ARTICLES

COMPARATIVE PROPORTIONALITY REVIEWS RECONCEPTUALIZED: CATEGORIZING MITIGATION AND SATISFYING THE EIGHTH AMENDMENT IN THE DEATH PENALTY

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INTRODUCTION

An element of precariousness pervades the sentencing decisions juries make in death penalty cases. Although the principle of being judged by one's peers as a reflection of societal judgment is a good one, variations in jurors' experiences, exposures, and inclinations can cause juries to differ greatly in their decisions and their ability to reflect overarching social norms. Though most criminal defendants face the risk of unusually harsh sentences, the death penalty requires greater scrutiny because the consequences are irreparable.[1]

According to the Supreme Court, the constitutional requirements imposed by the Eighth Amendment prohibition on cruel and unusual punishment evolve as society's moral sentiments regarding punishment and respect for human dignity evolve.[2] Thus application of the death penalty derives its legitimacy from present-day standards.[3] Should the day come when society's moral sentiments indicate that execution is no longer in compliance with our respect for human dignity, then the death penalty will cease to be constitutional. Until that day, individual defendants should be protected from the possibility of a jury judgment that runs afoul of general moral standards.

Sentences fail to represent prevalent sentiments not only when they are overtly aberrant or unreasonable, but also when they do not comport with current judgments about the kind and level of culpability that deserves death. While individual juries may not always approximate the moral standards of our society, jury judgments overall do provide such an approximation.[4] In fact, the Court has identified jury judgments as a key indicator of current social sentiments.[5]

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1. Lockett v. Ohio, 438 U.S. 586, 605 (1978).
2. *See* Woodson v. North Carolina, 428 U.S. 280, 288 (1976) (plurality opinion).
3. *See generally* Furman v. Georgia, 408 U.S. 238 (1972) (per curiam).
4. *See* Craig Haney, *Commonsense Justice and Capital Punishment: Problematizing the*

Procedures should exist to monitor these general sentiments and, in the event that a sentence falls beyond the pale, judges should correct the sentence so that defendants are not victimized by procedural imperfection. A procedure is needed to scrutinize and verify the legitimacy of each defendant's sentence in order to ensure that it fits within one of the few classes for which the death penalty is reserved. This procedure should determine that *this* defendant deserves to be executed according to our society's current conceptions of that which justifies the taking of human life.

This paper proposes the use of revised comparative proportionality reviews to fulfill this procedural necessity. Comparative proportionality reviews require the judge to compare aspects of the defendant's case to other cases in the jurisdiction and make a determination as to whether the sentence is proportional in relation to those sentences. Some state appellate courts currently conduct this type of review.[6] I believe these reviews can provide a scheme that satisfies Eighth Amendment prohibition of cruel and unusual punishment. Specifically, comparative proportionality reviews can accomplish two goals: careful individualization in sentencing, and assurance that death sentences take into account contemporary conceptions of human dignity as reflected in evolving determinations of culpability. However, a crucial revision of comparative proportionality reviews must take place before they fulfill these goals. This paper critiques the lack of rigor and the simplicity with which comparative proportionality reviews often are conducted, leading to their current ineffectiveness as a vital safeguard. Through this critique, I try to indicate the standards and considerations that should take place in this form of review.

Because reviews have been conducted with few guidelines and a great deal of judicial discretion, it has been difficult to determine whether they take into account all the information needed to make an effective comparison with other defendants. Since the application of the death penalty must evolve with moral standards, comparative proportionality reviews should be designed to reflect modern standards for the determination of culpability.

A look at the mitigation considered at the penalty phase of a trial demonstrates that current standards of culpability are informed by scientific advancements in psychology and other disciplines that study the formation of identity.[7] Mitigation, as presented to jurors in the penalty phase, indicates that we view

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"Will of the People," 3 PSYCH. PUB. POL. & L. 303, 332 (1997) (noting that judges have relied on jury judgments and legislators in determining general community sentiment).

5. *Woodson*, 428 U.S. at 288.

6. Those courts include: Connecticut (CONN. GEN. STAT. ANN. § 53a-46(b)(s) (West 1994)); Delaware (DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (Michie 1995)); Idaho (IDAHO CODE § 19-2827(c)(3) (1987)); Kentucky (KY. REV. STAT. ANN. § 532.075 (Michie 1990)).

7. Death penalty trials are separated into two phases: the guilt and penalty phases. As one would expect, in the guilt phase, the jury determines if the defendant is guilty, and in the penalty phase, the jury determines whether or not the defendant will receive the death penalty or a lower sentence.

identity-shaping experiences as cumulative and interactive. However, comparative proportionality reviews as they currently exist do not allow for the presentation of mitigation in a way that takes into account a defendant's cumulative experiences. Instead, mitigation is evaluated as a series of factors. By transforming mitigation into factor form, comparative proportionality reviews endanger the authenticity of information presented about the defendant. The interactivity of life experiences and their cumulative effect, which modern psychology indicates is of the utmost importance in shaping an individual's experiences, psychological understanding emphasizes, are lost in the factor analysis.

In this paper, I explain why comparative proportionality reviews have failed to provide significant protections against arbitrary application of the death penalty despite their potential to provide a powerful means of fulfilling the Eighth Amendment principles recognized in a piecemeal manner by the Supreme Court. Achieving this potential requires substantial alterations in review methodology. Currently the review procedure allows judges to arbitrarily emphasize certain portions of evidence over others, presenting only part of the defendant's mitigation as the whole of the relevant mitigation. Thus the comparative analysis is distorted because it fails to perceive the significance of the defendant's mitigation in full and so fails to accurately assess the defendant's culpability. The original narrative of mitigation presented during the penalty phase by the defendant is the most comprehensive, accurate, and effective account of the mitigation relevant to determining his or her culpability. Creating a set of categories that recognize the entirety of mitigation presented at the guilt phase in original narrative form and deemed important by a defendant, while reflecting contemporary moral conceptions relevant to culpability, is the proper way to allow for such depth. Although Eighth Amendment principles concerning fair application of the death penalty have not been organized into a coherent whole, the disparate opinions articulated by the Court provide the groundwork for a commitment to substantive Eighth Amendment protections in the application of the death penalty.

I.
DEATH PENALTY JURISPRUDENCE: A DIVERGENCE OF PRINCIPLES

To understand how the principles found in the Eighth Amendment are linked to the potential emergence of comparative proportionality reviews as an appellate safeguard, we must first examine these principles more closely. Because I hope to show that comparative proportionality reviews should be central to a death penalty procedural scheme that accords with a constitutional standard, it is necessary to understand why these reviews have occupied such a marginal place until now and why their transformation is necessary for the creation of a constitutionally-sufficient set of safeguards.

The current procedures for applying the death penalty are rooted in *Furman v. Georgia*, a landmark case in which the Court declared the death penalty, as it was being applied, unconstitutional on Eighth Amendment grounds.[8] *Furman* led to a series of cases that began to articulate the Eighth Amendment's foundational principles and to explore Eighth Amendment requirements for death penalty procedures. Comparative proportionality reviews emerged as a central safeguard enacted by states in their efforts to comply with the Court's interpretation of the Eighth Amendment. However, the ineffectiveness of these reviews, and the eventual indication by the Supreme Court that these reviews were not required by the Eighth Amendment, led to their large-scale abandonment. This abandonment was detrimental to the ability of death penalty procedures to comply with the Eighth Amendment. Fortunately, however, as the Court explored the constitutionality of the death penalty, various Justices articulated several principles underlying the Eighth Amendment that provide guidance for determining the appropriate goals and structure of comparative proportionality reviews.

The Supreme Court held in *Furman* that the death penalty, as it was applied in the cases before it, violated the Eighth Amendment prohibition against cruel and unusual punishment.[9] Despite a variety of concerns expressed in five separate concurring opinions, all five members of the majority declared that the death penalty violated the Eighth Amendment because its application was arbitrary and potentially discriminatory.[10] As Justice White wrote, there was "no meaningful basis" for distinguishing between cases in which the death penalty was applied and those in which it was not.[11] Although the Justices disagreed as to whether the death penalty could ever satisfy the Eighth Amendment, all concurred that until it did, it could not be applied. Thus *Furman* "firmly placed the Court in the role of constitutional overseer of how the death penalty would be implemented in the future."[12]

In the cases that followed, the Court carved out the boundaries of compliance with the Eighth Amendment. Although the *Furman* opinion is greatly fragmented, it contains Eighth Amendment principles (in addition to the prohibition against arbitrariness) that Court majorities solidified in subsequent

8. *See generally Furman*, 408 U.S. at 238.

9. *Id.* at 239–40.

10. The majority wrote five separate concurring opinions. Justices Brennan and Marshall argued that the death penalty was per se unconstitutional. *Id.* at 306 (Brennan, J., concurring); *id.* at 374 (Marshall, J., concurring). Justices Douglas, Stewart, and White focused on the arbitrary application of the death penalty: Justice Douglas claimed that it was "pregnant with discrimination." *Id.* at 257 (Douglas, J., concurring); Justice Stewart remarked that it was "wantonly" and "freakishly" imposed. *Id.* at 310 (Stewart, J., concurring); Justice White said that there was "no meaningful basis for distinguishing the few cases in which [death was] imposed from the many cases in which it [was] not." *Id.* at 313 (White, J., concurring).

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

12. Scott Sundby, *The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L. REV. 1147, 1152 (1991).

cases. One such principle, explained in *Furman* by Justices Brennan and Marshall, is that punishment must comport with a respect for human dignity because such respect is at the core of the Eighth Amendment.[13]

As a second basic principle, Justices Brennan, Marshall, and Douglas held that the Eighth Amendment, by its very nature, draws its meaning from evolving moral standards of society.[14] As their opinions explained, the meaning of "cruel and unusual" punishment is not limited by the historical roots of the Amendment, but should be interpreted in light of current social standards.[15] As our society's attitudes and standards towards the infliction of punishment transform, so too will the requirements and conditions imposed by the Eighth Amendment.[16] This interpretive principle is crucial, as the notion of evolving moral standards is central to my own argument concerning comparative proportionality reviews.

Disparate state responses to the fragmented concerns of *Furman* compelled the Court to clarify its principles regarding the Eighth Amendment's procedural requirements in applying the death penalty. In their efforts to comply with the principles espoused by the Court, most states included appellate safeguards against the arbitrary imposition of jury sentences, usually in the form of an automatic appellate review of every trial for harmful error. In addition, many included some form of proportionality review as part of their appellate safeguards.[17] Some reviews required that the court consider traditional proportionality (that is, whether the sentences arose from bias, passion, or prejudice), while others tested the proportionality of sentences to offenses by comparing each defendant's life and crimes to the lives and crimes of others against whom the death penalty had been imposed.[18]

Rather than assuming that a death sentence was disproportionate, comparative proportionality reviews inquired whether imposition of the death penalty would be unacceptably disproportionate when compared to the punishment of individuals convicted of the same or similar crimes.[19] This type of review aspired to ensure consistency in the level of culpability of individuals who received the death penalty, reduce arbitrariness, and provide meaningful

13. *Furman*, 408 U.S. at 274 (Brennan, J., concurring) ("This principle [against arbitrariness] derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others."); *id.* at 316 (Marshall, J., concurring); Gregg v. Georgia, 428 U.S. 153, 182 (1976) (plurality opinion).

