PROMULGATING PROPORTIONALITY
A REFRAMING OF THE EIGHTH AMENDMENT

William W. Berry III*

Two lines of cases have dominated the Supreme Court’s Eighth Amendment death penalty jurisprudence: the Furman-Gregg line of cases emphasizes the need to adopt rules to eliminate the arbitrariness inherent in unguided capital sentencing by juries, while the Woodson-Lockett line of cases emphasizes the opposite concern—the need for juries to make individualized sentencing determinations—highlighting the inadequacy of rules.

At first glance, these competing aims create some internal tension, if not outright conflict. In his concurrence in Walton v. Arizona, Justice Scalia argued that this conflict was irreconcilable: “[t]he latter requirement [individualized factual determinations] quite obviously destroys whatever rationality and predictability the former requirement [limitations on jury discretion] was designed to achieve . . . .” And the Court has done little to reconcile this conflict. Indeed, in Kennedy v. Louisiana, Justice Kennedy recently stated, “this case law . . . is still in search of a unifying principle.”

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. Using this principle, the 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 Supreme Court ought to apply the Eighth Amendment in capital cases solely in terms of two distinct types of proportionality—absolute and relative. Specifically, the model requires that the state court (and jury) determine the issue of absolute proportionality first, narrowing the individuals eligible for the death penalty 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.

Part I of the article describes the “problem”—the apparent tension between the Furman-Gregg arbitrariness principle and the Woodson-Lockett individualized determination principle. In Part II, the article defines the concept of proportionality, describing both its absolute and relative forms. In Part III, the article articulates a new model for implementing the Eighth Amendment that solves the Walton “problem.” Finally, in Part IV, the article demonstrates how proportionality can serve as the unifying principle for the Court’s capital jurisprudence.

* Assistant Professor, University of Mississippi School of Law; D.Phil. Candidate, University of Oxford. J.D., Vanderbilt University Law School; M.Sc., University of Oxford; B.A., University of Virginia. The author would like to thank Kathleen Ingram for her excellent research assistance on the article.
# Table of Contents

**Introduction** .................................................................................................................. 3  

I. THE COURT’S COMPETING LINES OF JURISPRUDENCE ........................................... 7  
  A. The Eighth Amendment Requirement of General Guiding Principles in Capital  
    Sentencing (The Furman-Gregg Line) ................................................................. 7  
      1. McGautha v. California ....................................................................................... 7  
      2. Furman v. Georgia ............................................................................................. 9  
      3. Gregg v. Georgia ............................................................................................ 10  
      4. The Basic Furman-Gregg doctrine ................................................................. 11  
  B. The Eighth Amendment Requirement of Case-Specific Sentencing Determinations  
    (The Woodson-Lockett Line) ............................................................................... 12  
      1. Woodson v. North Carolina .............................................................................. 12  
      2. Lockett v. Ohio ............................................................................................... 13  
      3. The Basic Woodson-Lockett doctrine ......................................................... 14  
  C. The Court’s Contemplation of the “Conflict” and Walton v. Arizona ................ 15  

II. The Concept of Proportionality .............................................................................. 17  
  A. The Concept of Absolute Proportionality ......................................................... 20  
     1. Absolute Proportionality Generally ............................................................. 20  
     2. Absolute Proportionality and the Purposes of Punishment ......................... 21  
  B. The Concept of Relative Proportionality .......................................................... 23  
     1. The Requirement of Eliminating “Unusual” Cases ................................ .... 24  
     2. The Requirement of a Critical Mass of Similar Outcomes ......................... 24  

III. Promulgating Proportionality ............................................................................. 25  
  A. The Absolute Proportionality Threshold ......................................................... 26  
     1. Categorical Exclusions .................................................................................... 26  
     2. Case-specific Exclusions and the Purposes of Punishment ....................... 27  
  B. The Relative Proportionality Threshold ............................................................ 29  
     1. The Requirement of Narrowing the Class of Murderers ......................... 29  
     2. The Requirement of Meaningful Appellate Review .................................... 30  

IV. Proportionality as the Unifying Principle .......................................................... 31  
  A. The Unifying Effects of Promulgating Proportionality .................................... 31  
     1. A Resolution to the Walton Conflict ............................................................ 31  
     2. A More Effective Eighth Amendment .......................................................... 32  
  B. Proportionality is Consistent with Eighth Amendment Purposes ................. 34  
     1. Original Purposes .......................................................................................... 34  
     2. Doctrinal Purposes ...................................................................................... 35  
  C. Proportionality is Consistent with Eighth Amendment Doctrine ................ 38  
     1. Absolute Proportionality as the Goal of Case-Specific Review .................. 39  
     2. Relative Proportionality as the Goal of General Guiding Principles .......... 40  

Conclusion ..................................................................................................................... 41  

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 must often decide whether to articulate a standard that applies to all similar cases, or forego the adoption of a general rule in favor of a case-by-case approach.¹ Rules have the advantage of creating consistency in decision-making, 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, a case-by-case ad hoc fact-based analysis (with an absence of rules or standards) allows for flexibility not available when applying rules, 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 decision-making been more apparent than in the United States Supreme Court’s attempts to interpret and apply the Eighth Amendment to capital cases.³

In the Furman-Gregg line of cases,⁴ the Supreme Court has emphasized the need to eliminate the arbitrariness inherent in unguided capital sentencing

¹ Compare Baltimore & Ohio R.R. Co. v. Goodman, 275 U.S. 66 (1927), with Pokora v. Wabash Ry. Co., 292 U.S. 98 (1934) (with Justice Cardozo in Pokora rejecting Justice Holmes’ 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., Northern Sec. Co. v. United States, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (“Great cases, like hard cases, make bad law.”). The courts have often echoed this concept in challenging the application of general common law and statutory rules. See Haig v. Agee, 453 U.S. 280, 319 (1981) (Brennan, J., dissenting); Doggett v. United States, 505 U.S. 647, 659 (1992) (Thomas, J., dissenting); In re Sole, 233 B.R. 347, 349 (E.D. Va. 1998); Abcon Assoc., Inc. v. United States, 49 Fed. Cl. 678, 690 (2001). See also Frederick Schauer, Do Cases Make Bad Law?, 73 U. Chi. L. Rev. 883 (2006) (arguing that the act of deciding cases itself under the common law makes bad law).


by juries. In *Furman v. Georgia*, the Court interpreted the “cruel and unusual” punishment language of the Eighth Amendment to prohibit States from using the death penalty without some systemic framework to cabin jury discretion such that courts treat “like cases” alike. In *Gregg v. Georgia*, the Court affirmed the use of the death penalty where States had adopted statutory rules to satisfy two Eighth Amendment limits on jury arbitrariness: (1) rules narrowing the jury’s exercise of discretion in sentencing; and (2) rules providing for meaningful appellate review of such jury decisions.

In the *Woodson-Lockett* line of cases, the Supreme Court emphasized the opposite concern—the need to consider case-specific circumstances—in highlighting the inadequacy of rules and standards. 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. The Court expanded this requirement of case-specific, individualized 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.

