

PROPORTIONALITY REVIEW AND THE DEATH PENALTY

TIMOTHY V. KAUFMAN-OSBORN

This essay explores the adequacy of one of the safeguards adopted by many states to ensure that the death penalty is applied fairly following the de facto moratorium imposed by the U.S. Supreme Court in 1972. Relying chiefly on evidence drawn from Washington State, the essay 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 suggests that the death penalty remains arbitrary and capricious in its administration and so furnishes yet another reason for concluding that capital punishment cannot be conducted in a way that comports with the claims of fairness.

The United States is currently engaged in its most vigorous debate about capital punishment in decades. This controversy is most often framed, explicitly or implicitly, through reference to the concept of fairness. So framed, 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, and the racially discriminatory administration of capital punishment.

Recently, yet another question regarding the fairness of the death penalty's administration has garnered considerable media attention. That question was posed in dramatic fashion by the plea bargain struck by the so-called Green River killer, Gary Ridgway. On November 5, 2003, in a Seattle courtroom, Ridgway confessed to murdering forty-eight women, making him the most prolific serial killer in U.S. history. In return for Ridgway's provision of information to the sheriff's office about these killings, the prosecuting attorney for King County agreed not to seek the death penalty. 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?" (Turner, 2003:A9.)

The purpose of this article is to examine one of the safeguards adopted by many states, including Washington, to address the issues of fairness illustrated by the Ridgway case, following imposition of a de facto moratorium on capital punishment by the U.S. Supreme Court in 1972. Specifically, this article evaluates the comparative proportionality review of death sentences. Comparative proportionality review is a procedure whereby a court determines whether a death sentence is consistent with the usual pattern of sentencing decisions in similar cases. By comparing any given death sentence with the penalties imposed on others convicted of death-eligible crimes, proportionality review is intended to ensure, first, that there is a rationally defensible basis for distinguishing those sentenced to die from those who are not, and,

second, that death sentences predicated on constitutionally impermissible factors, such as economic status or racial identity, whether of the defendant or the victim, are overturned (McAuliffe, 1988).

The next section of this article examines the constitutional history behind adoption of the practice of comparative proportionality review. Its third section explores the logic of comparative proportionality review, i.e., the principal questions that must be resolved by a court to translate an abstract statutory commitment into judicial practice. The fourth section examines comparative proportionality review as it has been practiced in Washington, as well as the major deficiencies of the database that provides the foundation for the state supreme court's articulation of this logic. The final section argues that the judiciary's difficulties in Washington pose serious questions about whether capital punishment can be administered in a way that comports with the claims of fairness.

A BRIEF HISTORY OF COMPARATIVE PROPORTIONALITY REVIEW

The roots of the larger controversy illustrated by the Ridgway deal can be traced to *Furman v. Georgia* (1972). In *Furman*, the U.S. Supreme Court invalidated Georgia and Texas statutes, and, by extension, the death penalty statutes of thirty-seven additional states, along with various federal statutory provisions, on the grounds that their administration violated the Eighth and Fourteenth Amendments. In his concurring opinion, Justice Stewart explained 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" (at 309-10). 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" (at 313). Effectively, the decision in *Furman* required that any state seeking to reintroduce the death penalty must adopt procedural safeguards designed to regulate the otherwise unchecked discretion of judges and juries. Such discretion can take shape as a problem of underinclusion (as illustrated by Gary Ridgway), in which case the death penalty is not imposed on a defendant who arguably deserves it. Or, and of greater concern to the *Furman* court as well as to most later commentators, this problem can take shape as a problem of overinclusion, in which case the death penalty is imposed on defendants whose crimes are not as heinous as those of others who have been sentenced to die.

The Court first evaluated the constitutionality of legislative efforts to rectify these concerns in *Woodson v. North Carolina* (1976), striking down a North Carolina statute that mandated the death penalty for everyone convicted of first-degree or felony murder. While the statute was intended to eliminate inconsistent sentencing patterns, Justice Stewart concluded that it did 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" (at 303). Operating 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” (at 304). Two years later, in *Lockett v. Ohio* (1978), the Court made clear that this rule permits defendants to introduce as mitigating evidence any factors, including those not statutorily specified, that may warrant a sentence less than death.

