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Promulgating Proportionality

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I. INTRODUCTION

> Exceptions are not always the proof of the old rule; they can also be the harbinger of a new one.
>
> – Marie von Ebner-Eschenbach

When deciding a particular class of cases, courts often must decide whether to articulate a standard that applies to all similar cases or to forego a general rule in favor of a case-by-case approach.[1] Rules have the advantage of creating consistency in decisionmaking yet the disadvantage of creating unfairness at the margins in "difficult" cases, that is, cases where application of the rule dictates a normatively unfavorable outcome.[2] By contrast, an ad hoc, fact-based, case-by-case analysis allows for flexibility not available when applying uniform rules or standards but can create the problems of inconsistency and relative inequality between cases. Nowhere has this tension between delineating bright-line rules and preserving fact-based, case-by-case decisionmaking been more apparent than in the Court's attempts to interpret and apply the Eighth Amendment to capital cases.[3]

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[1] *Compare* Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66, 70 (1927) ("[W]hen the standard is clear it should be laid down once and for all by the Court."), *with* Pokora v. Wabash Ry. Co., 292 U.S. 98, 105–06 (1934) (rejecting Justice Holmes's view in *Goodman* that the Court should adopt a common law rule requiring car drivers to exit the car and "stop, look, and listen" before proceeding through a railroad crossing, and instead opting for a case-by-case approach to determine liability in such situations).

[2] Indeed, the oft-quoted saying "bad facts make bad law" captures this idea—that using case-specific situations to create a general rule, or an exception to a general rule, often results in a bad rule. *See, e.g.*, N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) ("Great cases, like hard cases, make bad law."). The courts often have echoed this concept in challenging the application of general common law and statutory rules. *See* Doggett v. United States, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting) ("Just as 'bad facts make bad law,' so too odd facts make odd law." (citation omitted)); Haig v. Agee, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting) ("bad facts make bad law"); Abcon Assocs., Inc. v. United States, 49 Fed. Cl. 678, 690 (Fed. Cl. 2001) ("bad facts make bad law"); *In re* Sole, 233 B.R. 347, 349 (Bankr. E.D. Va. 1998) ("Clearly bad facts make for bad law."); *see also* Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 884 (2006) (arguing that the act of deciding cases itself under the common law makes bad law).

[3] *See, e.g.*, Mary Sigler, *Contradiction, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1153–54 (2003) (exploring the alleged contradictions of the Court's capital sentencing jurisprudence).

In the "*Furman–Gregg*" line of cases,[4] the Court has emphasized the need to eliminate the arbitrariness inherent in unguided capital sentencing by juries.[5] In *Furman v. Georgia*, the Court interpreted the "cruel and unusual" punishment language of the Eighth Amendment[6] to prohibit states from using the death penalty without some systematic guidelines to cabin jury discretion such that courts treat "like cases" alike.[7] In *Gregg v. Georgia*, the Court affirmed the use of the death penalty when states had adopted statutory rules to satisfy two Eighth Amendment safeguards against jury arbitrariness: (1) rules narrowing the jury's exercise of discretion in sentencing; and (2) rules providing for meaningful appellate review of jury decisions.[8]

In the "*Woodson–Lockett*" line of cases, the Court emphasized a different concern—the need to consider case-specific circumstances—in highlighting the inadequacy of state capital rules and standards.[9] In *Woodson v. North Carolina*, the Court held that the Eighth Amendment prohibited the use of mandatory death statutes because they prohibited jurors from considering facts specific to the offender and the offense in each case.[10] The Court expanded this requirement of case-specific, individualized

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[4] This line includes *McGautha v. California*, 402 U.S. 183 (1971), *Furman v. Georgia*, 408 U.S. 238 (1972), and *Gregg v. Georgia*, 428 U.S. 153 (1976).

[5] *See* discussion *infra* Part II.A. Indeed, Justice Stewart likened the administration of capital punishment in the pre-*Furman* era to being struck by lightning because of its random and arbitrary application. *Furman*, 408 U.S. at 309 (Stewart, J., concurring) ("These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.").

[6] The Eighth Amendment states, "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

[7] *Furman*, 408 U.S. at 276–77 (Brennan, J., concurring). As discussed below, these frameworks included state statutory safeguards requiring proof of aggravating factors and appellate review of jury sentencing, sometimes in the form of proportionality review—a method by which the state supreme court compares the case on appeal to other capital cases to determine whether it is comparatively excessive. *See infra* notes 28–32 and accompanying text.

[8] *Gregg*, 428 U.S. at 195, 198. Many states interpreted the Court's decision in *Gregg* to require proportionality review, but the Court made clear in *Pulley v. Harris*, that the Eighth Amendment does not require proportionality review, just some kind of meaningful appellate review. 465 U.S. 37, 43–46 (1984).

[9] Woodson v. North Carolina, 428 U.S. 280, 304 (1976); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

[10] 428 U.S. at 304

determinations in *Lockett v. Ohio*, where the Court interpreted the Eighth Amendment to bar any limitation on the defendant's ability to use mitigating evidence in capital sentencing.[11]

At first glance, requiring states to use a general set of parameters to create consistent jury verdicts in capital cases in conjunction with the requirement that juries consider all relevant individual and case-specific characteristics creates some internal tension,[12] if not outright conflict.[13] In his concurrence in *Walton v. Arizona*, Justice Scalia argued that this conflict was irreconcilable: "[O]ur jurisprudence and logic have long since parted ways. . . . The latter requirement [of individualized factual determinations] quite obviously destroys whatever rationality and predictability the former requirement [of limitations on jury discretion] was designed to achieve."[14]

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[11] 438 U.S. at 586, 604.

[12] *See, e.g.*, Tuilaepa v. California, 512 U.S. 967, 973 (1994) ("The objectives of these two inquiries can be in some tension, at least when the inquiries occur at the same time.").

[13] Justice Scalia's concurrence in *Walton v. Arizona* mocked the idea that there is merely a tension and not a complete conflict between these requirements: "To acknowledge that 'there perhaps is an inherent tension' between [the *Woodson–Lockett*] line of cases and the line stemming from *Furman* is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II." 497 U.S. 639, 664 (1990) (Scalia, J., concurring in part and concurring in judgment) (citation omitted) (quoting McCleskey v. Kemp, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting)).

[14] 497 U.S. at 664–65 (Scalia, J., concurring in part and concurring in judgment). Many commentators share Scalia's view that this conflict is irreconcilable. *See* Steven G. Gey, *Justice Scalia's Death Penalty*, 20 FLA. ST. U. L. REV. 67, 68, 89–90 (1992) (agreeing with Justice Scalia that the Court's capital sentencing jurisprudence is contradictory and concluding that the Court should declare capital punishment unconstitutional); Scott W. Howe, *Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation*, 26 GA. L. REV. 323, 327 (1992) (stating that the Court's two inconsistent lines of decisions create serious problems); Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1161 (1991) (asking if the tension between "individual consideration" and "guided discretion" can be reconciled); Robert Weisberg, *Deregulating Death*, 1983 SUP. CT. REV. 305, 325–26 (1984) (arguing that the two principles are inconsistent and efforts to reconcile them are based on questionable rationalizations); Carol S. Steiker & Jordan M. Steiker, *Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing*, 102 YALE L.J. 835, 860 (1992) (reviewing BEVERLY LOWRY, CROSSED OVER: A MURDER, A MEMOIR (1992)) (noting the long-observed tension between the two requirements). *But see* Louis D. Bilionis, *Moral Appropriateness, Capital Punishment, and the* Lockett *Doctrine*, 82 J. CRIM. L. & CRIMINOLOGY 283, 327–28 (1991) (suggesting that the two principles are not fundamentally irreconcilable); David R. Dow, *The Third Dimension of Death Penalty Jurisprudence*, 22 AM. J. CRIM. L. 151, 153 (1994) (arguing for a three-dimensional approach to harmonize the conflict); Ronald J. Mann, *The Individualized-Consideration*

The Court has done little to reconcile this conflict. Some Justices have advocated that the Court relieve this tension by relaxing, or even abandoning, the *Woodson–Lockett* requirement of case-specific inquiries.[15] Others have argued that the Court's inability to remedy the tension raises doubts about the constitutionality of capital punishment altogether.[16]

Indeed, in *Kennedy v. Louisiana*, Justice Kennedy observed that "this case law . . . is still in search of a unifying principle."[17] This Article attempts to provide just that—a unifying principle—through the concept of "proportionality." As herein construed, proportionality requires that the applicable punishment be commensurate with the crime in both a relative and absolute sense.[18] Using this principle, this Article develops a framework by which to apply the Court's Eighth Amendment jurisprudence, incorporating both lines of cases in a way that alleviates the inherent tension of pursuing the competing goals of general consistency and case-specific consideration.

This Article, then, argues that the Court ought to apply the Eighth Amendment prohibition against cruel and unusual

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Principle and the Death Penalty as Cruel and Unusual Punishment, 29 HOUS. L. REV. 493, 497 (1992) (arguing that the cases are not inconsistent but rather are tied to the text of the Eighth Amendment).

[15] Kennedy v. Louisiana, 554 U.S. 407, 436 (2008) (citing *Walton*, 497 U.S. at 667–73).

[16] Baze v. Rees, 553 U.S. 35, 71 (2008) (Stevens, J., concurring in judgment) (questioning the continued justification for the death penalty); Callins v. Collins, 510 U.S. 1141, 1144–45 (1994) (Blackmun, J., dissenting from denial of certiorari) (arguing that the "death penalty experiment has failed"); Furman v. Georgia, 408 U.S. 238, 310–14 (1972) (White, J., concurring) (suggesting that the death penalty is so rarely imposed that it constitutes cruel and unusual punishment).

[17] *Kennedy*, 554 U.S. at 437. Justice Kennedy predicted that the Court simply would "insist upon confining the instances in which capital punishment may be imposed." *Id.*; *see also* Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005) (proposing "a theory of the Eighth Amendment organized around the notion of cruelty"); Samuel B. Lutz, Note, *The Eighth Amendment Reconsidered: A Framework for Analyzing the Excessiveness Prohibition*, 80 N.Y.U. L. REV. 1862, 1863–66 (2005) (exploring the social values that should inform the interpretation of the Eighth Amendment and arguing that "there has been a general failure to develop any larger theory of the Eighth Amendment").

[18] As this Article defines it, proportionality encompasses both retributive and utilitarian purposes of punishment. *See* Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263, 271 (2005) (developing a robust conception of "political" proportionality and explaining that proportionality can be broader than the retributive concept of "just deserts"); discussion *infra* Part III.

punishment solely in terms of two distinct types of proportionality: absolute and relative. The proposed model of proportionality unites the two competing lines of cases by conceptualizing the Eighth Amendment to require that states meet *both* the demands of relative proportionality—which incorporates the need for general rules to address the arbitrariness concerns in the *Furman–Gregg* cases—*and* absolute proportionality—which incorporates the need for case-specific review from the *Woodson–Lockett* cases. Specifically, the model requires that the state court (and jury) *first* determine the issue of absolute proportionality, narrowing the class of individuals eligible for the death penalty by using case-specific mitigating facts. The state courts (typically through appellate review) must *then* determine the issue of relative proportionality, further narrowing the cases in which the offender is eligible to receive capital punishment by way of general rules.[19]

Part II of this Article fully describes the "*Walton* problem"—the apparent conflict between the *Furman–Gregg* arbitrariness principle and the *Woodson–Lockett* individualized determination principle. In Part III, the Article defines the proportionality concept, describing both its absolute and relative forms. In Part IV, the Article articulates the new model for implementing the Eighth Amendment that solves the *Walton* problem. Finally, in Part V, the Article demonstrates how proportionality can serve as the unifying principle for the Court's capital jurisprudence.

