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THE CONSTITUTIONAL REGULATION OF CAPITAL PUNISHMENT SINCE *FURMAN v. GEORGIA*

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Ms. Carol S. Steiker: "[T]he Supreme Court's constitutional regulation of capital punishment reveals that the Court's intervention has been a stunning failure on the Court's own terms."[1] It is a great pleasure to be here at St. Mary's University School of Law today. Jordan and I will provide a general overview of the Supreme Court's constitutional regulation of capital punishment from *Furman v. Georgia*[2] in 1972 to the present, as well as a very broad overview of the nature of that regulation, its degree of success, and its effect on American political life as it relates to capital punishment.[3]

For 175 years the Supreme Court remained virtually silent about whether the Constitution placed any limits on the imposition of the ultimate sanction. Over the last quarter century, the Supreme Court has engaged in a remarkable enterprise. For the very first time, beginning in 1972 with its decision in *Furman v. Georgia*, the Supreme Court has subjected the use of capital punishment to significant constitutional scrutiny.[4]

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1. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 403 (1995).

2. 408 U.S. 238 (1972).

3. In addition to this Symposium, the authors participated in a Panel Discussion in 1997 entitled *Reflections on Quarter-Century of Constitutional Regulation of Capital Punishment*, 30 J. MARSHALL L. REV. 399 (1997).

4. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355,

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Indeed, the Court has developed a detailed and intricate body of doctrine that addresses many aspects of state and federal death penalty practices, including but not limited to: (1) the definition of capital crimes, (2) the selection of jurors in capital cases, (3) permissible arguments and evidence in capital trials, (4) the structure and scope of capital sentencing hearings, and (5) the nature and quality of appellate and post-conviction review of death sentences.[5]

We view this experiment in constitutional regulation of capital punishment as basically a failure, a failure along two significant dimensions. First, the Court's regulation is a failure on its own terms. The central concerns of *Furman v. Georgia* and the Court's later cases focused on accuracy and fairness in the capital sentencing process. The Court sought to ensure that those persons sentenced to death genuinely deserved the ultimate sanction and that arbitrary and invidious decision making was minimized.[6] Unfortunately, the doctrines developed by the Court have failed to come close to achieving these admittedly ambitious goals. Indeed, there is little objective evidence that persons sentenced to death today are selected by means more rational or reliable than those employed in what is now regarded as the Dark Ages of pre-*Furman* capital sentencing processes.

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357 (1995) (noting that in 1972 the Supreme Court in *Furman* abolished the death penalty in the manner in which it was administered at that time). This Article characterized *Furman* as "the landmark Supreme Court decision regarding capital punishment." *Id.* at 362.

5. *See id.* at 361–62 (referring to the important judicial decisions regulating the administration of the death penalty); *e.g.* Barclay v. Florida, 463 U.S. 939 (1983); Lockett v. Ohio, 438 U.S. 586 (1978); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972); McGautha v. California, 402 U.S. 183 (1971); Witherspoon v. Illinois, 391 U.S. 510 (1968); United States v. Jackson, 390 U.S. 570 (1968). This Article also cited the "quartet of accompanying cases" to *Gregg*, including *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Profitt v. Florida*, 428 U.S. 242 (1976). *See also* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 361 n.19 (1995).

6. During the Panel Discussion entitled *Reflections on a Quarter Century of Constitutional Regulation of Capital Punishment*, 30 J. MARSHALL L. REV. 399, 407–10 (1997), Ms. Steiker intimated that the Justices of the Supreme Court were concerned with four issues at the time *Furman* and *Gregg* were decided: (1) whether those individuals who were receiving the death penalty could actually be considered as most deserving of a sentence of death; (2) the "fairness" of selecting certain persons for the death penalty while not selecting others who may be deserving of that sentence; (3) permitting states to "abdicate the responsibility to declare who really deserved the death penalty"; and (4) since the death penalty inherently differs from all other forms of punishment, the procedures resulting in the imposition of a sentence of death should be subject to a "heightened reliability" standard.

