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ARTICLE: CAPITAL PUNISHMENT, PROPORTIONALITY REVIEW, AND CLAIMS OF FAIRNESS (WITH LESSONS FROM WASHINGTON STATE)

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* "Blank Trial Judge Report RCW 10.95.120," available at <http://www.courts.wa.gov/appellate<uscore>trial<uscore>courts/supreme/clerks/> (last visited June 28, 2004) (providing the text of the trial judge report currently employed by the Washington State Supreme Court).

SUMMARY:

... The United States is now immersed in the most urgent debate about capital punishment in decades. ... Within the context of capital punishment jurisprudence, comparative proportionality review is a procedure by which a court determines whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases. ... Finally, absent any elaboration of what it had indeed found in this larger universe, and absent any discussion of specific cases other than that of Brett, the court declared that "after carefully reviewing the totality of similar cases," it deemed Brett's case "not disproportionate": "There is no unique or distinguishing characteristic of the Defendant or of this crime which makes imposition of the death penalty wanton and freakish. ...

HIGHLIGHT:

Abstract: This Article explores the adequacy of one of the safeguards adopted by many states to ensure that the death penalty is applied fairly, following the reinstatement of capital punishment in 1976. Relying chiefly on evidence drawn from Washington State, this Article asks whether the practice of comparative proportionality review has ensured that there is now a rational basis for distinguishing between those who are sentenced to die and those who are not. An analysis of the trial judge reports employed by the Washington State Supreme Court in reviewing death sentences, as well as the method used by the court in conducting its reviews over the course of the past two decades, indicates that the death penalty remains arbitrary and capricious in its administration. The failure of comparative proportionality review furnishes yet another reason for concluding that capital punishment cannot be conducted in a way that comports with claims of fairness.

"Capital punishment [must] be imposed fairly, and with reasonable consistency, or not at all." n1

TEXT:

[*776]

INTRODUCTION

The United States is now immersed in the most urgent debate about capital punishment in decades.

This controversy is most often framed, explicitly or implicitly, through reference to the concept of fairness. n2 The debate encompasses a broad range of questions, including the possible execution of the innocent, the deficient legal representation afforded those charged with capital crimes, the effective restriction of the death penalty to those who are impoverished, the racially discriminatory administration of capital punishment, and the execution of those who were minors at the time they committed their crimes. n3 Each of these [*777] questions raises concerns about whether the death penalty is now (or can ever be) applied in a way that is equitable.

Recently, yet another question regarding the fairness of the death penalty's administration has received considerable media attention. That question, phrased in the language of proportionality, was raised in dramatic fashion by the plea bargain struck by the so-called "Green River killer," Gary Ridgway. n4 On November 5, 2003 in a Seattle courtroom, Ridgway confessed to murdering forty-eight young women, making him the most prolific serial killer in U.S. history. n5 In return for providing information to the sheriff's office about these killings, the prosecuting attorney for King County agreed not to seek the death penalty. n6 Not surprisingly, this decision provoked considerable public furor, exemplified by the response of Mike Carrell, a Republican member of the Judiciary Committee of the Washington State House of Representatives: "If Ridgway does not deserve the death penalty, then what situation and who does deserve it?" n7 If Ridgway, with a body count of four dozen, is not condemned to die, then how can one justify sentencing to death a defendant who has murdered far fewer? How can one explain the Ridgway plea bargain to the ten persons now on death row in Washington, a majority of whom were convicted of murdering a single individual? Some speculate that these questions of fairness will make it more difficult to persuade courts in Washington, and perhaps elsewhere, to sentence those convicted of far less heinous crimes. n8 Indeed, the executive director of the Death Penalty Information Center, Richard Dieter, has suggested that legal challenges predicated on the [*778] Ridgway case may in time attract the attention of the U.S. Supreme Court: "There will be appeals, and there may well be a review about the whole country's use of the death penalty." n9

The roots of the controversy provoked by the Ridgway deal, as well as the broader question of proportionality, can be traced to *Furman v. Georgia*. n10 Consisting of a brief per curiam opinion, followed by nine separate opinions in a five to four vote, the *Furman* Court invalidated Georgia and Texas statutes that permitted defendants to be sentenced to death at the unfettered discretion of a judge or jury. n11 The Court held that these laws, and by extension the death penalty statutes of thirty-seven additional states along with various federal statutory provisions, constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments. n12 In his concurring opinion, Justice Stewart maintained that a legal order that allows death sentences to be "wantonly" and "freakishly" imposed is "cruel and unusual in the same way that being struck by lightning is cruel and unusual." n13 Justice White expressed much the same point, stating 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." n14 Justice Douglas, endorsing the constitutional conclusion of Justices Stewart and White on somewhat different grounds, explained that the death penalty statutes in question were unconstitutional not because their administration was capricious, but rather because their application to particular categories of persons was all too predictable: "We know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority." n15 Regardless of the rationale, the *Furman* Court [*779] required states to incorporate procedural safeguards designed to regulate the otherwise standardless deliberations of judges and juries. n16 Absent such checks there can be little reason to believe that capital punishment, the most severe sanction prescribed by law, is reserved for the most blameworthy defendants found guilty of the most heinous offenses.

Today, some three decades after *Furman*, but just short of the thirty-year anniversary of *Gregg v. Georgia*, n17 in which the U.S. Supreme Court authorized the states to resume capital punishment, n18 many of the concerns expressed by the Court in 1972 are being voiced once again. Perhaps the most dramatic echo of these worries was heard in Illinois when, on January 31, 2000, Governor George Ryan imposed a moratorium on executions in that state. n19 His decision to do so, he explained, was prompted by questions about the fairness of capital punishment. n20 Specifically, he noted that while twelve inmates had been executed since the death penalty was reinstated in Illinois in 1977, thirteen had been exonerated and freed from death row. n21 Shortly after this announcement, Governor Ryan appointed a commission and instructed it to furnish an explanation for this record of error and to advance recommendations aimed at reforming the administration of capital punishment in the state. n22

Two years later, the governor's commission called for a sweeping overhaul of the death penalty in Illinois, although its members conceded that "no system, given human nature and frailties, could ever be devised or constructed that would work perfectly and guarantee absolutely that no innocent person is ever again sentenced to death." n23 Aggravating this [*780] concern, a study appended to the commission's report reached two conclusions. First, the race of homicide victims is a statistically significant predictor of who is and is not sentenced to death in Illinois. n24 Second, the frequency of death sentences varies markedly from region to region throughout Illinois. n25 Responding to these findings, in January, 2003, Governor Ryan commuted every death sentence then in effect to prison terms of life or less: "The facts that I have seen in reviewing each and every one of these cases," he declared, "raised questions not only about the innocence of people on death row, but about the fairness of the death penalty system as a whole. Our capital system is haunted by the demon of error: error in determining guilt and error in determining who among the guilty deserves to die." n26

Governor Ryan's worries about the justice of capital punishment in Illinois have been articulated throughout the United States, and major [*781] death penalty studies have recently been conducted in Arizona, Connecticut, Florida, Illinois, Indiana, Maryland, Nebraska, Nevada, New Jersey, North Carolina, Virginia, and at the federal level. n27 In addition, legislatures in thirty-seven of the thirty-eight states that now provide for the death penalty considered reforms to its administration during their legislative sessions in 2001, with twenty-one of those states adopting at least one such reform. n28 Statements by public figures and in opinion polls also show a growing concern about the death penalty's fairness. For example, several long-time supporters of the death penalty, including George Will, the Reverend Pat Robertson, and Oliver North have expressed reservations about the death penalty based on concerns about the fairness of its administration. n29 Justice Sandra Day O'Connor, a longtime advocate of the death penalty, delivered two speeches in 2001 in which she noted that "serious questions" have been raised in recent years "about whether the death penalty is being fairly administered in this country." n30 Attesting to the cumulative effect of the publicity afforded to such concerns, a Gallup poll conducted in 2000 indicated that a bare majority of Americans (51%) believe that the death penalty is applied fairly, while 41% believe that it is not. n31 Moreover, support for the death penalty in national polls has dropped from about 77% to 63% since 1996. n32 In 2000, while 53% of Americans "favored a nationwide suspension of executions until a study is completed on the fairness of [*782] how the death penalty is used," only 29% opposed this recommendation. n33

Together, these concerns about the death penalty's fairness pose questions about whether the procedural reforms adopted by the states after 1972 and approved by the U.S. Supreme Court in 1976 have rendered the death penalty any less arbitrary and capricious than it was deemed in *Furman*. A mounting body of evidence suggests that the safeguards affirmed in *Gregg* do not in fact ensure the equitable administration of the death penalty demanded by *Furman*. n34 If that is so, then it is hard to escape the conclusion of James Liebman and his associates, authors of a comprehensive national study of error rates in capital cases: "the time has come to fix the death penalty, or end it." n35

The purpose of this Article is to examine the efficacy of one of the less frequently discussed safeguards commended by the *Gregg* plurality in authorizing the reinstatement of capital punishment. n36 Specifically, this Article evaluates the adoption and implementation of comparative proportionality review throughout Washington's judicial system. Comparative proportionality review is a statutorily mandated procedure intended to combat the two problems that arise when excessive discretion is granted to a jury vested with the authority to impose the death penalty. n37 By comparing any given death sentence with the penalties imposed on others convicted of death-eligible crimes, comparative proportionality review is intended to serve two purposes. n38 First, it is intended to ensure that there is a rationally defensible basis for distinguishing those sentenced to die from those who are not. n39 Second, it is intended to prevent death sentences predicated on constitutionally impermissible factors such as economic status or racial identity, whether [*783] of the defendant or the victim. n40

The evidence adduced in this Article is drawn chiefly from Washington, and many of its claims are specific to that state's comparative proportionality review. However, the flaws identified by this analysis suggest a broader conclusion: the implementation of comparative proportionality review over the last three decades has not provided, and indeed cannot provide, an adequate safeguard against the arbitrary and capricious administration of capital punishment. The predicaments encountered by the Washington State Supreme Court in its conduct of comparative proportionality review are indicative and, in part, constitutive of the defining dilemma that courts have struggled to resolve over the course of the past three decades in attempting to craft a constitutionally coherent doctrine regarding capital punishment. n41 Specifically, the deficiencies of comparative proportionality review in Washington mirror the judiciary's difficulties in fashioning a principled standpoint that will ensure that the death penalty is administered in a way that meets the standards of fairness in two distinct and arguably incompatible senses of the term. First, administration of the death

penalty must be fair in the sense that it must be restricted to, as well as consistently applied to, only the most heinous criminals found guilty of the most heinous crimes. n42 Second, it must be fair in the sense that the judicial processes that generate, review, and affirm death sentences must provide full consideration to the individualized character and circumstances of each capital defendant. n43 Insofar as the practice of comparative proportionality review in Washington founders on the competing claims of these two understandings of fairness, this Article indicates why, of the two options proposed by Liebman and his associates, to fix or to abolish the death penalty, only the latter is compatible with the diverse imperatives of justice.

Parts I and II of this Article offer two contexts for understanding the [*784] practice of comparative proportionality review as it is currently conducted in Washington. Part I examines the ethical and legal justifications as well as the constitutional history behind this practice. Part II looks at the logic of comparative proportionality review, i.e., the principal conceptual questions that must be answered in order to translate an abstract statutory commitment into a coherent judicial practice. Part II.A addresses the question of how to define the universe of cases deemed relevant to the conduct of such review. Part II.B addresses the question of how to extract from this universe the smaller pool of cases considered similar to any given case on appeal. Part II.C addresses the question of how to designate the criteria necessary to generate and sustain the conclusion that a death sentence under review is or is not proportionate. Part III then examines the history of comparative proportionality review's adoption in Washington. Part IV analyzes the principal deficiencies of comparative proportionality review as currently practiced. Specifically, Part IV.A examines deficiencies in the database of cases that the Washington State Supreme Court is statutorily required to consider in conducting comparative proportionality review, and Part IV.B critiques the way in which the court has actually conducted its proportionality reviews. Finally, Part V returns to the broader implications of comparative proportionality review for the current controversy regarding the fairness of capital punishment in contemporary America.

I. COMPARATIVE PROPORTIONALITY REVIEW: ITS JUSTIFICATION AND CONSTITUTIONAL HISTORY

Within the context of capital punishment jurisprudence, comparative proportionality review is a procedure by which a court determines whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases. n44 The justification for such review is predicated on the concept of fairness. As Margaret Radin has argued, the commitment to such review is a logical extension of our collective endorsement of a Kantian concept of justice and, more particularly, our dedication to fairness. n45 Because all individuals are entitled to equal dignity under the Equal Protection Clause of the Fourteenth [*785] Amendment, n46 fairness dictates that like crimes should be punished alike. By extension, it is unfair to mete out harsher punishment to certain members of a class of persons convicted of the same crime. n47 Conversely, it is unfair to impose a less harsh punishment on some convicted of the same crime (leaving aside for now the complications involved in determining what qualifies as the "same" crime). n48

Determination of consistency in the context of capital punishment necessarily involves assessing the proportionality of a death sentence by comparing it to similar cases in which the death penalty has or could have been imposed. Granted, in particular cases, comparative analysis may not be imperative in order to determine whether a death sentence has been imposed as a result of constitutionally impermissible considerations such as race. Such comparative analysis, however, is a crucial means of determining whether a systematic pattern of arbitrary (in the sense of discriminatory) sentencing exists in any given jurisdiction and hence, whether fairness (in the sense of equal treatment) has been achieved.

A general commitment to proportionality as a vital ingredient of fairness is expressed in the text of the U.S. Constitution. n49 The Eighth Amendment prohibits "excessive" bail and fines, and proscribes "unusual" punishments. n50 Obviously, neither what is "excessive," nor what is "unusual," can be determined absent consideration of some norm from which such punishments are said to depart. What is less apparent is whether the U.S. Constitution specifically requires comparative proportionality review or, as some have argued, n51 only "inherent" proportionality review. n52 The latter requires that any given punishment be commensurate to the offense in question. n53 On this account, a specific [*786] punishment may be deemed unconstitutional because it is excessive per se, without reference to sentences imposed on others for the same crime. n54 For example, in *Coker v. Georgia*, n55 a plurality of the U.S. Supreme Court concluded that the death penalty is always disproportionate to the crime of rape of an adult. n56 Justifying this conclusion, the Court first asked whether the death penalty, when imposed for this crime, advances either of the constitutionally permissible purposes of capital punishment: retribution or deterrence. n57 Unless the death penalty significantly contributes to one or both of these goals, as the Court later elaborated in *Enmund v. Florida*, n58 "it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional

punishment." n59 Second, the Court asked whether the punishment imposed, "is grossly out of proportion to the severity of the crime." n60 Because rape, unlike murder, does not involve the taking of life, the Coker plurality concluded that death is an excessive and hence unconstitutional penalty for this category of offense. n61

Unlike the Court in Coker, the Furman Court's principal concern was not that of the inherent disproportionality of death as a punishment for a particular category of crimes, but rather the comparative inconsistency between sentences imposed on different persons found guilty of similar crimes. n62 Because of the unbridled discretion vested in judges and juries, existing capital punishment statutes generated a pattern of death [*787] sentencing, which, according to Justice Brennan, "smacks of little more than a lottery system." n63 In part, that "lottery" is problematic because, as Justice Douglas suggested, one can explain why some are sentenced to death while others are not only by citing forms of discrimination that offend the principles of equality under the law. n64 However, it is also problematic because it may generate too many as well as too few death sentences. n65 On the one hand, Furman implied a concern about the problem of overinclusion. If death penalty statutes fail to provide juries adequate guidance in determining what counts as the most death-worthy offenses, an offender may be sentenced to death for a crime that does not so qualify. n66 On the other hand, Furman also implied a concern about the problem of underinclusion. If the death penalty is imposed in only a small number of the cases for which it is legally available, it may prove difficult, if not impossible, to articulate a coherent basis for differentiating between the few who are sentenced to death and the many who receive life sentences. n67 As Justice Brennan summarized, "when the punishment of death is inflicted in a trivial number of the cases in which it is legally available "the conclusion is virtually inescapable that it is being inflicted arbitrarily." n68

The immediate effect of Furman was to prompt state legislatures to revise their death penalty statutes in an effort to address the Court's concerns about excessive discretion. n69 The Court first evaluated the constitutionality of these efforts in Woodson v. North Carolina. n70 In that case, the Court struck down a North Carolina statute that mandated the death penalty for everyone convicted of first-degree or felony murder. n71 While the statute was intended to eliminate inconsistent sentencing patterns, Justice Stewart concluded that such a mandatory sentencing [*788] provision does not allow for "particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death." n72 Predicated on the belief that the penalty of death is qualitatively different from a sentence of imprisonment, however long, the Woodson Court insisted that "individualized sentencing" is a "constitutionally indispensable part of the process of inflicting the penalty of death." n73

In contrast, in Gregg v. Georgia n74 the Court found Georgia's revised statute to be constitutional. n75 The Georgia legislature sought to meet Furman's concerns by adopting three reforms. n76 First, it bifurcated capital proceedings into an initial phase to determine guilt or innocence and a subsequent phase to determine the appropriate sentence to be imposed upon those found guilty. n77 Second, in order to guide jury deliberations, it required that juries consider and, if applicable, weigh statutorily prescribed aggravating factors against mitigating factors before determining the appropriateness of a death sentence. n78 Third, and of principal interest here, it mandated appellate review of all death sentences, including the requirement that the Georgia State Supreme Court conduct comparative proportionality analyses. n79

More precisely, the Georgia law required its highest court to determine whether any given death sentence "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." n80 Should the court determine that [*789] Georgia juries do not generally impose the death penalty in factually similar cases, even if otherwise properly imposed, that sentence was to be set aside and the case remanded for resentencing. n81 Commending this requirement, the Gregg plurality predicted:

The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death. n82

In addition, the plurality commended the statutory provision that required trial judges to complete and submit a standard questionnaire to the state's highest court within ten days of sentencing. n83 That questionnaire required the trial judge to determine the influence, if any, of "passion, prejudice, or any other arbitrary factor" n84 in the deliberations of the sentencing authority and, in addition, to assess whether the evidence adduced at trial sustains the finding of at least one aggravating circumstance, which is a statutory prerequisite for the death sentence's imposition. n85 Finally, the

Georgia statute required the state's highest court to include express "reference to those similar cases which it took into consideration" in rendering its judgment regarding proportionality, n86 thereby ensuring that its rationale would be expressly [*790] articulated.

In the wake of Gregg, virtually all states whose death penalty statutes were invalidated by Furman re-crafted their laws, with many adopting the Georgia statute as their model. n87 Indeed, twenty-six states enacted reformed statutes that included comparative proportionality review provisions similar or, in many cases, identical to those adopted by the Georgia legislature. n88 Three additional states adopted comparative proportionality review as a result of state court decisions. n89 However, while Gregg established that Georgia's death penalty statute was sufficient to meet the concerns articulated in Furman, n90 it did not resolve the question of whether any or all of the specific procedural safeguards adopted by that state were necessary in order to render any given capital statute consonant with the U.S. Constitution and, more particularly, the Eighth Amendment.

The Court answered that question in *Pulley v. Harris*, n91 in 1984, holding that comparative proportionality review of death sentences is not constitutionally required. n92 Writing for the Court, Justice White acknowledged that the Gregg plurality had "made much" of Georgia's adoption of comparative proportionality review. n93 However, he insisted, the Court had not declared "that comparative review was so critical that without it the Georgia statute would not have passed constitutional muster." n94 Moreover, Justice White noted that when the Court decided Gregg, it simultaneously approved a revised Texas death penalty statute [*791] that did not include a provision for comparative proportionality review. n95 While the California statute at issue in *Pulley* did not provide for comparative proportionality review, it did endeavor to limit the discretion of juries. n96 Specifically, the statute "minimized the risk of wholly arbitrary and capricious action" by bifurcating capital trials into separate guilt and sentencing phases, as well as by requiring consideration of aggravating and mitigating factors. n97 Justice White acknowledged that a statute of the sort approved in *Pulley* "may occasionally produce aberrational outcomes," but insisted that "such inconsistencies are a far cry from the major systemic defects identified in *Furman*." n98 Therefore, while every valid death penalty statute must incorporate some "means to promote the evenhanded, rational, and consistent imposition of death sentences," n99 those means need not include comparative proportionality review. n100

Shortly after *Pulley* was decided, nine states repealed their statutory comparative proportionality review requirements; and several others that had been required to adopt comparative proportionality review by state supreme court mandate abandoned the practice as well. n101 On this basis, [*792] Leigh Bienen concluded that, following *Pulley*, "the majority of state high courts reduced proportionality review to a perfunctory exercise." n102 Moreover, of the state appellate decisions in capital cases rendered between 1975 and April 1996, only fifty-five death sentences were vacated on the ground of disproportionality, while 1376 death sentences were affirmed. n103 Despite this record, twenty of the thirty-eight states that provide for capital punishment continue to require comparative proportionality review by statute. n104 In addition, the State Supreme Courts of Florida and Arkansas continue to incorporate comparative proportionality review into their death sentence reviews, although not required to do so by statute. n105

Neither the infrequent and often superficial conduct of such review, nor the lack of an Eighth Amendment mandate for such review, answers the question of whether the determination of comparative proportionality is crucial in order to fashion a system of capital punishment that is consonant with the claims of fairness. That question acquires additional urgency in light of the contemporary controversy over the death penalty. One of the principal recommendations of the commission on capital punishment convened by Governor Ryan is that "the Illinois Supreme Court should consider on direct appeal ... whether the sentence of death was excessive or disproportionate to the penalty imposed in similar [*793] cases." n106 Echoing the statutory provisions commended in Gregg, the commission also urged that information "be collected at the trial level with respect to prosecutions of first-degree murder cases, by trial judges, which would detail information that could prove valuable in assessing whether the death penalty is, in fact, being fairly applied." n107 Among other recommendations, the national study of error rates in capital cases conducted by Liebman and his colleagues concluded by exhorting each jurisdiction to consider "using comparative review of murder sentences to identify what counts as 'the worst of the worst' in the state, and overturning outlying death verdicts." n108 Finally, in 2001, The Constitution Project, a bipartisan, nonprofit organization, recommended:

Every state should adopt procedures for ensuring that death sentences are meted out in a proportionate manner to make sure that the death penalty is being administered in a rational, non-arbitrary, and even-handed fashion, to provide a check on broad prosecutorial discretion, and to prevent discrimination from playing a role in the capital decision-making process. n109

In sum, we are now in the midst of a national debate about capital punishment fueled by renewed articulations of the concerns, initially advanced in *Furman*, about the arbitrary and/or discriminatory imposition of the death penalty. In response to these concerns, comparative proportionality review is once again being offered as a possible remedy for that worry. Especially in light of the Ridgway plea bargain, challenges in future murder cases will almost certainly be mounted on the grounds of disproportionality. For all of these reasons, it behooves us to ask whether in principle or in practice such review can be conducted in a way that effectively responds to the concerns about fairness that first prompted its adoption.

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II. THE LOGIC OF COMPARATIVE PROPORTIONALITY REVIEW

There is no single model of comparative proportionality review to which all state appellate courts adhere, and, as indicated below, no model is without problems. That said, the logic of this task requires a jurisdiction to perform three basic steps in order to implement comparative proportionality review. n110 First, a court must select the universe of cases to be considered when such reviews are conducted. n111 Second, a court must choose the pool of cases deemed "similar" to a specific case on appeal. n112 Third, a court must decide whether a specific case is proportionate when measured against the pool of similar cases. n113 Because any judgment about the comparative proportionality of a death sentence is relative in the sense that it is determined through reference to whatever other cases are included for the purposes of comparison, resolution of the first two steps will go a long way toward dictating the results of the third. This also means that any problems in a jurisdiction's resolution of each of the earlier steps will taint those that follow.

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A. Determining the Universe of Cases for Comparison

Most state statutes provide little or no guidance about how to determine the universe of cases for comparison. n114 Appropriating the language adopted in Georgia, most mandate merely that appellate courts decide whether a particular death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." n115 Accordingly, appellate courts must independently determine the universe of cases relevant to such comparisons. In this task, a court has a number of options. For the sake of illustrating the range of possibilities, as well as what is at stake in the choice of one as opposed to another, this section will outline the most restrictive as well as the most expansive methods of determining the universe of cases for comparison.

Most restrictively, a court can limit its comparative review to only those cases that resulted in death sentences upheld on appeal. n116 Or, somewhat more broadly, it can limit review to all cases advancing to penalty-phase trials, regardless of whether those proceedings did or did not result in death sentences. n117 This method is intuitively appealing [*796] because, on its face, it seems reasonable to determine the proportionality of any given death sentence by comparing it to other cases deemed sufficiently heinous to warrant the same punishment. That said, this method suffers from an obvious deficiency. To examine only those cases that culminated in death sentences, or those in which this sentence was considered by a jury during the penalty phase, is to deprive an appellate court of any means of calculating the relative frequency with which this penalty is imposed in the larger class of first-degree murders. Doing so defeats the very purpose of comparative proportionality review because an appellate court is thereby deprived of any basis for determining how many persons convicted of first-degree murder were spared the death penalty. The New Jersey State Supreme Court, in *State v. Marshall*, n118 offered the following hypothetical to illustrate this point:

On the assumption that 100 robbery-felony-murder cases are prosecuted as capital crimes, all defendants are convicted and one defendant is sentenced to death, a comparison of the death-sentenced defendant's punishment with the punishment imposed only on other death-sentenced defendants would exclude from the proportionality-review process the ninety-nine robbery-felony-murder defendants that juries did not sentence to death. Indisputably, the determination whether that single death sentence is disproportionate can be made only by comparing it with the life sentences imposed on the ninety-nine defendants convicted of the same crime. n119

Absent such comparison, this method constructs a universe of cases that tilts comparative proportionality review in favor of upholding any given death sentence. n120 Equally important, it fails to answer the question posed by Justice White in *Furman*: How is one to meaningfully distinguish the few cases in which death sentences are imposed from the many that result in sentences of life imprisonment? n121

At the opposite end of the spectrum, in determining the relevant universe of cases, a court may elect to review all cases in which the facts [*797] provide the legal basis for a possible capital prosecution, regardless of whether such prosecution actually ensues. n122 The National Center for State Courts recommended such a position in 1984, when it proposed that "the pool of cases for a proportionality review system should contain, as a minimum, all cases in which the indictment included a death-eligible charge, and a homicide conviction was obtained." n123 This method overcomes the principal deficiency of the first because, by not limiting its universe to those crimes that culminate in death sentences, it provides a more inclusive indication of the diverse ways that the law disposes of first-degree murders. Additionally, this method seeks to remedy not merely the problems occasioned by the discretionary authority of juries, but also by the discretion exercised by prosecutors when they choose whether or not to seek the death penalty in any given case. n124 Building on the hypothetical cited above, the New Jersey State Supreme Court explained:

Were we to assume that the remaining ninety-nine defendants were prosecuted and convicted of non-capital murder because of prosecutorial decisions not to seek the death penalty, the disproportionality of the single defendant's death sentence would arise not because of a disproportionate jury determination but because the prosecutorial decision to seek the death penalty was unique. That type of disproportionate death sentence could not be identified by a proportionality-review process that was limited to [capital cases tried to] a penalty phase; it could be [*798] identified, however, by a universe that included clearly death-eligible homicides that were not prosecuted as capital cases. n125

This expansive method of determining the scope of the universe also suffers from serious flaws. n126 For example, a prosecutor's decision to seek the death penalty may not be the best way to determine which cases should be included in the universe of cases for comparison because, often, for a number of reasons, prosecutors will elect not to seek a death sentence even when the facts of a case render this option available. Courts are therefore put in the position of engaging in independent discovery of the cases they deem death-eligible. As such, this method imposes an exceedingly expensive and time-consuming burden on the judiciary. In addition, because this method requires courts to render this determination absent the full range of information available to prosecutors, it introduces a highly speculative element into a given universe's composition. Finally, because this method requires that courts second-guess the judgments of prosecutors, it arguably poses constitutional problems regarding the proper separation of powers between the judicial and executive officers of state government and, more particularly, the measure of discretion justifiably left to the latter. n127

B. Specifying the Pool of Similar Cases

Once courts determine how to specify the relevant universe of cases, they must then establish the criteria that enable determination of the smaller pool of cases considered "similar" to that currently on appeal. n128 As with the question of determining the universe of cases, this section briefly discusses several ways of defining a pool of similar cases. n129 [*799] These differ from one another not so much in kind, but, rather, in degree of abstraction from the concrete facts of the case being appealed. Each suffers from significant practical and conceptual difficulties. n130

The most obvious, and perhaps the most intuitive, way to select a pool of similar cases is to identify cases whose facts are the same as the case under review. Literally construed, this method is impossible because no two cases are ever identical. Moreover, if the notion of similarity is construed in strictly factual terms, then a small number of concrete differences will suffice to render any two cases distinguishable, which, in turn, will render a court unable to fulfill its statutory mandate. n131 This difficulty may be answered by identifying more general fact patterns that are common to several cases. n132 A court, for example, might compare cases that involved invasion of a victim's private residence, that were [*800] unprovoked, and that were preceded by the infliction of severe physical abuse. However, this approach in and of itself does not answer the question of which features are to be deemed sufficiently salient to merit incorporation into a given fact pattern. For example, for the purposes of identifying a pool of cases similar to one on review, is it relevant if all of the victims were young African-American men or if all of the perpetrators used a specific sort of weapon in committing their crimes? Absent specification of the criteria to distinguish between significant and insignificant similarities, such questions cannot be answered.

These problems are compounded when a court takes seriously the standard statutory mandate to consider not just the nature of the crime, but also the character of the defendant. Assessment of the latter typically involves consideration of mitigating factors that may or may not have been introduced during the sentencing phase of a trial. n133 However, any attempt to render defendants comparable on this basis is likely to defy categorization, because defendants are constitutionally permitted to introduce all mitigating factors they deem relevant, including those that are not expressly provided for by statute. n134 Mitigating factors, for example, can include the death of a parent while a defendant was a

child, recent loss of a job, or prior service to the community. Should a court elect to ignore mitigating factors because it determines that these difficulties in comparing facts are insurmountable, it will fail to take into account an indispensable measure of a defendant's culpability.

