CONSTITUTIONAL LAW—SENTENCING—EIGHTH AMENDMENT DOES NOT REQUIRE COMPARATIVE PROPORTIONALITY REVIEW IN CAPITAL SENTENCING SCHEMES—*Pulley v. Harris*, 104 S. Ct. 871 (1984).

In 1976, the United States Supreme Court firmly established that the death penalty is permissible under the eighth amendment.[1] Since then, however, only twenty-five executions have taken place despite the fact that presently there are approximately 1,400 prisoners on death rows across the country.[2] A major reason for the infrequency of executions is the seemingly endless number of appeals, filed by condemned prisoners, which challenge the procedures under which they have been sentenced.[3] In an effort to clear the backlog of capital cases, the Supreme Court, in *Pulley v. Harris*,[4] recently held that one of the procedural protections often afforded the condemned, comparative proportionality review, is not required by the eighth amendment.[5]

On February 8, 1979, a California jury sentenced Robert Alton Harris to death.[6] That sentence culminated a ten week bifurcated trial,[7] during which Harris was convicted of the first degree murder of two teen-age boys.[8] On direct appeal to the California Supreme

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[1] *See infra* notes 36-38 and accompanying text. The eighth amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments imposed." U.S. CONST. amend. VIII.

[2] NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., DEATH ROW U.S.A. 1 (Oct. 1, 1984). Of the 25 people executed, four of them chose to die. *Id.*; *see* Comment, *Capital Punishment and the Waiver of Sentence Review*, 18 HARV. C.R.-C.L. L. REV. 483, 486-95 (1983) (discussing why the four chose to die).

[3] *See infra* notes 138-40 and accompanying text.

[4] 104 S. Ct. 871 (1984).

[5] *Id.* at 876. The eighth amendment was held to be applied to the states through the fourteenth amendment in Robinson v. California, 370 U.S. 660 (1962).

[6] Brief for Petitioner at 6, Pulley v. Harris, 104 S. Ct. 871 (1984).

[7] *Id.* at 5-6. A bifurcated trial separates the determination of guilt from the determination of punishment. Gregg v. Georgia, 428 U.S. 153, 190-91 (1976). *See generally* Comment, *The California Penalty Trial*, 52 CALIF. L. REV. 386 (1964) (bifurcated trial furthers two goals: avoiding prejudice to defendant on guilt issue and inquiring into defendant's background and character for informed penalty choice).

[8] *Pulley*, 104 S. Ct. at 873 n.1. Harris shot each boy twice and then calmly finished their lunches. *Id.* Pursuant to the California statute then in effect, a person convicted of first degree murder would receive life imprisonment unless one or more "special circumstances" were found, in which case the punishment would be either life imprisonment without possibility of parole or the death penalty. *Id.* at 880 (citing CAL. PENAL CODE §§ 190, 190.2 (West 1977)). The appropriate punishment was determined at a separate sentencing proceeding. *Id.* (citing CAL. PENAL CODE § 190.3 (West 1977)). At the guilt phase in Harris's trial, the jury found that the prosecutor had proved two "special circumstances" beyond a reasonable doubt: (1) Harris had been convicted of more than

Court, Harris argued that California's sentencing procedures were constitutionally defective because they failed to provide a comparative proportionality review.[9] Such a review would require the reviewing court, before affirming a sentence of death in a particular case, to compare that sentence with the sentences imposed in similar cases.[10] The California Supreme Court rejected Harris's claim and affirmed his sentence.[11] The United States Supreme Court denied certiorari.[12]

Harris unsuccessfully sought habeas corpus relief at all three levels of the California courts,[13] and he was again refused certiorari by the United States Supreme Court.[14] His subsequent petition for habeas corpus in the United States District Court for the Southern District of California was denied.[15] He appealed this denial to the Court of Appeals for the Ninth Circuit, which determined that the California Supreme Court should have conducted a comparative proportionality review.[16] According to the Ninth Circuit, such a review would ensure that the death penalty was not being imposed arbitrarily or discriminatorily.[17] The court of appeals directed the

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one first degree murder; and (2) each murder was "willful, deliberate, premeditated, and committed during the commission of kidnapping and robbery." *Id.* at 873 n.1. At the sentencing phase, the prosecutor presented evidence that, in 1975, Harris had been convicted of manslaughter, that he had been found with weapons while in jail, and that he had sodomized a fellow cellmate. Harris offered mitigating evidence detailing his pitiful childhood, including severe beatings by his father and his expulsion from home at age 14. *Id.*

9 *See id.* at 874 & n.2.

10 *Id.* at 874. At present, 36 states provide for comparative proportionality review, whether by statute or through case law. *See* Brief for Respondent app. A, at 1-7, Pulley v. Harris, 104 S. Ct. 871 (1984).

11 *Pulley*, 104 S. Ct. at 874.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 Harris v. Pulley, 692 F.2d 1189, 1192 (9th Cir. 1982), *rev'd*, 104 S. Ct. 871 (1984). The court's decision was based in part on its reading of two prior Supreme Court cases, Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976), wherein a plurality of the Court had approved of proportionality review. *See Pulley*, 692 F.2d at 1196.

Harris additionally claimed that he had been denied a fair trial because of prejudicial pretrial publicity. He also asserted that the California death penalty statute is discriminatorily applied to males, and to those who have been convicted of killing whites. The court of appeals remanded the case to the district court for a hearing on those issues. *Id.* at 1197-200.

17 Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982), *rev'd*, 104 S. Ct. 871 (1984). The court reasoned that in death penalty cases this review would provide "a 'meaningful basis for distinguishing the . . . cases in which [the death penalty] is imposed from . . . the many in which it is not.'" *Id.* at 1197 (quoting Lockett v. Ohio, 438 U.S. 586, 601 (1978)).

district court to vacate Harris's sentence unless the California Supreme Court performed a comparative proportionality review within 120 days.[18]

The Supreme Court granted California's petition for certiorari[19] and, in *Pulley*, reversed the Ninth Circuit's decision.[20] Justice White, writing for the majority, determined that the eighth amendment does not require state courts to conduct a proportionality review when considering the propriety of a death sentence.[21]

The eighth amendment forbids the imposition of cruel and unusual punishment.[22] In 1972, the Supreme Court, in *Furman v. Georgia*,[23] squarely addressed whether that restriction extended to the death penalty.[24] *Furman* involved three consolidated cases which had resulted in death sentences.[25] In each case, the sentencing decision

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18 *Id.* at 1196.