II. THE COURT'S COMPETING LINES OF JURISPRUDENCE

A. THE *FURMAN–GREGG* LINE: THE EIGHTH AMENDMENT REQUIREMENT OF GENERAL GUIDING PRINCIPLES IN CAPITAL SENTENCING

The Court's *Furman–Gregg* line of capital jurisprudence addresses the problem of jury verdict inconsistency in capital cases. As explained below, the principles adopted in those cases sought to remedy the disparities and largely arbitrary outcomes resulting from unguided jury sentencing in capital cases.

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[19] It is true that *part* of the relative proportionality determination occurs with application of aggravating factors, technically before the absolute proportionality analysis.

1. McGautha v. California. The Court first considered the efficacy of jury decisionmaking in capital cases in 1971 in *McGautha v. California.*[20] In *McGautha*, a 6-to-3 majority reaffirmed the Court's traditional faith in the reliability of jury decisions, rejecting the petitioners' claim that the state jury procedures in their respective capital cases violated the Fourteenth Amendment's procedural due process requirements.[21]

The Court in *McGautha* held that the Fourteenth Amendment did not require any restriction on the discretion of juries in capital trials or the bifurcation of such trials into guilt and punishment phases.[22] Acknowledging its belief in the jury system, the Court found it "quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution."[23]

Despite the outcome in *McGautha*, the dissenting justices expressed serious apprehension about the state sentencing procedures, particularly given the absence of any guidance or limitation on the jury's exercise of discretion.[24] Justice Brennan stressed the inadequacy of open-ended jury discretion in the state

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[20] 402 U.S. 183 (1971). *Crampton v. Ohio*, 248 N.E.2d 614 (Ohio 1969), was a companion case to *McGautha* and was decided as part of the opinion. *McGautha*, 402 U.S. at 185–86. In both, the Court held that the broad discretion afforded to juries did not violate the petitioners' due process rights under the Fourteenth Amendment. *Id.*

[21] *McGautha*, 402 U.S. at 196. Indeed, the *McGautha* case was the first challenge to the ability of jurors to decide capital cases.

[22] *Id.* at 207, 221. The Court rejected the argument that a unitary trial violated the Constitution by forcing a defendant to decide whether to "remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment." *Id.* at 211, 213.

[23] *Id.* at 207.

[24] *See id.* at 309 (Brennan, J., dissenting) ("The question . . . present[ed] for our decision is whether the rule of law, basic to our society and binding upon the States by virtue of the Due Process Clause of the Fourteenth Amendment, is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice."); *see also* John M. Harlan, *Thoughts at a Dedication: Keeping the Judicial Function in Balance*, *in* THE EVOLUTION OF A JUDICIAL PHILOSOPHY 289, 291–92 (David L. Shapiro ed., 1969) ("Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on ad hoc notions of what is right or wrong in a particular case.").

sentencing schemes at issue by emphasizing that such schemes were not "designed to control arbitrary action."[25] Thus, both the majority's and the dissenters' opinions hinged on their individual views of the fairness of the jury procedure and its relative consistency from case to case, and *not* on their views about the propriety of death sentences with respect to the crimes committed in each case before them.[26]

2. Furman v. Georgia. One year after *McGautha*, the Court decided *Furman v. Georgia* and held that the death penalty, as administered, violated the Eighth Amendment's prohibition against cruel and unusual punishment.[27] Initially understood by many to signal the abolition of capital punishment in the United States, a plurality of the Justices instead focused on the flaws in *the process*, particularly concerning the lack of guidance provided to the jury in determining the appropriate sentence.[28]

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[25] *McGautha*, 402 U.S. at 268 (Brennan, J., dissenting). Brennan was not questioning the role of the jury as the arbiter of the decision concerning life and death; rather, he was simply arguing for greater guidance from the state in the jury's decisionmaking process and for greater ability to review the rationales underlying the jury's verdict. *Id.* at 311 ("Finally, I should add that for several reasons the present cases do not draw into question the power of the States that should so desire to commit their criminal sentencing powers to a jury. For one thing, I see no reason to believe that juries are not capable of explaining, in simple but possibly perceptive terms, what facts they have found and what reasons they have considered sufficient to take a human life. Second, I have already indicated why I believe that life itself is an interest of such transcendent importance that a decision to take a life may require procedural regularity far beyond a decision simply to set a sentence at one or another term of years.").

[26] In rejecting the concept of a unitary trial as used by Ohio, Justice Douglas wrote:

> The unitary trial is certainly not "mercy" oriented. That is, however, not its defect. It has a constitutional infirmity because it is not neutral on the awesome issue of capital punishment. The rules are stacked in favor of death. It is one thing if the legislature decides that the death penalty attaches to defined crimes. It is quite another to leave to judge or jury the discretion to sentence an accused to death or to show mercy under procedures that make the trial death oriented. Then the law becomes a mere pretense, lacking the procedural integrity that would likely result in a fair resolution of the issues. In Ohio, the deficiency in the procedure is compounded by the unreviewability of the failure to grant mercy.

McGautha, 402 U.S. at 247 (Douglas, J., dissenting).

[27] 408 U.S. 238, 239–40 (1972).

[28] *Id.* at 295 (Brennan, J., concurring) (arguing that allowing juries to impose the death penalty without guidance invites "totally capricious selection of criminals for . . . death").

Abandoning the views adopted just a year earlier, Justices took issue with the broad discretion given to the jury,[29] particularly the range of potential sentences,[30] the lack of guidance as to when a death sentence was proper,[31] and the absence of bifurcation between the guilt and sentencing phases of trial.[32] Thus, Justice Stewart concluded that the death penalty *as applied* constituted cruel and unusual punishment because it was "so wantonly and so freakishly imposed."[33] Justice Brennan agreed: "When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily."[34]

The rarity of using the death penalty further contributed to the Court's view that its use was arbitrary. Justice White found that "the death penalty is exacted with great infrequency even for the most atrocious crimes . . . [and] there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."[35]

At its heart, the *Furman* decision found the death penalty unconstitutional *as applied* because there were no indicia or standards determining which murders warranted a punishment of death and which did not; thus, no mechanism was in place to ensure that like cases were treated alike. Justice Brennan explained:

> No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so

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[29] *Id.* at 314 (Stewart, J., concurring).

[30] *Id.*

[31] *Id.* at 305 (Brennan, J., concurring).

[32] *See* Gregg v. Georgia, 428 U.S. 153, 195 (1976) ("As a general proposition [*Furman*'s] concerns are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.").

[33] *Id.* at 310 (Stewart, J., concurring).

[34] *Id.* at 293 (Brennan, J., concurring). Brennan further commented that the administration of the death penalty "smacks of little more than a lottery system." *Id.*

[35] *Id.* at 313 (White, J., concurring). Similarly, Justice Brennan emphasized that "death is inflicted in only a minute fraction of these cases." *Id.* at 293 (Brennan, J., concurring).

> finely as to explain, on that ground, the execution of such a tiny sample of those eligible.[36]

The Justices in *Furman* highlighted the absence of a principle by which to distinguish murders deserving death from "ordinary" murders deserving a lesser sentence.[37] Thus, because the death sentences imposed were arbitrary *relative to* the many similar cases that did not receive the death penalty, these sentences were "cruel and unusual" under the Eighth Amendment.[38]

3. Gregg v. Georgia. In 1976, four years after *Furman*, the Court effectively reinstated the death penalty in *Gregg v. Georgia*, a case that validated the Georgia death penalty statutes as amended in response to *Furman*.[39] On the same day, the Court also decided several companion cases assessing the death penalty schemes adopted in other jurisdictions after *Furman*.[40]

Gregg cited several features of the new Georgia sentencing procedure that alleviated the *Furman* concern of arbitrary sentencing outcomes resulting from unfettered jury discretion.[41] First, the Georgia statute bifurcated the sentencing procedure by separating the sentencing determination from the determination of guilt.[42] Second, the statute created ten aggravating factors and required the State to prove at least one beyond a reasonable doubt before death became a potential sentence.[43] Third, the statute required the jury to weigh the aggravating factors against any mitigating factors offered into evidence at sentencing.[44] Finally, "[a]s an important additional safeguard against arbitrariness and

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[36] *Id.* at 294 (Brennan, J., concurring).

[37] *Id.*

[38] *Id.* at 305.

[39] 428 U.S. 153, 207 (1976). For a discussion of the rapid reaction of the states to *Furman*, with the passing of new capital statutes in most jurisdictions, see Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 45–48 (2007).

[40] *See* Jurek v. Texas, 428 U.S. 262, 276 (1976) (upholding Texas's new capital statute); Proffitt v. Florida, 428 U.S. 242, 259 (1976) (upholding Florida's new capital statute); Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (holding Louisiana's new capital statute unconstitutional); Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (holding North Carolina's new capital statute unconstitutional).

[41] *Gregg*, 428 U.S. at 196–98.

[42] *Id.* at 163.

[43] *Id.* at 164–65.

[44] *Id.* at 164.

caprice, the Georgia statutory scheme provide[d] for automatic appeal of all death sentences to the State's Supreme Court."[45] The Georgia Supreme Court was "required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases."[46]

The Court in *Gregg* concluded that the new procedures satisfied the *Furman* concerns because they ensured that a death sentence would not be comparatively disproportionate.[47] In other words, the procedures 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."[48] Thus, *Gregg* established that states could avoid the *Furman* problem of arbitrariness by ensuring the relative proportionality of outcomes through (1) guidance to the jury via aggravating and mitigating factors and (2) appellate review of sentences.

4. The Basic Furman–Gregg *Doctrine.* The decisions in *Furman* and *Gregg* clearly establish an Eighth Amendment doctrine requiring states to adopt general rules that narrow the class of offenders eligible for the death penalty and provide meaningful appellate review of jury decisions. The aggravating factors serve to categorize offenders such that juries punish offenders who commit "like crimes" in similar ways or under similar circumstances.[49] The safeguard of meaningful appellate review, particularly in the form of proportionality review,

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[45] *Id.* at 198.

[46] *Id.*

[47] *Id.*

[48] *Id.* (quoting Furman v. Georgia, 408 U.S. 238, 313 (1971) (White, J., concurring)) (internal quotation marks omitted).

[49] Although aggravating circumstances could be considered to be absolute bars to arbitrariness, a closer examination of the various prerequisites for death eligibility denote a wide and uneven grouping of cases that are, in many cases, disparate in offender culpability and harm inflicted. As such, this Article construes such factors to serve as merely part of the manner in which the Court can assure that juries will sentence similar cases in similar ways.

functions to prevent death sentences in "dissimilar" cases and thus to create relative proportionality.[50]

B. THE *WOODSON–LOCKETT* LINE: THE EIGHTH AMENDMENT REQUIREMENT OF CASE-SPECIFIC SENTENCING DETERMINATIONS

The second line of the Court's capital jurisprudence, the *Woodson–Lockett* cases, addresses an entirely different Eighth Amendment concern: the need to consider the unique, case-specific characteristics of the offense and the offender in capital cases. As explained below, the principle adopted in these cases sought to remedy the unfair outcomes resulting from applying general rules to determine a death sentence without considering the particular circumstances of the case at issue.