To overcome these difficulties in identifying a pool of similar cases, courts often interpret the concept of similarity more broadly. n135 In [*801] practice, courts most often accomplish this by identifying the relevant features of a given case with whatever statutorily defined aggravating factors were found applicable at trial. n136 This might include the fact that the offense in question was committed during the course of an armed robbery, that the victim was a police officer, that the offender was previously convicted of one or more homicides, etc. n137 Alternatively, the pool of similar cases is sometimes established not by identifying those that share the same or similar aggravating factors, but, rather, those in which the number of aggravating factors is the same or nearly so. n138 Because each of these approaches abstracts from the concrete circumstances of any given case, all are capable of generating the conclusion that cases differing markedly in strictly factual terms are nonetheless comparable in terms of their overall type or level of aggravation. That determination in turn is taken as an indicator of the degree of heinousness of any given murder and thus the measure of culpability to be ascribed to its perpetrator. n139

These approaches, however, are insufficient to differentiate aggravated first-degree murder cases in which death sentences are imposed from those in which this sentence is not imposed. The vast majority of cases in which aggravating factors are found applicable do not result in death sentences, no matter what their number, even when those factors are identical to those of cases in which death sentences were imposed. n140 In addition, an approach that defines similarity in terms [*802] of statutorily defined factors is likely to disregard those which, although not specified by law, a jury may find relevant in determining the sentence. Hence, a focus on aggravating factors alone will not take into account a defendant's willingness to cooperate with authorities or a defendant's remorsefulness, while an approach that seeks to overcome this difficulty by discovering what factors actually influenced sentencing decisions is beset by its own difficulties. For example, while one jury may conclude that prior drug use renders a crime less excusable, another may deem it a mitigating factor. By the same token, the existence of an intimate relationship between offender and victim may lead one jury to conclude that a murder is more inexplicable and so more heinous, while another jury may conclude that such a relationship renders a murder more understandable and hence its perpetrator more worthy of mercy.

In sum, approaches to the identification of a pool of similar cases that rely on strictly factual similarity founder due to their concrete specificity, whereas approaches that move away from the imperatives of strictly factual congruence stumble over the pitfalls of abstraction. The latter enables a court to assemble a group of cases for the purpose of engaging in comparative proportionality review. However, in doing so, it risks glossing over the facts that distinguish a case on review from other members of the group to which it belongs, thereby jeopardizing the principle that the fairness of the death penalty demands particularized consideration of specific individuals and their crimes. The former enables a court to engage in such particularized consideration, but, in doing so, renders it difficult, if not impossible, to generate the comparisons that assure us that any given death sentence is not arbitrary.

C. Identifying a Test of Proportionality

Once a court has identified the universe of cases to be considered and specified the pool of cases deemed similar to the current case, it must then resolve the final step in the logic of comparative proportionality review: determination of whether a case under review is (or is not) proportionate to others in the pool it has defined. Methods of answering this question range from the intuitive to the statistical, and all suffer from serious flaws. n141

[*803] The least systematic approaches to this question involve an appeal to some unarticulated notion of "reasonableness" in defending the conclusion that a specific death sentence is or is not proportionate, n142 or, alternatively, a precedent-seeking approach. n143 The former is unacceptable because, in employing it, courts fail to specify the criteria that inform their judgments, thereby rendering their decisions undefended and uncontestable. n144 Using the latter approach, regardless of whether similarity is defined in terms of factual congruence or like aggravating factors, courts attempt to discover one or more similar cases in which the death penalty was previously imposed and upheld (ignoring the difficulties noted above in specifying the criteria of similarity). n145 Arguably, this approach encourages ad hoc assessments based on unarticulated or insufficiently articulated notions of similarity, and, as such, does little if anything to meet Furman's concerns about patterns of inconsistent death sentencing. n146 Moreover, because this sort of inquiry presupposes restriction of the pool of comparable cases to those in which sentences of death were imposed and upheld, it is biased in favor of affirmation. This predisposition proves still more troublesome when one considers that the affirmed cases cited in order to justify a death sentence may themselves have been arbitrarily

imposed. When that is so, a precedent-seeking method will simply perpetuate and exacerbate the injurious effects of a chain of problematic sentences, as the most [*804] recently affirmed now becomes available for citation as precedent in future cases.

Because these first two approaches rely on either intuitive notions of reasonableness or on identification of a handful of comparable precedents, they appear inconsistent with Gregg. In conducting comparative proportionality review, the Gregg plurality stated, courts should ask whether juries do or do not "generally ... impose the death sentence in a certain kind of murder case." n147 This exhortation suggests a third method of proportionality analysis, involving an assessment of the frequency with which capital sentences are imposed among cases deemed similar. Unlike the precedent-seeking approach, this requires that courts consider not merely death-sentenced cases, but also those similar cases that resulted in some other sentence, most typically life imprisonment. Only then can a court determine whether imposition of the death penalty in a case on review is comparatively excessive because this penalty is imposed so infrequently in the larger class of cases to which it is similar.

The basic premise of frequency analysis is that the greater the frequency of death sentences within any given comparison group, the more confident a court can be in adjudging any given sentence in that group to be proportionate. n148 The effort to calculate such frequencies is not without its problems, however. For example, in order to evaluate a defendant's character, a review must take into account mitigating factors. However, for reasons indicated above, any attempt to categorize such factors for the purpose of determining their relative frequency appears to be a fool's errand. Specification of how to take mitigating factors into account is additionally complicated by the fact that juries need not be unanimous when determining mitigation and because they need not elaborate their reasons for imposing or refusing to impose a death sentence. n149 As such, the commitment to frequency analysis of the mitigating factors that account for a jury's determination represents an attempt to quantify that which is most often unknown and that even if known does not lend itself to quantification. More generally, as the example of mitigating factors suggests, the conduct of frequency analysis draws a court away from careful consideration of the qualitatively distinct features of prior cases, and so compromises its [*805] effort to give full weight to the unique characteristics of defendants, their crimes, and their respective degrees of culpability.

Leaving aside the complex methodological questions regarding just how frequency analysis should be conducted, n150 a court committed to this method must decide what rate of death sentence imposition is sufficient to sustain the conclusion that a sentence under review is not disproportionate. Just what that percentage should be is susceptible to disagreement, depending in large measure on what a court takes to be the principal purpose of comparative proportionality review. If the primary purpose of such review is to ensure that patently aberrant sentences are set aside, then a low threshold of frequency (e.g., 33%) in similar cases could be considered sufficient to guarantee capital punishment's fairness. Alternatively, if the primary purpose of such review is to ensure that death sentences are only upheld when, in similar cases, this punishment is "generally" imposed, then arguably a much higher threshold (e.g., 75%) is required.

In a similar vein, a commitment to frequency analysis does not in and of itself specify what percentage of similar cases is required in order to accomplish retribution and deterrence, capital punishment's two constitutionally permissible rationales. n151 Determination of that rate, moreover, may well vary if one considers one of these purposes more central than the other. For example, if one believes that capital punishment is justified chiefly as a deterrent, as Justice White's opinion in *Furman* suggests, n152 then the death penalty must be imposed sufficiently often in specified categories of murder to deter effectively. That in turn may suggest that findings of disproportionality should be confined to cases that are grossly out of line with those previously appealed. However, if one believes that capital punishment is justified chiefly in retributive terms, as Justice Stewart's opinion in *Furman* suggests, n153 then the frequency of capital punishment's imposition becomes a less significant concern, and so a court may conclude that a lower threshold is sufficient to justify a finding of disproportionality.

[*806] Finally, a commitment to frequency analysis may render it necessary for a court to choose between competing claims of fairness. On the one hand, in order to avoid the charge of arbitrariness, a court may specify a precise criterion of frequency that warrants imposition of the death penalty on the members of a group of defendants whose character and crimes are deemed comparable. In doing so, however, a court opens itself to the criticism that it is employing an overly formalistic procedure that renders it impossible to take into adequate account the idiosyncratic features that may render this particular defendant less worthy of death than another, and so denies the constitutional imperative of individualized sentencing in death penalty cases. n154 On the other hand, a court may refuse to specify a settled frequency standard so as to ensure its ability to engage in individualized sentencing. In doing so, however, it is

susceptible to the charge of arbitrariness on the ground that it is then free to select among different frequencies in order to ratify results determined on other and possibly undeclared bases.

III. COMPARATIVE PROPORTIONALITY REVIEW IN WASHINGTON

The current Washington statute dealing with aggravated first-degree murder and capital punishment requires the Washington State Supreme Court to review all death sentences imposed in the state. n155 On review, the court must determine whether there was "sufficient evidence" to justify the jury's determination that leniency was not warranted; n156 whether the death sentence was "brought about through passion or prejudice"; n157 whether the defendant was "mentally retarded"; n158 and, finally, of principal interest here, "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." n159 Should the court answer the first of these questions in the negative, or any of the remaining three questions in the affirmative, the death sentence under review shall be invalidated and the case remanded to the trial court for [*807] resentencing. n160

This statute, which became effective in 1981, n161 is the fruit of a complex political struggle that was provoked by the U.S. Supreme Court's ruling in *Furman*. In 1972, the U.S. Supreme Court vacated a Washington death sentence based on *Furman*. n162 Three years later, the Washington State Legislature abolished the death penalty altogether. n163 However, in the November general election of 1975, Washington voters approved Initiative Measure No. 316, which required imposition of a death sentence in all cases of aggravated first-degree murder. n164 Washington State Attorney General Slade Gorton declared that initiative unenforceable based on *Woodson*, n165 which invalidated mandatory death sentence statutes on the ground that they prevented juries from taking into account the individualized character and circumstances of particular defendants. n166

Following *Gregg*, Gorton recommended that any new capital punishment statute adopted in Washington follow the model of Georgia. n167 Specifically, he suggested that the statute provide for a bifurcated trial, include a mandatory appeal to the State Supreme Court, and require that court to conduct comparative proportionality reviews in order to ensure "that the death penalty imposed is consistent with other sentences imposed in other trials under similar circumstances." n168 Following receipt of these recommendations, during the 1977 legislative session Representative Earl Tilly drafted and introduced House Bill 615, which was closely patterned after the Georgia statute and incorporated verbatim its comparative proportionality provision. n169 The final version of that bill, which retained this provision without alteration, became law on June 3, 1977. n170

The 1977 statute required the clerk of the trial court, within ten days [*808] of receipt of the transcript of any trial culminating in a death sentence, to transmit that record to the State Supreme Court, along with a notice providing basic information about the case as well as "a report prepared by the trial judge ... in the form of a standard questionnaire prepared and supplied by the supreme court of Washington." n171 In addition, the statute authorized the court to affirm the death sentence or remand the case for resentencing by the trial court judge, who is to be furnished with "[the] records of those similar cases referred to by the supreme court of Washington in its decision and the extracts prepared therefor." n172 The 1977 statute, however, did not furnish any additional guidance on either the information to be collected via the required questionnaire or the use of the reports generated by that information by the Washington State Supreme Court. n173 The statute also did not indicate the universe of cases to be considered for the purpose of conducting comparative proportionality review. n174 Moreover, the statute did not specify the criteria to be employed in determining which cases are similar, or how to determine whether any given sentence is or is not "excessive" or "disproportionate." n175 Finally, the statute did not specify exactly what a trial judge was to do on remand with the records of similar cases or, for that matter, what sentence to impose if the State Supreme Court found that a given death sentence was disproportionate. n176

One year later, in 1978, in response to a request by Chief Justice Wright, and taking the Georgia equivalent as her prototype, a commissioner of the Washington State Supreme Court formulated a draft questionnaire to be completed by trial court judges. n177 After approving temporary use of this initial version, n178 the court established a Task Force on the Death Penalty Questionnaire to revise that draft. n179 [*809] This group met from May 1978 to February 1979, at which time it proposed a final version of this questionnaire as well as a rule to implement its use. n180

The minutes of the task force indicate a marked gap between its expectations with regard to the purpose of the trial judge reports and the subsequent practice of the Washington State Supreme Court in conducting comparative proportionality review. n181 The judges and attorneys who participated in that task force repeatedly affirmed their belief that the results generated by these questionnaires were to play a central role in informing the court's performance

of its statutorily mandated reviews: "the purpose of the [trial] report is to aid the Supreme Court in its review of a death sentence by providing the Court with all possible information regarding the defendant and the proceedings, particularly by eliciting from the trial judge his own unique perspective of the trial." n182 Furthermore, the members agreed that "such a perspective could be most effectively communicated by a report that was less a checklist of information also appearing in the record and more a report that included general questions calling for analysis, by the trial judge, of any extraneous factors not appearing in the record that may have influenced the jury's verdict." n183 Finally, the members expressed their collective view that "because the conduct of this report has the potential of influencing a decision upon which a defendant's life depends, it is imperative that it be properly completed, without oversight. A conscientious trial judge will ensure that the report is carefully completed and factually correct," n184 and that it be completed in [*810] a timely fashion, defined by the task force as thirty days after sentencing. n185

Of equal significance, in considering the appropriate universe of cases to be examined for the purposes of comparative proportionality review, and departing from the clear implication of the 1977 statute, the task force recommended that this questionnaire be

required in every case in which a defendant is charged with, and convicted of, murder in the first degree ... and a special sentencing proceeding is held The report is required regardless of whether the death penalty is imposed at the conclusion of the sentencing proceeding and regardless of whether the defendant pursues an appeal. n186

Justifying this recommendation, which was eventually incorporated into its proposed criminal rule for superior courts, the task force concluded that:

this approach was necessary to furnish the Supreme Court with the data it needs to compare the propriety of the death sentence in a particular case with the propriety of sentences in other cases. The task force did not feel it would be appropriate to compare a death penalty case only to other cases in which the death penalty was actually imposed. n187

Following discussion and revision of multiple drafts, the task force recommended to the Washington State Supreme Court a questionnaire that is similar and, in many respects, identical to the one currently employed. n188 Both are divided into multiple sections, and both request information about the chronology of the case; the defendant; the trial; the special sentencing proceeding, if conducted; the victim; the legal representation provided to the defendant; and, finally, "general considerations," which deals with the race, ethnic, and sexual orientation of the various participants in the trial, including the jury, as well as the [*811] demographics of the county in which the trial was conducted. n189 Included in the task force recommendation, but excluded from the form currently in use, is a question asking the trial court judge to "state anything not evoked by this questionnaire which may have affected the trial or the sentence imposed, or which you believe should be brought to the attention of the Supreme Court." n190 That question has been replaced in the current form by a comprehensive request for "general comments of the trial judge concerning the appropriateness of the sentence, considering the crime, the defendant, and other relevant factors." n191

Not long after the task force submitted its recommendation, the 1977 capital punishment statute was found unconstitutional as a result of 1980 and 1981 Washington State Supreme Court rulings, each of which held that this law chilled a defendant's right to trial by permitting those who pled guilty to avoid a sentence of death. n192 A new capital punishment proposal, House Bill 76, was introduced in the legislature in 1981. n193 Following a series of amendments, n194 it became law on May 14, 1981. n195 Four features of that bill's initial formulation and subsequent revision are crucial to an understanding of the present conduct of comparative proportionality review in Washington.

[*812] First, unlike the 1977 statute, which did not specify the content of the trial judge report, the 1981 bill enumerated each of the specific questions to be answered as well as the factual information to be provided by the trial judge. n196 This section was incorporated into the law enacted later that same year without amendment. n197 As the explanatory memorandum introduced in conjunction with this bill stated, the section of the 1981 bill that specified the content of the trial judge report was in large part derived from the form submitted by the task force two years prior. n198 By codifying that questionnaire, the bill's sponsors arguably endorsed the task force's understanding of its purpose and role in State Supreme Court reviews of death sentences.

Second, the original version of the 1981 bill, as in the 1977 statute, required that trial judge reports be filed only in cases in which a defendant was sentenced to death. n199 This provision, however, was eventually rejected in favor of a requirement that such reports be filed "in all cases in which a person is convicted of aggravated first-degree murder." n200 Thus, by expanding the universe of cases, the legislature indicated its appreciation of one of the key prerequisites

of meaningful comparative proportionality review. Specifically, this provision expressed the legislature's belief that the State Supreme Court's ability to determine why the death penalty is imposed in a few cases but not in most is impossible if it considers only those aggravated first-degree murder cases that culminate in capital sentences. n201

Third, as initially formulated, the 1981 bill defined "similar cases" as those "reported in the Washington Reports or Washington Appellate Reports since January 1, 1965." n202 This language notably omits reference to the trial judge reports, and had it been adopted, it is likely that review of specific cases would not have included examination of the reports. This reading is borne out by the explanatory memo: "Frankly, the [trial judge] report is of marginal value since the Supreme Court in its [*813] sentencing review will examine the entire record of the trial." n203 However, the memo did acknowledge that comparative proportionality review is "an important feature in a sentencing review for it will enhance uniformity in the imposition of the death penalty." n204 The bill's text was changed in the final law, which reads as follows:

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*. n205

With this last clause, which references the section of the statute that mandates submission of trial judge reports following all convictions for aggravated first-degree murder, the legislature expressly required that the cases covered by these reports be incorporated into the process of comparative proportionality review. n206

Fourth, and finally, the 1981 bill clarified an ambiguity of the 1977 statute by specifying what was to happen should a death sentence be vacated and then remanded "for resentencing by the trial judge based on the record and argument of counsel." n207 At least in principle, the 1977 statute left open the possibility that, on remand, a death sentence might be reimposed by the trial court judge. The 1981 bill, however, stated that should the State Supreme Court conclude that a death sentence was wrongly imposed for any of the reasons enumerated in the statute, including a finding of disproportionality, the court "shall invalidate the sentence of death." n208 More precisely, as the explanatory memorandum indicated, should any given death sentence be found invalid, "at the re-sentencing the defendant would get life without parole." n209

One year later, the Washington State Supreme Court affirmed the constitutionality of this statute in *State v. Bartholomew*. n210 The court [*814] reversed Bartholomew's sentence on the ground that the 1981 statute failed to limit the evidence that the prosecution may present at the sentencing phase of capital proceedings. n211 It nevertheless refused to strike down the statute in its entirety, holding that the constitutional infirmity could be remedied by application of the severability provision of the Revised Code of Washington (RCW) section 10.95.900. n212 More important for this analysis, when the court considered the adequacy of the procedural protections devised by the state legislature in order to meet the concerns articulated in *Furman*, it endorsed them, and in doing so expressly cited, among other protections, the "elaborate automatic review procedure which brings it under the scrutiny of this court." n213 As the court noted in subsequent cases involving such review, that process must incorporate a review of the trial judge reports in order to determine whether any given sentence falls afoul of the requirements of proportionality (although, as indicated in the following Part, its practice falls far short of this commitment). n214

IV. THE DEFICIENCIES OF COMPARATIVE PROPORTIONALITY REVIEW IN WASHINGTON

This Part offers two criticisms of the practice of comparative proportionality review in the State of Washington. Section A explores deficiencies in the trial judge reports, which furnish the data regarding the universe of cases that the court is to consider in conducting its reviews. Section B examines the way in which the court has actually proceeded in undertaking such reviews. Section B suggests that the court is inadequately performing its statutorily mandated reviews. Section A suggests that, even if it were to attempt to remedy the defects of its current practice, it would be unable to do so, given the deficiencies of the data available to it.

[*815]

A. Washington's Trial Judge Reports and Their Defects

Comparative proportionality review was originally developed in order to remedy two problems identified in *Furman*: first, the inconsistent and arbitrary application of the death penalty, and hence the absence of any rational basis for

distinguishing between those who are sentenced to death and those who are not; and, second, the concern that constitutionally impermissible factors, such as race and economic status, may in fact offer the most salient explanation for this distinction. n215 The capacity of the Washington State Supreme Court to perform such review in a meaningful way depends in large measure on the completeness and accuracy of the information that is included in the trial judge reports. As David Baldus, the preeminent student of comparative proportionality review, notes: "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." n216 Yet an analysis of the trial judge reports submitted to the Washington State Supreme Court indicates a host of problems which critically compromise the court's capacity to fulfill its statutory mandate.

This analysis includes all 259 trial judge reports filed with the Washington State Supreme Court, beginning with those first submitted in response to adoption of the 1981 capital punishment statute and running through March 2003. n217 Rather than offering an exhaustive [*816] account of the deficiencies of the trial judge reports, this section highlights those that are most troubling in light of the principal purposes of comparative proportionality review. Although the deficiencies are interrelated, for the sake of clarity, this section divides these problems into four categories: (1) reports that are absent, unrevised, and/or late; (2) reports that fail to provide accurate and/or adequate information regarding defendants and victim(s); (3) reports that fail to provide accurate and/or adequate information regarding aggravating and mitigating factors; and (4) reports that fail to provide accurate and/or adequate information regarding the racial and ethnic identities of various participants in capital trials.

1. Absent, Unrevised, and Late Reports

Perhaps the most obvious problem with the Washington State Supreme Court's database is its omission of cases that should have been included. A comparison of the trial judge reports on file with the Washington State Supreme Court with the records compiled by the Washington Sentencing Guidelines Commission, which maintains data on criminal judgments and sentences entered by Washington trial courts, n218 reveals that the court is missing reports for twelve aggravated [*817] first-degree homicide convictions. n219

An inspection of the records kept by the Washington State Department of Corrections reveals an additional missing record. n220 Leaving aside the fact that these thirteen missing records evidences a violation of the statutory requirement that trial judge reports be submitted not in some, but "in all cases in which a person is convicted of aggravated first-degree murder," n221 absent these reports, any attempt to [*818] identify the full range of cases similar to that on review, whether by seeking those with analogous fact patterns or comparable aggravating factors, will be incomplete. Moreover, the absence of these reports from the supreme court's database will frustrate any attempt to determine the frequency with which convictions for aggravated first-degree murder, in cases deemed similar to that on review, generate a sentence of death as opposed to life without possibility of parole. Still more troublesome, all of the defendants in the thirteen cases missing from the supreme court's database were sentenced to life without parole. n222 Should the court seek to determine that frequency, the absence of these reports will skew its calculations in favor of death. n223

In addition, the database maintained by the State Supreme Court includes cases that either ought not to be in the database or, at the very least, ought not to be present absent some indication of their current status. This includes fifteen trial judge reports (17.6% of the cases in which the death penalty was sought) for defendants who, although initially sentenced to death, have since been re-sentenced to life without parole, as well as those who have had their convictions and death sentences set aside and are no longer on death row. n224 The failure to [*819] revise these reports in order to reflect changes in the status of these defendants introduces a significant inaccuracy because, as a matter of law, these death sentences no longer stand. n225 One might maintain, as the [*820] Washington State Supreme Court has done, n226 that these cases should remain in the database on the ground that the statute requires inclusion of all cases in which "the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed." n227 However, if these reports are not updated, n228 and if the supreme court seeks to calculate the frequency with which convictions for aggravated first-degree murder generate a sentence of death as opposed to life without parole, this error will once again skew the results in favor of [*821] death. Additionally, if the court justifies a decision to uphold a death sentence on the basis of information contained in the trial judge reports for any of these cases, its comparison will be invalid. To do so, as Justice Handler of the New Jersey State Supreme Court observed, "produces the anomaly that a reversed sentence, by definition too unreliable to carry out on the sentenced defendant, is yet reliable enough for the purpose of comparison with other capital sentences in proportionality review." n229

Finally, a majority of the trial judge reports included in the supreme court database were not submitted "within thirty days after the entry of the judgment and sentence," n230 as required by law. Specifically, of the 259 trial judge reports, 161 (62%) were submitted late. The period of lateness ranges from a low of two daysⁿ²³¹ to a high of just under eight years. n232 The latter instance may be extreme, but is by no means aberrant. A total of seventy-nine, just under 31% of all reports, were received over a year late; fifty-eight over two years; forty over three years; and twenty-six over four years. The 161 late reports were received an average of 660 days past the statutory deadline. n233 This chronic tardiness in the filing of reports raises serious questions about the compliance of trial judges with the imperatives of the law, and, as the next subsection explains, poses equally serious questions about the accuracy of the information these reports contain.

[*822]

2. Inaccurate and/or Inadequate Information Regarding Defendants and Victims

No doubt in part because so many have been filed late, a very large number of trial judge reports provide insufficient and/or inaccurate information which cannot help but compromise the State Supreme Court's ability to conduct meaningful comparative proportionality review. In several reports, for example, as a result of the passage of time, trial judges found themselves unable to complete many of the questions on the form. Two examples, taken from the many that might be cited, serve to illustrate this problem. First, in Report No. 210 (Cheyenne Brown), which was submitted approximately three and a half years late, the trial judge explained that the mitigation packet prepared by defendant's counsel, containing "official records from many state agencies in Washington and Minnesota, school records, and extensive psychological records," was no longer available to her. n234 Therefore, she continued, "where I do not have a specific recollection of a fact I will indicate unknown rather than guess." n235 The judge then proceeded to enter "unknown" in response to fifteen different questions in the report. n236 Second, in response to the report's question regarding the number of jurors of the same race as the defendant and/or victim, the judge who completed Report No. 90 (Gerald Hankerson), concerning an African-American co-defendant sentenced to life imprisonment for murdering a Vietnamese immigrant, indicated the following: "I cannot recall if any black jurors served." n237 While this response is not surprising given that this form was submitted some three years after sentencing, it raises significant questions about the Washington State Supreme Court's ability to investigate the role of racial prejudice in sentencing patterns for aggravated first-degree murders. n238

[*823] In many more instances, rather than confessing to a lapse of memory, judges have simply not furnished answers to questions included in the form, despite the express instruction: "Please answer each question. If you do not have sufficient information to supply an answer, please so indicate after the specific question." n239 Indeed, when all 259 trial judge reports are considered, the only questions that are answered without exception are those that ask for the defendant's name, the plea he or she entered, and whether representation was provided by counsel. n240

Perhaps the most troublesome instance of a question left unanswered is the final question of section (6) (General Considerations). The task force that drafted the form from which the present version is derived indicated that the questionnaire's purpose is to "aid the Supreme Court in its review of a death sentence by providing the Court with all possible information regarding the defendant and the proceedings, particularly by [*824] eliciting from the trial judge his own unique perspective of the trial." n241 Despite this exhortation, in forty-seven of the 259 reports (19.1%), trial judges have failed to offer any response to the question asking for "general comments ... concerning the appropriateness of the sentence, considering the crime, the defendant, and other relevant factors." n242 Furthermore, when that question is answered, the response is often perfunctory and uninformative: "the sentence was appropriate"; n243 "the legislature determined the sentence for this defendant. I do not choose to comment on the legislature's judgment"; n244 and "the sentence was entirely appropriate given the gravity of the offense." n245

Problems of the same sort are apparent in all other sections of the reports on file with the court. For example, section (1) solicits information about the defendant. n246 In response to the questions included in this section, Report No. 198 (Joseph Schuler II) indicates that the defendant is a male African-American, but provides virtually no other information about him. n247 Specifically, this report fails to furnish answers to the following questions: the defendant's date of birth and marital status; number and age of children; whether the defendant's father and/or mother are alive or dead; the number of children born to defendant's parents; information regarding the defendant's formal education, intelligence level, and IQ score; pertinent psychiatric or psychological information; the work record of the defendant; prior convictions; and the defendant's length of residence in Washington and the county of conviction. n248 Quite remarkably, this report also provides [*825] no answers to the questions in section (7) (Information about the Chronology of the Case), which ask for the dates of the defendant's offense, arrest, trial, and sentence. n249

While this report represents an extreme example of apparent judicial negligence, inspection of the remaining trial judge reports turns up many others nearly as inadequate in providing basic information about the biography and character of defendants. n250 For example, in forty-one of the 259 reports (15.8%), no answer is provided in response to the question regarding the highest grade completed by the defendant; in sixty-three reports (24.3%), to the question regarding the defendant's intelligence level; and in 149 reports (57.5%), to the question regarding the defendant's IQ score. These deficiencies raise vexing questions about the capacity of the court to compare the character of various defendants, to make informed judgments about mental capacity, and so to determine the degree of culpability to be ascribed to one defendant as opposed to another.

Somewhat less common, but by no means infrequent, are those reports in which questions are left unanswered in section (4) (Information about the Victim), which is intended to provide the supreme court with a more adequate understanding of the crime in question, and, specifically, its more or less heinous nature. For example, Report No. 145 (Cristian Delbosque) fails to answer the questions that ask whether the victim was related to the defendant by blood or marriage; for the victim's occupation as well as whether the victim was an employer or employee of the defendant; n251 whether the victim was [*826] acquainted with the defendant; n252 for the victim's length of residency in Washington; whether the victim was the same race or ethnic origin as the defendant; whether the victim was of the same sex as the defendant; whether the victim was held hostage during the crime; whether physical harm or torture was inflicted upon the victim prior to death and, if so, of what sort and for how long; for the age of the victim; and, finally, for the type of weapon employed in the crime. n253 Again, while this is perhaps an extreme example, many other reports provide very little information regarding the biography of the victim and the way in which he or she was murdered, once again leaving the court ill-equipped to complete its task of comparing defendants convicted of "similar" crimes. n254 Not surprisingly, moreover, the reports that provide very little information regarding the defendant are also those that provide very little information on the nature of the crime and its victim, thus making it effectively impossible for the court to derive any benefit from these reports.

Finally, yet another variation on the problem of incomplete reports are those whose responses are almost if not entirely limited to questions that can be answered by checking a "yes" or "no" box; or, alternatively, those that furnish a bare minimum of comment, but only in response to those questions that are straightforwardly factual in nature (e.g., number and ages of defendant's children and defendant's prior convictions). n255 Such reports are largely superfluous for the purposes of proportionality review because Washington's capital punishment statute stipulates that within ten days of the entry of a judgment and sentence imposing the death penalty the clerk of the trial court must transmit to the supreme court information regarding "the caption of the case, its cause number, the defendant's name, the crime or crimes of which the defendant was convicted, the sentence imposed, the date of entry of judgment and [*827] sentence, and addresses of the attorneys for the parties." n256 Many trial judge reports, in other words, do little more than replicate the information included in the notice submitted by the trial court clerk and, as such, are of little or no use.