At first glance, requiring states to use a general set of parameters to create consistent jury verdicts in capital cases in conjunction with the jury’s consideration of all relevant individual and case-specific characteristics creates some internal tension, if not outright conflict. In his concurrence in *Walton*

---

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 __. As discussed infra in Part II-A, these included state statutory safeguards such as requiring proof of aggravating factors and appellate review, sometimes in the form of proportionality review, of jury sentencing.

8 *Gregg*, 428 U.S. at 195, 198 (1976). Many states interpreted the Court’s decision in *Gregg* to require proportionality review, but the Court made clear in *Pulley v. Harris*, 465 U.S. 37 (1984), that the Eighth Amendment did not require proportionality review, just some kind of meaningful appellate review.


10 Id.


12 Justice Scalia’s concurrence in *Walton v. Arizona* mocked the idea that there is merely a tension and not a complete conflict between these ideas: “To acknowledge that ‘there
v. Arizona, Justice Scalia argued that this conflict was irreconcilable:

[O]ur jurisprudence and logic have long since parted ways . . . The latter requirement [individualized factual determinations] quite obviously destroys whatever rationality and predictability the former requirement [limitations on jury discretion] was designed to achieve . . . .

And 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 requirement of case-specific inquiries from Woodson and Lockett. Others have argued that the Court’s inability to remedy the tension raises doubts about the constitutionality of capital punishment altogether.
Indeed, in *Kennedy v. Louisiana*, Justice Kennedy stated, “this case law . . . is still in search of a unifying principle.” 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 commiserate with the crime in both a relative and absolute sense. Using this principle, the 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 Supreme Court ought to apply the Eighth Amendment and its cruel and unusual punishment prohibition solely in terms of two distinct types of proportionality—absolute and relative. The proposed model of proportionality unites the two competing ideas 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* line of cases—and absolute proportionality—which incorporates the need for case-specific review from the *Woodson-Lockett* line of cases. Specifically, the model requires that the state court (and jury) determine the issue of absolute proportionality first, narrowing the individuals eligible for the death penalty 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.


17 *Kennedy*, 554 U.S. at 437. Kennedy explained that the Court simply would “insist upon confining the instances in which capital punishment may be imposed.” Id. See, e.g., 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, arguing that “there has been a general failure to develop any larger theory of the Eighth Amendment”). See also, Tom Stacy, *Cleaning up the Eighth Amendment Mess*, 14 WM. & MARY BILL RTS. J. 475, 475 (2005).

18 As herein construed, “proportionality” encompasses both retributive and utilitarian purposes of punishment. See Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 DUKE L.J. 263 (2005) (developing a robust conception of “political” proportionality and explaining that proportionality can be broader than the retributive concept of *just deserts*). See discussion infra Part II.

19 It is true that part of the relative proportionality determination occurs with application of aggravating factors, technically before the absolute proportionality determination.
Part I of the article describes the “problem” — the apparent tension between the Furman-Gregg arbitrariness principle and the Woodson-Lockett individualized determination principle. In Part II, the article defines the concept of proportionality, describing both its absolute and relative forms. In Part III, the article articulates a new model for implementing the Eighth Amendment that solves the Walton “problem.” Finally, in Part IV, the article demonstrates how proportionality can serve as the unifying principle for the Court’s capital jurisprudence.

I. THE COURT’S COMPETING LINES OF JURISPRUDENCE

A. The Eighth Amendment Requirement of General Guiding Principles in Capital Sentencing (the Furman-Gregg line)

The Court’s Furman-Gregg line of capital jurisprudence addresses the problem of inconsistency in jury verdicts in capital cases. As explained below, the principle adopted here sought to remedy the disparities and largely arbitrary outcomes resulting from unguided jury sentencing in capital cases.\(^{20}\)

1. McGautha v. California

The Supreme Court first considered the efficacy of jury decision-making in capital cases in McGautha v. California.\(^{21}\) In McGautha, a 6-3 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 procedural due process requirements of the Fourteenth Amendment.\(^{22}\)

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.\(^{23}\) Acknowledging

\(^{20}\) See supra note 5.

\(^{21}\) McGautha v. California, 402 U.S. 183 (1971). An Ohio case, Crampton v. Ohio, was a companion case to McGautha and was decided as part of the opinion. As with California, the Court held that the broad discretion afforded to Ohio juries did not violate the petitioner’s due process rights under the Fourteenth Amendment.

\(^{22}\) Id. at 196. Indeed, the McGautha case was the first challenge to the ability of jurors to decide capital cases.

\(^{23}\) 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.
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.”

Despite the outcome in *McGautha*, the opinions of the dissenting justices expressed serious apprehension about the state sentencing procedures, particularly given the absence of any guidance or limitation on the exercise of jury discretion. Justice Brennan highlighted the inadequacy of open-ended jury discretion in the state sentencing schemes at issue in *McGautha* by emphasizing that they were not “designed to control arbitrary action.” Thus, for both the majority and the dissenters, their respective opinions hinged on their individual views of the fairness of the jury procedure and its relative consistency from case to case, and *not* their views on the propriety of death sentences for the crimes committed in each case before them.

---

24 *McGautha*, 402 U.S. at 207.

25 See id. at 248, 309 (Brennan, J. dissenting) (“The question that petitioners present 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* (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.”).

26 *McGautha*, 402 U.S. at 268 (Brennan, J., dissenting). Brennan was not questioning the role of the jury here as the arbiter of the decision concerning life and death; rather, he was simply arguing for greater guidance from the state in the decision-making 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.”).

27 As to the concept of a unitary trial, Justice Douglas wrote: “The unitary trial is certainly not ‘mercy’ oriented. That is, however, not its defect. It has a constitutional
2. *Furman v. Georgia*

In 1972, one year after *McGautha*, the United States Supreme Court decided *Furman v. Georgia*, in which it held that the death penalty, as administered, violated the Eighth Amendment’s prohibition against cruel and unusual punishment.\(^{28}\) Initially understood by many to signal the abolition of capital punishment in the United States, a plurality of the justices in *Furman* instead focused on the flaws in the process, particularly concerning the lack of guidance provided to the jury in determining the appropriate sentence.\(^{29}\)

Abandoning the views adopted in *McGautha*, the Court took issue with the broad discretion given to the jury, particularly with the range of potential sentences, the lack of guidance as to when a death sentence was proper, and the absence of bifurcation between the guilt and sentencing phases of trial.\(^{30}\) In this vein, Justice Stewart concluded that the death penalty *as applied* constituted cruel and unusual punishment because it was “so wantonly and so freakishly imposed.”\(^{31}\) 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.”\(^{32}\)

The rarity of using the death penalty further contributed to the majority view that its use was arbitrary. Justice White found that “the death penalty is exacted with great infrequency even for the most atrocious crimes . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.”\(^{33}\)

---

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, joined by Brennan & Marshall, JJ.).


\(^{29}\) Id.

\(^{30}\) Id.

\(^{31}\) Id. at 309 (Stewart, J., concurring).

\(^{32}\) Id. at 293 (Brennan, J., concurring). Brennan further commented that “Indeed, [the administration of the death penalty] smacks of little more than a lottery system.” Id.

