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JUDICIAL REVIEW OF DEATH SENTENCES

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I. INTRODUCTION**

On December 7, 1982, Charles Brooks, Jr. was executed by lethal injection in Huntsville, Texas.[1] Brooks was both the first person to die by state administered injection and the first black man to be executed since the United States Supreme Court upheld the constitutionality of the death penalty in 1976.[2]

A jury had sentenced Brooks and an accomplice, Woody Loudres, to death for the kidnap-murder of an auto mechanic.[3] The prosecution failed to prove which of the two defendants did the actual killing.[4] Loudres won an appeal and then obtained a forty-year sentence in a plea-bargain.[5] Although originally convicted of the same crime as Brooks, on the same evidence, Loudres will not die for his offense. He will be eligible for parole in six years.[6] Brooks is dead.

Prior to Brooks' death, his prosecutor joined those seeking to stay his execution since Loudres had received only a forty-year term and no one knew which defendant had fired the fatal shot.[7] The courts which reviewed Brooks' sentence dismissed the argument that the disparate treatment was unconstitutional.[8] The United States Court of Appeals for the Fifth Circuit stated:

> The contention is that the two sentences [of Brooks and Loudres] are not proportional and that there is no rational basis for the difference in their sentences. It is well-settled that the State may favor with clemency a per-

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1 The Sacramento Bee, Dec. 7, 1982.

2 The Los Angeles Times, Dec. 6, 1982.

3 Los Angeles Daily Journal, Dec. 8, 1982.

4 *Id.*

5 *Id.*

6 The Los Angeles Times, *supra* note 2.

7 *Id.*

8 Brooks v. Estelle, 697 F.2d 586, 588 (5th Cir. 1982).

son who confesses his guilt. Moreover, to exact review of a prior sentence each time another person involved in the same crime or a person involved in another similar crime is sentenced would require literally endless review unless the state ceased to prosecute and obtain convictions in capital cases. The constitution does not require retrospective review of a sentence imposed four years earlier.[9]

Contrast the judicial review of Brooks' capital sentence to that of Robert Harris. Harris kidnapped two sixteen-year-old boys and drove them to a secluded area where he killed them.[10] After the killings, he fired an extra bullet into one boy's head.[11] He then ate hamburgers the boys had been eating when he came upon them.[12] Using the boys' car, he robbed a bank and was apprehended shortly thereafter.[13] Harris confessed several times to the killings.[14]

The jury convicted Harris and sentenced him to death.[15] The California Supreme Court upheld his conviction and sentence.[16] The United States Court of Appeals for the Ninth Circuit, however, stayed Harris' execution.[17] It ruled that Harris' case must be compared to similar cases to determine whether Harris' death sentence was disproportionate to the crime.[18] Unlike the Fifth Circuit, the Ninth Circuit Court of Appeals thus held that "proportionality review" of death sentences was constitutionally required.

These cases illustrate radical differences in the ways in which appellate courts interpret the constitutional requisites of capital judicial review. Disparate and inconsistent treatment is the result of these differing judicial interpretations. The death penalty which is constitutional when imposed rationally, consistently, and objectively, claimed Brooks,[19] passed over Loudres, and hovers uncertainly over Harris. These cases therefore raise an important question: what forms of judicial review are constitutionally required in capital cases? More specifically, are there particular forms of judicial review that may reduce arbitrariness in death sentences and, if so, does the Constitution require states to institute these reviews?

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9 *Id.*

10 People v. Harris, 28 Cal. 3d 935, 944, 623 P.2d 240, 243-44, 171 Cal. Rptr. 679, 683 (1981), *rev'd sub nom.* Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1425 (U.S. Mar. 21, 1983) (No. 82-1095).

11 *Id.*

12 *Id.* at 945, 623 P.2d at 244, 171 Cal. Rptr. at 683.

13 *Id.* at 944-45, 623 P.2d at 244, 171 Cal. Rptr. at 683.

14 *Id.* at 945, 623 P.2d at 244, 171 Cal. Rptr. at 683-84.

15 *Id.* at 947, 623 P.2d at 244, 171 Cal. Rptr. at 684.

16 *Id.*

17 Harris v. Pulley, 692 F.2d 1189 (9th Cir. 1982), *cert. granted*, 103 S. Ct. 1425 (U.S. Mar. 21, 1983) (No. 82-1095).

18 *Id.* at 1196.

19 *See infra* text accompanying notes 20-30.

This Article argues that rigorous appellate review, including proportionality review, is constitutionally required. Part II of the Article states the current constitutional requirements for the imposition of a death sentence, and develops the principles essential to them. Part III discusses the constitutional status of judicial review of death sentences and concludes that forms of judicial review which reduce arbitrariness are constitutionally mandated. Part IV discusses problems in judicial review of death sentences and describes constitutionally adequate systems of capital sentence review.

II. THE BASIC STRUCTURE OF CAPITAL SENTENCING LAW

Death sentences violate the eighth and fourteenth amendments' prohibitions against cruel and unusual punishment when imposed under a sentencing system which creates a substantial risk of an arbitrary, discriminatory, or capricious decision.[20] If a judge or jury may impose death without guidelines for selecting that sentence, there is a substantial risk of arbitrariness, discrimination, or caprice.[21] For these reasons, the United States Supreme Court in *Furman v. Georgia*[22] struck down a capital sentencing system which allowed unguided imposition of the death penalty.

Most state legislatures responded to *Furman* by requiring the death penalty for certain crimes or by establishing capital case sentencing guidelines for guided sentencer discretion. The guided discretion schemes involved statutorily defined aggravating circumstances, one of which had to be found by a sentencer before the death penalty could be imposed.

A. MANDATORY SENTENCING SCHEMES

In *Woodson v. North Carolina*[23] and *Roberts v. Louisiana*,[24] the Court overturned state statutes which required a death sentence for any first degree murder. In *Woodson*, the plurality noted that in the past, the majority of first-degree murder cases had resulted in sentences short of death[25] and that therefore, a "mandatory death penalty statute for first-degree murder departs markedly from contemporary standards respecting the imposition of the punishment of death."[26] In addition to a risk that such sentences might not comport with community mores, there

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20 Furman v. Georgia, 408 U.S. 238 (1972)(per curiam).
21 *Id.*
22 *Id.*
23 428 U.S. 280 (1976).
24 428 U.S. 325 (1976).
25 428 U.S. at 292-99, 303 (1976).
26 *Id.* at 301.

was a significant likelihood that juries might refuse to convict a defendant of first-degree murder. Such jury nullification would escape any appellate review.[27] The Court in *Woodson* also stated that a death sentence is qualitatively different from any term of imprisonment because it is final and irrevocable.[28] The eighth amendment's proscription of cruel and unusual punishment "requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[29] Mandatory death sentencing reflects neither contemporary standards nor permits individualization. It is therefore unconstitutional, according to the plurality.[30]

B. GUIDED DISCRETION SCHEMES

In *Gregg v. Georgia*,[31] *Proffitt v. Florida*,[32] and *Jurek v. Texas*,[33] the Court upheld guided discretion capital sentencing systems. In *Gregg*, Georgia's capital sentencing system included bifurcated trials, a requirement that the sentencer specifically find one of ten aggravating circumstances beyond a reasonable doubt, and a provision which allowed the sentencer to weigh mitigating evidence against aggravating evidence.[34] Georgia also provided for expedited state supreme court review of capital convictions.[35] On review, the Georgia Supreme Court was required to consider not only errors assigned on appeal, but also whether the death sentence had been imposed arbitrarily or disproportionately.[36]

According to the *Gregg* plurality, each of the foregoing devices minimized the risk of arbitrariness in a capital sentencing system.[37] The Court emphasized that Georgia's sentencing elements could collectively reduce arbitrariness to acceptable constitutional levels. It is therefore important to determine what role, if any, each individual element plays in a constitutional scheme of arbitrariness risk reduction.

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27 *Id.* at 303.

28 *Id.* at 305.

29 *Id.* at 304.

30 *Id.* at 304-05.

31 428 U.S. 153 (1976).

32 428 U.S. 242 (1976). For a discussion of *Proffitt*, see *infra* note 37.

33 428 U.S. 262 (1976). For a discussion of *Jurek*, see *infra* note 37.

34 *Gregg*, 428 U.S. at 164-66.

35 *Id.* at 167-68.

36 *Id.* at 198.

37 *Id.* at 206-07. In Proffitt v. Florida, 428 U.S. 242 (1976) and Jurek v. Texas, 428 U.S. 262 (1976), the Court considered guided discretion capital sentencing systems which were different from Georgia's. Nonetheless, construing each of them to require a bifurcated trial, sentencer discretion under guidelines, an opportunity to present mitigating evidence, and appellate review, the Court upheld these systems as well.

C. PROCEDURES REDUCING THE RISK OF ARBITRARY SENTENCING

1. Bifurcated trial

Bifurcated trials, in which guilt and penalty are tried separately, reduce arbitrary sentences in two ways. First, they permit a jury to consider evidence relevant to guilt apart from evidence relevant to sentence.[38] A jury can therefore focus on sentencing guidelines without the possible confusion and prejudice introduced by guilt considerations.[39] Second, the jury can hear mitigating evidence, necessary for individualized sentences,[40] which might be inadmissible in a unitary trial.

