionality rulings would likely no longer provide a basis for federal review of capital sentences.[187]

Furthermore, in most states where comparative proportionality review was judicially created, courts abandoned that review after *Pulley*. For example, despite its previous practice of invalidating death sentences on comparative proportionality grounds, the Arkansas court, in *Williams v. State*[188] and a number of subsequent decisions,[189] declined to conduct proportionality review, noting that it was not constitutionally mandated. Similarly, the Arizona Supreme Court abandoned this type of review in *State v. Salazar*.[190] Although a majority of the *Salazar* court simply relied on arguments in a prior deci-

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186. Connecticut repealed proportionality review in 1994. *See* CONN. GEN. STAT. § 53a-5-53(b) (Supp. 1998). Idaho also repealed proportionality review in 1994. After repeal the court was required only to find that the sentence was not "excessive." IDAHO CODE § 19-2827(c) (1997). The Idaho Supreme Court held in *State v. Fields*, 908 P.2d 1211, 1225 (Idaho 1995), that deletion of disproportionality from the statute rendered the remaining requirement "meaningless" and declined to undertake any review. Maryland repealed proportionality review in 1992. *See* MD. ANN. CODE art. 27, § 414(e) (1996). Nevada eliminated the requirement that the court consider proportionality in 1985. The requirement that the court consider excessiveness remains. *See* NEV. REV. STAT. § 177.055(2)(d) (1997). Oklahoma repealed proportionality review in 1985. *See* OKLA. STAT. tit. 21, § 701.13(c) (Supp. 1999). Pennsylvania repealed proportionality review in 1997. *See* PA. STAT. ANN. tit. 42, § 9711(h)(3)(iii) (West 1998). Wyoming repealed proportionality review in 1989. *See* WYO. STAT. ANN. § 6-2-103(d)(iii) (Michie 1997).

187. *See, e.g.*, People v. Davis, 794 P.2d 159 (Colo. 1990); Jackson v. State, 684 A.2d 745 (Del. 1996); State v. Wacaser, 794 S.W.2d 190 (Mo. 1992).

188. 902 S.W.2d 767, 772 (Ark. 1995).

189. *See, e.g.*, Willett v. State, 911 S.W.2d 937, 946 (Ark. 1995) ("[W]e no longer conduct a proportionality review . . . ."); Echols v. State, 936 S.W.2d 509, 546 (Ark. 1996); Sasser v. State, 902 S.W.2d 773 (Ark. 1995).

190. 844 P.2d 566, 584 (Ariz. 1992). In a case decided the year before *Salazar*, *State v. White*, 815 P.2d 869 (Ariz. 1991), members of the court had disagreed on the subject of continued comparative review. Justice Corcoran had suggested that the policy be abandoned, *see id.* at 886 (Corcoran, J., specially concurring), while Vice Chief Justice Feldman had recommended retaining proportionality review, *see id.* at 894 (Feldman, V.C.J., concurring). In *State v. Greenway*, 823 P.2d 22 (Ariz. 1991), the court conducted a proportionality review, but two justices specially concurred, refusing to join in the proportionality analysis. *See id.* at 40 (Moeller & Corcoran, JJ., specially concurring in part). *Salazar* was the first death case heard by a newly constituted Arizona court.

sion for its holding,[191] concurring Justice Martone chose to explain his rationale for eliminating the review as follows:

> If I thought proportionality reviews would add one iota of trustworthiness to the capital sentencing process, then I could well understand, if not agree with, the view that we should ignore our lack of authority to perform them. But any review of our cases, simple or exhaustive, belies the proposition that they do any good. . . . Our cases reveal that proportionality reviews are judicial afterthoughts, mere appendages to lengthy opinions. They are performed in a non-adversarial setting, without any pretense at real science. They require a court to engage in the alchemy of measuring degrees of depravity among a handful of selected cases. The pursuit of justice does not require us to engage in unauthorized false science.[192]

Strikingly, however, some courts in states with statutes being repealed after *Pulley* continued to set aside death sentences that were in the system before repeal as disproportionate—a very telling demonstration of some courts' recognition of the need for comparative proportionality review. In Nevada, for example, the legislature repealed its proportionality review statute in 1985.[193] Previously, in 1984 and 1985, the Nevada Supreme Court had set aside death sentences found to be disproportionate to sentences in similar cases.[194] In 1987, in the case of *Haynes v. State*,[195] the court held that Haynes was entitled to proportionality review because his crime had been committed two days before the effective date of repeal.[196] Finding the death sentence to be disproportionate, the Nevada Supreme Court spared Haynes's life.[197]

The Idaho Supreme Court in *State v. Pratt*[198] set aside a death sentence on comparative proportionality grounds just five months before the legislature repealed the statute requir-

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191. *See Salazar*, 844 P.2d at 584 (citing State v. Greenway, 823 P.2d 22, 40 (Ariz. 1991)).

192. *Id.* at 584-85 (Martone, J., specially concurring).

193. *See* NEV. REV. STAT. § 177.055(2)(d) (1997); *supra* note 186.

194. *See* Biondi v. State, 699 P.2d 1062 (Nev. 1985); Harvey v. State, 682 P.2d 1384 (Nev. 1984).

195. 739 P.2d 497 (Nev. 1987).

196. *See id.* at 504 n.5.

197. *See id.* at 504.

198. 873 P.2d 800 (Idaho 1993).

ing proportionality review and left only a requirement that the court evaluate excessiveness.[199] Following that statutory change, the court reasoned in a later case that the elimination of the proportionality language rendered the term "excessive" meaningless and declined to review death penalties for excessiveness or proportionality.[200] Since no other part of the Idaho death penalty scheme was altered as a substitute means of reducing arbitrariness, it is fatuous to assume that Idaho juries do not continue to, on occasion, render disproportionate death sentences in violation of the Eighth Amendment, just as they do in every other death penalty state.