19 *Pulley*, 104 S. Ct. at 874.

20 *Id.* at 876.

21 *Id.* Justice Stevens, in a concurring opinion, agreed with the majority that a comparative proportionality review was not a constitutionally essential component of a death penalty statute. He disagreed, however, with the majority's view of the role that appellate review should play in a capital sentencing scheme. *Id.* at 881-82 (Stevens, J., concurring). For a discussion of Justice Stevens's opinion, see *infra* notes 98-102 and accompanying text.

In his dissent, Justice Brennan, joined by Justice Marshall, continued to argue that the death penalty was unconstitutional per se. *Pulley*, 104 S. Ct. at 884 n.1 (Brennan, J., dissenting) (citing Gregg v. Georgia, 428 U.S. 153, 227 (1976) (Brennan, J., dissenting), and Furman v. Georgia, 840 U.S. 153, 227 (1972) (Brennan, J., dissenting)). See also *infra* notes 103-08 and accompanying text for a discussion of Justice Brennan's dissent.

22 U.S. CONST. amend. VIII; *see also supra* note 1 (text of the eighth amendment).

23 408 U.S. 153 (1972).

24 *Furman* was the first case to address the constitutionality of the death penalty under the eighth amendment. The Court had examined the constitutionality of the death penalty just one year before *Furman*, in McGautha v. California, 402 U.S. 183 (1971), wherein it determined that standardless jury discretion did not violate the due process clause. *McGautha*, 402 U.S. at 196.

Prior to *Furman*, the death penalty was challenged either on procedural grounds, Witherspoon v. Illinois, 391 U.S. 510, 518, 522 (1968) (automatic exclusion of jurors with conscientious objections to death penalty violates sixth and fourteenth amendments); Coleman v. Alabama, 389 U.S. 22, 23 (1967) (death penalty reversed on equal protection grounds due to systematic exclusion of black jurors), or on the mode of execution, *e.g.*, Louisiana *ex rel.* Francis v. Resweber, 329 U.S. 459, 463-65 (1947) (execution after failure of first attempt permissible); *In re* Kemmler, 136 U.S. 436 (1890) (death by electrocution permissible); *see, e.g.*, Wilkerson v. Utah, 99 U.S. 130, 136-37 (1878) (death by public execution permissible). *See generally* M. MELTSNER, CRUEL AND UNUSUAL: THE SUPREME COURT AND CAPITAL PUNISHMENT (1973) (discussing history of capital punishment prior to *Furman*).

25 The cases were Furman v. State, 225 Ga. 253, 167 S.E.2d 628 (1969) (death penalty for murder), *rev'd per curiam sub nom.* Furman v. Georgia, 408 U.S. 238 (1972), Jackson v. State, 225 Ga. 790, 171 S.E.2d 501 (1969) (death penalty for rape), *rev'd per curiam sub nom.* Furman v. Georgia, 408 U.S. 238 (1972), and Branch v. Texas, 447 S.W.2d 932

had been left to the unguided discretion of a judge or jury.[26] In a brief per curiam decision, five members of the Court[27] held that, *as applied*, the death penalty constituted cruel and unusual punishment in violation of the eighth amendment.[28]

Each member of the majority filed a separate opinion. Justice Brennan and Justice Marshall found the death penalty to be unconstitutional per se.[29] The other members of the majority focused on the administration of the statutes. Emphasizing the discriminatory application of the statutes, Justice Douglas maintained that they violated the concept of equal protection implicit in the eighth amendment.[30] Justice Stewart, troubled by the random selection of those sentenced to die, reasoned that the eighth amendment would not tolerate any death sentencing scheme that permitted "wanton" and "freakish" results.[31] Justice White's opinion evinced a desire for an even-handed application of the death penalty so as to provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[32] Although *Furman* was a fragmented decision, the Court has subsequently interpreted it as forbidding the arbitrary and capricious imposition of the death penalty.[33]

(Tex. Crim. App. 1969) (death penalty for murder), *rev'd per curiam sub nom.* Furman v. Georgia, 408 U.S. 238 (1972).

26 *Furman*, 408 U.S. at 240.

27 The five members of the plurality were Justice Brennan, Justice Douglas, Justice Marshall, Justice Stewart, and Justice White. *Id.*

28 *Id.* at 239-40.

29 *Id.* at 305 (Brennan, J., concurring); *id.* at 370 (Marshall, J., concurring). In concluding that the death penalty does not comport with basic "human dignity," Justice Brennan found death to be a "uniquely and unusually severe punishment," one which is inflicted arbitrarily without any justifiable penal purpose. *Id.* at 305 (Brennan, J., concurring). Justice Marshall reasoned that the eighth amendment " 'must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.' " *Id.* at 329 (Marshall, J., concurring) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958)). He concluded that capital punishment is excessive and unnecessary, serves no valid legislative purpose, is discriminatorily applied, and is rejected by enlightened public opinion. *Id.* at 356, 364-66, 369 (Marshall, J., concurring).

30 *Id.* at 256-57 (Douglas, J., concurring). Relying on studies that indicated that the death penalty was disproportionately imposed on minorities and the poor, Justice Douglas concluded that those statutes were "pregnant with discrimination." *Id.* at 257 (Douglas, J., concurring). For a discussion of the death penalty and equal protection, see Goldberg & Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1785 (1970).

31 *Furman*, 408 U.S. at 309-10 (Stewart, J., concurring). According to Justice Stewart, the sentences before the Court were "cruel and unusual in the same way that being struck by lightning is cruel and unusual." *Id.* at 309 (Stewart, J., concurring).

32 *Id.* at 313 (White, J., concurring).

33 *See* Gregg v. Georgia, 428 U.S. 153, 188 (1976). *See generally* Note, *Discretion and the*

While the precise scope of *Furman* was unclear,[34] its impact was startling: the capital punishment laws of forty jurisdictions were struck down, thereby removing approximately 600 people from the nation's death rows.[35] In the wake of *Furman*, states were forced either to redraft their capital punishment laws or to abolish the death penalty.[36] The Court's failure to indicate how states might best rid their sentencing schemes of the arbitrariness and caprice condemned in *Furman* led to inevitable progeny.[37] In 1976, a series of five Supreme Court decisions further refined the conditions under which the death penalty could be inflicted.[38]

In the first two cases of the series, *Gregg v. Georgia*[39] and *Proffitt v. Florida*,[40] the plurality concluded that the Georgia and Florida death penalty statutes eliminated the ills identified in *Furman*.[41] Pursuant to each statute, at the penalty phase of a bifurcated trial, the sentencer[42] considered aggravating and mitigating circumstances[43] in determining the appropriate punishment.[44] If a trial ended with a penalty of death, each statute provided for an expedited review by the state supreme court.[45] Each court was then obliged to compare the sentence before it with those previously imposed in similar cases to ensure that they were proportional to one another.[46] The Court relied upon three factors in concluding that these statutes minimized

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Constitutionality of the New Death Penalty Statutes, 87 HARV. L. REV. 1690, 1692-99 (1974) (discussing *Furman*).