1. Woodson v. North Carolina. On the same day it decided *Gregg*, the Court decided *Woodson v. North Carolina*, creating a distinct set of Eighth Amendment requirements that demand jury focus on the individual characteristics and actions of the offender.[51] In *Woodson*, the Court struck down the North Carolina death penalty scheme in which *all* individuals convicted of first-degree murder received a mandatory death sentence.[52] The Court explained that "[t]he inadequacy of distinguishing between murderers solely on the basis of legislative criteria" was the very reason that "led the States to grant juries sentencing discretion in

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[50] Appellate review provides the best opportunity to correct relative disproportionality, one case at a time. This is because appellate courts, unlike trial courts (and particularly juries), have the benefit of comparing cases rather than just deciding one case under a general standard.

[51] 428 U.S. 280, 303–04 (1976) (holding that the North Carolina statute was unconstitutional for failing to consider the character and record of individual defendants, among other reasons).

[52] *Id.* at 301. The North Carolina statute provided:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary, or other felony, shall be deemed to be murder in the first degree and *shall be punished with death.* All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975) (emphasis added).

capital cases."[53] The Court also emphasized the likelihood of juries declining to find a defendant guilty when they believed the death penalty was not the appropriate sentence.[54]

Given these deficiencies, the Court found that, unlike Georgia, the North Carolina system failed to address the *Furman* concerns.[55] Justice Stewart explained:

> In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences.[56]

This holding made clear that the Court believed constitutional capital punishment schemes must give juries—or trial judges—a way to differentiate meaningfully among first-degree murders in determining a sentence. This requirement was consistent with the broader principle the Court announced: that to pass muster under the Eighth Amendment, capital-sentencing decisions require individualized sentencing determinations. In other words, the judge or jury must consider the case-specific characteristics of the crime and the individual defendant. The broad categories articulated by the legislature were insufficient on their own to determine when death was an appropriate sentence.[57]

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[53] *Woodson*, 428 U.S. at 291.

[54] *Id.* at 295–96. Indeed, the Court previously had recognized the possibility of jury nullification in capital cases sentenced under mandatory statutes. McGautha v. California, 402 U.S. 183, 199 (1971).

[55] *Woodson*, 428 U.S. at 302.

[56] *Id.* at 303 (footnote omitted).

[57] The Court struck down a similar category-based scheme in a companion case, *Roberts v. Louisiana*, even though Louisiana's statute defined first-degree murder more narrowly than North Carolina's. 428 U.S. 325, 332, 334–36 (1976).

2. Lockett v. Ohio. In *Lockett v. Ohio*, decided two years after *Woodson*, the Court broadened the principle articulated in *Woodson* by striking down the Ohio capital statute for not allowing adequate consideration of the individual characteristics of the offender.[58] At the time, Ohio's capital statute required that offenders found guilty of an aggravating circumstance had to prove at least one statutory mitigating circumstance by a preponderance of the evidence to avoid a death sentence.[59] In overturning the defendant's[60] death sentence, the Court held that the statute violated the Eighth Amendment by limiting the consideration of the offender's mitigating evidence.[61] As Chief Justice Burger observed:

> [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.[62]

As a result, after *Lockett*, "[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors."[63]

3. The Basic Woodson–Lockett *Doctrine.* The decisions in *Woodson* and *Lockett* establish an Eighth Amendment doctrine

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[58] 438 U.S. 586, 608 (1978).

[59] The Ohio statute at issue limited the mitigating evidence to three categories:

> (1) The victim of the offense induced or facilitated it; (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation; (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

OHIO REV. CODE ANN. § 2929.04(B) (1975).

[60] Defendant Sandra Lockett played, at most, a very minor role in the crime. *See Lockett*, 438 U.S. at 590 (describing defendant's role as the driver of the getaway car in an armed robbery). She was prosecuted under a theory of felony murder; there was no evidence that she or her co-conspirators intended to kill. *Id.*

[61] *Id.* at 608.

[62] *Id.* at 605.

[63] *Id.* at 608.

prohibiting mandatory death statutes and requiring states to allow complete consideration of all case-specific evidence concerning the offender and the offense. These Eighth Amendment requirements thus serve to enable an individualized, fact-specific determination of whether death is an appropriate punishment in a given case.

C. THE COURT'S CONTEMPLATION OF THE "CONFLICT" AND *WALTON V. ARIZONA*

For twelve years, these two lines of cases co-existed, largely because statutory challenges based on one or the other were made and considered separately. Before *Walton v. Arizona*,[64] no petitioner had challenged aspects of both lines in the *same case*.

In *Walton*, the Court upheld Arizona's capital statute despite challenges by the petitioner under both the *Furman–Gregg* and *Woodson–Lockett* lines of cases.[65] The petitioner challenged one of the statutory aggravating circumstances, which made offenders committing "heinous, cruel, or depraved" murders eligible for the death penalty,[66] for being too vague to sufficiently narrow the class of offenders eligible for death as required by the *Furman–Gregg* doctrine.[67] The petitioner separately challenged the statutory requirements that "the sentencer may consider *only* those mitigating circumstances proved by a preponderance of the evidence" and that the defendant bears the burden of establishing mitigating circumstances "sufficiently substantial to call for leniency."[68]

While concurring in the decision to uphold the statute, Justice Scalia wrote separately to express his view that the *Furman–*

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[64] 497 U.S. 639 (1990).

[65] *See id.* at 674 (Scalia, J., concurring) (addressing petitioner's claims). Part of the Court's holding—that judges can make factual determinations underlying the imposition of aggravating factors—was reversed in *Ring v. Arizona*, 536 U.S. 584 (2002), which held that, pursuant to the Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Sixth Amendment requires jurors, *not judges*, to make such factual determinations. *Ring*, 536 U.S. at 588–89.

[66] Brief for Petitioner, Walton v. Arizona, 497 U.S. 639 (1990) (No. 88-7351), 1989 WL 430597 at *16–17.

[67] *Walton*, 497 U.S. at 639. The Arizona statutory aggravating circumstance at issue stated, "[t]he defendant committed the offense in an especially heinous, cruel, or depraved manner." ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1989).

[68] *Walton*, 497 U.S. at 677 (Blackmun, J., dissenting).

Gregg and *Woodson–Lockett* lines of cases created an irreconcilable conflict.[69] He stated:

> Today a petitioner before this Court says that a state sentencing court (1) had unconstitutionally *broad* discretion to sentence him to death instead of imprisonment, *and* (2) had unconstitutionally *narrow* discretion to sentence him to imprisonment instead of death. An observer unacquainted with our death penalty jurisprudence (and in the habit of thinking logically) would probably say these positions cannot both be right.[70]

Highlighting the way in which the *Woodson–Lockett* requirements conflict with the goals of the *Furman–Gregg* rules, Justice Scalia suggested that the process of making individualized jury determinations without guidance as to which factors are relevant undermined the ability of legislatures to require juries to apply the same standards in making sentencing determinations.[71]

By requiring individualized sentencing determinations, Justice Scalia believed that the Court opened the door to the use of different standards in applying the death penalty—the very concern *Furman* and *Gregg* sought to remedy.[72] As a remedy, Justice Scalia concluded that the Court should abandon the *Woodson–Lockett* line of cases.[73]

Justice Stevens wrote a separate dissent to refute Justice Scalia's view of the two lines of cases.[74] Specifically, Justice Stevens argued that the two concepts were *not* incompatible,

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[69] *See id.* at 664–74 (Scalia, J., concurring in part and concurring in judgment) ("*Woodson* and *Lockett* are rationally irreconcilable with *Furman*.").

[70] *Id.* at 656.

[71] *See id.* at 666 ("The issue is whether, in the process of the individualized sentencing determination, the society may specify which factors are relevant, and which are not—whether it may insist upon a rational scheme in which all sentencers making the individualized determinations apply the same standard.").

[72] *See id.* at 666–67 (explaining how individualized determinations "[permit] sentencers to accord different treatment . . . to two murderers whose crimes have been found to be of similar gravity").

[73] *Id.* at 667.

[74] *Id.* at 708–19 (Stevens, J., dissenting).

because whatever arbitrariness resulted from the use of case-specific indicia occurred only within the group of offenders narrowed according to the *Furman–Gregg* guidelines. Justice Stevens argued:

> The cases that Justice Scalia categorically rejects today rest on the theory that the risk of arbitrariness condemned in *Furman* is a function of the size of the class of convicted persons who are eligible for the death penalty. . . . However, the size of the class may be narrowed to reduce sufficiently that risk of arbitrariness, even if a jury is then given complete discretion to show mercy when evaluating the individual characteristics of the few individuals who have been found death eligible.[75]

To illustrate his point, Justice Stevens used the metaphor of a narrowing pyramid,[76] first described by the Court in *Zant v. Stevens*.[77] As the court applies the general *Furman–Gregg* rules to narrow the class of death-eligible offenders, one moves up the pyramid. As to Justice Scalia's view that the use of individualized considerations thereafter undermines the consistency achieved by the general narrowing standards, Justice Stevens emphasized:

> Justice Scalia ignores the difference between the base of the pyramid and its apex. A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex. After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to show mercy based on individual mitigating circumstances in the cases that remain.[78]

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[75] *Id.* at 715–16.
[76] *Id.* at 716–18.
[77] 462 U.S. 862, 870 (1983).
[78] *Walton*, 497 U.S. at 718.

For Justice Stevens, then, allowing disparities to arise between cases based on fact-specific circumstances was acceptable because any such arbitrariness would be limited to the narrowed group of offenders.[79] Such an approach, according to Justice Stevens, would limit the disparity in a way that complies with the Eighth Amendment requirements of both lines of cases.[80]

At the end of this discussion, the ultimate question is whether allowing jurors to consider *all* case-specific mitigating evidence under the *Woodson–Lockett* approach undermines the consistency achieved by the standard-based *Furman–Gregg* approach in a constitutionally significant way—Scalia's view—or an insignificant way—Stevens's view.

In light of Justice Scalia's and Justice Stevens's conversation in *Walton*, this Article offers a third approach that attempts to harmonize the two lines of cases in a distinct way. Given the importance of the competing Eighth Amendment considerations of individualized determinations and sentencing consistency, this Article endeavors to articulate a model that accords both approaches equal significance in a complementary, non-conflicting manner.

III. THE CONCEPT OF PROPORTIONALITY

Before describing the way in which proportionality can resolve the conflict described above, clarifying how this Article defines the term is important.[81] Proportionality refers to the relationship of

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[79] *Id.* The problem with Stevens's view is that, even in the case at bar, it is not evident that the use of aggravating factors, particularly vague ones based on concepts like "heinousness," necessarily serves to narrow the class of death-eligible offenders in a significant enough way to ensure that any ensuing arbitrariness resulting from case-specific considerations is *de minimis*.