Notably, two states, New York and Kansas, which have recently implemented death penalty statutes, have chosen to include proportionality review as part of their statutory schemes.[201] The New York statute requires an evaluation of proportionality including, upon request by the defendant, a review as to "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted."[202] Much less specifically, the Kansas statute requires a determination of whether the death sentence "was imposed under the influence of passion, prejudice or any other arbitrary factor."[203] Although not explicit in its direction, the Kansas statute arguably requires appellate courts to consider any factor that suggests the death penalty is inappropriate for the crime, including comparative proportionality.

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199. *See* IDAHO CODE § 19-2827(c)(3) (1997); *supra* note 186.

200. *See* State v. Fields, 908 P.2d 1211, 1225 (Idaho 1995); *supra* note 186.

201. The only other newcomer to capital punishment—the federal government—chose not to impose mandatory comparative proportionality review on federal appellate courts reviewing death sentences. *See* 18 U.S.C. § 3595 (1994). *But see* 10 U.S.C. § 866(c) (1994); United States v. Curtis, 32 M.J. 252 (C.M.A. 1991) (interpreting Uniform Code of Military Justice provision to require comparative proportionality review). However, the Justice Department utilizes a screening process to review decisions of United States Attorneys to seek the death penalty.

202. N.Y. CRIM. PROC. LAW § 470.30.3(b) (McKinney Supp. 1999).

203. KAN. STAT. ANN. § 21-4627(c)(1) (1995).

V. DUE PROCESS REQUIREMENTS IN OTHER EXCESSIVENESS CONTEXTS

The analytical difficulty in the Supreme Court's conclusion in *Pulley* that the Eighth Amendment does not require proportionality review in capital punishment cases comes from its inconsistency with constitutional requirements in other contexts. When confronted with due process and Eighth Amendment challenges to punitive damages awards in civil cases and excessive fines claims, the Court has labored to impose constitutional protections that include considerations of proportionality to other awards and fines. Thus, when loss of property but not loss of life is at stake, the Court has utilized the Constitution as a barrier to excessiveness.

A. Punitive Damages

When excessiveness challenges have been raised outside the sentencing arena in the context of punitive damages, the Court has labored to provide due process guarantees. Beginning with *Bankers Life & Casualty Co. v. Crenshaw*,[204] a tort action involving payment under an insurance policy, an insurance company raised ambiguous constitutional challenges based on the alleged excessiveness of a punitive damages award rendered by a state court jury.[205] The company asserted that the award violated the "excessive fines" provision of the Constitution, the Due Process Clause, and the Contract

204. 486 U.S. 71 (1988). Two years prior to *Crenshaw*, in an Alabama case, the Court faced a due process challenge to a large punitive damages award, but the case was resolved on other grounds. *See* Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813 (1986). The Court held that a justice who had filed two actions against insurance companies alleging bad faith failures to pay claims should have recused himself from participating in an appeal regarding the propriety of bad faith awards to partial payment cases. Because the same issue was pending in the lawsuits filed by the justice, the Court concluded that "Justice Embry's opinion for the Alabama Supreme Court had the clear and immediate effect of enhancing both the legal status and the settlement value of his own case. . . . [W]hen Justice Embry made that judgment, he acted as 'a judge in his own case.'" *Id.* at 824 (quoting *In re* Murchison, 349 U.S. 133, 136 (1955)).

205. In *Crenshaw*, the jury awarded $20,000 in compensatory damages under the "loss of limb" section of an insurance policy. Because the company refused to pay, the jury awarded an additional $1.6 million in punitive damages. *See Crenshaw*, 486 U.S. at 75.

Clause.[206] However, because these claims were not presented adequately to the Mississippi Supreme Court, the United States Supreme Court was barred from considering them.[207] Still, in a move that would foreshadow her position on whether a due process analysis was applicable to punitive damages awards, Justice O'Connor concurred in the Court's decision, but expressed her belief that the Court should reach the due process issue in "an appropriate case."[208]

As it turned out, it would take awhile for the "appropriate case" to reach the Supreme Court. Although litigants continued to creatively attack allegedly excessive assessments of punitive damages,[209] the failure to properly raise the due process

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206. *See id.* at 75-76.

207. At the state level, petitioner had argued in a petition for rehearing, that the "punitive damages award 'was clearly excessive, not reasonably related to any legitimate purpose, constitutes excessive fine, and violates constitutional principles.'" *Id.* at 77 (quoting App. to Juris. Statement 139a). The Court deemed this characterization to be inadequate to satisfy the *Webb* standard: "At the minimum . . . there should be no doubt from the record that a claim under a *federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law." *Id.* at 77-78 (quoting Webb v. Webb, 451 U.S. 493, 501 (1981)) (alteration in original).

208. *Id.* at 87 (O'Connor, J., concurring). Justice O'Connor explained:

> Appellant has touched on a due process issue that I think is worthy of the Court's attention in an appropriate case. Mississippi law gives juries discretion to award any amount of punitive damages in any tort case in which a defendant acts with a certain mental state. In my view, because of the punitive character of such awards, there is reason to think that this may violate the Due Process Clause.

Id. Most interesting is the fact that Justice Scalia, who later became a strong dissent on the notion of due process application to punitive damages awards, at least in the substantive context, joined Justice O'Connor's concurrence. *See id.* at 86; BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 598 (1996) (Scalia, J., dissenting).