\(^{33}\) Id. at 314 (White, J., concurring). Similarly, Justice Brennan emphasized its rarity, explaining, “death is inflicted in only a minute fraction of these cases.” Id. at 293 (Brennan, J., concurring).
At its heart, the Furman decision found the death penalty unconstitutional because there were no indicia or standards determining which murders warranted a punishment of death and which did not, and thus no mechanism to ensure that like cases are 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 finely as to explain, on that ground, the execution of such a tiny sample of those eligible.\[^{34}\]

The Court in Furman highlighted the absence of a principle by which to distinguish murders deserving death from “ordinary” murders deserving a lesser sentence.\[^{35}\] Thus, because the death sentences 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.\[^{36}\]

3. Gregg v. Georgia

In 1976, four years after Furman, the United States Supreme Court reinstated the death penalty through its holding in Gregg v. Georgia, a case that validated the Georgia death penalty statutes amended after Furman.\[^{37}\] On the same day, the Supreme Court also decided several companion cases assessing the death penalty schemes adopted in other jurisdictions.\[^{38}\]

Gregg cited several features of the new Georgia sentencing procedure that alleviated the Furman concern of arbitrary sentencing outcomes resulting

\[^{34}\] Furman, 408 U.S. at 294 (Brennan, J., concurring).
\[^{35}\] Id.
\[^{36}\] Id.
from unfettered jury discretion.\textsuperscript{39} First, the Georgia statute bifurcated the sentencing procedure, separating the determination of sentencing from the determination of guilt.\textsuperscript{40} Second, the statute created ten aggravating factors, at least one of which the State had to prove beyond a reasonable doubt before death became a potential sentence.\textsuperscript{41} Third, the statute required the jury to weigh the aggravating factors against any mitigating factors offered into evidence at sentencing.\textsuperscript{42}

Finally, “as an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provide[d] for automatic appeal of all death sentences to the State's Supreme Court.”\textsuperscript{43} 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.”\textsuperscript{44}

The Court in \textit{Gregg} concluded that the new procedures satisfied the concerns of \textit{Furman} because they ensured that a sentence of death would not be comparatively disproportionate.\textsuperscript{45} The Court found that 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.”\textsuperscript{46} Thus, \textit{Gregg} addressed the \textit{Furman} problem of arbitrariness by ensuring the relative proportionality of outcomes through (1) guidance to the jury via aggravating factors and (2) appellate review of sentences.

4. The Basic \textit{Furman-Gregg} doctrine

The decisions in \textit{Furman} and \textit{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

\begin{itemize}
  \item \textsuperscript{39} \textit{Gregg} v. Georgia, 428 U.S. 153 (1976).
  \item \textsuperscript{40} \textit{Id.}
  \item \textsuperscript{41} \textit{Gregg} v. Georgia, 428 U.S. 153 (1976).
  \item \textsuperscript{42} \textit{Id.}
  \item \textsuperscript{43} \textit{Id.} at 198 (citing \textit{GA. CODE ANN. § 27-2537(c)} (Supp. 1975)).
  \item \textsuperscript{44} \textit{Id.}
  \item \textsuperscript{45} \textit{Id.}
  \item \textsuperscript{46} \textit{Id.} at 188.
\end{itemize}
similar ways or under similar circumstances. The safeguard of meaningful appellate review, particularly in the form of proportionality review, functions to prevent death sentences in “dissimilar” cases, creating relative proportionality.

B. The Eighth Amendment Requirement of Case-Specific Sentencing Determinations (the Woodson-Lockett line)

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

1. Woodson v. North Carolina

On the same day that it decided Gregg, the Supreme Court decided Woodson v. North Carolina, creating an entirely different set of Eighth Amendment requirements that focus on the individual characteristics and actions of the offender. 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. The Court explained

47 Although aggravating circumstances could be considered to be absolute bars, 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 part of the manner in which the Court can assure that juries will sentence similar cases in similar ways.

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


50 Id. 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).
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 capital cases.”\textsuperscript{51} The Court also emphasized the likelihood of juries declining to find a defendant guilty where they believed the death penalty was not the appropriate sentence.\textsuperscript{52}

Given these deficiencies, the Court found that, unlike Georgia, the North Carolina system failed to address the concerns of \textit{Furman}.\textsuperscript{53} Justice Stewart explained:

\begin{quote}
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.\textsuperscript{54}
\end{quote}

The holding in \textit{Woodson} made clear that the Court believed that constitutional capital punishment schemes must give juries (or trial judges) a way to differentiate meaningfully between first-degree murders in determining a sentence. These requirements were consistent with the broad principle that capital-sentencing decisions require, in order to pass muster under the Eighth Amendment, 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.\textsuperscript{55}

2. \textit{Lockett v. Ohio}

In \textit{Lockett v. Ohio}, two years after \textit{Woodson}, the Supreme Court broadened the principle articulated in \textit{Woodson} by striking down the Ohio

\textsuperscript{51} \textit{Woodson}, 428 U.S. at 291.
\textsuperscript{52} \textit{Id.} at 295-98. Indeed, the Court had recognized the possibility of jury nullification in capital cases sentenced using mandatory statutes in \textit{McGautha}. \textit{McGautha}, 402 U.S. at 199.
\textsuperscript{53} \textit{Woodson}, 428 U.S. at 301-02.
\textsuperscript{54} \textit{Id.} at 303.
\textsuperscript{55} The Court struck down a similar scheme in a companion case, \textit{Roberts v. Louisiana}, 428 U.S. 325 (1976), even though Louisiana’s statute defined first degree murder more narrowly than North Carolina.
capital statute under the Eighth Amendment for not allowing adequate consideration of the individual characteristics of the offender.\textsuperscript{56} 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.\textsuperscript{57} In overturning the death sentence of Sandra Lockett,\textsuperscript{58} the Court held that the statute violated the Eighth Amendment because it limited the consideration of the offender’s mitigating evidence.\textsuperscript{59} As Chief Justice Burger explained, 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.\textsuperscript{60}

As a result, after \textit{Lockett}, “[t]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors.”\textsuperscript{61}

3. The Basic \textit{Woodson}-\textit{Lockett} doctrine

The decisions in \textit{Woodson} and \textit{Lockett} clearly establish an Eighth Amendment doctrine prohibiting mandatory death statutes and requiring states to allow complete consideration of all case-specific evidence concerning the offender and the offense. The Eighth Amendment requirement of juror or judge consideration of such evidence thus serves to enable an individualized, fact-specific determination of whether death is an appropriate punishment in a


\textsuperscript{57} 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).

\textsuperscript{58} Ms. Lockett played, at most, a very minor role in the crime. \textit{Lockett}, 438 U.S. at 590. She was the driver of the getaway car in an armed robbery and was prosecuted under a theory of felony murder, as there was no evidence that she or her co-conspirators intended to kill. \textit{Id.}

\textsuperscript{59} \textit{Id.} at 608.

\textsuperscript{60} \textit{Id.} at 605.

\textsuperscript{61} \textit{Id.} at 608.
given case.

