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# The Proportionality Review of Capital Cases By State High Courts after Gregg: Only The Appearance of Justice

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# THE PROPORTIONALITY REVIEW OF CAPITAL CASES BY STATE HIGH COURTS AFTER *GREGG*: ONLY "THE APPEARANCE OF JUSTICE"?*

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*Much of the discussion is designed to explain the process of record-gathering and the methods of analyses, both of science and law, that can be used to conduct proportionality review and to assess the relevance of the data to system-wide claims of unconstitutional infliction of the death penalty . . . .*

*Although we recognize that proportionality is not a scientific determination, we have attempted to make our determination as precise in terms of their bases and reasoning and as objective as possible. We have used scientific and statistical measures, when helpful, although we recognize that a value judgment is built into practically every measurement. A life is at stake, and although some degree of subjective value judgment may be required, we have attempted to make those judgments explicit so that they can be analyzed and tested against whatever objective measurements are applicable.*[1]

## I. INTRODUCTION

In the twenty years after the United States Supreme Court approved the parameters for the reimposition of capital punishment in *Gregg v. Georgia*[2] and its accompanying cases,[3] state and federal courts have been presented with constitutional challenges to capital punishment based upon statistical evidence of racial and geographic dispari-

* This article is dedicated to the memory of Robert N. Wilentz, the late Chief Justice of the New Jersey Supreme Court.

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1 State v. Marshall, 613 A.2d 1059, 1064 (N.J. 1992).

2 428 U.S. 153 (1976).

3 Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Proffitt v. Florida, 428 U.S. 242 (1976).

ties in state capital case processing systems.[4] These challenges are supported by the Supreme Court decisions in *Furman v. Georgia*[5] and *Coker v. Georgia*,[6] which both implied, without explicitly holding, that racially- and geographically-based disparities in the implementation of capital punishment were fundamental constitutional infirmities.

The majority of state legislatures and supreme courts took the United States Supreme Court at its word and believed that *Gregg* meant what it said: newly revised state capital punishment systems were going to be different from the old systems, and one important difference would be the requirement of proportionality review. *Gregg* in the context of *Furman* strongly implied that a state capital punishment scheme would be declared unconstitutional if it exhibited the patterns of disparity declared unconstitutional in *Furman*.

The post-*Gregg* statutes enacted by various states addressed the structure and substance of jury decision-making at trial.[7] As an additional safeguard, *Gregg* endorsed Georgia's statutory requirement of proportionality review,[8] a new appellate procedure designed to assure that the imposition of the death sentence under the revised statutes would not be characterized by the fundamental flaw of arbitrariness which made the former system unjust.[9] Proportionality review is the comparison of a death sentence with sentences imposed in similar

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4 The term "capital case processing system" will be used in this article to refer to the set of laws, rules and procedures governing the prosecution of capital cases within a single state. Within each state, local prosecutors are subject to jurisdictional boundaries, usually—but not always—termed counties. The legal authority of prosecutors may, but does not always, correspond to sharp demographic differences. *See infra* Appendix B.

Those challenging the reinstituted capital statutes presented empirical evidence of racially- and geographically-based discrepancies in capital case processing, whether the result of intentional discrimination or passive systemic discrimination, in order to establish the factual foundation for a constitutional challenge to the restructured state capital punishment systems.

5 408 U.S. 238 (1972).

6 433 U.S. 584 (1977).

7 These statutes are discussed *infra* in Appendix A.

8 This statute required the state supreme court to review each death sentence to determine, "if the sentence imposed is excessive compared with the sentence imposed in similar cases." GA. CODE ANN. § 27-2537(c)(3) (1983). Justice White rephrased the provision as "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Gregg v. Georgia, 428 U.S. 153, 212 (1976) (White, J., concurring). Justice White's formulation was typically incorporated into state statutes at the time of reenactment.

9 The Georgia statute, which controlled discretion by introducing a structure of aggravating and mitigating factors, was upheld in *Gregg* while the statutes which attempted to eliminate arbitrariness by introducing a mandatory system for imposing capital punishment were struck down. *Compare* Gregg v. Georgia, 428 U.S. 153, 206 (1976) (upholding GA. CODE ANN. § 27-2534.1 et seq.) *with* Roberts v. Louisiana, 428 U.S. 325, 336 (1976) (striking down statute which totally removed jury discretion) *and* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (same).

cases, to determine whether the sentence is fair or proportionate. The principle is that the death sentence is disproportionate if other defendants in similar cases are not sentenced to death. This statutory mandate can implicate broad principles of federal and state constitutional law and trigger the implementation of an empirical examination of the state's entire capital case processing system, raising issues of racial and economic disparity and questioning the charging practices and autonomy of local prosecutors. Or, it can result in no more than a conclusory sentence tacked on to the end of a state high court's affirmance of a death sentence.

The increasing use of proportionality review by state high courts in the period 1976-1991 mirrored tremendous changes in the jurisprudence and politics of capital punishment nationally: the withdrawal of federal courts, especially the United States Supreme Court, from the death penalty arena; increased political pressure upon state judicial institutions from both state legislatures and the electorate;[10] and polarized debate within the courts themselves. How state high courts approach proportionality review expresses a great deal about how these courts see themselves and their role within their own states and in the national criminal justice system.[11]

But despite the mandate given them by the absence of the United States Supreme Court on these issues, many state high courts ignored or dismissed statistical evidence of systemic disparities in capital case processing. Some courts held that such evidence could not even be presented to a state appellate court, neither within the context of proportionality review, nor as part of the direct appeal of an individual death sentence. Some members of these state high courts expressed

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10 A controlled empirical study of death penalty decision making in four state high courts (California, Louisiana, New Jersey, and Ohio) from 1980-1988 found judicial voting behavior to be significantly related to several variables: age and seniority of the justice, party affiliation, institutional effects, state environmental characteristics and other variables. These states were chosen to maximize variation in institutional features and to provide regional representation. Melinda Gann Hall & Paul Brace, *Toward an Integrated Model of Judicial Voting Behavior*, 20 AM. POL. Q. 147 (1992).

11 *See The Appearance of Justice: Juries, Judges, and the Media Transcript*, 86 J. CRIM. L. & CRIMINOLOGY 1096 (1996) [hereinafter *Justice Transcript*]. Recent empirical research supports the proposition that in capital cases, judges in state supreme courts are influenced by the prospect of not being elected or retained:

> [U]nder restricted conditions, elected justices in state supreme courts adopt a representational posture. District-based elections, close margins of victory, approaching the end of a term, conditioning from previous representational service, and experience in seeking reelection influence liberal justices to join conservative majorities in death penalty cases in Texas, North Carolina, Louisiana, and Kentucky . . . Instead of public policy goals driving judicial decisions, basic self-interest may also be an important consideration to the state supreme court justice when rendering decisions.

Melinda Gann Hall, *Electoral Politics and Strategic Voting in State Supreme Courts*, 54 J. POL. 427, 442-43 (1992).

the view that the issue of racial and geographic disparities in capital case processing was not justiciable if these disparities were caused by prosecutorial discretion, since prosecutorial decision-making is not subject to judicial review. In several jurisdictions the question provoked dissension among the justices and conflict between the state high court and the state legislature. Other state high court justices believed these considerations went to the heart of proportionality review.

Were state supreme courts only interested in maintaining the "appearance of justice"[12] on the issue of racial and geographic disparities in capital sentencing?[13] After the United States Supreme Court held in *Pulley v. Harris*[14] that proportionality review was not mandated by federal constitutional principles, the majority of state high courts reduced proportionality review to a perfunctory exercise.[15] Perhaps state high courts were simply responding to more generalized political pressures to uphold death sentences.[16] When the United States Supreme Court declared in *McCleskey v. Kemp*[17] that evidence of statistically significant racial disparities based on the race of the victim was not a sufficient ground for declaring the Georgia capital punishment system unconstitutional, many state high courts used the federal case as an excuse not to consider constitutional challenges to capital punishment based on statistical evidence of racial or geographical disparities in any context, undermining the entire foundation of proportionality review as defined in *Gregg*.

Is the "appearance of justice" the same as the doing of justice?[18]

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12 *See generally* Peter David Blanck, *The Appearance of Justice Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 887 (1996).

13 Courts are especially sensitive to charges of racial bias when the decision makers in the criminal justice system are overwhelmingly white, and those receiving the "justice" are blacks or other racial minorities. *See Justice Transcript, supra* note 11, at 1113.

14 465 U.S. 37 (1984).

15 There are now 39 reenacting jurisdictions. Twenty incorporate some form of a proportionality review provision in their statute, and in three other states the state supreme court has imposed proportionality review. *See* Appendix A.

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> Nationally, there is a close correlation between the method of selection of justices of a state supreme court and that court's affirmance rate in death penalty appeals. For the period 1977-87, death penalty affirmance rates varied among state supreme courts according to manner of judicial selection as follows: executive appointment, 26.3%; uncontested retention elections, 55.3%; nonpartisan contested elections, 62.9%; partisan contested elections, 62.5%; legislative appointments, 63.7%.

Gerald F. Uelmen, *Elected Judiciary*, *in* ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 170, 171 (Leonard W. Levy et al. eds., Supp. I 1992).

17 481 U.S. 279 (1987).

18 Sometimes the credibility of the court can be damaged when a judge attempts to maintain the appearance of justice. Recently a furor was created at a New Jersey sentencing proceeding held after the penalty phase trial had resulted in a hung jury when a vic-

The just result in these cases may not be the reversal of death sentences, but rather the establishment and maintenance of systematic and meaningful proportionality review. The opinions show many state high courts to be troubled about their responsibilities, suspicious of statistical evidence, and uneasy about the reliability of the factual record documenting disparities. In such states, the opinions illustrate the tension created when a law-and-order appellate court, whose judges are often mindful of their own retention, is both presented with a clearly guilty defendant and evidence of system wide disparities with a possibly significant relationship to the race of the victim or defendant.[19]

The Supreme Court of New Jersey is the exception.[20] It has taken considerable initiative to implement proportionality review: the court appointed a Special Master, ordered the preparation of a data base to compile statistics for proportionality review, and allocated the time and resources necessary to develop the factual predicate, methodological tools and constitutional principles for proportionality review.[21] Nonetheless, to date no death sentence in New Jersey has been held to be disproportionate, even after subjection to this scrutiny.

Are state courts only going through the motions on proportionality review? The buck should have stopped at the state supreme court; in most states it did not. Is proportionality review now continued only to maintain the "appearance of justice"? This examination of how state high courts have actually implemented proportionality review will, hopefully, offer a perspective on these questions.

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tim's outraged family confronted an unrepentant defendant.

> Before sentencing Johnson [the defendant], Judge Hoffman chastised him as "the man who made car jacking a household word" and blasted him for committing crimes that caused suffering for the victim, her family and residents throughout the state. "The devastating impact that this crime had, not only on the people of this community, but also on the citizenry of this state, must be considered in imposing sentence," Hoffman said . . . . Hoffman loaded up maximum prison terms against Johnson by imposing separate, consecutive terms . . . Under the sentence, the defendant faces life plus 100 years in prison and cannot become eligible for parole until he has served 80 years behind bars.

Jim O'Neil, *Emotions Seethe as Shollar Killer Gets Life Plus, Curses Her Family*, STAR-LEDGER (Newark), May 9, 1995, at 1. *See also* comments of Judge Hoffman, *Justice Transcript*, *supra* note 11, at 1126-27.

19 *See* comments of Judges Yaskin and Cordell, *Justice Transcript*, *supra* note 11, at 1133-35.

20 *See infra* Part IV.C.

21 *See* State v. Marshall, 613 A.2d 1059, 1063 (N.J. 1992). The opinions in *Marshall* describe the history and development of the Proportionality Review Project in New Jersey. The Order appointing the Special Master delegated to the court's own expert the authority and responsibility to collect and analyze data on all homicide cases in the state since the reimposition of capital punishment. *See* Order, *reprinted in* Leigh B. Bienen et al., *The Reimposition of Capital Punishment: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 371 (1988).

This Article analyses how state courts have addressed issues of racial and geographical disparities in capital case processing in the context of proportionality review. Part II of the Article sets out the doctrinal foundation for proportionality review established by the United States Supreme Court in 1976. After *Gregg*, however, the United States Supreme Court shifted away from an analysis of state capital punishment systems, as systems. In a series of landmark ruling the United States Supreme Court indicated it would not overturn state capital punishment systems on the basis of aggregate challenges. Part II of this Article sets out the difference between an analysis of a capital case processing system and a challenge to an individual death sentence.

Part III examines how state high courts and legislatures redefined and interpreted the principles of proportionality when sharp doctrinal changes in the capital jurisprudence of the United States Supreme Court became apparent. Immediately after *Gregg* all capital punishment jurisdictions faced the same situation. The United States Supreme Court in 1976 had strongly endorsed the procedures and principle of proportionality review set out in Georgia, but no state actually done it. Neither state high courts nor state legislatures wanted to risk the prospect of having their capital case processing system or newly reenacted statute declared unconstitutional by the United States Supreme Court. Most reenacting states included a provision for proportionality review in their capital statute. The state high court typically took charge of implementing proportionality review after the legislature enacted the skeletal language of proportionality from *Gregg*.

Each state developed its own capital punishment jurisprudence over the course of the next two decades, against the backdrop of changing attitudes towards crime and race in the country as whole. This jurisprudence frequently included the state high court's response to empirical evidence of racial and geographical disparities in capital case processing within the state. State high courts responded with a great deal of variety to the presentation of these data and to being presented with quantitative evidence of disparities and disproportionality in capital case processing. Yet some state high courts did take the responsibility for preparing and maintaining a reliable factual record of capital case processing in the jurisdiction.

Table 1 provides the details of dates of reenactment, of the state's first affirmance of the statute and the date of first execution, and the time differences between these events, for each capital punishment state. In several states it was ten years between reenactment and the state high courts first affirmance of a death sentence. And there were

waves in the patterns of reenactment and executions.

Table 2 sets out the specifics on death row populations and executions, and some ratios between theses levels as of 1984, 1987 and 1996, again for each capital punishment state. Some surprising relationships are seen when states are compared with regard to these data. Some states reenacted early but have relatively small death row populations. Other states have large death row populations, but relatively few executions. Still other states reenacted early and are at a high level on all measures and have been so since reenactment. The ratio between a state's death row population and the number of executions in the state is interesting and surprising.

Part III continues the analysis of patterns observed in the jurisprudence of proportionality review in the individual states by setting out the principal ways in which states responded to the disappearing mandate of the United States Supreme Court: 1) by repealing their statutory requirement; or 2) by severely limiting the pool of cases or scope of review. In addition some states simply let the process atrophy through disuse.

Part IV describes proportionality review in practice in three very different states, illustrating the conflicts that arose between state legislatures and state high courts over proportionality review and the presentation of empirical evidence of racial and geographical disparities in capital case processing. Section A details the scenario to date in Connecticut, where issues of proportionality are still pending although the legislature repealed the statutory requirement. Section B sets out the unusual dialogue between the state legislature and the state high court in Nebraska.

Section C outlines in greater detail the considerable capital jurisprudence of the Supreme Court of New Jersey, and the conflict between the Supreme Court of New Jersey, the state legislature and the Attorney General of New Jersey. During the decade between reenactment and the court's first affirmance and proportionality review a body of state constitutional case law was developed under the leadership of the late Chief Justice Robert N. Wilentz.

Part V places the 1995 reenactment in New York within the context of the experience of other states, and especially New Jersey. The unique legislative history in New York and the timing of the New York reenactment resulted in proportionality review provisions unlike those in any other jurisdiction. These are the most specific provisions for proportionality review enacted by any state legislature. They include two provisions requiring the state high court to consider aggregate data on racial and geographic disparities. Even though no death

sentence has yet been imposed in New York, the expectation is that racial and jurisdictional disparities will be a principal issue. The New York Court of Appeals has anticipated this development by calling for expert advice on issues of data collection and analysis for the purpose of proportionality review.

Part VI concludes by noting that state high courts have been the principal, if somewhat reluctant, interpreters of constitutional doctrine regarding proportionality review since *Gregg*, for better or for worse. Strong differences have emerged across states and within a single state's jurisprudence during the twenty year period since *Gregg*, as the numbers on death row increased. Each state legislature and court has been its own conscience. As this decade comes to a close it is clear that issues of proportionality in the application of capital statutes will remain salient into the next century.

Appendix A sets out the details of reenactment and proportionality review for each capital state and describes how each state's institutions addressed constitutional challenges to racial and geographical disparities in capital case processing.

Appendix B describes the development of the initial factual foundation for proportionality review in New Jersey, beginning with an accurate and complete identification of all homicides in the jurisdiction. Appendix B includes basic tables describing the patterns and distribution of homicides in the state and the stages of capital case processing. The preparation of a comprehensive and reliable factual basis is a necessary predicate to addressing the constitutional dimensions of proportionality in any jurisdiction. The identification of discrete decision making stages in the state's capital case processing system is the second step in the preparation of a database for proportionality review. Appendix B describes the beginning of this process in New Jersey. Without a solid factual foundation constitutional interpretation is an abstraction.

Appendix C is comprised of a memo by the Supreme Court of New Jersey's quantitative expert to the Administrative Office of the Courts in New Jersey detailing the finding of statistically significant race effects, including the models, in capital case processing in New Jersey and a subsequent Order in response to these data, dated October 22, 1996, of the Supreme Court of New Jersey in *State v. Donald Loftin*, regarding proportionality review.

## II. The Foundation for Proportionality Review in Capital Cases

### A. Taking the Supreme Court at Its Word

When the United States Supreme Court upheld the new capital punishment statutes in *Gregg v. Georgia*,[22] it did so on the premise that the procedural safeguards introduced in capital statutes after 1972 addressed the fundamental inequities which led the Court to declare all state capital punishment schemes unconstitutional in *Furman v. Georgia*.[23] While there was no majority opinion in *Furman*, there was a consensus that the imposition of capital punishment under then-existing statutory schemes violated fundamental rights guaranteed by the United States Constitution.[24] The perceived infirmity of the then existing capital statutes was that they provided capital sentencers with unbridled discretion, producing death sentencing patterns that could only be described as "wanton" or "freakish."[25]

A cornerstone of the *Furman* holding was that the death penalty is inflicted in a trivial number of the cases in which it is legally available.[26] There was, therefore, no meaningful basis for distinguishing the cases of those few who were executed from the many who were not.[27] This recognition became the bedrock of proportionality re-

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22 428 U.S. 153 (1976).

23 408 U.S. 238 (1972). These opinions have generated a very large literature. *See* Michael L. Radelet & Margaret Vandiver, Capital Punishment in America: An Annotated Bibliography (1988) (listing 971 books and articles as of June 1, 1988). *E.g.*, Robert Weisberg, *Deregulating Death*, 1983 Sup. Ct. Rev. 305 (1984). Commentary has not been confined to professional legal publications. Economists, criminologists, systems analysts, and other social scientists have also studied the relationships between patterns of homicide, demographic variables, and the imposition of capital punishment. *See, e.g.*, Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 Am. Econ. Rev. 397 (1975); Lawrence R. Klein et al., *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, *in* National Research Council, Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates 336-60 (Alfred Blumstein et al. eds., 1978); and James A. Fox and Michael L. Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect on the Death Penalty*, 23 Loy. L.A. L. Rev. 29 (1989).

24 This article will not address the reimposition of capital punishment on the federal level. However, the possibility of a relatively large number of federal capital prosecutions allows for arguments of disproportionality in the application of the federal death penalty, especially if the disparities are based upon regional differences in prosecutorial charging practices and result in racial differences.

25 *Furman*, 408 U.S. at 240-57 (Douglas, J., concurring); *id.* at 306-10 (Stewart, J., concurring); *id.* at 310-14 (White, J., concurring).

26 The relative infrequency with which the death penalty is imposed is such 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." *Furman*, 408 U.S. at 313 (White, J., concurring).

27 New Jersey, for example, has approximately 500 homicides a year. In the immediate post reenactment period there were never more than 50 capital trials in a year, and never more than 10 death sentences imposed. *See infra* Appendix B tbls. B1, B17. Even Texas, the state with the largest number of executions, executes a small proportion of those sen-

view, a new principle arising from the principles expressed in *Furman*. It was the number of cases which *could have* resulted in a death sentence but did not, in proportion to the number of death sentences actually imposed, which forced the Court to conclude that execution was arbitrary and fundamentally unjust.[28]

So that death sentences would no longer be "cruel and unusual in the same way that being struck by lightning is cruel and unusual,"[29] the revised capital punishment statutes which followed *Gregg* introduced a structure of aggravating and mitigating factors intended to guide the discretion of the sentencer. In *Gregg* the Court held that the infirmities of the former capital punishment schemes had been addressed by Georgia's revised statute.[30] The Georgia statute restructured the decision to impose the death sentence by requiring the jury to make specific factual findings as to the presence or absence of statutorily defined aggravating and mitigating factors.[31]

The caprice and arbitrariness of the former system would also be prevented by multi-layered, expanded appellate review, including proportionality review. Proportionality review created the framework for a comprehensive analysis of the state capital punishment system. The Georgia statute required the state's highest court to conduct proportionality review by examining the operation of the capital punishment system as a whole, adding to the refashioned death penalty decisionmaking a new system for comparing the death sentence on appeal with similar cases throughout the state. Heightened judicial scrutiny at the appellate level, with the inclusion of proportionality review, has since been viewed by some justices as fundamental to the constitution-

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tenced to death and a smaller proportion of those convicted of capital murder. *See* tbl. 1.

28 The holding in *Furman* was grounded in the Cruel and Unusual Punishment Clause of the Eighth Amendment to the United States Constitution, so *Furman* did not frame the constitutional principle in terms of proportionality. *See, e.g., Furman*, 408 U.S. at 240.

29 *Furman*, 408 U.S. at 309 (Stewart, J., concurring).

30 Justice White's expectation was that the statutory enumeration of aggravating and mitigating circumstances for the jurors would sufficiently guide their discretion so that it could "no longer be said that the penalty [of death] is being imposed wantonly and freakishly . . ." Gregg v. Georgia, 428 U.S. 153, 222 (1976) (White, J., concurring). The decision making of post-*Gregg* capital jurors is the subject of an interdisciplinary study involving personal interviews with penalty phase jurors in fourteen states. *See* William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1 (1987-88); William J. Bowers, Capital Jury Project, Models of Decision Making Among Sentencing Jurors, NSF SES-9013252 (National Science Foundation Law and Social Science Program 1993). The research findings of this Project have been reported in Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1 (1993); William Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 LAW & SOC'Y REV. 157, 169-70 (1993).

31 GA. CODE ANN. § 27-2534.1 (1973).

ality of the death penalty itself.[32]

*Gregg* and its companion cases upholding the revised capital statutes sent a clear signal to the state legislatures: enact a capital punishment statute resembling the Georgia statute, including a provision for proportionality review, and that statue will be upheld by the Court. Eager to reenact death penalty provisions, state legislatures took the Supreme Court at what seemed to be their word, and read *Gregg* as a how-to manual for constructing a constitutional capital punishment statute.[33] Over thirty states almost immediately enacted proportionality review procedures similar to those upheld in *Gregg*.[34] Although the United States Supreme Court declared in 1984 that proportionality review was not mandated under the constitution, twenty-two states continue to require some form of proportionality review as part of their appellate review of capital cases.[35]

Under the post-*Gregg* scheme, only some of the circumstances of the offense and a very limited set of defendant characteristics may be identified as statutory aggravating factors justifying a capital sentence. Non-statutory or extra-legal factors are, in principle, irrelevant. Disparities based upon the race of the defendant or victim, or county boundaries of prosecutorial jurisdiction are prime examples of extra-legal factors which are theoretically impermissible under *Gregg*.[36] If a statute is proven to place significant reliance upon an extra-legal factor, then the constitutionality of the entire system is questionable.[37]

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32 "[S]ome form of a meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges . . . meaningful appellate review is an indispensable component of the Court's determination that the State's capital sentencing procedure is valid." Pulley v. Harris, 465 U.S. 37, 59 (1984) (Stevens, J., concurring).

33 The majority of the 12 states whose mandatory capital punishment schemes were declared unconstitutional in 1976 responded by enacting statutes similar to the Georgia statute upheld in *Gregg*. For example, the post-*Gregg* South Carolina statute includes a proportionality review provision virtually identical to the Georgia provision. S.C. CODE ANN. § 16-3-25 (Law. Co-op. 1985); State v. Shaw, 255 S.E.2d 799, 803-04 (1979) ("The statutory death penalty complex adopted by the General Assembly in 1977 [S.C. CODE ANN. § 16-3-25] is constitutionally indistinguishable from the statutory complex approved by the United States Supreme Court in *Gregg*.").

34 *See* 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 30 States now require, either by statute or judicial decision, some form of comparative proportionality review." (citation omitted)).

35 *Pulley*, 465 U.S. at 37, held that proportionality review by the state high court was not required by the federal constitution. Arguments regarding proportionality are important in clemency proceedings. *See* Hugo Adam Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 255 (1990-91).

36 *See infra* Appendix B.

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[B]oth "legal" and "extra-legal" factors can influence sentencing decisions concerning the death penalty. Legal factors reflect legally relevant influences or "official-norma-

B. DIFFERENT APPROACHES: THE ANALYSIS OF A CAPITAL CASE SYSTEM VS. THE REVIEW OF A SINGLE DEATH SENTENCE

It is now almost twenty five years since *Furman* and over twenty years since *Gregg*. In addition to ideological changes at the United States Supreme Court, much has changed in the state and federal courts and in the state legislatures. Since *Furman*, two methods of analyzing capital case processing systems have become clear: one views the imposition of a death sentence as the outcome of a *decision-making system*, the other regards the imposition of the death sentence as a single isolated sentencing event.[38] The distinction between these two approaches is not merely whether or not one agrees with the proposition that 'death is different,' and consequently capital cases require more rigorous or heightened appellate review.

A systems approach begins with the collection of information on all potential capital cases to analyze aggregate data on intake and exit from the capital case processing system as a whole, regardless of whether that system is viewed as fair. Systems analysis identifies discrete, decision-making stages within capital case processing, and analyzes the characteristics of cases and defendants and how they move through the system at each identified stage.[39]

The case specific approach, on the other hand, sees the imposition of the death penalty upon a particular defendant simply as a sentence imposed for a specific crime; the decision of a particular jury at a unique time and place. Under this approach, each death sentence is an independent event, an idiosyncratic and essentially unpredictable individual result. This isolated decision-making event is seen as unrelated to any other decision-making event in that case or any other. According to this approach, no systems analysis can ever ac-

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tive descriptions of the criminal justice system," such as the offender's prior criminal record, statutory aggravating or mitigating characteristics, and official charges. Extra-legal factors "refer to perceived characteristics of the offender that are legally irrelevant to the imposition of sentence," such as race, gender, and socio-economic status . . . .

Bienen et al., *supra* note 21, at 101 (citing John Hagan, *Extra-Legal Attributes and Criminal Sentencing: An Assessment of a Sociological Viewpoint*, 8 LAW & SOC'Y REV. 357, 358 (1974)). The relevance and relationship of the race of the victim and the race of the defendant has been a particularly controversial. *See* David C. Baldus et al., *Reflections on the 'Inevitability' of Racial Discrimination in Capital Sentencing and the 'Impossibility' of Its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359 (1994).

38 The U.S. General Accounting Office emphasizes this distinction in their evaluation of empirical studies of state capital punishment systems. U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 3-5 (1990) [hereinafter 1990 GAO REPORT]. Studies which examine a system under controlled conditions are empirically sound. *Id.*

39 *See* Bienen et al., *supra* note 21, at 332 (diagramming stages in capital case processing). *See infra* Appendix B for a typical systems approach to capital case processing.

count for the individual characteristics of any case, and attempts to impose aggregate analysis or quantitative uniformity are irrelevant, distorting, futile, and, worse, dehumanizing.[40]

In *Furman* and *Coker*, the United States Supreme Court assessed an entire *system* for imposing capital punishment within a single state, although the opinions in *Furman* did not use the terminology of systems analysis. In *Furman* the court declared the Georgia death penalty unconstitutional because of the way the Georgia capital case processing system, and by analogy the systems in all states, operated as a whole. The remedy to the constitutional infirmity identified in *Furman* was therefore the abandonment of the previous *system* for imposing capital punishment in all of the states.[41]

The *Gregg* Court, by contrast, focused upon specific statutory remedies addressed to jury decision-making during the penalty phase of a capital trial.[42] *Gregg*'s emphasis on jurors was a shift from *Furman*'s focus on the capital case processing system as an institution.[43] How-

[40] This view ignores the fact that the law routinely quantifies human suffering, degradation and grief in the civil context with similar results. Tort judgments that put a dollar value on a victim's loss, suffering, and grief are acceptable in our culture. The tort law framework accounts for intentionality and malice, increasing the amount of money damages awarded when the intention to cause suffering or injury has been proved. Standard risk analysis is routinely applied in the prediction of accidents and projection of liability in situations involving loss of life such as airplane accidents and equipment failures, and in analyzing other social advancements such as advancement in education. *See* Feinberg & Mason, *Identification and Estimation of Age-Period-Cohort Models in the Analysis of Discrete Archival Data*, SOCIOLOGICAL METHODOLOGY, 1979 (K. Schuessler ed., 1978).

[41] In 1996 state high courts are typically the administrative center for the entire state's court system, with the responsibility for coordinating and reviewing case loads, dispositions and the allocation of judges and other staff, following the leadership of the federal courts. *See, e.g.*, SCOTT GILBERT & PATRICIA LOMBARD, FEDERAL JUDICIAL CENTER, A REPORT TO THE CONFERENCE OF CHIEF CIRCUIT JUDGES AND CIRCUIT EXECUTIVES: AN ANALYSIS OF DISPOSITION TIMES FOR CAPITAL HABEAS CORPUS PETITIONS (1995) (on file at State Documents Section, Northwestern University School of Law Library); DAVID RAUMA & DONNA STEINSTRA, FEDERAL JUDICIAL CENTER, THE CIVIL JUSTICE REFORM ACT EXPENSE AND DAILY PRODUCTION PLANS: A SOURCEBOOK 1995 (1995). Ironically the United States Supreme Court, the same court which rejected systems analysis in the context of capital case processing accepted the reliability of regression analysis as an adequate method of statistical proof in employment cases in *Bazemore v. Friday*, 478 U. S. 385 (1986). *See* David C. Baldus et al., *Law and Statistics in Conflict: Reflections on* McCleskey v. Kemp, *in* HANDBOOK OF PSYCHOLOGY AND LAW 251-71 (Dorothy K. Kagehiro & William S. Laufer eds., 1992).

[42] "The Court has said that 'one of the most important functions any jury can perform in making . . . a selection (between life imprisonment and death for a defendant convicted in a capital case) is to maintain a link between contemporary community values and the penal system." Gregg v. Georgia, 428 U.S. 153, 183 (1976) (opinion of Stewart, J.) (citing Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968)).

[43] *Compare Gregg*, 428 U.S. at 153, *with* Furman v. Georgia, 408 U.S. 238 (1972). The history of the Supreme Court of New Jersey's initial ruling on the state's death penalty statute offers an example of how state high courts resented and resisted rulings from the United States Supreme Court on the constitutionality of state capital punishment schemes. Prior to the decision in *Furman* there were intimations of what was to come. In *State v.*

ever, the court's emphasis in *Gregg* upon restructuring the decisions of jurors at the penalty phase of a capital trial[44] implied not only that jury decisions were autonomous and separable, but also that jurors might be the only actors whose decisions could be directly addressed by federal judicial fiat without violating separation of powers doctrines.[45] For example, separating the guilt and penalty phases of the capital trial and insisting on the specification of statutory aggravating and mitigating factors were legislative reforms addressed to jury deci-

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*Forcella*, 245 A. 2d 181 (N.J. 1968) the Supreme Court of New Jersey held that the system of allowing defendants to plead *non vult* and avoid the death sentence did not violate the United States Supreme Court opinion in *United States v. Jackson*, 390 U.S. 570 (1968). After keeping the appeal for three years, the United States Supreme Court reversed the holding in a memorandum opinion ordering the New Jersey Supreme Court to set aside the capital punishment system in New Jersey at the time. Funicello v. New Jersey, 403 U.S. 948 (1971). In the case overturning the death penalty sentencing scheme in New Jersey the then Chief Justice wrote an eloquent concurring opinion outlining the tensions between federal and state judicial authorities on matters of constitutional law:

> The case before us dramatizes the failure to provide direction and suggests the Federal and State Judiciaries cannot meet their responsibilities unless some rules are changed . . . . My point is the doctrines of the Federal Supreme Court have led to an impossible situation . . . . I believe the case method should be replaced by a rule-making process in which the Federal Supreme Court can meet regularly with representatives of State Supreme Courts, to become aware of their problems, to benefit from their experience, and to adopt rules of prospective application . . . .

State v. Funicello, 286 A.2d 55, 60, 62, 67-68 (N.J. 1972) (Weintraub, C.J., concurring).

[44] *Gregg*, 428 U.S at 196-98.

[45] Ironically, however, the jury only decides questions of fact. The other decision makers in a capital case processing system—prosecutors and judges—have the responsibility for interpreting law, which makes them a more logical focus of appellate review since they would be responsible for interpreting the new rules imposed upon juror decision-making. The strictures imposed upon jury decision-making discussed in *Gregg* needed first to be implemented by legislatures and then interpreted by prosecutors and appellate courts. For a graphic representation of the interactive relationship between trial judges and jurors, see Peter David Blanck, *What Empirical Research Tells Us: Studying Judges' and Juries' Behavior*, 40 AM. U. L. REV. 775, 783 fig.1 (1991).

Moreover, the Supreme Court generally addresses errors in legal interpretation. Factual decisions by jurors are usually thought to be beyond the scope of appellate review. The legislature's decision to structure the decision-making of jurors by defining statutory aggravating and mitigating factors could be characterized as no more than offering guidance to jurors on how to sort the facts. On the other hand, the decisions of prosecutors and the decisions of judges are based on professional judgment and interpretations of law, an appellate court's traditional province.

In many state jurisdictions the issue of separation of powers, and whether the state high court could regulate the exercise of prosecutorial discretion was controversial. For example, the Attorney General of New Jersey argued that it would violate the doctrine of separation of powers for the New Jersey Supreme Court to review prosecutorial decision making. The New Jersey Supreme Court rejected this argument, first in *State v. Koedatich*, 548 A.2d. 939, 955 (1988), and then in *State v. Marshall*, 613 A.2d. 1059, 1070-73 (1992) (*Marshall II*). In response to *Koedatich* the New Jersey County Prosecutors Association adopted The Prosecutor's Guidelines for Designation of Homicide Cases for Capital Prosecutions, *reprinted in* Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: Felony Murder Cases*, 54 ALB. L. REV. 709, 791-93 (1990).

sion making, although these changes also required prosecutors, defense attorneys, and judges to alter the way they structured a case for the jury. Because the focus was on jurors, however, these reforms could never be challenged on the basis of separation of powers doctrine.

Although one purpose of proportionality review was to correct aberrant decisions of jurors, proportionality review was not aimed at restructuring jury decision-making. The repeated references to jurors made in *Gregg* may have been rhetorical.[46] The court's focus upon jury decision-making at the penalty stage, however, implied that the jury or judge's life/death vote at sentencing was the principal locus of arbitrariness.[47] Proportionality review was rather designed to institute a different kind of constitutional protection.

The systemic discrimination which proportionality review is designed to address occurs independent of the decision making of possibly biased individual jurors. The racial imbalances occurring within and across capital punishment systems are strongly related to prosecutorial discretion, the political factors influencing the selection and retention of prosecutors and judges, and racial stereotyping. These system wide effects have been found to be especially pronounced in the middle range of capital cases.[48] These are the cases which might be capital in one county or state and not capital in another county or state. These differences partly explain the large discrepancies in death row populations between states.[49] The theoretical or doctrinal foundations for protection from racial discrimination in the application of capital case processing systems are the same principles which find a constitutional infirmity in system wide discrimination in employment, jury selection, or the entitlement to government benefits.[50] The protection from being punished by a racially discriminatory sentencing structure is grounded in the eighth amendment and in the requirements of due process.[51]

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46 The emphasis upon jury decision making in *Gregg* may be partly explained by the fact that systems analysis at that time was not routinely applied to decisions within the legal sector.

47 *Gregg's* emphasis upon juror decision making strongly influenced the direction of social science research. *See, e.g.*, William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043 (1995); Symposium, *The Capital Jury Project*, 70 IND. L.J. 1033 (1995).

48 For a graphic illustration, see Baldus et al., *supra* note 41, at 261, fig. 13.3.

49 *See infra* Table 1.

50 *See, e.g.*, Hazelwood School District v. United States, 433 U.S. 299 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

51 This is how the majority opinion in *Marshal II* explained the principle:

> The best way to understand the concept of proportionality review is to understand its origin

Although the jury's decision to impose the death sentence is a discrete, dichotomous event at the conclusion of the capital trial, the jury's decision to impose the death sentence is not isolated. Nor is the decision-making of jurors the end of a linear progression. After *Gregg*, the jury's decision to impose the death penalty is preceded by specific factual findings of statutory aggravating and mitigating factors which the jury must weigh or balance. A juror's decision to impose the death sentence is therefore the end result of a dynamic, interactive process imbedded in strata of procedural and substantive law. Long before a juror addresses the evidence at penalty phase, what the juror confronts has been structured by the rules, procedures, and discretionary decisions made by police, prosecutors, defense attorneys, administrators and judges at every step of the way.

The process begins well before the jury is convened, long before the judge's instructions at jury selection. It encompasses the legal criteria for jury selection and the admissibility of evidence, and is inextricably bound up with the legal system's restraints and sequencing imposed upon the parade of testimony and evidence. Why then, did the *Gregg* court choose to focus on this end result?

Perhaps the jurors' decision to impose the death sentence was the segment of the decision-making process which was perceived to be

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. . . .

. . . . Justice Stewart's plurality opinion in Gregg cited two features of Georgia's scheme that would guide and channel the exercise of sentencing discretion. Georgia's statute had a bifurcated procedure for deciding a defendant's guilt first and sentencing later, and also provided for the further safeguarding of meaningful appellate review of every death sentence

. . . .

. . . . Simply stated, the substantive or offense oriented proportionality review looks to whether the punishment of death is excessive for a particular offense, while procedural or offender-oriented review examines whether, when compared to factually similar cases involving the same offense, a defendant's death sentence is excessive. The kind of proportionality review that asks whether the death penalty is "generally" imposed is an Eighth Amendment inquiry into substantive proportionality-does the punishment fit the crime?

. . . .

. . . That type of substantive review is best perceived in the context of cases such as *Coker v. Georgia* and *Enmund v. Florida*

. . . .

. . . Another approach to proportionality review is to 'inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime . . . . proportionality review, "[a]lthough clearly no panacea, . . . often serves to identify the most extreme examples of proportionality among similarly situated defendants." That, we believe, is an acceptable understanding of the intention of the framers of our Act—that statutory proportionality review should seek to insure that the death penalty is being administered in a rational, non-arbitrary, and even-handed manner, fairly and with reasonable consistency. That review serves as a means through which to monitor the imposition of death sentences and thereby prevent any impermissible discrimination in imposing the death penalty.

State v. Marshall, 613 A.2d 1059, 1068-1070 (N.J. 1992) (citations omitted).

the most amenable to reform from above.[52] Or, the United States Supreme Court may have concluded that it was politically more acceptable to frame its decision in terms of jury decision-making, rather than to attempt to regulate the behavior of prosecutors or judges.[53] There could be no objection from the other institutionalized decision makers to rules aimed at restructuring the decision-making of jurors. On the other hand, an opinion which attempted to influence the discretionary decision-making of thousands of local prosecutors or judges in over thirty autonomous and very different legal jurisdictions of states could be controversial, unacceptable, or simply ignored.

### C. *PULLEY* AND *MCCLESKEY*: THE SUPREME COURT STOPS MONITORING CAPITAL CASE PROCESSING SYSTEMS

After *Gregg* the Court continued its retreat from *Furman's* emphasis on examining state capital punishment systems. *Pulley v. Harris*[54] in 1984 and *McCleskey v. Kemp*[55] in 1987 both rejected challenges to death sentences based upon a systems approach to capital case processing.

*Pulley* challenged the capital case processing system in California because it did not have a statutory requirement of proportionality review. The question was whether proportionality review of the state's entire system for imposing capital punishment was required at all.[56]

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52 For some jurors' own descriptions of their decision making processes and responses in capital cases, see Leigh B. Bienen, *Helping Jurors Out: Post-Verdict Debriefing for Jurors in Emotionally Disturbing Trials*, 68 IND. L. J. 1333, 1346-48 (1993). *See also* William J. Bowers, Capital Jury Project, Models of Decision Making among Sentencing Jurors, NSF SES-9013252 (National Science Foundation and Social Science Program 1993); William J. Bowers et al., In Their Own Words: How Capital Jurors Explain Their Life or Death Sentencing Decisions (Nov. 7, 1992) (Capital Jury Project Working Paper No. 7); William J. Bowers et al., In Their Own Words: How Capital Jurors Explain Their Life or Death Sentencing Decisions (May 26, 1992) (Capital Jury Project Working Paper No. 6); Marla Sandys, The Life or Death Decisions of Capital Jurors: Preliminary Findings from Kentucky (Nov. 27, 1991) (paper presented at the Annual Meeting of the American Society of Criminology, San Francisco, Cal.). A jury's decision to sentence a defendant to death is not only a determination of fact, although it may have a factual predicate in the finding of guilt and the finding of the existence of statutory aggravating and mitigating factors.

53 *See* Linda A. Foley & Richard S. Powell, *The Discretion of Prosecutors, Judges and Juries in Capital Cases*, CRIM. JUST. REV., Fall 1982, at 16, 19-22 (finding, post-*Furman*, that extra-legal factors continued to influence prosecutors and judges in Florida capital cases).

54 465 U.S. 37 (1984). *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 22-24 (1990) (outlining state legislative responses to *Furman*). Note that several state legislatures reenacted capital statutes almost immediately after *Furman* and before *Gregg*. *See, e.g.*, the date of reenactment in Florida, Arkansas, Indiana, Oklahoma, Utah, *infra* tbl.1.

55 481 U.S. 279 (1987).

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> The issue in this case, therefore, is whether the Eighth Amendment . . . requires a state appellate court, before it affirms a death sentence, to compare the sentence in

Thus, *Pulley* did not address the sufficiency or adequacy of an established proportionality review process or a statistical methodology.[57] The litigation had the potential of forcing states which did not conduct proportionality review to adopt it. Presumably the Court would have set out minimal proportionality review standards for the states if it had required such review. Instead, the Court held that proportionality review was not constitutionally required.[58]

*Pulley* was decided at a time when some state supreme courts were expanding their recognition of rights under state constitutional provisions.[59] When *Pulley* declared that the federal constitution did not require proportionality review, the state supreme courts had the alternative of shifting the requirement for proportionality review to analogous provisions of the state constitution. To date only the New Jersey Supreme Court has taken an unequivocal position that proportionality review and the systematic analysis of capital case processing is mandated by the state constitution.[60]

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the case before it with the penalties imposed in similar cases if requested to do so by the prisoner . . . . In some States, such as Florida, the appellate court performs proportionality review despite the absence of a statutory requirement; in others, such as California and Texas, it does not.

*Pulley*, 465 U.S. at 43-44.

[57] If the defendant had *not* been sentenced to death in California an appellate court would have been required to undertake proportionality review, but there was no such requirement for a death sentence.

Ironically, although the California death penalty statute reviewed in this case does not require comparative proportionality review, most other felony sentences in the State are subject to a mandatory, and highly complex, system of comparative review. California therefore accords greater protection to felons who are imprisoned than to felons who may be executed.

*Id.* at 73 n.7 (Brennan, J., dissenting) (citation omitted).

[58] *Id.* at 44-54. The length of time to final decision in Pulley may have contributed to its boomerang effect. The defendant was initially arrested on July 5, 1978. By the time the final decision was handed down on July 23, 1984, 6 years had passed and the mood of the Court had changed.

The dissent noted that the states could continue to require proportionality review under their statutory provisions or as a matter of state constitutional law.

Indeed, despite the Court's insistence that such review is not compelled by the Federal Constitution, over 30 states now require, either by statute or judicial decision, some form of comparative proportionality review before any death sentence may be carried out. By itself, this should weigh heavily on the side of requiring such appellate review.

*Id.* at 71 (Brennan, J., dissenting) (footnote omitted).

[59] State constitutions became an important independent source of constitutional guarantees in the 1980's and will continue to be so in the 1990's. *See, e.g.*, Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983). State constitutional provisions have been particularly important in the capital jurisprudence of New Jersey. *See, e.g.*, State v. Ramseur, 524 A.2d 188, 314 (N.J. 1987) (Handler, J., dissenting).

[60] "Whether in the exercise of statutory proportionality review or our constitutional duty to assure the equal protection and due process of law, we cannot escape the responsibility to review any effects of race in capital sentencing." State v. Marshall, 613 A.2d. 1059, 1112 (1992) (*Marshall II*) (citing N.J. CONST. art. VI, § 5(c)). In *Marshall II*, the court

Like *Pulley*, *McCleskey v. Kemp*[61] was a challenge to Georgia's entire system of imposing capital punishment, and by implication a challenge not only to the Georgia scheme but to every analogous state system developed after *Gregg*. The claim in *McCleskey* was that a pattern of racial discrimination based upon the race of the victim had been demonstrated in a statistical study of the state's capital punishment system.[62] If *McCleskey* had declared the Georgia capital punishment system unconstitutional on the basis of the statistical evidence presented, every state system would have been subject to question because of inherent discrepancies in capital case processing. Even in states with few minorities, group differences exist between rural and urban jurisdictions.[63]

But *McCleskey* did not involve an explicit challenge based upon Georgia's proportionality review procedures or to Georgia's method for conducting proportionality review.[64] Rather, the challenge to Warren McCleskey's death sentence, was based upon principles closely related to the doctrinal foundations of proportionality.[65] The argument was that Warren McCleskey's death sentence was unconstitutional because similarly situated defendants did not receive the death sentence *and* that there was statistical evidence that the imposition of the death sentence in Georgia was influenced by the extralegal factor of race, in this case the race of the victim.

The challenge to the defendant's death sentence in *McCleskey* was based upon a comprehensive, system wide study of the imposition of the death penalty in Georgia over a period of years.[66] In *McCleskey* the

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explicitly said that it was not following *McCleskey*. *Id.* at 1109-13.

61 481 U.S. 279 (1987).

62 *See* Baldus et al., *supra* note 37, at 364-76. The decision has generated considerable comment. *See, e.g.*, Robert A. Burt, *Disorder in the Court: The Death Penalty and the Constitution*, 85 MICH. L. REV. 1741 (1987); Randall L. Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 HARV. L. REV. 1388 (1988); David J. Macher, Note, *McCleskey v. Kemp: Race, Statistics and the Death Penalty*, 15 W. ST. U. L. REV. 179 (1987).

63 *See* Michael L. Radelet & Glenn L. Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991); Michael L. Radelet & Glenn L. Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985).

64 Warren McCleskey's death sentence had been subjected to the mandatory provisions of the Georgia proportionality review statute and been upheld as proportionate by the Georgia Supreme Court.

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> The second type of error in capital punishment occurs when we execute someone whose crime does not seem so aggravated when compared to those of many who escaped the death penalty. It is in this kind of case—which is extremely common—that we must worry whether, first, we have designed procedures which are appropriate to the decision between life and death and, second, whether we have followed those procedures.

John Kaplan, *The Problem of Capital Punishment*, 1983 ILL. L. REV. 555, 576 (1983).

66 The research conducted by Baldus and his colleagues on the Georgia capital case

defense presented statistical evidence that certain defendants who killed whites were significantly more likely to be sentenced to death than similar defendants whose victims were not white, and that these racial differences remained statistically significant when other possibly explanatory variables were controlled.[67] Even when confronted with this evidence, the Court did not reverse McCleskey's death sentence.

The immediately apparent implication of *McCleskey* was that the United States Supreme Court would not set aside a death sentence or overturn a state capital punishment system on the basis of an empirical analysis of a state system presented in the context of proportionality review. *McCleskey* held that such statistical evidence was irrelevant to the validity of the individual death sentence on appeal, unless it could be demonstrated that there had been a specific intent to discriminate against this particular defendant on the part of some identified individual decision maker.[68] Consequently, *McCleskey* was

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processing system is set out in DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990) and discussed in Bienen et al., *supra* note 21, at 147-56.

> The most recent study of the Georgia system by Baldus and his colleagues represents an extremely thorough and sophisticated perspective on the death sentencing process that both supports and builds upon previous research conducted elsewhere by the authors. Moreover, the authors have addressed, and in many cases denounced, in detail the methodological criticisms of their study that were raised in McCleskey v. Zant [580 F. Supp. 338 (N.D. Ga. 1984) (McCleskey I)] and McCleskey v. Kemp [753 F.2d. 877 (11th Cir. 1985) (McCleskey II)] . . . . Indeed, the Baldus study simply replicates with a more sophisticated methodology the result found in the numerous prior studies summarized here. Race is not a neutral variable. It may be as significant as the presence of an additional statutory aggravating factor.

*Id.* at 157 (footnotes omitted).

67 The 1990 book by Professor Baldus and his colleagues sets out in detail the lower court history of *McCleskey* and the research methodology employed in the study which provided the factual basis for the defendant's legal arguments. *See* BALDUS ET AL., *supra* note 54, at Ch. 4, 6, and 10.

68 However, Professor Baldus points out: "Social science research is relevant to death penalty decision-making because these institutions purport to be rational, principled, and guided by facts. And when the facts are in dispute, the basic idea is that the side with the better evidence should carry the day." David C. Baldus, *Keynote Address: The Death Penalty Dialogue Between Law and Social Science*, 70 IND. L.J. 1033 (1995). Under the *McCleskey* standard, what would be necessary to demonstrate such an intent has been the subject of much speculation by persons representing capital defendants. Would first person statements by prosecutors or legislators be necessary? Would the prosecutor, judge, or juror, an alleged racist, have to make statements in a public forum, such as a newspaper? Some of the most avowedly racist legislation in the history of the country would not meet the criteria set out in *McCleskey*, e.g., laws establishing literacy requirements for voting and a poll tax, which were race neutral on their face, but whose purpose was to disenfranchise blacks and maintain the political power of white minorities. Nor would explicitly racist provisions such as the exclusion of blacks from jury service meet the *McCleskey* criteria.

The United States Supreme Court's growing impatience with arguments based upon racial discrimination in capital sentencing was observable prior to 1987 and unmistakable after *McCleskey*, although many respected academic studies consistently document the so-called "race of victim" effects in capital case processing across jurisdictions. *See, e.g.*,

interpreted by most state high courts as negating the federal constitutional underpinnings for state proportionality review.[69]

Read together, *McCleskey*[70] and *Pulley*[71] sent a message to the states which was crystal clear: the Supreme Court was no longer willing to reverse individual death sentences or declare capital punishment statutes unconstitutional in response to evidence of arbitrariness or caprice, bias or systematic racial discrimination within a particular capital case processing system. *McCleskey* foreclosed further arguments to the Supreme Court based upon a statistical showing of a race of victim effect in the overall functioning of a capital case processing system, whether or not in the context of proportionality review. The execution of Warren McCleskey himself in 1991 as well as subsequent executions after the Supreme Court summarily denied relief, underscored the court's new intransigence.

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BALDUS ET AL., *supra* note 54 (Georgia); BARRY F. NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987) (North Carolina); Steven D. Arkin, Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-*Furman *Murder Cases in Dade County, Florida, 1973-1976,* 33 STAN. L. REV. 75 (1980); Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence,* 18 U.C. DAVIS L. REV. 1327 (1985); William J. Bowers, *The Pervasiveness and Arbitrariness of Post-*Furman *Capital Statutes,* 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983) (Florida and Georgia); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes,* 26 CRIME & DELINQ. 563 (1980) (Florida, Georgia, Texas and Ohio); Eckland-Olsen, *Structural Discretion, Racial Bias and the Death Penalty: The First Decade after* Furman *in Texas,* 60 SOC. SCI. Q. 853 (1988); Linda A. Foley, *Florida After the* Furman *Decision: The Effect of Extralegal Factors on the Processing of Capital Offense Cases,* 5 BEHAV. SCI. & L. 457 (1987); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization,* 37 STAN. L. REV. 27 (1984) (Florida, Georgia, and Illinois); Elizabeth Lynch Murphy, *Application of the Death Penalty in Cook County,* 73 ILL. B.J. 90 (1984) (Illinois); Raymond Paternoseter, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Biased Racial Discrimination,* 18 LAW & SOC'Y REV. 437 (1984) (South Carolina); Michael L. Radelet, *Racial Characteristics and the Imposition of the Death Penalty,* 46 AM. SOC. REV. 918 (1981) (Florida); M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana,* 15 J. CRIM. JUST. 279 (1987); Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-*Gregg *Period,* 79 J. CRIM. L. & CRIMINOLOGY 483 (1988); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience,* 95 HARV. L. REV. 456 (1981); Margaret Fae Klemm, The Determinants of Capital Sentencing in Louisiana: 1979-84 (1986) (unpublished Ph.D. dissertation, University of New Orleans) (on file with the University of New Orleans library). A recent review of the research literature concludes that pervasive race discrimination effects are amply documented in reliable empirical studies. *See* 1990 GAO REPORT, *supra* note 38, at 5.

69 Throughout the 1980's, and especially before *McCleskey,* numerous state supreme courts considered proportionality review to be the appropriate mechanism for reviewing the fundamental fairness of a state capital case processing system, including the assessment of racial and geographical disparities introduced by plea bargaining practices and prosecutorial discretion in the selection of cases for capital prosecution. *See, e.g.,* Tichnell v. State, 468 A.2d 1 (Md. 1983), discussed in Appendix A, *infra.*

70 481 U.S. 279 (1987).

71 465 U.S. 37 (1984).

Given the green light to do so by the United States Supreme Court, many state high courts after *McCleskey* refused to use the independent authority of their state constitutions to consider evidence of system wide racial disparities in their capital case processing schemes.[72] System wide arbitrariness in state capital punishment systems presented state supreme courts with the opportunity to use state constitutional guaranties to replace federal due process protections for capital defendants which were no longer recognized by the United States Supreme Court, but it was a challenge and an opportunity which the state high courts overwhelmingly chose to decline.[73]

The combined effect of *Pulley* and *McCleskey* is that state high courts no longer need to demonstrate to the United States Supreme Court that their capital punishment systems are free from systemic racial or jurisdictional bias. As far as the Supreme Court is concerned, the presumption is that these systems operate free from racial bias, or, if they don't, the court will accept the way they do operate.[74] The Supreme Court is no longer in the business of overturning state-imposed death sentences for any reason at all and especially not on the basis of seemingly abstract arguments based upon statistics describing capital case processing systems.[75]

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72 Only the New Jersey Supreme Court has taken upon itself the responsibility for collecting and maintaining a comprehensive data base on capital case processing. The New Jersey Supreme Court has initiated the development of a scientific methodology capable of producing a reliable factual basis documenting the presence of race effects and other system wide biases similar to those presented to the United States Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987). *See* David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986).

73 *See* Baldus et al., *supra* note 37, at 375 ("State courts, by contrast, are not bound by *McCleskey* and are free to entertain claims of racial discrimination under their state constitutions. Even so state courts routinely invoke *McCleskey* as a justification for dismissing such claims with or without a hearing.") (footnote citing to cases omitted).

74 Given that there is little disagreement about the demonstrated effects themselves, the sharp disagreements in the legal community, and within the state high courts themselves, occur over the responsibility of the judiciary to address the issue. *See, e.g., infra* Part IV.B.

75 *See, e.g.*, Whitmore v. Arkansas, 495 U.S. 149 (1990) (holding that a third party does not have standing to challenge the validity of a death sentence imposed on a capital defendant who elected to forgo his right to appeal); Clemons v. Mississippi, 494 U.S. 738 (1990) (holding that it is constitutionally permissible for an appellate court to reweigh aggravating and mitigating evidence to uphold a jury-imposed death sentence that is based in part on an invalid or improperly defined aggravating factor); Butler v. McKellar, 494 U.S. 407 (1990) (holding that a recently decided rule concerning police-initiated interrogation following suspect's request for counsel not retroactively available to support federal habeas corpus petition under *Teague v. Lane*, 489 U.S. 288 (1989)); Boyde v. California, 494 U.S. 370 (1990) (holding that California capital sentencing instructions to juries on mitigation do not violate the Eighth and Fourteenth Amendments as to defendant who presented mitigating evidence of background and character); Blystone v. Pennsylvania, 494 U.S. 299 (1990) (holding that Pennsylvania death penalty statute mandating a death sen-

The majority of states also took the United States Supreme Court at its word when *Pulley v. Harris* declared that probably proportionality review was not required by the federal constitution. After *McCleskey v. Kemp* state legislatures and state supreme courts understood that the United States Supreme Court was no longer interested in reviewing allegations of arbitrariness based upon racial disparities in state capital punishment systems.[76] State courts took the United States Supreme Court at it's word as it became clear that the United States Supreme Court was unlikely to overturn a state imposed death sentence on any grounds.[77] The way for state high courts to insulate themselves from changes at the United States Supreme Court was well mapped: avoid federal constitutional issues altogether or rely upon state constitutional doctrine.

Nonetheless, twenty-two states continue to require some form of proportionality review as part of the appellate review of death sentences.[78] For example, the 1995 statute reenacting capital punishment in New York includes a proportionality review provision directing the state high court to consider empirical evidence of system wide bias, with a specific reference to race. However, empirical evidence in a number of jurisdictions indicates that the risk of arbitrariness and systematic bias in the application of capital punishment continues to exist and that this risk is greatest in the so-called middle range, or low visibility cases.[79] While one purpose of proportionality

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tence if the jury finds at least one aggravating circumstance and no mitigating circumstances does not violate the Eighth Amendment). *But see* McKoy v. North Carolina, 494 U.S. 433 (1990) (holding that instructions which prevent the sentencing jury from considering any mitigating factor that the jury does not unanimously find violates the Eighth Amendment under *Mills v. Maryland*, 486 U.S. 279 (1987)).

[76] *McCleskey* held that demonstrated racial disparities in the imposition of the death sentence were not sufficient grounds to overturn an individual death sentence or declare a state system unconstitutional. McCleskey v. Kemp, 481 U.S. 279, 297-99, 319 (1987). The majority opinion in McCleskey did not deny or dispute the accuracy of the finding of racial disparities.

[77] After *McCleskey*, it became increasingly apparent that a majority of the Court was more interested in speeding up executions than in overturning state imposed death sentences. William H. Rehnquist, *Text of Chief Justice Rehnquist's Remarks to ABA*, CHI. DAILY L. BULL., Feb. 14, 1989, at 2. Recently, constitutional challenges to capital punishment have been addressed to methods of execution. *See, e.g.*, Deborah W. Denno, *Getting to Death: Are Executions Constitutional?*, 87 IOWA L. REV. (1997) (forthcoming).

[78] *See infra* Appendix A; James R. Acker & Charles S. Lanier, *Statutory Measures for More Effective Appellate Review of Capital Cases*, 31 CRIM. L. BULL. 211, 237 n.102 (1995). The states which require proportionality review by statute include: Alabama, Delaware, Georgia, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Pennsylvania, South Carolina, South Dakota, Tennessee, Virginia, and Washington.

[79] *See* Baldus et al., *supra* note 37, at 386 n.115, 410. *See also* 1990 GAO REPORT, *supra* note 38, at 5. Empirical studies of the application of the death penalty since *Furman* have repeatedly found evidence of discrimination by prosecutorial jurisdiction and by race of

review is to minimize or eliminate systematic and systemic bias in the application of capital punishment statutes, especially with regard to racial and geographic disparities, almost without exception state institutions have refused to address that issue.

### D. EXPLAINING THE VARIANCE IN THE OPINIONS OF STATE HIGH COURTS

Every state with proportionality review has adopted its own methodology. However, the procedure necessarily involves the comparison of the death sentence under review with other cases which the appellate court considers to be equivalent or similar in terms of the culpability or blameworthiness of the defendant and the relative aggravation of the circumstances of the offense.

Once the Supreme Court sent the message that a multiplicity of state capital punishment systems is acceptable, state high courts shared no common constitutional doctrine.[80] For example, Texas, and California are sui generis. Texas has a unique statutory structure, upheld by the Supreme Court at the time of *Gregg*. California had one jurisprudence when Rose Bird was Chief Justice and another when she and two other justices were replaced in a recall election in which the California Supreme Court's reversal of death sentences was critical.[81]

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the victim and defendant. Bienen et al., *supra* note 45, at 737 n.112 (1990) (listing and annotating studies).

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> The [Furman] opinions presented a staggering array of arguments for and against the constitutionality of the death penalty and offered little means, aside from shrewd political prediction, of determining which arguments would dominate in the decision of any future cases.
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> . . . . The *Gregg*, *Proffitt*, and *Jurek* opinions did not attempt to list in any definitive fashion the prerequisites for a valid capital punishment regime; rather, they simply upheld each particular scheme presented on the basis of its own peculiar mix of procedural protections. Hence, the 1976 opinions established the essentially "provisional" nature of the Supreme Court's capital punishment jurisprudence and thus marked the clear commencement of the Court's ongoing regulatory role.

Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 357, 362-63 (1995) (footnotes omitted).

