THE NEBRASKA LAW REVIEW BULLETIN

Creating Meaningful Proportionality Review: Expanding the Universe of Cases for Nebraska's Capital Punishment Scheme

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I. INTRODUCTION

Justice Frankfurter famously said, "[t]he history of liberty has largely been the history of observance of procedural safeguards."[1] Courts often face the difficult task of determining what level of procedural safeguards are required to protect the liberty of individuals. As society progresses and changes its values, these procedural safeguards become even more important to protect individuals against any unfair intrusions by the government into their personal lives. While the government has a valid interest in protecting society as a whole—especially through the criminal legal system—several amendments to the Constitution were created to protect individual liberty.[2]

Historically, courts have had to grapple with the unclear meaning of the Eighth Amendment to discern the protections offered to criminal defendants.[3] While the Supreme Court has historically held that proportionality is an essential element of its Eighth Amendment jurisprudence,[4] many states currently fail to provide adequate procedural safeguards to ensure that courts do not indiscriminately impose the death penalty.[5] Specifically, many states fail to conduct a comparative proportionality review of death penalty cases, and the states that do typically restrict their universe of cases to a degree that makes review meaningless.[6] Currently, Nebraska statutes require the Nebraska Supreme Court to compare a death sentence to other

[1] McNabb v. United States, 318 U.S. 332, 347 (1943).
[2] *See infra* section IV.B.
[3] *See infra* section IV.B.
[4] *See infra* section IV.B.
[5] *See infra* Part III.
[6] *See infra* Part III.

"same or similar circumstances,"[7] but the Nebraska Supreme Court has limited this statutory language to apply only to other death penalty cases.[8]

This Comment aims to analyze the Nebraska Supreme Court's proportionality review and show why Nebraska should expand its universe of cases by redefining "same or similar circumstances" to include all first-degree murder cases. First, this Comment will discuss the federal case law relating to the death penalty and how Nebraska statutes responded. Next, it will consider how various states have reacted to the Supreme Court's decision in *Pulley v. Harris*. Finally, this Comment offers a new perspective on Nebraska's proportionality review for death sentences and shows why Nebraska's universe of cases should be expanded to include both life imprisonment and death sentences. By expanding the universe of cases that the Nebraska Supreme Court considers in their death penalty review, Nebraska will be able to—as Justice White, concurring in *Furman v. Georgia*, believed was necessary—meaningfully distinguish between first-degree murder cases to ensure that the death penalty is not imposed indiscriminately.[9]

II. BACKGROUND

The Eighth Amendment to the United States Constitution provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted."[10] While criminal law is typically regulated at the state level, the United States Supreme Court ("Court") has held that the Constitution has a role in shaping criminal sentences to protect the

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[7] NEB. REV. STAT. § 29-2521.03 (Cum. Supp. 2020)
[8] State v. Palmer, 224 Neb. 282, 327–28, 399 N.W.2d 706, 736 (1986) ("Therefore, no other case but a death sentence case can be said to be a case similar to that under review.").
[9] *See* Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring) ("That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.").
[10] U.S. CONST. amend. VIII.

rights of criminal defendants, specifically through the Eighth and Fourteenth Amendments.[11] Over the last several decades, the Court has regularly had to consider the constitutionality of the death penalty.

Particularly, the Court has repeatedly had to analyze whether the Eighth Amendment requires a proportionality review and whether such review should take an "inherent" or "comparative" approach.[12] The Court has often defined inherent proportionality as challenges in which the Court "adopted categorical bans on sentencing practices based on mismatches between the culpability of a class of offenders and the severity of a penalty."[13] Under inherent proportionality review, the Court would determine that a specific criminal punishment always violates the Eighth Amendment, regardless of the offense or facts of the case.[14] In contrast, when applying comparative proportionality review, the Court often views the type of sentence itself as constitutional but will consider the length or severity of the sentence—in relation to the circumstances of the particular case—in determining the constitutionality of the imposed sentence.[15]

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[11] *See, e.g.*, Robinson v. California, 370 U.S. 660, 666 (1962) (holding that a criminal sentence punishing a disease was an "infliction of cruel and unusual punishment in violation of the Eight and Fourteenth Amendments."); Powell v. Texas, 392 U.S. 514, 532 (1968) (finding that a state statute that criminalized public intoxication did not violate the Eighth Amendment).

[12] *Compare* Pulley v. Harris, 465 U.S. 37 (1984) (holding that comparative proportionality is not constitutionally required); *with* Woodson v. North Carolina, 428 U.S. 280 (1976) (applying inherent proportionality to an Eighth Amendment analysis).

[13] Miller v. Alabama, 567 U.S. 460, 470 (2012); *see* Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)*, 64 ALB. L. REV. 1161, 1166–67 (2001) (referring to inherent proportionality as "retributive" review or "traditional" proportionality review).

[14] *See, e.g.*, Coker v. Georgia, 433 U.S. 584 (1977) (finding that the imposition of the death penalty in a rape case is always disproportionate and inherently violates the Eighth Amendment).

[15] *See, e.g.*, Graham v. Florida, 560 U.S. 48, 59–60 (2010) ("the Court considers all of the circumstances of the case to determine whether the sentence is unconstitutionally excessive."); Steven M. Sprenger, Comment, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719, 727 (1988).

A. Federal Death Penalty Case Law

In a plurality decision, the Court in *Furman v. Georgia* found that the death penalty—as applied in Georgia's statute—"constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[16] However, while *Furman* held *per curium* that Georgia's death penalty statute inherently violated the Eighth Amendment, the justices varied in their reasonings as to why the statute was unconstitutional.[17] Regardless, the idea of protecting against the indiscriminate impositions of the death penalty became an important consideration for the Court when reviewing subsequent death penalty statutes.[18]

Only four years later, the Court would again consider the application of a Georgia death penalty statute. In *Gregg. v. Georgia*, the Court found that the death penalty was not *per se* unconstitutional because arbitrary sentences can be prevented through the use of various procedural safeguards.[19] Besides the use of bifurcated trials, the Court in *Gregg* placed an important emphasis on the use of appellate review to prevent arbitrary sentences.[20] The Court

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[16] Furman v. Georgia, 408 U.S. 238, 239–40 (1972) (per curiam); *contra* Bucklew v. Precythe, 587 U.S. 119, 129 (2019) ("The Constitution allows capital punishment. In fact, death was 'the standard penalty for all serious crimes' at the time of the founding. Nor did the later addition of the Eighth Amendment outlaw the practice." (internal citations omitted)).

[17] *See Furman*, 408 U.S. at 249–51 (Douglas, J., concurring) (finding the death penalty violated the Eighth Amendment because of the unequal imposition of death sentences between defendants of differing races and income levels); *Furman*, 408 U.S. at 291, 305 (Brennan, J., concurring) (finding the death penalty "is uniquely degrading to human dignity"); *Furman*, 408 U.S. at 309 (Stewart, J., concurring) (finding that the death penalty is both cruel as a punishment and unusual in the sense that it is so infrequently imposed); *Furman*, 408 U.S. at 313 (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and…there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not."); *Furman*, 408 U.S. at 360 (Marshall, J., concurring) ("[E]ven if capital punishment is not excessive, it nonetheless violates the Eighth Amendment because it is morally unacceptable to the people of the United States at this time in their history.").

[18] *See* Sprenger, *supra* note 15, at 722 (finding the *Furman* Justices held the death penalty statutes unconstitutional for "fail[ing] to eliminate arbitrariness."); *see also* Gregg v. Georgia, 428 U.S. 153, 189 (1976) (finding that when a sentencing body has discretion to impose the death penalty, "discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

[19] *Gregg*, 428 U.S. at 191–92 ("When a human life is at stake and when the jury must have information prejudicial to the question of guilt but relevant to the question of penalty in order to impose a rational sentence, a bifurcated system is more likely to ensure elimination of the constitutional deficiencies identified in *Furman*.").

[20] *Id.* at 195 ("[T]he further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.").

focused on the use of aggravating and mitigating factors, a bifurcated trial, and appellate review—which created a strong, underlying impression that proportionality review is a key element in the constitutionality of the death penalty.[21] The Court went as far as to say that "proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."[22]

However, the Court directly addressed the question of comparative proportionality in *Pulley v. Harris* and found that the Constitution did not require comparative proportionality for death penalty cases.[23] The Court reasoned that while *Gregg* required procedural safeguards to protect against the "wanton" and "capricious" imposition of the death penalty, *Gregg* itself did not require comparative proportionality review but simply offered it as one of many viable safeguards.[24]

B. Nebraska's Death Penalty Proportionality Scheme

In 1973, following *Furman*, the Nebraska Legislature reinstated the death penalty via Legislative Bill 268.[25] Between 1977 and 2023, Nebraska courts imposed the death penalty forty-four times; eleven inmates are currently on death row, and only four individuals have been

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[21] Sprenger, *supra* note 15, at 723–24; *see also* Cong. Rsch. Serv., *Eighth Amendment Cruel and Unusual Punishment*, CONST. ANNOTATED, https://constitution.congress.gov/browse/amendment-8/#:~:text=Eighth%20Amendment%20Cruel%20and%20Unusual,cruel%20and%20unusual%20punishments%20inflicted (last visited Sept. 7, 2024) (finding that *Gregg* implying a proportionality review was essential to the constitutionality of a death sentence, but that the Court ultimately determined proportionality review was not constitutionally required in *Pulley v. Harris*).

[22] *Gregg*, 428 U.S. at 206 ("If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.").

[23] Pulley v. Harris, 465 U.S. 37, 45 (1984) ("Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement.").

[24] *Id.* at 50 ("Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required.").

[25] L.B. 268, 83d Leg., 1st Sess. (Neb. 1973).

executed since 1976.[26] In 1978, the Nebraska unicameral enacted Legislative Bill 711—creating Neb. Rev. Stat. § 29-2521.03 ("section 29-2521.03")— which stated:

> The Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances. No sentence imposed shall be greater than those imposed in other cases with the same or similar circumstances. The Supreme Court may reduce any sentence which it finds not to be consistent with sections 29-2521.01 to 29-2521.04, 29-2522, and 29-2524.[27]

Section 29-2521.03 was first challenged in 1979 when the Nebraska Supreme Court affirmed a death sentence for a defendant convicted of two counts of murder in the first degree and one count of first-degree sexual assault.[28] In *Williams*, the Nebraska Supreme Court construed "sentence" in section 29-2521.03 as a "sentence of death."[29] The *Williams* Court based their analysis on the "primary foundation…that in this state first[-]degree murder is the only crime for which the penalty of death can be imposed."[30] Because chapter 29, article 25 of the Nebraska Revised Statutes involves sentences imposed under section 28-303, the *Williams* Court reasoned that "sentence" must only refer to a death sentence, especially since the Legislature modeled section 29-2521.03 after a Georgia statute requiring a proportionality review of death *permissible* cases.[31]

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[26] *Nebraska*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/nebraska (last visited Feb. 27, 2025) (noting that one execution was conducted in 1994, 1996, 1997, and 2018); *State Execution Rates (through 2024)*, DEATH PENALTY INFO. CTR., https://deathpenaltyinfo.org/stories/state-execution-rates (last visited Feb. 27, 2025) (noting the total number of executions in Nebraska from 1976 to 2023).

[27] NEB. REV. STAT. § 29-2521.03 (Reissue 1979) (enacted by L.B. 711, § 3, 85th Leg., 2d Sess. (Neb. 1978)).

[28] State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979).

[29] *Id.* at 74–75, 287 N.W.2d at 28.

[30] *Id.* at 75, 287 N.W.2d at 28.