C. The Court’s Contemplation of the “Conflict” and Walton v. Arizona

For fifteen years, these two lines of cases co-existed, largely because statutory challenges based on one or the other of the two lines were made and considered separately. Before Walton v. Arizona, no petitioner had challenged aspects of both lines in the same case.\textsuperscript{62}

In Walton, the Court upheld Arizona’s capital statute despite challenges by the petitioner under both the Furman-Gregg line of cases and the Woodson-Lockett line of cases.\textsuperscript{63} The petitioner challenged one of the statutory aggravating circumstances, which made offenders committing “heinous, cruel, or depraved” murders eligible for the death penalty, because it was too vague to sufficiently narrow the class of offenders eligible for death as required by Furman and Gregg.\textsuperscript{64} 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.”\textsuperscript{65}

While concurring in the decision to uphold the statute, Justice Scalia wrote separately to express his view that the two lines of cases created an irreconcilable conflict.\textsuperscript{66} He explained,

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.\textsuperscript{67}


\textsuperscript{63} Id. Part of the Court’s holding in this case—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 United States v. Apprendi, 530 U.S. 466 (2000), the Sixth Amendment required jurors, not judges, to make such factual determinations.

\textsuperscript{64} 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).

\textsuperscript{65} Walton, 497 U.S. at 677 (Blackmun, J., dissenting).

\textsuperscript{66} Id. at 664-74 (Scalia, J., concurring in part and concurring in judgment).

\textsuperscript{67} Id. at 664.
Highlighting the way in which the Woodson-Lockett requirement undermines the goals of the Furman-Gregg line, Justice Scalia further suggested that the process of 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.\(^\text{68}\)

By allowing individualized 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.\(^\text{69}\) As a result, Justice Scalia concluded that the Court should abandon the Woodson-Lockett line of cases.\(^\text{70}\)

Justice Stevens wrote a separate dissent to address Justice Scalia’s view of the two lines of cases.\(^\text{71}\) Specifically, Justice Stevens argued that the two concepts were not incompatible, because whatever arbitrariness resulted from the use of case-specific indicia occurred only within the narrowed group of offenders. Justice Stevens explained:

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.\(^\text{72}\)

To illustrate his point, Justice Stevens used the metaphor of a narrowing pyramid, first described by the Court in Godfrey v. Georgia.\(^\text{73}\) As the court applies the general Furman-Gregg rules to narrow the class of offenders, one moves up the pyramid. As to Justice Scalia’s view that the use of individualized considerations undermines the consistency achieved by the general narrowing considerations, Justice Stevens emphasized that

\(^{\text{68}}\) Walton, 497 U.S. at 666. Scalia explained, “t]he 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.” Id.

\(^{\text{69}}\) Id.

\(^{\text{70}}\) Id. at 667.

\(^{\text{71}}\) Id. at 708-19 (Stevens, J., dissenting).

\(^{\text{72}}\) Id. at 715-16.

\(^{\text{73}}\) Godfrey v. Georgia, 446 U.S. 420 (1980).
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.\(^\text{74}\)

For Justice Stevens, then, allowing disparities to arise based on fact specific circumstances was acceptable because any such arbitrariness would be limited to the narrowed group of offenders.\(^\text{75}\) 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.\(^\text{76}\)

At the end of the discussion, it must be asked whether allowing jurors to consider all mitigating evidence under the *Woodson-Lockett* approach undermines the consistency achieved by the standard-based *Furman-Gregg* approach in a significant way (Scalia’s view) or an insignificant way (Stevens’ view).

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

II. THE CONCEPT OF PROPORTIONALITY

Before describing the way in which proportionality can resolve the conflict described above, it is important to clarify how this article defines “proportionality.”\(^\text{77}\) Proportionality refers to the relationship of the

\(^{74}\) *Walton*, 497 U.S. at 718.

\(^{75}\) *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 offenders in a significant enough way to ensure that any ensuing arbitrariness resulting from case-specific considerations is de minimis.

\(^{76}\) *Id*.

\(^{77}\) Indeed, the academic literature contains many iterations of the term proportionality as applied in the Eighth Amendment context. See, e.g., John D. Castiglione, 71 OHIO ST. L. J. 71 (2010) (describing a model of proportionality review based on qualitative and quantitative comparisons); Laurence Claus, *Methodology, Proportionality, Equality: Which Moral Questions Does the Eighth Amendment Pose?*, 31 HARV. J.L. & PUB. POL’Y 35, 45 (2008)
punishment to the criminal conduct of the offender, such that proportionality serves as a limit on the power of the state to impose criminal sanctions based on various individual interests and political considerations.78 As a result, punishments are disproportionate when one can demonstrate that they exceed the state’s legitimate power.79

While many scholars and courts have used proportionality merely as a term describing just deserts retribution,80 Professor Alice Ristroph and others have described it in broader terms.81 Professor Ristroph explains,

proportionality is compatible with a range of penological theories, but it is not dependent on any one of those theories . . . proportionality is better understood as an external limitation on the state’s power to incarcerate or execute individuals,

("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, and the Eighth Amendment: “Proportionality” Relative to What?, 89 MINN. L. REV. 571, 574 (2005) (exploring retributive and non-retributive proportionality principles to 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 (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 19 at 278 (examining proportionality as a constitutional limitation on the power to punish; 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).

78 Alice Ristroph, How (Not) to Think Like a Punisher, 61 FLA. L. REV. 727, 744 (2009).
79 Id.
80 See, e.g., Hyman Gross, Proportional Punishment and Justifiable Sentences, in HYMAN GROSS & ANDREW VON HIRSCH, ED., SENTENCING 272 (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).
81 See Ristroph, supra note 19, at 284. Ristroph terms this broader conception of proportionality as “political proportionality.” Id. at 284.
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.\textsuperscript{82}

Thus, proportionality, as herein construed, creates an outer limit on the ability of the state to punish, irrespective of the purpose of punishment.\textsuperscript{83}

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.\textsuperscript{84} As a result, proportionality requires that a given punishment not exceed the ceiling in order to be proportionate.

In addition, it is important to point out that the Court’s use of the term proportionality in the capital context has generally been in reference to categories of offenders for whom the death penalty would be disproportionate.

\textsuperscript{82} Ristroph, \textit{supra} note 19, at 271, 266. Indeed, as Ristroph demonstrates, proportionality is an important consideration in both retributive and utilitarian conceptions of punishment. \textit{Id.} at 277. See, e.g., IMMANUEL KANT, \textit{THE METAPHYSICS OF MORALS, in KANT, POLITICAL WRITINGS} 155 (trans. H. B. Nisbet) (Cambridge University Press 1991) (explaining the importance of proportionality in retributive punishment); JEREMY BENTHAM, \textit{THE PRINCIPLES OF MORALS AND LEGISLATION} 179 (Prometheus ed. 1988) (explaining that utilitarian punishments require that “[t]he value of the punishment must not be less than what is sufficient to outweigh that of the profit of the offense”).

\textsuperscript{83} See Ristroph, \textit{supra} note 79, at 744 (“it 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 Youngjae Lee, \textit{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).