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> California has the largest death row of any state in the nation. In 1986, Governor George Deukmejian publicly warned two justices of the state's supreme court that he would oppose them in their retention elections unless they voted to uphold more death sentences. He had already announced his opposition to Chief Justice Rose Bird because of her votes in capital cases. Apparently unsatisfied with the subsequent votes of the other two justices, the governor carried out his threat. He opposed the retention of all three justice and all lost their seats after a campaign dominated by the death penalty. Deukmejian appointed their replacements in 1987. The removal and replacement of the three justices has affected every capital case the court has subsequently reviewed, resulting in a dramatic change. In the last five years, the Court has affirmed neatly 97% of the capital cases it has reviewed, one of the highest rates in the

With little risk of reversal by the Supreme Court, high courts in states with large death row populations tend to conduct minimal proportionality review, and some of these courts have become factories for affirmances. In states where reenactment was relatively late, or where there have been few capital cases—such as New Jersey and Connecticut—whether for reasons of local culture, or simply a small number of homicide cases, capital jurisprudence and its microcosm, proportionality review, are an entirely different enterprise. These state high courts have continued a careful and individualized appellate review of death sentences, including proportionality review, in the face of administrative and political pressures to abandon it.

The general sense one gets from these formidable state high court opinions, which during the period of 1976-91, were overwhelmingly pointed in a single direction, is that absent the threat of reversal by the Supreme Court, there is no motivation to address the issue of racial and geographic disparities in capital case processing. State legislatures enacted proportionality review procedures because they believed, on the basis of language in *Gregg*, that state capital punishment statutes lacking proportionality review provisions would be declared unconstitutional by the Supreme Court.[82] After *Pulley* and *McCleskey*, many state supreme courts found themselves in an awkward position: statutory proportionality review provisions remained intact,[83] and a

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nation.

Stephen Bright & Patrick Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 760-61 (1995) (footnotes omitted).

Even before Chief Justice Bird's removal, justices in other states were influenced by perceived public reaction. A rare in-depth study of the voting behavior of Louisiana Supreme Court justices examined how 'liberal' justices were inclined not to dissent from affirmances in capital cases:

> Justice 'A' stated that he does not dissent in death penalty cases against the opinion of the court to affirm a defendant's conviction and sentence, expressly because of a perceived voter sanction, in spite of his deeply felt personal preferences to the contrary
> . . . .
> . . . .
> The other liberal justices, Justice 'B' and Justice 'C,' when asked about voters, argued that they were relatively unconcerned with winning or losing their next elections.

Melinda Gann Hall, *Constituent Influence in State Supreme Courts: Conceptual Notes and a Case Study*, 49 J. POL. 1116, 1120-21 (1987).

82 The timing of reenactment often played a role in whether the state enacted proportionality review. *See infra* Table 1. State legislatures and high courts eager to reinstate capital punishment after *Gregg* were very likely to include proportionality review provisions and/or institute procedures. The amount of time between reenactment, the court's first affirmance under the new statute, and the state's first execution may give some indication of a state's willingness to entertain constitutional challenges to the death penalty. *Compare, e.g.*, New Jersey, Alabama, and Colorado timing data in Table 1.

83 Six states have repealed their proportionality review statutes. They are Connecticut, Idaho, Maryland, Nevada, Oklahoma and Wyoming. *See infra* Appendix A.

number of state high courts had institutionalized proportionality review, either as part of their ordinary appellate review of individual death sentences, or by creating a special internal administrative procedure.[84] Now they were stuck with it.

However, many state high courts did revise existing procedures for proportionality review and reduce proportionality review to a formality after *Pulley* and *McCleskey*. Some courts did this in a technical manner by changing the definition of cases which would be considered similar. Other state high courts changed the character of the review conducted by simply refusing to consider any systemwide challenges to their capital punishment system, thereby restricting proportionality review to a narrow comparison. Finally, some other state courts limited proportionality review to a very narrow comparison between the sentences of codefendants in the same case.[85]

## III. State High Court Decisions and Changing Attitudes Towards Crime and Race

However complicated its implementation history, the principle behind proportionality review is simple and the same everywhere: it is unjust to impose a death sentence upon one defendant when a similarly situated defendant whose murder was equally aggravated is not sentenced to death or executed. Generalizing across jurisdictions and courts over a time period of fifteen years is hazardous, nonetheless certain patterns in state supreme court opinions are observable during the period between *Gregg* in 1976 and the second and final rejection of the federal appeal of Warren McCleskey's death sentence and his execution in 1991.[86] Racial and jurisdictional disparities were not the sole component of Warren McCleskey's appellate arguments. Racial and geographic disparities, however, were the only basis for challenging a state's entire capital case processing system before a federal court, and by implication in all of the states. Racial and geographic disparities are therefore at the heart of the concept of proportionality

[84] For example, the Pennsylvania Supreme Court set out the principles for proportionality review and authorized the administrative office of the courts to collect data on all homicides, but it has not been clear from subsequent opinions exactly how the court uses the information for proportionality review, or if it does use the database created for the purpose. *See infra* Appendix A.

[85] Intracase proportionality is a comparison between the death sentence under review and the sentences received by codefendants in the same case. California and Illinois are two states that perform only intracase proportionality review. *See infra* Appendix A.

[86] McCleskey v. Zant, 499 U.S. 467 (1991). Warren McCleskey was executed shortly after the Supreme Court rejected his second habeas corpus petition. The hope that the United States Supreme Court would again declare a state system unconstitutional died with Warren McCleskey.

itself, both in capital sentencing and in other areas, as the factors which show the most disparate results.

Commentary on state high court opinions, even on issues of national dimensions, is typically sporadic or relegated to footnotes. Yet these institutions are now the principal interpreters of constitutional principles in capital jurisprudence and other areas of constitutional law formerly the province of federal courts. Even if, as many say, state high court opinions are less erudite or well-reasoned than the constitutional discourse of the higher federal courts or academic journals, these opinions nonetheless began to define constitutional doctrine on this question in the period 1976-91.[87]

Both state judicial institutions and legislatures faced similar circumstances in this period. Legislatures were apprehensive that the Supreme Court would declare their state capital case processing systems and statutes unconstitutional. At the same time, the political climate grew increasingly favorable to the implementation of the death penalty. People became impatient with reversals of capital sentences on what were perceived as "legal technicalities,"[88] as well as the disparity between the large number of people sentenced to death and the few who were executed.[89]

Furthermore, the issue of proportionality always had race lurking in the background. On the other hand, consensus on issues of race generally did not exist during this period. The trend in decision-making by the federal courts during the 1980's was in the direction of denying relief to claims based upon allegations of racial discrimination generally. Certainly, arguments alleging that capital sentencing systems had disparate impact upon different racial groups were not heard by state high courts in a jurisprudential or political vacuum.[90] Arguments based upon differential racial impact in the capital punishment context were being considered by state high court justices who had witnessed the checkered history of court-imposed orders regarding school and housing desegregation and redistricting—orders which were neither straightforward nor uncontroversial. The ineffec-

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87 *See, e.g.*, State v. Ross, 646 A.2d. 1318, 1373-75 (Conn.) (Berdon, J., dissenting in part) (reviewing constitutional analysis in Connecticut state court decisions), *cert. denied*, 115 S. Ct. 1133 (1995).

88 *Justice Transcript*, *supra* note 11, at 1101-02. *See also* Bright & Keenan, *supra* note 81, at 785; Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views of the Death Penalty*, 50 J. Soc. Issues 19, 40-42.

89 *See infra* tbl.1, tbl.2.

90 "If the purpose of *McCleskey* was to provide closure, it certainly was successful in the federal courts. The decision has eliminated the federal courts as a forum for the consideration of statistically based claims of racial discrimination in capital sentencing." Baldus et al., *supra* note 37, at 374.

tive role of courts in many of these proceedings, and the political pressures placed upon them, may have made state high courts even more reluctant to intervene where these issues arose in the criminal justice arena.[91]

Where responsibility rested for defining the parameters of proportionality review was ambiguous. In some states neither the legislature nor the state high court firmly took charge of the process. In other states the legislature clearly ceded authority for defining proportionality review to the state high court. In other states institutional conflicts emerged between the state high court and the legislature. For example, if the legislature wanted to limit the scope of review by the court, the legislature limited the pool of comparison cases by statute. Most state legislatures had little conception of what proportionality review entailed at the time of enactment. State legislatures typically passed simply-worded proportionality review states in response to *Gregg*,[92] and a few state high courts almost immediately reversed one or two death sentences on grounds of disproportionality.

In the early 1980s, then, implementation of proportionality review seemed relatively straightforward, but this seeming simplicity was short lived. Ordinary delays met by the early capital cases as they made their way through state appellate systems were often further extended for proportionality review. Some state supreme courts did not conduct proportionality review until all other issues on appeal had already been decided. Some states waited until more than one death sentence had been affirmed so that there would be a pool of cases for comparison.[93]

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[91] The capital punishment decisions of the New Jersey Supreme Court in the 1980's were preceded by controversial decisions on zoning and school financing.

> Chief Justice Wilentz's landmark zoning opinion in 1983, which came to be known as Mt. Laurel II [*South Burlington County NAACP v. Mount Laurel Township*, 456 A. 2d 390 (N.J. 1983)] because it was the second involving that mostly white Burlington County suburb, set off a firestorm .... The other major decision that is still roiling New Jersey is *Abbott v. Burke* (1990) .... again written by Chief Justice Wilentz, in which the court ruled that the state's poorest school districts must be given enough state aid to bring their level of spending spend (sic) per pupil to that of the richest ones.
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> .... In the summer of 1986, Robert N. Wilentz was very nearly fired. By then he had been Chief Justice for seven years, the point at which the Senate considers whether to give a judge a lifetime appointment. Some of his rulings, especially the Mount Laurel decision, made him enemies ....

Jan Hoffman, *His Court, His Legacy*, N.Y. TIMES (New Jersey Section), June 30, 1996, at 13NJ6-7.

[92] Gregg v. Georgia, 428 U.S. 153 (1976).

[93] In some jurisdictions it took several years for post-*Gregg* statutes and procedures to be affirmed, even if the state reenacted immediately. Then it took some time for capital convictions to come to the state supreme court for proportionality review on appeal. The first proportionality review in the jurisdiction usually was incorporated in the first direct appeal of a death sentence. This was usually, but not always, the case holding the reenacted capi-

Proportionality review was also thrust into legal limbo during the pendency of the appeal in *Pulley*.[94] State legislatures and high courts were both reluctant to take a stand on proportionality which might subject them to reversal. Then, as the Supreme Court reduced the grounds for the reversal of death sentences in the late 1980s, state high courts reconsidered the status of proportionality review. If it wasn't a federal constitutional remedy, what was it? It had been enacted in response to an endorsement from a very different Supreme Court, that of the 1970s.[95] Now it was wholly a matter of state law, based upon either state statute, state court rule, or state common law. Proportionality review could be transformed into a state constitutional requirement, or it could be institutionalized as a statutory interpretation. The overwhelming response to the withdrawal of the federal constitutional requirement of proportionality review established in *Gregg* was the concomitant withdrawal of the state requirement, either through legislative action, irrespective of its procedural under-pinnings, or through the action or inaction of the state supreme court.[96]

In fact, the jurisprudence of proportionality review by state supreme courts between 1976 and 1991 became in large part the story of how state high courts responded to constitutional arguments based upon statistical evidence of racial and geographic disparities. State high courts are typically presented with variations upon several related arguments about proportionality. Some argue that the data show county by county disparities within the state, and that such disparities passively create racial and/or geographical differences with constitutional dimensions in capital sentencing. Others say that there are rural/urban differences in capital case processing, attributable to bureaucratic pressures, differing policies of individual prosecutors, or both. Finally, some argue that differences in capital case processing are introduced via the overtly different charging policies of autonomous local prosecutors within the same state.[97] The factual evidence for these arguments was strong, even if its presentation was sometimes unsystematic. Nonetheless, state high courts have been extremely reluctant to grant credence to statistical evidence of any of these disparities, or to regulate the effects of prosecutorial discretion on such

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tal statute constitutional. See *infra* tbl.1 for the different time periods between reenactment, affirmance of the first death sentence, and the first execution, by individual state.

94 Pulley v. Harris, 465 U.S. 37 (1984).

95 *See supra* Part II.A.

96 The state high court could say, after *Pulley*, "The United States Supreme Court does not require this, so we are not doing it." Or, the court could just no longer conduct proportionality review or just be very perfunctory. *See infra* Appendix A.

97 State v. Koedatich, 548 A.2d 939, 946 (N.J. 1988), *cert. denied*, 488 U.S. 1017 (1989). The factual parameters of such arguments are set out *infra*, Appendix B.

grounds.[98]

In capital cases, where a life is in the balance, state high courts might be expected to be more likely to give the benefit of the doubt to statistical evidence of racial disparities, which may be at least partially attributable to prosecutorial charging practices. In fact, the opposite appears to be true.[99] As state high courts have become increasingly confident that the Supreme Court would not declare state capital systems unconstitutional, they have become increasingly unwilling to entertain arguments alleging racial and jurisdictional disparities in capital case processing. In some states which reenacted the death penalty early there was a period in the mid-eighties during which proportionality review was a viable appellate issue since it was established in those states, and its federal fate was unclear. As the tide of popular opinion, however, continued to turn in the direction of increased support for executions, state high courts were content to let proportionality review wither on the vine. In many states not-so-benign neglect was as effective as the repeal of a statute or an explicit ruling overturning the requirement.

### A. THE RESPONSE OF STATE HIGH COURTS TO QUANTITATIVE ANALYSIS

Perhaps state high courts are justifiably suspicious of empirical data and social science evidence, especially of statistical analyses of racial disparities in the criminal justice system.[100] Appellate courts are particularly distrustful of statistics developed by the defense in criminal cases,[101] and the prosecution has no motivation to develop such evidence. A state high court is then left with two alternatives: (1) producing its own accurate data on the capital case processing system (not a trivial research task) and overseeing its analysis; or (2) accepting the analysis and data put forward by defense counsel. Very

98 *See, e.g.*, State v. Williams, 301 S.E.2d. 335, 353 (N.C. 1983) (rejecting a statistical analysis of capital case processing).

99 State high courts have been unwilling to rule on behalf of capital defendants on the basis of statistical evidence of racial disparities in capital case processing, irrespective of the alleged cause. A weaker scientific showing in the context of employment discrimination, or racial discrimination in jury selection has resulted in findings of racial discrimination. *See* Baldus et al., *supra* note 37, at 375-76.

100 Justice Powell's comment that "racial . . . discrimination still remain[s] a fact of life" in the criminal justice system may have accurately expressed the view of many state supreme court justices, many of whom had trial court experience. Rose v. Mitchell, 443 U.S. 545, 558 (1979).

101 The Supreme Court of New Jersey confronted this issue when the Public Defender presented a series of reports titled *The Reimposition of Capital Punishment in New Jersey*, which included the quantitative analysis of data on homicides and capital case processing in the jurisdiction as a whole. *See* Order, *reprinted in* Bienen et al., *supra* note 21, at 371-72 (1988) (requesting the Special Master to assess this data as one of his first tasks).

few courts have been willing to undertake research and data collection themselves, although many state high courts already maintain ongoing records of all capital appeals in their role as administrator of the court system. Transforming such records into a reliable data base for systematic analysis of capital sentencing would be feasible, especially since state high courts administer their court systems by using computerized case tracking systems.[102]

When presented with quantitative evidence of racial disparity, some courts did not understand how to interpret it or how to use it. Courts justifiably feared they would not be able to evaluate the objectivity of such evidence, especially when the findings were not unambiguous. Perhaps because many justices were unfamiliar with social science research and its norms they expected more definitive results than an increased likelihood or statements regarding probability.

The impact of racial and geographical disparities on capital case processing is counter-intuitive and inferential, in addition to being controversial and politically unpopular. This evidence supports arguments that the demonstrated racial differentials are caused by explicit or implicit racial discrimination, or by passive discrimination related to geographical differences among counties. Contributing to misunderstanding is the fact that the statistical results based upon county or jurisdictional disparities may demonstrate an unanticipated effect, namely that cases involving black or minority defendants and victims are treated less harshly because they are less likely to be declared capital. Jurisdictional disparities may then be articulated as the devaluing of minority or low status victims, while murders involving white or higher status victims are aggressively prosecuted as capital cases.[103] Furthermore, the data involving geographical disparities may be articulated as a rural/urban distinction, such that homicides are down-

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102 Increasingly, state supreme court Chief Justices have the administrative responsibility of overseeing the operation of the enitre court system:

> Chief Justice Wilentz spent perhaps two-thirds of his time overseeing the state court system, which now includes 10,000 employees. More than a million cases were filed last year in trial level Superior Courts
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> . . . . the Chief Justice strove to make the courts more efficient, accessible and credible
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> . . . . Toward the end of his tenure, he managed to centralize control of the budgets of the disparate judicial districts in an effort to erase distinctions in the services offered in poorer and wealthier counties—and, by extension, the quality of justice
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> . . . .

Jan Hoffman, *His Court, His Legacy*, N.Y. TIMES (New Jersey section), June 30, 1996, 13NJ7.

103 Minorities are in some cases "benefitting" from the discrimination, and this may additionally disturb political alliances on these issues. *See* Leigh B. Bienen, *A Good Murder*, 20 FORDHAM URB. L.J. 585 (1993).

graded in urban jurisdictions with overburdened dockets and strained bureaucratic resources, while similar crimes in relatively affluent rural or suburban districts are prosecuted capitally.[104] In every jurisdiction the potential exists for discussions of proportionality to be mired in technicalities. The more ambitious and sophisticated the scope and analysis of data, the greater the likelihood of frustration, confusion and misunderstanding.[105] A systematic, reliable study takes time and causes further appellate delay to executions, creating an additional source of unpopularity.

In the face of a judiciary unfamiliar with statistical arguments, persons convicted of capital murder and their court appointed lawyers are not in the best position to persuade a state high court to set aside death sentences on the basis of subtle quantitative analyses of capital case processing.[106] But these problems are surmountable. For instance, the response of the Supreme Court of New Jersey was to appoint an expert to advise the court on technical issues of data interpretation.[107] How unusual it was for the supreme court of New Jersey to create a Proportionality Review Project under the direction of this Special Master can be appreciated against the backdrop of what other state high courts chose to do, or not to do.[108]

During this period the New Jersey Supreme Court was considered to be the leading state high court for the development of state constitutional doctrine.[109] In particular, the Chief Justice of the New Jersey

104 The Guidelines for Prosecutorial Discretion adopted by the County Prosecutors Association in response to the Supreme Court of New Jersey's opinion in *State v. Koedatich*, 548 A.2d 939 (N.J. 1988), declare that factors such as race, socio-economic status, and the resources of the county prosecutor will not be a factor in the decision to declare a case capital. *See* Bienen et al., *supra* note 45, at 791-93. Nonetheless, patterns of urban/rural disparity persist. *See infra* Appendix B, tbl. B8.

105 The district court and circuit court opinions in *McCleskey v. Kemp* were mired in detail and demonstrated that both courts did not understand the analytical finding. *See* BALDUS ET AL., *supra* note 66, at 340-45.

106 The situation in New Jersey was unusual. The N.J. Office of the Public Defender supported the collection and analysis of data during the entire proportionality review project, including the hiring of statistical experts from the University of Pennsylvania and Princeton University. *See* Appendix B, text accompanying notes 549-552. In most states public defenders have few financial resources and are unable to support any systematic, empirical research. The typical pattern is for the research to be conducted by academics whose research agenda is not designed for the litigation strategy of the defense. The completed academic research is then translated into legal arguments. *See, e.g.*, NAKELL & HARDY, *supra* note 68, at 93 (1987). The New Jersey Public Defender never set a limit on expenditures for capital appeals, and the New Jersey Legislature consistently appropriated funds for capital defense during this period.

107 The New York Court of Appeals has implemented procedures to institutionalize systematic data collection and analysis by issuing a form for capital case data reports and by drawing upon the experience of other states. *See infra* Part V.B.

108 *See infra* Part IV; Appendix A.

109 State v. Marshall, 613 A.2d 1059 (N.J. 1992), shows a court struggling to maintain

Supreme Court was critical throughout the development of proportionality review in the state.[110] The commitment demonstrated by this court to proportionality review was in part due to several other factors: the independent character of the New Jersey Supreme Court itself, the experience and expertise of the Special Master hired by the court to compile and analyze the relevant data,[111] and institutional factors which made it possible for first the Office of the Public Defender and then the Administrative Office of the Courts to conduct a comprehensive research and analysis project.[112] The research conducted by the Proportionality Review Project, as it came to be called, refined and developed a broadly conceived methodology for measuring defendant culpability and the aggravation level of homicide. These measures are now available and applicable to studies of homicide and other analyses of criminal behavior and responsibility. The development of systematic, analytic categories for gradations of criminal culpability and aggravation levels in homicide is a path-breaking intellectual achievement. That such conceptual development should occur in a court sponsored research project is all the more extraordinary.

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consensus while coming to terms with an expert analysis of comprehensive data concerning racial disparities in capital case processing. Proportionality review in New Jersey was an ongoing study of the development of social science data and methodology by a court. The court was criticized, often inaccurately, for attempting to be as precise as possible in its reference to facts and quantitative relationships. The court's commitment is especially noteworthy because it was exceptional.

> 'It might be the best Supreme Court in the Country—state or federal,' said Harvard law Prof. Laurence H. Tribe.
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> . . . .
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> '[A] fair amount of the credit for the Court's achievements belongs to Chief Justice Wilentz,' said Professor Tribe, 'but it's certainly not a one-man accolade.' Professor Kamisar's [Professor Yale Kamisar, University of Michigan School of Law] personal applause is reserved for Stewart G. Pollock, 51, a liberal Republican who has, in speeches and articles, picked up a recurring theme of the court: the importance of the state constitution in protecting fundamental rights . . . .

Bruce S. Rosen, *A Bold Court Forges Ahead*, NAT'L L.J., November 5, 1984, at 1.

110 Chief Justice Wilentz not only authored several important opinions building the jurisprudence concerning proportionality in capital cases, but he also had a commitment to the principled application of social science methods which the court needed to maintain its commitment. During this period the Chief Justice was personally attacked when the court reversed death sentences. The Chief Justice died shortly after he announced his early retirement for reasons of ill health. *See* Jan Hoffman, *His Court, His Legacy*, N.Y. TIMES, June 30, 1996, at 13NJ1; David Stout, *Robert Wilentz, 69, Dies; Court Aided Women and Poor*, N.Y. TIMES, July 24, 1996, at D20.

111 *See infra* notes 217-18 and accompanying text.

112 The New York Court of Appeals may now be in a favorable position to demonstrate similar judicial leadership. *See infra* Part V. Recently, the state high courts of Pennsylvania and Connecticut have expressed a willingness to take the responsibility of maintaining an adequate factual record in order to conduct systematic proportionality review. *See* State v. Cobb, 663 A.2d 948, 961-62 (Conn. 1995); Commonwealth v. Banks, 656 A.2d 467, 474 (Pa.), *cert. denied*, 116 S. Ct. 113 (1995).

### B. THE STATE HIGH COURT'S DUTY AS COURT ADMINISTRATOR TO PREPARE AND MAINTAIN A RELIABLE FACTUAL RECORD ON CAPITAL CASE PROCESSING

In addition to New Jersey, a small number of state high courts have initiated comprehensive data collection and assumed responsibility for creating and maintaining a factual record on homicide cases within their jurisdiction. Without a reliable factual record documenting the movement of potentially capital cases through the system, however, there can be no meaningful proportionality review.

For example, an extensive data collection effort has been in place in Pennsylvania since that state reenacted the death penalty. Data have been collected and made available to the Pennsylvania Supreme Court since at least 1983, with some information on cases going back to 1978.[113] The data are now being updated and corrected by the Philadelphia office of the Public Defender.[114]

The Pennsylvania data set has the potential of providing a comprehensive factual basis for the systemwide analysis of a capital punishment system which seems to have wide disparities.[115] At the present

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113 *See* Commonwealth v. Frey, 475 A.2d 700, 712-13 (Pa. 1984) (proportionality review data collection instrument "Review Form: Murder of the First Degree"). The Pennsylvania Supreme Court database is described in John F. Kairns & Lee S. Weinberg, *The Death Sentence in Pennsylvania—1978-1990: A Preliminary Analysis of the Effects of Statutory and Nonstatutory factors*, 95 DICK. L. REV. 691 (1991).

114 *See* Commonwealth v. DeHart, 516 A.2d 656, 671 (Pa. 1986). Researchers have encountered problems in attempting to analyze the Pennsylvania database. Data are provided on a form by the trial court judge. Data are collected on the race, sex and age of defendant and victim; the dates and disposition of the offense; and whether or not the death penalty was sought. The form also asks whether there was a factual basis for any statutory aggravating factor submitted or found, whether there were aggravating circumstances which were not pursued by the State, and the court's opinion as to why the Commonwealth did not seek the death penalty or failed to pursue aggravating circumstances if there was a factual basis for seeking the death penalty. Information is sought on the statutory mitigating circumstances submitted and found, the statutory mitigating circumstances which were not pursued, and the court's assessment of why defense counsel may have failed to pursue any mitigating circumstances. Finally, both the prosecutor and the defense attorney, in theory, certify the accuracy of the data and provide additional information. *See Frey*, 475 A.2d at 712-13. The open ended database is intended to be maintained on a standardized statistical file. The absence of a narrative summary for each case is a serious methodological problem. Without case narratives it is impossible to verify facts or procedural decisions to ensure a reliable analysis.

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> In most jurisdictions, prosecutors file such notice [to seek the death penalty] in a small percentage of eligible homicides: in Pittsburgh, for example, W. Christopher Conrad, Allegheny County's deputy district attorney for homicide, estimates that his office files a Rule 352 [a notice of intention to seek the death penalty] in about a quarter of the cases in which aggravators are present. Philadelphia files one in virtually every case . . . .
>
> . . . .
>
> . . . . In 1991, the last year for which figures are available for comparison, Houston's

time, however, defendants challenging the application of the statute are verifying basic case processing data and collecting information on additional variables.[116] In sum, the Pennsylvania experience proves that collecting data without controls on accuracy and comprehensiveness cannot provide a reliable factual basis for proportionality analysis by a court or anyone else.

Indeed, state courts are disingenuous when they refuse to consider issues of racial and geographic disparity because of an absence of reliable data. The statutory mandate to conduct proportionality review necessarily implies creating and maintaining an adequate factual record. A critical distinction between the states is whether or not the state high court itself takes the initiative in institutionalizing data collection and certifies its accuracy; the data analysis which follows is relatively straightforward.[117]

### C. PATTERNS OBSERVED IN THE JURISPRUDENCE OF PROPORTIONALITY REVIEW IN THE INDIVIDUAL STATES

While each state has a unique statute and body of capital punishment jurisprudence, certain patterns are discernible. There are stark differences between states with large death row populations and states

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prosecutors sought death in seven cases at trial and won it in six. That year, Philadelphia sought it at trial in at least 59 cases, and probably many more . . . and won it 12 times.

Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 42, 46.

116 The Philadelphia Public Defender's Office is updating and verifying a segment of this data base as part of its challenge to racial and geographic disparities in the application of the death penalty in Philadelphia. The Defender Association of Philadelphia is in the process of creating a data base for a state wide study of proportionality in the imposition of the death sentences in Pennsylvania. The sample includes all death sentences, a sample of penalty phase life cases and death possible non penalty phase cases, including trials and pleas. The Administrative Offices of Pennsylvania Courts have provided this Project with its own data and research going back to 1978. Professor David C. Baldus is a consultant to the Defender Association. The Project is modeled after the Proportionality Review Project of the Supreme Court of New Jersey. Telephone interview with David Zuckerman, Assistant Defender, Appellate Division, Defender Association of Philadelphia, November 19, 1996.

117 When the court engages in independent data verification and maintains a factual record of potentially capital homicides, that record is usually a public record, available to any interested party, including those challenging the imposition of the death sentence. The Pennsylvania Supreme Court, for example, routinely gives its data files to capital defense attorneys. *But see* Skaggs v. Commonwealth, 694 S.W.2d 672, 681-82 (Ky. 1985) (holding that the public advocate is not entitled to data compiled for the Supreme Court pursuant to the court's authority to review death sentences). Some state high courts have created permanent data files on all capital appeals. The court typically appoints a special clerk or administrative agency to collect the data and ensure its reliability. In other states, the court will cooperate with independent researchers to prepare a data base on capital cases. See the description of the data collection methods in NAKELL & HARDY, *supra* note 68, at 93.

with a small number of capital cases.[118]

Table 1 summarizes the experience of the states since *Gregg*. In Table 1 the date of death penalty reenactment (Column 1), the date of the first affirmance of a death sentence (Column 2), and the date of the first execution (Column 3), are tracked for each reenacting state.[119] The next three columns show the period of time elapsing between reenactment and the first death sentence affirmed (Column 4), the period of time from reenactment to the first execution in the state (Column 5); and the number of years from the first death sentence affirmed to the first execution (Column 6). The final two columns show the death row population as of 1996 (Column 7) and the number of executions between 1976 and 1996 (Column 8).

When the states are ranked by these different measures several patterns emerge.[120] Texas, with over 100 executions since 1976 is grossly out of proportion in comparison to other states, even considering only other southern states. For example, Florida has executed thirty-four, Virginia, twenty-seven, Louisiana, twenty-two, and Georgia, twenty. Eight states have had six, five, or four executions; four states have executed three or two; and five states have executed one person. Twelve reenacting states have had no executions, including Connecticut, which reenacted in 1973, Tennessee, which reenacted in 1974, and Colorado and New Mexico which both reenacted in 1975. While the rhetoric of the capital punishment jurisprudence in these states may be favorable to capital punishment, the state high court is not expediting executions.

Ranking by date of reenactment, Florida was the first state to reenact, which it did on December 8, 1972, before *Gregg* was handed down. A total of eleven states then reenacted in 1973, and an additional ten reenacted in 1974. Another six reenacted in 1975. Before *Gregg* was handed down, then, twenty-eight states had already reen-

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118 *See infra* tbl. 1.

119 The date of the first death sentence affirmed should not be confused with the date the statute is held constitutional. In New Jersey, for example, the statute as a whole was held to be constitutional in *State v. Ramseur*, 524 A.2d 188 (N.J. 1987). However, the first capital conviction was not affirmed until *Marshall I* in 1991. State v. Marshall, 586 A.2d 85 (N.J. 1991). The death sentence of Robert Marshall was affirmed in 1992 after proportionality review in *Marshall II*. State v. Marshall, 613 A.2d 1059 (N.J. 1992). Although federal and state habeas actions are pending in Marshall's case, the New Jersey Supreme Court has issued a ruling on the direct appeal and upheld the death sentence after proportionality review—the final appellate action in a capital appeal. Similarly, in Connecticut, the state high court has upheld the statute's constitutionality as a whole, but the court has not yet upheld an individual death sentence after proportionality review.

120 The subtractions and the rankings within each column were done using Microsoft Excel.

## TABLE 1
## DATE OF REENACTMENT, DATE OF FIRST CAPITAL AFFIRMANCE, DATE OF FIRST EXECUTION, AND TIME PERIODS BETWEEN, BY STATE

| State | Date Death Penalty Reenacted Col. 1 | Date First Death Sentence Affirmed Col. 2 | Date of First Execution Col. 3 | Years from Re-enactment to First Death Sentence Affirmed (col. 2-col. 1) Col. 4 | Years from Re-enactment to First Execution (col. 3-col. 1) Col. 5 | Years from First Death Sentence Affirmed to First Execution (col. 3-col. 2) Col. 6 | Death Row Population as of 1996 Col. 7 | Executions Since 1976 as of 1996 Col. 8 |
|---|---|---|---|---|---|---|---|---|
| Alabama | 3/ 5/76 | 9/ 9/77 | 4/22/83 | 1.5 | 7.2 | 5.7 | 144 | 13 |
| Arizona | 8/ 8/73 | 12/20/76 | 4/ 6/92 | 3.4 | 18.9 | 15.5 | 121 | 4 |
| Arkansas | 3/23/73 | 12/22/75 | 6/18/90 | 2.8 | 17.5 | 14.7 | 37 | 11 |
| California | 1/ 1/74 | 10/12/80 | 4/21/92 | 6.9 | 18.6 | 11.7 | 444 | 3 |
| Colorado | 1/ 1/75 | 5/14/90 | | 15.6 | | | 4 | |
| Connecticut | 10/ 1/73 | | | | | | 5 | |
| Delaware | 3/29/74 | 9/20/84 | 3/14/92 | 10.6 | 18.2 | 7.6 | 11 | 8 |
| Florida | 12/ 8/72 | 11/27/74 | 5/25/79 | 2.0 | 6.6 | 4.6 | 351 | 36 |
| Georgia | 3/28/73 | 4/ 4/74 | 12/15/83 | 1.0 | 10.9 | 9.8 | 108 | 20 |
| Idaho | 7/ 1/73 | 5/23/83 | 1/ 6/94 | 10.0 | 20.8 | 10.8 | 19 | 1 |
| Illinois | 7/ 1/74 | 11/13/81 | 9/12/90 | 7.5 | 16.4 | 9.0 | 164 | 7 |
| Indiana | 5/ 1/73 | 1/30/81 | 3/ 9/81 | 7.9 | 8.0 | 0.1 | 50 | 3 |
| Kansas | 4/22/94 | | | | | | | |
| Kentucky | 1/ 1/75 | 11/ 2/80 | | 5.9 | | | 28 | |
| Louisiana | 7/ 2/73 | 10/11/74 | 12/14/83 | 1.3 | 10.6 | 9.3 | 53 | 23 |
| Maryland | 7/ 1/75 | 11/ 3/83 | 5/16/94 | 8.5 | 19.2 | 10.7 | 17 | 1 |
| Mississippi | 4/23/74 | 5/24/78 | 9/ 2/83 | 4.1 | 9.5 | 5.4 | 54 | 4 |
| Missouri | 9/28/75 | 5/11/81 | 1/ 6/89 | 5.7 | 13.5 | 7.8 | 92 | 19 |
| Montana | 3/11/74 | 11/12/76 | 5/10/95 | 2.7 | 21.5 | 18.8 | 6 | 1 |
| Nebraska | 4/20/73 | 2/ 2/77 | 9/ 2/94 | 3.8 | 21.7 | 17.8 | 10 | 1 |
| Nevada | 7/ 1/73 | 5/17/78 | 10/22/79 | 4.9 | 6.4 | 1.5 | 85 | 6 |
| New Hampshire | 1/ 1/91 | | | | | | | |
| New Jersey | 8/ 6/82 | 7/28/92 | | 10.1 | | | 12 | |
| New Mexico | 7/ 1/79 | 1/20/83 | | 3.6 | | | 3 | |
| New York | 9/ 1/95 | | | | | | | |
| North Carolina | 6/ 1/77 | 11/ 3/81 | 3/16/84 | 4.5 | 6.9 | 2.4 | 154 | 8 |
| Ohio | 1/ 1/74 | 11/24/76 | | 2.9 | | | 150 | |
| Oklahoma | 5/17/73 | 3/21/80 | 9/10/90 | 6.9 | 17.6 | 10.6 | 119 | 7 |
| Oregon | 12/ 7/78 | 2/26/88 | | 9.4 | | | 22 | |
| Pennsylvania | 3/26/74 | 12/30/82 | 5/ 2/95 | 8.9 | 21.4 | 12.5 | 200 | 2 |
| South Carolina | 7/ 2/74 | 2/11/76 | 1/11/85 | 1.6 | 10.7 | 9.0 | 71 | 5 |
| South Dakota | 1/ 1/79 | | | | | | 2 | |
| Tennessee | 2/27/74 | 1/ 7/80 | | 5.9 | | | 102 | |
| Texas | 1/ 1/74 | 4/16/75 | 12/ 7/82 | 1.3 | 9.1 | 7.8 | 394 | 106 |
| Utah+ | 7/ 1/73 | 11/25/77 | 1/17/77 | 4.5 | 3.6 | -0.9 | 10 | 5 |
| Virginia | 10/ 1/75 | 9/ 5/75 | 8/10/82 | -0.1 | 7.0 | 7.0 | 54 | 31 |
| Washington | 11/ 4/75 | 11/ 6/84 | 1/ 5/93 | 9.1 | 17.4 | 8.3 | 13 | 2 |
| Wyoming | 2/28/77 | 5/27/83 | 1/22/92 | 6.3 | 15.1 | 8.8 | | 1 |

Source: For date of reenactment, individual state statutes and session laws. Date of reenactment is the effective date of the statute. For date of affirmance, individual state high court opinions. Date of affirmance is the date the state high court upheld the first post-Furman death sentance on appeal, including proportionality review. Source for death row population and executions (as of April 30, 1996): NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW, USA, Spring 1996. Source for New Jersey death row population, Administrative Office of the Courts, New Jersey, as of August 1, 1996.

+ Utah executed Gary Gilmore when he withdrew his appeals, before his conviction and death sentence were affirmed.

acted.[121] After *Gregg*, two states reenacted in 1977 and 1979, and in all other years only one state reenacted, with no states at all reenacting in twelve of the years between 1980 and 1995.[122] Generalizations about the rush to capital punishment in the 1980's do not hold. Reenactments occured primarily in the 1970's.

When the dates for the first death sentence affirmed are ranked, a more even distribution is seen, with four states each having affirmances in the years 1976, 1980, and 1981 and 1983. Georgia was the first state to affirm, with Louisiana, Florida, Texas, Virginia, and Arkansas all affirming the constitutionality of their statutes before 1976, and before *Gregg*. After *Gregg* it might have been expected that there would be a cluster of affirmances in 1977, but there were only three. Similarly, by 1984, when *Pulley* was decided, most states had already affirmed their first death sentence, although a surprising number, five, had not.[123]

The distribution of dates of first execution in Column 3 shows Utah to have been first, in 1977. Following Utah were Florida, Nevada, Indiana, Virginia and Texas, all before 1983. Then four states had their first execution in 1984. No additional states began executions until 1990, then seven states executed their first person between 1990 and 1992. Three other states initiated executions in 1994. Eleven death penalty states had not yet executed anyone in 1996.

Column 4 shows the time lapse between reenactment and the first death sentence affirmed was less than two years in six states, and less than five years in seventeen states. Four states took ten years or more to affirm their first death sentence after reenactment, and five states had not yet affirmed their first death sentence in 1996.

The distribution of years from reenactment to the first execution for those twenty-seven (including Ohio) states which have had executions, shows Utah to be the outlier, with only 3.6 years elapsing between reenactment and execution. Eight other states executed their first capital defendant before ten years; thirteen took between ten and twenty years, and four took more than twenty years.

The ranking of years between the first affirmance and the first execution shows that twelve states are between five and ten years, and nine states are between ten and twenty years. Utah has a negative value, since Gary Gilmore was executed before his direct appeal was

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121 If *Gregg* had declared the Georgia statute unconstitutional, it would have sent all of those states back to square one. The political cost might have been very high indeed.

122 No states reenacted in 1980, 1981, 1983-1990, 1992 or 1993.

123 The states which have not affirmed their first death sentence as of 1996 include: Connecticut (reenacted in 1973), Kansas (1994), New Hampshire (1991), New York (1995), and South Dakota (1979).

decided. This is followed by Indiana, which executed its first person less than a year after affirmance. At the other extreme, Montana and Nebraska had 18.8 years and 17.8 years elapse, respectively, between the first affirmance and the first execution. Other relationships in Table 1 are noteworthy: Florida was the first state to reenact, one of the first states to affirm its statute, the second state to execute a defendant, and the state with the third largest death row population, yet the state has executed less than ten percent of that population.[124] By contrast, Texas, which reenacted early and affirmed early, did not execute its first defendant until 1982; but as of 1995 it had executed almost twenty-five percent of that population. Similarly, Virginia had executed almost one-third of its death row population as of 1996, although the state did not have an execution until 1982.

Table 2 lists death row population by state. In 1984, the year *Pulley* was decided, California already had 153 people on death row, placing it third. Only Florida, with 203, and Texas, with 172, had more people on death row.[125] Eleven states had between 20 and 40 prisoners on death row in 1984, while seven states had none. By 1987, when *McCleskey* was decided, Florida, with 267, still had more people on death row than any other state, followed by Texas with 245, and California with 196.[126] In 1987 only six states had no defendants on death row.

In 1996, the top three death row populations were in California, Texas, and Florida, with populations of 444, 394, and 351, respectively. The biggest change since 1987, however, is that twelve states have over 100. Seven other states had 50 or more people on death row and nine states had less than 5 defendants on death row. Percentage changes in death row populations from 1984 to 1987 and from 1987 to 1995 show large and varied percentage changes, as well as negative percentages, but these large variations in percentages often

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124 *See* Baldus et al., *supra* note 37, at 413-17 (discussing Florida's capital jurisprudence).

125 And, of course, a state will have a death row population as soon as the first defendant is sentenced to death at the trial level. The state need not have affirmed its first death sentence for a death row population to exist.

126 Changes in the number of people on death row reflect not only executions, but also defendants removed from death row because their death sentences were overturned by courts—either on direct appeal, or by a state or federal court on post conviction relief. To date no one has compiled an accurate account of the affirmance rate for each individual state supreme court, and defining such a rate has many methodological difficulties. For example, are reversals on direct appeal the only reversals counted? What about the reversal rate for federal district courts and federal circuit courts? Additionally, some circuits are much more likely to reverse death sentences than other circuits. Defining categories, as well as counting and tabulating, present difficult questions which must be resolved consistently if comparative figures are to have any meaning. For this reason, Tables 1 and 2 only contain numbers as of a specific date which could in theory be established with certainty.

## TABLE 2
## DEATH ROW POPULATION AND PERCENTAGE INCREASES, NUMBER OF EXECUTIONS, BY STATE, AND YEARS 1984, 1987, AND 1996

| State | Death Row Population as of 1984 Col. 1 | Death Row Population as of 1987 Col. 2 | Executions as of 1987 Col. 3 | Death Row Population 1996 Col. 4 | % Increase 1984-1996 Col. 5 | Executions as of 1996 Col. 6 | Executions as a % of Death Row Population 1996 Col. 7 |
|---|---|---|---|---|---|---|---|
| Alabama | 71 | 86 | 2 | 144 | 103% | 13 | 8% |
| Arizona | 50 | 64 | 0 | 121 | 142% | 4 | 3% |
| Arkansas | 23 | 33 | 0 | 37 | 61% | 11 | 23% |
| California | 153 | 196 | 0 | 444 | 190% | 3 | |
| Colorado | 2 | 2 | 0 | 4 | 100% | 0 | |
| Connecticut | 0 | 0 | 0 | 5 | | 0 | |
| Delaware | 6 | 6 | 0 | 11 | 83% | 8 | 42% |
| Florida | 203 | 267 | 16 | 351 | 73% | 36 | 9% |
| Georgia | 114 | 107 | 7 | 108 | -5% | 20 | 16% |
| Idaho | 9 | 14 | 0 | 19 | 111% | 1 | 5% |
| Illinois | 59 | 105 | 0 | 164 | 178% | 7 | 4% |
| Indiana | 25 | 42 | 2 | 50 | 100% | 3 | 6% |
| Kansas | 0 | 0 | 0 | | | 0 | |
| Kentucky | 19 | 31 | 0 | 28 | 47% | 0 | |
| Louisiana | 36 | 52 | 7 | 53 | 47% | 23 | 30% |
| Maryland | 13 | 19 | 0 | 17 | 31% | 1 | 6% |
| Mississippi | 38 | 48 | 1 | 54 | 42% | 4 | 7% |
| Missouri | 23 | 50 | 0 | 92 | 300% | 19 | 17% |
| Montana | 4 | 6 | 0 | 6 | 50% | 1 | 14% |
| Nebraska | 11 | 14 | 0 | 10 | -9% | 1 | 9% |
| Nevada | 20 | 39 | 2 | 85 | 325% | 6 | 7% |
| New Hampshire | 0 | 0 | 0 | | | 0 | |
| New Jersey | 5 | 24 | 0 | 12 | 140% | 0 | |
| New Mexico | 0 | 0 | 0 | 3 | | 0 | |
| New York | 0 | 0 | 0 | | | 0 | |
| North Carolina | 34 | 65 | 3 | 154 | 353% | 8 | 5% |
| Ohio | 21 | 76 | 0 | 150 | 614% | 0 | |
| Oklahoma | 40 | 69 | 0 | 119 | 198% | 7 | 6% |
| Oregon | 0 | 3 | 0 | 22 | | 0 | |
| Pennsylvania | 56 | 86 | 0 | 200 | 257% | 2 | 1% |
| South Carolina | 33 | 50 | 2 | 71 | 115% | 5 | 7% |
| South Dakota | 0 | 0 | 0 | 2 | | 0 | |
| Tennessee | 38 | 59 | 0 | 102 | 168% | 0 | |
| Texas | 172 | 245 | 22 | 394 | 129% | 106 | 21% |
| Utah | 4 | 7 | 1 | 10 | 150% | 5 | 33% |
| Virginia | 21 | 36 | 5 | 54 | 157% | 31 | 36% |
| Washington | 4 | 7 | 0 | 13 | 225% | 2 | 13% |
| Wyoming | 3 | 3 | 0 | 0 | -100% | 1 | 100% |

Source: NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW, U.S.A., Spring 1996; March 1, 1984 and May 1, 1987 (the dates immediately after *Pulley v. Harris* and *McCleskey v. Kemp*, respectively). The New Jersey figure for 1996 from Administrative Office of the Courts, as of Sept. 1, 1996.

Percentage increases are calculated as follows: Col. 5 = (Col. 4 - Col. 1)/Col. 1; Col. 7 = (Col. 6/Col. 6 + Col. 4).

Note: As of March 1, 1984, there were a total of thirteen post-1976 executions: one each in Alabama, Georgia, Indiana, Mississippi, Nevada, Texas, Utah and Virginia; two in Louisiana; and three in Florida.

occur when working with a small base.

The three states with the largest death row population in 1984, Florida, Texas, and California, showed percentage increases of thirty-two percent, forty-two percent and twenty-eight percent, respectively, between 1984 and 1987. By comparison, those same states show even greater percentage increases in their death row population from 1984 to 1996: Florida, 73%; Texas, 129%; and California, 190%. Overall, however, Texas has had the most persons sentenced to death. The current death row population in Texas only ranks below California because Texas has executed over 100 defendants, and California less than half a dozen.

Finally, the percentage of the death row population executed shows both expected and surprising comparisons. Texas has the highest number of executions, but Delaware, Virginia, Utah and Louisiana have executed the largest percentage of their death row populations, each with more than 30% on varying bases. In several indicators, Virginia emerges as a state almost as aggressive as Texas in its death penalty policies.[127] Florida again emerges as the surprising figure, having executed nine percent of its death row population. This results in a large number of actual executions for Florida, but a small proportion of the total death row population. The same effect occurs in the numbers for some other Southern states.

The high courts of Texas, Florida, and California spend a substantial amount of time on capital appeals, and have a highly developed capital jurisprudence.[128] However, goaded by political pressures, and staffed by judges who know they may be voted out of office if they reverse death sentences, these courts have almost become factories for affirmances.[129] The next tier of state high courts, those with death row populations above 100, are now being pushed in that direction.[130] Those state high courts with a small number of capi-

127 In the entire history of capital punishment in America, Virginia has executed more women than any other state, and more than twice as many as the next state (112 executions of women in Virginia, as opposed to 49 in Maryland). Victor L. Streb, *Death Penalty for Battered Women*, 20 FLA. ST. U. L. REV. 163, 172 (1992).

128 These states have had a great deal of interplay between the state high court and federal courts on capital punishment issues. *See, e.g.*, Deborah W. Denno, *Testing* Penry *and its Progeny*, 22 AM. J. CRIM. L. 1 (1994) (chronicling the interplay between the federal courts, the state appellate courts, and the Texas Legislature on the question of statutory mental mitigating factors).

129 *See* Bright & Kennan, *supra* note 81, at 766. Bright & Keenan discuss the replacement of Chief Justice Rose Bird and three other justices on the California Supreme Court, after a campaign in which the Chief Justice's prior reversal of death sentences played a prominent part. The affirmance rate for capital cases went up dramatically after that election.

130 *See supra* tbl.1.

tal appeals engage in an entirely different enterprise when they review death sentences.

After *McCleskey* the majority of states no longer took proportionality review seriously. If the state high court remained under a statutory mandate to conduct proportionality review, the manner and method for conducting such review changed. However, it is not always easy to tell when a state high court is setting aside a death sentence as disproportionate, since courts may give multiple reasons for setting aside a capital conviction.[131] Sometimes this fact was explicitly acknowledged by the state high courts, sometimes it was not. *McCleskey* shocked the defense bar, but it was welcomed by members of the legal community who thought that defendants had been too successful in postponing executions.[132]

Systematic, statistical analysis of a capital punishment system which found significant racial disparities would not result in the federal courts reversing a death sentence, so why then should a state high court conduct proportionality review using a systemwide approach? In the majority of states proportionality review was turned into a limited review of individual death sentences, a comparison to one or two or three other sentences which resulted in the predictable affirmance of the death sentence under review. It was especially easy to ignore the constitutional issues if there was no reliable, systematic analysis of the capital case processing system, since there could be no constitutional violation without a factual predicate indicating disparities with a constitutional dimension.

But state high courts were not required to abandon the constitutional principles of proportionality review, so why were so many state high courts eager to eviscerate the process? There is no definitive answer, but by the late 1980's, state high courts considered themselves ill-equipped and unprepared to undertake an empirical review of their state capital punishment systems. These courts did not have spare resources to devote to the task, and judges often did not wish to make the educational investment required to understand the issues. No institutional actor except the Public Defender was pushing the state high court to undertake systematic proportionality review; the political and institutional pressures were all in the opposite direction.

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131 Frequently a court will reverse on proportionality and on other grounds. *But see* Sinclair v. State, 657 So. 2d 1138, 1142 (Fla. 1995) (death sentence was not proportionate); *see also* State v. Pratt, 873 P.2d 800, 824 (Idaho 1993) ("We hold that the death penalty in this case is disproportionate.").

132 *See, e.g., Conference: The Death Penalty in the Twenty-First Century*, 45 AM. U. L. REV. 239, 327-31 (1995) (comments of Paul D. Kamenar). The Chief Justice of the Supreme Court went on record endorsing the speeding up of executions—a view that was shared by many in the judiciary. *See* Rehnquist, *supra* note 77, at 2.

Moreover, in most states the Public Defender had been rendered ineffective by the lack of a centralized administration, the absence of political support and a severe shortage of funds.[133] They were not strong enough to defend against the attack on proportionality review. The draconian dollar limits imposed upon capital appeals in many states means that no one defendant has the resources to collect the information required for a systematic analysis of the state's capital punishment system.[134] And if the defense does not press for proportionality review, certainly the Attorney General and county prosecutors will not. The prosecution has nothing to gain from systematic proportionality review by the court. Judges, including state high court judges, are overwhelmingly composed of ex-prosecutors.[135] The problem was not that there was no legal theory or principles available to support proportionality review. The patterns show that most state high courts intentionally turned away from support of proportionality review. They did this in two different ways: by repealing or overturning proportionality review entirely or by limiting the universe of cases for comparison.

### *1. Getting Rid of Proportionality Review*

Six state legislatures repealed their statutory provisions for proportionality review after initially following the *Gregg* mandate.[136] One state, Tennessee, reinstated its proportionality review provision after a repeal in 1992.[137] In two additional states the state high court, on its

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133 If the administrative unit for the public defender is the county, then the typical pattern is that the office of the public defender will be effective in the large cities, where there is a large volume of serious criminal cases and a professionalized staff. Even those attorneys, however, cannot undertake systematic data collection on homicides throughout the state. The New York statute enacted in 1995, N.Y. JUD. LAW § 35-b(3) (McKinney Supp. 1996), creates a central Capital Defenders Office for this purpose. In many states public defenders are appointed by local authorities, and there are vast differences in the quality of defense counsel in different parts of the same state.

134 In many jurisdictions, limits on defense spending limit the capability of the defense:

> In [capital] cases, Philadelphia pays a $1,700 flat fee for preparation and $400 for each day in court. This averages $3,519 a case, according to Geoff Gallas, the executive administrator of Philadelphia's courts . . . . Since the public defenders began taking murder cases in April 1993 [in Philadelphia], their clients have not been given a single death sentence, while 33 of those privately represented—most, if not all, court appointed—have been given one.

Rosenberg, *supra* note 115, at 50 (citations omitted). In Alabama, a court appointed lawyer in a death penalty case is awarded $20 an hour and limited to $2,000 for out-of-court time. In Mississippi, the limit is $1,000. *See The O.J. Simpson Case and Capital Punishment*, 38 How. L.J. 247, 265 (1995) (panel discussion) (comments of Stephen Bright).

135 *See* Bright & Keenan, *supra* note 81, at 781.

136 Those states were Connecticut, Idaho, Maryland, Nevada, Oklahoma and Wyoming. *See infra* Appendix A.

137 *See infra* Appendix A.

own initiative, explicitly abandoned the effort to conduct a systematic review of the state's capital case processing system.[138]

States that abandoned proportionality review were not necessarily the states where the procedure was a meaningless exercise. For example, in Wyoming, proportionality review was not a perfunctory exercise prior to repeal. The Wyoming high court systematically examined a large number of cases and carefully considered the issues.[139] Nevada overturned five death sentences as disproportionate prior to repeal, a relatively large number of death sentences to be overturned for such a small jurisdiction.[140]

### 2. *Limiting the Pool of Cases or Scope of Review*

a. Death Only

Some states limited proportionality review by cutting their pool of comparison cases to those in which the sentence of death had actually been imposed.[141] The articulated rationale for this is that a death sentence is unlike any other sentence, therefore a death sentence can only be compared with other death sentences.[142] Courts adopting this approach have thereby concluded that cases which did *not* result in a death sentence are *by definition* qualitatively different from the death sentence case under review.[143] Thus, the method fails to account for situations in which the death penalty was *not* applied.

Cases in which the death sentence was not imposed are irrelevant because the only purpose of proportionality review is to make sure that the death sentence under review belongs with the class of other death sentences. Similarity between cases can also mean nothing more than similarity to only *one other* death sentence which has been upheld. The proportionality decision in this context then is whether

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138 California was engaged in a systematic data analysis project prior to *McCleskey*. It was abandoned after *McCleskey* was decided.

139 *See infra* Appendix A.

140 *See infra* Appendix A.

141 Courts and legislatures define the relevant terms differently. The important analytic point is that a "pool" or "universe" of cases is the group of cases to which the death case under review is being compared, however that group is defined. Courts also use terms such as "death eligible" and "capital" to mean different things.

142 This is the "precedent-seeking" approach in the typology of the National Center for State Courts. *See* BALDUS ET AL., *supra* note 66, at 281. The death sentence under review is not disproportionate if the court can find at least one other similar case in which the death sentence has been upheld.

143 *See infra* Appendix A. The states which limit the pool of comparison cases to other death sentences imposed, either by statutory provision or by an explicit holding in the case law, are Alabama, Kentucky, Louisiana, Mississippi, Nebraska, New Jersey, Ohio, South Carolina, and Virginia. Even in these states, however, the court will occasionally depart from its own procedures and consider other non-death cases.

this death sentence is internally consistent with the class of other death sentences,[144] or, if there is any other case in which the death sentence has been upheld which is similar to the death sentence under review. This process ususally results in a statistically meaningless comparison. In California and Texas, states with large death row populations, where the pool of comparison cases using only death sentences could be large, with the possibility of statistically significant results, there is no mandated proportionality review.

Except in states where the death row populations are very large, this limitation essentially reduces proportionality review to a perfunctory exercise. Only one death sentence has been overturned on grounds of disproportionality in all of the jurisdictions which have limited the pool of cases to other death sentences, and that death sentence was overturned relatively soon after *Gregg*.[145]

Courts which adopt this rationale tend to ask whether the case under review is as "heinous," "aggravated" or "serious" as other cases in which the same court has already upheld a death sentence.[146] No similar cases in which defendants escaped the death penalty are considered. This proportionality review exercise, then, groups all the

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144 This type of proportionality review, however, makes no sense. Assume for the moment that it was demonstrated that the jurisdiction in question was found to only impose death in cases involving black defendants and white victims. Under the logic of this approach, it would be irrelevant that there were five, ten or one hundred allegedly similar cases involving white defendants and white victims in which the defendant was not sentenced to death. As long as the class of people sentenced to death was internally consistent, the standard is satisfied. The Attorney General of the State of New Jersey conceded this point in the oral argument in *Marshall*.

145 *See* Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719, 738 n.154 (1988) ("A reasonably diligent review of proportionality review opinions of state supreme courts that limit their universe to death sentence cases reveals that within all those states, courts have identified a death sentence as comparatively excessive in only one case") (citing Coleman v. State, 378 So. 2d 640 (Miss. 1979)).

> In *Coleman v. State*, the defendant was convicted and sentenced to death for committing a murder while engaged in the commission of a burglary. In conducting its proportionality review, the Mississippi Supreme Court refused to include similar life sentence cases in its universe even though it failed to identify any similar death sentence cases. Lacking such cases, the court vacated the death sentence as excessive.

*Id.* at 738 (footnotes omitted). A search of post-1987 proportionality review cases did not reveal another such case.

146 *See, e.g.*, Turner v. Commonwealth, 364 S.E.2d 483, 490 (Va. 1988).

> [The defendant] cites prior cases where the "vileness" involved was admittedly greater than the "vileness" present here. But no concept of proportionality requires that each new capital murder case equal in horror the worst possible scenario yet encountered, else the death penalty may not be imposed . . . . "While the atrociousness involved in Turner's murder does not rise to the level evidenced in *Stamper, James Dyral Briley*, or *Coppola*, Turner's murder is just as brutal as the murders in *Linwood Earl Briley* and *Clark* . . . ."

*Id.* (citation and footnotes omitted) (second ellipsis in original).

death sentences together and asks if all of the cases in which death was imposed are similar to one another. The principle of proportionality will be upheld if all of these case resemble one another. The death sentence will be overturned only if the court can identify the case under review as an aberrant judgment, a case in which the circumstances of a murder or the characteristics of the defendant are strikingly dissimilar to those in other death sentences. The circumstances most likely to occasion a substantive legal argument on this basis are those where the death sentence has been imposed upon one codefendant, while an "equally or more culpable" codefendant received life.[147] Typically, however, state court opinions upholding death sentences consist of inflammatory rhetoric, a recitation of horrors designed to appeal to emotions of vengeance and disgust before the court upholds the death sentence. Moderation is rare.

Interestingly, those state supreme courts that only consider the pool of other death sentences typically say little or nothing about their proportionality review procedures. The court may not even cite another case in affirming a death sentence. Courts adopting this approach usually have a small and manageable number of cases immediately after reenactment of the death penalty. Ironically, perfunctory review procedures are usually institutionalized when the number of comparison cases grows, as more people in the jurisdiction are sentenced to death.

b. Capital Convictions

Other state courts have defined the pool of comparison cases as all cases which resulted in a conviction for capital murder but not necessarily a death sentence. The rationale for this approach is that a death sentence should be compared with all cases where there has been an actual legal judgment which *could* have supported the imposition of the death sentence, i.e. all convictions which reached the penalty phase of a capital trial.[148] Cases which have a factual or circumstantial similarity to the case under review are excluded if there was no conviction for capital murder. The justification for this exclusion is that prosecutorial and juror decision making, and hence trial outcomes, are essentially unpredictable. This pool thus leaves out

147 Even in this circumstance, however, state high courts will not always set aside the death sentence as disproportionate. *See, e.g.*, Coppola v. Commonwealth, 257 S.E.2d 797, 807 (Va. 1979).

148 *See infra* Appendix A. The states which define their pool of comparison cases as all other penalty phase cases, either by statute or by an explicit holding to that effect by the state high court are: Delaware, Georgia, Idaho, Maryland, Missouri, Montana, New Mexico, North Carolina, Washington.

cases whose facts or circumstances *could have supported a capital prosecution,* but prosecutors choose not to pursue it.[149]

This initial choice does not result in the same universe in every jurisdiction. Nor does this decision rule mean that all death sentences or capital convictions which have ever been imposed in that jurisdiction will necessarily be included.[150] The pool may also not be comprised solely of jury verdicts at penalty phase. It may include some pleas to capital murder.[151] It may include some death sentences and life sentences imposed by a judge either without a jury or when overruling a jury.[152] It may or may not include death sentences reversed on appeal or the result of penalty phase retrials.[153]

A conviction for death eligible murder under this rationale appropriately limits the class of similar cases because these are the only cases in which there is both a legal and factual foundation for the death sentence. Or, to put the matter in terms of similar defendants, members of this class are similar because they are the only defendants *actually at risk* of receiving the death penalty. Proportionality review in the state high court, then, exists for the sole purpose of correcting aberrant death sentences imposed by a jury or judge, *after* the factual and legal prerequisite for such a judgment has been found to exist. A death sentence may be found disproportionate if other cases with similar facts and circumstances resulted in a life sentence *after a conviction for capital murder.*[154]

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149 *See Marshall II,* 613 A.2d 1059, 1070-72 (N.J. 1992).

150 This is due to the fact that some states do not include death sentences which have been reversed at guilt phase or penalty phase. Some states do not include death sentences which have not yet been upheld on appeal. This pool, therefore, is not in every instance *all* penalty phase cases, nor does it result in the same universe in every state. As the New Jersey Supreme Court explained:

> We realize that other courts throughout the country have used different measures of comparison . . . the Georgia Supreme Court uses all capital felony cases which have been appealed for comparison . . . Delaware's universe consists of a comparison between the subject case and 'the penalties in all first degree murder cases which have gone to trial and a penalty hearing.'

State v. Marshall, 613 A.2d 1059, 1073 (N.J. 1992) (citations omitted).

