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***883** IN DEFENSE OF SPECIFIC PROPORTIONALITY REVIEW

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I. Introduction

Last year in this space my colleague Barry Latzer argued that comparative proportionality review in death penalty cases has proven a failure. [FN1] By “[c]omparative proportionality review,” Professor Latzer means “whether a death sentence is consistent with the sentences imposed in factually similar cases.” [FN2] Consistency is defined by the relative culpability of defendants. [FN3] Under comparative review, a defendant argues that his sentence should be reduced because other equally or more blameworthy defendants have not been treated as harshly. [FN4] Comparative review is distinguished from “inherent” proportionality review, in which courts “determine the intrinsic deathworthiness of a category of crimes or class of defendants without regard to consistency or evenhandedness in the application of the death penalty.” [FN5]

According to Professor Latzer, comparative review is undesirable in theory because it unjustifiably allows capital defendants the opportunity--unique among criminal defendants--to claim that they should not be punished in a particular manner because some others in similar situations have not been punished in the same way. [FN6] And it assigns to courts an impossible task: assessing the ***884** relative culpability of defendants. Practical experience only strengthens these intuitions. The few states that have engaged in proportionality review in earnest, most notably New Jersey, have only demonstrated the difficulty of developing any sort of objective model to weigh the relative culpability of defendants. [FN7] The whole endeavor, he says, has been nothing more than a waste of time and money. [FN8]

Professor Latzer's argument has surface appeal. There is no other context in which criminal defendants may seek redress on the basis of disproportionality of culpability. [FN9] A rapist sentenced to a prison term of a certain length may not, for example, seek to have his sentence reduced on the grounds that some other rapists have acted in a more reprehensible manner and been sentenced to shorter terms.

It is not readily apparent how one would make a meaningful comparison of reprehensibility. Some factors incident to a crime seem more objective than others. One could, for example, compare the relative degrees of violence involved in separate offenses with some measure of certainty. But to gain a full picture of the culpability of an offender, questions independent of the offense itself need to be asked: How much education did the defendant possess? Were they desensitized to violence by the peculiarities of their childhood? What motivated them to commit this particular crime? Weighing the relative moral responsibility of two defendants on the basis of this host of factors seems daunting at best. How is one supposed to compare the rapist who acted more viol-

ently but had a troubled childhood and some mental impairment with the less-violent rapist who had fine parents and went to good schools? One may be treated more leniently than the other, but it seems impossible to say with any conviction that the other therefore deserves to be treated in the same way. This is Professor Latzer's point.

***885** Further bolstering Professor Latzer's position, the death-is-different arguments do not seem as useful in this context as they do in others. There is always some chance that a robber or rapist has been wrongly convicted, yet this does not deter the criminal justice system from sending them to jail with impunity. Death is different, abolitionists say with some force. It is one thing to sentence defendants to jail terms knowing that a few may be innocent, and quite another to sentence them to die. Death is irreversible; the wrong can never be undone. [FN10] The argument does not work so well with proportionality review.

So it would go: there is always some chance that a robber or rapist has been given a longer sentence than someone more culpable than he, yet this does not deter the criminal justice system from sentencing them with impunity. Death is different, though. It is one thing to sentence ordinary defendants to jail terms knowing that other defendants may be more deserving of longer sentences, and quite another to sentence someone to die knowing that other more blameworthy defendants exist. The argument works poorly. It seems difficult to maintain that a necessary element of a just capital punishment system is that among all those eligible for death, the system execute only the most reprehensible, and not anyone less reprehensible than anyone else who is spared. A fairer proposition would seem to be that it should execute only people who are highly reprehensible which, except for the occasional error, the existing system seems to do. [FN11] Again, Professor Latzer's point.

But it is not obvious that the aim of comparative proportionality review is to measure the relative blameworthiness of capital defendants, and once this definition is abandoned, many of Professor Latzer's arguments become more difficult to defend. "Comparative proportionality review" is Professor Latzer's term; [FN12] so too, the notion that the object of this review is to compare the relative blameworthiness of those sentenced to die. [FN13] It is a construct.

***886** Professor Latzer points to *Pulley v. Harris* [FN14] as the clearest expression of the notion of comparative proportionality review as an independent concept. *Pulley* is the seminal case on proportionality review. [FN15] Many state legislatures, and Professor Latzer, interpret it as holding that proportionality review is not a required element of a constitutional sentencing scheme. [FN16] Whether this accurately states the case is open to debate, [FN17] but it is clear that the *Pulley* Court never used the term "comparative" review. And it never suggested that the basis of this review was an assessment of relative blameworthiness. The Court simply said that the type of review sought by *Harris* was "different":

The proportionality review sought by *Harris* . . . is of a different sort. This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime. [FN18]

The question is whether the difference contemplated by the Court is one of kind or degree. Professor Latzer would no doubt rely on the clause following "because" in the last sentence of the preceding passage from *Pulley* in characterizing the difference between traditional proportionality review and the kind of review sought by *Harris* as a difference of kind. This argument would have force if "inherent" or "traditional" proportionality review, as the *Pulley* Court terms it, were conducted on the basis of moral judgments about the fitness of the death penalty for a particular type of crime. There would thus be two distinct types of review, different in kind: inherent review, based on a philosophical inquiry into the appropriateness of the death penalty for a type of crime, and

comparative review, based on an empirical inquiry into whether the punishment was meted out in an even-handed manner. But this is not the methodology of inherent review that has evolved in Eighth *887 Amendment jurisprudence. In determining whether a punishment is inherently proportionate, courts ask an empirical question: whether standards of decency have evolved to the point where a particular punishment is regarded as “cruel and unusual.” [FN19] Standards of decency are measured, varyingly, by public opinion, pronouncements of state legislatures, and, notably, juries. [FN20] The difference between inherent review and the sort of review sought by Harris thus cannot be methodological.

The emphasis in the critical passage in *Pulley* is more reasonably placed on the phrase “in a particular case.” [FN21] On this reading Harris was not seeking a review different in kind from traditional inherent proportionality review, he was rather seeking a more specific review of the appropriateness of death as a penalty for him--a review based on the facts of his particular case. An alternative definition of the sort of review sought by Harris presents itself: “Specific” proportionality review seeks to determine whether standards of decency, as measured by the treatment of other similarly situated defendants, have evolved to the point where execution would be inappropriate on the peculiarities of a particular defendant's case.

Three important facets distinguish specific proportionality review from comparative proportionality review. First, a capital defendant pursuing redress through specific proportionality review seeks not to have his sentence reduced because others have been better treated. Rather, he points to the better treatment of others as evidence that standards of decency regard death as an inappropriate punishment on the facts of his case. The goal of comparative proportionality review is equivalence. The goal of specific proportionality review is to prevent the aberrational *888 execution of a defendant where standards of decency have evolved to condemn such an act.

The first point suggests the second. Specific proportionality review narrows the focus of the lens through which a defendant is examined. Comparative proportionality review operates under the premise that all perpetrators of a particular type of crime are death-eligible; the question is whether a particular defendant has been treated fairly as compared to other similarly situated defendants. [FN22] For example, a murderer who admits guilt and has a history of drug abuse is relevantly categorized as a murderer. Operating on the presumption that the execution of anyone belonging to the universe of murderers is just, the court engaging in comparative review asks whether this defendant has been treated similarly to other murderers who have admitted guilt and possess histories of drug abuse. [FN23] By contrast, specific proportionality review defines the relevant universe as murderers who have admitted guilt and have a history of drug abuse. It then asks whether the death penalty is suitable for such individuals, answering the question by reference to jury verdicts and other empirical indicators of contemporary standards of decency.

Third, while comparative proportionality review is bound up with value judgments, specific review is value-neutral. Some element of comparative review is empirical: courts performing comparative review examine jury verdicts. [FN24] But these courts do so to examine how other equal or more culpable defendants have been treated. [FN25] Juries do not say whether they believe one defendant to be more responsible than another. They render a verdict only in a particular case. Thus the court conducting comparative review--or the legislature guiding the reviewing court--must impose its own notions of culpability to make sense of the verdicts. Specific review requires no such value judgments. It asks a purely empirical question: How often have some set of offenders sharing a particular trait or traits been sentenced to die?

*889 Determining which construct to impose upon the sort of review sought by Harris makes all the differ-

ence in deciding whether proportionality is a worthwhile endeavor. Comparative proportionality review is a failure, Professor Latzer argues, because there is no other context in which defendants are allowed to appeal to equality in the distribution of penal sanctions, and because it is practically impossible to make meaningful comparisons of the relative reprehensibility of criminal defendants. [FN26] But specific proportionality review engages in an endeavor that even Professor Latzer agrees is worthwhile: determining whether the punishment of a particular defendant fits the crime committed. [FN27] And the empirical question it frames is eminently answerable: How has the relevant class of offenders been treated in the past? It does not seek to assess the overall moral culpability of an offender. It asks whether the offender possesses certain traits, or combination of traits, that have been found to make death an inappropriate sanction.

Ample evidence supports the specific proportionality construct. To be sure, room for debate exists as to what the Supreme Court and state courts have understood the nature of proportionality review to be. Even within the last sentence of the passage from Pulley quoted above, evidence can be found to support both views. But while there is ambiguity in both the relief that defendants have asked for and how courts have interpreted their requests, three persistent facts support the specific proportionality view. First, no court has characterized proportionality review as an endeavor in measuring culpability. Second, inherent proportionality is assessed empirically by measuring community standards of decency. Third, in conducting inherent proportionality review, the Supreme Court has demonstrated a willingness to categorize offenders not just on the basis of the crime committed, but also on the basis of certain developmental characteristics--mental retardation, for example [FN28]--and on the basis of certain aspects of their role in an offense--for example, whether or not they pulled the trigger. [FN29] When the Supreme Court has considered whether death is a proportionate *890 penalty for retarded murderers or for murderers who did not pull the trigger, the Court has subdivided the universe of murderers into retarded murderers and non-trigger pulling murderers and then asked whether community standards of decency tolerate death as a punishment. [FN30] Standards of decency are measured by how other similarly situated defendants have been treated. [FN31] The Court thus has engaged in specific proportionality review--if appropriate in one case, appropriate in all.

Part Two of this Article defines the terms discussed above with greater precision. Specific proportionality review is characterized by determining whether death is appropriate for a particular offense by examining not only the crime committed, but also other specifics, including the defendant's role and history. Comparative proportionality review, by contrast, asks only whether death is appropriate for the charged offense. It then seeks to determine whether that punishment has been handed out in an even-handed manner based on the relative culpability of defendants.

Part Three argues that Pulley is misconstrued as "deconstitutionalizing" proportionality review. Interpreting Pulley is a confusing enterprise since competing strains of thought run through it and other Supreme Court decisions discussing proportionality review. On the one hand, Pulley seems to reject the notion that a just capital sentencing system must include a procedure for determining whether similarly situated defendants have been treated in a like manner. [FN32] At the same time, the Pulley Court cites with favor *Enmund v. Florida* [FN33] and other cases holding that a death-sentenced defendant is entitled to a determination of whether contemporary standards of decency support death not just for the offense committed, but on the particular circumstances of the defendant's case. [FN34] Since standards of decency are measured by how other similarly situated defendants have been treated, this strongly suggests that specific proportionality review is required. Part Three argues that Pulley says nothing at all about comparative review and is best understood as a narrow, procedural decision: it *891 rejects the proposition that capital defendants have a right to have a state appellate court review the proportionality of their sentence. It does nothing, however, to alter the substantive right of a defendant to have the pro-

portionality of his sentence determined by reference to the specific facts of his case.

Part Four argues that the New Jersey experience with proportionality review, cited by Professor Latzer as evidence of the failure of proportionality review, in fact shows that courts are well equipped to conduct specific proportionality review. It is a simple matter to determine how often defendants with a particular role in an offense, or with certain personal history characteristics, have been executed. The New Jersey Supreme Court does this now and does it well. [FN35] It is only when New Jersey courts have attempted to objectively measure the metaphysical variable of culpability that they have met with difficulty. Since specific proportionality review does not require this inquiry, the practical objection to proportionality review is removed.

Part Five anticipates and responds to some objections to specific proportionality review. One such objection is that any sort of proportionality review must fail because it cannot account for the exercise of prosecutorial discretion. This is a red herring. Accounting for prosecutorial discretion will have no bearing on a defendant's ability to prove his sentence disproportionate. If anything, accurate accounting will make the few death sentences that are imposed seem more aberrant than they appear in an absence of such an accounting. Another objection is that specific proportionality review opens the door to infinite challenges and threatens over time to erode the class of offenders that are eligible for death. But this same objection could be made of the Court's existing death penalty jurisprudence, and is only of concern if one decides, a priori, that some people should be sentenced to die. Part Five and the Article conclude with some reflections on desert. It rejects Professor's Latzer's notion that retributive justice is the sole concern of a just sentencing scheme and argues that, in any event, existing death penalty jurisprudence does not achieve retributive justice because it operates at a level of generality too vague to be meaningful.

It is not enough, in short, for judges and legislators to say that all murderers deserve to die and wash their hands of any concern as to who among those death-deserving individuals is executed and who *892 is spared. Such willful blindness undermines public confidence in the criminal justice system and offends basic notions of decency. At the very least, a just death-sentencing system--if one is possible--must ensure that decisions of who is eligible to die be made with more specificity than by simply examining the crime committed. Invoking the mantra of retributive justice does not obviate moral thought's unfailing demand for nuance.

II. Definitions

This Part sets out some starting points and definitions that govern the remainder of the discussion.

A. Inherent Proportionality Review

Inherent proportionality review is defined here as the assessment of the appropriateness of a punishment for a class of criminals. [FN36] In other words, inherent review asks whether it is ever appropriate to give the considered punishment for the crime at issue or, inversely, whether it is never appropriate to give the considered punishment for the crime at issue. Under any sentencing system, some perpetrators of a crime will receive the maximum punishment while others receive a lesser sentence. In the common example of murder, some murderers receive the death penalty, others life imprisonment. Under this mode of analysis, evenhandedness of application of the considered penalty is irrelevant. Inherent review asks only whether death is ever appropriate for murder. It thus acts as a ceiling on severity of punishment: that is, for certain offenses, death is never appropriate.

