

Remember Not to Forget *Furman*: A Response to Professor Smith

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I. INTRODUCTION	117
II. SUMMARY OF DISAGREEMENTS WITH PROFESSOR SMITH.....	119
III. CONCLUSION	122

I. INTRODUCTION

Professor Robert J. Smith encourages readers, lawyers, and courts to forget *Furman v. Georgia* and to focus instead on death penalty challenges grounded in the diminished culpability of nearly all capital defendants.¹ We applaud Professor Smith’s call to focus on the mental and emotional characteristics that reduce the blameworthiness of so many of those charged with capital crimes; recognizing diminished culpability as the rule rather than the exception among capital defendants conveys a reality that rarely finds its way into reported cases. Professor Smith’s Article also builds importantly on the Supreme Court’s decisions in *Roper v. Simmons*² and *Atkins v. Virginia*,³ which removed juveniles and the intellectually disabled, respectively, from the ranks of those eligible for capital punishment. We agree with the substance of Professor Smith’s analysis and applaud the contribution that it makes to the literature.

We are troubled, however, by Professor Smith’s call to “forget *Furman*.” We acknowledge that such a phrase is the kind of title that appeals to law review editors: short, pithy, alliterative, and provocative. But the title and the article’s efforts to undermine *Furman*-based challenges disserve Professor Smith’s principal goal—addressing the United States’ broken death penalty system. As death penalty

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1. Robert J. Smith, *Forgetting Furman*, 100 IOWA L. REV. 1149, 1154 (2015) (“[T]his Article makes the affirmative case that the death penalty is unconstitutional because of the high risk of executing offenders with insufficient personal culpability.”).

2. *Roper v. Simmons*, 543 U.S. 551, 568 (2005).

3. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

scholars who agree with much of what Smith has to say, we are compelled to respond to his affirmative call for collective amnesia when it comes to the most important death penalty decision of the century, *Furman v. Georgia*. In what follows, we explain that Smith's thesis is ill-served by his criticism of other constitutional attacks on the death penalty. And indeed, upon closer examination, Professor Smith's critique of *Furman* challenges falls flat.

Our motivation for this disagreement should be clear to anyone familiar with our work. The two of us have been engaged for several years in the project of urging courts to remember *Furman*; that is, one of our scholarly objectives has been to rejuvenate and reinvigorate the modern *Furman* claim.⁴ We believe that the death penalty in the United States continues to suffer from the problem identified in *Furman*—namely that the infrequency with which the death penalty is applied to statutorily eligible killers gives rise to concerns that it is being applied in either a discriminatory or an arbitrary manner.⁵ Simply put, the Court recognized in 1972 that when the proportion of persons eligible for the death penalty is great, and the use of the penalty is rare, the imposition of the penalty is likely to be unfair and arbitrary “in the same way that being struck by lightning is cruel and unusual.”⁶ We think that that this sort of constitutional defect, no less than the ones Professor Smith chooses to highlight, is an impediment to a fair and just death penalty system. We are thus among those at whom Professor Smith's criticism is leveled: We “seek[] to establish that the concerns that motivated the Court to strike down the death penalty in 1972 necessitate the same result today.”⁷

We have been able to study the application of the death penalty in our home state of Colorado. We have shown that the infrequency concern identified in *Furman* is in fact still demonstrably present in the application of the death penalty today. For example, the *Furman* Court seemed concerned that the death penalty was being imposed on “only” 15–20% of those eligible for the law's ultimate penalty. We showed that in Colorado the death sentence rate was at least an order of magnitude lower than that: Between 1999 and 2010, the death penalty was imposed on only 0.56% of those who were statutorily eligible for the penalty.⁸ And while our findings

4. See generally, e.g., Meg Beardslee et al., *Disquieting Discretion: Race, Geography, & the Colorado Death Penalty in the First Decade of the Twenty-First Century*, 92 DENV. U. L. REV. 431 (2015); Sam Kamin & Justin Marceau, *Waking the Furman Giant*, 48 U.C. DAVIS L. REV. 981 (2015).

5. *Walton v. Arizona*, 497 U.S. 639, 658 (1990) (Scalia, J., concurring) (“The critical opinions . . . [in *Furman*,] in light of the subsequent development of our jurisprudence, were those of Justices Stewart and White. They focused on the infrequency and seeming randomness with which, under the discretionary state systems, the death penalty was imposed.”).

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

7. Smith, *supra* note 1, at 1152. Indeed Professor Smith cites our work as emblematic of those who would continue to focus attention on the *Furman* challenge. See *id.* at 1160 n.54, 1163 n.80.