14. *Furman, 408 U.S.* at 329 (Marshall, J., concurring); *id.* at 242 (Douglas, J., concurring); *id.* at 278 (Brennan, J., concurring); *see id.* at 266 (Brennan, J., concurring).

15. *Furman*, 408 U.S. at 329 (Marshall, J., concurring); *id.* at 242 (Douglas, J., concurring); *id.* at 278 (Brennan, J., concurring); *see id.* at 266 (Brennan, J., concurring).

16. *See* Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (plurality opinion).

17. Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After* Pulley v. Harris, 70 U. COLO. L. REV. 813, 815–21 (1999).

18. *Id.* at 816.

19. David Baldus, *When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences*, 26 SETON HALL L. REV. 1582, 1586 (1996).

distinctions between those who received death and those who do not. If the reviewing court found that the culpability of the defendant in a particular case was significantly less than that of other defendants who had been sentenced to death, then the sentence could be reversed.

In addition to enacting appellate safeguards, states tried other approaches. Some states attempted to reduce arbitrariness at the trial level with mandatory death penalty statutes.[20] Others bifurcated the trial into guilt and penalty phases.[21] By bifurcating the trial, states hoped to separate out the issues needed to establish guilt from those considered in determining the sentence, namely aggravating and mitigating issues that affect culpability. In further efforts to reduce arbitrariness, many states defined "aggravating circumstances" and "mitigating circumstances" to guide the discretion of the jury.[22] By defining such circumstances, states attempted to guide the procedures through which the jury would decide on the sentence. Some states also used aggravating circumstances to narrow the class of death-eligible cases, requiring that at least one aggravating circumstance be present to justify consideration for the death penalty.

When the Supreme Court finally reviewed these improvements four years after *Furman*, in a consolidation of five cases, they further clarified Eighth Amendment principles.[23] Two of the states under consideration, Louisiana and North Carolina, had instituted mandatory death penalties for specified crimes. The Court struck down these statutes because they did not allow the individualized circumstances of the defendant to guide determinations of the appropriate sentence, as required by the policy of fundamental respect for human dignity underlying the Eighth Amendment.[24] The Court explained that because death is fundamentally different from any other penalty,[25] it should be subjected to a level of heightened reliability in the sentencing of each defendant.[26] Such reliability, the Court elaborated, required individualized considerations of each

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20. Twenty-two states enacted mandatory death penalties. John W. Poulos, *The Supreme Court, Capital Punishment and the Substantive Criminal Law: The Rise and Fall of Mandatory Capital Punishment*, 28 ARIZ. L. REV. 143, 199 n.461 & tbl.1 (1986).

21. White, *supra* note 17, at 815.

22. *Id.*

23. *See* Gregg v. Georgia, 428 U.S. 153 (1976) (plurality opinion); Proffitt v. Florida, 428 U.S. 242 (1976) (plurality opinion); Jurek v. Texas, 428 U.S. 262 (1976) (plurality opinion); Woodson, 428 U.S. 280 (1976) (plurality opinion); Roberts v. Louisiana, 428 U.S. 325 (1976) (plurality opinion).

24. *Woodson*, 428 U.S. at 304; *Roberts,* 428 U.S. at 334–35.

25. *Id. at* 303.

26. In *Woodson*, the Court held:

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305.

defendant, taking into account the "diverse frailties of human kind"[27] and reflecting "contemporary community values."[28] Because it was seen as an indicia of respect for human dignity, as the Eighth Amendment required, individualization in sentencing became a crucial requirement.

The Court also held that bifurcating the proceedings into guilt and penalty phases served to reduce arbitrariness and was useful for narrowing discretion while promoting individualization.[29] However, the Court determined that although narrowing discretion improved consistency, bifurcation alone was insufficient to guard against the possibility that juries might impose death in inappropriate cases.[30] The Court emphasized that meaningful and careful appellate review would provide an additional and significant check against arbitrary application[31] and would further assure that the imposition of the death penalty continued to develop in line with community sensibilities as captured in the composite judgments of juries.[32]

After holding that appellate review was constitutionally significant, the Supreme Court addressed the question of whether the Eighth Amendment mandated particular structural requirements for comparative proportionality reviews in the state appellate review process. *Gregg v. Georgia, Proffitt v. Florida,* and *Jurek v. Texas* were representative of the differing appellate structures established by various states. At one end of the spectrum, Georgia's statute required comparative proportionality review, while at the other end, Texas's statute did not require it, nor did the courts perform it.[33] Somewhere in between, Florida's statute did not address comparative proportionality reviews specifically but the courts performed such reviews as a practice.[34]

The Court upheld all three statutory schemes. While recognizing that comparative proportionality reviews served to substantially reduce the possibility that sentences would be applied in an arbitrary manner,[35] the Court asserted that meaningful appellate review, within a context of a variety of safeguards, could be sufficient to promote consistency of application.[36] However, because the Court upheld such disparate schemes, it was unclear whether the Eighth Amendment imposed specific requirements or certain

27. *Id.* at 304.
28. *Id.* at 295.
29. Gregg v. Georgia, 428 U.S. 153, 191–92 (1976) (plurality opinion).
30. *Id.* at 190–92.
31. *Id.* at 195.
32. *Id.* at 206.
33. *See Gregg,* 428 U.S. at 167; Proffitt v. Florida, 428 U.S. 250–51 (1976) (plurality opinion); *Jurek,* 428 U.S. 269–72 (1976) (plurality opinion).
34. *Proffitt,* 428 U.S. at 251.
35. *Gregg,* 428 U.S. at 206.
36. *Jurek,* 428 U.S. at 276.

combinations of safeguards on appellate review. Eight years later, in *Pulley v. Harris*,[37] the Court addressed this question.

In *Pulley,* the Court clarified that the Constitution's appellate requirements could be satisfied without comparative proportionality reviews.[38] Although the Court continued to assert that sentencing schemes needed checks on arbitrariness, it emphasized checks at the trial level.[39] *Pulley* did reassert, however, that the Constitution required "a means to promote the evenhanded, rational, and consistent imposition of death sentences."[40]

In line with its focus on trial level safeguards, the Court expanded the mitigation doctrine (the other body of safeguards meant to reduce arbitrariness) in *Lockett v. Ohio*.[41] The *Lockett* Court struck down state attempts to limit the mitigation information that juries were allowed to consider.[42] The Court concluded that individualized consideration in death penalty cases is a constitutional mandate and that the sentencer was compelled to hear all mitigating evidence presented by the defendant as to "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[43] According to the Court, the uniqueness of the death sentence compels the sentencer to individualize the defendant and determine that "death is the appropriate punishment in a *specific* case."[44] The death penalty's requirement for heightened reliability demands a focus on this individualization. In addition to insulating mitigating factors from limitation, the Court made clear that such factors would play a central role in assuring that the scales were tipped against death. Chief Justice Burger concluded that statutes limiting the mitigation evidence "create[d] the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[45]

Perhaps due to the Supreme Court's focus on trial level protections and its indication that comparative proportionality reviews were not constitutionally required, many states abandoned this form of review. At the time of *Pulley*, thirty states required the use of comparative proportionality reviews, either by statute or court decision.[46] Subsequently, six states repealed their statutes, others relaxed the analysis, and many with judicially-created reviews ceased to conduct them.[47]

37. Pulley v. Harris, 465 U.S. 37 (1984).
38. *Id.* at 45.
39. *Id.* at 51.
40. *Id.* at 49 (quoting *Jurek*, 428 U.S. at 276).
41. 438 U.S. 586 (1978).
42. *Id.* at 604–05.
43. *Id.*
44. *Id.* at 601 (quoting *Jurek*, 428 U.S. at 271–72) (emphasis added).
45. *Id.* at 605.
46. Pulley v. Harris, 465 U.S 37, 70 (1984) (Brennan, J., dissenting).
47. White, *supra* note 17, at 847–48.

Comparative proportionality reviews also may have been abandoned due to ineffectiveness. Courts that continued to perform comparative proportionality reviews began to demonstrate disillusionment with the process, recognizing that it was mechanical and ineffective in practice. One judge commented:

> If I thought proportionality reviews would add one iota of trustworthiness to the capital sentencing process, then I could well understand, if not agree with, the view that we should ignore our lack of authority to perform them. But any review of our cases, simple or exhaustive, belies the proposition that they do any good . . . . Our cases reveal that proportionality reviews are judicial afterthoughts, mere appendages to already lengthy opinions. They are performed in a non-adversarial setting, without any pretense at real science.[48]

Many legal scholars and professionals criticized comparative proportionality reviews as arbitrary and ineffective.[49] This disillusionment was warranted. David Baldus, a highly respected death penalty scholar, found that, through 1986, only thirty-one cases were vacated on grounds of excessiveness.[50] Commentators noted that the outcome of a comparative proportionality review often depended on the factors a particular judge chose to compare and the breadth of the comparison cases used.[51] Few efforts were made to reform or set standards for this type of review.

II.
COMPARATIVE PROPORTIONALITY REVIEWS

Despite the apparent ineffectiveness of comparative proportionality reviews and the focus on trial level protections, the Eighth Amendment principles that emerged post-*Furman* did indicate that some form of comparative review was necessary to avoid a constitutional violation. Indeed, the Eighth Amendment appears to require some form of appellate comparative scheme in order to infuse the system with respect for human dignity.

Various Justices have held that a respect for human dignity is at the core of the Eighth Amendment.[52] As natural outgrowths of this respect, the Supreme Court found that the Eighth Amendment requires non-arbitrary application and

48. Arizona v. Salazar, 844 P.2d. 566, 584–85 (Ariz. 1992) (Martone, J., specially concurring).

49. *See generally* Bruce Gilbert, *Comparative Proportionality Review: Will the Ends, Will the Means*, 18 SEATTLE U. L. REV. 593 (1995).

50. DAVID BALDUS, GEORGE WOODWORTH, & CHARLES A. PULASKI, EQUAL JUSTICE AND THE DEATH PENALTY 294 (1990).

51. *See generally id.* Gilbert also illustrates this point by referencing a Washington state case in which the majority, concurrence and dissent reached different conclusions on the proportionality of the case because each judge relied on different cases within the jurisdiction as a basis for their comparison, and then compares the cases in different ways. *See generally* Gilbert, *supra* note 49.