Second and less obviously, the Court's regulation is a failure because the highly visible involvement of the Court in supervising state and federal death penalty practices has created a false but powerful impression that the death penalty practices have, in fact, been meaningfully transformed. Participants in both the criminal justice system and the public at large seem to take an unjustified comfort in the seductive belief that all has changed and that the judicial process has tamed the abuses of an earlier age. Indeed, many believe that courts now have gone too far in erecting subjective and procedural barriers to the just imposition of the death penalty.[7] As a result, the Court's regulation of capital punishment actually may have aided in legitimizing and entrenching what remains a deeply flawed death penalty system.

In very recent years however, this entrenchment of the Supreme Court's constitutional regulation of capital punishment may have started to erode.[8] As the dust settles, it is becoming increasingly clear, both to criminal justice insiders and the public at large, how little the Court's doctrinal apparatus actually demands of state and federal death penalty schemes. Skeptics can point to, among other things, the Supreme Court's seeming indifference to the undeniable role of race in the capital sentencing process, to the highly visible elimination of much of federal habeas corpus review of state capital proceedings, and to the continued availability of the death penalty for persons widely regarded as the least deserving offenders such as juveniles, persons with mental retardation, and those convicted under the draconian felony murder rule.[9] Ironically then, as the reality sinks in and the lack of significant regulatory constraints on the use of capital punishment becomes clear, we may see the pendulum of public opinion swing back towards the skepticism and concern that first triggered the Court's intervention in 1972 in *Furman* itself.

Why do we believe that the Court's attempt at constitutional regulation failed on its own terms? After all, some aspects of capital sentencing law are undeniably better, fairer, and more rational than they were prior to 1972.[10] For example, every jurisdiction that imposes capital punishment now employs what are called bifurcated proceedings: holding a trial on the issue of guilt or innocence and then require a separate hearing on the

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7. *See generally id.* (discussing the issues confronted by the *Furman* and *Gregg* Courts).

8. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 371–403 (1995) (reviewing the current regulatory approach to capital sentencing).

9. *See id.*

10. *See id.* at 371–72.

issue of whether the death penalty should be imposed.[11] In addition, the death penalty is no longer permitted for the crime of rape, a change that has decreased, though not eliminated, the role race has played in the imposition of capital punishment.[12]

These changes, however, while important, have not wrought the systemic change necessary to address the deep concerns about the fairness of the death penalty that originally animated the Court in *Furman*. Instead, the Court has generated a number of system-wide requirements that have produced the worst of all possible worlds. These requirements do not do much to rationalize or to make more reliable the imposition of capital punishment, but they give the appearance of attempted reservation.[13] Thus, these safeguards alleviate misgivings that many people might otherwise have about our nation's increasing and increasingly isolated use of capital punishment.

For example, the *Furman* Court was concerned that pre-*Furman* statutes permitted a broad pool of offenders to be eligible for the death penalty. In the words of Justice Marshall, the "imposition of the death penalty solely on proof of felony murder . . . leads to . . . 'lightning bolt' . . . executions."[14] As a result, the post-*Furman* Court has insisted, *in dicta* at least, that the pool of those eligible for death be "meaningfully narrowed."[15] In implementing this requirement, however, the Supreme Court neither has demanded any kind of numerical narrowing, nor has imposed any serious limits on the nature of offenses or the kinds of offenders subject to capital punishment. As a result, states are permitted to include within the ambit of their current death penalty schemes virtually the same broad range of offenders eligible in the pre-*Furman* era.[16]

Results of a study administered in Georgia, the state in which *Furman* arose, show that ninety percent of those executed under Georgia's pre-*Furman* statute still would be eligible for execution today under Geor-

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11. *See id.* at 372 (providing for "individualized sentencing" whereby the defendant has the right to present mitigating evidence during capital proceedings).

12. *See id.* at 376 (noting that "the availability of the death penalty for rape was inextricably linked to race").

13. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 402 (1995) (arguing that the modern complexity of death penalty proceedings "conveys the impression that the current system, if at all, on the side of heightened reliability and fairness").