3. Inaccurate and/or Inadequate Information Regarding Aggravating and Mitigating Factors

The absence of adequate information in the trial judge reports concerning aggravating and mitigating factors particularly compromises the ability of the Washington State Supreme Court to conduct meaningful comparative proportionality review. Some trial judge reports fail to indicate the statutorily specified circumstances that warranted conviction on a charge of aggravated first-degree murder. A considerably larger number fail to provide adequate information regarding any mitigating evidence that may have been introduced during special sentencing proceedings.

At least one applicable aggravating circumstance must be found in order to sustain a conviction for aggravated first-degree murder, regardless of whether that conviction generates a sentence of death or life without parole, and regardless of whether a conviction results from a guilty plea or a jury determination. n257 The inclusion of twelve reports (4.6% of the total) that do not indicate any aggravating circumstances, alleged or found applicable, indicates either that these reports do not belong in the database maintained by the court or, that they incorporate a serious legal error. n258 This omission makes it impossible to know the [*828] basis on which a defendant was convicted of aggravated first-degree murder and thereby deprives the Washington State Supreme Court of one of the principal means of assessing the heinousness of any given murder.

The problem posed by inadequate information regarding mitigating circumstances is far more consequential because the supreme court, in reviewing a death sentence, is statutorily required to assess the evidence that persuaded a jury not to afford leniency to a defendant. n259 At the close of a special sentencing proceeding, jurors must answer the following question: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?" n260 Because the jury's

attention is directed by this question to the presence or absence of mitigating circumstances as the primary factor to consider in its deliberations, the failure of the vast majority of trial judge reports to elicit any significant detail on this issue seriously compromises the meaningfulness of the supreme court's conduct of comparative proportionality review. n261

Two questions in the trial judge report deal with mitigating circumstances introduced during the penalty phase of capital trials. The first asks whether there was, "in the court's opinion, credible evidence of [*829] any mitigating circumstances as provided in Laws of 1981, ch. 138, 7." n262 The second asks whether there was "evidence of mitigating circumstances, whether or not of a type listed in Laws of 1981, ch. 138, 7, not described" in the answer to the previous question. n263 The first of these questions is intended to elicit information about mitigating factors enumerated by the state legislature (e.g., "whether the defendant acted under duress or domination of another person;" "whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct ... was substantially impaired as a result of mental disease or defect;" and/or "whether there is a likelihood that the defendant will pose a danger to others in the future"). n264 The second of these questions is included in order to comply with the U.S. Supreme Court's ruling in *Lockett v. Ohio*. n265 That ruling, requiring individualized sentencing in capital cases, permits a defendant to offer as evidence during the sentencing phase "any aspect of [his or her] character or record and any of the circumstances of the offense" that may warrant a sentence other than death. n266

[*830] Of the cases in which the death penalty was sought, and a special sentencing proceeding was conducted, only very rarely do the trial judge reports indicate in any detail just what mitigating evidence was introduced by the defense. n267 In eight instances, one or both of the questions concerning mitigating evidence has been left entirely unanswered (9.7% of the total), leaving the Washington State Supreme Court uninformed about a key component of special sentencing proceedings. In an additional eleven instances (13.4%), the "No" box is checked in response to both of these two questions. In such instances, leaving aside the very small number of death penalty "volunteers," it is difficult to know whether these negatives are indicative of a failure on the part of defense counsel to introduce such evidence, which raises questions about the adequacy of legal representation in death penalty cases, or whether they are indicative of a failure on the part of the trial judge to record that evidence.

More significantly, in over half of these reports, when a judge has indicated that credible mitigating evidence has been introduced, his or her account of that evidence is limited to a single phrase or sentence. To provide just three examples, in Report No. 174 (Timothy Blackwell), the trial judge wrote: "The life history of the defendant;" n268 in Report No. 92 (Marc Darrah), the judge indicated only that "the defendant & prosecutor stipulated that there was [sic] mitigating circumstances"; n269 and in Report No. 164 (Steven Morgan), the judge reported that the "defendant's family and several ministers testified," but gave no indication of the nature of that testimony. n270 Moreover, although the form expressly asks for evidence regarding mitigating circumstances that the court found "credible," n271 in several reports, trial judges have cited such evidence only to discount its significance. Thus, in Report No. 140 (Cal Brown), the judge did not indicate in any substantive way the mitigating evidence that was introduced, limiting his assessment to the [*831] following after checking the "yes" box: "but ... it did not appear to be sufficient to merit leniency." n272 Similarly, in Report No. 181 (Henry Marshall), the judge noted: "There was evidence of a mitigating factor set out in the law, but given the other facts of the case it was not particularly credible as it all related to his ability to plan and carry out a plan. The planning of the robbery and the carrying out of the robbery indicated that he performed these functions quite well." n273 When this difficulty is considered in combination with the impoverished quality of the evidence regarding mitigating circumstances in the trial judge reports, it seems clear that the Washington State Supreme Court is in no position to reliably determine why any specific case resulted in a sentence of life imprisonment rather than death.

4. Inaccurate and/or Inadequate Information Regarding Race and Ethnicity

The trial judge report form does not provide a standardized set of categories for determining the racial and ethnic identities of various participants in aggravated first-degree murder trials. n274 Also judges do not have any reliable means of determining those identities. As a result, in conducting its death sentence reviews, the Washington State Supreme Court is unable to gauge the presence or absence of discrimination in the administration of the death penalty in any systematic way and is thus unable to meet one of the two primary objectives of comparative proportionality review. n275 This is true with regard to efforts to compare various cases among the trial judge reports, and it is equally true with [*832] regard to efforts, internal to a single case, to determine the import of responses to questions that ask whether the victim, jurors and/or witnesses are or are not of the same race or ethnic identity as the defendant.

Section (6) of the trial judge report requests information regarding the race or ethnic origin of the defendant, the victim, the jury, and the population of the county in which the trial was conducted. n276 Related questions ask whether any evidence indicates that persons of a particular race or ethnic origin were systematically excluded from the jury; whether the race or ethnic origin of the defendant, victim, or any witness was an apparent factor at trial; and whether the jury was expressly instructed to exclude race and ethnic origin in its deliberations. n277 These questions are intended to elicit the sort of information required by the court if it is to respond to the concern, articulated in *Furman*, that impermissible forms of bias may explain why some are sentenced to die, whereas most convicted of aggravated first-degree murder are not.

The responses in the trial judge reports to the questions regarding racial and ethnic identity include, but are not limited to, the following: African; African-American; Black; Black (Father Black, mother Caucasian); Albanian Muslim; American Indian-Colville; Anglo-Saxon; Asian; Asian (Filipino); Cambodian; Caucasian; Caucasian/Cajun; Caucasian-North American; European/N. American; Hispanic; Indian; Latino (Mexican); Mexican-American; Native; Native American; Samoan; Thai; Unknown; White; and White American. n278 Setting aside the racism and sexism evident in certain of these categorizations (e.g., Black-Father Black, mother Caucasian); and disregarding the failure in [*833] many cases to distinguish racial from ethnic identity, n279 as well as political or national identity from either; and, finally, leaving aside the fact that visual observation appears to be the principal means of determining to which category any given defendant, victim, jury member, or witness is assigned, n280 this miscellany cannot help but thwart the court's effort to determine whether Justice Douglas was correct in *Furman* when he stated that the death penalty is selectively applied to those who lack "political clout" and/or are members of "suspect" or "unpopular" minorities." n281

That trial court judges have struggled with these issues is apparent. For example, in Report No. 10 (Steven Carey), the judge identified Steven Carey as Caucasian, and, in considering the composition of the jury, he indicated that all twelve of its members were Caucasian as well. n282 His uncertainty about this conclusion, however, is indicated by a marginal comment, which reads: "Based on visual observation; no inquiry has been made as to the race or ethnic background of the jury." n283 In Report No. 33 (Donald Galbert), the judge indicated that the defendant is "black"; but, then, in response to the question concerning the demographics of the county in which the trial transpired, apparently could not decide whether "black" is a racial or an ethnic category and so checked boxes indicating that it is both. n284 Finally, in Report No. 34 (Paul Joseph St. Pierre), the judge indicated that, based on hearsay, he suspected that the defendant was Italian; but then, in response to the [*834] question concerning the composition of the jury, confessed that "I have made no effort to determine percentage of Italians." n285 The point to be drawn from these examples is not so much that the claims made in these reports are patently wrong. Rather, the point is that in the absence of standardized categories these claims are often arbitrary if not capricious, and, as such, cannot help but sabotage the aim of the report's questions concerning the racial and ethnic identities of various parties to any given trial.

In addition, the absence of pre-designated categories vitiates any effort to grasp the more subtle dimensions of discrimination, i.e., those that, in principle, might be identified by examining any given sentence in light of the percentage of the county population that is the same race or ethnic identity as the defendant. In many instances, it appears that trial court judges have simply guessed when answering this question. For example, Report No. 79 (Sherwood Knight), dealing with a trial conducted in 1986, indicates that African-Americans in King County comprise 10-25% of the total population, whereas Report No. 88 (Ray Lewis), concerning a trial conducted in the same year, indicates that the African-American population of King County is under 10%. n286 Both claims, to belabor the obvious, cannot simultaneously be true. n287 Similarly, Report No. 109 (Gregory Scott), filed in 1993, states that the Caucasian population of King County makes up 50-75% of the total population, whereas the 1990 census indicates that the correct figure is just shy of 85%. n288 Additionally, Report No. 193 (David Lewis) states that the African-American population of Pierce County in 1999 is between 10% and 25%, whereas the 2000 census indicates that the total [*835] was 7%. n289 In such instances, the fault lies not so much with the trial court judges but with the form itself and, more particularly, its presupposition that judges are in a position to know and to certify the accuracy of demographic information that is not within their professional ken.

To the extent that the trial judge reports are defective in the ways indicated here, the Washington State Supreme Court's ability to conduct meaningful comparative proportionality reviews is compromised. Moreover, even if the supreme court were to attempt to remedy the deficiencies in the database, it could not do so. The accuracy and utility of these reports depend on the trial judges' conscientious completion and timely submission. However, as demonstrated above, this condition has not been met in a majority of the reports, with the possible exception of those relating to cases most recently decided. One could attempt to remedy the failings of the court's database by returning to the trial record of every past aggravated murder case in order to seek answers to questions that are now unanswered, incomplete, or

erroneous. That, however, would be a largely pointless gesture because the principal purpose of the trial judge reports is to collect information that goes beyond what is contained in those records.

B. Comparative Proportionality Review in Washington and Its Defects

Since adoption of the current death penalty statute in 1981, n290 the Washington State Supreme Court has struggled to develop a coherent and consistent method to inform its conduct of comparative proportionality review. It has largely failed in this effort. As a result, its performance of such reviews has remained an ad hoc affair that does [*836] little to remedy the concerns articulated in *Furman* regarding the arbitrary and capricious administration of capital punishment. n291 More specifically, the court has failed to develop a procedure that ensures that the death penalty is consistently applied to those convicted of the most heinous murders and, correlatively, that those convicted of less heinous crimes are not sentenced to die. For the most part, moreover, the court has not engaged in the sort of inquiry necessary to ensure that constitutionally impermissible considerations such as race do not taint the administration of the death penalty. In sum, analysis of the Washington State Supreme Court's conduct of comparative proportionality review since 1981 provides little reason to believe that this procedure has remedied the concerns that initially prompted its adoption. n292

During the period covered by this study, the death penalty was sought in seventy-eight cases in the State of Washington and imposed in thirty-one. n293 Twenty sentences were reviewed for proportionality by the Washington State Supreme Court, but none were vacated for disproportionality. n294 This section examines the defects in the court's conduct of comparative proportionality review in those twenty cases. Prior to 1995, the court demonstrated considerable uncertainty regarding [*837] each of the three basic elements in the logic of comparative proportionality review: identification of the relevant universe of cases to be considered, specification of the criteria to be employed in defining "similar" cases; and, finally, articulation of a test to be used in determining whether a sentence under review is or is not disproportionate. By the close of 1995, the court concluded that the universe of cases must include all cases in which defendants were convicted of aggravated first-degree murder, and it had specified the factors it would consider in identifying a pool of similar cases. Yet, in reviewing specific cases, the court's method of selecting pools of similar cases from this universe proved inconsistent at best, and its method of comparing those cases to those under review in order to determine proportionality proved altogether unsystematic at best and arbitrary at worst.

1. Comparative Proportionality Review to 1995

The Washington State Supreme Court's early difficulties with all three elements of the logic of comparative proportionality review and its confusion regarding the very purpose of this practice were apparent in *State v. Campbell*, n295 the first case it reviewed. n296 In affirming the sentence and conviction of Charles Campbell, the court announced that the purpose of comparative proportionality review is to "assure that 'wholly arbitrary, capricious, or freakish sentences' are minimized." n297 In other words, rather than affirmatively seeking to ensure consistency in capital sentencing throughout the state, the court would merely seek to invalidate those deemed aberrant. n298

Although the court acknowledged the statutory provision requiring [*838] consideration of all "similar cases," it found no trial judge report with facts comparable to those of Campbell: "While many other defendants have been charged with aggravated first-degree murder, we find no other where four aggravating factors in the guilt phase were found to be present by the jury." n299 Stymied in its effort to abstract a pool of similar cases from the universe defined by statute, based on the number of aggravating factors involved, the court abandoned all pretense of comparative review. Instead, it reverted to inherent proportionality review: "A case which involves such a multitude of aggravating factors, we are convinced, would, with great frequency prompt a jury to impose the death penalty Moreover, we are hard pressed to find killings more premeditated and revengeful than those committed by defendant." n300 Without specifying which cases and trial judge reports it had inspected, without indicating why it considered the number of aggravating factors to be the dispositive element in its review, and without explaining why it did not see any need to consider the character of the defendant, as the law requires, the court simply asserted that Campbell's sentence was "clearly" proportionate "to the crime committed." n301

In several cases following on the heels of *Campbell*, the court acknowledged the distinction between inherent and comparative proportionality review, as well as its statutory obligation to perform the latter. The court, however, failed to remedy the defects of its analysis in *Campbell*, and, in certain respects, aggravated them. For example, in the second case it reviewed for proportionality, *State v. Jeffries*, n302 the court [*839] ignored the plain language of the statute when it declared that the universe of cases to be considered does "not include cases where the death penalty was not sought by the prosecutor." n303 As noted above, by limiting itself to cases in which the death penalty was sought, the

court neglected the far greater number of aggravated first-degree murder cases in which it is not, and so defeated the very purpose of comparative proportionality review. n304

The Jeffries court's determination of the appropriate pool of similar cases was equally flawed. The court first noted the number of aggravating factors found applicable in Jeffries (two), and, second, offered summary recapitulations of four other cases in which death sentences had been imposed (absent any express reference to the trial judge reports in these cases). On that basis, absent any elaboration, the court asserted that "these four cases strongly establish that the death penalty here is not disproportionate." n305 No effort was made to explain why these four cases, with very different fact configurations, were deemed similar to Jeffries; why other aggravated first-degree murder cases were not deemed similar; why the number of aggravating circumstances should preclude consideration of the qualitative features of the crime and the character of the defendant; or, what criteria, if any, were employed in determining that the sentence imposed on Jeffries was indeed proportionate to these other four. Given the poverty of this review, it is difficult to escape the conclusion that in this instance the court engaged in a results-oriented inquiry that provided a veneer of statutory compliance to a sentence deemed appropriate on grounds never expressly stated in the opinion.

[*840] In *State v. Harris*, n306 also decided in 1986, the court tacitly acknowledged that it had erred in Jeffries by confining its review of cases to those in which the death sentence had in fact been imposed. n307 However, as in *Campbell*, the court conceded that it could identify no other cases involving contract killings in which the death penalty had been sought: "therefore, there is no evidence to be considered whether the present case is disproportionate." n308 The court, though, was able to identify three post-1981 cases involving contract killings as an aggravating factor, but in which the death penalty had not been sought. n309 On the face of it, this alone would appear to argue against the proportionality of Harris's sentence, n310 especially given the court's declaration that "it is our duty under the similarity standard to assure that no death sentence is affirmed unless in similar cases throughout the state the death penalty has been imposed generally." n311 Yet the court did not draw that conclusion. Instead, after noting that the statute "provides little guidance to determine at what point a sentence becomes proportionate or disproportionate," n312 it stated: "We are satisfied the imposition of the death penalty was not 'wantonly or freakishly' imposed." n313 In defense of this ruling, the court noted: "No errors were made in the guilt and sentencing phases of the defendant's trial; the trial court made every effort to ensure the defendant's trial proceedings were fair and just." n314 However, to offer this as a justification for affirming a death sentence is [*841] to abdicate the court's statutory mandate to conduct an independent assessment of proportionality. As Bruce Gilbert noted:

The jury has never made a factual determination on the proportionality of the sentence. They have looked at no similar cases, and are presumably basing their decision solely on the facts of their individual case. While the presumption that a jury sentence is valid is relevant to whether the defendant deserves to die, or any other factual determination the jury has been asked to decide, comparative proportionality review is not such a determination. n315

In *State v. Rupe*, n316 decided in 1987, the court finally conceded that the Washington statute requires it to consider all convictions for aggravated first-degree murder, regardless of whether the death penalty was sought or imposed. n317 Resolution of this first issue in the logic of comparative proportionality review did not, however, lead to successful resolution of the second (determination of the pool of cases to be deemed "similar" to any specific case under review), or, for that matter, the third (determination of what conditions must be met in order to find a sentence disproportionate). With respect to the second, the Rupe court could find only a single death sentence case (David Rice), which, although not yet reviewed by the court, exhibited the same combination of aggravating factors (multiple victims were murdered as part of a common scheme or plan; the murders were committed in order to conceal the perpetrator's identity; and, lastly, they were committed in the course of a first-degree robbery). n318 Apparently unwilling to rest its conclusion on a single case it had yet to review, again without explanation, the court declared that the presence of two of the three aggravating factors found applicable in Rupe sufficed to render other cases comparable. n319 Employing this criterion, the court then identified four cases in which defendants had received the death sentence; two in which defendants were sentenced to life without parole, although the prosecution had sought the death penalty; one in which the prosecutor did not seek the death penalty; and another in which the defendant [*842] pleaded guilty and was sentenced to life without parole. n320 Without explaining why an even split in these sentencing decisions was sufficient to satisfy the criterion of "generality," the court affirmed Rupe's sentence. n321 Rupe's sentence was eventually reversed, n322 leading to his re-sentencing to life without parole. n323

In addition, the Rupe court conceded that RCW section 10.95 requires it to consider the character of the defendant as well as that of his or her crime in deciding questions of proportionality. n324 Reading Rupe's character as an additional justification for a death sentence proved to be a tricky matter, however, because, as the court acknowledged,

his "background is unusual among those convicted of first-degree aggravated murder": "Rupe has no prior criminal record. There is evidence that, most of his life, he was active in his community, respected and liked by others." n325 However, the court discounted this mitigating evidence, stating that "the Legislature has clearly contemplated that the death sentence is appropriate for crimes such as he has committed." n326 Deference to the legislature, however, is no more defensible than is deference to a jury. In both instances, the court fails to engage in an independent inquiry regarding whether any given death sentence constitutes a departure from the sentences generally imposed on other defendants, considering both the crime and the defendant.

The court offered yet another twist in its ongoing struggle to determine the relevant criteria of similarity when it affirmed the death [*843] sentence imposed on Brian Lord in *State v. Lord*. n327 Here, the court first reiterated its belief that the purpose of comparative proportionality review is to alleviate "the types of major systemic problems identified in *Furman*: random arbitrariness and imposition of the death sentence based on race." n328 It then rejected any approach that seeks to achieve these ends by simply comparing "numbers of victims or other aggravating factors" that may "superficially make two cases appear similar" n329 (as the court itself had done in previous years), and it did so on the ground that capital crimes are "unique and cannot be matched up like so many points on a graph." n330 Recognizing, though, that the very project of proportionality review requires some articulated basis for [*844] comparison, the court proceeded to invoke the work of the analytic philosopher Ludwig Wittgenstein in defense of what it called a "family resemblance approach": n331

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. n332

It is not clear that a defendant sentenced to death should find it reassuring when a State Supreme Court indicates that its proportionality review will be predicated on what it calls the "impressionistic" identification of unspecified resemblances that render various cases somehow related. n333 Perhaps sensing the inadequacy of this appeal, the court then proceeded to indicate the resemblances it now deemed most germane: the nature of the crime committed, the aggravating circumstances found by the jury, the defendant's personal history, and, finally, the defendant's criminal record. n334 Aside from rendering the review process ostensibly more sophisticated in a theoretical sense, it does not appear that the court's appropriation of one of the central metaphors of an Austrian philosopher effected any substantive changes in its method of folding these criteria of similarity into judgments of proportionality. As in the past, the court justified its affirmation of Lord's death sentence by citing the results of its previous reviews, with the aim of showing that his crime, character, and record were more heinous than those of his predecessors. Yet, in making this argument, the court cited only those cases that served its present purpose (specifically, those characterized by deaths that involved neither torture nor protracted suffering - e.g., *Rupe*, *Harris*, and *Jeffries*), while those that might render its conclusion problematic by virtue of their greater brutality (e.g., *Campbell's* revenge murder of two women and a child) made no [*845] appearance in the court's opinion. n335

The court offered its most ambitious pre-1995 effort to make good on its "family resemblance" approach when, in 1993, it affirmed the death sentence imposed on Gary Benn. n336 To begin, the court isolated thirty trial judge reports regarding defendants convicted of murdering two or more persons, as was Benn., n337 Following a bare-bones recitation of the content of these reports, as well as a still more abbreviated review of the arguments advanced by the prosecution and defense regarding the cases each believed were or were not comparable, the court once again acknowledged the "difficulties inherent to the identification of "similar cases." n338 That noted, the court then removed most cases from this pool without, in a majority of instances, explaining why it did so (although it did suggest that, more often than not, the factors that appear to exempt defendants from the death penalty include mental disturbances, guilty pleas, and/or youthfulness). n339 What remained following this process of [*846] exclusion was a pool of seven defendants, four of whom had been sentenced to life imprisonment without possibility of parole and three of whom had been sentenced to death. n340 The three sentenced to death, however, included one defendant whose case had never been reviewed by the court (*Clark Hazen*, who committed suicide while incarcerated), as well as two others (*Patrick Jeffries* and *Mitchell Rupe*) whose reviews were suspect for the reasons indicated above. n341 Relying on this unreliable group, the court affirmed Benn's sentence on the ground that this group "does not contain an arbitrary frequency of life without parole sentences over death sentences." n342 As before, the court justified its conclusion by citing its deference to the jury:

This court may systematically seek to undo and thus eradicate arbitrariness in sentencing. It will have limited success, however, in systematizing the unpredictable impulse toward mercy among juries which must decide cases that are ultimately as unique as each defendant. We have not sought to substitute this court's judgment for that of the jury. n343

In addition to granting the impossibility of conducting comparative proportionality review in a way that satisfies its designated purposes, this conclusion appears to suggest the court's willingness to affirm the jury's determination in any given case, so long as it can find a small handful of "similar" cases that resulted in death sentences, no matter how disproportionate they may be when compared to the overall universe of cases. n344

[*847] In sum, during its first decade of comparative proportionality review the Washington State Supreme Court did in time correctly conclude that, at least in principle, *RCW section 10.95.130* requires it to include in its universe all cases in which defendants were convicted of aggravated first-degree murder, regardless of whether the death penalty was or was not sought or imposed. Turning from the universe of cases to the pool of similar cases to be abstracted from that universe, over the course of its first decade the court moved from its initial position, in which it essentially abandoned the project of comparative proportionality review in favor of inherent review, to its eventual articulation of Lord's four criteria of similarity. Yet, as the cases reviewed above indicate, the court's actual selection of cases deemed similar was unsystematic at best and, at worst, chosen with an eye to a pre-determined outcome. Finally, in terms of the third element of the logic of comparative proportionality review, the actual disposition of these cases, to all appearances the court selectively cited those elements of previously affirmed cases that would warrant an affirmation of proportionality, while ignoring those that might complicate or contradict that judgment.

2. Comparative Proportionality Review After 1995

In 1995, at the close of the Washington State Supreme Court's first decade of comparative proportionality review, Justice Utter concluded that the court's conduct of such review "increases rather than decreases the likelihood the death penalty will be imposed in an arbitrary and standardless manner, in violation of the equal protection clause of the fourteenth amendment to the United States Constitution." n345 Justice Utter's criticism echoed a federal district court opinion from the previous year, which held that the Washington State Supreme Court failed to "fulfill the essential function of ensuring the evenhanded, rational, and consistent imposition of death sentences under Washington law." n346 Although the supreme court would eventually disavow this [*848] criticism, n347 in a trio of death sentences affirmed in 1995 it nonetheless took the district court's ruling as an opportunity to assess and reconsider its prior approach to the conduct of such review. n348 Together, these decisions established the basic template for the court's conduct of comparative proportionality review since that date. However, they also display the ongoing defects of that conduct.

As the law requires, n349 the court since 1995 has remained formally committed to a universe of cases that includes all convictions for aggravated first-degree murder, regardless of whether the death sentence was imposed or executed. Moreover, since 1995, in each of its reviews the court has applied a four-prong test in identifying a pool of similar cases and in determining whether the sentence, when compared to other members of that pool, is disproportionate. That test requires a consideration of the nature of the crime, the number of aggravating circumstances, the defendant's criminal history, and, finally, the defendant's past. n350 The standardization of this test, however, has done little to remedy the arbitrary nature of its pre-1995 reviews, and so, today, the court remains unable to offer a meaningful account of why some are sentenced to die, while the vast majority are not.

In the first of these three 1995 cases, *State v. Gentry*, n351 the court once again applied the four family resemblances (nature of the crime, [*849] aggravating circumstances, prior convictions, and personal history) articulated in Lord. n352 However, its consideration of the single aggravating circumstance consisted of nothing more than citation of the relevant statutory category (the crime was committed to protect the identity of the defendant); and its consideration of the nature of the crime consisted of the claim that Gentry's offense was at least as brutal as that of Lord, which, because it culminated in an affirmed death sentence, rendered Gentry's case not disproportionate. n353 No other cases that might have complicated this conclusion were cited or considered. With respect to the third family resemblance, the defendant's prior record, the court merely cited Gentry's previous convictions, but offered no consideration of any other cases, thereby rendering it impossible to decipher the sense in which this constituted a specifically comparative review. n354 Finally, with respect to the defendant's personal history, the court offered a bare bones citation of six trial judge reports, including those for David Rice and Westley Allan Dodd, in which evidence of

mitigating circumstances such as youth, child abuse, or mental illness had not been sufficient to exempt defendants from a sentence of death.ⁿ³⁵⁵

In the second of these three cases, *State v. Brett*,ⁿ³⁵⁶ the court once again returned to its view that the purpose of the proportionality review provision of RCW section 10.95 is not to ensure statewide consistency in capital sentencing, but merely to identify cases that are grossly disproportionate.ⁿ³⁵⁷ The justification it proffered for this view was new, however. Specifically, the court stated that the legislative provisions intended to channel jury discretion (e.g., the requirement that at least one aggravating factor be found applicable) "ensure proportionality and eliminate the ability of the jury, in all but the most aberrant case, to impose the death sentence in a wanton and freakish manner."ⁿ³⁵⁸ The [*850] court thus came very close to rendering its own reviews superfluous. By this account, except in extraordinary instances, the legislatively prescribed procedures that structure jury deliberation are presumed to ensure against disproportionality.ⁿ³⁵⁹

Having thus (mis)construed its task, the court then quite remarkably repudiated any attempt to extract a smaller pool of similar cases from the universe of cases available to it based on the number or kind of aggravating factors, the "family resemblances" articulated in *Lord*, or, for that matter, any other criterion. Instead, conflating the distinction between universe and pool, the court defined as "similar" all cases for which trial judge reports had been filed or cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965.ⁿ³⁶⁰ In defense of this violation of the logic of comparative proportionality review, the court contended that this definition remedied one of the due process concerns expressed by the federal district court.ⁿ³⁶¹ Specifically, by conflating the distinction between universe and pool, the court rendered it impossible for a defendant to claim that he or she could not know the criteria employed in identifying the cases the court found comparable to his or hers (or, it might be added, to contest those criteria as well as their application in isolating some smaller pool from the larger universe of cases).ⁿ³⁶² Finally, absent any elaboration of what it had indeed found in this larger universe, and absent any discussion of specific cases other than that of *Brett*, the court declared that "after carefully reviewing the totality of similar cases," it deemed *Brett's* case "not disproportionate": "There is no unique or distinguishing characteristic of the Defendant or of this crime which makes imposition of the death penalty wanton and freakish."ⁿ³⁶³ In sum, after discarding all [*851] previous attempts to render this process meaningful, the court abandoned any effort to articulate a method to inform its deliberations and, instead, opted to substitute an uncontestable declaration of its unexplained affirmation.ⁿ³⁶⁴

In affirming the death sentence imposed on Blake Pirtle,ⁿ³⁶⁵ the final member of the trio of cases reviewed in 1995, the court consolidated the basic template for all reviews conducted since that date.ⁿ³⁶⁶ In its opinion, the court essentially split the difference between *Lord* and *Brett*, and it did so in a way that, arguably, combined the most troublesome aspects of each. Citing *Brett*, the court in *Pirtle* restated its assumption that juries will not render aberrant judgments;ⁿ³⁶⁷ and, again citing *Brett*, it reaffirmed its commitment to consider as similar all cases specified by *RCW section 10.95.130(2)(b)*.ⁿ³⁶⁸ Although rejecting the "family resemblance" test articulated in *Lord* on the grounds that it had proved "somewhat unwieldy as more and more cases were reported,"ⁿ³⁶⁹ the court nonetheless adopted the very same "resemblances" it had identified as most salient in that case. Specifically, and without explaining why these criteria and only these merit consideration, the court stated that in conducting comparative proportionality analyses, it would assess the nature of the crime, the number of aggravating circumstances, the defendant's criminal history, and, finally, the defendant's past.ⁿ³⁷⁰

[*852] Applying these criteria, the *Pirtle* court concluded that "there is no factor or combination of factors which marks this as an unusual, let alone wanton or freakish, death penalty case."ⁿ³⁷¹ Although the court cited no specific case in defense of this conclusion, it did note, first, that only 20% of the cases on file involved, as did *Pirtle*, three or more aggravating factors; second, that approximately one-third involved, as did *Pirtle*, more than a single victim; and, finally, that only 3% of the cases involved, again as did *Pirtle*, defendants with more than ten prior convictions.ⁿ³⁷² It is difficult to know how much weight to ascribe to these quantitative determinations because the court also reiterated its oft-made claim that the determination of proportionality is not "a statistical task" that "can be reduced to a number," and that "numbers can" only "point to areas of concern."ⁿ³⁷³ Yet when it considered those matters that [*853] can be quantified, with the exception of *Pirtle's* crime, which it described in a brief paragraph, it offered nothing other than the bare figures noted here. Because one can only guess which cases provided the basis for these percentages, these figures are impossible to challenge.

