WHEN SYMBOLS CLASH: REFLECTIONS ON THE FUTURE OF THE COMPARATIVE PROPORTIONALITY REVIEW OF DEATH SENTENCES†

*David Baldus**

A. Two Symbols: In Conflict

This Article addresses the interaction between two important symbols in American life today: the death penalty and equal justice under the law. First, the death penalty reflects society's commitment to the protection of innocent human life and its condemnation of our most culpable criminals.[1] It also is said to reflect society's desire for retribution, revenge, and deterrence. Like many other important symbols, the death penalty simplifies a complex issue, unites much of the public in the belief that something is being done about an important problem, and by reassuring the public, may bring a level of quiescence and satisfaction to the community. For example, Philadelphia's District Attorney, Lynn Abraham, believes in and regularly seeks the death penalty, not because she believes it has a deterrent effect, but rather because she believes it gives the community a sense of control and satisfaction.[2] In my continuing research on the death penalty, I have found the literature on symbols in political life helpful in understanding our death penalty politics and practices.[3]

One important feature of the death penalty in America today

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* David C. Baldus received his A.B. from Dartmouth College, his M.A. from the University of Pittsburgh, and his J.D. from Yale Law School. He is presently the Joseph B. Tye Professor of Law at the University of Iowa College of Law where he teaches Criminal Law, Anti-discrimination Law, Capital Punishment Law, Federal Criminal Law, and Admiralty.

1 *See generally* FRANKLIN ZIMRING & GORDON HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA (1987).

2 Tina Rosenberg, *The Deadliest D.A.*, N.Y. TIMES MAG., July 16, 1995, at 23 ("To [Abraham, the death penalty] doesn't offer society control over crime—she doesn't believe it's a deterrent—but instead gives the *feeling* of control demanded by a city in decay.").

3 *See generally* DAVID KERTZER, RITUAL, POLITICS AND POWER (1988); MURRAY EDELMAN, THE SYMBOLIC USES OF POLITICS (1967).

is that the amount of symbolic ritual required to produce quiescence in a particular community varies significantly from place to place. At one extreme is New Hampshire, which has a statute on the books but no capital prosecutions of which I am aware and no prisoners on death row. At the other extreme is Texas, which averages about one execution every three weeks. Between these extremes is a substantial range of death penalty activity in terms of the numbers of sentences imposed, the size of death row, and the number and timing of actual executions.[4]

Another important feature of American death penalty politics is the significant variation from place to place in the community's tolerance for resistance to the death penalty by public officials. By tolerance I refer to the level of resistance, opposition, or inaction the community will allow before it is aroused and retaliates politically. There are different tolerance levels both among and within individual states. Of particular note is that tolerance for resistance to the death penalty has little correlation with the levels of public support for the death penalty expressed in public opinion polls. That support is the same, from 70% to 80%, in every part of the country—from abolitionist states like Iowa and Wisconsin to the states in the deep South.[5]

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[4] *Death Row, U.S.A.*, Execution Update (NAACP Legal Defense and Educational Fund, Inc., New York, N.Y.), Fall 1995, at 1. In my opinion, variations in the level of death penalty activity required for community quiescence are quite like the variations in dosage required to bring quiescence to people who are dependent on chemicals such as drugs, alcohol, and tobacco. For some people, a lot of the chemical is required each day, while for others a small dose is sufficient. In drug dependence theory, psychological dependence is generally defined as "a condition in which a drug produces a feeling of satisfaction and the psychic drive that requires periodic or continuous administration of the drug to produce pleasure or to avoid discomfort." WORLD HEALTH ORGANIZATION EXPERT COMMITTEE ON DRUG DEPENDENCE, TWENTIETH REPORT (1974), *quoted in* HANNES PETURSSON & MALCOLM LADER, DEPENDENCE ON TRANQUILIZERS 6 (1984). When a dependent drug user does not take the amount of the drug to which he or she is accustomed, withdrawal and agitation occur. *Id.* at 3. Additionally, with continued use, an addict may develop tolerance where "a given dose of a drug produces a decreased effect or, conversely, increasingly larger doses must be administered to obtain the effects observed with the original dose." J.H. Jaffe, *Drug Addiction and Drug Abuse*, *in* THE PHARMACOLOGICAL BASIS OF THERAPEUTICS 7 (A. Goodman Gilman et al. eds., 1980).

[5] James A. Fox et al., *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499, 520 (1991) (attitudes toward capital punishment are fairly stable throughout the various regions of the United States). *See, e.g.*, Neil Vidmar & Phoebe C. Ellsworth, *Research on Attitudes Toward Capital Punishment*, *in* THE DEATH PENALTY IN AMERICA 68, 86 (Hugo A. Bedau ed. 1982) (tracking death penalty support in the four major regions of the country between the years 1972-77 and illustrating generally stable support throughout the country). For an excellent critique of the interaction between politics and the death penalty, see generally Stephen B. Bright &

In most death penalty states, North and South, candidates for highly visible statewide and national office who oppose the death penalty generally do not succeed politically. This is also the case in many abolitionist states like Iowa and Massachusetts. However, at lower, less visible levels, especially in the North, legislators can resist and still prosper. Additionally, prosecutors everywhere routinely can waive the death penalty, especially in low visibility cases, without political risk. Indeed, in New York, despite very strong support for capital punishment in the polls, four of New York City's five prosecutors apparently perceive no significant risk in announcing that they would use it only in very special circumstances.[6] Similarly, in Pennsylvania, the district attorney in Pittsburgh has for years shown little enthusiasm for the death penalty at no political risk.[7]

State court judges, of course, run similar political risks. For example, in a recent Georgia case involving a "two-strikes-and-you're-out" statute, a four-to-three decision of the state supreme court was withdrawn and reversed by a new four-to-three opinion, thirteen days later. The court's reversal occurred after the attorney general expressed great concern that the theory of the case, which had recognized a prima facie claim of racial discrimination, might be extended to permit death sentenced offenders to successfully challenge their sentences.[8] In contrast, in California, it took sixty-one consecutive votes to vacate death sentences by Chief Justice Rose Bird of the California Supreme Court to arouse the voters to

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 (1995).

[6] Robert T. Johnson, the Bronx District Attorney, initially said he would refuse to seek the death penalty in any case. Adam Nossiter, *Balking Prosecutors: A Door Opens to Death Row Challenges*, N.Y. TIMES, March 11, 1995, at A27. Yet, Johnson was re-elected in a 1995 election. Ian Fisher, *Election 1995: The Overview*, N.Y. TIMES, Nov. 8, 1995, at B1. However, after withstanding pressure to seek a death sentence in a widely publicized police victim case, Johnson said that he had not ruled out entirely the possibility of seeking the death penalty in the case. Rachel Swarns, *A Killing in the Bronx: The Overview: The Governor Removes Bronx Prosecutor From Murder Case*, N.Y. TIMES, Mar. 22, 1996, at A1. Apparently, one reason the governor acted as he did was to reduce the risk that the decisions of prosecutors who consistently waive the death penalty in death-eligible cases might threaten, on a theory of comparative excessiveness in the New York Court of Appeals, the death sentences that are imposed in the state. Additionally, the District Attorneys of Manhattan, Queens, and Brooklyn have all criticized the New York death penalty statute, but pledge to use it in the appropriate highly aggravated case. Nossiter, *supra*, at A27.