\textsuperscript{84} Indeed, under-punishment has not been a concern in the United States over the past thirty years. See, \textit{e.g.}, MARC MAUER, \textit{RACE TO INCARCERATE} 10 (2006) (documenting the 500 percent increase in the United States prison population from 1972 to 2003). Commentators have increasingly 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, \textit{e.g.}, Erik Luna, \textit{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, \textit{The Pathological Politics of Criminal Law}, 100 MICH. L. REV. 505, 507 (2001) (discussing criminal law’s push toward more liability). This is particularly true given that almost half of the current state prison populations committed non-violent crimes. Bureau of Justice Statistics, U.S. Dep’t of Justice, \textit{Prison Statistics}, http://www.ojp.usdoj.gov/bjs/prisons.htm (last visited Feb. 15, 2011).
in an absolute sense. As explained below, the Court has made several categorical exclusions for classes of offenders for whom the death penalty would be disproportionate; however, for the purposes of this article, that conception of proportionality only addresses one part of the broader consideration of absolute proportionality.

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

A. The Concept of Absolute Proportionality

1. Absolute Proportionality Generally

The concept of absolute proportionality, at its broadest, refers to the relationship between two concepts and the balance their relationship creates. In terms of punishment, absolute proportionality generally describes the relationship between the intended goal of punishment as related to the amount and type of punishment selected. Thus, a proportional punishment is one where the chosen punishment corresponds to (and is equivalent to) the punishment required by the applicable purpose.

In measuring whether a punishment is proportional in an absolute sense, the question is simply whether the punishment fits the crime. With any punishment, there are three broad categories of measuring its sufficiency 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 disproportionate in the opposite sense, because they exceed the amount of necessary punishment to achieve the sought 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.  

It is important to note that identifying the penological purpose clearly guides the character and extent of the punishment; however, it dictates the quantum 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 quantum of punishment is typically unidentifiable. This gives rise in some cases to a range of punishments that would qualify as proportionate in absolute terms. Thus, when considering whether a punishment is proportionate in absolute terms, one can determine whether the sentence exceeds the range of proportionate punishments in light of the applicable purpose of punishment.

2. Absolute Proportionality and the Purposes of Punishment

In the capital punishment context, there are two legitimate purposes of punishment: retribution and deterrence.  

---

89 Congress incorporated this concept explicitly in the federal sentencing statutes. See 18 U.S.C. § 3553(a) (providing that “[t]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection.”).


91 The Supreme Court’s “subjective judgment” prong of its evolving standards of decency jurisprudence asks this question: does a purpose of punishment support the use of the death penalty in the applicable context? See Atkins, 536 U.S. at 321; Roper, 543 U.S. at 578; Kennedy, 554 U.S. at 421.

92 See, e.g., Gregg, 428 U.S. at 183 (“[t]he death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders”). Rehabilitation is not typically a goal of execution. And, as I have argued elsewhere, the future dangerousness of an offender is also an illegitimate goal in capital cases, particularly where life without parole is an available alternative. See William W. Berry III, Ending Death by Dangerousness, 52 ARIZ. L. REV. 889 (2010).

93 See supra note 86.

94 Indeed, in Furman, six out of the nine justices based their decision in part on their view of the validity of retribution and/or deterrence as a justification for capital punishment. Furman, 408 U.S. at 307–08 (Stewart, J., concurring) (“If we were reviewing death sentences imposed under these or similar laws . . . . We would need to decide whether a legislature—state or federal—could constitutionally determine that certain
an offender his *just deserts*—that is—sentencing an offender to a sentence commensurate with his level of culpability and the degree of harm caused by his conduct. Importantly, the academic literature and the Court’s jurisprudence clearly link the concept of absolute proportionality to retribution. A sentence that gives an offender his *just deserts* is, by definition, a proportionate sentence.

Although not as commonly connected as retribution by scholars and courts, the concept of absolute proportionality can also include the 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.

---


96 See Ristroph, *supra* note 19.

97 See VON HIRSCH, *supra* note 96.
penological purpose of deterrence. Deterrence measures the appropriate sentence in light of its effect on potential offenders. 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.

Thus, as conceived here, the concept of absolute proportionality encompasses both the purposes of retribution and deterrence. For a sentence to be proportional to the crime committed, it must be proportional in its extent to either the purpose of retribution or the purpose of deterrence.

B. The Concept of Relative Proportionality

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

The goal of relative proportionality is to satisfy the criminal law value of treating “like cases alike.” In other words, offenders whose acts and character are comparable should receive comparable sentences. The concept of relative proportionality does not require that comparable sentences be identical; it allows for a range of possible sentences. It does not allow, however, significant distinctions in harshness between sentences where 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 question then asks what makes a case similar, and how should courts apply this concept in practice. There are two basic requirements to ensure relative proportionality in criminal cases—the requirement of eliminating “unusual” cases, and the requirement of finding a critical mass of

98 See Ristroph, supra note 19.
99 Id. (describing general deterrence).
100 See BENTHAM, supra note 80.
101 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.” Indeed, I have written elsewhere concerning the conflicting nature of the various purposes of punishment in the context of the federal sentencing guidelines. 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 (2008).
102 See, e.g., H.L.A. HART, THE CONCEPT OF LAW, ch. VIII; CH. PERELMAN, JUSTICE (1967); DE LA JUSTICE (1945)).
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 this approach, cases are unusual where the outcome is extreme by comparison to other cases. The notion here is that sentencing decisions that are outliers are relatively disproportionate.

Where a punishment in a given case is distinctive in character and/or severe compared to punishments in similar cases, the sentence is disproportionate in a relative sense. This particularly applies in the capital context, where an individual receives a death sentence for a crime that typically has not warranted death.

Child rape provides an example of this in practice. Because virtually no child rapists have received the death penalty, Louisiana’s decision to make death available for that crime created “unusual” cases. Accordingly, the concept of relative proportionality would prohibit death sentences where 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

In addition to cases that are outliers, the concept of relative proportionality also requires the presence of a group of similar cases with the same outcome. The reason for the requirement of a critical mass of cases is to prevent unprecedented sentences that are excessive. Where there is not a

---

103 The punishments in Weems v. United States, 217 U.S. 349 (1910), and Trop v. Dulles, 356 U.S. 86 (1958), provide examples of such sentences; twenty years of hard labor for a forged signature and loss of citizenship for desertion both are penalties not typically given for the applicable offenses, and are more severe in character. See discussion infra Part IV.A.

104 While the Court based its categorical exclusion of death as a permissible punishment for child rape in Kennedy v. Louisiana 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, and thus relative disproportionality. Kennedy, 554 U.S. at 466. As explained below, the Court’s evolving standards of decency approach does incorporate the concept of relative proportionality in its survey of practices of state legislatures in considering whether a particular category of punishment satisfies the requirements of the Eighth Amendment.

105 Interestingly, this reasoning could apply to harsh shaming punishments as well. For competing views on the appropriateness of shaming punishments, compare Dan M. Kahan,
critical mass of cases with a similarly severe outcome, the concept of relative proportionality requires a lesser sanction to avoid excessiveness. Thus, where a death sentence has not previously been given under similar circumstances, to give a death sentence in a series of similar cases would be relatively disproportionate.

The benefits of this requirement are two-fold. The concept of relative proportionality situates each case among similar cases, promoting consistency in sentencing. In addition, where similar cases do not exist, the concept of relative proportionality prevents over-punishment by cautioning against using the most severe punishments.

III. PROMULGATING PROPORTIONALITY

In the model of proportionality analysis that I propose, there are two steps of analysis required to 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 it both reconciles the conflict enunciated above and why the model is an appropriate way to apply the Eighth Amendment.