52. Furman v. Georgia, 408 U.S. 238, 272 (1972) (Brennan, J., concurring); Gregg v. Georgia, 428 U.S. 153, 182 (1976) (plurality opinion).

careful and rigorous individualization in determining the appropriate sentence for a defendant, as already discussed. These principles are closely connected: Respect for human dignity requires detailed and complex attention to the uniqueness of each individual and their particular circumstances and experiences in determining the appropriate sentence.[53] The principle of non-arbitrariness requires that, given this careful look at individual aspects of the defendant, a coherent basis for a death sentence exists. As the Court has explained, "Individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual is far more important than in non-capital cases."[54] The Court stressed the importance of mitigation in determining the appropriateness of the sentence, allowing the jury to consider any possible basis for a sentence less than death.

The final relevant principle in determining what sort of death penalty scheme is necessary in order to enact a system that respects human dignity is that the Eighth Amendment must draw meaning from evolving and maturing standards of decency and morality.[55] The Eighth Amendment may "acquire meaning as public opinion becomes enlightened by a humane justice."[56] Justice Brennan clarified this principle in his opinion in *Robinson v. California*, where on behalf of the Court, he held that infliction of punishment for narcotics addiction violated the Eighth Amendment given the contemporary knowledge that drug addiction is a disease, and thus, that addiction should not be made a criminal offense.[57] The Court has reiterated the importance of some mechanism to measure cultural values so that "[i]f a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death."[58] If evolving contemporary knowledge and community judgments determine that certain aspects of a defendant's character or background counsel against severe punishment, the Eighth Amendment requires appellate courts to consider those evolving standards.

These principles support two propositions that advocate for the use of comparative proportionality reviews in the death penalty scheme. I turn now to a consideration of these propositions.

Proposition I: Toward The Centrality of Comparative Proportionality Reviews

The principles gleaned from the Eighth Amendment demonstrate that revised comparative proportionality reviews could be a central mechanism in

53. *See* Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion).

54. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

55. *Furman*, 408 U.S. at 329 (Marshall, J., concurring); *id.* at 242 (Douglas, J., concurring); *Woodson*, 428 U.S. at 288–95.

56. *Gregg*, 428 U.S. at 171 (quoting Weems v. United States, 217 U.S. 349, 378 (1910)).

57. *Furman*, 408 U.S. at 278 (citing Robinson v. California, 370 U.S. 660 (1962)).

58. *Gregg*, 428 U.S. at 206; *see Woodson*, 428 U.S. at 305.

accomplishing the protections guaranteed in *Furman* and subsequent cases.

Because the Court increasingly applied Eighth Amendment principles at the trial level, most safeguards are applied when the defendant's case is considered in isolation. To avoid arbitrary application while effectively individualizing each defendant's histories requires that protections be put in place at various levels of sentencing and review of sentencing. Comparative proportionality review is uniquely capable of ensuring that protections are applied in the larger comparative context of the death penalty such that cases that do receive death are meaningfully distinguished from those that do not.[59]

A mechanism that places cases in a larger context of other cases is necessary. Traditionally the jury was intended as a sampling of general social sentiments to ensure that sentences reflect evolving societal standards.[60] As the Court has recognized, the very purpose of the jury in criminal trials is to guarantee that the penal system stays in touch with contemporary community values.[61] In *Woodson*, the majority identified two crucial indicators of evolving social standards: jury determinations and legislative enactments.[62] However, juries are limited by the fact that they make their decisions without reference to the larger body of cases. For courts to monitor the overall evolution of moral standards for death penalty application, a broader view of community determinations is imperative.[63] Since jurors must judge the defendants according to the jurors' own narrow experiences, a particular jury cannot be said to always reflect the general scientific and cultural determinations of society. This may lead to an inaccurate determination that the defendant belongs to the class of the "worst of the worst." Thus, each jury decision is a limited assessment that cannot take account of the wider context of the purpose and application of the death penalty.[64] Given the Eighth Amendment's mandate, the legislature and

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59. One commentator writes:

> The infrequency of modern day executions led the *Furman*-court to conclude that no rational basis existed for distinguishing the few who were sentenced to death from those who were not. Because comparative proportionality review is the one procedural safeguard that allows comparisons with other cases, it is uniquely capable of addressing this problem.

Gilbert, *supra* note 49, at 624.

60. *Gregg*, 428 U.S. at 181.

61. *Id.* at 190 ("Jury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" (quoting Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958))).

62. Woodson v. North Carolina, 428 U.S. 280, 293 (1976) (plurality opinion).

63. In *Furman*, Justice Brennan considered acceptance by contemporary society to be key to the interpretation of "excessive." *Furman*, 408 U.S. at 270–80 (Brennan, J., concurring).

64. White, *supra* note 17, at 867 (noting that "jurors make their decision in a vacuum, based only on the facts of the single case before them, which for most will undoubtedly be the 'worst' they have ever heard"). White points out that jurors are not aware of the decisions (prosecutorial and otherwise) that go into deciding to seek the death penalty in a particular case. *Id.*

judiciary have a responsibility to assure that laws are applied evenhandedly,[65] and the appellate court has a responsibility to provide the final safeguard that ensures that a capital defendant is one of the few whom we choose to execute.[66] As one commentator notes, "[j]uries determine the sentences in the cases before them without reference to sentences imposed in similar cases. Thus, dissimilar results are bound to occur. The task of assuring that the dissimilarities do not offend basic principles of fairness must fall on those with knowledge of sentences in similar cases, namely judges."[67]

Each individual jury cannot be said to reflect the contemporary standards of morality in society. Since the Eighth Amendment must be interpreted in light of evolving standards, comparative proportionality reviews can serve to generalize jury determinations within the appropriate standards for death penalty application. Evolving standards may originate from scientific knowledge or general social sentiments. In patterns of jury determinations, one would likely find attitudes towards culpability grounded in current common knowledge of psychology and medicine. Comparative proportionality reviews allow a judge to discern these evolving social understandings and to apply the Eighth Amendment in light of their implications for culpability.

Proposition II: Guidelines for Comparative Proportionality Review Application

Eighth Amendment principles themselves provide some guidelines for how a meaningful and effective review should be constructed and what its aims should be. The current method of review, applied by the majority of courts conducting comparative proportionality reviews and known as "the factor method," compares the facts and circumstances of the case being reviewed with the facts and circumstances of other similar cases.[68] The court isolates relevant aggravating and mitigating factors in the case at hand and in other similar cases and compares them to determine where the defendant's case falls. Various jurisdictions compare the cases in different ways. Some may use "family resemblances," a process by which the court compares cases with the greatest number of matching factors, while others may settle on an initial "common denominator" and compare cases based on that particular kind of similarity.[69] If

65. *Furman*, 408 U.S. at 256–57 (Douglas, J., concurring).

66. White, *supra* note 17, at 867 ("In effect, appellate judges are the lone bastion between a properly administered capital punishment scheme and one that is teeming with arbitrariness and discrimination.").

67. *Id.* at 816.

68. Baldus, *supra* note 19, at 1585.

69. *See* State v. Benn, 845 P.2d 289, 317–18 (Wash. 1993). In the common denominator method, a court may choose to organize the cases around one specific variable: for example, the way in which the victim was killed. Using this method, if the case involved strangulation, the judge would find all the strangulation cases in the jurisdiction and compare them to the case before her. In the family resemblance method, rather than placing importance on one significant variable, such as the method of killing, the judge would look for cases that had the greatest number of similar variables. In a case where a defendant had two victims, was eighteen when convicted, and

the defendant's case is not comparable to other cases in which the death penalty was given, then the court may decide whether, despite the divergence from the comparison cases, the factors in this case are sufficient to warrant a disproportionate result. In determining this, there are two approaches. The frequency approach evaluates the frequency with which death is imposed in the jurisdiction among cases comparable to the review case. If the frequency is high, the penalty of death is considered proportionate.[70] The more common "precedent-seeking" approach determines, on the basis of facts and criminal culpability in death cases, whether the reviewed case is more comparable to cases where life imprisonment was imposed or to cases where death was imposed.[71]

In determining how to apply comparative proportionality reviews, two inquiries must be made. The first inquiry investigates how the comparisons should occur. The following questions are central: What categories should be used? How should they be organized? How general should they be? To truly eliminate arbitrariness and create a closer and more meaningful review, comparisons must be done carefully and the level of divergence tolerated must be low. The second inquiry should determine the level of divergence that signals disproportionality. This inquiry requires a determination of how closely the comparison case should match other cases to find proportionality in sentencing. While this paper focuses on the first issue, the second is crucial to a meaningful review and will be treated briefly, after we examine the kind of comparison that should take place.

The Eighth Amendment informs the framework for comparative proportionality reviews—the organization of the reviews, the factors they analyze, and the standards they imposes must be in accordance with these principles. Where trends indicate that certain aspects of a case (such as youth, kind of crime, or mental capacity) call for reduced culpability, a mechanism should identify such cases and, in certain situations, excise them from the consideration of the death penalty.[72] As moral standards evolve, new factors may come to be relevant to culpability that have not been recognized as relevant in the past. The factors used in comparative proportionality reviews must be

showed evidence of mental illness, the judge would look for cases with similar circumstances and then draw parallels between them. Using this method, a court does not necessarily replicate the variables in the cases used for comparison; a court, for example, may treat as similar cases involving different kinds of mental illness. *See* State v. Cauthern, 967 S.W.2d 726, 740 (Tenn. 1998) (treating borderline personality disorder as similar to post-traumatic stress disorder in a proportionality review).

70. Baldus, *supra* note 19, at 1586.

71. *Id.*

72. Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality opinion) ("If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death."). For detailed commentary, see Patrick Hubbard, *"Reasonable Levels of Arbitrariness" in Death Sentencing Patterns: A Tragic Perspective on Capital Punishment*, 18 U.C. DAVIS L. REV. 1113, 1120 (1985).

continually reassessed. For example, contemporary standards may determine that certain kinds of mental illness reduce culpability and render the death penalty inappropriate. Comparative proportionality reviews provide the mechanism to identify such situations so that certain cases may be extracted from the class of cases considered for the death penalty. In situations where total extraction is unwarranted but a determination of reduced culpability is appropriate, comparative proportionality reviews may provide a procedural check to ensure the new standard is taken into account.[73]

The requirement of individualization and the demand that sentencers take into account the diverse frailties of mankind also affects the structure that comparative proportionality reviews take. Particular characteristics of the individual defendant must be analyzed and all factors that significantly affect culpability be included in the determination.[74] Acknowledging this, comparative proportionality reviews should look at the circumstances of the defendant's life and not just the crime itself. Identification of areas where society has begun to exhibit mercy or claim greater responsibility for the contexts and circumstances in which people are placed and which lead them to have difficulties in making correct and viable choices also should be considered.