34 *See generally* Combs, *The Supreme and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control*, 7 S.U.L. REV. 1 (1980) (arguing that uncertainty in death penalty area may have been deliberate in order to control development of public policy in that area).

35 *Furman*, 408 U.S. at 411, 417.

36 *See* Lockett v. Ohio, 438 U.S. 586, 599-601 (1978). *See generally* Note, Furman *to* Gregg: *The Judicial and Legislative History*, 22 HOW. L.J. 53 (1979).

37 *See* Gregg v. Georgia, 428 U.S. 153, 168-69 (1976).

38 The Court initially determined that the death penalty was not inherently unconstitutional, a question arguably left open by *Furman*. *Id.* at 169. *See generally The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 63-76 (1976).

39 428 U.S. 153 (1976).

40 428 U.S. 242 (1976).

41 *Gregg*, 438 U.S. at 207; *Proffitt*, 428 U.S. at 253.

42 In Georgia, either a judge or a jury may determine the proper sentence. *Gregg*, 482 U.S. at 163. In Florida, after taking into account the jury's recommendation, the judge determines the appropriate sentence. *Proffitt*, 428 U.S. at 248-49.

43 The Georgia statute specified 10 aggravating circumstances. *Gregg*, 428 U.S. at 165 n.9. In addition, the sentencer was allowed to consider any applicable mitigating circumstance. *Id.* at 164. The Florida statute specified eight aggravating circumstances, *Proffit*, 428 U.S. at 248 n.6, and six mitigating circumstances. *Id.* at 249 n.6.

44 At the penalty phase, the sentencer could hear any evidence relevant to sentencing. *See Gregg*, 428 U.S. at 163-64; *Proffitt*, 428 U.S. at 248-50.

45 *Gregg*, 428 U.S. at 166-67; *Proffitt*, 428 U.S. at 250.

46 *Gregg*, 428 U.S. at 166-67; *Proffitt*, 428 U.S. at 251. In Georgia, the proportionality review was statutorily required. *Gregg*, 428 U.S. at 167 (citing GA. CODE ANN. § 27-2537

the risk of aberrant sentencing decisions: the provision for a bifurcated trial, the sentencing guidelines, and the provision for appellate review.[47] Additionally, the Court noted that proportionality review, aimed at achieving an even-handed application of the death penalty, would eliminate "wanton" and "freakish" results.[48]

In the third case of the series, *Jurek v. Texas*,[49] Texas's death penalty statute survived constitutional scrutiny. The statute mandated the death penalty for those convicted of capital murder if at the penalty phase the jury found that the state had proved three aggravating conditions beyond a reasonable doubt.[50] All death sentences were automatically reviewed by the Texas Court of Criminal Appeals.[51] The plurality reasoned that the statute did not violate the eighth amendment.[52] Important to the Court's decision was the statute's requirement that the jury find the defined aggravating circumstances; the Court noted that this prerequisite sufficiently narrowed

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(Supp. 1975)). Although not mandated by statute, the Florida Supreme Court had obliged itself to perform a comparative proportionality review. *Proffitt*, 428 U.S. at 251.

[47] *Gregg*, 428 U.S. at 198, 206; *Proffitt*, 428 U.S. at 251-53. *But cf.* Riedel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-*Furman *and Post-*Furman, 49 TEMPLE L.Q. 261 (1976) (post-*Furman* statutes fail to reduce discretion); Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman *Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75 (1980) (uncontrolled discretion results in arbitrary death sentences).

[48] *Gregg*, 428 U.S. at 206-07; *Proffitt*, 428 U.S. at 258-59. According to the plurality, this review provided a " 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' " *Gregg*, 428 U.S. at 198 (quoting *Furman*, 313 (1971) (White, J., concurring)).

[49] 428 U.S. 262 (1976). For a general discussion of *Jurek*, see Black, *Due Process for Death:* Jurek v. Texas *and Companion Cases*, 26 CATH. L. REV. 1 (1976).

[50] *Jurek*, 428 U.S. at 268-69. Capital murder was defined as

> intentional and knowing murders committed in five situations: murder of a peace officer or fireman; murder committed in the course of kidnapping, burglary, robbery, forcible rape, or arson; murder committed for remuneration; murder committed while escaping or attempting to escape from a penal institution; and murder committed by a prison inmate when the victim is a prison employee.

Id. at 268 (citing TEX. PENAL CODE ANN. § 19.03 (Vernon 1974)).

The three aggravating conditions were:

> (1) whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;
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> (2) whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society; and
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> (3) if raised by the evidence, whether the conduct of the defendant in killing the deceased was unreasonable in response to the provocation, if any, by the deceased.

Id. at 269 (quoting TEX. CODE CRIM. PROC. ANN. art. 37.071(b) (Vernon Supp. 1975-1976)).

[51] *Id.*

[52] *Id.* at 276.

the jury's discretion.[53] Moreover, the Court determined that the statute's provision for judicial review of a death sentence in a court of statewide jurisdiction would promote an even-handed and consistent application of the penalty.[54]

In *Woodson v. North Carolina*[55] and *Roberts v. Louisiana*,[56] the final cases of the 1976 series, a plurality of the Court struck down mandatory death penalty statutes, reasoning that they were inconsistent with *Furman*.[57] The statutes neither provided standards to regulate the jury's discretion, nor provided for an adequate judicial review of the sentence.[58] The Court concluded that our country's contemporary standards of decency prevented states from imposing the death penalty without taking into account the particular circumstances of the crime and the character and background of the defendant.[59]

Subsequent to 1976, the Court continued to closely scrutinize death penalty cases.[60] It was not until 1983, however, that the Court again addressed the significance of appellate review in capital sentencing procedures and, indirectly, the importance of comparative proportionality review.

