Remembering *Furman*'s Comparative Proportionality: A Response to Smith and Staihar

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I. INTRODUCTION

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.[1]

In a recent volume of the *Iowa Law Review*, scholars Robert J. Smith and Jim Staihar each published works addressing aspects of criminal punishment. Smith's article, *Forgetting* Furman, challenges the tendency of death penalty scholars and defense lawyers alike to look to the Court's decision in *Furman v. Georgia* as the best vehicle for reform.[2] Instead, Smith suggests that reformers should pursue development of the Court's mitigation jurisprudence.[3] Specifically, Smith focuses on the Court's evolving standards

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1. Furman v. Georgia, 408 U.S. 238, 309–10 (1972) (Stewart, J., concurring).
2. Robert J. Smith, *Forgetting* Furman, 100 IOWA L. REV. 1149, 1153–55 (2015).
3. *Id.* at 1170–78.

of decency cases that invoke the principle of proportionality to determine whether a punishment is cruel and unusual.[4]

Staihar's essay, *Proportionality and Punishment*, offers a novel theory justifying the unfair advantage theories that account for the concept of proportionality in the application of punitive desert.[5] Specifically, Staihar advocates determining the modicum of proportionality under a retributive approach to punishment that measures the societal goodwill or "trustworthiness" lost by the criminal act.[6] Thus, the greater the amount lost, the greater the required punishment.[7]

Certainly, both pieces make valuable contributions to the scholarly literature. Smith argues that the evolving decency standards and their focus on proportionality provide a better path to the abolition of the death penalty than *Furman*-type challenges that rely on discrimination and arbitrariness.[8] Staihar offers a novel explanation to support using the concept of unfair advantage to aid in the determination of ordinal, if not cardinal, proportionality among sentences.[9]

And both pieces seem to have the same end goal in mind—reducing the imposition of excessive punishment. For Smith, this means the abolition of the death penalty.[10] For Staihar, this means using proportionality to limit excessive punishment through using loss of trustworthiness as a punitive ceiling.[11]

This short response Essay does not seek to attack the core agenda of either contribution. Rather, it attempts to offer a broader context to each piece to demonstrate the efficacy of a second constitutional weapon in the fight against excessive punishments—comparative proportionality.

When each contribution considers the concept of proportionality, it focuses on absolute proportionality—the degree to which the sentence is

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4. *See id.* at 1162–64 (discussing the principle of proportionality).

5. Jim Staihar, *Proportionality and Punishment*, 100 IOWA L. REV. 1209, 1211–12 (2015). Just deserts or punitive desert refers to a theory of retribution that holds that an offender should receive a punishment commensurate with the culpability he possesses and the harm he caused. *See, e.g.*, ANDREW VON HIRSCH & ANDREW ASHWORTH, PROPORTIONATE SENTENCING: EXPLORING THE PRINCIPLES (2005).

6. Staihar, *supra* note 5, at 1219.

7. *Id.* ("[A] criminal deserves a punishment that is proportional to the burdens he is obligated to undertake to restore his trustworthiness to a minimally acceptable degree. Once the criminal undertakes a punishment proportional to such burdens, he deserves no more punishment for his offense." (footnote omitted)).

8. Smith, *supra* note 2, at 1162–64.

9. Staihar, *supra* note 5, at 1216–23 (discussing proportionality and a new unfair advantage theory).

10. Smith, *supra* note 2, at 1154 ("[T]he death penalty is unconstitutional because of the high risk of executing offenders with insufficient personal culpability.").

11. Staihar, *supra* note 5, at 1219 ("[A] criminal deserves a punishment that is proportional to the burdens he is obligated to undertake to restore his trustworthiness to a minimally acceptable degree.").

proportional to the criminal act, the characteristics of the offender, and the harm committed.[12] As *Furman* first articulated, however, the Eighth Amendment also requires a second kind of proportionality—relative or comparative proportionality.[13] This kind of proportionality measures the degree to which a sentence is excessive in light of the way in which courts have sentenced similarly situated individuals.