151 There may also be convictions for capital murder imposed by a judge. In some rare cases the conviction may be imposed pursuant to a plea bargain. *See* Bienen, et al., *supra* note 21, at 94 n.337 (discussing the conditional plea to capital murder in New Jersey); *see also* State v. Wright, 483 A.2d 436 (N.J. Super. Ct. Law Div. 1984) (involving a plea to capital murder in exchange for a sentence recommendation of four life sentences, where a mother killed her four children under circumstances similar to those in the highly publicized Susan Smith case).

152 For example, in Florida and Indiana the judge can override a jury's verdict at penalty phase. *See infra* Appendix A.

153 The inclusion of reversed death sentences is especially problematic. *See* State v. Marshall, 613 A.2d 1059, 1129 (N.J. 1992) (Handler, J. dissenting).

154 In the terminology of stage analysis, these jurisdictions look at one stage prior to the decision-making stage examined by courts that limit their universe solely to other death

## IV. PROPORTIONALITY REVIEW IN PRACTICE: THREE STATES, THREE APPROACHES

### A. CONNECTICUT: RACIAL DISCRIMINATION AND THE ABUSE OF PROSECUTORIAL DISCRETION AS A MATTER OF STATUTORY INTERPRETATION

Recently, the Supreme Court of Connecticut addressed its state's constitutional issues with respect to capital punishment in depth, carefully examining the standards in other jurisdictions before holding that the statute met state constitutional standards in the case *State v. Ross*.[155] The challenge to the death sentence was not, however, based upon proportionality.[156] The legislature revised the death penalty statute, effective October 1, 1995, prospectively eliminating proportionality review.[157] The legislature presumably took this action to pre-

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sentences. *See infra* Appendix B, fig.1 (outlining the stages of capital case processing). They stop short, however, of analyzing the two previous stages: all cases where there was a factual basis for capital murder, although the case never resulted in a prosecution for capital murder or a capital conviction. Not suprisingly, jurisdictions following this method have accounted for almost all of the reversals of death sentences on grounds of disproportionality.

155 646 A.2d 1318 (Conn. 1994), *cert. denied*, 115 S. Ct. 1133 (1995). The principal constitutional issues involved the structure of jury decision making and the standards and procedures for evaluating mitigating factors, as well as Eighth Amendment questions and other issues. *See id.* at 1353-58 (citing State v. Ramseur, 524 A.2d 188 (N.J. 1987)). For a detailed history of Connecticut constitutional history, see *id.* at 1373-1395 (Berdon, J., dissenting). *See also infra* Appendix B.

156 Dissenting Justice Berdon, however, noted that the defendant in *Ross*, who was convicted of six murders, was allowed to plead guilty and avoid the death penalty by a prosecuting attorney who had full knowledge of the convictions. In contrast, a prosector in another judicial district did seek the death penalty: "This life-and-death difference between the sentences received by the defendant for identical crimes proves that an unacceptable level of arbitrariness exists due to prosecutorial discretion, even if the jury is adequately guided by the statute." *Id.* at 1382 (Berdon, J., dissenting). Justice Berdon went on to say that in his opinion the death penalty was discriminatory on the basis of the race of the victim. He cited studies from other jurisdictions and noted that all of the five defendants on death row in Connecticut had killed white victims, and that two of the defendants were African American. *Id.* at 1384-85 (Berdon, J., dissenting). The dissent noted that the court was divided: "[T]wo justices of this court believe the death penalty is constitutional, one does not, and four are silent." *Id.* at 1387 (Berdon, J., dissenting). In a subsequent case, *State v. Breton*, 663 A.2d 1026, 1054 n.2 (Conn. 1995) (Berdon, J., dissenting), Justice Berdon noted that only three Supreme Court Justices were qualified to sit in *Ross*, and in *Breton* three justices still had not yet addressed the state constitutionality of the death penalty. Justice Berdon continued to express his view that the death penalty was applied in a discriminatory manner due to different prosecutorial charging practices. *Id.* at 1055, nn.5-6 (Berdon, J., dissenting). The court's opinion in *Breton* did not address proportionality since the death sentence was reversed for other reasons.

157 "The legislature recently eliminated proportionality review altogether on a prospective basis." State v. Cobb, 663 A.2d 948, 950 n.2 (Conn. 1995) (citing CONN. GEN. STAT. ANN. § 53a-46(b) (West Supp. 1996)). Connecticut previously had a standard proportionality review provision, using a slight variant of the language in *Gregg*. CONN. GEN. STAT. ANN. § 53a-46(b)(3) (West 1994) (repealed) ("[T]he sentence is excessive or dispropor-

empt the possibility of the court declaring the statute unconstitutional on grounds of proportionality. The court will, however, continue to conduct proportionality review for those cases in which the homicide occurred before the effective date of the amendment, avoiding issues of *ex post facto.*

The Supreme Court of Connecticut again addressed proportionality in *State v. Cobb.*[158] The proportionality arguments in *Cobb* were not based upon federal or state constitutional challenges. No empirical evidence or projections concerning the operation of the capital case processing system in the state were presented. The claim was that independent of the state and federal constitutions, the state proportionality review provision required expanding the universe of cases for proportionality review because the death penalty has been applied in a discriminatory manner.[159] Although the court did not consider the matter one of interpretation of state or federal constitutional issues, raising the issue of racial bias suggests that the court was mindful of the fact that this constitutional claim could be brought under proportionality review in the future.[160] The majority commented that evidence similar to that presented under *McCleskey* would be appropriately brought under the general provision for appellate review and such a claim would not necessarily be rejected if the factual basis was analogous to that in *McCleskey.*[161] The implication is that the Supreme Court of Connecticut could and would consider such evidence of bias and rule on the constitutional issue, irrespective of whether the legislature had eliminated proportionality review.

The question of what was and has been the universe of cases in Connecticut is confusing because the court made rulings regarding

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tionate to the penalty imposed in similar cases, considering both the circumstances of the crime and the character and record of the defendant.").

158 663 A.2d 948 (Conn. 1995).

159 One issue in *Cobb* was whether the proportionality question had been addressed and decided in *Ross. See id.* at 952. In *Cobb,* the court declined to rely upon its decision in *Ross. Id.*

160 The dissent discussed the issue of racial bias in terms of the state constitution. *Cobb,* 663 A.2d at 965 (Berdon, J., dissenting).

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> We emphasize that we do not decide whether a statistical study comparable to that offered in McCleskey v. Zant would establish a violation of [the appellate review provision] in any particular case. Nor do we suggest that only such a broad scale attack could establish such a violation. Obviously, if the record in any given case indicated that, irrespective of any statistics, the death sentence was the product of passion, prejudice or any other arbitrary factor incident to that particular trial, there would be a violation of [the appellate review provision]. We conclude only that, subject to the requirement that the defendant make his statistical challenge at trial, [the appellate review provision] provides an appropriate statutory vehicle for his statistical claim on appeal.

*Id.* at 961 n.20 (citation omitted).

the universe of cases which were not published and because the universe of potentially similar cases includes crimes committed as far back as 1973, when the capital statute in Connecticut was passed.[162] The universe of cases in *Cobb* includes all capital felony cases which have reached the penalty phase since 1973.[163] In *Ross* the court refused the defendant's request that the universe be expanded to include those cases in which the State clearly could have, but did not, charge the accused with a capital felony and which then resulted in a conviction of not less than first degree manslaughter.[164]

The court rested its interpretation on the legislative history of the proportionality review provision and held that the legislature did not "contemplate the kind of universe advocated by the defendant, which would necessarily be accompanied by a detailed, complex fact-finding."[165] The court also declined to follow the New Jersey model set out in *Marshall II*,[166] however the court allowed the defendant to present a post-appeal state habeas corpus petition, including empirical evidence of systematic racial bias in the Connecticut capital punishment system as applied, after creating a reliable factual record at the trial level.[167] In other words, the court will allow the defense to present a factual record based upon a system-wide study of the state capital pun-

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162 The universe of cases for proportionality review was governed by Practice Book § 4066A(b), authorized by the court under its rule making authority. This rule provides that the universe of cases shall be "only those capital felony cases that have been prosecuted in this state after October 1, 1973, and in which hearings on the imposition of the death penalty have taken place . . . unless the court . . . shall modify this limitation in a particular case." *Id.* at 952 n.6 (emphasis omitted).

163 *Id.*

164 *Id.* at 952 n.7. The court denied *Ross*' application, but granted a more limited request. *Id.* Prior to *Ross*, the court had granted two other enlargements to the proportionality universe. *Id.*

165 *See id.* at 955. The State argued that an expanded proportionality review would require the court to inquire into "the nature and circumstances of every case since 1973 that ended in a homicide conviction in order to determine whether that case could have been charged as a capital felony." *Id.* at 956. The court inaccurately noted that only Pennsylvania now conducts such fact-finding. *Id.* at 957. New Jersey, Tennessee, Washington, and Georgia review homicide cases to determine which *could have* resulted in a capital prosecution. *See infra* Appendix A.

166 613 A.2d 1059 (N.J. 1992).

167 *Cobb*, 663 A.2d at 962 ("[T]he nature of the defendant's claim of systematic racial bias, and the seriousness and finality of the death penalty, counsel against raising any undue procedural barriers to review of such a claim."). The dissent, which now included three justices of the court, believed that the statistical showing put forward by the defense in *Cobb* was sufficient to show that the death penalty was more likely to be imposed if the victim was white or otherwise not African-American. The data presented were preliminary. The dissenters believed that proportionality review was the appropriate rubric for these arguments and that the Supreme Court of Connecticut, not the trial court, was the appropriate forum in which to conduct a factual inquiry. *Id.* at 965 (Berdon, J. dissenting, joined by Norcott, J. and Katz, J.).

ishment system. The habeas corpus petition in state court on these issues is pending, and as of this writing no death sentence has been affirmed in Connecticut.

### B. NEBRASKA: CONFLICT BETWEEN THE SUPREME COURT AND LEGISLATURE OVER THE UNIVERSE OF CASES FOR PROPORTIONALITY REVIEW

The 1978 Nebraska statute specifies that proportionality review encompasses challenges to systemwide disparities and challenges to possibly discriminatory patterns introduced by the exercise of prosecutorial discretion, including a consideration of prosecutorial charging practices.[168] Since 1979, however, the Nebraska Supreme Court has consistently narrowed the scope of proportionality review. The Nebraska Supreme Court initially interpreted the proportionality review statute as requiring the court to review only cases in which the defendant was found guilty of first degree murder.[169] The court subsequently narrowed the pool of comparison cases even further to require a review only of death sentences imposed.[170] In other words, the court narrowed the universe of cases on two separate occasions. The most recent decisions of the Nebraska Supreme Court all limit comparison to other death sentences only, directly contradicting the 1978 statutory mandate to consider all potentially capital cases when conducting proportionality review.[171]

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168 The Nebraska legislature enacted a statute requiring proportionality review which read as follows:

> (3) State law should be applied uniformly throughout the state and since the death penalty is a statewide law an offense which would not result in a death sentence in one portion of the state should not result in death in a different portion; . . . .
> The Supreme Court shall within a reasonable time after July 22, 1978, review and analyze *all cases involving criminal homicide committed on or after April 20, 1973.* [The date of reenactment.] Such review and analysis shall examine (1) the facts including mitigating and aggravating circumstances, (2) *the charges filed,* (3) the crime for which defendant was convicted, and (4) the sentence imposed. Such review shall be updated as new criminal homicide cases occur.

NEB. REV. STAT. §§ 29-2521.01(3), 29-2521.02 (Reissue 1995) (emphasis added). This statute is also referred to as L.B. 711, Laws 1978.

169 State v. Williams, 287 N.W.2d 18, 28 (Neb. 1979). This ruling contradicted the specific statutory mandate to "review and analyze all cases involving criminal homicide." NEB. REV. STAT. § 29-2521.02.

170 State v. Welsh, 275 N.W.2d 54, 57 (Neb. 1979). This holding was reaffirmed in *State v. Reeves,* 453 N.W.2d 359, 386 (Neb. 1990).

171 The statute reads:

> *In order to compensate for the lack of uniformity in charges* which are filed as a result of similar circumstances it is necessary for the Supreme Court to review and analyze *all* criminal homicides committed under the existing law in order to insure that each case produces a result similar to that arrived at in other cases with the same or similar circumstances.

NEB. REV. STAT. § 29-2521.01(4) (Reissue 1995) (emphasis added). The court trumped

The majority opinion in *Williams* noted in dicta that the statutory mandate would violate constitutional principles of separation of powers if interpreted literally because it explicitly required the court to review prosecutorial decision making in the selection of cases for capital prosecution.[172] And that was the statute's explicit intention. *Williams* did not, however, hold the proportionality review provision unconstitutional on those grounds.[173] Instead the court ignored the legislative mandate and decided to conduct proportionality review by comparing the death sentence under review only with all other convictions for first degree murder after the effective date of the statute.[174] This compromise did not satisfy all members of the court.[175]

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this legislative directive. "In a series of cases this court determined that if read literally, L.B. 711 would unconstitutionally encroach upon the judicial function . . . . we held that the proportionality review under L.B. 711 should include only those cases in which the death penalty was imposed." State v. Reeves, 453 N.W.2d 359, 386 (Neb. 1990) (citations omitted).

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> There is language in at least two sections of L.B. 711, Laws of 1978, directing the Supreme Court to review and analyze 'all criminal homicides.' 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 exercise by 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 L.B. 711 literally would create insurmountable constitutional problems. In view of the disposition made here, it is unnecessary to discuss constitutional issues.

*Williams*, 287 N.W.2d at 29 (emphasis added).

173 *Id.*

174 In *Williams*, the court first considered cases which did not result in a death sentence. It reviewed 32 cases which resulted in a conviction for first degree murder, including eight cases which were not appealed and seven death sentences which were on appeal. The remaining 25 cases it considered were life sentences. *Id.* The court began with a consideration of the aggravating and mitigating circumstances.

> In all of the death penalty cases previously affirmed or now pending in this court, each has involved at least three separate and distinct statutory aggravating factors and only one or no statutory mitigating factors . . . . Any objective weighing and balancing of aggravating and mitigating circumstances and comparison to the other death penalty cases now pending establishes that the death sentence in the case now before us is not excessive or disproportionate to the death penalties imposed in the other death penalty cases.

*Id.* at 29-30.

175 The Chief Justice of the Nebraska Supreme Court, in dissent, described his concerns as follows:

> I am more concerned, as I believe L.B. 711, Laws 1978, requires me to be concerned, as to how this case squares with the remaining 25 cases where the death penalty was not imposed. [The Chief Justice then reviewed the statute and its relationship to an earlier provision.] All of that makes it seem clear to me that not only is this court required to examine aggravating and mitigating circumstances, but in addition to that we are supposed to in some manner place each first degree murder case one on top of the other to see whether or not they all conform. While I may be the first to concede that imposing such a duty upon the court is at best difficult and perhaps impossible, nevertheless, I cannot find how I can ignore that requirement. [The Chief Justice's opinion then goes on to enumerate a number of cases "similar" to the case under review in which the defendant was not sentenced to death, either because the defend-

The Nebraska Supreme Court further narrowed the scope of proportionality review in the 1986 case of *State v. Palmer*.[176] The majority in *Palmer* concluded that the appropriate universe of cases for proportionality review was other death sentences.[177] The Chief Justice of the Nebraska Supreme Court objected not only that the court's decision ignored the legislature's explicit mandate to review all homicide cases which were potentially death eligible,[178] but also that the court's decision to limit the universe of cases to other death sentences abrogated the primary function of proportionality review.

> The purpose of L.B. 711 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

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ant pled guilty or the defendant was sentenced to life imprisonment . . . . The Chief Justice then concludes that the legislative intent of L.B. 711 must have been to further restrict the imposition of the death penalty] by directing us not to impose the death penalty if on previous occasions of cruel and senseless killings we have not imposed the death penalty.

*Id.* at 32-35 (Krivosha, C.J., concurring in part and dissenting in part).

176 399 N.W.2d 706 (Neb. 1986).

177 The majority opinion commented:

> It would be possible to construe the statute so that cases in which the death penalty was not imposed, although upon reflection it could be said that the death penalty might have been imposed, would be the standard against which all future death penalty cases would be compared. By a process of 'attrition' this would result in a substantial narrowing of the group of cases in which the death penalty would be a possible sentence and, eventually, for all practical purposes, could amount to a repeal of the death penalty. We do not understand that the Legislature intended the statute to effect a repeal of the death penalty.

State v. Palmer, 399 N.W.2d 706, 735-36 (Neb. 1986) (citing State v. Copeland, 300 S.E.2d 63, 71-72 (S.C. 1982).

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> The plain language of the act seems to make it clear that *all* criminal homicide cases are to be reported to the Supreme Court and that the Supreme Court, in conducting its review, is to look at *all* of these cases and to then compare the case on appeal with those other cases having same or similar *circumstances*, not penalties, to determine whether the imposition of the death penalty in the case on appeal is more severe than that imposed in other cases having same or similar circumstances . . . . limiting the review to be conducted by this court to those cases in which the death penalty has been imposed is to rewrite the statute . . . . The language of the act simply will not, absent painful distortion, permit a finding that the review is to be limited to only cases in which the death penalty had been imposed.

*Id.* at 747-48 (Krivosha, C.J., concurring in part and dissenting in part) (emphasis added). Chief Justice Krivosha cited voluminous legislative history supporting this interpretation of the act. *See id.* at 751-52.

> 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.[179]

The Chief Justice then proceeded to present a data base and conduct his own proportionality review.[180] The Chief Justice attached to his opinion a list of 185 homicides in which individuals were involved in the killing of another and convicted, or pled guilty to either first degree murder, second degree murder, or manslaughter or less.[181] Of that number he noted that only thirteen, or seven percent, of these cases resulted in the death penalty being considered.[182] Out of these 185 cases, Chief Justice Krivosha identified 57 homicides involving robberies, of which six, or 10.5%, including the case under review, resulted in the imposition of the death penalty.[183] A closer examination of the facts of some of the non-death cases demonstrated to the satisfaction of Chief Justice Krivosha that many of the cases where a life sentence was imposed had not only similar, but nearly identical, fact patterns to the death case on appeal.[184] Therefore the death sentence under review was, in his opinion, disproportionate.[185]

### C. STATISTICS AND LAW: THE SUPREME COURT OF NEW JERSEY'S IMPLEMENTATION OF PROPORTIONALITY REVIEW

The development of the law in New Jersey illustrates the possibilities of what a state high court can do under the rubric of proportionality review. The doctrinal foundation for proportionality review in New Jersey was developed in the five year period between *State v. Ramseur*[186] in 1987, the case upholding the constitutionality of the New

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179 *Id.* at 752 (Krivosha, C.J., concurring in part and dissenting in part). Justice Handler, in *Marshall II*, used the same analogy. *See* State v. Marshall, 613 A.2d 1059, 1130 (N.J. 1992) (Handler, J., dissenting).

180 This discussion, including the annotations to allegedly similar cases in the concurring and dissenting opinion of Chief Justice Krivosha, comprises fifty pages. *See Palmer*, 399 N.W.2d at 733-83.

181 *Id.* at 753 (Krivosha, C.J., concurring in part and dissenting in part).

182 *Id.* (Krivosha, C.J., concurring in part and dissenting in part).

183 *Id.* at 753 (Krivosha, C.J., concurring in part and dissenting in part).

184 *Id.* at 753 (Krivosha, C.J., concurring in part and dissenting in part). The Chief Justice concluded that analysis of similar cases supported the conclusion that the death penalty for a killing during a robbery, absent other circumstances, was by definition disproportionate: "[T]he death penalty for murdering an individual while attempting to or in fact robbing the individual was imposed in only 12.8 percent of the cases, while life imprisonment or less was imposed in 87.2 percent of the cases." *Id.* at 754 (Krivosha, C.J., concurring in part and dissenting in part).

185 *Id.* at 754-55 (Krivosha, C.J., concurring in part and dissenting in part).

186 524 A.2d 188 (N.J. 1987).

Jersey statute, and *State v. Marshall*[187] in 1992, when the court conducted its first proportionality review using the data and analysis presented to it in the Proportionality Review Project's Final Report.[188] While the factual and legal issues in New Jersey were not unusual, they were simply not addressed with such careful reasoning elsewhere. Nonetheless, the Supreme Court of New Jersey has not yet reversed any death sentences on grounds of proportionality.[189]

*State v. Marshall II* is the leading case on proportionality review. Issues which were referred to tangentially in other jurisdictions were fully litigated before the New Jersey court. These issues polarized opinion on the court, although the majority held for the principle of systemwide review and for the commitment to proportionality review based upon comprehensive empirical analysis. The political pressure to abandon or severely restrict proportionality review was present in New Jersey just as it was in other jurisdictions. Even though it was politically costly to do so, the court maintained its initial commitment to the establishment of a process dedicated to protecting the constitutional due process rights of capital defendants. This sustained support for a reliable and comprehensive data-gathering and analysis project has not yet been matched by any other state high court.

Many other state high courts were presented with the identical statutory mandate as New Jersey following *Gregg*.[190] Similarly, New Jersey legal institutions and New Jersey homicide cases incorporate most of the features observed in other jurisdictions.[191] The New Jersey high court addressed the questions which arise again and again in other jurisdictions: what should be the universe of cases; should proportionality review include the review of prosecutorial discretion in charging; how should racial and geographic disparities be ex-

187 613 A.2d 1059 (N.J. 1992) (Marshall II).

188 *Marshall II* was the first case to implement proportionality review in New Jersey. The entire opinion, exceeding 100 pages, is devoted to proportionality review. The opinion summarizes the history of proportionality review litigation in New Jersey and applies the analysis and data of the Proportionality Review Project's Final Report to the facts and circumstances of the imposition of Robert Marshall's death sentence, which was upheld on direct appeal a year earlier in *State v. Marshall*, 586 A.2d 85 (N.J. 1991) (Marshall I).

189 The Supreme Court of New Jersey continues to analyze racial and geographic disparities in capital processing as new capital cases come before the court. Unfortunately, the race effects persist. *See infra* Appendix C. For example, the data in the court's most recent proportionality review, *State v. Harris*, 660 A.2d 539 (N.J. Super. Ct. App. Div. 1995), involved a black defendant and a white victim and showed evidence that the victim's race had a significant effect. However, the New Jersey Supreme Court did not address the proportionality data in that case because Harris died prior to the proportionality hearing.

190 *See infra* Appendix A.

191 Appendix B sets out some of the basic parameters from the *Marshall II* data set and presents a summary analysis of the proportionality review issues, such as racial and geographic disparities in capital case processing, that arise in death penalty jurisdictions.

amined; what should be the relationship between the authority of the state high court and the legislature; how should the political pressure placed on the court be reduced; and what is the foundation and purpose of proportionality review itself. What other state high courts did, or did not do, as they set about to conduct proportionality review is brought into focus by examining the approach taken by the Supreme Court of New Jersey.

The Proportionality Review Project of the Supreme Court of New Jersey put flesh on the bones of the statutory mandate to conduct proportionality review. Under the direction of the court's Special Master, David C. Baldus, the Proportionality Review Project established a reliable data base and a methodology and procedure for conducting proportionality review. Building on the assembled facts and the technical analysis of the Proportionality Review Project, the court then defined the constitutional foundation for proportionality review. From the beginning of the development of these principles to the conclusion of the first phase of proportionality review marked by *Marshall II*, the court moved against the direction taken by other high courts and contrary to the evolving capital jurisprudence of the United States Supreme Court.

The Proportionality Review Project identified the relevant variables affecting capital case processing and analyzed them using the most sophisticated social science methodologies available, while the project itself made substantial contributions to those methodologies.[192] The court educated itself concerning these methods and used the analyses in its proportionality review of Robert Marshall's death sentence.[193] The court chose among alternative formulations of comparison categories, rejecting some, elaborating upon others. At no time was the court the passive recipient of an expert's opinion. The court never shirked its responsibility to define the constitutional dimensions of proportionality for itself in the context of capital punishment.[194]

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192 The work of the Proportionality Review Project has been described and compared with the analogous data collection and analyses that were presented to the United States Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987). Baldus et al., *supra* note 37, at 405-13.

193 *See* State v. Marshall, 613 A.2d 1059 (N.J. 1992) (Marshall II). The court stated, "[w]e have but little knowledge of the science of statistical probabilities." *Id.* at 1111. This somewhat wistful comment in the court's opinion followed an extensive discussion of technical methodological issues. "If a court concludes that the statistical evidence is so deviant as to compel a conclusion of substantial significance, the court must then look to the circumstances surrounding that statistical showing to determine its full constitutional import." *Id.* at 1111.

194 The implementation of concepts based upon equity and principles of proportionality has been difficult in other areas of the law as well. For example, the principle of pro-

The methodological contributions of the Proportionality Review Project represent a considerable advance over previously existing methods for tracking case dispositions, and for measuring defendant culpability and the relative aggravation level of murder cases, especially for those cases which did not go to trial as capital cases.[195] The development of the constitutional principles underlying proportionality traces a part of the history of the court itself under the leadership of former Chief Justice Robert N. Wilentz. The center held on to proportionality, but it become increasingly embattled, both from within and without, with Justice Garibaldi and Justice Handler increasingly defining independent positions.[196] The death of Chief Justice Wilentz in July of 1996 may change these alignments and signal a change in the court's continued commitment to systematic proportionality review.

### *1. The Early History of Proportionality Review in New Jersey*

In 1982 the New Jersey legislature reinstated capital punishment. Reenactment was a decade after its former capital punishment statute had been declared unconstitutional by the Supreme Court followed by the reluctant concurrence of the state supreme court. It was almost two decades after the last execution in New Jersey.[197] The New Jersey

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portionality has been the doctrinal foundation of recent cases involving challenges to inequalities and disparities in a university's allocation of resources for men's and women's athletic teams. *See* Cohen v. Brown University, 879 F. Supp. 185 (D. R.I. 1995); *Judge Says Brown Plan Won't Work*, PLAIN DEALER (Cleveland), Aug. 18, 1995, at 3D.

195 These methodological refinements are transferrable to research on other forms of criminal conduct. The Proportionality Review Project sets out a graduated standard for evaluating the strength of evidence of guilt which is applicable to cases other than murder cases. The model carefully distinguished between circumstantial aspects of a case, aspects of the defendant's conduct, and facts relevant to criminal intent and is generalizable to other jurisdictions and crimes.

196 Justice Garibaldi, in her concurring and dissenting opinion, disagreed with several key points made by the *Marshall II* majority. *See Marshall II*, 613 A.2d at 1115 (Garibaldi, J., concurring in part and dissenting in part). *See infra* notes 222-24, 230-31 and accompanying text. Justice Handler took a position similar to that of former Justices Brennan and Marshall of the United States Supreme Court. Justice Handler believed that "[o]ur experience over the last ten years with capital punishment, capped by the lessons wrought from our gargantuan effort to attain proportionate sentencing, confirms the constitutional impossibility of capital punishment." *Id.* at 1144 (Handler, J., dissenting).

197 Reenactment was delayed in New Jersey because the then Governor, Brendan Byrne, refused to sign legislation reenacting capital punishment during his two terms in office. However, in 1982, the New Jersey legislature passed a capital punishment statute that was drafted to comport with the federal constitutional requirements specified in *Gregg v. Georgia*, 428 U.S. 153 (1976). *See* 1982 N.J. Laws 555. For a discussion of the legislative history of reenactment in New Jersey, see Bienen et al., *supra* note 21, at 66-70; Connie Chen, A Review and Analysis of the 1982 Legislative Decision Making Process Reenacting Capital Punishment in New Jersey (1992) (unpublished), *in* 1992 Woodrow Wilson School Policy Conference Final Report: A Decade of Capital Punishment in New Jersey (1992) (unpub-

capital punishment scheme, like the majority of those now in effect in the 39 other capital jurisdictions, is built upon a structure of statutory aggravating and mitigating factors which are found as facts and then weighed by a specially selected jury during the second stage of a capital trial.

Not all murders are eligible for capital prosecution in New Jersey. As in other states the county prosecutor in each of the twenty-one separate county jurisdictions has the sole discretionary authority to select which of the potentially death-eligible cases will be subject to capital prosecution through a procedure called the serving of a notice of factors. Throughout the period considered here, the law required both a factual basis for one of the eight enumerated statutory aggravating factors *and* that the defendant either committed the homicidal act by his own conduct with the requisite intent to kill, or paid another to commit the homicidal act.[198]

The language of the proportionality review provision in New Jersey was taken directly from *Gregg*: The New Jersey Supreme Court shall determine whether the death sentence is "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[199] Proportionality review was created by statute; however, it was always the responsibility of the state high court to determine how proportionality review would be conducted.[200]

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lished) (presented to the New Jersey Assembly Judiciary Committee and the New Jersey Senate Judiciary Committee in 1992 and included in the legislative history of A.C.R. 20, a pending amendment to the New Jersey Constitution) (on file with State Documents Section, Northwestern University School of Law Library) [hereinafter 1992 WWS Final Report], and Tanya Minhas, Newspapers, Crime and the Public: The Role of the Media in the Reinstatement of the Death Penalty in New Jersey (1992) (unpublished), *in* 1992 WWS Final Report.

For a description and statistical analysis of the structure of the New Jersey statute, see Bienen et al., *supra* note 21, at 242-62; Bienen et al., *supra* note 45, at 715-35.

198 A constitutional amendment ratified in 1992, N.J. CONST. art. I, par. 12 (West Supp. 1996), reduced the intent requirement for a conviction of capital murder, reversing the Supreme Court of New Jersey's opinion in *State v. Gerald*, 549 A.2d 792, 819 (N.J. 1988) (holding that a conviction for capital murder must include a finding of specific intent to commit capital murder). None of the cases prior to *Marshall II* or included *infra* in Appendix B are affected by the 1992 amendment.

199 N.J. STAT. ANN. § 2C:11-3e (West 1995). *Cf.* Gregg v. Georgia, 428 U.S. 153, 212 (1976) (White, J., concurring).

200 Most states institutionalized proportionality review in this manner. In New Jersey, the Proportionality Review Project was located within the Administrative Office of the Courts (AOC). In *Gregg* the Court cited with approval the fact that "in order that information regarding 'similar cases' may be before the court, the post of Assistant to the Supreme Court [of Georgia] was created. The Assistant must 'accumulate the records of all capital felony cases in which the sentence was imposed after January 1, 1970, or such earlier date as the court may deem appropriate.'" Gregg v. Georgia, 428 U.S. 153, 212 (1976) (White, J., concurring) (citation omitted). The language of *Gregg* was both very simple and very general: "similar cases considering both the crime and the defendant." *Id.* The Georgia

The Office of the Public Defender raised proportionality in all capital appeals beginning in 1982. The earliest direct appeals included data from the Public Defender Homicide Study in support of appellate arguments that the operation of the capital case processing system in New Jersey violated constitutional principles of proportionality.[201] The Public Defender consistently argued that proportionality review must encompass an examination of the entire capital case processing system in the jurisdiction and incorporate an analysis of capital case processing by stages. It was an unusual and fortuitous circumstance that the N.J. Office of the Public Defender had the resources and commitment to begin a systematic study of capital case processing throughout the state prior to the court appointing the Special Master.[202]

### 2. *The Identification of Issues*

*State v. Ramseur*,[203] and *State v. Marshall II*,[204] frame the constitutional jurisprudence on proportionality review in New Jersey.[205] Although proportionality review had not been mandated by the fed-

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Supreme Court had not implemented any procedures or conducted a proportionality review at the time the United States Supreme Court endorsed the Georgia statute and rules.

201 Arguments concerning disproportionality based on preliminary results from the Public Defender Homicide Study have been raised by defendants since *State v. Ramseur*, 524 A.2d 188 (N.J. 1987) and *State v. Koedatich*, 548 A.2d 939 (N.J. 1988). The arguments have taken different forms. *See, e.g.*, Brief for Defendant at 28-56, State v. Koedatich, 548 A.2d 939 (N.J. 1988) (arguing abuse of prosecutorial discretion in the decision to charge capital murder); *id.* at 178-80 (system-wide disproportionality and race and county-based disparities documented in the then available findings of the Public Defender Homicide Study). Earlier briefs relied upon data from the Preliminary Report (1986) of the Public Defender Homicide Study. Later briefs relied upon the Interim Report (1987) of the Public Defender Homicide Study or the statistical findings published in Bienen et al., *supra* note 21.

202 The work of the Public Defender Homicide Study was included in an annotation of major studies in the 1990 GAO REPORT, *supra* note 38. The GAO report stated:

> It is important to evaluate research quality . . . By quality we mean the strength of the design and the rigor of the analytic technique that leads to a level of confidence we have in the study findings. We judged a study to be of high quality if it [1] was characterized by a sound design that analyzed homicide cases throughout the sentencing process; [2] included legally relevant variables (aggravating and mitigating circumstances); and [3] used statistical analysis techniques to control for variables that correlate with race and/or capital sentencing.

*Id.* at 3. *See* Bienen et al., *supra* note 21, at 330 fig.1 (indicating the stages of capital case processing in New Jersey).

203 524 A.2d 188 (N.J. 1987). *Ramseur* has been influential outside of New Jersey as well. *See* State v. Black, 815 S.W.2d 166, 189 (Tenn. 1991) ("[W]e adhere to the analysis in *Gregg v. Georgia* . . . particularly as followed by the New Jersey Supreme Court in *State v. Ramseur* . . . and find persuasive the reasoning of both decisions.") (citations omitted).

204 613 A.2d 1059 (N.J. 1992).

205 The post reenactment capital cases prior to *Ramseur* address specialized constitutional issues, such as the access of the press and the public to pretrial proceedings in a capital trial. *See, e.g.*, State v. Williams, 459 A.2d 641 (N.J. 1983); Bienen et al., *supra* note 21, at 70-100 (summarizing the early case law interpreting the statute).

eral constitution since *Pulley v. Harris*,[206] or by the New Jersey legislature since 1985,[207] in 1987 the court in *Ramseur* stated its commitment to performing thorough and complete examinations of the imposition of the death penalty in the jurisdiction under the rubric of proportionality review: "Proportionality review has a function entirely unique among the review proceedings in a capital proceeding . . . . 'It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.'"[208] In *Ramseur* the court expressed "some preliminary views concerning this important aspect of the death-penalty review process . . . ."[209] Although proportionality review had not yet been institutionalized within the Administrative Office of the Court in 1987, the court was prescient in delineating the parameters of the impending legal debate within the court and in the larger legal community in New Jersey and elsewhere.

Prior to *Ramseur*, the court identified its concern that prosecutorial discretion could be a possible source of arbitrary or discriminatory patterns in capital charging and sentencing.[210] Then in *Ramseur* the court declared its intention to review prosecutorial decision-making in the selection of cases for capital prosecution. In doing so, it anticipated that it would consider empirical evidence of discrimination based upon race, sex, and socio-economic status as part of proportionality review.[211] Proportionality review would be statewide. It would include systematic data collection and a statistical analysis of the entire capital case processing system. The court called on the expert advice of statisticians, criminologists, sociologists and others to help prepare the data base.[212]

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206 465 U.S. 37 (1984).

207 1985 N.J. Laws 536, 541 (amending N.J. STAT. ANN. § 2C:11-3(e)).

208 State v. Ramseur, 524 A.2d 188, 291-92 (N.J. 1987) (citation omitted). Proportionality review, said the court in *Ramseur*, is required because the death sentence is "profoundly different from all other penalties" and consequently there is a heightened need for reliability in the imposition of that sentence. *Id.* at 292 (citing Lockett v. Ohio, 438 U.S. 586, 605 (1978)). Proportionality review acts "as a check against the random and arbitrary imposition of the death penalty." *Id.*

209 *Ramseur*, 524 A.2d at 291 ("In doing so, we intend only to guide future parties in their exploration of some of the issues that appear essential to the development of a proportionality review process that would satisfy the requirements of the statute and any applicable constitutional obligations.").

210 State v. McCrary, 478 A.2d 339, 343-45 (N.J. 1984) (permitting limited judicial review of the prosecutorial dicision to charge capital murder under the Act).

211 *Ramseur*, 524 A.2d at 293-94.

212 *Id.* at 293.

### 3. *The Process of Record Gathering*

In *Ramseur* the court asked all parties who expected to participate in the appellate review process in future capital cases to "begin gathering data necessary for proportionality review of a death penalty in comparison to similar crimes and defendants. Moreover, these statistics will be helpful in determining whether there is race and gender discrimination in the imposition of the death penalty."[213] The court correctly anticipated that controversy would crystallize around the issue of the universe of cases.[214] This apparently procedural decision in fact determined the scope of proportionality review itself. The controversy was initially resolved by the court in *Marshall II*, with the selection of the universe of cases recommended by the Special Master. However, the legislature would finally intervene on the side of the Attorney General, and attempt to restrict the universe of cases.[215]

In 1991, the court created the Proportionality Review Project and appointed the independent Special Master in an unprecedented and unexpected order. The July 29, 1988 Order[216] gave the Special Master the authority to collect and analyze data, produce a data base and files on individual homicide cases, invite the participation of interested parties, develop a public data file, including a record of dispositions of all relevant homicide cases, conduct hearings, procure expert technical advice, call witnesses, and request public records and any other relevant information. Not only was the Special Master given broad authority to accomplish a comprehensive, scientifically sound empirical study, but the court appointed as Special Master a person

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213 *Id.* at 293. The court then cited Joseph H. Rodriguez et al., *Proportionality Review in New Jersey: An Indispensable Safeguard in the Capital Sentencing Process*, 15 RUTGERS L.J. 399, 437 (1984).

214 "First, we must determine what will be the 'universe of cases,' . . . against which a comparison of the imposed death sentence will be made . . . ." *Ramseur*, 524 A.2d at 293 (citation omitted). In comparison to the practice in some other states, the court said it believed that:

> statewide uniformity is the more appropriate measure, and therefore [we] anticipate that comparisons will be made to "similar" cases throughout the state.
>
> But a decision to adopt statewide comparisons does not end the analysis. We must also decide whether to include in the statewide universe of cases only those in which a death penalty was actually imposed, or to expand the potential cases for comparison to include all those in which the death penalty could have been requested by the State.

*Id.* at 293 (citation omitted).

215 Determining the universe of cases was a source of conflict in other states as well. *See, e.g., supra* Part IV.B (discussing Nebraska).

216 The Supreme Court of New Jersey's Order of July 29, 1988 creating the Proportionality Review Project and appointing Professor David Baldus as the Special Master is reprinted in Bienen et al., *supra* note 21, at 371. The duration of the first phase of the Proportionality Review Project was approximately 4 years, from July, 1988, the date of the appointment of Professor Baldus as Special Master, until July, 1992, when the court decided *Marshall II*.

capable of achieving such a task: Professor David C. Baldus.[217] The Special Master was specifically ordered to consider and assess the validity and utility of the data base and analyses presented to the court in the Reports of the Public Defender Homicide Study.[218] To its credit the Proportionality Review Project accomplished all of the tasks enumerated in the Order.

The Special Master was ordered to make recommended findings of fact and recommended conclusions of law regarding proportionality in the administration of cases subject to capital punishment in New Jersey, but not to make any determination concerning the excessiveness or disproportionality of any death sentence imposed in any particular case.[219] The legal determination of proportionality was the province of the court. The Special Master was to educate the court

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217 David C. Baldus is the Joseph B. Tye Professor of Law at the University of Iowa College of Law. With George Woodworth and Charles Pulaski he conducted two empirical studies of the Georgia capital punishment system after *Furman*. *See* David C. Baldus et al., *Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts*, 15 STETSON L. REV. 133 (1986); David C. Baldus et al., *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983). The Georgia studies formed the factual basis for the statistical arguments presented to the United States Supreme Court in *McCleskey v. Kemp*, 481 U.S. 279 (1987). The Georgia studies and that litigation is described in detail in DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990). *See also* Bienen et al., *supra* note 21, at 147-58 (discussing "the Baldus Studies").

Professor Baldus has also served as a consultant to the supreme courts of South Dakota and Delaware and to the National Center for State Courts' Project on Comparative Proportionality Review of Death Sentences by State Supreme Courts. *See* Baldus et al., *supra* note 37.

218 "We authorized the consideration of the data base that formed the basis of the report of the New Jersey Public Defender entitled 'The Re-Imposition of Capital Punishment in New Jersey' . . ." *Marshall II*, 613 A.2d at 1062. This reference is to Parts I and II of the Interim Report of the Public Defender Homicide Study (on file along with the Preliminary Report of the Public Defender Homicide Study in the State Documents Collection of Northwestern University School of law). The Interim Report of the Public Defender Study was submitted to the N.J. Supreme court in *State v. Koedatich*, 548 A.2d 939 (N.J. 1988) before its findings were published in Bienen et al., *supra* note 21, at 27, 36-37. The Interim Report of the Public Defender Study included data on 703 cases. A Preliminary Report of the Public Defender Study was submitted to the N.J. Supreme Court in 1987 during the appeal in *Ramseur*. It contained data on 568 homicide cases. The majority opinion in *Koedatich* cites to data from the Preliminary Report of the Public Defender Study (1988). *Koedatich*, 548 A.2d at 955. In contrast, Justice Handler's dissent cites to the Interim Report of the Public Defender Study (1988). *Id.* at 1018-19 (Handler, J., dissenting). The research reports of the Public Defender Homicide Study are detailed in Bienen et al., *supra* note 21, at 27 n.3, 36-37; Bienen et al., *supra* note 45, at 744.

219 The work of the Proportionality Review Project, with particular emphasis upon the methodological issues, is described in David Baldus and George Woodworth, *Proportionality: The View of the Special Master*, 6 CHANCE: NEW DIRECTIONS FOR STATISTICS & COMPUTING 9-17 (1993). The Attorney General's position on these issues is described in Herbert I. Weisberg, *Proportionality: An Alternative View*. 6 CHANCE: NEW DIRECTIONS FOR STATISTICS & COMPUTING 18-24 (1993).

and provide the court with the factual basis necessary to make an informed decision. The Report recommended that the court keep open the data base, and that it continue to include death eligible cases which did not reach penalty phase. The court accepted that recommendation in *Marshall II*.[220]

The Proportionality Review Project conducted research over a four year period, assembling what is probably the most complete data base ever compiled by a court on homicide and capital case processing in a single United States jurisdiction.[221] The 1991 Final Report is both an extensive review of all death eligible cases in the jurisdiction from 1982 to 1990, and an exhaustive proportionality analysis of Robert Marshall's individual death sentence. The Attorney General filed an Independent Report containing a series of tables and analyses based upon an expanded data set of 264 death eligible murder cases.[222] The 246 cases analyzed in detail in the 1991 Final Report

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> We must take steps to assure that it [the data base] is kept current and accessible to the parties and the Court . . . . the data base is relevant to evaluate the system-wide claims of constitutional dimension, . . . . We have no way of knowing how long the Master will continue to assist the Court in the data-gathering process. Any system we maintain should be able to operate efficiently even after his departure, and, indeed, after our departure . . . . Hence . . . we shall appoint a Superior Court judge familiar with the relevant statistical and data-assembly concepts to oversee development of a recommended plan for future maintenance of the Court's records . . . .

*Marshall II*, 613 A.2d at 1113. See Appendix C, *infra*, for developments subsequent to *Marshall II*.

221 The Proportionality Review Project under the administrative supervision of John P. McCarthy, Jr. of the Administrative Office of the Courts, and with the assistance of other staff, including Nina Rossi, Esq., staff attorney, screened over 3,000 New Jersey homicide cases arising between 1982 and 1990. In the first proportionality review, the Special Master presented the Supreme Court of New Jersey with a detailed and accurate quantitative and qualitative analysis of 246 death eligible cases, including all cases in which the death sentence had been imposed or considered during the period. Staff at the Administrative Office of the Courts tracked cases, collected and verified official records, and contacted prosecutors and defense attorneys to clarify ambiguities, in addition to performing the ordinary tasks of any research team, such as data entry, systematic error checking, and the mechanics of generating computer runs. Important and fundamental factual errors were identified in official documents and court records at every stage—documents routinely relied upon by sentencing and parole authorities, courts, prosecutors and other decision makers. The accuracy of record keeping varied widely among counties.

222 This was the first and only time that the Attorney General complied with the court's suggestion that all parties collect data on capital case processing. The Proportionality Review data set, augmented by the cases added by the Attorney General, became the *Marshall II* data set. This is the data set analyzed in Appendix B. It is a data set unique to the *Marshall II* case, which is unlikely to be used again by the court. *See* Herbert I. Weisberg, Proportionality Review of Death Sentences in New Jersey: An Independent Analysis of Data on Capital Charging and Sentencing (November 26, 1991) (on file with the State Documents Collection of the Northwestern University School of Law) [hereinafter 1991 Weisberg Report]. The Attorney General's Report is also part of the record on appeal in *Marshall I* and can be requested from the Administrative Office of the Courts or the New Jersey Supreme Court.

went to the penalty phase as death eligible cases or were found to have met the factual criteria for at least one statutory aggravating factor, and hence to have been potentially death eligible, although the death sentence was either not imposed, not charged, or not even considered by the county prosecutor.[223] Justice Garibaldi took exception to this selection of cases.[224]

During the four years of the Proportionality Review Project the Attorney General of New Jersey consistently proposed that proportionality review be limited to death sentences only in its arguments before the courts, in its briefs and in the proportionality review meetings. The Attorney General also brought an independent action asking the court for a declaration that the universe of cases be limited to death sentences only.[225] The court consistently refused to limit proportionality review to such a restricted category.[226] During the pendency of *Marshall* the Attorney General took these arguments to the legislature, where he was successful in persuading the legislature to

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223 The 1991 Final Report of the New Jersey Proportionality Review Project, including a summary of its data and analyses in appendices and the technical commentary, is part of the record on appeal in *State v. Marshall*, 586 A.2d 85 (N.J. 1991) (Marshall I). In *Marshall I* the court upheld the death sentence but reserved the issue of proportionality review. *See* David C. Baldus, Death Penalty Proportionality Review Project Final Report to the New Jersey Supreme Court (September 24, 1991) (unpublished) (on file with the State Documents Collection of the Northwestern University School of Law) [hereinafter 1991 Final Report]. The 1991 Final Report, including its technical appendices, annotations to the data set and data collection process, a detailed description of the methodology and a discussion of the legal issues raised can be obtained upon written request from John P. McCarthy, Jr., Assistant Director, Administrative Office of the Courts, CN 982, Justice Complex, Trenton, New Jersey 08625.

224 *See* State v. Marshall, 613 A.2d 1059, 1117 (N.J. 1992) (Marshall II) (Garibaldi, J., concurring in part and dissenting in part). She believed the Proportionality Review Project could not accurately determine the facts of cases which did not go to a penalty phase trial.

> The validity of the entire system depends on the correctness of the subjective evaluations made by personnel of the Administrative Office of the Court concerning the "deathworthiness of a case" as contrasted with the evidentiary concerns and other hazards of litigation that a case presents. Such evaluations made on a cold record, are extremely difficult, even if undertaken by experienced prosecutors and defense counsel. To replace the reasoned determination of prosecutors, trial judges, and, in some cases, juries, and to rely instead on the subjective evaluations of persons who have never faced the realistic difficulties of trying a criminal case creates an unreliable data base and misleading conclusions.

*Id.* (Garibaldi, J., concurring in part and dissenting in part).

225 *See In re* Proportionality Review Project, 585 A.2d 358 (N.J. 1990).

226 Id. *See also Marshall II:*

> In an earlier proceeding we declined to determine in advance the appropriate "universe" of cases against which to compare challenged death sentences in order to assure proportionality. The Attorney General had contended that the only appropriate universe is one comprised exclusively of cases in which a death sentence has been imposed under our Capital Punishment Act.

613 A.2d at 1063 (citation omitted).

pass a statute adopting the State's position, declaring that the universe of cases for proportionality review would be limited to death sentences only.[227]

### 4. *The Relevance of the Data to System-Wide Claims of Unconstitutional Infliction of the Death Penalty*

In *Ramseur* the New Jersey Supreme Court stated its position on discrimination at the outset: "Discrimination on the basis of race, sex, or other suspect characteristics cannot be tolerated . . . ."[228] *Marshall II* reaffirmed that commitment and stated it more sharply:

> [W]ere we to believe that the race of the victim and race of the defendant played a significant part in capital sentencing decisions in New Jersey, we would seek corrective measures, and if that failed we could not, consistent with our State's policy, tolerate discrimination that threatened the foundation of our system of law.[229]

The first major issue addressed by the *Ramseur* court was whether proportionality review was the appropriate vehicle for examining systemwide defects in the operation of the capital case processing system. The court believed it was, declaring that "proportionality review therefore is a means through which to monitor the imposition of death sentences and thereby to prevent any impermissible discrimination in imposing the death penalty."[230] The *Ramseur* court's declaration did not end the controversy over this issue. In 1992, Justice Garibaldi broke with the *Marshall II* majority on this question.[231]

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> Following oral argument, the Legislature amended the Capital Punishment Act to provide that "[p]roportionality review . . . shall be limited to a comparison of similar cases in which a sentence of death has been imposed." L. 1992, c. 5 (eff. May 12, 1992) . . . . Because there are several capital appeals pending under the prior law, we address the issues in sufficient detail to deal with those appeals as well as this, depending on the ultimate effect of L. 1992, c.5.

*Id.* at 1063-64.

228 State v. Ramseur, 524 A.2d 188, 292 (N.J. 1987).

229 *See Marshall II*, 613 A.2d at 1110. *Marshall II* also states, "To countenance racial discrimination in capital sentencing would mock that tradition [to eliminate racial discrimination] and our own constitutional guarantee of equal protection of the laws under New Jersey Constitution Article I, paragraph 1." *Id.* at 1109. Recognizing that a white defendant could argue that the capital punishment system in New Jersey was unconstitutional because it discriminated against non-whites, *id.*, *Marshall II* stated that were it presented with a statistical showing analogous to that before the United States Supreme Court in *McCleskey*, "we would not hesitate to invalidate the sentence of death." *Id.* at 1112.

230 *Ramseur*, 524 A.2d at 292.

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> Proportionality review is not a second appellate review nor a broad review of due-process concerns or other constitutional issues . . . . It is not a vehicle for determining whether prosecutors abused their discretion. Nor is proportionality review a means of addressing individual instances of racial discrimination or other denials of due process. Of course, this Court will not tolerate such impermissible influences, and any

The *Ramseur* majority then set out its views on the second principal issue in proportionality review, the definition of similar cases.[232] In *Ramseur* the court anticipated what factors would be relevant in developing categories of similar cases and called for guidance from experts in their development.[233] The difference between the complexity of analysis in *Marshall II* and what was previously anticipated in *Ramseur* indicates just how far the court was brought along by the empirical analysis of the Special Master's Final Report. In *Marshall II* the facts allowed for a number of comparison categories, and the court went through a separate proportionality analysis for each category. The analysis relied upon by the court in *Marshall II* was far more detailed and case specific than what could have been anticipated in

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sentence of death that results therefrom will be fatally infected. However, the proper avenue for addressing those issues is the capital defendant's direct appeal, not on proportionality review.

*Marshall II*, 613 A.2d at 1116-17 (Garibaldi, J., concurring in part and dissenting in part). Meanwhile, Justice Handler again expressed his view that the New Jersey capital punishment scheme violated the state constitution's cruel and unusual punishment clause:

> The unequal treatment of capital defendants also implicates Article I, paragraph 5 of the [New Jersey] Constitution, which bars the denial of civil rights or discrimination against persons in the exercise of any right because of religion, race, or national origin. When inequality arises from improper considerations such as race, those concerns are most acute. The Special Master's study preliminarily shows the race of the victim to be a factor in many decisions to impose the death penalty, and seems to confirm many long-held suspicions . . . . The doctrine of evenhandedness and the accordant requirement of comprehensive proportionality review implicates, perhaps most directly, the protections secured by the cruel and unusual punishment clause.

*Id.* at 1126 (Handler, J., dissenting) (citations omitted).

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> Second, we must determine what are "similar crimes" . . . . in order to narrow the scope of the similar crimes to be used in the proportionality review, such categories as "torture," "sexual mutilation," or "multiple victim" crimes have been suggested. But beyond these, there is a difficult question whether there are subcategories of "murder" that can be appropriately identified and considered. "Domestic," "depravity of mind," and "execution style" crimes, for example, may be too broad or ambiguous to allow any real comparison for proportionality. We anticipate and welcome suggestions regarding which criminological, sociological, and statistical models are appropriate for analyzing the similarity of crimes and sentencing.

*Ramseur*, 524 A.2d at 293 (citation omitted).

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> Third, after the crimes similar to the case on review are identified, we must compare those defendants with the one before the court . . . . The aggravating and mitigating factors set forth in Section c(4) and Section c(5) are a beginning. But other factors such as race, sex, and socioeconomic status might also be appropriate considerations for reviewing proportionality. Moreover, the relationship between the defendant and victim, whether defendant pleaded guilty or not guilty, and the race and sex of the victim might also be appropriate factors. This list is only a beginning and still other factors could be relevant to proportionality review of the defendants. Our task in this process will be to sift through these factors to determine those that have an effect on the capital sentencing decision. We must ensure that discriminatory factors are not shifting the balance between life and death.

*Ramseur*, 524 A.2d at 293-94 (citations omitted).

*Ramseur*.[234]

### 5. *Racial and Geographical Disparities and Their Relation to Differences in Prosecutorial Charging Practices*

In *Ramseur* the New Jersey high court did not avoid another area of controversy: whether it would be appropriate within the context of proportionality for the court to examine the prosecutor's discretionary selection of cases for capital prosecution.[235] This issue sharply divided other state high courts. In *State v. Koedatich* the court prodded county prosecutors take action to reduce disparities in capital case charging.[236] The *Koedatich* court strongly suggested that New Jersey should promulgate uniform statewide guidelines for the exercise of prosecutorial discretion in the selection of cases for capital prosecution.[237] In response to this directive, the Attorney General and county

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234 The majority opinion in *Marshall II* compared the death sentence under review according to the following categories: (1) similar cases as defined by the same aggravating factor, and/or a similar constellation of aggravating and mitigating factors, *Marshall II*, 613 A.2d at 1085, 1090; (2) contract killers, both principals and hitmen, *id.* at 1089, 1095-96; (3) spousal murders involving a high level of blameworthiness and a defenseless victim, *id.* at 1090; (4) premeditated robbery/kidnap murder cases involving extensive premeditation, a pecuniary motive, deception/entrapment of the victim, and a defenseless victim, *id.* at 1090, 1097-98; (5) first-time murderers of spouses, *id.* at 1092; and (6) "other cases" offered as similar by the public defender, *id.* at 1098. The court also applied frequency analysis, the precedent seeking approach, Dr. Weisberg's approach, the salient-factors approach, arguments based upon the infrequency with which juries return the death penalty in New Jersey, *id.* at 1099, and arguments based upon geographical and racial patterns in charging and sentencing. *Id.* at 1102. The court carefully explained each approach prior to its analysis.

235 "Here we may anticipate considering whether to address concerns about possible misuse of prosecutorial discretion presented to the courts of this state, including in the review all cases in which a prosecutor had the discretion to seek the death penalty." *Ramseur*, 524 A.2d at 293 (citations omitted).

236 The role of prosecutorial discretion as one possible source of racial bias or arbitrariness in capital charging was at issue in *McCleskey v. Kemp*, 481 U.S. 279, 357 (1987) (Blackmun, J., dissenting). The Fulton County, Georgia District Attorney, who had served in that office for 18 years, testified that there were no standards for the Assistant District Attorneys regarding plea bargaining in death eligible cases or to guide them in when to seek the death penalty. *See* discussion concerning the identification of prosecutorial discretion as a source of bias in Baldus et al., *supra* note 37, at 414-15. *See also* U.S. *ex rel.* Silagy v. Peters, 713 F. Supp. 1246 (C.D. Ill. 1989) (holding the Illinois capital case processing system in violation of the Eighth Amendment because of a lack of guidelines for the exercise of prosecutorial discretion in the selection of cases for capital prosecution), *rev'd*, 905 F.2d 986 (7th Cir. 1990).

237 Citing data from the Public Defender Study, the Court noted that:

> while prosecutorial decision-making is normally beyond its purview, fundamental fairness required that this Court review the basis for the State's notice of aggravating factors in a capital case to ensure that prosecutors have cause to designate defendants as death-eligible. To be sure, we stated that our goal was to "effect on a minimal intrusion into this area of prosecutorial discretion." Nevertheless, we believe there is a need to promote uniformity in the administration of the death penalty, which will be an additional safeguard against arbitrariness and an assistance to the Court in its de-

prosecutors adopted a set of Guidelines.[238] The Guidelines directed each county prosecutor to screen all death eligible homicide cases in the jurisdiction and then decide whether or not a notice of factors should be served in any individual case. The Guidelines stated that the goal is to achieve uniform statewide standards for the charging of capital murder: "It is neither desirable nor acceptable to have a capital charging standard dependent upon individual attitudes."[239]

The Guidelines Preamble asserts that "race, sex, social or economic religion and/or national origin of a defendant [or victim] has not in the past, nor will in the future be considered in any fashion to

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veloping proportionality review. Accordingly, we strongly recommend that the Attorney General, and the various County Prosecutors, in consultation with the Public Defender, adopt guidelines for use throughout the state by prosecutors in determining the selection of capital cases.

State v. Koedatich, 548 A.2d 939, 955 (N.J. 1988) (citing State v. McCrary, 478 A.2d 339, 340 (N.J. 1984)). In December of 1995, using the analytic framework established by the Proportionality Review Project, the administrative office of the Courts reported a statistically significant race effect. *See also infra* Appendices B and C.

The majority opinion in *Marshall II* reasserted the court's willingness to review the charging decisions of prosecutors. *Marshall II*, 613 A.2d at 1071. The court suggested that the Attorney General set up a statewide panel to review the charging decisions of county prosecutors.

> We have encouraged the Attorney General, as the chief law-enforcement officer of the State of New Jersey, to exercise his undoubted authority to instill uniformity in the charging and prosecuting practices throughout the state. We realize the differing attitudes in counties and the jurisdictional concerns. If the system fails to eliminate unconstitutional disparities, that failure should not be because of hesitancy to invoke authority currently conferred on the Attorney General. A statewide review panel, appointed by the Attorney General in consultation with prosecutors, would be able to screen out any possible effects of race or socioeconomic status in the charging and selection process.

*Id.* at 1112.

Not all members of the court subscribed to the majority's view, however, that the review of prosecutorial discretion in charging was an appropriate consideration in performing proportionality review.

> Second-guessing prosecutorial decisions to pursue capital sentences will riddle the proportionality review with uncertainty . . . . The Special Master's classification of death-eligibility cases is an extremely-subjective process carried out in the absence of factual findings or jury determinations . . . . Such determinations [as to why a case was not prosecuted as a capital offense] are clearly outside the scope of a proper proportionality review.

*Id.* at 1118 (Garibaldi, J., concurring and dissenting).

But "[p]roportionality review is the obvious antidote for the enduring arbitrariness of disparate sentencing . . . . The legislative history to New Jersey's death-penalty statute evinces similar concerns: proportionality review ensures that death sentences 'are being meted out in a fair, even-handed way throughout the State.'" *Id.* at 1121-22 (Handler, J. dissenting) (citations omitted).

238 These Guidelines are reprinted in Bienen et al., *supra* note 45, at 791-93 and discussed at 732-34. The Guidelines were submitted on February 22, 1989 to the Chief Justice of the Supreme Court and to the Special Master and have been in effect ever since.

239 Preamble to the Guidelines for the Designation for Capital Prosecution, *reprinted in* Bienen et al., *supra* note 45, at 791-92.

determine whether or not a case warrants capital prosecution."[240] The Preamble further states that "economic or other resource constraints of their respective offices shall not be a factor in determining whether or not the case warrants capital prosection nor shall it in any specific case play any role whatsoever in the capital designation decision making process."[241]

The reference to economic or resource constraints is particularly noteworthy.[242] There are several aspects of the costs issue. To begin with, no one disputes that capital cases cost the system considerably more than non-capital cases—for the prosecution, the defense, and the courts. The question of who pays is always relevant. Another aspect of the cost issue is whether prosecutorial charging decisions are influenced by the budgetary constraints of *local* prosecutors, and/or the relative prosperity of individual counties.[243] A cost issue which did not arise during this period in New Jersey, but which is very much in the forefront elsewhere, is whether the state can effectively limit the defense of capital cases by refusing to authorize adequate funds for indigent capital defense.[244] Related to the defense limitation issue is the question of whether states may prohibit expenditure of funds for the development of a factual basis for a constitutional challenge. In New Jersey the legal costs of developing defense arguments on proportionality were not initially allocated to the county, thereby postponing some of these problems.

Capital murder prosecutions are significantly more expensive to prosecute than cases which do not proceed capitally.[245] In New Jersey

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240 *Id.* at 792. A communication subsequent to the original letter added that the words "or victim" were inadvertently left out of the Preamble. The Guidelines were formally amended on January 23, 1990, by the County Prosecutors to correct this oversight. *Id.* at 791 n.2.

241 *Id.* at 792.

242 *Marshall II*, 613 A.2d at 1118 (Garibaldi, J., concurring and dissenting).

243 *See* Appendix B for the selected economic and demographic indicators of the New Jersey counties.

244 At the time of the Proportionality Review Project, all indigent capital cases were represented by the public defender or by counsel appointed and assisted by the public defender. This is atypical. Also exceptional was that the Office of the Public Defender in New Jersey did not place an overall per case limit on capital defense expenditures.

> For example, an audit established that New Jersey spent nearly $3 million extra in 1984 to defend indigent defendants charged with capital crimes . . . . Specifically, of the $296,449.41 the Public Defender's Office spent to defend Thomas Ramseur at trial, the largest portion, $191,881, was spent on psychiatrists. The Public Defender spent more than $75,000 successfully attacking the makeup of grand and petit juries in Atlantic County.