Turning to matters that are not susceptible to quantitative analysis, by refusing to cite specific cases the court in *Pirtle* avoided the comparability challenges that might otherwise follow. But this omission also renders it impossible to fathom the basis for its affirmation of this sentence. This is most readily apparent when the court considered *Pirtle's* character, which it described through reference to the mitigating evidence introduced during the sentencing phase of the

trial. n374 Noting that Pirtle proffered evidence of drug abuse, alcohol addiction, and an abusive family history, the court contended that "an examination of the aggravated murder reports shows that some mitigators - for instance, mental illness or extreme emotional distress - may lead prosecutors and juries not to seek or impose the death penalty. Neither addiction nor a history of abuse as a child appears to have such an effect." n375 It is difficult to know how the court can sustain this claim given the extreme poverty of the trial judge reports, especially when it comes to their accounts of mitigating circumstances. Moreover, assuming that the information contained in these reports is correct, its claim in this regard is simply wrong. Addiction and childhood abuse are in fact often offered as credible mitigating evidence in cases that have not generated death sentences, n376 and so it is impossible to know what led the court to the [*854] conclusion that Pirtle's "mitigation evidence was, at best, average." n377 Still more troubling, once the court recorded this conclusion, it then began to cite Pirtle as precedential authority in affirming the same conclusion under equally suspect circumstances. n378

Since Pirtle, the court has applied this four-prong test to each of the death penalty cases it has reviewed on direct appeal. n379 The court has vacillated, however, with respect to its refusal, in Brett as well as Pirtle, to cite specific cases to justify its conclusions. n380 When it has elected to do so, the court typically cites only those cases that did in fact culminate in death sentences and that were subsequently reviewed and affirmed. n381 It thereby violates what it expressly affirmed in Rupe: the Washington statute requires consideration of all convictions for the crime of aggravated first-degree murder, including those in which the death penalty was not sought. That in turn cannot help but bias its review toward affirmation. For example, in *State v. Brown*, n382 the court first cited the affirmed death sentences imposed on Westley Allen Dodd, Mitchell Rupe, Patrick Jeffries, Gary Benn, Benjamin Harris, and Jonathan Gentry in order to sustain its claim that Brown's crime was at least as heinous as those committed by these defendants. n383 Second, it cited the cases of Gentry, Benn, Harris, and Jeffries in order to justify its claim that the number of aggravating factors found applicable in [*855] Brown's case was consistent with (or in some cases less than) the number in these other cases. n384 Third, it cited Rupe, Harris, and Benn in order to show that Brown's prior record was more extensive than these other defendants. n385 Finally, it cited Dodd, Brian Lord, and David Rice in order to show that the sort of mitigating evidence adduced in Brown's case (childhood abuse and various mental as well as personality disorders) has not precluded the court from affirming death sentences in the past. n386 Consideration of each of the four prongs of the Pirtle test consumes a single brief paragraph, and none involves any comparative analysis of the companion cases it cited or any treatment of aggravated murder convictions that did not result in death sentences. n387

On other occasions, the court has not cited specific cases in its reviews, which renders it difficult at best to know on what basis the court rests its conclusions. For example, in *State v. Stenson*, n388 the court stated that "this case involved a greater degree of premeditation than in many other cases of first-degree aggravated murder." n389 However, because no other cases are cited, it is impossible to grasp the rationale for this inherently comparative judgment. The court's failure becomes still more glaring when, in considering one or more prongs of the Pirtle test, it offers no comparative reference whatsoever, instead limiting itself to a mere restatement of the facts immediately relevant to the prong in question. n390 Again using Stenson as an example, in considering the relevant mitigating circumstances, the court's "analysis" consisted of the following statement: "The Defendant did have some criminal history, including felony drug convictions, although none of the prior crimes were crimes of violence." n391 The qualification registered at the end of this sentence is precisely the sort that should in principle invite rigorous examination of the defendant's character and biography in order to determine whether the sentence imposed in his case was [*856] disproportionate. The court, though, offered no such analysis, thereby making a mockery of the purpose of comparative proportionality review as well as its own four-prong test.

The Washington State Supreme Court is currently in a position to affirm any death sentence that comes before it by picking and choosing among the death penalty cases it has previously reviewed and affirmed. While the charade of the four-prong test articulated in Pirtle is formally perpetuated, perhaps a more candid statement of the court's true test was advanced in 1999 when it affirmed the death sentence imposed on Clark Elmore: "If the facts of Elmore's case are similar to some of the facts taken from cases in which the death penalty was upheld, the proportionality review is satisfied." n392 To all appearances, the court now finds application of this test virtually effortless. Should, for example, a defendant sentenced to death have little or no prior criminal record, Mitchell Rupe's case can be pressed into service in order to show that the court has in the past upheld death sentences imposed on defendants who had no prior record (which renders it impossible to ever generate the conclusion that a sentence is disproportionate on this basis). n393 Should a defendant have a history of diagnosed mental disorders, the cases of David Rice and Westley Allan Dodd can be trotted out in order to demonstrate that the court in the past has upheld death sentences imposed on defendants who were at least as disturbed as the present defendant. n394 Should a defendant be sentenced to death on the basis of two aggravating factors, the court can put to work the cases of Jonathan Gentry, Gary Benn, and Benjamin Harris to show

that the court has upheld sentences when only a single aggravator was found applicable, n395 or, if only a single aggravator is found applicable, the court can cite Gentry, Benn, and Harris once again in order to show that a case under review is not disproportionate. n396

[*857] True, the precise cast of characters alters slightly from one review to another, if only in the sense that each time another death sentence is affirmed an additional name becomes available to cite in authorizing subsequent affirmations. That said, the script now changes only in order to accommodate each new defendant, the plot unfolds with mechanical uniformity, and the dreary denouement never varies. Even when analysis is confined to the small number of death penalty cases reviewed by the Washington State Supreme Court since 1981, it is impossible to construct a reasoned account that explains why all were deemed sufficiently proportionate to warrant affirmation of their respective death sentences. A less flawed comparative proportionality analysis would require a far more sophisticated method than the court currently employs as well as a far more detailed analysis of death sentence cases than it currently provides. Moreover, even if the court were to commit itself to such a method, it is not clear how it could fulfill this pledge given the irremediable deficiencies of the trial judge reports on which it would have to predicate such an inquiry.

Taking note of the atrophy of the court's comparative proportionality review into a pro forma ritual, shortly before he retired from the bench, Justice Utter offered an apt characterization of the history I have traced here. n397 What the court in Brett characterized as

"an increasingly broad approach' to defining 'similar cases' is more aptly described as the gradual degeneration of judicial review in capital cases, a process which reaches its low point with the introduction into our proportionality analysis of a new, and curiously elusive, concept: all murders falling within the purview of RCW 10.95 are, ipso facto, proportionate - except when they are not. n398

Except, Justice Utter might have added, that they are never in fact not. n399

[*858]

V. THE FAILURE OF COMPARATIVE PROPORTIONALITY REVIEW AND THE FUTURE OF THE DEATH PENALTY

In *Gregg v. Georgia*, n400 Justices Stewart, Powell, and Stevens expressed considerable confidence in the capacity of the safeguards adopted by Georgia and affirmed by the U.S. Supreme Court in 1976 to prevent arbitrary and capricious imposition of the death penalty:

No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by the legislative guidelines. In addition, the review function of the Supreme Court of Georgia affords additional assurance that the concerns that prompted our decision in *Furman* are not present to any significant degree in the Georgia procedure applied here. n401

Echoing this claim in *State v. Rupe*, the Washington State Supreme Court upheld Washington's death penalty law on the basis of its confidence in these same safeguards: "Defendant's arguments were addressed by the Supreme Court in *Gregg*, and we find that analysis equally applicable here." n402 However, as was the case in *Gregg*, the *Rupe* court upheld a statute that had just been adopted and rarely applied. Nearly three decades later, we are in a position to assess whether state courts are indeed providing the protection promised in *Gregg*. Reviewing the studies that have examined this question, James Acker and Charles Lanier concluded: "A wealth of empirical research now exists on the operation of capital punishment statutes, and much of that evidence suggests that the premises underpinning the *Gregg* decision are fallacious. Arbitrariness and discrimination continue to plague the administration of death penalty legislation." n403 Evidence from the State of Washington with respect to the conduct of comparative proportionality review furnishes no reason to believe otherwise.

If Acker and Lanier are correct, then there are good grounds for concluding that the death penalty, as currently applied in the State of Washington, is unconstitutional. First, because the concerns that led the [*859] U.S. Supreme Court to invalidate all death penalty statutes in effect in 1972 remain, equally if not more, valid today, Washington's death penalty statute is unconstitutional under *Furman v. Georgia*. n404 Neither *Gregg* nor *Rupe* overruled *Furman*, and *Furman* stands today for the proposition that a capital punishment statute, in order to conform to the imperatives of the Eighth Amendment, must achieve two objectives: it must limit imposition of the death penalty to the small group of defendants for which it is appropriate, and ensure that the members of this small group are selected rationally and

consistently. n405 Leaving aside the disproportionate application of the death penalty to those who murder white victims, n406 as well as the failure of the death penalty's infrequent imposition to deter, n407 the lack of any meaningful way of distinguishing those who receive the death penalty from those who do not has not been remedied by the procedural reforms adopted by Washington in 1981. The administration of the death penalty in Washington does not ensure that the death sentence is restricted to the [*860] most heinous criminals guilty of the most brutal murders, and, correlatively, it fails to ensure that those who are convicted of murders as brutal as those committed by those who are in fact sentenced to death receive that same punishment. Because the Washington capital punishment statute operates in an arbitrary and capricious manner, it violates the Eighth Amendment and so cannot stand.

Second, even if an appeal to the Eighth Amendment proves unpersuasive, a meaningful comparative proportionality review is nonetheless required by article 1, section 14 of the Washington State Constitution, which prohibits the infliction of cruel punishment. n408 The U.S. Supreme Court's interpretation of the Eighth Amendment does not control the Washington State Supreme Court's interpretation of article 1, section 14; and, in *State v. Fain*, n409 the court reaffirmed its holding that Washington's prohibition of cruel punishment is broader than that provided by the Eighth Amendment. n410 Moreover, in *State v. Roberts*, n411 the court reiterated its conviction that the imposition of a capital sentence is cruel if it is imposed without an individualized determination that the punishment is appropriate. n412 That imperative is all the more pressing because, via adoption of RCW section 10.95, and in particular its requirement of proportionality review by the State Supreme Court, the legislature has given defendants a legitimate expectation that capital sentences will be imposed in a way that is fair. Specifically, it entitles them to the expectation that similarly situated defendants will be afforded the same punishment and that those who are not so situated will be punished differently. n413

Comparative proportionality review is the only mechanism, which, at least in principle, enables system-wide evaluation of jury decision-making in order to ensure that the death penalty is not applied in an [*861] arbitrary and capricious manner or on the basis of impermissible discrimination. To ensure that such application does not occur, the court must compare each aggravated murder conviction against all others, and in order to do that its review must be based on complete and accurate information. However, given the deficiencies of the trial judge reports, combined with those evident in the court's own conduct of comparative proportionality review, it cannot be maintained that individual defendants are presently protected from arbitrary, discriminatory, or otherwise unfair death sentences. n414 As such, the death penalty in Washington violates the state constitution's prohibition of cruel punishments.

Third, in *Hicks v. Oklahoma*, n415 the U.S. Supreme Court held that when a state enacts a criminal statute setting out a procedure for the imposition of a particular penalty, a defendant has a "substantial and legitimate expectation" that he or she will be deprived of liberty only if the state complies with the procedural requirements of that statute. n416 Accordingly, a defendant convicted of aggravated first-degree murder and sentenced to death in Washington has a due process right to appellate proportionality review in conformity with RCW section 10.95. True, as noted earlier, the U.S. Supreme Court held in *Pulley v. Harris* n417 that the federal constitution does not require such review. n418 That, however, is irrelevant to this argument. Because the Washington statute establishes the procedural protection of proportionality review, as the federal district court reiterated in *Harris v. Blodgett*, n419 the State Supreme Court is obligated under the Fourteenth Amendment's Due Process Clause to ensure that this analysis complies with the state statute and that it is performed in way that is meaningful. n420 This is all the more [*862] so when the state seeks to deliberately extinguish human life, which, the U.S. Supreme Court has ruled, demands a heightened degree of procedural due process scrutiny, or what Margaret Radin has called "super due process." n421 In other words, when the potential harm to a defendant extends to the taking of his or her life, concerns about the potential for arbitrary state action are greatest, and so safeguards against such arbitrariness must be the most scrupulous. However, for the reasons indicated in this Article's discussion of the State Supreme Court's actual conduct of comparative proportionality review, it cannot be maintained that such review has in fact been conducted in a meaningful way; and, for the reasons indicated in its discussion of Washington's trial judge reports and their deficiencies, even if the Washington State Supreme Court were to seek to remedy the deficiencies of its conduct, it could not do so. n422

Arguably, if one could somehow overcome the problems posed by the defects of the trial judge reports, and were the Washington State Supreme Court to render its conduct of comparative proportionality review less hollow than it presently is, certain constitutional infirmities might be alleviated. Other state supreme courts have attempted to do so. Most notably, in 1988 New Jersey appointed a special master, David Baldus, who developed a complex statistical methodology in order to determine the frequency with which death sentences are or are not imposed on different groups of defendants whose overall level of culpability is comparable. n423 (This methodology was subsequently modified as a result of recommendations advanced by a second special master in 1999). n424 However, rather than explore these

efforts to [*863] rationalize a system that remains infected by the same problems identified more than three decades ago, this Article's conclusion suggests that no matter how salutary such reforms might be, they should not distract us from an appreciation of the way in which comparative proportionality review discloses and compounds the fundamental dilemma on which the law has foundered since Gregg in its effort to develop a coherent jurisprudence of capital punishment. If comparative proportionality review, no matter how refined, cannot successfully overcome this dilemma, if such review simply rearticulates that dilemma in a new guise, then it would appear that Justice Blackmun was correct when he concluded that no amount of tinkering can salvage the machinery of state-imposed death. n425

The key premise of contemporary capital punishment jurisprudence is that the

penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity. n426

On the basis of this premise, in *Woodson v. North Carolina*, n427 the U.S. Supreme Court rejected a statute that provided for a mandatory death sentence for specific offenses on the ground that such a law denies to the sentencing authority the discretion that is crucial if that authority is to take into account the individual character of the defendant and the particular circumstances of his or her offense. n428 Such a statute "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." n429 One implication of *Woodson* was elaborated two years later when, in *Lockett v. Ohio*, n430 the Court held that because "the need for treating each defendant in a capital case with that degree of respect due the uniqueness [*864] of the individual is far more important than in noncapital cases," the sentencer cannot be precluded from "considering any aspect of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." n431

Yet it is precisely this sort of unrestricted discretion that led Justice Douglas in *Furman* to conclude that the death penalty, as then administered by the states, violated the Eighth Amendment ban on punishments that are selectively applied. n432 Mandatory death penalty statutes of the sort invalidated by *Woodson* were found to be arbitrary because they require all persons convicted of a given capital offense to be sentenced to death, regardless of relevant factors such as past criminal record or the likelihood of future criminal conduct. n433 Death penalty statutes that grant unfettered discretionary authority to sentencers were also found to be arbitrary because their actual operation renders it impossible to fathom why some are sentenced to die while others are not, and because they leave open the possibility that defendants may be sentenced to die on the basis of legally irrelevant factors such as race. n434 While the Gregg plurality sought to channel juries' discretion by denying them the authority to deem certain crimes worthy of death, thereby reducing the likelihood that individuals convicted of similar crimes will receive different sentences, n435 the *Lockett* Court endowed juries with the authority to render their sentencing decisions on the basis of any and all mitigating factors they consider relevant, thereby increasing the likelihood that individuals convicted of similar crimes will receive different sentences. n436

As numerous commentators have remarked, the bulk of post-*Furman* capital jurisprudence can be understood as an attempt to negotiate these competing imperatives, n437 each of which expresses a rival conception of fairness, neither of which we can reject in good constitutional conscience. One conception requires us to take into account the individual character and circumstances of particular defendants in [*865] determining what penalty is appropriate, while the other requires us to impose the same penalty on defendants convicted of the same crime. The U.S. Supreme Court has itself noted that these competing imperatives "can be in some tension" n438 and so can require "somewhat contradictory tasks." n439 Indeed, it is precisely the effort to navigate between this jurisprudential Scylla and Charybdis that ultimately led Justice Blackmun, nearing retirement from the Court, to declare that these two requirements are "not only inversely related, but irreconcilable" n440 and, on that basis, to conclude that the death penalty cannot be administered in a way that comports with the federal constitution. n441 If the operation of capital punishment's competing legal imperatives ensures that disparate sentencing for defendants who commit comparable crimes is inevitable, then arbitrariness in the imposition of the death penalty is inevitable as well.

The fundamental conceptual and practical problems involved in comparative proportionality review, no matter how sophisticated its conduct, duplicate this fundamental dilemma. Its aim is to ensure that similarly situated defendants are treated the same, but that no defendant is condemned to death absent full judicial consideration of the elements that render his or her situation unlike all others. The basic predicament inherent in comparative proportionality review stems from the assumption that it is possible to identify, with some legally adequate measure of exactitude, just what makes

some capital cases similar but others dissimilar, and hence what renders some deathworthy but others not. Only this premise renders tenable the belief that state high courts are indeed capable, on rationally defensible grounds, of vacating the judgment of a jury whose discretionary authority, when not adequately channeled by state statutes, results in a disproportionate sentence.

On the one hand, if appellate courts are to make good on the statutory requirement that they consider both the crime and the defendant, and do so in a way that comports with the requirement of individualized sentencing, they must engage in a particularized analysis of each death sentence in order to find out what, if anything, distinguishes this case from that of others who have been sentenced to death. However, that inquiry renders it difficult if not impossible to assemble a class of [*866] defendants on the basis of which one can make a comparative judgment about whether the death penalty is or is not generally imposed and so whether any given sentence is or is not disproportionate. On the other hand, the interest in legal uniformity necessarily draws courts away from consideration of the distinguishing circumstances of any given case through the application of comparative methods - e.g., frequency analysis - that abstract from the peculiarities of individual defendants and their crimes. However, that inquiry renders it difficult if not impossible to attend adequately to the factors which, because they distinguish a case on review from those with which it is compared, may warrant sparing a defendant's life.

The result of this dilemma, in Washington and elsewhere, is an unhappy history of decisions in which courts render judgments on the basis of considerations which, arguably, are no less arbitrary than the jury discretion its review was originally intended to remedy. "Is it," asks Justice Handler of the New Jersey Supreme Court, "worse to kill for money or for hatred? ... Is it worse to kill to support a gambling habit or to support a drug habit? Is it worse to kill a relative or a stranger? To pose those questions is to pose insoluble moral conundrums." n442 To give the appearance of solving these conundrums by conducting a proportionality review that seems to abide by the hallmarks of legal rationality, when it is based in fact on judgments of culpability, which, as a rule, are neither articulated nor defended, is to perpetuate the myth that the death penalty can indeed be administered in a principled way that comports with the claims of fairness. It is, under the guise of the law, to reproduce rather than to remedy the arbitrariness Gregg was held to resolve.

If we continue to believe that the unique nature of the death penalty requires an unusually heightened measure of due process protection, and if state high courts have failed to provide such protection, and if our three decade experiment with comparative proportionality review is a symptom of as well a contributor to that failure, then the conclusion to be drawn seems inescapable. As Justice Handler wrote, in dissenting from the New Jersey Supreme Court's decision in *State v. Martini*: n443

Today's decision serves as further confirmation of the failure of our experiment with capital punishment. The Court's early belief that it could fashion a constitutionally-legitimate process [*867] for imposing the death penalty ... has foundered on yet another rock - proportionality review. The inconsistency, subjectivity, and moralizing evident in today's decision are the inevitable products of a futile endeavor: the quest to devise and to apply a standard of due-process protection commensurate with the gravity of a death sentence... . The Court must either reject its effort to carry out capital punishment or accommodate itself to the juridical brutality of imposing death without due-process protections commensurate to its awesome finality. n444

The Washington State Supreme Court was perhaps refreshingly candid when, in *Pirtle*, it acknowledged that "at its heart, proportionality review will always be a subjective judgment as to whether a particular death sentence fairly represents the values inherent in Washington's sentencing scheme for aggravated murder." n445 However, it is not at all clear that this confession should allay any of the concerns now daily being voiced about the fundamental fairness of the death penalty's administration. Even those who believe that the U.S. Supreme Court was mistaken in holding that comparative proportionality review is not constitutionally required should not be deluded into thinking that what is constitutionally mandated can in fact be coherently implemented, or that its conduct can salvage a body of death penalty jurisprudence that is constitutionally infirm. Although oft-cited, Justice Marshall's claim in *Godfrey v. Georgia* n446 is worth recalling: "The task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system - and perhaps any criminal justice system - is unable to perform." n447 The history of comparative proportionality review provides additional testimony regarding the law's inability to devise and apply a standard of due process protection that is adequate to our well-founded conviction that death is indeed different.

[*868]

APPENDIX A*

<WPTABLE>

DATE FILED:

(to be indicated by Clerk of Supreme Court)

Questionnaire approved for use pursuant to Laws of 1981, ch. 138, 12. </WPTABLE>

REPORT OF THE TRIAL JUDGE

Aggravated First Degree Murder Case <WPTABLE>

Superior Court of County, Washington

Cause No.

State v. </WPTABLE>

INSTRUCTIONS: Please answer each question. If you do not have sufficient information to supply an answer, please so indicate after the specific question. If sufficient space is not allowed on the questionnaire form for answer to the question, use the back of the page, indicating the number of the question which you are answering, or attach additional sheets.

If more than one defendant was convicted of aggravated first degree murder in this case, please make out a separate questionnaire for each such defendant.

The statute specifies that this report shall, within thirty (30) days after the entry of the judgment and sentence, be submitted to the Clerk of the Supreme Court, to the defendant or his or her attorney, and to the prosecuting attorney.

[*869] <WPTABLE>

(1) Information about the Defendant

(a) Name: Date of Birth:

Last, First Middle

Sex: M Marital Status: Never Married F Married Separated Divorced Spouse Deceased

Race or ethnic origin of defendant: (Specify)

(b) Number and ages of defendant's children:

(c) Defendant's Father living: Yes No

If deceased, date of death:

Defendant's Mother living: Yes No

If deceased, date of death:

(d) Number of children born to defendant's parents:

(e) Defendant's education--check highest grade completed:

 1 2 3 4 5 6 7 8 9 10 11 12 College: 1 2 3 4Intelligence Level: Low IQ Score:Medium Above Average High

Further explanation or comment: </WPTABLE>

[*870] <WPTABLE>

(f) Was a psychiatric evaluation performed: Yes No

If yes, did the evaluation indicate that the defendant was:

(i) able to distinguish right from wrong? Yes No (ii) able to perceive the nature and quality of his or her act? Yes No (iii) able to cooperate intelligently in his or her own defense? Yes No

(g) Please describe any character or behavior disorders found or other pertinent psychiatric or psychological information:

(h) Please describe the work record of the defendant:

(i) If the defendant has a record of prior convictions, please list:

Offense Date Sentence Imposed

(j) Length of time defendant has resided in:
Washington: County of conviction: </WPTABLE>

[*871] (2) Information about the Trial <WPTABLE>

(a) How did the defendant plead to the charge of aggravated first degree murder?:

Guilty

Not Guilty

Not Guilty by reason of insanity (b) Was the defendant represented by counsel?: Yes No </WPTABLE>

<WPTABLE> (c) Please indicate if there was evidence introduced or instructions given as to any defense(s) to the crime of aggravated first degree murder:

Evidence Instruction(s)

Excusable Homicide

Justifiable Homicide

Insanity

Duress

Entrapment

Alibi

Intoxication

Other specific defenses:

</WPTABLE>

[*872] <WPTABLE>

(d) If the defendant was charged with other offenses which were tried in the same trial, list the other offenses below and indicate whether defendant was convicted:

Convicted

Yes No

Yes No

Yes No

Yes No

(e) What aggravating circumstances, as set forth in Laws of 1981, ch. 138 2, were alleged against the defendant and which of these circumstances were found to have been applicable?:

Aggravating Circumstances Alleged Found Applicable

Yes No

Yes No

Yes No

Yes No

(f) Please provide the names of each other defendant tried jointly with this defendant, the charges filed against each other defendant, and the disposition of each charge:

Name:

Offenses Charged Disposition

</WPTABLE>

[*873] Name: <WPTABLE>

Offenses Charged Disposition

</WPTABLE>

(3) Information Concerning the Special Sentencing Proceeding (a) Date of Conviction:

Date special sentencing proceeding commenced:

(b) Was the jury for the special sentencing proceeding composed of the same jurors as the jury that returned the verdict to the charge of aggravated first degree murder? Yes No

If the answer to the above question is no, please explain:

(c) Was there, in the court's opinion, credible evidence of any mitigating circumstances as provided in Laws of 1981, ch. 138, 7?

Yes No If yes, please describe:

(d) Was there evidence of mitigating circumstances, whether or not of a [*874] type listed in Laws of 1981, ch. 138, 7, not described in answer to (3)(c) above? Yes No

If yes, please describe:

(e) How did the jury answer the question posed in Laws of 1981, ch. 138, 6(4), that is: "Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?"

Yes No (f) What sentence was imposed?

(4) Information about the Victim (a) Was the victim related to the defendant by blood or marriage?

Yes No If yes, please describe the relationship:

(b) What was the victim's occupation, and was the victim an employer or employee of the defendant?

(c) Was the victim acquainted with the defendant, and if so, how well?

[*875] (d) If the victim was a resident of Washington, please state:

Length of Washington residency:

County of residence:

Length of residency in that county:

(e) Was the victim of the same race or ethnic origin as the defendant?

Yes No If no, please state the victim's race or ethnic origin:

(f) Was the victim of the same sex as the defendant?

Yes No (g) Was the victim held hostage during the crime?

Yes No If yes, for how long:

(h) Please describe the nature and extent of any physical harm or torture inflicted upon the victim prior to death:

[*876] (i) What was the age of the victim?

(j) What type of weapon, if any, was used in the crime?

(5) Information about the Representation of Defendant (If more than one counsel represented the defendant, answer each question separately as to each counsel. Attach separate sheets containing answers for additional counsel.)

(a) Name of counsel:

(b) Date on which counsel was secured:

(c) Was counsel retained or appointed? If appointed, please state the reason therefor:

(d) How long has counsel practiced law, and what is the nature of counsel's practice?

(e) Did the same counsel serve at both the trial and the special sentencing proceeding, and if not, why not?

[*877]

(6) General Considerations (a) Was the race or ethnic origin of the defendant, victim, or any witness an apparent factor at trial?

Yes No If yes, please explain:

(b) What percentage of the population of the county is the same race or ethnic origin as the defendant?

<WPTABLE>

Race Ethnic Origin

Under 10%

10 - 25%

25 - 50%

50 - 75%

75 - 90%

Over 90% </WPTABLE>

If there appears to be any reason to answer this question with respect to a county other than the county in which the trial was held, please explain:

[*878] (c) How many persons of the defendant's or victim's race or ethnic origin were represented on the jury?

Defendant:

Victim:

Further explanation or comment:

(d) Was there any evidence that persons of any particular race or ethnic origin were systematically excluded from the jury?

Yes No If yes, please explain:

(e) Was the sexual orientation of the defendant, victim, or any witness an apparent factor at trial?

Yes No If yes, please explain:

[*879] (f) Was the jury specifically instructed to exclude race, ethnic origin, or sexual preference as an issue?

Yes No (g) Was there extensive publicity in the community concerning this case?

Yes No (h) Was the jury instructed to disregard such publicity?

Yes No (i) Was the jury instructed to avoid any influence of passion, prejudice or any other arbitrary factor when considering its verdict or its findings in the special sentencing proceeding?