[7] *See* Rosenberg, *supra* note 2, at 23.

[8] *See* Stephens v. State, 456 S.E.2d 560 (1995) (substituting judgment for previous order entered 13 days earlier).

remove her from office in 1986.[9]

The second symbol referred to in the title of this paper is the concept of equal justice under the law. In the context of the criminal justice system, the idea of equal justice manifests itself first in a commitment to comparable treatment of similarly situated defendants, without regard to their race or socioeconomic status. Under the Equal Protection Clause of the Fourteenth Amendment, the Supreme Court has defined this commitment as a prohibition against purposeful racial discrimination.[10] This prohibition clearly applies in the death sentencing context,[11] but the burden of proof established in *McClesky v. Kemp*[12] is nearly impossible to satisfy. As a consequence, to date, no claim of racial discrimination in the administration of the death penalty has been successfully advanced.[13]

The commitment to equal justice also contemplates substantially comparable treatment of similarly situated defendants without regard to race. In the death penalty context, this commitment was first articulated by the Supreme Court in *Furman v. Georgia*,[14] which purported to invalidate death sentences in cases that cannot be meaningfully distinguished, in terms of defendants' criminal culpability, from many other cases where lesser sentences are typically imposed. The *Furman* ideal of equal justice embodies, therefore, a commitment to comparative proportionality.

The commitment to equal justice is also reflected in the requirement in more than twenty death sentencing states that no death sentence may be executed until the state supreme court determines that the sentence is not excessive when compared with "similar cases considering both the circumstances of the crime and the character and record of the defendant."[15]

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9 Douglas P. Shuit, *Death Penalty Draws Little Debate During This Political Season Campaigns: Legal and Political Climate is So Heavily Weighted in Favor of Carrying Out Execution*, L.A. TIMES, Apr. 15, 1992, at B2.

10 *See* Washington v. Davis, 426 U.S. 229 (1976).

11 Turner v. Murray, 476 U.S. 28 (1986); Zant v. Stephens, 456 U.S. 410 (1982).

12 481 U.S. 279 (1987).

13 Under the Eighth Amendment, an accused may successfully challenge a death sentence where the circumstances of the case suggest a substantial risk that race was a factor in the sentencing. Under *McClesky*, however, proving such a claim is particularly burdensome.

14 408 U.S. 238 (1972).

15 The principal policy reasons animating concern about comparatively excessive death sentences are described *infra*. The states which currently or formerly required proportionality reviews include: Alabama, ALA. CODE 13A-5-53(b)(3); Connecticut, CONN. GEN. STAT. 53a-46b(3); Delaware, DEL. CODE ANN. TIT. II, 4209(g); Georgia, GA CODE ANN. 17-10-35(c)(3) Idaho, IDAHO CODE 19-2827(c); Kentucky, KY. REV. STAT. ANN. 532.075(3); Maryland, MD. CODE ANN.[(CRIM. LAW] 414(e); Mississippi, MISS. CO-

Comparative proportionality review is the process in which a state court compares the facts and circumstances of a death sentence case with other death eligible-cases that result in either death or lesser sentences. Under one method of review, known as the frequency approach, the court first evaluates the frequency with which death sentences are imposed among cases in the jurisdiction that are comparable to the review case. The court then determines whether the death sentencing frequency among the similar cases is sufficiently high to justify the death sentence before the court.[16] The "precedent seeking" or "comparative culpability" approach is the more commonly used method of review.[17] Under this method, the court, on the basis of the facts and criminal culpability of the death cases before it, determines whether the review case is more comparable to past cases where life sentences were imposed or to those where death was imposed. When the review case appears more comparable to life sentence cases, it is found to be comparatively excessive and the sentence is reduced to life imprisonment. When, however, the review case appears more comparable to prior death sentence cases, the death sentence is affirmed as not excessive.

A principal theme of many pro-death penalty advocates over

DEX ANN. 99-19-105(3); Missouri, MO. REV. STAT. 565.035(3); Montana, MONT. CODE ANN. 46-18-310(3); Nebraska, NEB. REV. STAT. 29-2521.01 *et seq.*; Nevada, NEV. REV. STAT. 177.055(2)(d); New Hampshire, N.H. REV. STAT. ANN. 630.5(XI); New Jersey, N.J. REV. STAT. 2C:11-3(e); New Mexico, N.M. STAT. ANN. 31-20A-4(c); New York, N.Y. CRIM. PROC. 470.30(3); North Carolina, N.C. GEN. STAT. 15A-2000(d); Ohio, OHIO REV. CODE ANN. 2929.05(A); Pennsylvania, 42 PA. CONS. STAT. 9711(H); South Carolina, S.C. CODE ANN. 16-3-25(c); South Dakota, S.D. CODIFIED LAWS ANN. 23A-27A-12; Tennessee, TENN. CODE ANN. 39-13-206; Virginia, VA. CODE ANN. 17-110.1; Washington, WASH. REV. CODE 10-95-130(2); Wyoming, WYO. STAT. 6-4-103(d).

In a few other states, the courts conduct proportionality review, even though they are not required to do so by statute. These states include: Arkansas, *see* Sheridan v. State, 855 S.W.2d 772, 780 (Ark. 1993) (making proportionality review for death sentences mandatory); Florida, *see* Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991) (stating that the Florida Supreme Court has made proportionality review mandatory for death sentences); Louisiana, *see* State v. Davis, 637 So. 2d 1012, 1031 (La. 1994) ("[C]omparative proportionality review remains a relevant consideration in determining the issue of excessiveness in Louisiana"); and Illinois, see People v. Tye, 565 N.E.2d 931, 945 (Ill. 1991).

16 *See* State v. Stokes, 352 S.E.2d 653, 666 (N.C. 1987) ("[I]n robbery murder cases where conviciton rests solely on a felony murder theory, juries in this state almost invariably have recommended life imprisonment rather than death.").

17 *See* State v. Williams, 452 S.E.2d 245, 278 (N.C. 1994) (affirming a death sentence reasoning that "the present case is most analogous to cases in which this Court has held the death penalty to be proportionate"). The distinction between the different approaches to proportionality review is addressed in State v. Marshall, 613 A.2d 1059 (N.J. 1992) and discussed in DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY 281-82 (1990).

the last decade has been that these two symbols — the death penalty and equal justice under the law — cannot co-exist. The argument is that close scrutiny of the way in which death sentencing systems actually function and meaningful consideration of claims of arbitrariness and discrimination will result in the de facto abolition of the death penalty.[18] I think this claim is false. Nevertheless, it was a significant argument advanced in the United States Congress in 1994 to defeat the Racial Justice Act, a measure which would have allowed death-sentenced offenders to raise claims of racial discrimination in federal courts.[19] The argument may also have been a consideration in the legislatures of a handful of states that have repealed altogether or narrowed the scope of their proportionality review statutes.[20]

In my opinion, this same tension between the two symbols has also substantially limited the utility of proportionality review in the state courts that have attempted to apply the requirement over the last 20 years. Indeed, during this time, I estimate that fewer than 75 of the 5000 plus death sentences imposed have been vacated on grounds of excessiveness.[21]

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18 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, 418 (1994).