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

The second step is a determination of whether the case is relatively proportionate—that is—whether the punishment is excessive given punishments in similar cases. Where death is rarely the punishment for a particular crime, a death sentence in such a case would be relatively disproportionate.

As a practical matter, the trial court (typically through a jury) makes the initial determination of absolute proportionality, taking into account the

---


106 The model presumes the presence of aggravating factors—this is technically the first step.
categorical exclusions adopted by the United States Supreme Court. Cases that are not absolutely proportionate receive a sentence other than death. As explained below, the trial court thus narrows the class of death eligible offenders (as determined by the presence of aggravating factors) in determining whether a particular defendant merits death in light of all mitigating evidence as required by the *Woodson-Loxkett* line of cases. For the remaining death cases, the state supreme court (to which there is typically a 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* line subsequent to the *Woodson-Loxkett* line cures the conflict identified in *Walton*. Whatever consistency is lost by allowing juries to consider specific facts in sentencing determinations can be recaptured by the appellate court reviewing the case for relative proportionality, thus excluding 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 categorical rules that identify individuals or circumstances for whom an execution is, by definition, disproportionate. Specifically, the Court has held that the Eighth Amendment prohibits execution of individuals who are mentally retarded, individuals of minor age at the time of the commission of a crime, for all non-homicide crimes, and for felony murder where the individual was not a major participant in the crime.

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. The Court first asks whether there is a consensus among

---

107 See infra notes 116-19.


112 Indeed, as the Court in *Kennedy* explained, “the Court has been guided by ‘objective indicia of society’s standards, as expressed in legislative enactments and state practice with
the states concerning the category at issue. After deciding that there is a consensus, the Court’s subjective judgment is then “brought to bear.” 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.

If both the objective evidence and the subjective judgment of the Court deem the punishment excessive, the Court defines the punishment as per se disproportionate, and excludes it from jury consideration in its determination of absolute proportionality.

2. Case-specific Exclusions and the Purposes of Punishment

In addition to the categorical exclusions mandated by the Eighth Amendment, the Court’s decisions in *Woodson* and *Lockett* require the jury to consider all mitigating evidence in determining an appropriate sentence. This inquiry provides a case-specific analysis of whether, for the particular defendant involved, capital punishment is an absolutely proportionate sentence.

*Woodson* and *Lockett* allow consideration of virtually all mitigating evidence offered by the defendant; as such, they suggest that such information will likely have a bearing on whether death is absolutely proportionate in a given case. The Court’s application of this concept 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. Under this analysis, the concept of absolute proportionality assumes a fact-specific respect to executions.’ The inquiry does not end there, however. . . . Whether the death penalty is disproportionate to the crime committed depends as well upon the standards elaborated by controlling precedent and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose.” *Kennedy*, 554 U.S. at 421. Interestingly, this determination of absolute proportionality relies in part on considerations of relative proportionality in examining the practices of the various state legislatures.

The Court has typically “counted” the number of states that allow the death penalty for the category at issue in establishing consensus. 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 (2007).

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

114 Id.

115 See *Atkins*, 536 U.S. at 321; *Roper*, 543 U.S. at 578; *Kennedy*, 554 U.S. at 447.

116 Id.

117 See VON HIRSCH, supra note 93.

118 See *Lockett*, 438 U.S. at 604-05.
dimension. This approach makes sense given the gravity of the issue—whether the state should take the life of the offender.  

In practice, the individual character, past acts, mental capacity, and personal hardships of the offender are relevant when considering whether his life merits saving. Given these considerations, the jury must ask whether death is an excessive punishment for this offender.

Similarly, the facts and circumstances surrounding the criminal act bear on the jury determination of whether death is a proportionate sentence. Mitigating circumstances relating to the commission of the crime must be part of the determination of whether death is an excessive punishment for the offender given the nature and circumstances surrounding the specific acts of the offender and the character of the criminal acts themselves.

As explained above, the concept of absolute proportionality described here includes both retributive and utilitarian understandings of proportionality. In applying this concept, juries may apply one or both of these purposes of punishment in sentencing the offender; however, under Woodson and Lockett, neither purpose can foreclose the consideration of mitigating evidence.

Thus, under this model, the class of individuals eligible to receive the death penalty is subject to the Eighth Amendment requirement of absolute proportionality, as defined by the Court’s categorical exclusions and the case

---


120 See Lockett, 438 U.S. at 604-05.

121 Id.

122 Id.

123 Id.

124 See supra notes 93-103.

125 See Lockett, 438 U.S. at 605; Woodson, 408 U.S. at 304. Thus, while a just deserts retributive approach to sentencing would limit the evidence a jury could consider to that which relates to the culpability of and harm caused by the offender, the concept of absolute proportionality encompasses both sets of considerations.
specific jury determinations based in part on the offender’s mitigating evidence.

B. The Relative Proportionality Threshold

While the categorical exclusions, in theory, employ a consistent approach, the application of absolute proportionality by juries can create disparate results.\textsuperscript{126} Different juries may have different conceptions of what punishment is excessive for a particular crime or defendant, creating different outcomes in relatively similar cases.\textsuperscript{127} Further, different juries may place different weight on various mitigating circumstances, leading to discrepancies in outcomes.\textsuperscript{128} The application of relative proportionality, particularly \textit{after} jury determinations, can correct such discrepancies.

1. The Requirement of Narrowing the Class of Murderers

As explained above, \textit{Furman} established the requirement of narrowing the class of murderers eligible for the death penalty.\textsuperscript{129} This concept rested on the view that not all homicides warranted a death sentence.\textsuperscript{130} Narrowing, then, sought to achieve relative proportionality, such that similar homicide offenders received similar punishments.\textsuperscript{131} Unlike the concept of absolute

\textsuperscript{126} Three Supreme Court justices—Powell, Blackmun, and Stevens—have repudiated the use of the death penalty entirely in part because of a view that the Court and the state legislatures have not fixed the disparity problems identified in \textit{Furman} and will not ever be able to do so. See William W. Berry III, \textit{Repudiating Death}, 101 J. CRIM. L. & CRIMINOLOGY (forthcoming 2011).


\textsuperscript{128} Empirical research has also demonstrated the propensity of juries to place weight on impermissible factors, such as the race of the victim. See, e.g., David Baldus, George Woodworth and Charles A. Pulaski, Jr., \textit{Equal Justice and the Death Penalty: A Legal and Empirical Analysis} (1990); David Baldus, George Woodworth & Charles A. Pulaski, Jr., \textit{Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience}, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983); Raymond Paternoster, Robert Brame & Sarah Bacon, \textit{The Death Penalty: America’s Experiment with Capital Punishment} 208 (2008).

\textsuperscript{129} See discussion \textit{supra} notes 29-38.

\textsuperscript{130} Id.

\textsuperscript{131} Id.
proportionality, the goal of relative proportionality is simply to treat “like cases” alike, with less concern for overall 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 the case to other “similar” cases.

In response to the Court’s decision in Furman, states created a minimum threshold for relative proportionality in the form of aggravating circumstances. The requirement of proving 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. Thus, aggravating factors separate death eligible cases from non-capital cases based on various categories of factors, and not in light of a broader theoretical conception.