As discussed, the judge is in the unique position of being able to glean the evolving sentiments of society from a large body of cases. The judge's determination presumably will reflect how society is coming to understand its relationship to crime and its responsibility in execution. Because comparative proportionality reviews allow the judge to compare jury sentences and the information upon which those sentences are based, determinations which also serve as evidence of general social sentiments, these reviews are an appropriate safeguard for Eighth Amendment demands. Without such an analysis, each sentence determination is made in isolation, making it difficult to distinguish between cases that receive death and those that do not. Although absolute evenhandedness is not required, the Court has indicated that if a time comes when society clearly has rejected the death penalty in certain circumstances, defendants in such circumstances should be excised from consideration for the death penalty.[75] Comparative proportionality reviews will reveal these societal standards of proportionality. Only the judge is in a position to observe and determine the societal trends that exist in the larger picture of the application of the death penalty.

The second inquiry is a determination of the proper level of divergence among cases. There has been much disagreement about the extent to which a defendant's case must diverge from similar cases to reasonably decide that the

73. David Baldus suggests that one of the purposes of comparative proportionality reviews is to allow "courts [to] ratify into law the emerging trends of . . . jury decision." Baldus, *supra* note 19, at 1598.

74. *Gregg*, 428 U.S. at 206.

75. *Id.*

sentence is meaningfully disproportionate and worthy of reduction. The level of disproportionality a court is willing to tolerate depends on its understanding of the purposes of comparative proportionality reviews, and the extent to which the Eighth Amendment requires arbitrariness to be reduced. Two schools of thought have formed. One asserts that comparative proportionality reviews need only guard against the possibility of an aberrant sentence that stands against clearly discernable norms.[76] The other asserts that comparative proportionality reviews should go further toward eliminating the arbitrary application of the death penalty by requiring a meaningful basis for distinguishing the defendant's case from the cases of those that did not receive a death sentence.[77] Proponents of this standard contend that in order to be in accordance with *Furman*, the "court must change the focus of comparative proportionality review from safeguarding the rare case when a jury decision is an aberration, to a means for protecting defendants from inequitable sentences."[78] One suggested approach for meeting this stricter standard is a requirement that the majority of cases similar to the defendant's result in death as opposed to simply requiring that the sentence not be an aberration. A similar but less demanding standard would require that only a few similar cases result in death for a finding that the sentence is proportionate.[79]

Eighth Amendment principles strongly support the application of a stricter standard that allows low levels of divergence in comparative proportionality reviews. In the context of the death penalty, an important function of appellate review is to ensure that the death penalty is applied non-arbitrarily, reliably and consistently.[80] The need to make sure death is appropriate in a specific case cannot be satisfied by eliminating occasional aberrations. Any safeguard must do more than identify clear aberrations.[81] Eighth Amendment principles are best satisfied where a close analysis of the validity of death as applied to this particular case in the context of other cases takes place.

If done well, comparative proportionality reviews can limit cases to a class of offenders whose specific situations can be meaningfully distinguished from

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76. Gilbert, *supra* note 49, at 624.

77. *Id.*

78. *Id.* at 625.

79. *See id.* at 624.

80. Furman v. Georgia, 408 U.S. 238, 256 (1972) (Stewart, J., concurring) (holding that the Eighth Amendment "require[s] judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups").

81. As one commentator notes:

> The 'majority' case, on the other hand, provides a meaningful basis for distinguishing between those who live and those who die. If a majority of similarly situated defendants receive the death sentence, the very fact that the defendant is among this majority provides the meaningful basis for his sentence. In other words, the defendant will not be placed in a situation where he is sentenced to death and five equally culpable defendants are not.

Gilbert, *supra* note 49, at 624.

other cases resulting in lesser punishments.[82] If they could successfully accomplish this, comparative proportionality reviews would clearly meet *Furman*'s demands.[83]

III.
WHY THE CURRENT FORM OF ANALYSIS IS INEFFECTIVE

A description of the comparative proportionality review process helps clarify the relevant issues. In *State v. Cauthern,* a review was conducted on direct appeal in a case where the defendant was sentenced to death for two murders committed during a burglary.[84] In his opinion, the judge identifies certain categories he deems relevant to the analysis of relative culpability. With regard to the victim, the judge's list of relevant factors include means and manner of death; as for the defendant, the factor list includes:

> "(1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race and gender; (3) the defendant's mental, emotional, or physical condition [at the time of the crime] . . . ; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of helplessness of the victims; and (8) the defendant's capacity for rehabilitation."[85]

The judge then fit the facts of Mr. Cauthern's case into these categories. In addition to considering various facts about the murder itself, he notes that Mr. Cauthern's was nineteen at the time of the crime and that he had no previous criminal record.[86]

By setting out these categories, the judge was able to limit the *kind* of mitigation that was considered and the *way* in which that mitigation would appear. Mr. Cauthern did present mitigating evidence at trial that he was married, that he had a son who needed him, and that he had been debilitatingly intoxicated at the time of the murder.[87] However, none of these mitigating elements were considered during the comparative proportionality review. Mr. Cauthern's family relations did not fit into any of the categories set forth by the judge, and Mr. Cauthern's state of intoxication apparently did not seem relevant to the judge in assessing his emotional and mental state of mind at the time of

82. Baldus, *supra* note 19, at 1588–89.

83. *See id.* at 1585 (noting that while *Furman* did not specify comparative proportionality review as a constitutional necessity, the Court expressed a clear commitment to comparative proportionality by invalidating death sentences in cases that cannot "be meaningfully distinguished, in terms of defendants' criminal culpability, from many other cases where lesser sentences are typically imposed.").

84. State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998).

85. *Id.* at 739.

86. *Id.* at 740.

87. State v. Cauthern, C.C.A. No. 02C01-9506-CC-00164, 1996 Tenn. Crim. App. LEXIS 747, at *63 (Tenn. Crim. App. Dec. 2, 1996).

the murder. Had Mr. Cauthern presented evidence regarding the child abuse he had been subjected to, it appears that such evidence would not have been considered because no category was provided that could take this evidence into account.

By way of these factors, the judge then determined proportionality by identifying similarities and differences between Mr. Cauthern's case and others in the jurisdiction. He compared Cauthern's case to others by listing similar crimes in which defendants had "extensive psychological proof offered in mitigation," "anti-social personality disorder," "borderline personality disorder," "post-traumatic stress disorder," had "been raped as a child," and had shown "evidence of good behavior in prison."[88] With each comparison case, the judge listed the similarity in the type of crime, the mitigating factors, and comments on the existence of a greater number of mitigating factors or aggravating factors. The judge focused on each element of mitigation and presented comparison cases that contained that element. For example, the judge declared the Mr. Cauthern's youth did not render the sentence disproportionate because three other youthful defendants had been sentenced to death despite varying mitigation factors.[89] Finally, the judge concluded that Ronnie Cauthern's sentence was not disproportionate in light of similar cases because they contained more mitigating factors or less aggravating factors and still resulted in death.[90]

This analysis of proportionality relies to a great extent on a judge's initial construction of categories and subsequent identification of factors. Were the judge to have made other decisions about which mitigation evidence was important, the analysis might have been different. For example, rather than referring to the various psychological diagnoses as self-contained pieces of mitigation that weigh in favor of a defendant, the judge may have been interested in how each diagnosis affects decision-making abilities. Were he to have weighed particular kinds of mitigation differently, a different conclusion might have been reached. He might have decided that Ronnie Cauthern's youth provided greater mitigation in determining culpability than factors such as various personality disorders. The judge's isolation of each of the factors, in place of an evaluation of all the factors as a whole, affects the analysis as well. The judge could have accepted that where relationships exist between factors, *i.e.* where a defendant was "raped as a child" *and* developed "anti-social personality disorder," the culpability of the defendant is altered. Or the judge could have determined that because Mr. Cauthern was youthful *and* had no prior criminal record, his situation was somehow different from those that either were youthful *or* had no prior criminal record. Any and all of these decisions might have altered the comparisons.

88. *Cauthern*, 967 S.W.2d at 739–42.
89. *Id.* at 740–41.
90. *Id.* at 741.

This case illustrates the power of categories in framing information. Anthony Amsterdam and Jerome Bruner define categories as a "set of things or creatures or events or actions (or whatever) treated as if they were, for the purposes at hand, similar or equivalent or somehow substitutable for each other."[91] Categories are an efficient way of organizing objects of thought (things we think about), thereby responding to our needs for pragmatic utility (for a particular project or purpose) and mental economy (for convenience in encountering the world).[92] They are, of course, crucial to our relationships with our outer and inner worlds. We would be hindered if every time we encountered objects anew, we had to reassess their relation to us. Given the importance of categories, it remains crucial to understand that once categories have been constructed, other relevant considerations may be excluded, such as alternative characterizations of the comparisons we saw above.[93]

More specifically, the act of categorizing imposes limits on what characteristics of objects we deem relevant in particular circumstances. For example, we can fit strawberries and oranges in the category of "fruit." In using this particular category, we privilege the fact that both objects are the reproductive bodies of a seed plant.[94] Categorization according to alternative characteristics (for example, foods with edible skins, or objects orange in color) would highlight different aspects of each entity. These other characteristics already are present but they are not privileged or made relevant when we look only at whether an object is or is not a fruit, and thus these other characteristics and categories can be hidden from an analysis. A comparison of similarities among categories is ultimately dependent upon "what dimension or axis of comparison one uses."[95] Similarities are emphasized because we deem them relevant in a particular situation.[96] In comparative proportionality reviews, the categories chosen and the factors used in the comparison tell particular stories about the defendant's culpability in relation to the larger class of death-sentenced and death-eligible individuals. Countless other stories could be told using the same information if a judge chose a different configuration of categories and isolated a different set of factors.

Because categories organize and alter the place of things in the world, categories tend to serve as "instruments of power."[97] They frame the position and association of entities by placing them in relationships of hierarchy, importance, and visibility. The choice to create a particular category, the determination of what fits into that category and how that category relates to

91. ANTHONY G. AMSTERDAM & JEROME BRUNER, MINDING THE LAW 20 (2000).
92. *Id.* at 22.
93. *Id.* at 20.
94. *See* WEBSTER'S NEW COLLEGIATE DICTIONARY 458 (1981) (defining "fruit").
95. AMSTERDAM & BRUNER, *supra* note 91, at 42.
96. *Id.* at 50.
97. *Id.* at 24.

other categories are all significant and potentially creative or destructive acts.[98] Such a choice ultimately frames how we perceive an issue and our relation to it. By placing mental objects and defining their relation to each other, categories frame, alter, and sometimes reduce. The danger, most relevant to any categorical analysis, is that once an entity has been categorized it becomes more difficult to see those elements of the entity that fall outside the boundaries of categorization.[99] For example, aspects of a defendant's character or circumstances are altered, emphasized, or eliminated by the categories the judge uses and how she assigns them in a factor analysis. Errors in analysis can occur when relevant elements remain hidden in categorical blind spots.