19 *Id.* at 380.

20 States that have abandoned proportionality review include: Arizona, *see* State v. Salazar, 844 P.2d 566, 583-84 (Az. 1992) (stating that the Arizona Supreme Court will discontinue proportionality reviews); Maryland, 1992 MD. LAWS 331 (H.B. 590); Idaho, 1994 IDAHO SESS. LAWS 127 (S.B. 1302); Connecticut, 1995 Conn. Acts 16 (Reg. Sess.) and Wyoming, WYO. STAT. § 6-4-103(d). Several other state legislatures have significantly restricted the scope of proportionality review, including: New Jersey, N.J. STAT. ANN. § 2C: 11-3 (limiting proportionality review to a comparison only of cases in which the death sentence has been imposed); Utah, *see* State v. Carter, 888 P.2d 629, 656-57 (Utah 1995) (refusing to engage in comparative proportionality review, but applying a "crime-to-sentence" review); Idaho, 1994 IDAHO SESS. LAWS 127 (S.B. 1302) (deleting comparative nature of review); Nevada, 1985 Nev. Stat. 527 (deleting comparative nature of review requirement).

Some states have never engaged in proportionality review. These states include: California, *see* People v. Lang, 782 P.2d 627, 663 (Cal. 1989) (stating that proportionality review is not required in California); Colorado, *see* People v. Davis, 794 P.2d 159, 173-74 (Colo. 1990) (stating that proportionality review is not required in Colorado); Indiana, *see* Brewer v. State, 417 N.E.2d 889, 900-01 (Ind. 1981) (stating that proportionality review is not required in Indiana); Oregon, *see* Satte v. Cunningham, 880 P.2d 431, 443 (Or. 1994) (stating that proportionality review is not required in Oregon); Kansas; Texas, Oklahoma; and Virginia. Nor do the federal death penalty statutes require proportionality review.

21 BALDUS ET AL., *supra* note 17, at 294 (1990) (listing cases vacated on grounds of excessiveness as of 1987). More recently, only the Florida and Illinois courts use their proportionality review powers with any regularity. *See* Sinclair v. State, 657 So. 2d 1138 (Fla. 1995) (robbery aggravator with substantial non-statutory mitigation); Thompson

Should, therefore, the entire enterprise of proportionality review be scrapped? Most states that required comparative proportionality review from the outset still maintain the requirement on the books, despite the legislative trend against it and the fact that the review conducted by most courts has little or no substance and serves only a symbolic function. Nevertheless, the retention of these laws on the books provides some measure of the power, albeit weak, of the equal justice symbol.[22]

B. What Role For Proportionality Review

In spite of this history, I continue to believe that proportionality review has a role, particularly in the North, where the commitment to equal justice has more force than it does elsewhere. As I see it, the appropriate goal of proportionality review is the same today as it was in 1973 — to limit death sentences to the worst offenders whose cases can be meaningfully distinguished from the

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v. State, 647 So. 2d 824 (Fla. 1994); Clark v. State, 609 So. 2d 513 (Fla. 1992) (robber aggravator with substantial mitigation); Clark v. State, 609 So. 2d 513 (Fla. 1992) (pecuniary gain aggravator and several non-statutory mitigators); McKinney v. State, 579 So. 2d 80 (Fla. 1991) (violent prior felony aggravator and several non-statutory mitigators); Penn v. State, 574 So. 2d 1079 (Fla. 1991); Tillman v. State, 591 So. 2d 167 (Fla. 1991) (heinous and atrocious aggravator with several mitigators); Blakely v. State, 561 So. 2d 560 (Fla. 1990) (two aggravators but murder is a result of heated domestic confrontation); Nibert v. State, 574 So. 2d 1059 (Fla. 1990) (heinous and atrocious aggravators with substantial mitigation); Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988) (multiple aggravators but a low intelligence, childlike defendant under extreme emotional disturbance); Garron v. State, 528 So. 2d (Fla. 1988) (murder a result of heated domestic confrontation); Lloyd v. State, 524 So. 2d 396 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Proffitt v. State, 510 So. 2d 896 (Fla. 1987) (residential burglary, without more, and substantial mitigation); People v. Leger, 597 N.E.2d 586 (Ill. 1992) (no significant history of prior criminal conduct and murder precipitated by stressful circumstance or emotional disturbance).

The Florida cases cited above all involve a jury death sentence recommendation that was followed by a judge who sentenced the defendant to death. These cases are to be distinguished from another line of Florida cases in which a trial judge's decision to impose a death sentence overrides an earlier jury life sentence recommendation. In these cases, the Florida Supreme Court routinely vacates the judicially imposed death sentence on the authority of Tedder v. State, 322 So. 2d 908 (1975), which requires reinstitution of the jury's life sentence recommendation unless it concludes that no reasonable person could have voted for a sentence other than death. The language of the Florida Supreme Court's opinion reinstating life sentences under *Tedder* often turns both on implicit judgments of comparative culpability among the cases the court has reviewed, as well as on explicit comparisons of the review cases with other cases in which the court has applied *Tedder* to vacate judicially imposed death sentences.

[22] For example, the New Jersey Legislature, which could have completely eliminated the proportionality review requirement, chose instead to retain it in form only by limiting the comparative reviews solely to "similar" cases in which a death sentence was imposed.

great bulk of homicide cases that result in lesser punishments.[23] The salience of that objective was highlighted recently in a critique of the current status of the death penalty in America by Judge Alex Kozinski of the Ninth Circuit Court of Appeals.[24] Judge Kozinski noted that despite very broad death sentencing statutes and widespread public support for the death penalty, few people are actually executed.[25] To put his remarks in fuller context, I estimate that the American death penalty system annually processes from 2,000 to 4,000 death eligible cases and imposes 250 to 300 death sentences. Moreover, until 1995, fewer than forty executions per year were actually carried out. Since 1973, over 5,000 death sentences have been imposed, 2,000 of which were vacated, and just over 300 have resulted in executions, leaving approximately 3,000 on death row today.[26]

Judge Kozinski argues, and I agree, that this situation of legal stalemate is not likely to change in the foreseeable future.[27] I also share his belief that it is improbable that the United States Supreme Court will dismantle the Eighth Amendment jurisprudence which enables death sentenced offenders to resist execution in the courts.[28] I further share his belief that it is unlikely that American society would tolerate the level of violence that would be required to make a substantial dent in our current nationwide death row population of 3,000 people.[29]

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[23] *See* Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring) ("[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not").

[24] *See generally* Alex Kozinski & Sean Gallagher, *Death: The Ultimate Run on Sentence*, 46 CASE WEST. RES. L. REV. 1 (1995).

[25] As of April 30, 1996, there were 3,122 death row inmates. Death Row, U.S.A., (NAACP Legal Defense and Educational Fund, Inc., New York, N.Y.), Spring 1996, at 1.

[26] *Id.*

[27] *See* Kozinski and Gallagher, *supra* note 24, at 19-20.

[28] *See id.* at 2.