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 available cases through statutory categories. As explained by Justice Scalia, though, this narrowing is insufficient to address the disparities created through the factual analysis required by Woodson and Lockett.

Requiring meaningful appellate review of jury verdicts through the lens of relative proportionality provides a way to eliminate disparities in capital cases. Although not constitutionally required, many states have automatic appeals to the state supreme court, mandating that the court engage in “proportionality review.” This proportionality review requires 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. When the death sentence is not consistent, the case is disproportionate and the court reduces the death sentence to life without parole.

---

132 See discussion supra notes 29-38.
133 Id.
134 See supra note 40.
135 The lack of specificity and/or catchall nature of some aggravating factors raise the question as to whether such factors really achieve much narrowing at all. See infra note 137 (citing cases that address the sufficiency of various open-ended aggravating factors).
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. To avoid creating disparity by allowing the jury to consider individual mitigating facts, the relative proportionality inquiry should take place after the absolute proportionality inquiry. The result is the cure of any disparity caused by the consideration of mitigating evidence.

IV. PROPORTIONALITY AS THE UNIFYING PRINCIPLE

This model of proportionality connects the basic ideals of the Eighth Amendment: prohibition of “cruel” punishments (absolute proportionality) and “unusual” punishments (relative proportionality). Importantly, the model unifies the competing lines of jurisprudence while encouraging a stronger application of both lines of cases. Further, the model is consistent with both the purposes of the Eighth Amendment and the Court’s Eighth Amendment doctrine. In light of these reasons, as explained below, this article concludes that the Court should adopt the proportionality model as the sole basis for determining whether a death sentence under the Eighth Amendment is acceptable.

A. The Unifying Effects of Promulgating Proportionality

There are two primary unifying effects of adopting the model described herein. First, this approach resolves the conflict between the Furman-Gregg line of cases and the Woodson-Lockett line of cases, allowing for narrowed jury discretion and consideration of individual circumstances. Instead of the Woodson-Lockett approach, expanding the inconsistency in outcomes, the subsequent Furman-Gregg approach ensures an additional narrowing of the class of murderers to achieve consistent outcomes.

Second, the proposed model mandates a more robust application of the Eighth Amendment. By focusing the Court on the concept of proportionality, the model creates the possibility of a more effective Eighth Amendment.

1. A Resolution to the Walton Conflict

At its heart, the Walton problem is that the individualized determination inquiry (Woodson-Lockett) undoes the progress achieved by the
creation of standards (*Furman-Gregg*). By asking the relative proportionality question *first* as a way to generally narrow the class of offenders eligible for the death penalty, determining whether a particular punishment is cruel (or absolutely disproportionate) for a particular offender, given his particular mitigating circumstances, creates the potential for disparity.

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

Thus, the two lines complement one another. The *Woodson-Lockett* approach narrows the class of individuals eligible for the death penalty by eliminating “cruel” sentences, while the *Furman-Gregg* approach further narrows the class of individuals eligible for the death penalty by eliminating “unusual” outcomes.

2. A More Effective Eighth Amendment

The second effect of applying the 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 *Furman*: narrowing the class of murderers through aggravating factors, and conducting meaningful appellate review of cases.

A survey of aggravating circumstances 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.\(^{137}\) 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, elected official, etc.),

and circumstances surrounding the crime (felony murder).

As a result, the narrowing that occurs may not be that significant because of the many different (and disparate) avenues available. Therefore, the volume of possible aggravating factors makes it possible to charge most murders as capital crimes. The Court has even affirmed the use of vague catchall factors such as “especially heinous, atrocious, or cruel,” where the state supreme court has provided some limitation to the application of that phrase.

In practice, courts do not engage in proportionality review in a robust way. In fact, in some states, no sentence has ever been disproportionate, and such findings have been quite rare. 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. Such an approach effectively eliminates the possibility for any legitimate comparison or analysis. Justice Stevens’ dissent to the denial of certiorari in Walker v. Georgia emphasized this shortcoming in Georgia:

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

---

138 See supra note 138 and accompanying text.
142 BALDUS, supra note 129; 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 (2002).
sentences in contravention of the Eighth Amendment.\textsuperscript{143}

The proportionality model, unlike the Court’s current approach, would require a more careful examination of relative proportionality, encouraging the Court to address the shortcomings of the states in applying these principles.\textsuperscript{144}

\textbf{B. Proportionality is consistent with Eighth Amendment purposes}

In addition to resolving the conflict between the \textit{Furman-Gregg} line of cases and the \textit{Woodson-Lockett} line of cases, the proportionality approach is inherently consistent with the purposes of the Eighth Amendment. When considering these purposes, it is important to examine both the original purposes (as well as can be determined) and the doctrinal purposes, as identified by scholars and the Supreme Court.

\textbf{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, but instead prohibited punishments that were excessive in relation to the crime.\textsuperscript{145} 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.\textsuperscript{146}

In addition, 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.”\textsuperscript{147} Further supporting Granucci’s interpretation, Sir William Blackstone used the word


\textsuperscript{144} The Court would not have to overrule \textit{Pulley v. Harris} to achieve this result—it would just have to mandate that meaningful appellate review consider the relative proportionality of the case at issue to cases in the jurisdiction. \textit{See also} Bidish Sarma, \textit{Furman’s Resurrection: Proportionality Review and the Court’s Second Chance to Fulfill Furman’s Promise}, 2009 CARDOZO L. REV. DE NOVO 238.


\textsuperscript{146} \textit{Id.}

\textsuperscript{147} \textit{Id.} at 860.
“cruel” as a synonym for severe or excessive when describing the problem of “punishments of unreasonable severity.” 148

The research of Professor John Stinneford further confirms the importance of the concept of proportionality to the original understanding of the Eighth Amendment.149 He has argued that the original meaning of the Eighth Amendment term “cruel” refers to punishments that have not had “long usage.”150 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.151 This view likewise supports the idea that proportionality review—an encapsulation of the idea of relative proportionality—is consistent with the original purposes of the Eighth Amendment.152

2. Doctrinal Purposes

The Court’s early Eighth Amendment jurisprudence involved two non-capital cases, Weems v. United States153 and Trop v. Dulles,154 which defined the Court’s understanding of the purposes of the Eighth Amendment. Citing Weems, the Court in Trop explained that cruel and unusual punishments were those which were “degrading in their severity” (cruel) and “wantonly imposed” (unusual).155 Supreme Court Justice Arthur Goldberg’s dissent in Rudolph v. Alabama156 advocated using these purposes to create a “purposive

148 Granucci, supra note 145, at 860.
150 See Original Meaning, supra note 149.
151 Rethinking Proportionality, supra note 149. Stinneford does limit his definition of proportionality to retributive purposes, but as demonstrated above, utilitarian approaches allow for such considerations as well.
152 Rethinking Proportionality, supra note 149.
155 Id. at 100. For a discussion of whether the Eighth Amendment requires punishments to be both cruel and unusual, see 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).
test of constitutionality.”\textsuperscript{157} Goldberg’s test framed these purposes in terms of proportionality, finding a punishment in violation of the Eighth Amendment 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”\textsuperscript{158} unless a state could demonstrate that such punishment was not excessively severe.\textsuperscript{159}

a. Limiting “Cruel” (Absolutely Disproportionate) Punishments

The Court in \textit{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 was one that could evolve over time.\textsuperscript{160}

The trial court sentenced Weems to fifteen years of “hard and painful labor” in ankle chains for the falsification of a public record in the Philippines Territory.\textsuperscript{161} The Court held that the sentence was unconstitutional because the punishment was cruel and unusual in relation to the crime committed. Comparing the crime of Weems (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 Supreme Court held that the sentence prescribed by the statute was disproportionate—the sentence for the crime committed was unduly excessive and therefore disallowed in all situations.