[31] *Id.* at 75, 287 N.W.2d at 28–29 ("The Nebraska act, [§ 29-2521.03], was patterned after the Georgia act which requires the Georgia Supreme Court to review death sentences… The Georgia Supreme Court has restricted its review and comparison of 'similar' cases to cases involving crimes for which the death penalty is *permissible*." (emphasis added)); *see also* NEB. REV. STAT. § 28-303 (Reissue 1979) (enacted by L.B. 38, § 18, 85th Leg., 1st Sess. (Neb. 1977)) (defining murder in the first degree).

The *Williams* Court also concluded that section 29-2521.03 directs the Nebraska Supreme Court to consider the sentence of "*all* criminal homicides."[32] The *Williams* Court reasoned that "[t]o interpret that language of [§ 29-2521.03] literally would create insurmountable constitutional problems" because to extend beyond first-degree murder convictions would require speculation into prosecutorial discretion.[33] The *Williams* Court ultimately determined that each death sentence would be reviewed on a case-by-case basis and compared to other same or similar first-degree murder cases.[34] So, while *Williams* held that the Nebraska Supreme Court only had to review the proportionality of death sentences under section 29-2521.03, any first-degree murder case could be considered in its review.[35]

The Nebraska Supreme Court again reviewed Nebraska's death penalty proportionality scheme three years later in *State v. Moore*.[36] In *Moore*, the Nebraska Supreme Court affirmed *Williams,* holding that section 29-2521.03 applied only to other first-degree murder convictions.[37] The *Moore* Court again based its holding on the premise that considering *all* criminal homicides in a proportionality review would violate separation of powers principles. [38] The Court in *Moore* began their analysis by restating that the Nebraska constitution divides executive, legislative, and judicial power into different and distinct departments.[39] If section 29-

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[32] *Williams*, 205 Neb. at 75, 287 N.W.2d at 29 (emphasis added); *see also* § 29-2521.03 ("The Supreme Court shall…determine the propriety of the sentence in each case involving a *criminal homicide*…" (emphasis added)).
[33] *Williams*, 205 Neb. at 75–76, 287 N.W.2d at 29.
[34] *Id.* at 76, 287 N.W.2d at 29 ("Where a death sentence has been imposed, and this court is required to determine the propriety of that sentence in such case, the determination of which previous first-degree murder cases involve the same or similar circumstances and are therefore comparable will be made by this court on a case-by-case basis.").
[35] *Id.* at 77, 287 N.W.2d at 29–30 ("We find no case in which a life sentence was given which involves the same or similar circumstances to that of the case at bar.").
[36] State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).
[37] *Id.* at 476, 316 N.W.2d at 44.
[38] *Id.* at 473, 316 N.W.2d at 42 ("We now find it necessary to delineate the reasons why a literal application of [§ 29-2521.03] would unconstitutionally encroach upon the judicial function.").
[39] *Id.* at 473–74, 316 N.W.2d at 42–43.

2521.03 were to be read literally in requiring all criminal homicides to be considered, then the *Moore* Court reasoned a trial court would have to second-guess prosecutorial discretion and determine why a jury did not convict on first-degree murder when comparing a death sentence to other "similar" cases.[40]

The Nebraska Supreme Court in both *Williams* and *Moore* held that section 29-2521.03 only violated separation of powers provisions when courts considered non-death eligible cases.[41] However, two years after the United States Supreme Court determined *Pulley v. Harris*, the Nebraska Supreme Court in *State v. Palmer* further narrowed section 29-2521.03 to include only other cases where the death penalty was imposed.[42] In *Palmer*, the Nebraska Supreme Court reasoned that including all cases in which the death penalty *could* be imposed in a proportionality review would, in essence, result in repealing the death penalty.[43] If proportionality review considered all non-capital cases, then a court would be less likely to impose the death penalty because there is likely a similar case where a defendant's sentence was life imprisonment.[44] The *Palmer* Court reasoned that an interpretation of section 29-2521.03 that

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[40] *Id.* at 475–76, 316 N.W.2d at 43 ("If a person is charged with murder in the first degree but convicted of a lesser degree of homicide, and if [§ 29-2521.03] is to be applied literally, we would then, for purposes of reviewing the case before us, disregard the factfindings of the jury in the so-called 'analogous' case. Such a procedure would be constitutionally objectionable for a number of reasons. First, it would require this court to find facts in a case not before it. Secondly, it would constitute an attempt by the Legislature to make the factfindings of one case determinative of the sentence in another case on review. It is plain that under the principles we have earlier cited, that legislation which attempts to achieve such results is an intrusion on the judicial function, contrary to the separation of powers doctrine, and thus violates article II, s 1.").

[41] *See id.* at 476, 316 N.W.2d at 44 (finding review under § 29-2521.01 should be limited to only first-degree murder convictions); *see also* State v. Williams, 205 Neb. 56, 76, 287 N.W.2d 18, 29 (1979) (finding that only first-degree murder cases should be considered in a court's death penalty proportionality review).

[42] State v. Palmer, 224 Neb. 282, 328, 399 N.W.2d 706, 736 (1986).

[43] *Id.* at 327, 399 N.W.2d at 735–36.

[44] *Id.*; *see also* Donald H. Wallace & Jonathan R. Sorensen, *Comparative Proportionality Review: A Nationwide Examination of Reversed Death Sentences*, 22 AM. J. CRIM. JUST. 13, 19 (1997) (finding courts are less likely to deem a death sentence proportional when they review life imprisonment cases).

essentially repealed the death penalty was likely not what the Legislature intended, especially since the death penalty was reinstated only a few years earlier.[45]

The *Palmer* Court further reasoned that including life imprisonment cases in the proportionality review would prevent a court from adequately determining if any statutory aggravating or mitigating circumstances exist in the underlying case.[46] Because no aggravating circumstances exist in a life imprisonment case, they are not a "same or similar" case for purposes of proportionality review.[47] Additionally, the *Palmer* Court noted that in *Pully*, the Court found that the Constitution did not require comparative proportionality because the existence or non-existence of statutory aggravating factors and meaningful appellate review were enough to ensure proportionality.[48] Because of this, the *Palmer* Court held that section 29-2521.03's proportionality review should "include only those cases in which the death penalty was imposed."[49] Even though *Williams* and *Moore* ultimately concluded that a proportionality review could adequately be completed when considering all first-degree murder convictions, the Nebraska Supreme Court has been unwilling to overturn *State v. Palmer* and expand the scope of "same or similar" cases.[50]

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[45] *Palmer*, 224 Neb. at 327, 399 N.W.2d at 735–36.
[46] *Id.* at 327–28, 399 N.W.2d at 736.
[47] *Id.*
[48] *Id.* at 328, 399 N.W.2d at 736.
[49] *Id.*
[50] *E.g.*, State v. Garcia, 315 Neb. 74, 199, 994 N.W.2d 610, 704 (2023) ("This court held in *State v. Palmer* that it was appropriate to consider only those cases where the death penalty had been imposed…and that only such cases are 'similar'…we decline to reconsider it today."); State v. Schroeder, 305 Neb. 527, 558–59, 941 N.W.2d 445, 470 (2020) ("Proportionality review is not constitutionally mandated. It exists in Nebraska by virtue of §§ 29-2521.01 to 29-2521.04…In any case, we decline Schroeder's invitation to overrule our decision in *State v. Palmer*…"); State v. Gales, 269 Neb. 443, 496, 694 N.W.2d 124, 169 (2005) ("But there is no question that our holding in *State v. Palmer*, *supra*, is the law."). However, while the Nebraska Supreme Court has been unwilling to overturn *State v. Palmer*, the Federal District Court of Nebraska in *Palmer v. Clarke* did hold that *State v. Palmer* violated the due process clause by not comparing the sentence to all criminal homicides like the plain language of section 29-2521.03 requires. Palmer v. Clarke, 293 F. Supp. 2d 1011, 1041–42 (D. Neb. 2003), *overruled in* Palmer v. Clark, 408 F.3d 423 (8th Cir. 2005). Nevertheless, the Eighth Circuit held that the Federal constitution does not require a federal court to examine a state's proportionality scheme, and the Nebraska Supreme Court directly denied the Federal

III. STATE REACTIONS TO PULLEY SEVERELY LIMIT A COURT'S ABILITY TO CONDUCT MEANINGFUL PROPORTIONALITY REVIEW

The Court's holding in *Gregg* highlighted the important role of state legislators in ensuring proper procedural safeguards for state capital punishment schemes. Almost immediately following *Gregg*, over thirty states enacted some form of statutory comparative proportionality review for capital sentences.[51] Following *Pulley*, a dramatic downturn can be observed in state statutes, with many states abandoning their proportionality requirements entirely.[52] Currently, Alabama,[53] Georgia,[54] Kentucky,[55] Louisiana,[56] Mississippi,[57] Missouri,[58] Montana,[59] Nebraska,[60] North Carolina,[61] Ohio,[62] South Carolina,[63] South Dakota,[64] and Tennessee[65] all

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District Court's interpretation of section 29-2521.03 in *Gales*. Palmer v. Clarke, 408 F.3d 423, 438 (8th Cir. 2005); *Gales*, 269 Neb. at 496, 694 N.W.2d at 169.

[51] Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance Of Justice"?*, 87 J. CRIM. L. & CRIMINOLOGY 130, 140 (1996); *see also* Pulley v. Harris, 465 U.S. 37, 71 (1984) (Brennan, J., dissenting) ("Indeed, despite the Court's insistence that such review is not compelled by the Federal Constitution, over thirty States now require, either by statute or judicial decision, some form of comparative proportionality review before any death sentence may be carried out." (internal citation omitted)).

[52] *See* Bienen, *supra* note 51, at 140 (finding that the number of States requiring comparative proportionality review in capital cases dropped from over 30 States pre-*Pulley* down to 22 in 1996); Penny J. White, *Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris*, 70 U. COLO. L. REV. 813, 847–48 (1999) (finding that 6 states repealed proportionality review from their statutes following *Pulley* and several others stopped judicially requiring comparative proportionality review in capital cases).

[53] ALA. CODE § 13A-5-53(b)(3) (1981).

[54] GA. CODE ANN. § 17-10-35(c)(3) (West 1973); Gissendaner v. State, 532 S.E.2d 677, 690 (Ga. 2000) (finding that Georgia statutes require proportionality review to consider "whether the death penalty 'is excessive per se' or if the death penalty is 'only rarely imposed…or substantially out of line' for the type of crime involved and not whether there *ever* have been sentences less than death imposed for similar crimes." (omission in original)), *aff'd* in Brookins v. State, 879 S.E.2d 466, 491 (Ga. 2022) (applying *Gissendaner* to the underlying proportionality review); Cape v. Francis, 741 F.2d 1287, 1302 (11th Cir. 1984) (finding the Georgia Supreme Court did not need to consider life sentences in proportionality review).

[55] KY. REV. STAT. ANN. § 532.075(3)(c) (West 1976).

[56] LA. CODE CRIM. PROC. ANN. Art 905.9.1(c) (1976).

[57] MISS. CODE ANN. § 99-19-105(3)(c) (West 1977).

[58] MO. ANN. STAT. § 565.035(3)(3) (West 1983).

[59] MONT. CODE ANN. § 46-18-310(1)(c) (West 1977).

[60] NEB. REV. STAT. § 29-2521.03 (Cum. Supp. 2020).

[61] N.C. GEN. STAT. ANN. § 15A-2000(d)(2) (West 1977).

[62] OHIO REV. CODE ANN. § 2929.05(A) (West 1998).

[63] S.C. CODE ANN. § 16-3-25(C)(3) (1977).

[64] S.D. CODIFIED LAWS § 23A-27A-12(3) (West 1979).