B. Comparative Proportionality Review

Comparative proportionality review asks whether a member of a class of criminals is treated fairly with respect to other members of the same class. “The premise is that like cases should be treated alike, and if cases similar to the case under review are life-sentenced, this suggests that the death sentence is *893 disproportionate.” [FN37] Inherent proportionality review asks a purely theoretical question: whether it is ever appropriate to impose death for a particular type of crime. Comparative proportionality review, by contrast, asks a question part empirical, part theoretical: whether the defendant has been treated in the same manner as other defendants like him. The question is empirical in that jury verdicts must be examined to see how defendants have been treated. The question is theoretical inasmuch as it requires courts to determine whether one defendant's case is like another's.

Consider the application of the death penalty to murder. Under inherent proportionality review, how the universe of murderers is subdivided is irrelevant. The only question is whether death is ever an appropriate punishment for murder. The characteristics of the murderer do not matter; how the punishment is distributed does not matter. If only one murderer in ten thousand were executed, this would not prove the penalty disproportionate. The only question under inherent review is whether death is an appropriate penalty for the one person upon whom it is imposed. All other considerations are irrelevant.

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Figure A. Inherent Proportionality Review

By contrast, under comparative proportionality review, the sole consideration is whether a defendant has been treated fairly with respect to other similarly situated defendants. Whether or not the considered penalty is appropriate for the crime charged is irrelevant. It is not even relevant whether the considered penalty is theoretically appropriate for the crime charged on the facts of the defendant's case. The only issue is whether the defendant has been treated in the same manner as other people like him. Comparative *894 review divides the universe of murderers into subsets. It then compares how the defendant has been treated in comparison to other members of the subset to which he belongs.

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Figure B. Comparative Proportionality Review

C. Specific Proportionality Review

Specific proportionality review asks whether death is an appropriate punishment for a defendant on the facts of his particular case. It shares characteristics of each of the other types of proportionality review. Like inherent proportionality review, specific proportionality review asks whether death is ever an appropriate punishment for a particular class of criminal. Like comparative proportionality review, specific proportionality review defines the relevant set of murderers more specifically--it subdivides the universe of murderers based upon the characteristics of the defendant and the nature of the offense.

Unlike comparative review, however, specific review does not concern itself with how defendants sentenced to die are treated vis à vis similar defendants given a life sentence. Rather, the question is similar to that asked

under inherent review: whether death is ever appropriate for this type of criminal. But whereas, in determining appropriateness, inherent review inquires only into the nature of the offense committed, specific review considers other factors. Under inherent review, a court would ask only whether death were a proportionate punishment for murderers. Under specific review, a *895 court would go on to ask, for example, whether death is an appropriate punishment for convicted murderers who did not pull the trigger, or for murderers who operated under a significant level of mental impairment. [FN38]

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Figure C. Specific Proportionality Review

Specific review is also distinct from comparative review in that it is value-neutral. Comparative analysis requires a reviewing court to exercise judgment in assessing the culpability of defendants. The essence of comparative review is that like cases should be treated alike; determining whether two cases are like one another from the standpoint of blameworthiness is a subjective enterprise. Specific proportionality review requires no a priori value judgments. [FN39] *896 Specific proportionality review makes no inquiry into blameworthiness. It asks the purely empirical question of how a group of defendants have been treated in the past.

One could imagine the argument that specific proportionality review is inherently limited by virtue of its blindness to concerns of culpability. But no reason exists to think that drawing distinctions on the basis of crimes committed will by itself draw a meaningful division between more and less blameworthy defendants. It is easy to imagine, for example, a well-educated rapist (a crime for which death is unavailable when it concerns an adult woman) [FN40] who is more blameworthy than a mildly retarded murderer (who would be eligible for death). [FN41] Specific proportionality review, then, may hold the advantage of being able to make more nuanced distinctions among more culpable and less culpable classes of offenders.

D. Practical Difficulties of Recognition

Distinguishing between comparative proportionality review and specific proportionality review may sometimes be problematic. The two types of review have different underpinnings--comparative review is grounded in a concern for evenhandedness; specific review, like inherent review, stems from a desire for temperance in punishment. [FN42] But while the two types of review have different *897 philosophical bases, they require the same sort of analysis in practice. Distinguishing when a court is engaging in specific review from when it is engaging in comparative review would be easy if inherent and specific review were conducted on the basis of philosophical or moral judgments about the appropriateness of death for a particular crime. Inherent and specific review do not, however, ask an abstract question. Rather, they ask an empirical question: whether the punishment is appropriate under evolving standards of decency. [FN43]

In determining whether a punishment conforms with evolved standards of decency, courts look to a variety of factors, each empirical in nature: whether state legislatures have condoned or condemned the considered punishment, public opinion, and jury verdicts. [FN44] The Supreme Court places special weight on this last consideration because of the unique position of a jury as “a link between contemporary community values and the penal system.” [FN45] In cases where the Court has found death to be a disproportionate punishment, it has relied heavily on jury verdicts disapproving of death in comparable circumstances. [FN46] Hence the problem of recognition.

A court engaging in comparative proportionality review looks to jury verdicts to see how similarly situated defendants have been treated in the past for the purpose of assessing whether punishment is being meted out in a consistent manner. A court engaging in inherent or specific proportionality review looks to jury verdicts to see how similarly situated defendants have been treated, for the purpose of assessing whether standards of decency support the penalty for this type of offender. The two inquiries have different aims, but the analyses engaged are indistinguishable. This confluence is doubtlessly a major source of the confusion among courts at all levels as to the aims of proportionality review and as to *898 what procedure is required for purposes of the Eighth Amendment. [FN47] It is with this observation in mind that the Article considers the Supreme Court's treatment of proportionality review.

III. Comparative and Specific Proportionality Review and the Constitution

After the Supreme Court struck down Georgia's sentencing scheme in *Furman v. Georgia*, [FN48] the Georgia legislature revised its sentencing system to address the Furman Court's concern that the old procedure amounted to "little more than a lottery system." [FN49] The revised Georgia statute requires the Georgia Supreme Court to determine whether a sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." [FN50]

It is not clear, however, whether Georgia understood this to be comparative proportionality review or specific proportionality review. [FN51] Nor is it clear whether the Supreme Court in deeming this review an essential component of a constitutional sentencing system understood it to be comparative or specific. The Court stated in *Gregg v. Georgia*:

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death. [FN52]

*899 This passage as readily supports specific proportionality review as it does comparative proportionality review. Further, nothing in the case suggests whether the Court understood itself to be approving proportionality review as a means of comparing the reprehensibility of defendants (comparative review) or as a way of weighing death against a crime on the facts of a particular defendant's case (specific review).

States understood *Gregg* to require proportionality review as a component of a constitutional death penalty scheme. [FN53] It is again not clear whether states understood the review required to be comparative or specific. This is because, as Professor Latzer points out, Georgia conducted a review of only the most dilute type: a reviewing court would attempt to determine whether some other defendant had been executed on facts similar to those of the defendant at issue. [FN54] It is a review equally consistent with a nod of the head to comparative review as it is with a nod to specific review. No lesson could be drawn from the Supreme Court's approval or requirement of this procedure.

States nevertheless responded to *Gregg* by including proportionality review as part of their new sentencing schemes. [FN55] Following the Court's 1984 decision in *Pulley*, however, states reduced their efforts to a perfunctory exercise or abandoned the effort entirely. [FN56] In Professor Latzer's mind the reason for this is clear. "*Pulley v. Harris*," he writes, "should have made clear beyond all question that comparative proportionality re-

view is not an Eighth Amendment requirement.” [FN57] But what notion of proportionality review the Court considered in *Pulley* is unclear. It is further unclear whether the Court rejected anything beyond a simple procedural requirement.

Professor Latzer has a reasonable argument that *Pulley* rejected comparative review, as he defines it. It is far less clear that *Pulley* rejected specific proportionality review. Entwined within the Court's decision in *Pulley* are two competing views of the nature of proportionality review. On the one hand, the Court rejects the *900 notion that a defendant has a right to be treated in the same manner as other defendants. [FN58] This is the language in which Professor Latzer finds support for his position. [FN59] At the same time, the *Pulley* Court reaffirms the principle that capital defendants may be executed only where the punishment of death is proportionate to their offense, on the facts of their case. [FN60] Since proportionality is measured by reference to the treatment of other defendants, this language suggests that some sort of proportionality review, beyond simple inherent review, is required.

This Part argues that *Pulley* is best interpreted as a rejection of the procedural right of a capital defendant to have his or her sentence comparatively reviewed by a state appellate court. The decision does nothing to alter the substantive right of a capital defendant to have the proportionality of death for his or her crime determined by reference to the specific facts of their case. Since such a comparison can only be made by considering how other similarly treated defendants have been treated, this Part concludes that the New Jersey exercise, though not required in any precise form by the Supreme Court, is a worthwhile endeavor, true to the spirit of Eighth Amendment jurisprudence.

A. Competing Visions in *Pulley v. Harris*

A California jury convicted Robert Harris of murder in 1978. According to the evidence at trial, Harris and his brother approached two teenaged boys eating hamburgers in their car and forced the boys at gunpoint to drive them to a nearby wooded area. The Harrises told the boys they intended to use the car in a robbery. The boys offered to comply, agreeing to walk to the top of a nearby hill, wait for some time, and then report the car stolen, giving a somewhat misleading description of the Harrises. When one of the boys began to veer off into the woods, respondent Harris shot and killed them both. The Harrises went on to carry out their robbery and were arrested sometime later. They confessed to the killings. As aggravating factors, the State showed that Harris had been convicted of manslaughter in 1975, that he had been found in possession of weapons while in prison, that he had sodomized another inmate and threatened that inmate's life. As mitigating evidence, Harris testified that he had had a dismal childhood, *901 minimal education, and that his father had been convicted for sexually molesting his sisters. Harris apologized for the murders. The jury sentenced him to die. [FN61]

Harris appealed, but precisely on what basis he sought relief--and, more importantly, what basis the Court understood him to be seeking relief--is unclear. [FN62] For example, in detailing the procedural history of Harris's case, Justice White's opinion states that Harris sought a writ of habeas corpus in the state courts “complain[ing] of the failure to provide him with comparative proportionality review.” [FN63] Described in this way, Harris's claim is procedural in nature: he had a right to have this review undertaken, not to a particular result--in the same way that a capital defendant has a right to a bifurcated trial, but not to any particular outcome. Just a few sentences later, however, Justice White notes that on federal habeas review the Ninth Circuit Court of Appeals ordered a writ to issue, relieving Harris of the death sentence, “unless within 120 days the California Supreme Court undertook to determine whether the penalty imposed on Harris is proportionate to sentences im-

posed for similar crimes.” [FN64] This suggests that the nature of Harris's claim is substantive; that he could not be executed if death were a disproportionate punishment on the facts of his case. If his claim were procedural, no question would need to have been certified to the California Supreme Court. The only question before the court then would have been whether this additional review was required under Gregg.

Justice White's opinion does not distinguish between these competing views either in describing Harris's plea or in setting forth the rationale for denying him relief. Even within the central paragraph of the opinion, evidence of confusion persists:

The proportionality review sought by Harris, required by the Court of Appeals, and provided for in numerous state statutes is of a different sort [than “traditional” proportionality review]. This sort of proportionality review presumes that the death sentence is not disproportionate to the crime *902 in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime. The issue in this case, therefore, is whether the Eighth Amendment, applicable to the States through the Fourteenth Amendment, requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner. Harris insists that it does and that this is the invariable rule in every case. Apparently, the Court of Appeals was of the same view. We do not agree. [FN65]

Consider the two emphasized passages above. The former suggests that the nature of the review sought by Harris is substantive: the question is whether the punishment fits the crime in this case, with proportionality measured by treatment of other similarly situated defendants. If the question were procedural, whether or not the punishment fit the crime would not be an issue; the sole consideration would be whether some court took the step of determining whether the defendant had been treated comparably to other similar situated defendants. This is a point that would have been obvious to the Court. This distinction between the right to a process and the right to an outcome is one that the Court has relied on before in Eighth Amendment death penalty jurisprudence. [FN66] A defendant, for example, only has a right to have a factfinder weigh aggravating evidence against mitigating evidence. Even if the factfinder's decision seems irrational or unfair, it will not be reviewed on appeal since the nature of the right is procedural. [FN67]

The second emphasized passage seems to suggest that the relief sought by Harris is procedural in nature: whether a state appellate court has compared the sentence in the present case to other similar cases. If the right were substantive, it would not matter whether a *903 state appellate court, state trial court, or federal court undertook the review. The sole consideration would be whether the penalty was proportionate to the crime on the facts of that particular case.

So the question remains: when the Court rejected the “review sought by Harris,” [FN68] did it reject the substantive right to have the punishment weighed against the crime on the particular facts of the case by comparing the sentence to those imposed on other defendants or did it reject the procedural right to have a state appellate court compare the sentence to those imposed on other defendants? Several factors suggest that Harris sought procedural relief and that this was the argument the Court understood itself to be rejecting, not the substantive notion.

For one thing, executing Harris would not have been substantively troubling from a proportionality standpoint. Harris pulled the trigger himself--numerous times--and had prior convictions that suggested the possibility of recidivism. His behavior in prison suggested that he would be a difficult inmate and the mitigating evid-

ence presented on his behalf was not especially impressive. [FN69] It seems difficult to imagine that Harris believed himself to have a viable argument that the death penalty was inappropriate for him, or someone belonging to his subclass of murderers. More plausibly, he tried to argue that a procedural step had been skipped in his case, on the thought that receiving the benefit of the additional step could do him no harm and might lead to some fortuitous sympathetic calculation of proportionality.

The language of the decision in Pulley supports this view. Summarizing its holding, the Court says:

Any capital sentencing scheme may occasionally produce aberrational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in Furman. As we have acknowledged in the past, “there can be ‘no perfect procedure for deciding in which cases governmental authority should be used to impose death.’” As we are presently informed, we cannot say that the California procedures provided Harris inadequate protection against the evil identified in Furman. [FN70]

The emphasis here is entirely on the procedural nature of Harris's claim. It expresses no skepticism about Harris's right to have a determination of proportionality made. As framed by the Court, the *904 sole question is whether Harris has a right to have that determination made by any particular court. When the Court writes, “[i]n short, the [Pulley] Court of Appeals erred in concluding that Gregg required proportionality review,” [FN71] the argument here is that this is intended to mean that Gregg does not require the state courts to conduct specific proportionality review as part of a constitutional sentencing scheme, but says nothing about the substantive right of a defendant to specific proportionality review. This is entirely in keeping with the Court's treatment of proportionality review generally. While every defendant has a right to inherent proportionality review, they have no right to have the determination of whether a punishment is appropriate for a type of crime made by any particular court. The question is entirely substantive: whether evolving standards of decency permit the punishment sought to be imposed for that class of defendant.