8. Justin Marceau et al., *Death Eligibility in Colorado: Many Are Called, Few Are Chosen*, 84 U. COLO. L. REV. 1069, 1114 (2013) (“[I]t has been observed that ‘[w]hat was intolerable at the time of *Furman* . . . [was] that the ratio of death-eligibility to offenses-resulting-in-death [was] much closer to [90:1] than [5:1 or 10:1].’ Of course, in Colorado, the sentence rate is far below the 90:1 that has been deemed well below the constitutional floor. In Colorado the death sentence rate is only 0.56%.” (second through seventh alterations in original) (quoting Carol S. Steiker & Jordan M. Steiker, *Sober Second*

reveal a death-sentencing rate significantly lower than those observed elsewhere, the problem is clearly not isolated to Colorado.⁹ As Professor Smith notes, studies in other states have shown higher death sentencing rates, but nearly all of them are in the range that the *Furman* plurality found to be constitutionally suspect.¹⁰

As the ramifications for our findings are litigated in the Colorado court system, we are not surprised to find prosecutors arguing that *Furman* is a meaningless, dead-letter precedent.¹¹ After all, if *Furman*'s narrowing requirement means anything—if the Eighth Amendment continues to be concerned about the arbitrariness inherent to a death penalty system where almost all first-degree murders are death eligible—then the death penalty in Colorado and in many states is in need of a constitutional overhaul. But what has surprised us is that Smith's critique of *Furman* studies remarkably similar to those leveled by prosecutors seeking to impose the death penalty. We address each of Professor Smith's (and the prosecutors') critiques and identify our strong disagreement with them in what follows.

II. SUMMARY OF DISAGREEMENTS WITH PROFESSOR SMITH

First, it is argued that studying death eligibility is an unguided enterprise. Professor Smith maintains, for example, that “distinguishing offenders based on the relative aggravation of the offense [is] an almost mystical undertaking.”¹² But in fact there is nothing either magical or mysterious about separating out the worst of the worst. Indeed, that which Professor Smith declares nearly impossible is constitutionally mandated by *Zant v. Stephens*.¹³ In that case, the Supreme Court required that each state's death penalty system, at the stage of “legislative definition,” narrow the class of death eligible defendants in a determinate way.¹⁴ The entirety of the modern death penalty system is predicated on the rejection of the pre-*Furman* notion that it is “beyond present human ability” to identify certain murders that are more deserving of death than others.¹⁵ Stated differently, were we (and those with whom we share this endeavor) writing on a blank canvas in determining the relative culpability of murderers, Professor Smith might have a valid concern—as

Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 HARV. L. REV. 355, 415 (1995)).

9. See Kamin & Marceau, *supra* note 4, at 1015 tbl.1 (compiling data on death sentencing rates from all available *Furman* narrowing studies).

10. Smith, *supra* note 1, at 1160 (“In *Furman*, 15% to 20% was the worrisome eligibility-to-imposition ratio. But today, roughly 11% of offenders convicted of first-degree murder in California receive the death penalty. In Colorado, the death-eligibility to death-sentence rate is 0.56%.”).

11. Kamin & Marceau, *supra* note 4, at 1020 (summarizing the conclusions of some trial court judges relying on the arguments made by prosecutors).

12. Smith, *supra* note 1, at 1161.

13. *Zant v. Stephens*, 462 U.S. 862 (1983).

14. *Id.* at 878 (“Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition . . .”).

15. *McGautha v. California*, 402 U.S. 183, 204 (1971).

his footnote asks, is it worse to kill for hatred or money?¹⁶ But the states, as they are required to do under *Furman* and *Zant*, have already given us their studied assessment of which crimes they consider to be the worst of the worst; all we do is ask whether particular crimes fit within this constitutionally mandated framework.¹⁷

Smith's second critique of *Furman* studies is that the process of coding the cases¹⁸ "is an exercise fraught with subjective judgment calls."¹⁹ But there are several reasons that the task of coding capital cases is far from subjective. First, unlike the task we entrust to juries, the trained researchers conducting these studies are not engaging in the moral endeavor of weighing aggravators and mitigators against each other—our task is not to determine whether the facts in aggravation outweigh the facts in mitigation in any particular case. In fact, our study explicitly limits itself to the question of whether or not a killing is sufficiently aggravated to qualify for capital punishment. Likewise, these studies do not require any proportionality review because the researchers conducting them do not assess whether the cases singled out for death are worse than those that are not. Rather, we are merely asking in each case whether a jury could find a defendant guilty of first-degree murder with at least one aggravating circumstance.²⁰ This task is far from "mystical"—it is in fact a simpler form of the kind of question that we do, in fact we must, ask of juries in every capital case.