2. Specific objective standards for imposing a death sentence

Statutory sentencing guidelines reduce the likelihood of arbitrary sentencing. The requirement that a sentencer expressly find a statutory aggravating factor before imposing a death sentence limits the risk of arbitrariness.[41] Nonetheless, arbitrariness is not completely eliminated from the system. A sentencer could, for example, return a death sentence on the basis of a nonstatutory aggravating factor or on an irrelevant consideration. Mandatory appellate review can detect the arbitrary imposition of the death penalty in cases for which sentences are unusual. Furthermore, properly focused appellate review can correct other kinds of arbitrariness[42] and is, therefore, an additional safeguard against arbitrariness or disproportionality in sentencing.[43]

3. Dimensions of capital appellate review

In approving appellate and proportionality review, the *Gregg* plurality discussed the appellate reviews statutorily mandated in Georgia. The first is simply further scrutiny of the death sentence to determine first, whether the evidence indicates that it was imposed arbitrarily, and second, whether the evidence supports the finding of an aggravating circumstance.[44] Such review limits sentencer arbitrariness.

Another type of appellate review approved of in *Gregg* was a comparative review of previous cases to determine whether the death penalty generally had been imposed in cases similar to the case under review.[45] This is known as proportionality review.[46] If a death sentence

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38 *Gregg*, 428 U.S. at 190-92.

39 *Id.*

40 *Id.* at 191.

41 *Id.* at 192-95.

42 *See infra* text accompanying notes 122-46.

43 *Gregg*, 428 U.S. at 198, 204-06.

44 *Id.* at 204.

45 *Id.* at 204-06.

46 This review is also referred to as "comparative excessiveness review." Baldus, Pulaski,

was unusual for a specific set of circumstances, it would be considered disproportionate.[47]

In *Gregg*, six Justices emphasized the importance of appellate review as a means of minimizing arbitrariness in capital sentencing.[48] The plurality and concurring opinions reviewed the work of the Georgia Supreme Court and found that it had effectively vacated unusual or aberrant capital sentences. The *Gregg* plurality consequently concluded:

> 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.[49]

Similarly, the concurring Justices took the view that "[i]f 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 for any given category of crime will be set aside."[50]

In sum, according to a majority of the Justices, appellate review guards against arbitrariness and caprice by ensuring both that a capital sentence has a rational basis, supported by the record, and that the sentence is consistent with sentences in similar cases.[51]

III. THE CONSTITUTIONAL STATUS OF JUDICIAL REVIEW OF DEATH SENTENCES

A. CONSTITUTIONAL UNCERTAINTY REGARDING JUDICIAL REVIEW

While *Gregg* held that the elements of the Georgia system were sufficient to establish a constitutionally satisfactory capital sentencing scheme, it did not hold that any particular element was constitutionally indispensable.[52] Whether the Court will hold that any *particular form* of

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Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980).

47 *Gregg*, 428 U.S. at 205-06. For example, in Georgia, armed robbery was a capital offense. In *Gregg*, the Georgia Supreme Court concluded that capital sentences were rarely imposed for armed robbery and vacated Gregg's capital sentences for armed robbery. Gregg v. State, 210 S.E.2d 659, 667, 233 Ga. 117, 127-28 (1974).

48 428 U.S. 198, 204-06 (Stewart, Stevens, and Powell, JJ., for the plurality); *id.* at 211-12, 222-24 (White, J., Burger, C.J., and Rehnquist, J., concurring in judgment).

49 *Id.* at 206.

50 *Id.* at 224 (White, J., concurring in judgment).

51 *See supra* notes 48-50.

52 The *Gregg* plurality view is equivocal regarding the necessary elements of a constitutional capital sentencing system. In its view, possibly *any* system which minimizes the risk of

capital appellate review is constitutionally required, and, specifically, whether proportionality review is required remains uncertain.[53]

The Court's approval of the very different Texas capital sentencing system in *Jurek* creates additional uncertainty about the constitutional status of appellate review of capital sentences. Unlike the Georgia statute,[54] Texas did not statutorily require appellate review of capital cases. It had no provision for, nor a demonstrated court practice of, proportionality review.[55] In approving the Texas capital sentencing system on its face, the *Jurek* plurality simply noted that "[b]y providing prompt judicial review of the jury's decision in a court with statewide jurisdic-

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arbitrariness and permits individualized capital sentencing is consitutional. The Georgia, Florida, and Texas systems examined in *Gregg*, *Proffitt*, and *Jurek* were construed to do so on their face and were therefore approved. However, other systems, not having all four elements emphasized in these cases, might also minimize the risk of arbitrariness and therefore be constitutional. Bifurcated capital trials, sentencer discretion focused on objective guidelines, opportunities to present mitigating evidence, and appellate and proportionality review are together sufficient, but may not be individually necessary conditions for constitutional capital sentencing systems.

One federal court has held that proportionality review is constitutionally required. Harris v. Pulley, 692 F.2d 1189, 1196 (9th Cir. 1982), *cert. granted on this issue*, 103 S. Ct. 1425 (U.S. Mar. 21, 1983) (No. 82-1095). Another federal court has held that proportionality review is not required. Brooks v. Estelle, 697 F.2d 586, 588 (5th Cir. 1982).

[53] In both Gregg v. Georgia, 428 U.S. 153 (1976) and Proffitt v. Florida, 428 U.S. 242 (1976), the pluralities noted that proportionality review was an additional safeguard ensuring nonarbitrary capital sentencing, but did not expressly hold that it was constitutionally required.

"Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capricously or in a freakish manner." *Gregg*, 428 U.S. at 195.

"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." *Gregg*, 428 U.S. at 207.

> Moreover, to the extent that any risk to the contrary exists, it is minimizied by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida "to determine independently whether the imposition of the ultimate penalty is warranted." . . . The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined that the sentence should not have been imposed. Indeed, it has vacated 8 of the 21 death sentences that it has reviewed to date.

Proffitt, 428 U.S. at 253 (citations omitted).

[54] Also to be contrasted to *Jurek* is Proffitt v. Florida, 428 U.S. 242 (1976). In its capital sentencing system, Florida statutorily provided for automatic appellate capital sentence review, but did not further specify the form that such review should take. However, the Florida Supreme Court did conduct proportionality review:

> [T]he Supreme Court of Florida, like its Georgia counterpart, considers its function to be to "[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that under similar circumstances in another case. . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great."

Id. at 251 (quoting State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973)).

[55] Jurek v. Texas, 428 U.S. 262 (1976).

tion, Texas has provided a means to promote the evenhanded, rational, and consistent application of death sentences under law."[56]

This may be construed in three ways. First, noting the emphasis placed on appellate and proportionality review in *Gregg*[57] and in *Proffitt*,[58] the language can be read as presuming that Texas would achieve in practice the type of review that Florida and Georgia had achieved by statute. It was statutorily possible, and there was nothing to suggest that the Texas reviewing court would not do so.

A second reading of *Jurek* is that the Court found the definition of capital murder in the Texas death penalty statute to be so narrow that the further safeguard of proportionality review was unnecessary.[59] This reading implies that the Constitution may require proportionality review as an essential safeguard in looser capital sentencing schemes.

Finally, because the Texas statute mandated neither appellate review focused on arbitrariness nor proportionality review, the language can be read as holding that neither form of appellate review is required by the Constitution.

The constitutional status of capital appellate review is of immediate concern.[60] Some states, like Georgia, require relatively elaborate capital case review—including proportionality review. Others provide neither for any specific review nor for proportionality review as a part of their capital sentencing systems.[61] Many of these states, however, have ex-

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[56] *Id.* at 276.

[57] *Gregg*, 428 U.S. at 198, 204-06; *see supra* text accompanying notes 44-50.

[58] *Proffitt*, 428 U.S. at 251, 253; *see supra* note 53.

[59] *Jurek*, 428 U.S. at 270-71.

[60] The United States Supreme Court has granted certiorari on this issue. Pulley v. Harris, 103 S. Ct. 1425 (U.S. Mar. 21, 1983) (No. 82-1095); *see supra* note 52.