*Marshall II*, 613 A.2d at 1144-45 (Handler, J., dissenting) (citations omitted).

245 The exceptionally high expenses for capital trials begin long before the trial itself. If a case is to proceed capitally, there will be special pretrial motions concerning the Notice of Aggravating Factors. Moreover, if a case is going to trial as a capital case, typically both

the twenty-one county prosecutors are funded by twenty-one separate and autonomous authorities of the county freeholders.[246] Some counties are very rich, while other counties face severe budgetary constraints. The urban counties, such as Essex County, which includes the city of Newark, and Camden County, are characterized by a declining inner city tax base and high maintenance expenses.[247] The problem of vastly different economic resource distribution among counties is replicated in most large industrial states, the majority of whom now have substantial death row populations.[248]

Homicides themselves are also unevenly distributed across the state.[249] For instance, Essex County reports over 140 homicides a year on average.[250] A significant fraction of these are felony murders. Under the definition of the felony factor in the New Jersey statute, every felony murderer is potentially death eligible if he committed the homicidal act by his own conduct with the requisite specific intent to kill.[251] During the period studied by the Proportionality Review Pro-

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sides will assign additional resources and an extra attorney to prepare the case. Also, prior to the trial, the special procedures for the selection of a death-qualified jury will consume considerably more resources than the selection of an ordinary jury. *See id.* at 1144-49 (Handler, J. dissenting) for the most complete annotation to date of sources on the differential cost of capital prosecutions.

246 At least one state, New Hampshire, has provided for centralized decision making within the state for the prosecution of all homicide cases, including all capital cases, in order to insure uniformity in the application of prosecutorial standards. *See* N.H. REV. STAT. ANN. § 7:6 (West, WESTLAW, updated through 1996).

247 *See infra* Appendix B for statistics on selected demographic characteristics of New Jersey counties. *See also* South Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975) (discussing regional economic disparities in the context of a community's obligation to provide low income housing).

248 *See supra* Table 2.

249 *See supra* Table 1.

250 Since reenactment, there have been years when the Essex County Prosecutor's Office had no cases or one to two cases that proceeded as capital trials. There were at least two dozen cases whose facts would have supported a prosecution for death-eligible murder during the period when the Essex County Prosecutor brought no capital prosecutions. Prior to the *Koedatich* Guidelines, *see supra* notes 238-40 and accompanying text, a New Jersey Superior Court ordered the Essex County Prosecutor to come forward with guidelines for the selection of cases for capital prosecution because of the arbitrariness with which this defendant was singled out for capital prosecution. State v. Smith, 495 A.2d 507, 516 (N.J. Super. Ct. Law Div. 1985). The court noted that there were 15 similar cases of felony murder which had not been designated capital offenses. *Id.* at 514. The *Smith* case eventually pled out to manslaughter.

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a. Except as provided in N.J.S.2C:11-4 criminal homicide constitutes murder when:
(1) The actor purposely causes death or serious bodily injury resulting death; or
(2) The actor knowingly causes death or serious bodily injury resulting in death; or
(3) It is committed when the actor, acting either alone or with one or more other persons, is engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary, kidnapping or criminal escape, and in the course of such crime or of immediate flight there-

ject, the Essex County Prosecutor alone could have averaged 20 capital murder prosecutions a year for felony murder cases.

On April 6, 1989 the Attorney General and the County Prosecutors jointly asked the Supreme Court to rule on the appropriate universe of cases for proportionality review.[252] The Attorney General and the County Prosecutors saw proportionality review as a limited remedy whose purpose was to correct aberrational judgments. In their view, proportionality review was inappropriate for consideration of possible racial bias or other systemwide defects in the operation of the state's capital-case processing system, irrespective of whether racial or other disparities were introduced by prosecutorial discretion or other factors.[253]

The Office of the Public Defender took the position that the court must have a sufficiently large data base of cases from which to

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from, any person causes the death of a person other than one of the participants; . . . .
c. Any person convicted under subsection a.(1) or (2) who committed the homicidal act by his own conduct; or who as an accomplice procured the commission of the offense by payment or promise of payment of anything of pecuniary value; . . . .

N.J. STAT. ANN. § 2C:11-3a, c (West 1996).

252 In their Notice of Motion, the Attorney General and the County Prosecutors took the position that: 1) the only appropriate universe of cases for proportionality review consists of other cases in the state in which the death sentence has been imposed; and 2) prosecutorial discretion in the selection of cases for capital prosecution should not be reviewable within the context of proportionality review. *In re* Proportionality Review Project, 585 A.2d 358 (N.J. 1990) (rejecting point 1 and not addressing point 2).

On November 1, 1989, the New Jersey Supreme Court asked the Special Master to provide his

> analysis as to the advantages and disadvantages of each potential alternative "universe" of cases. Your analysis should consider the impact on the process of proportionality review if the universe were to include, for instance, on death-sentenced cases, or cases which advance to a capital sentencing proceeding, or broader universes such as all cases where a notice of aggravating factors was served. Your analysis should discuss the advantages and disadvantages of each alternative "universe" in terms of cost, the validity of the process, the utility of the final product, the ability to address broader issues related to proportionality, the criteria defining the universe, the standards used to determine whether individual cases should qualify to be ultimately considered in an actual proportionality review, the effect of recent decisions on the includability of prior death eligible cases, availability of data, the ability of county agencies to sustain and assist the research, and any other related issues which you care to raise.

Letter from Chief Justice Robert N. Wilentz to Professor David C. Baldus (Nov. 1, 1989) (on file the State Documents Collection of the Northwestern University School of Law). *See, e.g.*, David Baldus, Death Penalty Proportionality Review Project Final Report (Sept. 24, 1991) (unpublished report); Herbert I. Weisberg, Proportionality Review of Death Sentences in New Jersey (Nov. 26, 1991), *reprinted in* Brief of Attorney General, State v. Marshall, 586 A.2d 85 (N.J. 1991).

253 On September 11, 1989, at oral argument Justice O'Hern asked the Attorney General if the court should be prevented from considering the possibility of racial imbalance in a situation where, for example, nine death sentences had been imposed and all of the defendants were Asian. The Attorney General replied that under its proposed formulation of proportionality review the court would be prevented from considering the possibility of racial disparity in the implementation of the death penalty in that circumstance. Oral Argument, *In re* Proportionality Review Project, 585 A.2d 358 (N.J. 1990).

select appropriate categories of similar cases if proportionality review was to be meaningful.[254] The data base must include information on cases which were *not* prosecuted as capital cases so that prosecutorial discretion in charging can be subject to judicial review by the State's highest court. Proportionality review was created, the Public Defender argued, to allow the court to identify and correct systemwide defects, such as disparities related to race or economic factors, which might have been introduced by the exercise of prosecutorial discretion, caprice, or any other extra-legal factor.

The Attorney General and the County Prosecutors maintained that the New Jersey capital punishment system did not exhibit constitutionally impermissible disparities, and that proportionality review was not the mechanism for identifying or correcting such systemwide defects, even if there was evidence of them. They were unpersuaded by data and analysis presented by the Public Defender Homicide Study or the Special Master's Final Report, or by studies from other jurisdictions indicating that the exercise of prosecutorial discretion in the selection of capital cases had resulted in evidence of systemwide disparities.[255] The Public Defender argued there was no reason to think that such systemwide disparities are confined to a single aber-

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254 "Although there were over 250 cases where the death penalty could have been sought, and over 120 cases which went to a capital penalty trial after a verdict of guilty of capital murder, less than a quarter of all aggravated murders and less than a third of the cases which reached the second stage of a penalty trial resulted in the jury imposing a death sentence." Bienen, *supra* note 103, at 593.

255 *E.g.*, Maryland:

> For the first time, this Court has before it data concerning the exercise of prosecutorial discretion in death penalty cases. This data dramatically demonstrates that the inventory of relevant cases for proportionality review must include all death-eligible murder cases—not only those in which the prosecutor sought the death penalty, but also those in which he did not.
>
> This data reveals that in Maryland prosecutors seek the death penalty in only 7.8% of the death-eligible cases, whereas in 92.2% of the death-eligible cases the death penalty is not sought. Consequently, this data establishes that Maryland prosecutors rarely seek the death penalty, a fact that is relevant, in and of itself, in determining whether the death penalty is disproportionate . . . . In addition, the data concerning the exercise of prosecutorial discretion reveals that in cases in which the death penalty has been sought juries in Garrett County have imposed the death penalty in 50% of the cases, whereas juries in Baltimore City have imposed the death penalty in 33%. This data suggests that in these two jurisdictions the death penalty has been imposed in a somewhat consistent manner. The data further reveals, however, that in Maryland there is a substantial variation in the exercise of prosecutorial discretion. In Garret County prosecutors seek the death penalty in 100% of the death-eligible cases, whereas in Baltimore City, they seek that penalty in only 1.8%. This data further shows that when prosecutorial discretion is taken into account, juries in Garret County have imposed the death penalty in 50% of all the death-eligible cases, whereas juries in Baltimore City have imposed the death penalty in only .6%. Consequently, this data demonstrates that in these two jurisdictions the death penalty has been imposed in an inconsistent manner.

Tichnell v. State, 468 A.2d 1, 31-32 (Md. 1983) (Davidson, J., dissenting) (footnotes omitted).

rant jurisdiction or a particular period. The preliminary results of its own research suggested that racial and geographic disparities were present in the New Jersey capital case processing system. In *Marshall II*, the court adopted this position:

> That, we believe, is an acceptable understanding of the intentions of the framers of our Act—that statutory proportionality review should seek to ensure that the death penalty is being administered in a rational, non-arbitrary, and evenhanded manner, fairly and with reasonable consistency. That review serves as "a means through which to monitor the imposition of death sentences and thereby to prevent any impermissible discrimination in imposing the death penalty."[256]

Especially noteworthy is the court's willingness to analyze the capital case-processing system from its earliest stages, beginning with every indictment for homicide in the state.[257] Even Justice Garibaldi, who took the position that prosecutors' discretionary decisions *not* to seek the death penalty should not be reexamined, was persuaded that the data base must include all cases that the prosecutors declared capital.[258]

### 6. *The Methods of Analysis*

The 1991 Final Report of the Proportionality Review Project describes in detail its methodology for classifying cases as clearly death eligible.[259] This is a critical methodological decision and one which

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256 Marshall II, 613 A.2d 1059, 1069 (N.J. 1992) (quoting State v. Ramseur, 524 A.2d 188, 292 (N.J. 1987)). "That" refers to an opinion offered by the dissent in *Pulley v. Harris* which "suggested only that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. In their view, proportionality review, although clearly no panacea, often serves to identify the most extreme examples of disproportionality among similarly situated defendants." *Marshall II*, 613 A.2d at 1069 (citing Pulley v. Harris, 465 U.S. 37, 71 (1984) (Brennan, J., dissenting)) (quotations omitted).

257 "The focus in the *Marshall* case was on the constitutional legitimacy of the system as a whole, rather than on the risk that race might have adversely influenced the decision of the prosecutor or jury in an individual case." Baldus et al., *supra* note 37, at 406.

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> I would limit the universe of cases considered during proportionality review to those in which a prosecutor has served a notice of aggravating factor, thereby indicating an intention to seek a capital sentence . . . . Most prosecutorial decisions concerning the pursuit of capital sentences rely on permissible considerations. Most prosecutors will seek the death penalty for homicides that objectively satisfy one or more of the aggravating factors and where the physical and testimonial evidence create a reasonable likelihood that the State will be able to meet its burden of proof.

*Marshall II*, 613 A.2d at 1116, 1118 (Garibaldi, J., concurring and dissenting).

259 The initial screening removed cases involving death by auto, cases in which the homicide charge was only for an attempt or conspiracy to commit homicide, cases that resulted in an acquittal or dismissal of homicide charges, and cases in which the defendant was a juvenile. This reduced a data base of over 3000 cases to a screened data file of 1372 murder cases. *See infra* Appendix B tbl. 1.

The Project began with the State Police (SBI) list of 2300 persons arrested for a homicide offense between 1982 and 1988. This list was supplemented by an additional 500 cases

the Special Master addressed with care. What facts are sufficient to define the presence of statutory aggravating factors absent a penalty-phase determination, and how are these facts established? How are "cases" similar, considering both the "crime" and the "defendant"? The research in New Jersey gave new meaning to the abstraction: "in similar cases, considering both the crime and the defendant."[260] The preparation of detailed narrative summaries of the circumstances of the offense and the procedural history of the case was a crucial part of this methodology. Even with a detailed data collection instrument, maintaining an accurate record of the procedural events and circumstances of the crime was impossible without a narrative description. The narrative description for each case also gave the court concrete and specific facts for its qualitative analyses.

The 1991 Final Report addressed the methodological problem of how facts relevant to aggravating and mitigating factors are to be determined absent a penalty phase jury verdict. The methodology developed in New Jersey for classifying cases as death eligible takes into account the strength of the evidence in the case on the elements of capital murder and is fact sensitive.[261] This "strength of the evidence" typology sets out what constitutes an overwhelming case, a strong case, a clearly defensible case, and a clearly insufficient case on all of the elements of capital murder, including statutory aggravating factors.[262]

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identified by the Administrative Office of the Courts and by yet an additional 200 cases which were identified by the Public Defender Homicide Study. In other words, the Administrative Office of the Courts and the Public Defender together identified an additional 700 cases which were not in the official files of the State Police. The State Police files, the source of data for the F.B.I. Uniform Crime Reports, were missing *almost one-sixth* of the cases. These missing cases were all cases which were formally charged as homicide offenses, cases that went to final disposition at the trial court stage. After removing the identifiers for some variables, the Public Defender turned over to the Proportionality Review Project its data tapes on the 703 cases. *See* Bienen et al., *supra* note 21 (analyzing the cases).

260 GA. CODE ANN. § 17-10-35(c)(3) (Westlaw, updated as of 1996) (statutory language endorsed by the Supreme Court in *Gregg v. Georgia*, 428 U.S. 325 (1976)) (formerly codified at § 27-2537).

261 This methodology was refined to address the concerns of trial attorneys expressed in the proportionality review meetings held throughout the four years of data collection. Factual summaries of identified homicides were presented to prosecutors and defense attorneys who were then asked for their suggestions on ways to code ambiguous facts or classify problematic variables. *See* David C. Baldus, Death Penalty Proportionality Review Project, Final Report to the New Jersey Supreme Court (September 24, 1991) (unpublished report on file with State Documents Collection at Northwestern University School of Law) [Hereinafter PRP Final Report]

262 "We have used scientific and statistical measures, when helpful, although we recognize that a value judgment is built into practically every measurement." *Marshall II*, 613 A.2d at 1064. This recognition was a hallmark of all of the opinions in *Marshall II*. The majority and the justices writing separately acknowledged that their opinion reflected their personal experiences and ultimately a value judgment. In some sense, statistics were the

An overwhelming case, for example, would include evidence from eyewitnesses or a full confession which completely corroborated all of the elements of capital murder, including the "by his own conduct" requirement, the presence of at least one statutory aggravating factor, and the requisite mens rea under the legal standard in effect at the time.[263] Finding a measure for mens rea in cases which did not result in a jury verdict proved to be one of the Project's most challenging tasks. A clearly insufficient case, on the other hand, would include eyewitness evidence which only placed the defendant at the scene of the crime, or evidence which was inconclusive or unreliable. Non-penalty phase cases are identified as clearly death eligible only if there is overwhelming or strong evidence for all of the elements of capital murder.[264]

In another notable methodological advance, the 1991 Report developed two separate streams of analysis—one for decision making by juries and another for decision making by prosecutors, judges and others.[265] Jury decisions regarding facts and culpability trumped all other decisions. The methodological question was, how to determine facts when a jury was never presented with them, when a jury decision was preempted. A jury finding of intent less than the requisite intent

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least of it.

263 The data analysis of death eligibility incorporated relevant changes in the legal definition of the intent requirement for capital murder as they occurred. *See* State v. Gerald, 549 A.2d 792 (N.J. 1988) (declaring death penalty disproportionate under New Jersey constitution where defendant acted without intent to kill and without knowledge that death would result).

264 An important distinction between New Jersey and other states lies in the fact that in New Jersey non-slayer participants in felony murders are not eligible for capital prosecution. As a result, the New Jersey Supreme Court has not yet been required to address the constitutional issues raised by the attribution of intent to kill to a person who did not commit the homicidal act. *See* Bienen et al., *supra* note 45, at 722-32 (describing the history of felony murder at British common law and in New Jersey law, and the distinction between death eligibility for principals and co-defendants). These issues have been troublesome for many state supreme courts and have produced an opaque series of opinions from the United States Supreme Court. *See, e.g.*, Tison v. Arizona, 481 U.S. 137 (1987); Enmund v. Florida, 458 U.S. 782 (1982). Moreover, the issues arise frequently in the context of proportionality review when courts are asked to consider the comparative proportionality of the death sentence of a relatively less culpable codefendant, when the principal was sentenced to life or less, or when two equally culpable co-defendants receive disparate sentences. *See* State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992) (discussing constitutionality of death penalty as punishment for felony murder under state and federal constitutions, and interplay between state and federal principles on that issue).

265 "The New Jersey court in Marshall expressed concern about the evidence of discrimination in its capital sentencing system, especially in jury sentencing decisions." Baldus et al., *supra* note 37, at 412-13 (citing *Marshall II*, 613 A.2d at 1112). "As noted, the focus of Marshall was a 'structural challenge' to the system as a whole." *Id.* at 419 n.182 (citing *Marshall II*, 613 A.2d at 1112). *See id.* at 405-13 (comparing the race effects reported in the 1991 Final Report with the race effect found in the Georgia studies).

for capital murder, for example, a jury verdict for manslaughter, would automatically exclude a case from the category of death eligible murder—and thus from proportionality review—no matter how strongly the factual circumstances suggested a basis for death eligibility.

One of the Project's principal goals was to identify why some cases reach capital trial while others, which meet the "legal" criteria for death eligibility, do not.[266] The Project built upon the stage analysis of the earlier reports of the Public Defender Homicide Study, which began with an analysis of cases which dropped out of the capital case processing system. A sharp decline in the number of potentially capital cases at each successive capital case processing stage is typical.[267] Each county prosecutor unilaterally makes decisions about whether to declare a case capital. In almost all jurisdictions, prosecutors are elected and capital case prosecutions are vehicles for keeping the prosecutor in the public eye.[268] New Jersey is exceptional in that

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266

> There were five main goals in this project. The first was to conduct a census of New Jersey homicide cases and to identify those defendants who were death-eligible under the New Jersey capital-sentencing statute. Our second task was to develop a machine-readable data base of these cases that could be used by us to develop and refine measures of defendant culpability and, by interested parties, to evaluate the evenhandedness and consistency of New Jersey's capital sentencing system. The third task was to develop measures of defendant culpability which will assist the Court in identifying death-eligible cases that are "similar . . . considering both the crime and the defendant" within the meaning of N.J.S.A. 2C:11-3e. Our fourth task was to recommend approaches to proportionality review, including the basic universe of cases that the Court should routinely consider in its reviews. Our final assignment was to recommend an ongoing system of (a) contemporaneous data collection at the trial court level, and (b) data management and analysis in the AOC.

PRP Final Report, *supra* note 261, at 1-2.

267

> Five capital case processing stages are analyzed in this study. Beginning with all homicides in the data base [N=703], the first stage is death-possible, cases identified as having a factual basis for serving a notice of factors [N=404]. The second stage is death-eligible, cases where the prosecutor actually serves a notice of factors, designating the case capital [N=131]. The third stage is capital trial, cases which progress to capital trial before a judge or a death qualified jury [N=94]. The fourth stage is penalty phase, cases which result in a conviction for death-eligible murder and consequently progress to a penalty phase decision before a judge or a death qualified jury [N=69]. The fifth or final stage is the imposition of the death penalty [N=25].

Bienen et al., *supra* note 21, at 164 (footnotes omitted).

> Our analysis of prosecutorial decision making in felony murder cases focuses on the early stages of capital case processing because it is there that key determinative decisions are made. Seemingly technical or procedural pretrial decisions concerning charging may well determine a case's outcome and have other far-reaching consequences for the defendant and all other participants in the criminal justice system.

Bienen et al., *supra* note 45, at 739.

268

> One thing the most fervent district attorneys share is political ambition. For example, take the three recent Chicago prosecutors who have been avid users of the death penalty in Cook County, the only large county that rivals Philadelphia for aggressive-

neither county prosecutors nor judges are elected. Prosecutors are appointed for five-year terms. Local and party politics, however, play a role in the appointment process.[269]

The 1991 Final Report identified a significant race of defendant effect which has been replicated by subsequent research of the Proportionality Review Project. This effect was not considered by the court to be a sufficient basis for declaring the death sentence imposed upon Robert Marshall to be disproportionate.[270] In *Marshall* the court expressed its ongoing concern that decision making by prosecutors could be the cause of racial disparities in capital case processing.[271] The court continues to conduct proportionality analysis with an updated data base. The most recent proportionality review research, prepared for *State v. Harris*[272], yielded significant race

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ness . . . Richard M. Daley [former Cook County Prosecutor] is now Mayor and the current prosecutor, Jack O'Malley, has openly been contemplating higher office. Harry Connick Sr., New Orleans's District Attorney, ran for Louisiana Attorney General in 1987.

Rosenberg, *supra* note 115, at 46. *See also* Bright & Keenan, *supra* note 81.

269 In only three states are prosecutors not elected: Connecticut, Delaware and New Jersey. Connecticut, Delaware, Hawaii, Massachusetts, New Hampshire, New Jersey, New York, and Rhode Island do not elect judges, either initially or for retention. BUREAU OF JUSTICE STATISTICS, U.S. DEPT. OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS (1994).

270 *Marshall II*, 613 A.2d at 1110-12.

> [The court] concluded, however, that the data were less strong than the evidence presented in McCleskey and did not establish a constitutional violation. In terms of the overall race-of-victim effects . . . this conclusion seems correct because the disparity is smaller than the McCleskey disparity and is not statistically significant. As for the race-of-defendant effects in the jury penalty-trial data, the court was cautious because changes in the law that would be likely to reduce discrimination had occurred in 1987 and 1988 and because there were an inadequate number of post-1988 cases with which to estimate race-of-defendant effect.

Baldus et al., *supra* note 37, at 413 (footnotes omitted).

271

> There was stronger evidence of race effects in prosecutorial decision making. Nevertheless, the practical effect of these prosecutorial decisions has been ameliorated by the fact that according to the records of the Administrative Office of the New Jersey Courts, over 80% of all of New Jersey's death sentences imposed since 1982 have been vacated because of legal errors unrelated to racial issues. The data are disturbing nonetheless. To meet those concerns, the New Jersey court in *Marshall* urged the state's Attorney General and prosecutors to cooperate with the court and its staff in maintaining and improving the court's data base in order to enhance its capacity to detect sign of discrimination in the system. The court also suggested that its "unease" about racial issues would be ameliorated "if there were some type of inter-agency review to provide the most rudimentary monitoring of [prosecutorial] capital-charging decisions."

*Id.* at 413 (footnotes omitted) (discussing *Marshall II*, 613 A.2d at 1110-14).

272 662 A.2d 333 (N.J. 1995). Joseph Harris died prior to the scheduled oral argument in his case before the Supreme Court of New Jersey. His appeal was then dismissed as moot. The proportionality issues and the question of possible race effects will be addressed in *State v. Loftin*. *See infra* Appendix C.

effects.[273]

### 7. *The Politics of Proportionality Review in New Jersey: Conflict between the Legislature, the State Supreme Court, and the Attorney General*

In spite of or perhaps because the principled commitment of the New Jersey Supreme Court and its Proportionality Review Project, the court was sharply criticized by state legislators, the press, and the New Jersey Attorney General on capital punishment issues, particularly proportionality review, during the period from 1982 until 1992. The antagonistic relationship between the Attorney General, the state legislature, and the court was influenced by a variety of national and state events, not all of which were related to capital punishment, or to proportionality review, although capital punishment issues were prominent in the five year period between *Ramseur*[274] and *Marshall II*[275].

Capital punishment in the late 1980's and early 1990's was a salient political issue which politicians ignored at their peril.[276] There was then and is now no political support for those accused of capital murder and their representatives in the legal system. Moreover, the issues surrounding the cost of the reimposition of the death penalty, which might have caused some members of the public or the legislature to question the reimposition of capital punishment, have never been documented or treated seriously by the public, the press, or the legislature.[277]

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273 *See* Appendix C for the models and significant race effects found in *State v. Harris.* The court has appointed Judge Richard S. Cohen as the new Special Master for Proportionality Review. *See infra* Appendix C (*State v. Loftin*, No. A-86 (N.J. Oct. 22, 1986) (order appointing new special master). The Oct. 22, 1996 Order demonstrates that the newly constituted court will continue the court's prior commitment to a rigorous scientific analysis based upon a reliable factual foundation. The new Chief Justice, Deborah T. Poritz, formerly Attorney General of New Jersey, announced that she would recuse herself from those pending capital appeals with which she had been directly involved. *See* Stephen W. Townsend, Clerk of the Supreme Court, *Notice to the Bar, Recusal Policy of the Chief Justice*, N.J. L.J., Sept. 2, 1996, at 2.

274 524 A.2d 188 (N.J. 1987).

275 613 A.2d 1059 (N.J. 1992).

276 *See* Bright & Keenan, *supra* note 81, at 770-76. See also Rosenberg, *supra* note 115, at 46 ("[The death penalty's] political value is the unstated dark side to prosecutors' argument that they use the death penalty because their public demands it. One thing the most fervent district attorneys share is political ambition."); *id.* at 42 ("The 1994 campaign [for governor of Pennsylvania] was in itself a classic illustration of the political pressures on officials who deal with crime . . . . There is only one way to be safe: Always take the most hard-line position possible.") *See* Bienen, *supra* note 103, at 585 for other arguments regarding the politics of the death penalty, with specific reference to the high publicity circumstances surrounding Robert Marshall's trial.

277 Prior to reenactment, there was an unsuccessful attempt by Assembly Speaker Alan Karcher to attach a fiscal note to the bill reenacting capital punishment. *See Untitled*, UPI,

The conflict between the New Jersey Legislature and supreme court over capital punishment was preceded by sharp disagreements on other highly political issues, such as school funding and mandated low-income housing in suburban residential communities.[278] Conflict between the state high court and legislature occurs in many jurisdictions, however, the Supreme Court of New Jersey under the leadership of Chief Justice Wilentz provoked more than the ordinary amount of controversy. It was the Wilentz court's willingness to adopt principled and politically unpopular positions that led to its preeminence among state high courts.

Conflict between the court and the legislature began with a 1985 amendment to the capital punishment statute which retained the proportionality review requirement but removed the provision making such review mandatory in all appeals of death sentences.[279] In its first capital punishment decision the Supreme Court of New Jersey indicated that it did not intend to have its constitutional jurisprudence on capital punishment dictated by the legislature.[280] The court simply continued to prepare to conduct a proportionality review of every death sentence which was not reversed on other constitutional grounds.[281]

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May 19, 1982, *available in* LEXIS, NEWS Library, NEAST File. "In New Jersey, sentencing one person to death has been estimated to cost about $7.3 million . . . . For example, the prosecution estimated that the Ramseur case cost $60,000 a year to litigate." *Marshall II*, 613 A.2d. at 1144 (Handler, J., dissenting). In New York, the 1995 reenactment legislation did appropriate additional funds for the reimposition.

278 For almost 20 years the question of the constitutionality of property-tax-based school funding in New Jersey has oscillated between the state legislature and the courts, with the Supreme Court of New Jersey as final arbiter. *See, e.g.*, Abbott v. Burke, 477 A.2d 1278 (N.J. Super. Ct. App. Div. 1984), *rev'd*, 495 A.2d 376 (N.J. 1985); Robinson v. Cahill, 287 A.2d 187 (N.J. Super. Ct. Law Div. 1972), *modified*, 303 A.2d 273 (N.J. 1973). *See also* Peter Enrich, *Leaving Equality Behind: New Directions in School Finance Reform*, 48 VAND. L. REV. 101 (1995). The role of the Supreme Court of New Jersey in mandating affordable housing provoked similar conflict between that court and other branches of state government. *See, e.g.*, South Burlington County NAACP v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975) and subsequent cases.

279 *See* 1985 N.J. Laws 1935, 1940 (amending N.J. STAT. ANN. § 2C:11-3). The amended statute required the appeal of all death sentences, even over the objection of the defendant, with representation by the Public Defender or other court-appointed counsel. This mandate was similar to action taken by other state legislatures after *Pulley v. Harris*, 465 U.S. 37, 50 (1984) held that the United States Constitution did not require proportionality review.

280 State v. Ramseur, 524 A.2d 188, 292 (N.J. 1987) ("While proportionality review is no longer mandatory, and shall be undertaken only '[u]pon the request of the defendant,' we assume that almost all defendants who are sentenced to death will request such review." (citation omitted)).

281 In *Marshall II* the court sidestepped the question of whether a 1992 legislative amendment limiting the universe of cases to death sentences only would violate the ex post facto clause of the United States Constitution:

The New Jersey Supreme Court waited five years before holding the revised capital punishment statute constitutional on state and federal grounds.[282] Given the direction of federal constitutional law, the state constitutional holding was the important interpretation. Many state legislators were impatient with this delay and even more antagonized by the fact that the court reversed 27 death sentences before upholding the death sentence of Robert Marshall on direct appeal in January of 1991.[283]

The impatience of state legislators reared itself at Chief Justice Wilentz's reconfirmation in 1986. In New Jersey, judges are not elected. They are appointed by the Governor subject to confirmation by the Judiciary Committee of the New Jersey Senate.[284] The reconfirmation of the Chief Justice in 1986 was delayed by legislators who were frustrated by the court's independence under his leadership.

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The Attorney General has filed a letter memorandum suggesting that the 1992 amendment be applied to this appeal. Were the amendment to be applied to pending appeals, we would undoubtedly be required to resolve whether, as applied to offenses committed before its effective date, the Act might constitute an ex post facto law . . . . Because of the long pendency of this appeal, we decide this appeal under prior law . . . . We therefore have no occasion to consider either its applicability or validity . . . . Because there are several capital appeals pending under the prior law, we address the issues in sufficient detail to deal with those appeals as well.

State v. Marshall, 613 A.2d 1059, 1063-64 (N.J. 1992). In both *State v. Martini*, 651 A.2d 949 (N.J. 1994), *cert. denied*, 116 S. Ct. 203 (1995), and *State v. Bey*, 645 A.2d 685 (N.J. 1994), the court found the death sentences proportionate and based its proportionality review on an analysis similar to that in *Marshall II*, using an updated and expanded data set prepared for each case.

282 Section 2C:11-3 was enacted in 1982, *see supra* note 197 and accompanying text, but the statute was not held constitutional until *State v. Ramseur*, 524 A.2d 188, 216-21 (1987).

283

After the re-enactment in 1982, the majority of legislators expected executions to occur relatively quickly; they are disappointed that the statute has not been implemented as planned. "I expected that capital punishment would be the law of the state and that there would be executions. I had no idea the Supreme Court would thwart the will of the people," said [Assemblyman] Hardwick. The fault with the lack of complete implementation lies with a recalcitrant court, not with the legislators, says Hardwick. Other legislators expressed similar opinions. "I never imagined people would be languishing in jail while the courts fought it out," said [Senator] Orechio. Most of the legislators [interviewed] who supported the re-enactment expressed frustration at the "law in name only" that the death penalty statute has now become. According to Horan, Senator Dorsey thinks "it is a travesty that what the people want is not happening. It is almost like to was a waste of time to pass it." Dorsey would be bothered by the execution of another human being, but what has happened is "just opposite" from what he had expected. He never realized the legislation would be such an "exercise in futility. Why vote for something if nothing's going to happen?" said [Legislative Aide to Dorsey] Horan. The string of reversals has subsequently caused several legislators to accuse the New Jersey Supreme Court of legislating from the bench.

Chen, *supra* note 197, at 47-48 (footnotes omitted).

284 The Wilentz court era ended in 1996, when the Chief Justice resigned and died in July of 1996. Deborah T. Poritz, the former Attorney General and Governor's Counsel, was immediately appointed and confirmed as the new Chief Justice. Republican Governor Christine Todd Whitman also appointed the replacement for Justice Clifford, who retired in 1994. *See* Rocco Cammarere, *Coleman Passes Unanimously*, N.J. LAW., Oct. 24, 1994, at 1.

The court's decisions in capital cases were a large part of the controversy.[285] Legislators, the governor, and state law enforcement officials expressed the view that the court was determined not to enforce the capital punishment statute, even though the court had been unwilling or unable to declare the statute unconstitutional.[286]

In 1988, conflict between the state legislature and supreme court and criticism of the court by the law enforcement community intensified after the court held in *State v. Gerald*[287] that proof of a specific intent to kill, not merely an intent to cause bodily harm, was a prerequisite for a conviction for capital murder.[288] Ironically, the death sentence was reversed on other gounds as well, but this became the *general* doctrine. The New Jersey Legislature and state law enforcement personnel became even more outraged when a series of death sentences were overturned by the court on the basis of *Gerald*.[289] Since before *Gerald* the court has based its constitutional rulings in capital cases on independent state constitutional grounds, leaving no basis for an appeal to or the possibility of reversal by the Supreme Court.[290]

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285 In California, Rose Bird was defeated in a retention election because of the unpopularity of the California Supreme Court's reversals of death sentences. *See supra* note 81. For a discussion of judicial election, selection, and accountability, see Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969 (1988); Gerald F. Uelmen, *Commentary: Are We Reprising a Finale or an Overture?*, 61 S. CAL. L. REV. 2069 (1988).

286 "'[The court] is looking for ways to circumvent [the death penalty statute] on a case-by-case basis, by splitting hairs . . . You can pass all the legislation in the world, but if the Court is going to move along this road, it doesn't mean anything.'" Tracy Schroth, *Gerald Nearly Fatal to Death Appeals*, N.J. L.J., July 5, 1990, at 1 (footnotes omitted) (quoting former New Jersey Senator John Lynch). *See also* Kathleen Bird, *Florio Faults Supreme Court on Death Penalty: Governor Challenges Justices to Enforce the Law or Strike it Down*, N.J. L.J., Dec. 20, 1990, at 3.

287 549 A.2d 792 (N.J. 1988).

288 Following that decision in 1988, a number of other death sentences were set aside by the New Jersey Supreme Court on the grounds that the jury had not been appropriately instructed under the *Gerald* standard. Some of these cases went to penalty-phase retrial, others were resolved with a plea to a non-death sentence. *See* Bienen et al., *supra* note 45, at 713 n.12.

289 *See, e.g.*, Bird, *supra* note 286; Schroth, *supra* note 286.

290 *See generally*, William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977); *Developments in the Law: The Interpretation of State Constitutional Rights*, 95 HARV. L. REV. 1324 (1982); Jose L. Fernandez, *The New Jersey Supreme Court's Interpretation and Application of the State Constitution*, 15 RUTGERS L.J. 491 (1984); Stewart G. Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983); *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 284 (1973); Robin B. Johansen, *Note, The New Federalism: Toward a Principled Interpretation of the State Constitution*, 29 STAN. L. REV. 297 (1977). The United States Supreme Court is "utterly without jurisdiction to review . . . state decisions" resting in whole or in part on state constitutional law. Brennan, *supra*, at 501. Justice Brennan uses as an example of this doctrine another highly controversial case decided by the New Jersey

In the period between 1982 and 1991 public support for capital punishment in the country as a whole stayed high and showed little sign of being eroded, although there was no state poll on the issue in New Jersey from 1982 to 1992.[291] Even if the "public" was not more in favor of capital punishment and executions than they had been in the past, it was clear to New Jersey legislators and others that the Supreme Court had undergone a substantial doctrinal shift during the intervening decade.[292] The federal courts were not predictably going to interfere with any state supreme court ruling or statute which had the intention or effect of streamlining the process of carrying out executions.[293] Federal remedies became increasingly un available to state capital defendants during the period.[294] The Supreme Court of New Jersey was correctly perceived to be the principal impediment to executions being carried out in the state.

An unusual election in November of 1991 in which the entire New Jersey Senate and Assembly stood for election resulted in a veto-proof Republican majority in both houses for the first time in twenty-five years. Thereafter, on March 12, 1992, the Governor of New Jersey signed into law legislation restricting proportionality review in capital cases to cases in which the death sentence was imposed.[295] The newly

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Supreme Court: South Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (N.J.), *cert. denied*, 432 U.S. 808 (1975).

291 *See* Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, 50 J. Soc. Issues 19, 19-21, 48-49 (1994). *See also* William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 Am. J. Crim. L. 77 (1994). The highest level of public support for the death penalty was in 1988, 79%, with a low of 42% expressing their support in 1966. Ellsworth, *supra*, at 48-49. After 1974 the polling question asked was: Are you in favor of the death penalty for persons convicted of murder? *See* James Alan Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. Rev. L. & Soc. Change 499, 502 n.12 (1991). *See also* D. Milan, Capital Punishment and Perception: Public Opinion and its Influence *in* 1992 WWS Final Report; Minhas, *supra* note 197; A. Southwell, Life or Death? Analysis of the Current Public Opinion and Justifications: The Death Penalty and its Alternatives, *in* 1992 WWS Final Report.

292 "[W]hen the Legislature originally enacted the death-penalty statute, they most likely operated under the misconception that the United States Constitution required proportionality review as an essential element of a valid death-penalty system. That assumption was proven incorrect by the holding in *Pulley v. Harris*." State v. Marshall, 613 A.2d 1059, 1116 (N.J. 1992) (Garibaldi, J., concurring in part and dissenting in part) (citation omitted).

293 *See supra* Part II.

294 For example, the United States Supreme Court restricted access to the federal courts by 1) narrowing the procedural and substantive grounds for federal habeas review, while making those grounds much more technical; 2) interpreting the definition of incompetence of counsel so that only a very small subset of cases meet the standard for the appointment of counsel; and 3) tightening time requirements and strictly interpreting waiver questions. The goals of shutting down federal habeas review to capital defendants has been facilitated by the appointment of federal judges in favor of speeding up executions and limiting federal capital appeals. *See supra* Part II.

295 N.J. Laws ch. 5 (1992). The provision amended § 2C:11-3e by adding the following

elected legislature also directly challenged the independance of the New Jersey Supreme Court by passing a proposed constitutional amendment[296] that overturned the court's holding in *State v. Gerald.*[297]

These actions appeared to be part of a broad conservative agenda of the newly elected members of the legislature,[298] but the court did not change its procedure for conducting proportionality review when the "death only" law was enacted.[299] At some point the court will necessarily conduct proportionality review with the new reduced comparison category of death sentence cases only, but the practical effect of the amendment may be minimal. In *Marshall II* the court stated its commitment to the larger universe for the consideration of broad constitutional issues such as racial discrimination and arbitrariness in capital sentencing generally.[300]

## V. THE 1995 REENACTMENT IN NEW YORK: NEW RULES FOR THE REIMPOSITION OF CAPITAL PUNISHMENT IN THE 1990'S

The election of Republican Governor George Pataki in 1994 marked a turning point in New York politics.[301] Governor Mario

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language: "Proportionality review under this section shall only consist of a comparison of similar cases in which a sentence of death has been imposed under subsection c. of this section." N.J. STAT. ANN. § 2c:11-3e (West 1995). Principles of ex post facto prevent this provision from having a retrospective effect upon the *Marshall* case or upon any case in which the crime occurred prior to the effective date of the amendment. *See infra* notes 299-300 and accompanying text.

296 N.J. CONST., art. I, ¶ 12 (amended 1992).

297 549 A.2d 792 (N.J. 1988).

298 *See* Jerry Gray, *G.O.P. Is Told Not to Alter Constitution*, N.Y. TIMES, July 14, 1992, at B6. The article states:

> Blaming what he called "right wing extremists" within the Republican Party, the Senate Democratic leader, John A. Lynch, accused the Republican legislative majority today of trying to undermine the state constitution .... Since the Republican-controlled 205th Legislature began its two-year session in January, legislators have introduced nearly 90 bills to amend the State Constitution, about a dozen of them sponsored by Democrats.

299 *Marshall II*, 613 A.2d at 1071-73.

300 *Id.*

301

> Surrounded by lawmakers, district attorneys and relatives of murder victims, Pataki used the pens of two slain police officers to sign the death penalty legislation into law shortly after noon Tuesday. It's a bill that backers have been trying to get a New York governor to approve for 18 straight years. "This bill is going to save lives. This bill is going to be a deterrent and it's going to allow us to have a system that imposes justice fairly and appropriately in New York state," Pataki said .... Assembly Speaker Sheldon Silver, Senate Majority Leader Joseph Bruno and other lawmakers joined Pataki at the ceremony .... "I think it's a deterrent. Maybe they'll think twice before they'll pull triggers," said Janet McDonald, whose police officer husband, Sean, was murdered last March execution-style after he came upon a robbery .... Another murder victim's relative, who was featured in a campaign ad last fall for Pataki, said Tuesday's signing helped in the healing process. "It's an important day," said Carol McCauliff, whose

Cuomo was defeated in the 1994 election in part because of his continued opposition to capital punishment, even though he had been elected over pro-death penalty opponents in 1986 and 1990. His defeat in November of 1994 followed a campaign in which Pataki kept Cuomo's opposition to the death penalty in the public eye.

Reenactment was a certainty after the election of Governor Pataki, and a reenactment bill was passed less than six months after Pataki took office.[302] The timing of reenactment in New York strongly influenced the structure of the New York statute.[303] Experienced New York prosecutors and defense attorneys watched for twenty years as the number of persons on death row across the nation climbed to over 3,000 and the number of executions passed 300 with relatively little public protest.[304] New York was no longer going to be the exception.

### A. THE IMPORTANCE OF NEW YORK FOR PROPORTIONALITY REVIEW

By 1995 all efforts to enact national legislation addressing the persistent evidence of racial disparities in the application of state capital statutes had been rejected by the United States Congress.[305] With no foreseeable prospect of the Congress enacting legislation which

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stepson Thomas was killed last year allegedly by a repeat offender given early release from prison. McCauliff appeared in one of the campaign's more controversial ads, when, concerning her stepson's murder, she proclaimed, "I blame it all on Cuomo and his policies."

Tom Precious, *Justice Will Be Served*, TIMES UNION (Albany), Mar. 8, 1995, at A1.

302 Act of March 7, 1995, 1995 N.Y. Laws c.1.

303 *See Death Penalty Symposium*, 23 HOFSTRA L. REV. 627 (1995); R. Tabak, *Are Executions in New York Inevitable?*, 22 FORD. URB. L.J. 557 (1995). *See also* Mary R. Falk and Eve Cary, *Death-Defying Feats: State Constitutional Challenges to New York's Death Penalty*, 4 J.L. & POL'Y 161 (1995); Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283 (1996); Franklin E. Zimring, *The Wages of Ambivalence: On the Contexts and Prospects of New York's Death Penalty*, 44 BUFF. L. REV. 303 (1996). *See generally The New York Death Penalty in Context: A Symposium*, 44 BUFF. L. REV. 283 (1996). *See also* James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. (forthcoming 1997).

304 *See supra* tbl.2. Frank Zimring argues that the system's failure to execute a proportionate number of persons sentenced to death represents a societal ambivalence about the death penalty. *See* FRANKLIN E. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1986); Franklin E. Zimring, *Ambivalence in State Capital Punishment Policy: An Empirical Sounding*, 18 N.Y.U. REV. L. & SOC. CHANGE 729, 729 (1991);

305 See Baldus et al., *supra* note 37, at 376-405. Section IV of that article discusses the Racial Justice Act and the Fairness in Death Sentencing Act, both designed to "bypass *McCleskey* by relying on the legislative power granted Congress under the Enabling Clause of the Fourteenth Amendment." *Id.* at 377. The Fairness in Death Sentencing Act "would provide a condemned prisoner the opportunity to challenge his death sentence with statistical proof of racial discrimination and would also employ a risk-based model of proof." *Id.* at 379 (citation omitted). It is noteworthy that as this article went to press the American Bar Association House of Delegates voted for a moratorium on all executions because of the persuasive disparities in their application.

would require states to address the constitutional issues raised by the persistent evidence of racial disparities in capital sentencing, the procedures for appellate review included in the New York statute become especially critical. While no one can predict how the New York Court of Appeals will address issues of racial and geographic disparities in capital charging and sentencing, it is certain such disparities will emerge.[306] The statute anticipates that the court will consider the constitutional issues from an empirical perspective.

The New York Court of Appeals is in a position to take advantage of the strides made by the Supreme Court of New Jersey in defining the constitutional parameters for proportionality review under state constitutional law. Like the Supreme Court of New Jersey, the New York Court of Appeals has a long and distinguished history of developing state constitutional doctrine. This court's consideration of the constitutional issues raised by the reenactment of capital punishment in New York will not be perfunctory or evasive. That litigation and the development of state constitutional doctrine on the application of the death penalty in New York is anticipated with great interest in the national legal community.

No participant in the reenactment process in New York, including the state legislators, expects that the initial decision on the constitutionality of the New York statute will be made by a federal court. This is an important difference from the view expressed in many state legislatures in the past. Legislators in states where reenactment occurred prior to *Pulley* and *McCleskey* fully expected the Supreme Court to rule on the constitutionality of their statute, and they fashioned their statutes for review by the Supreme Court. State legislators copied the Georgia statute because they expected that was the only version of a capital statute which would be upheld by the Supreme Court. No such expectation of imminent review by the United States Supreme Court existed in New York in 1995. The New York Court of Appeals will, in all likelihood, be the first and only court to address the constitutional issues regarding the application of the New York statute in this century.

The national and local politics regarding capital punishment changed dramatically between 1976 and 1995, and the effects of these changes are reflected in the structure of the New York statute. The New York statute was designed to build in, to the extent the legislature

306 The dispute between Governor Pataki and Bronx Prosecutor Robert Johnson is a highly publicized example of the different charging practices and the autonomy of local officials. Johnson refused to charge capital murder in a case involving the killing of a police officer. Pataki argued Johnson must be removed to reduce county by county disparities in the application of the New York statute.

was willing and able to do so, protections for the due process rights of capital defendants. The statute is structured to preempt protracted litigation on certain issues which have been exhaustively litigated in other states or in the federal courts. Further, and most importantly, the statute is very detailed, with specific provisions on several issues which have been sharpened by extensive adversarial litigation in the state and federal courts throughout the 1980's. This by itself is remarkable. There is no other capital legislation which attempts to preempt litigation to this extent. Many of the provisions in this statute had previously been the subject of highly partisan debate in state and federal courts, in the state legislatures, and before the United States Congress.[307] Ironically, however, the specificity of some provisions may increase the likelihood of litigation, rather than preempt it.

### B. STATUTORY PROVISIONS FOR APPELLATE REVIEW AND PROPORTIONALITY REVIEW

The specificity of the appellate review procedures incorporated within the 1995 New York statute are unique. This comprehensive statutory structure, including very detailed rules governing the procedures and substantive aspects of appellate review, means at the very least that litigation under the statute will be governed by new principles. The Court of Appeals will first be required to address the statutory provisions under review and their effect and purpose. The legislature's clear intention is that the New York Court of Appeals will thoroughly review all constitutional issues, both state and federal, in direct capital appeals.[308]

The New York Court of Appeals has a distinguished history and is known for its independence. The experience of the Proportionality

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307 For example, the provision requiring the prosecutor to give notice of the intention to seek the death penalty was the subject of litigation in New Jersey prior to the Supreme Court of New Jersey addressing the constitutionality of the death penalty statute as a whole. *See* State v. McCrary, 478 A.2d 339 (N.J. 1984). New York addresses this issue by presumably preempting litigation in New York if prosecutors adhere to the time limitations. *See* N.Y. CRIM. PROC. LAW § 250.40 (McKinney Supp. 1996).

308 *See* Governor's Memorandum of Approval of L.1995, c.1 [The Death Penalty].

> Constitutional concerns and the infirmities in prior New York State law are fully met in this bill, which establishes a bifurcated trial procedure and sets forth clear standards to narrow the scope of the death penalty and guide the jury in determining whether to impose the death penalty . . . ." As one commentator observed: "In one sense the New York law is itself a 'constitutional moment.' It might be read as the original MPC [Model Penal Code] law with constitutional annotations folded into it. Line after line, the New York law incorporates identifiable post-*Furman* Supreme Court cases. In its aim at being proof against constitutional attack, it not only acquires the constitutional wisdom of the last twenty years; it takes the most 'conservative' and prophylactic view of constitutional law possible.

Robert Weisberg, *The New York Statute as Cultural Document: Seeking the Morally Optimal Death Penalty*, 44 BUFF. L. REV. 283, 293 (1996).

Review Project in New Jersey can save the New York Court of Appeals from time consuming litigation if the court institutes procedures for maintaining a reliable factual record for proportionality review and the consideration of other constitutional issues raised by racial and geographic disparities in capital case processing.

Although no death sentence has been imposed in New York in 1996, there are already indications of disparities in the policies of local prosecutors. At the time of reenactment some New York prosecutors, most notably the District Attorneys in the Bronx and Manhattan, had gone on record as saying they were not in favor of the reenactment.[309] The District Attorney from the Bronx, in particular, stated that his constitutents did not support the death penalty and that he did not intend to seek it.[310]

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309 During the Assembly Debate Mr. Stringer expressed concern about the misuse of the potential publicity surrounding capital prosecution by prosecutors seeking reelection, commenting upon the fact that Robert Morganthal, the District Attorney for Manhattan, was known to be against the death penalty. *See* N.Y. State Assembly, Death Penalty Debate, March 6, 1995, at 210 (on file with the State Documents Collection of Northwestern University School of Law). There is now a controversy regarding Governor Pataki's assertion in December of 1995 that he can remove a District Attorney from a potentially capital case if that District Attorney decided not to prosecute a case capitally. This raises the new issue of separation of powers and the autonomy of prosecutors.

The amount and disposition of funds appropriated for the defense of capital cases became, not surprisingly, both complicated and politically controversial. The Administrative Board of the New York Court of Appeals initially set the rates and requested comments. Differences arose in part because of large discrepancies in fee structures in various sections of the state. *See* Daniel Wise, *4 Panels Named for Death Penalty Cases; Assignments Include Counsel Compensation*, N.Y. L.J., Aug. 16, 1995, at 1; Daniel Wise, *Panels Split on Legal Fees in Death Cases: Proposals Vary from $125 to $300 for Lead Counsel*, N.Y. L.J., November 15, 1995, at 1, 4; Daniel Wise, *Comments Generally Favor Rates for Capital Counsel*, N.Y. L.J., March 6, 1996, at 1; and Daniel Wise, *Pataki Urges Capital Cases Pay Cut*, N.Y. L.J., March 13, 1996, at 1.

310 "Under the statute, prosecutors have the option of seeking the death penalty or life without parole. The Bronx District Attorney suggested yesterday he would seek the latter. 'The law is that district attorneys have the discretion,' Mr. Johnson said in a short statement." Ian Fisher, *Detailed Rules on Executions Released by New York State*, N.Y. TIMES, Sept. 2, 1995, at 1. *See also* Ellen Yan & Robin Topping, *Lawyers Dread Dealing with It But. . .*, NEWSDAY, Aug. 31, 1995, at A4:

> Nassau and Suffolk district attorneys' offices don't believe more than a few death penalty cases will be handled each year, because of the time and cost. Death penalty cases, which are appealed automatically, can drag on for years, possibly bankrupting counties and depleting state funds for the defense and prosecution of these cases . . . . "I'm really dreading the first case I'm going to have to make the decision on," said [the Nassau County Prosecutor] . . . . Like Nassau, the Suffolk District Attorney's Office has looked up their murder cases for the past few years to determine how many would have been eligible for the death penalty. About 20 to 25 cases met the criteria, said DA James Catterson Jr., and his prosecutors, in an informal survey, said they would be hard-pressed to recommend the death penalty in even three or four [of those] cases.

In addition, a *New York Times* article stated that:

> Prosecutors are discovering, however, that the state's first death penalty law in more than two decades, which covers a dozen categories of murder and appears to cast the widest of nets, is stitched so tightly that even the most heinous of September's murders

All death sentences will be reviewed by the Court of Appeals, irrespective of whether the defendant requests such a review.[311] This review cannot be waived by the defendant.[312] A provision allows the Court to set aside a sentence of death "in the interests of justice," which would encompass a variety of injustices at trial or incapacities of representation.[313]

The statute specifically provides for the court to consider, upon written motion, cases in which the death sentence is imposed on the grounds of improper conduct of a juror or a jury, or newly discovered evidence—grounds which are no longer considered sufficient to reopen a case by the federal courts in habeas corpus proceedings.[314] The statute affords the State the opportunity to appeal from a trial judge's order setting aside the sentence of death, another controversial procedural provision with constitutional implications strongly favoring the prosecution.[315]

The statute also contains provisions governing the court's consideration of evidence of racial disparities.[316] The Court of Appeals must determine whether the sentence of death was imposed under the influence of any "other arbitrary or legally impermissible factor including whether the imposition of the verdict or sentence was based upon the race of the defendant or [the race of] a victim of the crime for

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may not qualify . . . . There have been an estimated 65 homicides in New York City alone since the law took effect, and 26 just in Brooklyn—9 over the last weekend—Mr. Hynes said. So, he added, the absence of capital cases hardly implies that would-be killers throughout the state skidded to a halt over the Labor Day weekend.

Jan Hoffman, *Death Penalty Law Is Not Easy to Apply*, N.Y. TIMES, Sept. 22, 1995, at B2.

311 N.Y. CRIM. PROC. LAW §§ 470.30(2), 470.15(2)(c) (McKinney 1994 & Supp. 1996) (courts can set aside a death sentence which is "unduly harsh or severe" as a corrective action).

312 *Id.*

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Court Set Aside of Death Sentence: Subdivision (d) authorizes the defendant upon written motion, in cases where a death sentence is imposed to have the sentence set aside upon any of the grounds set forth in section 330.30 of the Criminal Procedure Law including newly discovered evidence, improper conduct of a juror or jurors which may have affected substantial rights of the defendant and any ground appearing in the record which, if raised on appeal from a prospective judgement of conviction, would require a reversal or modification as a matter of law . . . . In addition to ordering a new sentencing proceeding, the court may take any corrective action an appellate court could take upon reversing or modifying a judgment on the grounds at issue in the motion.

Summary and Description of Provisions: D. Separate Sentencing Proceedings, N.Y. State Assembly Committee Bill Memorandum-L. 1995, c.1. (available in Historical and Statutory Notes to N.Y. CORRECT. LAW art. 22-B (McKinney Supp. 1996)).

314 § 470.30(3). For an analysis of the most recent Congressional enactments regarding federal habeas, see Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381 (1996).

315 § 400.27(11)(d).

316 § 470.30(3)(a).

which the defendant was convicted."[317] And the statute has a proportionality review provision which requires the Court of Appeals to determine whether the sentence of death is "excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant."[318] The proportionality review provision additionally provides that the court shall, "upon request of the defendant . . . review whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases by virtue of the race of the defendant or a victim of the crime for which the defendant was convicted."[319] The presence of two such provisions means that if the legislature should repeal only the requirement for proportionality review, there would still be a second provision making explicit reference to the court's obligation to consider racial disparities in the application of the statute. In other words, the statute preempts the legislator's removal or limitation of proportionality review.

The statute establishes that the Court of Appeals, and not another institution, has the authority and responsibility for creating and maintaining a data base on capital case processing, including the creation of an accurate record of all murders and their disposition throughout the entire state.[320] The Court of Appeals has broad authority to set rules and procedures for the review of capital cases.[321] It is noteworthy that the court has not limited its universe of cases to penalty phase trials.

The fact that the statute refers to statistical evidence implies that the Court intends to rule on the state constitutional issues based upon

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317 *Id.*

318 § 470.30(3)(b).

319 *Id.* The court is required to list all similar cases considered in proportionality review.

320 § 211-a. The Court of Appeals set uniform rules for the Trial Courts in capital cases, effective Feb. 7, 1996. *See* N.Y. R. U. Trial Cts § 218.1 et seq. These rules include the requirement of the submission of capital case data reports:

> in every criminal action in which the defendant *has been indicted for murder in the first degree (P.L. 125.27) including those actions resolved by pleas of guilty,* to assist the Court of Appeals in determining whether a particular sentence of death is disproportionate or excessive in the context of penalties imposed in similar cases.

*See* CAPITAL CASE DATA REPORT (available from Counsel's Office, New York Court of Appeals, Albany, N.Y.) (emphasis added).

Proportionality review in New York will necessarily confront county by county disparities perpetuated by different charging policies of prosecutors, different patterns in the incidence of homicide across jurisdictions and the factors seen in New Jersey and other jurisdictions. *See, e.g.*, Daniel Wise, *Prosecutors Want Death Penalty; Qualms Voiced About Costs, Time, Training of Lawyers*, N.Y. L.J., March 3, 1995, at 1; Jan Hoffman, *Balancing Personal Beliefs and the Law*, N.Y. TIMES, Sept. 25, 1996, at B6. The existence of broad discretion in their decision to charge capital murder has and will continue to exacerbate county by county disparities.

321 § 211-a.

facts established in a scientifically reliable empirical study of its capital case processing system, similar to the data and analysis prepared for the Supreme Court of New Jersey. The court has already committed to a uniform capital case data report form for systematic data collection. Importantly, the universe of cases is all indictments for first degree murder, whether disposed of by plea or trial. As part of proportionality review, the court may consider statistical evidence to determine whether the race of the victim or the race of the defendant are having a "significant" impact upon the imposition of the death penalty. The use of the term "significant" implies that the court anticipates a standard multivariate analysis such as that recommended by the U.S. General Accounting Office.[322] Such evidence may be based upon the required data reports submitted and filed with the Court, or upon evidence independently gathered by the defense. The specific reference to data independently prepared by the defense implies that the legislature intended the court to consider *all* relevant empirical evidence. The legislative history supports that interpretation.[323] With this background, empirical findings are not likely to be ignored or dissmissed by this court.

These provisions stand in sharp contrast to the proportionality review provisions of any other state. The reference to the collection of data on race is not now included in any other state statute. The New York Court of Appeals called for comments on its proposed rules very soon after enactment.[324] Detailed comments on the proposed rules for data collection and the maintenance of an adequate record for proportionality review were submitted by attorneys with experience with the implementation of proportionality review in New Jersey

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322 See the criteria for research quality specified by the U.S. General Accounting Office:

> By quality we mean the strength of the design and the rigor of the analytic technique that leads to a level of confidence we have in the study findings. We judged a study to be high quality if it was characterized by a sound design that analyzed homicide cases throughout the sentencing process; included legally relevant variables (aggravating and mitigating circumstances); and used statistical analysis techniques to control for variables that correlate with race and/or capital sentencing.

1990 GAO REPORT, *supra* note 38, at 3.

323 *See* Governor's Memorandum of Approval of L. 1995, c.1 [Death Penalty] and N.Y. State Assembly Committe Bill memorandum L. 1995 [A.4843] issued on March 6, 1995.

324 On July 3, 1995, the Court released Proposed Rules of the Court of Appeals in Capital Cases and Proposed Uniform Procedures for Appeals from Pretrial Findings of Mental Retardation in Capital Cases. On August 31, 1995, the Court released Proposed Uniform Rules for the Trial Courts in Capital Cases and Proposed Minimum Standards for Lead Counsel and Associate Counsel in Capital Cases. On September 15, 1995, the Court released the Proposed Uniform Rules for Capital Case Data Reports and the Capital Case Data Report Form, with a comment period ending on October 16, 1995. *See* Richard R. Zander, Public Information Officer, New York Court of Appeals, *Statement Accompanying Release of Death Penalty Rules for Public Comment* (Sept. 15, 1995) (all on file with the State Documents Collection of Northwestern University School of Law).

and other states.[325]

Twenty years ago legislators and lobbyists would not have considered including provisions explicitly stating that the Court of Appeals can always consider questions "in the interests of justice," or on the basis of newly discovered evidence of innocence. Prior to the present holdings of the Supreme Court the assumption would have been that newly acquired evidence of innocence could always be presented, even after appeals were completed. However, given the present capital jurisprudence of the Supreme Court, such provisions have become advisable, if not necessary.[326]

The first capital case probably will not reach the New York Court of Appeals on direct review for at least two or more years. Interlocutory appeals, and even perhaps statistical evidence on the operation of the capital case processing system in New York may precede the first direct capital appeal. The Court of Appeals will have the benefit of the experience in Georgia, New Jersey, Connecticut, Pennsylvania and other jurisdictions. Technical advice on systematic case tracking, the necessity of a clear and concise narrative summary for each case, accessibility to and the appropriate use of the official data set and other issues have already been the subject of comment. This court will be in a better position to conduct systematic proportionality review than any other state high court has been in the past.

In particular, the New York Court of Appeals will benefit greatly from the expertise of the Proportionality Review Project commissioned by the Supreme Court of New Jersey. The Court of Appeals seems to recognize its responsibility to maintain an adequate record so that disparities in capital sentencing based upon racial identification and other extra legal factors can be accurately identified and measured. Without such documentation references to due process protections by legislators and others are an empty litany, performing lip service to the appearance, but not the fact, of justice.

## VI. Conclusion

State high courts have been the principal interpreters of state

325 Extensive comments were submitted to the court on the form and substance of the data collection, record keeping, and certification of accuracy and reliability which the court has a responsibility to undertake. These are preconditions to the systematic analysis of racial and geographic disparities. Without reliable information on capital cases and similar cases in which the death penalty was not sought or imposed, the Court cannot address the constitutional issues. *See* cases submitted on October 16, 1995 by Professor David Baldus et al. (comments on proposed rules of the court in capital cases) (on file with State Documents Collection of Northwestern University School of Law).