It is further evident that while the Pulley Court rejected the notion that a defendant has a right to have proportionality review conducted by any particular court, it understood specific proportionality review to be the substantive right of every defendant. Framing the issue, the Court writes:

At the outset, we should more clearly identify the issue before us. Traditionally, “proportionality” [review] has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime. See, e. g., *Solem v. Helm*; *Enmund v. Florida*; *Coker v. Georgia*. The death penalty is not in all cases a disproportionate penalty in this sense. [FN72]

The Court then goes on in the passage quoted to draw the distinction between traditional review and the “different sort” of proportionality review sought by Harris. [FN73]

Two aspects of this passage evidence the Court's endorsement of specific proportionality review as a substantive right. First, consider the significance of the italicized passage. Were proportionality review limited to inherent review (as defined by this Article), the sole question would be whether the punishment were appropriate for a category of crime. The inclusion of the additional language, “particular crime or category of crime,” is conspicuous. It suggests that proportionality review (as understood by the Court) includes considerations independent of the nature of the offense-- factors such as the defendant's role in the offense and his personal history-- in determining proportionality. This view is further strengthened by the cases cited with approval in

the above passage. In *Enmund v. Florida*, [FN74] for example, the Court has demonstrated a willingness to engage in an analysis that can only be characterized as specific proportionality review.

B. Specific Review in *Enmund v. Florida*

While the Pulley Court rejected the sort of proportionality review sought by Harris, it cited with approval the sort of proportionality review conducted in several other cases, including *Enmund v. Florida*. [FN75] The Court characterized the sort of review conducted in *Enmund* and the other cited cases as inherent review, [FN76] but it is not inherent under the definitions adopted here. Rather, it is specific proportionality review.

Earl *Enmund* and a co-defendant, Sampson Armstrong, were convicted of first-degree murder and robbery. The evidence at trial showed that Sampson and Jeanette Armstrong went to the back door of the home of Thomas and Eunice Kersey, aged 86 and 74, and asked for water for an overheated car. When Thomas Kersey answered the door, Sampson Armstrong grabbed Kersey, pointed a gun at him, and told Jeanette Armstrong to take his money. Thomas Kersey screamed, alerting his wife, who emerged shortly thereafter with a gun, which she used to shoot and wound Jeanette Armstrong. Sampson Armstrong then shot and killed both Thomas and Eunice Kersey. [FN77]

Earl *Enmund's* role in the enterprise was less clear. Two witnesses testified that at or around the time of the robbery and murder they saw a cream or yellow-colored car parked nearby the Kersey house and that they saw a man sitting in the car. Another witness testified that earlier the same day he saw *Enmund's* *906 common-law wife and Jeanette Armstrong's mother driving a yellow car. *Enmund* was a passenger in the car; he was also one of the owners. Shortly after the time of the murder, the same witness saw the car drive by again, this time moving quickly. *Enmund* was driving, two people were in the back seat, one lying down. [FN78]

Earl *Enmund* and Sampson Armstrong, tried jointly, were convicted of felony-murder and sentenced to death. [FN79] In its sentencing findings, [FN80] the trial court found that *Enmund* was a “major participant in the robbery because he planned the robbery in advance and himself [sic] shot the Kerses.” [FN81] On appeal the Florida Supreme Court took a sharply different view of the evidence. It found that “[t]here was no direct evidence . . . that Earl *Enmund* was present at the back door of the Kersey home when the plan to rob the elderly couple led to their being murdered.” [FN82] According to the Florida Supreme Court:

[T]he only evidence of the degree of [*Enmund's*] participation is the jury's likely inference that he was the person in the car by the side of the road near the scene of the crimes. The jury could have concluded that he was there, a few hundred feet away, waiting to help the robbers escape with the Kerses' money. [FN83]

Though the Florida Supreme Court found that the evidence against *Enmund* supported at most a conclusion that he abetted the murder of the Kerses, the court nevertheless found *Enmund* to be death-eligible. The court stated that the Florida “felony murder rule and the law of principals combine to make a felon generally responsible for the lethal acts of his co-felon.” [FN84] In so doing, the state supreme court rejected *Enmund's* argument that the death penalty was barred by the Eighth Amendment of the United States Constitution. [FN85] The United States Supreme Court granted certiorari on “the question whether death is a valid penalty . . . for one who neither took life, attempted to take life, nor intended to take life.” [FN86]

*907 Under inherent proportionality review the answer would be clear: death would be an appropriate punishment. Inherent review asks only whether the punishment is appropriate for the class of crime. Since there is

no serious debate that death is an appropriate punishment for murder under the Eighth Amendment, and since Enmund was charged with murder, death would be found a proportionate punishment under inherent review.

But the Enmund Court subdivides the universe of murderers based upon their role in the offense. Enmund is thus not simply a murderer: he is either a “vicarious felony murderer,” [FN87] a “[participant] in a robbery in which another robber takes life,” [FN88] or a murderer without “some culpable mental state.” [FN89] How the subdivision is defined makes all the difference to the analysis. Both the majority and dissent look to state legislatures for evidence of evolved standards of decency; they reach opposite conclusions. Defining the relevant universe as defendants who “did not kill, attempt to kill, or intend to kill,” the majority found only eight states that authorized the death penalty for Enmund’s class of criminal. [FN90] Declining to subdivide to the same degree, the dissent found thirty-one states that “authorize a sentencer to impose a death sentence for a death that occurs during the course of a robbery.” [FN91]

Against the backdrop of this dispute over the proper way to classify Enmund’s crime, the majority—notably—bolstered its argument by referring to jury sentencing decisions. [FN92] It found that the person receiving the death penalty personally committed a homicide in 339 of the 362 executions carried out for homicide between 1954 and the Court’s decision in 1982, compared to only six cases where the person executed was convicted of felony murder. [FN93] Partly on the basis of this, the Court concluded that death “is an excessive penalty for the robber who, as such, does not take human life.” [FN94]

*908 Enmund thus received specific proportionality review. He is classified not simply as a murderer, but as belonging to a subclass of less culpable murderers. The appropriateness of death for this subset is then evaluated on the basis of how other similarly situated defendants have been treated. The analysis is procedurally indistinguishable from comparative proportionality review, but it is not comparative proportionality review. Questions of reprehensibility do not factor in to the analysis. [FN95] It is specific proportionality review. [FN96]

*909 C. Reconciling the Competing Visions of Proportionality Review

The confusion created by the Pulley Court’s failure to distinguish between comparative proportionality review and specific proportionality review can be reconciled in this manner: a criminal defendant has no procedural right to have a particular court review the proportionality of his sentence; he retains, however, the substantive right to have the proportionality of his sentence reviewed on the facts of his particular case.

This argument is consistent with Eighth Amendment jurisprudence generally: criminal defendants have the substantive right to have their sentence reviewed for inherent proportionality, but they have no right to have that determination made by any particular court or body. [FN97] This understanding is further bolstered by the context in which Pulley was decided and the language of the case itself. Pulley, like Gregg, is a case about process. They are each cases about the procedures essential to a constitutional death penalty scheme. Pulley says only that a state court determination of proportionality is not an essential part of the scheme. [FN98] Just as Gregg does nothing to alter the substantive right of a defendant to inherent proportionality review, Pulley does not disturb the *910 substantive right of a defendant to specific proportionality review. This is made clear by the Pulley Court’s reference to a defendant’s right to have proportionality review for his “particular crime or category of crime” [FN99] and by its citing with favor the decisions in Enmund and other cases, which afford defendants specific review. [FN100]

Professor Latzer argues a different lesson from this line of authority. The Supreme Court, he argues, “do[es]

not require a determination whether a death sentence is proportionate to the sentences in other factually similar cases.” [FN101] Comparative review is not required according to Professor Latzer. [FN102] Again, the same semantic problem presents itself. If the purpose of the comparison with other factually similar cases is to suggest that the defendant is not “deathworthy” because other more culpable defendants have not been sentenced to die, then according to Pulley such comparison is not required. But if the purpose of the comparison is to determine whether standards of decency support the proportionality of the sentence on the facts of the defendant's particular case, then Professor Latzer's argument cannot hold. Pulley cannot be explained otherwise, nor can Coker, Enmund, or any of the other cases in which sentences have been held disproportionate on the basis of some factor other than the crime committed.

The Supreme Court, in short, requires specific proportionality review but not comparative proportionality review; the nature of the right is substantive, not procedural. This Article continues by arguing that specific proportionality review is a desirable endeavor, and one that state courts are well equipped to perform.

IV. Proportionality Review in New Jersey

Whether required by the Constitution or not, the experience of state courts engaging in proportionality review proves it to be a worthwhile undertaking if it is construed as an attempt to specifically determine the appropriateness of punishment rather than to weigh the relative culpability of defendants.

*911 Professor Latzer says proportionality review in New Jersey has been an “abject failure.” [FN103] The problem, he argues, is that comparative proportionality review in embracing the goal of treating like cases alike asks an unanswerable question: with a few exceptions, in no meaningful sense can two cases be said to be “like” one another. [FN104] In New Jersey, the state to take proportionality review most seriously, Professor Latzer says the result of a serious effort to quantify the process “has been confusion, a false sense of objectivity, a great expenditure of resources, and extremely unreliable outcomes.” [FN105]

Again, definitions determine all in this debate. If a state undertakes comparative proportionality review, failure is inevitable. Whether a comparison of the reprehensibility of defendants might be desirable from the standpoint of fairness, Professor Latzer is almost certainly right that it is not possible to make meaningful empirical comparisons of defendants' degrees of wrongdoing. After years of experience, New Jersey has conceded as much. [FN106]

The problem with empirical comparisons of reprehensibility is that reducing the morality of any individual to a data point will always ultimately prove unsatisfying: statistical models can only accommodate a small number of the infinite factors that contribute to an assessment of morality. Some especially bad defendants will come off better than they deserve under a model; some less culpable defendants worse. One New Jersey effort--now abandoned--at quantifying morality categorized defendants on the basis of the number of aggravating and mitigating factors found in their case. [FN107] Under this system a defendant was reduced to a two-digit number--the number of aggravators and mitigators found present in his *912 case. [FN108] The flaw in the system is obvious. One could easily imagine this scenario: an especially heinous murderer falls within only one of the statutorily enumerated aggravators, while a non-triggerman felony-murderer falls within two statutory aggravators because his crime was committed in the course of a robbery. [FN109] The number of aggravating factors offers little insight, if any, into the culpability of the defendants. The system creates the false sense of objectivity; the groupings are not meaningful.

But if the aim of proportionality review is to determine whether contemporary standards of decency condone death for classes of defendants defined more precisely than by the crime they committed--if it is specific proportionality review--then the result is different. This question lends itself well to empirical analysis. A court simply asks what percentage of the time juries have imposed the death penalty for non-triggerman felony-murderers, murderers acting out of jealousy, or whatever other subclass of offenders happens to be at issue. The results convey no false sense of objectivity. The groupings are natural, not artificial. [FN110] The jury data speaks for itself.

The question then presents itself: Does the experience of state courts suggest that specific proportionality review is something they have done well or could do well? This question is difficult to answer from an empirical standpoint since most states--drawing the conclusion that Pulley deconstitutionalized proportionality review--have reduced the process to a perfunctory exercise. [FN111] In these states it becomes virtually inevitable that every imposition of the death penalty will be found proportionate. No meaningful conclusions could be drawn from such a mechanical exercise.

But New Jersey has taken the process seriously, engaging since its 1982 reenactment of the death penalty in "the most elaborate statistical proportionality review process in the nation." [FN112] Professor *913 Latzer says this too has been a failure, a complicated and confusing waste of time. [FN113] This Part reevaluates the New Jersey experience in light of the revised understanding of proportionality review proposed here. Section A argues that the history of proportionality review in New Jersey demonstrates the same tension and confusion over the nature of proportionality review that was present in Pulley v. Harris. Over time, though, New Jersey has moved towards embracing the process of specific proportionality review. Section B argues that the practical experience of the New Jersey courts suggests that they are well equipped to handle the statistical analysis required by specific proportionality review. The New Jersey experience shows, in short, that proportionality review understood as an attempt to evaluate community standards of decency with precision is a worthwhile enterprise that state courts have demonstrated they can perform well.

A. History of Proportionality Review in New Jersey

The New Jersey death penalty statute, as revised in 1982, requires for every capital conviction, upon the defendant's request, a state supreme court determination of "whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." [FN114] This provision, identical with an analogous component of the Georgia statute and thus with the statute of at least twenty-five other states, [FN115] shares the same ambiguity as the decision in Pulley. It does not specify whether the underlying rationale for the review is to compare the relative culpability of death-sentenced defendants with death-eligible defendants not sentenced to death, or whether it is to determine whether standards of decency support death on the specific facts of a defendant's case.

As with the decision in Pulley, there is language in the New Jersey statute suggesting each of the competing views. Were the statute to read "consideration of the crime," the statute would *914 suggest that the legislature contemplated inherent proportionality review. Were it to read "consideration of the defendant," it would suggest that the legislature contemplated comparative review. Stating, as it does, consideration of "both the crime and the defendant" invites the inference that what is contemplated is specific review. The evolution of proportionality review in New Jersey confirms this tenuous conclusion. The current understanding of proportionality review in New Jersey is more in keeping with the principles of specific review than comparative review.