[80] *Id.*

[81] Indeed, the academic literature contains many iterations of the term proportionality as applied in the Eighth Amendment context. *See, e.g.*, John D. Castiglione, *Qualitative and Quantative Proportionality: A Specific Critique of Retributivism*, 71 OHIO ST. L.J. 71, 71 (2010) (describing a model of proportionality review based on qualitative and quantitative comparisons); Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Question Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL'Y 35, 45 (2008) ("The Eighth Amendment indisputably invites a moral inquiry. The Court has, however, treated the Amendment's words as describing a conceptual chameleon and inviting multiple, distinct moral inquiries."); Richard S. Frase, *Excessive Prison Sentences, Punishment Goals,*

the punishment to the criminal conduct of the offender, and it serves as a limit on the power of the state to impose criminal sanctions based on various individual interests and political considerations.[82] As a result, punishments are disproportionate when they exceed the state's legitimate power.[83]

While many scholars and courts have used proportionality merely as a term describing "just deserts" retribution,[84] Professor Alice Ristroph and others have described it more broadly.[85] Ristroph explains that proportionality is compatible with a range of penological theories, but it is not dependent on any one of them:

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and the Eighth Amendment: "Proportionality" Relative to What?, 89 MINN. L. REV. 571, 574 (2005) (exploring retributive and non-retributive proportionality principles and lengthy prison sentences); Donna H. Lee, *Resuscitating Proportionality in Noncapital Criminal Sentencing*, 40 ARIZ. ST. L.J. 527, 528 (2008) (proposing "three principles: transparency, limited deference, and a 'felt sense of justice' . . . [to] contribute to the development of a more coherent jurisprudence of proportionality"); Eva S. Nilsen, *Decency, Dignity, and Desert: Restoring Ideals of Humane Punishment to Constitutional Discourse*, 41 U.C. DAVIS L. REV. 111, 111 (2007) (arguing that the Court's "narrow and formalistic reading of the Eighth Amendment" has allowed "longer and meaner" sentences and more "degrading and dangerous" prison conditions); Ristroph, *supra* note 18, at 263 (examining "proportionality as a constitutional limitation on the power to punish" and arguing that the "constitutional proportionality requirement is better understood as an external limitation on the state's penal power that is independent of the goals of punishment"); Carol S. Steiker, Panetti v. Quarterman*: Is There a "Rational Understanding" of the Supreme Court's Eighth Amendment Jurisprudence?*, 5 OHIO ST. J. CRIM. L. 285, 290 (2007) (exploring the "tensions and uncertainties that plague the Supreme Court's Eighth Amendment jurisprudence"); Note, *The Eighth Amendment, Proportionality, and the Changing Meaning of "Punishments,"* 122 HARV. L. REV. 960, 961 (2009) (challenging Scalia's claim that Eighth Amendment proportionality requirements are invalid).

[82] Alice Ristroph, *How (Not) to Think Like a Punisher*, 61 FLA. L. REV. 727, 744 (2009).

[83] *Id.*

[84] "Just deserts" retribution is a theory of punishment that bases the punishment of offenders on what they "deserve," based on their culpability and the harm caused by the criminal behavior. *See, e.g.*, Hyman Gross, *Proportional Punishment and Justifiable Sentences*, *in* SENTENCING 272, 272 (Hymon Gross & Andrew von Hirsch eds., 1981) ("The principle of proportion between crime and punishment is a principle of just desert that serves as the foundation of every criminal sentence that is justifiable."). Justice Scalia has adopted this view, arguing that because proportionality "is inherently a concept tied to the penological goal of retribution," the Eighth Amendment contains no "guarantee against disproportionate sentences." Ewing v. California, 538 U.S. 11, 31 (2003) (Scalia, J., concurring) (citing Harmelin v. Michigan, 501 U.S. 957, 984 (1991)).

[85] *See, e.g.*, Ristroph, *supra* note 18, at 284 (calling this broader conception of the term "political proportionality").

> [P]roportionality is better understood as an external limitation on the state's power to incarcerate or execute individuals, and this limitation applies whether the state is punishing to exact retribution, to deter, to incapacitate, or (as is most often the case) to pursue some amalgam of ill-defined and possibly conflicting purposes.[86]

Thus, as herein construed, proportionality creates an outer limit on the ability of the state to punish, irrespective of the purpose of punishment.[87]

While the concept of proportionality denotes both a floor (the least-acceptable punishment for a particular crime) and a ceiling (the highest-permissible punishment for a particular crime), this Article's conception of the Eighth Amendment focuses exclusively on the ceiling.[88] As a result, proportionality requires that a given punishment not exceed the permissible ceiling.

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[86] *Id.* at 266. Indeed, proportionality is an important consideration in *both* retributive and utilitarian conceptions of punishment. *Id.* at 277; *see also* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 175 (J.H. Burns & H.L.A. Hart eds., 1970) (explaining that utilitarian punishments require that "[t]he quantity of punishment must not be less . . . than what is sufficient to outweigh the profit of the offense"); IMMANUEL KANT, *The Metaphysics of Morals, in* KANT, POLITICAL WRITINGS 155 (Hans Reiss ed., H.B. Nisbet trans., Cambridge Univ. Press 2d ed. 1991) (explaining the importance of proportionality in retributive punishment).

[87] *See* Ristroph, *supra* note 82, at 744 ("[I]t is possible to conceive of limitations on government powers without adopting particular views of the purposes underlying specific exercises of those powers."). Some have used purposes of punishment, namely retributivism, to articulate a method of applying the concept of proportionality. *See, e.g.*, Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 VA. L. REV. 677, 683–84 (2005) (proposing a model of "retributivism as a side constraint" as a conception of proportionality review that could harmonize seemingly disparate proportionality case law).

[88] Indeed, under-punishment has not been a concern in the United States during the past thirty years. *See, e.g.*, MARC MAUER, THE SENTENCING PROJECT, RACE TO INCARCERATE 10 (2d ed. 2006) (documenting the 500% increase in the U.S. prison population from 1972 to 2003). Commentators increasingly have questioned the size of the prison population and the continued move toward mass incarceration, suggesting that such widespread imprisonment is counterproductive in the fight against crime. *See, e.g.*, Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 719, 725–29 (2005) (discussing lawmakers' incentives to add new offenses and enhance penalties and the unfortunate consequences that result); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001) (discussing the criminal law's push towards more liability). In this view, it is particularly noteworthy that almost half of the current state prison populations committed non-violent crimes. Bureau of Justice Statistics, U.S. Dep't of Justice, Facts at a Glance

In addition, the Court's use of the term proportionality in the capital context has generally been in reference to several categories of offenders for whom it has determined that the death penalty would be disproportionate in an absolute sense.[89] For the purposes of this Article, however, that conception of proportionality only addresses one part of the broader absolute proportionality inquiry.

In the model articulated herein, punishments can be disproportionate in two senses. First, the punishment can be disproportionate in an absolute sense—the conduct at issue simply does not merit such an excessive punishment.[90] Second, the punishment can be excessive in a relative sense—that is, others who engaged in similar conduct did not receive as harsh a punishment by comparison.[91]

A. THE CONCEPT OF ABSOLUTE PROPORTIONALITY

1. Absolute Proportionality Generally. Absolute proportionality, in the broadest sense, refers to the relationship between two concepts and the balance their relationship creates. In terms of punishment, absolute proportionality generally describes the

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(2006), http://bjs.ojp.usdoj.gov/content/glance/tables/corrtyptab.cfm (last visited Oct. 29, 2011).

[89] *See, e.g.*, Kennedy v. Louisiana, 554 U.S. 407, 413 (2008) (applying the Court's conception of proportionality to eliminate rapists of children from eligibility for the death penalty); Roper v. Simmons, 543 U.S. 551, 568 (2005) (same for defendants aged younger than eighteen); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (same for mentally retarded defendants); Coker v. Georgia, 433 U.S. 584, 592 (1977) (same for rape cases). The Court has made clear, by comparison, that only "grossly disproportionate" punishments violate the Eighth Amendment in non-capital cases. Harmelin v. Michigan, 501 U.S. 957, 997–98 (1991) (Kennedy, J., concurring in part and concurring in judgment) (discussing a sentence for a term of years that was unconstitutional because it was grossly disproportionate to the offense). The Court's recent opinion in *Graham v. Florida*, 130 S. Ct. 2011 (2010), may, however, indicate a shift in this standard in life-without-parole cases. *See* William W. Berry III, *More Different than Life, Less Different than Death: The Argument for According Life Without Parole Its Own Category of Heightened Review After* Graham v. Florida, 71 OHIO ST. L.J. 1109, 1111–13 (2010) (arguing that the Court in *Graham* was identifying life-without-parole sentences as requiring a higher level of Eighth Amendment review).

[90] *See* discussion *infra* Part IV.A.*1*; *see, e.g.*, *Atkins*, 536 U.S. at 321 (discussing absolute disproportionality).

[91] *See* discussion *infra* Part IV.B; *see, e.g.*, Gregg v. Georgia, 428 U.S. 153, 223 (1976) (White, J., concurring in judgment) (discussing Georgia statutory scheme that required setting aside the death penalty "whenever juries across the State impose it only rarely for the type of crime in question").

relationship between the intended goal of punishment and the amount and type of punishment selected. Thus, an absolutely proportional punishment is one where the chosen punishment corresponds to—and is equivalent to—the punishment required by the applicable purpose.[92] The question is simply whether the punishment fits the crime in light of the chosen purpose.

As developed in this Article, there are three broad categories of measuring the sufficiency of any punishment in terms of absolute proportionality. First, some punishments are clearly insufficient to achieve the desired penological purpose and become disproportionate because the offender is under-punished. Second, some punishments are excessive and thus disproportionate in the opposite sense—they exceed the amount of necessary punishment to achieve the desired penological purpose. Finally, some punishments fall in the range of available punishments that are sufficient, but not greater than necessary, to achieve a desired penological purpose and are therefore proportionate.[93]

Thus, when considering whether a punishment is proportionate in absolute terms, one determines whether the sentence exceeds the range of proportionate punishments in light of the applicable purpose.[94] It is important to note that while identifying the penological purpose in a given case guides the character and extent of the punishment that will be proportional, it dictates the proportional amount of punishment only in a general and somewhat broad way. While one can determine that a particular punishment is excessive given the applicable penological purpose, the exact amount of punishment that would be proportional is typically unidentifiable. This uncertainty gives rise in some cases to a range of punishments that would qualify as proportionate in absolute terms.[95]

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[92] Ronen Perry, *Economic Loss, Punitive Damages, and the* Exxon Valdez *Litigation*, 45 GA. L. REV. 409, 447 (2011).

[93] Congress incorporated this concept explicitly in the federal sentencing statutes. *See* 18 U.S.C. § 3553(a) (2008) (providing that "[t]he court shall impose a sentence sufficient, but not greater than necessary," to achieve the purposes of the punishment).

[94] The Court's "subjective judgment" prong of its "evolving standards of decency" jurisprudence reflects this inquiry by asking: does a purpose of punishment support the use of the death penalty in the applicable context? *See, e.g.*, *Kennedy*, 554 U.S. at 421 (holding that the court must apply its independent judgment to the question of proportionality).

[95] *See, e.g.*, Norval Morris, *Desert as a Limiting Principle, in* PRINCIPLED SENTENCING

2. Absolute Proportionality and the Purposes of Punishment. In the capital punishment context, there are two legitimate purposes of punishment: retribution and deterrence.[96] Retribution consists of giving an offender his just deserts, that is, sentencing an offender in a way commensurate with his level of culpability and

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201, 201 (Andrew von Hirsch & Andrew Ashworth eds., 1992) (explaining how there is a range of maximum and minimum sentences that may be imposed in a case).

