# THE IMPORTANCE OF SAVING THE UNIVERSE: KEEPING PROPORTIONALITY REVIEW MEANINGFUL†

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## INTRODUCTION

The New Jersey Capital Punishment Act[1] provides for mandatory appeal to the state supreme court and, in the event the appeal results in the affirmance of the conviction and death sentence, what has become known as "proportionality review." Specifically, the New Jersey Criminal Code, section 2C:11-3e, as currently written, states:

> Every judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Proportionality review under this section shall be limited to a comparison of similar cases in which a death sentence has been imposed under subsection c. of this section. In any instance in which the

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[1] L. 1992, c. 111, *codified at* N.J. STAT. ANN. § 2C:11-3 (West 1995).

> defendant fails, or refuses to appeal, the appeal shall be taken by the Office of the Public Defender or other counsel appointed by the Supreme Court for that purpose.[2]

In inquiring "whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," the proportionality review mandated by the Act does not inquire whether the particular category of crimes, or of offenders, may appropriately be subjected to the death penalty.[3] The review does not address such issues as, for example, whether the death penalty may be imposed for rape,[4] or whether one may be executed for aiding and abetting a felony in which an unforeseen murder is committed by another.[5] Nor does it inquire

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[2] As originally enacted, the New Jersey Criminal Code did not list capital punishment as a sentencing option. *See* JOHN M. CANNEL, TITLE 2C, NEW JERSEY CRIMINAL CODE ANNOTATED, Comment 1 to N.J. STAT. ANN. § 2C:11-3, at 245 (West 1995). Death penalty provisions were added by L. 1982, c. 111, effective August 6, 1982. *See id.* This amendment provided for both appellate and proportionality review of capital sentences. N.J. STAT. ANN. §§ 2C:11-3c, e (West 1995). Initially, the Act mandated proportionality review in all cases in which the death sentence was imposed. The state legislature twice amended subsection e, which provides for proportionality review; initially in 1985 and once again in 1992. First, L. 1985 c. 178, made proportionality review optional at the request of the defendant, rather than mandatory in every case. CANNEL, *supra*, at 246; Hearings on A. 4316 (Proportionality Review) Before the Assembly Judiciary, Law & Public Safety Committee, 2 (Jan. 31, 1991) (Statement of Attorney General Robert J. Del Tufo) (hereinafter "*Hearings*"). The subsection was again amended by L. 1985, c. 478, to require that there be an appeal in every death-sentenced case, whether desired by the defendant or not. CANNEL, *supra*, at 246. The section was amended further by L. 1992, c. 5, which limited the universe of cases to be used in conducting the proportionality review to "similar cases in which a sentence of death has been imposed." *See* N.J. STAT. ANN. § 2C:11-3e (West 1995); CANNEL, *supra*, at 246.

[3] *See generally* Pulley v. Harris, 465 U.S. 37, 43 (1984); State v. Marshall, 130 N.J. 109, 127-31, 613 A.2d 1059, 1067-69 (1992).

[4] Coker v. Georgia, 433 U.S. 584, 592 (1977) ("We have concluded that a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment.").

[5] *See* Enmund v. Florida, 458 U.S. 782, 800-01 (1982) (imposition of death penalty on one who aids and abets felony in course of which murder is committed by others, but who does not himself kill, attempt to kill, or intend to kill, violates Eighth Amendment). *But see* Tison v. Arizona, 481 U.S. 137, 157-58 (1987) (death penalty for felony murder held constitutional for persons who do not kill or intend to kill, but who have major personal involvement in felony and show reckless indifference to human life). In State v. Gerald, 113 N.J. 40, 549 A.2d 792 (1988), the New Jersey Supreme Court rejected *Tison* and held that the New Jersey Constitution does not permit the imposition of the death penalty unless the defendant purposefully or knowingly caused death; the mere intent to cause serious bodily injury, which results in death, the Court held, could not constitutionally justify the death penalty. *See generally* 113 N.J. at 69-92, 549 A.2d at 806-25. This holding, which was the cause of a long string of reversals of death sentences, was subsequently overruled when the New Jersey Constitution was amended to provide that "[i]t shall not be cruel and unusual punishment to impose

whether certain classes of offenders, such as minors[6] or mentally retarded persons,[7] may be executed consistent with the Cruel and Unusual Punishment Clauses of the Constitutions of the United States[8] and New Jersey.[9] The resolution of any of these critical questions requires a careful, jurisdiction-by-jurisdiction analysis of whether the death penalty is "firmly rejected" for a category of crimes or a class of offenders.[10] Rather, the proportionality review

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the death penalty on a person convicted of . . . purposefully or knowingly causing serious bodily injury resulting in death . . ."). N.J. CONST. art. I, ¶ 12. Thereafter, in L. 1993, c. 111, the legislature amended the statute to define murder as purposefully or knowingly causing "death or serious bodily injury resulting in death." *See* N.J. STAT. ANN. § 2C:11-3a(1)-(2) (West 1995).

6 *See, e.g.*, Stanford v. Kentucky, 492 U.S. 361 (1989); Thompson v. Oklahoma, 487 U.S. 815 (1988); State v. Bey (I), 112 N.J. 45, 95-104, 548 A.2d 872-90 (1988).

7 *See* Penry v. Lynaugh, 492 U.S. 302 (1989).

8 U.S. CONST. amend VIII.

9 N.J. CONST. art. I, ¶ 12.

10 *Enmund*, 458 U.S. at 814 (O'Connor, J., dissenting), *cited in Marshall*, 130 N.J. at 128, 613 A.2d at 1068. *See also* Coker v. Georgia, 433 U.S. 584, 593 (1977) ("At no time in the last 50 years has a majority of the states authorized death as a punishment for rape."); *id.* at 596 ("The current judgment with respect to the death penalty for rape is not wholly unanimous among state legislatures, but it obviously weighs very heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman."); *Tison*, 481 U.S. at 152 (reviewing the several states' judgments as to the proportionality of capital punishment as a penalty for felony-murder for persons who do not kill or intend to kill victims); *Stanford*, 492 U.S. at 370 ("Of the 37 states whose laws permit capital punishment, 15 decline to impose it upon 16-year-old offenders and 12 decline to impose it on 17-year-old offenders. This does not establish the degree of national consensus this Court has previously thought sufficient to label a particular punishment cruel and unusual."); *Thompson*, 487 U.S. at 821 (In performing the task of determining whether the death penalty constitutes cruel and unusual punishment in a particular context, "the Court has reviewed the work product of State Legislatures and sentencing juries, and has carefully considered the reasons why a civilized society may accept or reject the death penalty in certain types of cases."); *Penry*, 492 U.S. at 335 ("[A]t present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses for us to conclude that it is categorically prohibited by the Eighth Amendment."); Ford v. Wainwright, 477 U.S. 399, 408 (1986) (Eighth Amendment precludes execution of the insane based on fact that "no state in the Union" permitted such punishment).

The Constitutions of the United States and New Jersey also provide that sentences less than death may, under certain circumstances, be disproportionate. *See, e.g.*, Solem v. Helm, 463 U.S. 277, 303 (1983) (holding life sentence without parole for seventh nonviolent felony to violate Eighth Amendment). *But see* Harmelin v. Michigan, 501 U.S. 957, 994-96 (1991) (holding mandatory life sentence without parole for possessing 672 grams of cocaine not to violate the Eighth Amendment). In determining whether these constitutions have been violated, courts look to, among other factors, whether the punishment for the crime conforms "with contemporary standards of decency." State v. Maldonado, 137 N.J. 536, 556-57, 645 A.2d 1165, 1175 (1994) (quoting *Ramseur*, 106 N.J. 123, 169, 524 A.2d 188, 210 (1987)). This is done by comparing the punishment at issue with others meted out in the same and other jurisdictions. *See Maldonado*, 137 N.J. at 557-58, 645 A.2d at 1175; Solem v. Helm, 463 U.S. at 291, 298-300. *But see Harmelin*, 501 U.S. at 988-993 (Scalia, J., concurring)

provided in New Jersey Statutes Annotated, section 2C:11-3e and addressed in this Article inquires "whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime."[11]

Defining the "same crime" for purposes of this analysis is, however, a critical and much-debated issue. Prosecutors have argued that the appropriate universe of cases to be used in proportionality review is one comprised exclusively of cases in which the death sentence was sought and imposed. In contrast, defense counsel have contended that proportionality review demands a universe including all cases in which the death sentence could have been imposed, whether or not it was actually sought.[12] In *State v. Marshall*,[13] the Supreme Court of New Jersey, after intense litigation of the issue, held that the appropriate "universe" of cases to be considered by the court in conducting statutory proportionality review was all clearly death-eligible homicides, whether or not capitally prosecuted.[14] After *Marshall* had been argued, but before it was decided, the legislature amended the Capital Punishment Act to limit the universe of cases in the manner originally sought by prosecutors. Thus, proportionality review is now "limited to a comparison of similar cases in which a sentence of death has been imposed."[15]

So far, the New Jersey Supreme Court has cited *ex post facto* concerns in refusing to apply this amendment to the proportionality reviews that it has undertaken.[16] Yet, the day is not far off when these concerns will dissipate and the court will face the prospect of conducting proportionality review using a universe of cases that includes only those in which a death verdict was, in fact, returned by a jury.[17]

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(criticizing use of these criteria in arguing that the Eighth Amendment does not contain a proportionality requirement).

11 *Pulley*, 465 U.S. at 43, *quoted in Marshall*, 130 N.J. at 130, 613 A.2d at 1069.

12 *See* In the Matter of the Proportionality Review Project, 122 N.J. 345, 345-46, 585 A.2d 358, 358-59 (1990) (describing the Attorney General's argument that universe should include only death sentenced cases); *Marshall*, 130 N.J. at 132-33, 613 A.2d at 1070 (same). The defense arguments were adopted by Special Master David C. Baldus in his *Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court* 44-53 (1991).

13 130 N.J. 109, 613 A.2d 1059 (1992).

14 *Id.* at 137, 613 A.2d at 1073.

15 L. 1992, c. 5, *codified at* N.J. STAT. ANN. § 2C:11-3e (West 1995); *see also Marshall*, 130 N.J. at 133-37, 613 A.2d at 1070-73.

16 *See Marshall*, 130 N.J. at 118-19, 613 A.2d at 1062-64. *See also* State v. DiFrisco, 142 N.J. 148, 162-63, 662 A.2d 442, 449-50 (1995); State v. Martini, 139 N.J. 3, 23, 651 A.2d 949, 958-59 (1994); State v. Bey, 137 N.J. 334, 343-44, 645 A.2d 685, 689-90 (1994).

17 In State v. Harris, Docket No. 36,692, a currently pending proportionality re-

As we discuss below, were the court to conduct such a proportionality review, it would be engaging in a useless exercise, utterly incapable of vindicating the purposes or utilizing the methods of proportionality review. Part I of this Article describes those purposes and methods and demonstrates the manner in which they are undermined by the legislatively restricted universe.

That proportionality review is thus rendered meaningless by the 1992 amendment to the Capital Punishment Act does not necessarily raise constitutional issues, however. Indeed, the United States Supreme Court has held proportionality review not to be required by the United States Constitution in all circumstances.[18] Part II of this Article argues that the New Jersey Constitution should be interpreted to require proportionality review, and that the 1992 amendment violates this constitutional guarantee by weakening the mechanism through which it is implemented.

Restricting the universe does more than merely emasculate proportionality review: it also threatens the constitutionality of the New Jersey Capital Punishment Act as a whole. In Part III of this Article, we argue that the elimination of meaningful proportionality review leaves the appellate review provisions of the Capital Punishment Act so limited as to be constitutionally deficient under both the United States and New Jersey Constitutions.

Ironically, then, in its haste to weaken the procedures that stand between capital defendants and their executions, and thus to move New Jersey ever closer to its first lethal injection, the legislature, reflexively responding to the pleas of state prosecutors to limit the scope of proportionality review, has created new constitutional problems. Even as the concerns which had prompted the New Jersey Supreme Court to reverse the first thirty-one death verdicts that came before it[19] approach such resolution that prosecu-

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view, the Attorney General has argued that because the defendant was convicted and sentenced to death after enactment of L. 1992, c. 5, the New Jersey Supreme Court must now apply the more limited universe set forth in the 1992 amendment. *See* Brief on Behalf of the Attorney General *Amicus Curiae* in State v. Harris, Docket No. 36,692 at 6-13.

18 Pulley v. Harris, 465 U.S. 37 (1984). *But see* discussion *infra* at Part III (where other appellate review safeguards are deficient, proportionality review may be required under the United States Constitution).

19 *See generally* State v. Ogelsby, 122 N.J. 522, 585 A.2d 916 (1991); State v. Moore, 122 N.J. 420, 585 A.2d 864 (1991); State v. Keitt, 121 N.J. 483, 582 A.2d 630 (1990); State v. Harvey, 121 N.J. 407, 581 A.2d 483, *cert. denied*, 499 U.S. 931 (1991); State v. Clausell, 121 N.J. 298, 580 A.2d 221 (1990); State v. Savage, 120 N.J. 594, 577 A.2d 455 (1990); State v. Hightower, 120 N.J. 378, 577 A.2d 99 (1990); State v. McDougald, 120 N.J. 523, 577 A.2d 419 (1990); State v. Johnson, 120 N.J. 263, 576 A.2d 834 (1990); State v. Rose, 120 N.J. 61, 576 A.2d 235 (1990); State v. Pennington, 119 N.J. 547, 575

tors and judges in capital cases now understand their obligations and death verdicts accordingly become less assailable on appeal, the legislature's enactment of L. 1992, c. 5 has created yet a new avenue of attack. That attack is no mere invocation of a technicality, for meaningful proportionality review is necessary to ensure the very fairness, even-handedness and egalitarian application of the most severe sanction available in this or any other society: state-sponsored death.

## I.

In *Marshall*, the Supreme Court of New Jersey recognized that the question of the appropriate universe of cases to be used in proportionality review is inextricably linked to the purposes to be served by that review.[20] The court wrote:

> How detailed a compilation of homicide cases is required to facilitate an adequate proportionality review of a given death sentence depends upon the purposes to be served by that review. We assume that the basic difference in the respective positions of the parties about the breadth of the field of homicide cases to serve as a source for proportionality review stems from disagreement about the objectives to be achieved by proportionality review. By identifying those objectives we shall also determine the appropriate universe of cases.[21]

The court then proceeded to spell out the purposes of proportionality review, ultimately concluding that those purposes required the adoption of an expanded universe, including all cases that were or could have been capitally prosecuted.[22] It follows that proportionality review cannot accomplish those purposes if the universe now mandated by the legislature is used.

First, by its statutory terms, proportionality review must result

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A.2d 816 (1990); State v. Long, 119 N.J. 439, 575 A.2d 435 (1990); State v. Coyle, 119 N.J. 194, 574 A.2d 951 (1990); State v. Koedatich, 118 N.J. 513, 572 A.2d 622 (1990); State v. Jackson, 118 N.J. 484, 572 A.2d 607 (1990); State v. DiFrisco, 118 N.J. 253, 571 A.2d 914 (1990); State v. Davis, 116 N.J. 341, 561 A.2d 1082 (1989); State v. Pitts, 116 N.J 580, 562 A.2d 1320 (1989); State v. Hunt, 115 N.J. 330, 558 A.2d 1259 (1989); State v. Matulewicz, 115 N.J. 191, 557 A.2d 1001 (1989); State v. Williams, 113 N.J. 393, 550 A.2d 1172 (1988); State v. (Marie) Moore, 113 N.J. 239, 550 A.2d 117 (1988); State v. Gerald, 113 N.J. 40, 549 A.2d 792 (1988); State v. Zola, 112 N.J. 384, 548 A.2d 1022 (1988), *cert. denied*, 489 U.S. 1022 (1989); State v. Koedatich, 112 N.J. 225, 548 A.2d 939, *cert. denied*, 488 U.S. 1017 (1989); State v. Bey II, 112 N.J. 123, 548 A.2d 887 (1988); State v. Bey I, 112 N.J. 45, 548 A.2d 846 (1988); State v. Biegenwald, 110 N.J. 521, 542 A.2d 442 (1988); State v. Ramseur, 106 N.J. 123, 524 A.2d 188 (1987).