Yes No (j) Please describe the nature of any evidence suggesting the necessity for instructions of the type described in 6(f) through 6(i) above which were given:

[*880] (k) General comments of the trial judge concerning the appropriateness of the sentence, considering the crime, the defendant, and other relevant factors:

(7) Information about the Chronology of the Case <WPTABLE>

(a) Date of offense:

(b) Date of arrest:

(c) Date trial began:

(d) Date jury returned verdict:

(e) Date post-trial motions ruled on:

(f) Date special sentencing proceeding began:

(g) Date sentence was imposed:

(h) Date this trial judge's report was completed:

TRIAL JUDGE </WPTABLE>

FOOTNOTES:

n1. *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982).

n2. See generally Mike Gray, *The Death Game: Capital Punishment and the Luck of the Draw* (2003) (arguing that the administration of the death penalty is a rigged lottery); Robert Jay Lifton & Gregg Mitchell,

Who Owns Death? (2000) (arguing that concerns about the fairness of the death penalty will soon lead to its abolition); Austin Sarat, *When the State Kills* (2001) (arguing that those opposed to the death penalty should frame their claims in the language of fairness); Franklin E. Zimring, *The Contradictions of American Capital Punishment* (Michael Tonry & Norval Morris eds., 2003) (arguing that the death penalty violates the norms of due process).

n3. See generally Hugo Adam Bedau, *An Abolitionist's Survey of the Death Penalty in America Today*, in *Debating the Death Penalty: Should America Have Capital Punishment?* 15 (Hugo Adam Bedau & Paul G. Cassell eds., 2004) (reviewing abolitionist arguments, including the claim that the death penalty cannot be administered fairly); Stephen B. Bright, *Discrimination, Death, and Denial: Race and the Death Penalty*, in *Machinery of Death: The Reality of America's Death Penalty Regime* 45 (David R. Dow & Mark Dow eds., 2002) (arguing that the death penalty perpetuates the racist history of lynching in the United States); J. Michael Martinez, "Freakishly Imposed" or "Fundamentally Fair"? *Legal Arguments Against the Death Penalty*, in *The Leviathan's Choice* 227-47 (J. Michael Martinez et al., eds., 2002) (arguing that the administration of capital punishment is infected by inequities based on race, poverty, mental capacity, and age); Elizabeth Theiss Smith, *Fatal Flaws: The Implementation of the Death Penalty in the States*, in *The Leviathan's Choice* 159 (J. Michael Martinez et al., eds., 2002) (examining and explaining the error rate in capital convictions); Bryan Stevenson, *Close to Death: Reflections on Race and Capital Punishment in America*, in *Debating the Death Penalty: Should America Have Capital Punishment?* 76 (Hugo Bedau & Paul Cassell eds., 2004) (exploring the influence of conscious and unconscious racial bias in the administration of the death penalty); Mandy Welch & Richard Burr, *The Politics of Finality and the Execution of the Innocent: The Case of Gary Graham*, in *Machinery of Death: The Reality of America's Death Penalty Regime* 127 (David R. Dow & Mark Dow eds., 2002) (arguing that innocent persons are convicted, sentenced to death, and sometimes executed).

n4. Sarah Kershaw, *In Deal for Life, Man Admits Killing 48 Women*, *N.Y. Times*, Nov. 5, 2003, at A1.

n5. *Id.*

n6. *Id.*

n7. Joseph Turner, *Bill Would Ban Plea Bargains in Serial Killings, Mass Murders*, *News Trib.*, Nov. 6, 2003, at A9.

n8. Gene Johnson, *In Theory and in Fairness, Gary Ridgway Case Could End Death Penalty for Entire Country*, *News Trib.*, Nov. 6, 2003, at A8; Patrick McMahon & Laura Parker, *Killer's Deal Could Spare Others*, *USA Today*, Nov. 6, 2003, at 3A.

n9. Johnson, *supra* note 8, at A8. Even prior to announcement of the Ridgway deal, attorneys for two defendants accused of killing a woman in Snohomish County sought and secured a delay in prosecutors' decision whether to seek the death penalty against their clients. See Ian Ith, *Ridgway Deal Could Change Criteria for Death Penalty*, *Seattle Times*, Oct. 17, 2003, at A1. The attorneys argued that this decision should turn on the results of the Ridgway negotiations. *Id.* at A15.

n10. *408 U.S. 238 (1972)* (per curiam).

n11. *Id.* at 253 (Douglas, J., concurring).

n12. *Id.* at 239-40.

n13. *Id.* at 309-10 (Stewart, J., concurring).

n14. *Id.* at 313 (White, J., concurring).

n15. *Id.* at 255 (Douglas, J., concurring).

n16. *Id.* at 400-01 (Burger, C.J., dissenting) ("While I would not undertake to make a definitive statement as to the parameters of the Court's ruling, it is clear that if state legislatures and the Congress wish to maintain the availability of capital punishment, significant statutory changes will have to be made.").

n17. 428 U.S. 153 (1976).

n18. *Id.* at 207 (plurality opinion).

n19. Dirk Johnson, Illinois, Citing Faulty Verdicts, Bars Executions, N.Y. Times, Feb. 1, 2000, at A1.

n20. *Id.*

n21. *Id.*

n22. Dirk Johnson, No Executions in Illinois Until System Is Repaired, N.Y. Times, May 21, 2000, at 20.

n23. Governor's Commission on Capital Punishment, Report of the Governor's Commission on Capital Punishment 220 (April 2002), available at <http://www.idoc.state.il.us/ccp/ccp/reports/index.html> (last visited June 27, 2004) [hereinafter Governor's Commission].

n24. Glenn Pierce & Michael Radelet, Race, Region, and Death Sentencing in Illinois, 1988-1997 iii (April 2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/technical_appendix/research_report.html (last visited June 27, 2004).

n25. *Id.* Contrary to the contention of Justice Douglas in *Furman*, the study by Pierce and Radelet did not find statistically significant evidence of disparate treatment based on the race of the defendant, holding aggravating factors constant. *Id.* However, the study did caution that, because its inquiry was limited to defendants convicted of first-degree murder and because earlier stages in the judicial process were not examined, "estimates of arbitrariness and/or discrimination ... may under-represent the effects of extra-legal factors." *Id.*; see also Raymond Paternoster, An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction 33 (2003) (finding that black killers of white victims are nearly three and a half times as likely to be sentenced to die as are blacks who kill blacks in

Maryland, in a recent study demonstrating significant racial bias in the capital punishment system), available at <http://www.urhome.umd.edu/newsdesk/pdf/finalrep.pdf> (last visited June 27, 2004); U.S. Dep't of Justice, *The Federal Death Penalty System: A Statistical Survey (1988-2000)* (2000) (conducting a comparable inquiry into racial bias and geographic disparity in the administration of the federal death penalty statute), available at <http://www.usdoj.gov/dag/pubdoc/dpsurvey.html> (last visited June 27, 2004).

n26. Jodi Wilgoren, *Citing Issue of Fairness, Governor Clears Out Death Row in Illinois*, N.Y. Times, Jan. 12, 2003, at 1. A 2000 study conducted under the auspices of Columbia University provides empirical support for the Illinois governor's concerns about error. See James Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 *Tex. L. Rev.* 1839, 1846-61 (2000); James Liebman et al., *A Broken System, Part I: Error Rates in Capital Cases, 1973-1995*, at 34 (June 2000) [hereinafter *Broken System I*] (concluding that of 4578 death sentence appeals conducted between 1973 and 1995, more than two-thirds were successful in state or federal courts, chiefly because of incompetent defense counsel; police and prosecutors who had suppressed exculpatory evidence or committed some other form of professional misconduct; juries that had been misinformed about the law; or, finally, biased judges and/or juries), available at <http://justice.policy.net/cjedfund/dpstudy> (last visited June 27, 2004). But see generally M. Christine Cagle & J. Michael Martinez, *Social Science Data and the Death Penalty*, in *The Leviathan's Choice* 141 (J. Michael Martinez et al. eds., 2002) (providing various criticisms of the Liebman study).

n27. Death Penalty Information Center, *The Death Penalty in 2002: Year End Report 4* (Dec. 2002), available at <http://www.deathpenaltyinfo.org/yrendrpt02.pdf> (last visited June 27, 2004); Death Penalty Information Center, *The Death Penalty in 2001: Year End Report 5-7* (Dec. 2001), available at <http://www.deathpenaltyinfo.org/YearEndReport2001.pdf> (last visited June 27, 2004).

n28. See The Justice Project, *2001 State Legislation on Death Penalty Reform at a Glimpse*, at http://justice.policy.net/proactive/newsroom/release.vtml?id=27021&PROACTIVE_ID=cececfbc8cdcf7c6c5cecfbcfc5cececb6c6c8cc9c9c5cf (last visited June 30, 2004).

n29. See ABC This Week: Roundtable Discussion of the Death Penalty Moratorium (ABC television broadcast, Apr. 9, 2000) (discussing the death penalty, George Will expressed his conviction that innocent persons have been executed, and Pat Robertson expressed his support for a moratorium on executions because of concern about capital punishment's unfairness to the poor and minorities); see also Robert Reno, *Support for Death Penalty Goes Wobbly*, *Des Moines Reg.*, June 12, 2000, at 7A (quoting Oliver North: "I think capital punishment's day is done in this country. I don't think it's fairly applied.").

n30. Editorial, *Second Thoughts*, *Wash. Post*, July 4, 2001, at A18.

n31. Press Release, Jeffrey M. Jones, The Gallup Organization, *Slim Majority Think Death Penalty Applied Fairly in this Country* (June 30, 2000), available at <http://www.gallup.com/content/login.aspx?ci=2761> (last visited July 10, 2004).

n32. Richard Morin & Claudia Deane, *Support for Death Penalty Eases: McVeigh's Execution Approved, While Principle Splits Public*, *Wash. Post*, May 3, 2001, at A9.

n33. Henry Weinstein, *Support for Executions Declines*, *L.A. Times*, Sept. 15, 2000, at A26.

n34. *Furman v. Georgia*, 408 U.S. 238, 256 (1972) (Douglas, J., concurring); see supra note 3 (citing articles examining some of the mounting evidence against the equitable administration of the death penalty).

n35. James Liebman et al., A Broken System, Part II: Why There Is so Much Error in Capital Cases, and What Can Be Done About It 478 (Feb. 2002) [hereinafter Broken System II], available at <http://justice.policy.net/cjedfund/dpstudy> (last visited June 27, 2004).

n36. *Gregg v. Georgia*, 428 U.S. 153, 204-06 (1976) (plurality opinion).

n37. *Id.* at 188-89 (plurality opinion) (expressing concern about excessive discretion on the part of sentencers).

N38. *Id.* at 204-06 (plurality opinion) (discussing comparative proportionality review as a remedy for prejudice and arbitrariness).

n39. *Id.*

n40. *Id.*

n41. See Carol S. Steiker & Jordan M. Steiker, Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment, 109 *Harv. L. Rev.* 357, 417-18 (1995).

n42. See *Gregg*, 428 U.S. at 187 (plurality opinion) (stating that capital punishment is "an extreme sanction, suitable to the most extreme of crimes").

n43. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion) (noting that a "process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind").

n44. See *Gregg*, 428 U.S. at 204-05 (plurality opinion).

n45. Margaret J. Radin, Proportionality, Subjectivity, and Tragedy, 18 *U.C. Davis L. Rev.* 1165, 1165-66 (1985).

n46. U.S. Const. amend. XIV.

n47. Radin, supra note 45, at 1166.

n48. *Id.*

n49. See Daryl P. Rush, Note, Constitutional Law - Safeguarding Eighth Amendment Rights with a Comparative Proportionality Review in the Imposition of the Death Penalty, 28 *How. L.J.* 331, 333-34 (1985) (providing an account of the English origins of the U.S. Constitution's commitment to proportionality as an element of fair sentencing).

n50. U.S. Const. amend. VIII.

n51. See Barry Latzer, The Failure of Comparative Proportionality Review of Capital Cases (with Lessons from New Jersey), 64 *Alb. L. Rev.* 1161, 1162-63 (2001).

n52. See *Pulley v. Harris*, 465 U.S. 37, 42-43 (1984) (elaborating on the distinction between these two forms of proportionality review).

n53. See *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958); *Weems v. United States*, 217 U.S. 349, 382 (1910).

n54. See *Trop*, 356 U.S. at 100-01; *Weems*, 217 U.S. at 382.

n55. 433 U.S. 584 (1977). There are two principal antecedents to *Coker*, each of which rests on the concept of inherent disproportionality. See *Trop*, 356 U.S. at 100-01 (holding that, according to "the evolving standards of decency that mark the progress of a maturing society," deprivation of citizenship is an excessive punishment for a conviction imposed by a court martial for the offense of wartime desertion); *Weems*, 217 U.S. at 382 (holding that fifteen years of incarceration with hard labor is an excessive punishment for the crime of falsifying a public document).

n56. *Coker*, 433 U.S. at 592 (plurality opinion).

n57. *Id.* (citing *Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion)).

n58. 458 U.S. 782 (1982).

n59. *Id.* at 798 (citation omitted).

n60. *Coker*, 433 U.S. at 592 (plurality opinion). Arguably, the *Coker* plurality advanced a second rationale for its conclusion as well. In 1977, when *Coker* was decided, only three states authorized the death penalty for rape. *Id.* at 595-96 (plurality opinion). In two of these states, the victim had to be a child in order to warrant a death sentence. *Id.* On this basis, the Court concluded that the penalty of death for rape was no longer consistent with public opinion, as reflected in state statutes, and, as such, was no longer congruent with contemporary norms of appropriate punishment. *Id.*

n61. *Id.* at 598 (plurality opinion).

n62. See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

n63. *Id.* at 293 (Brennan, J., concurring).

n64. *Id.* at 255 (Douglas, J., concurring).

n65. See Donald H. Wallace & Jonathan R. Sorenson, A State Supreme Court's Review of Comparative Proportionality: Explanations for Three Disproportionate and Executed Death Sentences, 20 *T. Jefferson L. Rev.* 207, 251-52 (1998) [hereinafter Explanations].

n66. See *Furman*, 408 U.S. at 253 (Douglas, J., concurring).

n67. *Id.* at 313 (White, J., concurring).

n68. *Id.* at 293 (Brennan, J., concurring).

n69. See Franklin E. Zimring & Gordon Hawkins, Capital Punishment and the American Agenda 38-45 (1986) (providing an account of the state legislative activity generated by the *Furman* ruling).

n70. 428 U.S. 280 (1976).

n71. *Id.* at 305 (plurality opinion).

n72. *Id.* at 303 (plurality opinion). At the same time, a plurality of the Court found unconstitutional a Louisiana statute, which, like its North Carolina counterpart, also required the imposition of death sentences for certain crimes. *Roberts v. Louisiana*, 428 U.S. 325, 329 (1976) (plurality opinion). In addition to arguing that such a procedure fails to allow particularized consideration of any given defendant's character and record, the *Woodson* and *Roberts* pluralities concluded that this requirement offends contemporary standards of decency and perpetuates the concerns about arbitrariness identified in *Furman*, specifically by encouraging the practice of jury nullification. *Id.* at 347 (plurality opinion); *Woodson*, 428 U.S. at 293 (plurality opinion).

n73. *Woodson*, 428 U.S. at 304 (plurality opinion).

n74. 428 U.S. 153 (1976).

n75. *Id.* at 207 (plurality opinion).

n76. *Id.* at 153-54 (plurality opinion).

n77. Criminal Law - Provisions for Imposition of Death Penalty Made, 1973 Ga. Laws 74 1 (codified at *Ga. Code Ann. 17-10-2(c)* (1996)).

n78. Criminal Law - Provisions for Imposition of Death Penalty Made, 1973 Ga. Laws 74 3 (codified at *Ga. Code Ann. 17-10-30(b)* (1996)).

n79. Criminal Law - Provisions for Imposition of Death Penalty Made, 1973 Ga. Laws 74 4 (codified at *Ga. Code Ann. 17-10-35(c)(3)* (1996)).

n80. *Id.*

n81. See *id.*

n82. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (plurality opinion). Additionally, Justice White, joined by Chief Justice Burger and Justice Rehnquist, predicted that "if the Georgia Supreme Court properly performs the task assigned to it under the Georgia statutes, death sentences imposed for discriminatory reasons or wantonly or freakishly will be set aside." *Id.* at 224 (White, J., concurring).

n83. *Id.* at 167-68 (plurality opinion).

n84. Criminal Law - Provisions for Imposition of Death Penalty Made, 1973 Ga. Laws 74 4 (codified at *Ga. Code Ann. 17-10-35(c)(1)* (1996)).

n85. *Id.* (codified at *Ga. Code Ann. 17-10-35(c)(2)* (1996)).

n86. *Id.* (codified at *Ga. Code Ann. 17-10-35(e)* (1996)). The Court's commitment to the importance of using comparative proportionality review was effectively reaffirmed in *Zant v. Stephens*, 462 U.S. 862, 876 (1983). In *Zant*, the Georgia death penalty statute was once again upheld, in part because of its comparative proportionality review provision. *Id.* at 876-77. At issue was whether invalidation of one of the three aggravating factors supporting the death sentence invalidated the sentence imposed. *Id.* at 864. The Court concluded that the narrowing function performed by the two valid factors adequately distinguished the case under review from other Georgia murder cases in which the death penalty had not been imposed. *Id.* at 879. Moreover, the Court upheld the sentence on the grounds that the Georgia State Supreme Court had reviewed the sentence to determine whether it was disproportionate. *Id.*

n87. See Latzer, *supra* note 51, at 1168 n.29 (listing the states that adopted comparative proportionality review by statutory reform during the decade following Furman).

n88. *Id.*

n89. Arizona adopted proportionality review in *State v. Richmond*, 560 P.2d 41, 51 (Ariz. 1976). Arkansas did so in *Collins v. State*, 548 S.W.2d 106, 119 (Ark. 1977). Florida followed suit in *Sinclair v. State*, 657 So. 2d 1138, 1142 (Fla. 1995).

n90. *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976) (plurality opinion).

n91. 465 U.S. 37 (1984).

n92. *Id.* at 43-44.

n93. *Id.* at 45.

n94. *Id.* Justices Brennan and Marshall dissented on the grounds that comparative proportionality review has been shown to "eliminate some, if only a small part, of the irrationality that currently surrounds the imposition of the death penalty," and thus should be required by the U.S. Constitution. *Id.* at 60-61 (Brennan, J., dissenting).

n95. See *Pulley*, 465 U.S. at 48; *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

n96. *Pulley*, 465 U.S. at 45.

n97. *Id.* at 53.

n98. *Id.* at 54.

n99. *Id.* at 49 (citation omitted).

n100. The Court's retreat from its endorsement of comparative proportionality review in *Gregg* was further cemented by its ruling in *McCleskey v. Kemp*, 481 U.S. 279 (1987). In *McCleskey*, a black man convicted of murdering a white police officer sought habeas corpus relief in federal court, alleging that the Georgia capital sentencing process was administered in a racially discriminatory manner and, as such, violated the Eighth and Fourteenth Amendments. *Id.* at 286. In support of this claim, *McCleskey* offered a statistical study on the imposition of the death sentence in Georgia that demonstrated significant disparities based, most significantly, on the race of the murder victim. *Id.* at 286-87. The U.S. Supreme Court rejected *McCleskey's* claim, holding that in order to prevail he was required to prove that the judge or jury in his particular case had acted with discriminatory purpose. *Id.* at 297-98. The net effect of this decision was to undercut one of the two central rationales for comparative proportionality review: that of preventing the sort of prejudicial decision-making that can only be determined by comparing any given sentence with the overall pattern of death sentencing in the relevant jurisdiction.

n101. See Latzer, *supra* note 51, at 1168 n.31 (listing the states that repealed comparative proportionality review following *Pulley*); see also Penny J. White, Can Lightning Strike Twice? Obligations of State Courts After *Pulley v. Harris*, 70 *U. Colo. L. Rev.* 813, 848-49 (1999) (discussing why Arkansas and Arizona abandoned the mandatory practice of comparative proportionality review following *Pulley*). It should be noted, however, that three other state legislatures adopted comparative proportionality review after *Pulley*. See *N.H. Rev. Stat. Ann.* 630:5(XI)(c) (1996); *N.Y. Crim. Proc. Law* 470.30(2)(b) (McKinney Supp. 2001); *Tenn. Code*

Ann. 39-13-206(c)(1)(D) (1997). In fact, Tennessee reinstated this practice in 1997 after repealing it in 1992. Latzer, *supra* note 51, at 1168 n.31.

n102. Leigh B. Bienen, *The Proportionality Review of Capital Cases by State High Courts After Gregg: Only "The Appearance of Justice"?*, 87 *J. Crim. L. & Criminology* 130, 133 (1996).

n103. Donald H. Wallace & Jonathan R. Sorenson, *Comparative Proportionality Review: A Nationwide Examination of Reversed Death Sentences*, 22 *Am. J. Crim. Just.* 13, 35 (1997) [hereinafter *Nationwide Examination*].

n104. The states are: Alabama, *Ala. Code 13A-5-53(b)(3)* (1994); Delaware, *Del. Code Ann. tit. 11, 4209(g)(2)(a)* (1995); Georgia, *Ga. Code Ann. 17-10-35(c)(3)* (1997); Kentucky, *Ky. Rev. Stat. Ann. 532.075(3)(c)* (Michie 1999); Louisiana, *La. Code Crim. Proc. Ann. art. 905.9.1(1)(c)* (West 1997); Mississippi, *Miss. Code Ann. 99-19-105(3)(c)* (1999); Missouri, *Mo. Ann. Stat. 565.035.3(3)* (West 1999); Montana, *Mont. Code Ann. 46-18-310(1)(c)* (1999); Nebraska, *Neb. Rev. Stat. 29-2521.03* (1995); New Hampshire, *N.H. Rev. Stat. Ann. 630:5(XI)(c)* (1996); New Jersey, *N.J. Stat. Ann. 2C:11-3(e)* (West 1995); New Mexico, *N.M. Stat. Ann. 31-20A-4(C)(4)* (Michie 2000); New York, *N.Y. Crim. Proc. Law 470.30(3)(b)* (McKinney Supp. 2001); North Carolina, *N.C. Gen. Stat. 15A-2000(d)(2)* (1999); Ohio, *Ohio Rev. Code. Ann. 2929.05(A)* (Anderson 1999); South Carolina, *S.C. Code Ann. 16-3-25(c)(3)* (Law. Co-op. 1985); South Dakota, *S.D. Codified Laws 23A-27A-12(3)* (Michie 1998); Tennessee, *Tenn. Code Ann. 39-13-206(c)(1)(D)* (1997); Virginia, *Va. Code Ann. 17.1-313(c)(2)* (Michie 1999); and Washington, *Wash. Rev. Code 10.95.130(2)(b)* (1990).

n105. See Wallace & Sorenson, *Nationwide Examination*, *supra* note 103, at 16 (providing a table indicating the status of comparative proportionality review requirements in all death penalty states as of 1997).

n106. Governor's Commission, *supra* note 23, at Recommendation 70.

n107. *Id.* at Recommendation 84.

n108. *Broken System II*, *supra* note 35, at 7.

n109. See The Constitution Project, *Mandatory Justice: Eighteen Reforms to the Death Penalty* 27 (2001); see also Rachel King, *Broken Justice: The Death Penalty in Virginia* 55 (Nov. 2003) (recommending, among other reforms, that the "Virginia Supreme Court should keep a database of all murder convictions - those where the death penalty was imposed and those where it was not - to use for proportionality reviews," in a study by the American Civil Liberties Union of Virginia and the ACLU Capital Punishment Project endorsed by groups as diverse as the Rutherford Institute and Amnesty International USA), available at <http://www.acluva.org> (last visited July 29, 2004).

n110. See Richard Van Duizend, *Comparative Proportionality Review in Death Sentence Cases: What? How? Why?*, 8 *St. Ct. J.* 9, 9-13 (1984).

n111. *Id.* at 11-12.

n112. Id. at 10-11.

n113. Id. at 12-13. Some commentators have assessed how states other than Washington have addressed the three-step analysis of comparative proportionality review. See generally Rhonda Hartman, Critiquing Pennsylvania's Comparative Proportionality Review in Capital Cases, 52 *U. Pitt. L. Rev.* 871 (1991) (assessing Pennsylvania's analysis of comparative proportionality review); Ellen Liebman, Appellate Review of Death Sentences: A Critique of Proportionality Review, 18 *U.C. Davis L. Rev.* 1433 (1985) (assessing Georgia's analysis of comparative proportionality review); Lawrence S. Lustberg & Lenora M. Lapidus, The Importance of Saving the Universe, 26 *Seton Hall L. Rev.* 1423 (1996) (assessing New Jersey's analysis of comparative proportionality review); Joseph H. Rodriguez et al., Proportionality Review in New Jersey: An Indispensable Safeguard in the Capital Sentencing Process, 15 *Rutgers L.J.* 399 (1984) (arguing that New Jersey's conduct of comparative proportionality review is essential to the fair administration of the death penalty); Wallace & Sorenson, Explanations, *supra* note 65 (assessing Missouri's analysis of comparative proportionality review). Others have given cross-state assessments. See generally David C. Baldus et al., Equal Justice and the Death Penalty 280 (1990) [hereinafter *Equal Justice*] (analyzing the effectiveness of different methods of conducting comparative proportionality review); Bienen, *supra* note 102 (criticizing the conduct of comparative proportionality review on the ground that it provides only an illusion of fairness); Wallace & Sorenson, Nationwide Examination, *supra* note 103 (providing a national examination of death sentences reversed on the ground of disproportionality).

n114. White, *supra* note 101, at 842.

n115. See *Ga. Code Ann. 17-10-35(c)* (2003); Steven M. Sprenger, Note, A Critical Evaluation of State Supreme Court Proportionality Review in Death Sentence Cases, 73 *Iowa L. Rev.* 719, 727, 738-40 (1986) (making the claim that after the Supreme Court upheld the Georgia statute a "majority of states with statutory authorization for the death penalty adopted similar or identical comparative proportionality review legislation").

n116. See, e.g., *Sanborn v. State*, 892 *S.W.2d* 542, 556 (Ky. 1994) (considering all cases in which death penalty was imposed, as required by statute), cert. denied, 516 *U.S.* 854 (1995); *State v. Palmer*, 399 *N.W.2d* 706, 737 (Neb. 1986) (finding the universe of death-sentenced cases to be "a threshold requirement for comparative study"), cert. denied, 484 *U.S.* 872 (1987); *State v. Copeland*, 300 *S.E.2d* 63, 74 (S.C. 1982) (relying only on death-sentenced cases because "fact findings of the trial court ... provide a fundamental line of demarcation" and because a larger universe would cause the court to "enter a realm of pure conjecture" and to engage in "intolerable speculation"), cert. denied, 460 *U.S.* 1103 (1983).

n117. See, e.g., *Flamer v. State*, 490 *A.2d* 104, 139 (Del. 1980) (declaring it "inherently fair, logical and necessary to prevent disproportionate sentencing that this Court compare the sentence below to the facts and circumstances of cases in which a capital sentencing proceeding was actually conducted, whether the murderers have been sentenced to life imprisonment or death"), cert. denied, 474 *U.S.* 865 (1985); *State v. Bolder*, 635 *S.W.2d* 673, 685 (Mo. 1982) (finding that "inquiry would be unduly slanted were [the court] to compare only those cases in which the death penalty has been imposed" and deeming "similar those cases in which both death and life imprisonment were submitted to the jury") (citation omitted), cert. denied, 459 *U.S.* 1137 (1983); *State v. Rhines*, 548 *N.W.2d* 415, 455-56 (S.D. 1996) (finding that "because the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses, the only cases that could be deemed similar ... are those in which imposition of the death penalty was properly before the sentencing authority for determination") (citation omitted), cert. denied, 519 *U.S.* 1013 (1996) .

n118. 613 *A.2d* 1059 (N.J. 1992).

n119. *Id. at 1071*.

n120. Sprenger, *supra* note 115, at 738-40 (concluding that states that exclude life sentence cases from the universe of comparative cases engage in the least effective approach to identify disproportionate sentences).

N121. See *Furman v. Georgia*, 408 U.S. 238, 313 (1972) (White, J., concurring).

n122. New York, for example, has defined a broad universe encompassing some homicide cases that were not capitally prosecuted. See *N.Y. Jud. Law 211-a* (McKinney 2003); N.Y. Ct. R. 510.18 (authorizing collection of case data for every criminal action in which defendant is indicted for first-degree murder).

n123. The National Center for State Courts, User Manual for Prototype Proportionality Review Systems A-8 (1984) [hereinafter User Manual]. The report noted:

In most jurisdictions, this guideline will mean all cases in which the defendant was charged with first degree murder and convicted of first-or second-degree murder or manslaughter. It is to include convictions resulting from a plea of guilty as well as those following a trial, and life sentences resulting from the absence of any aggravating circumstances as well as those stemming from a jury's apparent determination to exercise mercy after finding a defendant legally eligible for capital punishment.