326 Concerns for the execution of the innocent were expressed often in the Assembly Debates. *See, e.g.*, N.Y. Assembly Death Penalty Debate, at 165-75.

constitutional doctrine in capital jurisprudence since *Gregg*. Overwhelmingly, these institutions have not been staunch guardians of the constitutional rights of capital defendants, or so it would seem from the way in which states have conducted proportionality review. As the state by state analysis in Appendix A indicates, vast differences exist among the states on this subject. The national frustration, even rage, over what is perceived to be an intractable crime problem, and its association, in the minds of the public, with minorities in large cities, and the fragility fo courts in the face of political pressure seems to make courts unwilling to reverse death sentences on grounds of documented racial or geographical disparities. Such documentation, showing sharp differences in the administration of justice with respect to the death penalty, might well persuade courts of the unconstitutionality of the application of capital punishment within a jurisdiction if they were actually willing to review it. The Supreme Court of New Jersey has been the exception. The Court of Appeals in New York now has the opportunity to follow New Jersey's lead.

In the past few years a few other state supreme courts have also refused to bow to the public's demand for vengeance. Too often, however, it appears that, for the overwhelmingly white and middle class members of the judiciary, young men, many of them minorities, who have committed murder are the problem, not an allegedly discriminatory criminal justice system. And when, in jurisdiction after jurisdiction, an innocent person is found to have been sentenced to death, it has little or no impact upon the criminal justice system in the state. That an innocent person has been found to be sentenced to death might in another era provoke a reaction of public outrage, but in this period the public and the courts do not seem surprised.

Certainly the large number of people on death row, as well as the sharp increase in the death row population in the period 1984 to 1996, has influenced the public, the judiciary, and the administration of criminal justice. For the remainder of this century state high courts, and legislatures will be the legal institutions with the primary responsibility of protecting the constitutional rights of criminal defendants. These institutions, though they are beset by political pressures, by changing demographics, and by large and unwieldy caseloads, will, hopefully, create a jurisprudence which they and we can respect and recognize as principled.

## APPENDIX A
## PROPORTIONALITY REVIEW IN THE INDIVIDUAL STATES

*Alabama*

Both the intermediate appellate court and the state supreme court are required to perform proportionality review. The requirement was imposed by the Alabama high court in *Beck v. State*.[327] The Alabama legislature subsequently adopted a statutory requirement which codified the proportionality review procedures established by the court in that case.[328]

*Beck* remains the leading case on proportionality review in Alabama. In *Beck* the court provided extensive documentation of the legislative history and application of the death penalty in Alabama from the time prior to the Civil War to the present.[329] On its own initiative the court examined fifty post-*Furman* cases in which the death sentence had been imposed.[330] The *Beck* opinion included statistics documenting the race of the defendant and victim for the persons on death row at the time of *Furman* and listed the offenses for which the defendants had been sentenced to death.[331]

In *Beck* the court examined system wide racial disparities in capital sentencing post-*Furman* within the context of proportionality review, under the rubric of inquiring whether similar crimes were being punished capitally. Racial disparities in capital case processing were considered part of proportionality review because these disparities suggested that defendants who committed similar crimes received dissimilar sentences. Although the court in *Beck* only included statistics on other cases which resulted in the death sentence being imposed, the court's repeated references to similar cases and its explicit reference to the sentence of a codefendant both imply that the court

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327 396 So. 2d 645 (1980).

> To insure that sentences of death will not be arbitrarily and capriciously imposed, we hold that both the Court of Criminal Appeals and this Court should examine all death sentences in light of the standards and procedure approved in *Gregg*. Each death sentence should be reviewed to ascertain whether the crime was in fact one properly punishable by death, whether similar crimes throughout the state are being punished capitally and whether the sentence of death is appropriate in relation to the particular defendant. In making this final determination, the courts should examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any.

*Id.* at 664 (Ala. 1980).

328 *Compare Beck*, 396 So. 2d at 664, *with* ALA. CODE § 13A-5-53(b) (Michie 1982) (codifying the proportionality review procedures set out in *Beck*).

329 *Beck*, 396 So. 2d at 648-55.

330 "We researched independently the convictions for which a sentence of death was imposed under Alabama's present Death Penalty Statute, and we also used information furnished by the parties at our request." *Id.* at 654, n.5.

331 *Id.* at 653-54.

would consider in an appropriate case data on non death sentences as part of proportionality review.[332] The court also implied that it would consider evidence concerning system wide discrimination based upon race of the defendant or victim within the context of proportionality review if such evidence were presented to them.[333]

Since *Beck*, the court has not overturned any death sentence on grounds of disproportionality.[334] Nor has the court readdressed issues concerning system wide race effects in the Alabama capital punishment system since *Beck*. Proportionality review has been perfunctory and conclusory.[335]

*Arizona*

Arizona no longer conducts proportionality review.[336] The Arizona Supreme Court formerly conducted proportionality review pursuant to a general mandate from the legislature to correct sentences where the punishment imposed is greater than the circumstances of

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> 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.

*Id.* at 664.

333 "We were especially interested in determining whether racial discrimination may have been present." *Id.* at 652. In *DeBruce v. State*, 651 So. 2d 624 (Ala. 1994), the supreme court referred to the trial court's denial of defendant's "motion to preclude the death on the grounds of racial discrimination for discovery," *id.* at 628, as an attempt to raise the issue of the disproportionate sentencing of blacks to death. The district attorney countered the defendant's motion by stating that there had been 15 whites sentenced to death in the county compared to four blacks. *Id.*

334 *See, e.g.*, Thompson v. State, 542 So. 2d 1286 (Ala. Crim. App. 1988).

335 *See, e.g.*, Gentry v. State, No. CR-92-0409, 1994 WL 529410, at *18 (Ala. Crim. App. Sept. 30, 1994) ("[S]imilar crimes are being punished capitally throughout this state . . . . considering the premeditated, vicious, and unnecessarily tortuous nature of the crime committed and considering the appellant, we find that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases." *Id.*). This was the extent of the proportionality analysis. In other cases the court has simply concluded that the sentence of death was neither excessive nor disproportionate. *E.g.*, *Ex parte* Rieber, 663 So. 2d 999, 1015 (Ala. 1995); *Ex parte* DeBruce, 651 So. 2d 624, 635 (Ala. 1994) (not "disproportionate to the penalty imposed in other robbery-intentional killing cases"); *Ex parte* Williams, 627 So. 2d 999, 1005 (Ala. 1993).

336 State v. Salazar, 844 P.2d 566, 583-84 (Ariz. 1992). *Accord* State v. Bolton, 896 P.2d 830, 856 (Ariz. 1995); State v. Hinchey, 890 P.2d 602, 605 (Ariz. 1995); State v. Ross, 886 P.2d 1354, 1358 (Ariz. 1994). Previously, the court held that it was inappropriate for the trial court to consider sentences imposed in other cases when sentencing a defendant. *See* State v. Greenway, 823 P.2d 22, 38 (Ariz. 1991). *But see* State v. White, 815 P.2d 869, 882-83 (Ariz. 1991) (discussing whether the death penalty is disproportionately applied to men and women).

the case warrant.[337] There was never a statutory requirement to conduct proportionality review. The Arizona Supreme Court established proportionality review itself and then abolished it after *Pulley*.[338]

In defining similar cases, the Arizona Supreme Court formerly considered the aggravating circumstances and the similarity of the circumstances of the offense, as well as characteristics of the defendant which might serve as mitigating factors.[339] The proportionality re-

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337 The court established proportionality review in *State v. Richman*, 560 P.2d 41, 51 (Ariz. 1976) (citing statutory provisions). The Arizona Supreme Court said that as part of its review of capital cases the court found it necessary to determine whether the sentence of death is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." *Id.* (citing Gregg v. State, 220 S.E.2d 659 (Ga. 1974), *aff'd*, Gregg v. Georgia, 428 U.S. 153 (1976)).

338 Justice Corcoran argued against the continued use of proportionality review and set forth its history in the state. *See* State v. White, 815 P.2d 869, 866 (Ariz. 1991) (Corcoran, J., concurring). In *Salazar*, the court commented that the composition of the court had changed and since the court was examining its own rules, and not the interpretation or application of a statutory or constitutional interpretation, the court had "more latitude in reexamining earlier precedent." *Salazar*, 844 P.2d at 583. A concurring Justice Martone stated:

> It is also clear that the practice of proportionality reviews in death penalty cases had its origin in the mistaken notion that because some other state's statute required them, so did the United States Constitution. *Pulley v. Harris* put that erroneous notion to rest . . . . Our cases reveal that proportionality reviews are judicial afterthoughts, mere appendages to already lengthy opinions. They are performed in a non-adversarial setting, without any pretense at real science. They require a court to engage in the alchemy of measuring degrees of depravity among a handful of selected cases. The pursuit of justice does not require us to engage in unauthorized false science.

*Salazar*, 844 P.2d 566, 584-85 (1992) (Martone, J., concurring) (citation omitted). The dissent replied that:

> Implicit in this, I fear, *is* the idea that death penalty jurisprudence is some form of "real science" and that, in deciding who should live and who should die, courts do not "engage in the alchemy of measuring degrees of depravity" . . . . Proportionality review is simply another form of comparison entailing no more "alchemy" than the rest of our capital jurisprudence. It is a tool by which the court can compare and remedy injustice when, as, and if it is perceived. It is wrong to discard this tool, especially if we do so under the illusion that we will thereby return to some scientific method of capital punishment. We are not smart enough to know the answer to the age-old question of who should live. It is one that can be correctly answered only with divine knowledge of proportionality and purpose. Because we must stumble on with human intelligence, we should use every tool in our possession to hold error and injustice to a minimum.

*Id.* at 585-86 (Feldman, C.J., dissenting) (emphasis in original).

339 The court described its decision making process as follows:

> Based on our review of other decisions of this court, we believe that the circumstances of this murder indicate it is above the norm of first degree murders and that the defendant is above the norm of other first degree murderers. Therefore, we find that the imposition of the death penalty is proportional to the penalties imposed in similar cases.

State v. Castaneda, 724 P.2d 1, 14-15 (Ariz. 1986) (citation omitted). For example, the court defined as similar cases those in which a defendant abducted, sexually assaulted and strangled a child. The court cited to four death sentences and to six other cases where the death sentence had been reduced to a life sentence, primarily because of mitigating circumstances regarding the defendant. *Id.* at 15.

views previously conducted were not always perfunctory.[340] The universe of cases seems to have included cases where a death sentence was reduced to life imprisonment, in addition to other death sentences.[341] The Arizona Supreme Court never overturned a death sentence because of disproportionality. However, since *State v. Salazar*, Arizona has conducted one proportionality analysis without calling it such.[342]

*Arkansas*

Arkansas does not require proportionality review by statute.[343] The Arkansas supreme court, however, made proportionality review mandatory in *Sheridan v. State*.[344] The pool of comparison cases is other death sentence appeals.[345]

*California*

The California capital punishment statute has never included a provision for proportionality review. It was challenged on that basis and upheld in *Pulley v. Harris*. Although it is not required, the court on its own initiative conducts intracase proportionality review.[346] In-

340 *See, e.g.*, State v. Cook, 821 P.2d 731, 756 (Ariz. 1991). However, the court did not always perform a review. *See* State v. Rossi, 830 P.2d 797 (Ariz. 1992). In *State v. Brewer*, 826 P.2d 783 (Ariz. 1992), the majority opinion did not perform a proportionality review while a concurring opinion conducted a thorough review.

341 "In conducting this review, we have considered those cases involving the presence of one aggravating circumstance and no mitigating circumstances sufficiently substantial to call for leniency . . . . We also have considered those cases where a [death] sentence has been reduced to life imprisonment." State v. Wallace, 728 P.2d 232, 240 (Ariz. 1983).

342 *See* State v. Willoughby, 892 P.2d 1319, 1338 (Ariz. 1995) (comparing two cases in evaluating the quality of the aggravating factor of murder for pecuniary gain). Arizona does independently consider and weigh aggravating and mitigating evidence in every death case. *See* State v. West, 862 P.2d 192, 215 (Ariz. 1993).

343 The Arkansas Supreme Court is only required to conduct a harmless error review of the defendant's death sentence, determining that the remaining aggravating circumstances exist beyond a reasonable doubt and that they justify a sentence of death beyond a reasonable doubt. If the Arkansas Supreme Court concludes that the erroneous finding of any aggravating circumstances by the jury would not have changed the jury's decisions to impose the death penalty, a simple majority of the court may vote to affirm. ARK. CODE ANN. § 5-4-603(d) (Michie 1994).

344 852 S.W.2d 772, 780 (Ark. 1993) ("Finally, we undertake a 'proportionality review' of [the defendant's] case which we have made a requirement under Arkansas law . . . to insure that the sentence is not imposed in a freakish, capricious, or whimsical manner.").

345 The defendant's position was that the universe of cases should be all capital and first degree murder cases occurring after July 3, 1989, charged as 'premeditated or deliberated.' *Id.* The Arkansas Supreme Court rejected this position, stating that the court would "only compare death sentence appeals to other death sentence appeals. To do otherwise would be to compare apples to oranges." *Id.*

346 *See* People v. Champion, 891 P.2d 93, 136 n.35 (Cal. 1995); People v. Webb, 862 P.2d 779, 806 (Cal. 1993) (considering whether death penalty is disproportionate to defendant's relative culpability); People v. Clark, 857 P.2d 1099, 1156 (Cal. 1993).

tracase proportionality review compares the death sentence under review to the sentences of codefendants in the same case. In one appellate level case the trial court conducted an intercase proportionality review, and the higher appellate court said that this was an error, and remanded for reconsideration "based solely on the evidence presented to the penalty jury."[347]

*Colorado*

The Colorado statute does not require proportionality review, and thus, it is not conducted by the court.[348] The court does use proportionality review for life sentences, however.[349] In 1990 the Colorado Supreme Court rejected a claim under the state constitution that the death penalty was disproportionately imposed upon the poor, on blacks and on members of unpopular groups on the basis that the defendant did not present any data proving that contention.[350]

*Connecticut*

Connecticut has a standard proportionality review provision, using a slight variant of the language in *Gregg*.[351] In the first case in which the court considered federal and state constitutional challenges to the statute, the court reversed the death sentences imposed and upheld the constitutionality of the statute on its face, based upon federal and state constitutional principles.[352]

*Delaware*

Delaware requires proportionality review by statute.[353] Although

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347 People v. Crew, 2 Cal. Rptr. 2d 755, 756 (Cal Ct. App. 1991).

348 COLO. REV. STAT. ANN. § 16-11-103 (West 1963). The original statute was repealed as reenacted by Act of Sept. 20, 1991, ch.4, 1991 Colo. Sess. Laws 2d Ex. Sess. 8, and amended further in 1993, 1994, and 1995.

349 People v. Valenzuela, 856 P.2d 805, 809 (Colo. 1993). The Supreme Court of Colorado is required to review the "propriety of [the death] sentence, having regard to the nature of the offense, the character and record of the offender, the public interest, and the manner in which the sentence was imposed, including the sufficiency and accuracy of the information in which it was based." People v. Davis, 794 P.2d 159, 174 (Colo. 1990).

350 *Id.*

351 "[T]he sentence is excessive or disproportionate to the penalty imposed in similar cases considering both the circumstances of the crime and the character and record of the defendant." CONN. GEN STAT. ANN. § 53a-46(b)(s) (West 1994). The proportionality review provision was enacted in 1980. 1980 Conn. Acts 80-332 (addressing the entire issue of appellate review in capital cases). *See also* State v. Cobb. 663 A.2d 948, 954 (Conn. 1995) (citing the House Judiciary Committee Chairman as saying that appellate procedures were enacted in 1980 to put the existing capital statute in compliance with federal constitutional standards). The first death sentence to reach the court did not address the state of federal constitutional issues. *See* State v. Breton, 562 A.2d 1060 (Conn. 1989).

352 State v. Ross, 646 A.2d 1318 (Conn. 1994). *See supra* Part III.C.

353 DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (Michie 1995). The supreme court shall determine whether the death penalty was "disproportionate to the penalty recommended

the Delaware Supreme Court has defined its universe as all convictions for capital murder, the court only compares the death sentence under review with "those other first degree murder cases that have arisen under our statute and in which a statutory aggravating circumstance was found by a jury."[354]

Effective November 4, 1991, the Delaware legislature changed the Delaware capital sentencing scheme in several important ways, some of which had an ancillary effect upon proportionality review.[355] Prior to 1991, the jury was required to vote unanimously for a death penalty. Subsequent to the 1991 amendment, in order to impose the death penalty the jury is only required to answer two questions: whether there is at least one aggravating circumstance found beyond a reasonable doubt, and whether the aggravating factors outweigh the mitigating factors. The jury is required to report its final vote to the court on each question. The court then decides whether to impose the death penalty. The statute relieves jurors from the responsibility of making the decision to impose the death sentence, following the *Proffitt v. Florida* model.[356] The purpose of this amendment was, presumably, to make it easier to impose the death sentence, on an assumption that a judge would be more likely to impose a death sentence than a jury.

One result of this statutory change has been a change in the universe of cases the Delaware Supreme Court considers when conducting proportionality review. Immediately after the 1991 amendment, these cases consisted of "those First Degree Murder cases since 1985 which have gone to a penalty hearing and where the sentence has become final, either without or following review by this Court."[357] In *Gattis v. State*,[358] the court listed all first degree murder

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or imposed in similar cases . . . ." *Id.* For a discussion of the methodology, see *Red Dog v. State*, 616 A.2d 298 (Del. 1992).

354 Deputy v. State, 500 A.2d 581, 602 (Del. 1985). The court did not describe its process:

> We have made the appropriate proportionality review and find, after careful consideration, that the imposition of the death penalty on Deputy was not *disproportionate to the penalty recommended or imposed in those other first degree murder cases that have arisen under our statute and in which a statutory aggravating circumstance was found by the jury* . . . . Deputy, like the other defendants in Delaware who have been sentenced to the death penalty under 11 Del.C. sec. 4209, was found guilty of an "unprovoked, cold blooded murder of [two] helpless [persons] committed upon victims lacking the ability to defend themselves and solely for pecuniary gain . . . ."

*Id.* (citations omitted) (emphasis added).

355 *See* Act of November 4, 1991, ch. 189, 1991 Del. Laws 689 (amending DEL. CODE. ANN. tit. 11, § 4209).

356 428 U.S. 242, 260 (1976). The trial court judge is required to impose the death penalty on all first-degree murderers for whom the statutory aggravating statutory factors outweigh the mitigating factors. DEL. CODE ANN. tit. 11, § 4209(d)(2).

357 Wright v. State, 633 A.2d 329, 342 (Del 1993) (citing *Red Dog*, 616 A.2d at 311).

Since the revision of the death penalty procedure in 1991, the jury's determination is

cases that went to penalty phase from 1985 to date, and considered cases from both before and after the 1991 statutory alteration for its proportionality review, "since all such cases are pertinent to the proportionality analysis."[359]

Beginning with *Lawrie v. State*,[360] however, this universe of cases changed. In *Lawrie*, the court adopted a different standard for similarity based upon the changes introduced by the 1991 amendment.[361] The applicable universe of cases then became: "those First Degree Murder cases governed by the 1991 amendment to the death penalty statute which have continued to a penalty hearing and where the sentence has become final." In *Weeks v. State*,[362] the court held that the different manner of sentencing by definition made the cases before and after the amendment dissimilar, irrespective of other considerations.[363] As of *Weeks*, the court also stopped including a list of similar cases.[364] The court has, however, reviewed the sentencing determination in cases where the defendants received life imprisonment rather than death.[365]

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no longer conclusive. However, pre-1991 death penalty cases involving jury determination are nevertheless pertinent to the proportionality determination since those cases do reflect a jury consensus on the appropriateness of imposing the death penalty. More importantly, in all cases in which the death sentence was imposed, this court conducted proportionality review.

*Id.* at 342 n.21.

358 637 A.2d 808 (Del. 1994).

359 *Id.* at 822-23.

360 643 A.2d 1336 (Del. 1994).

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Although the significant 1991 changes in the statutory scheme create a significant dissimilarity between the pre-1991 cases and the post-1991 cases in the universe, pre-1991 jury decisions are nevertheless "pertinent" to our proportionality analysis . . . . the *Chao*, *Liu*, and *Fleming* [similar cases where only life sentences were issued], while "pertinent," are clearly distinguishable from the instant case because they were decided under the significantly dissimilar statutory scheme which requires a unanimous jury verdict to impose the death penalty.

*Id.* at 1350.

362 653 A.2d 266 (Del. 1995).

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The pre-1991 cases required a unanimous jury verdict to impose the death penalty. In the post-1991 cases, it is the trial judge who has the final responsibility for sentencing, and the jury's recommendation need not be unanimous. As a result, we held that the pre-1991 cases "are not similar cases arising under this section. Thus, while pertinent, they are not dispositive . . . ."

*Id.* at 273 (quoting *Lawrie*, 643 A.2d at 1350). This procedure was upheld as constitutional in *Shelton v. State*, 652 A.2d 1, 6-7 (Del. 1995). The evidentiary standard for the jury's decision weighing the aggravating and mitigating factors is only by a preponderance, and that has also been upheld against a constitutional challenge. State v. Cohen, 604 A.2d 846, 851 (Del. 1992).

364 *See, e.g.*, Gattis v. State, 637 A.2d 808, 823-24 (Del. 1994); Wright v. State, 633 A.2d 329, 344-45 (Del. 1993).

365 *Weeks*, 653 A.2d at 274-75. "Although a 'definitive comparison of the universe of cases is almost impossible,' this Court has relied upon the factual background of relevant

The Delaware Supreme Court has not overturned any death sentences for reasons of disproportionality, nor have there been any published empirical studies of the Delaware capital punishment system. For a state with a small death row population, Delaware has had a relatively large number of executions.[366]

*Florida*

There is no statutory requirement for proportionality review in Florida.[367] However, the Florida Supreme Court conducts proportionality review on its own initiative. When it does, the universe of cases it examines is other verdicts of death.[368] The Florida Supreme Court does not document or explain its procedures for conducting proportionality review.[369] In overturning a 1986 death sentence as disproportionate, the court cited to two earlier, allegedly similar cases in which the death sentence was overturned as disproportionate.[370]

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cases to determine the proportionality of a sentence." Outten v. State, 650 A.2d 1291, 1301 (Del. 1994) (citing Pennell v. State, 604 A.2d 1368, 1376-77 (Del. 1992)). *See also* Shelton v. State, 652 A.2d 1 (Del. 1995). The court also analyzes "intentions, expectations, and actions" to determine whether a defendant's culpability level is sufficient to justify capital punishment under a proportionality analysis. *Outten*, 650 A.2d at 1301 (citing *Lawrie*, 643 A.2d at 1349).

366 *See supra* table 1.

367 The capital statute requires a general review by the state supreme court within 60 days after certification. FLA. STAT. ANN. § 921.141(4) (West 1996).

368 In two recent cases, the sentencing order did not provide a sufficiently reasoned analysis for meaningful proportionality review, and the cases were remanded. *See* Larkins v. State, 655 So. 2d 95, 101 (Fla. 1995); Crump v. State, 654 So. 2d 545, 547 (Fla. 1995). *See also* Scott v. State, 657 So. 2d 1129 (Fla. 1995) (considering proportionality issue on remand). In a case where the defendant tried to raise proportionality for a second time on appeal because there was new evidence of mitigation not considered at trial, the court said that the claim was procedurally barred. Rose v. State, 617 So. 2d 291, 297 (Fla. 1993). In *Farr v. State*, the court considered its obligation when the defendant refused to challenge his death sentence and consequently the record was so deficient that a proportionality analysis, required absolutely by the Florida Constitution, could not be carried out. 565 So. 2d 448, 450 (Fla. 1995). In *Johnson v. Singletary*, proportionality was brought up in a concurring opinion without being raised by the defense. 612 So. 2d 575, 577-81 (Fla. 1993) (Kogan, J., concurring).

369 *See, e.g., Garcia v. State*, where the court merely stated: "We have conducted a comparative proportionality review of appellant's death penalty and we are satisfied that the sentence is not disproportionate to the crime or to the death sentences that we have approved or disapproved statewide." 492 So. 2d 360, 368 (Fla. 1986). The nature of the Florida Supreme Court's proportionality review is difficult to determine. *See* Neil Skene, *Review of Capital Cases: Does the Florida Supreme Court Know What It's Doing?*, 15 STETSON L. REV. 263, 296 (1986); Hans Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981) (discussing racial bias in Florida's proportionality review).

370 *See* Wilson v. State, 493 So. 2d 1019, 1023 (Fla. 1986) (per curiam) (citing Ross v. State, 474 So. 2d 1170 (Fla. 1985); Blair v. State, 406 So. 2d 1103 (Fla. 1981)). In other words, the pool of similar cases consisted of other death sentences that had been declared disproportionate. A dissenter, on the other hand, distinguished the two earlier cases because in those cases the court had reassessed the mitigating factors and found the death

Because there are so many death sentences the Florida Supreme Court can compare, there is often considerable discussion of proportionality review.[371]

The Florida capital punishment scheme contains a statutory provision giving the trial court judge the power to override the jury's verdict in capital cases.[372] Cases in which the judge imposed a death sentence after overriding the jury's recommendation of life are particularly likely to have the sentence overturned by the Florida Supreme Court. In the opinion of at least one commentator these reversals of jury overrides are essentially indistinguishable from reversals on grounds of disproportionality.[373]

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sentence disproportionate on that ground. *Id.* at 1024 (Ehrlich, J., dissenting).

371 Cases with relatively extensive analysis of proportionality before upholding the death sentence as proportionate include *Hunter v. State*, 660 So. 2d 244 (Fla. 1995); *Bogle v. State*, 655 So. 2d 1103 (Fla. 1995); *Jones v. State*, 652 So. 2d 346 (Fla. 1995); *Henry v. State*, 649 So. 2d 1366 (Fla. 1994); *Pietri v. State*, 644 So. 2d 1347 (Fla. 1994); *Armstrong v. State*, 642 So. 2d 730 (Fla. 1994) (holding that the death penalty is not disproportionate where the defendant is the shooter despite a codefendant receiving a lesser sentence); *Smith v. State*, 641 So. 2d 1319 (Fla. 1994); *Walls v. State*, 641 So. 2d 381 (Fla. 1994); *Cardona v. State*, 641 So. 2d 361 (Fla. 1994) (holding that a codefendant's sentence may be relevant to proportionality analysis where the codefendant is equally or more culpable); *Hannon v. State*, 638 So. 2d 39 (Fla. 1994) (ruling that death sentence is not disproportionate when a less culpable codefendant receives a lighter punishment); *Lindsey v. State*, 636 So. 2d 1327 (Fla. 1994); *Mordenti v. State*, 630 So. 2d 1080 (Fla. 1994); *Arbelaez v. State*, 626 So. 2d 169 (Fla. 1993); *Sochor v. State*, 619 So. 2d 285 (Fla. 1993); *Duncan v. State*, 619 So. 2d 279 (Fla. 1993); *Hall v. State*, 614 So. 2d 473, 479-82 (Fla. 1993) (Barkett, J., dissenting) (disagreeing due to the defendant's mental retardation); *Clark v. State*, 613 So. 2d 412 (Fla. 1992).

Cases with cursory analysis include *Gamble v. State*, 659 So. 2d 242 (Fla. 1995); *Windom v. State*, 656 So. 2d 432 (Fla. 1995); *Lowe v. State*, 650 So. 2d 969 (Fla. 1994); *Henry v. State*, 649 So. 2d 1361 (Fla. 1994); *Whitton v. State*, 649 So. 2d 861 (Fla. 1994); *Thompson v. State*, 648 So. 2d 692 (Fla. 1994); *Jones v. State*, 648 So. 2d 669 (Fla. 1994); *Davis v. State*, 648 So. 2d 107 (Fla. 1994); *Pittman v. State*, 646 So. 2d 167 (Fla. 1994); *Wyatt v. State*, 641 So. 2d 1336 (Fla. 1994); *Green v. State*, 641 So. 2d 391 (Fla. 1994); *Derrick v. State*, 641 So. 2d 378 (Fla. 1994); *Parker v. State*, 641 So. 2d 369 (Fla. 1994); *Griffin v. State*, 639 So. 2d 966 (Fla. 1994); *Rhodes v. State*, 638 So. 2d 920 (Fla. 1994); *Street v. State*, 636 So. 2d 1297 (Fla. 1994); *Ferguson v. Singletary*, 632 So. 2d 53 (Fla. 1993) (stating that no mention of a proportionality analysis in a written opinion does not mean that one was not conducted); *Atwater v. State*, 626 So. 2d 1325 (Fla. 1993); *Garcia v. State*, 622 So. 2d 1325 (Fla. 1993); *Trepal v. State*, 621 So. 2d 1361 (Fla. 1993); *Stewart v. State*, 620 So. 2d 177 (Fla. 1993); *Slawson v. State*, 619 So. 2d 255 (Fla. 1993) (performing proportionality analysis voluntarily even though defendant did not raise proportionality claim); *Thomas v. State*, 618 So. 2d 155 (Fla. 1993); *Lucas v. State*, 613 So. 2d 408 (Fla. 1993); *Preston v. State*, 607 So. 2d 404 (Fla. 1992).

372 FLA. STAT. ANN § 921.141(3) (West 1996). If the judge overrides the jury's recommendation of life and substitutes a death sentence, the judge must set forth in writing the finding on which the sentence of death is based. This includes a finding that sufficient aggravating circumstances exist and that mitigating circumstances are insufficient to outweigh the aggravating circumstances.

373 *See* Michael Mello, *The Jurisdiction to Do Justice: Florida's Jury Override and the State Constitution*, 18 FLA. ST. U. L. REV. 923 (1991) (providing data on 134 cases in which a death sentence was imposed after the jury recommended a life sentence); Michael Radelet & Michael Mello, *Death-to-Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA.

Florida has one of the largest death row populations, and it has been one of the states leading in executions.[374] Florida has also been a state where a great deal of empirical work has been done of the application of the death penalty. Proportionality review by the Florida Supreme Court has resulted in overturning at least ten death sentences in Florida.[375]

*Georgia*

The Georgia proportionality review process was not just cited with approval in *Gregg*, it became a model for many other states.[376] Because the Georgia proportionality review provision was the subject of such favorable attention by the Supreme Court, the applications of that proportionality review provision and other state court appellate procedures in Georgia have been of considerable interest both to researchers and to other state supreme courts.[377]

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ST. U. L. REV. 195 (1992). The Florida Supreme Court has reversed a judge's imposition of the death sentence after a jury recommended a life sentence in a total of 65 cases. In another 11 cases in which the judge exercised the override provision to sentence the defendant to death after the jury recommended life, the Florida Supreme Court reversed both the guilt phase and the penalty phase verdicts. The Florida Supreme Court affirmed the death sentence in 29 other cases in which the judge exercised the override provision and sentenced the defendant to death. These 127 cases of death sentences imposed by a judge after the jury recommended life compose approximately one-sixth of all the death sentences imposed in Florida. *See also* Michael Radelet & Glenn Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 FLA. L. REV. 1 (1991).

374 *See supra* table 1.

375 *See* Steven Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719, 738 n.61 (1988) (identifying 10 death sentences that had been overturned in Florida through 1987). *See also* Besaraba v. State, 656 So. 2d 241 (Fla. 1995); Chaky v. State, 651 So. 2d 1169 (Fla. 1995); Morgan v. State, 639 So. 2d 6 (Fla. 1994); Allen v. State, 636 So. 2d 494 (Fla. 1994) (discussing gender equality in death penalty sentencing); Santos v. State, 629 So. 2d 838 (Fla. 1994); Knowles v. State, 632 So. 2d 62 (Fla. 1993); Kramer v. State, 619 So. 2d 274 (Fla. 1993); Deangelo v. State, 616 So. 2d 440 (Fla. 1993); White v. State, 616 So. 2d 21 (Fla. 1993).

376 Gregg v. Georgia, 418 U.S. 153, 207 (1976) (affirming lower court's holding that death sentence imposed for armed robbery was disproportionate). The capital punishment scheme in Georgia has been the subject of a number of empirical studies since *Gregg*. The work of Professor Baldus and his colleagues is the most systematic and extensive. It includes an analysis of several different data sets covering different periods. *See* DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY (1990). *See also* Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327 (1985); Ursulla Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U. L.Q. 573 (1985); William J. Bowers, *The Pervasiveness of Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 74 J. CRIM. L. & CRIMINOLOGY 1067 (1983); William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980); George E. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97 (1979); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

377 *See, e.g.*, Beck v. State, 396 So. 2d 645, 655 (Ala. 1981) (citing *Gregg*); Tichnell v. State, 468 A.2d 1, 13 (Md. 1983) (same).

Initially, the Georgia Supreme Court overturned some death sentences as disproportionate.[378] The court reversed one death sentence on grounds of proportionality before the United States Supreme Court handed down its decision in *Gregg*.[379] When death sentences were not found disproportionate, the court has included an appendix of similar cases, including life verdicts.[380] In 1984, the Eleventh Circuit held that the Georgia Supreme Court did not need to consider life sentences in proportionality review.[381] These appendices have since become increasingly perfunctory.[382] In recent cases the court has discussed how comparisons are made or the criteria applied.[383] Recently, the Georgia Supreme Court has not overturned any death sentences as disproportionate.[384]

*Idaho*

Proportionality review was not included in Idaho's original capi-

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378 *See, e.g.*, Hall v. State, 244 S.E.2d 833, 839 (Ga. 1978).

379 In *Coley v. State*, the court stated that where prior cases indicate that the past practice among juries faced with similar fact situations has been to impose a life sentence, the court has no alternative but to set aside the sentence of death. 204 S.E.2d 612, 616-617 (Ga. 1974).

380 *E.g.*, Moore v. State, 213 S.E.2d 829 (Ga. 1975). In *Moore*, the court included as an appendix cases of robbery-murder in which the defendant was sentenced to life and indicated that it had compared the death sentence under review with those cases:

> We find that the sentence of death in this case is not excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Notwithstanding the fact that there have been cases in which robbery victims were murdered and the juries imposed life sentences . . . . the cited cases show that juries faced with similar factual situations have imposed death sentences.

*Id.* at 833 (citations omitted).

381 *See* Cape v. Francis, 741 F.2d 1287, 1302-03 (11th Cir. 1984).

382 *See, e.g.*, McMichen v. State, 458 S.E.2d 833, 847 (Ga. 1995) (containing appendix which cites to eight presumably similar cases without indicating whether they involve life sentences, death sentences, or other reasons for their selection).

383 *See, e.g.*, Fleming v. Zant, 386 S.E.2d 339 (Ga. 1989). *See also McMichen*, 458 S.E.2d at 847 (reaffirming that the method by which the court conducts proportionality review is constitutionally sound); Crowe v. State, 458 S.E.2d 799, 813 (Ga. 1995); Mobley v. State, 455 S.E.2d 61, 71 (Ga. 1995); Drane v. State, 455 S.E.2d 27, 33 (Ga. 1995) (rejecting defendant's allegation of disproportionality); Hittson v. State, 449 S.E.2d 586, 596 (Ga. 1994); Bennett v. State, 414 S.E.2d 218, 224 (Ga. 1992) (including and appendix of similar cases).

Intracase proportionality—the comparison of a defendant's death sentence with the nondeath sentence of a codefendant—has on occasion received more attention. *See Hittson*, 449 S.E.2d at 594. *But see* Beck v. State, 340 S.E.2d 9 (Ga. 1986) (holding that defendant's death sentence is not disproportionate to codefendant's life sentence imposed only because state did not have as strong a case against codefendant).

384 Prior to *Pulley v. Harris*, 465 U.S. 37 (1984), the Eleventh Circuit rejected a constitutional challenge to the state supreme court's method of conducting proportionality review. *See* Moore v. Balkcom, 716 F.2d 1511, 1525 (11th Cir. 1983). However, it is not the role of the federal courts to dictate to the state courts the methods of conducting proportionality review so long as the state supreme court's review and results do not rise to the level of unconstitutional action. Collins v. Francis, 728 F.2d 1322, 1343 (11th Cir. 1984).

tal statute enacted in 1973, but was added by amendment in 1977.[385] This proportionality review provision mandated that the court refer to "similar cases that it took into consideration."[386] In 1994 a statutory amendment removed the statutory requirement to conduct proportionality review.[387]

Immediately prior to the statutory change, a death sentence had been set aside on grounds of proportionality, perhaps precipitating the legislative enactment.[388] The Idaho Supreme Court no longer conducts proportionality review.[389] The Supreme Court of Idaho declared two death sentences disproportionate prior to 1994.[390]

Prior to the statutory change, proportionality review was a broad based, de novo consideration of a variety of factors.[391] In its first case addressing proportionality issues the court went back fifty years and

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385 IDAHO CODE § 19-2827(g) (1977) (repealed 1994).

386 *Id.* The proportionality review provision requires the trial court to transmit the entire record and transcript to the Supreme Court of Idaho, including "a narrative statement .... The report may be in the form of a standard questionnaire prepared and supplied by the Supreme Court of Idaho." *Id.* § 29-2827(a). "The court shall include in its decision a reference to those similar cases which it took into consideration." *Id.* § 29-2827(e). "The supreme court shall collect and preserve the records of all cases in which the penalty of death was imposed from and including the year 1975." *Id.* § 29-2827(g).

387 Act of March 21, 1994, ch. 127, 1994 Idaho Sess. Laws 285. The former provision required the court to determine whether the sentence of death was "disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." IDAHO CODE § 19-2827(c)(3) (1987). The amended version only requires the court to consider whether the sentence of death was imposed under the influence of passion, prejudice or other arbitrary factor, whether the evidence supports the judge's finding of a statutory aggravating circumstance, and whether the death sentence is excessive. *Id.* § 19-2827(c) (1994).

388 *See* State v. Pratt, 873 P.2d 800, 824 (Idaho 1993) ("We have compared the nature of the crime and the nature of the defendant in this case with other similar cases, and we hold that the death penalty in this case is disproportionate." (citation omitted)). The court found the case similar to *State v. Scroggins*, 716 P.2d 1152 (Idaho 1985), the only prior Idaho case that held a death sentence disproportionate. *Pratt*, 873 P.2d at 824-25.

389 *See, e.g.*, State v. Sivak, 901 P.2d 494, 500 n.1 (Idaho 1994).

390 *See Pratt*, 873 P.2d at 824; *Scroggins*, 716 P.2d at 1152. After Scroggins' sentence was set aside, his codefendant petitioned for a reconsideration on grounds of proportionality. The court rejected the codefendant's arguments, distinguishing Scroggins' case on the grounds of that defendant's youth and lack of a prior criminal record. State v. Beam, 766 P.2d 678, 686 (Idaho 1988). There are no published empirical studies of the Idaho capital punishment system.

391 These included "(1) the nature of, and motive for, the crime committed; (2) the heinous nature of the crime; and (3) the nature and character of the defendant," to determine whether the sentence was proportionate and just. State v. Dunlap, 873 P.2d 784, 792 (Idaho 1993). The court also included lists of comparison cases. *See, e.g., id.* at 792 n.5; *Pratt*, 873 P.2d at 824 n.12; State v. Wells, 864 P.2d 1123, 1125 n.3 (Idaho 1993); State v. Hoffman, 851 P.2d 934, 943-44 (Idaho 1993) (also comparing defendant's sentence with that of codefendant). In considering similar cases, the court considered cases in which a life sentence was handed down as well as other death sentences. *E.g., Dunlap*, 873 P.2d at 793 (Johnson, J., concurring).

examined every death sentence imposed in the state since 1921.[392] The universe of cases had been "the sentence imposed in other capital cases where the death penalty was imposed as well as cases in which the death penalty was not imposed."[393] The decision not to consider cases in which the death penalty could have been sought was controversial within the court.[394] Some members of the court criticized the court's procedures as perfunctory.[395]

The court has not addressed the question of whether removing the defense of disproportionality from cases in which the offense occurred prior to the effective date of the amendment violates principles of ex post facto.[396] The Supreme Court did not find itself obligated to conduct proportionality review after the effective date of the legislative amendment, even though the offense may have occurred prior to the date of repeal.[397] The court has chosen not to

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392 *See* State v. Creech, 670 P.2d 463-475-76 (Idaho 1983).

393 *Wells*, 864 P.2d at 1125 (footnotes omitted). In *Dunlap*, 873 P.2d at 793-800 (Johnson, J., concurring) and *Pratt*, 873 P.2d at 829-35 (Johnson, J., concurring), Justice Johnson's opinions included appendices of comparison cases containing the case names and citation, the characteristics of the defendant, the circumstances of the murder, the conviction, and sentence by the trial court, and the disposition by the Idaho Supreme Court or Court of Appeals. Justice Johnson described his approach to proportionality review in *State v. Card*, 825 P.2d 1081, 1104-15 (Idaho 1991) (Johnson, J., concurring in part and dissenting in part).

394 "How there can ever be any real proportionality continues to escape me where prosecutors exercise a divine right to reduce the charge and to ask or not ask for the death penalty, as may at the moment so move them." State v. Stuart, 715 P.2d 833, 872 (Idaho 1985) (Bistline, J., dissenting). *See also* State v. Aragon, 690 P.2d 293, 314 (Idaho 1984) (Bistline, J., dissenting in part) ("[p]roportionality will never exist so long as prosecutors have discretion in charging, and, worse yet, in assuming that it is in their prerogative to also tell the judge which convicted first degree murderers should die and which should live").

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> This summary and wholly conclusory disposition of an issue [proportionality review] which the legislature itself by its mandate deemed highly important did not go unnoticed by counsel for [the defendant] . . . . [The] specific issue presented to us was: "(4) Whether this Court's proportionality review was incomplete and constitutionally defective as the majority opinion contains no specific reference to particular cases it examined." Of discussion there is none.

Sivak v. State, 731 P.2d 192, 227 (Idaho 1987) (Bistline, J., concurring in part and dissenting in part). *See also* State v. Bainbridge, 787 P.2d 231, 243 (Idaho 1990) (Bistline, J., concurring in part and dissenting in part) ("The majority's response to the statutory mandate was the simple expedient of declaring that 'our review of similar cases involving the death penalty while necessarily limited by the lack of such cases . . . does not reveal the presence of any particular excessiveness or disproportionality in this particular case.'" (ellipses in original; citation omitted)).

396 This issue was addressed by the Supreme Court of New Jersey. *See* State v. Marshall, 613 A.2d 1059, 1062-63 (N.J. 1992) (Marshall II) (declaring that all pending cases would be reviewed under preamendment standards).

397 "Because this opinion was released after July 1, 1994, we will not review whether the sentence of death as applied to Sivak was disproportionate to the penalty imposed in similar cases." State v. Sivak, 901 P.2d 494, 500 n.1 (Idaho 1995) (affirming death sentence).

consider proportionality under excessiveness, instead holding that "excessiveness" has no meaning absent proportionality.[398]

*Illinois*

Comparative proportionality review is no longer required in Illinois, and the capital sentencing scheme in Illinois has survived a constitutional challenge on that basis. The Illinois Supreme Court discontinued proportionality review after *Pulley*.[399] The Illinois high court will consider issues of proportionality if they are raised in a particular case, and the court continues to conduct a limited intracase proportionality review.[400] Recent cases suggest that such review is generally perfunctory.[401]

Illinois is noteworthy because the issue of prosecutorial discretion leading to discrepancies in sentencing arose early on in an unusual posture and was the basis for a constitutional challenge to the application of the statute before the state high court.[402] In 1989, a federal district court vacated a death sentence upheld by the Illinois Supreme Court on the ground of the system-wide arbitrariness of the application of the death penalty without proportionality review.[403]

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> IDAHO CODE § 19-2827(c)(3) [as amended] requires that this Court consider "whether the sentence of death is excessive." 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" . . . meaningless. We therefore decline to undertake any consideration of "excessiveness" beyond our independent review to determine whether the district court's finding and weighing of aggravating and mitigating factors is supported by the record.

State v. Fields, 908 P.2d 1211, 1225 (Idaho 1994) (citation omitted).

399 *See* People v. King, 488 N.E.2d 949 (Ill. 1986).

400 *See, e.g.*, People v. Byron, 647 N.E.2d 946, 957-58 (Ill. 1995); People v. Palmer, 643 N.E.2d 797, 808 (Ill. 1994); People v. Thompkins, 641 N.E.2d 371, 388-89 (Ill. 1994); People v. Kitchen, 636 N.E.2d 433, 452 (Ill. 1994); People v. Strickland, 609 N.E.2d 1366, 1389 (Ill. 1992); People v. Pierre, 588 N.E.2d 1159, 1168-69 (Ill. 1992). The death penalty was upheld in all of these cases.

401 People v. Glecker, 411 N.E.2d 849, 856-61 (Ill. 1980). *Glecker* has been identified as a case where a death sentence was set aside on the grounds of disproportionality. *See* Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA L. REV. 719, 728 n.82 (1988). Sprenger classifies Illinois as a state which adopted proportionality review by judicial decree and then repealed it by judicial decree after *Pulley*.

402 The argument was that the prosecutor's discretion to wait until sentencing to ask for the death penalty encroached upon judicial perogatives and violated the doctrine of separation of powers. *See* People v. Lewis, 473 N.E.2d 901 (Ill. 1984); People v. Silagy, 461 N.E.2d 415 (Ill. 1984); People v. Lewis, 430 N.E.2d 1346 (Ill. 1981); People ex rel. Carey v. Cousins, 397 N.E.2d 809 (Ill. 1979).

403 Silagy v. Peters, 713 F. Supp. 1246 (C.D. Ill. 1989). The Seventh Circuit reversed, mentioning that although many death penalty statutes have proportionality review, the Illinois capital statute has enough procedural safeguards without it. Silagy v. Peters, 643

*Indiana*

The Indiana capital statute does not require proportionality review.[404] In the Indiana capital punishment scheme, the jury advises the court on punishment, and the judge can override the jury's recommendation of a life sentence.[405] The Indiana capital statute has been upheld under the federal and state constitutions.[406] For example, challenges based upon the unlimited discretion of the prosecutor to charge capital murder were unsuccessful.[407] The statute was also upheld against a challenge based upon the absence of proportionality review.[408]

*Kansas*

Kansas reenacted late, in April of 1994.[409] The Kansas capital statute does not require proportionality review.[410] There have not been any death sentences imposed in Kansas to date, nor has the supreme court considered any aspect of the capital statute.[411]

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F.2d 986, 1000-01 (7th Cir. 1990). Other recent cases also say that proportionality is not required. *See, e.g.*, People v. Mahaffey, 651 N.E.2d 1055, 1071 (Ill. 1995); *Palmer*, 643 N.E.2d at 808; *Thompkins*, 641 N.E.2d at 380; People v, Fair, 636 N.E.2d 455, 478 (Ill. 1994); *Kitchen*, 636 N.E.2d at 452; People v. Childress, 633 N.E.2d 635, 654 (Ill. 1994); People v. Tenner, 626 N.E.2d 138, 160 (Ill. 1993) (ruling that illinois has sufficient information-gathering techniques to insure sufficient appellate review); People v. Page, 620 N.E.2d 339, 355 (Ill. 1993); *Strickland*, 609 N.E.2d at 1389; People v. Johnson, 594 N.E.2d 253, 273 (Ill. 1992).

404 Rather, the statute has a provision stating that one of the grounds for the state high court overturning a death sentence is if the sentence "is otherwise erroneous." IND. CODE ANN. § 35-50-2-9(j) (West 1986 & Supp. 1996). A state constitutional provision requiring that all penalties be proportionate to the nature of the offense has not been interpreted to require proportionality review. *See* Bivins v. State, 642 N.E.2d 928, 948 (Ind. 1994). In 1995, the sentence of life without parole became the alternative to the death sentence. Act of March 15, 1994, P.L. 158, 1994 Ind. Acts 1854. A 1995 amendment provides that execution of the defendant be carried out "not later than one (1) year and one (1) day after the date the defendant was convicted," and gives the supreme court exclusive jurisdiction to stay a capital sentence. IND. CODE ANN. § 35-50-2-9(h). This amendment requires the supreme court to take into account all claims that the conviction or sentence was in violation of the state or federal constitution. Act of Apr. 25, 1995, P.L. 306, 1995 Ind. Acts 4171 (codified as IND. CODE ANN. § 1(j)(1)(A), (B)).

405 *See, e.g.*, Roark v. State, 644 N.E.2d 565, 572-73 (Ind. 1995).

406 *See, e.g.*, Dillon v. State, 454 N.E.2d 845, 852 (Ind. 1983); Brewer v. State, 417 N.E.2d 889, 901 (Ind. 1981).

407 Williams v. State, 430 N.E.2d 759, 765 (Ind. 1982).

408 Van Cleave v. State, 517 N.E.2d 356, 373 (Ind. 1987). *See also* Schiro v. State, 451 N.E.2d 1047, 1052 (Ind. 1983) ("[w]e are confident that through continuous and exclusive review of [death] cases, no sentence of death will be freakishly or capriciously applied in Indiana").

409 Act of July 1, 1994, ch. 252, 1994 Kan Sess. Laws 2389.

410 The statute requires the supreme court to consider whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factor. KAN. STAT. ANN. § 21-4627(c)(1) (1995).

411 NAACP LEGAL DEFENSE AND EDUC. FUND, INC. DEATH ROW U.S.A. (1996).

*Kentucky*

The Kentucky Supreme Court conducts proportionality review pursuant to statute.[412] The court has limited its review to a consideration of post-1970 cases where the death penalty was both imposed and affirmed.[413] The court has created special data collection procedures for the compilation of a factual record on death sentences.[414] In 1990, the court rejected a challenge to its proportionality review procedures.[415] The court sometimes includes a provocative, conclusory reference to race.[416] The Kentucky Supreme Court has not set aside any death sentences as a result of proportionality review.[417] There has

412 KY REV. STAT. ANN. § 532.075 (Michie 1990).

413 *See, e.g.*, Sanborn v. Commonwealth, 892 S.W.2d 542, 556-57 (Ky. 1994), *cert. denied*, 116 S. Ct. 154 (1995) (incorporating Simmons v. Commonwealth, 746 S.W.2d 393 (Ky. 1988) (listing cases in which the death penalty was imposed after 1969)). The *Sanborn* court "conducted an independent review of all the circumstances" and referred to four additional cases. *Id.* at 556. *See* Bussel v. Commonwealth, 882 S.W.2d 111 (Ky. 1994), *cert. denied*, 115 S. Ct. 1729 (1995); Wilson v. Commonwealth, 836 S.W.2d 872 (Ky. 1992); Taylor v. Commonwealth, 821 S.W.2d 72 (Ky. 1991); Epperson v. Commonwealth, 809 S.W.2d 835 (Ky. 1990). In addition to looking at similar cases, the court considers the "circumstances" of the instant case to see if they "exceed any minimum justifying capital punishment." *Sanborn*, 892, S.W.2d at 557. In *Perdue v. Commonwealth*, 916 S.W.2d 148, 169 (Ky. 1995), the court reversed the death sentence, but did not reach the issue of proportionality, noting that nothing in the case itself would preclude Kentucky from again seeking the death penalty.

414 The court is activley involved in the process of minority cases and establishing a reliable factual predicate for proportionality review:

> The chief justice shall assign to an administrative assistant who is an attorney the following duties: (a) To accumulate the records of all felony offenses in which the death penalty was imposed after January 1, 1970, or such earlier date as the court may deem appropriate. (b) To provide the court with whatever extracted information it desires with respect thereto .... (c) To compile such data as are deemed by the chief justice to be appropriate and relevant ...

KY. REV. STAT. ANN. § 532.075(6).

415 Sanders v. Commonwealth, 801 S.W.2d 665 (Ky. 1990). The appellant argued that he was prejudiced by the inability to gain access to the data collected by the court for proportionality review and that the court's method of conducting proportionality review was unconstitutional because the court's restrictive universe did not allow for a determination of whether the death penalty was being applied in an arbitrary and capricious manner. The appellant argued further that the proportionality review as conducted by the court pursuant to the statute was unconstitutional for lack of articulated standards, and that proportionality review does not fall within the appellate jurisdiction of the court. *Id.* at 41-42. The court rejected all of these arguments. *Id.*

416 *See* Bussel v. Commonwealth, 882 S.W.2d 111, 116 (Ky. 1994) ("The sentence was not fixed because he was black or because the victim was white."); Wilson v. Commonwealth, 836 S.W.2d 872, 892 (Ky. 1992) ("The sentence was not fixed because he was black..."). It is unclear whether the court conducted some sort of analysis or systemwide review of black/white capital murders and concluded that the death sentence was not imposed on racial grounds or if the court is simply asserting its opinion as to that matter.

417 See cases annotated under KY. REV. STAT. ANN. § 532.075(8) (Michie 1982 & Supp. 1996). The annotation lists eight death sentences which were upheld after proportionality review and no cases which were reversed. *See, e.g.*, Slaughter v. Commonwealth, 744 S.W.2d 407 (Ky. 1987) (conducting proportionality review and concluding that the sentence of

been extensive empirical work done on the Kentucky capital punishment system.[418]

*Louisiana*

In Louisiana proportionality review is required by state statute.[419] The most noteworthy feature of proportionality review in Louisiana is that this is the only state in which proportionality review is restricted to a consideration of cases within the same trial court jurisdiction.[420]

A death sentence will not be disproportionate if it comports with other death sentences imposed in the particular parish.[421] This procedure was formulated by the state high court and is now incorporated within its rules.[422] This unusual feature of the Louisiana rules

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death was neither excessive not disproportionate). *But see* Smith v. Commonwealth, 634 S.W.2d 411, 413-14 (Ky. 1982) (affirming the trial court's refusal to submit aggravating circumstances to the penalty phase jury on grounds of proportionality). The trial court apparently recognized the possibility that the death sentence was disproportionate.

418 *See* Gennaro F. Vito & Thomas J. Keil, *Race, Homicide Severity and Application of the Death Penalty: A Consideration of the Barnett Scale*, 27 CRIMINOLOGY 511 (1989); Gennaro F. Vito & Thomas J. Keil, *Capital Sentencing in Kentucky: An Analysis of the Factors Influencing Decision Making in the Post-Gregg Period*, 79 J. CRIM. L. & CRIMINOLOGY, 483 (1988); Gennaro F. Vito & Thomas J. Keil, *Race and the Death Penalty in Kentucky Murder Trials: An Analysis of Post-Gregg Outcomes*, JUST. Q. (forthcoming); Kentucky capital cases are the factual basis for the analysis in Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds about the Punishment: A Litmus Test For Sentencing Guidelines*, 70 IND. L.J. 1183 (1995).

419 LA. CODE CRIM. PROC. ANN. art. 905.9 (West 1995); State v. Welcome, 458 So. 2d 1235, 1252 (La. 1983) (stating that despite *Pulley*, proportionality review is still required by state statute).

420 The State's appellate review procedures are described in Note, *Capital Sentencing Under Supreme Court Rule 28*, 42 LA. L. REV. 1100, 1117-19 (1982). *See also* M. Dwayne Smith, *Patterns of Discrimination in Assessments of the Death Penalty: The Case of Louisiana*, 15 J. CRIM. JUST. 279 (1987); Jason DeParle, *A Matter of Life or Death*, TIMES PICAYUNE SPECIAL REPORT, Apr. 7, 1985; M.F. Klemm, The Determinants of Capital Sentencing in Louisiana: 1979-84 (1986) (unpublished dissertation on file with the University of New Orleans).

421 The parish defines the limits of a prosecutor's jurisdiction and is equivalent to a county. Recent cases indicate that if there is a lack of similar cases in a particular jurisdiction, the Louisiana Supreme Court will examine similar cases in other jurisdictions in order to conduct the proportionality review. *See, e.g.*, State v. Davis, 637 So. 2d 1012, 1031 (La. 1994), *cert. denied*, 115 S. Ct. 450 (1994); State v. Code, 627 So. 2d 1373, 1387 (La. 1994), *cert. denied*, 114 S. Ct. 2775 (1994).

422 LA. CODE CRIM. PROC. ANN. art. 905.9 (West 1995). The Louisiana scheme was upheld by the Fifth Circuit in *Prejean v. Blackburn*, 743 F.2d 1091, 1099 (5th Cir. 1984). The defendant in this case also sought to overturn his death sentence on the ground that Louisiana applied the death sentence in a discriminatory manner with regard to the race of both the defendant and victim. The court also rejected this contention. *Id.*

> The Louisiana Code of Criminal Procedure requires a proportionality review of all first degree murder cases after January 1, 1976 *within the district in which the sentence was imposed* . . . . Parishes, and the judicial districts they compose are individualistic. We take judicial notice that the political and economic make-up, and educational background of citizens vary from one district to the next. Such characteristics identify a parish with certain views, beliefs and practices . . . . Thus, to test whether discriminatory application of Louisiana's valid capital sentencing statutes has been shown . . . the statistical base must, at least initially, deal with numbers within the boundaries of the

eliminates challenges based upon county by county discrepancies and most challenges based upon prosecutorial discretion at the charging stage.[423] The Louisiana Supreme Court has been criticized for this decision and may modify its process in the future.[424]

Aside from referring to this unusual and controversial aspect of proportionality review, the Louisiana Supreme Court does not set out its procedures or precisely designate its universe of cases. In one case the court seemed to define the set of 'similar case' as cases in which a mentally retarded defendant had been sentenced to death.[425] The Louisiana Supreme court has not indicated in any opinion that it engages in systematic data collection or an independent preparation of a factual record.[426] These limitations aside, proportionality review by this court has not always been a cursory effort. The court makes explicit reference to the race of the defendant and victim in conducting proportionality review.[427] The Louisiana Supreme Court has overturned at least two death sentences on grounds of proportionality, one in 1979[428] and one in 1987.[429]

*Maryland*

In 1992 the legislature removed the statutory requirement for proportionality review.[430] Although the present standard requires the

district where the sentence was imposed.

*Prejean*, 743 F.2d at 1101. In fact, the court looked at three cases from two districts outside of the parish in Prejean's case. *See id.* at 1099.

423 One of the strongest arguments concerning disproportionality is the argument that a common, particular kind of murder, for example robbery murder, is treated differently in different trial court jurisdictions within a single state. *See, e.g.*, the data on county by county disparities presented *infra* Appendix B. The disproportionality is created when the crime of murder during the course of a robbery, for example, merits one penalty in an urban jurisdiction and a different penalty in a rural or suburban jurisdiction.

424 *See* BALDUS ET AL., *supra* note 376, at 299 n.25.

425 State v. Lindsey, 543 So. 2d 886, 907 (La. 1989). The Louisiana Supreme Court affirmed the death sentence for the defendant who was mentally retarded, noting that it had affirmed death sentences for retarded defendants several other times. Therefore in the court's judgment the imposition of the death sentence in this case was not disproportionate. *Id.* at 907. "This court has affirmed the death sentence where evidence of comparable or more severe retardation was present in the record . . . ." *Id.* Almost as an afterthought, the court noted that it had also consistently affirmed the death sentence in other single shot armed robberies. *Id.*

426 Louisiana SUP. CT. R. 28 § 4(b) requires district attorneys to file a "list of each first degree murder case tried after January 1, 1976 in the district in which [the] sentence was imposed." State v. Scales, 655 So. 2d 1326, 1338 (La. 1995) (finding death sentence proportional to penalty imposed in other cases involving murders committed during perpetration or attempted perpetration of strong-armed robbery in the district since 1976).

427 *See, e.g.*, State v. Wille, 559 So. 2d 1321, 1340 n.15, 1342 n.17 (La. 1990).

428 State v. Sonnier, 380 So. 2d 1, 6-9 (La. 1979).

429 State v. Weiland, 505 So. 2d 702, 708 (La. 1987).

430 MD. ANN. CODE, art. 27, § 414(e)(4) (Michie 1957) was deleted and proportionality review is no longer mandated as part of the required appellate review. Act of October 1,

sentence not to have been imposed "under the influence of passion, prejudice, or any other arbitrary factor," the Maryland courts no longer conduct proportionality reviews.[431] However, in two recent cases, the Maryland Court of Special Appeals addressed issues subsumed under proportionality in *Marshall II*.[432]

The Court of Appeals of Maryland formerly conducted proportionality review pursuant to a statute modeled after the statute upheld in *Gregg*,[433] and the court's first decision involving proportionality review, *Tichnell v. State*, remains a leading case.[434] The discussion in *Tichnell* was prescient in identifying issues which were controversial in other jurisdictions during the next decade. *Tichnell* held that the universe of cases for proportionality review would be all first degree murder cases in which the State sought the death penalty, whether it was imposed or not.[435] The court was open to considering cases outside

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1992, ch. 331, 1992 Md. Laws. 2674. *See also* Oken v. State, 612 A.2d 258, 283 n.9 (Md. 1992).

431 *See* Thanos v. State, 622 A.2d 727, 737 (Md. 1993); Bruce v. State, 616 A.2d 392, 411 (Md. 1992). In its last proportionality review, the Maryland high court conducted an extensive analysis before finding the death sentence appealed to be proportionate. *Oken*, 612 A.2d at 283 (Md. 1992).

432 *Brooks v. State*, 655 A.2d 1311 (Md. Ct. Spec. App. 1995), considers whether "the duplicate consideration of the underlying felony in both the guilt/innocence and sentencing phases of the appellant's trial does not genuinely narrow the class of death-eligible defendants, and is contrary to the Eighth Amendment prohibition against cruel and unusual punishment," *id.* at 1315-16, and "whether the capital sentencing scheme reasonably justifies the imposition of a more severe sentence on the defendant compared with others found guilty of murder." *Id.* at 1322.