[61] Thirty-two states provide for proportionality review either by case law, State v. Richmond, 114 Ariz. 186, 560 P.2d 41 (1976), *cert. denied*, 434 U.S. 976 (1977); Collins v. State, 261 Ark. 195, 548 S.W.2d 106, *cert. denied*, 434 U.S. 878 (1977); State v. Dixon, 283 So. 2d 1 (Fla. 1973); People v. Brownell, 79 Ill. 2d 508, 404 N.E.2d 181 (1980); Brewer v. State, — Ind. —, 417 N.E.2d 889 (1981); State v. Simants, 197 Neb. 549, 250 N.W.2d 881, *cert. denied*, 434 U.S. 878 (1977); State v. Pierre, 572 P.2d 1338 (Utah 1977), *cert. denied*, 439 U.S. 882 (1978), or by statute, ALA. CODE § 13A-5-53(b) (1975); CONN. GEN. STAT. ANN. § 53a-46b(b)(West 1983); DEL. CODE ANN. tit. 11, § 4209(g)(2)(1979); GA. CODE ANN. § 27-2537(b) (Supp. 1982); IDAHO CODE § 19-2827(c)(1979); KY. REV. STAT. § 532.075(3)(Supp. 1982); LA. CODE CRIM. PRO. ANN. art. 905.9 (West Supp. 1983); MD. ANN. CODE art. 27, § 414(e)(1982); MISS. CODE ANN. § 99-19-105 (Supp. 1982); MO. ANN. STAT. § 565.014(e)(Vernon 1979); MONT. CODE ANN. § 46-18-310 (1981); NEB. REV. STAT. § 29-2521.03 (1979); NEV. REV. STAT. § 177.055(c), (d) (1979); N.H. REV. STAT. ANN. § 630:5(VII) (Supp. 1979); N.M. STAT. ANN. § 31-20A-4(c) (Supp. 1981); N.C. GEN. STAT. § 15A-2000(d)(2) (Supp. 1981); OHIO REV. CODE ANN. § 2929.05(a) (Baldwin Supp. 1982); OKLA. STAT. ANN. tit. 21, § 701.13 (West Supp. 1982); 42 PA. CONS. STAT. ANN. § 9711(h)(3) (Purdon 1982); S.C. CODE ANN. § 16-3-25(c) (Law. Co-op Supp. 1982); S.D. CODIFIED LAWS ANN. § 23A-27A-12 to -13 (1979); TENN. CODE ANN. § 39-2-205(4) (1982); VA. CODE § 17.110.1C (1982); WASH. REV. CODE ANN. § 10.95.130 (Supp. 1983); WYO. STAT. § 6-4-103(d) (1983).

pressed a willingness to incorporate specific reviews should they be required.[62] One state court interpreted *Jurek* to say that the required appellate review assurance is merely that "the death penalty will be applied in a reasonably consistent manner,"[63] and that no particular way of fulfilling this assurance is mandated. Different courts, therefore, conduct different kinds of judicial review in capital cases and perform it with considerably varying degrees of care and rigor.[64] Thus, from state to state, appellate procedural protections provided for capital felons vary substantially.

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[62] *See, e.g.*, State v. Richmond, 114 Ariz. 186, 196, 560 P.2d 41, 51 (1976), *cert. denied*, 433 U.S. 915 (1977); Collins v. State, 261 Ark. 195, 210-19, 548 S.W.2d 106, 115-19, *cert. denied*, 434 U.S. 878 (1977); People v. Frierson, 25 Cal. 3d 142, 182, 599 P.2d 587, 611, 158 Cal. Rptr. 281, 304 (1979); Bell v. State, 360 So. 2d 1206, 1214-15 (Miss. 1978), *cert. denied*, 440 U.S. 950 (1979); State v. Simants, 197 Neb. 549, 563-64, 250 N.W.2d 881, 890, *cert. denied*, 434 U.S. 878 (1977); Commonwealth v. Zettlemoyer, — Pa. —, —, 454 A.2d 937, 960-61 (1982), *cert. denied*, 103 S. Ct. 2444 (1983); Smith v. Commonwealth, 219 Va. 455, 482, 248 S.E.2d 135, 151 (1978), *cert. denied*, 441 U.S. 967 (1979).

[63] *Frierson*, 25 Cal. 3d at 182, 599 P.2d at 610, 158 Cal. Rptr. at 304.

[64] Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L. J. 97 (1979):

> [A]ppellate review has not lived up to maximum expectations in [Georgia, Texas and Florida].
>
> First, the appellate courts in all three states have rarely held death sentences invalid on their merits. The Georgia and Texas courts have held death sentences invalid in only two and one percent of the cases reviewed. Although the Florida court has reduced death sentences in twenty-three percent of the cases reviewed, in all but one of those cases the trial judge had ignored a jury recommendation of leniency. When the trial judge and the jury have agreed on the death penalty, the Florida court has been no more willing to overturn this decision than have the Texas and Georgia appellate courts. Although this is not conclusive, it suggests an absence of rigorous review.
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> Second, the appellate review process has not resulted in appellate opinions that provide an effective basis for the encouragement of proper and consistent sentencing practices. The Texas court, because of the nature of the review undertaken, has not addressed the propriety of death sentences under a comparative analysis or through a balancing of aggravating and mitigating factors. Even insofar as it addresses the "dangerousness" of capital murder defendants, emphasized in question two of the Texas procedure, the court's opinions provide little useful guidance in evaluating the type of showing required to make death the appropriate penalty.
>
> Although the Georgia appellate procedure suggests that case law developed under it might be more useful, in practice this has not proven true. The court has at least superficially engaged in a comparative analysis of the case before it with other, purportedly similar, cases and has considered whether particular death sentences were imposed under the influence of passion or prejudice. But the opinions contain few discussions precise enough to serve as useful guidelines for trial courts. Although the court has taken care to ensure that at least one aggravating circumstance is established in each case, the flexibility of the statute's enumerated aggravating circumstances means that this is of little actual value. The court's discussions ignore opportunities to compel or encourage either careful scrutiny of potentially mitigating circumstances or the process by which aggravating and mitigating circumstances might be compared.
>
> The results of review under the Florida scheme are very similar, and the appellate decisions are, if anything, less useful for present purposes than those of the Georgia court. The breadth and imprecision of the statutory aggravating circumstances has minimized the need for careful development of criteria and the Florida court has not undertaken more than is demanded.

Id. at 159.

B. BOTH RIGOROUS APPELLATE REVIEW AND PROPORTIONALITY REVIEW ARE FAVORED BY THE SUPREME COURT

Constitutional principles and Supreme Court practice indicate that both rigorous appellate review and proportionality review are constitutionally required in cases in which the death sentence is imposed.[65] Together, they are the only systematic means of ensuring that capital sentences reflect contemporary mores and minimize the risk of arbitrary sentencing.

The Supreme Court has taken note of the necessity of rigorous and proportional review by engaging in both kinds of review itself in capital cases. Although the Supreme Court's death penalty decisions are complex and depend up on different rationales, the Court has evolved a coherent body of capital sentencing law, summarized by the following principles:[66]

(1) The cruel and unusual punishment clause of the eighth amendment has no fixed meaning. Its content must be determined by reference to current societal norms. Therefore, capital sentences must reflect these contemporary societal norms.[67]

(2) A capital sentence may not be imposed for an arbitrary reason, but must be based on a principled, objective reason.[68]

(3) Capital sentencing systems must, viewed as a whole, minimize the risk of arbitrariness.[69]

(4) Because each individual is unique and because death is an irrevocable punishment, the eighth amendment requires individualized sentencing

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65 The issue is now before the Supreme Court in Pulley v. Harris, *cert. granted*, 103 S. Ct. 1425 (U.S. Mar. 21, 1983) (No. 82-1095).

66 Some commentators think that the Court has shifted rationales in the death penalty cases and that the latest cases disclose the governing rationales. *See, e.g.*, Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendants' Rights to Consideration of Mitigating Circumstances*, 69 CAL. L. REV. 317 (1981). In fact, the Court has evolved a set of related principles, each of which remains important, though all of which may not be germane to every case which it reviews. Fundamental issues in capital sentencing law, however, may call all of these principles into play, and they should be used in concert, and interpreted harmoniously, to resolve such issues.

67 Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (plurality opinion); Furman v. Georgia, 408 U.S. 238, 242 (1972)(Douglas, J., concurring); *id.* at 274-79 (Brennan, J., concurring); *id.* at 309-10 (Stewart, J., concurring); *id.* at 332 (Marshall, J., concurring); *id.* at 382-84 (Burger, C.J., dissenting); *id.* at 409 (Blackmun, J., dissenting); *id.* at 429-30 (Powell, J., dissenting); Robinson v. California, 370 U.S. 660 (1962); Trop v. Dulles, 356 U.S. 86, 101 (1958)(plurality opinion); Weems v. United States, 217 U.S. 349, 378 (1910).

68 Gregg v. Georgia, 428 U.S. 153, 206-07 (1976); Proffitt v. Florida, 428 U.S. 242, 251-53 (1976); Jurek v. Texas, 428 U.S. 262, 303 (1976); Roberts v. Louisiana, 428 U.S. 325, 335 (1976); Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam).

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

which punishes capital defendants in accordance with their just deserts.[70] (5) Similarly, a capitally convicted defendant may introduce, in his sentencing hearing, any evidence relevant to mitigation of his offenses.[71] Rigorous appellate and proportionality review of capital sentences are necessary to ensure the application of these principles.

1. Proportionality review and rigorous appellate review of capital cases are implicit in the concept of cruel and unusual punishment

The Supreme Court's capital sentencing decisions are bottomed on the eighth amendment's proscription of cruel and unusual punishments.[72] In *Furman*, a majority of the Court noted that the cruel and unusual clause had no fixed content.[73] Instead, its meaning is defined by reference to current norms of American society.[74] Imposition of a death sentence which contravenes societal norms is unconstitutional.

Several of the plurality decisions in the death penalty cases—a total of eight Justices—have acknowledged the constitutional importance of the principle that capital sentencing must reflect contemporary standards of decency.[75] As stated in *Woodson*, "It is now well established that the Eighth Amendment draws much of its meaning from 'the evolving standards of decency that mark the progress of a maturing society.' "[76]

Because there is no universal principle that determines what punishment is appropriate for a given offense or offender, the appropriate punishment is relative to the society and time in which it is imposed. Therefore, the appropriate degree of punishment can only be determined by comparing the offense and the offender to similar cases and criminals.