[20] State v. Marshall, 130 N.J. 109, 132, 613 A.2d 1059, 1070 (1992).

[21] *Id.*

[22] *Id.*

in a determination of "whether the sentence is disproportionate to the penalty imposed in similar cases."[23] The notion of such a review derives from the decision of the United States Supreme Court in *Furman v. Georgia*,[24] in which the death penalty was invalidated because it was being imposed "wantonly and freakishly," and so arbitrarily that it was "cruel and unusual in the same way that being struck by lightening is cruel and unusual."[25] When, four years later, in *Gregg v. Georgia*,[26] the Supreme Court upheld the amended Georgia death penalty statute, it did so in part because it provided for proportionality review. The Court wrote:

> [T]o guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate. On their face, these procedures seem to satisfy the concerns of *Furman*. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[27]

The Court concluded that the proportionality review requirement of the Georgia capital sentencing system, in particular, "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 case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death."[28]

Thus, the first purpose of proportionality review is "to ensure that the death penalty is being administered in a rational, non-arbitrary, and evenhanded manner, fairly and with reasonable consistency."[29] However, as the New Jersey Supreme Court held in

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[23] N.J. STAT. ANN. § 2C:11-3e (West 1995). *See also Marshall*, 130 N.J. at 133, 613 A.2d at 1071 (quoting State v. Ramseur, 106 N.J. 123, 326, 524 A.2d 29-30 (1987) (quoting *Pulley*, 465 U.S. at 43)).

[24] 408 U.S. 238 (1972).

[25] *Id.* at 309-10 (Stewart, J., concurring). The five Justices who voted to strike down Georgia's death penalty statute in *Furman* did so based upon the notion that it was being imposed discriminatorily, *see generally id.* at 240-57 (Douglas, J., concurring); *id.* at 364-66 (Marshall, J., concurring); "arbitrarily," *id.* at 291-95 (Brennan, J., concurring); "wantonly and freakishly," *id.* (Stewart, J., concurring); "and simply too infrequently," *id.* at 311-13 (White, J., concurring).

[26] 428 U.S. 153 (1976).

[27] *Gregg*, 428 U.S. at 198 (plurality opinion) (quoting *Furman*, 408 U.S. at 313).

[28] *Id.* at 206.

[29] State v. Marshall, 130 N.J. 109, 131, 613 A.2d 1059, 1070 (1992).

*Marshall*, this purpose may not be served by comparing only those cases in which a death sentence is imposed. The court illustrated the point with a simple example:

> On the assumption that 100 robbery-felony-murder cases are prosecuted as capital crimes, all defendants are convicted and one defendant is sentenced to death, a comparison of the death-sentenced defendant's punishment with the punishment imposed only on other death-sentenced defendants would exclude from the proportionality-review process the ninety-nine robbery-felony-murder defendants that juries did not sentence to death. Indisputably, the determination whether that single death sentence is disproportionate can be made only by comparing it with the life sentences imposed on the ninety-nine defendants convicted of the same crime.[30]

Or, as the National Center for State Courts concluded in designing a prototype proportionality review system:

> Comparing a case under review solely to other cases in which a death sentence has been imposed makes the size of the pool more manageable. However, it fails to address the question framed by Justice White in *Furman*—how can the few cases in which a death sentence is imposed be "meaningfully distinguished" from the many apparently similar cases that resulted in a life sentence? Although the case under review may be similar to another death case, it may also be similar to thirty life cases. Without examining the life cases, it is impossible to develop the rational distinctions required.[31]

In order, therefore, to at least approximate a judgment as to whether cases in which the death penalty is imposed are meaningfully distinguishable from similar cases in which it was not, the universe must include all those cases in which the death penalty could have been sought, including both cases in which juries or judges

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[30] 130 N.J. at 133-34, 613 A.2d at 1070-71. *See also* Tichnell v. State, 468 A.2d 1, 32 (Md. 1983) (Davidson J., dissenting) ("[I]f all death eligible cases are not included in the inventory, it is impossible conscientiously to determine whether the death penalty has been imposed generally in similar cases throughout the State."); Linda Burgess, *Comparative Proportionality Review of Death Sentences: Is It a Meaningful Safeguard in Oklahoma?*, 38 OKLA. L. REV. 267, 278 (1985) ("If a universe is made up only of cases in which the defendants' sentences are death, the death penalty under review will naturally be found comparatively proportionate. Comparative proportionality review can, therefore, be a meaningless check against excessive capital sentencing when a court simply compares one death sentence to another death sentence.").

[31] National Center for State Courts, *User Manual for Prototype Proportionality Review Systems*, at A-7 (1984), *reprinted in* Richard Van Duizend, *Comparative Proportionality Review in Death Sentence Cases: What? How? Why?* 8 STATE CT. J. 9, 11 (1988) (footnote omitted). *See also* Steven M. Sprenger, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719, 733 (1988).

returned life verdicts and cases in which prosecutors chose not to proceed capitally. Similarly, to assure that the death penalty is being imposed in only the most heinous cases, the court must conduct as complete a comparison as possible with those cases in which the death penalty was not imposed, either because a judge or jury chose not to impose it or because it was not sought by a prosecutor.[32]

The second purpose of proportionality review identified by the New Jersey Supreme Court in *Marshall* was "to address concerns about possible misuse of prosecutorial discretion."[33] Indeed, the use, and possible abuse, of such discretion has long been a subject of concern and controversy in New Jersey. Even after prosecutorial guidelines were promulgated, at the insistence of the New Jersey Supreme Court,[34] the sufficiency of those guidelines in practice is a matter that has been explicitly left for proportionality review.[35]

Of course, this makes perfect sense, as there can be no doubt but that, as the *Marshall* Court acknowledged, "disproportionality can originate in both prosecutorial and jury decisions."[36] The *Marshall* Court explained:

> The point may best be illustrated by the prior example of 100 robbery-felony-murder defendants, only one of whom is sen-

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[32] Indeed, the evidence suggests that by excluding cases that end in plea bargains, the court would be ignoring many of the most aggravated murders. DAVID C. BALDUS, ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 284 & n.23 (1990).

[33] *Marshall*, 130 N.J. at 134, 613 A.2d at 1071 (quoting *Ramseur*, 106 N.J. at 329, 524 A.2d at 293).

[34] *See* State v. Koedatich, 112 N.J. 225, 258, 548 A.2d 949, 955 (1988).

[35] *See* State v. Perry, 124 N.J. 128, 186, 590 A.2d 624, 653-54 (1991) (Stein, J., concurring in part and dissenting in part) (whether guidelines are "sufficiently specific to overcome the problem of arbitrariness in the designation of cases for capital prosecution [is] a problem that is addressed currently only in the course of proportionality review of a death sentence that has been affirmed"); *Marshall*, 123 N.J. at 251, 586 A.2d at 204 (Handler, J., dissenting) (expressing hope that problem of prosecutorial discretion would be the subject of a "thorough, mandatory proportionality review") (citing State v. Kiett, 121 N.J. 483, 511, 582 A.2d 630, 644-45 (1990) (Handler, J., dissenting)); State v. Di Frisco, 118 N.J. 253, 302-05, 571 A.2d 914, 939-41 (1990) (Handler, J., dissenting in part and concurring in part); State v. Matulewicz, 115 N.J. 191, 206-09, 557 A.2d 1001, 1009-11 (1989) (Handler, J., concurring); State v. Gerald, 113 N.J. 40, 153-67, 549 A.2d 792, 850-58 (1988) (Handler, J., concurring in part and dissenting)). *See also* State v. Moore, 122 N.J. 420, 486-87, 585 A.2d 864, 898-99 (1991); State v. Long, 119 N.J. 439, 503, 575 A.2d 435, 467 (1990).

[36] *Marshall*, 130 N.J. at 134, 613 A.2d at 1071 (citing *Kiett*, 121 N.J. at 492, 582 A.2d at 634-35). *See also* Joseph H. Rodriguez, et al., *Proportionality Review in New Jersey: An Indispensable Safeguard in the Capital Sentencing Process*, 15 RUTGERS L.J. 399, 424-30 (1984).

> tenced to death. Were we to assume that the remaining ninety-nine defendants were prosecuted and convicted of *non-capital* murder because of prosecutorial decisions not to seek the death penalty, the disproportionality of the single defendant's death sentence would arise not because of a disproportionate jury determination but because the prosecutorial decision to seek the death penalty was unique. That type of disproportionate death sentence could not be identified by a proportionality-review process that was limited to capital cases tried to a penalty phase; it could be identified, however, by a universe that included clearly death-eligible homicides that were not prosecuted as capital cases.[37]

Finally, the New Jersey Supreme Court in *Marshall* identified as a third purpose of proportionality review "the prevention of 'any impermissible discrimination in imposing the death penalty.'"[38] From the first, proportionality review was viewed as "a means through which to monitor the imposition of death sentences and thereby to prevent any impermissible discrimination in imposing the death penalty."[39] It must "insure that elements of sexual, racial, and social-economic discrimination do not invidiously infect the prosecutorial charging decision,"[40] or influence jury verdicts.[41] Indeed, the Attorney General of New Jersey originally urged the enactment of a proportionality review provision "to make sure that [death] sentences are being meted out in a fair, even-handed way throughout the State, and that we do not have either classes of individuals or areas in the State which appear to be arbitrary one way or the other."[42]

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[37] 130 N.J. at 134-35, 614 A.2d at 135 (emphasis in original). *See also* Rodriguez, et al., *supra* note 36, at 429; Sprenger, *supra* note 36, at 735-36; Van Duizend, *supra* note 33, at 11-12 (although the universe should include, "as a minimum, all cases in which the indictment included a death-eligible charge, and a homicide conviction was obtained . . . [w]hen there is concern about the exercise of prosecutorial discretion . . . a pool of cases including all murder indictments may be desirable"); *Tichnell*, 468 A.2d at 24-25 (Eldridge, J., concurring) (in order for proportionality review to cure the aberration resulting from the variable exercise of prosecutorial discretion, cases other than those in which the death penalty was sought must be considered); *id.* at 33-34 (Davidson, J., dissenting) (same).

[38] *Marshall*, 130 N.J. at 135, 613 A.2d at 1072 (quoting *Ramseur*, 106 N.J. at 327, 524 A.2d at 292-93).

[39] *Ramseur*, 106 N.J. at 327, 524 A.2d at 292. *See also id.* at 330, 524 A.2d at 293-94.

[40] Rodriguez, et al., *supra* note 36, at 429-30.

[41] *Id.* at 430-32. *See also* Furman v. Georgia, 408 U.S. 238, 240-57 (Douglas, J., concurring).

[42] *Hearings on S. 112 Before the N.J. Senate Judiciary Comm.*, 200th Leg., 2nd Sess. 20-21. *See also* Rodriguez, et al., *supra* note 36, at 429 n.203 (proportionality review should be applied "to guard against an imbalance, a disproportionate imposition of the death penalty in any one area") (Stier statement).

The New Jersey Supreme Court has always reserved issues of bias in the capital sentencing scheme for proportionality review. Thus, it has stated that one purpose of proportionality review is to "prevent discrimination on an impermissible basis, including, but not limited to, race and sex."[43] Statistical information regarding such issues as whether there are county-by-county or race-related disparities with respect to the pursuit of the death penalty is to be considered by the court in performing proportionality review.[44] And the court has even promised that proportionality review would address "the question of whether in New Jersey the death sentence is being disproportionately imposed upon mentally-disturbed defendants."[45]

Each proportionality review thus far undertaken by the court has, in fact, included the consideration of issues of discrimination. In *Marshall*,[46] the court held that neither the race of the victim nor the race of the defendant had been shown to have played an impermissible invidious role in the imposition of the death penalty in New Jersey. In so concluding, however, the court explicitly rejected the United States Supreme Court's holding in *McCleskey v. Kemp*,[47] to the effect that a showing of purposeful discrimination, which could not be established by statistical analysis, was required.[48] It also reiterated that "the people of New Jersey would not tolerate a system that condones disparate treatment for black and white defendants or a system that would debase the value of a black victim's life,"[49] and stated:

> were we to believe that the race of the victim and race of the defendant played a significant part in capital sentencing decisions in New Jersey, we would seek corrective measures, and if that failed we could not, consistent with our State's policy, tolerate discrimination that threatened the foundation of our system of law.[50]

Again in *State v. Bey*,[51] the New Jersey Supreme Court utilized proportionality review to consider ever more extensive and troubling data revealing race-based disparities in the frequency with which

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[43] *Ramseur*, 106 N.J. at 330, 524 A.2d at 293-94.

[44] State v. Koedatich, 112 N.J. 225, 255-58, 548 A.2d 939, 954-55 (1988).

[45] State v. Zola, 112 N.J. 384, 437, 548 A.2d 1022, 1049 (1988).

[46] 130 N.J. at 207-15, 613 A.2d at 1109-12.

[47] 481 U.S. 279 (1987).

[48] *Marshall*, 130 N.J. at 209, 613 A.2d at 1109-10. *See also id.* at 210-15, 613 A.2d at 1110-13 (quoting Justice Brennan's dissenting opinion in *McCleskey*).

[49] *Id.* at 214, 613 A.2d at 1112.

[50] *Id.* at 209, 613 A.2d at 1109-10.

[51] 137 N.J. 334, 645 A.2d 685 (1994).

juries impose death verdicts.[52] Although the court recognized that the data had been analyzed in a more sophisticated manner than ever before, and that more and more cases had been added to the universe, it held that there were still too few cases to hold "that race impermissibly influences the imposition of the death penalty."[53] The court adhered to this holding in its proportionality reviews in *State v. Martini*[54] and *State v. DiFrisco*.[55] As this Article goes to press, however, new data have emerged, in connection with the proportionality review in *State v. Harris*,[56] that race plays a statistically significant role in capital sentencing. Indeed, according to data developed by the court itself, the odds of a black defendant receiving a death sentence are almost ten times greater than are the odds of a nonblack defendant whose case has the same aggravating and mitigating characteristics.[57]

These disturbing facts are currently the subject of written debate between and among the parties and *amici curiae* in *Harris*, and as to which there will be oral argument before and probably a decision by the state supreme court next term. Notably, however, the issue could not even be reasonably debated without the expanded universe of cases that the court has thus far utilized. As the court stated in *Marshall*, "[t]he conclusion is inescapable that a universe restricted to penalty-phase cases would be inadequate to enable us to verify that our capital-sentencing procedure does not tolerate 'discrimination on an impermissible basis, including, but not limited to, race and sex.'"[58] Specifically, to the extent that such discrimination originates in prosecutorial decisionmaking, it could not be monitored in the absence of a universe including cases in

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52 *Id.* at 388-96, 645 A.2d at 711-16.

53 *Id.* at 393-94, 645 A.2d at 714-15. *See also id.* at 388, 645 A.2d at 711-12.

54 139 N.J. 3, 80, 651 A.2d 949, 987 (1994).

55 142 N.J. 148, 210, 662 A.2d 442, 473 (1995).