At the suggestion of David Baldus, the first Special Master of the New Jersey Death Penalty Proportionality Review Project, the New Jersey Supreme Court uses a statistical approach referred to as “frequency analysis” in carrying out proportionality review. [FN116] Professor Baldus's original recommendation called for three different kinds of frequency analysis: (1) the salient factors test; (2) the numerical-preponderance-of-aggravating-andmitigating-factors test; and (3) the index-of-outcomes test. [FN117]

The salient factors test defines “similar cases in terms of factual comparability.” [FN118] Each case is assigned to one of sixteen possible categories [FN119] on the basis of New Jersey's statutory aggravating factors. A death-eligible murderer is thus defined, for example, as a murderer of multiple victims, or a murderer of a victim under the age of fourteen. The court then examines three statistics with respect to the relevant classification: (1) how often juries have returned death verdicts for this class of offender in death penalty trials; (2) how often juries have returned death verdicts as compared to the total number of cases in the category; and (3) how often prosecutors have sought the death penalty for offenders of this category. [FN120]

*915 The numerical preponderance of aggravating and mitigating factors test compares a defendant's case to other defendants having the same number of aggravating and mitigating factors. [FN121] Under the numerical preponderance test, a defendant is classified, for example, as a single-aggravator and double-mitigator. The reviewing court then examines how often death has been imposed in the past where juries have found one aggravator and two mitigators to be present. [FN122]

The index-of-outcomes test undertakes a more sophisticated effort to compare the treatment of defendants with respect to a host of factors bearing on culpability. Cases are ranked according to twenty-seven variables that “appear to influence prosecutorial and jury decision-making.” [FN123] A regression analysis is then employed to predict the probability of a defendant receiving a death sentence given the factors that are present in his case. [FN124]

Over the past four years, the New Jersey Supreme Court has abandoned both the numerical preponderance test and the index-of-outcomes test. [FN125] It is not possible to draw any conclusive lessons from this history as to the New Jersey Supreme Court's conception of the nature of proportionality review. The New Jersey Supreme Court does not rely upon the constructs discussed here, [FN126] and the *916 issues they implicate are not the sole factors driving the court's analysis. [FN127] Nevertheless, the New Jersey Supreme Court's opinions suggest that the court is skeptical about the propriety and possibility of conducting comparative review, but remains optimistic about and committed to conducting meaningful specific proportionality review.

Of the three types of frequency analysis, the salient factors test is on its face most consistent with specific proportionality review. The salient factors test simply “defines ‘similar cases in terms of factual comparability.’” [FN128] It is difficult to imagine that assessing or comparing culpability is part of the aim of the test. An assessment of culpability based on a single aspect of a particular defendant's case, even if it were the most salient aspect, would be highly unsatisfying. [FN129] Moreover, the salient factors test does not take mitigating factors into account, [FN130] certainly an essential aspect of any meaningful effort to evaluate the blameworthiness of a defendant or defendants. [FN131] The numerical preponderance and index-of-outcomes tests, by contrast, attempt to construct a more complete picture of the defendant. With the numerical preponderance test, the effort is useless because the test makes no qualitative distinction among the factors present. [FN132] The index-of *917 outcomes test, though noble in theory, has failed to produce reliable results because of the lack of a large enough data set. [FN133] Each of these tests has proven problematic in practice in large part because the aim of these two tests is categorically different from the salient factors test. The numerical preponderance and

index-of-outcomes tests each attempt to assess and compare culpability as measured by a court-constructed model. The salient factors test makes its comparison solely on the basis of factual similarity; it requires no interpretive models.

It would be too much to say that by rejecting the index-of-outcomes and numerical preponderance tests and adhering to the salient factors test the New Jersey Supreme Court has rejected comparative proportionality review and affirmed a commitment to specific proportionality review. The court's opinions, however, do demonstrate a consciousness of the differing rationales for proportionality review, a skepticism for the aims of comparative review, and a respect for the approach of specific review.

In its comprehensive review of New Jersey death penalty procedures in *State v. Loftin*, [FN134] the New Jersey Supreme Court said of the different types of frequency analysis: “These methods compare the case at bar to other cases that have been found to have either similar fact patterns or similar levels of culpability.” [FN135] By using this disjunction, the court acknowledges that proportionality review accomplishes some aim other than comparing the culpability of defendants. The Loftin court goes on to describe the individual tests. The index-of-outcomes test, it says, makes a determination of the “culpability levels of defendants ‘as measured by the presence or absence in the cases of . . . factors that appear to influence prosecutorial and jury decision-making.’” [FN136] The salient factors test, the court says by contrast, “‘defines similar cases in terms of factual comparability.’” [FN137] The court makes no reference to culpability in describing the test. [FN138] This difference in language is fairly consistent throughout New Jersey Supreme Court death penalty decisions. [FN139]

***918** It thus seems at least plausible to say that in discarding the index-of-outcomes and numerical preponderance tests and in reaffirming the salient factors test, the New Jersey Supreme Court is expressing skepticism for comparative proportionality review and respect for specific proportionality review. Professor Latzer would presumably argue in response that many problems underlie each of the methods of frequency analysis and that it is too much to draw any broad conclusions from the New Jersey Supreme Court's retention of the least problematic test from a set of flawed tests. [FN140]

***919** The reply is unconvincing. The problem that has drawn the most attention from the New Jersey Supreme Court--and from Professor Latzer--is that the sample pool of the death penalty cases is too small to generate reliable statistical results. [FN141] This is the main reason for the New Jersey Supreme Court's decision to abandon the index-of-outcomes test, [FN142] and plays a large role in the court's decision to abandon the numerical preponderance test. [FN143] The New Jersey Supreme Court also sees small sample size as a problem with the salient factors test. [FN144] But while the New Jersey Supreme Court abandoned the other tests for precisely this reason, the court repeatedly praises the salient factors test as the “most persuasive” of the frequency tests. [FN145] So the court's decision to retain the salient factors test, while scrapping the index-of-outcomes and numerical preponderance tests, must demonstrate more than a concern for drawing statistical conclusions from a small data set.

The language of the court's decisions suggests a rejection of the possibility of constructing a mathematical profile of culpability, but an affirmation of the possibility of assessing whether community standards tolerate the imposition of the death penalty on the facts of a particular defendant's case.

B. The Success of the New Jersey Experience

Whatever the intention of the New Jersey legislature and courts, the most important lesson to be drawn from

the New Jersey experience is that specific proportionality review works quite well.

Attempting to model culpability is problematic: the construction of the model itself is laden with impossible value judgments. What bears on culpability? Is childhood relevant? Education? Further, it *920 is nearly impossible to draw meaningful conclusions from jury verdicts. When a jury finds a particular mitigating or aggravating circumstance to be present, a statistician cannot say with any certainty that other factors, perhaps not statutorily enumerated, did not bear in some way on the decision. Arguing that “the problems with the index-of-outcomes test run far deeper than mere statistical infirmities,” Professor Latzer asks, “[e]ven if [the test] yielded a stable index of capital cases, what would this test tell us?” [FN146] The question is difficult to answer.

Specific proportionality review, though, does not share the same problem because it requires no value judgments. [FN147] It does not attempt to construct a profile of the defendant. It asks the purely objective question whether community standards tolerate the imposition of the death penalty for an offense or on the facts of a particular offender's case. This question lends itself well to empirical analysis. A court can easily determine what percentage of the time juries have voted for death for jealousy-motivated murderers or non-triggerman felony murderers.

Understanding proportionality review in this narrower, value-free sense, also goes a long way to addressing the New Jersey Supreme Court's and Professor Latzer's concern with sample pool size. The problem, in short, is this: as of the time of the Loftin decision in 1999, the universe of death-eligible cases, as classified by the Special Master, totaled 369. [FN148] Of these 369 cases where death could have been sought by the prosecutor and imposed by the jury, only 47 resulted in death sentences. [FN149] This means that any conclusion about jury attitudes towards death in New Jersey is being drawn from a data set that any statistician would regard as small. [FN150]

This problem manifests itself in different ways in the context of the more complicated and value-ridden index-of-outcomes test than *921 with the salient factors test. The index-of-outcomes test generates a conviction rate based on the presence of certain variables, enumerated by the first Special Master David Baldus. [FN151] As with all regression analyses the result is expressed in the form of a confidence interval [FN152] (social scientists generally express results at a 95% confidence level; that is the range within which the investigator can say with 95% confidence that the variable at issue falls). [FN153] The more data available, the more confidently the results can be expressed. Inversely, the less data available, the greater the range required to state a result with the desired degree of confidence.

Because multi-variable regression analysis needs large data sets to produce reliable statistical outcomes, results of the index-of-outcomes test in New Jersey death penalty cases generally have had little meaning. Consider Donald Loftin's case, discussed extensively by Professor Latzer and discussed further below. In Loftin's case, the index-of-outcomes test determined with 95% confidence that someone with Loftin's profile had a probability of being sentenced to die of between 9% and 81%--a useless statistic. [FN154] In order to generate reliable data, the index-of-outcomes model would require a data pool containing at least 160 death sentences, a quantity that Professor Latzer reasonably argues will take more than fifty years to achieve. [FN155]

It seems at least worth asking why this is a conclusive argument against the index-of-outcomes test. Even if the fifty-year estimate is accurate, there is still a point in the foreseeable future at which the test could generate reliable results. Rather than scrap the test, New Jersey courts could simply ignore the results until the point where the data becomes reliable. Professor Latzer suggests two reasons for not pursuing this course of action:

cost and delay in the *922 administration of capital punishment. [FN156] Professor Latzer does not, however, quantify the cost, and there is every reason to believe the marginal cost of maintaining the data set is quite low. The initial effort in establishing the index and coding past cases would be considerable, but once the system were established it would presumably take little effort to add new cases to the data set as they came in. On the issue of delay, Professor Latzer says “that proportionality review add[s] an average of over eighteen months to the post-sentence review process.” [FN157] He does not say, though, why delay is undesirable. [FN158] But even allowing that statistical unreliability is a conclusive argument against the retention of a frequency analysis test, the salient factors test still passes muster.

The salient factors test does not employ a multivariable or regression analysis. It thus requires a smaller sample pool to generate reliable results. The uncertainty in interpreting the results of the salient factors test is of a different nature than with the index-of-outcomes test. The salient factors test compares the death-sentencing rate for the relevant subset to which the defendant's case belongs to the death-sentencing rate for the entire death-eligible pool. [FN159] The uncertainty here is in determining whether the difference between the two rates, if any exists, is reflective of a significant difference in attitudes or is merely attributable to random variation.

For example, in Loftin, the court grouped the defendant in the subcategory of murderers with prior murder convictions with two or more additional aggravating circumstances. [FN160] The total universe of death-eligible cases in New Jersey totaled 369 at the time, of which 154 went to the penalty phase, and 47 resulted in a death sentence. [FN161] The death-sentencing rate for all death-eligible cases was thus 13% (47/369). The death-sentencing rate for all cases that *923 proceeded to the penalty phase was 31% (47/154). Of the seven cases in Loftin's subcategory, five proceeded to the penalty phase, and two of these resulted in a death sentence. [FN162] The death-sentencing rate for Loftin's subcategory was thus 29% (2/7) for all death-eligible cases and 40% (2/5) for cases proceeding to the penalty phase.

It is immediately apparent that these results are not helpful to Loftin. Neither of the results suggests disproportionality--that is, a consensus that death is inappropriate on the facts of this case--since each death-sentencing rate for Loftin's subcategory is higher than the corresponding rate for the pool as a whole: 29% versus 13% for all death eligible cases, and 40% compared to 31% for cases proceeding to the penalty phase. This is hardly surprising since Donald Loftin belonged to an especially egregious class of murderers. [FN163] The Loftin court relied upon these statistical results in affirming Loftin's conviction. [FN164]

Professor Latzer criticizes the use of the salient factors in Loftin's situation because the small size of the category in which Loftin is placed “makes the result nearly meaningless.” [FN165] To illustrate this point, Professor Latzer offers the observation that a single additional death sentence in Loftin's category would raise the rate to 37.5%, and that two additional sentences would raise the rate all the way to 50%. “This kind of instability,” he writes, “undermines confidence in the results.” [FN166]

The use of absolute numbers is appealing, but deceptive. For one thing, the scenario Professor Latzer hypothesizes is extremely *924 unlikely. Given the aggregate death-sentencing rate of 13%, the chance of any two consecutive random cases resulting in death is just 1.7%. [FN167] Even if this scenario were to transpire, the relevant question to ask would not be how much the sentencing rate for the subcategory had changed in absolute terms. Rather, since the point of this objection is that small data sets cannot generate statistically significant results, the question is whether the inclusion of one or two new data points [FN168] would provide additional confidence that the difference between the death-sentencing rate for the subcategory and the death-sentencing rate

for the pool as a whole was not attributable to chance.

An analysis of the data in Loftin shows a 90% chance that the sentencing rate for Loftin's subcategory cannot be explained by random variation. [FN169] This is below the 95% confidence level statisticians require to reject the default hypothesis that the difference between the population and subset is attributable to chance. [FN170] It suggests, though, that useful results may be obtainable even on small data sets. In Professor Latzer's hypothetical, where two consecutive death sentences occur in Loftin's subcategory, it becomes possible to say with 99% certainty that the higher sentencing rate for the subcategory is not attributable to chance.

These results are not useful to defendants since the sentencing rate for their subcategory is higher than the population, but it is easy to imagine obtaining useful results with small data sets. If we imagine that two fewer people in Loftin's subcategory who proceeded to trial were sentenced to death, [FN171] we could say with 93% confidence that the variation from the normal 31% death-sentencing rate was not attributable to chance. If just one more jury followed by not imposing death for this subcategory, the confidence level would rise to the required 95%.

It also bears mention that Loftin need not be considered only as a member of the subcategory of repeat murderers with two or more *925 aggravating circumstances. If Loftin is considered simply as a repeat murderer, as the Loftin court in fact treated him, [FN172] the results become more meaningful still. Of 26 death-eligible cases involving repeat offenders, 17 proceeded to the penalty phase, and 10 of these resulted in death sentences. [FN173] The sentencing rate was thus 38% (10/26) overall, and 59% (10/17) for cases proceeding to the penalty phase. This result is significant at the 99% confidence level. In other words, it is virtually certain that prosecutors and juries regard the class of repeat murderers as more "deathworthy" than one-time offenders.

The specific figures are beside the point though. What is important is that the New Jersey experience with the salient factors test demonstrates that it is possible to obtain statistically useful results with small data sets and, in some cases, on the death penalty data pool as it currently exists. These results offer meaningful insight into whether the New Jersey community believes death an appropriate punishment for subcategories of murderers, as defined by the facts of a particular defendant's case. The New Jersey experience shows, in other words, that specific proportionality review is workable and useful.