14. Lockett v. Ohio, 438 U.S. 586, 620 (1978) (Marshall, J., concurring).

15. Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 415 (1995).

16. *See id.* (demonstrating that "current doctrine permits the death penalty to be imposed upon virtually any offender involved in an offense that results in death").

gia's revised and approved post-*Furman* capital punishment statute. The range in the number of those eligible for execution is virtually unchanged.[17]

Similarly, while the Supreme Court has insisted that the discretion of capital sentencers, whether they be a judge or jury, must be "channeled" to avoid capriousness or discrimination in the sentencing process, the Court has concluded that the channeling requirement is met by the already minimal requirement of narrowing.[18] As a result, states are permitted to narrow the class of the death-eligible in fairly negligible ways by enacting broad definitions of capital crimes or long lists of aggravating factors, and then by allowing the sentencer almost unlimited and unguided discretion to impose the death penalty.

This vast discretion is virtually compelled by yet another system-wide requirement imposed by the Court: the requirement of individualized sentencing. In tension with, and perhaps even at war with, the requirement that arbitrariness in capital sentencing be contained by narrowing and channeling, is the separate requirement that the sentencer in a capital case confront the humanity of the person before it by considering all potentially mitigating aspects of the person's crime, character and background.[19] This requirement not only has undermined the possibility of any real containment of arbitrariness and discrimination in the capital sentencing process, but it has also spawned an enormous and complex body of law. This straightforward requirement has generated complexity, because many states drafted their post-*Furman* capital sentencing schemes before the Supreme Court had decided upon or announced the individualized sentencing requirement. The ensuing litigation surrounding the constitutionality of the old statutes has furthered the impression of intensive judicial regulation of capital sentencing, despite the reality that the Supreme Court's actual requirements are relatively simple, straightforward, easy to meet, and not substantially different from the pre-*Furman* world of capital sentencing.

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17. As a participant in the Panel Discussion on *Reflections on a Quarter-Century of Constitutional Regulation of Capital Punishment*, 30 J. MARSHALL L. REV. 399, 455 (1997), Professor Stephen B. Bright remarked that executions have become common in Georgia, Alabama, Texas, and Virginia.

18. *See generally* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 414 (1995) (opining that "'channeling' sentencer discretion is a hopeless task in a regime that values and requires individualized sentencing.").

19. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 415–18 (1995) (analyzing the possibility of narrowing the class of death-eligible persons).

The Court also has spoken, at times, of the need for "heightened reliability"[20] in the capital sentencing process, and thus has demanded, on occasion, a particular procedure in capital cases when such procedures are not constitutionally required in ordinary criminal cases. Such procedures might include the giving of lessor included offense instructions or the questioning of prospective jurors about racial bias in cases involving interracial crime.[21] However, the Court has applied what is called the "Death is Different" doctrine[22] extremely sparingly in isolated and fairly idiosyncratic instances.[23] Most importantly, the Court never has found that the need for heightened reliability in capital cases implies the need for either special scrutiny of capital defense counsel, whose deficiencies are widely documented, or special exceptions from the more and more rigorous restrictions on federal habeas review of state capital sentences. Consequently, the language of heightened reliability and death is no different. Like the rest of the Court's regulation of capital punishment, it creates the impression of careful scrutiny, more than it actually imposes it.[24]

Sadly, this mistaken impression of careful judicial regulation of capital sentencing processes likely has led many observers to feel more comfortable with current American death penalty law than they otherwise would or should feel. Actors within the criminal justice system, like prosecutors, trial judges, and jurors, may well have the erroneous impression that intensive constitutional regulation of capital punishment ensures that some future judicial process will correct any mistake that they might make in seeking or imposing a sentence of death.

Other institutional actors with the power of clemency, such as state governors or bodies like Texas' Boards of Pardons and Paroles, may perceive that the use of their extraordinary power is not warranted given the supposed careful scrutiny of the courts. Such perceptions probably account for much of the drastic post-*Furman* decline in the use of clemency powers across the country. Members of the general public likely believe,

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20. *See id.* at 414 (discussing the principle of "heightened reliability" as it relates to procedural safeguards in the death penalty process).