Id.

n124. See *Marshall*, 613 A.2d at 1070-73 (arguing on behalf of a broad-based universe of cases and explaining that the exclusion of non-capital murder cases, for example, could lead to disproportionality due to prosecutorial discretion); Baldus, Equal Justice, *supra* note 113, at 211-12 (arguing that a restrictive specification of the universe of similar cases renders prosecutorial discretion immune to judicial oversight).

n125. *Marshall*, 613 A.2d at 1071 (emphasis in original).

n126. See generally Latzer, *supra* note 51 (criticizing this method when examining the practice of the New Jersey Supreme Court).

n127. See Latzer, *supra* note 51, at 1204.

n128. Of course, a court can simply duck this second issue by presupposing that all cases in whatever universe it has specified are by definition "similar." However, that once again defeats the very purpose of comparative proportionality review and thus does nothing to remedy the concerns about the inconsistent application of capital punishment. See *infra* Part IV.B.2 (discussing the Washington State Supreme Court's post-1995 conflation of the categories of universe and pool).

n129. See User Manual, *supra* note 123, at A-4 to A-6 (stating the recommendations of the National Center for State Courts on this question). See generally Baldus, *supra* note 113 (analyzing the effectiveness of different methods of conducting comparative proportionality review); Bienen, *supra* note 102 (criticizing the conduct of comparative proportionality review on the ground that it provides only an illusion of fairness); Rhonda Hartman,

Critiquing Pennsylvania's Comparative Proportionality Review in Capital Cases, 52 *U. Pitt. L. Rev.* 871 (1991) (assessing Pennsylvania's analysis of comparative proportionality review); Ellen Liebman, Appellate Review of Death Sentences: A Critique of Proportionality Review, 18 *U.C. Davis L. Rev.* 1433 (1985) (assessing Georgia's analysis of comparative proportionality review); Lawrence S. Lustberg & Lenora M. Lapidus, The Importance of Saving the Universe, 26 *Seton Hall L. Rev.* 1423 (1996) (assessing New Jersey's analysis of comparative proportionality review); Joseph H. Rodriguez et al., Proportionality Review in New Jersey: An Indispensable Safeguard in the Capital Sentencing Process, 15 *Rutgers L.J.* 399 (1984) (arguing that New Jersey's conduct of comparative proportionality review is essential to the fair administration of the death penalty); Gregory M. Stein, Distinguishing Among Murders When Assessing the Proportionality of the Death Penalty, 85 *Colum. L. Rev.* 1786 (1985) (seeking to distinguish capital murder from other types of first-degree murder); Wallace & Sorenson, Nationwide Examination, *supra* note 103 (providing a national examination of death sentences reversed on the ground of disproportionality); Wallace & Sorenson, Explanations, *supra* note 65 (assessing Missouri's analysis of comparative proportionality review).

n130. As with different ways of specifying the universe of cases, these are not the only conceivable methods by which a court might determine "similarity." Moreover, it is worth noting that many courts have issued proportionality determinations absent any statement of the method employed to determine similarity. See, e.g., *DeYoung v. State*, 493 *S.E.2d* 157, 168 (*Ga.* 1997) (referring without discussion to appendix listing similar cases where the death penalty was upheld, cert. denied, 523 *U.S.* 1141 (1998)); *Davis v. State*, 660 *So. 2d* 1228, 1261-62 (*Miss.* 1995) (referring without discussion to an appendix with list of capital cases the court previously affirmed), cert. denied, 517 *U.S.* 1192 (1996); *Commonwealth v. Uderra*, 706 *A.2d* 334, 342 (*Pa.* 1998) (making passing reference to statistical data without mention of similar cases).

n131. See, e.g., *State v. Correll*, 715 *P.2d* 721, 737 (*Ariz.* 1986) (finding no cases similar on every factual point); *Collins v. State*, 548 *S.W.2d* 106, 122 (*Ark.* 1977) (determining no similar cases because this was the first case reviewed under the new statute); *State v. Plath*, 313 *S.E.2d* 619, 630 (*S.C.* 1984) ("Lacking precisely identical cases with which to compare these verdicts, we are convinced that the sentence of death is neither excessive nor disproportionate in light of this crime and these defendants.").

n132. See, e.g., *Cabello v. State*, 471 *So. 2d* 332, 350-51 (*Miss.* 1985) (concluding that all robbery/murder cases were similar); *State v. Lawson*, 314 *S.E.2d* 493, 503 (*N.C.* 1984) (requiring "roughly similar" fact patterns); *Boggs v. Commonwealth*, 331 *S.E.2d* 407, 422 (*Va.* 1985) (concluding that all murder for hire cases were similar).

n133. See David C. Baldus et al., Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience, 74 *J. Crim. L. & Criminology* 661, 668-70 (1983) [hereinafter Georgia Experience].

n134. See *Lockett v. Ohio*, 438 *U.S.* 586, 605 (1978) (holding that any aspect of a defendant's character or record may be introduced during the sentencing phase of a capital trial); Rhonda G. Hartman, *supra* note 113, at 893-99 (discussing the difficulties involved in comparing cases on the basis of mitigating factors).

n135. See Baldus, Georgia Experience, *supra* note 133, at 671-72 (discussing the difference between a fact-specific approach to identifying similar cases as opposed to an approach that seeks to render a judgment regarding overall culpability); Baldus, Georgia Experience, *supra* note 133, at 675-78 (discussing the Georgia State Supreme Court's struggle with this question); Baldus, Equal Justice, *supra* note 113, at 285 (discussing the difficulties inherent in fact-specific definitions of similar cases as well as the need for more general measures of defendant culpability); Liebman, *supra* note 113, at 1438 (discussing the difficulties inherent in fact-specific as opposed to broader methods of defining similar cases); Liebman, *supra* note 113, at 1442-58 (discussing the

Georgia State Supreme Court's varying definitions of similar cases in terms of "the same crime," "similar crimes," and "similar defendants"); Wallace & Sorenson, *Nationwide Examination*, supra note 103, at 19-20.

n136. See Baldus, *Georgia Experience*, supra note 133, at 670-72; Wallace & Sorenson, *Nationwide Examination*, supra note 103, at 20; Baldus, *Equal Justice*, supra note 113, at 201-02.

n137. See Baldus, *Georgia Experience*, supra note 133, at 670-72; Wallace & Sorenson, *Nationwide Examination*, supra note 103, at 20; Baldus, *Equal Justice*, supra note 113, 201.

n138. See Baldus, *Georgia Experience*, supra note 133, at 670-72; Wallace & Sorenson, *Nationwide Examination*, supra note 103, 20; Baldus, *Equal Justice*, supra note 113, at 201-02.

n139. See, e.g., *State v. Croggins*, 716 P.2d 1152, 1158-61 (Idaho 1985) (vacating death sentence imposed on one of two co-defendants on the ground of lesser culpability); *State v. Windsor*, 716 P.2d 1182, 1193-94 (Idaho 1985) (using culpability measure when comparing intracase sentences); *State v. Williams*, 287 N.W.2d 18, 29 (Neb. 1979) (employing aggravating factors to determine comparative culpability of different defendants); *State v. Gaskin*, 326 S.E.2d 132, 147 (S.C. 1985) ("The facts are not the same in any two cases and, accordingly, our review of the facts relate largely to degrees of culpability of the defendants and the viciousness of the killing."); *State v. Carter*, 714 S.W.2d 241, 251 (Tenn. 1986) (using an assessment of culpability to distinguish accomplice's life sentence); *Watkins v. Commonwealth*, 331 S.E.2d 422, 440 (Va. 1985) (comparing defendant's future dangerousness and vileness of the crime with previous defendants).

n140. See James S. Liebman, *The Overproduction of Death*, 100 *Colum. L. Rev.* 2030, 2053-57 (2000) (stating that on average only three hundred of the approximately 21,000 homicides committed in the United States each year result in death sentences, and that of the 6700 persons sentenced to die between 1973 and 1999, only 598 were executed).

n141. See User Manual, supra note 123, at A-10 to A-11 (providing recommendations of the National Center for State Courts on this question). See generally Baldus, *Equal Justice*, supra note 113 (analyzing the effectiveness of different methods of conducting comparative proportionality review); Bienen, supra note 102 (criticizing the conduct of comparative proportionality review on the ground that it provides only an illusion of fairness); Hartman, supra note 113 (assessing Pennsylvania's analysis of comparative proportionality review); Liebman, supra note 113 (assessing Georgia's analysis of comparative proportionality review); Lustberg & Lapidus, supra note 113 (assessing New Jersey's analysis of comparative proportionality review); Rodriguez, supra note 113 (arguing that New Jersey's conduct of comparative); Wallace & Sorenson, *Explanations*, supra note 65 (assessing Missouri's analysis of comparative proportionality review).

n142. See Raymond Paternoster & Ann Marie Kazyaka, *The Administration of the Death Penalty in South Carolina: Experiences Over the First Few Years*, 39 *S.C. L. Rev.* 245, 396-401 (1988) (discussing the reliance of courts on unarticulated notions of reasonableness in justifying the results of comparative proportionality reviews).

n143. See generally Baldus, *Equal Justice*, supra note 113 (discussing precedent-seeking approaches to the conduct of comparative proportionality review).

n144. User Manual, *supra* note 123, at A-5 to A-6 (criticizing an "intuitive approach" on the ground that it renders courts unable to demonstrate that their reasoning is consistent and fair across cases).

n145. See Baldus, *Georgia Experience*, *supra* note 133 at 669-70 (criticizing the precedent-seeking approach because courts are "satisfied upon finding one or two prior cases, the circumstances of which make them suitable benchmarks for the death sentence on appeal," which is insufficient to determine whether the death penalty is generally applied in comparable cases).

n146. See Baldus, *Georgia Experience*, *supra* note 133, at 718-20.

n147. *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (plurality opinion).

n148. See Baldus, *Equal Justice*, *supra* note 113, at 281-82.

n149. See Latzer, *supra* note 51, at 1220.

n150. Because my aim in this section is to outline the basic logic of comparative proportionality review, these methodological questions, while crucial for some purposes, are not essential to my argument. See generally David C. Baldus et al., *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 *Stan. L. Rev.* 1 (1980) (reviewing the statistical methods appropriate to this task).

n151. See *Gregg*, 428 U.S. at 183 (plurality opinion).

n152. *Furman v. Georgia*, 408 U.S. 238, 312 (1972) (White, J., concurring).

n153. *Id.* at 308 (Stewart, J., concurring).

n154. *Woodson v. North Carolina*, 428 U.S. 153, 304 (1976).

n155. *Wash. Rev. Code* 10.95.130(1) (2004).

n156. *Id.* 10.95.130(2)(a).

n157. *Id.* 10.95.130(2)(c).

n158. *Id.* 10.95.130(2)(d).

n159. *Id.* 10.95.130(2)(b).

n160. Id. 10.95.140(1).

n161. Murder, Sentencing, ch. 138, 1981 Wash. Laws 535, 535-47.

n162. *Smith v. Washington*, 408 U.S. 934, 934 (1972).

n163. Washington Criminal Code, ch. 260, 9A.92.010(125), 1975 Wash. Laws 862.

n164. Death Penalty - Aggravated Murder, ch. 9, 1975-76 Wash. Laws 17-19.

n165. See *State v. Green*, 91 Wash. 2d 431, 444-47, 588 P.2d 1370, 1378-79 (1979) (declaring the initiative unconstitutional, heeding the attorney general's advice).

n166. See *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (plurality opinion).

n167. Op. Att'y Gen. 15, 12-13 (Wash. 1976).

n168. Id. at 13.

n169. H.B. 615, 45th Leg., 1st Ex. Sess. (Wash. 1977).

n170. Death Penalty - Aggravated Murder, ch. 206, 7(3)(b), 1977 Wash. Laws 774, 778.

n171. Id. 7(1).

n172. Id. 7(5)(b).

n173. See id. 7.

n174. See id. However, by requiring the submission of trial records and questionnaires only in death penalty cases, the statute arguably implied that the court's comparison would be similarly restricted. See id. 7(1).

n175. Id. 7(3)(b).

n176. Id. 7.

n177. Memorandum from Joan Smith Lawrence, Commissioner, to the Washington State Supreme Court (Feb. 15, 1978).

n178. In re Trial Judge's Report - Death Penalty Cases, No. 25700-B-186 (Wash. Sup. Ct. Feb. 17, 1978) (order approving questionnaire for trial judge's report).

n179. The task force was created in April 1978 by the Washington State Supreme Court via its Judicial Council. Its purpose, according to minutes of its initial meeting, was "to assist the Supreme Court and the Judicial Council in the development of a permanent questionnaire." See Mins., Task Force on the Death Penalty Questionnaire, at 1 (May 12, 1978).

n180. Mins., Task Force on the Death Penalty Questionnaire (Feb. 1, 1979). Not long after the task force submitted its recommendation, the 1977 capital punishment statute was found unconstitutional as a result of Washington State Supreme Court rulings in 1980 and 1981. See *State v. Frampton*, 95 Wash. 2d 469, 478-79, 627 P.2d 922, 926-27 (1981); *State v. Martin*, 94 Wash. 2d 1, 2, 614 P.2d 164, 164 (1980). As a result, the task force's questionnaire was never formally adopted by the State Supreme Court or employed by trial court judges. The adoption of this questionnaire would not have required legislative approval because the 1977 statute mandated that the State Supreme Court prepare and supply such a form. See Death Penalty - Aggravated Murder, ch. 206, 7(3)(b), 1977 Wash. Laws 778. With relatively minor alteration, the text of the task force's proposed questionnaire was incorporated into the aggravated first-degree murder and capital punishment statute in 1981. Murder, Sentencing, ch. 138, 1981 Wash. Laws 535, 535-47.

n181. See *infra* Part IV.B.

n182. Mins., Task Force on the Death Penalty Questionnaire, at 1 (Aug. 25, 1978).

n183. *Id.*

n184. Rough Draft Questionnaire (attached to Agenda, Task Force on the Death Penalty Questionnaire (Aug. 25, 1978)).

n185. Proposed Criminal Rule for Superior Court 1 (attached to Letter from Karl B. Tegland, Staff Attorney, Washington Judicial Council, to John J. Champagne, Clerk, Washington Supreme Court (Feb. 1, 1979)) (citation omitted). The task force allotted an additional ten days to the prosecution and defense counsel to offer comments prior to final submission of the report.

n186. *Id.*

n187. Letter from Karl B. Tegland, Staff Attorney, Washington Judicial Council, to John J. Champagne, Clerk, Washington State Supreme Court 2 (Feb. 1, 1979).

n188. See App. A, *infra* pp. 868-80.

n189. See Mins. (Feb. 1, 1979), *supra* note 180.

n190. Proposed Report of the Trial Judge (attached to Letter from Karl B. Tegland, Staff Attorney, Washington Judicial Council, to John J. Champagne, Clerk, Washington State Supreme Court (Feb. 1, 1979)).

n191. See App. A, *infra* p. 880, at (6)(k). Also included in the task force recommendation, but excluded from the form currently in use, is a question asking the judge to comment on the conduct of the defendant in the presence and absence of the jury as well as "any other significant conduct, characteristics, or other factors concerning the defendant." See Proposed Criminal Rule for Superior Court 10 (attached to Letter from Karl B. Tegland, Staff Attorney, Washington Judicial Council, to John J. Champagne, Clerk, Washington State Supreme Court (Feb. 1, 1979)). In addition, excluded from the form currently in use is a question aimed at ensuring that the report be submitted to prosecution and defense counsel, each of whom were then to be given an opportunity to propose corrections of factual data. See *id.* at 1. This opportunity is effectively afforded to counsel by the statute currently in force, which invites both sides to "submit briefs within the time prescribed by the court and present oral argument to the court." *Wash. Rev. Code 10.95.130(1)* (2000).

n192. In 1980, the Washington State Supreme Court ruled that the 1977 statute did not allow for imposition of a death sentence if a defendant pled guilty to aggravated first-degree murder. *State v. Martin*, 94 Wash. 2d 1, 2, 614 P.2d 164, 164 (1980). One year later, in light of *Martin*, the court found the 1977 capital punishment statute unconstitutional because it permitted a defendant to escape the death penalty by pleading guilty, whereas those who elected to contest their guilt remained candidates for death, thus impermissibly chilling the former's right to trial. *State v. Frampton*, 95 Wash. 2d 469, 478-79, 627 P.2d 922, 926-27 (1981).

n193. H.B. 76, 47th Leg., Reg. Sess. (Wash. 1981).

n194. S.H.B. 76, 47th Leg., Reg. Sess. (Wash. 1981).

n195. Murder, Sentencing, ch. 138, 12, 1981 Wash. Laws 535, 541-43.

n196. H.B. 76, 47th Leg., Reg. Sess. (Wash. 1981).

n197. Murder, Sentencing, ch. 138, 12, 1981 Wash. Laws 535, 541-43.

n198. Explanatory Material for "An Act Concerning Murder and Capital Punishment," Dec. 31, 1980, at 18 ("The form of the report contained in this proposal [HB 76] is largely the product of a task force which was appointed by the supreme court to develop a form under our current statute. There are, of course, modifications to accommodate this revised capital murder scheme.").

n199. See H.B. 76, 47th Leg., Reg. Sess. (Wash. 1981).

n200. Murder, Sentencing, ch. 138, 12, 1981 Wash. Laws, 535, 541-43.

n201. See *id.*

n202. H.B. 76, 47th Leg., Reg. Sess. (Wash. 1981).

n203. Explanatory Material, *supra* note 198, at 18.

n204. Explanatory Material, *supra* note 198, at 18-19.

n205. *Wash. Rev. Code 10.95.130(2)(b)* (2000).

n206. See *id.*

n207. Death Penalty - Aggravated Murder, ch. 206, 7(5)(b), 1977 Wash. Laws 774, 778.

n208. Murder, Sentencing, ch. 138, 14(1), 1981 Wash. Laws, 535, 544.

n209. Explanatory Material, *supra* note 198, at 20.

n210. *98 Wash. 2d 173, 654 P.2d 1170* (1982).

n211. *Id. at 195-96, 654 P.2d at 1183-84.*

n212. *Id. at 176, 654 P.2d at 1173.*

n213. *Id. at 192, 654 P.2d at 1182.*

n214. See *State v. Gentry*, *125 Wash. 2d 570, 655-56, 888 P.2d 1105, 1154-55* (1995) (reviewing the trial judge reports to determine presence of a pattern of imposition of the death penalty based on race of defendant or victim); see also *State v. Benn*, *120 Wash. 2d 631, 680-93, 845 P.2d 289, 317-24* (1991) (reviewing the trial judge reports to determine whether a sentence was disproportionate); *State v. Lord*, *117 Wash. 2d 829, 907, 910-11, 822 P.2d 177, 221, 223* (1991) (concluding that, in order to determine that a sentence is neither arbitrary nor based on illegitimate racial factors, a court should review the universe of cases set out in *RCW 10.95.120*).

n215. See *Furman v. Georgia*, *408 U.S. 238, 242, 293* (1972).

n216. David C. Baldus, When Symbols Clash: Reflections on the Future of Comparative Proportionality Review of Death Sentences, *26 Seton Hall L. Rev. 1582, 1598* (1996); cf. Bienen, *supra* note 102, at 164 (explaining that the statutory mandate to conduct proportionality review necessarily implies creating and maintaining an adequate factual record).

n217. The most recent trial judge report considered in this study, filed with the Washington State Supreme Court as of March 24, 2003, is numbered 255. The discrepancy between that number and the number of trial judge reports submitted since 1981 is explained as follows: (1) Reports of the Trial Judge Nos. 16/16A concern two different trials for different defendants and incidents; (2) Reports of the Trial Judge Nos. 34/34A concern two separate trials for different incidents with the same defendant; (3) Reports of the Trial Judge Nos. 85/85A and 97/97A each represent two separate reports for the same defendant and incident. Although *RCW 10.95.120* requires the State Supreme Court to consider "cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965," in addition to those for which trial reports have been filed, I have not considered the pre-1981 cases because that would entail consideration of convictions and sentences rendered under an unconstitutional statute. See Bruce Gilbert, *Comparative Proportionality Review: Will the Ends, Will the Means*, 18 *Seattle U. L. Rev.* 593, 621 (1995). Because the pre-1981 statute was found unconstitutional, Gilbert argues, it may have generated death sentences that were influenced by discrimination or other impermissible considerations, which, in turn, could provide a constitutionally flawed foundation for finding a contemporary case proportional. See *id.* In *Benn*, Justice Utter stated:

Admittedly, the cases between 1965 and 1981 are less useful in many respects for conducting proportionality review. In making comparisons, we do not have the benefit of the more detailed information contained in the questionnaires trial courts have completed since 1981 as required by *RCW 10.95.120*. In addition, defendants in those cases were sentenced under earlier versions of Washington's death penalty statute which have subsequently been declared unconstitutional.

Benn, 120 Wash. 2d at 705, 845 P.2d at 330 (Utter, J., dissenting). While this is a persuasive justification for not considering pre-1981 cases, there still remains a significant contradiction between what *RCW 10.95.120* formally requires in terms of its definition of "similar" cases and the universe of cases actually considered by the State Supreme Court in conducting comparative proportionality reviews.

n218. See Sentencing Guideline Comm'n, Power and Duties of the Commission, at <http://sgc.wa.gov/powersandduties.htm> (providing powers and duties of the Washington Sentencing Guidelines Commission, which include maintaining information on criminal judgments and sentences entered by trial courts) (last visited July 26, 2004). The Sentencing Guideline Commission stated that in 1981:

The Washington State Legislature enacted the Sentencing Reform Act ("SRA"), which established the Sentencing Guidelines Commission and directed it to recommend to the Legislature a determinate sentencing system for adult felonies. The principal goal of the new sentencing guidelines system was to ensure that offenders who commit similar crimes and have similar criminal histories receive equivalent sentences. Sentences were to be determined by the seriousness of the offense and by the criminal record of the offender. The Commission completed the original adult felony sentencing "grid" in 1982, and the Legislature enacted it into law in 1983. The Sentencing Reform Act took effect for crimes committed on and after July 1, 1984. Codified in chapter 9.94A RCW, the SRA contains the guidelines and procedures used by the courts to impose sentences for adult felonies.

Sentencing Guideline Comm'n, Sentencing Reform Act: Historical Background, at <http://www.sgc.wa.gov/historical.htm> (last visited June 29, 2004).

n219. The first case included in the database compiled by the Sentencing Guidelines Commission was filed in 1985 (Robert Strandy, Cause No. 85-1-00487-6 (1985)). It is not unreasonable to assume that were the Commission's records to extend back to 1981, when the trial judge reports currently in use were first required by law, the number of reports missing from the State Supreme Court collection would be larger. In chronological order by date of sentence, convictions for aggravated first-degree murder on record with the Sentencing Guidelines Commission, but missing from the trial judge reports, are as follows: Michel McBride, Cause No. 86-1-00523-5 (1986); Daniel Edwards, Cause No. 87-1-00550-1 (1987); Billy Ballard, Cause No. 91-1-00083-5 (1991); Miguel Gaitan, Cause No. 93-1-01018-0 (1993); Robert Anderson, Cause No. 97-1-00128-0 (1997); Chad Walton, Cause No. 97-1-02153-1 (1998); Brandon Backstrom, Cause No. 97-1-01993-6 (1999); Alex Baranyi, Cause No. 97-1-00343-8 (1999); Michael Thorton, Cause No. 98-1-00493-6 (1999); Kevin Cruz, Cause

No. 00-1-00284-6 (2002); Christopher Miller, Cause No. 01-1-00311-3 (2002); Donald Durga, Cause No. 01-1-011709-1 (2002). In addition, at least ten defendants present in the State Supreme Court's database are missing from that maintained by the Sentencing Guidelines Commission. By trial judge report number, they are as follows: Susan Kroll (No. 60); Martin Lee Sanders (No. 81); Stanley Runion (No. 99); Constantine Baruso (No. 112); Tommy Metcalf (No. 128); Cal Brown (No. 140); Darold Stenson (No. 144); William Robinson, Jr. (No. 166); Dwayne Antony Woods (No. 177); Dayva Cross (No. 220).

n220. No trial judge report has been filed for David Anderson, Cause No. 97-1-00421-3 (2000). There is some confusion regarding this case because, according to the Department of Corrections, the name that corresponds to this cause number is Richard Hampton. A CourtLink search indicates that the name corresponding to this number is in fact David Anderson, who was convicted by a jury on four counts of aggravated first-degree murder in 1997 and sentenced to life imprisonment without parole.

n221. *Wash. Rev. Code 10.95.120* (2000). In a brief filed with the Washington State Supreme Court, the prosecuting attorney contended that the "absence of a couple dozen reports" does not pose a legal problem because *RCW 10.95.130(2)(b)* only requires the court to consider "cases in which reports have been filed with the supreme court under *RCW 10.95.120*." *Brief for Respondent at 176-77, Thomas v. State, 150 Wash. 2d 821, 83 P.3d 970 (2004)* (No. 70727-8). On this reading, the court is required to consider only those reports that have actually been filed, not those that are mandated by law. Surprisingly, given this view, the brief proceeds to acknowledge that "the court should try to ensure that all of the mandated reports get filed." *Id.* (emphasis omitted). Then, citing the example of New Jersey, it recommends appointment of a retired judge to the position of standing master in order "to supervise ... the court's data collection as well as the completion of the trial judge questionnaires." *Id.* at 178. Finally, it states that "the collection of accurate data from all aggravated murders (whether or not the death penalty is imposed) is imperative for proportionality review." *Id.* at 179. Leaving aside what appears to be a direct self-contradiction, this argument fails to explain why such an extraordinary measure as the appointment of a special master is necessary in light of its contention that the law's mandate is satisfied if the court merely considers those reports that are indeed filed. In addition, the brief contends that the defendant has failed to explain why the absence of some unspecified number of trial judge reports "prevents" proportionality review. See *id.* at 177. Granted, the absence of any number of trial judge reports does not render the conduct of comparative proportionality review literally impossible. The larger the number of missing reports, however, the less adequate and meaningful such review will be. That is so regardless of whether the court engages in a quantitative effort to calculate the frequency with which "similar" aggravated first-degree murders do or do not result in death sentences, or if it seeks to engage in a qualitative review that compares the facts of any given case on review to cases deemed similar.

n222. See *supra* note 219.

n223. See *State v. Elledge, 144 Wash. 2d 62, 91, 26 P.3d 271, 287 (2001)* (Sanders, J., dissenting). Justice Sanders stated:

The proportionality database is itself flawed because it ... is missing a staggering number of cases required by *RCW 10.95.130* in which defendants were convicted of aggravated first-degree murder, but no death penalty was imposed. Even if the court were to consider whether death was generally imposed in similar cases (which it no longer apparently does), the universe of cases we are supposed to consider is markedly skewed by these factors against the defendant, in favor of imposing death, and contrary to the statute.

Id. (emphasis in original). While the number of missing trial judge reports is perhaps not "staggering," as Justice Sanders suggested, his basic point remains valid.

n224. Cases involving defendants once sentenced to death but now re-sentenced to life without parole include the following: *Lord v. Wood, 184 F.3d 1083 (9th Cir. 1999)*; *Jeffries v. Wood, 114 F.3d 1484 (9th Cir.*

1997); *Rupe v. Wood*, 863 F. Supp. 1315 (W.D. Wash. 1994), aff'd, 93 F.3d 1434 (9th Cir. 1996); *In re Brett*, 142 Wash. 2d 868, 16 P.3d 601 (2001); *State v. Finch*, 137 Wash. 2d 792, 975 P.2d 967 (1999); *State v. Luvane*, 127 Wash. 2d 690, 903 P.2d 960 (1995); *State v. Bartholomew*, 101 Wash. 2d 631, 683 P.2d 1079 (1989). Additionally, in 1998, David Lewis Rice was re-sentenced to life without parole as a result of a plea bargain after a judge ordered a new trial, ruling that Rice's first lawyer had inadequately represented him. See Ronald K. Fitten, In Plea Deal, Rice Finally Gets Life for '85 Slayings, *Seattle Times*, May 28, 1998, at B1. Cases involving defendants who were sentenced to death but have now had their convictions and sentences set aside include: *Benn v. Wood*, 283 F.3d 1040, 1062 (9th Cir. 2002); *Mak v. Blodgett*, 970 F.2d 614, 625 (9th Cir. 1992); *Pirtle v. Lambert*, 150 F. Supp. 2d 1078, (E.D. Wash. 2001); *Harris v. Blodgett*, 853 F. Supp. 1239, 1294 (W.D. Wash. 1994), aff'd, 64 F.3d 1432 (9th Cir. 1995); *Thomas v. State*, 150 Wash. 2d 821, 876, 83 P.3d 970, 997 (2004); *State v. Clark*, 143 Wash. 2d 731, 783-84, 24 P.3d 1006, 1032 (2001); *State v. Marshall*, 144 Wash. 2d 266, 282, 27 P.3d 192, 200 (2001); *State v. Roberts*, 142 Wash. 2d 471, 534, 14 P.3d 713, 747 (2000); *State v. Furman*, 122 Wash. 2d 440, 458, 858 P.2d 1092, 1103 (1993).

A related complication is posed by cases like that of Timothy Cronin. See *State v. Cronin*, 142 Wash. 2d 568, 14 P.3d 752 (2000). In 1997, Cronin was convicted of aggravated first-degree murder and sentenced to life imprisonment without parole. *Id.* at 577, 14 P.3d at 757. The Washington State Supreme Court subsequently overturned his conviction due to errors in the instructions given to the jury. *Id.* at 581-82, 14 P.3d at 758-59. However, the court also concluded that because Cronin's first-degree felony murder conviction was unaffected by the instructional error, his felony murder conviction should be affirmed. *Id.* at 586, 14 P.3d at 761. Because Cronin was convicted of aggravated first-degree murder, arguably the law requires that a trial judge report be filed with the supreme court, as it was. Report of the Trial Judge No. 217 (Timothy Cronin). However, once his conviction on that charge was overturned, this report should either be removed from the court's database, or it should be amended to reflect its present status. Neither step, however, has been taken.

n225. The question of whether juvenile defendants should be included in the State Supreme Court's database is more complicated. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), the U.S. Supreme Court upheld imposition of the death penalty for defendants who were sixteen or seventeen when they committed their crimes on the grounds that such imposition does not constitute a violation of the Eighth Amendment's Cruel and Unusual Punishment Clause. *Id.* at 380. However, one year earlier, in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), a plurality had ruled that the death penalty cannot be imposed on defendants who were fifteen or younger when they committed the crime on the grounds that a death sentence serves no valid retributive or deterrent purpose in such cases. *Id.* at 836-37 (plurality opinion). In her concurring opinion, Justice O'Connor concluded that defendants who were under sixteen when they committed their crimes "may not be executed under the authority of a capital punishment statute that specifies no minimum age at which the commission of a capital crime can lead to the offender's execution." *Id.* at 857-58 (O'Connor, J., concurring). In light of this claim, the Washington State Supreme Court, in *State v. Furman*, 122 Wash. 2d 440, 858 P.2d 1092 (1993), concluded that, because the state capital punishment statute did not expressly provide for imposition of the death penalty on minors and did not specify any minimum age for its imposition, those under eighteen could not be sentenced to death. *Id.* at 457-58, 858 P.2d at 1102-03. Included in the State Supreme Court's database, however, are twenty-five defendants who were juveniles at the time they committed the crimes for which they were eventually convicted on a charge of aggravated first-degree murder. In three of these cases, the death penalty was sought, and in Michael Furman's case, it was imposed (but later reversed). *Id.* at 443, 858 P.2d at 1095. On the one hand, because Washington State's capital punishment statute clearly requires trial court judges to complete reports for all defendants convicted of aggravated first-degree murder, reports regarding juvenile defendants must be submitted and maintained in the State Supreme Court's database. On the other hand, because *RCW 10.95.130(2)(b)* defines "similar cases" as those in which "the judge or jury considered the imposition of capital punishment," and because this punishment cannot be considered in the case of juvenile defendants, arguably the courts should not use these cases when they engage in comparative proportionality review. In his concurring opinion in *State v. Furman*, Justice Utter made reference to pre-Furman trial judge reports filed for juvenile defendants in support of his argument that Furman's sentence should be reversed not simply on the grounds indicated here, but also on the grounds of disproportionality. *Id.* at 461-67, 858 P.2d at 1104-08 (Utter, J., concurring). Specifically, Justice Utter noted that none of the seven other defendants convicted of aggravated first-degree murder since 1981 had received the death penalty. *Id.* at 462-67, 858 P.2d at 1105-07 (Utter, J., concurring). Much the same argument, incidentally, can be made regarding defendants who were convicted of

aggravated first-degree murder, but have also been deemed "mentally retarded," as defined in *RCW 10.95.030(2)(a)*. Because the statute stipulates that no person falling into this category can be sentenced to death, as with juveniles, such defendants should be included in the Washington State Supreme Court's database of trial judge reports because such reports must be filed for all aggravated first-degree murder convictions. However, they should not be considered when the court conducts its comparative proportionality reviews because the trial court cannot consider imposition of the death penalty in these cases. To the best of my knowledge, the only defendant who fits into this category is Mario Ortiz. See Report of the Trial Judge No. 1 (Mario Ortiz).

n226. In *State v. Woods*, 143 Wash. 2d 561, 23 P.3d 1046 (2001), the Washington State Supreme Court expressly rejected the claim that the trial judge reports must be updated after any given death penalty is overturned or the case in question is remanded for resentencing by an appellate court. *Id.* at 612-14, 23 P.3d at 1074-75. To do so, the court determined that the language of *RCW 10.95.120* does not confine the universe of cases to be considered for the purposes of comparative proportionality review to those that are upheld on appeal. *Id.* at 613, 23 P.3d at 1075. While this is technically true, the effect of the court's statutory literalism is to permit it to cite, in its future reviews, death sentences that it once upheld but later rejected. One might argue, as the court stated in *State v. Elledge*, 144 Wash. 2d 62, 26 P.3d 271 (2001), that the trial judge reports should be revised only if a sentence is rejected by an appellate court on the ground of disproportionality. *Id.* at 79 n.5, 26 P.3d at 281 n.5. That will not do, however, because whatever errors occurred at the guilt and/or sentencing phase(s) of a capital trial may well have affected the jury's ultimate decision. Because, as indicated in Part IV.B below, the court is committed to the view that it should not second-guess the jury's decision unless there is compelling reason to do so, the court's refusal to update the trial judge reports means that the errors remain on the record.

n227. *Wash. Rev. Code 10.95.130(2)(b)* (2000) (for cases after Jan. 1965).

n228. The National Center for State Courts recommends removal of such reports. User Manual, *supra* note 123, at A-8.

n229. *State v. Martini*, 651 A.2d 949, 989 (N.J. 1994) (Handler, J., dissenting).

n230. *Wash. Rev. Code 10.95.120* (2000).

n231. Report of the Trial Judge No. 247 (Jimmee Chea).

n232. Report of the Trial Judge No. 100 (Michael Hightower).

n233. It appears that the State Supreme Court sought to remedy the problem of late filings through adoption of a court rule in December 1997. See Superior Court Special Proceedings Rules - Criminal 6, available at http://courts.wa.gov/court_rules (last visited July 20, 2004). This rule requires the prosecutor and defense counsel to complete and submit to the clerk of the trial court a copy of the questionnaire specified in *RCW 10.95.120* within fourteen days following the entry of a judgment and sentence for an aggravated first-degree homicide conviction. *Id.* Once completed and served on each of the opposing attorneys, that questionnaire assists in the preparation of the trial judge's report. That report, as the statute and rule require, must be filed within thirty days after entry of the judgment and sentence. *Wash. Rev. Code 10.95.120*. Perhaps in response to the promulgation of this rule, a flurry of very late reports (a total of ten, averaging just over five years past their respective due dates) were filed with the State Supreme Court during the final month of 2001 and the first three months of 2002. On balance, however, it would appear that this rule has had little effect in expediting

submission of the trial judge reports. Of the seventy-five reports filed since this rule became effective on January 1, 1998, only twenty-three have been submitted in accordance with the statutory deadline.

n234. Report of the Trial Judge No. 210 (Cheyenne Brown).

n235. Id.

n236. Id.

n237. Report of the Trial Judge No. 90 (Gerald Hankerson).

n238. See Report of the Trial Judge No. 95 (Kenneth Schrader), submitted more than five years late. In response to the same question about jury composition, the judge wrote: "I do not honestly recall if any jurors were members of minority races. It is possible that one or two may have been." Id.; see also Report of the Trial Judge No. 208 (Kenneth Comeslast), submitted approximately five years late, in which the judge wrote, "I do not recall," in response to the same question. Id. Another example is the Report of the Trial Judge No. 104 (Harold Eirich), submitted approximately three years late, in which the judge wrote, "no record of race or ethnic origin of jurors has been kept." Id. A comment of this sort obviously raises questions about whether the judge who presided over the trial was the same judge who completed the trial judge report. No guesswork is necessary to confirm this hypothesis in the case of Report of the Trial Judge No. 226 (Marvin Leo). There, the judge who completed the form wrote, "the trial judge failed to complete this report. He was defeated in his bid for re-election and I succeeded him as Dept. 2 judge for Pierce County. They have been unable to get Judge Rudy Tollefson to do this report." Id.