56 State v. Harris, Docket No. 36,962, scheduled for oral argument on September 10, 1996.

57 *See* Administrative Office of the Courts, Criminal Practice Division, State v. Joseph Harris, Appendices and Tables, Technical Appendix 10, Schedule 5 (showing "odds ratio" of 9.989 for the variable "black defendant," which is statistically significant at a level of p = .0083, in regression analysis accounting for numerous statutory and non-statutory variables). As the expert retained by the Administrative Office of the Courts has concluded, ". . . these analyses suggest strong and consistent biases in the application of death sentencing in New Jersey." Memorandum from David Weisburd to John P. McCarthy, Jr., Dec. 20, 1995, at 6. This conclusion is, as this matter goes to press, the subject of vigorous litigation between and among the parties and *amici* in the *Harris* case.

58 *Marshall*, 130 N.J. at 136, 613 A.2d at 1072 (quoting *Ramseur*, 106 N.J. at 330, 524 A.2d at 294-95).

which the death penalty was not sought.[59] Thus, even a universe consisting of all cases that advance to a penalty trial would be insufficient for this purpose "because it excludes from judicial oversight such a large part of the state's capital sentencing system, especially the decisions of prosecutors."[60]

However, a universe restricted to death sentenced cases would even further prevent the court from effectively probing discrimination in the operation of the capital sentencing system. Thus, in order to probe the discriminatory effects of jury decisionmaking, a universe consisting of at least all penalty trial cases is required. Indeed, in the absence of such a universe, the issue will be left completely unaddressed. As Chief Justice Krivosha of the Nebraska Supreme Court put it:

> The purpose of [proportionality review] was to ensure that persons were not being arbitrarily sentenced to death. To therefore suggest that we look only at those individuals who may have been discriminated against to determine whether or not they have been discriminated against is an exercise in futility. If one wants to determine whether individuals are being discriminated against in public transportation, one does not merely look at those who are required to sit in the back of the bus and conclude that since everyone in the back of the bus looks alike, there is no discrimination. One, of necessity, must look at who is riding in the front of the bus as well in order to determine whether the persons in the back are being discriminated against. So, too, there is no way that we can determine whether those who are sentenced to death are being discriminated against if we do not examine those cases having the same or similar circumstances which, for whatever reason, did not result in the imposition of the death sentence.[61]

In sum, as the New Jersey Supreme Court held in *Marshall*, "the purposes to be achieved by proportionality review require that the universe include clearly death eligible homicides in which the

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59 Rodriguez, *supra* note 36, at 429-30.

60 BALDUS, ET AL., *supra* note 32, at 284. *See also* Tichnell v. State, 468 A.2d 1, 26-27 (Md. 1983) (Cole, J., concurring) ("Only with a full range of information about the individual defendants potentially but not ultimately exposed to the death penalty can this Court make a sound proportionality decision and thereby be assured that it has given no quarter to disproportionality based solely on factors such as race, sex, or wealth."). *See also generally* F. Patrick Hubbard et al., *A Meaningful Basis for the Death Penalty: The Practice, Constitutionality and Justice of Capital Punishment in South Carolina*, 34 S.C. L. REV. 391, 442-43 (1982).

61 State v. Palmer, 399 N.W.2d 706, 752 (Neb. 1986) (Krivosha, C.J., concurring in part and dissenting in part) (quoted in *Marshall*, 130 N.J. at 250-51, 613 A.2d at 1130-31 (Handler, J., dissenting)).

prosecutor elected not to seek the death penalty."[62] Although the court did not analyze it this way, such a universe is also required by the methodology through which proportionality review is conducted. That methodology is discussed below.

In New Jersey, the supreme court has conducted proportionality review using two methods. First, the court has employed the "Frequency Approach." Using this approach, the court computes the frequency of death sentences within a pool of similar cases.[63] The statistical analysis that emerges reveals how jurors and prosecutors treat similar cases and thus seeks to measure "the societal consensus that death is the appropriate penalty in the measured cases."[64] Frequency analysis has the advantage of being relatively

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62 *Marshall*, 130 N.J. at 137, 613 A.2d at 1072-73. In support of this holding, the *Marshall* court pointed to the jurisdictions that adopted a similarly expansive universe. *See id.* at 136-37, 613 A.2d at 1072-73 (citing *Tichnell*, 468 A.2d at 18 (concluding proportionality-review process may take into account noncapital murder cases)); State v. Moore, 316 N.W.2d 33, 44 (Neb.) (conducting proportionality review by comparison with all other first-degree-murder convictions), *cert. denied*, 456 U.S. 984 (1982); State v. Williams, 287 N.W.2d 18, 28-29 (Neb. 1979) (same), *cert. denied*, 449 U.S. 891 (1980); Commonwealth v. Pursell, 495 A.2d 183, 198 (Pa. 1985) (conducting proportionality review by comparison with other first-degree-murder cases in which evidence could support an aggravating circumstance); State v. Rupe, 743 P.2d 210, 229 (Wash. 1987) (concluding that for purposes of proportionality review, similar cases include cases in which defendant convicted of first-degree murder regardless of whether death penalty was sought), *cert. denied*, 486 U.S. 1061 (1988); State v. Harris, 725 P.2d 975, 982-83 (Wash. 1986) (conducting proportionality review of death sentence for contract killing court considered contract-murder cases in which death penalty was not sought by prosecutor), *cert. denied*, 480 U.S. 940 (1987).

63 Similar cases are identified for purposes of frequency analysis in three ways. First, a complex "salient-factors measure" is used to assemble similar cases by assessing factual blameworthiness using a battery of both statutory and nonstatutory aggravating and mitigating factors; these factors are identified based upon both assumptions and empirical data that establish the relationship between these factors and the blameworthiness of a defendant. See *Marshall*, 130 N.J. at 146, 613 A.2d at 1077; *see also DiFrisco*, 142 N.J. at 172, 662 A.2d 454; *Martini*, 139 N.J. at 33, 651 A.2d at 963; *Bey*, 137 N.J. at 353, 645 A.2d at 694-95.

Second, similar cases are collected by simply counting numbers of aggravating and mitigating factors. *See Marshall*, 130 N.J. at 146-47, 613 A.2d at 1077-78; *see also DiFrisco*, 142 N.J. at 175, 662 A.2d at 455-56; *Martini*, 139 N.J. at 38, 651 A.2d at 966; *Bey*, 137 N.J. at 358, 645 A.2d at 697. Finally, a set of similar cases are derived by using an "index-of-outcomes test," which uses statistical analysis to produce a scale of overall defendant culpability as measured by the presence or absence of factors that appear to influence prosecutorial or jury decisionmaking; those cases ranked near each other on this scale would be deemed similar for purposes of conducting frequency analysis. *See Marshall*, 130 N.J. at 147-48, 613 A.2d at 1078-79; *see also DiFrisco*, 142 N.J. at 178-79, 662 A.2d at 457-58; *Martini*, 139 N.J. at 41-43, 651 A.2d at 968-69; *Bey*, 137 N.J. at 362, 645 A.2d at 698-99. For each such set of similar cases, a death-sentencing rate is calculated.

64 *See Bey*, 137 N.J. at 350, 645 A.2d at 693. *See also DiFrisco*, 142 N.J. at 166, 662 A.2d at 451; *Martini*, 139 N.J. at 28, 651 A.2d at 960.

objective;[65] it also helps the court "to review cases in terms of the substantive principle that . . . should be controlling in these cases, namely, '[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.'"[66]

Obviously, a universe of only death-sentenced cases could not be utilized to perform a frequency analysis. To the extent that societal consensus is measured by jury verdicts, a universe that does not include life verdicts could not be used to calculate the "rate of death sentencing in similar cases,"[67] because the resulting rate will always be 100 percent. Similarly, to the extent that prosecutors reflect, or predict, emerging societal consensus, their actions too must be taken into account in performing frequency analysis.[68] This, of course, cannot occur if only death-sentenced cases are considered, for these, by definition, include only cases in which the death penalty was sought. Thus, a universe including only those cases in which the death penalty was sought does not include those in which it was not, as is necessary to establish a rate that reveals how "prosecutors treat similar cases."[69]

Nor could the limited universe of death-sentenced only cases be used to undertake the precedent-seeking approach that constitutes the second method of performing proportionality review. Precedent seeking analysis is "more intuitive" than is the frequency approach,[70] and "engages familiar judicial case-by-case analysis, wherein we compare defendant's case to factually similar cases in order to discern whether defendant is deathworthy vis-à-vis other similarly situated defendants."[71]

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65 *See Marshall*, 130 N.J. at 152, 613 A.2d at 1080-81 (citing State v. Jeffries, 717 P.2d 722, 744-45 (Wash.) (Utter, J., dissenting), *cert. denied*, 479 U.S. 922 (1986)). *See also* Van Duizend, *supra* note 30, at 10-11; David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 670 (1983) (hereinafter Baldus, "*Comparative Review*").

66 *Marshall*, 130 N.J. at 153-54, 613 A.2d at 1081-82 (quoting Tichnell v. State, 468 A.2d 1, 17 n.18 (Md. 1983)). *See also* David C. Baldus, et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133 (1986).

67 *See, e.g.*, *DiFrisco*, 142 N.J. at 166, 662 A.2d at 445-46; *Martini*, 139 N.J. at 28, 651 A.2d at 961.

68 *See Tichnell*, 468 A.2d at 30 (Davidson, J., dissenting) ("the judgment of prosecutors constitutes an objective index of contemporary standards of decency, [and] the fact that in certain circumstances prosecutors rarely seek the death penalty is relevant and should be considered in determining whether the death penalty is excessive or disproportionate").

69 *DiFrisco*, 142 N.J. at 166, 662 A.2d at 451; *Martini*, 139 N.J. at 28, 651 A.2d at 961.

70 *Bey*, 137 N.J. at 350, 645 A.2d at 693.

71 *DiFrisco*, 142 N.J. at 166, 662 A.2d at 451. *See also Martini*, 139 N.J. at 28, 651

This type of precedent-seeking review could not, by its very nature, function without consideration of all factually similar cases. Thus, as the Supreme Court of New Jersey has demonstrated in each of the proportionality reviews that it has undertaken, the precedent-seeking approach proceeds by identifying such cases, and then inquiring whether the case before it reflects an unfair singling out of the defendant for capital punishment,[72] that is, whether the case is "aberrant."[73] In order to do so, the court must "examine defendant's criminal culpability to determine whether it exceeds that of similar life-sentenced defendants and whether it equals or exceeds that of other death-sentenced defendants."[74] In *Marshall*, the court described this process as "the familiar judicial process of case-by-case comparison of *life-sentenced and death-sentenced similar cases.*"[75]

As defined, this analysis would be woefully incomplete without a comparison of the case before the court with life-sentenced, as well as death-sentenced, cases. One cannot tell whether a case is more like life-sentenced than death-sentenced cases if only the latter may be considered, just as one cannot tell whether a child looks more like her mother than her father unless one can see both parents. Precedent-seeking review, then, like frequency analysis, cannot proceed using the universe of cases that the New Jersey Legislature has now imposed upon the court. Both methods used in proportionality review are, then, rendered useless by L. 1992, c. 5, just as all of the purposes of that review are rendered unattainable thereby. Though it purports to affect only the universe of cases used, the 1992 amendment thus robs proportionality review of all meaning, increasing the risk that the death penalty will be imposed in a case in which it should not.

## II.

As is discussed above, L. 1992, c. 5, renders proportionality review meaningless. With this amendment, the purposes of pro-

A.2d at 961; *Bey*, 137 N.J. at 350, 645 A.2d at 693; *Marshall*, 130 N.J. at 154, 613 A.2d at 1081-82; Flamer v. State, 490 A.2d 104, 140-43 (Del. 1983).

72 *See DiFrisco*, 142 N.J. at 184, 662 A.2d at 460; *Martini*, 139 N.J. at 47, 651 A.2d at 971; *Marshall*, 130 N.J. at 159, 613 A.2d at 1085.

73 *Bey*, 137 N.J. at 369, 645 A.2d at 702.

74 *DiFrisco*, 142 N.J. at 184, 662 A.2d at 460; *Martini*, 139 N.J. at 47, 651 A.2d at 971. If the defendant's culpability is more like that of similar life-sentenced defendants and less like that of death-sentenced defendants, then his sentence may, using this methodology, be deemed disproportionate. *Id.*

75 *Marshall*, 130 N.J. at 154, 613 A.2d at 1082 (emphasis added).

portionality review are not served and the methods established for that review become useless. This evisceration of the proportionality review provisions of the Capital Punishment Act might not, however, violate the Eighth Amendment to the United States Constitution because proportionality review is not required by the federal constitution under all circumstances.[76] Such a drastic curtailment, however, does violate the New Jersey Constitution, as we discuss below.

First, the constitutionality of the Capital Punishment Act depends upon the existence of meaningful proportionality review prior to the imposition of a death sentence. In *State v. Ramseur*,[77] the New Jersey Supreme Court upheld the New Jersey Capital Punishment Act[78] as against a broad challenge to its constitutionality. In finding that the Act survived scrutiny under the Eighth Amendment to the Constitution of the United States, the court explicitly relied upon the mandatory appellate review provisions of the Act,[79] review which, the court stated, it would exercise "in accordance with applicable constitutional standards."[80] Additionally, however, the court noted that the Act "provide[d] several procedural protections for the defendant that are not required under the constitutional analysis of the [United States] Supreme Court," including "the authorization to conduct proportionality review upon the defendant's request."[81]

The court also upheld the Capital Punishment Act as against a constitutional challenge based upon the Cruel and Unusual Punishment Clause of Article I, paragraph 12 of the New Jersey Constitution of 1947. Although the court found that the New Jersey analog "provides an additional and, where appropriate, more expansive source of protections against the arbitrary and nonindividualized imposition of the death penalty,"[82] it held that the Act survived state constitutional scrutiny as well. In doing so, however, the court expressed "concerns with respect to the need for controlling prosecutorial discretion and the importance of proportionality review even in the absence of a request by the defend-

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76 Pulley v. Harris, 465 U.S. 37 (1984). *But see* discussion *infra* at Point III (where other appellate review safeguards are insufficient, proportionality review may be required under the United States Constitution).

77 106 N.J. 123, 524 A.2d 188 (1987).

78 L. 1992, c. 111, *codified at* N.J. STAT. ANN. § 2C:11-3 (West 1995).

79 *See* N.J. STAT. ANN. § 2C:11-3 (West 1995).

80 106 N.J. at 186 & n.18, 524 A.2d at 218-19 & 219 n.18.

81 *Id.* at 186, 524 A.2d at 219.

82 *Id.* at 190, 524 A.2d at 221.

ant."[83] At the time, however, it found such concerns, however, to be "premature," promising to "consider these issues if and when they arise."[84]

Without squarely confronting the question of whether the New Jersey Constitution requires proportionality review, the court in *Ramseur* made absolutely clear that it viewed proportionality review as playing a role of constitutional importance in the implementation of the death penalty in this State. Describing it as an "important aspect of the death penalty review process," the *Ramseur* Court embarked upon a discussion of proportionality review in order "to guide future parties in their exploration of some of the issues that appear essential to the development of a proportionality review process that would satisfy the requirements of the statute *and any applicable constitutional obligations.*"[85]

Recognizing that in *Pulley v. Harris*,[86] the Supreme Court of the United States had held proportionality review not to be mandated by the Eighth Amendment in all cases, the court went on to quote the dissenting opinion in *Pulley* to the effect that "[p]roportionality review assists us in assuring that 'we have designed procedures which are appropriate to the decision between life and death and [that] we have followed those procedures.'"[87] Thus, the court held that proportionality review "acts 'as a check against the random and arbitrary imposition of the death penalty' by an aberrant jury,"[88] and therefore sought to "devise a procedure of review that will adequately protect defendants from the arbitrary and capricious imposition of the death penalty prohibited by *Furman v. Georgia.*"[89]

Similarly echoing the *Pulley* dissent, the *Ramseur* court expressed its concern that "given the emotions generated by capital crimes, it may well be that juries, trial judges and appellate courts considering sentences of death [may be] affected by impermissible considerations."[90] The court therefore assigned to proportionality review the constitutionally significant role of providing "a means through which to monitor the imposition of death sentences and

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83 *Id.* at 193, 524 A.2d at 222.