[65] TENN. CODE ANN. § 39-13-206(c)(1)(D) (West 1989).

statutorily require proportionality review for capital cases. However, Arizona,[66] Arkansas,[67] California,[68] Florida,[69] Idaho,[70] Indiana,[71] Kansas,[72] Nevada,[73] Oklahoma,[74] Oregon,[75]

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[66] *See* Ariz. REV. STAT. ANN. § 13-755 (1994); ARIZ. REV. STAT. ANN. § 13-756 (2002); State v. Salazar, 844 P.2d 566, 584 (Ariz. 1992) ("We are persuaded by Justice Corcoran's arguments in support of discontinuing proportionality reviews and we, therefore, adopt them.").

[67] *See* ARK. CODE ANN. §10(b) (West 1996); Williams v. State, 902 S.W.2d 767, 772 (Ark. 1995) (finding that a comparative proportionality review is not required); Williams v. State, No. CR93-988, 2011 WL 6275536, at *2 (Ark. 2011), *overruled on other grounds by* Nooner v. State, 438 S.W.3d 233 (2014) (holding that while proportionality review is not required, the Court can conducted a proportionality review and found no error in the present case).

[68] *See* CAL. PENAL CODE § 190.1 (West 1978); CAL. PENAL CODE § 1239 (West 1982); People v. Gamache, 227 P.3d 342, 393–94 (Cal. 2010) (holding that comparative proportionality is not required under the California Constitution).

[69] *See* FLA. STAT. ANN. § 921.141 (West 2023); Lawrence v. State, 308 So.3d 544, 552 (Fla. 2020) ("Accordingly, we recede from *Yacob's* requirement to review death sentences for comparative proportionality and thus eliminate comparative proportionality review from the scope of our appellate review set forth in rule 9.142(a)(5).").

[70] *See* IDAHO CODE ANN. § 19-2827 (West 1977) (amended in 1994 to remove "disproportionate" language); State v. Fields, 908 P.2d 1211, 1225 (Idaho 1995) ("In 1994, the Idaho Legislature amended the statute governing the standards to be applied by this Court when reviewing cases in which the death penalty is imposed…The legislature's amendment eliminated the requirement that this Court conduct a proportionality review…Prior to this amendment, excessiveness was determined under that section by determining whether the penalty in the case before this Court was 'disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.' The elimination of this language has rendered the term 'excessive' as used in I.C. § 19-2827(c)(3) meaningless." (citations omitted)).

[71] *See* IND. CODE ANN. § 35-50-2-9 (West 1977); Timberlake v. State, 690 N.E.2d 243, 266 (Ind. 1997) ("As this Court has held many times in the past, however, neither the Indiana nor the United States Constitution requires a comparative-proportionality review."); Wrinkles v. State, 690 N.E.2d 1156, 1173 (Ind. 1997) (finding that even when compared to other cases, the underlying death sentence was proportionate to other death penalty cases."); *INDIANA DEATH PENALTY CASES, INDEXED BY ISSUE*, INDIANA PUBLIC DEFENDER COUNCIL, 17 (last updated Nov. 30, 2016), https://secure.in.gov/ipdc/files/indiana-capital-case-outline.pdf (finding a court "may go on to cite other similar cases, but is not constitutionally required to conduct comparative proportionality review, comparing the case to other capital cases.").

[72] *See* KAN. STAT. ANN. § 21-6619 (West 2010).

[73] *See* NEV. REV. STAT. ANN. § 177.055(2)(e) (West 1967) (amended in 1985 to remove "disproportionate" language); McConnell v. State, 212 P.3d 307, 315 (Nev. 2009) ("In *Dennis*, this court explained that, although we no longer conduct proportionality review of death sentences, our consideration of the death sentences of 'similarly situated defendants may serve as a frame of reference for determining the crucial issue in the excessiveness analysis' under NRS 177.055(2).").

[74] *See* OKLA. STAT. ANN. tit. 21, § 701.13(C) (West 1976) (amended in 1985 to remove "disproportionate" language); Smith v. State, 306 P.3d 557, 577 (Okla. 2013) (acknowledging that Oklahoma courts are not statutorily or constitutionally required to conduct a proportionality review).

[75] *See* OR. REV. STAT. ANN. § 163.150 (West 1985); State v. Cunningham, 880 P.2d 431, 443 (Or. 1994) ("Defendant was not entitled to proportionality review of death sentences.").

Pennsylvania,[76] Texas,[77] Utah,[78] and Wyoming[79] have all abandoned their statutory or judicial requirement of proportionality review for capital sentences.

Of the thirteen states requiring proportionality review, the states often differ in their approach to determining the universe of cases to which a court will compare the underlying sentence. States have traditionally taken three main approaches to defining the pool of "similar" cases: a pool including only cases where a court imposed a death sentence, either a life imprisonment or death sentence at an aggravating hearing, or any sentence for any first-degree murder conviction.[80]

A. States that Include Only Death Sentences in their Universe of Cases

While this approach is the most popular within states that conduct a comparative proportionality review, it also creates the most restrictive universe of cases.[81] Despite this

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[76] *See* 42 PA. STAT. AND CONS. STAT. § 9711(h)(3) (West 1974) (amended in 1997 to remove "disproportionate" language.); Commonwealth v. Knight, 156 A.3d 239, 249 (Pa. 2016) (acknowledging that Pennsylvania courts are not statutorily or constitutionally required to conduct a proportionality review).

[77] *See* TEX. CODE CRIM. PROC. ANN. art. 37.071 (West 1973); Cantu v. State, 939 S.W.2d 627, 648 (Tex. Crim. App. 1997) (finding that a proportionality review is not required under the Eighth or Fourteenth Amendments to the United States Constitution); *see also The Texas Capital Punishment Assessment Report: An Analysis of Texas's Death Penalty Laws, Procedures, and Practices*, AM. BAR ASS'N, xii (Sept. 2013), https://www.capitalclemency.org/file/Texas-Assessment.pdf (completing a comprehensive study of Texas's death penalty scheme and finding that comparative proportionality review is not conducted, but finding that the Texas Court of Criminal Appeals should adopt a proportionality test that includes a pool of all death-eligible cases).

[78] *See* UTAH CODE ANN. § 76-3-206 (West 1973); State v. Maestas, 299 P.3d 892, 987 (Utah 2012) (finding that comparative proportionality was not constitutionally required in Utah, but a court could engage in a proportionality review if the court finds it appropriate); State v. Lafferty, 20 P.3d 342, 376 (Utah 2001) ("We have declined to engage in comparative proportionality review in the past, and we will not here conduct a case-by-case comparison of defendant's sentence with other similar cases…to determine whether the death penalty was properly imposed.").

[79] *See* WYO. STAT. ANN. § 6-2-103 (West 1982) (amended in 1989 to remove "disproportionate" language); Olsen v. State, 67 P.3d 536, 610 (Wyo. 2003) (finding that Wyoming courts do not constitutionally need to conduct a comparative proportionality review, however, the courts must ensure a capital sentence is not arbitrary or unjust).

[80] Timothy V. Kaufman-Osborn, *Capital Punishment, Proportionality Review, and Claims of Fairness (with Lessons from Washington State)*, 79 WASH. L. REV. 775, 795–97 (2004); *see also* Latzer, *supra* note 13, at 1203 (referring to the issue of determining similar cases as "The 'Universe' Problem").

[81] Kaufman-Osborn, *supra* note 80, at 795.

approach's critiques, Alabama,[82] Kentucky,[83] Mississippi,[84] Missouri,[85] Nebraska,[86] and Ohio[87] all limit their proportionality review to only other death sentences. In doing so, these states preclude courts from even considering other first-degree murder cases that resulted in a life imprisonment sentence when determining if the underlying sentence is proportional to other "similar" cases.[88]

Courts often point to several policy reasons why limiting the universe of cases to only other death sentences makes greater sense. First, some courts believe that expanding the universe

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[82] Beck v. State, 396 So. 2d 645, 664 (Ala. 1980) ("The procedure we adopt requires that the reviewing court examine cases in which the death penalty is imposed and ascertain that the death penalty is imposed with some uniformity and that its imposition is not substantially out of line with sentences imposed for other acts. In other words, the reviewing court should not affirm a death sentence unless the death penalty is being imposed generally in similar cases throughout the state.").

[83] Hodge v. Commonwealth, 17 S.W.3d 824, 855 (Ky. 2000) ("Pursuant to KRS 532.075(3), we have reviewed this record and concluded that the sentence of death was not imposed under the influence of passion, prejudice, or any other arbitrary factor…We have also reviewed all cases decided since 1970 in which the death penalty was imposed."); Meece v. Commonwealth, 348 S.W.3d 627, 726 (Ky. 2011) (compared the underlying death penalty to those similar cases listed in *Hodge*, 17 S.W.3d 824 (Ky. 2000)).

[84] Clark v. State, 343 So. 3d 943, 1002 (Miss. 2022) ("Further, this Court has repeatedly found that death sentences are not disproportionate to capital murders with underlying armed robberies."); Loden v. State, 971 So. 2d 548, 571 (Miss. 2007) ("From the evidence presented, this Court finds that death penalty…was not disproportionate or excessive when compared to the sentences in other capital murder cases affirmed by this Court.").

[85] State v. Wood, 580 S.W.3d 566, 590–91 (Mo. 2019) (compared the underlying case to other cases that imposed the death sentence for a similar crime.); State v. Deck, 303 S.W.3d 527, 551 (Mo. 2010) ("Deck also claims this Court's proportionality review is fatally flawed because it considers only cases in which death was imposed instead of all factually similar cases. This argument has been repeatedly rejected by this Court.").

[86] State v. Palmer, 224 Neb. 282, 327–28, 399 N.W.2d 706, 736 (1986) ("Accordingly, there is no way of this court's knowing whether any aggravating or mitigating circumstances were present in a given case unless the sentence was death. Therefore, no other case but a death sentence case can be said to be a case similar to that under review.").

[87] State v. Whitaker, 207 N.E.3d 677, 716 (Ohio 2022) (the court held that "[t]he proportionality review required by R.C. 2929.05(A) is satisfied by a review of those cases already decided by the reviewing court in which the death penalty has been imposed." (quoting State v. Steffen, 509 N.E.2d 383, 386 (Ohio 1987)); State v. Davis, 584 N.E.2d 1192, 1197 (Ohio 1992) ("[T]he proportionality review mandated by R.C. 2929.05(A) does not require a review of those cases in which a sentence of life imprisonment is imposed."); State v. Holmes, 506 N.E.2d 276, 279 (Ohio 1986) (finding comparative proportionality review is not constitutionally required and the proportionality review required under RC 2929.05 does not apply to sentences of life imprisonment).