In *Zant v. Stephens*,[61] the Court upheld the death penalty imposed on the respondent even though one of the aggravating circumstances

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53 *See id.*

54 *Id.* The Court relied on the appellate court's commitment to impose the penalty only " 'for the same type of offenses which occur under the same type of circumstances.' " *Id.* at 270 (quoting State v. Jurek, 522 S.W.2d 934, 939 (Tex. Crim. App. 1975), *aff'd sub nom.* Jurek v. Texas, 428 U.S. 262 (1976)). *But cf.* Dix, *Administration of the Death Penalty Statutes: Constitutional Infirmities Related to the Prediction of Dangerousness*, 55 TEX. L. REV. 1343 (1977) (Texas appellate court has performed review function ineffectively).

55 428 U.S. 280 (1976).

56 428 U.S. 325 (1976).

57 *Roberts*, 428 U.S. at 334; *Woodson*, 428 U.S. at 302.

58 *Roberts*, 428 U.S. at 334-35; *Woodson*, 428 U.S. at 303.

59 *Roberts*, 428 U.S. at 336; *Woodson*, 428 U.S. at 301, 304. The plurality noted that, historically, mandatory death penalties were viewed as harsh and unworkable and were incompatible with contemporary standards of decency. *Woodson*, 428 U.S. at 293. The Court also noted that jurors operating under mandatory death penalty statutes have generally disregarded their oaths and refused to convict when the death penalty was automatic. *Id.*

60 *See, e.g.*, Eddings v. Oklahoma, 102 S. Ct. 869 (1982) (death penalty invalidated because trial judge refused to consider relevant mitigating evidence); Beck v. Alabama, 447 U.S. 625 (1980) (in capital cases, jury must be afforded opportunity to consider verdict on lesser included offenses if supported by evidence); Godfrey v. Georgia, 446 U.S. 420 (1980) (death sentence invalidated because Georgia Supreme Court too broadly construed statutory aggravating circumstance); Lockett v. Ohio, 438 U.S. 586 (1978) (in capital cases, eighth amendment requires consideration of all relevant mitigating evidence).

61 103 S. Ct. 2733 (1983).

upon which the jury had relied in imposing the penalty—that the respondent had a "substantial history of serious assaultive criminal convictions"—was subsequently declared unconstitutional by the Georgia Supreme Court.[62] Justice Stevens, who authored the majority opinion, observed that although the single circumstance could not support the death penalty, two other aggravating circumstances had been found to be present.[63] Justice Stevens also reasoned that the jury's consideration of the unconstitutional circumstance was not damaging, since underlying evidence of the respondent's criminal history was admissible at the penalty phase.[64] The Court further explained that if a truly malignant error had been present, the state supreme court, through its comparative proportionality review, would have corrected it.[65]

Similarly, in *Barclay v. Florida*[66] the Court upheld a death sentence despite the trial judge's improper consideration of the respondent's criminal record as an aggravating circumstance.[67] In sustaining the sentence, the Court concluded that the judge's consideration of that factor did not so contaminate the penalty phase as to render the sentence unconstitutional.[68] As in *Zant*, the Court reasoned that the state supreme court's comparative proportionality review had adequately protected the defendant from a clearly erroneous sentence.[69]

In upholding the capital sentencing schemes in *Zant* and *Barclay*, the Court placed significant emphasis upon the obligation of the state supreme courts to conduct a comparative proportionality re-

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62 *Id.* at 2738, 2744. While respondent's direct appeal to the Georgia Supreme Court was pending, that court held that, as an aggravating circumstance, a " 'substantial history of criminal convictions' " was "unconstitutionally vague." *Id.* at 2738 (quoting Arnold v. State, 236 Ga. 534, 539-42, 224 S.E.2d 386, 391-92 (1976)).

63 *Id.* at 2749. The two other aggravating circumstances relied upon by the jury were that the respondent had a prior conviction for a capital felony and that he had escaped from the lawful custody of a peace officer and place of confinement. *Id.* at 2737-38.

64 *Id.* at 2749.

65 *Id.* at 2749-50.

66 103 S. Ct. 3418 (1983).

67 *Id.* at 3422. Under Florida law, a defendant's criminal record is not a proper aggravating circumstance. *See* Mikenas v. State, 367 So. 2d 606, 610 (Fla. 1978).

68 *Barclay*, 103 S. Ct. at 3428. The sentence had been affirmed by the Florida Supreme Court. *Id.* at 3422. Justice Rehnquist observed that "[t]here is no reason why the Florida Supreme Court cannot examine the balance struck by the trial judge and decide that the elimination of improperly considered aggravating circumstances could not possibly affect the balance." *Id.* at 3428.

69 *Id. Contra id.* at 3444 (Marshall, J., dissenting) (Florida Supreme Court had conducted no meaningful appellate review and had merely affirmed judgment rife with error).

view of death sentences.[70] It was unclear, however, whether those statutes would have withstood constitutional scrutiny without such review. That uncertainty was clarified six months later in *Pulley*, wherein the Court upheld the constitutionality of California's death penalty statute, which did not provide for comparative proportionality review.[71]

Justice White, writing for the majority, initially examined the two separate and distinct concepts embodied in the term "proportionality." According to Justice White, a traditional proportionality analysis evaluates the propriety of imposing a particular punishment on any offender convicted of a particular crime.[72] He reasoned that the Supreme Court's prior decisions clearly establish that the death penalty is not disproportionate per se.[73] He contrasted the conventional proportionality analysis with the type of proportionality analysis sought by Harris, namely, comparative proportionality review.[74] This analysis, essentially an intrajurisdictional review, inquires whether a punishment, although proportionate in the traditional sense, is nonetheless inappropriate in a particular case because it is not imposed uniformly on others convicted of the same crime.[75] The

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70 *See supra* notes 65 & 69 and accompanying text.

71 *Pulley*, 104 S. Ct. at 876. At the time *Pulley* was rendered, there were approximately 1,200 people on death rows across the country. N.Y. Times, Feb. 8, 1984, at A23, col. 1. The *Pulley* decision would affect primarily those inmates convicted under statutes that did not provide for comparative proportionality review. For instance, in Texas, one inmate, James Autry, anxiously awaited the decision. He had narrowly escaped his execution when his lawyer obtained a last minute stay by raising the identical constitutional argument pending in *Pulley*. Autry v. Estelle, 104 S. Ct. 24 (White, Circuit Justice 1983). Autry had been strapped in his death bed with a needle in his arm when the stay was granted. He was subsequently executed after the *Pulley* decision. N.Y. Times, Feb. 8, 1984, at A23, col. 1.