84 *Id.*

85 *Id.* at 325, 524 A.2d at 291 (emphasis added).

86 465 U.S. 37 (1984).

87 *Ramseur*, 106 N.J. at 326-27, 524 A.2d at 292 (quoting *Pulley*, 465 U.S. at 68-69 (Brennan and Marshall, JJ., dissenting) (citations omitted)).

88 *Id.* at 327, 524 A.2d at 292 (quoting Gregg v. Georgia, 428 U.S. 153, 206 (1976)).

89 *Id.* at 328, 524 A.2d at 292 (citing 408 U.S. 238).

90 *Id.* at 327, 524 A.2d at 292 (quoting *Pulley*, 465 U.S. at 64 (Brennan and Marshall, JJ., dissenting)).

thereby to prevent any impermissible discrimination in imposing the death penalty."[91]

In sum, in the course of rejecting state and federal constitutional challenges to the Capital Punishment Act, the New Jersey Supreme Court described proportionality review as "an important procedural mechanism to safeguard against the arbitrary and capricious imposition of the death penalty."[92] The court thus required proportionality review to play the constitutionally essential functions of "assur[ing] similar results in similar cases and . . . prevent[ing] discrimination on an impermissible basis, including, but not limited to, race and sex."[93]

After *Ramseur*, the New Jersey Supreme Court continued to assign this essential role to proportionality review. Thus, the court repeatedly restated its understanding that proportionality review would address "the problem of arbitrariness in the designation of cases for capital prosecution."[94] In particular, the court continued to require that proportionality review include an examination of county-by-county and racial disparities in the administration of the death penalty,[95] and even "the question of whether in New Jersey the death penalty is being disproportionately imposed upon mentally disturbed defendants."[96] And, perhaps most significantly, the court repeated that these functions were of constitutional dimension.[97]

When, finally, the court set about to perform proportionality review, it did so with these constitutional functions in mind. Repeatedly, in the course of its first four proportionality reviews, the court has emphasized that the purpose of such review is "to ensure that the death penalty is being administered in a rational, non-arbitrary, and evenhanded manner, fairly and with reasonable consis-

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91 *Id.*

92 *Id.* at 330, 524 A.2d at 294.

93 *Id.*

94 State v. Perry, 124 N.J. 128, 186, 590 A.2d 624, 654 (1991) (Stein, J., concurring in part and dissenting in part). *See also* In the Matter of the Proportionality Review Project, 122 N.J. 345, 346, 585 A.2d 358, 359 (1990) (quoting *Ramseur*, 106 N.J. at 330, 524 A.2d at 294) (reiterating that "the proportionality review provision in the Act is an important procedural mechanism to safeguard against the arbitrary and capricious imposition of the death penalty").

95 *See* State v. Koedatich, 112 N.J. 225, 255-58, 548 A.2d 939, 954-56 (1988).

96 State v. Zola, 112 N.J. 384, 437, 548 A.2d 1022, 1048-49 (1988).

97 *See* State v. Hightower, 120 N.J. 378, 415, 577 A.2d 99, 116-17 (1990) (holding that "[w]ithout a record concerning mitigating evidence we would be unable to fulfill our *constitutional* and statutory duty to review the proportionality of a defendant's sentence") (emphasis added).

tency," and that this purpose is of constitutional dimension.[98] Consistently, the court has included as a function of proportionality review "the prevention of 'any impermissible discrimination in imposing the death penalty.'"[99] And throughout, it has referred to *Ramseur*, in which the court made clear that these goals of consistency and nondiscrimination are of constitutional dimension.[100]

It follows that proportionality review is, in New Jersey, constitutionally mandated. This is true notwithstanding the holding of the United States Supreme Court that proportionality review is not required under the federal Constitution in every case in which the death penalty is imposed and the defendant requests it.[101]

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98 State v. Marshall, 130 N.J. 109, 131, 613 A.2d 1059, 1069-70 (1992); *see also* State v. Bey, 137 N.J. 334, 343, 645 A.2d 685, 689 (1994) (discussing proportionality review and stating that "[i]n general, the death penalty must be imposed fairly and with reasonable consistency"); State v. Martini, 139 N.J. 3, 21, 651 A.2d 949, 958 (1994) (proportionality review "permits New Jersey's capital-sentencing scheme to comply with the dictates of *Furman* and with the Eighth Amendment, which prohibit arbitrary and inconsistent application of the death penalty"); State v. DiFrisco, 142 N.J. 148, 162, 662 A.2d 442, 449 (1995) (though not required by the federal Constitution, proportionality review "allows [the New Jersey Supreme] Court to monitor the results of jury discretion and prevent the arbitrary and inconsistent application of the death penalty").

99 *Marshall*, 130 N.J. at 135, 613 A.2d at 1072 (quoting *Ramseur*, 106 N.J. at 327, 524 A.2d at 292); *see also Bey*, 137 N.J. at 388-96, 645 A.2d at 711-16 (utilizing proportionality review to examine whether impermissible race-based disparities exist in the capital sentencing process).

100 *See, e.g.*, *Ramseur*, 106 N.J. at 181-83, 524 A.2d at 216-18 (quoted in *Marshall*, 130 N.J. at 131, 613 A.2d at 1069-70). *See also Koedatich*, 112 N.J. at 251, 548 A.2d at 952 ("the New Jersey Constitution . . . mandates consistency and reliability in the administration of capital punishment") (citing *Ramseur*, 106 N.J. at 190, 524 A.2d at 221).

101 Pulley v. Harris, 465 U.S. 37, 50-51 (1983). Proportionality review may be required under the United States Constitution where other safeguards of appellate review are inadequate. Indeed, the New Jersey Capital Punishment Act is so lacking in appellate review safeguards that meaningful proportionality review is required by the United States Constitution. *See generally infra* at Part III. For this reason, with a universe limited to death-sentenced cases, New Jersey's death penalty law therefore also violates the United States Constitution. *See id.*

In State v. Gerald, 113 N.J. 40, 549 A.2d 792 (1988), the New Jersey Supreme Court refused to follow a similar curtailment of capital defendants' rights adopted by the United States Supreme Court. *See generally id.* In Enmund v. Florida, 458 U.S. 782 (1982), the United States Supreme Court had held that only those defendants who intend to kill are eligible for the death penalty. *See id.* at 797. In Tison v. Arizona, 481 U.S. 137 (1987), however, the Supreme Court severely curtailed *Enmund*, holding that defendants could be eligible for the death penalty even if they did not intend to kill the decedent. *See id.* at 156-58. Rather than following the Supreme Court's retrenchment in *Tison*, however, our state supreme court in *Gerald* adhered to its prior decision in *Ramseur*, which had been based on *Enmund*, and refused to lessen the protections of the state constitution, notwithstanding the more restrictive ruling of the United States Supreme Court. *See generally Gerald*, 113 N.J. at 75-90, 549 A.2d at 810-18; State v. Moore, 113 N.J. 239, 300-01, 550 A.2d 117, 148 (1988).

There is, of course, nothing unique about the New Jersey Constitution requiring greater protections for defendants than does the United States Constitution:

> In our federal system, state constitutions have a significant role to play as protectors of individual rights and liberties. This role derives its character from the freedom of state courts to move beyond the protections provided by federal doctrine and from the distinctive character of state courts and state constitutions. . . . The present function of state constitutions is as a second line of defense for those rights protected by the federal Constitution and as an independent source of supplemental rights unrecognized by federal law.[102]

As Justice Brennan recognized nearly twenty years ago,

> state courts no less than federal are and ought to be the guardians of our liberties. . . . [S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.[103]

Thus, each state has the "sovereign right to adopt in its own Constitution individual liberties more expansive than those conferred by the Federal Constitution."[104] Historically, state constitutions have provided protections for individual liberties independent of the federal Constitution.[105] Indeed, our "[u]nderstanding of the relationship between the United States Supreme Court and a state Supreme Court as interpreters of constitutional rights begins with the recollection that the original states, including New Jersey, and their Constitutions preceded the formation of the federal government and its Constitution."[106] As New Jersey Supreme Court Justice Morris Pashman eloquently stated over a decade ago: "The citizens of New Jersey have adopted a constitution that ensures their liberties independent of the federal law. The New Jersey Constitution is not an empty gesture. It is

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102 State v. Hunt, 91 N.J. 338, 346, 450 A.2d 952, 955 (1982) (quoting *The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324, 1367 (1982)).

103 William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

104 Pruneyard Shopping Center v. Robins, 447 U.S. 74, 81 (1980). *See also* California v. Greenwood, 486 U.S. 35, 43 (1988); Oregon v. Hass, 420 U.S. 714, 718 (1975); State v. Alston, 88 N.J. 211, 225, 440 A.2d 1311, 1318 (1981); Brennan, *supra* note 103.

105 Brennan, *supra* note 103, at 501 ("Prior to the adoption of the Federal Constitution, each of the rights eventually recognized in the federal Bill of Rights had previously been protected in one or more state constitutions.").

106 Right to Choose v. Byrne, 91 N.J. 287, 299, 450 A.2d 925, 931 (1982) (citation omitted).

the bedrock of liberty in this State."[107]

It is, then undisputed that "although the federal Constitution may remain as the basic charter, state constitutions may serve as a supplemental source of fundamental liberties."[108] In other words, the federal Constitution serves as a floor in protecting individual rights and no state may afford protection below this level; state courts may, however, interpret their state constitutions to require greater protections.[109] "[T]he United States Constitution as construed by the United States Supreme Court establishes the minimum degree of protection a state must give to constitutional rights. . . . [S]tate constitutions may provide further protection for individual liberties by limiting state powers to a greater degree than they are limited by the federal constitution."[110]

Thus, the proposition that our state supreme court "has the power to construe the New Jersey Constitution to reach results contrary to United States Supreme Court decisions construing the federal constitution is not controverted."[111] Where federal law is insufficient to protect the state constitutional rights of citizens, state courts are free—and indeed are obligated—to undertake an independent analysis of the state provision and to provide greater rights.[112] Specifically, where decisions of the United States Supreme Court fail to pay "due regard to precedent and the policies underlying specific constitutional guarantees,"[113] state courts need not follow them.

Applying this principle, the New Jersey Supreme Court has interpreted provisions of the state constitution more broadly than their federal counterparts on numerous occasions.[114] Specifically,

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107 *Id.* at 333, 450 A.2d at 949 (Pashman, J., concurring in part and dissenting in part).

108 *Id.* at 300, 450 A.2d at 931 (citing Brennan, *supra* note 103).

109 *Id.* ("the individual states may accord greater respect than the federal government to certain fundamental rights"); *see also generally id.* at 330-32, 450 A.2d at 947-49 (Pashman, J., concurring in part and dissenting in part).

110 State v. Hunt, 91 N.J. 338, 353-54, 450 A.2d 952, 959-60 (1982) (Pashman, J., concurring).

111 *Id.* at 353, 450 A.2d at 959 (Pashman, J., concurring).

112 *See generally* Brennan, *supra* note 103, at 498-502 (reviewing cases that recognize independence of state constitutions from federal counterparts).

113 *Id.* at 502.

114 *See, e.g.*, State v. Hogan, 144 N.J. 216, 231, 676 A.2d 533, 540 (1996); Doe v. Poritz, 142, N.J. 1, 104, 662 A.2d 367, 419 (1995); New Jersey Coalition Against the War in the Middle East v. J.M.B. Realty, 138 N.J. 326, 650 A.2d 757 (1994); State v. Pierce, 136 N.J. 184, 208-13, 642 A.2d 947, 959-62 (1994); State v. Hempele, 120 N.J. 182, 196-97, 576 A.2d 793, 800-01 (1990); State v. Mollica, 114 N.J. 329, 352-53, 554 A.2d 1315, 1327 (1989); State v. Novembrino, 105 N.J. 96, 145, 519 A.2d 820, 849 (1987); State v. Gilmore, 103 N.J. 508, 522-23, 511 A.2d 1150, 1157 (1986); *Hunt*, 91

the court has done so when one or more of the following criteria are present:[115] (1) textual language differences between the state constitutional provision and the federal counterpart;[116] (2) legislative history that reveals an intention to provide protections independent of federal law;[117] (3) preexisting state law that suggests distinctive state constitutional rights;[118] (4) structural differences between the federal and state constitutions that provide a basis for rejecting the constraints of federal doctrine at the state level;[119] (5)

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N.J. at 344, 450 A.2d at 955; Right to Choose v. Byrne, 91 N.J. 257, 299-310, 450 A.2d 925, 931-37 (1982); State v. Alston, 88 N.J. 211, 440 A.2d 1311 (1981); In re Grady, 85 N.J. 235, 249, 426 A.2d 467, 474 (1981); State v. Schmid, 84 N.J. 535, 560, 423 A.2d 615, 628 (1980), *appeal dismissed*, 455 U.S. 100 (1982); State v. Baker, 81 N.J. 99, 112-13, 405 A.2d 368, 374-75 (1979); Peper v. Princeton University Board of Trustees, 77 N.J. 55, 79, 389 A.2d 465, 477 (1978); In re Quinlan, 70 N.J. 10, 19, 40-41, 51, 355 A.2d 647, 651-52, 662-63, 669, *cert. denied*, 429 U.S. 922 (1976); State v. Johnson, 68 N.J. 349, 353, 346 A.2d 66, 67-68 (1975); Robinson v. Cahill, 62 N.J. 473, 490, 303 A.2d 273, 282, *cert. denied*, 414 U.S. 976 (1973). *See generally* Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); Brennan, *supra* note 103.

115 In his concurrence in *State v. Hunt*, Justice Handler identified seven criteria for determining when to invoke the state constitution as an independent source for protecting individual rights. *See generally* 91 N.J. at 363-68, 450 A.2d at 965-67. Criteria have since been adopted by the court. *See, e.g., State v. Muhammad*, 145 N.J. 23, 42, 678 A.2d 164, 181 (1996).

116 The state constitution's language may provide a basis for reaching a result different from that which could be obtained under federal law in either of two contexts. First, the language of the state constitution may recognize rights not identified in the federal Constitution, e.g. a right to education. *See* N.J. CONST. art. VIII, § 4, par. 1; *see also generally* Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973). Second, the phrasing of a provision in the state constitution may be so significantly different from the language in the federal counterpart that the Supreme Court "feel[s] free to interpret our provision on an independent basis." *Hunt*, 91 N.J. at 364, 450 A.2d at 965. *See also Muhammad*, 145 N.J. at 42, 678 A.2d at 181 (inclusion of Victim Rights Amendment in New Jersey Constitution, art. 1, ¶ 4, precludes interpreting the state constitution from barring victim impact evidence); State v. Schmid, 84 N.J. at 557, 423 A.2d at 626-27 (unique language of New Jersey's free speech clause, N.J. CONST. art. 1, par. 6, indicated that provision was meant to be broader in scope than the First Amendment); *Right to Choose*, 91 N.J. at 302-04, 450 A.2d at 932-33 (fundamental right to choose to have an abortion is entitled to enhanced protection under New Jersey Constitution's doctrine of equal protection found implicit in N.J. CONST. art. 1, par. 1); In re Grady, 85 N.J. 235, 250, 426 A.2d 467, 474 (1981) (recognizing individual rights involving personal privacy under state constitution's bill of rights which protects the right of all people to enjoy and pursue their individual well-being and happiness).