209. In 1989, the Court faced a properly preserved Eighth Amendment challenge to a punitive damages assessment. In *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), a Sherman Act case, the defendant challenged as an "excessive fine" the award of $6 million in punitive damages when the compensatory award was only $51,146. Declining to go "so far as to hold that the Excessive Fines Clause applies just to criminal cases," *id.* at 263, the Court nonetheless declined relief. "Whatever the outer confines of the Clause's reach may be, we now decide only that it does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." *Id.* at 263-64; *see* United States v. Bajakajian, 118 S. Ct. 2028 (1998); *see also* United States v. Halper, 490 U.S. 435, 448-49 (1988) (concluding that "a civil as well as a criminal sanction constitutes punishment when the sanction as applied in the individual case serves the goals of punishment" for Double Jeopardy Clause purposes; because the disparity between the Government's cost and penalty was

issue forestalled the Court's review until 1991.[210] Beginning in 1991 with *Pacific Mutual Life Insurance Co. v. Haslip*,[211] a case which involved misappropriation of insurance premiums, and continuing for the next five years, the Court was finally able to chart its view of due process limitations on punitive damages awards in private civil actions. In the end, a divided Court has deemed the Due Process Clause's procedural and substantive components as protective guardians against excessive punitive damages awards.[212]

"overwhelmingly disproportionate" suggesting that the penalty was a second punishment, the Court remanded to allow the Government an opportunity to demonstrate that its costs were greater than the district court had found).

210. Like the petitioners in *Crenshaw*, the petitioners in *Browning-Ferris* challenged the excessiveness of the punitive damages award on due process grounds as well. Previewing the debate that would begin with the next case, the Court noted:

> The parties agree that due process imposes some limits on jury awards of punitive damages . . . . There is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme, but we have never addressed the precise question presented here: whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit. That inquiry must await another day [because petitioner failed to raise the claim below].

Browning-Ferris, 492 U.S. at 276-77 (citations omitted).

In *Browning-Ferris* four concurring Justices evidenced their desire to reach the substantive issue. Justices Brennan and Marshall concurred noting that they did so with the "understanding that [the majority opinion] leaves the door open for a holding that the Due Process Clause constrains the imposition of punitive damages in civil cases brought by private parties." *Id.* at 280 (Brennan & Marshall, JJ., concurring). Justices O'Connor and Stevens likewise shared Justice Brennan's view that "nothing in the Court's opinion forecloses a due process challenge to awards of punitive damages or the method by which they are imposed." *Id.* at 283 (O'Connor & Brennan, JJ., concurring). Justices O'Connor and Stevens would have applied the excessive fines provision to the award as well. *See id.*

211. 499 U.S. 1 (1991).

212. In *Haslip*, a jury awarded compensatory and punitive damages to an insured in a fraud action based upon the misappropriation of premiums by the defendant's agent. The punitive award was some four times greater than the compensatory award. In the Supreme Court, the petitioner challenged the award as a product of unbridled jury discretion and thus violative of the Due Process Clause.

The Court carefully reviewed the common law method for assessing punitive damages and the method in place in Alabama. It noted that Alabama juries were required to initially determine the amount of an award considering the gravity of the conduct and the need to deter future similar conduct. After this

Although the decisions in both *Haslip* and *TXO Production Corp. v. Alliance Resources Corp.*,[213] a slander of title case in which the jury awarded $19,000 in compensatory damages and $10 million in punitive damages, emphasized procedural due process protections, the Court considered but rejected substantive due process claims in each case as well. Three years later, however, in *BMW of North America, Inc. v. Gore*,[214] a majority of the Court found a substantive due process violation in the context of a punitive damages award. In *BMW*, a case involving a claim by an automobile purchaser for undisclosed repairs, the Court applied the "grossly excessive" test and declared a $2 million punitive damages award on a $4000 judgment to "transcend[] the constitutional limit."[215] The *BMW* Court focused on three indicia of excessiveness: (1) the degree of reprehensibility; (2) the ratio between compensatory and punitive damages; and (3) the sanctions for comparative misconduct in other cases.[216]

B. A Comparison of the Analyses Used in Punitive Damages and Capital Punishment Cases

The specifics of the Court's due process analysis in the area of punitive damages is strikingly similar to the analysis advocated by some Justices in the early capital cases. In both contexts, the Court has focused on the importance of proce-

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determination, the amount was then generally reviewed by the trial and appellate courts. *See id.* at 6-10.

The Court then turned to the next inquiry, which it characterized as "whether the Due Process Clause renders the punitive damages award in this case constitutionally unacceptable." *Id.* at 18. Although the particular award in this case did not offend due process standards, the Court paved the way for similar arguments in the future. Those arguments were quick to come.

213. 509 U.S. 443 (1993). In *TXO Production Corp.*, the Court reaffirmed the principle that due process imposed restraints on punitive damages awards in civil actions. The plurality affirmed a $10 million punitive award in a case involving $19,000 in compensatory damages. The Court rejected the tests for determining the due process limits posed by both parties, choosing to reiterate the *Haslip* test: "[a] general concern[] of reasonableness . . . properly enter[s] into the constitutional calculus." *Id.* at 458 (quoting *Haslip*, 499 U.S. at 18). Additionally, the Court considered TXO's procedural due process claims, but held that the procedures were not so lacking in objective criteria so as to offend the notions of due process. *See id.* at 463-66.

214. 517 U.S. 559 (1996).

215. *Id.* at 586.

216. *See id.* at 574-75.

dural protections, the gravity of the decision, and the need to control unfettered jury discretion.

First, the Court has emphasized the importance of procedural protections in both contexts. In *Haslip*, for example, the Court reviewed Alabama's method for assessing punitive damages. Emphasizing guided jury instructions, individualized assessment of deterrence and retribution, post-trial court review procedures, and comparative and substantive review on appeal, the Court held that the system was not "so inherently unfair as to deny due process and be *per se* unconstitutional."[217] Similarly, in *TXO Production Corp.*, the Court concluded that objective criteria, including jury instructions and both trial court and appellate review, protected against a valid due process claim.[218] Thus, the procedural safeguards attendant to a jury's decision have been deemed important in both the punitive damages and capital punishment contexts.[219] As previously noted for example, in *Gregg v. Georgia*, the Court endorsed the use of clear jury instructions and appellate proportionality review as a means of assuring fairness.[220]

Second, in both capital cases and punitive damages cases, the Court has emphasized the gravity of the decision. The finality and uniqueness of a death sentence has long been recognized as a reason for heightened scrutiny and "super" due process.[221] Death, quite simply, is different, and must be treated differently. Akin to the notion that death should not be imposed arbitrarily and capriciously, certain Justices likewise muse over the "unpredictable and potentially substantial" windfalls in punitive damages cases.[222] Because of the potential severity of a capital punishment or punitive damages decision, care must be taken to assure that the decision is based on reason and not on whim, bias, or caprice.[223] In point of fact,

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217. *Haslip*, 499 U.S. at 17.