Moreover, and contrary to the clear implication of *RCW 10.95.120*, which seeks "general comments of the trial judge concerning the appropriateness of the sentence," see App. A, *infra* p. 880, at (6)(k), and which requires the trial judge to sign and date the questionnaire, see App. A, *infra* p. 880, it appears that some reports have been completed by court staff, long after the fact, rather than by the judge who presided over the trial. In one trial judge report, question marks appear throughout the report and all questions seeking information beyond that included in the record itself are simply left blank. Report of the Trial Judge No. 211 (Dennis Anfinson). In apparent explanation, the person who completed the report indicated that the "judge is retired - file contained very little information." Id. Finally, in at least one instance, the trial court judge indicated that the "trial judge, after completing this report to the best of her information and belief, forwarded the report to the prosecutor for completion." See Report of the Trial Judge No. 121 (Sterling Jarnagin). There is no indication of whether the report was also submitted to the defense counsel as required by *RCW 10.95.120*.

n239. App. A, *infra* p. 868. In some instances, the absence of a response to a question is not problematic. For example, section (1)(f) of the trial judge report asks whether a psychiatric evaluation of the defendant was performed. App. A, *infra* p. 870, at (1)(f). Obviously, if the answer to that question is "no," then one should not expect a trial judge to answer the following three questions, all of which are germane only if the answer to the initial question is "yes." These questions concern the defendant's ability to "distinguish right from wrong," to "perceive the nature and quality of his or her act," and to "cooperate intelligently in his or her own defense." By the same token, in cases where the death penalty was not sought by the prosecutor, all of the questions regarding the special proceeding conducted to determine whether the sentence shall be death or life imprisonment without possibility of parole become irrelevant and so unnecessary to answer.

n240. In what follows, I have elected to focus my inquiry on those questions left unanswered that are most problematic from the standpoint of comparative proportionality review. Many other examples, though, might be

cited. For example, in seventeen of the reports (6%), no answer is provided in response to the request for the date on which the report itself was completed.

n241. Mins. (Aug. 25, 1978), *supra* note 182, at 1.

n242. Examples include section (6)(k) in the following trial judge reports: Report of the Trial Judge No. 18 (Brian Kester); No. 19 (Michael Cornethan); No. 35 (David Lennon); No. 46 (Nicholas Giesa); No. 48 (Christopher St. Pierre).

n243. Report of the Trial Judge No. 6 (Kenneth Hovland).

n244. Report of the Trial Judge No. 11 (Rosaline Edmondson).

n245. Report of the Trial Judge No. 40 (John Schoenhals). On rare occasions, a trial court judge will indicate that he or she disagrees with a sentence imposed by a jury. But typically, the judge's elaboration of the reasons for the disagreement is not helpful. Consider, for example, Report of the Trial Judge No. 2 (Arnold Brown), in which the judge answered 6(k) as follows: "since there were no mitigating circumstances the failure of the jury not to impose the death penalty was not appropriate." See also Report of the Trial Judge No. 21 (Leslie Pounds) ("Because of unusual factual situation life without parole seems a little harsh (defendant's lack of recollection - immunity granted participant whose involvement was substantial - prior good character of defendant.)").

n246. App. A, *infra* pp. 869-70, at (1).

n247. See Report of the Trial Judge No. 198 (Joseph Schuler II).

n248. *Id.* at (1)(a)-(j).

n249. *Id.* at (7).

n250. In section (1) of the 259 trial judge reports, date of birth is omitted in twelve (4.4%); gender in seven (2.7%); marital status in eleven (4.2%); race in three (1.2%); number and ages of defendant's children in eight (3.1%); whether defendant's father is living in eight (3.1%); whether defendant's mother is living in eleven (4.2%); number of siblings of defendant in twelve (4.6%); whether a psychiatric evaluation was performed on the defendant in nine (3.5%); the existence of character or behavioral disorders on the part of the defendant in twenty-eight (10.8%); the work record of the defendant in seven (2.7%); the defendant's prior convictions, if any, in sixteen (6.2%); and, finally, the length of time the defendant has resided in Washington in nine (3.5%). For other examples of reports that provide minimal information about the defendant, see Report of the Trial Judge No. 99 (Stanley Runion); No. 103 (Jose Nash); No. 124 (Christopher Bradley); No. 189 (Kevin Boot); No. 193 (David Lewis); No. 197 (Joseph Revay); No. 202 (Gary Ackley); No. 207 (Donnie Ivy); No. 211 (Dennis Anfinson); No. 212 (Sap Kray); No. 213 (Richard Morgan); No. 221 (Steven Phillips); No. 228 (Rosendo Delgado); No. 232 (Kenneth Leuluaialii); and No. 250 (Joseph Kennedy).

n251. Report of the Trial Judge No. 145 (Cristian Delbosque) at (4)(a) & (b).

n252. *Id.* at (4)(c). In some reports, the answer provided to this question is suspect. For example, in Report No. 208 (Kenneth Comeslast), which was filed just short of five years late, the judge answered, "I believe the victims were acquainted with the defendant but at this time I cannot recall the extent of their acquaintance." Report of the Trial Judge No. 208 (Kenneth Comeslast).

n253. See Report of the Trial Judge No. 145 (Cristian Delbosque) at (4)(d)-(j).

n254. For examples of additional reports that provide very little information on the nature of the crime and its victim, see Report of the Trial Judge No. 197 (Joseph Revay); No. 202 (Gary Ackley); No. 211 (Dennis Anfinson); No. 212 (Sap Kray).

n255. For examples of reports that are limited to box checking and/or the provision of bare factual information, see Report of the Trial Judge No. 15 (Patrick Jeffries); No. 22 (Fortunato Dictado); No. 27 (John Anderson); No. 28 (Gus Turner).

n256. *Wash. Rev. Code 10.95.100* (2000).

n257. *Id.* 10.95.020. Some trial court judges seem to believe that a guilty plea exempts them from indicating the aggravating circumstance(s) that provides the basis for conviction on a charge of aggravated first-degree murder. Because the question concerning aggravating circumstances appears in the section of the trial judge reports regarding the trial (as opposed to the section on the special sentencing proceeding), this belief is without foundation. In two cases, in response to the questions regarding alleged and applicable aggravating circumstances, the judge wrote "Not applicable," and explained this entry by referring back to the question concerning the defendant's initial plea. Report of the Trial Judge No. 152 (Steven McCord); No. 153 (Ernest Benson). Moreover, in another report, a judge listed "more than one victim and murders part of a common scheme" under the heading of alleged aggravating circumstances, but then checked two boxes under the heading "Found Applicable." Report of the Trial Judge No. 196 (Barry Loukaitis). In fact, according to Washington State's death penalty statute, this is a single aggravating circumstance. *Wash. Rev. Code 10.95.020(10)*. This error effectively makes this homicide appear more heinous when measured by number of aggravating circumstances than it was in fact.

n258. For trial judge reports that fail to indicate any aggravating circumstances, alleged and/or applicable, see Report of the Trial Judge No. 24 (Grady Mitchell); No. 55 (Russell Stenger); No. 80 (Gabriel Garcia); No. 83 (Ronald Thomas); No. 97 (James Fountain) (here, the aggravating circumstances are indicated in the subsequently submitted revision, No. 97A); No. 143 (Pedro Mendez-Reyna); No. 152 (Steven McCord); No. 153 (Ernest Benson); No. 181 (Henry Marshall); No. 185 (Robert Parker); No. 211 (Dennis Anfinson); No. 222 (Donald Lambert); No. 227 (Brodie Walradt) (this information may be included in documents which, according to the trial judge, were appended to the report); No. 233 (Keith Ruch); No. 236 (Duwayne Bender); No. 245 (James Kinney).

n259. See *Wash. Rev. Code 10.95.130(1)* (2000).

n260. *Id.* 10.95.060(4) (2000). Incidentally, one report includes what is arguably a valid complaint regarding the formulation of this statutory question: "The question asked of the jury ... is asked in the negative,

and the jurors had difficulty understanding the concept, as well as the question, and the application thereof. It is confusing!" Report of the Trial Judge No. 77 (Charles Tate).

n261. The absence of adequate evidence regarding mitigating circumstances is also problematic if a prosecutor elects to consult the trial judge reports for assistance in determining whether or not to seek the death penalty. *RCW 10.95.040* specifies that "if a person is charged with aggravated first degree murder as defined by *RCW 10.95.020*, the prosecuting attorney shall file written notice of a special sentencing proceeding to determine whether or not the death penalty should be imposed when there is reason to believe that there are not sufficient mitigating circumstances to merit leniency." *Wash. Rev. Code 10.95.040* (2000). Should a prosecutor seek guidance from the trial judge reports in deciding whether or not to seek the death penalty, little will be gleaned from this source.

n262. App. A, *infra* p. 873, at (3)(c).

n263. App. A, *infra* p. 874, at (3)(d).

n264. *Wash. Rev. Code 10.95.070(5)*, (6), and (8) (2000).

n265. *438 U.S. 586, 605 (1978)*.

n266. *Id. at 604*. Because both of these questions appear in section (3) of the trial judge questionnaire (Information Concerning the Special Sentencing Proceeding), App. A, *infra* pp. 873-74, at (3), information regarding mitigating circumstances is only solicited from judges when the death penalty is sought by the state and a special sentencing proceeding is in fact conducted. So constructed, it is not clear that the two questions in section (3) adequately satisfy the principal purpose of the trial judge reports. If that purpose is to provide the State Supreme Court with as much information as possible regarding the factors that justified a sentence of death as opposed to life imprisonment without the possibility of parole, and if that information is a necessary condition of meaningful comparative proportionality review, then it is at least arguable that the form should also seek to draw out any information relevant to this question that was introduced during the guilt phase. Yet, in section (2) (Information about the Trial), trial judges are simply given a list of possible defenses (e.g., excusable homicide, insanity, duress, alibi, intoxication), followed by one column of boxes in which they must indicate whether evidence was introduced regarding any of these defenses. A second column follows in which they must indicate whether the jury received instructions regarding these defenses. App. A, *infra* pp. 871-73, at (2). This checklist fails to solicit any information introduced during the guilt phase that may bear on the question of mitigating circumstances, should a special sentencing proceeding ensue. For example, should a defendant introduce evidence regarding the defense of duress, that information will almost certainly prove pertinent during the special sentencing proceeding to the statutorily enumerated mitigating circumstance dealing with the question of whether a defendant "acted under duress or domination of another person." *Wash. Rev. Code 10.95.070(5)*. Yet the trial judge report does nothing to secure information about this evidence, unless of course it is reintroduced during the special sentencing proceeding and the trial court judge, in completing the report, sees fit to introduce that evidence in response to the questions concerning that proceeding.

n267. In only three instances would I describe the trial judge's account of mitigating circumstances as adequate. See Report of the Trial Judge No. 70 (Herbert Rice); No. 73 (Michael Furman); No. 220 (Dayva Cross).

n268. Report of the Trial Judge No. 174 (Timothy Blackwell).

n269. Report of the Trial Judge No. 92 (Marc Darrah).

n270. Report of the Trial Judge No. 164 (Steven Morgan). For other examples of trial judge reports which provided extremely limited account of mitigating circumstances, see Report of the Trial Judge No. 45 (James Dykgraaf); No. 75 (Gary Benn); No. 140 (Cal Brown); No. 175 (Richard Clark); No. 224 (Nicolas Vasquez).

n271. App. A, *infra* p. 873, at (3)(c).

n272. Report of the Trial Judge No. 140 (Cal Brown).

n273. Report of the Trial Judge No. 181 (Henry Marshall). Ironically, Henry Marshall's death sentence was subsequently vacated by the State Supreme Court when it held that the trial court erred in refusing to allow the defendant to withdraw a guilty plea when presented with significant evidence of his mental incompetence. *State v. Marshall*, 144 Wash. 2d 266, 277-81, 27 P.3d 192, 198-200 (2001).

n274. I am fully aware of the problematic nature of such racial and ethnic classifications. My point is not to commend their employment, but, rather, to indicate how their absence from the trial judge reports undermines the effort to ferret out instances when constitutionally impermissible factors influence the deliberation and judgment of juries. For specification of the standardized categories employed by the federal government, see U.S. Dep't of Commerce, Bureau of the Census, United States Census 2000, available at <http://www.census.gov/dmd/www/pdf/d61a.pdf> (last visited June 29, 2004).

n275. *State v. Lord*, 117 Wash. 2d 829, 910, 822 P.2d 177, 223 (1991) ("Our concern is with alleviating the types of major systemic problems identified in Furman: random arbitrariness and imposition of the death sentence based on race.").

n276. App. A, *infra* pp. 877-80, at (6).

n277. App. A, *infra* pp. 877-80, at (6).

n278. See Report of the Trial Judge No. 1 (Mario Ortiz) (Mexican American); No. 2 (Arnold Roy Brown) (Caucasian); No. 3 (Dwayne Earl Bartholomew) (White); No. 12 (Gregory Tyree Brown) (Black); No. 13 (Kwan Fai Mak) (Asian); No. 42 (Kenneth R. Petersen) (European/N. American); No. 54 (Sandra Entz) (Anglo-Saxon (Caucasian)); No. 70 (Herbert A. Rice, Jr.) (American Indian-Colville); No. 71 (Patrick G. Hoffman) (Indian); No. 73 (Michael Monroe Furman) (Caucasian-North American); No. 77 (Charles Curtis Tate) (Black (Father Black, Mother Caucasian)); No. 79 (Sherwood Knight) (African American); No. 80 (Gabriel Garcia) (Hispanic); No. 114 (Kly Bun Meas) (Cambodian); No. 127 (Joseph Casbon) (Caucasian/Cajun); No. 130 (Cherno Camara) (African); No. 146 (Martin Rasim Bulichi) (Albanian Muslim); No. 158 (Roderick Shawn Selwyn) (Native); No. 161 (Nga Ngoeung) (Born in Thailand); No. 197 (Joseph Revay) (Native American); No. 203 (Marvin Jay Francisco) (Asian (Filipino)/Caucasian); No. 210 (Cheyenne Troy Brown) (Unknown); No. 224 (Nicolas Solorio Vasquez) (Latino (Mexican)); No. 232 (Kenneth John Leuluai) (Samoan); No. 235 (Aaron Eugene Howerton) (White American).

n279. To cite but one illustration of the latter problem, consider Report of the Trial Judge No. 214 (Gary Packer). There, the trial judge indicates that 75-90% of the population of Clark County is of the same race as the defendant (Caucasian), but that only 25-50% of its population is of the same ethnic origin as the defendant. Absent some indication of the ethnicity of the defendant, which is not provided, it is impossible to understand the distinction drawn here and so to draw any clear conclusions about the operation of prejudice in the trial and/or jury deliberation.

n280. On occasion, a defendant's, victim's, or juror's surname is used as a surrogate for visible appearance. See, e.g., Report of the Trial Judge No. 228 (Rosendo Delgado) (noting the trial judge's statement that "the victims and defendant (all Hispanic). It appeared there were no Hispanics on the jury, at least by surname"); Report of the Trial Judge No. 229 (Julio Delgado) (noting the trial judge's statement that "4 jurors had Hispanic surnames but whether they are Hispanics is unknown").

n281. *Furman v. Georgia*, 408 U.S. 238, 255 (1972) (Douglas, J., concurring).

n282. Report of the Trial Judge No. 10 (Steven Carey).

n283. *Id.*; see also Report of the Trial Judge No. 26 (Lonnie Link) (indicating that the defendant "appears to be Caucasian"); No. 216 (Allen Gregory) (noting the judge's statement that "no juror asked to provide his/her race or ethnic origin. Above numbers are based on appearance only").

n284. See Report of the Trial Judge No. 33 (Donald Galbert); see also Report of the Trial Judge No. 4 (Jimmy Ramil) (noting the same occurrence with respect to the classification "Filipino").

n285. Report of the Trial Judge No. 34 (Paul Joseph St. Pierre). In some cases, the answers provided to these questions are simply confusing. In one report, the defendant is identified as Caucasian. See Report of the Trial Judge No. 4 (Dennis Williams). Then, in response to the question concerning the demographics of the county in which the trial was held, the judge indicated that over 90% of the population is of the same race or ethnic origin as the defendant, and, in apparent explanation for this claim, contends that "there is a significant Native American population in Mason County." *Id.*

n286. See Report of the Trial Judge No. 79 (Sherwood Knight); No. 88 (Ray Lewis).

n287. In this instance, the second judge got it right. The 1990 U.S. Census data indicates that African-Americans made up 5% of the total population of King County. See 1990 US Census Data, at <http://homer.ssd.census.gov/cdrom/lookup/1086358727=/1086358739=/1086358746=/1086358787=/CMD=RET/DB=C90STF3A/F0=FIPS.STATE/F1=FIPS.COUNTY90/F2=STUB.GEO/FMT=HTML/LEV=COUNTY90/SEL=53,033,King+County/T=P8> (last visited June 29, 2004).

n288. Report of the Trial Judge No. 109 (Gregory Scott); see 1990 US Census Data, *supra* note 287.

n289. Report of the Trial Judge No. 193 (David Lewis); 2000 US Census Data, at <http://quickfacts.census.gov/qfd/states/53/53053.html> (last visited July 3, 2004). The question of whether judges sometimes offer ill or uninformed guesses in answering this demographic query is plainly answered by Report of the Trial Judge No. 165 (Clark Elmore). There, the judge indicated that the Caucasian population of the county

is 75-90% of the total population, but then proceeded to indicate that it may in fact be over 90%, adding a parenthetical comment of "possibly" in order to explain these inconsistent responses. Report of the Trial Judge No. 165 (Clark Elmore). Another judge similarly failed to answer the county demographic question, but indicated that a "big majority of Spokane [is] believed to be of white race." Report of the Trial Judge No. 94 (Daniel Edwards); see also Report of the Trial Judge No. 235 (Aaron Howerton) (indicating that "most" of the jurors were of the same race as the defendant).

n290. *Wash. Rev. Code 10.95.010-.900* (2000).

n291. *Furman v. Georgia*, 408 U.S. 238, 309-10 (1972) (Stewart, J., concurring); *id.* at 313 (White, J., concurring); *id.* at 253-57 (Douglas, J., concurring).

n292. *State v. Lord*, 117 Wash. 2d 829, 910, 822 P.2d 177, 223 (1991) ("Our concern is with alleviating the types of major systemic problems identified in *Furman*: random arbitrariness and imposition of the death sentence based on race.").

n293. Mark Larranaga, Washington Death Penalty Assistance Center, *Where Are We Heading? Current Trends of Washington's Death Penalty* 14 n.63 (2003). Of these thirty-one, Michael Furman was a juvenile at the time of his offense and his death sentence was reversed on that basis. *Id.*; see *State v. Furman*, 122 Wash. 2d 440, 458; 858 P.2d 1092, 1103 (1993).

n294. The following have been analyzed for proportionality by the Washington State Supreme Court: Dwayne Bartholomew (No. 3), Charles Campbell (No. 9), Kwan Mak (No. 13), Patrick Jeffries (No. 15), Benjamin Harris (No. 29), Mitchell Rupe (Nos. 7 and 31), David Rice (No. 43), Brian Lord (No. 49), Gary Benn (No. 75), Westley Dodd (No. 76), Jonathan Gentry (No. 119), James Brett (No. 125), Blake Pirtle (No. 132), Cal Brown (No. 140), Darold Stenson (No. 144), Jeremy Sagastegui (No. 160), Clark Elmore (No. 165), Dwayne Woods (No. 177), Cecil Davis (No. 180), James Elledge (No. 183); while the following have not been analyzed for proportionality: Clark Hazen (No. 39, committed suicide while case on appeal), Michael Furman (No. 73), Sammie Luvane (No. 135), Charles Finch (No. 154), Richard Clark (No. 175), Michael Roberts (No. 176), Henry Marshall (No. 181), Covell Thomas (No. 194), Allen Gregory (No. 216), Dayva Cross (No. 220), and Robert Yates (No. 251). As of this writing, four of these defendants have been executed (Dodd, Campbell, Segastegui, and Elledge), and three of these cases are currently on direct appeal (Gregory, Cross, and Yates). See Office of the Attorney General, Criminal Justice Division, Capital Punishment Case Status Report, available at http://www.atg.wa.gov/pubs/capital_litigation/Capital_Lit_Report0304.doc (last visited July 13, 2004).

n295. *103 Wash. 2d 1, 691 P.2d 929* (1984).

n296. Gilbert, *supra* note 217, at 604.

n297. *Campbell*, 103 Wash. 2d at 30 n.2, 691 P.2d at 945 n.2 (quoting *Pulley v. Harris*, 465 U.S. 37, 45 (1984)).

n298. This holding is not consistent with the legislative history of *RCW 10.95.130*, which indicates that the purpose of comparative proportionality review is to ensure statewide consistency in the application of the death penalty. See Memorandum from Bill Gales, Senior Counsel, Washington State Senate Judiciary Committee, to Gene Baxstrom 2 (Oct. 24, 1980). Gales stated:

The supreme court is required to review any death penalty sentence both for trial errors and for a determination of whether the sentence is excessive or disproportionate to the penalty imposed in similar cases taking into consideration both the crime and the defendant. This last requirement is intended to eliminate any possibility of differing standards for the imposition of the death penalty across the state.

Id.; see Death Penalty - Aggravated Murder, ch. 206, sec. 7(3)(b), 1977 Wash. Laws 778.

n299. *Campbell*, 103 Wash. 2d at 30, 691 P.2d at 945. By the end of 1983, eighteen trial judge reports had been filed with the Washington State Supreme Court, and so, at minimum, this number was available to the court when it reviewed Campbell's case. In addition, RCW 10.95.130(b) defines as "similar" all those "reported in the Washington Reports or Washington Appellate Reports since January 1, 1965." Whether this latter groups of cases should be considered in conducting comparative proportionality review is debatable. See supra note 217.

n300. *Campbell*, 103 Wash. 2d at 30, 691 P.2d at 945-46.

n301. Id. Upon reviewing the factual circumstances of a number of cases tried since adoption of the 1981 capital punishment statute, Justice Utter stated that the "pattern of filings and of jury verdicts under our new statute defies any rational explanation We can find no basis on the face of these cases to explain why many of the cases where the death penalty was not sought differ in substantial degree from any where the death penalty was sought." *Id.* at 45, 691 P.2d at 954 (Utter, J., concurring in part, dissenting in part).

n302. 105 Wash. 2d 398, 717 P.2d 722 (1986). See generally 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) (providing a detailed account of the court's comparative proportionality review in Jeffries).

n303. *Jeffries*, 105 Wash. 2d at 430, 717 P.2d at 740. In his dissenting opinion in *State v. Rupe*, 108 Wash. 2d 734, 743 P.2d 210 (1987), Chief Justice Pearson explained why the State Supreme Court typically confines its proportionality inquiries to cases in which the death penalty has been imposed: "In examining the special circumstances in death penalty cases, we have a substantial record before us, but in comparing death penalty cases to those in which the death penalty was not imposed we are limited to the facts elicited from the trial courts by this court's standard questionnaire." *Id.* at 786, 743 P.2d at 239 (Pearson, C.J., dissenting) (emphasis in original). Given the quality of information elicited by those questionnaires, it is perhaps not surprising (although it remains legally indefensible) that the court most often limits its comparative inquiries to death sentence cases.

n304. Comparative proportionality review is meaningful only if the universe of reports includes those defendants who were convicted of aggravated first-degree murder, but for whom the death penalty was not sought, as well as those for whom the death penalty was sought but not imposed. See supra Part II.A.

n305. *Jeffries*, 105 Wash. 2d at 430, 717 P.2d at 740.

n306. 106 Wash. 2d 784, 725 P.2d 975 (1986).

n307. See *id.* at 798, 725 P.2d at 982.

n308. *Id.*, 725 P.2d at 982-83.

n309. *Id.* at 798-99, 725 P.2d at 983.

n310. Granted, the court did distinguish Harris from the three other cases involving contract killings by noting that Harris had received a one-year sentence for a prior manslaughter charge, whereas the other defendants "showed little, if any, prior records that rose to the seriousness of defendant's." *Id.* at 799, 725 P.2d at 983. However, as Justice Utter noted in his dissent, two of these three murders were far more brutal than that committed by Harris. *Id.* at 803-06, 725 P.2d at 985-86 (Utter, J., dissenting). Moreover, in addition to disregarding the fifteen years between Harris's prior and present convictions, the court also ignored the fact that two of the three defendants it cited had been imprisoned for various offenses much closer to the time of their convictions for aggravated first-degree murder. *Id.*

n311. *Id.* at 798, 725 P.2d at 982 (quoting *Moore v. State*, 213 S.E.2d 829, 864 (Ga. 1975)) (emphasis in original).

n312. *Id.*, 725 P.2d at 982.

n313. *Id.* at 799, 725 P.2d at 983.

n314. *Id.* The court in fact erred on this point. Harris's conviction was eventually overturned by a federal district court and he was released from prison. *Harris v. Blodgett*, 853 F. Supp. 1239, 1294, 1300 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995).

n315. Gilbert, *supra* note 217, at 622-23.

n316. 108 Wash. 2d 734, 743 P.2d 210 (1987).

n317. See *id.* at 767-68, 743 P.2d at 229.

n318. See *id.* at 768, 743 P.2d at 229.

n319. See *id.* at 768-69, 743 P.2d at 229-30.

n320. See *id.*

n321. *Id.*

n322. *State v. Rupe*, 93 F.3d 1434, 1437 (9th Cir. 1996).

n323. Nancy Bartley, *Rupe Spared Death Penalty for Final Time*, Seattle Times, Mar. 11, 2000, at A1.

n324. See *Rupe*, 108 Wash. 2d at 770, 743 P.2d at 230.

n325. *Id.* During Rupe's sentencing hearing, approximately fifty persons testified on his behalf. *Id.* at 780, 743 P.2d at 235. He had been involved in many activities, including the Boy Scouts, the Civil Air Patrol, and the Mason County Search and Rescue Council. *Id.* at 780, 743 P.2d at 235-36. Moreover, he had served in the Army, had never previously committed a crime, and was arguably mentally disturbed. *Id.* at 781-83, 743 P.2d at 236-37. In dissent, Chief Justice Pearson, after comparing Rupe's case to others involving first-degree robbery and multiple victims, concluded:

Rupe's case is the sole case in which the victims did not suffer prior to death and the defendant acted under the influence of an extreme mental disturbance. Just as the murders in this case were wanton and freakish in light of Rupe's entire personal history, so the imposition of the death penalty is wanton and freakish in light of the other defendants.