117 *See, e.g., Schmid*, 84 N.J. at 557, 423 A.2d at 626-27 (exploring the legislative history in determining that New Jersey's free speech clause was intended to be more expansive than the First Amendment). *See also Muhammad*, 145 N.J. at 42, 678 A.2d at 181.

118 *See, e.g., Schmid*, 84 N.J. at 557, 423 A.2d at 626-27.

119 For example, "[t]he United States Constitution is a grant of enumerated powers to the federal government." *Hunt*, 91 N.J. at 365, 450 A.2d at 966. *See also* State v. Saunders, 75 N.J. 200, 225-26, 381 A.2d 333, 345 (1977) (Schreiber, J., concurring); Gangemi v. Berry, 25 N.J. 1, 8-9, 134 A.2d 1, 5 (1957). In contrast, the New Jersey

matters of particular state interest or local concern;[120] (6) the state's history and traditions;[121] and (7) public attitudes.[122] All of these criteria "share a common thread—that distinctive and identifiable attributes of a state government, its laws and its people justify recourse to the state constitution as an independent source for recognizing and protecting individual rights."[123]

The New Jersey Supreme Court has been most willing to engage in an independent analysis under the state constitution and provide broader protections than are available under the federal Constitution "[w]hen particular questions are local in character

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Constitution "serves only to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives." *Hunt*, 91 N.J. at 365, 450 A.2d at 966 (citing *Schmid*, 84 N.J. at 558, 423 A.2d at 62; Smith v. Penta, 81 N.J. 65, 74, 405 A.2d 350, 354 (1984); *Gangemi*, 25 N.J. at 8-9, 134 A.2d at 5). Thus, the explicit affirmation of fundamental rights in the state constitution can be seen as a guarantee of those rights rather than a restriction upon the State's authority to curtail them. *See Hunt*, 91 N.J. at 366, 450 A.2d at 966; *Schmid*, 84 N.J. at 558, 423 A.2d at 627.

This distinction is apparent in the free speech context. While the First Amendment simply provides that "Congress shall make no law . . . abridging the freedom of speech," U.S. CONST. amend. I, the New Jersey Constitution affirmatively guarantees that "[e]very person may freely speak, write and publish his sentiments on all subjects." N.J. CONST. art. 1, ¶ 6.

120 The New Jersey Supreme Court has held that certain matters are uniquely appropriate for independent state action. For example in *Alston*, 88 N.J. 211, 440 A.2d 1311 (1981), the court adopted a rule of standing to challenge searches and seizures that is broader than the federal standard. *See id.* at 227, 440 A.2d at 1319. The court "felt free to do so because that question implicated the management of our own court system, which is of peculiarly local concern." *Hunt*, 91 N.J. at 366, 450 A.2d at 966. It also "reflected a strong state policy in favor of access to our courts and liberalized standing to vindicate legal claims." *Id.* (citing Salorio v. Glaser, 82 N.J. 482, 490-91, 414 A.2d 943, 946-47 (1980); New Jersey Chamber of Commerce v. New Jersey Elec. Law Enforcement Comm'n, 82 N.J. 57, 67, 411 A.2d 168, 172-73 (1980); Home Builders League of South Jersey, Inc. v. Township of Berlin, 81 N.J. 127, 132, 405 A.2d 381, 384 (1979); Crescent Park Tenants Ass'n v. Realty Equities Corp., 58 N.J. 98, 107, 275 A.2d 433, 437-38 (1971)).

121 For example, in *Schmid*, 84 N.J. 535, 423 A.2d 615, the New Jersey Supreme Court found that New Jersey's history and traditions provided a basis for the independent application of the state constitution. *See generally id.* In holding that the New Jersey Constitution provided greater protections for the right to free speech than those found in the federal Constitution, the court emphasized the state's strong tradition of protecting individual expressional and associational rights. *Id.* at 562, 423 A.2d at 629-30. Similarly, in State v. Bellucci, 81 N.J. 531, 410 A.2d 666 (1979), the New Jersey Supreme Court gave the state constitutional right to effective assistance of counsel more expansive protection than that found in the federal Constitution because of the state's firm policy regarding the proper role of attorneys in criminal trials. *See id.* at 544, 410 A.2d at 672-73.

122 "Distinctive attitudes of a state's citizenry may also furnish grounds to expand constitutional rights under state charters." *Hunt*, 91 N.J. at 367, 450 A.2d at 966 (Handler, J., concurring). *See also Muhammad*, 145 N.J. at 42, 678 A.2d at 164.

123 *Hunt*, 91 N.J. at 368, 450 A.2d at 967 (Handler, J., concurring).

and do not appear to require a uniform national policy."[124] Then, the court has held, "they are ripe for decision under state law."[125]

Such an independent interpretation is especially appropriate with respect to capital punishment, because this "is a matter of particular state interest or local concern and does not require a uniform national policy."[126] Indeed, the New Jersey Supreme Court recently reiterated that "[w]ith respect to capital punishment in particular . . . 'our state constitution provides an additional and, where appropriate, more expansive source of protections against the arbitrary and non-individualized imposition of the death penalty."[127] Thus, the court in *Ramseur* specifically disapproved such holdings as that of the Supreme Court in *Pulley*, writing:

> . . . in recent years the United States Supreme Court has departed from the vigorous enforcement of these constitutional principles [of protecting against the arbitrary and non-individualized imposition of the death penalty], *particularly the principle of consistency*. We are not obliged to follow the reasoning of all these United States Supreme Court decisions in interpreting our own state constitutional protections, nor do we intend to.[128]

Instead, the court recognized that "[i]n the context of the death penalty, where the demands for fairness and accuracy are heightened, the principles of consistency and reliability rise to constitutional dimension."[129] Accordingly, in administering and implementing the capital punishment statute in New Jersey, the state high court has striven to ensure that there are "sufficient safeguards to prevent both arbitrary and nonindividualized infliction of the death penalty, whether or not the United States Supreme Court would require those safeguards under the federal Constitu-

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124 *Id.* at 366, 450 A.2d at 966 (Handler, J., concurring).

125 *Id.*

126 State v. Gerald, 113 N.J. 40, 76, 549 A.2d 792, 810 (1988) (quoting *Ramseur*, 106 N.J. at 167, 524 A.2d at 209). *See also* California v. Ramos, 463 U.S. 992, 1013-14 (1983) (in capital cases, "States are free to provide greater protections in the criminal justice system than the Federal Constitution requires.").

The United States Supreme Court has also recognized that "the primary responsibility for defining crimes against state law [and] fixing punishments for the commission of these crimes . . . rests with the States." Payne v. Tennessee, 501 U.S. 808, 824 (1991).

127 *Muhammad*, 1996 WL 354668, at *7 (quoting *Koedatich*, 112 N.J. 225, 251, 548 A.2d 939, 952 (1988) (quoting *Ramseur*, 106 N.J. at 190, 524 A.2d at 221)) (internal quotation marks omitted); *see also Gerald*, 113 N.J. at 76, 549 A.2d at 810-11 (concluding that Article 1, paragraph 12 of the state constitution "affords greater protections to capital defendants than does the eighth amendment of the federal constitution").

128 106 N.J. at 190, 524 A.2d at 219 (emphasis added).

129 *Id.*

tion."[130] The lack of meaningful proportionality review—as would result if the restricted universe set forth in L. 1992, c. 5, were used—inherently threatens the goals of consistency and reliability.[131] The statute, as curtailed, therefore cannot pass constitutional muster.

Moreover, as scholars have established, in an article cited with approval by the New Jersey Supreme Court in *Ramseur*,[132] the conclusion that proportionality review is required by the New Jersey Constitution is both consistent with the fact that "the concept of proportionality is rooted deeply in state law," and is supported by "compelling public policy rationales," including that it "enables the judiciary to provide for fundamental fairness in death penalty reviews in a way that best maintains the integrity of the state statutory scheme and the entire criminal justice system."[133]

It follows that the concept of proportionality is a part of this state's history and traditions. Indeed, proportionality was a governing principle underlying the adoption of the New Jersey Code of Criminal Justice in 1978.[134] This new Code enacted into law "the prevailing theme . . . that punishment should fit the offender as well as the offense."[135]

The Code developed as a response to criticisms of the criminal justice system that arose during the 1960s and 1970s, in both New Jersey and throughout the United States. The most serious criticism was leveled at the arbitrary and capricious nature of criminal sentencing.[136] Many commentators "focused upon disparity in sentencing as the cruelest manifestation of a sentencing system bereft of structure."[137]

As a result, new models for sentencing arose in New Jersey and in state legislatures throughout the country as well as in Congress. These new approaches sought to achieve consistency and propor-

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130 *Id.*

131 *See generally* discussion *supra* at Part I.

132 *See* 106 N.J. at 327-28, 524 A.2d at 292-93.

133 Rodriguez et al., *supra* note 36, at 417, 423.

134 L. 1978, c. 95, *codified at* N.J. STAT. ANN. § 2C:1-1, *et seq* (West 1995).

135 State v. Roth, 95 N.J. 334, 345-46, 471 A.2d 370, 374-75 (1984) (quoting State v. Ivan, 33 N.J. 197, 199-201, 162 A.2d 851, 852-53 (1960) (internal citations omitted)).

136 *See Roth* 95 N.J. at 347-48, 471 A.2d at 376-77 (citing FAIR AND CERTAIN PUNISHMENT, REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON CRIMINAL SENTENCING 3 (1976); NORVAL MORRIS, THE FUTURE OF IMPRISONMENT 45 (1974); Marvin E. Frankel, *Lawlessness in Sentencing*, 41 U. CIN. L. REV. 1, 54 (1972); Edward M. Kennedy, *Introduction: Symposium on Sentencing*, 7 HOFSTRA L. REV. 1, 1 (1978)); *see also* Andrew von Hirsch, *Recent Trends in American Criminal Sentencing Theory*, 42 MD. L. REV. 6 (1983); Thomas Weigend, *Sentencing in West Germany*, 42 MD. L. REV. 37 (1983).

137 *Roth*, 95 N.J. at 348, 471 A.2d at 377.

tionality. California's Penal Code, for example, required that the punishment be "proportionate to the seriousness of the offense with provision for uniformity in the sentences of offenders committing the same offense under similar circumstances."[138] Similarly, the National Conference of Commissioners on Uniform State Laws proposed new standards. Its Model Sentencing and Corrections Act of 1978 reported:

> The current system results in large scale disparity in sentences creating frustrations, tensions, and disrespect for the system in both the offenders and the public-at-large.
>
> * * *
>
> The provisions of Article 3 reflect the use of "just desert" as the overriding philosophy justifying the imposition of criminal sanctions. This philosophy requires that the nature and severity of the sanction imposed to be deserved on the basis of the offense committed and certain limited mitigating and aggravating factors relating to the offender. This seeks to avoid the injustice that results from utilizing the other traditional purposes of punishment.[139]

Each of these reforms sought to make sentencing policy more rational and, in particular, to ensure that the punishment imposed be proportionate with respect to the offense and the offender.

In line with this national trend, the New Jersey Legislature began efforts to recodify our state's criminal laws in 1968 and the judiciary began to struggle with the establishment of sentencing guidelines.[140] A state-wide project conducted over two years by the Administrative Office of the Courts was described as being "in response to a growing awareness of the need for greater equity in sentencing, i.e., that similarly situated offenders should receive similar sentences. Grave concerns had been expressed on a national basis, and in New Jersey, concerning undue sentencing

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138 CAL. PENAL CODE § 1170 (West 1983). *See also* ILL. ANN. STAT. ch. 38, ¶¶ 1005-1-1 to 1005-10-2 (Smith-Hurd 1982); WASH. REV. CODE ANN. ch. 9.94A (West Supp. 1983-84); MINN. STAT. §§ 244.09-244.11.

139 *Roth*, 95 N.J. at 350, 471 A.2d at 378 (quoting MODEL SENTENCING AND CORRECTIONS ACT, Art. 3, Prefatory Note (1978), 10 U.L.A. 175-76 (Supp. 1983) (emphasis in original)).

140 A commission was established, and in October 1971, the commission submitted its final draft and report to the Governor and the legislature. *See* NEW JERSEY PENAL CODE, FINAL REPORT OF THE NEW JERSEY CRIMINAL LAW REVISION COMMISSION (2 vols. 1971). Assembly hearings took place in 1972, but then the matter languished in the Legislature for several years. *See generally* Cameron H. Allen, *Legislative History of the New Jersey Code of Criminal Justice*, 7 CRIM. JUST. Q. 31, 35 (1979).

disparity."[141]

In 1978, the New Jersey Legislature finally passed the Code of Criminal Justice and Governor Byrne signed the new code into law. Upon signing the new law, the Governor stated: "This Criminal Code is intended to make sentencing more definitive. . . . It is designed to reduce the possibility of one judge giving a stiff sentence and another a light sentence for similar crimes."[142] Thus, an overriding purpose of the New Jersey Criminal Code is to ensure that defendants who commit similar crimes receive similar punishment. In its structure, the New Jersey Criminal Code "closely resembles a 'model for sentencing based on notions of proportionality and desert.'"[143] Specifically, the Code was structured to prevent "excessive, disproportionate or arbitrary punishment."[144]

In order to achieve these goals, the new Code established proportionality and appellate review procedures that would seek to prevent disproportionate sentences. In *State v. Roth*,[145] the New Jersey Supreme Court identified "appellate review of sentences to provide a greater degree of uniformity" as a central focus of sentencing reform.[146] In a companion case, *State v. Hodge*,[147] the court reaffirmed the principle that statutes establishing penalties "must be construed 'so as to avoid the unfairness of arbitrary enforcement.'"[148] In short, "the concepts of proportionality and fairness permeate the sentencing provisions of the new code and contemporaneous judicial interpretations."[149] The Code was viewed as a "significant step[ ] . . . to make the criminal justice system fairer and more equitable."[150] Consistent with this goal of ensuring fairness and proportionality in sentencing, the Capital Punishment Act, enacted as an amendment to the Criminal Code in 1982, pro-

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141 *Roth*, 95 N.J. at 353 n.3, 471 A.2d at 380 n.3 (quoting REPORT OF THE SENTENCING GUIDELINES PROJECT TO THE ADMINISTRATIVE DIRECTOR OF THE COURTS 1-2 (1979)).

142 *Roth*, 95 N.J. at 354, 471 A.2d at 381 (quoting Statement of Gov. Brendan T. Byrne, Aug. 10, 1978).

143 *Roth*, 95 N.J. at 355, 471 A.2d at 381-82 (quoting Andrew von Hirsh, *Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Criminal Sentencing*, 33 RUTGERS L. REV. 772, 773 (1981).

144 N.J. STAT. ANN. § 2C:1-2(b)(4) (West 1995).

145 95 N.J. 334, 471 A.2d 370 (1984).

146 *Id.* at 361, 471 A.2d at 385.

147 95 N.J. 369, 471 A.2d 389 (1984).

148 *Id.* at 374, 471 A.2d at 392 (quoting State v. Maguire, 84 N.J. 508, 514 n.6, 423 A.2d 294, 297 n.6 (1980)).