72 *Pulley*, 104 S. Ct. at 875. See, e.g., Solem v. Helm, 103 S. Ct. 3001 (1983) (life sentence without possibility of parole excessive penalty for recidivist guilty of seven nonviolent felonies); Rummel v. Estelle, 445 U.S. 263 (1980) (life sentence with possibility of parole not excessive penalty for recidivist guilty of three nonviolent felonies).

73 *Pulley*, 104 S. Ct. at 875 (citing *Gregg*, 428 U.S. at 187 (1976)). *But cf.* Edmund v. Florida, 102 S. Ct. 3368 (1982) (death penalty excessive when defendant did not take life, attempt to take life, or intend that life be taken); Coker v. Georgia, 433 U.S. 584 (1977) (death penalty excessive punishment for rape).

74 *Pulley*, 104 S. Ct. at 876. Justice White noted that this term was inspired, no doubt, by the oft-imitated Georgia death penalty statute, which requires the Georgia Supreme Court, when reviewing a sentence of death, "to 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.'" *Id.* at 876 n.7 (quoting GA. CODE ANN. § 17-10-35(c)(3) (1982)).

75 *Id.* at 876. The methodology for identifying whether a sentence is comparatively disproportionate is similar to that used in determining whether a sentence is disproportionate in the traditional sense (excessive per se). Baldus, Pulaski, Woodworth, & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L.

Court defined the precise issue before it as whether the eighth amendment required state appellate courts to conduct a comparative proportionality review when scrutinizing individual death sentences.[76]

Justice White stated that any death penalty statute had to be measured against *Furman*.[77] He remarked that state sentencing schemes enacted in response to *Furman* were aimed at avoiding sentencing decisions characterized by arbitrariness and caprice.[78] Observing that all of those statutes provided for an automatic appeal of death sentences, he noted that some states had specifically addressed *Furman*'s concerns by including a provision for comparative proportionality review.[79] Justice White concluded, however, that neither *Furman* nor its progeny had held that such a review was required.[80]

The *Pulley* majority recounted that under the capital punishment schemes at issue in *Gregg* and *Proffitt*, the state supreme courts were obliged to conduct a comparative proportionality review.[81] According to Justice White, however, that review was not considered to be a mandatory component in a valid sentencing scheme, but rather an "additional safeguard against arbitrary or capricious sentencing."[82] He maintained that the validity of the death penalty statutes was dependent upon their containing provisions for a bifurcated trial, the circumscribed number of capital offenses, and the jury's required consideration of aggravating and mitigating circumstances.[83] He concluded that nothing in those two decisions indicated that a comparative proportionality review was constitutionally mandated.[84] Justice White further argued that *Jurek*, decided with *Gregg* and *Prof-*

REV. 1, 4 n.8 (1980). Both types of analysis consider the jury's sentencing practice in similar cases. Whereas the latter asks if the government can impose a certain penalty for a legally defined category of crime, the former asks the same question for a group of factually similar cases involving the same legal offense. *Id.*

76 *Pulley*, 104 S. Ct. at 876.

77 *Id.* For a discussion of *Furman*, see *supra* notes 24-33 and accompanying text.

78 *Pulley*, 104 S. Ct. at 876. After *Furman*, roughly two-thirds of the states redrafted their statutes. *See supra* notes 34-36 and accompanying text.

79 *Pulley*, 104 S. Ct. at 876-77.

80 *Id.* at 879.

81 *See id.* at 877; *see also supra* note 46 (discussing courts' obligation to conduct comparative proportionality review).

82 *Id.* at 877. Justice White reasoned that although *Gregg* had suggested that "some form of meaningful appellate review is required," it did not hold that the provision for comparative proportionality review was necessary in order to uphold that statute. Moreover, Justice White noted that when *Gregg* summarized the components of an adequate capital sentencing scheme, it did not mention comparative proportionality review. *Id.*

83 *Id.* at 876-77.

84 *See id.* at 878.

Jitt, negated any possibility that comparative proportionality review was required by the eighth amendment.[85] He noted that in *Jurek*, the Court had upheld Texas's death penalty statute despite the fact that the state court was not required to conduct a comparative proportionality review.[86]

The Court also rejected Harris's claim that its recent decision in *Zant* had established that comparative proportionality review was a requisite element in a valid capital sentencing scheme.[87] According to Justice White, the Court's decision in *Zant* rested on the "constitutionally necessary narrowing function of statutory aggravating circumstances," *not* on the "additional safeguard" provided by comparative proportionality review.[88]

The Court then focused on the California death penalty statute at issue. The statute provided for a bifurcated trial in all capital cases.[89] At the guilt phase, the jury determined the question of guilt or innocence and whether any of the statutorily prescribed special circumstances were present.[90] If the jury arrived at a guilty verdict and found at least one special circumstance to be present, the trial progressed to the penalty phase.[91] During that portion of the proceeding, the jury was given a list of relevant factors in order to determine the appropriate punishment.[92] In all cases in which the death

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85 *Id.*

86 *Id.* Although the Texas statute required review of the decision to impose death, it did not clarify the scope of that review. *Id.* The *Jurek* majority had considered Texas's appellate review to be " 'a means to promote the even-handed, rational, and consistent imposition of death sentences.' " *Id.* (quoting *Jurek*, 428 U.S. 276 (1976)).

87 *Id.* at 879. For a discussion of *Zant*, see *supra* notes 61-65 and accompanying text.

88 *Pulley*, 104 S. Ct. at 879. Conceding that, in *Zant*, the Court had emphasized the importance of Georgia's appellate review, Justice White nevertheless maintained that the Court did *not* hold that without comparative proportionality review the statute would be unconstitutional. *Id.*

89 *Id.* at 880.

90 *Id.* The special circumstance(s) had to be proved beyond a reasonable doubt. *Id.* The circumstances that the jury could find were:

> 1) the murder was for profit; 2) the murder was perpetrated by an explosive; 3) the victim was a police officer killed in the line of duty; 4) the victim was a witness to a crime, killed to prevent his testifying in a criminal proceeding; 5) the murder was committed during the commission of robbery, kidnapping, rape, performance of a lewd or lascivious act on someone under 14, or burglary; 6) the murder involved torture; 7) the defendant had been previously convicted of first or second degree murder, or was convicted of more than one murder in the first or second degree in this proceeding.

Id. at 880 n.13 (quoting CAL. PENAL CODE § 190.2 (West 1977)).