[96] *See, e.g.*, *Gregg*, 428 U.S. at 183 ("The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."). By contrast, rehabilitation is not typically a goal of execution. And the future dangerousness of an offender is also an illegitimate justification for capital sentences, particularly where life without parole is an available alternative. *See* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 904 (2010) (arguing that life without parole is an alternative to the death penalty). In *Furman*, despite holding the state capital sentencing scheme unconstitutional, six of the nine justices affirmed in their opinions that retribution and/or deterrence could provide a valid justification for capital punishment. Furman v. Georgia, 408 U.S. 238, 304 (1971) (Brennan, J., concurring) ("There is, then, no substantial reason to believe that the punishment of death, as currently administered, is necessary for the protection of society. The only other purpose suggested, one that is independent of protection for society, is retribution. . . . As administered today, however, the punishment of death cannot be justified as a necessary means of exacting retribution from criminals."); *id.* at 307–08 (Stewart, J., concurring) (footnote omitted) ("If we were reviewing death sentences imposed under these or similar laws . . . [w]e would need to decide whether a legislature—state or federal—could constitutionally determine that certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, only the automatic penalty of death will provide maximum deterrence. On that score I would say only that I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment."); *id.* at 311–12 (White, J., concurring) ("But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked."); *id.* at 342–47 (Marshall, J., concurring) (discussing deterrence and retribution among conceivable purposes served by capital punishment); *id.* at 394–95 (Burger, C.J., dissenting) ("Two of the several aims of punishment are generally associated with capital punishment—retribution and deterrence. It is argued that retribution can be discounted because that, after all, is what the Eighth Amendment seeks to eliminate. . . . It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose."); *id.* at 452–53 (Powell, J., dissenting) ("I come now to consider, subject to the reservations above expressed, the two justifications most often cited for the retention of capital punishment. . . . Many are inclined to test the efficacy of punishment solely by its value as a deterrent: but this is too narrow a view." (internal quotation marks omitted)).

the degree of harm caused by his conduct.[97] The academic literature and the Court's jurisprudence clearly link the concept of absolute proportionality to retribution.[98] A sentence that gives an offender his just deserts is, by definition, a proportionate sentence.[99]

The absolute proportionality concept also can encompass the penological purpose of deterrence,[100] which determines the appropriate sentence in light of the effect of the punishment on potential offenders.[101] In fact, as conceived by Jeremy Bentham, the concept of deterrence *requires* proportionality: a sentence must not be any more or any less than is required to adequately deter other potential offenders from committing the same act.[102]

Thus, the absolute proportionality concept encompasses *both* retribution and deterrence—the only legitimate aims served by the death penalty. For a sentence to be proportional to the crime committed, it must be proportional to either the purpose of retribution or deterrence.[103]

B. THE CONCEPT OF RELATIVE PROPORTIONALITY

The proportionality concept possesses a second dimension: relative proportionality. Unlike absolute proportionality, the relative proportionality concept asks whether a punishment is proportionate *as compared to* other punishments for the same crime.

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[97] *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES 4–5 (2005) (focusing on the justifications for and demonstrating the role of proportionality in just deserts sentencing).

[98] *See* Ristroph, *supra* note 18, at 266 (noting that proportionality has been linked to retribution).

[99] *See* VON HIRSCH & ASHWORTH, *supra* note 97, at 5 (noting that just desert theory rests on the idea of proportionality).

[100] *See* Ristroph, *supra* note 18, at 277 (explaining how deterrence theory relates to proportionality).

[101] *Id.* at 278 (describing general deterrence).

[102] BENTHAM, *supra* note 86, at 175.

[103] Clearly, these purposes can dictate different outcomes, so it would make little sense to require sentences to be proportionate in terms of *both* deterrence and retribution in order to be "proportional." *See* William W. Berry III, *Discretion Without Guidance: The Need to Give Meaning to § 3553 After* Booker *and Its Progeny*, 40 CONN. L. REV. 631, 634 (2008) (noting "inherent conflicts" in federal sentencing guidelines' use of purposes of sentencing).

The goal of relative proportionality is to satisfy the criminal law value of treating "like cases alike."[104] In other words, offenders whose acts and character are comparable should receive comparable sentences. Relative proportionality does not require that comparable sentences be *identical.* Rather, it allows for a range of possible sentences. Significant distinctions in harshness between sentences, however, are not allowed when the criminal acts are not significantly different in character and there are no other mitigating reasons to limit the culpability of one offender as compared to the other.

Thus, the questions in applying this concept are: (1) what makes a case similar and (2) how should courts apply this concept in practice. Two basic requirements exist to ensure relative proportionality in capital cases: eliminating "unusual" cases and finding a critical mass of cases with similar outcomes.

1. The Requirement of Eliminating "Unusual" Cases. One important aspect of treating like cases alike is to eliminate cases with comparatively disproportionate results. Under the relative proportionality approach, cases are unusual when the outcome is extreme by comparison to other cases. The notion here is that sentencing decisions that are outliers are relatively disproportionate.

Thus, when a punishment in a given case is distinctive in character or severe compared to punishments in similar cases, the sentence is disproportionate in a relative sense.[105] This problem is particularly acute in the capital context, where an individual may receive a death sentence for a crime that typically has not warranted death.

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[104] *See, e.g.*, CH. PERELMAN, JUSTICE 38 (Random House, Inc. 1967) ("In dealing with the problem of formal justice . . . we compare the various treatments accorded to members of the same basic category . . . ."); CH. PERELMAN, *Concerning Justice, in* JUSTICE, LAW, AND ARGUMENT: ESSAYS ON MORAL AND LEGAL REASONING 1, 11–12 (John Petrie trans., 1980) (identifying "[t]o each the same thing" as a formula of justice).

[105] The punishments in *Weems v. United States*, 217 U.S. 349, 357 (1910), and *Trop v. Dulles*, 356 U.S. 86, 87 (1958), provide examples of such sentences: twenty years of hard labor for a forged signature and loss of citizenship for desertion, respectively, are penalties not typically given for the applicable offenses and are more severe in character. *See* discussion *infra* Part V.A (discussing relative proportionality in the model proposed in this Article).

Child rape provides an example of this in practice. Because virtually no rapists of children ever had received the death penalty, Louisiana's law in 2008 making death available for that crime created unusual cases.[106] Accordingly, the relative proportionality concept prohibited death sentences for such offenders since the death sentence would be unique—and thus excessive—by comparison to other similar cases.

2. The Requirement of a Critical Mass of Similar Outcomes. Similar to eliminating cases that are outliers, the relative proportionality concept also requires the presence of a group of similar cases reaching ostensibly the same outcome. The requirement of a critical mass of similar cases is meant to prevent unprecedented sentences that are excessive.[107] Where a critical mass of cases with a similarly severe outcome does not exist, the relative proportionality concept requires that a lesser sanction be imposed to avoid excessiveness. As a result, where a death sentence has not previously been given in a series of similar cases under similar circumstances, giving a death sentence would be relatively disproportionate.

The benefits of this requirement are two-fold. The relative proportionality concept situates each case among similar cases, promoting consistency in sentencing. In addition, where similar cases do not exist, the relative proportionality concept prevents

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[106] *See* Kennedy v. Louisiana, 554 U.S. 407, 423 (2008) (noting that only six states even treated child rape as a capital offense). Although the Court in *Kennedy* based its categorical exclusion of death as a permissible punishment for child rape on its view that the sanction was disproportionate in an absolute sense, the Court could have reached the same outcome based on its lack of prior use, that is, its relative disproportionality. *Id.* at 412. The Court's "evolving standards of decency" approach, *see infra* notes 167–71, incorporates the relative proportionality concept in its survey of state legislative practices in considering whether a particular category of punishment satisfies Eighth Amendment requirements. *See infra* notes 113–14 and accompanying text.

[107] Interestingly, this reasoning could apply to harsh punishments meant to shame the offender as well. For competing views on the appropriateness of "shaming punishments," compare Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2076 (2006) (arguing that shaming punishments are wrong because they express norms valuing community and social differentiation over individuality and equality), with Dan Markel, *Are Shaming Punishments Beautifully Retributive? Retributivism and the Implications for the Alternative Sanctions Debate*, 54 VAND. L. REV. 2157, 2216 (2001) (arguing that shaming punishments are wrong because they are incompatible with theories of retribution).

over-punishment by cautioning against using the most severe punishments.

IV. PROMULGATING PROPORTIONALITY

In the model of proportionality analysis this Article proposes, two analytical steps determine whether a particular sentence complies with the Eighth Amendment's prohibition against cruel and unusual punishment. This section describes the model, and the subsequent section explains how the model both reconciles the conflict between the *Woodson–Lockett* and *Furman–Gregg* lines of cases and why the model is an appropriate way to apply the Eighth Amendment.

The first step in this approach is to determine whether a death sentence is absolutely proportionate, that is, whether the punishment fits the crime.[108] Analysis of this fit requirement occurs on two levels: (1) identifying any categorical exclusions of offenses or offenders for which a death sentence is, by definition, excessive and (2) identifying any case-specific exclusions, which are facts or circumstances related to the offender or the offense that mitigate the appropriate punishment such that death would be an excessive punishment *in that case.*

The second step is to determine whether the case is relatively proportionate, that is, whether the punishment is excessive in light of the punishments imposed in similar cases. Where death is rarely the punishment for a particular crime, a death sentence in such a case likely would be relatively disproportionate.

As a practical matter, the trial court (typically through a jury) makes the initial determination regarding absolute proportionality by taking into account the categorical exclusions adopted by the Court. Cases that are not absolutely proportionate only may receive a sentence other than death. As explained below, the trial court then further narrows the class of death-eligible offenders by determining whether a particular defendant merits death in light of all mitigating evidence, as required by the *Woodson–Lockett* line of cases. The state supreme court (to which there is typically a

[108] The model presumes the presence of aggravating factors justifying a potential death sentence. Determining the presence of such factors is technically the first step.

mandatory appeal) then applies the *Furman–Gregg* line of cases to eliminate any outliers through relative proportionality review.

As explained more fully below, the application of the *Furman–Gregg* principles *subsequent* to the *Woodson–Lockett* rules cures the *Walton* problem. Whatever consistency is lost by allowing juries to consider specific facts in individual sentencing determinations is recaptured by the appellate court reviewing the case for relative proportionality, thereby protecting against any outlier death verdicts.

A. THE ABSOLUTE PROPORTIONALITY THRESHOLD

1. Categorical Exclusions. As to the question of absolute proportionality, the Court has interpreted the Eighth Amendment to include several categorical exclusions, or several categories of individuals for whom or circumstances for which an execution is, by definition, disproportionate. Specifically, the Court has held that the Eighth Amendment prohibits execution of individuals who are mentally retarded[109] or of minor age at the time of the crime[110] and for all non-homicide crimes[111] and for felony murder where the individual was not a major participant in the crime.[112]

The theoretical basis for the Court's categorical exclusions rests on a two-part analysis of absolute proportionality that relies on both objective and subjective indicia.[113] The Court first asks whether a consensus exists among the states concerning the

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[109] Atkins v. Virginia, 536 U.S. 304, 321 (2002).

[110] Roper v. Simmons, 543 U.S. 551, 568 (2005).

[111] *Kennedy*, 554 U.S. at 413 (child rape); Coker v. Georgia, 433 U.S. 584, 592 (1977) (rape).

[112] Enmund v. Florida, 458 U.S. 782, 798 (1982). *Cf.* Tison v. Arizona, 481 U.S. 137, 158 (1987) (allowing the death penalty for "major participation in the felony . . . combined with reckless indifference to human life").