Moreover, the claim that these studies are crippled with subjectivity and potential bias at the coding stage²¹ is utterly belied by the litigation surrounding these studies, including the litigation of our study in Edward Montour's case in Colorado, where our study was used as a basis for arguing that the Colorado capital

16. See Smith, *supra* note 1, at 1161 n.64; see also *State v. Marshall*, 613 A.2d 1059, 1142 (N.J. 1992) (Handler, J., dissenting) ("Is it worse to kill for money or for hatred? Is it worse to kill over a woman or over a dog? Is it worse to kill to support a gambling habit or to support a drug habit? Is it worse to kill a relative or a stranger? To pose those questions is to pose insoluble moral conundrums.").

17. It is notable that not one of Professor Smith's 58 pages and 337 footnotes so much as cite *Zant*.

18. Coding is the process of classifying large quantities of data. In this instance, we used coding to determine whether each particular case was statutorily death eligible. See, e.g., Marceau et al., *supra* note 8, at 1104; Smith, *supra* note 1, at 1207.

19. Smith, *supra* note 1, at 1163.

20. As we explained in the methodology section of our Article: "Under this standard, the question is not what the expert believes is the correct factual determination in a given case, nor how a reasonable jury should resolve the issue. Rather, the question is whether a Colorado appellate court would affirm a . . . conviction [or finding of an aggravator] . . . That is, we reviewed the facts in the case file, giving particular weight to available appellate court opinions, and determined whether a jury verdict . . . would be supported by the facts when viewed in the light most favorable to the prosecution." Marceau et al., *supra* note 8, at 1103–04 (citations omitted); see also *id.* at 1104 n.171 (citing to the relevant social science literature identifying this approach as the best practice).

21. See Smith, *supra* note 1, at 1163. Smith also advances an argument against *Furman* attacks as requiring too much of our time—that is to say, he suggests that our study of the Colorado death penalty is not worthless per se, but rather a poor decision from the resource management perspective. *Id.* at 1169 n.114 ("[T]he opportunity cost of spending additional time trying to perfect assessments of crime-based arbitrariness and discrimination is too high."). As a scholars interested in the creation of knowledge, we find an opportunity cost argument in the context of legal scholarship (as opposed to litigation) somewhat disconcerting.

sentencing statute failed to comport with *Furman* because it did not meaningfully narrow the class of death-eligible defendants at the stage of legislative definition.²² After originally deriding our study as subjective (though not going so far as to say “mystical”), the prosecutors conducted their own independently funded study and replicated our results almost perfectly.²³ Although they viewed our project with skepticism, when they sat down and looked at the cases themselves, they saw almost exactly what we did. Specifically, they found death eligibility rates almost identical to ours (90.4% compared to their 88.4%).²⁴ The reason for this is simple: the application of most aggravators in most cases is a relatively rote process that neither requires great expertise, nor involves unchecked discretion. Indeed, using our dataset from the study of the Colorado death penalty it is possible to show that even if discretion is completely removed from the equation by including only those killings for which there is an objectively identifiable aggravating factor, the aggravating factor rate is still so high that the corresponding death sentencing rate is still well below the 15% constitutional floor suggested in *Furman*.²⁵

Professor Smith also takes aim at studies like ours as pragmatically untenable. He analogizes efforts to employ *Furman* in the service of alleviating the harshness and arbitrariness of the death penalty to a treadmill: “Advocates can push harder and faster, but their efforts will not result in much forward progress.”²⁶ The effectiveness of the *Furman* challenge is an empirical question and only time will tell whether Smith is correct. But the early use of these studies certainly contradicts Professor Smith’s thesis. For example, the Governor of Colorado, John Hickenlooper, granted

22. Order [2013-05-02] D-181 at 2, *People v. Montour*, No. 02CR782 (Colo. Dist. Ct. May 2, 2013). After two years of litigation, the Colorado district court issued an order summarizing our study’s findings and the prosecution’s essential agreement with those findings. *See id.* (“The prosecution found that the aggravating-factor rate was 88.49%, and the death-sentence rate was 0.57%.”); *id.* at 2 n.5 (“The Court will use the defense’s statistics . . . to resolve this motion on the merits, because the parties’ statistics are similar, and because the prosecution stipulated to the defense’s numbers for purposes of this motion.”).