218. *See TXO Prod. Corp.*, 509 U.S. at 465.

219. *See supra* notes 28-44, 213 and accompanying text.

220. *See* 428 U.S. 153, 195, 198 (1976).

221. This article is not to be read as suggesting that the Court has accomplished "super" due process, or perhaps, even ordinary due process in many capital cases.

222. International Bhd. of Elec. Workers v. Foust, 442 U.S. 42, 50 (1979).

223. *Compare Haslip*, 499 U.S. at 18 ("One must concede that unlimited jury discretion . . . may invite extreme results that jar one's constitutional sensibilities."), *with* Furman v. Georgia, 408 U.S. 238, 255 (1972) (Douglas, J., concurring) ("[T]he discretion of judges and juries . . . enables the penalty to be

the concern that the jury's decision would be based on inappropriate considerations was at the heart of *Furman* and is also conspicuously present in punitive damages cases. As Justice O'Connor stated in *TXO Production Corp.*:

> [J]urors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influence impermissible in our system of justice. In fact, they are more susceptible to such influences than judges. . . . Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking.[224]

A third theme that transcends both inquiries is the fear of unfettered jury discretion. In capital cases, the Court has cautioned against "a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants . . . should die or be imprisoned."[225] Similarly, as to the determination of punitive damages, the Court has worried that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities."[226] In commenting on a state system in which the amount of punitive damages was left wholly to the jury's discretion, Justice O'Connor commented: "This grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process."[227] Likewise, in *TXO Production Corp.*, Justice Kennedy stated, "[w]hen a punitive damages award reflects bias, passion, or prejudice on the part of the jury, rather than a rational concern for deter-

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selectively applied, feeding prejudices against the accused if he is poor . . . or if he is a member of a suspect or unpopular minority, and saving those who by social position may be . . . more protected . . . .").

224. *TXO Prod. Corp.*, 509 U.S. at 474 (O'Connor, J., dissenting) (citation omitted). Justice O'Connor went on to conclude that in this case the punitive damages award resulted because "the jury in fact was unduly influenced by the fact that TXO is a very large, out-of-state corporation." *Id.* at 489. Justice O'Connor contends that courts must have the "authority to recognize the special danger of bias that such considerations create." *Id.* at 492.

225. Furman v. Georgia, 408 U.S. 238, 253 (1972) (Douglas, J., concurring).

226. *Haslip*, 499 U.S. at 18.

227. Bankers Life & Cas. Co. v. Crenshaw, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring).

rence and retribution, the Constitution has been violated."[228] The arbitrariness that resulted from unguided discretion in death penalty cases similarly led the Court in *Furman* to conclude that capital punishment, as it was being administered, violated the Eighth Amendment.

In order to avoid bias and arbitrariness in both contexts, the Court requires guided discretion in decision making. Usually, the decision maker is the jury, hearing the evidence in a single case, and unaware of the results in similar cases. Because of this inexperience, the jury has no benchmark for its decision. On the other hand, the Court has recognized that decisions by judges in both capital cases and punitive damages cases should lead to more consistent results "since a trial judge is more experienced . . . than a jury, and therefore is better able to impose . . . similar [sentences or awards] to those imposed in analogous cases."[229] In neither context, though, does the Constitution require the parties to submit the decision to a judge. Capital defendants at the guilt phase and civil defendants sued for punitive damages are both entitled to a trial by jury.[230] Thus, the Court, concerned about jury inexperience but unable to alleviate it by mandating judge trials, has devised other methods to allay its concerns about jury inexperience.

One method is to assure that jurors are carefully instructed.[231] When the arbitrariness of a jury decision is challenged, the Court often analyzes the clarity and usefulness of those instructions. In *Haslip*, for example, the Court reviewed the Alabama jury instructions and found that although the instructions afforded "significant discretion" to the jury, the discretion was not unlimited.[232] Rather, the instructions required a consideration of the policy concerns behind punitive damages and required the jury to consider the "character and degree of

228. *TXO Prod. Corp.*, 509 U.S. at 443 (Kennedy, J., concurring).

229. Proffitt v. Florida, 428 U.S. 242, 252 (1976) (footnote omitted).

230. *See* U.S. CONST. amends. V, VI.

231. Although the Court has frequently shown concern for jury selection in capital cases, *see* Wainwright v. Witt, 469 U.S. 412 (1985); Witherspoon v. Illinois, 391 U.S. 510 (1968), in recent years the Court has exerted more control over juror qualifications in civil cases as well. *See* Edmonson v. Leesville Concrete Co., 500 U.S. 614 (1991).

232. *See Haslip*, 499 U.S. at 19.

the wrong as shown by the evidence and necessity of preventing similar wrong."[233]

Even in light of sufficient jury instructions, the Court has applauded statutes that go further and provide for critical judicial review of a jury's decision. For example, in capital cases before *Pulley*, the Court commended the Georgia and Florida appellate review provisions. Similarly, in punitive damages cases, the Court has emphasized trial court review as a means of assuring that punitive damages awards are reasonable.[234] Following this initial trial court review, the Court also has emphasized the importance of meaningful appellate review, which generally includes a comparative assessment of the award.[235]

According to the Court in *BMW*, even the carefully selected and instructed jury, the conscientious trial court review, and the comparative appellate court review do not end the inquiry as to whether excessive "property" has been taken in violation of due process of law. That is because the *BMW* Court recognized a federal substantive constitutional right prohibiting excessive punitive damages awards in civil actions.[236] That due process protection requires an assessment of the punitive award to determine whether it is "grossly excessive."[237] Determining whether punitive damages are grossly

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233. *Id.* Although the majority found these limitations sufficient, Justice O'Connor deemed the limitations "deceiving." *Id.* at 48 (O'Connor, J., dissenting). The references to character and degree of the wrong Justice O'Connor deemed as "too amorphous." *Id.* Furthermore, the instruction did not address the relationship between the harm caused and the size of the award and did not provide any information for comparative purposes. "In short, the trial court's instruction identified the ultimate destination, but did not tell the jury how to get there. Due process may not require a detailed roadmap, but it certainly requires directions of some sort." *Id.* at 49.