[113] *See Kennedy*, 554 U.S. at 408 ("[T]he Court is guided by 'objective indicia of society's standards, as expressed in legislative enactments and state practice with respect to executions.' . . . [However] [w]hether the death penalty is disproportionate to the crime also depends on the standards elaborated by controlling precedents and on the Court's own understanding and interpretation of the Eighth Amendment's text, history, meaning, and purpose." (quoting *Roper*, 543 U.S. at 563)). Interestingly, this absolute proportionality determination relies in part on relative proportionality considerations, in examining the practices of the various state legislatures.

category at issue.[114] If there is a consensus, the Court's subjective judgment is then "brought to bear."[115] In applying its own judgment, the Court endeavors to determine whether the applicable purposes of punishment—retribution or deterrence—support the use of the death penalty against the applicable category of offender.[116] If both the objective evidence and the subjective judgment of the Court deem the punishment excessive, the Court defines the punishment as absolutely disproportionate and excludes it from jury consideration.[117]

2. Case-Specific Exclusions and the Purposes of Punishment. In addition to the categorical exclusions mandated by the Eighth Amendment, the Court's *Woodson–Lockett* line of cases requires the jury to consider all mitigating evidence in determining an appropriate sentence in the case *at hand*.[118] This inquiry entails a case-specific analysis of whether capital punishment is an absolutely proportionate sentence for the particular defendant involved.

The Court's application of the *Woodson–Lockett* doctrine suggests a robust inquiry, both in terms of the character of the defendant and his criminal acts, and in terms of retributive and utilitarian goals of punishment.[119] Under this analysis, the concept of absolute proportionality assumes a fact-specific

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[114] The Court typically has counted the number of states that allow the death penalty for the category at issue in evaluating consensus, looking for a numerical majority. William W. Berry III, *Following the Yellow Brick Road of Evolving Standards of Decency: The Ironic Consequences of "Death-is-Different" Jurisprudence*, 28 PACE L. REV. 15, 22 (2007).

[115] *Coker*, 433 U.S. at 597.

[116] *See, e.g.*, *Kennedy*, 554 U.S. at 441–42 (noting that applying the death penalty for child rape might have a deterrent effect but would be too harsh to be justified by the goal of retribution); *Roper*, 543 U.S. at 571–72 (noting that the penalogical justifications for the death penalty apply with less force to juveniles); Atkins v. Virginia, 536 U.S. 304, 321 (2002) (finding that application of the death penalty to mentally retarded criminals will not measurably advance a deterrent or retributive purpose).

[117] *See, e.g.*, *Kennedy*, 554 U.S. at 446 (finding the death penalty disproportionate for rapists of children who do not kill their victims); *Roper*, 543 U.S. at 575 (holding the death penalty disproportionate for offenders who are juveniles at the time of the crime); *Atkins*, 536 U.S. at 321 (holding the death penalty disproportionate for mentally retarded offenders).

[118] *See* discussion *supra* Part II.B.*1–2*.

[119] *See, e.g.*, Lockett v. Ohio, 438 U.S. 586, 604–05 (1978) (allowing consideration of defendant's character and circumstances of the offense as mitigating factors).

dimension. Such an approach makes sense given the gravity of the issue—whether the state should take the life of the offender.[120]

In practice, the jury must consider relevant evidence introduced about the individual character, past acts, mental capacity, and personal hardships of the offender when determining whether that person's life merits saving.[121] Similarly, the jury is required to consider the facts and circumstances surrounding the criminal act as well as the character of the acts themselves.[122] Using these considerations, the jury must ask whether death is an excessive punishment *for this offender*.[123]

As explained above, the absolute proportionality concept described here includes both retributive and utilitarian understandings of proportionality.[124] In applying this concept, therefore, juries may advance one or both of these valid purposes of punishment in sentencing the offender, however, with all the relevant mitigating evidence considered as required by *Woodson* and *Lockett*.[125]

Thus, under this Article's model, the class of individuals eligible to receive the death penalty is subject first to the Eighth Amendment requirement of absolute proportionality, as defined by the Court's categorical exclusions, and then the case-specific jury determinations based in part on the offender's mitigating evidence.

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[120] The Court often has emphasized that death is different. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that because "death is not reversible," DNA evidence that the convictions of numerous persons on death row were erroneous is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (remarking that death differs from life imprisonment because of its "finality"); *see also* Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 (2004) (discussing the Court's death-is-different jurisprudence); Rachel E. Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity*, 107 MICH. L. REV. 1145, 1145 (2009) (acknowledging the Court's different treatment of capital cases).

[121] *See, e.g.*, *Lockett*, 438 U.S. at 604–05 (allowing consideration of myriad of mitigating factors).

[122] *Id.*

[123] *Id.*

[124] *See* discussion *supra* Part III.A.*2*.

[125] *See Lockett*, 438 U.S. at 605 (requiring that sentencer be permitted to consider mitigating factors); *Woodson*, 428 U.S. at 304 (requiring consideration of mitigating factors).

B. THE RELATIVE PROPORTIONALITY THRESHOLD

While the categorical exclusions, in theory, employ a consistent approach, the application of only absolute proportionality by juries still can create disparate results.[126] Different juries may have different conceptions of what punishment is excessive for a particular crime or defendant, creating inconsistent outcomes in relatively similar cases.[127] Further, different juries may weigh various mitigating circumstances differently, leading to discrepancies in outcomes.[128] The application of relative proportionality, particularly *after* jury determinations, on the other hand, can correct such discrepancies.

1. The Requirement of Narrowing the Class of Murderers. Furman established the requirement of narrowing the class of murderers eligible for the death penalty.[129] This concept rested on the view that not all homicides warrant a death sentence.[130] Narrowing, then, sought to achieve relative proportionality, such that similar homicide offenders received similar punishments.[131]

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[126] Three Justices—Powell, Blackmun, and Stevens—have repudiated the use of the death penalty entirely because they believe that the Court and state legislatures have not fixed the disparity problems identified in *Furman* and will never be able to do so. *See* William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY (forthcoming 2011) (manuscript at 4) (on file with author) (discussing Justices' repudiation of the death penalty in light of *Furman*).

[127] *See, e.g.*, Katherine Barnes, David Sloss & Stephen Thaman, *Place Matters (Most): An Empirical Study of Prosecutorial Decision-Making in Death-Eligible Cases*, 51 ARIZ. L. REV. 305, 307 (2009) (finding that the racial composition of the jury pool may affect the outcome of a case); Scott Phillips, *Racial Disparities in the Capital of Capital Punishment*, 45 HOUS. L. REV. 807, 808 (2008) ("Decades of research on race and capital punishment . . . demonstrate that blind justice is a mirage.").

[128] Empirical research also has demonstrated the propensity of juries to place weight on impermissible factors, such as the victim's race. *See, e.g.*, DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 400 (1990) (discussing empirical discrepancies based on the victim's race); RAYMOND PATERNOSTER, ROBERT BRAME & SARAH BACON, THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT 208 (2008) (noting that many empirical studies have found that the race of the victim matters); David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 710 (1983) ("Georgia juries appear to tolerate greater levels of aggravation without imposing the death penalty in black victim cases.").

[129] *See* discussion *supra* Part II.A.*2*.

[130] *See supra* notes 36–37 and accompanying text.

[131] *See supra* notes 35–38 and accompanying text.

Unlike the concept of absolute proportionality, the goal of relative proportionality is simply to treat "like cases alike," with less concern for overall systemic excessiveness. Relative proportionality therefore eschews the need to compare a given case to all other cases regarding the appropriateness of death as a punishment. Instead, it seeks to compare each case to other similar cases.

In response to *Furman*, states created a minimum threshold for ensuring relative proportionality in the form of statutory aggravating circumstances.[132] Requiring the State to prove such aggravating circumstances beyond a reasonable doubt narrows the class of individuals eligible for the death penalty because the case must fit one or more of the articulated categories for when death is a proper sentence.[133] Thus, aggravating factors separate death-eligible cases from non-capital cases based on various categories of pre-established factors and not in light of a broader theoretical conception that might fail to ensure relative proportionality.

2. The Requirement of Meaningful Appellate Review. As Justice Stevens explained in *Walton*, the use of aggravating factors limits the disparity of jury determinations in capital cases by restricting the cases for which the death penalty is available through pre-set statutory categories.[134] As explained by Justice Scalia, however, this narrowing is insufficient to address the disparities created by the individualized analysis required by *Woodson* and *Lockett*.[135]

Requiring meaningful appellate review of jury verdicts through the lens of relative proportionality provides a way to eliminate disparities in capital cases and address this conflict. Although not constitutionally required, many states provide for automatic appeals to the state supreme court and mandate that the court engage in a form of proportionality review.[136] This review requires

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[132] *See supra* note 43 and accompanying text.

[133] The lack of specificity, catch-all nature, or both of some aggravating factors, however, raises the question as to whether such factors really achieve much narrowing at all. *See infra* note 141 (citing scholarship that address the sufficiency of various open-ended aggravating factors).

[134] *See supra* notes 74–80 and accompanying text.

[135] *See supra* notes 69–73 and accompanying text.

[136] Pulley v. Harris, 465 U.S. 37, 43–44 (1984) (holding that the Eighth Amendment does not require proportionality review but does require some form of meaningful appellate review).

the court to assess whether the case at issue is proportional to other capital cases in a relative sense, that is, whether the death sentence is consistent with other *similar* cases.[137] When the death sentence is inconsistent with such cases, the punishment is disproportionate and the court reduces the sentence (i.e., to life without parole).[138]

Using appellate proportionality review to narrow the state's use of the death penalty further eliminates arbitrariness in jury sentencing because the appellate court can identify and compare the current case to similar cases. This relative proportionality inquiry should take place *after* the absolute proportionality one. This will cure any disparity caused by requiring jury consideration of individual mitigating evidence—the conflict of the *Woodson–Lockett* and *Furman–Gregg* lines of cases.

V. PROPORTIONALITY AS THE UNIFYING PRINCIPLE

This Article's proportionality model connects the basic Eighth Amendment ideals: prohibition of "cruel" punishments (absolute proportionality) and "unusual" punishments (relative proportionality). More importantly, the model unifies the competing lines of capital jurisprudence while encouraging a stronger application of both. In light of these reasons, as explained *infra*, this Article concludes that the Court should adopt the proportionality model as the sole basis for determining whether a death sentence is acceptable under the Eighth Amendment.

A. THE UNIFYING EFFECTS OF PROMULGATING PROPORTIONALITY

Adopting the model described herein would have two primary unifying effects. First, this approach would resolve the conflict between the *Furman–Gregg* and the *Woodson–Lockett* lines of cases, allowing for narrowed jury discretion *and* consideration of individual circumstances. Second, by focusing the Court on the proportionality concept, the proposed model would create the

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[137] *See supra* Part III.B.

[138] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153, 206 (1976).

possibility of a more effective application of the Eighth Amendment.

1. A Resolution to the Walton *Conflict.* At its heart, the *Walton* problem is that the individualized determination inquiry of the *Woodson–Lockett* doctrine seemingly undoes the consistency achieved by the creation of unifying standards under the *Furman–Gregg* doctrine.[139] Asking the relative proportionality question first, as a way to generally narrow the class of offenders eligible for the death penalty, and then determining whether a particular punishment is cruel for a particular offender given the particular mitigating circumstances creates the potential for disparities between cases.

If, on the other hand, the Court adopts the model proposed in this Article and asks the relative proportionality question *after* the absolute proportionality question, the Court can cure outcomes that are otherwise relatively disproportionate between cases. Absolute proportionality, then, becomes a prerequisite to imposing a death sentence but not a source of final approval. Instead, relative proportionality carves out a further subset of the absolutely proportional cases—eliminating those that are dissimilar—to create relative consistency after already having prevented absolute excessiveness.