23. *Id.*

24. *Id.*

25. For example, we could separate out the following class of indisputably objective aggravating factors under the Colorado statute: (1) prior violent felony; (2) already serving a felony sentence at the time of the killing; (3) pregnant victim; (4) victim was a child; (5) possession of the murder weapon was a felony; (6) the defendant killed two or more people in one or more incidents; (7) felony murder; and (8) killing for pecuniary gain. *See* COLO. REV. STAT. § 18-1.3-1201(5) (2014). Based on these aggravating factors alone, over a ten-year period of study, 368 cases (out of the 596 first-degree murders within the study period) would have objective, indisputable aggravating factors. *See* Appendix to Mr. Montour’s Brief in Reply to the Prosecution’s Motion to Vacate and to its Submission of the Prosecution Montour Murder Study (PMMS) app.J, *People v. Montour*, No. 02CR782 (Colo. Dist. Ct. Mar. 29, 2013). This would produce an aggravating factor rate of 61.7% (368/596), or approximately four times higher than what has been suggested as an acceptable death eligibility rate. *See* Steven F. Shatz & Nina Rivkind, *The California Death Penalty Scheme: Requiem for Furman?*, 72 N.Y.U. L. REV. 1283, 1288 (1997) (“In *Furman*, the Justices’ conclusion that the death penalty was imposed only infrequently derived from their understanding that only 15–20% of convicted murderers who were death-eligible were being sentenced to death.”).

26. Smith, *supra* note 1, at 1153.

a reprieve to a condemned inmate, Nathan Dunlap based, in part, on the findings of arbitrariness inherent to Colorado's death penalty demonstrated in our *Furman* Study.²⁷ Similar statements by governors in Pennsylvania and Oregon make Smith's willingness to call these efforts futile appear a bit premature, if not outright incorrect.²⁸

In addition to his pragmatic and methodological objections to the studies of *Furman*, Professor Smith also seems to quarrel with the research's substantive grounding. On this point we find Professor Smith's criticism of the modern *Furman* claim to be based in a surprisingly formalist view of the Eighth Amendment. For him, the Supreme Court's Eighth Amendment jurisprudence has largely eliminated the principal risks of arbitrariness that concerned the *Furman* Court—the application of the death penalty to non-murderers and a non-directive sentencing regime that left to the jury absolute discretion whether to impose the death penalty or not.²⁹ With these impediments gone, Smith seems to argue, the *Furman* concern becomes both less relevant and more difficult to evaluate. Our work challenges these assertions. We believe that the structural changes that arose in the wake of *Furman*—the use of aggravating factors and mitigating factors, bifurcated capital trials, etc.—in many cases merely masked the arbitrariness that remained in the application of the death penalty in the United States. Because many state legislatures enacted capacious capital statutes that create exactly the same risk of arbitrariness at which *Furman* was directed, the structural reforms of the last forty years have actually done little to improve the administration of capital punishment in the United States.

III. CONCLUSION

While we obviously disagree with Professor Smith's criticism of our work, here is our central critique of his Article:³⁰ We believe it is possible—indeed laudable—

27. Executive Order D 2013-006 of Colo. Governor John W. Hickenlooper (May 22, 2013), available at <http://www.deathpenaltyinfo.org/documents/COexecutiveorder.pdf>.

28. See Memorandum from Pa. Governor Tom Wolf (Feb. 13, 2015), available at <http://www.scribd.com/doc/255669059/Governor-Tom-Wolf-Announces-a-Moratorium-on-the-Death-Penalty-in-Pa> (providing the Pennsylvania's Governor's statements about the death penalty and noting, among other things, that arbitrariness was a key feature in his death penalty decision); Memorandum from Or. Governor John Kitzhaber on Capital Punishment (Nov. 22, 2011), available at <http://media.oregonlive.com/pacific-northwest-news/other/Microsoft%20Word%20-%20Final%20Final%20JK%20Statement%20on%20the%20Death%20Penalty.pdf> (providing arbitrariness as a reason for the Oregon Governor's decision).

29. Smith, *supra* note 1, at 1153 (“Today, death penalty cases have a separate penalty phase where the jury is presented with aggravating and mitigating evidence to guide its sentencing decision. When the Court decided *Furman*, some non-homicide offenses could be charged capitally. Today, only homicides are death-eligible.” (citation omitted)).