234. In *Haslip*, the Court applauded the Alabama Supreme Court's creation of post-trial procedures for assessing punitive damages awards. The Court noted that Alabama trial courts are "to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of excessiveness of the damages." *Id.* at 20 (quoting Hammond v. City of Gadsden, 493 So. 2d 1374, 1379 (Ala. 1986)). The Court detailed with approval the factors that the trial courts are to consider: culpability of conduct, desirability of discouraging others, impact on the parties, and others. *See id.*

235. In *Haslip*, for example, the Alabama Supreme Court first undertook to analyze the award in comparison to other awards. Secondly, it applied the standards adopted to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." *Id.* at 21 (quoting Green Oil Co. v. Hornsby, 539 So. 2d 218, 222 (Ala. 1989)).

236. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

237. *Id.*

excessive involves three inquiries. The first two inquiries might be referred to as, what Justice White calls, "traditional" proportionality, "an abstract evaluation of the appropriateness of [the damages] for [the conduct]."[238] The first inquiry is the degree of reprehensibility.[239] Thus, as in *Enmund*, in which the defendant's comparative culpability was at issue, limited culpability may make a punishment, or an award in the context of punitive damages, per se unconstitutional.[240]

The second inquiry is the ratio between the compensatory or actual damages and punitive damages.[241] This inquiry, by definition, focuses on the nature of the conduct that produced the actual damage and the resulting injury. Although no exact parallel exists in capital jurisprudence, this inquiry is similar to the question of culpability raised in *Enmund* and in *Tison*. Proportionality review in the capital context requires an examination of the actual conduct of the defendant as it relates to the harm actually caused—that is, in most cases, the death of the victim.

According to the Court, however, traditional inquiries alone are insufficient to determine whether a punitive damages award "transcends the constitutional limit."[242] The third inquiry, therefore, focuses on sanctions for comparative misconduct.[243] Significantly, this inquiry, which asks whether the punitive damages award was proportionate when compared with awards imposed on others for the same conduct,[244] is similar to what Justice White categorized as "comparative" proportionality in *Pulley*.

C. *A Comparison of the Analyses Used in Excessive Fines and Capital Punishment Cases*

The Court's very recent excessive fines analysis similarly reveals heightened protection for property deprivations.[245] In

238. Pulley v. Harris, 465 U.S. 37, 42-43 (1984).
239. *See BMW*, 517 U.S. at 575.
240. *See supra* notes 80-87, 214-16 and accompanying text.
241. *See BMW*, 517 U.S. at 580.
242. *Id.* at 586.
243. *See id.* at 583.
244. *Compare Pulley*, 465 U.S. at 40-41, *with BMW*, 517 U.S. at 568.
245. The Eighth Amendment provides that "excessive fines [shall not be] imposed." U.S. CONST. amend. VIII.

United States v. Bajakajian,[246] for example, the Court faced an excessiveness challenge in a forfeiture action. A federal statute required those traveling out of the country with more than $10,000 in currency to report the amount of currency on a form when leaving the country. [247] Bajakajian, the defendant, did not report having more than the statutory maximum and was arrested for attempting to leave the country with more than $350,000. The federal government sought the forfeiture of the $350,000. After the lower courts deemed the entire $350,000 forfeitable, respondent challenged the forfeiture as a violation of the Excessive Fines Clause of the Eighth Amendment.[248] Although most of the Court's opinion pertained to whether the forfeiture was in fact a "fine" within the meaning of the Excessive Fines Clause, the underlying principles of the case are germane to proportionality issues.

First, the Court held with little difficulty that a grossly disproportionate fine would violate the Excessive Fines Clause of the Eighth Amendment.[249] Second, the Court articulated the appropriate standard for assessing constitutionality: "[A] punitive forfeiture violates the Excessive Fines Clause if it is grossly disproportional to the gravity of the defendant's offense,"[250] in other words, if it offends notions of traditional proportionality.

However, as in the punitive damages cases, the Court's analysis did not end with an inquiry into traditional proportionality. The Court went on to apply the "grossly disproportional" test by comparing Bajakajian's offense to others to

246. 118 S. Ct. 2028 (1998).

247. *See* 18 U.S.C. § 982(a)(1) (1994).

248. *See Bajakajian*, 118 S. Ct. at 2028.

249. *See id.* at 2036 ("The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.").

250. *Id.* In arriving at the appropriate standard, the Court acknowledged that neither the text nor the history of the Excessive Fines Clause gave guidance. Thus, the Court turned to other "particularly relevant considerations." The first is legislative deference; the second, the imprecision of judicial determination. *See id.* at 2037. "Both of these principles counsel against requiring strict proportionality between the amount of a punitive forfeiture and the gravity of a criminal offense, and we therefore adopt the standard of gross disproportionality articulated in our Cruel and Unusual Punishments Clause precedents." *Id.* at 2037 (citing Solem v. Helm, 463 U.S. 277, 288 (1983); Rummell v. Estelle, 445 U.S. 263, 271 (1980)).

whom the statute was meant to apply: "Whatever his other vices, respondent does not fit into the class of persons for whom the statute was principally designed: He is not a money launderer, a drug trafficker, or a tax evader."[251] Thus, just as it did in the punitive damages context, after recognizing that a grossly disproportionate fine violated the Constitution, the Court incorporated comparative proportionality into the constitutional test, this time basing its decision on the Eighth Amendment's Excessive Fines Clause rather than on substantive due process.