V. Some Objections to Specific Proportionality Review and Responses

This Part anticipates and addresses some objections that might be raised against specific proportionality review. Professor Latzer raises the first of these as an argument against proportionality review generally: proportionality review does not and cannot account for the exercise of prosecutorial discretion, which legitimately spares some defendants from death on the basis of concerns unrelated to culpability. Thus the data on who is brought to trial is not reflective of community standards concerning the relative culpability of various classes of defendants.

The other arguments discussed here are hypothesized. The first is that specific proportionality review opens the door to infinite arguments by defendants that they belong to some subcategory or another. Since to prevail a defendant need only show that death is not considered proportionate for one subcategory to which he belongs, specific review will make it nearly impossible to prove that a sentence is proportionate. The final argument is that specific *926 proportionality review operates as a "one-way ratchet." Over time, death will be found disproportionate for more and more subcategories, until the exclusions swallow the punishment. The Part concludes

with some reflections on who deserves to die.

A. The Red Herring of Accounting for Prosecutorial Discretion

Professor Latzer raises a general objection to proportionality review, arguing that it fails to account for the legitimate vagaries of the exercise of prosecutorial discretion. [FN174] Professor Latzer's main concern is that prosecutors exercise discretion on the basis of a host of factors, none of which necessarily bear on the defendant's culpability. [FN175] Prosecutors legitimately consider provability and extrajudicial concerns such as the political climate and resources of the office in deciding whether to pursue a death penalty conviction. [FN176] They may also take into account invidious considerations such as race and ethnicity. [FN177] It is thus not fair when conducting comparative proportionality review to draw any conclusion from a prosecutor's decision not to seek the death penalty against a particular defendant since the decision may be based on factors unrelated to culpability. In essence, Professor Latzer is arguing that only the universe of cases proceeding to the penalty phase should be considered in conducting proportionality review. Even this sub-universe is unreliable, he would say, since it would include some cases where prosecutors sought the death penalty for extrajudicial reasons.

This concern is answered if proportionality review is specific rather than comparative. Assessing culpability is not the concern of specific proportionality review. The sole concern is the value-free, purely empirical question of whether community standards of decency tolerate imposition of the death penalty on the facts of the defendant's case. No individual case matters; conclusions are drawn from patterns. No single prosecutor can affect the analysis; the question is how prosecutors and juries in the several cases resembling the defendant's have chosen to act.

*927 Even if this reconception of the nature of proportionality review were invalid, it is not obvious why the failure to account for prosecutorial discretion should be a concern for Professor Latzer. Accurately accounting for prosecutorial discretion should have no bearing on the ability of a defendant to prove that his sentence is disproportionate. Suppose that of the 369 death-eligible cases in New Jersey, it could be determined that prosecutors declined to seek the death penalty in one quarter of those cases because of legitimate questions of provability. The baseline death-sentencing rate would thus rise from 13% to 17% (47/277) (The converse of this need not be accounted for-- presumably no prosecutor seeks the death penalty in a case they otherwise would not because the case is extra-provable).

At first glance it might appear that this would only make it easier for a defendant to prove disproportionality since the objective of a defendant in this position is to show that the sentencing rate for his subcategory is significantly lower than the aggregate sentencing rate. In other words, failing to account for prosecutorial discretion would only make the death sentences that are imposed seem more aberrant than they would appear if prosecutorial discretion were taken into account. Thus, the failure to account for the exercise of prosecutorial discretion should not be a concern for Professor Latzer. [FN178]

This fails to take into account, though, that some of the cases in which prosecutors decline to seek the death penalty will fall in defendant's subcategory, thus raising the death-sentencing rate for his subcategory. On average, one would expect that the percentage of cases in which the death penalty was not sought for extrajudicial reasons would be the same as in the overall pool. Thus, accurate accounting for prosecutorial discretion will not change a defendant's ability to show disproportionality.

The following example illustrates this proposition: the baseline death-sentencing rate for a community is

10%, equal to fifty death sentences out of five hundred death-eligible cases. The sentencing rate for a defendant's subcategory is 2%, equal to one death sentence out of fifty death eligible cases. It is determined that for both the aggregate pool and the relevant subset, 20% of the decisions not to seek death stem from concerns of provability on the part of prosecutors. The aggregate death-sentencing rate thus rises *928 from 10% to 12.5% (50/400). The subcategory death-sentencing rate rises from 2% to 2.5% (1/40). The defendant's case on proportionality review is equally compelling. Either way, the death-sentencing rate for his subcategory is one-fifth of the aggregate death-sentencing rate.

The concern for not accounting for prosecutorial discretion is thus a red herring. Accurate accounting of the exercise of prosecutorial discretion will have no bearing on a defendant's ability to show that his sentence is disproportionate.

B. The Problem of Infinite Subdivisions

One could imagine the argument that specific proportionality review is flawed because it opens the door to infinite subdivisions of the universe of murderers. [FN179] Under specific review, a murderer is not simply a murderer, but a non-triggerman felony murderer, or a murderer motivated by jealousy, or a female murderer, or some combination of any or all of these traits: a female non-triggerperson felony murderer motivated by jealousy. The problem with specific review, the argument might go, is that by repeatedly dividing the universe of murderers, a creative defense attorney could always define a subset for which contemporary standards of decency deplore death as a punishment. Death penalty proponents could find two sorts of unfairness in this: it makes it practically difficult to impose death in any individual case and it creates an irreversible carving-out process whereby subsets of murderers are found to be protected from the death penalty for all time.

As a practical matter, this first concern seems misplaced. In the famous study by David Baldus, George Woodworth, and Charles Pulaski on the imposition of the death penalty in Georgia, [FN180] Professor Baldus and his colleagues assessed how thirty-nine factors bore on the likelihood of a particular defendant receiving the death penalty. [FN181] Of these thirty-nine factors, only five made it more *929 than 50% less likely that a jury would sentence to die: the defendant was not the triggerman, the defendant admitted guilt or did not assert a defense, the defendant had a history of drug or alcohol abuse, the defendant was under seventeen years of age, the defendant was motivated by jealousy. [FN182] Of these five factors, only two had statistical significance beyond the 95% confidence level: the defendant who was not the triggerman and the defendant who had a history of drug or alcohol abuse. [FN183] In other words, of thirty-nine possible subdivisions, only five would have benefited a defendant claiming his sentence of death to be disproportionate. [FN184] The anecdotal experience in New Jersey confirms skepticism for the notion that floodgates will be open for criminal defendants. Only one defendant has yet succeeded in New Jersey in proving his death sentence to be disproportionate. [FN185] David Baldus estimates that out of 5000 death sentences imposed over the past twenty years, fewer than 75 (1.5%) have been vacated on grounds of excessiveness. [FN186] In a wide-ranging survey of proportionality decisions throughout the country, Baldus identified three categories of offenders for whom he thought a consensus might be emerging that death is inappropriate. [FN187]

Even if this were a practical concern, it could be easily addressed by adopting an approach similar to that used by New Jersey in conducting precedent-seeking review. Under precedent-seeking review, the New Jersey Supreme Court compares the defendant's case with other cases drawn from the category into which the *930 defendant's case was placed for purpose of the salient factors test. [FN188] The court leaves it to the parties to re-

commend comparison cases. [FN189] The court makes the final decision as to which cases are to be considered for review. [FN190]

It is almost impossible to imagine a defendant proving disproportionality by showing membership in a subcategory that has no bearing on deathworthiness. Nevertheless, the same approach could be employed with the salient factors test as with precedent-seeking review. The reviewing court could act as a screen for proposed subcategories that had no reasonable bearing on deathworthiness, thus weeding out irrelevant subdivisions, without having to engage in value-laden assessments of evidence.

Even if the problem of infinite subdivisions were a practical concern, and defense attorneys could routinely succeed in defining their clients as belonging to subclasses of murderers for which societal standards deemed death to be inappropriate, it is not at all obvious how this undermines specific proportionality review. This criticism reduces to: too few people that deserve the death penalty are receiving the death penalty. The force of this argument depends on a priori notions of desert, an issue discussed below in Section D.

C. The One-Way Ratchet

Another potential objection is that specific proportionality review operates as a one-way ratchet. This concern is related to the problem of infinite subdivisions. The concern is as follows: once death is found in one case to be disproportionate for a subcategory of offenders, the penalty is foreclosed for that class of offenders for all time. Over time, the inevitable result of specific proportionality review is that the death penalty will ultimately be found disproportionate for all offenders.

This argument could be made--perhaps even more convincingly--against the Supreme Court's existing Eighth Amendment jurisprudence. Under contemporary inherent proportionality review a one-time finding of disproportionality renders death off limits for that crime for all time, even though the relevant standard is contemporary standards of decency. [FN191] To illustrate, imagine that in *931 conducting inherent proportionality review, the Court considered only the number of state legislatures that authorized death for a particular crime. If the number is less than ten, the Court declares the penalty disproportionate. At all times between 1960 and 1990, eleven states authorized the death penalty for crime A. During the same period, between twenty-five and thirty states authorize the death penalty for crime B. In 1991, however, because of a highly publicized mistaken prosecution for crime B, twenty states repeal the death penalty for crime B. There is no reason to think the situation permanent, and indeed over the next few years two states reinstate the death penalty for crime B. But in 1993, a challenge is brought to the proportionality of death for crime B. Because fewer than ten states authorize death for crime B at that moment, death is never again permitted for crime B, despite evidence that public opinion is reforming in support of death for the crime. The Eighth Amendment thus gives permanent significance to temporary fluctuations in public opinion.

The analogous argument in the context of specific proportionality review would be that permanent significance would be given to temporary fluctuations in jury attitudes. If five consecutive juries, for example, were to decline to give death sentences for a particular subcategory of offender, then death would be off limits for that category of offender for all time. This argument is somewhat less convincing at the state level than at the federal level. The outcome of an inherent proportionality ruling, such as *Coker v. Georgia*, is that the death penalty for rape is unconstitutional. Hence no prosecutors will seek the death penalty for rapists and no state legislatures will draft new legislation authorizing it. The Supreme Court's ruling will have the effect of freezing tangible manifestations of public opinion.

State court rulings need not have the same conclusive effect since the rulings only apply to a particular defendant's case. One could imagine, though, that prosecutors would hesitate to seek the death penalty against categories of offenders for which death had previously been found disproportionate. They might conclude that it would be imprudent to expend the additional resources required to secure a death conviction where the chance of reversal on proportionality appeal were known in advance to be higher.

*932 Whether this is true or not, the ratchet argument is conclusive in either context only if one concludes a priori that it is desirable that some people receive the death penalty. This conclusion is informed, again, by preformed notions of desert.

D. Reflections on Desert

Professor Latzer raises a final argument against comparative review: it denies retributive justice in the name of distributive justice. “To decline to impose the punishment some murderers deserve, viz., death, because other equally deserving murderers get less, is to treat all equally, but unjustly in a retributive sense.” [FN192] Understanding proportionality review as specific rather than comparative addresses this objection. Specific proportionality review seeks to determine what defendants are “deserving” of death more precisely than by merely examining the crime they committed. Its object is refined retributive justice. It avoids the dichotomy between retributive and distributive justice posed by Professor Latzer. [FN193]

Undeniably, though, another component of the passage quoted above is the notion that murderers deserve to die. This view is evident in other passages throughout Professor Latzer's article. [FN194] Notions of desert are hopelessly entwined with a priori value judgments. The proposition that murderers deserve to die cannot be demonstrated objectively. [FN195] And it is likely that Professor Latzer would not agree with the proposition that all murderers deserve to die. He does not advocate a mandatory death penalty as a remedy for his concerns for distributive justice.

Once distinctions are drawn among murderers who deserve to die and murderers who do not, speaking of desert is fruitless. Any effort to distinguish those who deserve to die from those who do not will be based on subjective assessments of culpability. All that can be said objectively is that certain murderers have an expectation of death as a punishment. Indeed, this is the approach taken by the *933 Supreme Court in its Eighth Amendment jurisprudence. Tacitly recognizing that any attempt to classify certain offenders as more deserving of death than others would have a hollow air of objectivity; the Court has instead invested in a process-assessing standards of decency--whereby desert takes a back seat to expectation.

Specific proportionality review takes one further logical step down this path. Inherent review has traditionally asked whether death is an appropriate punishment for perpetrators of a certain type of crime. Specific review attempts to ascertain whether community standards of decency support death as a punishment for a defendant on the facts of his particular case.

VI. Conclusion

Specific proportionality review is a necessary component of any just sentencing scheme. Even accepting the proposition that the primary aim of a sentencing system is to achieve retributive justice, specific proportionality review remains indispensable. It is not enough to cursorily examine the crime that has been committed, decide

upon the maximum acceptable penalty, and claim that retributive justice has been achieved. Meaningful retributive justice requires that a more nuanced comparison be made, one that considers not only the crime committed, but the defendant's involvement and personal history.

Professor Latzer's characterization of the aim of proportionality review as an effort to weigh the culpability of defendants and achieve distributive justice is without basis. The United States Supreme Court's decisions on this subject have dealt primarily with the procedural question whether state court proportionality review is a necessary component of a constitutional sentencing scheme. The Court has never wavered from the substantive right of a capital defendant to have the proportionality of his sentence assessed on the facts of his particular case.

The New Jersey Supreme Court has demonstrated over the past two decades that specific proportionality review is something that courts can handle quite well. This history is checkered with less than successful efforts at review that are probably better understood as comparative. But the lesson remains clear that meaningful statistical results can be achieved by examining even small data sets for lessons as to precisely what impositions of the death penalty societal standards of decency will tolerate.

***934** In the absence of meaningful proportionality review, neither distributive nor retributive justice is achieved. Imposition of death sentences amounts to a lottery; no effort is made to check who receives death and who does not. Retributive justice receives only a nod of the head. Courts examine only whether types of crimes committed are deserving of death--an examination that is universally recognized as having little bearing on blameworthiness.

Perhaps understanding these objections, a trend has emerged among state courts, which are making a more meaningful commitment to proportionality review. [\[FN196\]](#) With the objectives of this review properly understood, this development should be welcomed and embraced in the name of fairness.

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[\[FN1\]](#). Barry Latzer, [The Failure of Comparative Proportionality Review of Capital Cases \(with Lessons From New Jersey\)](#), 64 Alb. L. Rev. 1161, 1162 (2001).