21. Other potential safeguards may include ensuring the quality of the defendant's counsel and the availability of post-conviction review. *See id.*

22. *See id.* at 397 (providing the "Death is Different" principle in capital case proceedings).

23. *See id.* (determining that the "heightened reliability" procedural protections in death penalty cases have been applied "in an entirely ad hoc fashion").

24. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 397 (1995) (describing and discussing the types of instances wherein the court has invoked the notion of "heightened reliability").

if the debate and discussion surrounding the passage of the Anti-Terrorism Bill,[25] which strictly limited the scope of federal habeas corpus, is any indication, that the judicial process ensures, indeed over ensures protects against arbitrariness, discrimination, and mistake in the capital sentencing process.

Thus, the Supreme Court's intricate and complex scheme of constitutional regulation of capital punishment, in our view, simply is not worth a candle. It does little to rectify the serious concerns raised by the *Furman* Court, while at the same time it serves to legitimize the death penalty for people both within and outside the criminal justice system.

Mr. Jordan M. Steiker: Revolutions beget counter-revolutions. Sometimes the counterrevolution is swift and apparent. Other times, the reversing tide moves slowly and undramatically. The immediate response to *Furman v. Georgia*[26] was swift and dramatic, but it was only partially successful as a counter-revolt. Thirty-five states sought to salvage the death penalty as an available punishment by revamping their statutes in light of the court's various opinions in *Furman*.[27] Of course, the absence of a majority opinion in *Furman* made this task difficult, and only some of the state's statutes ultimately were sustained.[28]

The immediate counter-revolt, however, was partial in a more significant sense. Even as the Court upheld many of the new statutes, it did not repudiate *Furman*'s conclusion that the federal courts had a continuing role in reviewing and supervising state death penalty practices.[29] Indeed, in the first decade or so of post-*Furman* litigation, the federal courts overturned an enormous number of capital convictions or sentences on federal habeas. So, the short-term counter-revolution, although obviously quite significant, was successful only in preserving the death penalty as a constitutionally-available and permissible punishment. The longer term and continuing counter-revolution has sought to limit federal court intervention altogether.

Critics of the Court have vigorously decried the multiple avenues of review afforded capital defendants, the length of time between trial and

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25. Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, Title I, § 101 *et. seq.*, 110 Stat. 1214 (1996).

26. 408 U.S. 238 (1972).

27. *See* Panel Discussion, *Reflections on a Quarter-Century of Constitutional Regulation of Capital Punishment*, 30 J. MARSHALL L. REV. 349, 405 (1997).

28. *See id.* at 405–06 (noting that in *Gregg v. Georgia*, 428 U.S. 153 (1976), the Supreme Court upheld three and stuck down two of the five statutes being reviewed).

29. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 363 (1995) (expressing the view that *Furman* caused state and federal lawmakers to amend death penalty practices).

actual imposition of punishment, and the frequency with which federal courts grant stays of execution or worse, substantive relief. On the Court, Justice Scalia has been the leading critic of the Court's seemingly extensive body of constitutional doctrine in the area of capital punishment. Indeed, Justice Scalia's most colorful expressions of dissatisfaction illustrate the aptness of the revolution counter-revolution metaphor. Justice Scalia frequently has lamented that the masses have not made sufficient inroads against the woolly but unrepresentative elites that seized power in 1972. As he said in a dissenting opinion in *Simmons v. South Carolina*,[30] a 1994 decision which required states, in some circumstances, to give the true meaning of life without possibility of parole, "[t]he heavily outnumbered opponents of capital punishment have successfully opened yet another front in their guerilla war to make this unquestionably constitutional sentence a practical impossibility."[31]