In the same term it decided *Woodson*, however, the Court found Georgia’s revised death penalty statute constitutional (*Gregg v. Georgia*, 1976). The Georgia legislature sought to meet *Furman*’s concerns by adopting several reforms, including the requirement that the state supreme court, when conducting its mandatory review of any given death sentence, determine whether it “is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant” (1973 Ga. Laws 74 1). Should the court determine that a specific sentence is flawed in this way, even if otherwise properly imposed, the sentence is to be set aside and the case is to be remanded for resentencing. In addition, to provide the state supreme court with the basis for such review, the revised Georgia statute required trial judges to complete and submit a standard questionnaire to the state’s highest court within ten days of sentencing.

Like Georgia, in the years between *Furman* and *Gregg*, most of the other states whose death penalty statutes had been invalidated in 1972 recrafted their laws. Twenty-six enacted statutes that included comparative proportionality review provisions similar or, in many cases, identical to those adopted by the Georgia legislature (Latzer, 2001:1168, n.29). In addition, absent legislative mandate, Arizona (*State v. Richmond* [1976]), Arkansas (*Collins v. State* [1977]), and eventually Florida (*Sinclair v. State* [1995]) adopted comparative proportionality review as a result of state court decisions. In 1984, however, the U.S. Supreme Court in *Pulley v. Harris* (1984) held that comparative proportionality review of death sentences is a valuable safeguard, but it is not constitutionally required. Shortly thereafter, nine states repealed their statutory comparative proportionality review provisions (Latzer, 2001:1168, n. 31), and several others that had been required to adopt such review by state supreme court mandate abandoned the practice as well (White, 1999:848-49). Empirical assessments of the conduct of proportionality review in the states that have retained such review have been mixed at best (see, e.g., Rodriguez, Perlin, and Apicella, 1984 [New Jersey]; Hartman, 1991 [Pennsylvania]; Wallace and Sorenson, 1994 [Missouri]; Durham, 2004 [Florida]; Calhoun, 2005 [Georgia]; Wilmot, 2005 [Washington]). Despite this uneven record, today, nineteen of the thirty-six states that provide for capital punishment continue to require comparative proportionality review by statute, and the supreme courts of Florida and Arkansas incorporate this practice into their death-sentence reviews although not required to do so by law (Wallace and Sorenson, 1997).

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

(Baldus, Woodworth, and Pulaski, 1990). However this task is conducted, its logic requires a court to perform three basic steps. First, a court must select the universe of cases to be considered. Second, a court must choose the pool of cases deemed "similar" to a specific case on appeal. And third, a court must decide whether a specific case is proportionate when measured against that pool (Van Duizend, 1984).

Most state statutes provide little or no guidance about how to determine the universe of cases for possible comparison (Lustberg and Lapidus, 1996). Most restrictively, a court can limit its comparative review to only those cases that resulted in death sentences upheld on appeal, or, somewhat more broadly, it can limit review to all cases advancing to penalty-phase trials, regardless of whether those proceedings result in death sentences. These strategies are appealing 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. Yet 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 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 and sentenced instead to life imprisonment.

Most expansively, in determining the relevant universe of cases, a court may elect to review all cases in which the facts provide the legal basis for a possible capital prosecution, regardless of whether such prosecution actually ensues. This method overcomes the principal deficiency of the first method because it provides a more inclusive indication of the diverse ways in which the legal system disposes of first-degree murders. Unlike more restrictive strategies, this method also seeks to remedy the problems occasioned by prosecutors' discretionary authority when they choose whether to seek the death penalty in any given case. Yet this method also suffers from serious flaws. 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, as the Ridgway case illustrates, prosecutors will elect not to seek a death sentence even when the facts of a case render this option available. Courts are thereby put in the position of engaging in independent discovery of the cases they deem death-eligible; this places a heavy, if not impossible, burden on the judiciary. By the same token, 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 the composition of a given universe. Finally, because this method requires that courts second-guess the judgments of prosecutors, arguably, it poses constitutional problems regarding the proper separation of powers between the judicial and executive officers of state governments and, more particularly, the measure of discretion properly left to the latter.