91 *Id.* at 880.

92 *Id.* Although the statute did not separate aggravating and mitigating circumstances, the jury was instructed to consider the following factors, if relevant:

> (a) The circumstances of the crime of which the defendant was convicted

penalty was imposed, there was an automatic right of appeal.[93] The Court determined that, in sum, the statute possessed sufficient checks on arbitrariness without a provision for comparative proportionality review.[94] Justice White reasoned that there could be " 'no perfect procedure' " for imposing the death penalty,[95] and he noted that "[a]ny capital sentencing scheme may occasionally produce aberrational outcomes."[96] The Court concluded that these minor inconsistencies would not invalidate an otherwise sound statute.[97]

In a concurring opinion, Justice Stevens disagreed with the majority's conception of the role of appellate review in a capital sentencing scheme. He felt that the majority had characterized appellate review as an additional safeguard in a death penalty statute, whereas he conceived appellate review as a necessary element of a constitutionally valid capital punishment statute.[98] In his opinion, this conclusion was compelled by the presence of "meaningful appellate

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in the present proceeding and the existence of any special circumstances found to be true pursuant to § 190.1.

(b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence.

(c) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(d) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.

(e) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(f) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(g) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or the effects of intoxication.

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

(i) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(j) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

Id. at 880 n.14 (quoting CAL. PENAL CODE § 190.3 (West 1977)). At the conclusion of the penalty phase, the jury retained discretion to decide whether the defendant would receive life imprisonment without possibility of parole, or death. *Id.* at 880.

93 *Id.* at 880-81.

94 *Id.*

95 *Id.* at 881 (quoting *Zant*, 103 S. Ct. at 2747).

96 *Id.*

97 *Id.*

98 *Id.* at 881-82 (Stevens, J., concurring). Justice Stevens reasoned that appellate review played an indispensable role in "eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by Furman v. Georgia." *Id.* at 881 (Stevens, J., concurring).

review" in every death penalty statute previously upheld by the Court.[99] Like the majority, however, Justice Stevens doubted that comparative proportionality review is the only method by which an appellate court can ensure that the sentencing decision before it is not the product of arbitrariness and caprice.[100] He maintained that although comparative proportionality review provides " 'a maximum of rationality and consistency,' "[101] it is not necessarily an "indispensable element of meaningful appellate review."[102]

Justice Brennan, writing for the dissent,[103] agreed with the majority that *Furman* condemned sentencing procedures that " 'creat[e] a substantial risk that [the death penalty will] be inflicted in an arbitrary and capricious manner.' "[104] The dissent, however, disputed the majority's conclusion that existing capital punishment statutes ensure a principled application of the death penalty.[105] Because current sentencing decisions are often irrational, reasoned Justice Brennan, it was imperative that the Court reevaluate its stance on capital punishment.[106]

Although not at issue in *Pulley*, the dissent discussed the discriminatory application of the death penalty.[107] Justice Brennan cited a number of authorities that indicated that impermissible factors, such as the race of the victim, entered into the decision to impose the death penalty.[108] He recognized that lower courts had discussed

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99 *Id.* at 882-84 (Stevens, J., concurring) (citing *Zant, Jurek, Proffit*, and *Gregg*).

100 *Id.* at 884 (Stevens, J., concurring).

101 *Id.* at 883 n.1 (Stevens, J., concurring) (quoting *Proffitt*, 428 U.S. at 258-59).

102 *Id.*

103 *Id.* at 884 (Brennan, J., dissenting). Justice Marshall joined in Justice Brennan's dissent. *Id.*

104 *Id.* at 885 (Brennan, J., dissenting) (quoting *Gregg*, 428 U.S. at 188). Moreover, Justice Brennan remarked that since *Furman*, the Court's overriding concern in the area of capital punishment has been to guard against the irrational imposition of the death penalty. *Id.* at 886 (Brennan, J., dissenting).

105 *See id.* at 885 (Brennan, J., dissenting). The dissent argued that the Court has allowed executions to continue without "fully examining the results obtained by the death penalty statutes enacted in response to the *Furman* decision." Justice Brennan opined that merely following specified procedural safeguards did not ensure that a particular death sentence was constitutional. *Id.* at 886 (Brennan, J., dissenting).

106 *Id.* at 887 (Brennan, J., dissenting). The dissent posited that because capital crimes generate emotional responses, "it may well be that juries, trial judges, and appellate courts considering sentences of death are invariably affected by impermissible considerations." *Id.*

107 *Id.* at 887-88 (Brennan, J., dissenting). Justice Brennan observed that the court of appeals had remanded Harris's case for an evidentiary hearing on his claims concerning discriminatory application of death penalty. *Id.* at 887 n.4 (Brennan, J., dissenting).

108 *Id.* at 887-88 (Brennan, J., dissenting). Among the authorities Justice Brennan cited were Bowers & Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980) (study conducted in Florida, Ohio, Texas, and

equal protection violations in the administration of the death penalty.[109] Thus, according to the dissent, the Supreme Court could no longer shirk its constitutional responsibilities by uncritically assuming that the death penalty was being administered fairly.[110]

Turning to the precise issue in *Pulley*, the dissent argued that capital sentencing schemes are plagued by irrationality and unpredictability.[111] To support this view, Justice Brennan noted the disparity among sentences imposed within the same jurisdiction for similar crimes.[112] He reasoned that such discrepancies could be avoided if an intrajurisdictional review of the penalties imposed on similarly situated defendants was instituted.[113] Thus, in the dissent's view, some of the irrationality surrounding the imposition of capital punishment could be eliminated.[114] The dissent chided the majority for superficially examining the Court's prior decisions in its attempt to discern whether comparative proportionality review was constitutionally mandated.[115] Justice Brennan argued that the proper in-

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Georgia indicates that black killers and killers of whites are substantially more likely to receive death penalty); Jacoby & Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982) (South Carolina study indicates prosecutors seek death penalty more frequently for murder of whites); and Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981) (Florida study indicates prosecutors more likely to indict killers of whites for first degree murder; therefore, killers of white more likely to be sentenced to death). *See generally* W. BOWERS, DEATH AS PUNISHMENT IN AMERICA, 1864-1982 (1984) (blacks more likely than whites to receive death sentence).