County by county disparities in prosecutions for capital murder were considered in *Richardson v. State*, 598 A.2d 1 (Md. Ct. Spec. App. 1991). "[A] defendant charged with first degree or robbery-murder in Baltimore County is more likely than in other countries to receive notice of the State's intention to seek the death penalty, [because] it is the 'policy' of Baltimore County to seek the death penalty without any discretion." *Id.* at 5. "[T]he Baltimore County prosecutor is more likely to seek the death penalty in a robbery murder case than is a prosecutor in another county in Maryland." *Id.* at 6. Reference is also made to a proportionality study being conducted by the Maryland Court of Appeals pursuant to the repealed § 414(e)(4) of the Maryland Code. *Id.*

433 MD. ANN. CODE, art. 27, § 414(e) (Michie 1957).

434 "[T]he language of . . . the Maryland statute is virtually identical to, and was patterned after, the proportionality review provisions of the Georgia death penalty statute." Tichnell v. State, 468 A.2d 1, 13 (Md. 1983) (citation omitted).

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> Considering the purpose of proportionality review in death sentence cases, the language of sec. 414(e)(4), the law in other jurisdictions with proportionality review provisions like our own, and the views expressed by legal commentators, we conclude that the legislatively intended inventory of cases from which "similar cases" are to be culled encompasses only those first degree murder cases in which the state sought the death penalty under sec. 413, whether it was imposed or not.

*Tichnell*, 468 A.2d at 17 (citation omitted). In addition to its extensive discussion of the legal and constitutional issues, and the law in other jurisdictions, the court analyzed five similar cases and reviewed all forty-eight capital proceedings between reenactment and the time of the decision. *See id.* at 13-23.

of the pool when presented with the appropriate evidence.[436] Three members of the *Tichnell* court argued that cases where the prosecutor did not seek the death penalty must be included to ensure uniformity of application of the statute.[437] In a far sighted observation, one of the concurring justices in *Tichnell* anticipated that the question of who had the responsibility for collecting and presenting data on similar cases also had constitutional dimensions.[438]

There have not been any death sentences overturned in Maryland on grounds of disproportionality. Nor have there been any published empirical studies of the Maryland capital punishment system.[439]

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436 "In so concluding, we do not preclude any defendant whose death sentence is under appellate review from presenting argument, with relevant facts, that designated non-capital murder cases are similar to the case then under scrutiny and should be taken into account in the exercise of our proportionality review function." *Id.* at 18.

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> In sum, in my view, under [the statute] the inventory of cases utilized for proportionality review must include not only those death-eligible cases in which the prosecutor has sought the death penalty, whether it was imposed or not, but all those death eligible cases in which the prosecutor did not seek the death penalty. Such a construction is supported by the legislative history of [the statute], is consonant with the legislative intent that the broadest possible inventory of similar cases be utilized in Maryland's proportionality review procedure, avoids serious constitutional questions, and prevents the arbitrary imposition of an unjustified burden upon the defendant. Most important, such an interpretation effectuates the purpose of proportionality review—to assure consistent and fair application of the death penalty—and therefore is favorable to the accused.

*Id.* at 36 (Davidson, J., dissenting). A concurring justice stated:

> Nothing in the language of the statute supports the view that our consideration should be further limited to those cases in which the prosecutor has exercised his discretion to seek the death penalty.
>
> The crime and defendant in another case may be similar to the crime and defendant in the case under review even though the prosecuting attorney in the former case decided, for whatever reason, not to seek the death penalty . . . . In Maryland, however, we now have facts demonstrating that prosecutors throughout the State do not employ common standards in deciding to seek the death penalty. . . . [T]he Public Defender's Office made a record which convincingly demonstrated that there are no common standards guiding the prosecutors in this State . . . . In light of the known facts concerning the policies of Maryland State's Attorneys, proportionality review limited to those cases in which the death penalty is sought presents serious constitutional questions under the principles of *Furman v. Georgia.*

*Id.* at 23-24 (Eldridge, J., concurring) (footnote omitted). Finally, see the concurrence of Justice Cole, who stated, "In my view, allowing the Court to review a pool of cases which includes cases where the prosecutor chose not to seek the death penalty, because of plea agreements or because of other tactical reasons, is essential to meaningful proportionality review and fundamental to the constitutional application of the statute." *Id.* at 26 (Cole, J., concurring).

438 "Whether the responsibility for marshalling this data imposes a constitutionally impermissible burden on the defendant is a question for another day. I am willing to assume that the various prosecutors will maintain such a data bank which they will readily make available to defense counsel, public or private." *Id.* at 26 (Cole, J., concurring).

439 *But see* Richardson v. State, 598 A.2d 1, 6 (Md. Ct. Spec. App. 1991) (referring to a proportionality study being conducted by Maryland Court of Appeals prior to the repeal of the proportionality review requirement).

*Mississippi*

The Mississippi Supreme Court conducts proportionality review pursuant to statute.[440] A 1994 amendment required the court to include in its decision references to similar cases considered in proportionality review.[441] The court has defined the universe of cases as other death sentences in *Wiley v. State*.[442] This decision was criticized by a concurring justice who considered that universe to be overly restrictive.[443] *Wiley* involved a murder during the course of a robbery,

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[440] MISS. CODE ANN. § 99-19-105(1) (1972). *See, e.g., Beckman*, 556 So. 2d 342 (Miss. 1990). The statute requires the court to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." MISS. CODE ANN. § 99-19-105(3)(c) (1972). The court usually lists the number of death sentences affirmed, reversed and remanded at the end of the opinion. The statute also requires the clerk of the trial court to transmit to the state supreme court the record, a notice, and a report prepared by the trial judge for every death sentence imposed. *Id.* The state high court rejected a challenge to a death sentence on the grounds that the trial court filed an incomplete and inadequate report to the state supreme court. *See* Culberson v. State, 580 So. 2d 1136, 1140 (Miss. 1990). *See also Clemons v. Mississippi*, 494 U.S. 738 (1990) (discussing standards for appellate review).

[441] Act of August 23, 1994, 1994 Miss. Ex. Sess. Laws 23. This amendment may have been precipitated by *Culberson v. State*, 580 So. 2d 1136 (Miss. 1990), in which the court considered whether blanks in the form filed by the Circuit Judge "for the benefit of the Court to assure full awareness of all relevant facts and circumstances in performance of the legislatively mandated proportionality review" merited reversal. *Id.* at 1140. This is another example of a state high court being unwilling or unable to monitor the compilation of a reliable factual record. See discussion of Pennsylvania *infra*. The court found "no basis for believing that any basis in the report deprived Culberson of any important right." *Id.* Recent decisions have given perfunctory consideration to the issue. *See, e.g.*, Davis v. State, 660 So. 2d 1228, 1261 (Miss. 1995) (proportionality review consisted of the court declaring that it found no disproportionality, and including a list of cases in appendix). *See also* Simon v. State, No. 91-DP-00353-SCT, 1995 WL 49560 (Miss. Feb. 9, 1995) (listing in an appendix all of the death cases affirmed by the court).

[442] The Mississippi Supreme Court describes its proportionality review process as follows:

> [T]his court must determine whether the sentence imposed here is excessive or disproportionate to the penalty imposed in similar cases since *Jackson v. State*. This comparison is made from cases in which the death sentence was imposed and reviewed on appeal by this court. In making this individualized comparison, this Court considers the crime and the defendant . . . . In so doing, the comparison leads this Court to conclude that the death sentence [sic] upon this defendant is not excessive or disproportionate. Our review reveals nothing that would justify treating this defendant differently from any other defendants given the death penalty since *Jackson v. State*, nor leads this court to conclude that the defendant should receive a life sentence.

Wiley v. State, 484 So. 2d 339, 355 (Miss. 1986) (citations omitted).

[443] In the opinion of this justice it was also irrelevant to list cases where the death penalty was reversed because of guilt phase issues and equally irrelevant to include for the purposes of proportionality review those cases which have been remanded for a new sentencing hearing. *Id.* at 361-62 (Robertson, J., concurring).

> Of greater concern [however] is our refusal to include in proportionality review those capital murder cases which have resulted in affirmed life sentences. Such cases are to my mind "similar cases" within [the statute]. Certainly the crime is legally the same: capital murder. More important, the facts and circumstances of such cases may well be quite similar with those wherein the death sentence has been imposed. A compari-

and the concurrence was concerned that this common form of murder was being treated differently by different prosecutors in different trial court jurisdictions.[444]

The Mississippi Supreme Court has discussed the issues raised by proportionality review in detail and reversed two death sentences on grounds of disproportionality.[445] In *Reddix v. State* the court found the death sentence disproportionate upon reconsideration of proportionality.[446] Among courts which consider only other death sentences in conducting proportionality review, the Mississippi Supreme Court had been unusual in its extensive consideration of the issues.[447]

*Missouri*

The Supreme Court of Missouri is required by statute to conduct

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son or contrast of such cases with a given death penalty surely would reveal valuable information regarding the proportionality of the sentence under review . . . .

*Id.* (citation omitted).

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And what are we to make of the other capital murder/life results in other convenience store robbery/killings not qualitatively less reprehensible than that here? . . . Where we confront such situations it is no longer sufficient to give the shop worn answer that different juries have the prerogative of deciding comparable cases differently. Proportionality review has been instituted among men as a mandate that we do more than wring our hands and mutter something about luck of the draw. If it has any purpose, [the Mississippi proportionality review provision] has been fashioned to ameliorate the arbitrary result necessarily attendant upon individualized verdicts returned by separate juries.

*Id.* at 361-62 (citation omitted).

445 Coleman v. State, 378 So. 2d 640 (Miss. 1979); Reddix v. State, 547 So. 2d 792 (Miss. 1989). In a third case, a defendant's death sentence was reversed with three of the five member majority voting for life imprisonment on the basis that the appellant's death sentence was disproportionate to the penalty imposed in similar capital cases. Bullock v. State, 525 So. 2d 764 (Miss. 1987). In a fourth case the Supreme Court of Mississippi remanded to allow the trial court to justify the disparity between the defendant's sentence and the accomplice's sentence. *See* McGilvery v. State, 540 So. 2d 41, 42 (1989).

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We performed . . . [proportionality] review and affirmed [the death sentence] in *Reddix II*, 381 So. 2d at 1011-13. However, the passage of time and subsequent developments convince us that the proportionality of Reddix's sentence must be reconsidered . . . . Our proportionality decision in Bullock, rested on the fact that, with only two exceptions, "no capital defendant has had a death sentence affirmed in this state where the sole finding was that he contemplated that lethal force would be used." *Bullock*, 525 So. 2d at 770. We also noted that Bullock's accomplice, the actual killer, had received a life sentence, a point reinforcing our determination that justice required fixing Bullock's sentence at life imprisonment. *Id.* The same is true here . . . . Accordingly, we hold that Reddix' death sentence is disproportionate to the penalty imposed in similar capital cases, considering both the crime and the appellant.

*Reddix*, 547 So. 2d at 793-94 (Miss. 1989).

447 Mississippi data are analyzed in Samuel R. Gross and Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984). That study found that race of the victim had a strong and statistically significant effect on the odds of receiving a death sentence in Mississippi. *Id.* at 92-98. This study concluded that the odds of receiving a death sentence in Mississippi were about five times greater for defendants linked to white victims, relative to black victims. *Id.*

proportionality review as a check upon arbitrariness.[448] In Missouri intermediate appellate courts may also conduct proportionality review.[449] Proportionality review is not constitutionally required in Missouri.[450] In Missouri, a judge can impose the death sentence if the jury cannot agree upon the sentence.[451] The court defines the universe of cases as all penalty phase cases.[452] The court has refused to consider cases in which the death sentence was not sought. The type of proportionality review conducted by the Missouri Supreme Court has been characterized as standardless by the Chief Justice of that Court.[453] The court generally lists the cases used for comparison and

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448 MO. ANN. STAT. § 565.035 (West 1996).

449 *See* State v. Shinn, 874 S.W.2d 403 (Mo. Ct. App.), *cert. denied*, 115 S. Ct. 371 (1994). The appellate court reversed the trial court's grant of a motion "to preclude the State from seeking the death penalty . . . due to disproportionality in sentencing based on the defendant's age and the circumstances of this case" because "proper review of proportionality in sentencing . . . is not concerned with whether . . . [a particular] individual should receive the death penalty" but whether "any defendant in circumstances similar to . . . [the defendant's] should receive the death penalty." *Id.* at 406. Defendant was a juvenile at the time of the offense. *Id.*

450 *See* State v. Chambers, 891 S.W.2d 93 (Mo. 1994); State v. Ramsey, 864 S.W.2d 320, 328 (Mo. 1993) (proportionality review is not constitutionally required and that "the statutory review merely provides a backstop against the freakish and wanton application of the death penalty").

451 "I find it easier to vote to mitigate the death sentence because the jury was unwilling to impose the death penalty, and left sentencing to the judge." *See, e.g.*, State v. Powell, 798 S.W.2d 709, 719 (Mo. 1990) (Blackmar, C.J., concurring in part and dissenting in part).

452 A constitutional challenge to this definition of the universe was recently rejected by the court:

> Appellant seems to contend that proportionality review is of constitutional dimension and that this Court must consider all cases in which a sentence of death was available, not simply cases in which the death penalty has been imposed, in conducting proportionality review. This claim is also without merit. Proportionality review need not include cases such as those in which the state chose not to charge a defendant with capital murder, in which the state agreed to a plea bargain whereby a defendant pled guilty to a lesser charge, where the conviction was for an offense less that capital murder, or where the state waived the death penalty.

State v. McMillan, 783 S.W.2d 82,102 (Mo. 1990) (citations omitted). *Accord* State v. Smith, 756 S.W.2d 493 (Mo. 1988). *But see* State v. LaRette, 648 S.W.2d 96, 110 (Mo. 1983) (Seiler, J., dissenting in part) (criticizing the restriction of the universe to penalty phase cases).

453 In a recent case the Chief Justice complained that the court lacks any

> articulated standards for the exercise of our responsibility for proportionality review . . . . The Court has never rested easy with its responsibility for proportionality review. The early cases regularly affirmed death sentences on the basis that there was nothing to compare. The later cases are prone to search the books for cases presenting one or more comparable circumstances, following which there is a routine affirmance. I do not believe that this is what was contemplated by the legislature when it mandated proportionality review as a means of selecting the cases in which the ultimate penalty is to be exacted. The Court has proceeded by hunch. My hunch is that the death sentence in this case is out of line with other cases in which death has been decreed . . .

*Powell*, 798 S.W.2d 709, 719 (Mo. 1990) (Blackmar, C.J., concurring in part and dissenting in part).

states the rationale for comparison.[454]

Since the reimposition of the death penalty in Missouri, the court has found only one death sentence disproportionate.[455] The finding of disproportionality in that case might not have been reached under the Missouri high court's present capital jurisprudence.[456]

In *State v. Parker*,[457] the court considered the Defendant's "Experts' Analysis of the Court's Proportionality Data," data consisting of three statistical studies of Missouri's death penalty cases. There is a 1994 empirical study of the Missouri capital punishment system.[458]

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454 *See, e.g., Chambers*, 891 S.W.2d at 114 (defendants with similar histories of convictions, where the "nature of the crime" was similar); State v. Gray, 887 S.W.2d 369 (Mo. 1994) (cases where murders committed to avoid arrest or detection; defendant was oldest in group and appeared to have taken on the role of a leader; multiple attempts at homicide although no evidence defendant was present at the homicide); State v. Parker, 886 S.W.2d 908 (Mo. 1994) (cases where the defendant murdered the victim because of the victim's status as a witness), *cert. denied*, 115 S. Ct. 757 (1995); State v. Wise, 879 S.W.2d 494 (Mo. 1994) (cases where defendant had a prior conviction for first degree murder, murdered the victim for pecuniary gain, murdered the victim in the course of a robbery, or possessed a combination of these three aggravating circumstances), *cert. denied*, 115 S. Ct. 757 (1995); State v. Harris, 870 S.W.2d 798 (Mo. 1994) (cases which involve defendants who have committed numerous other offenses, and cases in which the death penalty was imposed because the defendant committed the murder for the purpose of obtaining something of monetary value from the victim, and cases in which the court has failed to find as a mitigating factor the presence of a mental disease or defect), *cert. denied*, 115 S. Ct. 371 (1994); State v. Ramsey, 864 S.W.2d 320 (Mo. 1993) (cases where defendant killed for monetary gain or there was victim helplessness or there were multiple murders or there was a murder of witnesses, and cases where victims were murdered during the course of a robbery); State v. Mease, 842 S.W.2d 98 (Mo. 1992) (cases where there are multiple homicides, the killing of a person who is disabled, or an intricate, well thought out plan of how the killing is to be committed); State v. Hunter, 840 S.W.2d 850 (Mo. 1992) (cases where overwhelming evidence shows a planned killing during the course of a robbery, and cases where a defendant has previously been convicted of murder); State v. Ervin, 835 S.W.2d 905 (Mo. 1992) (cases where the defendant has carried out a planned killing for his own purposes).

455 *See* State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982).

456 In the opinion of at least one justice, "it is questionable whether a present majority of this Court would follow *State v. McIlvoy* in a proportionality review situation." State v. Bibb, 702 S.W.2d 462, 466-67 (Mo. 1985) (Billings, J., concurring). Two members of the court found the death sentence upheld in Bibb to be indistinguishable from the death sentence in McIlvoy which was overturned on grounds of disproportionality. *Id.* at 466 (Blackmar, J., concurring); *Id.* at 471 (Welliver, J., dissenting). In *Bibb* the death sentence was overturned for other reasons, and the prosecutor did not choose to retry the case as a capital case. Telephone interview with John M. Morris, Missouri Assistant Attorney General.

457 886 S.W.2d 908, 933 (Mo. 1994). In later cases, defendants have requested the court to consider the proportionality data submitted in *Parker* along with a supplemental affidavit. *See* State v. Chambers, 891 S.W.2d 93 (Mo. 1994). Recent cases include *State v. Brown*, 902 S.W.2d 278 (Mo. 1995) and *State v. Storey*, 901 S.W. 2d 886 (Mo. 1995). In none of these cases, however, did the court find the death sentences disproportionate based upon the data submitted.

458 *See* Donald H. Wallace & Jonathan R. Sorenson, *Missouri Proportionality Review: An Assessment of a State Supreme Court's Procedures in Capital Cases*, 8 NOTRE DAME J.L. ETHICS & PUB. POL'Y 281 (1994).

*Montana*

The Montana capital punishment system is unusual. The judge alone considers statutory aggravating and mitigating circumstances.[459] The Montana Supreme Court is under a statutory obligation to conduct proportionality review.[460] The court has held that similar cases would be drawn only from a universe of appealed penalty phase cases.[461] However, prior to *State v. Smith*, members of the court did not always agree that the universe should be limited in such a manner.[462] Typically the court lists the universe of death penalty cases, and then selects one or two that resemble the case on appeal for comparison purposes.[463] There are very few death sentences imposed in Montana. None have been found to be disproportionate.

*Nebraska*

The Nebraska cases present a dramatic illustration of a court attempting to sidestep controversial substantive issues by making procedural decisions. Nebraska is atypical in that the provision enacted by the legislature envisioned a more comprehensive form of proportionality review than what was eventually institutionalized by the state supreme court.[464] The internal debate within the court produced the most complete judicial discussion of proportionality review prior to

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459 MONT. CODE ANN. § 46-18-310 (1996). The same section requires the Montana Supreme Court to consider whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant, including in its decision a reference to the similar cases considered.

460 MONT. CODE ANN. § 46-18-307 (1996). The history of the application of capital punishment in Montana is summarized in *State v. Kills on Top*, 787 P.2d 336, 355-56 (Mont. 1990) (Sheehy, J., dissenting). Justice Sheehy notes: "The Montana experience since 1977 indicates that judges are far more likely than juries to impose the death sentence." *Id.*

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> [W]e need not examine every similar case whether appealed or not, rather we need only examine those cases where after conviction the death penalty could have been or was imposed that has reached our attention through the appellate process. We are obligated to define the scope of our review when considering similar cases. We will thus consider cases where the defendant has been charged with kidnapping and murder . . . .

State v. Smith, 705 P.2d 1087, 1108 (Mont. 1985). In *Smith*, the court reached back to compare the facts and circumstances of the case under review with a case decided in 1947. *Id.* at 1109.

462 *See* State v. Coleman, 605 P.2d 1000, 1044 (Mont. 1979) (Shea, J. dissenting) (arguing that review cannot be effective without a comparison of the cases where the death penalty could have been imposed).

463 *See, e.g.*, State v. Turner, 864 P.2d 235, 247 (Mont. 1993) ("[T]his Court reviews the gravity of the offense, the brutality with which it was committed, and the factors, if any, which led to a call for leniency, with the purpose of making certain that there has been no discriminatory action on the part of the sentencing judge").

464 NEB. REV. STAT. § 29-2521 (1996). *Cf.* New Jersey, where the opposite dynamic occurred, see *supra* Parts IV.B, IV.C.

*Marshall II*, with the Chief Justice in sharp disagreement with the other members of the court.[465]

Nebraska requires proportionality review by statute, but it may not be raised in post conviction proceedings.[466] The Nebraska Supreme Court has not overturned any death sentences for reasons of disproportionality.[467]

*Nevada*

Nevada's proportionality review provision was repealed in 1985, although the legislature let stand a similar and more general statutory section which requires the court to consider whether the sentence of death is excessive, "considering both the crime and the defendant."[468] Prior to the statutory repeal of proportionality review Nevada had a standard proportionality review provision with the language from *Gregg* which required the court to consider whether the sentence of death was disproportionate in comparison to the sentence imposed in similar cases.[469]

When Nevada had mandatory proportionality review the court compared the death sentence under review with "all capital cases, as well as appealed murder cases in which the death penalty was sought but not imposed . . . ."[470] In other words, the universe of cases was all penalty phase cases. When it was conducting proportionality review,

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465 State v. Palmer, 399 N.W.2d 706, 738 (Neb. 1986) (Krivosha, C.J., concurring and dissenting). *See supra* Part IV.B.

466 Nebraska's present proportionality review procedures are set out in *State v. Rust*, 528 N.W.2d 320, 326-27 (Neb. 1995). Proportionality cannot be raised a second time for post conviction relief. *See* State v. Ryan, 534 N.W.2d 766, 799 (Neb. 1995); State v. Victor, 494 N.W.2d 565, 569 (Neb. 1993). State v. Otey, 464 N.W.2d 352, 359 (Neb. 1991) (performing a second proportionality review).

467 There are no published empirical studies of the Nebraska capital punishment scheme in spite of the lively debate on these issues before the court.

468 NEV. REV. STAT. § 177.055(2)(D) (Michie 1995). *See also* Paine v. State, 877 P.2d 1025, 1032 (Nev. 1994) (interpreting statutory language). In 1989, the court conducted proportionality review for ex post facto reasons in *Lopez v. State*, 769 P.2d 1276 (Nev. 1989). The court did not express an opinion as to whether the amendment abolishing the proportionality review requirement "accomplished its intended purpose". *Id.* at 1289 n.14. In *Lane v. State*, 881 P.2d 1358 (Nev. 1994), the defendant claimed, under principles of equal protection, that the prosecutor's office, as a general practice, unconstitutionally discriminated in seeking the death penalty more frequently when the defendant was black. The defendant provided data indicating that the county district attorney sought the death penalty in "eighty percent of the cases involving a black defendant with no prior felony conviction whereas it has not sought the death penalty in eighty percent of the cases involving a white defendant with a prior felony conviction." *Id.* at 1362. Relief was denied. *Id.* at 1367.

469 The 1985 amendment repealing proportionality review became effective in June of 1985. NEV. REV. STAT. § 177.055 (1985).

470 Harvey v. State, 682 P.2d 1384 (Nev. 1984); Rogers v. State, 705 P.2d 664 (Nev. 1985), *cert. denied*, 106 S. Ct. 1999 (1986).

the Nevada Supreme court upheld 17 death sentences as not being disproportionate and overturned five death sentences—a relativley large number of reversals—as disproportionate.[471]

*New Hampshire*

The New Hampshire legislature reenacted in 1990, modifying the former statute which had been declared unconstitutional. This statute can not be applied retroactively.[472] The New Hampshire capital statute provides for proportionality review, adopting the language of *Gregg*.[473] The New Hampshire Supreme Court has not yet reviewed any death sentences or conducted proportionality review.

*New Jersey*

Proportionality review in New Jersey is discussed in detail in *Marshall II*[474] and in the text of the main article.[475]

*New Mexico*

The New Mexico Supreme court set out its guidelines and standards for proportionality review in *State v. Garcia*.[476] Under the au-

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471 In *Harvey*, 682 P.2d at 1384, the court reviewed the aggravating and mitigating circumstances of this case, including the defendant's lack of a significant criminal history and that the defendant suffered from an extreme mental or emotional disturbance at the time of the killing, and concluded the death sentence was disproportionate to the penalty imposed in this state in similar cases. In *Biondi v. State*, 699 P.2d 1062, 1067 (Nev. 1985), the court found the death sentence disproportionate because (1) a codefendant was sentenced to life imprisonment with the possibility of parole for the same crime, (2) the crime took place in a barroom among intoxicated strangers, and (3) there was no evidence that the murder was premeditated. In *Jones v. State*, 707 P.2d 1128, 1134 (Nev. 1985), the court found that in Nevada the death sentence was reserved for cases that exhibit a high degree of premeditation coupled with aggravating circumstances such as brutality, torture or depravity. The court thus held it inappropriate to impose a death sentence where the victim died almost immediately from a single shot to the head and the defendant had not entered the situs of the murder (a bar) intending to kill. The court also found that the jury may have imposed the death sentence arbitrarily under the influence of the passion incited by the prosecutor's statements. *Id.* at 1134. Finally, in *Moran v. State*, 734 P.2d 712, 714 ( Nev. 1987), the court reversed a defendant's death sentence because there were no aggravating circumstances in his murder of his wife. The Nevada court also set aside a death sentence as disproportionate in *Haynes v. State*, 739 P.2d 497, 509 (1987).

472 State v. Johnson, 595 A.2d 498, 500 (N.H. 1991). As of 1996 the constitutionality of the statute has not yet been addressed by the court, nor has a death sentence been imposed and upheld on appeal.

473 "The supreme court shall determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." N.H. REV. STAT. ANN. § 630:5(XI) (1995).

474 613 A.2d 1059 (N.J. 1992).

475 *See supra* Part IV.C.

476 664 P.2d 969 (N.M. 1983).

> We assume that the Legislature means that in similar cases, considering both the crime and defendant, a defendant convicted of first degree murder under a specific aggravating circumstance should not be put to death if another defendant or other

thority of its statutory mandate to conduct proportionality review,[477] the Court established proportionality review procedures in which the court will consider as similar penalty phase cases which have the same aggravating circumstances and that sentenced the defendant to either life imprisonment or death.[478] This is a more limited pool than the universe of all penalty phase cases or all convictions for circumstantially similar death eligible murders. The court selects among penalty phase cases and places the burden upon the defense to provide information on similar cases. The New Mexico Supreme Court has not overturned any death sentences for reasons of disproportionality.[479]

*New York*

The recently reenacted New York capital statute includes detailed and innovative statutory requirements for proportionality review which are discussed in the main text of the article.[480]

*North Carolina*

The Supreme Court of North Carolina conducts proportionality review pursuant to statute.[481] The universe of cases is all capital cases since reenactment in 1977 which have been affirmed on appeal.[482] The court considers a range of issues during its proportionality re-

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defendants, convicted of murder under the same aggravating circumstance is given life imprisonment, unless there is some justification.

*Id.* at 978.

477 N.M. STAT. ANN. § 31-20A-4(C) (Michie 1978).

478 "In reviewing a sentence under these guidelines we will compare other New Mexico cases in which a capital defendant has been convicted of capital murder under the same aggravating circumstances, and then received *either* the sentence of death or life imprisonment." State v. Clark, 772 P.2d 322, 345 (N.M. 1989). In *Clark,* the court refused to address a challenge to these restrictions on the court's proportionality review, in the absence of the defendant producing evidence that his sentence would be disproportionate to a broader pool of cases. *Id.* There have not been any recent changes to this standard.

479 Proportionality review has received very little attention from the New Mexico Supreme Court. *See* Clark v. Tansy, 882 P.2d 527, 535 (N.M. 1994); State v. Wyrostek, 873 P.2d 260 (N.M. 1994).

480 *See* N.Y. CORRECT. LAW CH. 43 ART. 22-B (McKinney 1995). The proportionality review provisions of this statute are discussed in Part V, *supra.*

481 N.C. GEN. STAT. § 15 A-2000(D)(2) (1988). The court conducts proportionality review even if neither the defense nor prosecution raise the issue. State v. Rose, 451 S.E.2d 211, 230 (N.C. 1994).

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> In comparing 'similar cases' for purposes of proportionality review, we use as a pool for comparison purposes all cases arising since the effective date of our capital punishment statute, 1 June 1977, which have been tried as capital cases and reviewed on direct appeal by the Court and in which the jury recommended death or life imprisonment or in which the trial court imposed life imprisonment after the jury's failure to agree upon a sentencing recommendation within a reasonable period of time.

State v. Williams, 301 S.E.2d 335, 355 (N.C. 1983).

view.[483] The North Carolina high court has categorically rejected a statistical approach to proportionality review.[484] The court relies upon its own case reports, records and the briefs.[485] North Carolina has vacated seven death sentences as disproportionate,[486] again a relatively large number. The state's capital punishment system has been studied in considerable detail by several independent researchers.[487]

*Ohio*

Ohio conducts proportionality review pursuant to a statutory mandate.[488] The universe of cases in Ohio is limited to cases in which the death penalty has been imposed. The Ohio Supreme Court rejected an argument to include "cases where the death penalty could have been sought but was not . . . ."[489] In the same case the Court rejected statistical arguments regarding racial bias in the administration of the death penalty, finding that the defendant must show that racial considerations affected the sentencing process in his individual case, although the court acknowledged that it had accepted analogous statistical proof of discrimination in the area of employment discrimi-

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483 Proportionality review:

> includes not only a reappraisal of the relative weight of aggravating and mitigating circumstances of the case, but also a scrutiny of the entire records for all the circumstances of the case, including the manner of the mission of the crime and the defendant's character, background, and mental and physical condition.

State v. Price, 388 S.E.2d 84, 106 (N.C. 1990) (citations omitted). *See also* State v. Williams, 452 S.E.2d 245, 276 (N.C. 1994).

484 State v. Quesinberry, 381 S.E.2d 681, 693 (N.C. 1989); *Williams*, 301 S.E.2d at 355.

485 The court does not include an appendix listing the cases considered. "We do not feel compelled to cite every case consulted." *Price*, 388 S.E.2d at 106. *Price* discusses the proportionality review process in some detail. *Id.* at 106-09. *See also* State v. Davis, 455 S.E.2d 627, 641-43 (N.C. 1995); State v. Miller, 455 S.E.2d 137, 153-55 (N.C. 1995); State v. Bacon, 446 S.E.2d 542, 562-70 (N.C. 1994).

486 *See* State v. Benson, 372 S.E.2d 517, 523 (N.C. 1988); State v. Stokes, 352 S.E.2d 653, 668 (N.C. 1987); State v. Rogers, 341 S.E.2d 713, 733 (N.C. 1986), *overruled on other grounds by* State v. Vandiver, 364 S.E.2d 373, 375 (N.C. 1988); State v. Young, 325 S.E.2d 181, 195 (N.C. 1985); State v. Hill, 319 S.E.2d 163, 172 (N.C. 1984); State v. Bondurant, 309 S.E.2d 170, 183 (N.C. 1983); State v. Jackson, 305 S.E.2d 703, 718 (N.C. 1983).

487 The most comprehensive study on the death penalty in North Carolina is BARRY NAKELL & KENNETH A. HARDY, THE ARBITRARINESS OF THE DEATH PENALTY (1987). The study analyzed 489 homicide cases arising during the first year after the state reenacted its capital punishment statute. This work is discussed in Leigh B. Bienen et al., *The Reimposition of Capital Punishment: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 142-47 (1988).

488 OHIO REV. CODE ANN. § 2929.05(A) (Anderson 1981) (repealed 1993).

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> [W]e are persuaded that the proportionality review contemplated by [the statute] should be limited to cases already decided by the reviewing court in which the death penalty has been imposed . . . . No reviewing court need consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not.

State v. Steffen, 509 N.E.2d 383, 395 (Ohio 1987) (citations omitted).

nation and jury selection.[490] The Ohio Supreme court has not overturned any death sentences on grounds of disproportionality.[491]

Prior to 1994, *both* the intermediate appellate court and the state supreme court were required to consider whether the sentence imposed was excessive or disproportionate to the penalty imposed in similar cases.[492] Unlike the Supreme Court, when the intermediate appellate court conducted proportionality review, the case on appeal was compared with other cases where the death sentence had been imposed *from the same trial court jurisdiction.*[493] The intermediate appellate court would not consider the sentence imposed upon a codefendant for the purpose of proportionality review.[494]

*Oklahoma*

Oklahoma repealed its statutory proportionality review provision in 1985.[495] Before that section was repealed, the Oklahoma Supreme Court overturned one death sentence for reasons of disproportionality.[496] Oklahoma's highest criminal court of appeal has affirmed that

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490 *Id.* This is a clear example of the influence of *McCleskey.* The claim that these limits on proportionality review are unconstitutional has been summarily rejected by the court. State v. Loza, 641 N.E.2d 1082, 1106-07 (Ohio 1994).

491 There has not been a systematic, empirical study of the operation of the Ohio capital punishment system since reenactment. Data on 2,193 Ohio homicides, which occurred during the first five years after *Furman,* were analyzed in William J. Bowers and Glenn L. Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes,* 26 CRIME & DELINQ. 563 (1980). This study is discussed in detail in Bienen et al, *supra* note 487, at 122-25.

492 OHIO REV. CODE. ANN § 2929.05(A). In November of 1994 the Ohio voters approved an amendment to the Ohio Constitution which removed the jurisdiction of the Ohio Court of Appeals to hear direct appeals in death penalty cases. OHIO CONST. art. IV, § 2.

493 *See, e.g.,* State v. Grant, No. 83-CA-144, 1990 WL 176825, at *38 (Ohio Ct. App. Nov. 9, 1990); State v. Lampkin, No. C-890273, 1990 WL 143466, at *5 (Ohio Ct. App. Oct. 3, 1990); State v. Combs, No. C-880156, 1990 WL 135000, at *7 (Ohio Ct. App. Sept. 19, 1990). As the *Lampkin* court wrote:

> [r]eview is restricted to those capital prosecutions in Hamilton County where the death penalty has, in fact, been imposed. The defendant points to other domestic- or spousal- murder cases, where, regardless of motive, either the State did not seek to indict for a capital offense or the defendant entered a negotiated plea to a lesser, noncapital offense. However, a reviewing court cannot consider in its proportionality review any case where the charge did not include a death eligible specification under R.C. 2929.04 (A), or where the death penalty was sought but not obtained.

*Lampkin,* 1990 WL 143466 at *5 (citations omitted).

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> Likewise, defendant's claim of disproportionality, on the ground that her accomplice, the gunman, received only a life sentence with parole eligibility after thirty years, is outside consideration in this phase of our review.

*Id.* at *5. This position was criticized in *State v. Green,* 609 N.E.2d 1253, 1264 (Ohio 1993) (Pfeifer, J., dissenting) and *State v. Burke,* No. 90AP-1344, 1993 WL 541653, at *5 (Ohio Ct. App. Dec. 28, 1993) (Deshler, J., dissenting).

495 OKLA. STAT. ANN. tit. 21, § 701.13(c)(3) (West 1983) (repealed 1985). *See also* Hawkins v. State, 891 P.2d 586, 598 (Okla. 1995).

496 Munn v. State, 658 P.2d 482, 487-88 (Okla. Crim. App. 1983). The court also con-

extensive proportionality review is not constitutionally required.[497]

*Oregon*

Oregon does not require proportionality review, either under its statute[498] or by court rule.[499] However, Oregon's capital punishment statute has several distinctive features including requiring the jury to answer questions rather than weigh statutory aggravating and mitigating factors.[500]

*Pennsylvania*

Proportionality review is mandated by statute. The Pennsylvania Supreme Court ordered a comprehensive data collection project to be established by the Administrative Office of the Court.[501] There have been numerous problems with the accuracy of these data, however, and this has hampered analysis.

The court does not include an appendix of cases considered or state what factors were considered in the review.[502] As of 1996, the

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ducted a proportionality review under principles of ex post facto in Fisher v. State, 736 P.2d 1003, 1015 (Okla. Crim. App. 1994). *See also* Snow v. State, 876 P.2d 291, 300 (Okla. Crim. App. 1994).

497 *See* Battenfield v. Oklahoma, 816 P.2d 555, 565 (Okla. Crim. App. 1991); Maxwell v. State, 775 P.2d 818, 820 (Okla. Crim. App. 1989). Both these cases state that extensive proportionality review is not required by the state or federal constitution. Recently, however, the Oklahoma court nonetheless conducted its own proportionality review before affirming an appealed death sentence. "Two [dissenting] members of this Court hold that proportionality review is no longer necessary. I have compared the sentence imposed herein to previous cases, . . . and find the sentence to be proper." Moore v. State, 788 P.2d 387, 403 (Okla. Crim. App. 1990) (citations omitted).

498 OR. REV. STAT. § 163.150 (1995).

499 State v. Cunningham, 880 P.2d 431, 441-42 (Or. 1994) (en banc).

500 The statutory sentencing scheme requires the jury to answer yes to three questions before deciding whether to sentence the defendant to death: (A) whether the defendant caused the death "deliberately and with the reasonable expectation that death of the deceased or another would result;" (B) whether there is "a probability" the defendant would constitute a "continuing threat to society;" (C) whether the conduct of the defendant "in killing the deceased was unreasonable in response to the provocation;" and (D) whether the defendant should be sentenced to death. OR. REV. STAT. § 163.150(1)(b)(A)-(D) (1995). The jury can consider any mitigating circumstances offered. If the jury unanimously answers "yes" to all questions, the trial judge shall sentence the defendant to death. The jury answers no if one or more jurors find there is any mitigating circumstance that would justify a sentence of less than death. *Id.*

501 These data are described in John F. Kairns & Lee S. Weinberg, *The Death Sentence in Pennsylvania: 1978-1990: A Preliminary Analysis of the Effects of Statutory and Nonstatutory Factors*, 95 DICK L. REV. 691 (1991). Data are collected on all first degree murder cases by the trial court judge on a standardized form. The form has been changed since its publication in *Commonwealth v. Frey*, 475 A.2d 700, 711 (Pa. 1984). Data include race, sex, and age of defendant and victim, the dates of sentence and of the offense, and whether or not the death penalty was sought. *Id.* The court does not release or publish these reports. *Id.*

502 *See, e.g.*, Commonwealth v. Hughes, 639 A.2d 763 (Pa. 1994) (rejecting defendant's proportionality arguments); Commonwealth v. Williams, 615 A.2d 716 (Pa. 1992) (holding

court has not articulated standards or principles for proportionality review, nor has the court systematically analyzed the data it collects.[503] The Pennsylvania Supreme Court has not yet overturned any death sentence as disproportionate.

*South Carolina*

Proportionality review is required by statute in South Carolina.[504] The issue of the universe of cases was addressed in an early opinion.[505] The court rejected the idea of comparing the death sentence under review with cases which did not result in a death sentence.

Since its inception the proportionality review conducted by the South Carolina Supreme Court has been perfunctory.[506] In the first capital appeal where proportionality was raised, the court simply stated that it had conducted proportionality review and then upheld the first death sentence imposed since reenactment.[507] The South Carolina Supreme Court has been criticized for its unsystematic and

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death sentence to be proportional when the defendant intended to kill a different person than the one whom he killed); Commonwealth v. Banks, 656 A.2d 467, 474 (Pa. 1995) (denying a defendant the opportunity to challenge data used for proportionality review is not a denial of due process).

503 Rhonda G. Hartman, *Critiquing Pennsylvania's Comparative Proportionality Review in Capital Cases*, 52 U. PITT. L. REV. 871 (1991).

504 S.C. CODE ANN. § 16-3-25 (Law Co-op. 1985).

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> We recognize that in some jurisdictions and commentaries it is felt that the reviewing court should compare a given death sentence with a "universe" of cases which includes sentences of life imprisonment, acquittal, reversals and even mere indictments and arrests. Under such a regime, the reviewing court could only determine the size of its sample or "universe" by some arbitrary device.

State v. Copeland, 300 S.E.2d 63, 74 (S.C. 1983).

506 *See, e.g.*, State v. Holmes, 464 S.E.2d 334, 339 (S.C. 1995), *cert. denied*, 116 S. Ct. 2507 (1996). In another case, the court purported to summarize the proportionality review exercise as follows: "We have conducted the review mandated by S.C. CODE ANN. § 16-3-25 (1985) and conclude that the sentence is not arbitrary, excessive, or disproportionate and that the evidence supports the jury's finding of the statutory aggravating circumstance." State v. Green, 392 S.E.2d 157, 164 (S.C. 1990). Typically the report consists of a single sentence declaring that the death penalty is proportionate followed by citations. *See, e.g.*, State v. Hall, 439 S.E.2d 278, 281 (S.C. 1994); State v. Simmons, 427 S.E.2d 175, 179 (S.C. 1993), *rev'd*, 512 U.S. 154 (1993); State v. Davis, 422 S.E.2d 133, 148 (S.C. 1992). Proportionality in terms of mitigating circumstances was discussed in *State v. Wilson*, 413 S.E.2d 19, 28 (S.C. 1992).

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> It is of no consequence that the South Carolina universe has consisted of only five cases to this date. *State v. Shaw*, presented the first occasion for proportionality review under our current statute. We noted then that no similar cases existed, but the sentence imposed was none the less [sic] appropriate and neither "excessive" nor "disproportionate" considering the crime and the defendants.

*Copeland*, 300 S.E.2d at 75 (citation omitted) (discussing State v. Shaw, 255 S.E.2d 799, 807 (S.C. 1979)). The category of comparison cases was apparently robbery-murder cases which had resulted in the imposition of the death sentence.

cursory approach to a legislatively mandated task.[508] In a 1985 case, the court reported that it conducted proportionality review and considered all death sentences imposed, a total of 12 at the time of the decision, and none were similar.[509] Proportionality review has resulted in no death sentences being overturned on grounds of proportionality in South Carolina.

*South Dakota*

The South Dakota capital statute provides for proportionality review, as part of its capital statute which was enacted in 1979.[510] No cases interpret or describe how the court conducts proportionality review or what the court uses for a universe of cases.[511]

*Tennessee*

Tennessee has done something no other state has done: instituted relatively extensive proportionality review; repealed the statutory requirement for proportionality review; and then reenacted it. Prior to the repeal of its proportionality review provision on November 1, 1989, Tennessee had for eleven years a relatively comprehensive program for data collection and system wide review.[512] The Supreme Court of Tennessee under the authority of its rule making power commissioned a broad based data collection effort in response to a statutory requirement to conduct proportionality review.[513] In its

508 There has been extensive empirical work on the South Carolina capital punishment system. In a comprehensive study Paternoster and his co-authors examined all of the death sentences appealed to the South Carolina Supreme Court, with the cooperation of the court, and showed how various types of proportionality review could have been conducted more rigorously given the detailed information on cases available to the court. *See* Joseph E. Jacoby & Raymond Paternoster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982); Raymond Paternoster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754 (1983); Raymond Paternoster & Anne Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 S.C. L. REV. 245 (1988); Raymond Paternoster, *Prosecutorial Discretion in Requesting the Death Penalty: A Case of Victim-Based Racial Discrimination*, 18 L. & SOC'Y REV. 437 (1984). This work is discussed in Bienen et al., *supra* note 487, at 133-37.

509 State v. Koon, 328 S.E.2d 625, 627 (S.C. 1985) ("None of these cases presents facts comparable to this case; [nonetheless, w]e find the death penalty neither excessive nor inappropriate in light of the circumstances of the crime and the character of [the defendant].").

510 "[T]he Supreme Court shall determine: . . . whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." S.D. CODIFIED LAWS § 23A-27A-12(3) (Michie 1996).

511 South Dakota has two people sentenced to death and has executed none. *See supra* tbl.1.

512 *See* TENN. CODE. ANN. § 39-2-205 (Michie 1977) (repealed 1989).

513 The court described its Proportionality Review Project as follows:

> On Feb. 24, 1978, this Court, pursuant to Chapter 51, Public Acts of 1977, promulgated Supreme Court Rule 47 (now Rule 12) requiring trial judges to complete and

proportonaltiy review, the Tennessee Supreme Court considered all first degree murder convictions, which includes premeditated murders and felony murder, whether or not the death sentence had been imposed.[514]

Tennessee reinstated proportionality review in 1992, effective May 1, 1992.[515] Presumably principles of equal protection would require that defendants whose crimes were committed during the period between repeal and reenactment must also now be eligible to raise the issue of proportionality review.[516] And, presumably, principles of equal prosecution would require that the proportionality review now conducted by the court be as extensive as the former procedures.

The Tennessee Supreme Court in 1993 addressed a number of

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submit to this Court a "report of trial judge" in all first degree murder cases in which life imprisonment or a sentence of death is imposed. The nine page report was adopted to enable this Court properly to review whether the sentence of death was imposed in an arbitrary fashion and whether it was excessive or disproportionate to the penalty imposed in similar cases. *The report prepared by the trial judge consists of data concerning the defendant, the trial, the victim, the aggravating and mitigating circumstances, the representation of the defendant, and other general considerations which we have found helpful in our review of first degree murder cases. The report is submitted to defense counsel and the attorney for the State, who may attach comments to the report. The trial judge is asked to comment upon the appropriateness of the sentence*.... We have reviewed Rule 12 reports from trial judges sitting throughout this State submitted over the past ten years *in all criminal trials for first degree murder in which life imprisonment or a sentence of death have been imposed*.... A comparative review, with the aid of the Rule 12 report of the trial judge, has been conducted in all first degree murder cases in which life imprisonment or a sentence of death has been imposed.

State v. Barber, 753 S.W.2d 659, 663-66 (Tenn. 1988) (footnotes omitted) (emphasis added).

514 In other words, the universe was all cases which resulted in a conviction of first degree murder, irrespective of whether death was sought or the facts or circumstances were death eligible.

515 TENN. CODE ANN. §§ 39-13-206, 39-2406. The reinstated proportionality review statute provides that the court shall consider whether

death is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant... The Tennessee Supreme Court may promulgate rules as it deems appropriate to establish such procedures as are necessary to enable the reviewing courts to properly review the death sentence .... The Court of Criminal Appeals and the Tennessee Supreme Court... are authorized to affirm the sentence of death or modify the punishment to life imprisonment.

*Id.* § 39-13-206.

516 *But see*, State v. Harris, 839 S.W.2d 54, 78 n.2 (Tenn. 1992) (stating that the proportionality review of a death sentence is not constitutionally required in every case where the defendant requests it. It is not clear whether the standards and procedures for data collection instituted after reenactment are identical to those in place prior to the repeal). *See also* State v. Nichols, 877 S.W.2d 722 (Tenn. 1994); State v. Howell, 868 S.W.2d 238, 265 (Tenn. 1993) (Reid, C.J., concurring) (criticizing proportionality review procedures) ("First, the sentence of death is compared with the offense committed; then, the defendant is compared with other death-eligible offenders; and, last, the defendant and the criminal acts on which the sentence is based are compared with other similar [ones]").

constitutional issues in capital cases.[517] The court rejected a defendant's racial discrimination arguments, citing the *McCleskey* standard.[518] In 1992 and 1993, however, the Tennessee Supreme Court overturned two death sentences on grounds of disproportionality.[519]

*Texas*

The Texas capital statute has several unusual features, including having the jury answer questions instead of weighing aggravating factors. Early in the United States Supreme Court's jurisprudence the statute was upheld.[520] Because of the unusual structure of the statute and also because Texas has executed more people than any other state by a large margin, the Texas statute and the state's capital punishment system have both been the subject of extensive litigation, research and comment.[521] Constitutional challenges to the Texas

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517 In a 1992 case the court raised the question of the constitutionality of the death penalty as a punishment for felony murder, although the parties did not directly raise that issue. The majority concluded that the felony murder statute did not sufficiently narrow the population of death eligibles under the Eighth Amendment to the federal and state constitutional principles. *See* State v. Bane, 853 S.W.2d 483, 489 (Tenn. 1993); State v. Caughron, 855 S.W.2d 526 (Tenn. 1993). *See also*, State v. Middlebrooks, 840 S.W.2d 317, 335-41 (Tenn. 1992). The constitutionality of the death penalty under the federal and state constitution had previously been discussed at length in *State v. Black*, 815 S.W.2d 166, 187-91 (Tenn. 1991).

518 State v. Evans, 838 S.W.2d 185, 196 (Tenn. 1992) ("In order to establish that the discriminatory application of the death penalty violates the Equal Protection Clause, a defendant must show that the legislature enacting the statute, or the jury sentencing the defendant, acted with a discriminatory intent") (citing McCleskey v. Kemp, 481 U.S. 279 (1987)).

519 State v. Hale, 840 S.W.2d 307, 315 (Tenn. 1992) and State v. Branam, 855 S.W.2d 563, 573 (Tenn. 1993). The *Branam* court stated,

> In order to prevent the execution of all but the most deserving of murderers and to avoid arbitrary and capricious sentencing, the Court reviews all felony-murder cases to assure that a sentence of death has not been arbitrarily imposed, that the evidence supports the jury's findings, and that the sentence of death is not disproportionate. For purposes of the death penalty, a distinction must be drawn in felony-murders between cold-blooded, execution style murders and accidental, unforeseen killings or accomplice killings . . . .

*Branam*, 855 S.W.2d at 573 (Drowata, J., concurring). The court also stated, "Because, therefore, the death penalty would be disproportionate to the offense committed by Branam, its imposition under these facts would, in our judgment, constitute a violation of the Eighth Amendment's guarantee against cruel and unusual punishment." *Id.* at 571.

Neither Baldus nor Sprenger identified any prior cases in which the Tennessee Supreme Court overturned a death sentence on grounds of disproportionality. *See* BALDUS ET AL., *supra* note 376, at 281; Steven M. Sprenger, Note, *A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases*, 73 IOWA. L. REV. 719, 738 n.161 (1988).

520 Jurek v. Texas, 428 U.S. 262, 276 (1976); *see also* Barefoot v. Estelle, 463 U.S. 880, 906 (1983).

521 Texas has executed 106 people, almost three times as many as the number of people executed by the next state, Florida, which has executed 36. *See supra* tbl.1. After California (444), Texas has the second largest death row population, with 401 people on death row.

statute and to the Texas capital case processing system have been the occasion for a number of far reaching interpretations of federal constitutional law.[522] The Texas statute and capital sentencing system generates extensive critical commentary.[523] There is no statutory requirement for proportionality review in Texas capital jurisprudence. Few death sentences are overturned by the Texas Court of Criminal Appeals for any reason.[524]

*Utah*

The Utah legislature has not mandated proportionality review. The Utah Supreme Court, however, took upon itself the task of conducting proportionality review.[525] Initially the court did not specify whether proportionality review would be on the initiative of the court or in response to a defense request, or how the court would conduct proportionality review. The Utah Supreme Court describes its procedures as an individual "crime-to-sentence" proportionality review, in-

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*Id. See* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 763 (1995). *See Texas County in Forefront in Executions*, N.Y. TIMES, Aug. 7, 1994, at 31. As of February, 1995, 37 persons sentenced to death in Harris county alone had been executed, more than the total number executed in Florida.

522 *See, e.g.*, Penry v. Lynaugh, 492 U.S. 302, 318-19 (1989) (holding that death penalty had been unconstitutionally applied because the trial court gave the jury no instructions on mental mitigating evidence). The Texas Court of Criminal Appeals applied restrictive evidentiary standards regarding *Penry* evidence in response. *See, e.g.*, *Ex Parte* Lucas, 877 S.W.2d 315, 317 (Tex. Crim. App. 1994); Trevino v. State, 815 S.W.2d 592, 621 (Tex. Crim. App. 1991). *See also* Deborah W. Denno, *Testing* Penry *and Its Progeny*, 22 AM. J. CRIM. L. 1 (1994). Recently, the United States Supreme Court further narrowed the *Penry* holding. *See* Johnson v. Texas, 509 U.S. 350, 365 (1993); Graham v. Collins, 506 U.S. 461, 473-77 (1993).

523 *See, e.g.*, Daniel H. Benson, *Texas Capital Sentencing Procedures After Eddings: Some Questions Regarding Constitutional Validity*, 23 S. TEX. L. REV. 315 (1982); Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845 (1990); Mary K. Sicola & Richard R. Shreves, *Jury Considerations of Mitigating Evidence: A Renewed Challenge to the Constitutionality of the Texas Death Penalty Statute*, 15 AM. J. CRIM. L. 55 (1988); Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision Making in Post-Furman Texas Capital Cases*, 18 N.Y.U. REV. L. & SOC. CHANGE 743, 746-51 (1990-91).

524 For a caustic description of the relationship between the level of executions and judicial elections, see Bright & Keenan, *supra* note 521, at 961-63.

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> [T]his Court has indicated that it will review sentences for proportionality .... [O]ver time, as this Court becomes aware of a general pattern in the imposition of the death penalty in this state, the Court may set aside death sentences that fall outside of the general pattern and thus reflect an anomaly in the imposition of the death penalty .... With few exceptions, juries in this state have not opted for death penalties when a defendant has committed only a single murder; for the most part death penalties have been imposed when the defendant was involved in multiple murders, either at the time of the particular homicide charged or at some other time.

State v. Holland, 777 P.2d 1019, 1025-26 (Utah 1989) (citations omitted).

stead of a 'case by case' or 'comparison' proportionality review.[526] As of 1996, no death sentences have been set aside as disproportionate in Utah.

*Virginia*

The Supreme Court of Virginia conducts proportionality review pursuant to statute.[527] Typically the court will affirm a death sentence and simply cite to other death sentences affirmed.[528] The Virginia Supreme Court even consolidates capital appeals and conducts proportionality review for several defendants at the same time.[529] The Virginia Supreme Court has not overturned any death sentence on grounds of proportionality.[530] The court does little more than list the cases it has considered.[531] The court does, however, explicitly consider the nondeath sentence imposed upon the codefendant in the same case.[532] The parameters for comparison cases are not explicitly

526 *See* State v. Carter, 888 P.2d 629, 656-57 (Utah 1995); State v. Archuleta, 850 P.2d 1232, 1249 (Utah 1993). Although it is not clear what 'crime-to-sentence' review means, it does not require specifying the aggravating circumstances found. The court views the evidence in the light most favorable to the jury verdict in determining proportionality. State v. Andrews, 843 P.2d 1027, 1030 (Utah 1992). *See also* State v. Young, 853 P.2d 327, 403-11 (Utah 1994) (discussing why Utah's capital system does not adequately limit the class of death eligibles, and including an Appendix comparing Utah and other states).

527 VA. CODE ANN. § 17-110.1(E) (Michie 1996).

528 *See, e.g.*, Poyner v. Commonwealth, 329 S.E.2d 815, 838 (Va. 1985).

529 The court affirmed five death sentences in three cases in a consolidated, single proceeding, which included a consolidated proportionality review of all five death sentences consisting of a list of citations and no analysis. *Id.*

530 *See* Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 54-92 (1984) (discussing empirical data from Virginia and other states).

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> In a proportionality review, we inquire whether "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes." . . . Considering both "the crime and the defendant," . . . we can say with confidence that juries in this jurisdiction generally approve the supreme penalty for offenses comparable to the murder committed by Turner. Indeed, recently, we cited *Turner I* in demonstrating that a death sentence imposed upon a different defendant was not "excessive or disproportionate to sentences generally imposed by juries in Virginia for similar crimes."

Turner v. Commonwealth, 364 S.E.2d 483, 491 (Va. 1988) (citations omitted). The reference to "jurisdiction" is ambiguous. Is the reference to the local prosecutorial jurisdiction or to the state as a whole? The court's suggestion that the death sentence now under review is not disproportionate because this court itself previously cited it as support for upholding the death sentence in another case is bootstrapping.

532 As to the fact that an "equally culpable" codefendant received a life sentence in exchange for testifying for the State, the court said: "Their cooperation puts them in a different category from [the other defendants] . . . and diminishes the similarity of the cases . . . . Moreover, we do not believe that a codefendant is necessarily entitled to commutation of a death sentence because an equally culpable confederate, on substantially the same evidence, has been sentenced to life imprisonment." Coppola v. Commonwealth, 257 S.E.2d 797, 807 (Va. 1979). Although the court considers the sentences imposed on codefendants in the same case, the court has not addressed the issue of whether the plea bargaining

defined.[533] The court has not addressed the issues raised by racial disparities in the application of capital punishment in the jurisdiction.

*Washington*

In Washington proportionality review is required by statute.[534] The Washington statute defining proportionality review specifically provides that the pool of similar cases shall be all cases of aggravated first degree murder since January 1, 1965.[535] It is noteworthy that this provision explicitly requires the court to compare post-*Furman* cases with cases in which the death sentence was reversed under *Furman*.[536] The standard for proportionality is defined in *State v. Harris*.[537] The

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policies of the State could result in a practice which encouraged more culpable defendants into pleading guilty to avoid the death penalty, or whether the threat of the death penalty spurred a race to the bargaining table.

533 *See, e.g.*, Cardwell v. Commonwealth, 450 S.E.2d 146, 156 (Va. 1994) (consulting a compilation of all capital murder cases reviewed by the court); Murphy v. Commonwealth, 431 S.E.2d 48, 54 (Va. 1993) (referring to a record of capital murder cases, which implies that the court systematically maintains a database for its own review); Chabrol v. Commonwealth, 427 S.E.2d 374, 378-79 (Va. 1993).

The court has conducted cursory comparisons with similarly situated defendants not sentenced to death, although the discussion of proportionality in general is relatively extensive. *See, e.g.*, Joseph v. Commonwealth, 452 S.E.2d 862, 871 (Va. 1995); Weeks v. Commonwealth, 450 S.E.2d 379, 391 (Va. 1994); Chichester v. Commonwealth, 448 S.E.2d 638, 651-52 (Va. 1994). Sometimes the court makes comparisons with nondeath sentences imposed upon codefendants or defendants. *See, e.g.*, Thomas v. Commonwealth, 419 S.E.2d 606, 620-21 (Va. 1992); King v. Commonwealth, 416 S.E.2d 669, 679 (Va. 1992). In other cases a comparison to nondeath sentences is not mentioned. *See, e.g.*, Wilson v. Commonwealth, 452 S.E.2d 669, 676 (Va. 1995).

534 WASH. REV. CODE ANN. § 10.95.130 (West 1996).

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> For the purposes of this subsection, 'similar cases' means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120; . . .

Wash. Rev. Code Ann. § 10.95.1301(2)(b) (West 1996).

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> [The court's] review is not intended to ensure that there can be no variation on a case-by-case basis, nor to guarantee that the death penalty is always imposed in superficially similar circumstances . . . . Our approach, perhaps, can instead best be explained as a search for "family resemblances" . . . . Although the cases where death was imposed do not necessarily have one characteristic or set of attributes in common, we nonetheless recognize that they are somehow related. This relation cannot easily be described; it consists of a complicated network of overlapping similarities—much like members of the same family, who can be recognized as relatives, even though they do not all share any one set of features. Thus, we examine prior cases for those which belong together because they resemble each other.

State v. Lord, 822 P.2d 177, 223 (Wash. 1991).

The court begins by comparing cases which have the same array of aggravating factors. Then the court compares the mitigating factors and other specific circumstances. State v. Rupe, 743 P.2d 210, 228-30 (Wash. 1987) (summarizing the history of proportionality review and the procedures followed by the court).

537 725 P.2d 975, 982 (Wash. 1986) ("[W]e view it to be our duty under the similarity

Washington Supreme Court will examine cases in which the death penalty was not sought in the context of proportionality review.[538]

A federal district court in 1994 held that Washington's proportionality review process violated a defendant's procedural due process rights, because it "does not establish adequate standards or guidelines on which the Court or the parties can rely."[539] The Washington Supreme Court's response was: that "The court has taken an increasingly broad approach to its definition of similar cases, replacing the comparison of aggravating factors with the search for family resemblances, . . ." Finding its proportionality review procedures constitutional, the court commented that the purpose of Washington's proportionality review is not to ensure proportionality but to determine whether disproportionality exists.[540]

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standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally and not 'wantonly and freakishly.' . . .") (citations omitted). In *Harris*, the pool of similar cases was contract killings, and the court identified three such cases in the jurisdiction. *Id.* at 982.

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> "Similar cases" include cases reported in the Washington Reports or the Washington Appellate Reports since January 1965, where imposition of capital punishment was considered, *and cases in which reports have been filed with this court pursuant to RCW 10.95.120.* Under RCW 10.95.120, "[i]n all cases in which a person is convicted of aggravated first degree murder, the trial court shall" submit a report with details about the defendant and the crime. Thus, *"similar cases" include cases where the defendant was convicted of first degree aggravated murder regardless of whether the death penalty was sought.*

*Rupe*, 743 P.2d at 229 (Wash. 1987) (emphasis added).

539 Harris v. Blodgett, 853 F. Supp. 1239, 1288 (W.D. Wash. 1994) (citing five specific problems with the way the Washington Supreme Court conducts proportionality review, distinguishing between comparative [intercase] review and traditional [intracase] review, and concluding that the Washington statute required comparative review), *aff'd*, 64 F.3d 1432 (9th Cir. 1995). *See also* W. Ward Morrison Jr., Comment, *Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution*, 64 WASH. L. REV. 111 (1989).