Other underpinnings of the *Bajakajian* opinion are equally profound. In discussing the lower courts' roles in the proportionality determination, the Court noted that the district courts and the courts of appeals, when "reviewing the proportionality determination *de novo*, must compare the amount of the forfeiture to the gravity of the defendant's offense."[252] This emphasis on the courts' role in assuring proportionality at both the trial and appellate levels is important. True, in the forfeiture context, a judge, not an inexperienced jury, determines both the sentence and the amount of the fine based on statutory mandates. Nonetheless, the Supreme Court has specifically deemed a proportionality review to be among the trial judge's responsibilities and has mandated that an appellate court conduct a *de novo* review.[253]

Thus, as in the civil punitive damages context, the United States Supreme Court has authored a constitutional test for assessing whether certain monetary penalties are excessive that includes comparative proportionality review. In protecting against the imposition of excessive fines, the Court has obliged judges at both the trial and appellate levels to assure that a grossly disproportionate fine is not levied and has included a comparative analysis as an element of constitutional proportionality. Surely, no less is required when the excessiveness feared is the loss of life rather than the loss of funds.

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251. *Id.* at 2038 (footnote omitted).

252. *Id.* at 2037-38 (footnote omitted).

253. The Court clarified that although the factual findings made by the district court are accepted unless clearly erroneous, the question of the constitutionality of the fine calls for a *de novo* review. *See id.* at 2037 n.10.

D. Due Process Requires Similar Safeguards in All Three Areas

The scrutiny with which the Supreme Court has reviewed alleged monetary excesses, deprivations of property by punitive damages awards under the Due Process Clause, and fines or forfeitures under the Excessive Fines Clause, attests to the need for similar, constitutionally based comparative proportionality reviews of sentences in capital cases. There is no question that the Due Process Clause applies with equal force to deprivations of life and that "unusual" punishments require the same standard of constitutional review as excessive fines. Nor is there any question that those sentenced to the ultimate penalty of death are entitled to at least the same level of scrutiny as those held liable for punitive damages in civil actions or fines or forfeitures in criminal ones. Therefore, the Fourteenth Amendment due process guarantee against disproportionate punishment requires a comparative assessment of other cases in both the context of deprivations of property and deprivations of life.

In short, in defining the substantive due process test for the excessiveness of punitive damages awards and excessive fines, the Supreme Court has required inquiry into both traditional and comparative proportionality. It has declared that before the deprivation of property under the Fourteenth Amendment can be constitutional, that deprivation must be assessed in light of conduct and culpability and in light of awards or fines in similar cases.[254] Specifically, when the excessiveness of a punitive damages award or a fine is challenged on due process grounds, the Constitution requires an assessment of comparative proportionality. Although *Pulley* has established that the Eighth Amendment does not require comparative proportionality review as a component of a state court's appellate system, *Pulley*, when read in light of *BMW*, which mandates an assessment of comparative proportionality, and *Bajakajian*, which compared the circumstances of Bajakajian's offense to that of others, simply cannot foreclose a similar Fourteenth Amendment due process challenge to a capital sentence. Surely, the Court would not

254. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 568 (1996).

condone a system in which the taking of property is subjected to more rigorous due process protection than the taking of life.

Critics of comparative proportionality review in the context of capital sentences complain that the process is difficult to administer.[255] Deciding which cases are similar for comparative purposes is difficult. However, that process is no more difficult to administer in the criminal context than it is in the civil context. The facts that prompt punitive damages awards in civil cases or fines in criminal cases are legally as diverse as circumstances giving rise to death sentences in criminal cases. All cases have nuances and distinctions that set them apart from others. Although the Supreme Court has acknowledged the difficulty of drawing a bright per se proportionality line in the punitive damages context, it has refused to let that obstacle stand in the way of constitutional inquiry: "[T]his consideration surely does not justify an abdication of [the Court's] responsibility to enforce constitutional protections . . . ."[256] Why should this acceptance of responsibility be any less in capital cases?

VI. ESTABLISHING THE NEED FOR COMPARATIVE PROPORTIONALITY REVIEW IN CAPITAL CASES

Because of comparative proportionality's role in eliminating arbitrary and excessive death sentences, states that no longer engage in the review, or do so superficially, risk an arbitrary and discriminatory capital system. Quite simply, comparative proportionality review is the only means of assuring that death sentences are not arbitrarily imposed. In a jury sentencing system, juries lack the experience needed to evaluate the propriety of a sentence in light of sentences in similar cases. Likewise, in a judge sentencing system, the trial judge may be unaware of statewide sentencing practices. Further-

255. *See* Richard Van Duizend, *Comparative Proportionality Review in Death Sentence Cases: What? How? Why?*, STATE CT. J., Summer 1984, at 9.

256. *BMW*, 517 U.S. at 586 n.41. Justice Ginsburg in dissent in the *BMW* case suggested that the Court was putting itself in the place of being the "*only* federal court policing" punitive damages awards. *Id.* at 613 (Ginsburg, J., dissenting). Justice Stevens, discounting this concern, noted that potential difficulty does not remove the Court's constitutional obligations. *See id.* at 586 n.41.

more, the judge's decisions may be affected by public or political pressure.[257]

A. *The Role of State Appellate Courts*

The current landscape of the death penalty in America places state appellate courts in a pivotal and essential role for assuring the appropriate use of the death penalty. The United States Supreme Court has, in recent years, exhibited an unwillingness to examine system-wide problems and lower federal courts are largely unable to remedy inappropriate death sentences due to the restrictions imposed by the federal Antiterrorism and Effective Death Penalty Act.[258] In the view of at least two Justices, the Supreme Court "has stripped state prisoners of virtually *any* meaningful federal review of the constitutionality of their incarceration."[259] In essence, the federal judiciary no longer provides "any meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death."[260]

This laissez-faire philosophy is further demonstrated by the Court's view that executive clemency is the appropriate vehicle for disposing of claims of actual innocence by death row inmates.[261] It is unrealistic to expect governors to commute death sentences in today's "tough on crime" environment. Thus, the Court's delegation of its duty to the executive branch will provide no protection against inappropriate death sentences.