109 *Pulley*, 104 S. Ct. at 887 (Brennan, J., dissenting). See, e.g., Spencer v. Zant, 715 F.2d 1562, 1578-83 (11th Cir. 1983) (on remand, death row inmate has standing to assert, under equal protection clause, claim that death penalty is discriminatorily applied when victim is white); Ross v. Hopper, 716 F.2d 1528, 1539 (11th Cir. 1983) (remanded on same issues as *Zant*). But see Britton v. Rogers, 631 F.2d 572, 577 n.3 (8th Cir. 1980) (death-sentenced petitioner has no standing to raise claim that he has been sentenced to death because his victim was white).

In McClesky v. Zant, 580 F. Supp. 338 (N.D. Ga. 1984), the petitioner claimed that the death penalty is discriminatorily applied when the victim is white. *Id.* at 345, 349. His evidence consisted of a sophisticated statistical study which conclusively demonstrated that racial discrimination was rampant in Georgia's capital sentencing process. *Id.* at 350-79. The court conducted an extensive hearing and concluded that the statistics did not "demonstrate a prima facie case in support of the contention that the death penalty" was discriminatorily applied to the petitioner. *Id.* at 379. *But cf.* Wallace v. Kemp, 581 F. Supp. 1471, 1476 (M.D. Ga. 1984) (petitioner precluded from introducing statistical study in Federal court because he failed to present it in state court).

110 *Pulley*, 104 S. Ct. at 888 (Brennan, J., dissenting).

111 *Id.* at 889 (Brennan, J., dissenting).

112 *Id.*

113 *Id.* at 890 (Brennan, J., dissenting). His conclusion was based in part on the fact that many states had struck down death sentences after conducting a comparative proportionality review. *See id.* at 890-91 (Brennan, J., dissenting).

114 *Id.*

115 *Id.* at 891 (Brennan, J., dissenting).

quiry is whether this review is required "to ensure that the irrational, arbitrary, and capricious imposition of the death penalty, invalidated by *Furman* does not still exist."[116] Because comparative proportionality review guards against such outcomes, he concluded that it should be constitutionally required.[117]

While the *Pulley* majority held that there is no constitutional right to comparative proportionality review, there are previous judicial interpretations of the eighth amendment that would support a finding to the contrary. The Court has determined that a punishment violates the eighth amendment if it is excessive in relation to the severity of the crime.[118] Thus, one goal of the eighth amendment is to ensure that a punishment is proportionate to the crime.[119] Moreover, the Court has explicitly recognized that in order to effectuate this goal, courts should consider "the sentences imposed on other criminals in the same jurisdiction," thus embracing the concept of comparative proportionality review.[120] By acknowledging the need for an intrajurisdictional review in one context, the next logical step would have been for the Court to require that state courts conduct such a review when examining the imposition of the death penalty in a particular case. Yet, in *Pulley*, Justice White refused to do so.

The method by which the majority reached its conclusion is troublesome. Rather than addressing whether comparative proportionality review should be required to ensure that the death penalty is not arbitrarily imposed, the Court cursorily examined several of its prior death penalty decisions and concluded that they did not com-

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116 *Id.*

117 *Id.*

118 *E.g.*, Solem v. Helm, 103 S. Ct. 3001 (1983) (life imprisonment without possibility of parole for non-violent felonies violates eighth amendment); Coker v. Georgia, 433 U.S. 58 (1977) (death penalty for rape of adult woman violates eighth amendment); Trop v. Dulles, 356 U.S. 86 (1958) (expatriation for military desertion constitutes unduly severe punishment).

119 *See* Solem v. Helm, 103 S. Ct. 3001, 3007-09 (1983); *see also* Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

120 Solem v. Helm, 103 S. Ct. 3001, 3011 (1983). In *Solem*, the Court proposed the following three-pronged test to be used for reviewing sentences under the eighth amendment: "(i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; (iii) the sentences imposed for commission of the same crime in other jurisdictions." *Id.*

In striking down the life sentence without possibility of parole imposed on a recidivist convicted of six prior non-violent felonies, the Court noted that there was no indication that "any habitual offender other than Helm has ever been given the maximum sentence on the basis of comparable crimes." *Id.* at 3014; *cf.* Coker v. Georgia, 433 U.S. 584, 596-97 (1977) (death sentence for rape excessive when only five of 63 convictions had ended in similar penalty).

pel such review.[121] In prior death penalty cases, the Court has consistently questioned whether the challenged statutes tolerate arbitrary and capricious results.[122] Since its landmark decision in *Furman*, the Court has insisted that capital sentencing schemes provide a " 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.' "[123] One of the most common errors in capital cases occurs when the death penalty is imposed on an offender whose crime does not seem so egregious when compared to the crimes of those upon whom the penalty is not imposed.[124] Requiring a state court to compare the death sentence under review with the sentences imposed in similar cases is a step toward eradicating that kind of error. If arbitrary and capricious punishment is prohibited under the eighth amendment, then any test that would promote consistency should be required.

One objective of appellate review is to eliminate disparate sentences imposed in similar cases without any rational justification.[125] Because death is "qualitatively different" from any other punishment, the need for uniformity in sentencing decisions is more pronounced.[126] Legislative protections[127] at the state level, in particular comparative proportionality review, can achieve this objective. The goal of comparative proportionality review is coextensive with the goal of our legal system—to treat like cases alike.[128]

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121 *Accord Pulley*, 104 S. Ct. at 891 (Brennan, J., dissenting).

122 *E.g.*, Eddings v. Oklahoma, 102 S. Ct. 869, 874 (1982); Godfrey v. Georgia, 446 U.S. 420, 427 (1980); *Gregg*, 428 U.S. at 189.

123 Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980) (quoting *Furman*, 408 U.S. at 313).

124 Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 576. Kaplan argues that in order to avoid that kind of error, courts and legislatures must design and follow "procedures which are appropriate to the decision between life and death. . . ." *Id.*

125 Labbe, *Appellate Review of Sentences: Penology on the Judicial Doorstep*, 68 J. CRIM. L. & CRIMINOLOGY 122, 133 (1977). Labbe notes that sentencing disparities are common, "particularly when sentences are imposed by different judges for the same or similar crimes. . . ." *Id.*

126 Woodson v. North Carolina, 428 U.S. 280, 305 (Brennan, J., concurring) (1976). Justice Brennan argues that

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. 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.

Id. (footnote omitted).

127 *See* Burr, *Appellate Review as a Means of Controlling Criminal Sentencing Discretion—A Workable Alternative?*, 33 U. PITT. L. REV. 1, 26 (1971).

128 *See* H.L.A. HART, THE CONCEPT OF LAW (1961).