[88] *E.g.*, *Palmer*, 224 Neb. at 327–28, 399 N.W.2d at 736 ("[N]o other case but a death sentence case can be said to be a case similar to that under review."); *Davis*, 584 N.E.2d at 1197 ("[T]he proportionality review mandated by R.C. 2929.05(A) does not require a review of those cases in which a sentence of life imprisonment is imposed.").

beyond death penalty cases would cause "intolerable speculation and conjecture" because it would require courts to determine if an aggravating factor would have been present.[89] Second, there are concerns that expanding the universe of cases beyond death penalty cases could violate separation of powers provisions in state constitutions because it would require courts to examine the issue of prosecutorial discretion.[90] Third, expanding the universe of cases would create a pool of cases too large for states to manage effectively.[91]

However, when considering these concerns, it is evident that they do not hold up to any discernable level of scrutiny.[92] First, under the state's statute, even a first-degree murder case that results in a life imprisonment sentence is similar to a capital offense.[93] Under most state statutes, first-degree capital and non-capital murder are often defined within the same statute and are only differentiated by the existence of an aggravating factor for the purposes of sentencing.[94] Therefore, the reviewing court would not need to speculate or conjecture which cases are similar, because all first-degree murder cases are innately similar if prosecuted under the same statute.[95] Additionally, it is ordinarily within the province of most appellate courts to ensure the existence of aggravating factors upon an appeal.[96] By reviewing the record or sentencing order of the judge in life imprisonment cases, an appellate court can properly determine if a case sentenced to life

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[89] Sprenger, *supra* note 15, at 731; Latzer, *supra* note 13, at 1204.
[90] *Id.*
[91] *Id.*
[92] Sprenger, *supra* note 15, at 731.
[93] *Id*.
[94] *See, e.g.*, NEB. REV. STAT. § 28-303 (Cum. Supp. 2020); *see also* NEB. REV. STAT. § 29-2519(2)(d) (Cum. Supp. 2020) (declaring that the statutory aggravating factors do not constitute an additional element to the crime of first-degree murder but are rather a factor for sentencing considerations).
[95] *See, e.g.*, State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979) (showing that a reviewing court can consider all first-degree murder convictions for a proportionality review); State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982) (finding that an unappealed, non-capital murder case was not a binding precedent for subsequent convictions but could be considered when determining proportionality).
[96] *See, e.g.*, NEB. REV. STAT. § 29-2522 (Cum. Supp. 2020) (mandating the appellate court to ensure the existence of any found aggravating factors).

imprisonment is similar to the death sentence under review because they already conduct a similar review for aggravating circumstances in capital cases.[97]

A reviewing court would not need to speculate or conjecture whether an aggravating factor could be found in a life imprisonment case. While it is important for a court to consider the underlying death sentence to other death penalty cases with an aggravating factor, it is just as important to consider those cases sentenced to life imprisonment where there is no aggravating factor. A court cannot adequately determine if a factual circumstance is an aggravating factor unless they also consider first-degree murder cases where a defendant was sentenced to life imprisonment. It is only when the court reviews all first-degree murder cases that they can meaningfully distinguish between factual circumstances to determine if an aggravating factor worthy of imposing the death penalty exists.

Second, courts would not violate separation of powers provisions because the appellate courts could simply look at the *resulting* sentences imposed in other first-degree murder cases.[98] A court would not need to consider whether a prosecutor used their discretion to either plead or charge a case lower than first-degree murder; rather, the appellate court can simply look at the sentences imposed in other cases that were convicted of first-degree murder.[99]

Third, expanding the universe of cases would not create an unmanageable caseload because many states that utilize the death penalty impose the sentence infrequently.[100] However,

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[97] Sprenger, *supra* note 15, at 731.
[98] Sprenger, *supra* note 15, at 732.
[99] *See* Williams, 205 Neb. at 75–76, 287 N.W.2d at 29 (interpreting the Nebraska statute requiring proportionality review of all criminal homicides, but not beyond that as to avoid constitutional issues of prosecutorial discretion); *Moore*, 210 Neb. at 475–76, 316 N.W.2d at 43 (discussing separation of powers concerns when a court considers not-death eligible cases in a proportionality review).
[100] Sprenger, *supra* note 15, at 732; *State Execution Rates*, *supra* note 26.

even if courts would need to consider several cases, judicial efficiency should not outweigh the rights of the accused when their life is being considered.[101]

B. States that Include Life and Death Sentences Imposed at Aggravation Hearings in their Universe of Cases

While this approach is slightly less restrictive, states that limit their proportionality review to cases sentenced to either life imprisonment or death—upon an aggravation hearing—still leave several first-degree murder cases out of their universe simply because the death penalty was not actively pursued by the prosecutor for an aggravation hearing to occur.[102] Montana,[103] South Dakota,[104] and Tennessee[105] have adopted this approach. Under this approach,

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[101] *See* Loana Nardoni, *Florida's Removal of Safeguards for Defendants on Death-Row: Comparative Proportionality Review*, 49 FLA. ST. U. L. REV. 357, 376 (2022) ("While requiring comparative proportionality review would necessitate additional funding, administrative convenience does not justify an increased risk of error where a person's life is at stake.").

[102] Kaufman-Osborn, *supra* note 80, at 795–96; *see also* Sprenger, *supra* note 15, at 735 ("Although preferable to a universe of potentially similar cases restricted to death sentence cases, the penalty-trial approach is also flawed because it grossly underrepresents similar cases that resulted in life sentences.").

[103] State v. Smith, 931 P.2d 1272, 1285 (Mont. 1996) ("On appellate review of a death penalty case, our evaluation of the proportionality of the death sentence imposed must take into account the discretionary stages in all criminal cases, as described above. A further rationale for limiting proportionality review of other cases to cases in which the death penalty was proposed is that only when the death penalty is sought will a record exist concerning aggravating and mitigating circumstances."); State v. Johnson, 969 P.2d 925, 937 (Mont. 1998) ("Our reasoning in *Smith* remains sound; only when the death penalty is sought will a record exist concerning aggravating and mitigating circumstances.").

[104] State v. Piper, 842 N.W.2d 338, 347 (S.D. 2014) (finding that "similar cases for purposes of SDCL 23A-27A-12(3) are those cases in which a capital sentencing proceeding was actually conducted, whether the sentence imposed was life or death. Because the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar…are those in which imposition of the death penalty was properly before the sentencing authority for determination." (quoting State v. Robert, 820 N.W.2d 136, 145 (S.D. 2012))).

[105] State v. Miller, 638 S.W.3d 136, 166 (Tenn. 2021) ("Our review employs the precedent-seeking method of comparative proportionality review, in which we compare this case with other cases involving similar crimes and similar defendants in order to 'identify and invalidate the aberrant death sentence.' The relevant pool of cases consists of 'those first-degree murder cases in which the State sought the death penalty, a capital sentencing hearing was held, and the jury determined whether the sentence should be life imprisonment, life imprisonment without possibility of parole, or death.'" (internal citations omitted)); State v. Bland, 958 S.W.2d 651, 666 (Tenn. 1997) ("For purposes of comparative proportionality review, we eliminate from the 'universe' and include in the more narrow 'pool' for comparison only those cases in which a capital sentencing hearing was actually conducted to determine whether the sentence should be life imprisonment, life imprisonment without the possibility of parole, or death by electrocution, regardless of the sentence actually imposed.").

these states restrict their review to cases where the defendant was convicted of first-degree murder and has advanced to an aggravation hearing.[106]

However, while this approach does expand the universe of cases slightly, it is still plagued with the same deficiencies as the universe of cases considering only other death sentences.[107] Particularly,

> [T]his method suffers from an obvious deficiency. To examine only those cases that culminated in death sentences, or those in which this sentence was considered by a jury during the penalty phase, is to deprive an appellate court of any means of calculating the relative frequency with which this penalty is imposed in the larger class of first-degree murders. Doing so defeats the very purpose of comparative proportionality review because an appellate court is thereby deprived of any basis for determining how many persons convicted of first-degree murder were spared the death penalty.[108]

Without fully representing other life imprisonment cases, a court has no way to adequately determine if the underlying death sentence is truly proportional to other capital convictions. Without considering all first-degree murder cases, a court cannot adequately perform a comparative proportionality review because they have no means to "meaningfully distinguish the few cases in which death sentences are imposed from the many that result in sentences of life imprisonment[.]"[109]

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[106] Sprenger, *supra* note 15, at 734–35 ("A penalty trial is to be distinguished from a guilt or liability trial. In a penalty trial, a court or jury assumes criminal responsibility exists. The central issue is whether aggravating circumstances are present and, if so, whether they outweigh any mitigating circumstances and therefore justify the imposition of a death penalty.").

[107] *Id.* at 735.

[108] Kaufman-Osborn, *supra* note 80, at 796.

[109] *Id.*; *see also* Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring) (finding the death penalty is imposed too infrequently to create any meaningful distinction between the cases it is imposed in, and those cases which it is not).

C. States that Include Life and Death Sentences in their Universe of Cases

The third and most expansive approach that states take in defining their universe of cases is to consider all first-degree murder convictions that resulted either in life imprisonment or a death sentence.[110] While this approach adopts the truest version of proportionality review,[111] only Louisiana,[112] North Carolina,[113] and South Carolina[114] have adopted this approach. Nevertheless,

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[110] Kaufman-Osborn, *supra* note 80, at 797 (providing a "more inclusive indication of the diverse ways that the law disposes of first-degree murders."); Sprenger, *supra* note 15, at 737.

[111] *See* Sprenger, *supra* note 15, at 739 (advocating for an approach that considers all first-degree murder convictions to fairly perform a proportionality review).

[112] State v. Brown, 347 So. 3d 745, 845–47 (La. 2022) (comparing other cases where the defendants were sentenced to death or life imprisonment).

[113] State v. Green, 443 S.E.2d 14, 198 (N.C. 1994) ("If, after making such comparison, we find that juries have consistently returned death sentences in factually similar cases, we will have a strong basis for concluding that the death sentence under review is not excessive or disproportionate. If juries have consistently returned life sentences in factually similar cases, however, we will have a strong basis for concluding that the death sentence in the case under review is disproportionate." (quoting State v. McCollum, 433 S.E.2d 144, 163 (N.C. 1993)). However, while *Green* held that the Court would look to both life sentences and death sentences of factually similar cases, the Court has often limited its review to only those cases where the death penalty was found to be proportionate or disproportionate. *See, e.g.*, State v. McNeill, 813 S.E.2d 797, 838–39 (N.C. 2018); State v. Maness, 677 S.E.2d 796, 818 (N.C. 2009). While North Carolina includes life and death sentences in their universe of similar cases, the limited scope of their review contradicts the premise of comparative proportionality because the state Supreme Court does not properly consider the likelihood that a jury will sentence an individual to life or death. *See* Brooks Emanuel, Comment, *North Carolina's Failure to Perform Comparative Proportionality Review: Violating the Eighth and Fourteenth Amendments by Allowing the Arbitrary and Discriminatory Application of the Death Penalty*, 39 N.Y.U. REV. L. & SOC. CHANGE 419, 435–36 (2015) ("By only comparing to the few cases in which it has previously found a death sentence disproportionate, the North Carolina Supreme Court *does not compare to any jury sentences*, making it impossible for comparative proportionality review to fulfill its constitutional mandate.").

[114] Moore v. Stirling, 871 S.E.2d 423, 435 (S.C. 2022) ("[W]e clarify our holding in *Copeland* and hold this Court is not statutorily required to limit the pool of 'similar cases' for comparative proportionality review to only those cases in which the death penalty was imposed."). The South Carolina Supreme Court in *Stirling* reviewed defendant's *habeas corpus* petition and found that the defendant's claim of an unconstitutionally restrictive pool of cases—which included only cases sentenced to death—was a valid *Habeas Corpus* claim under South Carolina law. *Id.* at 433–35. The South Carolina Supreme Court ultimately determined that defendant's death sentence was proportional; however, the South Carolina Supreme Court did expand its pool of similar cases to include cases where the defendant was sentenced to life imprisonment. *Id.* The South Carolina Supreme Court determined that § 16-3-25 did not limit a court to consider only other death penalty cases, and the growing prevalence of appellate courts reviewing life sentences made it judicially feasible to include appellate records of life sentences in the pool of similar cases for death penalty proportionality review. *Id.* at 433–34.

this universe of cases more directly resolves Justice White's concerns in *Furman* by ensuring that a court can adequately ensure that death sentences are not imposed indiscriminately.[115]

However, there are several concerns that a court must consider before adopting this approach. While a court may not violate the separation of powers provisions by considering all first-degree murder convictions, there is a benefit in allowing prosecutorial discretion for which cases the death penalty is pursued.[116] Prosecutors often receive great deference in how they pursue a criminal conviction, and any number of factors could lead a prosecutor not to pursue the death penalty in a particular case.[117] Courts should not regularly second-guess a prosecutor's determinations but rather allow them to decide whether a case is worth pursuing the death penalty.