With non-capital punishments, a more severe punishment for one offender than another is commonly accepted, even in similar circumstances. The infinite gradations of guilt and the limits of human capacity to judge cause us to overlook differential treatment of apparently similar offenders. As the relative severity of punishment increases, however, it becomes more difficult to overlook sentencing disparities. Death is the most severe of all punishments. The Supreme Court has acknowledged that there is a profound and immeasurable gap between a death

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70 Eddings v. Oklahoma, 455 U.S. 104 (1982); *Roberts*, 428 U.S. at 333-34 (plurality opinion); Lockett v. Ohio, 438 U.S. 586, 604-05 (1978) (plurality opinion); *Woodson*, 428 U.S. at 303-05 (plurality opinion).

71 Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978) (plurality opinion).

72 *See supra* note 67 and accompanying text.

73 *Id.*

74 *Id.*

75 *Id.*

76 Woodson v. North Carolina, 428 U.S. 280, 301 (1976) (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion).

sentence and a life sentence.[77] Fairness to any capitally sentenced felon, therefore, requires an assessment of the relative propriety of the sentence. The only way to determine whether a death sentence is fair for a given offense and a given offender is to compare his offense and his culpability with that of others.

In addition to proportionality review, the eighth amendment requires vigorous appellate review to ensure that the decisions of individual juries have reflected societal norms. In accordance with this principle, the Court in both *Woodson* and *Roberts* struck down a scheme which required the death sentence for all first degree murders. The Court also held that such a mandatory sentence departed from contemporary standards of decency.[78] The Court also found mandatory sentencing schemes unconstitutional because they do not allow the sentencer to express his or her actual sentiment, and therefore do not allow sentencing to reflect contemporary standards.[79] Because values continually change and because so many factors are significant in decisions regarding the appropriateness of the death penalty for an individual, neither courts nor legislatures are capable of detailing in advance exactly who should die or why.[80] Only factfinders[81] can, for they alone

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[77] "[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. . . . [T]here is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." *Woodson*, 428 U.S. at 305; *see also Lockett*, 438 U.S. at 604. In Rummel v. Estelle, 445 U.S. 263, 272 (1980), the Court noted that challenges to the excessiveness of particular sentences have rarely been successful in non-capital cases.

[78] *Woodson*, 428 U.S. at 288, 301; Roberts v. Louisiana, 428 U.S. 325, 336 (1976).

[79] Still further evidence of the incompatibility of mandatory death penalties with contemporary values is provided by the results of jury sentencing under discretionary statutes. . . . The actions of sentencing juries suggest that under contemporary standards of decency death is viewed as an inappropriate punishment for a substantial portion of convicted first degree murderers.

Woodson, 428 U.S. at 295-96; *see also Roberts*, 428 U.S. at 333-35.

[80] Legislatures, as representatives of the people, may establish factors they feel should trigger consideration of a death sentence for an offender. Courts may discern from the infrequency of death sentences for particular offenses or offenders that the community does not feel that death is an appropriate penalty in such cases. Nonetheless, neither legislatures nor courts can keep pace with the changing pulse of the community's sense of decency.

In McGautha v. California, 402 U.S. 183 (1971), the Court explicitly recognized that neither legislatures nor courts were capable of pre-defining who should live and who should die:

> Those who have come to grips with the hard task of actually attempting to draft means of channeling capital sentencing discretion have confirmed the lesson taught by the history recounted above. To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability.

Id. at 204.

> For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete. The infinite variety of cases and facets to each case would make general

confront and weigh the specific aggravating and mitigating factors in particular cases.

The Court and its members have repeatedly recognized the crucial role that capital case juries play in determining contemporary standards of decency. In *Witherspoon v. Illinois*,[82] the Court stated that jury sentencing was important in capital cases in order "to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'"[83] The *Gregg* plurality stated that the "jury . . . is a significant and reliable objective index of contemporary values because it is so directly involved [in the imposition of the death sentence]."[84] In *Coker v. Georgia*,[85] the plurality said, "it is thus important to look to the sentencing decisions that juries have made in the course of assessing whether capital punishment is an appropriate penalty for the crime being tried."[86]

Still, a single jury may not accurately reflect dominant community sentiment. Jury venires are designed to be cross-sectionally representative of the community. Nonetheless, voir dire and peremptory and cause challenges can skew a jury's cross-sectional character.[87] In addition, even a jury which is cross-sectionally representative of the local population is not necessarily attitudinally representative of the population of a state taken as a whole. Therefore, while the jury role is essential to ensure expression of present and developing community sentiment, there is a risk that individual juries may not reflect that sentiment.[88]

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standards either meaningless "boiler-plate" or a statement of the obvious that no jury would need.

Id. at 208; *see also* Gregg v. Georgia, 428 U.S. 153, 181-82 (1976); *Woodson*, 428 U.S. at 291; Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968).

81 Some states, such as Florida, mandate advisory juries on sentencing and require judicial imposition of capital sentences. Proffitt v. Florida, 428 U.S. 242, 249 (1976); *see* Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1, 101-19 app. (1980)(state by state listing of whether judge or jury sentences).

82 391 U.S. 510 (1968).

83 *Id.* at 519 n.15 (quoting Trop v. Dulles, 356 U.S. 86, 101 (1958) (plurality opinion)).

84 *Gregg*, 428 U.S. at 181.

85 433 U.S. 584 (1977).

86 *Id.* at 596.

87 "Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge." Williams v. Florida, 399 U.S. 78, 102 (1970).

88 The same is true when the judge acts as sole factfinder. In the leading study of the American jury, jurors were found to disagree with judges in 24.6% of a sample of 3576 criminal trials. KALVEN AND ZEISEL, THE AMERICAN JURY 56 (1966).

2. *Only judicial review can circumscribe potential arbitrariness in current capital sentencing*

The second and third principles of capital sentencing law are that death sentences must be imposed for principled, objective reasons and that capital sentencing systems, as a whole, must minimize the risk of arbitrary sentencing. If a given system produces arbitrary results, and a procedural mechanism exists that can correct those arbitrary results, the procedural mechanism is constitutionally required.[89]

The fourth and fifth principles of capital sentencing law call for individualized sentencing and unlimited sentencer consideration of mitigating evidence. As explained below, unless checked in some way, sentencer discretion to accord mercy may also increase the risk of arbitrariness in capital sentencing.

Lockett v. Ohio[90] and *Eddings v. Oklahoma*[91] extended *Woodson*'s individualized sentencing requirement. In *Lockett*, Ohio's capital sentencing statute required the sentencing judge to impose a death penalty if one of seven specified aggravating circumstances had been found.[92] If, however, the judge determined that one of three statutory mitigating circumstances had been established, he had discretion not to impose a death sentence.[93] Ohio's statute prevented the sentencer from giving *independent* weight to mitigating factors other than the statutory factors. Ohio's system limited not only the sentencer's discretion to impose a death sentence, as *Furman* and *Gregg* required, but also the sentencer's discretion to impose a life sentence. This latter restriction was held unconstitutional. As stated by the plurality,

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. . . . [A] statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the

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89 The greater the possibilities of error at the trial level, the greater the capacity necessary for the appellate process to detect and correct error.

90 438 U.S. 586 (1978).

91 455 U.S. 104 (1982).

92 *Lockett*, 438 U.S. at 611-12 app.

93 *Id.* at 593-94. The statutory mitigating factors were: 1) that the victim induced or facilitated the offense; 2) that the defendant was under duress, coercion, or strong provocation; 3) that the offense was a product of defendant's psychosis or mental deficiency short of insanity. *Id.* at 607. Therefore, while the sentencing judge could consider any mitigating aspect of the offense or the offender, a death sentence was nonetheless required unless the mitigating evidence established one of the three factors. *Id.* at 608. For example, if a defendant had been an aider and abettor in a felony-robbery that resulted in a homicide, a death sentence would be imposed unless it could be shown, for example, that the defendant aided and abetted because of duress.

> defendent's character or record and the circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.[94]

Although a decision to impose death must be based on rational statutory aggravating circumstances, constitutional respect for the individual requires individualized sentencing and full consideration of any mitigating factor.[95] The Constitution thus requires guided sentencer discretion to impose death and unlimited discretion to grant mercy and return a life sentence.[96]

Requiring specific aggravating factors while leaving mitigating factors open-ended creates an asymmetry in capital sentencing law and appears to contradict *Furman*'s nonarbitrariness principle. *Furman* and the *Gregg* series of cases held that a capital sentencing system which permitted *unguided* sentencer discretion was arbitrary and therefore unconstitutional. *Lockett*, by allowing the sentencer to accord mitigating evidence any weight it desired, effectively held that unguided sentencer discretion was constitutionally required. If unguided discretion regarding aggravating circumstances produces arbitrary results, unguided discretion regarding mitigating circumstances will produce equally arbitrary results. *Lockett* has apparently returned the law to the state in which it was before *Furman*, and it appears that, once again, we may expect arbitrary capital sentencing.[97]

Equivalently circumstanced capital defendants should be punished

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[94] *Id.* at 604-05 (emphasis in original).