In the area of capital punishment, the Supreme Court has consistently sought to eliminate disparities in sentencing decisions and thus achieve a uniform and principled application of the death penalty.[129] Nevertheless, the Court has recognized that not all inconsistent sentencing decisions in capital cases violate the eighth amendment.[130] The jury retains constitutional discretion to dispense mercy.[131] For example, in California and Georgia, a jury can impose a lesser sentence even if the circumstances of the murder and the characteristics of the offender would justify a sentence of death.[132] Thus it is possible for factually similar cases to result in different penalties. Almost ten years ago in *Gregg*, the Court relied upon the statutory provision for comparative proportionality review to correct aberrational outcomes resulting from jury discretion.[133] According to the *Gregg* Court, if it became obvious that juries generally dispensed mercy in a particular class of capital cases, an occasional death sentence imposed under such circumstances would be invalidated on appeal.[134] The Court's determination that this procedural safeguard no longer is necessary is inconsistent with the theme of *Gregg*.

Because life hangs in the balance, capital cases require a greater degree of scrutiny than those wherein only liberty or property is at stake. In the wake of *Pulley*, however, a decision to impose death requires a lesser quantum of review. In order to ensure that death is the appropriate punishment in a particular case, most states have provided for comparative proportionality review.[135] New Jersey, though, has responded to the *Pulley* decision by attempting to excise the requirement of comparative proportionality review from its death penalty statute.[136] Although that attempt has heretofore been unsuccessful, the future of comparative proportionality review is uncertain.

One justification for the result in *Pulley* is the Court's dissatisfaction with the length of time a capital case takes to conclude.[137] Auto-

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129 *See, e.g.*, Barclay v. Florida, 103 S. Ct. 3418, 3429 (1982); *Gregg*, 428 U.S. at 188.

130 *Gregg*, 428 U.S. at 203; *see* Baldus, Pulaski, Woodworth, & Kyle, *supra* note 75, at 14-16.

131 McGautha v. California, 402 U.S. 183, 203 (1971).

132 *See Pulley*, 104 S. Ct. at 880 (California); *Gregg*, 428 U.S. at 203 (Georgia).

133 *Gregg*, 428 U.S. at 203.

134 *Id.* at 206.

135 *See supra* note 10.

136 Conversation with Stanley C. Van Ness, Former Public Advocate, State of New Jersey (May 1, 1984).

137 Owing to the extensive post-conviction remedies afforded to capital defendants, *see infra* notes 138-40 and accompanying text, capital litigation is lengthy. Several Supreme Court Justices have expressed outrage at such protracted litigation. *See, e.g.*, Autry v. Estelle, 104 S. Ct. 24, 25 (White, Circuit Justice 1983) (Justice White believes that "all

matic review in the state court is only the first step available to a defendant seeking post-conviction relief.[138] It is followed by a petition to the Supreme Court for certiorari[139] and then by numerous habeas corpus petitions in the state and Federal courts.[140] The *Pulley* decision, because it fails to acknowledge a constitutional requirement of comparative proportionality review, will expedite the appeals process in state courts.[141]

Because approximately seventy percent of Federal habeas corpus petitions filed by death row inmates are successful,[142] it can be inferred that important rights have been overlooked in capital cases and that greater procedural protections are needed. Yet *Pulley* indicates that the Court is willing to limit procedural safeguards in order to truncate the capital appeals process.

The *Pulley* decision, however, comports with the Court's recent treatment of capital cases. Since 1983, the Court has been reticent to invalidate death sentences that have come before it. In *Zant* and *Barclay*, for example, the Court upheld the petitioners' death sentences despite the fact that significant errors had occurred at sentencing.[143] This recent trend is in dramatic contrast to the Court's former position in capital cases. Between 1976 and 1982, the Court invalidated *every* death sentence that came before it except one.[144]

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federal grounds for challenging a conviction or a sentence [should] be presented in the first petition for habeas corpus."); Coleman v. Balkcom, 101 S. Ct. 2031, 2032 (1981) (Stevens, J., concurring in denial of certiorari) (arguing that Justice Rehnquist thinks the Court should "grant certiorari and decide the merits of every capital case coming from state courts . . . to expedite the administration of the death penalty"); N.Y. Times, col. 1 Nov. 13, 1983, § 6 (Magazine), at 103, col. 1 (Justice Powell remarked that American appellate process either be expedited or capital punishment abolished).

138 *See* Kaplan, *supra* note 124, at 573; Greenburg, *Capital Punishment as a System*, 91 YALE L.J. 908, 909-14 (1982).

139 Kaplan, *supra* note 124, at 573.

140 Fay v. Noia, 372 U.S. 391 (1963), opened the door to challenging a death sentence through a writ of habeas corpus. Prior to *Fay*, habeas corpus was unavailable unless the defendant had exhausted all state remedies. *Fay*, 372 U.S. at 434.

141 Correspondingly, the Supreme Court's decision in Barefoot v. Estelle, 103 S. Ct. 3383 (1983), will facilitate the lower Federal courts' efforts to accelerate habeas proceedings in capital cases. In *Barefoot*, Justice White, noting the frequency with which capital defendants utilize writs of habeas corpus, held that a court of appeals could adopt summary procedures to resolve the merits of habeas appeals. *Barefoot*, 103 S. Ct. at 3393-95.

142 *Id.* at 3405 (Marshall, J., dissenting).

143 *See supra* notes 61-69 and accompanying text.

144 For a list of cases in which the Court has struck down death sentences, see Enmund v. Florida, 102 S. Ct. 3368, 3384 n.23 (1982) (O'Connor, J., dissenting). The one case wherein the death penalty was upheld was Dobbert v. Florida, 432 U.S. 282 (1977) (changes in Florida death penalty statute between time of conviction for murder and time of trial do not constitute *ex post facto* violation).

As public support of capital punishment waxes,[145] the Supreme Court seems willing to let the states get on with the business of executions.[146] The Court is apparently removing itself from the capital appeals process. It should reexamine its function. As arbiter of what is acceptable punishment under the eighth amendment, the Court should fulfill its role and not merely respond to a devolving standard of decency.

Nancy A. Zajac

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[145] Approximately 68% of the American people now favor capital punishment. *Rejected Again*, TIME MAG., Feb. 6, 1984, at 55.

[146] Of the 25 executions that have taken place since 1976, 18 have been carried out within the past year. NAACP LEGAL DEFENSE AND EDUCATION FUND, INC., *supra* note 2, at 1.