30. We have noted several examples of general disagreement, but there are also several specific points of disagreement with the claims advanced in Smith's article. For example, coming from a state where the entire death row is comprised of African-Americans, Coloradans (and many others) might justifiably take umbrage with Smith's bold assertion that the abolition of the death penalty for rape “mostly solved the problem of defendant-based race discrimination.” *Id.* at 1200. Smith also argues that because race is an “explosive topic,” death penalty scholars would be wise to avoid it, or treat it as a peripheral “background consideration.” *Id.* at 1201 n.310. We think that the synthesis of a carefully

to build up one theory of constitutional attack on the death penalty without tearing down others. The various requirements of the Eighth Amendment are not a zero-sum game. The culpability-based framework advanced by Professor Smith is not inconsistent with our finding that the present system remains arbitrary, and as far removed from notions of equity as being struck by lightning. Our central point is that these doctrines are perfectly consistent with one another. The argument is not just that there is no conflict among the various challenges to the death penalty; rather we argue that there is not even a tension between, say, challenging the defendant's intellectual capacity, the role the defendant played in the killing, and the means by which the state seeks to put the defendant to death in the same proceeding. A competent capital lawyer does not have to choose among these claims; bringing all of them in the same proceeding in no way prejudices a defendant. In fact, the more varied the kinds of attacks simultaneously made on the death penalty, the less capital punishment looks like a fixable system. The more problems identified in the current system, the more likely a court is to find, as Justice Breyer recently did in *Glossip v. Gross*, that the time for tinkering with the machinery of death has passed.³¹ Similarly, on August 13, 2015, the Connecticut Supreme Court wrote an exhaustive opinion invalidating its death penalty scheme;³² the court considered questions of legislative enactment,³³ delay, the risk of error, and questions of caprice and bias.³⁴

produced *Furman* study (showing that a state system does not narrow the class of offenders based on objective, legislative criteria) and race studies (showing that race correlates in statistically significant way with prosecutorial decisions to seek death) provide a necessary and properly critical lens through which to examine the death penalty.

31. *Glossip v. Gross*, 135 S. Ct. 2726, 2755–56 (2015) (Breyer, J., dissenting) (“Today’s administration of the death penalty involves three fundamental constitutional defects: (1) serious unreliability, (2) arbitrariness in application, and (3) unconscionably long delays that undermine the death penalty’s penological purpose. Perhaps as a result, (4) most places within the United States have abandoned its use. I shall describe each of these considerations, emphasizing changes that have occurred during the past four decades. For it is those changes, taken together with my own 20 years of experience on this Court, that lead me to believe that the death penalty, in and of itself, now likely constitutes a legally prohibited “cruel and unusual punishment[t].”).

32. *Connecticut v. Santiago*, No. SC 17413, slip op. (Conn. Aug. 13, 2015).

33. The Connecticut General Assembly voted in 2012 to repeal the death penalty. See David Ariosto, *Connecticut Becomes 17th State to Abolish Death Penalty*, CNN (Apr. 25, 2012, 5:41 PM), <http://www.cnn.com/2012/04/25/justice/connecticut-death-penalty-law-repealed/>. The Connecticut court decided in *Santiago* to invalidate the death sentences of those who were already on death row at the time of the repeal.

34. This last factor was simply a *Furman* challenge; the court concluded that the Connecticut scheme did not single out the worst of the worst for the law’s ultimate punishment. See *Santiago*, slip op. at 60 (“There is no doubt that our death row has counted among its residents the perpetrators of some of the most heinous crimes in Connecticut history. It is equally clear, however, that the process of selecting offenders for execution has been both under inclusive and over inclusive. Many who commit truly horrific crimes are spared, whereas certain defendants whose crimes are, by all objective measures, less brutal are condemned to death. The defendant in the present case is, perhaps, the clearest example. He shot the sole victim, an adult white male, in his sleep, killing him instantly. The defendant had no prior criminal convictions. And yet, of the seventeen offenders convicted of committing capital eligible murders for hire in the state since 1973, Eduardo Santiago was the only one sentenced to death. To the extent that the population of death row has been chosen on grounds other than the atrocity of the offenders’ crimes, this

The weight of all of these factors simply proved too much for the death penalty to bear.

Thus, if Professor Smith's point were simply that personal culpability arguments should be brought more often, we would have no quibble with his Article. In fact we would likely be among its principal fans. However, Professor Smith stops along the way to this important conclusion to run on a needless errand (and titles his Article after this frolic). Rather than seeking to add his voice to a chorus working to point out the problems with the death penalty in the United States today, Professor Smith has endeavored to be heard above the others.

would undermine all confidence that capital punishment, as applied, is morally proportionate and serves a legitimate retributive function in Connecticut." (citation omitted).