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 the one currently on appeal (Stein, 1985). The most obvious way to select a pool of similar cases is to identify cases whose facts are the same as the case under review. However, if the notion of factual similarity is strictly construed, any concrete differences will suffice to distinguish cases, and thus, in turn, render it difficult for a court to conduct a comparative inquiry (Sprenger, 1986). This difficulty can be answered by identifying more general fact patterns that are common to several cases. However, this approach in and of itself does not answer the question of which features of any given set of cases are sufficiently salient to merit incorporation into a given fact pattern. These problems are compounded when a court takes seriously the common 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 are introduced during the sentencing phase of a trial. However, any attempt to render defendants comparable on this basis is likely to defy categorization because, as noted above, defendants are constitutionally permitted to proffer any and all factors that may justify a sentence other than death. Should a court elect to ignore mitigating factors because it determines that the difficulties posed thereby are insurmountable, it will fail to take into account an indispensable measure of a defendant's culpability.

To overcome these difficulties, courts often interpret the concept of similarity more broadly by identifying the relevant features of a given case with whatever statutorily defined aggravating factors are found applicable at trial. Alternatively, the pool of similar cases is sometimes established by identifying those that share the same or nearly the same number of aggravating factors. 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 even when those factors are identical to those of cases in which death sentences were imposed. In addition, an approach that defines similarity in terms of statutorily defined factors is likely to disregard those that, although not specified by law, a jury may find relevant in determining the sentence. For example, a focus on aggravating factors alone will not take into account a defendant's willingness to cooperate with authorities or a defendant's remorsefulness. Yet an approach that seeks to overcome this difficulty by discovering what factors actually influenced sentencing decisions is beset by its own difficulties. For example, the existence of an intimate relationship between offender and victim may lead one jury to conclude that a murder is more incomprehensible 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 identification of a pool of similar cases that rely on strictly factual similarity often founder due to their concrete specificity, whereas approach-

es 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, the court 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 consideration, but, in doing so, renders it conceptually difficult to generate the comparisons that are intended to ensure that any given death sentence is not arbitrary or capricious.

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 address the final step in the logic of comparative proportionality review: determination of whether a case under review is proportionate to others in the pool the court has selected. The least systematic, but quite common approach to this question involves an appeal to some unarticulated notion of “reasonableness” in defending the conclusion that a specific death sentence is or is not proportionate. This is problematic because courts, in employing it, often fail to specify the criteria that inform their judgments, thereby rendering their decisions undefended and uncontestable. Alternatively, many courts have employed a precedent-seeking approach. Here, regardless of whether similarity is defined in terms of factual congruence or comparable aggravating factors, courts attempt to discover one or more like cases in which the death penalty was previously upheld. 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. Moreover, because this sort of inquiry presupposes restriction of the pool of comparable cases to those in which sentences of death were upheld, it is tilted in favor of affirmation.

Because these first two approaches rely on either intuitive notions of reasonableness or identification of a handful of comparable precedents, they appear inconsistent with the plurality opinion in *Gregg*, which urged courts to ask whether juries do or do not “generally . . . impose the death sentence in a certain kind of murder case” (at 206). This exhortation suggests a third method of determining proportionality, an assessment of the frequency with which capital sentences are imposed among cases deemed similar (Baldus et al., 1980). This requires that courts consider not merely death sentence cases but also those similar cases that resulted in some other sentence, typically life imprisonment. 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 judging a sentence in that group to be proportionate. 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 mitigating factors into account. However, given the unbounded character of the factors that may be cited in mitigation, any attempt to categorize them for the purpose of determining their relative frequency appears to represent an attempt to quantify the unquantifi-

able. More generally, the conduct of frequency analysis draws a court away from careful consideration of the qualitatively distinct features of prior cases, and so compromises its effort to give full weight to the unique characteristics of defendants, their crimes, and their respective degrees of culpability.

COMPARATIVE PROPORTIONALITY REVIEW IN WASHINGTON

The logic of comparative proportionality review is fraught with problems that stem at least in part from the conflict between, on the one hand, our conviction that like cases must be treated alike and, on the other hand, our conviction that, because death is a unique penalty, defendants must be given every opportunity to cite the factors that distinguish their cases from those that otherwise appear comparable. Even if the conceptual dilemmas just noted can be resolved satisfactorily, which is unlikely, the effort to engage in comparative proportionality review will come to naught if the quality of the information available to an appellate court is flawed. Following a brief review of comparative-proportionality-review provisions in Washington's current death penalty statute and their history, the deficiencies of the trial judge reports submitted to the state supreme court are explored.