149 Rodriguez, et al., *supra* note 36, at 419.

150 *Roth*, 95 N.J. at 356, 471 A.2d at 382 (quoting Kennedy, *supra* note 136, at 8.

vided for both appellate and proportionality review.[151]

Because the concept of proportionality is so deeply rooted in this state's history and traditions,[152] and was so guiding a force in the creation of the new Criminal Code, the constitutionality of the proportionality review provision of the Capital Punishment Act should be analyzed independently under the New Jersey Constitution. Applying the *Hunt* criteria,[153] the New Jersey Constitution requires meaningful proportionality review of death sentences, notwithstanding the United States Supreme Court's contrary interpretation of the federal constitution. As discussed above, the legislative history of the Capital Punishment Act, factor two of the *Hunt* test, demonstrates that the Act, and indeed the entire Criminal

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151 N.J. STAT. ANN. § 2C:11-3e. The statute provides.

> Every judgment of conviction which results in a sentence of death under this section shall be appealed . . . to the Supreme Court. Upon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

*Id.*

152 A review to assess whether punishment is proportional has been conducted in a wide range of contexts far beyond criminal sentencing. For example, in addressing the question when public employees may be forced to forfeit their pensions on the basis of misconduct, the New Jersey Supreme Court in Uricoli v. Police & Fire Retirement System, 91 N.J. 62, 449 A.2d 1267 (1982), held that a *per se* denial of all pension rights would be too harsh. *See id.* at 77, 449 A.2d at 1275. Instead, the court stated, "the proper approach to the resolution of the problem of what constitutes dishonorable service justifying the forfeiture of earned pension benefits is one which calls for flexibility and the application of equitable considerations." *Id.*

Similarly, in determining the appropriate sanction for attorneys who are disciplined for ethical violations, the New Jersey Supreme Court has repeatedly stated that "[t]he severity of discipline to be imposed must comport with the seriousness of the ethical infractions in light of all the relevant circumstances." In re Nigohosian, 88 N.J. 308, 315, 442 A.2d 1007, 1010 (1982). Likewise, in the context of the revocation of a medical doctor's license by the State Board of Medical Examiners the court has held that "the test in reviewing administrative sanctions is 'whether such punishment is so disproportionate to the offense, in light of all the circumstances, as to be shocking to one's sense of fairness.'" In re Polk License Revocation, 90 N.J. 550, 578, 449 A.2d 7, 21 (1982) (quotation omitted).

In determining appropriate sanctions in a wide variety of contexts, then, the New Jersey Supreme Court has frequently assessed whether a punishment is proportional to the harm done. *See generally* In re Rogers, 126 N.J. 345, 359-60, 601 A.2d 198, 204 (1991); *In re Polk License Revocation*, 90 N.J. at 578, 449 A.2d at 21. In doing so, moreover, the court has often considered the sanction imposed in similar cases. *See In re Rogers*, 126 N.J. at 359-60, 601 A.2d at 204 (considering discipline imposed on attorneys in similar cases when determining the appropriate sanction to impose on the case at bar); *In re Polk License Revocation*, 90 N.J. at 578-79, 449 A.2d at 21-22 (reviewing other cases involving revocation of medical licenses as a sanction for sexually abusing a patient); *In re Barrett*, 88 N.J. 450, 458-59, 443 A.2d 678, 682-83 (1982) (reviewing attorney disciplinary sanctions in similar cases).

153 *See* 91 N.J. 338, 364-67, 450 A.2d 952, 965-67 (1982).

Code, was created to ensure fairness and proportionality in sentencing and to rid this state's criminal justice system of arbitrary punishment. For this reason, L. 1992, c. 5 should be analyzed with greater scrutiny under the state constitution than it might be by the United States Supreme Court under the federal Constitution, to ensure that comports with these goals.

Similarly, an independent analysis is warranted under the state constitution pursuant to the third *Hunt* factor: preexisting state law. As originally enacted, the Capital Punishment Act required proportionality review of all death sentences to ensure that this most severe punishment was not imposed arbitrarily. With the 1992 amendment, and its constricted universe, the Act can no longer serve this critical function. Because preexisting state law sought to ensure even-handedness, however, a departure from the United States Supreme Court's analysis under the federal Constitution is required.

Next, an independent and more protective analysis is warranted, under factor 5 of the *Hunt* criteria, because, as discussed above, criminal justice in general,[154] and capital punishment in particular, are matters of state interest and local concern. Finally, as described above, New Jersey has a long-standing tradition of ensuring proportionality not only in criminal sentencing but in imposing sanctions in a broad range of contexts. The sixth *Hunt* factor, state traditions, therefore also counsels in favor of reaching a result under the New Jersey Constitution that departs from the less protective result rendered by the United States Supreme Court under the United States Constitution.

Applying the *Hunt* factors, then, the New Jersey Constitution should be interpreted more broadly than its federal counterpart. Notwithstanding the United States Supreme Court's holding to the contrary, the New Jersey Supreme Court should hold that the New Jersey Constitution requires meaningful proportionality review of capital sentences.[155]

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154 *See* United States v. Lopez, 115 S. Ct. 1624, 1631 (1995) ("States possess primary authority for defining and enforcing the criminal law") (quoting Brecht v. Abramson, 507 U.S. 619 (1993); Engle v. Isaac, 456 U.S. 107, 128 (1982)).

155 For the reasons set forth above, the analysis of the *Hunt* factors in the context of the proportionality review provision of the Capital Punishment Act differs from the New Jersey Supreme Court's recent analysis of these factors with respect to the victim impact statute at issue in *Muhammad.* In *Muhammad,* the court upheld the victim impact statute based, in part, on the fact that "[i]n the New Jersey Constitution there is a specific provision, namely, the Victim's Rights Amendment, that recognizes the rights of victims." 1996 WL 354668, at *8. Indeed, were it not for this constitutional amendment explicitly protecting the interests sought to be protected by the victim

It is not surprising, then, that the court has previously indicated its fundamental agreement with the *dissenting* opinion in *Pulley*, an opinion that expressly characterized proportionality review as constitutionally necessary. Thus, in *Marshall*, the court wrote:

> The dissenting members in *Pulley* suggested not that in any sense there be a requirement of generality of nearly unanimous death verdicts for those convicted of the same crime, but rather suggested only that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action, and have insisted that capital punishment be imposed fairly, and with reasonable consistency, or not at all. In their view, proportionality review, although clearly no panacea, often serves to identify the most extreme examples of disproportionality among similarly situated defendants.
>
> That, we believe, is an acceptable understanding of the intentions of the framers of our Act—that statutory proportionality review should seek to ensure that the death penalty is being administered in a rational, non-arbitrary, and evenhanded manner, fairly and with reasonable consistency. That review serves as a means through which to monitor the imposition of death sentences and thereby to prevent any impermissible discrimination in imposing the death penalty.[156]

Following the dissenting justices in *Pulley*, the New Jersey Supreme Court, then, has defined proportionality review in a manner that renders it constitutionally necessary. "Proportionality review," the court has written, again quoting from the *Pulley* dissent, "assists us in assuring that 'we have designed procedures which are appropriate to the decision between life and death and . . . [that] we have followed those procedures.'"[157] The dissent in *Pulley* concluded that proportionality review was constitutionally required. The New Jersey Supreme Court has signaled its fundamental agreement with that dissent.

Proportionality review is, therefore, an essential component of

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impact statute, the court might have struck down the statute. *See id.* at *9 ("In the absence of the Victim's Rights Amendment, we might have continued to hold that victim impact evidence should not be admitted during the sentencing phase of a capital case."). No such countervailing constitutional provision exists in the context of proportionality review.

156 State v. Marshall, 130 N.J. 109, 130-31, 613 A.2d 1059, 1069-70 (1992).

157 *Ramseur*, 106 N.J. at 326, 524 A.2d at 292 (quoting *Pulley*, 465 U.S. at 68-69 (Brennan and Marshall, JJ., dissenting)). The *Ramseur* court also relied upon the *Pulley* dissent for the proposition that proportionality review plays an essential, constitutional function in assuring that death sentences are not "affected by impermissible considerations." *Ramseur*, 106 N.J. at 327, 524 A.2d at 292 (quoting *Pulley*, 465 U.S. at 64 (Brennan and Marshall, JJ., dissenting)).

New Jersey's system of capital punishment, one which is required by Article 1, paragraph 12 of the New Jersey Constitution of 1947. L. 1992, c. 5, is unconstitutional because it renders that constitutionally mandated review utterly meaningless. By limiting proportionality review "to a comparison of similar cases in which a sentence of death has been imposed,"[158] the statute undermines the ability of proportionality review to accomplish any of its constitutionally-mandated purposes.

Where a legislative curtailment thus renders a constitutional right meaningless, the limitation itself is unconstitutional.[159] This

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158 L. 1992, c. 5.

159 *See, e.g.*, Right to Choose v. Byrne, 91 N.J. 287, 308 n.6, 450 A.2d 925, 935 n.6 (1982) ("For many indigent women, the denial of Medicaid funds, as a practical matter, forecloses the option of obtaining a medically necessary abortion. . . . Only those least able to bear the financial burden will be forced into childbirth at the expense of their health. If the purpose of the statute is to protect potential life by depriving indigent women of their right to protect their health, the statute, in that sense, is rational. But it is that ruthless rationality that our Constitution will not condone."); *id.* at 303-08, 450 A.2d at 933-37 ("In recent years, . . . a body of law has developed in New Jersey acknowledging a woman's right to choose whether to carry a pregnancy to full-term or to undergo an abortion . . . . In this case, however, the State admittedly seeks to influence the decision between abortion and childbirth. Indeed, it concedes that, for a woman who cannot afford either medical procedure, the statute skews the decision in favor of childbirth at the expense of the mother's health. . . . Statutes such as [this] 'can only be understood as an attempt to achieve with carrots what the government is forbidden to achieve with sticks.'") (quoting LAWRENCE TRIBE, AMERICAN CONSTITUTIONAL LAW § 15-10, at 933 n.77 (1978)); *see also id.* at 324, 450 A.2d at 944 (Pashman, J., concurring in part and dissenting in part) ("The freedom to act is meaningless if it is not coupled with the ability to effectively enjoy that freedom."); *id.* ("No 'meaningful opportunity' to choose can exist for poor women in the absence of funding. '[F]or women eligible for Medicaid—poor women—denial of a Medicaid-funded abortion is equivalent to denial of legal abortion altogether.'") (quoting Harris v. McRae, 448 U.S. 297, 338 (1980) (Marshall, J., dissenting)); *id.* at 325, 450 A.2d at 944-45 ("Poor women who cannot afford abortions simply cannot obtain them in the absence of funding. . . . [T]he failure to fund abortion for the poor . . . is tantamount to an absolute prohibition."); *id.* ("[I]t is ludicrous to assert that in the absence of funding, poor women who cannot afford abortions have the same freedom to choose between abortion and childbirth as do women who can afford either option."); *id.* at 328, 450 A.2d at 946 ("The failure to fund abortions for women who cannot afford them effectively deprives them of the freedom to choose."); Berman v. Allan, 80 N.J. 421, 431-32, 404 A.2d 8, 14-15 (1979) ("[A] woman possesses a constitutional right to decide whether her fetus should be aborted . . . . Public policy now supports . . . the proposition that she not be impermissibly denied a meaningful opportunity to make that decision."); Boddie v. Connecticut, 401 U.S. 371, 374, 380-81 (1971) (Court invalidated requirement of payment of court fees and costs that restricted ability of indigent people to get a divorce reasoning that "the right to due process reflects a fundamental value in our American constitutional system," and the denial of access to the courts effectively denied poor persons the meaningful 'opportunity' to obtain a divorce.); Beal v. Doe, 432 U.S. 438, 462 (1977) (Blackmun, J., dissenting) ("The Court concedes the existence of a constitutional right but denies the realization and enjoyment of that right on the ground that existence and realiza-

is true because, "a theoretical right is of no use to a real person."[160] In recognition of this principle, the Supreme Court of New Jersey has held that unlike the United States Constitution, provisions enshrined in the state constitution often require affirmative conduct—not merely the absence of interference—on the part of the government to effectuate an individual's meaningful realization of his or her constitutional rights.[161]

Moreover, the responsibility for defining and preserving the guarantees of the state constitution is entrusted exclusively to the judiciary. "[T]he judicial obligation to protect the fundamental rights of individuals is as old as the country."[162] As the New Jersey Supreme Court has explained: "The judicial branch of the government has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights guaranteed thereby to the people. . . . However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it."[163]

Thus, the legislature may not enact a law, such as L. 1992, c. 5, that curtails the constitutional right to proportionality review and renders that right meaningless. Where a procedural rule, such as the proportionality review mechanism, is of constitutional dimen-

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tion are separate and distinct. . . . I find that disingenuous and alarming, almost reminiscent of: 'Let them eat cake.'").

160 *Right to Choose*, 91 N.J. at 327, 450 A.2d at 946 (Pashman, J., concurring in part and dissenting in part). *See also* New Jersey Coalition v. J.M.B., 138 N.J. 326, 370, 650 A.2d 757, 779 (1994) (finding that for the right to free speech under the New Jersey Constitution to have meaning, it must protect leafletting in private shopping malls because malls have replaced downtown public streets: "If free speech is to mean anything in the future, it must be exercised at these [shopping] centers. Our constitutional right encompasses more than leafletting and associated speech on sidewalks located in empty downtown business districts. It means communicating with the people in the new commercial and social centers; if the people have left for the shopping centers, our constitutional right includes the right to go there too, to follow them, and to talk to them.").

161 *See, e.g.*, *New Jersey Coalition*, 138 N.J. at 353, 650 A.2d at 770 ("We thus held that Article 1, paragraph 6 of our State Constitution granted substantive free speech rights, and that unlike the First Amendment, those rights were not limited to protection from government interference. In effect, we found that the reach of our constitutional provision was affirmative.").

162 King v. South Jersey Nat'l Bank, 66 N.J. 161, 177, 330 A.2d 1, 10 (1974).

163 Asbury Park Press, Inc. v. Woolley, 33 N.J. 1, 12, 161 A.2d 705, 710 (1960); *see also* Robinson v. Cahill, 69 N.J. 133, 147, 351 A.2d 713, 720 (1975) (same); State v. Hunt, 91 N.J. 287, 358, 450 A.2d 952, 962 (1982) ("The New Jersey Constitution provides the citizens of this state with a fully independent source of protection of fundamental rights and liberties. It is our role alone to say what those rights are, and it is our solemn obligation to enforce them."); State v. Novembrino, 105 N.J. 95, 157, 519 A.2d 820, 856 ("In our tripartite system of separate governmental powers, the primary responsibility for [the] preservation" of constitutional principles "is that of the judiciary.").

sion, the legislature lacks authority to revoke or restrict that rule in such a way as to undermine its utility. As discussed above,[164] proportionality review is indispensable to the protection of the constitutional rights of capital defendants and therefore is a rule of constitutional dimension. Because L. 1992, c. 5, eviscerates meaningful proportionality review,[165] the amendment is unconstitutional.[166]

## III.

Although the Supreme Court of the United States held in *Pulley v. Harris* that proportionality review is not required by the United States Constitution in all cases,[167] the Court also made clear that proportionality review would be required in "a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."[168] Thus, even if proportionality review—and therefore meaningful proportionality review—is not required by the New Jersey Constitution,[169] the provision limiting such review may be unconstitutional, or may render New Jersey's Capital Punishment Act unconstitutional, if it leaves the appellate review provisions of

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164 *See* discussion *supra* at Part I.

165 *See* discussion *supra* at Part I.