[\[FN2\]](#). *Id.* at 1167.

[\[FN3\]](#). See *id.* at 1164-65 (“The concept...is premised on...an assessment on the basis of reprehensibility alone.”). “Cases are compared along a single dimension--the defendant's criminal culpability....” *Id.* at 1235.

[\[FN4\]](#). See *id.* at 1161-62.

[\[FN5\]](#). *Id.* at 1167.

[\[FN6\]](#). See *id.* at 1165.

[\[FN7\]](#). See *id.* at 1164.

[FN8]. *Id.* (“An elaborate, time-consuming, and costly methodology was developed [in New Jersey]--with little to show for the effort.”).

There is simply no good reason to continue comparative review of capital cases. Comparison of capital cases drains judicial resources, diverts the focus of the courts, distends the post-conviction process, and denies the imposition of justice upon the guilty--all in pursuit of a chimera without basis in the Constitution. *Id.* at 1166.

[FN9]. See *id.* at 1165 (“No distribution of penal sanctions can meet such a test, and, except for the death penalty, I have never seen a serious suggestion that a punishment itself be abolished on this account.”).

[FN10]. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 357 (1977) (recognizing that “death is a different kind of punishment from any other which may be imposed”).

[FN11]. See Latzer, *supra* note 1, at 1240 n.388 (“In short, we should strive to equalize the distribution of death sentences, not abolish the death penalty because it is imposed on only some deserving murderers.”).

[FN12]. *Id.* at 1166 (“In *Pulley v. Harris*, the Supreme Court identified two types of proportionality review: traditional analysis of inherent disproportionality and comparative analysis of the kind *Harris* unsuccessfully sought to constitutionalize.”) (footnote omitted).

[FN13]. See *id.* at 1161-62, 1164 (“Comparative proportionality review could result in the reversal of a death sentence on grounds of failure to impose the same sentence on other similarly situated defendants.”).

[FN14]. 465 U.S. 37 (1984).

[FN15]. See Latzer, *supra* note 1, at 1168 (noting how the decision marked a prominent change for the Court and, subsequently, the states).

[FN16]. See *id.* “*Pulley* declared that comparative proportionality review was not an Eighth Amendment requirement after all...” *Id.* For example, states such as Connecticut, Idaho, and Maryland deleted proportionality review language from their statutes. See Act of Apr. 12, 1995, 1995 Conn. Acts 95-16 (Reg. Sess.); Act of Mar. 21, 1994, 1994 Idaho Sess. Laws 127; Act of May 12, 1992, 1992 Md. Laws 331.

[FN17]. See *infra* Part III.

[FN18]. *Pulley*, 465 U.S. at 43 (footnotes omitted).

[FN19]. See, e.g., *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989) (“The public sentiment expressed in... polls and resolutions may ultimately find expression in legislation, which is an objective indicator of contemporary values upon which we can rely.”); *Solem v. Helm*, 463 U.S. 277, 292 (1983) (finding that “a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria”); *Coker v. Georgia*, 433 U.S. 584, 592 (1977) (“Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent.”). But see *Coker*, 433 U.S. at 597 (stating that the determination of whether capital punishment is excessive is ultimately left to the discretion of the Court). This assertion from Justice White's opinion in *Coker* is possibly, though not necessarily, in tension with the preceding quotes. It could be understood to mean that the Court must make a subjective assessment whether the objective evidence of standards of decency support death.

[FN20]. See *Coker*, 433 U.S. at 592 (“[A]ttention must be given to the public attitudes concerning a particular

sentence--history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.”).

[FN21]. [Pulley](#), 465 U.S. at 43.

[FN22]. See Latzer, *supra* note 1, at 1164.

[FN23]. Of course, precisely what level of “similarity” is required makes all the difference to an individual defendant. As Leigh Bienen notes, many states “reduced proportionality review to a perfunctory exercise” by requiring only the vaguest sort of similarity. See Leigh B. Bienen, [The Proportionality Review of Capital Cases by State High Courts After Gregg: Only “The Appearance of Justice” ?](#), 87 *J. Crim. L. & Criminology* 130, 133 (1996).

[FN24]. See Latzer, *supra* note 1, at 1167-68 (stating that comparative proportionality review uses prosecutorial and jury decisions to measure consistency).

[FN25]. See *id.*

[FN26]. See *id.* at 1164-65.

[FN27]. See *id.*

[FN28]. See [Penry v. Lynaugh](#), 492 U.S. 302, 330-35, 340 (1989) (considering, but ultimately rejecting, the argument that the Eighth Amendment prohibits the execution of someone who is mentally retarded).

[FN29]. See [Enmund v. Florida](#), 458 U.S. 782, 797 (1982) (declaring that the Eighth Amendment precludes executing a participant in felony murder who does not kill or intend to kill). But see [Tison v. Arizona](#), 481 U.S. 137, 151, 158 (1987) (concluding that major participation in the commission of a felony, compounded by a reckless indifference to human life, is enough to warrant the death penalty despite a lack of intent to kill).

[FN30]. See [Penry](#), 492 U.S. at 340 (“While a national consensus against execution of the mentally retarded may someday emerge reflecting the ‘evolving standards of decency that mark the progress of a maturing society,’ there is insufficient evidence of such a consensus today.”); see also [Enmund](#), 458 U.S. at 794.

[FN31]. See [Penry](#), 492 U.S. at 335, 340; [Enmund](#), 458 U.S. at 794-95 (examining nation-wide statistics to illustrate that American society has overwhelmingly refused to execute individuals who had no intent to kill or were not triggermen).

[FN32]. See [Pulley v. Harris](#), 465 U.S. 37, 43-44 (1984).

[FN33]. 458 U.S. 782 (1982).

[FN34]. See [Pulley](#), 465 U.S. at 43.

[FN35]. See *infra* Part IV.B.

[FN36]. Professor Latzer defines inherent review somewhat differently as the determination of “the intrinsic deathworthiness of a category of crimes or class of defendants without regard to consistency or evenhandedness in the application of the death penalty.” Latzer, *supra* note 1, at 1167. The difference is that this definition al-

lows for the relevant universe to be defined either by the type of crime committed or by some characteristic of the defendant. For purposes of this Article, distinctions drawn on the basis of characteristics of the defendant are classified as specific proportionality review. See *infra* Part II.C.

[FN37]. Latzer, *supra* note 1, at 1167-68.

[FN38]. David Baldus offers some examples of categories of defendants for which consensus is emerging that death is an inappropriate punishment. See David Baldus, [When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences](#), 26 *Seton Hall L. Rev.* 1582, 1605 (1996).

[I]n Florida and other states where the volume of cases is substantial, some patterns are emerging. We see in the cases suggestions that some case categories are among the least culpable and should be put beyond the risk of a death sentence.... Examples include cases involving mentally ill defendants, killings arising out of violent marital discord, and cases of [sic] involving robbery murders with substantial mitigation.

Id. (footnotes omitted).

[FN39]. Specific proportionality review is thus distinct from the sort of review sought in [McCleskey v. Kemp](#), 481 U.S. 279 (1987). McCleskey argued that his capital sentence was unconstitutional in light of a study that showed blacks were more likely to receive the death penalty than whites. See *id.*, 481 U.S. at 308-09. McCleskey had no argument to make under specific review. For that matter, he had no argument to make under inherent or comparative review, though Professor Latzer terms what McCleskey sought as comparative proportionality review. See Latzer, *supra* note 1, at 1185-87. Comparative proportionality review is a rule of exclusion; an argument that someone should not receive death because others like him had not received death. McCleskey belonged to a class of defendants who received death more often than average. See [McCleskey](#), 481 U.S. at 306-07 (“McCleskey cannot prove a constitutional violation by demonstrating that other defendants who may be similarly situated did not receive the death penalty.”). Rather, McCleskey premised his argument on the a priori notion that race should not enter into sentencing decisions. See *id.* at 308. The relief sought by McCleskey might be better termed systemic proportionality review. Inherent, comparative, and specific proportionality review arguments are all about the treatment of individuals and groups of individuals. Showing an individual sentence to be disproportionate does not show any general failing of the sentencing system. McCleskey argued that the system itself had failed, an argument the Court rejected. See *id.* at 311-13 (“The discrepancy indicated by the Baldus study is ‘a far cry from the major systemic defects identified in Furman.’”).

[FN40]. See [Coker v. Georgia](#), 433 U.S. 584, 592, 597 (1977) (rejecting capital punishment as a penalty for the rape of an adult woman); see also [State v. Wilson](#), 685 So. 2d 1063, 1070 (La. 1996) (declaring that “the death penalty is not an excessive penalty for the crime of rape when the victim is a child under the age of twelve years old”).

[FN41]. See *supra* note 28 and accompanying text. The point that the crime of rape may be more deserving of the death penalty than murder, depending on the circumstances, is made by Justice Powell in his concurrence in [Coker](#), and is discussed *infra* note 96. See [Coker](#), 433 U.S. at 601-04 (Powell, J., concurring in part and dissenting in part).

[FN42]. See [Coker](#), 433 U.S. at 592 (“[A] punishment is ‘excessive’ and unconstitutional if it (1) makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering; or (2) is grossly out of proportion to the severity of the crime.”).

[FN43]. See *supra* note 19 and accompanying text.

[FN44]. See supra note 20 and accompanying text.

[FN45]. *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968); see also *Enmund v. Florida*, 458 U.S. 782, 794 (1982) (“Society’s rejection of the death penalty for accomplice liability in felony murders is also indicated by the sentencing decisions that juries have made.”); *Coker*, 433 U.S. at 596 (observing that “[t]he jury...is a significant and reliable objective index of contemporary values because it is so directly involved”) (alteration in original).

[FN46]. See, e.g., *Enmund*, 458 U.S. at 794 (rejecting the death penalty for nontriggerman felony murderers in light of “overwhelming [evidence] that American juries have repudiated imposition of the death penalty for [these] crimes”); *Coker*, 433 U.S. at 596 (determining that “it is...important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried”).

[FN47]. See infra notes 48-57 and accompanying text.

[FN48]. 408 U.S. 238 (1972).

[FN49]. *Id.* at 293 (Brennan, J., concurring).

[FN50]. Ga. Code Ann. § 17-10-35(c)(3) (1997).

[FN51]. At the time, Georgia Supreme Court practice was to compare the case before it with factually similar Georgia Supreme Court cases in which death or life sentences had been imposed after 1969. See Latzer, supra note 1, at 1178. There was no formula for comparison. Death sentences were sustained if “in similar cases throughout the state the death penalty has been imposed generally.” *Moore v. State*, 213 S.E.2d 829, 832 (Ga. 1975). A death sentence would be reversed if it were “substantially out of line with reactions of prior sentencers.” *Ross v. State*, 211 S.E.2d 356, 360 (Ga. 1974). Professor Latzer describes the process in greater detail. See Latzer, supra note 1, at 1178-79.

[FN52]. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).

[FN53]. See Latzer, supra note 1, at 1168 & nn.28-29 (“Twenty-six states responded to this signal by establishing statutory proportionality review requirements in the 1970s and 1980s.”).

[FN54]. See *id.* at 1178-79.

[FN55]. See *id.* at 1168 n.29 (listing state proportionality review statutes).

[FN56]. See Bienen, supra note 23, at 133; Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. Colo. L. Rev. 813, 847-48 (1999); see also Latzer, supra note 1, at 1168 & n.31.

[FN57]. Latzer, supra note 1, at 1181.

[FN58]. See *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984).

[FN59]. See Latzer, supra, note 1, at 1181-83.

[FN60]. See [Pulley](#), 465 U.S. at 43; *infra* discussion Part III.A.

[FN61]. [Pulley](#), 465 U.S. at 38 n.1.

[FN62]. A purely logistical matter contributed to the Court's uncertainty: the Court did not have before it a copy of Harris's state habeas petition. *Id.* at 40 n.2. Some evidence suggested that Harris's theory of his own case may have evolved over time. Significantly, while his federal habeas petition included an affidavit detailing California cases similar to his own in which the death penalty was not imposed, his direct appeal to the California Supreme Court had not included this affidavit. *Id.*

[FN63]. *Id.* at 40.

[FN64]. *Id.* at 40-41.

[FN65]. *Id.* at 43-44 (citations omitted) (emphasis added).

[FN66]. The Court has made such a distinction, for example, in rejecting claims of actual innocence as a basis for habeas relief. See [Herrera v. Collins](#), 506 U.S. 390, 400 (1993) (“[F]ederal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution--not to correct errors of fact.”); see also [Cabana v. Bullock](#), 474 U.S. 376, 386 (1986) (“Indeed Enmund does not impose any particular form of procedure upon the States. The Eighth Amendment is satisfied so long as the death penalty is not imposed upon a person ineligible under Enmund for such punishment.”).

[FN67]. See, e.g., [Barclay v. Florida](#), 463 U.S. 939, 950-51 (1983) (“As long as that discretion is guided in a constitutionally adequate way, and as long as the decision is not so wholly arbitrary as to offend the Constitution, the Eighth Amendment cannot and should not demand more.”) (citation omitted).

[FN68]. [Pulley](#), 465 U.S. at 43.

[FN69]. *Id.* at 38 n.1.

[FN70]. *Id.* at 54 (citations omitted).

[FN71]. *Id.* at 46.

[FN72]. *Id.* at 42-43 (emphasis added) (citations omitted).

[FN73]. *Id.* at 43; see also *supra* notes 61-64 and accompanying text.

[FN74]. 458 U.S. 782 (1982).

[FN75]. See [Pulley](#), 465 U.S. at 43.

[FN76]. *Id.*

[FN77]. See [Enmund](#), 458 U.S. at 784.

[FN78]. *Id.*

[FN79]. *Id.* at 785-86.

[FN80]. Under Florida death-sentencing procedure, the jury advises the trial judge whether to impose the death penalty. The decision is ultimately the judge's. See [Fla. Stat. Ann. § 921.141\(2\)](#) (West 2001).

[FN81]. [Enmund](#), 458 U.S. at 786 n.2.

[FN82]. [Enmund v. State](#), 399 So. 2d 1362, 1370 (Fla. 1981).

[FN83]. *Id.* at 1370.

[FN84]. *Id.* at 1369.

[FN85]. *Id.* at 1371.

[FN86]. [Enmund v. Florida](#), 458 U.S. 782, 787 (1982).