Similarly, considering non-capital offenses does require some level of speculation on behalf of a court. While the courts would not need to speculate which cases are similar because all first-degree murder cases are innately similar, the courts would need to speculate if the prosecutor presented all of the evidence.[118] If a prosecutor is not actively pursuing the death penalty, they may decide not to introduce certain evidence that would ordinarily be relevant to determining an aggravating circumstance. This possible lack of relevant evidence has caused

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[115] *See* Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring) (finding the death penalty is imposed too infrequently to create any meaningful distinction between the cases it is imposed in, and those cases which it is not).
[116] Kaufman-Osborn, *supra* note 80, at 798.
[117] *Id.*; *Prosecutorial Discretion*, CAP. PUNISHMENT IN CONTEXT, https://capitalpunishmentincontext.org/issues/discretion#:~:text=State%20prosecutors%20have%20sole%20discretion,will%20face%20the%20death%20penalty (last visited Jan. 11, 2025) (finding a jurisdiction's financial resources, the views of the local constituents, the local political climate, and the prosecutor's own personal beliefs are all factors a prosecutor can consider when deciding whether to pursue the death penalty).
[118] *See* Kaufman-Osborn, *supra* note 80, at 798.

many courts to be concerned about whether the universe of cases should be expanded to include cases that were sentenced to life imprisonment when no aggravation hearing was held.[119]

IV. ENSURING MEANINGFUL PROPORTIONALITY REVIEW IN NEBRASKA BY EXPANDING "SAME OR SIMILAR" CASES TO INCLUDE ALL FIRST-DEGREE MURDER CASES

Even assuming, *arguendo*, that *Pulley v. Harris* was correctly decided and that a comparative proportionality review is truly not constitutionally required, Nebraska is still one of several states that statutorily require a comparative proportionality review to be conducted.[120] However, the Nebraska Supreme Court directly addressed the issue of proportionality review in *State v. Palmer* and improperly limited their universe of cases to only other first-degree murder cases sentenced to the death penalty—a universe that renders proportionality review meaningless.[121] While the Nebraska Supreme Court should expand its universe of cases to include all first-degree murder convictions, the Nebraska Supreme Court has been unwilling to overturn *State v. Palmer* in recent years.[122]

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[119] *See* Latzer, *supra* note 13, at 1204 (discussing the uncertainty of prosecutorial discretion and not having all relevant information presented to the reviewing court as problems in a death-eligible universe of cases).

[120] NEB. REV. STAT. § 29-2521.03 (Cum. Supp. 2020) ("The Nebraska Supreme Court shall, upon appeal, determine the propriety of the sentence in each case involving a criminal homicide by comparing such case with previous cases involving the same or similar circumstances.").

[121] *See* State v. Palmer, 224 Neb. 282, 327–28, 399 N.W.2d 706, 736 (1986) ("Accordingly, there is no way of this court's knowing whether any aggravating or mitigating circumstances were present in a given case unless the sentence was death. Therefore, no other case but a death sentence case can be said to be a case similar to that under review."). *See also* Kaufman-Osborn, *supra* note 80, at 795 ("Most restrictively, a court can limit its comparative review to only those cases that resulted in death sentences upheld on appeal."); William W. Berry III, *Ending the Death Lottery: A Case Study of Ohio's Broken Proportionality Review*, 76 OHIO ST. L.J. 67, 80 (2005) (arguing that Ohio does not conduct meaningful comparative proportionality review by only considering other death sentences).

[122] *See, e.g.*, State v. Garcia, 315 Neb. 74, 199, 994 N.W.2d 610, 704 (2023) (declining to reconsider *State v. Palmer*); State v. Schroeder, 305 Neb. 527, 563, 941 N.W.2d 445, 472–73 (2020) (finding that courts only need to consider other death penalty cases in its proportionality review).

A. Considering All First-Degree Murder Convictions Best Serves the Policy of Proportionality

Comparative proportionality is an essential means to prevent the aberrant and arbitrary imposition of the death penalty, ensuring fairness within our criminal legal system.[123] Outside of the Court's Eighth Amendment jurisprudence, some scholars even argue that the use of comparative proportionality is required under the Equal Protection Clause of the Fourteenth Amendment.[124] In order to ensure fairness within capital sentences, courts need to review the sentences of all first-degree murder cases because:

> Without considering affirmed, factually similar capital cases that resulted in life imprisonment, the court prevents itself from determining whether juries no longer impose the death sentence in the kind of case before the court, whether juries impose the death penalty with systematic racial bias, and whether the instant case shares more factual similarities to those cases which resulted in life imprisonment.[125]

A court cannot perform a true proportionality review unless it reviews the life imprisonment sentences in its jurisdiction to determine if the underlying sentence is an indiscriminate imposition of the death penalty.[126]

State v. Marshall, a New Jersey Supreme Court case, gained popularity from scholars because of its staunch defense of a universe of cases that included both life imprisonment and

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[123] Kaufman-Osborn, *supra* note 80, at 785 ("A general commitment to proportionality as a vital ingredient of fairness is expressed in the text of the U.S. Constitution.").
[124] *Id.*
[125] Alexandra E. Wilson-Schoone, *The Debate on Whether Life Sentences Should be Considered: Will Missouri's Proportionality Review Remain Meaningful*, 77 MO. L. REV. 909, 928 (2012) (finding that "[s]uch a limited comparison [of only death penalty cases] proves perfunctory, rendering the comparison meaningless."); *see also The Report of the Oklahoma Death Penalty Review Commission*, OKLA. CITY UNIV. SCH. OF L., 200 (Apr. 18, 2024), https://scholarship.law.okcu.edu/work/ns/29e235bd-9711-442e-9ce5-14d05086d63b (finding that geographic location could also be a factor for indiscriminate death sentences because only 2% of the counties in the United States are responsible for more than half of the total executions between 1976 and 2013. This large discrepancy creates questions about "[t]he disparate use of capital punishment by a small number of counties [which] raises meaningful questions about the fairness and effectiveness of the death penalty.").
[126] Wilson-Schoone, *supra* note 125, at 928 (finding that a comparison of only other death sentences rendered proportionality review meaningless).

death sentences.[127] *Marshall* demonstrated why a more expansive universe of cases is required, by illustrating that,

> 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.[128]

Marshall correctly held that it is essential to consider all similar cases to determine if the underlying sentence is proportional. To ensure proportionality and eliminate arbitrary sentences—as was the concern in *Furman*—a court must consider an expansive universe that includes all death-eligible cases.[129] Without considering those cases that were sentenced to life imprisonment, a court has no metric to determine what society deems as being worthy of the death penalty. While an underlying sentence may be similar to another case where the death penalty was imposed, it is also possible that—as *Marshall* illustrates—the case is similar to ninety-nine other cases that were sentenced to life imprisonment.[130] Without considering all one hundred of the similar cases, a court has no ability to determine if an overwhelming amount of factually similar cases were sentenced to life imprisonment or if they were sentenced to death.[131]

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[127] *See* State v. Marshall, 130 N.J. 109 (1992), *abrogated* by State v. Harris, 165 N.J. 303 (2000); *see also* Latzer, *supra* note 13, at 1205 (finding that the New Jersey Supreme Court has "been unswervingly committed to the expansive universe", defending both the consideration of life imprisonment sentences and death penalty sentences in their proportionality review).

[128] *Marshall*, 130 N.J. at 133–34.

[129] Gregg v. Georgia, 428 U.S. 153, 189 (1976) ("Furman mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.").

[130] *See Marshall*, 130 N.J. at 133–34.

[131] Lawrence S. Lustberg & Lenora M. Lapidus, *The Importance of Saving The Universe: Keeping Proportionality Review Meaningful*, 26 SETON HALL L. REV. 1423, 1430 (1996) ("Comparing a case under review solely to other

Nebraska courts are prevented from even considering life sentences when conducting a proportionality review. In *State v. Palmer*, the Nebraska Supreme Court reviewed the universe of cases that should be considered during a proportionality review and determined that "the review should include *only* those cases in which the death penalty was imposed."[132] While the Nebraska Supreme Court did correctly find in *Palmer* that § 29-2521.03 required a comparative proportionality review,[133] the Nebraska Supreme Court's restrictive interpretation of their universe of cases prevents Nebraska's proportionality review from creating any "meaningful basis for distinguishing" cases sentenced either to life imprisonment or to death.[134]

The Nebraska Supreme Court's holding in *Palmer* relied on the premise that including life imprisonment cases for a proportionality review would violate separation of powers

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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?...Without examining the life cases, it is impossible to develop the rational distinctions required."); Sprenger, *supra* note 15, at 733 ("If a court identifies only one similar death sentence case that supports a death sentence under review, the court does not meaningfully distinguish the current case from similar cases that ended in a sentence less than death. Indeed, the similar death sentence case that supports the death sentence under review may itself be arbitrary. Without examining similar life sentence cases, it is impossible for a court to develop the distinctions required both under the state death penalty statute and the Constitution.").

[132] State v. Palmer, 224 Neb. 282, 328, 399 N.W.2d 706, 736 (1986) (emphasis added).

[133] *Compare Palmer*, 224 Neb. at 329, 300 N.W.2d at 706 (requiring courts to compare the underlying sentence to other cases sentenced to death), *with* Gissendaner v. State, 532 S.E.2d 677, 690 (Ga. 2000) (finding that Georgia statutes require proportionality review to consider "whether the death penalty "is excessive per se" or if the death penalty is "only rarely imposed…or substantially out of line" for the type of crime involved and not whether there ever have been sentences less than death imposed for similar crimes."), *aff'd* in Brookings v. State, 879 S.E.2d 466, 491 (Ga. 2022) (applying *Gissendaner* to the underlying proportionality review). *See also infra* Part IV, section B (showing the Court's continued practice of using comparative proportionality review for Eighth Amendment challenges).

[134] *See* Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring); *see also* Emanuel, *supra* note 113, at 435 (finding that a system that considered only cases where the death penalty was found to be disproportionate is "necessarily of limited value because it cannot answer the central question: whether the death sentence is proportionate when compared to jury sentences in which life and death verdicts were imposed."); JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 57 (4th ed. 2006) (advocating that "[o]ne real-world way to scale deserts in a sentencing system based on retribution is to proportion punishment *between* offenses, rather than *to* offenses.").

provisions because courts would "entail intolerable speculation" by inquiring into why a prosecutor or jury did not impose the death penalty.[135] However, neither *Williams* nor *Moore* held that a review of life imprisonment cases violated the provisions of separation of powers.[136] Instead, *Williams* and *Moore* found that separation of powers provisions were only violated when a court inquired into the facts of a non-first-degree murder conviction to determine why a prosecutor or jury did not convict a certain degree of homicide.[137] The *Palmer* Court erred in holding that the review of life imprisonment cases called for intolerable speculation because all first-degree murder convictions are innately similar.[138] Capital and non-capital murder cases are only differentiated by the existence of a statutory aggravating factor, which requires comparison to non-capital cases to adequately determine if an aggravating factor is present.[139]

A review of the legislative history of Nebraska's statute also shows that the Nebraska Supreme Court should have adopted a universe encompassing all first-degree murder cases.[140] While debating debating L.B. 711, which created § 29-2521.03 and mandated that the Nebraska Supreme Court perform a proportionality review of death penalty cases, Senator Ernie Chambers

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[135] *Palmer*, 224 Neb. at 328–31, 399 N.W.2d at 736–38.

[136] *See* State v. Williams, 205 Neb. 56, 287 N.W.2d 18 (1979); State v. Moore, 210 Neb. 457, 316 N.W.2d 33 (1982).