As we have argued throughout, the guerrilla's success has been highly overstated. There is much intricacy in capital sentencing doctrine but few real impediments to the administration of the death penalty. We think the news from the front is gradually but discernibly reaching home. *McCleskey v. Zant*[32] represents perhaps the most significant and most visible evidence of the Court's retreat from its ambitious regulatory role. Confronted with intricate statistical evidence of the highly significant role race plays in determining who lives or dies, the Court refused to overturn the death sentence of an inmate who could not prove intentional discrimination.[33]

Although *McCleskey* constituted an unremarkable application of prevailing Equal Protection doctrine, it merely reiterated the constitutional requirements of proof of motive above and beyond proof of disparate impact. The Court's Eighth Amendment analysis was subtle.[34] Race discrimination in the administration of the death penalty was undoubtedly a central, if not the central, impetus for the Court's embarking on the *Furman* experiment. Yet the Court insisted that racial discrimination must be tolerated in the death penalty context to the same extent that it is tolerated in the larger criminal justice system.[35] If it were not, the Court

30. 512 U.S. 154 (1994).

31. *See Simmons*, 512 U.S. at 185 (Scalia, J., dissenting).

32. McCleskey v. Zant, 499 U.S. 467 (1991); *see also* McCleskey v. Kemp, 481 U.S. 279 (1987).

33. *See McCleskey*, 499 U.S. at 497–503.

34. *See McCleskey*, 481 U.S. at 299–306 (discussing the Eighth Amendment's prohibition on the infliction of cruel and unusual punishments).

35. *See id.* at 312–13 (noting that disparities in sentencing which correlate with race "are an inevitable part of our criminal justice system").

reasoned, the state might not be able to punish at all.[36] *McCleskey* starkly revealed the extent to which the Court would not view the death penalty as different if doing so, in the Court's words, would "'plac[e] totally unrealistic conditions on its use.'"[37] *McCleskey* also remains the sole decision in the post-*Furman* era that actually led to serious, albeit unsuccessful efforts by Congress to reduce state powers to impose the death penalty.

The guerrillas have also been notably and visibly unsuccessful in exempting classes of offenders from the death penalty based on their limited culpability. These decisions upholding the availability of capital punishment for juveniles, persons with mental retardation and non-trigger men have likewise undermined the perception that the court provides a wide and imposing net against excessive state processes.[38] Indeed, in *Penry*,[39] the Court sustained the death verdict despite admittedly modest empirical evidence that a substantial majority of Americans reject its use in such circumstances.

Of course, the most powerful evidence of the counter-revolution success is in the sheer numbers of offenders states manage to execute. In the first post-*Furman* decade, six executions were carried out nationwide, or about one-half per year. In the second post-*Furman* decade, the number climbed to 170, or about 17 per year. Over the past five years and about nine months there have been 266 executions nationwide, or about 48 a year. Although these numbers still do not approach the numbers of persons actually sentenced to death, there probably remains a perception that the federal courts obstruct the imposition of the death penalty. The death penalty has become a reality and not merely an aberration and the Court has not blinked.

The future then may resemble the past. As the most visible signs of contemporary regulation are withdrawn, actors from within the criminal justice system will no longer be able to indulge the comforting presumptions that their decisions and actions are rendered less significant or meaningful by extensive checks elsewhere established. If the numbers of those sentenced to death and executed climb, the general public may revisit the fairness and reliability issues surrounding death penalty practices that first surfaced a quarter century ago. Indeed, Congress's decision to curtail federal habeas for death row inmates was responsible in part for

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36. *See id.* at 314–15 (arguing that McCleskey's claim would question the principles that underlie the entire criminal justice system).

37. *See id.* at 319 (quoting Gregg v. Georgia, 428 U.S. 153, 199 (1976)).

38. *See* Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 373 (1995) (noting the broad applicability of death sentencing).

39. Penry v. Lynaugh, 492 U.S. 302 (1989).

the American Bar Association's recent decision to call for a moratorium execution pending enhancement and restoration and enhancement of federal court's authority to review the constitutional claims of state prisoners. Just as there is irony in the stabilization of the death penalty by its reformers who gave us *Furman* and its progeny, so too would there be irony if the success of death penalty proponents were to lead a new generation to reexamine the justice of the American system of capital punishment.