To be clear, this Essay does not advocate abandoning the pursuit of improving the absolute proportionality inquiry under the Eighth Amendment—Smith and Staihar's pieces reiterate the value in doing so. Rather, this Essay argues for a robust application of the Eighth Amendment principles of comparative proportionality alongside absolute proportionality. Further, this Essay demonstrates that the principles are complementary, not antithetical, particularly when viewed through the absolute proportionality lenses that Smith and Staihar offer.[14]

II. COMPARATIVE PROPORTIONALITY THROUGH THE SMITH LENS

In his article, Smith makes a passionate case that following the doctrinal approach of *Furman* as a means to abolish the death penalty possesses a degree of futility, particularly when compared to the absolute proportionality approach of categorical exclusions under the evolving standards of decency.[15] While the categorical exclusion approach holds promise, with five new exclusions over the past decade, Smith may be overstating the likelihood of death penalty abolition by the evolving standards of decency. While I hope that his assessment is correct, only two Justices—Brennan and Marshall—have ever held that the death penalty is unconstitutional because it is a disproportionate punishment.[16] To be sure, other Justices on the Supreme

12. As I have argued elsewhere, this inquiry need not be limited to the retributive focus that Staihar's paper adopts. William W. Berry III, *Separating Retribution from Proportionality: A Response to Stinneford*, 97 VA. L. REV. IN BRIEF 61, 62 (2011) ("While retribution is certainly part of the 'proportionality' analysis, I believe that utilitarian justifications of punishment are also relevant to the concept of proportionality.").

13. *See* William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 93 (2011) ("[T]he relative proportionality concept asks whether a punishment is proportionate *as compared to* other punishments for the same crime.").

14. Some have argued that the principle of absolute proportionality—in the form of individualized sentencing—which requires consideration of mitigating characteristics of an offender, is irreconcilable with the concept of comparative proportionality—ensuring a modicum of consistency *between* similarly situated offenders. *See, e.g.*, Walton v. Arizona, 497 U.S. 639, 664–65 (1990) (Scalia, J., concurring). This is only true if one attempts to perform the inquiries simultaneously instead of sequentially. Berry, *supra* note 13, at 75 (noting how the proposed model of proportionality involving both absolute and comparative proportionality first requires determining absolute proportionality, then determining comparative proportionality).

15. *See generally* Smith, *supra* note 2.

16. *See* Penry v. Lynaugh, 492 U.S. 302, 346 (1989) (Brennan, J., concurring in part and dissenting in part) ("[T]he ultimate penalty of death is always and necessarily disproportionate

Court have declined to adopt their view from *Furman* that the death penalty is per se unconstitutional because it is an excessive and immoral punishment. And while the focus on mitigating evidence and diminished culpability might lead to additional categorical exemptions from the death penalty, there is no evidence that any of the justices on the current Court are ready to follow the path that Smith so clearly articulates.

By contrast, a number of Justices, both in the *Furman* decision itself and subsequently, have concluded that it is impossible to administer the death penalty in a fair and constitutional manner.[17] Indeed, Justices Powell, Blackmun, and Stevens all reached the same conclusion that Douglas, Stewart, and White reached in *Furman*—that the death penalty is arbitrarily and discriminatorily administered.[18] Unfortunately, these Justices did not reach the conclusion until the end of their time on the bench or after its conclusion.

In the most recent term, however, Justice Breyer's dissent in *Glossip v. Gross* echoed this same idea from *Furman*—that the death penalty is broken, and cannot be constitutionally administered.[19] Justice Ginsburg signed on to Breyer's decision. Assuming that Breyer and Ginsburg continue down this path, eight Justices will have reached the conclusion that the death penalty is unconstitutional based on arbitrary and discriminatory administration.

Whether Smith's argument to focus on absolute proportionality is correct or not, the hidden value in his article lies in the way in which he begins to marry the two concepts near the end of his paper. Smith claims that one path towards abolition, albeit not preferred, is to follow what he terms the "reverse-*Furman* route."[20] Under this approach, the failure to accord absolute proportionality to offenders by giving death sentences to less culpable offenders, serves to demonstrate arbitrariness and thus violates the Eighth Amendment under *Furman*'s reasoning.[21] Similarly, in cases where race provides the basis for less culpable offenders receiving the death penalty, the *Furman* anti-discrimination rationale would also apply.