To expose how the power of categorization is being wielded and to determine whether particular systems of categories are truly serving their purpose, attention must be paid to the background story or understanding that directs the categorization. What a categorizer decides is relevant ultimately is based on the larger narrative or story he has constructed, as well as his values, principles and general understanding of the world.[100] The categorizer implicitly relies on a larger narrative or story that directs him in assigning membership to certain factors, organizing them into particular sets and determining the relationships between these sets.[101] This larger narrative or story is defined by the categorizer's background understanding of what is at stake, what the rules are, what is important, and what is irrelevant.[102]

In comparative proportionality review analysis, the judge's background assumptions and understandings set the stage for the categorization. The judge's understanding of what he is to accomplish through the review (identifying

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98. *See id.* at 49.

99. Professors Amsterdam and Bruner describe the problem as follows:

> Once we put a creature, thing, or situation in a category, we will attribute to it the features of that category and fail to see the features of it that don't fit. We will miss the opportunities that might have existed in all the alternative categories we did *not* use. We will see distinctions where there may be no differences and ignore differences because we fail to see distinctions.

Id.

100. *See id.* at 51.

101. *See id.* at 3–4.

102. Describing how background suppositions influence legal decision-making, Professors Amsterdam and Bruner write:

> The traditional supposition of the law has been that questions like these can be answered by examining the free-standing factual data selected on grounds of their logical pertinency. But increasingly we are coming to recognize that both the questions and the answers in such matters of 'fact' depend largely upon one's choice (considered or unconsidered) of some overall narrative as best describing *what happened* or *how the world works*. We now understand that stories are not just recipes for stringing together a set of 'hard facts'; that, in some profound, often puzzling way, stories *construct* the facts that comprise them. For this reason, much of human reality and its 'facts' are not merely recounted by narrative but *constituted* by it. To the extent that law is fact-contingent, it is inescapably rooted in narrative.

Id. at 111.

aberrations in sentences or ensuring a higher standard of reliability) and the judge's views about the kind of mitigation that affects culpability (whether age reduces responsibility significantly, whether mental impairments differ in their effect on culpability or simply serve as one point in the defendant's favor) are background assumptions that will change the outcome of the review. Sometimes what should be considered in making a determination of culpability will be heavily informed by the judge's understanding of what makes a person "bad" or "good." These assumptions are deep-seated and implicit.

Failure to pay attention to the background narrative directing the creation of categories can lead to dangerous results, particularly where the background narrative is widespread and historically common. Because categories come to replace the original entities for the purposes of a project, it becomes more difficult to see the originals in another way; the project's aim may begin to seem inextricably tied to a particular perspective. The categories become entrenched and begin to represent themselves as the only reasonable way of organizing those objects.[103] Moreover, certain kinds of categories may claim and appear to be objective or inherent to the object, rather than constructed according to particular purposes.[104] Once a particular category or method of categorization gains power and mainstream status, it can begin to seem natural.[105] When a constructed category or method of categorization is thought of as natural, people are often unable to envision anything but the representation offered.[106] Specifically, when a particular form of discourse or analysis becomes dominant, such naturalization or domestication occurs.[107] This naturalization and objectification can hide the fact that those categories are constructed from a particular conception of the way the world works and obfuscate the particular understanding behind the category.[108]

For this reason, categories must be continually challenged and tested.[109] We must ask whether categories continue to serve the purpose for which they

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103. *See id.* at 30.

104. On the dangers of categorization, Professors Amsterdam and Bruner add:

> Once we put a creature, thing, or situation in a category, we will attribute to it the features of that category and fail to see the features of it that don't fit. We will miss the opportunities that might have existed in all the alternative categories we did *not* use. We will see distinctions where there may be no differences and ignore differences because we fail to see distinctions.

Id. at 49.

105. *Id.* at 44.

106. *Id.* (Categories "too often conceal their limited potential usefulness and their contestable pedigree by posting as *real*, as in the world *eo ipso*, 'natural.'")

107. *See id.* at 122 ("[N]arrative has a way of domesticating the breakings themselves. Told often enough, any particular narrative version of norm-violation founds a tradition, becomes the kernel of a genre, of an accounting of 'how the world is.'").

108. *Id.* at 50.

109. Professors Amsterdam and Bruner describe how categories change:

> [C]ategories, together with the other canons and conventions of any culture, are perpetually under threat of excavation or sapping by those at its fringes, by those less

were created and whether alternative categories or relationships exist that would allow for more accurate conceptions of what is important. It is as imperative to take a close look at whether the appearance created by the categories corresponds with our sense of what is important and relevant. This is especially necessary when the stakes resting on categorization are high, as in the application of the death penalty.[110]

Sometimes, the particular way in which we conduct an analysis of information or the particular way in which we construct categories and apply them in relation to each other (such as comparative proportionality reviews) does not effectively address the important issues. A misguided analysis can distort or neutralize central issues. When aspects of an analysis have outlived their usefulness in a particular situation, a rethinking of the way the analysis is conducted and a reconceptualization of the issue itself is required. By exposing assumptions behind categories, we can begin to determine whether the analytical methods of comparative proportionality reviews are true to the purpose of the analysis itself.

In the case of the death penalty, the categories many judges often use may have outlived their usefulness because they are no longer representative of modern conceptions of morality and culpability. If the categories used in comparative proportionality reviews cease to reflect the "evolution of contemporary moral standards," then they fail to perform the work for which they were created. Instead, these categories achieve an illusion of comparison when in fact they render the comparison stagnant, preventing it from evolving in the way the Eighth Amendment requires.

Categories and the use of factors for those categories in the comparative proportionality reviews must be tested to determine whether they appropriately transmit the relevant mitigation for consideration in the comparisons of culpability. To test these categories for their usefulness, it is important to go beyond exposing the larger narrative upon which the judge based his categorizing decisions. It is also necessary to examine the basis upon which categories should be created to ensure that they reflect appropriate considerations. For these inquiries, we must return to the original mitigation narrative offered by the defendant in the penalty phase.

In the death penalty context, the judge must be guided by the mitigation factors the defendant chooses to present. Doing so will ensure that the judge complies with the expansive protections given to the defendant by the Eighth Amendment in the presentation of mitigation. Using the defendant's mitigation

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privileged, by the culture's parodists, its playwrights, its comics. Our First Rule of the category game was that categories are made, not found. Our Last Rule is intended to restate that first one. Neither habit nor culture has the final word on how we categorize things in our worlds.

Id. at 37.

110. *See id.* at 43.

will also allow the judge to comply with evolving societal determinations of the proper context for applying the death penalty.

At the penalty phase, substantive mitigation works through the power of stories told by and on behalf of the defendant to the jury. Thus, judges must reexamine the way in which they conduct their analysis so that it contains the most robust account of the defendant's life. By looking at the original presentation of mitigation as a blueprint, we expose what makes comparative proportionality reviews seem so ineffective. If this failure is not examined, the Supreme Court runs greater risk of presenting a false sense of circumspection in applications of the death penalty. In many ways, empty safeguards are worse than no safeguards at all because they lull us into believing that adequate safeguards are in place.

IV.
MITIGATION AS NARRATIVE IN THE PENALTY PHASE

The comparisons made in current comparative proportionality reviews do not allow for a sufficiently complex analysis of culpability. Comparative proportionality reviews must attend to more than an examination of the crimes for which society no longer wishes to execute or to particular conditions society is reluctant to ignore. Comparative proportionality reviews must also attend to the complex interrelations of sociological forces that are now recognized as providing a context for which society must accept some responsibility for horrific events.[111] In order to appropriately address these concerns, the judge's natural tendencies to organize the analysis around her assumptions and understanding should be limited and directed by the defendant's mitigation narrative. This narrative is presented for the very purpose of distinguishing the defendant from the group of those who should be executed.

Capturing faithfully the mitigation evidence presented in the penalty phase is a challenge to the comparative proportionality review process's insistence on comparing factors. Presentation of mitigation in the narrative form during the penalty phase, however, allows such evidence to be communicated in a way that accentuates its complexity and implications. The power of narrative has been appropriately recognized by scholars of narrative legal theory.[112] Narrative legal theory challenges the myth that law is comprised of logically ordered facts and

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111. Professor Haney describes the process of contextualizing crimes:

> Indeed, the broad sociological forces that constitute the larger context of the crime, the background and history of the defendant, and even the deeper psychological issues that help to account for why a particular crime was committed by a specific defendant, are complex questions that often elude even those charged with the responsibility of investigating and prosecuting the crime.

Craig Haney, *The Social Context of Capital Murder: Social Histories and the Logic of Mitigation,* 35 SANTA CLARA L. REV. 547, 551 (1995).

112. *See generally* Austin Sarat, *Narrative Strategy and Death Penalty Advocacy*, 31 HARV. C.R.-C.L. L. REV. 353 (1996).

processes guided solely by reason, and argues instead that every presentation of an argument is actually a story that relies implicitly on arguable assumptions.[113] Narrative legal theory had a revolutionary impact on the law because of its recognition of the power of narrative in legal argument and presentation. Categories, without narrative, can only poorly approximate this power of presentation.

Narrative, as opposed to categorizing, offers contextualized explanations of events and widens one's perception of the scope of those events.[114] Any event, such as a particular act of violence, has a story that is crucial to the understanding of that event. The power of narrative is its ability to frame an event in a way that contextual connections are revealed among previously unrelated or alternately related facts, events, and circumstances. We organize facts in specific ways through the telling of a particular story.[115] Underlying every story are implicit assumptions about the context in which its central events are placed.

In the case of mitigation, the aim of the narrative is to convey an understanding of the actions of the defendant and a framework around which juries or reviewing judges may evaluate those actions. They must attempt to understand capital violence through "an examination of the structure of the lives of those who commit it."[116] By requiring consideration of the background and character of the defendant, the Supreme Court has implicitly recognized the relevance of this narrative context in explaining the crime and in lessening culpability. Without narrative context, society can substitute the "heinousness of [a defendant's] crimes for the reality of their personhood."[117] This substitution is an affront to the basic conception of human dignity embodied in the Eighth Amendment. In the following sections, I examine the ways in which mitigatory narrative individualizes and makes comprehensible the defendant.

A. The Narrative of Mitigation in the Penalty Phase

In order to understand the use of mitigating and aggravating information in comparative proportionality reviews, it is useful to look at the narrative form in which information is presented in the penalty phase. As discussed earlier, the Court approved of Georgia's sentencing procedures in *Gregg* because the state focused "the jury's attention on particularized characteristics of the individual defendant."[118] In *Woodson*, the Court struck down North Carolina's mandatory

113. *See generally* AMSTERDAM & BRUNER, *supra* note 91.