Id. at 788, 743 P.2d at 239 (Pearson, C.J., dissenting) (emphasis in original).

n326. *Id.* at 770, 743 P.2d at 230.

n327. 117 Wash. 2d 829, 916, 822 P.2d 177, 226 (1991). One year after *Rupe*, the court elaborated its criteria of similarity in *State v. Rice*, 110 Wash. 2d 577, 757 P.2d 889 (1988). In *Rice*, the court announced that it would consider the "heinous nature of [the] crimes, the number and severity of the aggravating factors, and the number of ... victims." *Id.* at 628, 757 P.2d at 917. However, in applying this expanded set of criteria, it concluded that the most relevant cases for purposes of comparison were *Jeffries*, *Campbell*, and *Rupe*. *Id.* at 625-27, 757 P.2d at 915-16. Citing these highly questionable precedents to justify its decision in *Rice*, the court thereby piled problematic precedent upon problematic precedent, rendering it ever more difficult for a future defendant to mount a successful proportionality challenge. Note, incidentally, that the court used *Rice*, prior to reviewing his case, to justify *Rupe*, and then used *Rupe* to justify its decision in *Rice*. *Rice*, 110 Wash. 2d at 625-26, 757 P.2d at 915-16; *Rupe*, 108 Wash. 2d at 768, 743 P.2d at 229. From this sort of circular reasoning, citing two cases to render each other proportionate, it would appear that no exit is possible. Once again, it is difficult to escape the conclusion that in this instance, as in others, the court engaged in selective identification of cases in order to sustain a particular outcome. This conclusion seems all the more plausible given the court's conclusion on three points. First, there was credible mitigating evidence introduced during the sentencing phase of *Rice*'s trial (specifically, a lack of criminal history and a history of mental illness). See *Rice*, 110 Wash. 2d at 627, 757 P.2d at 916. Second, the court's examination of the trial judge reports turned up four other cases in which there was "credible evidence of a mental disorder or diminished mental capacity," but in which the death penalty was not imposed. *Id.* Third, the relevance of these other four cases was dismissed on various grounds, including the relative youth of two of the other defendants, the severity of their respective mental problems, and the fact that, in one, only a single juror had voted against the death penalty. *Id.* at 627-28, 757 P.2d at 916-17. While the first and second points do arguably distinguish these cases from *Rice* (whereas the third is irrelevant to comparative proportionality review), they are nonetheless vexing in light of the court's earlier refusal to distinguish between, for example, *Campbell and Rupe*. *Rupe*, 108 Wash. 2d at 770, 743 P.2d at 230. In the former, the trial court did not find any mitigating evidence credible, *State v. Campbell*, 103 Wash. 2d 1, 30, 691 P.2d 929, 945-46 (1984). But, in the latter, the court made extensive findings of such evidence. *Rupe*, 108 Wash. 2d at 780-83, 743 P.2d at 235-37. If that difference is deemed of insufficient relevance in determining comparative proportionality, then it is hard to know why the relatively minor differences identified in *Rice* should be deemed sufficient to distinguish his case from others in which the death penalty was not imposed.

n328. *Lord*, 117 Wash. 2d at 910, 822 P.2d at 223.

n329. *Id.* (quoting *In re Jeffries*, 114 Wash. 2d 485, 490, 789 P.2d 731, 736 (1990)).

n330. *Id.*

N331. *Id.* at 911, 822 P.2d at 223; see Ludwig Wittgenstein, *Philosophical Investigations* 65-67 (1958).

n332. *Lord*, 117 Wash. 2d at 911, 822 P.2d at 223.

n333. *State v. Benn*, 120 Wash. 2d 631, 680, 845 P.2d 289, 317 (1993).

n334. *Id.*

n335. In order to discount the significance of "similar" cases in which the death penalty was not sought, with reference to each of the four prongs of its new test, the court simply cited one or two trial judge reports without any elaboration. *Lord*, 117 Wash. 2d 829, 911-14, 822 P.2d 177, 224-25. For example, with regard to its analysis of the nature of the crime, the court cited two trial judge reports which, like *Lord*, involved only a single victim, but which, unlike *Lord*, involved defendants with no prior convictions for a violent crime. *Id.* at 911, 822 P.2d at 224. The court thereby ignored trial judge reports filed in other rape/murder cases involving at least three aggravating factors, as was the case with *Lord*. *Id.* at 911-12, 822 P.2d at 224. On this point, see Justice Utter's dissent in *State v. Lord*. In *Lord*, Justice Utter stated:

The majority focuses on those cases in which the death penalty was actually imposed. It expends precious little ink in describing a few similar cases in which the death penalty was either not imposed or not sought by the prosecutor. It does not list all of the similar cases. When the majority does mention such cases, it does not describe the aggravating factors and mitigating factors in those cases. It does not describe the defendant's prior convictions in those cases. It superficially distinguishes those cases from this one without meaningfully comparing all of the relevant factors in those cases to the ones in this case. The majority then concludes that *Lord*'s sentence is proportionate, because, in the majority's view, the death penalty has been imposed in similar cases.

Id. at 939-40, 822 P.2d at 239 (Utter, J., dissenting). Justice Utter then proceeded to identify five cases, all involving rape/murder and at least three aggravating circumstances, in which the death penalty was not imposed by the jury or in which the state never sought the death penalty. *Id.* at 943, 822 P.2d at 241 (Utter, J., dissenting). In addition, he identified four more cases, which, although not involving the same number and type of aggravating circumstances, were nonetheless similar in terms of the nature of the crime, the existence of a prior record, and the absence of credible evidence of mitigating circumstances. *Id.* at 944-45, 822 P.2d at 241-42 (Utter, J., dissenting). In each of the four, either the state did not seek the death penalty or the jury did not impose it. *Id.*

n336. *Benn*, 120 Wash. 2d at 680, 845 P.2d at 317; see also Gilbert, *supra* note 217, at 607-12 (providing a detailed analysis of the court's review in *Benn*).

n337. *Benn*, 120 Wash. 2d at 681-83, 85 P.2d at 318-21.

n338. *Id. at 691, 845 P.2d at 323.*

n339. *Id. at 692, 845 P.2d at 323.* In his analysis of its review of Benn's sentence, Gilbert argued that the court was inconsistent in excluding from the pool of similar cases those that exhibited one or more of these three factors. Gilbert, *supra* note 217, at 615. For example, the court excluded young defendants who did not receive the death penalty from its pool of similar cases. *Id.* Yet, without explanation, it then included in its pool of similar cases an eighteen-year old (Clark Hazen) who was sentenced to death. *Id.* Gilbert concluded: "The only plausible reason that the Hazen case was included by the majority was to make Benn's sentence appear more proportionate." *Id.*

n340. *Id. at 692, 845 P.2d at 323.*

n341. *Id. at 684 n.9, 845 P.2d at 319 n.9* (stating that Clark Hazen committed suicide in prison before his conviction or sentence could be reviewed).

n342. *Benn, 120 Wash. 2d at 692, 845 P.2d at 323.*

n343. *Id. at 692-93, 845 P.2d at 324.*

n344. Registering this concern in his dissent, Justice Utter reviewed fifteen cases not deemed similar by the court (including two the court did not list in its pool of thirty), none of which resulted in a death sentence. *Id. at 700, 845 P.2d at 328* (Utter, J., dissenting). Adding these cases to those the majority found similar, Justice Utter determined that the death penalty is imposed on members of this pool of twenty-seven at a rate of approximately 11%. *Id. at 706, 845 P.2d at 330* (Utter, J., dissenting). That, he concluded, does not begin to approach the requirement that death sentences be affirmed only if this penalty is imposed "generally" in similar cases. *Id. at 709, 845 P.2d at 332* (Utter, J., dissenting). "I cannot," he closed, "ease the requirements of comparative proportionality review to the point where it becomes an empty ritual." *Id.*

n345. *State v. Brett, 126 Wash. 2d 136, 219, 828 P.2d 29, 72 (1995)* (Utter, J., dissenting).

n346. *Harris v. Blodgett, 853 F. Supp. 1239 (W.D. Wash. 1994), aff'd, 64 F.3d 1432 (9th Cir. 1995).* Among other issues, this habeas petition raised the question of whether the Washington State Supreme Court had conducted an adequate proportionality review in Harris's case. *Id. at 1286.* Answering this question in the negative, the federal court identified five flaws in the court's practice. First, although *RCW 10.95.130* specifies where to find similar cases, it does not define what counts as a similar case, and the court has failed to clarify how this determination should be made. *Id. at 1288.* Second, when conducting any given review, there is no procedure for the parties to be notified of which cases the court considers similar until they receive its ultimate determination. *Id. at 1286.* Third, when no similar case can be identified, as in Campbell, no alternative procedure is available to inform the conduct of comparative proportionality review. *Id. at 1289.* Fourth, the court has not indicated the standards it employs in assessing proportionality through reference to the cases ultimately selected for the purposes of comparison. *Id.* Finally, the court presents information from the trial judge report filed in Harris's case, as in other cases, as findings of fact, although "it is anyone's guess whether the Report of the Trial Judge under *RCW 10.95.120* is intended to be findings of fact." *Id. at 1290.*

n347. The Washington State Supreme Court indicated that because the Ninth Circuit, in affirming Harris, did not reach the question of proportionality, it did not consider itself bound by the district court decision. *In re*

Benn, 134 Wash. 2d 868, 928, 952 P.2d 116, 147 (1998) ("The existence of an analytically flawed federal district court decision is not a compelling reason to vacate this defendant's death sentence or reconsider the proportionality review in his case.").

n348. *Brett*, 126 Wash. 2d at 207-09, 212, 892 P.2d at 66-67, 69 ("Without determining the merits of these challenges under this court's current proportionality review, we take this opportunity to revisit the development of such review in Washington and evaluate the continued viability of our present approach."); see *State v. Pirtle*, 127 Wash. 2d 628, 683, 904 P.2d 245, 275 (1995); *State v. Gentry*, 125 Wash. 2d 570, 654-58, 888 P.2d 1105, 1154-56 (1995).

n349. *Wash. Rev. Code 10.95.130(b)* (2000).

n350. *Pirtle*, 127 Wash. 2d at 687-88, 904 P.2d at 277.

n351. 125 Wash. 2d 570, 888 P.2d 1105 (1995).

n352. *Id.* at 656, 888 P.2d at 1155.

n353. See *id.* at 656-57, 888 P.2d at 1155-56.

n354. See *id.* at 657, 888 P.2d at 1155-56.

n355. *Id.* In his dissenting opinion in *Gentry*, Justice Utter indicated that an examination of the trial judge reports turned up at least twelve cases involving multiple murders (which *Gentry's* did not), murders involving extreme and prolonged suffering on the part of the victim (which *Gentry's* may or may not have, depending on how one reads the autopsy evidence), and a victim who was particularly vulnerable by virtue of age (as was the case with *Gentry*). *Id.* at 669-71, 888 P.2d at 1161-63 (Utter, J., dissenting). On the face of it, all of these murders appear more brutal than that committed by *Gentry*, and yet in none was the death penalty imposed. *Id.*

n356. 126 Wash. 2d 136, 892 P.2d 29 (1995).

n357. See *id.* at 212-13, 892 P.2d at 68-69.

n358. *Id.* at 210-11, 892 P.2d at 68.

n359. Justice Utter addressed this point in his dissent:

If the imposition of death in a given case were proportionate simply by virtue of coming within the scope of RCW 10.95, the legislative requirement in *RCW 10.95.130(2)(b)* that we compare the aggravated murder case at hand to other "similar" aggravated murder cases would be senseless. It is an elementary tenet of statutory construction that we do not construe provisions to be nullities If RCW 10.95 "ensures proportionality" can there ever be a "disproportionate" case? If so, by what process, and according to what standards, are we to identify it? The designated majority offers no guidance.

Id. at 218-19, 892 P.2d at 72 (Utter, J., dissenting).

n360. *Id.* at 211, 828 P.2d at 68.

n361. *Brett*, 126 Wash. 2d at 208, 828 P.2d at 66; *Harris v. Blodgett*, 853 F. Supp. 1239, 1288-89 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995).

n362. See *Brett*, 126 Wash. 2d at 212-13, 828 P.2d at 69.

n363. *Id.* at 213, 828 P.2d at 69. By adopting yet another "method" for conducting comparative proportionality review in *Brett*, the court aggravated the problems caused by the court's previous vacillation on this question. Because virtually every review conducted prior to and including *Brett* was decided on a novel basis, the authority of all these judgments is compromised. This has potentially lethal consequences for those sentenced to death. See *id.* at 214-16, 828 P.2d at 70-71 (Durham, J., concurring) ("In virtually every recent death penalty case decided by this court, a different definition of proportionality has been promulgated. The resulting confusion is unacceptable" because, arguably, any given determination of "proportionality itself depends on the consistency of a proportionality analysis.").

n364. Justice Utter stated:

Even if "aberrant" or "wanton and freakish" were the standard, and it is not, it is impossible to conclude a given sentence is not "aberrant" or "wanton and freakish" without engaging in some process of reflection, whatever that may be. The designated majority requires that one simply take its word on so important a question as whether a defendant properly may be executed, without revealing what that process is. It thus forecloses any possibility of review or even discussion of its conclusion.

See *id.* at 230, 828 P.2d at 77 (Utter, J., dissenting).

n365. *State v. Pirtle*, 127 Wash. 2d 628, 904 P.2d 245 (1995).

n366. See *id.* at 683-89, 904 P.2d at 275-77.

n367. *Id.* at 686, 904 P.2d at 276.

n368. *Id.*

n369. *Id.* at 687, 904 P.2d at 276.

n370. *Id.* at 686, 904 P.2d at 276.

n371. *Id.* at 688, 904 P.2d at 277.

n372. *Id. at 687-88, 904 P.2d at 277*

n373. *Id. at 687, 904 P.2d at 277*. Were the court to engage in a serious effort at frequency analysis, it would almost certainly discover several areas of significant concern. First, for example, all other things being equal, one would assume that the greater the number of victims in any given case, the more likely it is that the death penalty will be sought. Indeed, it is true that of the total number of convictions for aggravated murder, the death penalty has been sought in 27% of the cases involving a single victim; 34% when there were two; and 47% when there were three. However, the death penalty was sought in only 20% of the cases involving four victims, never in those involving five victims or, for that matter, in the lone case involving ten. Granted, the death penalty was sought for two co-defendants convicted of jointly murdering thirteen persons (although it was imposed on only one of the two, Kwan Mak, and his sentence was subsequently set aside). *Mak v. Blodgett, 970 F.2d 614 (9th Cir. 1992)*. However, in 2000, Robert Yates evaded a likely death sentence in Spokane County after confessing to the murder of thirteen victims, only to be sentenced to death two years later in Pierce County for the killing of two. Christine Clarridge, *Death Sentence for Yates Elicits Tears, but None for Joy*, *Seattle Times*, Oct. 4, 2002, at A1. Finally, the sole person convicted of murdering a larger number, Gary Ridgway, was able to escape an almost certain death sentence by pleading guilty to killing forty-eight women. *Kershaw, supra note 4, at A1*. If nothing else, these calculations suggest that body count cannot be taken as a reliable predictor of whether or not a defendant will be sentenced to death, which implies in turn that those responsible for a far smaller tally cannot be confident of escaping the death chamber.

Second, again all other things being equal, if the court takes the number of aggravating factors as an indicator of the heinousness of any given crime, as the court clearly does, one would expect that the percentage of death sentences sought and imposed would increase as the number of aggravating circumstances rises. However, that does not consistently hold true. Setting aside the cases in which the number of aggravating circumstances is not indicated in the trial judge reports, 47% of the remaining convictions for aggravated first-degree murder involved a single aggravating factor. In 25% of these cases the death penalty was sought, and in 5% it was imposed. In cases involving two aggravating factors (29% of the total), the rate at which the death penalty was sought remained the same (25%), but the rate at which it was imposed rose from 5% to 28%. In cases involving three aggravating factors (15% of the total), the rate at which the death penalty was sought jumped from 25% to 47%, and the rate at which it was imposed increased from 28% to 37%. To this extent, these numbers correspond, at least in rough terms, to what one might reasonably anticipate. However, when one considers the cases involving four aggravating factors (6% of the total), the death penalty was sought in a whopping 73% of the cases, but the rate of imposition dropped from 37% to 27%. Finally, when one considers the very small number of cases involving five or more aggravating factors, the rate at which the death penalty was sought decreased significantly (from 73% to 43%), but its rate of imposition increased dramatically (from 27% to 67%).

Of course, one might contend that the court's overall rationale in the cases it has reviewed for proportionality becomes explicable not when one considers any of the four prongs of the Pirtle test individually, but only when one considers their cumulative combination in any given case. In order for that claim to prove credible, however, the court would have to abstract from the four prongs of its current test some generalized measure of defendant culpability, and then compare each defendant's degree of culpability with that of others, again using the same abstracted standard in order to avoid the problems that crop up when the court seeks to compare cases on the basis of factual similarity. That, however, the court has not done.

n374. *Pirtle, 127 Wash. 2d at 688, 904 P.2d at 277*.

n375. *Id.*

n376. Cases considering these factors include: Report of Trial Judge No. 8 (Charles Bingham); No. 20 (William Martin); No. 44 (Dennis Williams); No. 45 (James Dykgraaf); No. 50 (Sean Stevenson); No. 52 (Christopher Blystone); No. 53 (James Thompson); No. 58 (Gene Kane); No. 64 (Jonathan Woods); No. 85

(Jeffrey Lane); No. 68 (Darrin Hutchinson); No. 77 (Charles Tate); No. 80 (Gabriel Garcia); No. 93 (Timothy Caffrey); No. 95 (Kenneth Schrader); No. 182 (Joey Ellis); No. 186 (Gerald Davis). These reports expressly cite alcohol and/or childhood abuse as credible mitigating evidence in the cases of defendants not sentenced to death. It is true that the mere citation of such mitigating evidence does not allow one to know for certain that the jury was influenced by that evidence when rendering its sentencing decision. However, the Washington State Supreme Court is in no position to know this either.

n377. *Pirtle*, 127 Wash. 2d at 688, 904 P.2d at 277.

n378. See, e.g., *State v. Elmore*, 139 Wash. 2d 250, 310, 985 P.2d 289, 323 (1999) (holding that Clark Elmore's personal history did not excuse his crime despite his history of abuse as a child, the court relied on *State v. Brown*, 132 Wash. 2d 529, 940 P.2d 546 (1997), which, in turn, was based on Pirtle's erroneous conclusion).

n379. See *State v. Elledge*, 144 Wash. 2d 62, 80, 26 P.3d 271, 281 (2001); *State v. Woods*, 143 Wash. 2d 561, 616, 23 P.3d 1046, 1076 (2001); *State v. Davis*, 141 Wash. 2d 798, 880, 10 P.3d 977, 1023-24 (2000); *Elmore*, 139 Wash. 2d at 308, 985 P.2d at 322; *State v. Sagastegui*, 135 Wash. 2d 67, 92, 954 P.2d 1311, 1324 (1998); *Brown*, 132 Wash. 2d at 555-56, 940 P.2d at 562; *State v. Stenson*, 132 Wash. 2d 668, 759, 940 P.2d 1239, 1285 (1997).

n380. *Pirtle*, 127 Wash. 2d at 685-86, 904 P.2d at 276; *State v. Brett*, 126 Wash. 2d 136, 211, 892 P.2d 29, 68 (1995).

n381. Cases in which comparative proportionality review is limited to affirmed death sentences include: *Woods*, 143 Wash. 2d at 616, 23 P.3d at 1076; *Davis*, 141 Wash. 2d at 880, 10 P.3d at 1023-24; *Elmore*, 139 Wash. 2d at 308, 985 P.2d at 322; *Sagastegui*, 135 Wash. 2d at 92, 954 P.2d at 1324; *Brown*, 132 Wash. 2d at 555-56, 940 P.2d at 562.

n382. 132 Wash. 2d 529, 940 P.2d 546 (1997).

n383. *Id.* at 557 n.56, 940 P.2d at 562 n.56.

n384. *Id.* at 558 n.60, 940 P.2d at 563 n.60.

n385. *Id.* at 558 n.62, 940 P.2d at 563 n.62.

n386. *Id.* at 559 n.66, 940 P.2d at 563 n.66.

n387. *Id.* at 556-59, 940 P.2d at 562-63.

n388. 132 Wash. 2d 668, 940 P.2d 1239 (1997).

n389. *Id.* at 759, 940 P.2d at 1285.

n390. *Id.* at 759-60, 940 P.2d at 1285.

n391. *Id.* at 760, 949 P.2d at 1285. By the same token, in considering the applicable aggravating circumstances in this case, the court's review consisted of the following: "The aggravating circumstances are that there was more than one murder victim and that Frank's murder was committed to conceal the identity of Denise's murderer." *Id.* at 759-60, 949 P.2d at 1285.

n392. *State v. Elmore*, 139 Wash. 2d 250, 308, 985 P.2d 289, 322 (1999).

n393. See, e.g., *State v. Sagastegui*, 135 Wash. 2d 67, 94, 954 P.2d 1311, 1325 (1998) (stating that the court affirmed the death sentence imposed on Rupe even though he, like Sagastegui, had little or no criminal record).

n394. See, e.g., *State v. Brown*, 132 Wash. 2d 529, 559 n.66, 940 P.2d 546, 563 n.66 (1997) (stating that the court has upheld death sentences imposed on defendants, including Dodd and Rice, who suffered from personality disorders similar to, or more severe than, that suffered by Brown).

n395. See, e.g., *Elmore*, 139 Wash. 2d at 309, 985 P.2d at 323 (stating that the court has upheld death sentences imposed on defendants, including Gentry, Benn, and Harris, when only a single aggravator was found applicable).

n396. See, e.g., *State v. Elledge*, 144 Wash. 2d 62, 81, 26 P.3d 271, 282 (2001) (stating that the court has upheld death sentences imposed on defendants, including Gentry, Benn, and Harris, when only a single aggravator was found applicable).

n397. See *State v. Brett*, 126 Wash. 2d 136, 226, 892 P.2d 29, 76 (1995) (Utter, J., dissenting).

n398. *Id.*

n399. The sophistry apparent in the court's conduct of comparative proportionality reviews has apparently proven too much for at least one of its current members to bear. Thus, in *Elledge*, Justice Sanders condemned the court for initiating its review in any given case on the basis of the premise that "the defendant is 'qualified' for the death penalty so long as it is not 'wantonly and freakishly' imposed, notwithstanding how many others may have engaged in similar conduct who were not executed." 144 Wash. 2d at 88, 26 P.3d at 285 (Sanders, J., dissenting) (emphasis in original). The statutory requirement of comparative proportionality review, Justice Sanders concluded, "has degenerated through numerous iterations into the current 'wanton and freakish' standard, finally becoming little more than lip service to the important protection proportionality review was originally intended to offer." *Id.*

n400. 428 U.S. 153 (1976).

n401. *Id.* at 206-07 (plurality opinion).

n402. *State v. Rupe*, 101 Wash. 2d 664, 698, 683 P.2d 571, 592 (1984).

n403. James R. Acker & Charles S. Lanier, Statutory Measures for More Effective Appellate Review of Capital Cases, 31 *Crim. L. Bull.* 211, 215 (1995).

n404. 408 U.S. 238 (1972) (per curiam).

n405. See *id.* at 294 (Brennan, J., concurring).

n406. See generally Larranaga, *supra* note 293 (analyzing racial and geographical disparities in the administration of capital punishment in Washington). Larranaga found that in the majority of counties in the state (57%) death notices have never been filed, and that in 74% of those counties no death sentence has ever been imposed. *Id.* at 17. With respect to racial disparities, Larranaga concluded that since 1981,

death has been imposed at a higher rate against African-Americans as compared to Caucasians. Additionally, death is sought and imposed at a significantly lower rate when the victim is African-American. And finally African-American defendants charged with killing a Caucasian victim have a significantly higher percentage of death notices filed and death sentences imposed.

Id. at 26. Moreover, at the time Larranaga completed his study, in a state with an African-American population of 3.2%, see United States Dep't of Commerce, Bureau of the Census, Washington Quick Facts, at <http://quickfacts.census.gov/qfd/states/53000.html> (last visited June 30, 2004), five of the ten on death row were African-Americans, all but one of whom were convicted of killing white victims. These findings are especially troubling in light of the Washington State Supreme Court's denial, in 1995, that race plays any role in determining who is and is not sentenced to death. See *State v. Gentry*, 125 Wash. 2d 570, 655, 888 P.2d 1105, 1154 (1995) ("In this case, there is no evidence that race was a motivating factor for the jury, and contrary to the Defendant's suggestion, a review of the first degree aggravated murder cases in Washington does not reveal a pattern of imposition of the death penalty based upon the race of the Defendant or the victim."); see generally David C. Baldus et al., Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview with Recent Findings From Philadelphia, 83 *Cornell L. Rev.* 1638 (1998) (providing a recent study dealing with racial disparities and the death penalty on a national level).

n407. See *Furman*, 408 U.S. at 312 (White, J., concurring) (stating that "a major goal of the criminal law - to deter others by punishing the convicted criminal - would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others").

n408. Wash. Const. art. I, 14.

n409. 94 Wash. 2d 387, 617 P.2d 720 (1980).

n410. *Id.* at 392, 617 P.2d at 723.

n411. 142 Wash. 2d 471, 14 P.3d 713 (2000).

n412. *Id.* at 502, 14 P.3d at 731.

n413. In this context, it is worth noting that in 1997 the state legislature passed a bill, S.B. 5093, 55th Leg., Reg. Sess. (Wash. 1997), that would have eliminated the requirement that the State Supreme Court conduct comparative proportionality reviews in conjunction with its mandatory review of all death sentences. *Id.* That bill, however, was vetoed by Governor Gary Locke, who stated: "I am a strong supporter of the death penalty. However, I am also a strong supporter of fairness. The proportionality review has not yet resulted in the reversal of any death sentences. Nonetheless, I believe that it is an important safeguard." Veto Message on S.B. 5093 (April 24, 1997).

n414. See *State v. Bartholomew*, 101 Wash. 2d 631, 640, 683 P.2d 1079, 1085 (1984). The court stated:

Since the death penalty is the ultimate punishment, due process under this state's constitution requires stringent procedural safeguards so that a fundamentally fair proceeding is provided. Where the trial which results in imposition of the death penalty lacks fundamental fairness, the punishment violates article 1, section 14 of the state constitution.

Id.

n415. 447 U.S. 343 (1980).

n416. *Id.* at 346.

n417. 465 U.S. 37 (1984).

n418. *Id.* at 41-43.

n419. *Harris v. Blodgett*, 853 F. Supp 1239, 1286 (W.D. Wash. 1994), *aff'd*, 64 F.3d 1432 (9th Cir. 1995).

n420. *Hicks*, 447 U.S. at 346.

n421. Margaret J. Radin, Cruel Punishment and Respect for Persons: Super Due Process for Death, 53 S. Cal. L. Rev. 1143, 1150 (1980).

n422. See generally Robert McAuliffe, A Procedural Due Process Argument for Proportionality Review in Capital Sentencing, 21 Colum. J. L. & Soc. Probs. 385 (1988) (elaborating on this due process argument, although not specifically in regard to Washington).

n423. See David C. Baldus, Special Master, Death Penalty Proportionality Review Project: Final Report to the New Jersey Supreme Court (Sept. 24, 1991) (recommending a method for the conduct of comparative proportionality review by the New Jersey Supreme Court); see also *State v. Bey*, 645 A.2d 685, 689-703 (N.J. 1994) (providing a helpful account of the methodology adopted as a result of the report submitted by Baldus). See generally David Weisburd, Good for What Purpose? Social Science, Race, and Proportionality Review in

New Jersey, in *Social Science, Social Policy, and the Law* 258 (Patricia Ewick et al. eds., 1999) (reviewing some of the principal problems inherent in New Jersey's statistical approach).

n424. For an account of the modifications adopted in response to the second master's report, see *In re Proportionality Review Project*, 735 A.2d 528 (N.J. 1999) and *In re Proportionality Project (II)*, 757 A.2d 168 (N.J. 2000).

n425. *Callins v. Collins*, 510 U.S. 1141, 1145-46 (1994) (Blackmun, J., dissenting) (denying review).

n426. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring).

n427. 428 U.S. 280 (1976).

n428. *Id.* at 304 (plurality opinion).

n429. *Id.*

n430. 438 U.S. 586 (1978).

n431. *Id.* at 605, 607 (plurality opinion).

n432. *Furman*, 408 U.S. at 242 (Douglas, J., concurring).

n433. *Woodson*, 428 U.S. at 303-05 (Stewart, J., concurring).

n434. *Furman*, 238 U.S. at 253-57 (Douglas, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 313 (White, J., concurring).

n435. *Gregg v. Georgia*, 428 U.S. 153, 188-99 (1976) (plurality opinion).

n436. *Lockett*, 438 U.S. at 605 (plurality opinion).

n437. The best account of the U.S. Supreme Court's attempt to negotiate this dilemma remains that provided by Steiker & Steiker. See Steiker & Steiker, *supra* note 41, at 417-18.

n438. *Tuilaepa v. California*, 512 U.S. 967, 973 (1994).

n439. *Romano v. Oklahoma*, 512 U.S. 1, 6 (1994).

n440. *Callins v. Collins*, 510 U.S. 1141, 1155 (1994) (Blackmun, J., dissenting) (denying review).

n441. See *id.* at 1145-46 (Blackmun, J., dissenting) (denying review).

n442. *State v. Marshall*, 613 A.2d 1059, 1142 (N.J. 1992) (Handler, J., dissenting).

n443. 651 A.2d 949 (N.J. 1994).

n444. *Id.* at 1001 (Handler, J., dissenting) (citations omitted).

n445. *State v. Pirtle*, 127 Wash. 2d 628, 687, 904 P.2d 245, 277 (1995).

n446. 446 U.S. 420 (1989).

n447. *Id.* at 440 (Marshall, J., concurring).