[29] This is not China, where more than 2,000 people have been executed in a single year, or Africa or the Middle East, where large numbers are dispatched on a single day. In China, levels of crime lag far behind those in Western cities. However, about 65 crimes (one-third of all serious criminal offenses in China) are now punishable by death including such crimes as serious prostitution, trade in cultural relics, sabotage of dikes, and organized secret religious societies. Lena H. Sun, *Turmoil in China Brings an Increase in Executions*, AUSTIN AMERICAN-STATESMAN, Apr. 10, 1994, at 2. This system results in large numbers of death sentences and executions. In 1992, China executed at least 1,079 prisoners. Lucy Johnson, *China Human Rights: More Than 1,400 Executed in 1993*, INTER PRESS SERV., May 5, 1994, at 1. In 1993, at least 2,564 people were sentenced to death and more than 1,419 were executed. *Id.* In 1994, Amnesty International counted 1,791 executions, but believes the actual figure to be

The current system has several practical consequences. First, it delivers little in the way of deterrence or retribution. Second, it delivers much more death penalty ritual than is required to fulfill the symbolic functions of the death penalty.[30] Third, the relatively few defendants who are actually executed are often not the most heinous and aggravated killers, and the defendants whose death sentences are reduced to life on appeal, or in retrials, are often among the most aggravated killers, thereby giving the process of ultimate selection for death a random quality.[31] Fourth, the risk of racial bias is heightened in case categories that are not highly aggravated.[32] Fifth, the system involves substantial public investment, and the opportunity costs on the business of state and federal courts are very high.[33] Sixth, the large number of death sentence cases in the legal system slows down the pace of actual executions by creating, in many states, long queues of cases awaiting decision

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much higher. *China's Legislature Extends Death Penalty to Economic Crimes*, ASSOCIATED PRESS, June 30, 1995, *available in* 1995 WL 4395422, at 1. China has been reported to execute large numbers of people in a given day; on one day in 1993, it was reported that 62 prisoners were put to death. David Mazie, *Death Penalty Remains Alive Around the World*, L.A. TIMES, Jan. 16, 1994, at A2.

In August 1983, Chinese authorities launched a nationwide campaign against crime during which extremely high numbers of executions were carried out. Amnesty International recorded 600 in only a few places in China during the first three months of the campaign. Foreign press reports estimated the total number of executions during these three months to be over 5,000. One Hong Kong publication reported that over 10,000 people were executed in China between August of 1983 and January of 1984. *See* Amnesty International, China: Violations of Human Rights 54-55 (1984).

Additionally, other countries are known to be frequent users of the death penalty. Iran, for example, executed at least 1,791 people between 1983-1987, with as many as 661 in one year. ROGER HOOD, THE DEATH PENALTY 49 (1989). Nigeria is reported to have executed at least 773 people during the same time period, with as many as 355 in one year. *Id.* These figures are certainly underestimates and are based on official announcements of executions. *Id.*

30 Also, by keeping death cases active for so many years before the death sentence is vacated or the defendant is resentenced to life in a retrial, the pain and suffering of the victims' families is prolonged, and emotional closure is significantly delayed.

31 Kozinski & Gallagher, *supra* note 24, at 31.

32 This is documented by my own research in both Georgia and New Jersey, *see* BALDUS ET AL., *supra* note 17, at 321-22, and is recognized by experienced participants in the system. *See* Kozinski & Gallagher, *supra* note 24, at 32. A considerable portion of the American public perceives racial and socioeconomic discrimination in the administration of the death penalty. A 1991 Gallup Poll reported that 41% of whites and 73% of blacks believe that "[a] black person is more likely than a white person to receive the death penalty for the same crime." The same poll indicated that 59% of whites and 72% of blacks believe that poor people are more likely to receive the death penalty for the same crime committed by "a person of average or above average income." The Death Penalty, Gallup Poll, vol. 1991 (June 26, 1991).

33 Kozinski & Gallagher, *supra* note 24, at 11-16.

at each stage in the process of post-conviction review.[34]

The list of adverse consequences of the current broadly focused system suggests the advantages that could flow from a more narrowly focused death penalty that limits death sentencing to the worst cases and "sentence[s] to death about the number we truly have the means and will to execute."[35]

In the view of some people, including Judge Kozinski, such a system would enhance deterrence and retribution. The output of the system would also appear less random and capricious, and would reduce the risk of racial discrimination. Finally, it would reduce public expenditures and opportunity costs in the courts, while fully serving the symbolic functions of the death penalty in the community at large.

How might the goal of limiting the death penalty to the worst cases be achieved or even attempted? On this issue, I consider it helpful to view the output of the American death penalty system as subject to regulation by an invisible hand. It clearly is controlled by no single entity, nor is its output prescribed by explicit agreement among the principal actors in the system.[36] Rather, the system reflects an initial legislative judgment about the appropriate breadth of each state's statute. Additionally, in the prosecution of individual death eligible cases, it reflects thousands of decisions made annually by prosecutors, jurors, judges, and governors. These decisions reflect legal, economic, political and moral considerations; but they also appear to reflect judgments about the level of death penalty activity that the community expects. I believe this hypothesis draws support from the significantly different levels of death penalty activity we see in different states. The hypothesis further is supported by the apparent stability from year to year of the sentences imposed and executions conducted. The data in Table 1 (death sentences) and Table 2 (executions) reflect both the variability among states and the stability within them. Of particular note is the experience in Louisiana in 1987 when eight people were executed in the span of eleven weeks. Over the following year

[34] *See* Michael L. Radelet & Michael Mellow, *Death to Life Overrides: Saving the Resources of the Florida Supreme Court*, 20 FLA. STATE U.L. REV. 195, 213-14 (1992). Radelet and Mellow develop the theory of the long queue in an assessment of the Florida court's practice of generally sustaining trial court decisions to override jury recommended death sentences. *See id.*; *see also* Kozinski & Gallagher, supra note 26, at 2-3 (describing the backlog of cases in specific courts).

[35] Kozinski & Gallagher, *supra* note 24, at 31.

[36] *See generally* Franklin Zimring, *Ambivalence in State Capital Punishment Policy: An Experimental Sounding*, 18 N.Y.U. REV. L. & SOC. CHANGE 729 (1991).

TABLE 1

Prisoners Under Sentence of Death on December 31, 1993, by State and Year of Sentencing

State	Year of death sentence													Under sentence of death	Average number of years under sentence of death as of
	1974-75	1976-77	1978-79	1980-81	1982-83	1984-85	1986-87	1988	1989	1990	1991	1992	1993	12/31/93	12/31/93
Total sentenced to and remaining on death row, 12/31/93															
Florida	4	7	17	16	30	36	35	26	21	25	45	30	32	324	6.3
Georgia	3	5	3	4	9	7	19	4	9	11	6	8	8	96	6.9
Texas	2	6	11	22	31	40	64	31	29	27	29	38	27	357	6.3
Montana	1				1		1	2	1			2		8	**
Nebraska	1		4	2		2	1	1						11	12.4
Arizona		2	6	11	12	11	8	10	6	11	14	8	13	112	6.4
Arkansas		1	1	4	1		6	2	4	3	1	3	7	33	5.6
Mississippi		1		5	5	2	4	3		8	6	4	12	50	5.1
Oklahoma		1	2	3	9	18	25	18	12	9	12	5	8	122	6.1
California*			11	21	55	39	49	31	30	33	24	38	32	363	6.2
Tennessee*			6	10	10	17	19	5	3	8	10	8	2	98	7.4
Illinois			3	19	17	16	21	12	9	19	8	16	12	152	6.5
Nevada			2	4	10	9	8	6	9	7	4	3	3	65	6.7
North Carolina			2	5	6	7	1	2		7	16	21	32	99	3.5
South Carolina*			2	4	5	8	6	2	3	1	7	2	7	47	6.3
Alabama			1	6	22	15	18	7	15	10	4	14	8	120	6.4
Indiana			1	6	6	11	6	6		3	2	4	2	47	7.4
Kentucky			1	2	8	3	4	2	1	1	3	3	2	30	7.2