540 "Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." State v. Brett, 892 P.2d 29, 69 (Wash. 1986). *But see* Durham, C.J., concurring: "In virtually every recent death penalty case decided by this court, a differing definition of proportionality has been promulgated. The resulting confusion is unacceptable." *Id.* at 70. And, "The concern in proportionality review is in avoiding two systemic problems in death sentences: random arbitrariness and imposition of the death sentence based on race." State v. Gentry, 888 P.2d 1105 (Wash. 1995) (footnote omitted), *cert. denied*, 116 S. Ct. 131 (1995). The court reviews other cases to determine whether race is a motivating factor in sentencing in Washington before concluding that it is not.

> Our review is not intended to ensure that there can be no variation on a case-by-case basis, nor to guarantee that the death penalty is always imposed in superficially similar circumstances . . . Requiring precise uniformity would not only be unworkable, it would effectively eliminate the death penalty. Indeed, the jury is directed to tailor its decision to the individual circumstances of the crime.

*Id.* at 1155 (citing *Lord*, 822 P.2d at 223).

Initially, the court had difficulty identifying similar cases because of the small number of people sentenced to death in the jurisdiction.[541] The court has subsequently considered several unusual issues in capital appeals generally, and in the context of proportionality.[542] In an unusual case, the court was asked to reconsider the proportionality of a death sentence previously upheld, on the grounds that subsequently decided cases retroactively rendered the judgment disproportionate.[543] In another case, a defendant who presented evidence of mental mitigating factors argued that his death sentence was disproportionate in comparison to other defendants who were mentally ill.[544]

As of 1996, the Washington Supreme Court has not overturned any death sentences for reasons of disproportionality.[545] There have not been any systematic empirical studies of the entire Washington

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541 In one case, the court commented that there were no cases reported which considered the imposition of capital punishment for a contract killing. "Therefore there is no evidence to be considered whether the present case is disproportionate to previous cases. There have been only three capital cases involving a contract as the aggravating factor since 1981 . . . In each case, no death penalty was sought by the prosecutor." State v. Harris, 725 P.2d 975, 982-83 (Wash. 1986) (citations omitted). The court nonetheless found the death sentence imposed was not disproportionate. *Id.*

542 *See, e.g., Brett*, 892 P.2d at 66 (Wash. 1995) (considering the claim that the universe of similar cases is not reliable because it includes cases from two now invalid death penalty statutes as well as pre-*Lockett* cases where sympathy instructions were not allowed, cases where proportionality reviews were not conducted, and cases where proportionality review was conducted but the universe was smaller), *cert. denied*, 116 S. Ct. 931 (1996).

543 *In re* Jeffries, 789 P.2d 731, 735 (Wash. 1990). The petitioner's original appeal was the second case in which the Supreme Court of Washington conducted proportionality review. The petitioner subsequently argued that intervening cases gave the court a larger universe of potentially similar cases and the opportunity to reconsider its original conclusion that the death sentence was proportionate. *Id.* at 734-35.

544 State v. Rice, 757 P.2d 889, 915-17 (Wash. 1988). The defendant argued that the appropriate group of comparison categories was other cases, including cases in which the defendant was not sentenced to death, in which there was "credible evidence of a mental disorder or diminished mental capacity." *Id.* at 916. The court found four such cases in which the death sentence was not imposed at penalty phase. *Id.* The court, however, found other mitigating factors in two of the cases and found that a third defendant had a mental illness "more severe" than that of Rice. *Id.* The question of whether mentally ill defendants should be defined as a comparison category has arisen in other states as well. *See, e.g.*, State v. Koedatich, 564 A.2d 873 (N.J. 1989).

545 *Cf.* State v. Benn, 845 P.2d 289, 326-32 (Wash. 1993) (Utter, J., dissenting). The dissent concluded the death sentence under review was disproportionate, and the dissenting opinion includes a review of the history of proportionality analysis in Washington, the purpose of proportionality review, and a comparison of proportionality review in North Carolina, Pennsylvania, and Georgia. *Id.* The concurring opinion argues that the analysis adopted by the majority is too precise, and that the court should be searching for family resemblances, not individual matches. *Id.* at 325 (Durham, C.J., concurring). The majority's proportionality analysis compared the nature of the defendant's crime and aggravating factor, his prior convictions, and his personal history to the statutorily required pool of similar cases and found the death sentence not disproportionate. *Id.* at 316-324.

capital punishment system.[546]

*Wyoming*

In 1989, Wyoming repealed its statutory proportionality review requirement, which had been enacted in 1983.[547] Prior to the repeal, the Wyoming Supreme Court looked at a wider range of cases than it has in recently imposed death sentences in Wyoming. In its prportionaltiy analysis, the court formerly examined cases in which the defendants were not sentenced to death, cases in which the prosecutor made a discretionary decision not to seek the death penalty, the non-death sentences of codefendants, and similar cases from out of state jurisdictions.[548] In conducting proportionality review of a death sentence imposed for murder during the course of a robbery, the Wyoming Supreme Court defined similar cases as felony murder-robbery cases and examined 18 cases from other jurisdictions, including federal cases. While proportionality review was in effect, the Wyoming Supreme Court never overturned a death sentence on grounds of disproportionality.

546 *But see* Harris v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995). *See also* James E. Lobsenz, *Unbridled Prosecutorial Discretion and Standardless Death Penalty Policies: The Unconstitutionality of the Washington Capital Punishment Statutory Scheme*, 7 U. PUGET SOUND L. REV. 299 (1984).

547 Act of March 6, 1989, ch. 171, 1989 Wyo. Sess. Laws 293 (repealed the former subsection (d)(iii) of WYO. STAT. ANN. § 6-2-103 (1977)). The former provision read: "[T]he court shall determine if: . . . whether [t]he sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." WYO. STAT. ANN. § 6-2-103 (Michie 1977) (repealed 1989). The statute currently retains a provision requiring the court to "determine if: . . . (i) the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; . . ." WYO STAT. ANN. § 6-2-103 (Michie 1996).

548 The court addressed issues concerning proportionality prior to repeal. *See* Engberg v. State, 686 P.2d 541, 555-56 (Wyo. 1984); Hopkinson v. State, 664 P.2d 43, 88-91 (Wyo. 1983).

## APPENDIX B*

## PREPARING A FACTUAL BASIS FOR THE SYSTEMATIC EXAMINATION OF RACIAL AND GEOGRAPHICAL DISPARITIES: THE COURT'S RESPONSIBILITY

For the better part of a decade an interdisciplinary team created a comprehensive research project to study homicide cases and their disposition after the reenactment of capital punishment in New Jersey.[549] This Project began at the Department of the Public Advocate as part of an early systematic challenge by the Office of the Public Defender to the reimposition of capital punishment in the state in 1982.[550] The Public Defender Homicide Project was eventually subsumed into the more comprehensive Proportionality Review Project of the Supreme Court of New Jersey.

This appendix reports some previously unpublished data and analyses arising from that work.[551] This supplemental research note sets out a few of the methodological issues which must be addressed in such an investigation and suggests possible directions for further research on the relationship between race and geographic variables in homicide cases and capital case processing. These discrepancies go to the heart of proportionality review. This research demonstrates the importance of precise and reliable data collection as a predicate to any analysis of a capital case processing system.

In *Marshall II*,[552] the court expressed concern about the findings of racial and geographic disparities in capital case processing in the Proportionality Review Project (PRP) Final Report, but concluded that the offer of proof of racial discrimination was weaker than in *Mc-*

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* An earlier version of these data and analyses were presented at the 1992 Annual Meeting of the Law and Society Association in Philadelphia, as L. Bienen and D. Mills, "Race and County Disparities in Capital Case Processing in New Jersey," May 29, 1992.

549 David C. Baldus, Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court (Sept. 24, 1991) (unpublished report on file with State Documents Collection of Northwestern University School of Law Library) [hereinafter PRP Final Report].

550 The evidence of race effects in other states suggested that such effects were pervasive and not confined to a single jurisdiction. *See* Leigh B. Bienen et al., *The Reimposition of Capital Punishment in New Jersey: The Role of Prosecutorial Discretion*, 41 RUTGERS L. REV. 27, 118-67 (1988); U.S. GENERAL ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990) [hereinafter 1990 GAO REPORT].

551 The analysis presented here is of the screened data set of 1372 homicides analyzed in the PRP Final Report and of 264 cases comprising the Marshall data set. The 264 cases are compiled from a subset of the 1372 plus 35 cases added by the Attorney General. *See* Herbert I. Weisberg, Proportionality Review of Death Sentences in New Jersey: An Independent Analysis of Data on Capital Charging and Sentencing (Nov. 26, 1991) (unpublished report on file with the State Documents Collection of Northwestern University University School of Law Library).

552 State v. Marshall, 613 A.2d 1059 (N.J. 1992) (Marshall II).

*Cleskey.*[553] The court's view was that the analytic results did not justify declaring the capital case processing system in the state unconstitutional.[554] Since *Marshall II*, further analysis on an expanded database has resulted in significant findings of prejudice based upon the race of the victim and defendant as well as the social status of the victim.[555] The PRP Final Report and the Attorney General's Report both analyzed differences in capital case processing between urban and nonurban jurisdictions, but found no significant effects at that time.[556] The analysis presented here found that the victim's race had a small effect and whether the homicide was processed in an urban jurisdiction also had a small effect.[557]

Proportionality review in capital cases has been the primary but not the exclusive avenue for the introduction of statistical arguments based upon racial disparities to challenge the operation of capital punishment systems. The data presented here were developed in connection with capital appeals and other proceedings before the New Jersey Supreme Court regarding proportionality review. They provide a factual context for the discussion of the legal issues surrounding proportionality review. These are the kinds of data and relationships courts address as part of proportionality review. The issues of definition and methodological choice presented in New Jersey are typical. The difference between New Jersey and other states was in the comprehensiveness of the data and analyses presented to the court, the professional caliber of the social science research, and the court's will-

553 McClesky v. Kemp, 481 U.S. 279 (1987).

554 *Marshall II*, 613 A.2d at 1110-12. The court discussed the race-of-victim and race-of-defendent effects, and their attribution to jury decision making and prosecutorial decision making, while specifically rejecting the holding in *McCleskey v. Kemp*. For a detailed discussion of how the court treated these statistical findings and a detailed comparison between statistics on race effects presented to the United States Supreme Court in *McCleskey v. Kemp* and the statistics on race effects presented to the New Jersey Supreme Court in *Marshall II*, see David C. Baldus, *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and "Impossibility" of Its Prevention Detection, and Correction*, 51 WASH. & LEE L. REV. 359, 405-13 (1994).

555 *See infra* Appendix C.

556 *See* sources cited *supra* note 551. Other studies directed to these and related variables include JOHN M. DAWSON & BARBARA BOLAND, U.S. DEP'T OF JUSTICE, MURDER IN LARGE URBAN COUNTIES, 1988 (1993) [hereinafter BJS REPORT] [This data set is archived at University of Michigan and available upon request], and Brandon S. Centerwall, *Race, Socioeconomic Status, and Domestic Homicide*, 273 JAMA 1755-58 (1995) (citing earlier similar studies in other jurisdictions).

557 Urban cases are defined in this analysis as cases from the New Jersey counties of Camden, Essex, Hudson, Mercer, Passaic and Union. These six counties were the location of the six largest cities identified as cities in economic distress by the New Jersey State Planning Commission in 1988. *See* NEW JERSEY STATE PLANNING COMM'N, COMMUNITIES OF PLACE: THE PRELIMINARY STATE DEVELOPMENT AND REDEVELOPMENT PLAN FOR THE STATE OF NEW JERSEY 7 (1988).

ingness to address constitutional issues in the context of this information.

In *State v. Marshall II*, and the cases preceding it, the court incorporated into its interpretation of the law an expert analysis of data concerning racial disparities in capital case processing. Proportionality review in New Jersey was a live experiment in the use of social science data by a court. The court was criticized, often inaccurately, for attempting to be as precise as possible in its adjudications regarding facts and quantitative relationships. The data and analysis presented here offer an additional perspective on the quantitative and methodological issues raised in these proceedings. Locating all the cases in the jurisdiction during the time period is the first task. It requires verification, tracking down information sources, and educated judgements about classifying cases.

## I. The Distribution of Homicide Cases and Death Eligible Cases

Where do murder cases arise in New Jersey? The distribution of potentially death eligible homicide cases by county and year from 1982-90 is reported in Table 1.[558] These 1372 homicide cases comprise only cases which had the potential of being designated death eligible. An indictment for murder and an adjudication of that indictment qualifies a case for entry into the database. Excluded from this data set are cases involving juveniles, indictments for death by auto, acquittals in a murder trial, and non-penalty trial cases that involved indictments for less than murder and homicides that resulted in convictions for crimes less serious than aggravated manslaughter.

The 1372 cases include all murder indictments, including cases which were disposed of by a plea to murder, felony murder or aggravated manslaughter when the original charge was a form of murder, a jury conviction for murder or for felony murder, and a capital murder conviction. This data set is based upon final adjudications at the trial court stage, irrespective of the result upon appeal.[559]

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[558] The PRP Master File is an unusually comprehensive and complete data set on potentially capital murder cases for the period since reenactment. It was compiled and cross checked on the basis of multiple sources, including trial court judgments, indictments, state police arrest files, department of corrections records of persons serving a sentence for murder, United States Department of Justice Promis/Gavel prosecutorial case processing files and other sources. *See* PRP Final Report, *supra* note 549, at 2-15 (describing methodology used in compiling the file of 1372 homicide cases).

[559] The PRP Final Report discusses how instances of retrials and reversals on appeal were classified. Since the New Jersey Supreme Court was interpreting the New Jersey capital punishment statute during the pendency of the compilation of this data base the PRP Final Report retrospectively incorporated evolving rules restricting application of the capi-

Not surprisingly, the counties with large urban centers accounted for the majority of homicides. Essex County, which includes Newark, is represented by 393 cases, 28.6% of the entire data set; Hudson, 11.5%; Camden, 10.2%; Passaic, 7.7%; and Union, 5.3%. All other counties combined accounted for another 34.8% of the entire data set. The top five counties in terms of incidence, all counties with a large urban center, account for 63.4% of all murders during the period. More than half of the potentially capital murders occurred in the urban counties. Mercer County, which includes the state capital, Trenton, accounted for an additional 65 cases (4.7%). Altogether, these six counties, which include the older urban centers, accounted for 68.1% of all potentially death eligible cases. Cases from the six counties with a large urban center are the urban cases.

## II. COUNTING THE DEAD: WHERE ARE THE BRIGHT LINES?

Homicide is an appealing research topic both because it is the most serious of crimes against the person and because there are some bright line distinctions.[560] Although race was not a razor sharp definition, being dead or alive was. These cases rarely involved circumstances in which victims lingered on life support, raising philosophical, medical and ethical questions about the definition of "dead."[561] In few of these cases was cause of death an issue. Similarly, time of death and the effective date of the statute, August 6, 1992, was a bright line distinction. Only homicides which occurred after the effective date of the reenactment of capital punishment in New Jersey were eligible for capital prosecution, and only if the other criteria defining death eligibility were met.

Entry into the data base was triggered by a homicidal event and the filing of an indictment or a formal accusation for a homicide of-

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tal statute. *Id.* at 15-18.

In the BJS Report, "The murder data were collected from the prosecutors' offices in the 33 sampled counties . . . . The criterion for including a case on a roster from which cases would be sampled was that (a) one or more defendants must have been charged with murder, and (b) the matter must have been adjudicated during 1988 . . . . Only 6 of the 33 counties had more than 200 cases." BJS REPORT, *supra* note 556, at 10. Note that three of the states, Michigan, New York, and Massachusetts, including 6 counties, did not have capital statutes in 1988. Note also that New Jersey, and consequently Essex County was not included in the sample.

560 Homicide is an area of great interest for researchers and policy makers, perhaps because the threat of homicide brings out a primordial fear.

561 The likelihood of death in an automobile accident is far higher than the likelihood of being a victim of homicide, although people are much more apprehensive about being the victim of a homicide. When populations are divided by race, sex, and age, the likelihood of death from homicide drops dramatically for all groups except young adult black men.

fense. A bright line distinction existed for the definition of homicide, if not for murder—which requires a pretrial judgment as to the intent or motive of the defendant. The definitions of other circumstances relevant to capital charging also involved judgments as to the presence of a factual basis for a statutory aggravating factor.

## III. Source of Data

The tables and analyses presented here are based upon 1372 murder cases presented to the New Jersey Supreme Court in *State v. Marshall I* and upon a modified and slightly expanded subset of that data base consisting of 246 potentially death eligible ("death possible") homicide cases which was developed in 1991 as part of the proportionality review in *State v. Marshall II*.[562] The 264 case database was compiled by the New Jersey Office of the Attorney General within the context of litigation concerning proportionality review.[563] The larger data set of 1372 cases does not include data on race of the victim. It is, however, a very accurate description of the incidence of murder and the distribution of murders across counties.[564]

The Proportionality Review Project addressed the issue of aggravating circumstances when it divided the PRP Master File into three categories: cases which were presumptively death eligible (clearly in); cases which were not death eligible under New Jersey law (clearly out), and cases where it was undetermined whether or not the case could have supported a capital case prosecution.[565] In this paper the terminology "death possible" is used instead of "clearly in."

The data base of 264 cases form the principal basis for the analysis and discussion here. There is no regression analysis subsequent to

562 State v. Marshall, 613 A.2d 1059 (1992) (Marshall II). The data set of 1372 murder cases includes all homicide cases during the period 1982-1990 which were verified as murder cases and hence potentially eligible for capital prosecution after the effective date of the New Jersey capital statute. The subset of 264 cases were those cases determined to be eligible for prosecution as capital cases by both the Attorney General and the Office of the Public Defender. The technical aspects of the data collection and analysis, and the methodological disputes between the Attorney General's expert, Herbert I. Weisberg, and the Special Master, Professor David Baldus, are set out in detail in "The Proportionality Review of New Jersey Death Sentences," Chance, Oct. 1993 at 8.

563 The 35 cases in which a notice of factors was served, but the case did not reach penalty phase, are identified in Weisberg, *supra* note 551, at app. A. The Weisberg analysis was presented to the New Jersey Supreme Court by the Office of the Attorney General on November 26, 1991, during the course of the litigation of the proportionality review case in *Marshall II*. *See* Weisberg, *supra* note 551, at app. A. A different data set of 703 cases, *see* Bienen et al., *supra* note 550, at 288-326, identifies other cases in which a notice of factors was served but the case did not reach penalty phase. These files have not been merged.

564 *See infra* tables B1, B2, B5, B6a, and B6b.

565 This screening procedure is described in detail in PRP Final Report, *supra* note 549, at 4-12.

that included in the PRP Final Report. These tables are a set of preliminary screens of the data set of 1372 potentially death eligible murder cases superimposed against external variables. The hypothesis was that these variables might explain variances in the more comprehensive and detailed data set of 264 murder cases which were determined to have the potential of being death eligible after a rigorous analysis of their facts in an adversarial context.[566] This analysis compares the distribution of murder cases across the counties, the distribution of cases chosen for capital case processing across counties and the distribution of death sentences. This paper continues the analysis of capital case processing by stages, reported in prior research.[567]

This investigation verifies the observation that counties have vastly different rates of capital prosecution and conviction. The anecdotal explanations for these differences range from the aggressive character of individual county prosecutors to the observation that capital prosecutions cost a great deal of money—therefore certain identifiable counties cannot afford to prosecute all eligible cases capitally—to the suggestion that the different rates of capital prosecution and conviction are the result of changing prosecutorial policies over time.[568]

Given the history of capital punishment in New Jersey and other states, all parties involved, including the New Jersey Supreme Court have been extremely sensitive to allegations that race, socioeconomic status, gender or other impermissible extra-legal criteria were influencing the capital charging and sentencing decision. The PRP Final Report reported a significant race effect for Black defendants at penalty phase and a significant race effect for White victim cases at the stage of advancing to penalty phase.[569] In 1995, the Administrative

566 One issue in *Marshall* concerned the classification of cases involving deadlocked juries, the treatment and definition of relative and comparative culpability for the purpose of proportionality review, and the classification of particular cases. None of these adversarial issues is relevant to the discussion here. Figure 1 describes case flow through the New Jersey capital charging and sentencing system and was presented to the New Jersey Supreme Court by the Attorney General. *See* Weisberg, *supra* note 551. The classification of a case as death possible was made on the basis of submissions of fact by prosecutors and defense attorneys, in an adversarial setting where attention was paid to the legal implications.

567 *See* Bienen et al., *supra* note 550. The stages to a death verdict at trial are: Death Possible Case, Notice of Factors served, Capital Trial, Penalty Phase, and Death Verdict imposed. *Id.* at 332 Fig.2.

568 The PRP Final Report offers another hypothesis: that the county prosecutors changed their charging practices in response to the evolving capital jurisprudence of the New Jersey Supreme Court. *See* PRP Final Report, *supra* note 549, at 20-22. Some regression analysis in the report is directed towards testing that proposition. *See id.* at 18-24.

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Our analysis of the penalty-trial sentencing decision suggests that black offenders may

Office of the Courts released new statistically significant findings of discrimination based upon race in the proportionality review of the death sentence of Joseph Harris.[570]

## IV. The Identification of Urban Cases

The initial screening of murder cases included, where the data were available, a screen on the basis of defendant and victim race. Data on race of defendant were available for the 1372 murder cases, and data on defendant and victim race were available for the 264 death possible murder cases.

The purpose of this analysis is to explore whether or not the urban character of an individual county was predictive of whether or not a case was prosecuted as a capital trial and/or resulted in a death sentence.[571] This is a preliminary exploration of some relationships between the distribution of murder cases across New Jersey counties and the distribution of capital case prosecutions across these counties. It asks whether differing rates seem to be correlated with aggregate variables related to the character of counties themselves, such as economic or demographic indicators. It goes beyond what was included in the PRP Final Report. These basic data provide important background for the understanding of statistically significant findings which occur in subsequent regression analyses.

## V. The Measurement and Analysis of Race in the Public Defender Homicide Study

Murder occurs among all social and economic groups. What we did not know was: why some murders are treated more seriously than others, and why some murders threaten the communities' concern for safety and security, while others do not. Who decides what small number of murders will be treated as capital cases and consequently be subject to intense scrutiny by the public and the criminal justice system and the media? Prosecutors designate crimes as capital accord-

be at greater risk of receiving a death sentence than similarly situated white and Hispanic defendants. . . . [FN. these same data showed no race-of-victim effects in the penalty-trial decisions.] . . . The model we developed to explain which cases advanced to a penalty trial showed no race of defendant effects. It did suggest, however, that cases with white victims may be at greater risk of advancing to penalty trial than cases involving black or hispanic victims.

*Id.* at 101, 103.

570 *See infra* Appendix C.

571 In New Jersey, cases are designated capital by the procedure of serving a notice of factors. The decision to serve a notice of factors is made unilaterally by each individual county prosecutor. While county prosecutors in New Jersey are not elected, they are selected and appointed in a process which is politically controlled at the county level.

ing to criteria which are as objective as the statutory aggravating factors. The criminal justice system apparently designates crimes as capital according to other circumstances as well. Police and other record keepers play a role in these decisions, as well as prosecutors. If race is a factor in this equation, how would we measure its influence and effects? And do racial disparities imply constitutionally impermissible racial discrimination?

One challenging aspect of this study, and indeed of all quantitative research, has been to measure and estimate with accuracy the relationships and influences observed during the initial data collection, as well as to test opinions formed during several years of practice in the criminal justice system. The Public Defender Research Team and many others who did not believe that race was a neutral or insignificant variable, although the experienced researchers were aware that the precise delineation or identification of a race effect would never be simple or straightforward.[572]

The first decisions were practical ones. How was race to be measured? What were valid racial categories? What should be used as indications of racial identity? This seemingly simple task of data collection was not straightforward. At times, the presentence reports classified defendants, and less frequently victims, as Black, White or Hispanic, but these classifications were not consistent or always present. Official documents also used other racial or ethnic categories, such as Asian, Puerto Rican, Cuban, Dominican, Negro, Mixed, Indian, Polish or Greek. In this data set, the number of individuals identified as "other" was so small that this designation was negligible. The defendant's race in the data set of 1372 cases was independently verified from several sources. Similarly the race of the defendant and victim in the data set of 264 cases was based on multiple sources.

The methodological design of the Public Defender Homicide Study, the source of data on a large number of these cases, included, among other things, interviews with defense attorneys. The defense attorney was asked to verify the race of the defendant, whom she met in a face to face client interview, and the race of the victim, based upon her knowledge of the circumstances of the offense. In cases where the defendant and victim were of mixed race, race was identified as the race of the mother of the defendant or victim. These theoretical problems were not large practical problems in this study, with one exception: how to classify Hispanic victims and defendants.

Separately identifying Hispanics as a racial category was necessary, although problematic. Hispanic is not a racial category of the

572 *See infra* table B2.

U.S. Census, and definitional problems are plentiful.[573] Hispanics were, at the time of this research, a growing ethnic group within the state, concentrated in principal metropolitan areas. Hispanics were disproportionately represented in both low income areas and as defendants and victims in the criminal justice system and in homicide cases. For example, the trial jurisdiction of Hudson County (which encompasses Jersey City) and Camden County both include a large number of Hispanics. Hispanics as a group were separately identified in the data base because Hispanics were perceived as a distinct group by decision makers in the criminal justice system.[574] Hispanic was defined as a separate racial category for both victims and defendants in spite of the definitional and methodological problems, because it was an additional piece of information which might be relevant to some aspects of decision making in the capital case processing system.[575] It might affect prosecutorial charging decisions for a variety of reasons, including differences in the availability of a reliable factual foundation for cases involving Whites, Blacks and Hispanics.

There are definitional and methodological problems with all racial and ethnic categorizations, ranging from classifying a person of mixed race to the reliability and consistency of the judgment of the persons making the classification. The Public Defender Homicide Study used the identification of race provided by the defense attorney in the case, and this identification was based upon both the self-identification of the defendant and the personal observation of the defense attorney.[576]

Initially, Asian was identified as a separate racial category, and Asians do comprise a significant fraction of the population in New

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573 The threshold issue was whether to adopt the U.S. Census definition of race. The U.S. Census categories were adopted by the Public Defender Homicide Study, with the exception of separately coding for Hispanics. Should the identification "Hispanic" be by name, by self identification, or by the designation by a third party, such as the defense attorney? Should all Spanish surnamed victims and defendants be included in the category? What about long time resident Puerto Ricans who might in fact be citizens? Was citizenship a significant indicator, perhaps measuring integration within the culture of the majority? Citizenship was often included on the presentence report, as was whether or not the defendant was proficient in English.

574 There was anecdotal evidence that at least one county prosecutor believed that "poor Hispanics shouldn't get the death penalty." The ethnic category Hispanic might be relevant to the exercise of prosecutorial discretion. In the final analysis the total number of Hispanics in the data set of death possible cases was small, less than 8% of the 264 cases. *See* Bienen et al., *supra* note 550, at 184 tbl.8.

575 The Proportionality Review Project did not retain the separate identification of Hispanics for either defendants or victims. *See* Baldus, *supra* note 554, 410 tbl.4.

576 At least the person providing the data had met the defendant and the defendant had seen or knew the victim. The racial classifications were verified by the Proportionality Review Project. *See* Bienen et al., *supra* note 550, at 371 (Order of July 29, 1988).

Jersey. The Asian category was eventually collapsed into "Other."[577] When there were insufficient numbers of Hispanics to support regression analysis, Hispanic was dropped as a category, and Hispanics were characterized a Whites.[578] From the outset researchers were aware that one of the critical variables in the study, the race of the defendant and victim, was measured in a manner which could lead to analytical difficulties. As a practical matter, there were very few cases in which the racial categorization was in doubt, and they were all removed from the database.[579]

## VI. The Identification of County As a Variable of Interest

By contrast, the identification of county of jurisdiction for the offense was straightforward. County of jurisdiction was the county in which the homicide occurred, except in those very few cases where a change of venue was authorized because of pretrial publicity.[580] Because county was the jurisdictional boundary delineating the authority of judges, prosecutors, jurors, defense attorneys and other legal personnel, this was a bright line distinction for almost all relevant purposes. County is a very important variable for the measurement of prosecutorial discretion, since prosecutors have the sole authority to declare a case capital within their county.

If a county was declining economically relative to the state as a whole or to other counties, for example, might that have an effect upon whether or not cases would be likely to be declared capital, on the theory that the judicial and prosecutorial institutions in such counties would be particularly stressed? The hypothesized relationship might be that relatively poor counties could not "afford" capital prosecutions, or conversely that counties which were declining economically were more likely to be more "punitive" in their prosecutions. Or, that counties which were rising economically might be

577 There were four victims identified as having a race of "Other" in the data base of 703 cases. *See* Bienen et al., *supra* note 550, at 170-71 tbl.2. Asians had an insignificant presence throughout this study, in spite of their number in the population.

578 Putting Hispanics with Whites was a methodological decision which made it less likely that discrimination would be found. If the decision had been made to put Hispanics with Blacks, a finding of discrimination against Blacks would have been subject to the criticism that the result was confounded by including Hispanics in the category, because it would be impossible to tell how much of the effect was due to putting Hispanics in the same category with Blacks. If such decisions are not documented, findings of racial discrimination may be subject to criticism.

579 There were no unknowns for race of defendant in the database of 703 cases; there were four cases—which were removed—where the race of the victim was "Other." *See* Bienen et al., *supra* note 550, 170-71.

580 *See infra* tables B1 and B2.

relatively more likely to "invest" in capital prosecutions.[581]

Large differences were apparent in the treatment of murder cases in counties without a large urban center in comparison to murder prosecutions in counties with a large urban center. The New Jersey State Planning Commission in 1988 identified six large cities in New Jersey in economic distress. These cities were: Camden, Elizabeth, Jersey City, Newark, Patterson, and Trenton.

> From 1970 to 1985, the population of the state grew by almost 5.5 per cent. *But* . . . our six largest cities lost over 13 per cent of their population and now house the poorest segments of the New Jersey population. From 1960 to 1985, employment in the State increased by over 70 per cent, but our 6 largest cities lost over 35 per cent of their employment and are now the repositories of under-used human and public capital resources.[582]

There are large variations in basic demographics between counties. The picture which emerges is of vastly different circumstances for individual counties, differences of more than 100 per cent in income and unemployment between individual counties. The general precept is that the older cities are associated with bleak economic indicators, a high crime rate, and overcrowded courts and criminal justice agencies under the pressure of significant case backlogs. This latter factor seems to dominate the character of the county in terms of capital case processing.[583]

The most superficial observation of homicide cases and case processing in different counties suggested that each county had its own legal culture. The office of the county prosecutor had different traditions in each county. Prosecutors had their own individual style and different attitudes towards the death penalty. For example, at the time of reenactment, not all county prosecutors and judges were in favor of reenactment.[584] It was expected that the prosecutors who en-

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581 *See infra* tables B3 and B4.

582 NEW JERSEY STATE PLANNING COMM'N, *supra* note 557, at 7. In the 1990 cases, these six cities were no longer the six largest cities in the state. The characterization of these cities as economically distressed has not changed, however. The majority of cases in this data set came from the mid-1980's. *See infra* table B1.

583 The bureaucratic pressures placed upon the courts and county budgets are another manifestation of economic differences between counties, differences which come to be expressed in the quality of state and local administrative services which the county is able to provide. The courts in the distressed cities are clogged with cases. Backlogs and delays are commonplace. In Essex County in the late 1980s, several court rooms were regularly set aside just to handle cases which were more than five years old.

584 This discrepancy in attitudes towards capital punishment among county prosecutors is not unique to New Jersey. Compare the reported sharp difference in prosecutorial policies between Philadelphia and Pittsburgh District Attorneys. Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 20. According to the author,

> In most jurisdictions, prosecutors file such notice [declaring a case capital] in a small

thusiastically welcomed reenactment might be more likely to aggressively pursue capital prosecutions. However, at the time of this study there was no urban jurisdiction with a prosecutor whose policy was to pursue all eligible cases as capital prosecutions. Moreover, the character of a county was subtly defined by intangible factors such as the county's sense of community, as well as by relatively measurable factors such as per capita income, degree of urbanization, and other demographics.[585] The distribution of cases by race had an important relationship to county.[586]

Importantly, all statistics and case records were kept on the basis of county. Data collection and preservation were handled differently by different counties, and court administrators had different policies regarding the release of information regarding homicide cases and the maintenance of records. Because the county defined both the prosecutor's and the court's authority, the county was a key variable for recording legal decision making.

The capability to break the county down into separate variables would have been helpful in some instances: e.g., to distinguish between cases that occurred in urban environments from cases originating in the same jurisdiction that occurred in rural or suburban environments. For example, Mercer County includes Princeton township and borough, the wealthy suburbs surrounding Princeton, relatively wealthy farms and county estates and the urban center of Trenton, a city in economic and social decline during the period of the study.[587] A murder in Princeton would occupy the front pages of the local newspapers for weeks, or months, while murders in Trenton of Blacks or Whites of low socio-economic status were only reported once or twice when the circumstances were sensational, and then dropped from public view.[588]

Trenton cases would often be resolved as pleas, although occasionally such murders might be prosecuted as capital cases and result

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percentage of eligible homicides: in Pittsburgh, for example, W. Christopher Conrad, Allegheny County's deputy district attorney for homicide, estimates that his office files a Rule 352 [the equivalent of serving a Notice of Factors in New Jersey] in about a quarter of the cases where aggravators are present. Philadelphia files one in virtually every case.

*Id.* at 42. *See supra* main article Part V. For a description of the character of the county in which Robert Marshall was prosecuted see JOE MCGINNIS, BLIND FAITH (1989).

585 *See infra* table B3.

586 *See infra* table B4.

587 *See infra* table B3.

588 For example, there was an extraordinary amount of media attention given to the murder of Emily C. Stuart, age 74, in Princeton on March 4, 1989, including an editorial in the *New York Times*. The homicide occurred in the middle of the day in a prosperous neighborhood and remains unsolved. Charles C. Staurt, *Nightmare in Princeton*, N.Y. TIMES, May 26, 1989, at A31.

in a death sentence. Plea/trial was a critical case processing decision.[589] The cases involving middle class White victims were more likely to be prosecuted as capital cases, but on occasion, if the defendant was sympathetic or middle class, other idiosyncratic circumstances of the case might also be influential. The character of the homicide itself, its location, the manner of the killing, in addition to the race and class identifications of the victim and defendant could also effect the perception of the offense and perhaps influence the prosecutor's decision to charge capital murder.[590]

Researchers questioned whether what was observed as an interaction of race, class and character of county could be sharpened. First, we looked at frequencies and cross tabulations of race and county.[591] The elusive variable of "county character" might not be precisely captured by county of jurisdiction. For example, Essex County includes the city of Newark, but it also contains some relatively prosperous suburbs. Yet, the overwhelming number of homicides in the jurisdiction are from the City of Newark and the legal culture of the county is dominated by the atmosphere and dynamics of the Newark County Courthouse, and not the middle class suburbs.[592]

The distribution of unclassified or ambiguous cases is particularly interesting.[593] These cases were almost entirely in the high volume counties, with Essex accounting for 31.6% of all ambiguous cases by itself, and Camden, Hudson, Passaic and Union accounting for almost exactly two thirds (59.1%) of all ambiguous cases. In terms of county disparities this may be one part of the explanation for differing rates of capital prosecution. The high volume urban counties do not have the resources to investigate whether there is a factual basis for capital murder in all potentially capital cases. Rather, they operate a triage system.

This led us to conceptualize a variable which we labeled urban/nonurban in an attempt to capture characteristics of some homicide cases which might be related to the interaction of race and class, thereby pointing the direction for further research. The 1995 regressions for proportionality review, which found significant race effects in the *Harris* case, took the same approach.[594] A study of intra-racial

589 *See* Bienen et al., *supra* note 550, at 196-219 tbl.16.

590 *See* Leigh B. Bienen, *A Good Murder*, 20 FORDHAM URB. L.J. 585 (1993).

591 *See infra* tables B1 to B5.

592 *See infra* tables B2 to B5.

593 Questionable cases were cases where there was insufficient information to conclude death eligibility. Those cases are termed "ambiguous" in the Tables included in this appendix.

594 In *Harris* both race and the revised high status factor achieved statistical significance, and the increased sample size allowed for the convergence of models including the preju-

homicides in New Orleans, for example, found that different rates of homicide for Blacks and Whites are entirely accounted for by differences in socioeconomic status between the Black and White populations, replicating results from an earlier study of Atlanta homicides.[595] We chose the dichotomous variable of urban/nonurban rather than suburban/nonsuburban.[596] The Supreme Court of New Jersey has consistently said that discrimination based upon socio/economic status was impermissible.[597]

While the county of jurisdiction was not always a definition for location or associated with a type of homicide, it was a clear boundary for all jurisdictional variables. Even though not all homicides in Essex County occurred in urban Newark, they were nevertheless all adjudicated by the same bureaucratic and administrative court and prosecutorial system in the Essex County Courthouse and were subject to similar delays due to docket overcrowding.[598] Our research explored whether the urban character of these homicides seemed to be associated with the reasons why they were treated the way they were in the system, and particularly why they were not likely to be declared capital.[599] Some urban homicides seemed to be unworthy of capital prosecution even when there were statutory aggravating factors. Urban crime, like the health problems of the urban poor, the collapse of urban school systems and the decline of urban housing stock, were perhaps issues the relatively wealthy and secure in the suburbs choose to avoid. If urban crime was not a threat to the suburbs, perhaps there was little public pressure to prosecute those cases capitally.[600]

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dicial factors. *See* Memorandum from David Weisburd to John P. McCarthy (Dec. 20, 1995), Appendix C *infra.*

595 *See* Centerwall, *supra* note 556, at 1755-58.

596 *See infra* table B6.

597 *See* State v. Ramseur, 524 A.2d 188, 293-94 (N.J. 1987).

598 Whether or not the Newark County Courthouse is or should be a symbol of the sorry state of urban justice was the subject of litigation in *Amato v. Wilentz*, 952 F.2d. 742 (3d Cir. 1991), *vacating as moot* 753 F. Supp. 543 (D. N.J. 1990). The Chief Justice of the Supreme Court of New Jersey refused to allow the Newark County Courthouse to be used as the setting for the filming of the movie *Bonfire of the Vanities.* "The Chief Justice based his decision on the grounds that the scene [to be filmed] (which depicted African-Americans rioting in a courtroom against a perceived judicial injustice) offensively stereotyped blacks and might undermine 'their already vulnerable' confidence in the state judiciary." *Id.* at 743.

599 *See infra* tables B5 and B6.

600 The BJS Report analyzed the disposition of approximately half (52%) of all murder convictions during 1988. This study reported that less than 10% of all defendants were charged with a capital offense, although over 80% were charged with first-degree murder. Half of the murder defendants charged with capital murder received a life sentence and an eighth were sentenced to death. In the total sample, 1% of the urban homicides resulted in a death sentence being imposed. BJS Report, *supra* note 556, at tbls.9, 10. "Th[e] study chose 33 counties to represent the 75 largest counties. These 75 counties, out of the Na-

The county prosecutors were probably accurately reflecting the most vocal part of the electorate when they chose not to delegate the full range of prosecutorial resources to urban cases. If the defendant and victim were both low income or low social visibility and/or of minority status, then the prosecution was more likely to be decided by a plea, rather than prosecuted as a capital case, and to be disposed of without public attention. Could such a proposition be measured?

The data show that while homicides originate in the urban areas, the homicides in urban areas are much less likely to be prosecuted as capital cases. Table B1 shows the distribution of cases by year and county of origin, for the larger data set of 1372 cases. Table B5 shows the distribution of death possible cases and ambiguous cases for the same 1372 cases. Table B2 shows the number and per cent of Black defendant cases by county. The urban counties have a small proportion of death possible cases, and a larger number of ambiguous cases.[601] These are also the counties with large numbers of Black defendants.[602] Only 13.49% of Essex County cases are death possible, and 20.10% are ambiguous.[603] This discrepancy existed in the county which accounted for the largest number of felony murders, at a time when the presence of an underlying felony was the basis for declaring a case capital for the slayer.[604] A similar pattern can be seen for Camden and Hudson counties.[605]

The pattern in the suburban counties was in the opposite direction. For example, Monmouth and Ocean counties both had a greater proportion of death possible cases than ambiguous cases. The proportion of death possible cases to ambiguous cases is especially important. The latter are the cases no one cared enough about to create a factual foundation for death eligibility. Yet they were murder indictments.

Across all counties there is much less discrepancy between the

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tional 3,100 total, accounted for 37 per cent of the U.S. population but 63 per cent of the 22,680 murders reported to the police and 52 per cent of all murder convictions during 1988." *Id.* at 2. "A total of 2,539 murder cases were studied, which yielded data on 3,119 defendants and 2,655 victims .... Case weights were applied to statistics on the sampled cases to expand them to estimates for the universe of the 75 largest counties .... Statistically weighted, the 3,119 defendants in the sample cases represented 9,576 murder defendants in the nation's 75 largest counties. The 2,655 victims represented 8,063 victims in the 75 largest counties." *Id.* at 10.

601 *See infra* table B5.

602 *See infra* table B4.

603 *See infra* table B5.

604 Essex County accounted for 24% of all felony murders reported in Leigh B. Beinen et al., *The Reimposition of Capital Punishment in New Jersey: Felony Murder Cases*, 54 ALB. L. REV. 709, 797 (1990).

605 *See infra* table B5.

cases that are clearly not death eligible.[606] The highest percentages are Warren and Gloucester counties with over 77%, which may or may not reflect those prosecutors lack of enthusiasm for capital cases. The rest of the counties are around the same level. These relationships are further evidence of how important it is to have reliable data on noncapital cases to understand the capital case processing system as a whole.

Table B6 confirms that 60.17% of all death eligible cases are Urban in comparison with 38.53% being from nonurban counties. The seeming contradiction between the majority of death eligible cases being urban while urban cases seem to be downgraded is resolved by the information in the rest of Table B6 and the figures in Table B6. Urban cases are the largest proportion of all categories, and especially they are a disproportionately large percentage of the ambiguous cases, 72.0%.

Table B7 points out why there is no contradiction. Only 14.85% of all urban cases are death possible, although this is still a large number of cases (139) and a large proportion of all death possible cases. Urban and nonurban cases have very similar proportions of not death eligible cases, 65.92% and 63.28%, respectively.

The examination of capital case progression analyzes the 264 cases which the Attorney General and the Special Master agreed had a factual basis for statutory aggravating factors. Table B9 shows that of the 158 death possible urban cases, only 48.73% were designated capital by the county prosecutor serving a notice of factors. This is in contrast to 72.64% of all nonurban cases being declared death eligible by the county prosecutor. This is a more than 20% difference. Similarly, a larger per cent of nonurban cases went to penalty phase, 81.82% as opposed to 72.72%.

Table B8 shows the relationships differently. Half of all cases which were declared capital, or death eligible, were urban seeming to contradict the allegation that urban cases were being treated less seriously. When those numbers are put along side the difference of over 20% between urban and nonurban cases in terms of the likelihood of being declared capital, there is no contradiction. The comparable levels between urban and nonurban cases at subsequent stages is not surprising, nor does it contradict the hypothesis that urban cases are more likely to be downgraded.

Table B10 shows the ratio of death possible cases to death eligible cases, by individual county. The lows of 42.62% for Essex and 46.15% for Camden are expected, and do not involve small numbers. Hudson

606 *Id.*

county at 52.63% is somewhat higher than expected. The large discrepancies are between Essex county (42.62%) and Monmouth (78.95%) Middlesex (90.91%) and Mercer (61.11%) all on substantial numbers of cases. Table 10 verifies that although the proportion of cases declared capital in Essex is low (42.62%) Essex county nonetheless accounts for the largest per cent of all cases declared capital, 16.88%. Again, this is no contradiction. Essex county simply has lots of homicides, enough for many to be prosecuted capitally while a large proportion are not. Similarly, Table B11 confirms that Essex county has the largest share of death verdicts, 20%. The death sentencing rate by county shows large variation, but juries in the urban counties are more likely to return death verdicts, Camden at 54.55% and Essex at 43.75%, in comparison to Middlesex at 28.57% and Monmouth at 27.27%. This calls into question the belief that urban juries will not sentence to death. The suburban counties have a lower death sentencing rate. Experience with a longer time period and a larger number of cases should clarify these relationships.

An alternative, which can be explored in the future, is to create a composite variable, consisting of a constellation of factors which together categorize the prototypical urban case. This variable could be built around circumstances such as the following: age of defendant and victim (if the defendant and the victim were teenagers, or both between the ages of 16 and 21), if drugs or alcohol were involved in the offense; whether the victim and offender were acquaintances, and if there was a sexual relationship, including marriage; whether the homicide occurred in the street and was accompanied by a minor robbery, and whether the victim and/or defendant were nonwhite. The hypothesis would be that the combination of these factors made it *less* likely that the prosecutor would seek the death penalty. Ideally, these factors should be built into the construction of a variable, for they may be relevant to decision making in the criminal justice system. The judgments which would have to be made regarding the relative weight of various factors would be no more complicated than the decisions prosecutors make every time a capital prosecution is initiated.

Race and county analyzed together might capture some of this effect. Adding the urban character of the county to the other variables might isolate the circumstances under which the race effect occurs. Race is a variable of interest because race effects have traditionally triggered special interest, or in technical terms, a higher level of scrutiny by reviewing courts in capital cases. If race analyzed in conjunction with the urban character of a county identified a statistically significant effect, at least that would be a beginning for identifying a possible source of race related bias in the system. Whether the

defendant was Black and from an urban jurisdiction is expected to point in the direction of making the case less likely to go to trial, less likely to be designated capital, and less likely to result in a death sentence. A small statistically significant effect in that direction was observed.

## VII. Distribution of Race of Defendant and Victim Across All Potentially Death Possible and Death Eligible Homicides

The data set of 1372 cases only distinguishes between White defendants, Black defendants and all others. It does not include data on race of victim, except for the subset of death eligible cases. The majority of murders are intra-racial in this data set, which is consistent with research in other jurisdictions and with prior work in New Jersey.[607]

Slightly more than half of all murder cases statewide (709 cases, 51.7%) are reported as Black defendant cases. White defendants comprise 33.2% of all cases and all others or missing make up a total 15.1%.[608] Five of the six counties with urban centers (Essex, Camden, Hudson, Passaic and Union) accounted for 73.6% of all cases involving Black defendants, with Essex County alone accounting for over 40% of all Black defendant cases. Mercer County accounted for an additional 6.2% of all Black defendant cases. Black defendant cases were overwhelmingly urban cases.[609]

White defendant cases were more evenly distributed across the state. No single county accounted for more than 15% of all White defendant homicides. The urban counties of Essex and Hudson together accounted for 25.7% of all White defendant murders (12.5% and 13.2%, respectively). Passaic and Camden (9.7% and 6.8%, respectively) were followed by Atlantic, Bergen, and Monmouth, which were the only other counties with more than 5% of all White defendant cases.

The difference between the distribution of Black defendant murder cases and the White defendant murder cases is that the Black defendant, and presumably the Black victim murder cases, are overwhelmingly located in the five counties with the economically depressed large urban centers.[610] The White defendant, and presumably White victim murders, are spread throughout the state as a whole;

607 *See infra* table B2; *see also* Bienen et al., *supra* note 550, at 176-77 tbl.6.
608 *See infra* table B2.
609 *Id.*
610 *Id.*

counties with a large number of murders have a large number of cases with both Black and White defendants. These are the counties which would be expected to have high rates of capital prosecution.

Looking at the proportion of murder cases which have Black or White defendants by county, the following trend emerges: the six counties with urban centers have a large proportion of their murders being Black defendant cases: Essex County, 72.5% of all cases being Black defendant cases; Camden, 61.4%; and Union, 52.0%; and Mercer, 67.7%. But other counties have a large proportion of Black defendant cases as well: Atlantic has 57.8% of all murders involving Black defendants; and Burlington, Cape May, and Passaic counties all have over 40% of all of their cases involving Black defendants.[611]

The counties which have more than half of their murder cases involving White defendants are: Bergen, Cumberland, Gloucester, Hunterdon, Morris, Ocean, Sussex, and Warren, with both Middlesex and Somerset being at exactly 50%. The largest numbers of White defendants are Essex, Camden and Hudson counties, although these counties have the smallest proportion of White defendants.[612] Again, there is no contradiction here.

These racial juxtapositions must be placed in a context in which murder cases are screened for seriousness and death eligibility.[613] If the majority of murders in Essex County, for example, are unintentional murders, or felony murder charges involving non-slayer participants—neither of which are eligible for capital prosecution in New Jersey—then the fact that so many Black defendant murders occur in Essex county or in urban counties is irrelevant to the capital prosecution rate. If that were the case, then no legally relevant implication could be drawn from the seemingly large racial discrepancy.[614]

## VIII. Capital Case Progression by Race of Defendant and Victim

The distribution of cases by race of defendant and victim for 264 death possible cases is set out in Table B13. Death possible cases are almost equally divided between White victim cases and Black victim cases.[615]

White victim cases are much more likely to progress to the next capital case processing stage. Almost three quarters of the White vic-

611 *Id.*
612 *Id.*
613 *See infra* table B5.
614 *See infra* table B6.
615 *See infra* table B13.

tim cases were declared capital, 70.94%, in comparison to about half of the Black victim cases, 49.07%.[616] A similar but smaller discrepancy exists for the next stage, but not for the final stage. The same sets of relationships are set out for race of defendant in Table B15. The discrepancies are generally smaller than for race of victim. A similar discrepancy for the likelihood of a case progressing through the system is observed in Table B16. White defendant cases have a 71.76% chance of being declared capital, while Black defendant cases have only a 50.69% chance. Similar, but smaller discrepancies exist for the likelihood of being sentenced to death, once a case reaches penalty phase. Few cases result in a capital prosecution and fewer still in a death verdict. The question is, what are the selection criteria?

These simple progressions and proportions suggest that the capital case processing system is not neutral with regard to race of the defendant or victim, or the geographic location of the homicide. All these discrepancies raise the possibility of constitutional issues.

## CONCLUSION

Whether or not a potentially death eligible capital case was selected to be prosecuted as a capital case is likely to be influenced by the economic health and viability of the county and its judicial system, as well as by the seriousness or aggravation level of the offense. These factors may influence prosecutorial decision making, especially if prosecutors must select cases for capital prosection on basis of a triage system.

The racial implications of this analysis are not trivial. Those urban centers identified as distressed in the 1988 New Jersey Master Plan are disproportionately Black and Hispanic, while the relatively more prosperous, nonurban counties are overwhelmingly White and upper income. The nonurban counties can prosecute every death possible case capitally.

This research offers support for the hypothesis that there are two criminal justice systems within the state. One criminal justice system operates within the distressed urban centers and that criminal justice system is characterized by a crowded docket, a large number of homicides, and other familiar characteristics of social stress. These systems have courts with large backlogs, prosecutors and defense attorneys with extremely high caseloads, and bureaucratic and budgetary constraints upon the police and prosecutorial agencies.[617] The concen-

616 *See infra* table B14.

617 During the period in question an important distinction existed between the manner in which public defenders and prosecutors funded capital cases. The county prosecutors'

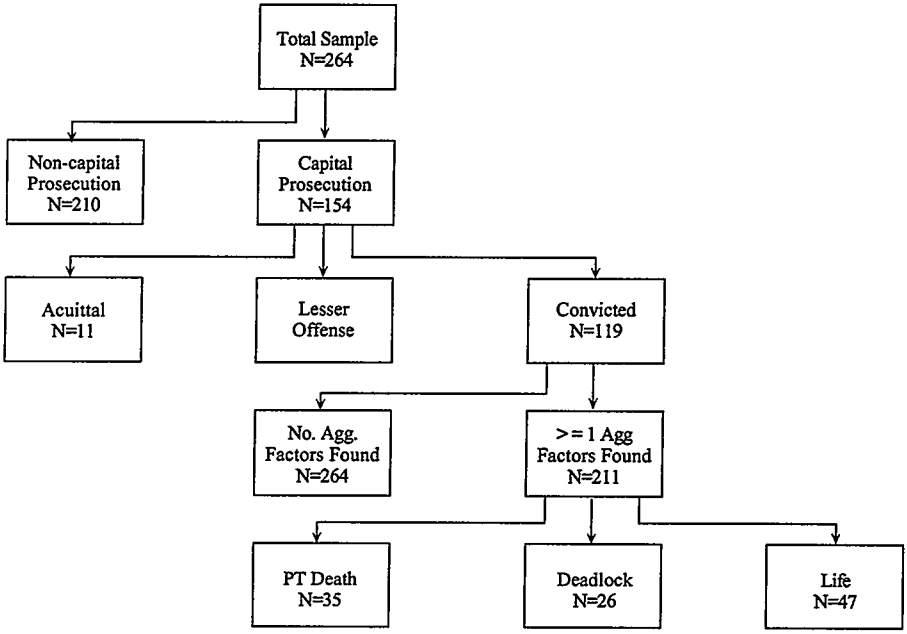
tration of questionable or ambiguous cases in the urban jurisdictions supports this hypothesis. These counties do not have the resources to find out whether a substantial number of their cases are death eligible. They necessarily prosecute a small proportion of their capital cases. The other criminal justice system is characterized by greater resources, the availability of investigators, budgets that allow the staff to investigate a large proportion of potentially capital prosecutions, and the support and encouragement of the community to do so. If the existence of such different norms in decision making were to be documented, it would be relevant to constitutional arguments concerning geographical and racial disparities in capital case processing. As a matter of passive public policy, homicides in the urban jurisdictions are downgraded. Or, to express the matter differently, the loss of lives in these communities is not treated as if it has the same social value as the loss of the life of a victim from a relatively more prosperous community.

This analysis suggests a methodological approach to this issue and outlines how a factual basis would be established to prepare for a legal analysis of such data. This and any more elaborate and rigorous analysis is dependent first upon an accurate and comprehensive data collection effort identifying all of the cases and their relevant characteristics. The initial investigation of the facts of cases is probably the most important part of the enterprise, the one without which any sort of systematic legal analysis is impossible. Any attempt to understand race and socio-economic influences upon capital case processing cannot proceed without a firm factual foundation. Once such a factual basis is established, many hypotheses can be investigated.

The Proportionality Review Project of the Supreme Court of New Jersey demonstrated that a motivated court could responsibly institutionalize such data collection. The reward for such an effort will be the court's confidence that its constitutional rulings rest on a solid factual basis.

budgets were set by the county. The public defender budget for capital cases was funded by the central administration, and that central administration did not put a cap on the amount of money which could be expended on any capital defense. Indeed, it was the position of the Office of the Public Defender that it would have been unconstitutional to do so. Another important institutional difference between the prosecution and defense is that the defense is always in the position of responding to the county prosecutor's unilateral decision to declare a case capital in almost all instances.

FIGURE B1
CASE FLOW THROUGH NEW JERSEY'S CAPITAL CHARGING AND SENTENCING SYSTEM




Source: H. Weisberg "Proportionality Review of Death Sentences in New Jersey" (Attorney General's Report 1991, on file with State Data Collection, Northwestern University School of Law Library).

TABLE B1
DISTRIBUTION OF CASES BY YEAR AND COUNTY[a]

| Year of Offense / County[b] | 1982[c] | 1983 | 1984 | 1985 | 1986 | 1987 | 1988 | 1989 | 1990[d] | Row Total |
|---|---|---|---|---|---|---|---|---|---|---|
| Atlantic | 14 | 4 | 13 | 7 | 8 | 9 | 4 | 4 | 1 | 64 |
| Bergen | 4 | 7 | 9 | 6 | 7 | 6 | 7 | 2 | 0 | 48 |
| Burlington | 2 | 3 | 7 | 7 | 3 | 9 | 7 | 2 | 0 | 40 |
| Camden | 15 | 20 | 21 | 17 | 23 | 14 | 22 | 5 | 3 | 140 |
| Cape May | 0 | 3 | 2 | 1 | 1 | 1 | 2 | 1 | 0 | 11 |
| Cumberland | 5 | 2 | 8 | 4 | 8 | 0 | 2 | 0 | 2 | 31 |
| Essex | 21 | 65 | 55 | 56 | 54 | 39 | 47 | 32 | 24 | 393 |
| Gloucester | 4 | 4 | 3 | 8 | 2 | 5 | 0 | 1 | 1 | 28 |
| Hudson | 14 | 35 | 35 | 17 | 17 | 19 | 14 | 6 | 2 | 159 |
| Hunterdon | 0 | 2 | 3 | 0 | 4 | 0 | 1 | 0 | 0 | 10 |
| Mercer | 2 | 13 | 11 | 7 | 9 | 13 | 7 | 1 | 2 | 65 |
| Middlesex | 2 | 6 | 6 | 12 | 7 | 8 | 5 | 3 | 1 | 50 |
| Monmouth | 6 | 13 | 10 | 7 | 6 | 11 | 3 | 1 | 1 | 58 |
| Morris | 7 | 5 | 4 | 2 | 2 | 4 | 4 | 2 | 0 | 30 |
| Ocean | 2 | 10 | 8 | 3 | 0 | 0 | 0 | 2 | 2 | 27 |
| Passaic | 7 | 16 | 25 | 16 | 13 | 14 | 8 | 6 | 1 | 106 |
| Salem | 2 | 0 | 1 | 2 | 0 | 0 | 3 | 1 | 1 | 10 |
| Somerset | 1 | 2 | 4 | 1 | 2 | 2 | 0 | 0 | 0 | 12 |
| Sussex | 0 | 4 | 0 | 1 | 2 | 0 | 1 | 0 | 0 | 8 |
| Union | 6 | 11 | 8 | 14 | 14 | 5 | 8 | 5 | 2 | 73 |
| Warren | 1 | 1 | 0 | 0 | 4 | 1 | 2 | 0 | 0 | 9 |
| Column Total | 116 | 226 | 223 | 189 | 187 | 160 | 147 | 74 | 40 | 1372 |

[a] Source: New Jersey Proportionality Review Project Screened Data File (1992).
[b] Three cases were initially listed with an unknown county of conviction in the data base. In all these cases county was identified: Biegenwald II (1982) (Monmouth); Manfredonia (1985) (Morris); and Pennington (Bergen) (1986). These three cases were then placed in the appropriate cells.
[c] Figures for 1982 include only those cases where the homicide occurred after August 6, 1982, the effective date of reimposition of capital punishment.
[d] Figures for 1990 include two cases listed as 78 and 80, which are presumably coding errors, and 12 cases where the exact date of offense was missing. These cases were combined with the available data for 1990. The figures for 1990 are necessarily incomplete, as are the figures for 1988 and 1989 for some counties. Homicide cases typically take two years to final disposition.

## TABLE B2
## RACE OF DEFENDANT BY COUNTY

| Race of Defendant / County | White Defendants N | Per cent of all White Defendants Col. (%) | Per cent of all Defendants in County Row (%) | Black Defendants N | Per cent of all Black Defendants Col. (%) | Per cent of all Defendants in County Row (%) | All Defendants in County N |
|---|---|---|---|---|---|---|---|
| Atlantic | 25 | (5.48) | (39.06) | 37 | (5.22) | (57.81) | 64 |
| Bergen | 26 | (5.7) | (55.32) | 16 | (2.26) | (34.04) | 47 |
| Burlington | 18 | (3.95) | (45.00) | 18 | (2.54) | (45.00) | 40 |
| Camden | 31 | (6.80) | (22.14) | 86 | (12.13) | (61.43) | 140 |
| Cape May | 4 | (0.88) | (36.36) | 5 | (0.71) | (45.45) | 11 |
| Cumberland | 21 | (4.61) | (67.74) | 3 | (0.42) | (9.68) | 31 |
| Essex | 57 | (12.5) | (14.50) | 285 | (40.2) | (72.52) | 393 |
| Gloucester | 19 | (4.17) | (67.86) | 7 | (0.99) | (25.00) | 28 |
| Hudson | 60 | (4.37) | (37.74) | 70 | (9.87) | (44.03) | 159 |
| Hunterdon | 6 | (1.32) | (60.00) | 2 | (0.28) | (20.00) | 10 |
| Mercer | 12 | (2.63) | (18.46) | 44 | (6.21) | (67.69) | 65 |
| Middlesex | 25 | (5.48) | (50.00) | 18 | (2.54) | (36.00) | 50 |
| Monmouth | 24 | (5.26) | (42.11) | 22 | (3.10) | (38.60) | 57 |
| Morris | 20 | (4.39) | (68.97) | 5 | (0.71) | (17.24) | 29 |
| Ocean | 18 | (3.95) | (66.67) | 4 | (0.56) | (14.81) | 27 |
| Passaic | 44 | (9.65) | (41.51) | 43 | (6.06) | (40.57) | 106 |
| Salem | 4 | (0.88) | (40.00) | 3 | (0.42) | (30.00) | 10 |
| Somerset | 6 | (1.32) | (50.00) | 3 | (0.42) | (25.00) | 12 |
| Sussex | 7 | (1.54) | (87.50) | 0 | (0.00) | (0.00) | 8 |
| Union | 19 | (4.17) | (26.03) | 38 | (5.36) | (52.05) | 73 |
| Warren | 9 | (1.97) | (100) | 0 | (0.00) | (0.00) | 9 |
| Total Defendants | 456 | (100.00) | | 709 | (100.00) | | [1372][a] |

[a] Of the 1372 defendants, a total of 108 were categorized as "other" race, and the data on Race of Defendant was missing for another 99 defendants. Essex County and Hudson County included the largest number of defendants classified as "other", 26 and 23 respectively; Passaic and Camden followed with 14 and 13 other, respectively. These were probably all Hispanic defendants. Essex and Camden had the largest number of "missing", 25 and 10, respectively. Both Monmouth and Union listed 9 as "missing."