[137] *See Williams*, 205 Neb. at 75–76, 287 N.W.2d at 29 ("If the language be interpreted to extend beyond first[-]degree murder convictions, problems relating to the exercise of prosecutorial discretion in homicide cases and the sentencing juries of the decisional power of determining guilt or innocence or fixing degrees of culpability in homicide cases are all involved. To interpret that language of [§ 29-2521.03] literally would create insurmountable constitutional problems."); *Moore*, 210 Neb. at 475–76, 316 N.W.2d 43–44 (finding that a comparison of death sentences to non-first-degree murder convictions is improper because it would require the Nebraska Supreme Court to: (1) find facts not before it, (2) improperly allow the Legislature to require factfinding, and (3) improperly bind the Supreme Court to the determination of lower district court decisions).

[138] While no Nebraska court has ever called the statuary process of finding aggravating circumstances in a death penalty proceeding "an enhancement proceeding," they are analogous for purposes of justiciability. Notably, the Nebraska Supreme Court has held that aggravating factors are not essential elements of first-degree murder. State v. Sandoval, 280 Neb. 309, 322–23, 788 N.W.2d 172, 193 (2010); State v. Mata, 275 Neb. 1, 17–18, 745 N.W.2d 229, 247 (2008); NEB. REV. STAT. § 29-2519(2)(d) (Cum. Supp. 2020) ("but the aggravating circumstances are not intended to constitute elements of the crime…").

[139] *See* NEB. REV. STAT. § 29-2523(1) (Cum. Supp. 2020); Lustberg & Lapidus, *supra* note 131, at 1430.

[140] *See Palmer*, 224 Neb. at 345–59, 399 N.W.2d at 746–53 (Krivosha, J., concurring in part and dissenting in part) (detailing the legislative history of Nebraska's proportionality statute).

made it clear that the bill's purpose was to expand Nebraska's universe of cases to included life imprisonment sentences.[141] During a floor debate in the Legislature, Senator Clark asked Senator Chambers why L.B. 711 was necessary if the Nebraska Supreme Court already reviewed death penalty sentences upon appeal.[142] Senator Chambers responded that the Nebraska Supreme Court conducted a review of "the individual case[,] but they do not compare them with the cases where the death penalty *was not imposed*. They do not make a comparison of case against case."[143] Senator Chambers further stated that:

> [The Nebraska Supreme Court] under this bill will not merely review an individual case to see whether errors were committed in that case[,] but it will compare the cases of criminal homicide throughout the state to see just what kind of cases ought to carry the death penalty and which kind ought not…This bill, remember, causes a comparison among cases.[144]

It is evident from Senator Chamber's remarks to the Legislature that the purpose of § 29-2521.03 was to expand the universe beyond cases where the death penalty was imposed to cases that also resulted in life imprisonment sentences.[145]

Senator Chambers is not the only advocate for expanding the universe of cases. The National Center for State Courts (NCSC) has also advocated for a more expansive universe.[146] An NCSC Project on Comparative Proportionality Review in Death Sentence Cases released a report advocating for a universe that includes both life imprisonment and death sentences when

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[141] *Id.* at 356, 399 N.W.2d at 751 ("The statement makes it clear that the intent of the act was to expand the cases to be included in the review.").
[142] *Hearings on L.B. 711 Before the Judiciary Comm.*, 85th Leg., 2d Sess. 7377 (1978) (statement of Senator Chambers) [Hereinafter *Hearings on L.B. 711*], *quoted* in *Palmer*, 224 Neb. at 356, 399 N.W.2d at 752.
[143] *Hearings on L.B. 711*, *supra* note 142, at 7377 (emphasis added).
[144] *Id.* at 7378.
[145] *See* NEB. REV. STAT. § 29-2521.03 (Cum. Supp. 2020) (showing that the statute has not been amended since its adoption in 1978 by L.B. 711 from the legislative history).
[146] Lustberg & Lapidus, *supra* note 131, at 1430; Sherod Thaxton, *Disciplining Death: Assessing and Ameliorating Arbitrariness in Capital Charging*, 49 ARIZ. ST. L.J. 137, 199–200 (2017). *See also The Texas Capital Punishment Assessment Report: An Analysis of Texas's Death Penalty Laws*, *supra* note 77, at xii (finding that the Texas Court of Criminal Appeals should adopt a proportionality test that includes a pool of all death-eligible cases).

reviewing capital cases.[147] Specifically, the report advocated for courts to (1) identify both life imprisonment and death sentences with a similar factual background, (2) determine the likelihood of cases resulting in the death penalty, and (3) make a determination whether factually similar cases are sentenced to death at a high enough likelihood to justify affirming the underlying death sentence.[148] While a few states have adopted a more expansive universe of cases, no state currently conducts its proportionality review in the entire manner advanced by the NCSC report.[149]

Another deficiency of the Nebraska Supreme Court's restriction of its universe of cases is that a smaller universe distorts a court's perception of what is proportional.[150] By only considering other death sentences, the Nebraska Supreme Court can have a distorted perception of what is "proportional" because all the cases that they review had aggravating circumstances.[151] Research has found that the extent to which a court reviews life sentence cases will affect the probability that the court will find the underlying death sentence proportional.[152] If a court considers a small pool of other death penalty cases, it is more likely to find similarities to justify affirming the underlying sentence. By considering cases that were sentenced to life imprisonment, a court can differentiate between factors and adequately determine the circumstances that make a case worthy of the death penalty. To prevent a distorted proportionality review, the Nebraska Supreme Court should consider all first-degree murder

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147 Thaxton, *supra* note 146, at 199.
148 *Id.* at 199–200.
149 *Id.* at 200.
150 Emanuel, *supra* note 113, at 432–37 (finding that the scope of the universe of cases a court considers is essential to ensure that an accurate proportionality review is conducted).
151 *Id.* at 436 ("The inclusion of life sentences is "essential" because "quite obviously, a significant number or similar cases in which death was not imposed might well provide the most relevant evidence or arbitrariness in the sentence before the court."").
152 Wallace & Sorensen, *supra* note 44, at 19.

sentences to determine if factually similar cases are more likely to be sentenced to life imprisonment or to death.

Comparative proportionality is meaningless in preventing the arbitrary sentence of death unless courts consider all first-degree murder cases because "[i]f 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."[153] Chief Justice Krivosha shared this sentiment in his concurring and dissenting opinion in *Palmer* when he argued that:

> The purpose of L.B. 711 [§ 29-2521.03] 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 a death sentence.[154]

Chief Justice Krivosha understood that a court will never find a discriminatory act if its only point of reference is a biased pool of cases.[155] The Nebraska Supreme Court cannot adequately determine which cases are discriminatory or disproportionate if they only consider other death sentences. Instead, the Nebraska Supreme Court needs to consider life imprisonment sentences to be able to perform any meaningful distinction between life imprisonment and death sentences—

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[153] Linda Burgess, *Comparative Proportionality Review of Death Sentences: Is It a Meaningful Safeguard in Oklahoma?*, 38 OKLA. L. REV. 267, 278 (1985).
[154] State v. Palmer, 224 Neb. 282, 357–58, 399 N.W.2d 706, 752 (1986) (Krivosha, C.J., concurring in part and dissenting in part).
[155] *See Id.*

as advanced by Justice White in *Furman*.[156] By expanding the universe of cases, the Nebraska Supreme Court can adequately review the underlying sentence to ensure that it was not imposed in an indiscriminate or discriminatory manner.[157]

Some courts have often relied on judicial efficiency to justify a more restrictive universe of cases,[158] yet the rights of a criminal defendant facing the death penalty should not be outweighed by judicial ease. If courts want to address the concerns raised in *Furman*, then courts should strive to create the most accurate universe of cases possible rather than a merely sufficient universe.[159] Further, the aim of *Furman* was to create reliable criteria for courts to ensure that the death penalty was not being imposed arbitrarily.[160] For the Nebraska Supreme Court to adequately respond to the concerns raised in *Furman*, it is essential that "[t]he need for an accurate and convincing determination…should outweigh the court's goal of a "sufficient" determination."[161]

The Nebraska Crime Commission reports that forty-nine criminal homicides were committed in both 2021 and 2022.[162] It is important to note that these statistics reflect all criminal homicides, so the number of first-degree murders—while unknown and not reflected in the report—would be even lower than forty-nine for both years. For a state like Nebraska, even if

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[156] *See* Sprenger, *supra* note 15, at 733 ("despite the virtuous simplicity to include only death sentence cases in the universe, this approach fails to address a hard question to which the legislatures wanted an answer: Can a case under review be meaningfully distinguished from the many similar cases that resulted in sentences less than death?" Further finding that "examining only death cases effectively defeats the purpose of proportionality review in the vast majority of cases.").

[157] *See* Traci Smith, *The Outlier Case: Proportionality Review In State v. Rhines*, 42 S.D. L. REV. 192, 211 (1997) (finding an expansive universe of cases can protect against social, racial, or sexual discrimination).

[158] Sprenger, *supra* note 15, at 736; Smith, *supra* note 157, at 218.

[159] Sprenger, *supra* note 15, at 736 ("To assure accurate and convincing determination, the courts' goal should be to find the best available cross section rather than 'a sufficient cross section.'").

[160] *See* Furman v. Georgia, 498 U.S. 238 (1972) (per curiam).

[161] Smith, *supra* note 157, at 218.

[162] *Crime in Nebraska (2022)*, NEB. COMM'N ON L. ENF'T AND CRIM. JUST., 2 (Aug. 4, 2023), https://ncc.nebraska.gov/sites/default/files/doc/2022%20Crime%20in%20Nebraska.pdf.

judicial efficiency is seen as a compelling justification to restrict the universe of cases, the universe would still be a manageable size for consideration because first-degree murders are not committed frequently.[163]

Nebraska also has a statute that requires each county attorney to file a report to the State Court Administrator detailing important information related to a criminal homicide.[164] Included in this report, a county attorney must report the initial charge, any reduction in charge with the reason for reduction, whether the case was dismissed prior to trial, the outcome of the trial, the sentence imposed, whether an appeal was sought, and any other information that may be required by the Administrator.[165] The Nebraska Supreme Court would already have records of each first-degree murder conviction because § 29-2524.01 requires the disclosure of these records to the Nebraska Supreme Court by county attorneys.

The Nebraska Supreme Court would not be unreasonably burdened by having to find factually similar cases, nor would the Nebraska Supreme Court struggle from judicial inefficiency from reviewing all first-degree murder cases because the records are readily available to the Nebraska Supreme Court. While judicial efficiency is a goal our courts should strive for, courts should also remember that the rights of defendants are equally important—if not more important—especially when the protection of the defendant's rights would pose no real difficulty for the court.

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[163] *See* Smith, *supra* note 157, at 218 (finding that in a small state like South Dakota—which has relatively few murders each year—it would "be no great feat to include all reported murder cases in the pool of similar cases."); *see also State Execution Rates*, *supra* note 26 (finding that only 44 individuals have been sentenced to death in Nebraska since 1976).

[164] NEB. REV. STAT. § 29-2524.01 (Cum. Supp. 2020); *see also* NEB. REV. STAT. § 29-2524.02 (Cum. Supp. 2020) (requiring the State Court Administrator to carry out § 29-2524.01).

[165] § 29-2524.01.