(*continued*)

TABLE 1 (continued)

State	Year of death sentence													Under sentence of death 12/31/93	Average number of years under sentence of death as of 12/31/93
	1974-75	1976-77	1978-79	1980-81	1982-83	1984-85	1986-87	1988	1989	1990	1991	1992	1993		
Virginia						5	14	3	3	6	6	6	6	49	4.4
Missouri				4	4	14	16	12	2	4	11	7	6	80	5.7
Pennsylvania				6	17	21	27	21	16	10	19	16	16	169	5.6
Delaware				2	2			1				4	6	15	4.2
Idaho				1	4	5	1	3	2	1	1	2	2	22	6.7
Louisiana					5	11	9	1		1	4	7	7	45	5.4
Maryland				1	1	2	1	1	3	2	1	2	1	15	5.5
Ohio					11	29	22	10	9	9	13	16	10	129	5.5
Washington					3	1	1			1	1	1	2	10	5.6
Utah*					1	2	1	2	3		1		1	11	5.5
Colorado							2				1			3	**
Connecticut							1		1		2		1	5	**
New Jersey							1			2			4	7	**
New Mexico							1							1	**
Oregon									1		2	6	4	13	1.6
South Dakota												1	1	2	**
Federal											1		5	6	**
Total	11	23	73	158	285	331	392	224	192	219	254	275	279	2,716	6.1

*Preliminary numbers, subject to revision.
**Averages not calculated on fewer than 10 inmates.

Source: *Capital Punishment 1993*, Bureau of Justice Statistics Bulletin (U.S. Dept. of Justice, Wash. D.C.), December 1994, at 13.

TABLE 2

Number of Executions by State and Year, 1977-95

State	1977	1978	1979	1980	1981	1982	1983	1984	1985	1986	1987	1988	1989	1990	1991	1992	1993	1994	1995	Total
Utah	1											1				1				4
Florida			1				1	8	3	3	1	2	2	4	2	2	3	1	3	36
Nevada			1						1				2	1						5
Indiana					1				1									1		3
Virginia						1		1	2	1	1	1	1	3	2	4	5	2	5	29
Texas						1		3	6	10	6	3	4	4	5	12	17	14	19	104
Alabama							1			1	1		4	1		2			2	12
Mississippi							1				2		1							4
Louisiana							1	5	1		8	3		1	1		1		1	22
Georgia							1	2	3	1	5	1	1		1		2	1	2	20
N. Carolina								2		1					1	1		1	2	8
S. Carolina									1	1				1	1				1	5
Missouri													1	4	1	1	4		6	17
Arkansas														2		2		5	2	11
Oklahoma														1					3	6
Illinois														1				1	5	7
Wyoming																1				1
Delaware																1	2	1	1	5
Arizona																1	2		1	4
California																1	1			2
Washington																	1	1		2
Idaho																		1		1
Maryland																		1		1
Nebraska																		1		1
Pennsylvania																			2	2
Montana																			1	1
TOTALS	1	0	2	0	1	2	5	21	18	18	25	11	16	23	14	31	38	31	56	313

Source: *Death Row U.S.A.*, Execution Update (NAACP Legal Defense and Education Fund, N.Y.), March 1, 1996

not a single death sentence was returned at a penalty trial in the entire state.[37] Thereafter, the numbers of executions in Louisiana have been much lower and more stable.

The geographic variability of death penalty activity also supports the observation of Hugo Bedau that the public's support for the death penalty expressed in opinion polls very likely means different things in different communities.[38] In some places it means support for actual executions, while in other communities the symbolic function of the death penalty is satisfied with ritual that falls considerably short of actual executions.

C. Toward A Narrower Death Penalty System

What institutions, therefore, are in the best position to limit our current system to a worst case scenario focus? Given our current political climate, state legislatures seem unlikely candidates. The current trend in most state legislatures is in the direction of expanding rather than contracting the current system.

Gubernatorial commutation is another unlikely alternative. In the pre-*Furman* period, about a quarter of death sentences were commuted by gubernatorial decisions.[39] However, today that tradition has withered to virtually zero in most states.[40]

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[37] Jason DePaule, *Abstract Death Penalty Meets Real Executions: Did State of Louisiana Electrocution Affect Juries?*, N.Y. Times, June 30, 1991, at E2.

[38] *See* Hugo A. Bedau, The Death Penalty in America 68 (1982) (addressing the ambiguity of the death penalty as a symbol: "One question that has proved more difficult to answer than all others is what the present high levels of support for the death penalty really support. Is it only the legal threat of the death penalty, coupled with the judicial ritual of trying, convicting, and occasionally sentencing a murderer to death rather than actual executions?").

[39] *See* Hugo A. Bedau, *The Decline of Executive Clemency in Capital Cases*, 18 N.Y.U. Rev. L. & Soc. Change 255, 262-66 (1991) (showing that prior to *Furman*, the ratio of commutations to death sentences was approximately 3 to 8); *see also* W. Bowers, Executions in America 76 (1974) (stating that from two to four out of 10 death row inmates escape execution through commutation); Scott, *The Pardoning Power*, 284 Annals 95, 99 (1952) (hypothesizing that most of the 184 people who were sentenced to death but not executed between the years 1940-46 undoubtedly received commutations). This is not to diminish, however, the central role of gubernatorial discretion in controlling the number and pace of state executions through the signing of death warrants.

[40] Since January 1, 1973, only 72 death sentences have been commuted by governors. *Death Row, U.S.A.*, *supra* note 25, at 1. For a history of executive clemency, see generally Note, Elkan Abramowitz & David Paget, *Executive Clemency in Capital Cases*, 39 N.Y.L. Rev. 136 (1964). Professors Radelet and Zsembik demonstrate that the post-*Furman* commutation figures overstate the role that executive clemency has played. See generally Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. Rich. L. Rev. 289 (1993). Fewer than one half of the commutations are "humanitarian" in that they involve an assessment of the appropri-

The federal courts are also out of the picture because of *Pulley v. Harris*,[41] *McCleskey v. Kemp*[42] and the failure of Congress to enact the Racial Justice Act. This leaves us with the state courts. To a significant degree, they face the same risk of arousing the community as do other highly visible state officials. This is especially the case if court decisions vacating death sentences are based on the appellate court's judgments of death worthiness rather than on the procedural grounds that are the traditional grist of appellate review in criminal cases. Even when judges limit themselves to these usual modes of review, they are often unfairly attacked for their death penalty rulings. Some are even defeated at the polls for their effort to uphold the Constitution.[43]

Similar concerns would likely attach to decisions based on judicial findings of racial discrimination. As suggested earlier, I believe that political considerations of this sort are a major explanation for the ineffectiveness of proportionality review over the last twenty years. Moreover, my reading of hundreds of state court proportionality review decisions during this period also indicates that most appellate judges are uncomfortable with proportionality review because of the substantive life or death issues it implicates. Such decisions are painful, and in the view of many jurists, inappropriate for them to make. A second concern relates to the nontraditional methodology involving questions of data collection and analysis. A third concern is with the cost and complexity of an empirically based system of review. Finally, there is a question of whether a principled system of proportionality review is even possible. Years ago, Justice Rehnquist characterized the entire enterprise as "impossible" of attainment in any principled

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ateness of a death sentence in terms of the "characteristics of the crime or the defendant." *Id.* at 305. The majority of the commutations are in response to judicial rulings identifying constitutional violations or other legal errors in the defendant's penalty trial. Radelet and Zsembik conclude that executive clemency post-*Furman* has failed to "ensure that only the most blameworthy and irredeemable defendants are executed." *Id.* at 30.