Thus, the two lines of inquiry in this model complement one another. The approach narrows the class of individuals eligible for the death penalty by first eliminating *cruel* sentences, while it further narrows the class of death-eligible individuals by eliminating *unusual* outcomes.

2. A More Effective Eighth Amendment. The second effect of applying this Article's proportionality model is to narrow the overall use of the death penalty by mandating a more robust application of the Eighth Amendment. This is true in part because adopting the proportionality model will require the Court to address the failure of state legislatures to adequately address the two central tenets of the *Furman–Gregg* line of cases: narrowing the class of murderers through aggravating factors and conducting meaningful appellate review of cases.[140]

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[139] *See* discussion *supra* Part II.C.

[140] *See* discussion *supra* Part II.A.

A survey of the aggravating factors used by various states demonstrates the lack of a guiding principle in separating (in an absolute sense) those cases deserving of death from those that are not.[141] Aggravating factors consider a wide variety of theoretical concepts, including offender culpability (intent of offender), severity of the crime (type of killing, number of victims), identity of the victim (law enforcement officer, elected official, etc.), and circumstances surrounding the crime (felony murder, etc.).[142] As a result, any narrowing that occurs may not be that significant because of the many different—and disparate—avenues still available for juries to take. Simply put, the volume of possible aggravating factors makes it possible to charge most murders as capital crimes.[143] The Court even has affirmed the use of vague catch-all factors such as "especially heinous, atrocious, or cruel" where the state supreme court has provided some limitation to the application of that phrase.[144]

In practice, courts do not engage in proportionality review in a robust way.[145] In fact, in some states *no* sentence has *ever* been

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[141] *See, e.g.*, Richard A. Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C. L. REV. 941, 945 (1986) (arguing that the "especially heinous" aggravating circumstance does not limit discretion in imposing the death penalty); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 373–74 (1995) (arguing that the approval of vague aggravating circumstances and lack of limits on the number of aggravating factors do not narrow the choice of who dies).

[142] *See* DEATH PENALTY INFO. CTR., *Aggravating Factors for Capital Punishment by State*, http://www.deathpenaltyinfo.org/aggravating-factors-capital-punishment-state (last visited Oct. 24, 2011) (detailing lists of aggravating factors for each state).

[143] Steiker & Steiker, *supra* note 141, at 373–74.

[144] *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 652–54 (1990) (holding that vague statutory factors may be constitutional if state courts have sufficiently defined them); Proffitt v. Florida, 428 U.S. 242, 255–56 (1976) (noting how the Florida Supreme Court's construction of an aggravating factor did not render it "impermissibly vague"). *Cf.* Maynard v. Cartwright, 486 U.S. 356, 363–64 (1988) (discussing how the Oklahoma court failed to give adequate guidance on the aggravating factor used to impose death); Godfrey v. Georgia, 446 U.S. 420, 428–32 (1980) (holding that the Georgia Supreme Court did not adequately limit the aggravating factor that the jury used to impose death).

[145] *See* Barry Latzer, *The Failure of Comparative Proportionality Review in Capital Cases (with Lessons from New Jersey)*, 64 ALB. L. REV. 1161, 1166 (2001) (arguing that states have been moving toward abolition of proportionality review). *See generally* Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After* Gregg*: Only "the Appearance of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130 (1996) (discussing the development of proportionality review and analyzing different states' approaches);

held to be disproportionate, or such findings have been rare.[146] Many state supreme courts conduct proportionality review by comparing the appealed case solely to other death cases, ignoring cases in which juries gave a life sentence.[147] Such an approach effectively eliminates the possibility for any legitimate comparison or analysis of similar cases. Justice Stevens's dissent to the denial of certiorari in *Walker v. Georgia* emphasized this shortcoming:

> Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review . . . .
>
> Particularly troubling is that the shortcomings of the Georgia Supreme Court's review are not unique to this case . . . .
>
> . . . And the likely result . . . is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.[148]

The proportionality model, unlike the Court's current approach, would require a more careful examination of relative

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Lawrence S. Lustberg & Lenora S. Lustberg, *The Importance of Saving the Universe: Keeping Proportionality Review Meaningful*, 26 SETON HALL L. REV. 1423 (1996) (discussing how New Jersey's method of proportionality review is inadequate to accomplish its goals).

[146] *See, e.g.*, Kelly E.P. Bennett, *Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103, 103 (1999) (explaining how the Virginia Supreme Court only engages in proportionality review of capital cases); Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 ST. THOMAS L. REV. 299, 311 (2004) ("[O]f the state high courts that have engaged in comparative proportionality review only the supreme courts of Florida and Illinois have produced more than a handful of vacations."); Claudia Flores, *Comparative Proportionality Reviews Reconceptualized: Categorizing Mitigation and Satisfying the Eighth Amendment in the Death Penalty*, 27 N.Y.U. REV. L. & SOC. CHANGE 139, 147 (2002) ("[T]hrough 1986, only thirty-one cases were vacated on grounds of excessiveness.").

[147] Cynthia M. Bruce, *Proportionality Review: Still Inadequate, But Still Necessary*, 14 CAP. DEF. J. 265, 265 (2002) ("Proportionality reviews, as they are currently conducted [in Virginia], fail to include a variety of life cases.").

[148] Walker v. Georgia, 129 S. Ct. 453, 455–57 (2008) (Stevens, J., dissenting to denial of certiorari).

proportionality and encourage the Court to address the shortcomings of the states in applying these principles.[149]

B. PROPORTIONALITY IS CONSISTENT WITH EIGHTH AMENDMENT PURPOSES

In addition to resolving the conflict between the *Furman–Gregg* and *Woodson–Lockett* lines of cases, the proportionality approach proposed herein is inherently consistent with the original purposes, as well as can be determined, and the doctrinal purposes, as identified by scholars and the Court, of the Eighth Amendment.

1. Original Purposes. Historian Anthony Granucci explains that the proper understanding of the Eighth Amendment's original meaning was not that it prohibited "barbarous" punishments; instead, it prohibited punishments that were excessive in relation to the crime.[150] He argues that the Framers of the Constitution misunderstood the English Bill of Rights of 1689 from which they derived the language of the Eighth Amendment.[151] Granucci notes that "[t]he English evidence shows that the cruel and unusual punishments clause of the Bill of Rights of 1689 was . . . a reiteration of the English policy against disproportionate penalties."[152] Further supporting Granucci's interpretation, Sir William Blackstone used the word "cruel" as a synonym for severe or excessive when describing the problem of "punishments of unreasonable severity."[153]

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[149] The Court would not have to overrule *Pulley v. Harris* to achieve this result. 465 U.S. 37, 43–46 (1984) (noting that the Eighth Amendment does not require proportionality review but just some kind of meaningful appellate review). Rather, it would merely need to mandate that meaningful appellate review consider the relative proportionality of the case at issue to cases in the jurisdiction. *See* Bidish Sarma, Furman*'s Resurrection: Proportionality Review and the Supreme Court's Second Chance to Fulfill* Furman's *Promise*, 2009 CARDOZO L. REV. DE NOVO 238, 243 (2009), http://www.cardozolawreview.com/content/denovo/SARMA_2009_238.pdf (arguing that the Court should "decide that meaningful proportionality review is constitutionally required").

[150] Anthony F. Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CAL. L. REV. 839, 839 (1969).

[151] *Id.*

[152] *Id.* at 860.

[153] *Id.*

Professor John Stinneford's research further confirms the importance of the proportionality concept to the original understanding of the Eighth Amendment.[154] He argues that the original meaning of the Eighth Amendment term "cruel" refers to punishments that have not had "long usage."[155] Stinneford then argues that this understanding of the original meaning supports the concept of proportionality as a central part of the original understanding of the Eighth Amendment.[156] This view likewise supports the idea that proportionality review—encapsulating relative proportionality—is consistent with the original purposes of the Eighth Amendment.

2. Doctrinal Purposes. The Court's early Eighth Amendment jurisprudence involved two non-capital cases, *Weems v. United States*[157] and *Trop v. Dulles*,[158] that defined the Court's understanding of the purposes of the Amendment. Citing *Weems*, the Court in *Trop* posited that cruel and unusual punishments included those which were excessive in their severity (cruel) and were wantonly imposed (unusual).[159]

Justice Arthur Goldberg has advocated using these understandings to create a "purposive test of constitutionality."[160]

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[154] *See* John F. Stinneford, *The Original Meaning of "Unusual": The Eighth Amendment as a Bar to Cruel Innovation*, 102 NW. U. L. REV. 1739, 1819–20 (2008) [hereinafter Stinneford, *Original Meaning*] (arguing that the Cruel and Unusual Punishments Clause was intended to prohibit disproportionate punishments); John F. Stinneford, *Rethinking Proportionality Under the Cruel and Unusual Punishments Clause*, 97 VA. L. REV. (forthcoming 2011) (manuscript at 1) (on file with author) [hereinafter Stinneford, *Rethinking Proportionality*] (arguing that "cruel and unusual punishment" originally meant "excessive punishment" and so "proportionality review is therefore unquestionably legitimate").

[155] Stinneford, *Original Meaning*, *supra* note 154, at 1745.

[156] *See* Stinneford, *Rethinking Proportionality*, *supra* note 154 (manuscript at 9) (arguing that "cruel and unusual" originally meant "excessive"). Stinneford limits his definition of proportionality to retributive purposes of punishment, though utilitarian approaches allow for such considerations as well. *See supra* note 86 and accompanying text.

[157] 217 U.S. 349 (1910).

[158] 356 U.S. 86 (1958).

[159] *Id.* at 100. For an argument that the Eighth Amendment requires punishments to be both cruel *and* unusual, see generally Meghan J. Ryan, *Does the Eighth Amendment Punishments Clause Prohibit Only Punishments That Are Both Cruel* and *Unusual?*, 87 WASH. U. L. REV. 567 (2010).

[160] Arthur Goldberg & Alan Dershowitz, *Declaring the Death Penalty Unconstitutional*, 83 HARV. L. REV. 1773, 1784 (1970); *see also* William W. Berry III, *supra* note 114, at 31 (arguing for the purposive test to be adopted in lieu of others, such as the evolving standards of decency one).

Goldberg's test frames the purposes of the Eighth Amendment in terms of proportionality, finding a punishment cruel and unusual if "(a) it produces hardship disproportionately greater than the harm it seeks to prevent, or (b) a less severe punishment could as effectively achieve the permissible ends of punishment"[161] *unless* a state could demonstrate that such punishment was not excessively severe.[162]

a. Limiting "Cruel" (Absolutely Disproportionate) Punishments. The Court in *Weems* established two aspects of the concept that the Eighth Amendment sought to prohibit punishments that were degrading in severity—such punishments could not be excessive, and the concept of excessiveness could evolve over time.[163] The trial court had sentenced Weems to fifteen years of "hard and painful labor" in ankle chains for the falsification of a public record in the then-Philippines Territory.[164] The Court held that the sentence was unconstitutional because the punishment was cruel and unusual in relation to the crime committed.[165] Comparing the defendant's crime—falsifying a single public record—with a litany of other more serious crimes (including some types of murder) that received significantly more lenient sentences, the Court held that the sentence prescribed by the statute was unconstitutionally disproportionate.[166]

In addition to making clear that the Eighth Amendment prohibited certain punishments for certain crimes when the punishment was disproportionate to the crime, the *Weems* Court established that the concept of cruel and unusual punishments was not a static one.[167] In other words, the Court could, as it saw fit over time, determine that certain punishments were disproportionate (and thus unconstitutionally excessive) for

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[161] Goldberg & Dershowitz, *supra* note 160, at 1794.