166 *See Novembrino*, 105 N.J. at 157-58 n.39, 519 A.2d at 856 n.39. In *Novembrino*, the New Jersey Supreme Court held that the exclusionary rule, precluding the admission of evidence obtained illegally by the state, was a rule of constitutional dimension. As the court described, the exclusionary rule "serves as the indispensable mechanism for vindicating the constitutional right to be free from unreasonable searches," and it is therefore an integral part of the state constitution. *Id.* at 157, 519 A.2d at 856. In the same way, because meaningful proportionality review is an indispensable mechanism for vindicating the constitutional right to be free from cruel and unusual punishment—by ensuring that the death penalty is not imposed arbitrarily or disproportionately in one case as compared to other cases—proportionality review is an integral part of the state constitution. As such, the legislature is not free to constrict this review procedure in such a manner as to leave it impotent to serve its constitutionally required goal.

In other words, in *Novembrino*, the court held that the legislature has no authority to abolish or modify the exclusionary rule by enacting a statute that allows illegally obtained evidence to be admitted at a criminal trial because if the legislature annulled the exclusionary rule, it would indirectly abrogate the constitutional right protected by the rule, and the legislature clearly lacks authority to derogate constitutional guarantees. *See id.* at 156-58, 519 A.2d at 855-57; *see also Robinson*, 69 N.J. at 147, 351 A.2d at 720. The same reasoning applies to proportionality review: because such review is an integral part of the constitutional rights of capital defendants, it cannot be abolished—or eviscerated—by statute.

167 465 U.S. 37, 50 (1984).

168 *Id.* at 51.

169 *See generally supra* discussion at Point II.

the Act constitutionally deficient. In this section, we argue that that is precisely the effect of L. 1992, c. 5.

The Supreme Court of the United States has "emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally."[170] Indeed, in *Gregg*, *Proffitt*, and *Jurek*—the first three cases following *Furman* in which the Supreme Court found the death penalty constitutional—the Court upheld the capital sentencing schemes of Georgia, Florida, and Texas, respectively, in large part because those states' statutes required in-depth appellate review of every death sentence. In *Gregg*, the Court held:

> As an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court. That court is required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.[171]

Similarly, the provision of thorough appellate review was a significant factor in the Court's decisions upholding the capital sentencing schemes of Florida and Texas.[172]

Following these three decisions, in *Zant v. Stephens*,[173] the United States Supreme Court reiterated the importance of appellate review to the constitutionality of a death sentencing scheme. The Court observed that the appellate review of every death penalty proceeding "to determine whether the sentence was arbitrary or disproportionate" was one of the two primary features upon which the Court's approval of the Georgia scheme in *Gregg* had rested.[174] In reaffirming the validity of the Georgia statute, the

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[170] Parker v. Dugger, 498 U.S. 308, 321 (1991); *see also* Clemons v. Mississippi, 494 U.S. 738, 749 (1990); Gregg v. Georgia, 428 U.S. 153, 204-06 (1976); Profitt v. Florida, 428 U.S. 242, 253 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976).

[171] *Gregg*, 428 U.S. at 198.

[172] *See Proffitt*, 428 U.S. at 253 (risk of arbitrary or capricious infliction of death penalty "is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted'") (quotation omitted); *Jurek*, 428 U.S. at 276 ("By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law.").

[173] 462 U.S. 862 (1983).

[174] *Id.* at 877.

Court found the appellate review process central to its holding that the statute was constitutional.[175]

More recently, in *Parker v. Dugger*,[176] the Court reversed a death sentence in part because the Florida Supreme Court had failed to conduct the meaningful appellate review required by the Constitution. The Court held that the state court's affirmance of the death sentence "neither based on a review of the individual record in the case nor in reliance on the trial judge's findings based on that record,"[177] rendered the sentence unconstitutionally arbitrary in violation of the Eighth Amendment. A death sentence that is not subject to meaningful appellate review, the Court held, cannot survive constitutional scrutiny. Thus, the Supreme Court of the United States has made clear that for a capital punishment system to be constitutional, "some form of meaningful appellate review is required."[178]

Proportionality review provides such a meaningful form of appellate review. In *Gregg*,[179] the Supreme Court explicitly relied on this feature of the Georgia capital-sentencing system to find the scheme constitutional. "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."[180]

The New Jersey Supreme Court, too, has held that meaningful appellate review is a constitutionally-required component of a death penalty statute.[181] Further, it has recognized that proportionality review "allows the Court to monitor the results of jury discretion," and thereby "permits New Jersey's capital-sentencing scheme to comply with the dictates of *Furman* and with the Eighth

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175 *Id.* at 876-77; *see also Pulley*, 465 U.S. at 58 (Stevens, J., concurring) ("While the Court [in *Zant*] did not focus on the comparative review element of the scheme in reaffirming the constitutionality of the Georgia statute, appellate review of the sentencing decision was *essential* to upholding its constitutionality.") (emphasis added).

176 498 U.S. 308, 321-23 (1991).

177 *Id.* at 321.

178 *Pulley*, 465 U.S. at 45; *see also id.* at 59 (Stevens, J., concurring) ("some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges"); Whitmore v. Arkansas, 495 U.S. 149, 169 (1990) (Marshall, J., dissenting from dismissal of writ of certiorari) (noting the importance of appellate review in Supreme Court's death penalty jurisprudence).

179 428 U.S. at 206.

180 *Id.*

181 *See, e.g.*, State v. Martini, 1996 WL 35461, at *6.

Amendment, which prohibit arbitrary and inconsistent application of the death penalty."[182] Indeed, in *Ramseur*, the Court relied on the proportionality review mechanism, as part of the appellate review procedure under the Capital Punishment Act, to find the Act constitutional under the Eighth Amendment, noting, "[t]his Court not only has mandatory appellate review, but also the authorization to conduct proportionality review upon the defendant's request."[183] Thus, the Supreme Court of New Jersey, following the Supreme Court of the United States, has held that a death sentencing scheme must contain meaningful appellate review and that the proportionality review provided by the New Jersey Capital Punishment Act plays this vital role in the system.[184]

In *Pulley*,[185] the United States Supreme Court held that the absence of proportionality review in the California capital punishment system did not render that scheme unconstitutional. The Court did so, however, only after finding that California's system provided other safeguards against arbitrariness. For example, the Court found that the California death penalty statute required the trial judge to review every jury verdict of death, including performing a complete review of the evidence and making an "independent determination as to whether the weight of the evidence supports the jury's findings and verdicts;"[186] it also required that the court state on the record the reasons for its findings.[187] The Supreme Court further found that under the California system, the trial court's review was followed by mandatory appellate review of the evidence relied upon by the court, thus "assur[ing] thoughtful and effective appellate review, focusing upon the circumstances present in each particular case."[188] These additional procedural safeguards rendered California's capital-punishment system constitutional notwithstanding the absence of proportionality review. The Court acknowledged, however, that "there could be a capital sentencing system so lacking in other checks on arbitrariness that it would not pass constitutional muster without comparative proportionality review."[189]

In contrast to California's extensive appellate review proce-

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182 State v. Martini, 139 N.J. 3, 21, 651 A.2d 949, 957 (1994).
183 106 N.J. 123, 186, 190, 524 A.2d 188, 219, 221 (1987).
184 *Id.*
185 465 U.S. 37 (1984).
186 *Id.* at 52-53 (quoting CAL. PENAL CODE ANN. § 190.4(e) (West Supp. 1983)).
187 *Id.*
188 *Id.* at 53 (quoting People v. Frierson, 599 P.2d 587, 609 (Cal. 1979)).
189 *Id.* at 51.

dures, the New Jersey Capital Punishment Act requires no special appellate safeguards other than proportionality review. The Act is silent with respect to the substance of an appeal other than to require that "[e]very judgment of conviction which results in a sentence of death under this section shall be appealed, pursuant to the Rules of Court, to the Supreme Court."[190] Indeed, New Jersey is the only state among all those conducting proportionality review that does not require more extensive appellate review. New Jersey's statute requires only that "[u]pon the request of the defendant, the Supreme Court shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[191] In contrast, every other state mandating proportionality review requires additional findings to be made in the course of appellate review.[192]

For example, Alabama, Connecticut, Delaware, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Montana, New Hampshire, New Mexico, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee and Washington all require independent fact-finding by the Supreme Court to determine whether the evidence supports the judge or jury's finding of aggravating or other circumstances.[193] Some of these states also require the independent weighing or reweighing of factors.[194]

In addition, virtually every state that mandates proportionality review also requires the appellate court to determine whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.[195] Finally, the majority of

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190 N.J. STAT. ANN. § 2C:11-3e (West 1995).

191 *Id.*

192 In addition, some states that are not required by statute to conduct proportionality review nonetheless perform such review along with other appellate review safeguards. *See, e.g.*, State v. Richmond, 560 P.2d 41, 50-51 (Ariz. 1977); Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

193 *See* ALA. CODE § 13A-5-53(a); CONN. GEN. STAT. ANN. § 53a-46b; DEL. CODE ANN. tit. 11, § 4209(g)(2); GA. CODE ANN. § 17-10-35; KY. REV. STAT. § 532.075(3), (5); LA. CODE CRIM. PROC. ANN. art. 905.9.1 (Supreme Court Rule 28); MISS. CODE ANN. § 99-19-105(3), (5); MO. ANN. STAT. § 565.035; MONT. CODE ANN. § 46-18-310; N.H. REV. STAT. ANN. § 630:5; N.M. STAT. ANN. § 31-20A-4; N.C. GEN. STAT. § 15A-2000(d)(2); OHIO REV. CODE § 2929.05(A); 42 PA. CONS. STAT. ANN. § 9711(h); S.C. CODE ANN. § 16-3-25(C), (E); S.D. CODIFIED LAWS ANN. § 23A-27A-12; TENN. CODE ANN. § 39-13-206(C)(1); WASH. REV. CODE ANN. § 10.95.130(2).

194 *See* ALA. CODE § 13A-5-53(a); DEL. CODE ANN. tit. 11, § 4209(g)(2); OHIO REV. CODE § 2929.05(A); TENN. CODE ANN. § 39-13-206(C)(1).

195 *See* ALA. CODE § 13A-5-53(a); CONN. GEN. STAT. ANN. § 53a-46b; DEL. CODE ANN. tit. 11, § 4209(g)(2); GA. CODE ANN. § 17-10-35; KY. REV. STAT. § 532.075(3), (5); LA. CODE CRIM. PROC. ANN. art. 905.9.1 (Supreme Court Rule 28); MISS. CODE ANN. § 99-19-105(3), (5); MO. ANN. STAT. § 565.035; MONT. CODE ANN. § 46-18-310; N.H. REV.

states also require consideration of whether the death sentence is excessive.[196]

New Jersey's capital sentencing scheme, unlike the states discussed above, contains no appellate review safeguards whatsoever: it does not require independent fact-finding or weighing of factors; it does not require a determination of whether the sentence of death was imposed under the influence of passion, prejudice, or other arbitrary factors; and it does not require consideration of whether the death sentence was excessive. For this reason, proportionality review is essential to the constitutionality of the New Jersey Capital Punishment Act under the Eighth Amendment and *Pulley*.[197] Indeed, other states, considering the role of proportionality review as part of their death penalty systems, have concluded that those schemes could withstand constitutional scrutiny under the federal Constitution without proportionality review only because of the existence of such other appellate review safeguards. The Supreme Court of Louisiana reasoned:

> The Supreme Court of the United States in *Pulley v. Harris*, held that the Eighth Amendment does not necessarily require a capital sentencing system to include a provision for the appellate court to compare the sentence in the case under review with the penalties imposed in similar cases. The principal constitutional consideration is that the overall system contain sufficient checks and safeguards against the arbitrary imposition of capital punishment.
>
> Thus, while some sort of proportionality review is desirable (and is arguably necessary to maintain the constitutionality of some capital sentencing schemes) as part of an automatic appellate review, the exact role of proportionality review varies from state to state in relation to the variations in the overall capital sentencing scheme of the particular state.[198]

The court concluded that "the present Louisiana capital sentenc-

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STAT. ANN. § 630:5 XI; N.M. STAT. ANN. § 31-20A-4; N.C. GEN. STAT. § 15A-2000(d)(2); 42 PA. CONS. STAT. ANN. § 9711(h); S.C. CODE ANN. § 16-3-25(C), (E); S.D. CODIFIED LAWS ANN. § 23A-27A-12; TENN. CODE ANN. § 39-13-206(C) (1); VA. CODE § 17-110.1C; WASH. REV. CODE ANN. § 10.95.130(2).

196 *See* ALA. CODE § 13A-5-53(a); CONN. GEN. STAT. ANN. § 53a-46b; GA. CODE ANN. § 17-10-35; KY. REV. STAT. § 532.075(3), (5); MISS. CODE ANN. § 99-19-105(3), (5); MO. ANN. STAT. § 565.035; MONT. CODE ANN. § 46-18-310; N.H. REV. STAT. ANN. § 630:5 XI; N.M. STAT. ANN. § 31-20A-4; N.C. GEN. STAT. § 15A-2000(d)(2); OHIO REV. CODE § 2929.05(A); 42 PA. CONS. STAT. ANN. § 9711(h); S.C. CODE ANN. § 16-3-25(C), (E); S.D. CODIFIED LAWS ANN. § 23A-27A-12; TENN. CODE ANN. § 39-13-206(C)(1); VA. CODE § 17-110.1C; WASH. REV. CODE ANN. § 10.95.130(2).

197 465 U.S. 37 (1984).

198 State v. Welcome, 458 So. 2d 1235, 1248-49 (La. 1983).

ing system contains so many safeguards and checks on arbitrariness, in comparison to other states, that a comparative proportionality review clearly is not constitutionally required."[199]

Similarly, the Attorney General of Idaho, in an Opinion concerning whether deleting proportionality review from that state's capital punishment act would be constitutional under the Eighth Amendment, relied largely on the existence of other appellate review safeguards as a basis for finding that proportionality review was not constitutionally mandated.[200] Based in part on these additional appellate requirements, the Idaho Attorney General concluded:

> Comparative proportionality as mandated by Idaho Code § 19-2827 is not required by the United States Constitution. Idaho's capital scheme without proportionality would still adequately channel a judge's discretion at sentencing . . . [and] the Idaho Supreme Court would still be mandated to determine whether 1) the sentence was the result of passion, prejudice or any other arbitrary factor; 2) whether the evidence supports the finding of an aggravating factor; and 3) whether the sentence is excessive.[201]

The existence of these additional appellate review requirements, then, provides a means to ensure the evenhanded and consistent imposition of the death penalty and saves Idaho's capital punishment scheme from constitutional infirmity. Because New Jersey has none of these additional appellate safeguards, proportionality review is essential to render the Act constitutional.

More significantly, perhaps, with the passage of L. 1992, c. 5, New Jersey has become the only state to legislate a universe for proportionality review restricted to "a comparison of similar cases in which a sentence of death has been imposed."[202] Indeed, the vast majority of states that conduct proportionality review use a broader universe. Many states include in the universe all death-eligible cases, whether or not they advanced to a penalty-phase hearing. For example, in Pennsylvania, the supreme court "conducts an independent evaluation of all cases of murder of the first degree convictions which were prosecuted or could have been prosecuted. . . ."[203] Similarly, in Georgia, the supreme court "com-

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199 *Id.* at 1252.

200 1993 Idaho Op. Atty. Gen. No. 93-12 (1993).

201 *Id.* at 3 (citing IDAHO CODE § 19-2827).