[95] Woodson v. North Cariolina, 428 U.S. 280, 304 (1976); Roberts v. Louisiana, 428 U.S. 325, 333-34 (1976).

[96] In *Gregg*, the Court recognized that sentencer mercy did not violate the Constitution. *Gregg*, 428 U.S. at 199, 203. *Lockett* allows a capital defendant to introduce all the migitating evidence he or she may have, and permits the sentencer to accord such evidence any weight he or she wishes. *Lockett* thus removes legal restrictions on the evidence that a sentencer may consider in determining whether to return a life sentence.

[97] Indeed, this was the view taken by Justices White and Rehnquist in *Lockett*:

> The Court has now completed its about-face since *Furman v. Georgia*. . . . By requiring as a matter of constitutional law that sentencing authorities be permitted to consider and in their discretion to act upon any and all mitigating circumstances the Court permits them to refuse to impose the death penalty no matter what the circumstances of the crime. This invites a return to the *pre-Furman* days when the death penalty was generally reserved for those very few for whom society has least consideration.

Lockett, 438 U.S. at 623 (White, J., concurring in part).

> If a defendant as a matter of constitutional law is to be permitted to offer as evidence in the sentencing hearing any fact, however bizarre, which he wishes, even though the most sympathetically disposed trial judge could conceive no basis upon which the jury might take it into account in imposing a sentence, the new constitutional doctrine will not eliminate arbitrariness or freakishness in the imposition of sentences, but will codify and instutitionalize it. By encouraging defendants in capital cases, and presumably sentencing judges and juries, to take into consideration anything under the sun as a 'mitigating circumstance,' it will not guide sentencing discretion but will totally unleash it.

Id. at 631 (Rehnquist, J., dissenting); *see also* Radin, *Cruel Punishment and Respect for Persons:*

equally. If they are not, and the life sentence is not an isolated grant of mercy, the death sentence is arbitrarily imposed and is therefore unconstitutional.[98] The amount of capital sentencer discretion required under *Lockett*, however, is so great that sentencers may easily treat equivalently circumstanced capital defendants unequally. When dissimilar sentencing of similar defendants is frequent, a capital system is constitutuionally arbitrary.[99] Since the Constitution requires that a sentencer have

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Super Due Process for Death, 53 S. CAL. L. REV. 1143, 1153-55 (1980); Gillers, *supra* note 81, at 26-31. For a comprehensive treatment of *Lockett*, see Hertz & Weisberg, *supra* note 66.

It may be argued that *Lockett* does not reintroduce arbitrariness into capital sentencing. As long as death sentences are imposed only for principled reasons, the argument runs, they will not be arbitrary. Nonetheless, if, as *Lockett* permits, death sentences are not imposed even when aggravating circumstances are present, it may become impossible to distinguish cases in which death is imposed from cases in which it is not. Intercase arbitrariness results when defendants who should be treated equally are not so treated.

There is a radical inconsistency between the *Furman* and *Gregg* line of cases and *Lockett* if a sentencer may impose a life sentence, rather than a death sentence, for *any* reason. May a sentencer, for example, return a life sentence based on the race of the capital defendant or victim, or based on the locale in which the crime was committed? Such reasons are unprincipled and would be held unconsitutional grounds for the imposition of a death sentence. In addition, such sentencing rationales also should be unconstitutional as a basis for mercy. Of course, the capital defendant receiving a life sentence in mercy has no such complaint. A defendant capitally sentenced under similar circumstances, however, has a claim of unequal treatment based on a denial of the constitutionally guaranteed equal protection.

There are at least two definitions of the word "arbitrary" as used in constitutional law. It can mean either "without any reason" or "without any legitimate reason." For example, governmental decisions based on racial, religious or ethnic discrimination are considered arbitrary in constitutional law. They are "arbitrary" because they are based on illegal considerations and not because they are "without reason."

Lockett, if read consistently with *Furman* and *Gregg*, assumes that a sentencer's unguided discretionary decision to impose a life sentence will be based either on *legitimate* mitigating factors or will be "without reason," or an act of grace. *Lockett* does not contemplate sentencer mercy based on unlawful or discriminatory reasons. However, because a sentencer is not required to justify a life sentence as it must justify a death sentence, *Lockett* allows constitutionally objectionable, arbitrary sentencing. Unless there is some mechanism to offset this possibility, *Lockett* generates, or at least reopens, the equal treatment problems addressed by *Furman*. Since the Constitution requires that a sentencer have unguided discretion to give a life sentence, rigorous judicial review, including proportionality review, is necessary to check the arbitrariness this discretion may produce.

[98] Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the penalty, the *isolated* decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice.

Gregg, 428 U.S. at 203 (emphasis added).

[99] The following example illustrates the point. Assume there are 100 robbery-murder capital eligible defendants with essentially equivalent overall culpability. Of these, 90 receive a death penalty after aggravating factors are found by the sentencer. The remaining 10 get a life sentence for no apparent reason, which may be interpreted as a grant of mercy. In this situation, no unconstitutional arbitrariness is shown because the typical punishment for the offense is death.

If the proportions are reversed, however, the death sentences are constitutionally arbitrary. It is the frequency of grants of mercy (or life sentences) which is relevant to the issue of arbitrariness, and not merely the existence of such grants. As knowledge of the frequency of

unguided discretion to give a life sentence, the only corrective device to check the possible unequal treatment this discretion may produce is rigorous proportionality review. Only proportionality review reveals whether a given death sentence is consistent with a principled pattern of capital sentencing in similar cases.

3. Equal protection requires comparative review of capital sentences

According to equal protection doctrine, if a state classification impinges on a fundamental right, it must be justified by a compelling state interest.[100] If the state cannot demonstrate such interest, the classification will fall.[101] Although the Court has not so held, it is axiomatic that no right is more fundamental than the right to life.[102] A capital sentencing system which results in differential treatment of similarly situated capital felons has effectively classified similar felons differently with respect to their rights to life. Consequently, an equal protection analysis of this problem is appropriate.

The Court has held that the penological interests of deterrence and retribution justify the principled application of the death penalty.[103] These may seem to be compelling state interests, justifying differential state treatment of capital felons. But neither deterrence nor retribution can justify a capital sentencing system which results in different sentences for similarly situated capital defendants. Nonetheless, because individualized sentencing is constitutionally required, it may be argued that differential treatment of similar capital defendants is the inevitable result of the system. Given constitutional and human constraints, there is no way to perfect the system. It could further be argued that the fact that some defendants are underpenalized does not demonstrate that similar capital defendants who also deserve to die should not receive the death penalty or that the state has discriminated against the latter if they do. Sentencer mercy, as the argument runs, does not offend the Constitution.[104]

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life sentences for similar offenses and offenders is critical, comparative review of cases is essential.

[100] Dunn v. Blumstein, 405 U.S. 330 (1972)(rights of voting and travel); Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Williams v. Rhodes, 393 U.S. 23 (1968) (rights of association and voting); *cf.* Douglas v. California, 372 U.S. 353 (1963) (right to counsel); Griffin v. Illinois, 351 U.S. 12 (1956) (right to appellate review).

[101] *See* cases cited *supra* note 100.

[102] Although not stated in these terms, this is the import of the major death penalty decisions: Enmund v. Florida, 102 S. Ct. 3368 (1982); Lockett v. Ohio, 438 U.S. 586 (1978); Coker v. Georgia, 433 U.S. 584 (1977); Woodson v. North Carolina, 428 U.S. 280 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); Furman v. Georgia, 408 U.S. 238 (1972).

[103] *Gregg*, 428 U.S. at 183-87 (plurality opinion).

[104] *Id.* at 203 (plurality opinion).

These arguments are correct when applied to isolated cases, for the Constitution requires only that the decision to impose the death penalty be principled.[105] There is a tipping point, however, at which these arguments lose their validity. Where capital sentences cannot be rationally distinguished from a significant number of cases where the result was a life sentence, more is present than the irremediable failure of an imperfect human system. When this occurs, the capital sentencing system has become constitutionally arbitrary. Further, where mercy becomes the norm for specific crimes and defendants, there is no justification for an isolated capital sentence. At this point, which is determinable only by comparative review, the state's interests in executing the capitally sentenced criminal fail. As his fundamental right to life would then be taken without compelling justification, his execution would violate the equal protection clause of the Constitution.

Even where a state has a compelling interest to justify infringing on a fundamental right, it must still show that the means it has chosen to effect its interest is necessary[106] and is the least restrictive alternative. Therefore, a state must adopt means which minimize the possibility that defendants will be wrongly deprived of their right to life. Since the basic issue is whether a state's capital sentencing system differentially classifies similar defendants, a state must devise some means of ensuring proportional sentencing. Comparative review, since it is explicitly directed to this issue, is the least restrictive means of making this determination.

In some states, there is another kind of sentencing classification which denies capital defendants equal protection. California, for example, has a system of mandatory comparative review of non-capital felony sentences to ensure that similarly situated defendants are sentenced alike.[107] California, however, does not provide an equivalent comparative review for capital felons. In effect, it classifies felons on the basis of capital or non-capital conviction, according greater procedural protections to non-capital felons than to capital felons.