[41] 465 U.S. 37 (1984) (stating that proportionality review is not required by the Constitution).

[42] 481 U.S. 279 (1987) (allowing race discrimination claims under the Fourteenth and Eighth Amendments, but under extremely onerous burdens of proof).

[43] The politically dangerous environment in which many judges operate is described in graphic detail in 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. 769, 776-91 (1995). *See also Politics and the Death Penalty: Can Rational Discourse and Due Process Survive the Perceived Political Pressures*, 21 FORDHAM URBAN L.J. 239 (providing a transcript of an A.B.A. program).

fashion.[44]

As a result of these obstacles, we are most likely to see a meaningful commitment to proportionality review in Northern states where the symbol of equal justice is most salient. In fact, there is evidence of renewed interest in proportionality review in some Northern courts, a trend which may reflect an awareness that actual executions are more imminent than in the past and that state courts are now the only forum in which these issues can be heard. For example, the Pennsylvania court, which has for years conducted perfunctory proportionality reviews, recently suggested that it might be willing to explore problems with the database of cases it maintains to inform its reviews.[45] Additionally, the Connecticut court, which has traditionally taken a passive role on the issue of proportionality review, has recently expressed a willingness to hear statistically based claims of racial discrimination in the use of the death penalty.[46]

In New York state, the new death penalty statute provides for extensive proportionality review, including an explicit requirement that the court of appeals consider claims of racial discrimination.[47] In addition, the New York legislation directs the court of appeals to develop a comprehensive database of information for all cases involving indictment for first-degree murder.[48]

Finally, in the Washington Supreme Court, proportionality review is a continuing issue, whose salience was recently enhanced by a federal district court holding that the Washington court's system of proportionality review was unconstitutional on due process

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44 BALDUS ET AL., *supra* note 17. In spite of these misgivings and the lack of progress in most state courts, the occasional dissenting opinion by judges who take the issue of proportionality review seriously indicate that a coherent and manageable, yet comprehensive system of review is possible. *See, e.g.*, State v. Harris, 449 S.E.2d 371, 381-86 (N.C. 1994) (Exxum, J., dissenting); State v. Jeffries, 717 P.2d 722, 742-46 (Wash. 1986) (Utter, J., dissenting); State v. Missouri, 648 S.W.2d 96, 111-13 (Mo. 1983) (Seiler, J., dissenting); State v. Rhines, 1996 U.S. Dist. LEXIS 60 (S.D. 1960) (Sabers, J. and Amundson, J., dissenting).

45 *See* Banks v. Commonwealth, 656 A.2d 467, 474 (Pa. 1995).

46 *See* State v. Cobb, 663 A.2d 948, 961 (Conn. 1995).

47 N.Y. CRIM. PROC. § 470.30(3)(a) (McKinney 1995) (requiring the court to consider "whether the imposition of the verdict or sentence [of death] was based upon the race of the defendant or a victim of the crime for which the defendant was convicted").

48 N.Y. JUD. LAW § 211-a (McKinney 1995). The New York Court of Appeals recently adopted a 19-page "Capital Case Data Report" that is to be completed by the clerk of the trial court for each first-degree murder case processed through the system. N.Y.R. UNIF. TRIAL CTS. PART 218 (Uniform Rules for the Trial Courts in Capital Cases). The actual data collection instrument is not included in the rules but is available from the court.

grounds.[49]

Consider again the broader question of limiting executions to the worst cases. I see this largely as a political issue driven primarily by the decisions of prosecutors and juries reflecting a determination that a reduced system is capable of satisfying the needs and expectations of the community. It would be an incremental process analogous to the development of the common law — reflecting an evolving consensus that a sharply focused death penalty is in the best interests of the community. It would distinctly not be a top-down process driven by frequent appellate court decisions invalidating death sentences as excessive. In our culture, that outcome is no more likely than a program of mass executions. Rather, we are more likely to see an interactive process between the court, the prosecutorial community, the defense community, and the public. Also, as noted earlier, in most states the exercise of gubernatorial discretion in signing death warrants is a major determinant of the number and pace of executions.

This prognosis is not to diminish the role of the state courts. Indeed, I think their involvement is crucial on three levels. First is the development of a comprehensive database to inform the community interested in the actual operation of its death penalty system process. Data can enlighten the decisions of the invisible hand. Second, courts can provide crucial leadership and dialogue with the prosecutorial and defense communities and the public. Third, courts can ratify into law the emerging trends of prosecutorial and jury decision. Let me briefly elaborate on these points with some New Jersey illustrations.

The most important role for state courts is to develop a database that provides an overview of the system and reliable information on the universe of cases that are used as comparison cases in individual reviews. This task should be assumed by the court and not left to the meager resources of capital defendants and their attorneys. In addition to a database, the court can inform the community dialogue by compiling simple tabulations of the flow of cases through the system. For example, Tables 3 and 4, which are routinely prepared and updated by the Administrative Office of the New Jersey courts, present a comprehensive overview of the New Jersey system.[50]

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[49] *See* Harris v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994), *aff'd on other grounds sub nom.* Harris v. Wood, 64 F.3d 1432 (9th Cir. 1995) (offering no ruling on the constitutionality of Washington's system of proportionality review).

[50] The Office of the Attorney General of New Jersey, through its Division of Crimi-

TABLE 3

Distribution of New Jersey Death-Sentencing Rates Among All Death-Eligible Cases by Year of Penalty Trial or Conviction (in Non-Penalty-Trial Cases): October 1995*

Year	Death-Sentencing Rate
1983	.22 (2/9)
1984	.25 (7/28)
1985	.15 (5/34)
1986	.20 (7/35)
1987	.25 (8/32)
1988	.04 (1/24)
1989	.03 (1/31)
1990	.10 (3/30)
1991	.0 (0/35)
1992	.0 (0/21)
1993	.14 (4/29)
1994	.13 (3/24)
1995	.22 (2/9)
Average	.13 (43/341)

* This table includes only defendants who are death-eligible under current law. It also counts as a separate case each verdict sheet that was returned for multiple victims in penalty trial cases.
This table includes all penalty trial cases sentenced through October 31, 1995.