202 N.J. STAT. ANN. § 2C:11-3e.

203 Commonwealth v. Frey, 475 A.2d 700, 707 (Pa.), *cert. denied*, 469 U.S. 963 (1984). *See also* Commonwealth v. Pursell, 495 A.2d 183, 197-98 (Pa. 1985) (propor-

pare[s] cases as to which the death penalty could have been sought by the prosecutor but was not."[204] In Washington, the pool of similar cases for proportionality review consists of all cases in which a person was convicted of aggravated first degree murder "including the majority of cases which death is either not sought or not imposed."[205] Similarly, in Nebraska the universe is determined on a case by case basis, looking to all homicides in which the death sentence was "authorized."[206]

Several other states conduct proportionality review by comparing cases that have proceeded to the penalty phase, whether the sentence imposed was life or death. For example, Connecticut includes in the class of similar cases, "cases in which the conviction of a capital felony after trial was followed by a hearing to consider the imposition of the death penalty."[207] Similarly, the Virginia Supreme Court, in conducting its proportionality review, compares the sentence with capital murder cases in which the death penalty was imposed "as well as capital cases resulting in life imprisonment."[208] Other states are in accord.[209]

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tionality review conducted by comparison with other first-degree murder cases in which evidence could support an aggravating factor).

[204] Horton v. State, 295 S.E.2d 281, 289 n.9 (Ga. 1982), *cert. denied*, 459 U.S. 1188 (1983). *See also* Castell v. State, 301 S.E.2d 234, 250 and n.12 (Ga. 1983) (employing such a universe).

[205] State v. Pirtle, 904 P.2d 246, 276 (Wash. 1995). *See also* State v. Benn, 845 P.2d 289, 316 (Wash. 1993) (pool includes "those cases in which the death penalty was sought and those in which it was not"); State v. Rupe, 743 P.2d 210 (Wash. 1987), *cert. denied*, 486 U.S. 1061 (1988) (same).

[206] State v. Williams, 287 N.W.2d 18, 28-29 (Neb. 1979), *cert. denied*, 449 U.S. 891 (1980). *See also* State v. Moore, 316 N.W.2d 33, 44 (Neb.), *cert. denied*, 456 U.S. 984 (1982) (proportionality review includes comparison with all other first-degree murder convictions).

[207] State v. Ross, 624 A.2d 886 (Conn. 1993) (citing CONNECTICUT PRACTICE BOOK § 4066A(b) which limits comparison cases to those proceeding to death penalty phase, "unless the court, on application of a party claiming that the resulting pool of eligible cases is inadequate for disproportionality review, shall modify this limitation in a particular case").

[208] Murphy v. Commonwealth, 431 S.E.2d 48, 54 (Va.), *cert. denied*, 114 S. Ct. 336 (1993)

[209] *See, e.g.*, State v. Ortiz, 639 P.2d 1020, 1031-32 (Ariz.), *cert. denied*, 456 U.S. 984 (1982); Whitmore v. State 756 S.W.2d 890, 895 (Ark. 1988); Flamer v. State, 490 A.2d 104, 138-39 (Del.), *cert. denied*, 464 U.S. 865 (1983); State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), *cert. denied*, 416 U.S. 943 (1974); State v. Bates, 495 So. 2d 1262, 1277 (La. 1986), *cert. denied*, 481 U.S. 1042 (1987); State v. Brogdon, 457 So. 2d 616 (La. 1984); State v. Whitfield, 837 S.W.2d 503, 515 (Mo. 1992); State v. McIlvoy, 629 S.W.2d 333, 334-42 (Mo. 1982); State v. Kills on Top, 793 P.2d 1273, 1308 (Mont. 1990), *cert. denied*, 501 U.S. 1259 (1991); State v. Coleman, 605 P.2d 1000 (Mont. 1979); Petrocelli v. State, 692 P.2d 503, 511 (Nev. 1985); State v. Clark, 772 P.2d 322 (N.M.), *cert. denied*, 493 U.S. 923 (1989); State v. Garcia, 664 P.2d 969 (N.M.), *cert. denied*, 462 U.S. 1112 (1983); State v. McCollum, 433 S.E.2d 144, 161-64 (N.C. 1993); State v. McHone, 435

Furthermore, even those states that purport to use a universe limited to only death-sentenced cases will in fact consider additional cases, such as those of co-defendants who were not sentenced to death.[210] Some permit an expansion of the universe upon application of the defendant.[211] New Jersey's L. 1992, c. 5, unlike these states, prohibits the court from considering any cases other than "similar cases in which a sentence of death has been imposed . . .," even at the request of the defendant.[212]

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S.E.2d 296, 307 (N.C. 1993), *cert. denied*, 114 S. Ct. 1577 (1994); State v. Harris, 839 S.W.2d 54, 77 (Tenn. 1992), *cert. denied*, 113 S. Ct. 1368 (1993); Boggs v. Commonwealth, 331 S.E.2d 407 (Va. 1985), *cert. denied*, 475 U.S. 1031 (1986); Whitley v. Commonwealth, 286 S.E.2d 162 (Va.), *cert. denied*, 459 U.S. 882 (1982).

210 *See, e.g.*, Beck v. State, 396 So. 2d 645, 664 (Ala.), *rev'd on other grounds*, 447 U.S. 625 (1980) (court may examine "penalty imposed upon the defendant in relation to that imposed upon his accomplices"); People v. Bean, 560 N.E.2d 258, 289 (Ill. 1990) (although proportionality review is not required, Court compares death sentences to sentences imposed upon co-defendants or accomplices); People v. Jimerson, 535 N.E.2d 889, 906-907 (Ill. 1989), *cert. denied*, 497 U.S. 1031 (1990) (same); Johnson v. State, 477 So. 2d 196 (Miss. 1985), *cert. denied*, 476 U.S. 1109 (1986) (comparing death sentence imposed on a defendant to the life sentences imposed on accomplices).

211 *See, e.g.*, *Ross*, 624 A.2d at 886-87 (allowing, upon application of the defendant, the universe of cases to be expanded beyond penalty trial cases) (citing CONNECTICUT PRACTICE BOOK, § 4066(b) which limits comparison cases to those proceeding to death penalty phase, "unless the court, on application of a party claiming that the resulting pool of eligible cases is inadequate for disproportionality review, shall modify this limitation in a particular case"); Tichnell v. State, 468 A.2d 1, 18 (Md. 1983) (holding that universe consists of cases in which the state sought the death penalty, but writing, but writing "[i]n so concluding, we do not preclude any defendant whose death sentence is under appellate review from presenting argument with relevant facts, that designated non-capital murder cases are similar to the case then under scrutiny and should be taken into account in the exercise of the proportionality review decision"); *Moore*, 316 N.W.2d at 44 (Although the Nebraska Supreme Court has limited the universe of cases for proportionality review, the trial courts, which initially address the issue of proportionality, will consider any first degree homicide cases introduced by either party).

212 By its terms, then, the statute precludes the New Jersey Supreme Court from considering mitigating evidence in the proportionality review context. This prohibition violates the well-established rule of both the United States and New Jersey Supreme Courts that a sentencer may "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Penry v. Lynaugh, 492 U.S. 302, 317 (1989) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)) (emphasis in original); *see also* Franklin v. Lynaugh, 487 U.S. 164, 184 (1988) (O'Connor, J. concurring in judgment); Sussmer v. Shuman, 483 U.S. 66, 75-76 (1987); California v. Brown, 479 U.S. 538, 545 (1987) (O'Connor, J. concurring); Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Indeed, the New Jersey Supreme Court has repeatedly recognized that "a death penalty law may not provide for the exclusion of any mitigating evidence concerning the defendant's character or record or the circumstances of the offense." State v. Ramseur, 106 N.J. 123, 185, 524 A.2d 188, 218 (1987) (citing *Lockett*, 438 U.S. at 604); State v. DiFrisco, 137 N.J. 434, 503, 645 A.2d 734, 770 (1994); State v. Marshall, 123 N.J. 1, 150, 613 A.2d 1059, 1079-80 (1992); State v. Gerald, 113 N.J. 40, 103, 549 A.2d

Indeed, only three states—Ohio, Kentucky, and South Carolina—limit their proportionality review to a comparison with other cases in which the death penalty has been imposed. Unlike New Jersey, however, these jurisdictions require other appellate action to ensure that the death penalty is not imposed arbitrarily. In Ohio, for example, if a jury recommends a death sentence, a single judge or panel of three judges reconsiders and reweighs all the evidence and factors, and death may be imposed only if it is again unanimously found beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors.[213] After these two levels of *de novo* review, both an intermediate appellate court and the Ohio Supreme Court "review and independently weigh all of the facts and other evidence disclosed in the record" to determine whether the aggravating factors outweigh the mitigating factors, evaluate the evidence to determine if it supports the finding of the

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792, 825 (1988); State v. Bey, 112 N.J. 123, 156, 548 A.2d 887, 903 (1988). Relevant mitigating evidence must not be precluded because "[a] sentencing procedure . . . may not expose a defendant to 'the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.'" *Bey*, 112 N.J. at 157, 548 A.2d at 903 (quoting *Lockett*, 438 U.S. at 605). The court has thus recognized that "'the defendant [must] be granted wide leeway in presenting evidence in mitigation of the death penalty.'" *Id.* In sum, to withstand federal and state constitutional scrutiny, a capital punishment system must not preclude consideration of any relevant mitigating evidence.

The New Jersey Capital Punishment Act, as amended by L. 1992, c. 5, cannot withstand such scrutiny because it precludes consideration, during proportionality review, of cases in which the death sentence was not imposed. In the context of proportionality review, cases that are similar to the case before the court in which the death penalty was not imposed clearly amount to mitigating evidence. These cases are necessary to show that "the sentence is disproportionate to the penalty imposed in similar cases." N.J. STAT. ANN. § 2C:11-3(e) (West 1995); *see also Marshall*, 130 N.J. at 131, 613 A.2d at 1070 ("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") (citing *Tichnell*, 468 A.2d at 17 n.18); *Bey*, 137 N.J. 334, 343, 645 A.2d 685, 689 (1994) (same); State v. Martini, 139 N.J. 3, 20, 651 A.2d 949, 957 (1994) (same); *DiFrisco*, 142 N.J. at 160, 662 A.2d at 448 (same). Thus, a comparison with these cases provides "a basis for a sentence less than death." *Lockett*, 438 U.S. at 604.

Because it absolutely precludes introduction of the mitigating evidence, L. 1992, c. 5, unlike the victim impact statute at issue in *Muhammad*, contravenes the principles set forth in *Lockett*, and thus violates the federal and state constitutions. In *Muhammad*, the New Jersey Supreme Court reiterated that "*Lockett* . . . held that a defendant has a right to present any relevant mitigating evidence in support of a sentence less that death." 1996 WL 354668, at *6. The court distinguished the victim impact statute, however, holding that "[t]he victim impact statute does not prohibit the introduction of any mitigating evidence." *Id.* Unlike the victim impact statute, however, L. 1992, c. 5 does prohibit the introduction of mitigating evidence; it bars defendants from presenting and the court from considering any cases in which the death penalty could have been but was not imposed. L. 1992, c. 5 is therefore unconstitutional.

213 OHIO REV. CODE § 2929.03(D)(3).

aggravating circumstances found below, and make a determination as to whether the sentencing court properly weighed the aggravating and mitigating factors.[214] Similarly, in Kentucky and South Carolina, the supreme court must determine "whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor" and "whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance."[215]

The New Jersey Capital Punishment Act does not require any such additional review. Thus, New Jersey now joins a minority of states in restricting the universe of cases for comparison to those in which the death penalty has been imposed. In addition, however, New Jersey further limits review by failing to provide any other appellate safeguards. New Jersey, then, stands alone in providing such limited appellate review of death sentences. The extreme rarity of a system with such limited review in itself suggests the unconstitutionality of the scheme.[216]

More importantly, without additional appellate review procedures, proportionality review provides the only mechanism under the New Jersey capital punishment scheme to safeguard against the arbitrary imposition of the death penalty. By restricting the universe of cases for comparison to those in which the death penalty has been imposed, however, New Jersey cannot provide meaningful proportionality review.[217] The New Jersey Capital Punishment Act, as amended by L. 1992, c. 5, therefore, fails to provide any meaningful appellate review. Because New Jersey's death sentencing scheme does not contain other appellate safeguards to serve as

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214 OHIO REV. CODE § 2929.05(A). *See also* State v. Williams, 660 N.E.2d 724 (Ohio 1996) (court of appeals has authority to reweigh evidence); State v. Simko, 644 N.E.2d 345 (Ohio 1994), *reconsideration denied*, 644 N.E.2d 1389, *cert. denied*, 116 S. Ct. 103 (1995) (supreme court independently weighs aggravating and mitigating factors); State v. Sowell, 530 N.E.2d 1294 (Ohio 1988) (describing appellate review procedures); State v. Thompson, 514 N.E.2d 407, 420-21 (Ohio 1987) (reversing death sentence on ground that prosecutor's prejudicial argument at sentencing may have prevented jury from dispassionately weighing aggravating and mitigating factors).

215 KY. REV. STAT. § 532.075(3); Bussell v. Commonwealth, 882 S.W.2d 111, 116 (Ky. 1994); Sanborne v. Commonwealth, 892 S.W.2d 542, 556 (Ky. 1994); S.C. CODE ANN. 16-3-25(C); State v. Bell, 406 S.E.2d 165, 171 (S.C. 1991), *cert. denied*, 112 S. Ct. 888 (1992).

216 *Cf.* Enmund v. Florida, 458 U.S. 782, 788-96 (1982) (finding unconstitutional Florida's death penalty for felony murder in part because only eight of 36 jurisdictions authorized death for such a crime); Coker v. Georgia, 433 U.S. 584, 593-97 (1977) (striking down Georgia's provision for death penalty for rape of adult woman in part because Georgia was only state with such a provision).

217 *See* discussion *supra* at Part I.

"checks on arbitrariness,"[218] the eradication of meaningful proportionality review by limiting the universe to death-sentenced cases only, renders the Capital Punishment Act invalid under the United States Constitution. Additionally, because the absence of meaningful proportionality review leaves the constitutional functions of such review unfulfilled,[219] the Act is unconstitutional under Article 1, paragraph 12 of the New Jersey Constitution, which, as discussed above, is interpreted more expansively than is the Eighth Amendment to the United States Constitution.[220]

## CONCLUSION

Proportionality review following the affirmance of a sentence of death has been incorporated in the New Jersey Capital Punishment Act in order to ensure that society's most severe sanction is in fact being reserved by prosecutors and jurors for the worst criminals and the most heinous crimes. It has also been delegated the essential role of insuring that the death penalty is not sought or imposed arbitrarily or based upon impermissible factors such as race, gender, mental illness, or geography. A comprehensive methodology to accomplish these goals has been developed.

Those goals, which are of constitutional magnitude in New Jersey, cannot be accomplished and that methodology cannot be used if the Supreme Court of New Jersey considers only those cases in which a death sentence was imposed, as mandated by the 1992 amendment to the Capital Punishment Act, L. 1992, c. 5. In essence, that amendment renders proportionality review a meaningless enterprise, capable of serving neither society's interest in the fair and unbiased application of the death penalty nor a defendant's interest in not being arbitrarily or inappropriately selected for execution.

The 1992 amendment to the Capital Punishment Act is more than merely bad policy. It also violates the New Jersey Constitution which has been interpreted more broadly than its federal counterpart in numerous respects, including the death penalty. Application of L. 1992, c. 5, will topple the state constitutional foundation upon which the validity of the Capital Punishment Act is built. It will weaken the appellate review provisions of the Act to such an extent that it will become the least protective death penalty statute in the nation, and so unable to assure due process that it will run

218 Pulley v. Harris, 465 U.S. 37, 51 (1984).
219 *See* discussion *supra* at Part I.
220 *See* discussion *supra* at Part II.

afoul of both the state and federal constitutions. And it will leave New Jersey's citizens uniquely exposed to capital punishment, even when that sanction ought not be imposed. No less than our society's willingness to tolerate this supreme injustice is on the line: in order to prevent it, we must save the universe of cases necessary to perform meaningful proportionality review.