The disparity in treatment may be even greater than this statement suggests. In California, most non-capital felons are subject to determinate sentences which mandate a sentence within a narrow range of years.[108] When a state provides disparate sentence review to such felons,

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105 *Id.*

106 *See supra* note 100.

107 CAL. PEN. CODE § 1170(f) (supp. 1982); *see infra* notes 188-91 and accompanying text.

108 For most offenses, the California Penal Code prescribes three terms, a lower, a middle, and an upper term, depending, respectively, on whether the crime was mitigated, average, or aggravated. For example, the punishment for rape is three, six, or eight years. CAL. PEN. CODE § 264 (West Supp. 1983). Robbery is punishable by a term of two, three, or five years. CAL. PEN. CODE § 213 (West Supp. 1983). For any felony without a prescribed punishment,

it protects a liberty interest amounting to a few years. The protection of a small liberty does not, in and of itself, violate the Constitution. Nonetheless, where a state does not provide an equivalent protection to capital felons, it prefers a non-capital felon's liberty interest of a few years to a capital felon's life interest. There is neither a compelling nor even a rational reason for a state to do this.[109]

In protecting the reliability and fairness of non-capital sentences while failing to do so for capital sentences, a state reverses constitutional values. Because of their irrevocability and severity, the Constitution requires greater reliability and fairness for capital sentences than for non-capital sentences.[110] Consequently, as a matter of equal protection, any state providing for comparative review of non-capital sentences must provide such review for capital sentences.

4. United States Supreme Court practice indicates the effectiveness of both rigorous appellate and proportionality review

The Supreme Court, when called upon to review capital sentences, has engaged in both rigorous appellate review and proportionality review. This militates strongly in favor of adoption of the two types of review by the states. A good example of this is *Godfrey v. Georgia*.[111] Godfrey and his wife had a heated argument. She left home and filed for a divorce. Godfrey made reconciliation efforts, but his wife, apparently supported by her mother, refused. After a telephone argument during which his wife reasserted her desire for a divorce, Godfrey took his shotgun and walked to his mother-in-law's trailer, where his wife was staying. He shot both his wife and mother-in-law, killing them instantly.

The jury sentenced Godfrey to death for both killings, finding the statutory aggravating circumstance that each killing "was outrageously or wantonly vile, horrible and inhuman."[112] The Georgia Supreme Court had previously interpreted these words to require a finding that the murderer had a depraved mind which led him to torture or seriously

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the punishment is either 16 months, two years, or three years in state prison. CAL. PEN. CODE § 18 (West Supp. 1983).

109 A state might argue that its procedures for determining whether the death penalty should be applied are designed to prevent error at least as much as disparate sentence review. This argument would be more convincing where non-capital felons received indeterminate sentences. Where the sentence is mandatory within a range, however, and a higher than average sentence must be specifically justified, the argument fails. Sentencing in the latter system is subject to narrow constraints at least equal to those called for in capital sentencing.

110 *Woodson*, 428 U.S. at 305.

111 446 U.S. 420 (1980).

112 *Id.* at 426.

physically abuse a victim before death.[113] Even though Godfrey's crimes did not involve torture or physical abuse, the Georgia Supreme Court affirmed his death sentences.[114]

The United States Supreme Court reversed, finding the aggravating circumstance vague as applied.[115] The Court implicitly criticized the Georgia Supreme Court for failing to construe the "outrageously vile" aggravating circumstance narrowly and consistently enough to give clear guidance to juries and to provide a basis for making "rationally reviewable the process of imposing a sentence of death."[116] This imports a strong obligation on the part of reviewing courts to do whatever they can to make death sentencing procedures and sentences strictly rational, objective and reviewable.

The Court also suggested that the Georgia Supreme Court had not truly reviewed the evidence to determine whether it supported a finding of an aggravating circumstance.[117] It thus failed in its obligation to conduct an independent review of the evidence. The *Godfrey* plurality also suggested that the Georgia court had not conducted a genuine proportionality review.[118] Had it done so, it would have found that defendants committing crimes similar to Godfrey's had not been sentenced to death. The *Godfrey* plurality conducted a generalized comparative review by finding that there was no principled way to distinguish Godfrey's case from the many murder cases in which no death penalty was imposed.[119]

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113 *Id.* at 431-32.

114 243 Ga. 302, 253 S.E.2d 710 (1979).

115 *Id.* at 428-29. "There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'" *Id.*

116 *Id.* at 428.

117 *Id.* at 432.

118 *Id.* at 431-33.

119 *Id.* at 433. In assessing the constitutionality of the death penalty in various cases, the Court has characteristically conducted a comparative review to determine whether the death sentence comports with contemporary values. In Coker v. Georgia, 433 U.S. 584 (1977), in which the issue was whether a death sentence was an excessive punishment for the rape of an adult woman, the court canvassed state capital statutes and jury capital sentences. That evidence, it concluded, weighed "heavily on the side of rejecting capital punishment as a suitable penalty for raping an adult woman." *Id.* at 596.

The Court conducted a similar comparative review in Enmund v. Florida, 102 S. Ct. 3368 (1982), in which it concluded that death was an excessive sentence for an aider and abettor in a felony-murder when the defendant was neither present at the scene nor shown to have an intent to kill. Because it so clearly demonstrates the Court's approach, its treatment of jury sentencing as evidence supporting its conclusion is worth quoting in full:

> The evidence is overwhelming that American juries have repudiated imposition of the death penalty for crimes such as petitioner's. First, according to the petitioner, a search of all reported appellate court decisions since 1954 in cases where a defendant was executed for homicide shows that of the 362 executions, in 339 the person executed person-

Godfrey implies that rigorous judicial review, including proportionality review, is required to ensure the constitutional imposition of death sentences. Capital sentencing schemes must provide a "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."[120] Without stringent appellate review and comparative proportionality review, it is not possible to determine whether a death sentence imposed in a particular case is in fact the usual punishment imposed throughout the jurisdiction for offenses of similar seriousness committed by comparable defendants.[121]

5. The experience and practice of state supreme courts show that appellate and proportionality review can and do detect arbitrary death sentences

The guided discretion statutes which the Supreme Court held constitutional on their face were relatively new statutes. Consequently, in considering the capital sentencing systems in *Gregg*, *Proffitt*, and *Jurek*, the Court had little information regarding the application of the statutes at either the trial or appellate level. The Court said only that the statutes appeared to provide adequate safeguards against arbitrariness.

These decisions, however, sent a clear message to the states that the

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ally committed a homicidal assault. In 2 cases the person executed had another person commit the homicide for him, and in 16 cases the facts were not reported in sufficient detail to determine whether the person executed committed the homicide. The survey revealed only 6 cases out of 362 where a nontriggerman felony murderer was executed. . . .

That juries have rejected the death penalty in cases such as this one where the defendant did not commit the homicide, was not present when the killing took place, and did not participate in a plot or scheme to murder is also shown by petitioner's survey of the nation's death-row population. As of October 1, 1981, there were 796 inmates under sentences of death for homicide. Of the 739 for whom sufficient data are available, only 41 did not participate in the fatal assault on the victim. Of the 40 among the 41 for whom sufficient information was available, only 16 were not physically present when the fatal assault was committed. These 16 prisoners included only 3, including petitioner, who were sentenced to die absent a finding that they hired or solicited someone else to kill the victim or participated in a scheme designed to kill the victim. The figures for Florida are similar. Forty-five felony murderers are currently on death row. The Florida Supreme Court either found or affirmed a trial court or jury finding that the defendant intended life to be taken in 36 cases. In eight cases the courts made no finding with respect to intent, but the defendant was the triggerman in each case. In only one case—Enmund's—there was no finding of an intent to kill and the defendant was not the triggerman.

Id. at 3375-76 (footnotes omitted).

120 Gregg v. Georgia, 428 U.S. 153, 188 (1976) (plurality opinion) (quoting Furman v. Georgia, 408 U.S. 238, 313 (1972)(White, J., concurring)).

121 At least 31 of the 33 states which allow the death penalty call for proportionality review. This may be good evidence that such review is deemed an essential safeguard against arbitrary death sentencing. *See supra* note 61. Since many of the states may have adopted proportionality review in response to the *Gregg* series of decisions, the adoption may reflect the considered judgment of states regarding safeguards against arbitrariness. Many may have assumed that proportionality review was constitutionally required. In any event, virtually every death penalty state interpreted the *Gregg* series of cases to require proportionality review.

approved systems should be applied to reduce the risk of arbitrariness. The procedures necessary to accomplish that goal were not at issue before the Court. Without accumulated experience as to how state systems were actually applied, the Court could not effectively mandate specific forms of capital judicial review. Now, however, there has been considerable experience with the applicability of guided discretion systems and with the character of capital appellate review, and the Court is now in a position to assess the constitutionality of specific forms of judicial review. The sentence reversals of state courts, detecting capital sentencing arbitrariness, are good evidence of continuing capital sentencing impropriety and the capacity of appellate review to correct it.