TABLE B3
COUNTY DEMOGRAPHIC AND ECONOMIC CHARACTERISTICS

| County | Population (1990) | Population Density (pers/sq mi) | Unemployment Rate (1989-90) | Per Capita Income (1989) |
|---|---|---|---|---|
| Atlantic | 224,327 | 400 | 5.1 | $23,723 |
| Bergen | 825,380 | 3,525 | 2.9 | $30,967 |
| Burlington | 395,066 | 491 | 3.4 | $21,270 |
| Camden | 502,824 | 2,262 | 4.4 | $19,180 |
| Cape May | 95,089 | 373 | 6.7 | $21,406 |
| Cumberland | 138,053 | 282 | 7.2 | $15,869 |
| Essex | 778,206 | 6,164 | 5.2 | $21,873 |
| Gloucester | 230,082 | 708 | 4.4 | $18,187 |
| Hudson | 553,099 | 11,858 | 6.4 | $18,440 |
| Hunterdon | 107,776 | 251 | 2.0 | $30,301 |
| Mercer | 325,824 | 1,442 | 3.2 | $23,913 |
| Middlesex | 671,780 | 2,163 | 3.3 | $23,139 |
| Monmouth | 553,124 | 1,173 | 3.4 | $25,393 |
| Morris | 421,353 | 898 | 2.7 | $29,961 |
| Ocean | 433,203 | 681 | 4.2 | $20,844 |
| Passaic | 453,060 | 2,449 | 5.3 | $20,977 |
| Salem | 65,294 | 193 | 5.2 | $16,933 |
| Somerset | 240,279 | 789 | 2.2 | $32,469 |
| Sussex | 130,943 | 251 | 3.5 | $23,782 |
| Union | 493,819 | 4,782 | 4.4 | $25,328 |
| Warren | 91,607 | 256 | 4.3 | $21,327 |
| All New Jersey | 7,730,188 | 1,042 | 4.1 | $23,671 |

Source: U.S. Census: General Population Characteristics, New Jersey, 1990.

TABLE B4
POPULATION CHANGES BY COUNTY AND RACE, 1980-90

| | Total Population 1980 | Total Population 1990 | Per cent change 1980-1990 (%) | Black Population 1980 | Black Population 1990 | Black Population, Per cent change 1980-1990 (%) |
|---|---|---|---|---|---|---|
| Atlantic | 194,119 | 224,327 | (15.56) | 34,134 | 39,064 | (14.44) |
| Bergen | 845,385 | 825,380 | (–2.37) | 33,043 | 40,031 | (21.15) |
| Burlington | 362,542 | 395,066 | (8.97) | 45,471 | 56,545 | (24.35) |
| Camden | 471,650 | 502,824 | (6.61) | 67,232 | 81,665 | (21.47) |
| Cape May | 82,266 | 95,089 | (15.59) | 5,157 | 5,334 | (3.43) |
| Cumberland | 132,866 | 138,053 | (3.90) | 19,868 | 23,318 | (17.36) |
| Essex | 851,304 | 778,206 | (–8.59) | 316,440 | 316,262 | (–0.06) |
| Gloucester | 199,917 | 230,082 | (15.09) | 16,936 | 19,935 | (17.71) |
| Hudson | 556,972 | 553,099 | (–0.70) | 70,050 | 79,770 | (13.88) |
| Hunterdon | 87,361 | 107,776 | (23.37) | 1,123 | 2,217 | (97.42) |
| Mercer | 307,863 | 325,824 | (5.83) | 55,545 | 61,481 | (10.69) |
| Middlesex | 595,893 | 671,780 | (12.74) | 35,768 | 53,629 | (49.94) |
| Monmouth | 503,173 | 553,124 | (9.93) | 42,985 | 47,229 | (9.87) |
| Morris | 407,630 | 421,353 | (3.37) | 10,017 | 12,491 | (24.70) |
| Ocean | 346,038 | 433,203 | (25.19) | 9,439 | 12,035 | (27.50) |
| Passaic | 447,585 | 453,060 | (1.22) | 59,171 | 66,077 | (11.67) |
| Salem | 64,676 | 65,294 | (0.96) | 9,744 | 9,567 | (–1.82) |
| Somerset | 203,129 | 240,279 | (18.29) | 10,123 | 14,824 | (46.44) |
| Sussex | 116,119 | 130,943 | (12.77) | 680 | 1,242 | (82.65) |
| Union | 504,094 | 493,819 | (–2.04) | 81,207 | 92,807 | (14.28) |
| Warren | 84,429 | 91,607 | (8.50) | 933 | 1,302 | (39.55) |
| All New Jersey | 7,365,011 | 7,730,188 | (4.96) | 925,066 | 1,035,386 | (11.93) |

Source: N.J. Dept. of Labor, State Data Center, 1989, New Jersey County Data Summary 1991b. New Jersey Population Trends 1790-1990.

TABLE B5
CAPITAL CASE STATUS BY COUNTY (N = 1372)

| County | Death-Possible Cases[a] N | Per cent of total in County Row (%) | Ambiguous Cases[b] N | Per cent of total in County Row (%) | Not Death Eligible[c] N | Per cent of total in County Row (%) | Total Cases in County N |
|---|---|---|---|---|---|---|---|
| Atlantic | 16 | (25.00) | 5 | (7.81) | 43 | (67.19) | 64 |
| Bergen | 10 | (21.28) | 11 | (23.40) | 26 | (55.32) | 47 |
| Burlington | 8 | (20.00) | 6 | (15.00) | 26 | (65.00) | 40 |
| Camden | 25 | (17.86) | 34 | (24.29) | 81 | (57.86) | 140 |
| Cape May | 3 | (27.27) | 1 | (9.09) | 7 | (63.64) | 11 |
| Cumberland | 0 | (0.00) | 10 | (32.26) | 21 | (67.74) | 31 |
| Essex | 53 | (13.49) | 79 | (20.10) | 261 | (66.41) | 393 |
| Gloucester | 6 | (21.43) | 4 | (14.29) | 18 | (64.29) | 28 |
| Hudson | 15 | (9.43) | 21 | (13.21) | 123 | (77.36) | 159 |
| Hunterdon | 1 | (10.00) | 3 | (30.00) | 6 | (60.00) | 10 |
| Mercer | 16 | (24.62) | 11 | (16.92) | 38 | (58.46) | 65 |
| Middlesex | 8 | (16.00) | 9 | (18.00) | 33 | (66.00) | 50 |
| Monmouth | 14 | (24.56) | 8 | (14.04) | 35 | (61.40) | 57 |
| Morris | 7 | (24.14) | 7 | (24.14) | 15 | (51.72) | 29 |
| Ocean | 7 | (25.93) | 2 | (7.41) | 18 | (66.67) | 27 |
| Passaic | 14 | (13.21) | 21 | (19.81) | 71 | (66.98) | 106 |
| Salem | 1 | (10.00) | 2 | (20.00) | 7 | (70.00) | 10 |
| Somerset | 3 | (25.00) | 1 | (8.33) | 8 | (66.67) | 12 |
| Sussex | 3 | (37.50) | 1 | (12.50) | 4 | (50.00) | 8 |
| Union | 16 | (21.92) | 14 | (19.18) | 43 | (58.90) | 73 |
| Warren | 2 | (22.22) | 0 | 0.00 | 7 | (77.78) | 9 |
| Total | 231 | | 250 | | 891 | | 1372 |

[a] Death Possible cases have a factual basis for capital prosecution. In the Proportionality Review Project Final Report these are the cases labelled "clearly in".
[b] Ambiguous cases are those designated as Category 2 by the Proportionality Review Project. These are cases in which there is not enough information to determine whether or not there is a factual basis for capital prosecution.
[c] Not Death Eligible cases are those termed "clearly out" by the Proportionality Review Project. These are cases where there was no factual basis for capital prosecution. These included cases by non-slayer participants in felony murders.

TABLE B6
URBAN/NONURBAN STATUS OF CAPITAL CASES
BY CASE CATEGORY[a] (N = 1372)

| Death Possible Cases[b] | N | (%) |
|---|---|---|
| Urban[c] | 139 | (60.17) |
| NonUrban | 89 | (38.53) |
| Total | 231 | (100.0) |
| Ambiguous Cases[d] | | |
| Urban | 180 | (72.0) |
| NonUrban | 70 | (28.0) |
| Total | 250 | (100.0) |
| Not Death Eligible[e] | | |
| Urban | 617 | (69.25) |
| NonUrban | 274 | (30.75) |
| Total | 891 | (100.0) |

[a] Three cases were missing data on Urban/Nonurban.
[b] Death Possible cases have a factual basis for capital prosecution. In the Proportionality Review Project Final Report these are the cases labelled "clearly in".
[c] Urban cases are from Camden, Essex, Hudson, Mercer, Passaic and Union counties.
[d] Ambiguous cases are those designated as Category 2 by the Proportionality Review Project. These are cases in which there is not enough information to determine whether or not there is a factual basis for capital prosecution.
[e] Not Death Eligible cases are those termed "clearly out" by the Proportionality Review Project. These are cases where there was no factual basis for capital prosecution. These included cases by non-slayer participants in felony murders.

TABLE B7
CAPITAL CASE STATUS, PER CENT OF ALL
URBAN/NONURBAN (N = 1372)[a]

| Capital Case Status | Urban[b] Col. % (N) | NonUrban Col. % (N) |
|---|---|---|
| Death Possible[c] | 14.85 (139) | 20.55 (89) |
| Ambiguous[d] | 19.23 (180) | 16.17 (70) |
| Not Death Eligible[e] | 65.92 (617) | 63.28 (274) |
| Total | 100.0 (936) | 100.0 (433) |

[a] Three cases are missing data on Urban/Nonurban status.
[b] Urban cases are from Camden, Essex, Hudson, Mercer, Passaic and Union counties.
[c] Death Possible cases have a factual basis for capital prosecution. In the Proportionality Review Project Final Report these are the cases labelled "clearly in".
[d] Ambiguous cases are those designated as Category 2 by the Proportionality Review Project. These are cases in which there is not enough information to determine whether or not there is a factual basis for capital prosecution.
[e] Not Death Eligible cases are those termed "clearly out" by the Proportionality Review Project. These are cases where there was no factual basis for capital prosecution. These included cases by non-slayer participants in felony murders.

TABLE B8
CAPITAL CASE STATUS, BY URBAN/NONURBAN,
COLUMN PERCENTAGES (N = 264)

| | Death Possible[a] % (N) | Death Eligible[b] % (N) | Penalty Phase[c] % (N) | Death Verdict[d] % (N) |
|---|---|---|---|---|
| Urban | 59.85 (158) | 50.0 (77) | 52.94 (56) | 45.71 (16) |
| NonUrban | 40.15 (106) | 50.0 (77) | 47.06 (63) | 54.29 (19) |
| Total | 100.0 (264) | 100.0 (154) | 100.0 (119) | 100.0 (35) |

[a] Death Possible cases have a factual basis for capital prosecution.
[b] Death Eligible cases are those prosecuted as capital cases (Notice of Factors served).
[c] Penalty phase cases reached the second stage of a capital trial, the penalty phase.
[d] Death verdict cases had a death sentence imposed at the penalty phase.

TABLE B9
CAPITAL CASE PROGRESSION, BY URBAN/NONURBAN, ROW PERCENTAGES (N = 264)

| | Death Possible[a] % (N) | Death Eligible[b] % (N) | Penalty Phase[c] % (N) | Death Verdict[d] % (N) |
|---|---|---|---|---|
| Urban | 100.0 (158) | 48.73 (77) | 72.72 (56) | 28.57 (16) |
| NonUrban | 100.0 (106) | 72.64 (77) | 81.82 (63) | 30.16 (19) |
| Total | 100.0 (264) | 58.33 (154) | 77.27 (119) | 29.41 (35) |

[a] Death Possible cases have a factual basis for capital prosecution.
[b] Death Eligible cases are those prosecuted as capital cases (Notice of Factors served).
[c] Penalty phase cases reached the second stage of a capital trial, the penalty phase.
[d] Death verdict cases are those where a death sentence was imposed at the penalty phase.

TABLE B10
DEATH ELIGIBILITY STATUS, BY COUNTY, NUMBER AND PERCENTAGES (N = 264)

| | Death Possible Cases[a] N | Death Eligible Cases[b] N | Death Eligible / Death Possible Col. 1/Col. 2 (%) | Per cent of total Death Eligible Col. (%) |
|---|---|---|---|---|
| Atlantic | 16 | 9 | (56.25) | (5.84) |
| Bergan | 13 | 9 | (69.23) | (5.84) |
| Burlington | 9 | 5 | (55.56) | (3.25) |
| Camden | 26 | 12 | (46.15) | (7.79) |
| Cape May | 3 | 1 | (33.33) | (0.65) |
| Essex | 61 | 26 | (42.62) | (16.88) |
| Gloucester | 6 | 4 | (66.67) | (2.60) |
| Hudson | 19 | 10 | (52.63) | (6.49) |
| Hunterdon | 1 | 1 | (100.00) | (0.65) |
| Mercer | 18 | 11 | (61.11) | (7.14) |
| Middlesex | 11 | 10 | (90.91) | (6.49) |
| Monmouth | 19 | 15 | (78.95) | (9.74) |
| Morris | 9 | 7 | (77.78) | (4.55) |
| Ocean | 8 | 8 | (100.00) | (5.19) |
| Passaic | 14 | 7 | (50.00) | (4.55) |
| Salem | 1 | 1 | (100.00) | (0.65) |
| Somerset | 4 | 3 | (75.00) | (1.95) |
| Sussex | 3 | 1 | (33.33) | (0.65) |
| Union | 20 | 11 | (55.00) | (7.14) |
| Warren | 3 | 3 | (100.00) | (1.95) |
| Total New Jersey | 264 | 154 | (58.33) | (100.0) |

[a] Death Possible cases have a factual basis for capital prosecution.
[b] Death Eligible cases are those prosecuted as capital cases (Notice of Factors served).

TABLE B11
PENALTY TRIALS AND DEATH VERDICTS, BY COUNTY, NUMBER AND PERCENTAGES (N = 119)[a]

| State | Penalty Trials N | Death Verdicts N | Death Verdicts / Penalty Trials Col. 2/Col. 1 | Death Verdicts, % of Total Death Verdicts Col. % |
|---|---|---|---|---|
| Atlantic | 8 | 3 | (37.50) | (8.57) |
| Bergan | 7 | 2 | (28.57) | (5.71) |
| Burlington | 4 | 2 | (50.00) | (5.71) |
| Camden | 11 | 6 | (54.55) | (17.14) |
| Cape May | 1 | 0 | (0.00) | (0.00) |
| Essex | 16 | 7 | (43.75) | (20.00) |
| Gloucester | 4 | 2 | (50.00) | (5.71) |
| Hudson | 7 | 0 | (0.00) | (0.00) |
| Hunterdon | 1 | 0 | (0.00) | (0.00) |
| Mercer | 8 | 2 | (25.00) | (5.71) |
| Middlesex | 7 | 2 | (28.57) | (5.71) |
| Monmouth | 11 | 3 | (27.27) | (8.57) |
| Morris | 6 | 1 | (16.67) | (2.86) |
| Ocean | 7 | 3 | (42.86) | (8.57) |
| Passaic | 7 | 1 | (14.29) | (2.86) |
| Salem | 1 | 0 | (0.00) | (0.00) |
| Somerset | 2 | 0 | (0.00) | (0.00) |
| Sussex | 1 | 0 | (0.00) | (0.00) |
| Union | 7 | 0 | (0.00) | (0.00) |
| Warren | 3 | 1 | (33.33) | (2.86) |
| Total | 119 | 35 | (29.41) | (100.0) |

[a] 119 cases of the 264 Death Possible cases went to penalty trial, with 35 death sentences imposed.

TABLE B12
RACE OF VICTIM, BY RACE OF DEFENDANT DEATH POSSIBLE CASES[a] (N = 264)[b]

| | Defendant Race White N (%) | Defendant Race Black N (%) | Defendant Race Hispanic and Other[c] N (%) | Total Percent of Total Cases |
|---|---|---|---|---|
| Victim Race White | 75 (28.41) | 33 (12.50) | 9 (3.41) | 117 (44.32) |
| Victim Race Black | 2 (0.76) | 101 (38.26) | 5 (1.89) | 108 (40.91) |
| Victim Race Hispanic and Other | 8 (3.03) | 10 (3.79) | 21 (7.96) | 39 (14.77) |
| Total Cases | 85 | 144 | 35 | 264 |
| Per cent of Total Cases | (32.20) | (54.55) | (12.50) | (100.00) |

[a] Death Possible cases have a factual basis for capital prosecution.
[b] Data on race of victim not available for N = 1372.
[c] Eight cases were coded "other" on either race of defendant or victim.

TABLE B13
CAPITAL CASE STATUS, BY RACE OF VICTIM,
COLUMN PERCENTAGES (N = 264)[a]

| | Death Possible[b] % (N) | Death Eligible[c] % (N) | Penalty Phase[d] % (N) | Death Verdict[e] % (N) |
|---|---|---|---|---|
| White Victim | 44.32 | 53.90 | 57.98 | 57.14 |
| | (117) | (83) | (69) | (20) |
| Black Victim | 40.91 | 34.42 | 30.25 | 37.14 |
| | (108) | (53) | (36) | (13) |
| Hispanic & Other[f] | 13.26 | 11.69 | 11.76 | 5.76 |
| | (39) | (18) | (14) | (2) |
| Total | 100.0 | 100.0 | 100.0 | 100.0 |
| | (264) | (154) | (119) | (35) |

[a] Data on race of victim not available for N = 1372.
[b] cases have a factual basis for capital prosecution.
[c] Death Eligible cases are those prosecuted as capital cases (Notice of Factors served).
[d] Penalty phase cases reached the second stage of a capital trial, the penalty phase.
[e] Death verdict cases had a death sentence imposed at the penalty phase.
[f] Eight cases were coded "other".

TABLE B14
CAPITAL CASE PROGRESSION, BY RACE OF VICTIM, ROW PERCENTAGES (N = 264)

| | Death Possible[a] % (N) | Death Eligible[b] % (N) | Penalty Phase[c] % (N) | Death Verdict[d] % (N) |
|---|---|---|---|---|
| White Victim | 100.0 (117) | 70.94 (83) | 83.13 (69) | 28.99 (20) |
| Black Victim | 100.0 (108) | 49.07 (53) | 67.92 (36) | 36.11 (13) |
| Hispanic & Other[e] | 100.0 (39) | 46.15 (18) | 77.78 (14) | 14.29 (2) |
| Total | 100.0 (264) | 58.33 (154) | 77.27 (119) | 29.41 (35) |

[a] Death Possible cases have a factual basis for capital prosecution.
[b] Death Eligible cases are those prosecuted as capital cases (Notice of Factors served).
[c] Penalty phase cases reached the second stage of a capital trial, the penalty phase.
[d] Death Verdict cases had a death sentence imposed at the penalty phase.
[e] Includes eight cases coded "other" race.

## TABLE B15
## CAPITAL CASE STATUS, BY RACE OF DEFENDANT, COLUMN PERCENTAGES

| Race of Defendant | All Cases % (N) | Death Possible[a] % (N) | Death Eligible[b] % (N) | Penalty Phase[c] % (N) | Death Verdict[d] % (N) |
|---|---|---|---|---|---|
| White | 33.24 (456) | 32.20 (85) | 39.61 (61) | 42.02 (50) | 45.71 (16) |
| Black | 51.68 (709) | 54.55 (144) | 47.40 (73) | 46.22 (55) | 51.43 (18) |
| Hispanic & Other[e] | 15.08 (207) | 12.50 (33) | 12.99 (20) | 11.76 (14) | 2.86 (1) |
| Total | 100.00 (1372) | 100.00 (264) | 100.00 (154) | 100.00 (119) | 100.00 (35) |

[a] Death Possible cases have a factual basis for capital prosecution.
[b] Death Eligible cases are those prosecuted as capital cases (Notice of Factors served).
[c] Penalty phase cases reached the second stage of a capital trial, the penalty phase.
[d] Death Verdict cases had a death sentence imposed at the penalty phase.
[e] Includes two cases coded "other" race.

TABLE B16
CAPITAL CASE PROGRESSION, BY RACE OF DEFENDANT,
ROW PERCENTAGES

| Race of Defendant | All Cases % (N) | Death Possible[a] % (N) | Death Eligible[b] % (N) | Penalty Phase[c] % (N) | Death Verdict[d] % (N) |
|---|---|---|---|---|---|
| White | 100.0 (456) | 18.64 (85) | 71.76 (61) | 81.97 (50) | 32.00 (16) |
| Black | 100.0 (709) | 20.31 (144) | 50.69 (73) | 74.34 (55) | 32.73 (18) |
| Hispanic & Other[e] | 100.0 (207) | 15.94 (33) | 60.61 (20) | 70.00 (14) | 7.14 (1) |
| Total | 100.0 (1372) | 19.24 (264) | 58.33 (154) | 77.27 (119) | 29.41 (35) |

[a] Death Possible cases have a factual basis for capital prosecution.
[b] Death Eligible cases are those prosecuted as capital cases (Notice of Factors served).
[c] Penalty phase cases reached the second stage of a capital trial, the penalty phase.
[d] Death Verdict cases had a death sentence imposed at the penalty phase.
[e] Includes two cases coded "other" race.

## TABLE B17
## DEATH SENTENCES IN NEW JERSEY BY DATE IMPOSED, COUNTY OF DISPOSITION, RACE OF DEFENDANT AND VICTIM, AND STATUS ON APPEAL

| Name of Defendant | Date Death Sentance Imposed | County | Race of Defendant and Victim | Date Death Sentance Reversed |
|---|---|---|---|---|
| Thomas Ramseur | 5/17/83 | Essex | B/B | 3/15/87 |
| Richard Biegenwald | 12/8/83 | Monmouth | W/W | 3/5/87 |
| Marko Bey | 12/15/83 | Monmouth | B/B | 8/2/88 |
| James Williams | 2/11/84 | Mercer | B/B | 12/8/88 |
| James Hunt | 2/21/84 | Camden | B/B | 6/9/89 |
| Walter Gerald | 5/19/84 | Atlantic | B/W | 10/25/88 |
| James Zola | 6/6/84 | Mercer | W/W | 10/7/88 |
| Benjamin Lodato | 7/13/84 | Ocean | W/W | 4/15/87 |
| Marko Bey | 9/28/84 | Monmouth | B/B | 8/2/88 |
| James Koedatich | 10/30/84 | Morris | W/O(code W) | 8/3/88 |
| Marie Moore | 11/19/84 | Passaic | W/W | 10/26/88 |
| Roy Savage | 1/28/85 | Essex | B/B | 7/19/90 |
| Darryl Pitts | 2/22/85 | Camden | W/W | 6/21/89 |
| Bryan Coyle | 3/19/85 | Middlesex | W/W | 6/11/90 |
| Steven Davis | 5/10/85 | Atlantic | W/W | 8/3/89 |
| Teddy Rose | 6/12/85 | Essex | W/W | 10/22/88 |
| Walter Johnson | 8/16/85 | Gloucester | W/W | 7/19/90 |
| Ronald Long | 10/24/85 | Atlantic | B/W | 6/2/90 |
| Robert Marshall | 3/5/86 | Ocean | W/W | [7/28/92]* |
| Walter Oglesby | 3/18/86 | Camden | B/B | 1/23/91 |
| Anthony McDougald | 4/4/86 | Essex | B/B | 7/12/90 |
| James Clausell | 4/21/86 | Burlington | B/B | 8/30/90 |
| Nathaniel Harvey | 10/17/86 | Middlesex | B/W | 10/18/90 |
| Jacinto Hightower | 11/10/86 | Burlington | B/W | 7/12/90 |
| Phillip Dixon | 2/3/87 | Camden | B/B | 7/25/91 |
| Kevin Jackson | 2/7/87 | Ocean | B/W | 4/18/90 |
| Raymond Kise | 3/13/87 | Warren | W/W | 4/15/87 |
| Arthur Perry | 5/22/87 | Camden | B/B | 5/20/91 |
| Dominic Sehiavo | 5/28/87 | Gloucester | W/W | 5/2/89 |
| Frank Pennington | 6/15/87 | Bergen | W/W | 6/21/90 |
| Samuel Moore | 6/30/87 | Essex | B/B | 1/23/91 |
| Samuel Erazo | 10/21/87 | Essex | H/H | 8/8/91 |
| Anthony Difrisco | 1/25/88 | Essex | W/W | 3/12/90 |
| Marko Bey | 9/11/90 | Monmouth | B/B | [6/30/94]* |
| John Martini | 12/12/90 | Bergen | W/W | [12/21/94]* |
| Bobby Lee Brown | 1/14/93 | Warren | B/W | 12/21/94 |
| Anthony DiFrisco | 2/5/93 | Essex | W/W | [7/26/95]* |
| Rigoberto Mejia | 5/25/93 | Monmouth | H/H | 7/12/95 |
| Joseph Harris | 5/28/93 | Morris | B/W | PPR |
| Jacinto Hightower | 11/2/94 | Burlington | B/W | 8/8/96 |
| Donald Loftin | 12/6/94 | Mercer | B/W | PPR |
| Nathaniel Harvey | 12/16/94 | Middlesex | B/W | PDA |
| David Cooper | 5/17/95 | Monmouth | B/B | PDA |
| John Chew | 6/22/95 | Middlesex | W/W | PDA |
| Ambrose Harris | 3/1/96 | Mercer | B/W | PDA |
| Richard Feaster | 3/27/96 | Gloucester | W/W | PDA |
| Joseph Harris | 5/24/96 | Bergen | B/W | PDA |
| Robert Morton | 6/26/96 | Burlington | B/W | PDA |

PPR = Pending decision on Proportionality Review as of 9/1/96. PDA = Pending decision on direct appeal as of 9/1/96.
* = [sentence affirmed]
As of 9/1/96 48 death sentences have been imposed and 35 have been vacated. Four death sentences have been affirmed after proportionality review: Robert Marshall, Marko Bey, John Martini, and Anthony DiFrisco.

## APPENDIX C

MEMO: PREJUDICIAL FACTORS DEATH IN SENTENCING

ORDER OF THE SUPREME COURT OF NEW JERSEY: *STATE V. DONALD LOFTIN*

The following are two recent New Jersey Supreme Court documents relating to proportionality review. The first is an internal memo produced for the *Harris* case, and the second is an Order of the Court in the *Loftin* case.

MEMO

To: John P. McCarthy, Jr.[618]
From: David Weisburd[619]
Re: Prejudicial Factors Death in Sentencing
Date: December 20, 1995

The issue of prejudicial factors has been raised from the outset in proportionality review in New Jersey. In particular, the possibility of race bias in death sentencing has been discussed and analyzed in work conducted by David Baldus and his colleagues acting as Special Master for the court. While early results suggested some race bias, they did not hold stable across later analyses (see Martini, Difrisco). Moreover, the overall instability of the models developed by the Special Master (as evidenced in the failure of these analyses to converge in logistic regression and "jumbo" coefficients for specific measures—see Appendix 9, Marshall), raised doubt as to the level of confidence that could be placed in specific outcomes of their analysis.

With the Harris case, a new set of circumstances has arisen which raises renewed questions regarding prejudicial factors in death sentencing in New Jersey. First, the increased sample size available for the prejudicial factors. Second, both race and the revised high status factor (see Memo, "Revisions in Social Status Measures") achieve statistical significance in specific schedules provided to the court (for race, see schedules 2, 5; for status, see schedule 2,8).

Because of the special sensitivity of these questions, the Assistant Director of the AOC (Criminal Practice) John McCarthy, Jr., requested a preliminary review of the nature and impact of four specific prejudicial factors: race of defendant, race of victim, status of victim and status of defendant. Below, the impacts of these factors are ex-

618 John P. McCarthy is the Assistant Director, Criminal Practice Division of the Administrative Office of the Courts. Requests for the analyses and models in other proportionality reviews should be directed to the Administrative Office of the Courts, Trenton, N.J.

619 David Weisburd is an associate professor at the Institute of Criminology, Hebrew University, Jerussalem, and is a consultant to the Supreme Court of New Jersey.

amined individually and in a simple additive prejudicial measure.

## THE IMPACT OF INDIVIDUAL FACTORS

### *1. Race of Defendant*

Race of defendant achieves statistical significance at the .05 level in two (schedules 2 and 5) of the three schedules that include race that achieve convergence in the Harris case (schedule 11 did not converge). In schedule 8 the impact of race is in the prejudicial direction, but does not achieve statistical significance (p=.112). The coefficients and significance levels of the race measure for models 2 and 5 are listed below. To gain an overall sense of the magnitude of the effect of race, the probability of receiving a death sentence (based on the logistic models) for blacks is calculated assuming that the defendant would otherwise have a 50/50 chance of being sentenced to death:

model 2: b=1.3725 p=.0314 prob. for whites=.50 for blacks=.80
model 5: b=2.3015 p=.0083 prob. for whites=.50 for blacks=.91

Because of questions that have been raised about the overall stability of the schedules developed by the Special Master, as well as the sensitivity of this factor, the underlying effect or race in the models was examined.

Examination of the bivariate relationship between race and death penalty does not provide strong support for a solid race effect. While blacks are more likely to receive the death penalty than whites (36% of blacks receive death, as compared with 30% of whites), the difference between them is not statistically significant (p=.437). The question is: why is there a significant and strong race effect in the multivariate analyses and not in the bivariate case? A simple response would be that the race effect is an artifact of the instability of the models estimated. However, there is reason to believe that the multivariate models are correcting for a bias that develops from differences among whites and blacks in regard to other circumstances of their crimes.

The most straightforward method of illustrating this point, is to examine significant statutory aggravating circumstances in model 2 (a reduced model as compared with 5, and thus easier to use as an example). In all four of the statutory categories—4A 4C 4D 4H—that achieve statistical significance at the .05 level whites are more culpable than blacks. The difference is small for 4C, the wanton/vile factor, where 42% of whites evidence this factor versus 40% of blacks. In case of 4D and 4H the proportional differences are larger in the same direction, but the absolute number of cases is small. Four of the six

pecuniary gain cases involved whites (while whites and blacks are about equally distributed in the sample), and three of the four police officer victims cases involve whites (4H). In the case of 4A, however, the difference is both proportionally and in absolute numbers much larger. Fifteen percent of whites (N=11) are defined as prior murderers and only 7% of blacks (N=5).

The impact of these relationships on the model is illustrated when we compare reduced models that build in the significant aggravating circumstances. While there is little relationship between race and the death penalty in the case of the logistic regression model including only the extra-legal factors in the model (p=.281), there is an increase in the p level when each of the four significant aggravating circumstances are added. With only 4A, p for blackd=.14. With 4A, 4C, 4D and 4H, the p level goes below .05. Similarly, in terms of the strength of the coefficients, the b where aggravating circumstances are not included is only .46 with 4A it goes to .66, 4A and 4C to .70, with 4A, 4C and 4D to .94, and finally with the four aggravating circumstances to .99.

Accordingly, a statistical explanation for why the effect of race grows in the multivariate case, is that the inclusion of these aggravating circumstances "cleans away" biases that develop from the fact that whites are "more culpable" on these significant aggravators than blacks. In effect, the model is suggesting that whites should receive the penalty of death at a higher rate than blacks given their scores on these (and other) variables. In fact they are sentenced to death at a slightly lower rate.[620]

### 2. *Race of Victim*

White victim does not achieve statistical signigicance at the .10 level in any of the three converged models. In the bivariate case, there is virtually no relationship between race of victim and death sentence, with about a third of those cases with and without a white victim gaining a death sentence. In all three models the effect of whitvic is in the prejudicial direction. In the case of model 2 the p value approaches statistical significance (p <.12). However, in model 5 the p value is .49., and in model 8 .20. While there is not strong evidence to suggest an independent race of victim effect, as is illustrated later, whitvic does contribute to the stability of an overall prejudicial index.

620 It should be noted that whites on average are also somewhat more likely to evidence significant mitigating factors. Overall the differences here are not large. However, in the case of 5G (cooperation with state) 5 of the 6 cooperating defendants were white.

### *3. Status Measures*

For the Harris case, the status measures were reexamined and revised (see memo "Revisions in Social Status Measures"). Most importantly, offenders of middling status were excluded from the high status category, which now represents primarily individuals of professional or managerial position. A status impact is found for the high status victim measure (SESF1). Reconstructed, it now shows a statistically significant impact in schedules 2 ($p < .05$) and 8 ($p < .10$). Though its effect is not significant in schedule 5, the coefficient size is relatively similar (b=1.43). None of the other status measures yield significant results in the models examined.

The coefficients of SESF1 in schedules 2 and 8, significance levels, and probability estimates for receiving a death penalty based on a 50/50 probability split before inclusion of the victim status variable are:

model 2, SESF1 b=1.5514 p=.0431 prob for not high/not low status=.50, High Status Victim=.83
model 8, SESF1 b=1.1869 p=.0507 prob for not high/not low status=.50, High Status Victim=.77.

The SESF1 effect is also strong in the bivariate case. While fifty two percent of the defendants (11 of 21) who killed someone of high status received the death penalty, this was true in only twenty nine percent of the cases not involving a high status victim. The relationship here is statistically significant at the five percent level (p=.036).

## The Impact of a Prejudicial Factor Overall

One issue raised in prior research, as well as in discussions with AOC staff, is whether one can measure a prejudicial factor overall, and whether this factor would provide a stronger and more stable indicator of disparity in death sentencing. As an initial test of this proposition, three prejudicial measures (blackd, whitvic, and SESF1) were combined into a simple additive score. Thus in a case with a black defendant, and a white victim of high status, the case would gain a prejudicial factor score of 3. When none of these characteristics applied the case would gain a score of 0. If the defendant was black and killed a white victim (not of high status) the case would gain a score of 2.

This measure assumes that it is not a specific combination of defendant and victim characteristics that creates the prejudicial factor, but rather the simple addition of these factors. It scores a case with only a white victim, or only a black defendant, or only a defendant of high status similarly. In essence, each trait acts cumulatively against

the defendant.

The prejudicial factor is a strong and highly significant factor in each of the three models examined:

model 2: b=1.348 p=.0038
model 5: b=1.418 p=.0140
model 8: b=0.864 p=.0119

It should be noted that the strength of the effect here is larger than it seems from the coefficients themselves. This because the measure can have four possible scores (as opposed to only two possible scores for the individual measures). Accordingly, the probability estimates for receiving the death penalty developed below are associated with a range of "prejudice" scores of from 0 through 3 (i.e. someone who is not black and did not kill a high status white victim, to a black defendant who killed a high status white victim). They are developed setting the probability estimate at .50 for all other measures:

| | 0 | 1 | 2 | 3 |
|---|---|---|---|---|
| model 2 | .50 | .79 | .94 | .98 |
| model 5 | .50 | .81 | .94 | .99 |
| model 8 | .50 | .70 | .85 | .93 |

This simple prejudicial measure has a strong and significant impact in each of the models examined. Importantly, however, other prejudicial factors could be developed based on other assumptions about the nature of death penalty sentencing. The issue here is theoretical rather than analytic. For example, a prejudicial factor could be defined that included only black defendants who kill white victims (as has been suggested in other death penalty research). For these data, the additive measure appears more stable than this possibility as well as other simple combinations of the prejudicial factors. The additive measure is also more stable across the models than any of the individual factors (though individual factors are strong in specific models; e.g. see blackd for model 5).[621]

621 Taken together, these analyses suggest strong and consistent biases in the application of death sentencing in New Jersey. Nonetheless, they are based on an initial analysis of prejudicial factors in the context of schedules developed for defining culpability for individual defendants for proportionality review. A full examination of these issues, which would begin with the goal of identifying the impacts of prejudicial factors per se, is warranted given these findings.

## SCHEDULE 2, LOGISTIC VERSION

| Variable | DF | Parameter Estimate | Standard Error | Wald Chi-Square | Pr > Chi-Square | Standardized Estimate | Odds Ratio |
|---|---|---|---|---|---|---|---|
| INTERCPT | 1 | 0.4978 | 1.9837 | 0.0630 | 0.8019 | | 1.645 |
| V4APTY | 1 | 2.2817 | 1.1176 | 4.1682 | 0.0412 | 0.400415 | 9.793 |
| V4BPTY | 1 | –0.4640 | 1.3810 | 0.1129 | 0.7369 | –0.071633 | 0.629 |
| V4CPTY | 1 | 1.9201 | 0.6965 | 7.6003 | 0.0058 | 0.522774 | 6.822 |
| V4DPTY | 1 | 5.1605 | 1.6699 | 9.5505 | 0.0020 | 0.576331 | 174.252 |
| V4EPTY | 1 | 2.8470 | 2.4151 | 1.3897 | 0.2385 | 0.227314 | 17.236 |
| V4FPTY | 1 | 0.5881 | 0.6748 | 0.7595 | 0.3825 | 0.150766 | 1.801 |
| V4GPTY | 1 | 0.9718 | 0.7332 | 1.7568 | 0.1850 | 0.260430 | 2.643 |
| V4HPTY | 1 | 3.4700 | 1.6185 | 4.5964 | 0.0320 | 0.318757 | 32.137 |
| V5APTY | 1 | 0.0339 | 0.6576 | 0.0027 | 0.9589 | 0.009257 | 1.034 |
| V5BPTY | 1 | 0.8963 | 1.4901 | 0.3618 | 0.5475 | 0.107721 | 2.451 |
| V5CPTY | 1 | –0.5476 | 0.6412 | 0.7293 | 0.3931 | –0.139484 | 0.578 |
| V5DPTY | 1 | –2.6410 | 0.7318 | 13.0249 | 0.0003 | –0.725284 | 0.071 |
| V5EPTY | 1 | –0.6415 | 1.2099 | 0.2811 | 0.5960 | –0.091117 | 0.526 |
| V5FPTY | 1 | 0.1381 | 0.6237 | 0.0490 | 0.8248 | 0.036863 | 1.148 |
| V5GPTY | 1 | –2.9775 | 1.9451 | 2.3434 | 0.1258 | –0.332534 | 0.051 |
| V5HPTY | 1 | –2.5180 | 0.8369 | 9.0526 | 0.0026 | –0.475716 | 0.081 |
| SESF1 | 1 | 1.5514 | 0.7670 | 4.0914 | 0.0431 | 0.305599 | 4.718 |
| SESF2 | 1 | 0.6568 | 1.4139 | 0.2158 | 0.6423 | 0.078934 | 1.929 |
| SESF3 | 1 | –0.2938 | 0.6701 | 0.1923 | 0.6611 | –0.073286 | 0.745 |
| SESF4 | 1 | –0.4280 | 1.4973 | 0.0817 | 0.7750 | –0.047798 | 0.652 |
| VSESMIS | 1 | 0.2787 | 1.3697 | 0.0414 | 0.8388 | 0.039581 | 1.321 |
| WHITVIC | 1 | 1.0702 | 0.6803 | 2.4752 | 0.1157 | 0.291389 | 2.916 |
| BLACKD | 1 | 1.3725 | 0.6376 | 4.6336 | 0.0314 | 0.379691 | 3.945 |
| MALEDEF | 1 | –1.9607 | 1.5214 | 1.6609 | 0.1975 | –0.156551 | 0.141 |

## SCHEDULE 3, LOGISTIC VERSION

| Variable | DF | Parameter Estimate | Standard Error | Wald Chi-Square | Pr > Chi-Square | Standardized Estimate | Odds Ratio |
|---|---|---|---|---|---|---|---|
| INTERCPT | 1 | 0.5938 | 1.2314 | 0.2325 | 0.6297 | | 1.811 |
| V4APTY | 1 | 2.0915 | 0.8732 | 5.7373 | 0.0166 | 0.376545 | 8.097 |
| V4BPTY | 1 | –0.2689 | 1.3504 | 0.0397 | 0.8421 | –0.042642 | 0.764 |
| V4CPTY | 1 | 1.3697 | 0.6492 | 4.4515 | –0.0349 | 0.368555 | 3.934 |
| V4DPTY | 1 | 3.9733 | 1.5492 | 6.5779 | 0.0103 | 0.456382 | 53.160 |
| V4EPTY | 1 | 1.8494 | 1.7806 | 1.0788 | 0.2990 | 0.151969 | 6.356 |
| V4FPTY | 1 | 0.6337 | 0.6010 | 1.1115 | 0.2918 | 0.164024 | 1.884 |
| V4GPTY | 1 | 0.9025 | 0.7290 | 1.5329 | 0.2157 | 0.240936 | 2.466 |
| V4HPTY | 1 | 3.1203 | 1.5809 | 3.8960 | 0.0484 | 0.294932 | 22.654 |
| V5APTY | 1 | –0.6057 | 0.5777 | 1.0992 | 0.2944 | –0.165078 | 0.546 |
| V5BPTY | 1 | 0.1146 | 1.4710 | 0.0061 | 0.9379 | 0.013167 | 1.121 |
| V5CPTY | 1 | –0.8114 | 0.6274 | 1.6729 | 0.1959 | –0.205931 | 0.444 |
| V5DPTY | 1 | –2.2339 | 0.6737 | 10.9942 | 0.0009 | –0.615187 | 0.107 |
| V5EPTY | 1 | –0.8029 | 1.1008 | 0.5320 | 0.4658 | –0.111611 | 0.448 |
| V5FPTY | 1 | 0.3285 | 0.5916 | 0.3084 | 0.5786 | 0.086914 | 1.389 |
| V5GPTY | 1 | –2.0726 | 1.7569 | 1.3917 | 0.2381 | –0.238061 | 0.126 |
| V5HPTY | 1 | –2.5879 | 0.8252 | 9.8343 | 0.0017 | –0.489924 | 0.075 |

SCHEDULE 5, LOGISTIC VERSION

| Variable | DF | Parameter Estimate | Standard Error | Wald Chi-Square | Pr > Chi-Square | Standardized Estimate | Odds Ratio |
|---|---|---|---|---|---|---|---|
| INTERCPT | 1 | −0.6259 | 4.3354 | 0.0208 | 0.8852 | | 0.535 |
| V4APTY | 1 | 1.9495 | 1.2439 | 2.4564 | 0.1170 | 0.342111 | 7.025 |
| V4BPTY | 1 | −0.5056 | 1.8245 | 0.0768 | 0.7817 | −0.078061 | 0.603 |
| V4CPTY | 1 | 1.4104 | 0.9199 | 2.3509 | 0.1252 | 0.384000 | 4.098 |
| V4DPTY | 1 | 4.6215 | 1.8507 | 6.2359 | 0.0125 | 0.516130 | 101.642 |
| V4EPTY | 1 | −0.4121 | 2.8048 | 0.0216 | 0.8832 | −0.032904 | 0.662 |
| V4FPTY | 1 | −0.3102 | 0.8443 | 0.1350 | 0.7133 | −0.079523 | 0.733 |
| V4GPTY | 1 | 0.6570 | 0.8724 | 0.5671 | 0.4514 | 0.176056 | 1.929 |
| V4HPTY | 1 | 4.3539 | 2.0435 | 4.5396 | 0.0331 | 0.399952 | 77.783 |
| V5APTY | 1 | −0.1754 | 0.8565 | 0.0420 | 0.8377 | −0.047882 | 0.839 |
| V5BPTY | 1 | 1.8980 | 1.7493 | 1.1772 | 0.2779 | 0.228101 | 6.672 |
| V5CPTY | 1 | −1.0972 | 0.8662 | 1.6044 | 0.2053 | −0.279496 | 0.334 |
| V5DPTY | 1 | −4.2719 | 1.1823 | 13.0546 | 0.0003 | −1.173192 | 0.014 |
| V5EPTY | 1 | 0.0652 | 1.2905 | 0.0026 | 0.9597 | 0.009264 | 1.067 |
| V5FPTY | 1 | 0.6529 | 0.8364 | 0.6094 | 0.4350 | 0.174306 | 1.921 |
| V5GPTY | 1 | −5.9664 | 2.8021 | 4.5339 | 0.0332 | −0.666331 | 0.003 |
| V5HPTY | 1 | −3.9609 | 1.3045 | 9.2191 | 0.0024 | −0.748320 | 0.010 |
| SESF1 | 1 | 1.4297 | 1.0045 | 1.7064 | 0.1915 | 0.281628 | 4.177 |
| SESF2 | 1 | −0.8412 | 1.7102 | 0.2419 | 0.6228 | −0.101094 | 0.431 |
| SESF3 | 1 | −1.3372 | 0.9113 | 2.1531 | 0.1423 | −0.333514 | 0.263 |
| SESF4 | 1 | −0.4450 | 1.7055 | 0.0618 | 0.7942 | −0.049693 | 0.641 |
| VSESMIS | 1 | −2.6194 | 1.7069 | 2.3550 | 0.1249 | −0.372029 | 0.073 |
| THREAT1 | 1 | 1.2489 | 1.0072 | 1.5375 | 0.2150 | 0.337515 | 3.486 |
| BLAME1 | 1 | 1.1084 | 0.7840 | 1.9985 | 0.1575 | 0.354193 | 3.030 |
| BLAME2 | 1 | 1.3687 | 0.5077 | 7.2690 | 0.0070 | 0.667405 | 3.930 |
| WHYSUFR | 1 | 0.3892 | 0.3022 | 1.6594 | 0.1977 | 0.267306 | 1.476 |
| RPRIOR1 | 1 | 0.8940 | 0.4383 | 4.1603 | 0.0414 | 0.443732 | 2.445 |
| MUTILATE | 1 | 2.4801 | 1.3666 | 3.2936 | 0.0695 | 0.298068 | 11.943 |
| AMBUSH | 1 | 0.1466 | 0.7593 | 0.0373 | 0.8470 | 0.037082 | 1.158 |
| WHITVIC | 1 | 0.5952 | 0.8551 | 0.4845 | 0.4864 | 0.162050 | 1.813 |
| BLACKD | 1 | 2.3015 | 0.8719 | 6.9669 | 0.0083 | 0.636682 | 9.989 |
| MALEDEF | 1 | −0.2059 | 3.9183 | 0.0028 | 0.9581 | −0.016436 | 0.814 |

SCHEDULE 6, PURGED LOGISTIC VERSION

| LABEL | NAME | BETA | STD | EST_T | EST_P |
|---|---|---|---|---|---|
| | CONST | −0.039 | 0.964 | −0.04 | 0.9681 |
| PEN. TRIAL JURY FOUND 4A FACTOR | V4APTY | 1.114 | 1.365 | 0.82 | 0.4145 |
| PEN. TRIAL JURY FOUND 4B FACTOR | V4BPTY | 0.169 | 0.921 | −0.18 | 0.8548 |
| PEN. TRIAL JURY FOUND 4C FACTOR | V4CPTY | 1.125 | 0.652 | 1.73 | 0.0845 |
| PEN. TRIAL JURY FOUND 4D FACTOR | V4DPTY | 3.017 | 1.295 | 2.33 | 0.0199 |
| PEN. TRIAL JURY FOUND 4E FACTOR | V4EPTY | 0.072 | 1.650 | 0.04 | 0.9649 |
| PEN. TRIAL JURY FOUND 4F FACTOR | V4FPTY | −0.356 | 0.737 | −0.48 | 0.6291 |
| PEN. TRIAL JURY FOUND 4G FACTOR | V4GPTY | 0.428 | 0.592 | 0.72 | 0.4691 |
| PEN. TRIAL JURY FOUND 4H FACTOR | V4HPTY | 3.104 | 1.631 | 1.90 | 0.0570 |
| MIT. CIR. 5A FOUND AT PEN. TRIAL | V5APTY | −0.233 | 0.597 | −0.39 | 0.6958 |
| MIT. CIR. 5B FOUND AT PEN. TRIAL | V5BPTY | 1.311 | 1.031 | 1.27 | 0.2037 |
| MIT. CIR. 5C FOUND AT PEN. TRIAL | V5CPTY | −0.739 | 0.706 | −1.05 | 0.2951 |
| MIT. CIR. 5D FOUND AT PEN. TRIAL | V5DPTY | −2.819 | 0.562 | −5.02 | 0.0000 |
| MIT. CIR. 5E FOUND AT PEN. TRIAL | V5EPTY | 0.056 | 0.773 | 0.07 | 0.9426 |
| MIT. CIR. 5F FOUND AT PEN. TRIAL | V5FPTY | 0.368 | 0.570 | 0.65 | 0.5189 |
| MIT. CIR. 5G FOUND AT PEN. TRIAL | V5GPTY | −3.891 | 1.406 | −2.77 | 0.0056 |
| MIT. CIR. 5H FOUND AT PEN. TRIAL | V5HPTY | −2.716 | 0.686 | −3.96 | 0.0001 |
| THREATS FACTOR (PTDEATH MODEL) | THREAT1 | 0.815 | 0.519 | 1.57 | 0.1166 |
| BLAMEWORTHINESS FACT. #1 (PTDTH MOD) | BLAME1 | 0.772 | 0.362 | 2.14 | 0.0328 |
| BLAMEWORTHINESS FACT. #2 (PTDTH MOD) | BLAME2 | 0.934 | 0.396 | 2.36 | 0.0184 |
| SOURCE OF SUFFERING: VIC #1&#2 | WHYSUFR | 0.246 | 0.261 | 0.94 | 0.3457 |
| PERCENT PRIOR/RELEASE (PTDTH MOD) | RPRIOR1 | 0.625 | 0.395 | 1.58 | 0.1134 |
| MUTILATION DURING KILLING | MUTILATE | 1.639 | 0.782 | 2.10 | 0.0359 |
| DURING/AMBUSH | AMBUSH | −0.001 | 0.663 | 0.00 | 0.9992 |
| | PDAWASRC | 0.098 | 0.137 | 0.72 | 0.4734 |

## SCHEDULE 8, LOGISTIC VERSION

| Variable | DF | Parameter Estimate | Standard Error | Wald Chi-Square | Pr > Chi-Square | Standardized Estimate | Odds Ratio |
|---|---|---|---|---|---|---|---|
| INTERCPT | 1 | −0.4808 | 1.5953 | 0.0909 | 0.7631 | | 0.681 |
| V4APRC | 1 | 2.2058 | 0.7363 | 8.9751 | 0.0027 | 0.313238 | 9.078 |
| V4BPRC | 1 | −0.1694 | 1.0000 | 0.0284 | 0.8662 | −0.031928 | 0.845 |
| V4CPRC | 1 | 1.7526 | 0.5032 | 12.1295 | 0.0005 | 0.438126 | 5.770 |
| V4DPRC | 1 | 3.2398 | 1.1964 | 7.3326 | 0.0068 | 0.303540 | 25.528 |
| V4EPRC | 1 | 2.1912 | 1.6220 | 1.8251 | 0.1767 | 0.131028 | 8.946 |
| V4FPRC | 1 | 0.9734 | 0.5219 | 3.4783 | 0.0622 | 0.221401 | 2.647 |
| V4GPRC | 1 | 0.2340 | 0.5684 | 0.1695 | 0.6806 | 0.058127 | 1.264 |
| V4HPRC | 1 | 3.0956 | 1.3341 | 5.3837 | 0.0203 | 0.185105 | 22.100 |
| V5APRC | 1 | 0.2110 | 0.4841 | 0.1901 | 0.6629 | 0.053967 | 1.235 |
| V5BPRC | 1 | −0.1904 | 1.0791 | 0.0311 | 0.8600 | −0.024835 | 0.827 |
| V5CPRC | 1 | −1.3928 | 0.5367 | 0.5358 | 0.4642 | −0.099088 | 0.675 |
| V5DPRC | 1 | −1.9742 | 0.5709 | 11.9587 | 0.0005 | −0.541365 | 0.139 |
| V5EPRC | 1 | −0.3440 | 1.0985 | 0.0980 | 0.7542 | −0.037898 | 0.709 |
| V5FPRC | 1 | −0.1202 | 0.5095 | 0.0556 | 0.8135 | −0.032480 | 0.887 |
| V5GPRC | 1 | −1.6883 | 1.6964 | 0.9905 | 0.3196 | −0.158181 | 0.185 |
| V5HPRC | 1 | −3.2342 | 0.7810 | 17.1473 | 0.0001 | −0.411887 | 0.039 |
| WHITVIC | 1 | 0.6391 | 0.4980 | 1.6468 | 0.1994 | 0.176148 | 1.895 |
| BLACKD | 1 | 0.7888 | 0.4969 | 2.5199 | 0.1124 | 0.216138 | 2.201 |
| MALEDEF | 1 | −0.1881 | 1.2522 | 0.0226 | 0.8806 | −0.016741 | 0.829 |
| SESF1 | 1 | 1.1869 | 0.6074 | 3.8185 | 0.0507 | 0.218649 | 3.277 |
| SESF2 | 1 | −0.5856 | 1.1863 | 0.2437 | 0.6216 | −0.092077 | 0.557 |
| SESF3 | 1 | −0.2445 | 0.5159 | 0.2246 | 0.6356 | −0.063148 | 0.783 |
| SESF4 | 1 | −0.7343 | 0.9440 | 0.6051 | 0.4366 | −0.086226 | 0.480 |
| VSESMIS | 1 | −0.1977 | 0.7951 | 0.0618 | 0.8036 | −0.035691 | 0.821 |

## SCHEDULE 9, LOGISTIC VERSION

| Variable | DF | Parameter Estimate | Standard Error | Wald Chi-Square | Pr > Chi-Square | Standardized Estimate | Odds Ratio |
|---|---|---|---|---|---|---|---|
| INTERCPT | 1 | 0.0607 | 0.9581 | 0.0040 | 0.9495 | | 1.063 |
| V4APRC | 1 | 1.9302 | 0.6525 | 8.7511 | 0.0031 | 0.274100 | 6.891 |
| V4BPRC | 1 | −0.4137 | 0.9614 | 0.1851 | 0.6670 | −0.078414 | 0.661 |
| V4CPRC | 1 | 1.6674 | 0.4802 | 12.0585 | 0.0005 | 0.416838 | 5.299 |
| V4DPRC | 1 | 3.1006 | 1.1921 | 6.7648 | 0.0093 | 0.290495 | 22.210 |
| V4EPRC | 1 | 2.2821 | 1.4399 | 2.5120 | 0.1130 | 0.136464 | 9.797 |
| V4FPRC | 1 | 1.0325 | 0.4792 | 4.6427 | 0.0312 | 0.234852 | 2.808 |
| V4GPRC | 1 | 0.3961 | 0.5356 | 0.5469 | 0.4596 | 0.098397 | 1.486 |
| V4HPRC | 1 | 3.1904 | 1.3055 | 5.9719 | 0.0145 | 0.190774 | 24.297 |
| V5APRC | 1 | 0.0851 | 0.4541 | 0.0355 | 0.8504 | 0.021770 | 1.089 |
| V5BPRC | 1 | −0.2457 | 1.0047 | 0.0598 | 0.8068 | −0.032056 | 0.782 |
| V5CPRC | 1 | −0.4544 | 0.5076 | 0.8012 | 0.3707 | −0.114612 | 0.635 |
| V5DPRC | 1 | −1.8793 | 0.5442 | 11.9253 | 0.0006 | −0.515330 | 0.153 |
| V5EPRC | 1 | −0.4941 | 0.9839 | 0.2522 | 0.6155 | −0.054440 | 0.610 |
| V5FPRC | 1 | −0.1386 | 0.4742 | 0.0854 | 0.7701 | −0.037450 | 0.871 |
| V5GPRC | 1 | −0.7693 | 1.5191 | 0.2565 | 0.6126 | −0.072079 | 0.463 |
| V5HPRC | 1 | −3.1326 | 0.7332 | 18.2565 | 0.0001 | −0.398957 | 0.044 |

ORDER OF THE SUPREME COURT OF NEW JERSEY IN *STATE V. DONALD LOFTIN*, S.C. DOCKET NO. A-86, REGARDING PROPORTIONALITY REVIEW, OCTOBER 22, 1996

SUPREME COURT OF NEW JERSEY
A-86 September Term 1996
39,597

STATE OF NEW JERSEY,
Plaintiff-Respondent,
v.
DONALD LOFTIN,
Defendant-Appellant.

The Supreme Court having affirmed the conviction and death sentence of defendant, *State v. Loftin*, 146 N.J. 295 (1996), and having directed that a proportionality review of his sentence be undertaken at the request of defendant;

And the Court having previously affirmed the conviction and death sentence of Joseph Harris, *State v. Harris*, 141 *N.J.* 525 (1995), and the Administrative Office of the Courts having thereafter prepared a report for the proportionality review of the defendant Harris's death sentence (the Report), which proportionality review was scheduled to be heard by the Court in September 1996;

And the evidence of the proportionality of the defendant Harris's death sentence having been sharply controverted by the parties;

And the proportionality review of Joseph Harris; death sentence no longer being before the Court because of the dismissal by the Court of the Harris case based on the defendant's unrelated death;

And the Court having noted that the evidence and statistical data in the Report that was prepared in the Harris case, as supplemented, will be considered in the within matter, that Report having stated that additional study would have to be undertaken to evaluate fully the validity of a preliminary indication of the possibility that race is a factor in the proportionality of the death sentence in the Harris case and in the imposition of death sentences by juries generally;

And the Court having further noted that the within matter, which is scheduled to be heard by the Court this term, will raise a racial discrimination claim identical to that raised in *State v. Harris* (A-3-96);

And the Court, based on the Report and the contentions of the respective parties, having determined that the issues implicated by the preliminary indication of the possibility of race as a factor in the imposition of death sentences must be addressed more completely as a part of its consideration and adjudication of pending capital cases;

And the Court having further determined that the need for addi-

tional study of such issues can be most appropriately addressed by the Court through the use of supplemental proceedings with the assistance of a Special Master;

And good cause appearing;

It is ORDERED that retired Superior Court Judge Richard S. Cohen is appointed as a Special Master for the Supreme Court to conduct a review, perform analyses, and make findings and recommendations relating to defendants' race as a possible factor in the decision of juries to impose the death penalty as implicated by date in the Report; and it is further

ORDERED that such review and analyses shall encompass the following areas:

(1) The Special Master shall examine and issue findings on the reliability of the data obtained by the Administrative Office of the Courts as it relates to the issue of racial discrimination in the proportionality review proceedings in *State v. Harris* (A-3-96) and the within matter. The Special Master shall review and evaluate the arguments of the parties as they relate to the reliability of the data and the statistical techniques employed; shall consult with the parties, representatives of the Administrative Office of the Court, and with experts as appropriate; shall conduct analyses as appropriate; and make recommendations as to alternative research methods as appropriate;

(2) The Special Master shall independently assess and rank by culpability, sentence, and race of defendant all penalty-phase cases in the Administrative Office of the Courts' proportionality review universe. The Special Master shall consider the findings regarding the reliability of the data and statistical techniques when ranking such cases, and, where appropriate and feasible, shall incorporate suggestions for improvement;

(3) In addition to statistical analyses relating to culpability rankings, the Special Master shall attempt independently to corroborate the appropriateness of the culpability rankings, and in this respect, may consider other factors including those deemed relevant by witnesses, including prosecutors, defense attorney, trial judges, and others experienced in the trial of death penalty cases; and

(4) The Special Master shall undertake or cause to be undertaken a precedent-seeking review of those cases falling within the mid-range of culpability on the table(s) that the Special Master causes to be created. The precedent-seeking review shall be conducted without disclosure of the race of individual defendants and in accordance with the general standards used by the Supreme Court when it conducts proportionality review. The Special Master shall make detailed find-

ings regarding whether the precedent-seeking review reveals reasons why some of the mid-range cases received life sentences while others received death sentences and whether race appears to have been a factor in the sentences. As noted, the Special Master may obtain evaluations of the mid-range cases from other witnesses experienced in death penalty cases, provided all such evaluations are made a matter of record; and it is further

ORDERED that to assist the Special Master in the project, the Administrative Office of the Courts shall forthwith provide the Special Master and the parties with: (1) a list of all penalty-phase cases, broken down by the race of the defendants, the sentences, and the aggravating and mitigating factors found; (2) a brief synopsis of all penalty-phase cases; and (3) copies of the reports on all prior proportionality review including the report in the within matter when finalized, as well as the reports submitted to the Court by David Baldus; and it is further

ORDERED that the Clerk of the Court shall forthwith provide the Special Master with copies of the proportionality review briefs in *State v. Harris* and with copies of the proportionality review briefs in within matter as they are filed; and it is further

ORDERED that the Special Master shall conduct the review directed by this Order using all available data and reports, together with the assistance of the Administrative Office of the Courts and a consultant to be appointed by the Special Master with the approval of the Court; and it is further

ORDERED that in respect of the relevant issues, the Special Master may invite the participation of interested parties not otherwise participating in the within matter; and it is further

ORDERED that the Special Master shall have the authority to conduct hearings, to procure technical and judicial expert advice, to call witnesses, and to direct the Administrative Office of the Courts and the selected consultant to perform such analyses and to provide such advice as the Special Master deems necessary and appropriate to comply with the terms of this Order; and it is further

ORDERED that the Special Master shall promptly undertake the review required by this Order and shall file a report consisting of the Master's findings and recommendations, as well as the underlying evidence, data, and analyses by January 17, 1997; and it is further

ORDERED that the within Order may be modified or supplemented by the Court on the application of the Special Master, on application of any party, or on the Court's own motion; and it is further

ORDERED that the report of the Special Master shall not include

any determination concerning the appropriateness of a death sentence imposed in any case of the constitutionality of the death penalty statute; and it is further

ORDERED that parties in the within matter shall file supplemental briefs within thirty days of the filing of the Special Master's report with the Clerk of the Court, with responding briefs to be filed within thirty days thereafter; and it is further

ORDERED that nothing in this Order should be construed by the Special Master or the parties to represent a position of the Supreme Court on any issue before it.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 22st day of October, 1996.

Clerk of the Supreme Court

Chief Justice Poritz and Justices Handler, Pollock, O'Hern, Garibaldi, Stein, and Coleman join in the Court's Order.