Moreover, the courts cannot expect the legislative branch to provide safeguards from inappropriate death sentences. Legislatures certainly will not further narrow capital eligibility as a substitute check on arbitrariness. In fact, most legisla-

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257. *See* Bright & Keenan, *supra* note 140, at 759.

258. *See* Stephen B. Bright, *Is Fairness Irrelevant: The Evisceration of Federal Habeas Corpus Review and Limits on the Ability of State Courts to Protect Fundamental Rights*, 54 WASH. & LEE L. REV. 1 (1997).

259. Callins v. Collins, 510 U.S. 1141, 1146 n.2 (1994) (Blackmun, J., dissenting from denial of cert.) (quoting Butler v. McKellar, 494 U.S. 407, 417 (1990) (Brennan, J., dissenting)).

260. *Id.* at 1158-59.

261. *See* Herrera v. Collins, 506 U.S. 390 (1993). In *Herrera*, Chief Justice Rehnquist refers to executive clemency as the "fail safe" of our criminal justice system arguing that throughout history wrongfully convicted people have been pardoned once their innocence was discovered.

tures continue to expand capital crimes while some have even authorized the death penalty for non-homicide offenses.[262] The legislative branch's political agenda, like that of the executive branch, steers towards reducing, rather than expanding, checks on the arbitrariness of the death penalty.

In no other context is the challenge for state courts as great as assuring the rights of those who face the ultimate penalty of death. Within the criminal justice system prosecutors often use death cases as political currency.[263] Public defenders, with dwindling resources, are finding it more and more difficult to provide effective representation in capital cases.[264] Finally, federal habeas corpus review has been greatly reduced[265] and the United States Supreme Court has in recent years indicated an unwillingness to examine system-wide problems in capital cases.[266] Therefore, the state appellate courts are the last bastion to assure that the administration of justice in capital cases in this country does not return to a pre-*Furman* system in which the imposition of the death penalty is based upon arbitrary and discriminatory factors. As the Supreme Court has recently commented: "While this Court has the ultimate power to interpret the Constitution, we grant review in only a small number of cases. We therefore rely primarily on state courts to fulfill the constitutional role as primary guarantors of federal rights."[267] Thus, the mantle has clearly been passed.

B. The Insufficiency of Other Checks on Arbitrariness

State appellate courts must fulfill their obligation of assuring that arbitrariness does not infiltrate capital jurisprudence in part because other checks on arbitrariness simply will not accomplish this task. In *Pulley*, although the Supreme Court did not issue a wholesale rejection of Eighth Amendment

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262. *See, e.g.*, LA. REV. STAT. ANN. § 14.42(C) (West 1997) (authorizing the imposition of death for the rape of a child under twelve).

263. *See* Bright & Keenan, *supra* note 140.

264. *See* Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835 (1994); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 65-67 (1990).

265. *See* 28 U.S.C. §§ 2261-2266 (Supp. II 1996); Bright, *supra* note 264.

266. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987).

267. TXO Prod. Corp. v. Alliance Resource Corp., 509 U.S. 443, 499 (1993).

claims based on disproportionality, it explicitly approved California's capital punishment scheme because it contained other sufficient checks on arbitrariness. In endorsing the California scheme, the Court acknowledged that a system lacking in sufficient checks on arbitrariness would not withstand a constitutional challenge.

Most of the checks that the Court endorsed in the California scheme at issue in *Pulley* pertained to narrowing the class of defendants eligible for the death penalty.[268] In approving the scheme, the Court assumed that by appropriately narrowing death eligibility (and providing for mandatory appellate review) the death penalty could adequately be reserved for the "worst of the worst."[269] Such an assumption could not be more erroneous. Often, the nature of narrowing statutes requires a comparison that a juror is unable to make. Many states, for example, have an aggravating circumstance component that allows the death penalty if the murder is especially heinous, atrocious, or cruel. The very use of the word "especially" connotes a comparison. Jurors, who sit only in a single case, however, have no basis to make that comparison.

Limiting crimes for which the death penalty is a viable punishment certainly reduces those eligible for death. Likewise, carefully drafted aggravating circumstances may diminish the number of individuals who will receive the death penalty. Still, the death penalty may be disproportionate even in a capital murder case if the mitigating circumstances set it apart from other similar cases. Therefore, neither narrowing the crimes for which death is an available sentence nor carefully drafted aggravating circumstances provide any check

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268. *See Pulley*, 465 U.S. at 51-54. Additionally, the Court noted that the California statute required trial judges to independently reweigh the evidence to determine if it supported the jury's verdict, *see id.* at 52, and that appellate judges were required to conduct appellate review. *See id.* at 53. Neither provision, however, protects against the arbitrary, disproportionate death sentence. Although California applies a "shocks the conscience" test in evaluating death sentences, that test focuses only on the crime and the defendant, and does not take into account sentences imposed by juries in similar cases. *See* People v. Ramos, 938 P.2d 950 (Cal. 1997); People v. Davenport, 906 P.2d 1068 (Cal. 1995); People v. Sanders, 905 P.2d 420, 471 (Cal. 1995) (finding that the defendant was not entitled to intracase or intercase proportionality review even though codefendant received life sentence).

269. *See Pulley*, 465 U.S. at 51.

against an inflamed jury[270] or an overly zealous prosecutor.[271] A jury can still impose, for example, a death sentence in a robbery-murder case without realizing that thousands of similar cases, many more aggravated, resulted in life sentences. Similarly, neither provides any protection against a biased jury or a racially motivated prosecutor. Only the courts can accomplish that protection; and they can accomplish that task only through comparative proportionality review.