States, by statute, and state supreme courts have developed the following appellate review practices to reduce capital sentencing arbitrariness in guided discretion systems:

a. *Statewide appellate review*. To ensure both the development and application of consistent procedural and substantive capital sentencing rules, a single court with statewide authority must review all capital sentences with a view toward applying uniform rules.[122] Comparative review of capital cases is also implicit in the idea of mandatory single court review. When a single court reviews all capital sentences, it accumulates a view of what is occurring under a state's capital sentencing system and may detect and correct deviant sentencing.

b. *Review for procedural regularity*. Perhaps a majority of the death sentences that are reversed are overturned because of a procedural irregularity.[123] Given that a life is at stake in a capital case, reviewing courts are understandably more willing to reverse a capital case for procedural error than other criminal cases. A liberal policy of procedural reversal is required to ensure sentencing regularity and consistency.[124]

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122 The Supreme Court has indicated that this is an important protection. Gregg v. Georgia, 428 U.S. 153, 206-07 (1976); Proffitt v. Florida, 428 U.S. 242, 250-51 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976).

123 Although the conclusion is intuitive, it is supported by empirical evidence. For example, of the 23 death sentence appeals decided, the California Supreme Court has upheld only two. All of the reversals have been for various procedural errors, but none have been based on disproportionality or excessiveness.

The scholarly literature leaves the same impression:

> [T]he Georgia Supreme Court has been quite willing to invalidate death sentences for procedural errors in the sentencing process. This practice suggests a sensitivity to those procedural problems that affect the proper application of the death penalty. A comparison of these actions with the low rate of substantive reversals suggests another possibility: the court is using procedural defects to justify the reversal of death sentences that it finds offensive for unarticulated but more "substantive" reasons.

Dix, *supra* note 64, at 118; *see also* Baldus, Pulaski & Woodworth, *Proportionality Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661 (1983) [hereinafter cited as Baldus].

124 There are, however, procedural means of ensuring rational capital sentencing and ra-

c. *Waiver of ordinary rules of appellate review*. Usually, appellate courts reviewing criminal appeals exclude consideration of errors not noted at trial but raised on appeal.[125] Because of the gravity and irrevocability of a death sentence, even a small risk of error is intolerable.[126] Consequently, in capital appeals, some reviewing courts waive rules precluding review of such errors.[127]

d. *Narrowing constructions*. Only an appellate court of statewide jurisdiction can provide the necessary narrowing of vague statutory terms defining aggravating circumstances. For example, some states provide that a death sentence may be imposed where a killing was "heinous, atrocious, and cruel."[128] If left to sentencer interpretation without further definition, there is a strong likelihood that different sentencers will ascribe greatly varying meanings to such terms, leading to arbitrary and inconsistent results. The phrase needs a narrowing construction, which only an appellate court can satisfactorily supply, to ensure at least relatively uniform application throughout the jurisdiction.

There is a significant relationship between the appellate functions of narrowly defining broad terms, conducting proportionality review, and determining contemporary mores regarding the imposition of the

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tional capital review. For example, courts have not demanded that sentencers be guided in considering and weighing aggravating and mitigating circumstances. Sentencers lack structure with which to examine such factors. In addition, in the absence of a statute, courts have not required sentencers to state their reasons for the sentence imposed. This may result in less responsible judgments.

125 For example, defense counsel's failure to object to prosecutorial or judicial misconduct is usually deemed a waiver of the error. *See, e.g.*, B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE § 747-49 (1978). For the general rule respecting appeals, see 5 C.J.S. *Appeal & Error* § 1220 (1958).

126 *See supra* notes 20-30, 90-94 and accompanying text.

127 Death is clearly a different kind of punishment from any other that may be imposed, and [Idaho Code] § 19-2827 mandates that we examine not only the sentence but the procedure followed in imposing that sentence regardless of whether an appeal is even taken. This indicates to us that we may not ignore unchallenged errors. Moreover, the gravity of a sentence of death and the infrequency with which it is imposed outweighs any rationale that might be proposed to justify refusal to consider errors not objected to below.

State v. Osborn, 102 Idaho 405, 410-11, 631 P.2d 187, 192-93 (1981). Some other jurisdictions follow similar rules to ensure comprehensive review of death sentences. *See, e.g.*, State v. Brown, 607 P.2d 261, 265 (Utah 1980); Commonwealth v. McKenna, 476 Pa. 428, 438, 383 A.2d 174, 179-80 (1978); State v. Ceja, 115 Ariz. 413, 415, 565 P.2d 1274, 1276, *cert. denied*, 434 U.S. 975 (1977); State v. Martin, 423 Iowa 1323, 1327, 55 N.W.2d 258, 260-61 (1952).

128 *See* People v. Superior Court, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 360 (1982) (California statute permitting the death penalty for murders "especially heinous, atrocious, or cruel, manifesting exceptional depravity," declared unconstitutionally vague); *cf.* Godfrey v. Georgia, 446 U.S. 420 (1980) (plurality opinion) (plurality declared that a Georgia statute permitting imposition of death penalty for murder "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim," was interpreted in a broad an vague fashion by the Georgia Supreme Court, thus violating the Constitution).

death penalty. By employing proportionality review, a court can examine a community's application of a statutory term to those fact situations which lie at the core of its application. When such applications are neither excessive nor arbitrary, they are a guide to both community mores and the appropriate meaning of a vague term.[129]

e. *Legal rulings on questionable applications of existing law*. Even a narrowly defined statutory aggravating circumstance may result in arbitrariness if its application in a particular case is unwarranted. For example, a jury might convict and sentence a defendant to death for an unintentional killing during the course of a felony.[130] In a non-capital case, the felony-murder rule would permit a conviction. Nonetheless, to impose a death sentence for such a killing is excessive.[131] Thus, the ordinary rules of substantive criminal law may not adequately protect the constitutional proscription of arbitrary capital sentences. Critical judicial scrutiny is necessary.

f. *Review for passion, prejudice, or other arbitrary factor*. In a number of states, reviewing courts are statutorily required to examine whether death sentences have been imposed because of passion, prejudice, or other arbitrary factors.[132] While such factors would probably be noticed by comparing a case with others, a single record might also reveal the operation of arbitrary factors.

Such focused review might overturn death sentences where a sentencer was unduly influenced by the bloodiness of a crime as opposed to the depravity of the criminal. Suppose, for example, that defendant killed his victim by shotgun blast and that the victim died instantly. Compared to an instantaneous killing by poisoning or a single blow to the temple, a shotgun killing is exceptionally gory, yet otherwise the killings are equivalent.[133] A jury could thus be prejudiced by the manner of killing, lacking an objective appraisal of the killing itself.

If the legislature has provided that only specified statutory aggravating circumstances will make an offense death-eligible, a sentencer's consideration of non-statutory factors is improper.[134] A reviewing court therefore must determine whether a sentencer was swayed by improper

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129 *See Godfrey*, 446 U.S. at 429-32.

130 *See* Enmund v. Florida, 102 S. Ct. 3368 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

131 *Enmund*, 102 S. Ct. at 3378.

132 *See, e.g.*, GA. CODE ANN. § 27-2537 (Supp. 1975); MISS. CODE ANN. §§ 99-19-101(5)(h)(Supp. 1982).

133 *See Godfrey*, 446 U.S. at 433; Hance v. State, 245 Ga. 856, 268 S.E.2d 339 (1980); *cf.* Proffitt v. Wainwright, 685 F.2d 1227, 1263-64 (5th Cir. 1982) (discussing the "heinous, atrocious, and cruel" aggravating factor); State v. Oliver, 302 N.C. 28, 274 S.E.2d 183 (1981); State v. Goodman, 298 N.C. 1, 257 S.E.2d 569 (1979).

134 Miller v. State, 373 So. 2d 882 (Fla. 1979); Elledge v. State, 346 So. 2d 998 (Fla. 1977); Purdy v. State, 343 So. 2d 4 (Fla. 1977).

factors. For example, in a state in which a defendant's future danger to society is not an aggravating factor, a prosecutor may interject an improper consideration by suggesting that the defendant could be released if not sentenced to death.[135] Jury fear of defendant's eventual release might impel a death sentence. Similarly, the jury should not consider the possibility that a sentence may be reviewed by a higher court and corrected if wrong.[136]

g. *Independent review of the aggravating circumstances evidence*. Some reviewing courts, rather than relying on trial court findings, conduct an independent evaluation of the record to determine whether there is sufficient support for a finding of an aggravating circumstance.[137] In ordinary criminal appeals, a jury's assessment of facts will be upheld as long as the jury could reasonably have found facts as it did.[138] Independent review of the evidence means that the reviewing court, rather than deferring to the jury verdict as conclusively settling the facts, makes its own determination of the strength of factual support for the finding. This double check on the quality and weight of evidence further ensures principled capital sentencing.

h. *Independent weighing of aggravating and mitigating factors*. Following an independent assessment of the evidence, a reviewing court may determine whether mitigating factors are sufficient to require leniency. If so, the court will conclude that, as a matter of law, no reasonable jury could have returned a death sentence.[139]

i. *Reviewing a death sentence to determine whether it makes a measurable contribution to deterrence or retribution*. Excessive sentences may be detected through proportionality review or individual case review.[140] The review may take the form of questioning the purpose that the death sentence would have in a particular case. Suppose, for example, that a capital defendant presents evidence of substantial mental impairment. Even if the evidence serves neither as a defense to the crime nor as a mitigating circumstance, a reviewing court could note the mental impairment and conclude that defendant's execution would not serve any legitimate pur-

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135 State v. Lindsey, 404 So. 2d 466 (La. 1981).