Source: Administrative Office of the New Jersey Courts, Proportionality Review Report for *State v. Harris*, Table 1, January 11, 1996.

nal Justice, Research and Evaluation Section, also compiles data of the type shown in Tables 1 and 2. For a detailed description of the New Jersey system of comparative proportionality review, see State v. Marshall, 130 N.J. 109, 613 A.2d 1059 (1992).

TABLE 4

Distribution of New Jersey Penalty Trial Cases and Death Sentencing Rates: 1983-1995*

Year	A Death-Sentencing Rates—All Penalty-Trials	B Death-Sentencing Rates Among Cases That Are Death-Eligible Under Current Law
1983	.50 (3/6)	.40 (2/5)
1984	.33 (8/24)	.35 (7/20)
1985	.29 (7/24)	.26 (5/19)
1986	.35 (7/20)	.39 (7/18)
1987	.43 (9/21)	.42 (8/19)
1988	.09 (1/11)	.09 (1/11)
1989	.07 (1/15)	.08 (1/12)
1990	.38 (3/8)	.43 (3/7)
1991	.0 (0/6)	.0 (0/4)
1992	.0 (0/5)	.0 (0/4)
1993	.40 (4/10)	.44 (4/9)
1994	.27 (3/11)	.30 (3/10)
1995	.29 (2/7)	.29 (2/7)
Average	.29 (48/168)	.30 (43/145)

* This table includes all penalty trials which were sentenced on or before October 31, 1995. It also counts as a separate case, each verdict sheet that was returned for multiple victims in penalty trial cases.

Column A includes all penalty trials while Column B is limited to cases that are death eligible under current law.

Source: Administrative Office of the New Jersey Courts, Proportionality Review Report for *State v. Harris*, Table 2, January 11, 1996.

A database can also provide case typologies and simple tabulations, which document death sentencing frequencies in different categories of similar cases. Tables 5 and 6 are two examples from New Jersey.[51]

[51] Table 5 is an excerpt from the New Jersey "salient factors" measure of defendant culpability. It classifies cases in terms of major statutory aggravating circumstances, with subcategories determined by the presence of mitigating circumstances and non-statutory aggravating circumstances. Table 6 measures defendant culpability in terms of the number of statutory aggravating and mitigating factors present in the case.

TABLE 5

Death-Sentencing and Penalty-Trial Rates Among New Jersey Death-Eligible Cases, 1983-1995 Classified with a Salient Factors Measure of Death-Eligible Homicides[a]

Principal Salient Factors and Subcategories	Jury Penalty Trial Death-Sentencing Rate	Death-Sentencing Rate Among All Death-Eligible Cases[b]	Proportion of Death-Eligible Cases that Went to Penalty Trial
A. Multiple victims (4g)[c]	.25 (6/24)	.12 (6/49)	.49 (24/49)
1. With sexual assault or particular violence/terror	.36 (5/14)	.24 (5/21)	.67 (14/21)
2. Other without significant (<2) mitigating circumstances	.00 (0/6)	.00 (0/9)	.67 (6/9)
3. With significant (>=2) mitigating circumstances	.25 (1/4)	.05 (1/19)	.21 (4/19)
B. Prior murder conviction without A above (4a)	.59 (10/17)	.42 (10/24)	.71 (17/24)
1. Two or more additional aggravating circumstances or particular violence/terror	.40 (2/5)	.33 (2/6)	.83 (5/6)
2. One additional aggravating circumstance or violence/terror	.80 (8/10)	.53 (8/15)	.67 (10/15)
3. With no other aggravating circumstances or particular violence/terror	.00 (0/2)	.00 (0/3)	.67 (2/3)
C. Sexual assault without A-B above (4g)	.32 (7/22)	.15 (7/47)	.47 (22/47)
1. With particular violence/terror	.39 (7/18)	.19 (7/37)	.49 (18/37)
2. Other with one or more additional statutory aggravating circumstances	.00 (0/4)	.00 (0/7)	.57 (4/7)
3. Other	. (./0)	.00 (0/3)	.00 (0/3)

(continued)

TABLE 5 (continued)

Principal Salient Factors and Subcategories	Jury Penalty Trial Death-Sentencing Rate	Death-Sentencing Rate Among All Death-Eligible Cases	Proportion of Death-Eligible Cases that Went to Penalty Trial
D. Victim a public servant without A-C above (4h)	.40 (2/5)	.40 (2/5)	1.0 (5/5)
1. Police officer victim with one or more additional statutory aggravating circumstances or particular violence/terror	.50 (2/4)	.50 (2/4)	1.0 (4/4)
2. Police officer victim with no other statutory aggravating circumstances or particular violence/terror	.00 (0/1)	.00 (0/1)	1.0 (1/1)
3. Other	. (./.)	. (./.)	. (./.)
E. Robbery without A-D above (4g)	.24 (8/33)	.07 (8/107)	.31 (33/107)
1. Residential forced entry with particular violence/terror	.50 (4/8)	.21 (4/19)	.42 (8/19)
2. Other with particular violence/terror	.17 (1/6)	.04 (1/24)	.25 (6/24)
3. Other forced entry	.00 (0/4)	.00 (0/5)	.80 (4/5)
4. Nonbusiness holdup, stranger victim	.00 (0/1)	.00 (0/15)	.07 (1/15)
5. Business holdup	.27 (3/11)	.14 (3/21)	.52 (11/21)
6. Between acquaintances	.00 (0/2)	.00 (0/17)	.12 (2/17)
7. In illegal drug transaction	.00 (0/1)	.00 (0/6)	.17 (1/6)

(continued)

TABLE 5 (continued)

Principal Salient Factors and Subcategories	Jury Penalty Trial Death-Sentencing Rate	Death-Sentencing Rate Among All Death-Eligible Cases	Proportion of Death-Eligible Cases that Went to Penalty Trial
F. Arson without A-E above (4g)	.00 (0/3)	.00 (0/8)	.38 (3/8)
1. Multiple victims	. (./0)	.00 (0/2)	.00 (0/2)
2. One victim and perceived risk to multiple victims	.00 (0/2)	.00 (0/5)	.40 (2/5)
3. One victim and perceived a risk to one victim	.00 (0/1)	.00 (0/1)	1.0 (1/1)
G. Burglary without A-E above (4g)	.00 (0/5)	.00 (0/14)	.36 (5/14)
1. Residence with forced entry with particular violence/terror	.00 (0/4)	.00 (0/12)	.33 (4/12)
2. Residence with forced entry without particular violence/terror	.00 (0/1)	.00 (0/1)	1.0 (1/1)
3. Other	. (./0)	.00 (0/1)	.00 (0/1)
H. Kidnapping without A-G above (4g)	.20 (1/5)	.08 (1/13)	.38 (5/13)
1. Abduction with particular violence/terror and stranger victim	.00 (0/1)	.00 (0/1)	1.0 (1/1)
2. Abduction with particular violence/terror and other victim	.25 (1/4)	.13 (1/8)	.50 (4/8)

[a]. This table includes all cases in the universe that are death-eligible under current law. It also includes multiple death-sentencing decisions in the cases in which a separate penalty trial verdict was returned for two or more victims.
[b]. This column, and the one to the right, include penalty trial and death-eligible non-penalty trial cases.
[c]. Parentheticals refer to statutory aggravating circumstances.