Expressly patterned after Georgia law, the current Washington statute dealing with aggravated first-degree murder and capital punishment requires the supreme court to review all imposed death sentences to determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant" (Revised Code of Washington 10.95.130 (2)(b) (2004)). As in Georgia, should the court answer this question in the affirmative, the death sentence under review shall be invalidated and the case remanded to the trial court for resentencing.

This statute is the fruit of a complex political struggle that was provoked by the U.S. Supreme Court's ruling in *Furman* (Gilbert, 1995). Of most immediate relevance is the fact that in 1977 Washington adopted a statute that required court clerks, within ten days 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 report prepared by the trial judge . . . in the form of a standard questionnaire prepared and supplied by the supreme court of Washington" (1977 Wash. Laws 774, 778). This statute did not, however, provide guidance on the information to be collected via these questionnaires. Nor did it indicate the universe of cases to be considered for the purpose of conducting comparative proportionality review, specify the criteria to be employed in determining which cases are similar, or indicate how the court should determine whether any given sentence is or is not "excessive" or "disproportionate."

One year later, the supreme court established a Task Force on the Death Penalty Questionnaire to comply with the statute's mandate. Task force minutes indicate a marked discrepancy between its members' expectations with regard to the trial judge reports as well as their role in comparative proportionality review and their actual employment in later practice. The judges and attorneys who participated in the task

force made clear that “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.” Its members also 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.” In addition, the members expressed their 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” (Task Force, 1978a:1), and that it be submitted in a timely fashion, defined by the task force as thirty days after sentencing. Finally, rejecting the 1977 statute’s limitation of the universe of cases to those in which a death sentence is imposed, 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” (Task Force, 1978b:n.p.).

At the close of its deliberations, the task force recommended to the Washington State Supreme Court a questionnaire that is similar and, in most respects, identical to the one employed today. Not long after the task force submitted its recommendation, however, the 1977 capital-punishment statute was found unconstitutional for reasons unrelated to its proportionality review provisions, and a new capital-punishment statute was adopted in 1981. Unlike the 1977 statute, which did not specify the content of the trial judge report, the 1981 law enumerates each specific question to be answered, as well as the factual information to be provided by the trial judge. Specifically, the questionnaire requests information about the chronology of the case; defendant; trial; special sentencing proceeding, if conducted; victim; legal representation provided to the defendant; “general considerations” concerning the race, ethnic, and sexual orientation of the various participants in the trial, including the jury, as well as the demographics of the county in which the trial was conducted; and, finally, “general comments of the trial judge concerning the appropriateness of the sentence, considering the crime, the defendant, and other relevant factors” (Blank Trial Judge Report).

Moreover, in accordance with the task force recommendation, the 1981 statute required that such reports be filed “in all cases in which a person is convicted of aggravated first-degree murder,” and the centrality of the trial judge reports to the conduct of comparative proportionality review was affirmed by the statute’s construction of similarity through reference to them: “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” (Revised Code of Washington 10.95.130 (2)(b) (2000)). Beyond this, however, the statute provides no substantive guidance regarding how to resolve the second and third steps in the logic of comparative proportionality review, i.e., determination of the criteria of similarity to be employed in assembling a pool for comparison or the method to be employed in determining whether a case under review is or is not proportionate.

Between 1981 and March 2003, the death penalty was sought in seventy-eight cases and imposed in thirty-one. During this same period, the Washington State Supreme Court reviewed twenty sentences for proportionality, but vacated none for disproportionality. Many of the 259 trial judge reports on which the court relied in rendering these decisions were deficient. The deficiencies can be divided into five basic categories.

The most obvious problem with the database is its omission of cases that should have been included, as well as its inclusion of cases that should not have been included, at least not in their present form. A comparison of the trial judge reports on file with the supreme court with the records compiled by the Washington Sentencing Guidelines Commission, which maintains data on criminal judgments and sentences entered by state trial courts, reveals that the court is missing reports for twelve aggravated first-degree homicide convictions, and inspection of the records kept by the Washington State Department of Corrections reveals an additional missing record. Leaving aside the fact that absence of these records violates 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,” any attempt to identify the full range of cases similar to that on review is necessarily incomplete without these reports. Moreover, the absence of these reports from the 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, have generated a sentence of death as opposed to life without possibility of parole. Perhaps more troublesome, all of the defendants in the thirteen cases missing from the database were sentenced to life without parole. Should the court seek to determine that frequency, the absence of these reports will skew its calculations in favor of death.