114. *See id.* at 110–42.

115. *See id.* at 111 ("We now understand that stories are not just recipes for stringing together a set of 'hard facts'; that, in some profound, often puzzling way, stories *construct* the facts that comprise them.").

116. Haney, *supra* note 111, at 559.

117. *Id.* at 547.

118. Gregg v. Georgia, 428 U.S. 153, 206 (1976) (plurality opinion).

death penalty statute because it failed to allow "particularized consideration of relevant aspects of the character and record of each convicted defendant."[119] The Court in *Woodson* went on to assert that because death is different, the Constitution demanded that the process allow for the "possibility of compassionate or mitigating factors stemming from the *diverse frailties of humankind*."[120] Individualization in capital sentencing, the Court asserted, was the principle underlying the fundamental respect for humanity advanced by the Eighth Amendment.[121] Individualization was meant to reduce arbitrariness and allowed the Court to ensure that only the worst crimes and defendants received the death penalty.[122]

The way that aggravating factors are used in death penalty cases must be distinguished from the role of mitigation. Aggravating information has been limited to statutorily defined aspects of the crime that make the defendant eligible for the death penalty and, during the penalty phase, influence the jury's determination of whether or not to apply death.[123] The use of aggravating information responds to the constitutional requirement that the state narrow the class of defendants eligible for the death penalty.[124]

Mitigating information, on the other hand, becomes relevant during the actual sentencing phase, in which the sentencer may refrain from imposing the death penalty due to individualized consideration of the defendant's character and the circumstances of the crime.[125] The penalty phase serves to ensure reliability by taking into account all relevant information necessary to make a "reasoned moral response."[126] Mitigating information generally takes the form of a social history presentation in which the defense attempts to explain in narrative form the circumstances surrounding the defendant's life.[127] The goal of this narrative is "to place the defendant's life in a larger social context and, in

119. Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (plurality opinion).

120. *Id.* at 304 (emphasis added).

121. *Id.*

122. *See* Gregg, 428 U.S. at 182 ("Rather, the reluctance of juries in many cases to impose the sentence may well reflect the humane feeling that this most irrevocable of sanctions should be reserved for a small number of extreme cases.").

123. *See* Sundby, *supra* note 12, at 1163–64.

124. *Id.* at 1154.

125. Professor Sundby writes:

> *Furman*'s concern with unbridled discretion is satisfied through the specification of aggravating circumstances that operate to identify the pool of defendants upon whom the penalty can be imposed. Once the pool is identified and the sentencer is faced with the decision of whether 'to *decline to impose* the death sentence,' then full consideration of mitigating evidence must be allowed.

Id. at 1164.

126. *Id.* (quoting Penry v. Lynaugh, 492 U.S. 302, 328 (1989) (O'Connor, J., concurrence)) ("This stage enhances reliability by ensuring that the sentencer has considered all relevant factors pertaining to the individual's culpability and character before making its 'reasoned moral response.'").

127. Haney, *supra* note 111, at 547.

the final analysis, to reach conclusions about how someone who has had certain life experiences, been treated in particular ways, and experienced certain kinds of psychologically-important events has been shaped and influenced by them."[128]

Aggravating and mitigating information has often been identified as "factors" in the factor analysis. The Supreme Court presented this information as factors in order to counter the fear in *Furman* that the jury would have unbridled discretion.[129] These "factors," however, are simply meant to guide the jury and the state in identifying the relevant considerations that should be taken into account throughout the entire process of imposing death. Unfortunately, the characterization of such information as factors is somewhat misleading. While aggravating information is statutorily limited to a list of particular conditions, mitigating information is not limited to enumerated factors.[130] In fact, the Court has recognized a constitutional requirement that capital juries be given the fullest account possible of the life, background, and character of the defendant.[131] The limited usefulness of the factor framework, in relation to mitigating factors, is evident in the *Lockett* command that the jury be allowed to consider, without limitation by the state, any mitigating information that concerns the "defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[132] The Court in effect has barred all efforts to impose barriers—judicial, statutory, or procedural—on the consideration of mitigating evidence.[133]

Thus, it is important to recognize, as is evident in the Court's discussion, that the factor framework is simply a conceptual tool for *referring* to such relevant information. It should not be considered the goal or terminus of a trajectory of thought about the defendant. Rather, identifying and organizing mitigation in factor form is simply a way of getting at the more profound considerations at issue, the actual ways in which human behavior is affected by difficult and harming environments and experiences. As we will see, the inability to recognize mitigating factors as just a tool to reach the "diverse frailties of humankind" clouds the comparative proportionality review inquiry, thereby limiting the defendant's ability to present mitigation and have it considered as a basis for a lesser sentence.

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128. *Id.* at 561.

129. Gregg v. Georgia, 428 U.S. 153, 192 (1976) (plurality opinion).

130. Sundby, *supra* note 12, at 1163–64 (noting that the sentencer must consider all mitigating evidence to ensure all relevant factors have been considered).

131. Haney, *supra* note 111, at 559–60 ("Indeed, since the mid-1970s constitutional law has *required* that capital juries . . . must consider, among other things, the background and character of the defendant."); Lockett v. Ohio, 438 U.S. 586, 603 (1978) (quoting Williams v. New York, 337 U.S. 241, 247 (1949) (recognizing the sentencer needed the "fullest information possible concerning the defendant's life" in order to appropriately make the decision of death)).

132. Lockett, 438 U.S. at 604.

133. *See* Sundby, *supra* note 12, at 1160.

B. The Social History: The Reality of Mitigation

Social history information attempts to provide a "meaningful explanation for capital violence" by examining "the structure of the lives of those who commit it."[134] Social histories have become "the primary vehicle with which to correct the misinformed and badly skewed vision of the capital jury" that often occurs as a result of lack of experience or understanding.[135]

Social histories, supporting expert testimony, and affidavits provide the basis of mitigation presented in the penalty phase of a capital trial. A good defense attorney will interview the defendant's family, friends, teachers, cell-mates and anyone else who witnessed and participated in the defendant's development. Ideally an expert psychologist, psychiatrist, or other trained person will analyze the information collected. When done well, social histories integrate and digest all this information and present a narrative that attempts to account for the sociological, cultural, and psychological context in which the defendant and the crime came to be.[136]

In short, social histories are an attempt to rehumanize the defendant.[137] The social history counteracts arguments presented by the prosecutor that seek to demonize the defendant and conceive of him as a monster or animal, without social context and with sole responsibility for all of his experiences.[138] The characterization of the defendant offered by the prosecution allows us to accept capital punishment as an option by excluding the defendant "from the universe of morally protected entities."[139] Without the revelations of social and cultural context that social histories provide, we are forced to locate the cause of capital crime "exclusively within the offender," which ultimately makes it easier to justify imposition of the death penalty and allows us to "distance ourselves from any sense of responsibility for the roots of the problem itself."[140]

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134. Haney, *supra* note 111, at 558.

135. *See id.* at 559–60.

136. *See generally* Haney, *supra* note 111.

137. *See* James Doyle, *The Lawyer's Art: "Representation" in Capital Cases*, 8 YALE J.L. & HUMAN. 417, 433 (1996).

138. *See* Haney, *supra* note 111, at 558.

139. *Id.* at 558 (quoting Robin M. Williams, Jr., *Legitimate and Illegitimate Uses of Violence: A Review of Ideas and Evidence*, in VIOLENCE AND THE POLITICS OF RESEARCH 23, 34 (Willard Gaylin, Ruth Macklin & Tabitha M. Powledge, eds., 1981). Haney further explains:

> [L]ocating the causes of capital crime exclusively within the offender—whose evil must be distorted, exaggerated, and mythologized—not only makes it easier to kill them but also to distance ourselves from any sense of responsibility for the roots of the problem itself. If violent crime is the product of monstrous offenders, then our only responsibility is to find and eliminate them. On the other hand, social histories—because they connect individual violent behavior to the violence of social conditions—implicate us all in the crime problem.

Id. at 558.

140. *Id.*

Advocates and scholars have long recognized the practice and power of social history narratives in death penalty advocacy.[141] Death penalty defense lawyers acknowledge that the work during mitigation is mainly "crafting persuasive stories" that draw out the tragic and formative events in defendants' lives in order to explain the context that led up to the crime.[142] This act of storytelling resituates the defendant in the realm of community and compassion instead of leaving him to occupy the place of an incomprehensible other.[143]

As we saw before, because social histories, and thus mitigation, are stories that provide explanations for a life that "went wrong," they are considered narratives. As noted legal philosopher Robert Cover explains, a large part of the legal system takes place through and around efforts to make sense of violence and determine an appropriate response to a realm where "trouble," a disturbing out-of-the-ordinary event, has occurred.[144] Social histories are, in effect, stories organized around explaining what led to this trouble, such as a murder. Social histories provide a reason for the cause and effects of trouble, the disturbing rupture in a life brought about by the commission of a crime, a rupture that eventually can lead to the execution of life.

Through narrative, we can recognize that the "roots of violent behavior extend beyond the personality or character structure of those people who perform it, and connect historically to the brutalizing experiences they have commonly shared as well as the immediately precipitating situations in which violence transpires."[145] We are able to see the ways in which poverty, child abandonment and neglect, child abuse, maltreatment, violence, the costs of institutional failure, racial discrimination and oppression affect the lives and choices of an individual.[146] Further, narrative helps us see the hidden nature of adaptive and survival tactics such as drug abuse and gang membership.[147] All of this information can be lost, underemphasized, or distorted when presented in the form of factors in a comparative proportionality review. Because it requires a reduction of narrative into categories, factor analysis always runs the risk of failing to allow relevant and contextualized representations to surface.

In the realm of the death penalty, inclusive and holistic explanations for trouble are crucial: It is only when a juror understands and identifies with these disturbing and disjunctive narratives that she can see the defendant as human, as a person who has developed impoverished coping mechanisms and thus reacted in tragic but conceivable ways to the circumstances in which he found himself.

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141. *See, e.g.*, Sarat, *supra* note 112.

142. *Id.* at 367.

143. *See id.* at 370–71. Sarat also states that "the client must be given a unique human face and an inhuman act must be put into a distinctive narrative of human tragedy." *Id.* at 372.

144. ROBERT M. COVER, NARRATIVE, VIOLENCE AND THE LAW 203 (Martha Minow, Michael Ryan & Austin Sarat eds., 1992).

145. *See* Haney, *supra* note 111, at 561.

146. *Id.*

147. *Id.* at 582–89.