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to his or her blameworthiness and hence is unconstitutional."); Gregg v. Georgia, 428 U.S. 153, 231 (1976) (Marshall, J., dissenting) ("[T]he death penalty is excessive.").

17. Furman v. Georgia, 408 U.S. 238, 309 (1972) (Stewart, J., concurring) ("[T]he death sentences now before us are the product of a legal system that brings them, I believe, within the very core of the Eighth Amendment's guarantee against cruel and unusual punishments, a guarantee applicable against the States through the Fourteenth Amendment."); *id.* at 240 (Douglas, J., concurring) ("[T]he exaction of the death penalty does violate the Eighth and Fourteenth Amendments."); *id.* at 312 (White, J., concurring) ("A penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment."). *See generally* William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441 (2011).

18. Berry, *supra* note 17, at 443 ("As with Justices Powell and Blackmun, Justice John Paul Stevens reached the conclusion that the death penalty should be abolished.").

19. Glossip v. Gross, 135 S. Ct. 2726, 2776–77 (2015) (Breyer, J., dissenting) ("I believe it highly likely that the death penalty violates the Eighth Amendment.").

20. Smith, *supra* note 2, at 1196.

21. *Id.* at 1196–202 (discussing the reverse-*Furman* view).

The intersecting point of the two concepts of proportionality, however, is where these ideas have the *most* power. The arbitrariness in administering the death penalty is best demonstrated by showing that less culpable individuals—particularly those with mental disabilities—are the ones who have received the death penalty. Likewise, one's diminished culpability can best be shown by comparison to others who are more culpable.

Another way of thinking of the two concepts of proportionality—absolute and comparative—are as analogs of the two prohibitions of the Eighth Amendment—cruel punishments and unusual punishments. The concept of absolute proportionality that Smith champions is the prohibition against cruel punishments—punishments that are excessive and disproportionate. The second concept, comparative proportionality, encapsulates the concept of unusualness—the sentences are unconstitutional because they are excessive by comparison.

The powerful combination of the two coalesces when one takes the subsequent step of finding unusual sentences to be cruel and, in the frame of Smith, cruel sentences to be unusual. The *Furman* view that Smith advocates marginalizing would use comparative proportionality to find that the administration of the death penalty is arbitrary and discriminatory—unusual—and thus cruel.[22] The reverse-*Furman* view that Smith grudgingly accepts would find the imposition of the death penalty upon less culpable individuals—a cruel outcome—unusual, in the sense that it is arbitrary and discriminatory.[23]

Practically, the best analysis would be one in which the Court asks both questions—the absolute and the comparative proportionality questions—in assessing the constitutionality of the death penalty.[24] Perhaps, then, Smith is partially right: The concept of absolute proportionality needs increased focus, but it will be most effective when advanced hand-in-hand with the idea of comparative proportionality.

III. COMPARATIVE PROPORTIONALITY THROUGH THE STAIHAR LENS

Ensconced in retributive theory, Staihar's essay seeks to leverage a new rationale for unfair advantage justifications for empirical desert into a limit on the scope of punishment. One of the core challenges in applying the concept of just deserts to a crime to determine a punishment amount is that there is no tangible guidance on how to give a punitive value to the crime.[25] It is impossible to tell, for instance, whether an armed robbery conviction warrants one year, five years, or ten years of imprisonment. The theory of just deserts does not offer any cardinal value as a "proportional" punishment. As

22. *See generally id.*
23. *Id.* at 1196–202 (discussing the reverse-*Furman* view).
24. *See generally* Berry, *supra* note 13.
25. *See, e.g.*, VON HIRSCH & ASHWORTH, *supra* note 5.

scholars have admitted, the best just deserts retribution can do is to rank offenses ordinally in term of seriousness.[26]

Staihar's essay takes issue with the justifications for ranking offenses ordinally under the theory of just desert.[27] Other theorists, as he explains, have used various iterations of the concept of unfair advantage to determine the seriousness of an offense.[28] In other words, the degree to which the criminal obtains an unfair advantage over others through the criminal behavior is the degree to which the crime should be higher on the ordinal ranking of offenses.