In addition, as is also true of other states (Rankin, Vegell, and Wertheim, 2007), the court-maintained database includes cases that either ought not to be in the database or ought not to be present absent some indication of their current status. This includes fifteen trial judge reports (17.6 percent of the cases in which the death penalty was sought) for defendants who, although initially sentenced to death, subsequently were resentenced to life without parole. The failure to revise these reports to reflect these changes introduces a significant inaccuracy because, as a matter of law, these death sentences no longer stand. Moreover, if these reports are not updated, 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 death.

Second, a majority of the trial judge reports in the supreme court database were not submitted “within thirty days after the entry of the judgment and sentence,” as required by law. Specifically, of the 259 trial judge reports, 161 (62 percent) were submitted late—from two days to as much as just under eight years. The 161 late reports were received an average of 660 days past the statutory deadline, with 79 submitted over a year late; 58 more than two years; 40 over three years; and 26 over four years. This chronic tardiness in the filing of reports raises serious questions about the compliance of trial judges with the law and poses equally vexing questions about the accuracy of the information contained in these reports.

Third, a very large number of trial judge reports provide insufficient or inaccurate information, no doubt in part because so many were filed so late. In several reports, for example, as a result of the passage of time, trial judges found themselves unable to complete many questions on the form. This problem is illustrated by two examples. In Report No. 210, submitted approximately three-and-a-half years late, the trial judge explained that the mitigation packet prepared by defendant’s counsel was no longer available to her. Therefore, she continued, “where I do not have a specific recollection of a fact I will indicate unknown rather than guess”; she then proceeded to enter “unknown” in response to fifteen of the report’s questions. And in response to the question regarding the number of jurors of the same race as the defendant or victim, the judge who completed Report No. 90, concerning an African-American codefendant sentenced to life imprisonment for murdering a Vietnamese immigrant, indicated, “I cannot recall if any black jurors served.” While this response is not surprising, given that this form was submitted three years after sentencing, it raises significant questions about the supreme court’s ability to investigate the role of racial prejudice in sentencing patterns for aggravated first-degree murders.

Perhaps still more problematic is that many reports fail to provide basic information about defendants’ biographies and character. For example, in 41 of the 259 reports (15.8 percent), no answer is provided to the question about the highest grade completed by the defendant; in 63 reports (24.3 percent), about the defendant’s intelligence level; and in 149 reports (57.5 percent), about the defendant’s IQ score. These deficiencies raise questions about the court’s capacity to make informed judgments about mental capacity and thus to determine the measure of culpability to be ascribed to one defendant rather than another. Moreover, in 47 of the 259 reports (19.1 percent), trial judges failed to respond to the question asking for “general comments . . . concerning the appropriateness of the sentence, considering the crime, the defendant, and other relevant factors.” When that question is in fact answered, the response is often perfunctory and uninformative, as in “the sentence was appropriate”; “the sentence was entirely appropriate given the gravity of the offense”; and “the legislature determined the sentence for this defendant. I do not choose to comment on the legislature’s judgment.”

Somewhat less common, but by no means infrequent, are those reports in which questions are left unanswered in the section titled "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 fails to answer the questions asking about whether the victim was related to the defendant by blood or marriage; the victim's occupation, as well as whether the victim was an employer or employee of the defendant; whether the victim was acquainted with the defendant; 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 before death and, if so, of what sort and for how long; the age of the victim; and, finally, the type of weapon employed in the crime. While this is perhaps an extreme example, many other reports provide very little information regarding the biography of the victim, as well as the way in which he or she was murdered, once again leaving the court ill-equipped to compare defendants convicted of "similar" crimes.

Fourth, the absence of adequate information in the trial judge reports concerning aggravating and mitigating factors compromises the state supreme court's ability to conduct meaningful comparative proportionality reviews. At least one applicable aggravating circumstance must be found 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 it results from a guilty plea or a jury determination. The inclusion of twelve reports (4.6 percent 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 or that they contain a serious legal error.