Source: Administrative Office of the New Jersey Courts, Proportionality Review Report for *State v. Harris*, Table 7, January 11, 1996 (parts I through M omitted).

TABLE 6

Death-Sentencing Rates Controlling for the Number of Aggravating and Mitigating Factors Found by the Penalty Trial Jury or Present in Non-Penalty-Trial Cases*

	Number of Statutory Mitigating Circumstances	Number of Statutory Aggravating Circumstances			
		4	3	2	1
	0		1.0 (1/1)	1.0 (2/2)	
	1	.00 (0/1)	.00 (0/4)	.38 (6/16)	.10 (3/30)
	2		.50 (4/8)	.26 (13/50)	.05 (4/74)
	3	.00 (0/1)	.43 (3/7)	.14 (4/29)	.00 (0/55)
	4		.00 (0/3)	.14 (2/14)	.03 (1/35)
	5			.00 (0/4)	.00 (0/5)
	6				.00 (0/2)
All Cases	.13 (43/341)	.00 (0/2)	.35 (8/23)	.23 (27/115)	.04 (8/201)

* This table includes all cases in the universe that are death-eligible under current law (November 1995). It also includes multiple death-sentencing decisions in the cases in which a separate penalty-trial verdict was returned for two or more victims. For this anaysis, the 5h catchall factor, which is found in 86% of all penalty-trial cases, was coded as being present in all non-penalty-trial cases.

Source: Administrative Office of the New Jersey Courts, Proportionality Review Report for *State v. Harris*, Table 9, January 11, 1996.

The New Jersey court has also provided leadership through suggestions to the prosecutorial community,[52] which in turn has responded with the promulgation of standards for evaluating the death worthiness of individual cases and the establishment of county level capital case screening panels.[53]

A word about complex statistical analyses. They may be helpful in some cases, but they are clearly not essential. Indeed, for the purpose of helping the community dialogue focus on the worst cases, quite rudimentary pictures of the system are sufficient. Tables 5 and 6 are good examples of simple statistical presentations. Also, principled, well-focused reviews can be conducted strictly with narrative factual summaries of the death sentenced review case and the comparison cases.[54]

[52] *See* State v. Koedatich, 112 N.J. 225, 257, 548 A.2d 939, 955 (1988) (recommending that the attorney general and the county prosecutors adopt guidelines for the selection of capital cases in order "to promote uniformity in the administration of justice").

[53] *See* Leigh Beinen et al., *Capital Punishment in New Jersey*, 54 ALB. L. REV. 709, 791-93 (1990).

[54] For good examples of the effective use of narrative summaries in proportional-

The state court function of ratification and rulemaking has not progressed far in New Jersey, principally because the system is still small and the number of cases in given categories is sparse. However, in Florida and other states where the volume of cases is substantial, some patterns are emerging. We see in the cases suggestions that some case categories are among the least culpable and should be put beyond the risk of a death sentence either by a court rule or a rebuttable presumption. Examples include cases involving mentally ill defendants,[55] killings arising out of violent marital discord,[56] and cases of involving robbery murders with substantial mitigation.[57]

Finally, what might inform the process of identifying the worst cases? The categories must appear reasonable and credible to the supporters of the death penalty who believe it serves deterrent and retributive functions. Considerations of deterrence and retribution place high on the list of such cases those involving multiple killings, defendants with prior murder convictions, contract killings, police victim cases, extreme torture, and sexual assaults with particular violence and terror. Also, empirical data from Georgia and New Jersey suggest that the highest death sentencing rates are in these case categories that appear most aggravated on *a priori*

ity review, see State v. Bey, 137 N.J. 334, 645 A.2d 685 (1994); State v. Martini, 139 N.J. 3, 651 A.2d 949 (1994); State v. Marshall, 130 N.J. 109, 613 A.2d 1059 (1992); State v. Williams, 452 S.E.2d 245 (N.C. 1994) (citing cases).

Recently, October 22, 1996, the New Jersey Supreme Court appointed a Special Master to conduct, among other things, qualitative analyses of narrative summaries of penalty trial cases as a vehicle for assessing the validity of claims of racial discrimination in the application of the death penalty by New Jersey penalty trial juries. Order, State v. Loftin, Supreme Court of New Jersey, A-86 - September Term (1996). This is a salutary move by the New Jersey court since it will enable it to put aside technical objections concerning the validity of the multiple regression analyses that produced the original rankings of cases according to their levels of criminal culpability. The court's Special Master will be in a position to produce groups of case that are "similar" in terms of their criminal culpability, strictly on the basis of legal concepts of "culpability" that have been subjected to adversarial scrutiny in hearing before the Master and are wholly independent of the assumptions of the statistical procedures that produced the original case rankings.

55 *E.g.* State v. Wilson, 413 S.E.2d 19, 29 (S.C. 1992) (Finney, J., dissenting) (finding defendant guilty but mentally ill).

56 *See, e.g.*, Blakely v. State, 561 So. 2d 560, 561 (Fla. 1990) (stating that "murder is a result of a heated domestic confrontation"); People v. Tye, 565 N.E.2d 931, 945 (Ill. 1991) (collecting cases) (vacating death sentence where there was no significant history of prior criminal conduct and the offense was precipitated by some stressful circumstances or other mental or emotional disturbance).

57 Sinclair v. State, 657 So.2d 1138, 1142 (Fla. 1995) (vacating death sentence where robbery was the sole statutory aggravating circumstance with substantial mitigation present).

grounds. The rates found in the other less aggravated categories involving armed robbery, burglary, arson, kidnapping and grave risk of death to others are substantially lower.[58]

D. Conclusion

In conclusion, I believe that the process of proportionality review can usefully support movement toward a more narrowly focused death penalty system. Recall that when the overly broad death statutes now in place in America were proposed by the American Law Institute in the Model Penal Code in the early 1960s and adopted by state legislatures since 1972, no one knew what would actually evolve from the administration of these statutes. Our current understanding from the experience of the last twenty years, which can be greatly enhanced by the systemic collection of data by state courts, could inform legislative, prosecutorial, and community judgments about the allocation of judicial resources in each state's death penalty system. It could also support movements, particularly led by the state courts, toward limiting death sentencing to the worst cases. This, in turn, could increase the efficiency of the entire process and satisfy the death penalty's core symbolic functions. Also, by reducing the risk of arbitrariness and discrimination in the administration of the death penalty, the two symbols—the death penalty and equal justice under the law—would no longer clash but instead would peacefully coexist.

58 For example, in New Jersey, the penalty trial death sentencing rate among the most aggravated cases is about 45%, and among all death eligible cases the rate is about 35%. Among the less aggravated cases, the penalty phase death sentencing rate is about 15% and the rate among all death eligible cases is about 6%. David C. Baldus, Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court (1991) (*see* Table 7). In Georgia, death sentencing rates from the 1970s are uniformly higher than the New Jersey rates. Among the aggravated categories, the penalty trial rates range between 60 and 70%, and among all death eligible cases the rates are 10 to 15 percentage points lower. Among the less aggravated cases, the rates are in the 30 to 50% range in the penalty phase, and in the 20 to 30% range among all death eligible cases. *Id.* at 104, 110.