Because social history mitigation relies so heavily on contextual explanations of events and the relationships between them, replacing consideration of the narrative with the skeletal categorical outline is particularly threatening to the power of mitigation. The power of mitigation is not contained within the factors themselves but in their connections and cumulative effects on the defendant.[148] Judges' reliance upon categories and factors rather than social historical narratives therefore is problematic. It is solely within the judge's control to allow these nuances to come through in the analysis and do justice to the mitigating aspects of the case that may indicate that the death penalty would be inappropriate.

By excising the defendant from a narrative in the practice of comparative proportionality reviews and altering the significance of and relationships among his experiences, we deprive him of his one chance to have his sentence assessed in a scheme larger than individual experience. Defendants are being denied the most powerful tool at their disposal. Neglecting the narrative denies the defendant the only protection that will allow him to escape death: an appeal to our collective sense of human community and responsibility.

V.
A CASE STUDY: NARRATIVE ANALYSIS OF COMPARATIVE PROPORTIONALITY REVIEWS

Illustrating the way in which the social history narrative is transformed into factors allows the effects of that transformation—which include distortion and the exclusion of information—to become clearer. Let me give a fictitious example to ground the discussion. The following narrative serves as a model for a portion of a trial mitigation narrative, though it is presented in a condensed skeletal form of what could, and perhaps should, be told. Our fictional defendant, Antonio Menendez, was charged at the age of nineteen with a drug-related murder. Prior to that, he had been placed in a juvenile detention facility for three years due to a conviction for possession of an illegal substance. The prosecutor requested the death penalty, the jury found him guilty and, during the penalty phase, his defense team presented a social history. This social history was drafted by a cultural psychology expert and was supported by the testimony and affidavits of twenty individuals who provided relevant information about Antonio's life. The individuals included the defendant's family, his counselors at the juvenile detention facility, and teachers at the schools he attended in New York. The social history, as discussed, attempts to provide the cultural, social, and psychological context for the decisions that led to Antonio's conviction, as well as context for an accurate assessment of his culpability. The following fictional excerpt is what we might see in a social history. It explains some events that occurred during the formative years in Antonio's development:

148. *Id.* at 600.

As a result of his mother Laura's attempt to escape his abusive father, Antonio was forced to emigrate to New York City from Latin America at the age of eleven. During the first few weeks of his new life here, Antonio and Laura stayed in a hostel for transients. Here they were subjected to repeated break-ins, and Laura was constantly defending herself from sexual advances made by neighbors.

After a few weeks of searching, Laura was able to find work cleaning the homes of wealthy people. Some time after she began working, she was able to save enough money so that they could move into a tiny studio apartment. For awhile, Antonio stayed home so he could tend to the house and, to the extent he was able, have dinner ready when Laura came home late at night. When she found the time, Laura finally enrolled him in a public school. Immediately upon arrival in school, Antonio was placed in the back of the room by his overworked and frustrated teacher. He was the only student in the class who did not speak functional English. His teacher continued with her regular lesson plan while Antonio sat in the back of the room, day after day, without any comprehension of what was happening to him.

He was soon targeted in his neighborhood as the "new shy kid" and was harassed and assaulted regularly on his way home from school. Upset at her son's pleas to be allowed to stay at home, Laura briefly enrolled him in a private school. There his experience improved (now receiving some specialized attention) but Laura was not able to afford the tuition for long, so Antonio returned to public school. Shortly after his return, he began to get in fights with fellow students when they would tease and threaten him. He stopped attending school. He was soon approached by a group of boys in the neighborhood who offered to help him defend himself against the bullies that had targeted him. Antonio began socializing exclusively with this group of boys and participating in their activities, which included selling marijuana in his neighborhood. He was arrested for possession of marijuana at the age of twelve.

This narrative, which is similar to the narrative that would be presented to a jury, provides a story about Antonio's life and circumstances. A comparative proportionality review, on the other hand, compares the defendant's story by isolating from this narrative certain "relevant elements" of general evidence presented in the penalty phase by both sides—"emigration," "truancy," "gang membership," "troubled youth," "illegal activity," "single-parent household," "child abuse" and possibly, if Antonio has a particularly careful judge, "violent neighborhood," "immigrant isolation" and "abandonment by the school

system."[149] In current practice, even reference to these limited categories would be an unusually involved comparative proportionality review.

Currently, the judge must first determine which parts of the story she believes to be relevant to a comparison analysis. For example, she may think the abusive behavior of Antonio's father toward him and his mother is significant as an element of mitigation. This decision would be based on the judge's understanding of which elements of mitigation are relevant to an analysis of culpability. She would then place this event into a category that may either be dictated by statutory delineation of aggravating and mitigating circumstances (mitigating elements clearly identified as such by the defense at trial) or by her intuition and experience.[150] Either the background narrative or the assumptions upon which the judge operates would fill in whatever spaces are left by the legal directives provided by the state for judges conducting comparative proportionality reviews. These spaces are generally wide, as discretion has largely been left to the judge in this kind of review.

The judge follows this procedure for all mitigation that fits appropriately in the categories set forth at the beginning of the analysis, and then she proceeds to do the comparison. Depending on the practice in the jurisdiction, she would compare the cases in various ways. If the jurisdiction uses the family resemblance method, she would search for a general resemblance among cases.[151] Alternatively if the jurisdiction uses the common denominator method, she would settle on one particular factor, generally having to do with the crime (the method of killing, for example) and find cases that contain that factor and, if possible, have other similarities to Antonio's case as well.[152] Should the judge find that either some or the majority of defendants were still executed despite the fact that they were abused as children and had other relevant similarities, Antonio's sentence would probably be found proportionate.

As is clear, both methods leave ample room for judicial bias, and more importantly, for the judge's conception of what is relevant in the larger narrative to which she subscribes, to influence the result of analysis. If the judge has developed a sense that what distinguishes one case where the defendant receives a death sentence from one where the defendant does not is the extent to which

149. Review of a few proportionality reviews, as they are presently conducted, reveals that this is a highly idealized characterization of what is actually considered.

150. An example of the kinds of factor lists developed can be found in State v. Cauthern, 967 S.W.2d 726 (Tenn. 1998). The court identified "numerous factors for consideration regarding an offense, including: '(1) the means of death; (2) the manner of death (e.g. violent, tortuous, etc.); (3) the motivation for killing . . . ; (6) the absence or presence of premeditation.'" *Id.* at 739 (quoting State v. Bland, 958 S.W.2d 651, 667 (Tenn. 1997)). The court also identified factors related to a particular defendant: "(1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional, or physical condition." *Id.* at 739 (internal citations omitted).

151. Gilbert, *supra* note 49, at 606.

152. *See, e.g.*, State v. Benn, 845 P.2d 289, 317–18 (Wash. 1993) for an example of this method of comparison.

the victims were tortured, then he will organize the cases around this factor. As the judge's background narrative isolates mitigation in particular ways, the mitigation becomes limited by the factors into which it is molded.

There are various ways in which the process of categorization can lead to a distortion of the original narrative presented at trial. For example, the judge may fit the story of Antonio's father's abusive behavior into the category of "abusive childhood" or "parental violence." This particular event in Antonio's life is generalized and will appear indistinguishable from the infinite forms and extremities of child abuse. The particularity of Antonio's experience is lost, as well as the way in which the abuse he experienced as a child relates to the rest of his life experiences. All of this may seem obvious, but the significance of the loss may not be.

Not only can the specificity of mitigation be compromised, but the ability of mitigation to shed light on other parts of the defendant's life or actions can also be lost. For example, excising an element such as "gang membership" from its context can result in the dilution of much of its explanatory power. This element does not communicate that Antonio joined a gang to protect himself and to find a community that would accept him. The influences this community had on him and the difficulty he would have had trying to survive in such a neighborhood without a community is also cast aside. Most importantly, this event may be overlooked as an adaptive coping mechanism, as it has often been identified by social scientists.[153]

A similar fate of distortion may occur in the generalization of Antonio's mother's efforts to raise her child alone. By using "single-parent family" as a category of mitigation, one may ignore the effect being home alone all day had on Antonio, knowing his mother was working long hours so that she could support them. That his youth was centered around making dinner and cleaning the house for his mother is not emphasized nor considered. Thus from Antonio's story, all that is left are identifiable factors that can be generalized and compared. Because these experiences surround the central category of "single-parent family," that category is made significant. Moreover, it is these experiences that surround the fact that Antonio grew up in a single-parent household that the jury is compelled to take into account in mitigation and that often sways them to find for life.

It is not only the specifics of the child abuse that are crucial to the mitigation, but the way that experience illuminates other events in his life. In order to understand the implications of this, we can explore alternative characterizations that could have been made of the relevance of particular experiences in Antonio's life. As described above, narrative theory shows us that categorizing entities in a particular way often privileges certain elements to the exclusion of others. In the case of the child abuse experienced by Antonio, we

153. *See* Haney, *supra* note 111, at 586–90.

have an event that is important in ways neglected by a comparative proportionality review. The experience of child abuse may tell us something about the ways Antonio was introduced to violence at a young age, the responses he learned were necessary, the ways he came to fear particular kinds of people, the resentment he gained toward those who harmed his loved ones and finally about the ways he coped with his new environment and responded to the violence that permeated his neighborhood and school experience. Although these explanations do not create a formula for the construction of identity, they inform us about the construction of his particular identity.[154]

What becomes clear is that the connections between the defendant's experiences are of great relevance in determining their culpability. It is in fact this *family* of related experiences that distinguishes one defendant from another. Consequently, in comparative proportionality reviews, where the aim is drawing differences and similarities between defendants, the category of "single-parent family" must be given its individualized meaning according to a holistic and contextual description of Antonio's life. Often judges determine which relations to emphasize or whether to emphasize them at all, without necessarily having a clear sense of their overall fit within the defendant's life. For example, by placing a particular event in Antonio's life in a category and naming it "child abuse" or even "family violence," the judge may be unable to see the specific and actual connections within Antonio's life, even though she may draw certain inferences regarding the relations among these experiences.

To take this an important step further, the categorization scheme chosen by the judge may make another crucial aim of mitigation difficult—viewing experiences in their cumulative capacity. Because categorization provides for consideration of only one mitigating factor at a time, the method undermines the total impact of a destructive life history.[155] Factor analysis may lead the judge to ignore that "human lives are made up of numerous experiences that accumulate and interact with one another. What matters much more than the presence or absence of one or another specific damaging experience or condition of life is their additive impact and the way in which they interact with each other to compound the effect."[156] Considering these life conditions in isolation ignores that "when added up over the course of a life," they "form a whole that is greater than its individual parts."[157] By viewing a human life as composed of disparate rather than cumulative experiences, the role that each experience plays in the overall structure of the defendant's identity is not fully considered in the analysis of culpability.