Because of the nature of state death penalty statutes, the prosecution's decision to seek the death penalty is unchecked. Prosecutors in one jurisdiction may seek the death penalty routinely while others exercise greater deliberation in deciding in which cases to seek a death sentence. A trial judge has no authority to question the prosecution's choice of defendants eligible for death sentences. Generally, jurors are not aware of those choices. Thus, the jurors make their decision in a vacuum, based only on the facts of the single case before them, which for most will undoubtedly be the "worst" they have ever heard.

But, indeed, the defendant may not be the "worst of the worst." The case may not be one of those "few cases"[272] in which the death penalty should be imposed. Only the appellate court whose obligation over time has included reviewing other capital cases can determine whether a defendant's death sentence is inconsistent with the punishment usually imposed

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270. Victim impact testimony, now admissible under *Payne v. Tennessee*, 501 U.S. 808 (1991), can have the effect of particularly arousing the jury. For an article that concludes that the disadvantages of victim impact testimony outweighs the benefits, see Amy K. Phillips, *Thou Shalt Not Kill Any Nice People: The Problem of Victim Impact Statements in Capital Sentencing*, 35 AM. CRIM. L. REV. 93 (1997).

271. *See* Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669; Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-*Furman *Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743 (1991). "The absence of uniform standards governing prosecutorial discretion heightens the uncertainty and inconsistency in the administration of the capital murder statute. Derivatively, it . . . inevitably compounds the risk of arbitrary and capricious death sentences." State v. Gerald, 549 A.2d 792, 851 (N.J. 1988) (Handler, J., concurring in part & dissenting in part).

272. Lowefield v. Phelps, 484 U.S. 231, 255 (1988) (Marshall, J., dissenting). "Since our decision in *Furman* . . . we have required that there be a 'meaningful basis for distinguishing the few cases in which [the death sentence] is imposed from the many cases in which it is not.'" *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring) (alteration in original)).

for the crime. In effect, appellate judges are the lone bastion between a properly administered capital punishment scheme and one that is teeming with arbitrariness and discrimination.

Likewise, the existence of mandatory appellate review of death sentences, as California had, is insufficient to guard against arbitrariness. The California statute at issue in *Pulley* did require appellate courts to conduct appellate review of death penalty cases; but the required review only involved the particular case before the court at the time of review. To be meaningful, appellate review of death sentences must always include scrupulous and deliberate comparative proportionality review. That review must include a comparison of the sentence in the case before the court to sentences in similar cases. Similar cases should include those in which the death penalty was or could have been imposed.[273]

Additionally, the parties should have notice of the cases the court intends to compare and should have an opportunity to present arguments about the cases and suggest that the court compare additional cases. Defendants should be allowed to raise and point to other similar cases in which the death penalty was not imposed. Because of the uniqueness of this review, which in effect requires fact finding by appellate courts, clearly articulated rules of court should detail the procedure. [274]

C. The Benefits of Comparative Proportionality Review

Several reasons support the conclusion that meaningful appellate review of death sentences must include comparative proportionality review. First, it is ultimately the courts' responsibility to assure that the death penalty is not administered, and does not appear to be administered, randomly. Respect for the justice system flows from the existence of a fair, indiscriminate system, not an unfair and selective one. To this end, the Model Code of Judicial Conduct recognizes that "[o]ur legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the

273. *See supra* notes 16, 21.

274. At least one federal district court has found a due process violation in a state's comparative proportionality review because the defendant "did not have adequate, meaningful, notice of the *procedure* to be followed." Harris v. Blodgett, 853 F. Supp. 1239, 1291 (W.D. Wash. 1994).

laws that govern us.... [J]udges ... must ... strive to enhance and maintain confidence in our legal system."[275] To assure that the death penalty is administered fairly, an appellate court must compare the case before the court to other cases in which the death penalty has been authorized.

Secondly, comparative proportionality review helps to reduce the risk of discrimination in the operation of the death penalty. All too often capital punishment seems to be reserved for the poor and minorities. Only the appellate judge who witnesses these trends can remedy disparate punishments that appear to be influenced by prejudice. Due process surely does not allow the execution of an African American man for a crime for which a white man routinely is only sentenced to life; nor does due process allow the execution of those who kill whites, but not those who kill African Americans. Reducing the risk of discrimination in the capital punishment system improves the integrity and, consequently, the public's support for the justice system.[276]

Finally, meaningful appellate review, including comparative proportionality review, would reduce the costs of the capital punishment system. If courts were obliged to set aside disproportionate death sentences, it would reduce the number of appeals and the number of postconviction and habeas petitions. Over time, prosecutors would be deterred from pursuing a capital indictment as a bargaining tool in cases in which the death penalty is not appropriate, thus reducing the cost of trial in what would have been a capital case.

CONCLUSION

Only the courts, created to be the "safe asylum in times of crisis,"[277] can assure that we do not devolve to randomly, arbitrarily imposed death sentences excused by the notion that "no perfect procedure for deciding [when] to impose death" exists.[278] The Supreme Court rendered a questionable decision in *Pulley*. Since it is unlikely, however, that the Court will recon-

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275. MODEL CODE OF JUDICIAL CONDUCT Preamble (1998).

276. *See supra* Part VI.A.; *see also* MODEL CODE OF JUDICIAL CONDUCT Canon 3(B)(5) (1998).

277. EDMUND BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 242 (Thomas H.D. Mahoney ed., Bobbs-Merrill 1955) (1790).

278. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

sider that case, state appellate courts must engage in comparative proportionality review to prevent Eighth Amendment arbitrariness and ensure due process in capital sentencing.

In a time when attacks on the independence of the judiciary are rampant, a common reaction is to avoid any judicial action that might be viewed as activist. That reaction, however, only serves to further reduce the independence and integrity of the American justice system. Instead, it is the obligation of every judge to "uphold the integrity and independence of the judiciary."[279] In this most important of judicial functions—determining which lives the Government can take—judges simply must uphold this duty. Only then will the constitutional mandate that the penalty of death be reserved for "the worst of the worst," and not administered as randomly as a lighting strike, be accomplished.

279. MODEL CODE OF JUDICIAL CONDUCT Canon 1 (1998).