B. Federal Case Law on Proportionality Review Supports the Comparison of All First-Degree Murder Cases

While the text of the Eighth Amendment does not explicitly mention proportionality, scholars believe that proportionality review has developed from common law doctrines.[166] Under the common law principle of remitter, a trial judge—upon motion of the defendant for a new trial after a jury verdict in favor of the plaintiff, and with the consent of both parties—could reduce the amount of the civil judgment on the grounds that it was disproportionate to the actual legal injury.[167]

When the Framers drafted the Eighth Amendment, there was little debate at the ratifying convention over its meaning.[168] Drawing upon common law principles and the 1689 English Bill of Rights, the Eighth Amendment—while only explicitly addressing excessive bail, fines, and cruel and unusual punishment—is believed to include the English common law protections against arbitrary and disproportionate punishments.[169] The Court has often struggled to determine the level of proportionality review that is required by the Eighth Amendment, as it received minimal attention at the state ratifying conventions and only a few early cases explored its protections.[170] However, "[w]hat an examination of those early cases reveals is a clear

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[166] Sprenger, *supra* note 15, at 727.
[167] *Id.*
[168] Susan Raeker-Jordan, *Kennedy, Kennedy, and the Eighth Amendment: "Still In Search of A Unifying Principle"?,* 73 U. PITT. L. REV. 107, 112 (2011); *see also Eighth Amendment Cruel and Unusual Punishment*, *supra* note 21 (finding that many Framers were concerned about "tortures and barbarous" punishments, which led to the creation of the Eighth Amendment).
[169] THE HERITAGE GUIDE TO THE CONSTITUTION 363 (Edwin Meese III, Matthew Spalding, & David Forte eds. 2005); *see also Eighth Amendment Cruel and Unusual Punishment*, *supra* note 21 ("but the English history which led to the inclusion of a predecessor provision in the Bill of Rights of 1689 indicates additional concern with arbitrary and disproportionate punishments.").
[170] Raeker-Jordan, *supra* note 168, at 112.

tendency of the Court to measure a punishment for excessiveness, to state in so many words that a punishment is or is not simply too much for the crime involved."[171]

The Court conducted a comparative proportionality review as early as 1866.[172] In *Pervear v. Commonwealth*, the Court considered Pervear's criminal penalty for failure to keep and maintain a license for the sale of liquor.[173] Pervear contended that Massachusetts' statute violated the Eighth Amendment because the sentence of a $50 fine and three months imprisonment at a hard labor camp was cruel and unusual in violation of the Eighth Amendment.[174] However, the Court found that the Eighth Amendment's protections did not invalidate the Massachusetts statute because the Eighth Amendment only applied to national legislation.[175] The Court did note that even if the Amendment applied to state legislation, the sentence still would not be considered disproportionate because the sentence was comparatively similar to the sentences imposed in other jurisdictions for the *same* offense.[176]

A few years later, the Court conducted a comparative proportionality review again when it reviewed a death sentence for a Utah defendant in *Wilkerson v. Utah*.[177] In *Wilkerson*, the defendant was sentenced to death for committing a first-degree murder; however, Utah was still a territory at the time, so its laws had to comply with the federal constitution.[178] In one of the

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[171] *Id.*
[172] *Id.* at 113 (relating to *Pervear*, "[t]he Court's brief consideration reveals that, as early as 1866, it was conducting proportionality analysis."); *see* Pervear v. Commonwealth, 72 U.S. 475, 480 (1866).
[173] *Pervear*, 72 U.S. at 476.
[174] *Id.* at 480.
[175] *Id.* at 479–80; *contra* Robinson v. California, 370 U.S. 660, 667 (1962) (holding that a state criminal law punishing a disease was an "infliction of cruel and unusual punishment in violation of the Eight and Fourteenth Amendments.").
[176] *Pervear*, 72 U.S. at 480 ("We perceive nothing excessive, or cruel, or unusual in this…The mode adopted, of prohibiting under penalties the sale and keeping for sale of intoxicating liquors, without license, is the usual mode adopted in many, perhaps, all of the States."); Raeker-Jordan, *supra* note 168, at 114 (finding that the Court in *Pervear* went beyond inherent proportionality review by conducting a comparative analysis to other state statutes).
[177] *See* Wilkerson v. Utah, 99 U.S. 130 (1878).
[178] *Id.* at 130.

Court's earliest opportunities to define the Eighth Amendment, the Court took a reserved approach and found that the Eighth Amendment forbade punishments of torture or unnecessary cruelty.[179] Yet, the Court utilized a comparative proportionality review when it specifically found that shooting—as a mode of execution—was not cruel or unusual because it was utilized in other jurisdictions as a means of execution.[180]

O'Neil v. Vermont is not famous for being an Eighth Amendment case because the Court found that even if the Amendment applied to the states, the issue of an Eighth Amendment violation was not properly appealed.[181] However, the case is famous for Justice Field's dissent, which argued that the Eighth Amendment includes a proportionality element—a view that was later accepted by a majority of the Court in *Weems v. United States*.[182]

In *Weems*, the Court raised a proportionality argument when reviewing a sentence that included fifteen years in a hard labor camp, a fine, and other accessory punishments for falsifying a public document.[183] The Court famously wrote that it is an important American value and is "a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."[184] The Court was astonished at the severity of the punishment and accepted

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[179] *Id.* at 136 ("but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that amendment to the Constitution.").
[180] *Id.* at 134–35 ("Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment.").
[181] O'Neil v. Vermont, 144 U.S. 323, 331 (1892) ("It is not assigned in this court as error, in the assignment of errors, or in the brief of O'Neil, that he was subjected to cruel and unusual punishment, in violation of the constitution of the United States.").
[182] *Id.* at 339–40 ("The inhibition is directed, not only against punishments of the character mentioned, *but against all punishments which by their excessive length or severity are greatly disproportioned to the offense charged*…the judgment of mankind would be that the punishment was not only an unusual one, but a cruel, one, and a cry of horror would rise from every civilized and Christian community of the country against it. It does not alter its character as cruel and unusual that for each distinct offense there is a small punishment, if, when they are brought together, and one punishment for the whole is inflicted, it becomes one of excessive severity." (emphasis added)).
[183] Weems v. United States, 217 U.S. 349, 358 (1910).
[184] *Id.* at 367.

Justice Field's interpretation of the Eighth Amendment in *O'Neil* to accept proportionality as an essential constitutional element for criminal sentences.[185] After much discussion, both over the historical protections of the Eight Amendment in limiting legislative deference and the comparability of the sentence to that of other jurisdictions, [186] the Court found that the defendant's sentence violated the Amendment because it was disproportionate to the crime.[187]

Building on *Weems*, the court in *Solem v. Helm* found that objective criteria should be applied to ensure that sentences are proportional and conform with the Eighth Amendment.[188] The Court went on to establish the *Solem* test, focusing primarily on (1) the gravity of the offense and the harshness of the penalty, (2) comparing the sentence imposed to other sentences imposed in the same jurisdiction for a similar crime, and (3) comparing the sentence imposed to other sentences for the *same* crime in other jurisdictions.[189] The Court took a historical approach and determined that proportionality was required by the 1215 Magna Carta and the 1689 English Bill of Rights, with the requirement of proportionality review passed down through common law and adopted by the Framers through the Eighth Amendment.[190]

Additionally, the Court had previously used comparative proportionality review in *Enmund v. Florida* when the Court compared the criminal sentence to other states and found that

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[185] *Id.* at 550–51.
[186] *Id.* at 381 ("And this contrast shows more than different exercise of legislative judgment. It is greater than that. It condemns the sentence in this case as cruel and unusual. It exhibits a difference between unrestrained power and that which is exercised under the spirit of the constitutional limitations formed to establish justice."); *see also Proportionality*, JUSTIA (last visited Sept. 9, 2024), https://law.justia.com/constitution/us/amendment-08/14-proportionality.html (finding that the Court in *Weems* compared the sentence to similar sentences imposed by other state legislatures).
[187] *Weems*, 217 U.S. at 377 (finding the punishment is disproportionate "under the condemnation of the Bill of Rights, both on account of their degree and kind.").
[188] Solem v. Helm, 463 U.S. 277, 290 (1983) ("When sentences are reviewed under the Eighth Amendment, courts should be guided by objective factors that our cases have recognized.").
[189] *Id.* at 292.
[190] *Id.* at 284–87; *contra* Harmelin v. Michigan, 501 U.S. 957 (1991) (finding that a narrow proportionality requirement existed in the Eighth Amendment but disagreed with the historical approach taken in *Solem*—finding that proportionality was not required by common law).

only one-third of the state jurisdictions would have imposed the death penalty in that situation.[191] One scholar has noted that:

> [A]lthough a part of the proportionality inquiry focused on the nature of the crime and the culpability of the defendant and would thus be tagged "traditional" [inherent] proportionality, the Court in both pre-Pulley cases [*Solem* and *Enmund*] also compared the sentences with those imposed for similar crimes in other jurisdictions. By doing so, the Court accepted the reality that determining proportionality requires more than a consideration of the particular offense and the offender. To truly determine proportionality, a sentence must be viewed in light of other sentences; in other words, it must be compared.[192]

However, in recent years, the Court has struggled to maintain a consistent and reliable jurisprudence for the Eighth Amendment.[193] The Court's confusing and inconsistent stance on proportionality review has only been expounded by their reluctance to require the use of comparative proportionality review for death penalty cases.[194] While the Court has not fully embraced a consistent interpretation of the Eighth Amendment, proportionality review remains a vital and integral aspect of the Court's constitutional analysis for general criminal convictions.[195]

While the Court has struggled to clearly define its Eighth Amendment proportionality jurisprudence, it has consistently implied that proportionality review of death penalty sentences is an essential constitutional element.[196] In *Gregg v. Georgia*, the Court stated that "proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."[197] While the Court mainly focused on the use of

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[191] *Solem*, 463 U.S. at 291; *see also* Enmund v. Florida, 458 U.S. 782, 792–93 (1982) (finding that only eight jurisdictions allowed for a defendant in a similar crime to be sentenced to death).
[192] White, *supra* note 52, at 834–35.
[193] *See, e.g.*, Lockyer v. Andrade, 538 U.S. 63, 70 (2003) (finding the Court has "not established a clear or consistent path for courts to follow.").
[194] *See supra* section IV.B.
[195] *E.g.*, Graham v. Florida, 560 U.S. 48, 59 (2010) (finding that "[t]he concept of proportionality is central to the Eighth Amendment."); Miller v. Alabama, 567 U.S. 460, 469 (2012) (finding a court should conduct proportionality review through the "evolving standards of decency" test).
[196] *See, e.g.*, Gregg v. Georgia, 428 U.S. 153 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).
[197] *Gregg*, 428 U.S. at 206.

aggravating factors and bifurcated trials to prevent arbitrary death sentences, the Court implied the importance of comparative proportionality review of death sentences.[198]

The Court has also used inherent proportionality review to determine if a state statute violates the Eighth Amendment, with the most famous examples being *Woodson v. North Carolina* or *Coker v. Georgia*.[199] In *Woodson*, the Court looked at a North Carolina statute that imposed the death sentence for all cases involving a first-degree murder.[200] The Court found that while the death penalty for first-degree murder itself was not cruel or unusual, creating a mandatory sentence of death violated the Eighth Amendment.[201] A large concern with the Georgia statute in *Furman* was that it did not prevent indiscriminate sentences for defendants; however, the Court in *Woodson* found that the mandatory imposition of death sentences does little to resolve the concerns discussed in *Furman*.[202] Specifically, a mandatory sentence of death fails to "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."[203] The Court in *Woodson* again implied the need to conduct a comparative proportionality review to ensure a fair and just imposition of the death sentence when compared to other similar cases.[204] Yet, the

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[198] See *id.* ("If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.").
[199] *Woodson*, 428 U.S. at 280; Coker v. Georgia, 433 U.S. 584 (1977).
[200] *Woodson*, 428 U.S. at 282.
[201] *Id.* at 292–93 ("The history of mandatory death penalty statutes in the United States thus reveals that the practice of sentencing to death all persons convicted of a particular offense has been rejected as unduly harsh and unworkably rigid. The two critical indicators of evolving standards of decency respecting the imposition of punishment in our society[,] jury determinations and legislative enactments[,] both point conclusively to the repudiation of automatic death sentences.").
[202] *Id.* at 302.
[203] *Id.* at 303.
[204] *Id.* at 304 ("we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment…requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death.").