Staihar finds these theories unsatisfactory, particularly outside of the economic context. He instead attempts to justify the general idea of unfair advantage by redefining what constitutes an unfair advantage.[29]

Staihar's novel theory looks to society's view of the offender as the basis for analysis. One should measure the advantage not in terms of the gain for the offender, but in terms of the effect of the punishment.[30] The greater the loss in societal trustworthiness that an individual suffers from a particular criminal act, the more severe the punishment ranks on the ordinal proportionality scale according to Staihar.[31]

Putting aside the many difficulties with measuring or quantifying the concept of loss of societal trust, one can find value in Staihar's theory related to absolute and comparative proportionality. As with Smith's article, Staihar's approach also benefits from the concept of comparative proportionality. Despite his claim that the deprivation of trustworthiness can explain the concept of proportionality with respect to desert, it is unable to do so in an absolute way.[32] In other words, under Staihar's theory, it is impossible to say that the particular amount of trustworthiness lost corresponds to the commission of a particular crime. The best Staihar can do is to offer three broad categories—"A Cooperative Criminal Who Commits a Moderately Serious Offense," "A Defiant Criminal Who Commits a Moderately Serious Offense," and "An Extremely Serious Crime"—as examples of how his approach might work in practice.[33]

At its heart though, this approach rests more on comparative, as opposed to absolute, conceptions of proportionality. The levels of criminal activity are comparative—a particular crime creates a *greater* loss of trustworthiness than

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26. *See generally id.*

27. Staihar, *supra* note 5, at 1212–15.

28. *See id.*

29. *Id.* at 1216–23.

30. *Id.*

31. *Id.*

32. *Id.* at 1211–12 ("This Essay defends a novel unfair advantage theory of punitive desert that is the first to account *plausibly* for the proportionality of punitive desert." (emphasis added)).

33. *Id.* at 1223–26.

another, rather than a measurable amount of trustworthiness lost—as are the punishments.

The limit, then, that Staihar's approach really imposes is one of comparative proportionality, not absolute proportionality. A punishment under his theory would be excessive where the punishment, by comparison, is more serious than another in which the loss of trustworthiness was greater.

The hidden value of Staihar's contribution, as with Smith's, is that it implicitly marries the concepts of absolute and comparative proportionality. While the concept of retribution can, in theory, impose a limit on the modicum of punishment for a particular offense because the punishment is disproportionate in an absolute sense, it struggles to do so practically because just deserts does not ordain a cardinal amount of punishment for a particular criminal offense. As Staihar implicitly demonstrates, the concept of comparative proportionality partially remedies this dilemma by promoting the ordinal ranking of offenses.[34] And Staihar's theory offers an interesting way in which one might determine which crime warrants, *by comparison*, a greater sentence.

IV. THE VALUE OF COMPARATIVE PROPORTIONALITY

The contributions of Staihar and Smith, as explained, both point implicitly to the value of comparative proportionality. This final section of this Essay explores this concept further under the Eighth Amendment.

At the time of *Furman v. Georgia*, the Supreme Court's concern related in part to the lack of guidance provided to juries in capital cases, which from the Court's perspective related directly to the arbitrary administration of the death penalty.[35] Again, the problem was not one of absolute proportionality—that the death penalty was excessive for a particular offender—but one of comparative proportionality—that the application of the punishment was arbitrary and discriminatory. The imposition of the death penalty seemed unfair *by comparison*.

In *Gregg v. Georgia*, the Supreme Court held that the safeguards adopted by the Georgia legislature, in the form of aggravating and mitigating circumstances and comparative proportionality review, served to narrow the group of offenders eligible for the death penalty enough that the safeguards had removed arbitrariness from the sentencing process.[36] Over the past 30 years, it has become increasingly apparent that these safeguards are inadequate. The scope and number of aggravating circumstances in most states means that the provisions themselves offer wide discretion and little

34. *Id.* at 1212.

35. Furman v. Georgia, 408 U.S. 238, 248 (1972) (Douglas, J., concurring) ("Juries (or judges, as the case may be) have practically untrammeled discretion to let an accused live or insist that he die.").