[162] *Id.* at 1796–97.

[163] Weems v. United States, 217 U.S. 349, 369–73 (1910).

[164] *Id.* at 366. The punishment, known as *cadena temporal*, had a sentencing range of twelve to twenty-one years and provided that the inmate "shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution." *Id.* at 364 (citations omitted).

[165] *Id.* at 380–82.

[166] *Id.* at 379–820.

[167] *Id.* at 373.

certain crimes even if such punishments historically had been administered. The Court explained:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions.[168]

Thus, after *Weems*, the Eighth Amendment provided not only a means of prohibiting disproportionate penalties, but one that could—and would—evolve over time.

In *Trop*, decided almost fifty years later, the Court broadened these principles when considering whether the punishment of expatriation for the crime of wartime desertion constituted cruel and unusual punishment in violation of the Eighth Amendment.[169] As in *Weems*, the Court held that the punishment was unconstitutionally severe for the crime committed.[170] While recognizing that this punishment historically had not been deemed absolutely disproportionate to the crime committed, the Court again recognized that "the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment

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[168] *Id.*

[169] Trop v. Dulles, 356 U.S. 86, 87 (1958).

[170] *Id.* at 102. The Court explained:

> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

Id. (footnote omitted).

must draw its meaning from the [']evolving standards of decency['] that mark the progress of a maturing society."[171]

The absolute proportionality model described herein[172] is identical to the concept advocated by the Court in *Weems* and *Trop*. As a result, the application of the absolute proportionality concept helps to achieve the goal of eliminating cruel punishments.

b. Limiting "Unusual" (Relatively Disproportionate) Punishments. In addition to prohibiting the punishments imposed for excessiveness, the Court in both *Weems* and *Trop* prohibited the sentences for being unusual, or rarely imposed.[173] In *Weems*, the Court found the sentence "unusual in its character"[174] because the United States did not use the sentence of *cadena temporal* with any frequency.[175] In *Trop*, the Court emphasized the same with respect to revocation of U.S. citizenship, amplifying the notion by remarking, "[t]he civilized nations of the world are in virtual unanimity that statelessness is not to be imposed as punishment for crime."[176]

The idea from these cases provides a basis for the relative proportionality concept—excluding punishments based on the infrequency of using such punishments generally. The Court in the *Furman–Gregg* line of cases took this concept one step further, excluding punishments in given cases based on the rarity of such punishments being given in *similar* cases.[177] Notably, several Justices in *Furman* emphasized the rarity of the use of the death penalty as a reason for abolishing it.[178] In sum, the relative proportionality concept, as with the absolute proportionality one, is congruent with the Eighth Amendment purpose of eliminating unusual sentences.

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[171] *Id.* at 100–01 (footnote omitted).

[172] *See supra* Part III.A.

[173] *Weems*, 217 U.S. at 377, 381; *Trop*, 356 U.S. at 100–01 n.32.

[174] *Weems*, 217 U.S. at 377.

[175] *See id.* (noting that *cadena temporal* has "no fellow in American legislation").

[176] *Trop*, 356 U.S. at 102.

[177] *See* discussion *supra* Part II.A.

[178] *See, e.g.*, Furman v. Georgia, 408 U.S. 238, 293 (1972) (Brennan, J., concurring) ("However the rate of infliction is characterized—as 'freakishly' or 'spectacularly' rare, or simply as rare—it would take the purest sophistry to deny that death is inflicted in only a minute fraction of these cases." (citations omitted)); discussion *supra* Part II.A.

c. Proportionality is Consistent with Eighth Amendment Doctrine. In addition to the benefits enumerated above, the adoption of the proportionality model outlined in this Article does not require a radical shift in the Court's doctrine. As described more fully *infra*, aspects of absolute and relative proportionality already have driven the Court's application of the Eighth Amendment in capital cases in many ways.

3. Absolute Proportionality as the Goal of Case-Specific Review. The principle of absolute proportionality remains vital in the application of the Eighth Amendment to all criminal sentences, although it has been applied almost exclusively to capital cases since *Trop*.[179] When applying the evolving standards of decency concept from *Trop*,[180] the Court has articulated two standards to help determine whether a punishment is absolutely disproportionate for a given crime. First, the Court examines objective, majoritarian criteria, looking to the sentencing schemes of state legislatures, jury sentencing decisions, and sometimes international norms and standards to identify proportional evolving standards of decency.[181] Second, the Court applies its own subjective judgment to determine whether to follow the prevailing trend, glossed from the objective indicia.[182]

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[179] *See* Harmelin v. Michigan, 501 U.S. 957, 997 (1991) (Kennedy, J., concurring) (noting that the proportionality principle applies to non-capital sentences even though its most extensive application has been in capital cases). This is in large part attributable to the Court's adoption of the death-is-different principle; as a result, the scrutiny and procedural protections afforded to capital cases have been significantly more rigorous than in non-capital cases. Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 (2004); *see also* Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that, as "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (differentiating death from life imprisonment because of its "finality"); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability.").

[180] *See supra* note 171 and accompanying text.

[181] This is an interesting approach given that the Constitution (and the rights that it affords) is in many ways designed to protect the rights of political minorities against the tyranny of the political majority.

[182] *E.g.*, Atkins v. Virginia, 536 U.S. 304, 313 (2002) (finding the death penalty for mentally retarded defendants unconstitutional). The Court has, thus far, always followed the approach suggested by the objective indicia. *See* Bruce J. Winick, *The Supreme Court's*

Using this analysis, the Court has held that the death penalty is an absolutely disproportionate penalty for the rape of an adult when the victim is not killed,[183] for juveniles at the time of the commission of the crime,[184] for mentally retarded individuals,[185] for robbery where the participant had no intent to kill and did not kill,[186] and, most recently, for the rape of a child.[187] Thus, the Court has increasingly focused in recent capital cases on factual characteristics of the offender or the offense in eliminating offenders from death eligibility.

The decreasing number of capital sentences in recent years[188] demonstrates that juries are increasingly examining such individualized characteristics in deciding whether to apply the death penalty.[189] Though partially attributable to the rise in life-without-parole statutes, the decline in the number of death sentences per murder indicates that case-specific circumstances and absolute proportionality continue to play a significant role in sentencing determinations.[190]

Evolving Death Penalty Jurisprudence: Severe Mental Illness as the Next Frontier, 50 B.C. L. REV. 785, 801 (2009) (questioning the Court's ability to hold that the Eighth Amendment was violated when no objective indicia support the Court's holding). Its application of the objective indicia, however, has not been immune from criticism. *See, e.g.*, *Atkins*, 536 U.S. at 337–38 (Scalia, J., dissenting) ("Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members."). Others have warned of the dangers of non-democratic "elites" substituting their own values in place of popular ones. *See, e.g.*, John Hart Ely, *The Supreme Court, 1977 Term–Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 51 (1978) (noting that this situation arose in Nazi Germany).

183 Coker v. Georgia, 433 U.S. 584, 600 (1977).

184 Roper v. Simmons, 543 U.S. 551, 578 (2005).

185 *Atkins*, 536 U.S. at 321.

186 Enmund v. Florida, 458 U.S. 782, 801 (1982).

187 Kennedy v. Louisiana, 554 U.S. 407, 446 (2008).

188 *See Part II: History of the Death Penalty*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/part-ii-history-death-penalty (last visited Oct. 24, 2011) ("In the United States numbers of death sentences are steadily declining from 300 in 1998 to 106 in 2009.").

189 *See, e.g.*, PATERNOSTER, BRAME & BACON, *supra* note 128, at 208 (noting that many empirical studies have found that the race of the victim matters).

190 *See* Berry, *supra* note 96.

4. Relative Proportionality as the Goal of General Guiding Principles. One question remained open after the Court's decision in *Gregg*: What constitutes relative disproportionality under the Eighth Amendment? Justice Stewart's plurality opinion offered one approach:

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. *If a time comes when juries generally do not impose the death sentence in a certain kind of murder case*, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.[191]

Justice Stewart's view of relative disproportionality, then, seemed to regard appellate comparative sentence review as a safeguard only against the lightning-strike type of aberrant death sentence that concerned him in *Furman*.[192]

By contrast, Justice White conceptualized relative proportionality more expansively in his concurring opinion in *Gregg*.[193] As he indicated in *Furman*, Justice White believed that the constitutional flaw of the then-existing death penalty statutes was not randomness, but underutilization.[194] To him, what made a particular death sentence cruel and unusual was the rarity of similar cases receiving the same sentence.[195] This approach relied on a view that deterrence justified capital punishment. Therefore, where the frequency of death sentences in an identifiable class is

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[191] Gregg v. Georgia, 428 U.S. 153, 206 (1976) (emphasis added).

[192] Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring); BALDUS, WOODWORTH & PULASKI, *supra* note 128, at 696.

[193] *See Gregg*, 428 U.S. at 222 (White, J., concurring) (stating that relative proportionality would lead to reasonably consistent sentences for certain types of murders).

[194] *Furman*, 408 U.S. at 312 (White, J., concurring).

[195] *Id.*

something less than substantial, a death sentence becomes unconstitutionally excessive because it loses its deterrent value.

Viewing relative proportionality from the perspective of regularity of imposition—as opposed to eliminating randomness—creates a heightened requirement of proportionality in the consideration of excessiveness. Importantly, the method applied to determine the narrowing requirements of *Furman* dictates the degree to which state supreme courts should implement proportionality review—as a narrow or broad safeguard against relatively disproportionate outcomes.

Thus, the goal of eliminating arbitrariness through standards permeated the Court's initial approach and is still at the heart of its capital punishment doctrine. Accordingly, proportionality review encompassing the concept of relative proportionality is an important consideration in the application of the Eighth Amendment.

VI. CONCLUSION

As recently as 2008—in *Kennedy v. Louisiana*[196]—the Court has recognized the need for a unifying principle in its Eighth Amendment jurisprudence, particularly given the two competing aims of the *Furman–Gregg* and the *Woodson–Lockett* lines of cases—eliminating arbitrariness and making individualized sentencing determinations, respectively. This Article offers such a principle by introducing a new model of proportionality, which encompasses both of these competing goals in its conceptions of absolute and relative proportionality. Further, proportionality makes the competing concepts complementary if applied as proposed herein, with the individualized determination (absolute proportionality) inquiry *preceding* the eliminating arbitrariness determination (relative proportionality).

The result is an extra level for narrowing cases that can receive the death penalty, thereby providing an additional means to separate out cases that are either excessive in an absolute sense (based on case-specific facts) or in a relative sense (based on

[196] 554 U.S. 407 (2008).

results in other, *similar* cases). The *Furman–Gregg* and *Woodson–Lockett* lines of cases articulate important Eighth Amendment values that both warrant application to safeguard against arbitrariness and rule-based injustice. This model provides a framework to achieve *both* goals.

Thus, this Article serves several purposes. First, it highlights the continuing problem created by the current application of the *Furman–Gregg* and *Woodson–Lockett* doctrines. Second, it provides a model for applying the doctrines in a manner that eliminates their inconsistency. Finally, it explains why such an approach is both consistent with the purposes of the Eighth Amendment and with current Eighth Amendment doctrine.