Court chose to simply utilize an inherent proportionality review and find a mandatory sentence of death is, per se, unconstitutional.[205]

The Court again employed an inherent proportionality review in *Coker v. Georgia*, where the death penalty was imposed on a defendant convicted of rape.[206] In *Coker*, the Court looked back to objective factors established in *Gregg* to determine if a sentence is excessive under the Eighth Amendment. The court found a sentence excessive if it: "(1) makes no measurable contribution to acceptable goals of punishment and is hence a purposeless and needless imposition of pain and suffering, or (2) is grossly out of proportion to the severity of the crime."[207] In *Coker*, the Court focused on the second *Gregg* factor and observed the objective, historical approach to rape statutes to determine that the imposition of the death penalty for rape violates the Eighth Amendment. The Court observed that at the time they were considering the present case, Georgia was the only state that allowed the death penalty to be imposed in cases where an adult woman was raped.[208] The Court believed that Georgia's statute was inherently disproportionate to the severity of the crime because—comparad to other state statutes—the imposition of the death penalty for rape was not socially accepted through state legislation.[209]

While the Court in *Gregg* and *Woodson* implied the importance of conducting a comparative proportionality review, the Court directly found that comparative proportionality

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[205] *Id.* at 292–93.
[206] Coker v. Georgia, 433 U.S. 584, 592 (1977).
[207] *Id.*; Gregg v. Georgia, 428 U.S. 153, 173 (1976) ("First, the punishment must not involve the unnecessary and wanton infliction of pain…Second, the punishment must not be grossly out of proportion to the severity of the crime.").
[208] *Coker*, 433 U.S. at 595–96.
[209] *Id.* at 597 ("the legislative rejection of capital punishment for rape strongly confirms our own judgment, which is that death is indeed a disproportionate penalty for the crime of raping an adult woman."); *see also* Kennedy v. Louisiana, 554 U.S. 407 (2008) (finding that *Coker* applied to rape cases where the victim was a child—who survived—because only 6 states permitted the death penalty for such a crime).

review was not constitutionally required for death penalty cases in *Pulley v. Harris*.[210] The Court reasoned that while *Gregg* required procedural safeguards to protect against the "wanton" and "capricious" imposition of the death penalty, *Gregg* itself did not require comparative proportionality review but simply offered it as one of many viable safeguards.[211] The Court further reasoned that comparative proportionality was not constitutionally necessary because the Court had previously upheld a death penalty statute in *Jurek v. Texas* when no comparative proportionality review was required.[212]

However, while the Court correctly noted that *Gregg*, *Jurek*, and *Proffitt v. Florida*[213] did not constitutionally require a comparative proportionality review to be conducted, the Court severely downplayed the importance of the proportionality review established in *Zant v. Stephens*. In *Zant*, the Court found that:

> Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and to assure *proportionality*…we have also been assured that a death sentence will be vacated if it is excessive or *substantially disproportionate to the penalties that have been imposed under similar circumstances*.[214]

While *Zant* did focus on the use of appellate review for death penalty cases, the appellate review's focus was to determine whether the sentence was proportionate.[215] Instead of

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[210] Pulley v. Harris, 465 U.S. 37, 45 (1983) ("Examination of our 1976 cases makes clear that they do not establish proportionality review as a constitutional requirement.").
[211] *Id.* at 50 ("Proportionality review was considered to be an additional safeguard against arbitrarily imposed death sentences, but we certainly did not hold that comparative review was constitutionally required.").
[212] *Id.* at 48; *see also* Jurek v. Texas, 428 U.S. 262 (1976) (finding that Texas had proper procedural safeguards to prevent the arbitrary imposition of the death penalty).
[213] Proffitt v. Florida, 428 U.S. 242 (1976) (finding that Florida's requirement for prompt appellate review of death sentences prevented arbitrary impositions of the death penalty).
[214] Zant v. Stephens, 462 U.S. 862, 890 (1983) (emphasis added).
[215] *Id.*; White, *supra* note 52, at 836 ("the *Zant* court relied on the "mandatory appellate review," which assured proportionality.").

relying on *Zant*'s strong language to require a comparative proportionality review for death penalty cases, the Court in *Pulley* essentially reduced *Zant'*s effect to nothing.[216]

While *Pulley v. Harris* directly found that comparative proportionality review is not required in capital cases under the Eighth Amendment, the Court's expansive use of comparative proportionality review shows that it should be a vital constitutional element in death penalty cases.[217] *Pulley* itself is incompatible with the Court's Eighth Amendment jurisprudence when considering the issue presented by the Court's decision in *Woodson*.[218] The Court has often struck down death sentences that have been imposed for other types of crimes but has allowed the death penalty to be imposed in cases of first-degree murder.[219]

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[216] White, *supra* note 52, at 836 ("Yet, when relied upon in Pulley, the Zant decision was recast as one which focused instead on the validity of the remaining aggravating circumstances."); Pulley v. Harris, 465 U.S. 37, 50 (1984) (finding that *Zant*'s holding did not require comparative proportionality review, but "relied on the jury's finding of aggravating circumstances, not the State Supreme Court's finding of proportionality, as rationalizing the sentence.").

[217] *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (finding a mandatory sentence of death fails to "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death."); Zant v. Stephens, 462 U.S. 862, 890 (1983) ("we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances."); Weems v. United States, 217 U.S. 349, 367 (1910) ("a precept of justice that punishment for crime should be graduated and proportioned to [the] offense."). *See also* St. George Tucker, *Blackstone's Commentaries with Notes of Reference*, LONGANG INSTITUTE (last visited Sept. 1, 2024), https://lonang.com/library/reference/tucker-blackstone-notes-reference/tuck-501/ (offering an online version of St. George Tucker, *Of the Nature of Crimes; and Their Punishment*, *in* BLACKSTONE'S COMMENTARIES WITH NOTES OF REFERENCE (vol. 5 1803)). While not regarded as a Framer, Tucker was an early American attorney who served as a judge in Virginia. Tucker wrote several notable commentaries on the Constitution which were used to determine how the Constitution was interpreted by early 19th century attorneys. In one of these commentaries, Tucker wrote that "[t]he method however of inflicting punishment ought always be proportioned to the particular purpose it is meant to serve, and by no means exceed it." *Id.* Again, showing the early American belief that proportionality of criminal sentences was a common law protection.

[218] *See* Woodson v. North Carolina, 428 U.S. 280, 303 (1976) (finding the mandatory imposition of the death penalty for all first-degree murder cases violated the 8th Amendment).

[219] *See e.g.*, Coker v. Georgia, 433 U.S. 584 (1974) (finding that the imposition of the death penalty for cases of rape of an adult woman is unconstitutional); Enmund v. Florida, 458 U.S. 782 (1982) (finding that the imposition of the death penalty for felony murder is inherently disproportionate); Roper v. Simmons, 534 U.S. 551 (2005) (finding the imposition of the death penalty for juvenile offenders is inherently disproportionate).

The issue arises: if the Court has inherently found that only first-degree murders can be sentenced to death, and if the Court in *Woodson* has found that the mandatory imposition of the death penalty in first-degree murder cases is inherently disproportionate, then how can a court properly distinguish between cases without being required to conduct a comparative proportionality review? The Court's main concern in *Furman* was that the death penalty was being imposed in an indiscriminate manner.[220] The Court addressed these concerns in *Woodson* by finding that some form of distinction—i.e., comparative proportionality review— must be made between cases sentenced to either life imprisonment or death.[221] Yet, the Court abandoned *Furman's* concerns in *Pulley* when the Court lessened the protections that would be afforded to criminal defendants facing the death penalty by finding that comparative proportionality review was not constitutionally necessary.[222]

While the Court in *Pulley* is correct that *Gregg* considered other procedural safeguards, *Pulley* ignored the need to ensure that the death penalty is not imposed indiscriminately.[223] Since the death penalty is only imposed in first-degree murder cases—which cannot be mandatorily sentenced to death—there is no effective way for a court to ensure that the death penalty is not imposed arbitrarily without comparing the underlying sentence to other first-degree murder cases.[224] While a court could consider the existence of aggravating factors, the court would still

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[220] Furman v. Georgia, 408 U.S. 238, 256–57 (1972) (Douglas, J., concurring) (finding the death penalty is discriminatorily applied against indigent defendants); *Furman*, 408 U.S. at 310 (White, J., concurring) (finding the death penalty is imposed too infrequently to not be arbitrary).

[221] *See Woodson*, 428 U.S. at 303 (finding the North Carolina law failed to allow the judiciary to review for arbitrary and capricious impositions of the death penalty).

[222] *See* Pulley v. Harris, 465 U.S. 37 (1984).

[223] *See* Gregg v. Georgia, 428 U.S. 153, 206 (1976) ("proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury.").

[224] *See* Wallace & Sorensen, *supra* note 44 (finding that a court's consideration of life sentences reduces the likelihood the court finds the death sentence to be proportional); Sprenger, *supra* note 15, at 733 ("despite the virtuous simplicity to include only death sentence cases in the universe, this approach fails to address a hard question to which the legislatures wanted an answer: Can a case under review be meaningfully distinguished from

not be able to compare how other courts view those same aggravating circumstances without conducting a comparative proportionality review.[225] So, while bifurcated trials and the existence or non-existence of aggravating circumstances can offer some protections for the defendant, Nebraska cannot truly prevent indiscriminate sentences until they conduct a comparative proportionality review against all other first-degree murder cases.

V. CONCLUSION

This Comment analyzed the Nebraska Supreme Court's proportionality review to show why Nebraska should expand its universe of "same or similar" cases to include all first-degree murder convictions. First, this Comment discussed the federal case law relating to the death penalty and how Nebraska statutes responded. Next, this Comment considered how various states reacted to the Court's decision in *Pulley v. Harris*. Finally, this Comment offered a new perspective on Nebraska's proportionality review for death sentences to show why a more expansive universe of cases will allow Nebraska to achieve true proportionality in its death penalty scheme.

Furman challenged states to create policies that would meaningfully distinguish cases to ensure that the death penalty was not imposed in an arbitrary or capricious manner.[226] Through various Eighth Amendment challenges, the Court has consistently used comparative proportionality to ensure that a criminal sentence complies with the Constitution.[227] However, even though the Court has repeatedly relied on a comparative proportionality review, the Court

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the many similar cases that resulted in sentences less than death?" Further finding that "examining only death cases effectively defeats the purpose of proportionality review in the vast majority of cases.").

[225] Sprenger, *supra* note 15, at 733.

[226] *See supra* section II.A.

[227] *See supra* section IV.B.

in *Pulley v. Harris* incorrectly found that comparative proportionality review was not constitutionally required.[228]

Without comparing the underlying death penalty case to other similar cases, there is no meaningful way for a court to conclude that the sentence is proportional.[229] The Nebraska Supreme Court has further abandoned the concept of proportionality review by restricting its review of cases to a degree that makes its proportionality review meaningless.[230] The Nebraska Supreme Court cannot determine if the underlying sentence is arbitrary or capricious unless it also considers the cases that were found to be unworthy of the death penalty.[231] By only considering other death penalty cases, a court distorts its perception of what is "proportional" and is more likely to affirm the underlying death sentence being reviewed.[232] The Nebraska Supreme Court in *State v. Palmer* found that "[e]venhandedness in sentencing is a goal for which all courts strive."[233] By adopting a more expansive universe of cases, the Nebraska Supreme Court can achieve evenhandedness in their sentencing by adopting meaningful distinctions to achieve true proportionality in Nebraska's death penalty scheme.

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[228] *See supra* section IV.B.
[229] *See supra* section IV.A.
[230] *See supra* section IV.A.
[231] *See supra* section IV.A.
[232] *See supra* section IV.A.
[233] State v. Palmer, 224 Neb. 282, 326–27, 399 N.W.2d 706, 735 (1986).