36. Gregg v. Georgia, 428 U.S. 153, 206–07 (1976).

guidance to prosecutors.[37] Comparative proportionality review likewise does not serve as a check on inconsistency between jury verdicts. In *Pulley v. Harris*, the Court held that such review was not required per se as long as states engaged in meaningful appellate review.[38]

The many states that do engage in comparative proportionality review do so in a way that is cursory and meaningless, comparing the case on appeal to other cases that received the death penalty.[39] Almost every state that uses comparative proportionality review does not compare the case on appeal to other cases in which the offender did not receive the death penalty. Further, the point of comparison in such cases is often simply that both cases had the same aggravating factor. The categories of aggravating factors—felony murder and heinous crimes are obvious examples—are so broad that the comparable cases are often quite factually dissimilar.

Justice Stevens, one of the co-authors of *Gregg*, explained in *Walker v. Georgia* that Georgia's system had failed to conduct meaningful appellate review.[40] He explained that:

> The Georgia Supreme Court's failure to [examine other similar non-death cases] creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations. . . . And the likely result of such a truncated review . . . is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.[41]

While state supreme courts have largely eschewed the responsibility of assessing the degree to which cases on appeal from death sentences are consistent with other sentencing outcomes in similar cases, it does not mean that such analysis is obsolete. To the contrary, the decision of state supreme courts not to explore comparative proportionality in capital cases has allowed the central problem of *Furman*—arbitrariness in jury sentencing outcomes—to remain over 40 years later. Justice Breyer's recent concurring opinion in *Glossip* likewise outlines this problem as well as all of the many other problems with the administration of the death penalty that still persist.

While equality under the law cannot always be achieved in criminal sentencing, the Court's consistent view that "death is different" requires courts and legislatures to make significant efforts in capital cases to minimize disparity in sentencing outcomes.[42] Comparative proportionality—treating

37. Jeffrey L. Kirchmeier, *Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme*, 6 WM. & MARY BILL RTS. J. 345, 363 (1998).

38. Pulley v. Harris, 465 U.S. 37, 44–51 (1984).

39. William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 706–09 (2012).

40. Walker v. Georgia, 129 S. Ct. 453 (2008).

41. *Id.* at 456–57.

42. *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that because "death is not reversible," DNA evidence that the convictions of numerous persons

similar offenders in a similar manner in the most serious cases—must be a minimal requirement under the Eighth Amendment. A death sentence arbitrarily imposed, as held by *Furman*, constitutes a cruel and unusual punishment.

Comparative proportionality also, as explained, informs the application of retributive theory to criminal punishments. This remains important, as retribution is one of two purposes of punishment the Court employs when it brings its own judgment to bear pursuant to the evolving standards of decency.[43] In other words, the absolute proportionality analysis that Smith advocates emphasizing rests in part on the application of retributive theory to a particular punishment. Latent in such analysis of just deserts, at least on the explanatory level that Staihar explores, is the question of comparative proportionality. Thus, whether a punishment is cruel and unusual under the evolving standards of decency relates in part to whether it achieves the goal of just deserts. And as I have explained, that determination rests largely on a comparative analysis between cases, not an absolute determination in an individual case standing alone.

V. CONCLUSION

The contributions of Smith and Staihar both further the academic discussion with respect to the concept of absolute proportionality. Smith's contribution advances this concept primarily using doctrinal perspective, while Staihar employs a more theoretical lens. Both papers, however, would benefit from a marriage with the concept of comparative proportionality, unduly eschewed by Smith and largely ignored by Staihar. Indeed, as explained, the combination of the approaches of Smith and Staihar into the concept of comparative proportionality yield a more robust doctrinal and theoretical framework for applying constitutional law and retributive theory to cabin the use of excessive punishments, including the death penalty.

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on death row were erroneous is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (remarking that death differs from life imprisonment because of its "finality"); *Gregg*, 428 U.S at 187 ("There is no question that death as a punishment is unique in its severity and irrevocability.").

43. *See, e.g.*, Coker v. Georgia, 433 U.S. 584, 597 (1977).