In addition to establishing that the Eighth Amendment prohibited certain punishments for certain crimes when the punishment was disproportionate to the crime, the \textit{Weems} Court established that the concept of


\textsuperscript{158} Goldberg, supra note 165, at 1794.

\textsuperscript{159} Id.

\textsuperscript{160} Weems v. United States, 217 U.S. 349 (1910).

\textsuperscript{161} 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.
cruel and unusual punishments was not a static one. In other words, the Court could, as it saw fit over time, determine that certain punishments were disproportionate (and thus unconstitutionally excessive) for certain crimes, even if such punishments had historically 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.\(^{162}\)

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 v. Dulles*, decided almost fifty years later, the U.S. Supreme Court broadened these principles in considering whether the punishment of expatriation (loss of United States citizenship) for the crime of wartime desertion constituted cruel and unusual punishment in violation of the Eighth Amendment.\(^{163}\) As in *Weems*, the Supreme Court held that the punishment was unconstitutionally severe for the crime committed.\(^{164}\) While recognizing that this punishment had not been historically deemed absolutely disproportionate to the crime committed, the Court recognized that “the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.”\(^{165}\)

The concept of absolute proportionality described herein is identical to the concept advocated in both *Weems* and *Trop*. As a result, the application

\(^{162}\) *Weems*, 217 U.S. at 373.


\(^{164}\) *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.*

\(^{165}\) *Id.* at 101.
of the concept of absolute proportionality facilitates the achievement of the goal of eliminating cruel punishments.

b. Limiting “Unusual” (Relatively Disproportionate) Punishments

In addition to prohibiting the punishments imposed on the grounds of excessiveness, the Court in both *Weems* and *Trop* prohibited a sentence that was unusual, or rarely imposed. In *Weems*, the Court found the sentence “unusual in its character” because the United States did not use the sentence of *cadena temporal* with any frequency. In *Trop*, the Court emphasized the same with respect to revocation of citizenship in the United States, 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.”

The idea here provides a basis for the concept of relative proportionality—excluding punishments for particular cases given the infrequency of the use of the punishment generally. The Courts in *Furman* and *Gregg* took this concept one step further, advocating to exclude punishments in given cases based on the rarity that such punishments were given in similar cases. Notably, several justices in *Furman* emphasized the rarity of the use of the death penalty as a reason for abolishing it.

In sum, the concept of relative proportionality, as with absolute proportionality, is congruent with the Eighth Amendment purpose of eliminating unusual sentences—sentences that are rarely used.

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 seen below, aspects of absolute and relative proportionality have, in many ways, driven the Court’s application of the Eighth Amendment in capital cases.

---

166 *Weems*, 217 U.S. at 381; *Trop*, 356 U.S. at 101-02.
168 *Id.* at 381.
170 See discussion *supra*, Part I.A.
171 See, e.g., *Furman*, 408 U.S. at 293 (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.”). See discussion *supra*, Part I.A.
1. 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.* When applying the evolving standards of decency concept from *Trop,* the Supreme Court has articulated two standards to aid in determining 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.” Second, the Court applies its own subjective judgment to determine whether to follow the prevailing trend of its objective indicia.

Using this analysis, the Court has held that the death penalty is an absolutely disproportionate penalty for the rape of an adult (with no...
killing),\textsuperscript{175} for juveniles (under eighteen at the time of the commission of the crime),\textsuperscript{176} for mentally retarded individuals,\textsuperscript{177} for robbery where the participant had no intent to kill and did not kill,\textsuperscript{178} and, most recently, for the rape of a child.\textsuperscript{179} Thus, the Court has increasingly focused, in recent years, on factual characteristics of the offender or the offense in eliminating offenders from death-eligibility.

The decreasing number of capital sentences in recent years demonstrates that juries are increasingly examining such mitigating characteristics in deciding whether to apply the death penalty.\textsuperscript{180} 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.\textsuperscript{181}

2. Relative Proportionality as the Goal of General Guiding Principles

One question remained open after the Court’s decision in \textit{Gregg}: what constituted 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. \textit{If a time comes when juries 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.}\textsuperscript{182}

Justice Stewart’s view of relative disproportionality, then, seemed to view comparative sentence review as a safeguard only against the lightning-strike type of aberrant death sentence that concerned him in \textit{Furman}.\textsuperscript{183}

\textsuperscript{176} Atkins v. Virginia, 536 U.S. 304 (2002).
\textsuperscript{177} Roper v. Simmons, 543 U.S. 551 (2005).
\textsuperscript{180} See \textit{DEATH PENALTY INFO. CTR.}, supra note ___.
\textsuperscript{181} See Berry, supra note ___ [Ariz. L. Rev.]
\textsuperscript{182} Gregg, 428 U.S. at 206 (emphasis added).
\textsuperscript{183} \textit{Furman}, 408 U.S. at 309 (Stewart, J., concurring). See David Baldus et al., \textit{Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience}, 74 J. CRIM.
By contrast, Justice White, as indicated in his concurring opinion in Gregg, conceptualized relative proportionality more expansively.\textsuperscript{184} As he indicated in Furman, White believed that the constitutional flaw was not randomness, but under-utility.\textsuperscript{185} What made a particular death sentence cruel and unusual was the rarity of similar cases receiving the same sentence. His approach relied on a view that deterrence justified capital punishment; therefore, where the frequency of death sentences in an identifiable class is 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 conceive the 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) remains an important consideration in the application of the Eighth Amendment.

CONCLUSION

As recently as 2008 (in Kennedy), the Supreme Court has recognized the need for a unifying principle in its Eighth Amendment jurisprudence, particularly given the two competing aims—eliminating arbitrariness and making individualized sentencing determinations—of the Furman-Gregg line and the Woodson-Lockett line. This article offers such a principle—proportionality—that encompasses both these competing goals in its conceptions of absolute and relative proportionality. Further, if applied as proposed by the model, proportionality makes the competing concepts complimentary, 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

---

\textsuperscript{184} Gregg, 428 U.S. at 222.

\textsuperscript{185} Furman, 408 U.S. at 312 (White, J., concurring).
death penalty, 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 results in other cases). Furman and Woodson articulate important Eighth Amendment values that both warrant application in order to safeguard against arbitrariness and rule-based injustice, and this model provides a framework to achieve both goals.

Thus, this article has sought to achieve several purposes. First, the article has attempted to highlight the continuing problem created by the current application of the Furman-Gregg and Woodson-Lockett doctrines. Second, this article has provided a model for applying the doctrines in a manner that eliminates their apparent inconsistency. Finally, this article has attempted to explain why such an approach is both consistent with the purposes of the Eighth Amendment and with current Eighth Amendment doctrine.