[FN87]. *Id.* at 791.

[FN88]. *Id.* at 789.

[FN89]. *Id.*

[FN90]. *Id.* at 792-93 & n.15.

[FN91]. *Id.* at 819 (O'Connor, J., dissenting).

[FN92]. *Id.* at 794 (“The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's.”).

[FN93]. *Id.* Of the remaining twenty-three cases, in two the person executed had someone else commit the murder for him, and in sixteen the Court could not determine whether the person executed committed the homicide. *Id.*

[FN94]. *Id.* at 797.

[FN95]. Indeed, it is easy to imagine a murderer less reprehensible than a non-triggerman felony murderer like [Enmund](#) since the trial court found that no mitigating circumstances were present in [Enmund's](#) case. *Id.* at 787.

[FN96]. Whether other examples of specific proportionality review exist is a subject for debate. The view here is that [Thompson v. Oklahoma](#), 487 U.S. 815 (1988), holding the death penalty unconstitutional for persons under the age of sixteen at the time of their offense, is best classified as specific proportionality review. *Id.* at 838. By considering a factor--age-- independent of the nature of the offense, the Court divides the universe of death-eligible criminals into two subsets: adults and juveniles. It then proceeds to analyze how other legislatures and juries have acted with respect to the subset of juveniles. See *id.* at 830-31. In [Penry v. Lynaugh](#), 492 U.S. 302 (1989), the Court also undertook specific review analysis. In [Penry](#), the Court divides death eligible criminals on the basis of mental capacity, though the Court declines to find that evolved standards of decency bar the execution of those mildly to moderately retarded. *Id.* at 328, 333-35.

Professor Latzer might respond that [Thompson](#) and [Penry](#) are examples of inherent review since he defines inherent review as the determination of “the intrinsic deathworthiness of a category of crimes or class of defendants.” Latzer, *supra* note 1, at 1167 (emphasis added). But [Thompson](#) and [Penry](#) illustrate that this broader

definition of inherent review, expanded to include classes of defendants, is not useful. The divisions of the universe of death-eligible defendants made in *Thompson and Penry* are different in kind from those made in cases such as *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (Coker ruled that death is a disproportionate penalty for the rape of an adult woman). In *Thompson and Penry*, the Court makes divisions on the basis of factors unrelated to the nature of the offense. Prior to *Coker*, for example, in order to assess whether death was a proportionate punishment for rape, a court need only have examined how juries and legislatures dealt with rapists. It need not have examined the facts of any individual case. A court undertaking proportionality analysis for fifteen year-olds needs to open the books, so to speak, on jury verdicts. The fact of an acquittal-- relevant to the sort of inherent review analysis found in *Coker*--would be meaningless to an assessment of contemporary standards of decency without knowing the circumstances of the case, relevantly the age of the defendant acquitted. Also, the divisions made in *Thompson and Penry* have no definitive bearing on culpability. It is easy, for example, to imagine both an especially blameworthy fifteen-year old murderer and a sympathetic seventeen-year old. Put simply, if *Thompson and Penry* are classified as inherent review, then everything is inherent review. A potential response to this is that *Thompson and Penry* are different because the basis used to divide the death-eligible universe--age and mental capacity--are immutable personal characteristics. The argument might go that though the division carved in *Thompson and Penry* is different from *Coker*, it is also different from that in *Enmund*, and better grouped with *Coker* and the inherent review cases because the relevant mitigating factor is unchangeable. This argument leads to a bizarre result: greater scrutiny would be given to factors such as age and mental capacity, which are outside of the defendant's control and have no obvious bearing on culpability, than to volitional factors. While it may be true that fifteen-year old murderers on the whole are less culpable than sixteen-year old murderers, it seems plausible if not probable that the culpability difference is far greater between murderers who act say, out of jealousy, and those who do not. Perhaps the better argument is that divisions based on the crime committed are not especially useful because there are no definitive conclusions that can be drawn about the relative culpability of the various classes of criminals. Justice Powell makes a similar argument in his concurrence in *Coker*:

Today...the plurality draws a bright line between murder and all rapes-- regardless of the degree of brutality of the rape or the effect upon the victim. I dissent because I am not persuaded that such a bright line is appropriate. As noted in *Snider v. Peyton*, “[t]here is extreme variation in the degree of culpability of rapists.” The deliberate viciousness of the rapist may be greater than that of the murderer. Rape is never an act committed accidentally. Rarely can it be said to be unpremeditated. There also is wide variation in the effect on the victim. The plurality opinion says that “[l]ife is over for the victim of the murderer; for the rape victim, life may not be nearly so happy as it was, but it is not over and normally is not beyond repair.” But there is indeed “extreme variation” in the crime of rape. Some victims are so grievously injured physically or psychologically that life is beyond repair.

433 U.S. at 603 (Powell, J., concurring in part and dissenting in part) (citations omitted) (alteration in original). Powell argues for “a more discriminating inquiry” into whether “society finds the [death] penalty disproportionate for all rapes.” *Id.* at 604. In essence, he argues that all proportionality review should be specific.

Whether the decisions in *Thompson and Penry* are better grouped under an expansive definition of inherent review or whether they show that all proportionality review is specific is ultimately of no moment. The review in *Enmund* is clearly not of the inherent variety. *Enmund* divides the universe of murderers on the basis of the defendant's role in the offense, a factor that though relevant to an assessment of culpability, is certainly not immutable.

[FN97]. See *Cabana v. Bullock*, 474 U.S. 376, 386 (1986).

[FN98]. *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984).

[FN99]. *Id.* at 43.

[FN100]. *Id.*

[FN101]. Latzer, *supra* note 1, at 1195.

[FN102]. *Id.* at 1194-95 (“Neither the Cruel and Unusual Punishments Clause nor the Equal Protection Clause require consistency, rationality, or evenhandedness in the imposition of death sentences. Consequently, they do not require comparative proportionality review.”) (footnote omitted).

[FN103]. *Id.* at 1234 (asserting that both statistical and non-statistical proportionality review in New Jersey has failed).

[FN104]. See *id.* at 1203 (“A key question thus arises: what is meant by ‘like’ with respect to capital cases, and how can this be determined?... The controversy is not just methodological, as it implicates the aims, breadth, and feasibility of the review process.”); see also Baldus, *supra* note 38, at 1596-97 (“Finally, there is a question of whether a principled system of proportionality review is even possible. Years ago, Justice Rehnquist characterized the entire enterprise as ‘impossible’ of attainment in any principled fashion.”). The one possible exception to this claim is the case of co-defendants, an instance relied upon by some commentators as a compelling rationale for proportionality review. See, e.g., White, *supra* note 56, at 813-14. Even co-defendants who perform the same criminal acts may vary in culpability, though, if the mitigating evidence is different for one than the other.

[FN105]. Latzer, *supra* note 1, at 1234.

[FN106]. New Jersey has abandoned the two methods of frequency analysis most directly aimed at assessing the culpability of defendants. See *infra* note 125 and accompanying text.

[FN107]. See *infra* notes 121-22, 125 and accompanying text.

[FN108]. See *infra* notes 121-22 and accompanying text (explaining the mechanics of the numerical preponderance test).

[FN109]. As an example, Professor Latzer offers the case of Robert Marshall, a contract killer, who was classified under this system as a single-aggravator and double-mitigator. Latzer, *supra* note 1, at 1223.

[FN110]. One could imagine the argument, though, that specific proportionality review opens the door to subdivisions that have no bearing on “deathworthiness.” This suggests a flaw in the specific proportionality construct: specific review opens the door to infinite subdivisions of the universe of murderers. This claim is laid out in greater detail in Part V.B., which argues that it is not ultimately a cause for concern and presents relevant responses.

[FN111]. See *supra* note 56 and accompanying text.

[FN112]. Latzer, *supra* note 1, at 1198; see also Bienen, *supra* note 23, at 184 (“This sustained support for a reliable and comprehensive data-gathering and analysis project has not yet been matched by any other state high

court.”).

[FN113]. See Latzer, *supra* note 1, at 1196. Latzer maintains that:

The history of proportionality review, Jersey style, is a story of conflict between the state judiciary and the other institutions of state government over a process that... remains complicated, confusing, and time-consuming, has had no effect on death sentences, except to delay their imposition, and is fundamentally unsound.

Id.

[FN114]. N.J. Stat. Ann. § 2C:11-3(e) (West 1995 & Supp. 2001).

[FN115]. All of these states copied the Georgia statute, which was upheld in Gregg, “like a recipe.” See *State v. Loftin*, 724 A.2d 129, 136 (N.J. 1999); see also Latzer, *supra* note 1, at 1196.

[FN116]. See *Loftin*, 724 A.2d at 140.

[FN117]. See *State v. Marshall*, 613 A.2d 1059, 1088-92 (N.J. 1992) [hereinafter *Marshall II*] (presenting a brief description of the salient features of each of these tests). For a more detailed description of the tests, see Latzer, *supra* note 1, at 1214-29.

[FN118]. *Marshall II*, 613 A.2d at 1077.

[FN119]. Each category is further divided into two to seven subcategories making a total of fifty-six subcategories. See Hon. David S. Baime, Report to the New Jersey Supreme Court: Proportionality Review Project 54-55 (1999) [hereinafter *Baime Report*].

[FN120]. See *id.* (providing statistical data); see also David C. Baldus, Death Penalty Proportionality Review Project Final Report to the New Jersey Supreme Court 93 n.103 (1991) [hereinafter *Baldus Report*]. The New Jersey Supreme Court has declined to adopt any per se numerical threshold. It merely considers the death-sentencing rate as one factor among others in determining the proportionality of a sentence. See *Marshall II*, 613 A.2d at 1081.

[FN121]. *Loftin*, 724 A.2d at 149.

[FN122]. *Id.* at 149-50; see also *Baldus Report*, *supra* note 120, at 88-92 (describing the process by which aggravating and mitigating factors are used for comparison to other cases).

[FN123]. See *Baldus Report*, *supra* note 120, at 93.

[FN124]. *Id.* at 92-93.

[FN125]. Numerical preponderance test: *Loftin*, 724 A.2d at 146 (“Today we decide, based on our experience and on the record before us, that the numerical-preponderance-of-aggravating-and-mitigating-factors test should be abandoned.”). Index-of-outcomes test: *In re Proportionality Review Project*, 735 A.2d 528, 541 (N.J. 1999) (“[T]here remain obvious problems with the test, and there is no advocate for the test in its present form.”).

[FN126]. The closest any New Jersey court comes to discussing any of the issues raised here is in *Marshall II*. In discussing the significance of *Pulley v. Harris*, the *Marshall II* court draws a distinction between “substantive or offense-oriented proportionality review” and “procedural or offender-oriented [proportionality] review.” *Mar-*

shall II, 613 A.2d 1059, 1067-69 (N.J. 1992). This distinction is similar to the basic distinction Professor Latzer draws between inherent proportionality review and comparative proportionality review. See Latzer, *supra* note 1, at 1166-68, 1187-94. After Pulley, New Jersey changed its statutes to make proportionality review a requirement only when requested by a defendant. See *Marshall II*, 613 A.2d at 1067. The *Marshall II* Court interpreted Pulley as a rejection of offender-oriented review, but an affirmation of offense-oriented review. It understood the framers of the New Jersey Capital Punishment Act to be following the lead of the dissenters in Pulley and implementing a system to weed out extreme examples of disproportionality. *Id.* at 1069. The New Jersey Capital Punishment Act thus allowed for the rejection of some applications of the death penalty without the presence of “the nearly unanimous degree of generality that attends the Eighth Amendment rejection of the death penalty for particular crimes or categories of crimes as being disproportionate punishment.” *Id.* at 1070. The *Marshall II* discussion bears more on the quantum and nature of evidence required for a proportionality reversal than on any of the issues raised here. To the extent it does bear on these issues, however, the language in *Marshall II* is more consistent with specific review than comparative review. See *id.* at 1069-70 (“[A] death sentence is comparatively excessive if other defendants with similar characteristics generally receive sentences other than death for committing factually similar offenses in the same jurisdiction.”) (alteration in original). The court makes no mention of contemplating any assessment of culpability.

[FN127]. Nor does it offer any insight into the New Jersey state legislature, which can only be characterized as opposing the entire enterprise of proportionality review. See Latzer, *supra* note 1, at 1196-99.

[FN128]. *Marshall II*, 613 A.2d at 1077.

[FN129]. See discussion *supra* Part II.C.

[FN130]. See *Proportionality Review Project*, 735 A.2d at 539. In *Proportionality Review Project*, the New Jersey Supreme Court rejected a proposal by Special Master David Baime to introduce mitigating factors into the salient factors test. See Baime Report, *supra* note 119, at 64-65. The court's reasoning in rejecting Judge Baime's proposal offers little insight into its understanding of the nature of proportionality review. The court's concern is with the more practical matter of complicating the one method of statistical analysis that it found to be workable. *Proportionality Review Project*, 735 A.2d at 539 (“In order to channel the salient-factors analysis into a simpler reading of the data, we reject for now the incorporation of mitigating factors into the analysis.”).

[FN131]. Professor Latzer himself makes this point. See Latzer, *supra* note 1, at 1220 (“[I]t is almost inconceivable that deathworthiness can be accurately assessed without including mitigating considerations.”).

[FN132]. Special Master Baldus recognized this problem from the start. See Baldus Report, *supra* note 120, at 92 (observing the test's limitations in “that it assumes an equal weight for all aggravating and mitigating circumstances”). This concern ultimately contributed in large part to the abandonment of the test. See *State v. Loftin*, 724 A.2d 129, 150 (N.J. 1999).

[FN133]. In other words, there have been too few executions in New Jersey to run regressions.

[FN134]. 724 A.2d 129 (N.J. 1999).

[FN135]. *Id.* at 140 (emphasis added).

[FN136]. *Id.* at 140-41 (emphasis added) (quoting *Marshall II*, 613 A.2d 1059, 1078 (N.J. 1992)).

[FN137]. *Id.* at 140.

[FN138]. Though the Loftin Court characterizes frequency analysis generally as “a statistical approach that determines in three ways which cases have similar levels of culpability.” *Id.* (emphasis added).