The problem posed by inadequate information regarding mitigating circumstances is still 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. Leaving aside the reports in which the questions regarding mitigating circumstances are left unanswered altogether, in over half of the reports in which the death penalty was sought and a special sentencing proceeding was conducted, 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. Thus, in Report No. 174, the trial judge wrote, "The life history of the defendant"; in Report No. 92, the judge stated only that "the defendant & prosecutor stipulated that there was [sic] mitigating circumstances"; and in Report No. 164, the judge reported that the "defendant's family and several ministers testified," but provided no indication of the nature of that testimony. These impoverished responses cannot help but pose significant questions about whether the supreme court is in a position to determine, with any degree of reliability, the character of the mitigating circumstances that help explain why some cases resulted in a sentence of death, while others resulted in a sentence of life.

Fifth, a section 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. 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. Yet the report form does not furnish a standardized set of categories for indicating the racial and ethnic identities of various participants in aggravated first-degree murder trials, and, apart from visual observation, judges have no reliable means of determining those identities. The problems thus posed are suggested by the fact that the responses to the questions regarding racial and ethnic identity include the following: African, African-American, and Black; Anglo-Saxon, Caucasian, Caucasian/Cajun, European/N. American, White, and White American; Asian, Cambodian, Samoan, and Thai; American Indian-Colville, Indian, Native, and Native American; and Unknown. 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" or are members of "suspect" or "unpopular" minorities" (at 255). In addition, the absence of predesignated categories vitiates efforts to grasp dimensions of discrimination that 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.

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 undermined. 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 their being conscientiously completed and submitted in a timely manner (Balduz, 1996). However, as noted above, this condition has not been met in a majority of the reports. One might attempt to remedy the failings of the court's database by returning to the trial record of every past aggravated murder case 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 these records.

THE FAILURE OF COMPARATIVE PROPORTIONALITY REVIEW

As four of nine justices recently concluded in its first post-*Ridgway* proportionality decision (*State v. Cross*, 2006), the Washington State Supreme Court has yet to articulate a coherent methodology to inform comparative proportionality review. Its performance of such reviews has remained a pro forma affair that has relied chiefly on the selective citation of precedents from previously upheld death sentences to affirm the proportionality of every case it has reviewed to date. In short, 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. Moreover, even if the court were to seek to formulate a more sophisticated method of fulfilling the terms of the logic of comparative proportionality review, it is not clear how it could make good on this effort, given the irremediable deficiencies of the trial judge reports.

The predicaments encountered by the Washington judiciary in its conduct of comparative proportionality review are indicative of the defining dilemma that federal and state courts have struggled to resolve in attempting to craft a constitutionally coherent doctrine regarding capital punishment. Specifically, the deficiencies of comparative proportionality review in Washington mirror the judiciary's difficulties in fashioning a principled standpoint that ensures 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 should be restricted to, as well as consistently applied to, only the most heinous criminals found guilty of the most heinous crimes; like crimes, in short, must be treated similarly, and unlike crimes must be treated differently. Second, and especially because of its unique nature, administration of the death penalty must be fair in the sense that the judicial processes that generate, review, and affirm death sentences should provide full consideration to the individualized character and circumstances of each capital defendant.

As the present account of comparative proportionality review implies, the conceptual and practical problems involved in its logic duplicate the dilemma posed by these competing imperatives. The aim of such review 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 that defendant's situation unlike all others. 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 to find out what, if anything, distinguishes this case from that of others who have been sentenced to death. That inquiry, however, renders it difficult if not impossible to assemble a class of defendants on the basis of which one can make a comparative judgment about whether the death penalty is generally imposed and so whether any given sentence is 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. That inquiry, however, renders it difficult if not impossible to attend adequately to the factors that, because they distinguish a case on review from those with which it is compared, may warrant sparing a defendant's life (Liebman, 1985).

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 that, arguably, are no less arbitrary than the jury discretion its review was originally intended to remedy. To give the appearance of solving this conundrum 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 be administered in a principled way that comports with the claims of fairness (Bienen, 1996). It is, under the guise of the law, to reproduce rather than to remedy the arbitrariness *Gregg* was said to resolve. **jsj**

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