In sum, when one excises elements of a story from the relationships and connections contained in that story, one is free to create a different set of

154. *See generally id.*
155. *See id.* at 600.
156. *Id.*
157. *Id.*

relationships among these elements and to characterize them anew. If one changes the relations among properties, one changes the meaning of those properties. Similarly, when a judge isolates elements from the defendant's life and extracts them from the relationships that exist among them, the meaning of these elements is altered. When these experiences are compared in isolation against other defendants' experiences, they come to represent only generalized symbolic residues of the original experience. The actual experience of "child abuse" is not necessarily equivalent for every defendant. Neither is the way in which that child abuse affected the defendant, informed their conception of their relationship to the world, or damaged their psyche. What is important is not the child abuse itself but the relationship of that child abuse within the context of the life.

Further content can be given to this idea by demonstrating clear manifestations of the misconceptions of mitigation created by the factor analysis. The view that mitigation is comprised of self–contained factors is reflected in a common description of the jury's weighing of aggravating and mitigating factors in determining the defendant's culpability. Various courts have appeared to proceed on the assumption "that the sentencer's decision to impose or not impose the death penalty is a logical, almost mathematical, evaluation of aggravating and mitigating evidence. The paradigm invoked is that of the scales of justice: the sentencer places the aggravating factors on one side and mitigating factors on the other and decides which outweighs the other."[158] However, the metaphor of "weighing" ignores the fact that the assessment of culpability also stems from contemporary standards of morality,[159] which have been regarded as the proper background for jury deliberations, and other "intangibles based on human responses outside the traditional realm of logic and reason."[160] The intensely problematic nature of this metaphor has been recognized.[161] Comparative proportionality review analysis suffers from similar difficulties as it is conducted through a process of weighing the relative mitigation and aggravation in one defendant's case with that of another defendant. It is partly from this mistaken conception of the use of mitigation in the penalty phase that the process of comparative proportionality review has derived its legitimacy and sense of efficiency.

Because comparative proportionality reviews fail to capture the elements of mitigation described above, there are two main Eighth Amendment protections that may be violated. First, the defendant's constitutional right to have any and all mitigating evidence taken into account in determining his culpability may be violated. Second, the Eighth Amendment principle that the death penalty should be applied in light of evolving moral judgments may be violated.

158. Sundby, *supra* note 12, at 1196 (internal citations omitted).

159. *See* California v. Brown, 479 U.S 538, 562–63 (1987) (Blackmun, J., dissenting).

160. Sundby, *supra* note 12, at 1198.

161. *See id.*

Regarding the first, the narrative form of mitigation that assesses the defendant's culpability in the penalty phase is the social history. As discussed, this form arose out of the Supreme Court's elaboration of the purpose of mitigation and has been widely recognized as the basis for meaningfully examining the defendant's life.[162] Thus, just as the defendant has the right in the penalty phase to have all mitigating evidence taken into account, so too the defendant has the right to have all mitigating evidence taken into account during the comparative proportionality review. As we saw before, it is only by assessing the defendant's relative culpability and thereby narrowing the class of defendants to a meaningfully distinguished group that the Court assists in eliminating arbitrariness. At the same time, such an assessment assures that the defendant is not sentenced to death on the basis of the jury's narrow and limited determination of whether he belongs to a class of people that deserve death.

The Constitution grants the defendant this right to present evidence in order to minimize "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty."[163] On appeal, in the act of doing comparative proportionality reviews, the Court does not determine which mitigating evidence is worth considering and which is not. That is, the format approved by the Supreme Court was not a reassessment of the value of mitigation, but an analysis of the same mitigation presented at trial in the larger context of other cases.[164] Thus, in a comparative proportionality review, the court is not free to recharacterize the mitigation but is compelled to honor fully the defendant's characterization of the mitigation relevant to a determination of their culpability.

With regard to the second possible violation, the judge must develop a method that allows contemporary values to come through in determining relative culpability. Although the jury is presumably the source of those contemporary values, the defendant should have the benefit of the wisdom of juries en masse. While the jury is the primary source for determining appropriate sentencing, the seriousness of the death penalty requires further safeguards to ensure the reliability of the sentence. The evolution of moral judgment may reveal that certain conditions of life context, interacting in particular ways, can prevent us from comfortably imposing the death penalty. These conditions may constitute a distinct class from the kinds of murders or defendants with particular attributes that are usually excluded from the death penalty.

Obviously, judicial discretion is implicitly central to the legal system. The aim here is not to eliminate that discretion but simply to provide guidelines for it. Because of the dangers of categorization, it is important that the judge be aware of his assumptions and biases in conducting the analysis. To assist the judge in conducting the analysis justly, several rules should be established. First of all,

162. *See* Haney, *supra* note 111, at 559.

163. Lockett v. Ohio, 438 U.S. 586, 605 (1978).

164. *See* Part II, *supra.*

because the defendant has an Eighth Amendment right to have all his mitigation go toward determining his culpability, the categories used in a proportionality review should allow for inclusion of all mitigation, including the relationships among events and life elements, their specificity, and their cumulative impact. The judge should not be free to determine how and in what capacity to take mitigation into account. Secondly, because the application of the death penalty is meant to evolve as contemporary standards of morality evolve, the analysis and categories should be allowed to reflect contemporary conceptions of culpability and responsibility. Identifying a psychological, cultural, or social influence is not enough; such influences must be provided with a vehicle to demonstrate the way they affected the defendant's actions and his understanding of these actions. Varying kinds of mental illness, for example, have different implications for the defendant's behavior. Influential conditions or events on the defendant's life should not be treated as interchangeable points that simply fall in favor of or against the defendant, but should be seen in the context of their larger relevance to the development of his identity.

Comparative proportionality reviews serve as a safeguard on the decision of the jury. While jurors are clearly the central determiners of the defendant's level of culpability, it has been recognized that inexperience and an inability to compare the defendant with others may compromise the jury's judgment. Jurors are not as well-positioned to judge who is the "worst of the worst," and so the judge must review their sentences, thereby providing a crucial safeguard. In order to do that, the judge must analyze the defendant's sentence in the context of other sentences to determine whether the defendant is truly one of the few whom we, given our particular understandings of culpability, would choose to execute. This practice will introduce the necessary reliability and consistency that *Furman* requires.

CONCLUSION

As I have tried to show, if *Furman* is to have any meaning, there must be some procedure for assessing a defendant's sentence in the larger context of the aims of the death penalty. On my account, comparative proportionality reviews rescue the significance of *Furman* in three ways. First, they can ensure that attendance to mitigating elements is consistent with and reflective of community principles of morality, mercy, and responsibility. Second, they allow the death penalty to evolve as society's conception of responsibility evolves. Finally, comparative proportionality reviews can prevent arbitrary application of the death penalty by ensuring that death is reserved for a discernable and limited group of people.

Though a perfect procedure is unlikely, Justice Marshall reminds us "[w]here life itself is what hangs in the balance, a fine precision in the process

must be insisted upon."[165] The question remains of what "fine precision" must mean. An analysis of comparative proportionality reviews must assess the information in the defendant's case that is relevant to the assessment of relative culpability. It must allow judges to take into account the ways in which community determinations of what information is relevant to culpability have developed through our evolving standards of decency.

In order for sentences to truly reflect contemporary moral standards, comparisons of culpability must countenance mitigating information that sometimes falls outside of the categories presently used in comparative proportionality reviews. It is highly likely that general community sentiments, for example, have come to reflect developments in psychology that indicate the cumulative difficulties in psychic development caused by life experiences.[166] Often these scientific findings are reflected in the jury's assessment of culpability. It is imperative, therefore, that these conceptions also be included in comparative proportionality reviews.

How we expose these complexly interrelated factors can be crucial to an authentic evaluation of our evolving sense of what behaviors are deserving of a death sentence. "Fine precision" need not mean increased systematization or mathematical predictability, but rather paying attention to what is relevant to our moral and cultural sense of the distinctions to be made between those who deserve death and those who do not. The categories presently applied in comparative proportionality reviews have likely outlived their usefulness and yet continue to pose as exclusive. In order to see the disjunction between issues deemed relevant to culpability at the penalty phase and those deemed relevant at the appeals phase, it is necessary to return to the original narrative presented by the defendant at trial.

As explained, the evolution of moral judgment likely indicates that the cumulative and interactive impact of life experiences are crucial for reducing culpability and thus counsel against applying death.[167] What matters is not simply that Antonio had a single mother, lived in a violent neighborhood, and was isolated at school, but also the ways in which all of the conditions and events interacted in his life. The context surrounding these experiences and the ways in which they melded to create his conception of self and his relationship to his surroundings should be of greatest importance to us.

Mitigating information that profoundly affects juries at the trial level is lost when comparisons of those cases are conducted by presenting them as a collection of unrepresentative factors. Thus, while a jury's moral assessments may be profoundly affected by elements of the defendant's life that are excluded from the factor analysis, those considerations are not taken into account in the comparative assessment of the defendant's culpability.

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165. *Lockett*, 438 U.S. at 620 (Marshall, J., concurring).

166. *See generally* Haney, *supra* note 111.

167. *See id.* at 600.

Categorization of the elements of the defendant's life, while useful benchmarks, can also become dangerous when a particular set of unexamined categories are accepted as natural and inclusive of all relevant information. Although mitigating factors are meant to serve as a guide for understanding the story in the penalty phase, they inadvertently replace the complex factors that emerge in the story on appeal. As a result, those who occupy classes that are silenced and disempowered are being cast to the side because elements that make them greatly significant at the penalty phase, make them irrelevant in an overall constitutional assessment.

It is, therefore, necessary to reevaluate the use of categories in comparative proportionality reviews in light of evolving contemporary community values and ensure that the values and principles of the Eighth Amendment are applied in the categorizing scheme. To this end, the assumptions relied on by the judge in organizing the comparison scheme should be exposed. Then, judges should return to the narrative used and valued in the penalty phase of the trial to assess the information deemed relevant in the sentencing decision. Factors may be organized in many ways—they may be assessed in configurations; supra-categories may be created such that when two or three connected factors exist together a new factor may be created; or they may be reduced to contain more specific information to be distinguished from similar but ultimately distinct elements.

Though this process will require great effort and innovation by decision-makers, the socially sanctioned extinction of life requires such an effort. As one scholar eloquently reminds us, "[i]n the end, it is the defendant whose life is in the balance. It is the defendant as a complete person, not as a composite drawing of mitigating and aggravating evidence, who will suffer the ultimate penalty. The fundamental purpose of the capital sentencing hearing is to force the sentencer to view the defendant as a person, no matter how hard some prosecutors might try to describe the defendant as an animal or inanimate object."[168]

168. Markus D. Dubber, *Regulating the Tender Heart When the Axe is Ready to Strike*, 41 BUFF. L. REV. 85, 114 (1993).