[FN139]. On the contemplation of culpability as the key factor underlying the index-of-outcomes test, see, for example *State v. DiFrisco*, 662 A.2d 442, 451 (N.J. 1995), writing that cases will be classified “according to their comparative levels of blameworthiness.” See also *State v. Martini*, 651 A.2d 949, 968 (N.J. 1994) (explaining how in the index-of-outcomes test, the court will “compare the blameworthiness of different defendants by the statistically-relevant measures of culpability”) (emphasis added); *Marshall II*, 613 A.2d at 1091 (describing how the approach seeks “to identify the characteristics common to the cases in terms of their degree of blameworthiness as perceived by prosecutors and juries”) (emphasis added); Baldus Report, *supra* note 120, at 93 (noting that cases are ranked “according to overall defendant culpability”) (emphasis added).

Descriptions of the salient factors and numerical preponderance tests almost uniformly exclude mention of culpability. On the numerical preponderance test, see, for example, *Loftin*, 724 A.2d at 149, where the court states, “[I]n the numerical-preponderance test, a defendant's case is compared to other cases having the same number of aggravating and mitigating factors.”

On the salient factors test, see, for example, the Baldus Report, *supra* note 120, at 80-81, which illustrates how the aim of the test is to achieve “factual comparability” of similar cases by narrowly and precisely delineating the salient factors classifications.

One notable exception is in *Loftin*. The salient factors test, the Loftin Court says, “employs thirteen major comparison groups or categories of cases ranked generally in descending order of blameworthiness and derived from the statutory aggravating factors.” *Loftin*, 724 A.2d at 148-49 (emphasis added). But the Loftin Court makes no other mention of culpability as a consideration of the salient factors test, and, significantly, even in the quote in question the court does not say or imply that the purpose of the test is to make a comparison of culpability. The comparison is between factually similar cases classified by factors, arranged by Master Baldus's assessment of blameworthiness.

[FN140]. Professor Latzer argues that the salient factors test is flawed because: (1) it does not take mitigating factors into account, which is an essential part of an evaluation of deathworthiness, and that any effort to take mitigating evidence into account would be highly problematic; (2) the New Jersey Supreme Court has not made clear whether the case under review should be counted when determining the death-sentencing rate for the relevant subcategory--an important ambiguity given the low number of cases available for review; and (3) the court has not made clear how to count death-sentenced cases in which the sentence was reversed on appeal. Latzer, *supra* note 1, at 1220-21. The numerical preponderance test is flawed, he says, because “cases with identical numbers of aggravators and mitigators are not alike except in the narrowest of senses” and for all of the reasons stated in connection with the salient factors test. *Id.* at 1223-24. The index-of-outcomes tests, Professor Latzer says, suffers from all of the “statistical infirmities” of the other tests and from fatal problems of interpretation. *Id.* at 1228.

With respect to the salient factors test, it is not obvious why the failure to take mitigating factors into account should be of consequence to Professor Latzer. Because proportionality is a rule of exclusion--that is, it keeps people who would otherwise receive death from receiving it--and since Professor Latzer operates from the premise that all who receive the death penalty are deserving of death, incorporating mitigating factors into the salient factors test should be seen as undesirable since it would lead to some sentences being found disproportionate that would otherwise appear measured. See *id.* at 1240 & n.388.

[FN141]. See *id.* at 1222 (“In fact, the small size of the category makes the result nearly meaningless.... This kind of instability undermines confidence in the results.”).

[FN142]. See *In re Proportionality Review Project*, 735 A.2d 528, 540 (N.J. 1999).

[Special Master] Judge Baime recommends abandoning the index-of-outcomes test due to the instability of the regression models...which means that the computer models are using the data from a relatively small number of cases to explain the effect of too many different factors on the likelihood of receiving the death penalty.

Id. (footnote omitted).

[FN143]. See *Loftin*, 724 A.2d at 150 (“In fact, the results of the numerical-preponderance test have been consistently discounted, not only because the test fails ‘to account for the qualitative character of jury deliberations,’ but also due to persistently small sample sizes.”) (citation omitted).

[FN144]. See *DiFrisco*, 662 A.2d at 455 (“[T]he small sample sizes of the groups in this salient-factors test preclude us from investing great weight in those results.”).

[FN145]. See, e.g., *id.* at 454; *State v. Martini*, 651 A.2d 949, 963 (N.J. 1994); *State v. Bey*, 645 A.2d 685, 694 (N.J. 1994) (each describing the salient-factors test as being the most persuasive because it compares factually similar cases).

[FN146]. *Latzer*, *supra* note 1, at 1228.

[FN147]. With one possible exception--the problem of infinite subdivisions. See *infra* Part V.B.

[FN148]. See *Loftin*, 724 A.2d at 164 (referring to the Loftin Report).

[FN149]. *Id.* (reporting that the statistics result in a death sentence rate of thirteen percent).

[FN150]. See generally David Weisburd, *Good for What Purpose? Social Science, Race, and Proportionality Review in New Jersey*, in *Social Science, Social Policy, and the Law* 258, 266-71 (Patricia Ewick et al. eds., 1999). Weisburd states:

Even if the special master had included only the statutory factors, sixteen independent variables remained in the analysis. Although there is no hard-and-fast rule about the number of independent variables that may be included in any specific model, it is generally noted that models should be reviewed for problems of instability when there are fewer than ten cases in the less-frequent category (a death verdict in this example) for each of the independent variables. That threshold would have required a minimum of 160 death sentences rather than the thirty-nine present in the Marshall case.

Id. at 271.

[FN151]. See *id.* at 264 (describing the factors Baldus enumerated as being both legal and extra-legal, including factors not limited to aggravating or mitigating circumstances).

[FN152]. See *id.* at 277 (listing three death penalty cases where confidence intervals were used, albeit with “growing discomfort”).

[FN153]. See generally *Loftin*, 724 A.2d at 168 (explaining that confidence intervals are expressed in a range and that the results increase in predictive quality as the size of the confidence interval decreases).

[FN154]. *Id.* at 168-70. Before abandoning the test, New Jersey courts ran the index-of-outcomes test on four

different case pools--some considering only cases that went to penalty phase, some considering only statutory aggravating and mitigating factors. *Id.* The result described in the text considers the entire universe of death eligible defendants and considers statutory aggravating and mitigating factors and non-statutory mitigating factors. Running the test over the different case pools produced widely different results, which further undermined the Loftin court's confidence in the process. *Id.* See generally Latzer, *supra* note 1, at 1226-27.

[FN155]. See Latzer, *supra* note 1, at 1225-26 & n.319.

[FN156]. *Id.* at 1243 (“New Jersey has taken comparative proportionality review to unparalleled heights of complexity, at great expense in resources and in delays in the administration of capital punishment.”).

[FN157]. *Id.* at 1199.

[FN158]. It is imaginable that delay might serve the useful purpose of solidifying public confidence in executions. Delay addresses, to some extent, the irreversibility objection to the death penalty. The more time elapsed between conviction and execution, the greater the chance that exculpatory evidence could be found and, hence, the less the chance of a mistake.

[FN159]. Debate persists over what universe of cases should be considered for proportionality review. The obvious possibilities from narrowest to broadest include: all death-sentenced cases, all cases that proceeded to the penalty stage, all cases where a capital trial commenced, and all death-eligible cases regardless of whether prosecution ensued. See generally *id.* at 1203-14 (noting the difficulty in determining the similarities in capital cases).

[FN160]. See *State v. Loftin*, 724 A.2d 129, 165 & nn.15-16, 166 (N.J. 1999).

[FN161]. *Id.* at 164.

[FN162]. *Id.* at 166.

[FN163]. See *id.* app. C at 178-90 (providing, in graphic detail, comparison case summaries of murderers in Loftin's class).

[FN164]. *Id.* at 167 (“In sum, application of the salient-factors test appears to suggest that prior murderers receive the death penalty more frequently than most defendants in the death-eligible and penalty-trial universes.... In fact, prior murderers are sentenced to death at a higher rate than any other category of murderers.”).

[FN165]. Latzer, *supra* note 1, at 1222. A concern noted, and discarded, by the Loftin Court. See *Loftin*, 724 A.2d at 167 (“While we are mindful that the small sample sizes prevent us from relying on the results of this test, they do support a finding of no disproportionality.”) (citation omitted).

[FN166]. Latzer, *supra* note 1, at 1222. Two sorts of errors could stem from a small data set: (1) a death sentence could be found to be proportionate when in fact community sentiment, if gauged accurately, would regard it as disproportionate, or (2) a death sentence could be found to be disproportionate when in fact community sentiment, if gauged accurately, would regard it as proportionate. The possible error at issue in Loftin's case is of the first sort. It is not obvious why this sort of error should concern Professor Latzer. Since he operates from the premise that all those sentenced to die deserve to die, the only concern that should bother him is an erroneous finding of disproportionality. See *supra* note 140 and accompanying text for a similar point.

[FN167]. The square of .13.

[FN168]. Presumably achievable in less than the fifty years required to achieve stability in the index-of-outcomes model.

[FN169]. The statistical method for making this comparison is a one-tailed test of hypothesis. This test determines whether the difference between the mean of a population and the mean of the subset is attributable to chance. The formula is $Z = \frac{P(b) - P(a)}{\sqrt{P(a)(1 - P(a)/N)}}$ where N is the number of data points, and Z is the level of confidence with which the hypothesis can be rejected, as expressed in standard deviations between the mean of a population and the mean of a subset.

[FN170]. See supra notes 152-53 and accompanying text.

[FN171]. A more likely scenario than Professor Latzer's given the low aggregate death-sentencing rate.

[FN172]. See *State v. Loftin*, 724 A.2d 129, 166 (N.J. 1999).

[FN173]. *Id.* at 167.

[FN174]. See Latzer, supra note 1, at 1235-39 (analyzing the many flaws of comparative review and finally noting that “[b]y failing to take account of the myriad of legitimate grounds for prosecutors' decisions, proportionality review holds the death penalty hostage”).

[FN175]. *Id.* at 1235.

[FN176]. *Id.* at 1236-37.

[FN177]. *Id.* at 1238. This formulation of prosecutorial concerns draws upon David McCord's analysis. See David McCord, *Judging the Effectiveness of the Supreme Court's Death Penalty Jurisprudence According to the Court's Own Goals: Mild Success or Major Disaster?*, 24 Fla. St. U. L. Rev. 545, 546-47 (1997).

[FN178]. In other words, failing to account for prosecutorial discretion should not concern Professor Latzer because it would only lead to the first sort of error, discussed supra note 140; that is, that a sentence would erroneously be found proportionate.

[FN179]. That is, if the concept were carried to its logical extreme. Under existing New Jersey law, this would not be a concern since cases are currently assigned to exactly one subcategory under a principle known as “unique assignment.” If more than one aggravating factor is present, the case is assigned to the category with the more “deathworthy” factor. See *In re Proportionality Review Project*, 735 A.2d 528, 538-39 (N.J. 1999). The New Jersey Public Defender has already proposed that cases should be compared with all death-eligible cases that share aggravating features. *Id.* at 539. The argument is of greater consequence when multiple mitigating factors are present than with multiple aggravators.

[FN180]. This study is the same one that formed the basis of the appeal in *McCleskey*. See *McCleskey v. Kemp*, 481 U.S. 279, 286 (1987).

[FN181]. See David C. Baldus, George Woodworth & Charles A. Pulaski, Jr., Law and Statistics in Conflict: Reflections on *McCleskey v. Kemp*, in *Handbook of Psychology and Law* 251, 259 (D.K. Kagehiro & W.S.

Laufer eds., 1992).

[FN182]. *Id.* at 260 tbl. 13.2.

[FN183]. *Id.*

[FN184]. Or two. This, of course, depends upon what standard is adopted for evenhandedness or disproportionality. The New Jersey Supreme Court has declined to adopt any per se numerical threshold. See *supra* note 120.

[FN185]. See *State v. Papasavvas*, 790 A.2d 798, 818 (N.J. 2002) (“Peter Papasavvas has met his burden of establishing that his death sentence is disproportionate....Accordingly, we vacate [his] death sentence and remand for sentencing consistent with this opinion.”); see also Latzer, *supra* note 1, at 1199 & n.192 (collecting citations). The Papasavvas case was decided after publication of the Latzer article in which Professor Latzer argues that the paucity (at the time, total lack) of instances where defendants proved their death sentences were disproportionate is yet another argument against proportionality review. See *id.* at 1243 (“After a decade of commitment to such elaborate and pointless review--not one sentence has been declared disproportionate--the state supreme court is now beginning to acknowledge its errors.”).

[FN186]. Baldus, *supra* note 38, at 1587.

[FN187]. *Id.* at 1605 (listing the three categories as “cases involving mentally ill defendants, killings arising out of violent marital discord, and cases involving robbery murders with substantial mitigation”) (footnotes omitted).

[FN188]. See, e.g., *State v. Loftin*, 724 A.2d 129, 170-71 (N.J. 1999).

[FN189]. See *In re Proportionality Review Project*, 735 A.2d 528, 539-40 (N.J. 1999).

[FN190]. *Id.* at 540.

[FN191]. Justice White has pointed out that the proportionality of a punishment for a particular crime should be judged by objective factors and not the subjective standards of individual Justices. He further stated in rather concrete terms that the death penalty is grossly disproportionate to the crime of rape and is therefore forbidden by the Eighth Amendment. He seems to have left no room for changing societal norms to alter a court's ability to allow this particular punishment for this particular crime. See *Coker v. Georgia*, 433 U.S. 584, 592 (1977).

[FN192]. Latzer, *supra* note 1, at 1240.

[FN193]. See *id.* (“All getting less than they deserve is not better than some getting less than they deserve.”).

[FN194]. See, e.g., *id.* at 1230 (“[T]here is little point in comparing Loftin's case to other murders. That other cases may be more blameworthy does not diminish Loftin's culpability.”); *id.* at 1240, n.388 (discussing hypothetical example proposed by David McCord and arguing that comparative review denies “life-sentenced defendants their due”).

[FN195]. Hugo Bedau makes a similar point in a reply to Earnest van den Haag. See Hugo Adam Bedau, A Reply to van den Haag, in *The Death Penalty in America: Current Controversies* 457, 466 (Hugo Adam Bedau ed., 1997).

[FN196]. See Baldus, *supra* note 38, at 1597-98 (noting that the courts in Pennsylvania, New York, Connecticut, and Washington have all indicated increasing receptiveness to statistical proportionality review).
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