136 Hawes v. State, 240 Ga. 327, 240 S.E.2d 833 (1977); Fleming v. State, 240 Ga. 142, 240 S.E.2d 37 (1977); Prevatte v. State, 233 Ga. 929, 214 S.E.2d 365 (1975); State v. Jones, 296 N.C. 495, 251 S.E.2d 425 (1979); State v. Gilbert, 273 S.C. 690, 258 S.E.2d 890 (1979).

137 *See, e.g.*, State v. Gretzler, 135 Ariz. 42, 659 P.2d 1, *cert. denied*, 103 S. Ct. 2444 (1983); Hobbs v. Arkansas, 277 Ark. 271, 641 S.W.2d 9 (1982); Pierre v. Morris, 607 P.2d 812 (Utah 1980).

138 *See, e.g.*, B. WITKIN, CALIFORNIA CRIMINAL PROCEDURE §§ 683, 685 (Supp. 1978).

139 *See supra* note 137 and *infra* note 141. The United States Supreme Court has noted that determination of the acceptability of a death penalty is ultimately a judicial function. *Enmund*, 102 S. Ct. at 3376; Coker v. Georgia, 433 U.S. 584, 597 (1977).

140 *See supra* notes 45-47 and accompanying text and *infra* notes 142-46 and accompanying text.

pose of punishment: persons with his degree of incapacity could not be deterred by execution, and retribution against someone who may not understand his own offense would be unwarranted.[141]

j. *Proportionality reviews*. While proportionality review is a separate technique developed to discover both excessive and arbitrary sentencing, it also facilitates the other forms of appellate capital sentence review. Indeed, it is sometimes the interplay between proportionality review and other appellate review techniques that enables a reviewing court to discover improper capital sentencing. A comparison of the case under review with other cases is always a useful exercise since it is the only way to ensure consistency among cases.

There are three kinds of proportionality review: offense, intracase, and intercase proportionality review.

1. *Offense proportionality review*. Appellate courts have an obligation to determine whether a death sentence is excessive for a given crime. For example, some state death penalty statutes permit the imposition of the death penalty for non-homicidal offenses such as rape or armed robbery.[142] Such statutes exceed contemporary standards of decency regarding the imposition of death sentences,[143] and only appellate review can control their application.

2. *Intracase proportionality review*. In some capital cases, multiple defendants are charged with the same crimes based on the same evidence. A prosecutor may then permit one or more defendants to plead guilty to a non-capital charge while refusing the same bargain to a co-defendant. If the non-pleading defendant is convicted and receives a death sentence, a serious question of equal treatment may arise. When the evidence shows that the pleading defendants are equally or more culpable than the defendant going to capital trial, the disparate treatment is indefensible, unless leniency is legally warranted in exchange for a plea.[144]

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141 While this is a case-by-case determination, some courts have established general rules regarding the significance of particular mitigating circumstances. For example, a defendant's youth or mental impairment are particularly important mitigating circumstances. Some courts have adopted a rebuttable presumption in favor of a life sentence for capitally convicted juveniles and the mentally impaired. *See* State v. Valencia, 132 Ariz. 248, 645 P.2d 239 (1982); State v. Brookover, 124 Ariz. 38, 601 P.2d 1322 (1979); Jones v. State, 332 So. 2d 615 (Fla. 1976).

142 *See, e.g.*, *Gregg*, 428 U.S. at 165 n.9.

143 *See, e.g.*, *Enmund*, 102 S. Ct. at 3376; *Coker*, 433 U.S. at 599.

144 Fairness in sentencing between capital defendants who receive a capital sentence and those who plea bargain and receive a lesser sentence is a major issue in capital sentencing law.

In Corbitt v. New Jersey, 439 U.S. 212 (1978), a non-capital case, the Supreme Court held that a state may constitutionally extend leniency in exchange for a guilty plea. In United States v. Jackson, 390 U.S. 570 (1968), the Court held that a defendant may not be penalized for demanding a jury trial. Under the federal statute struck down in *Jackson*, a death sentence could be imposed following a jury's recommendation, but not following a

Intracase disproportionality also occurs where two defendants are tried either together or separately on the same charges and the same

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bench trial. The Court held that this statutory structure "needlessly penalize[d] the assertion of a constitutional right," and was therefore unconstitutional. *Id.* at 583.

When two or more co-defendants have committed the same capital crime and are equally culpable, it is not clear that one defendant's plea of guilty justifies leniency toward him as a matter of law. Although a guilty plea may show remorse, it may also show a desire to avoid the death penalty. Is it appropriate to let a capital defendant live simply because he or she saved the state the time, trouble, and expense of trying the case? This is tantamount to telling a capital defendant who chooses to go to trial that the real reason he will receive the death sentence is the time, trouble, and expense he imposed on the state.

Since it is an executive function, courts rarely interfere with the exercise of prosecutorial discretion. A prosecutor may have good reasons, such as the quality of the proof or lesser culpability, for offering a capital defendant a life sentence in exchange for a plea. This seems unjustifiable, however, where a prosecutor could prove the equal culpability of co-defendants at trial.

The real constitutional issue is not whether leniency can be accorded for a guilty plea in general, but whether there is any constitutional check on a prosecutor's ability to do this. The issue was abstractly raised and summarily dismissed in *Gregg*, 428 U.S. at 199. There petitioner argued that unfettered prosecutorial discretion to plea bargain in capital cases introduced unconstitutional arbitrariness into the ultimate decision of whether a given capital defendant would live or die. The *Gregg* plurality stated that a decision to afford a capital defendant mercy did not violate the Constitution. It further noted that to rule otherwise, "it would be necessary to require that prosecuting authorities charge a capital offense whenever arguably there had been a capital murder and that they refuse to plea bargain with the defendant." *Id.* at 199 n.50.

This position, while addressing the issue of arbitrariness, fails to recognize the equal treatment issue. Justice White, in *Gregg*, treated the issue somewhat more forthrightly:

> Petitioner's argument that prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies is unsupported by any facts. Petitioner simply asserts that since prosecutors have the power not to charge capital felonies they will exercise that power in a standardless fashion. This is untenable. Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments, the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong. This does not cause the system to be standardless any more than the jury's decision to impose life imprisonment on a defendant whose crime is deemed insufficiently serious or its decision to acquit someone who is probably guilty but whose guilt is not established beyond a reasonable doubt. Thus the prosecutor's charging decisions are unlikely to have removed from the sample of cases considered by the Georgia Supreme Court any which are truly "similar." If the cases really were "similar" in relevant respects, it is unlikely that prosecutors would fail to prosecute them as capital cases; and I am unwilling to assume the contrary.

Gregg, 428 U.S. at 225 (White, J., concurring). Justice White thus assumed that prosecutors generally have a good reason for differential treatment of capital defendants. He leaves open the possibility that a capital defendant's death sentence should be overturned when his co-defendant was unjustifiably allowed to plead guilty and receive a lesser sentence. This is in accord with the position taken by the American Bar Association: "Similarly situated defendants should be afforded equal plea agreement opportunities." AMERICAN BAR ASSOCIATION, STANDARDS FOR CRIMINAL JUSTICE, PLEAS OF GUILTY, § 14-3.1(c) (1982); *accord* State v. Coleman, 185 Mont. 299, 371-72, 605 P.2d 1000, 1041 (1979)(Shea, J., dissenting), *cert. denied*, 448 U.S. 914 (1980).

aggravating and mitigating evidence and one receives a death sentence while the other does not. On occasion, even where the evidence respecting the culpability of the separate defendants differs somewhat, an apparently more culpable defendant receives a life sentence while a less culpable defendant receives a death sentence.[145] If there is no principled distinction between same-crime defendants, a death sentence for one is aberrant and should fall.[146]

3. *Intercase proportionality review*. Capital sentencers must have unguided discretion to impose a life sentence rather than a death penalty to insure that the sentences reflect changing standards of decency. It is impossible to determine and apply contemporary mores regarding the imposition of death sentences without systematic intercase proportionality review. It is an essential means of ensuring principled capital sentencing through the consistent application of contemporary mores.

States have developed the foregoing appellate review procedures to detect unconstitutional capital sentencing. Each technique has, in practice, uncovered improper sentencing. The procedures overlap and the different techniques might discover the same error. Techniques other than proportionality review treat only the internal reliability of a death sentence. Proportionality review, by contrast, provides an external check that other forms of review cannot duplicate. Thus, while the Constitution might not demand that a jurisdiction adopt all of the described internal review techniques, some combination of internal and external review is essential to detect error.

C. SUMMARY OF ARGUMENTS REGARDING THE CONSTITUTIONAL REQUIREMENT OF RIGOROUS APPELLATE AND PROPORTIONALITY REVIEW OF CAPITAL SENTENCING

Capital sentences are constitutional only when imposed on the basis of contemporary standards of decency. Due respect and fairness to individuals require that the death penalty be imposed consistently or not at all.

There is a continued risk of arbitrariness in practice in capital sentencing systems which are constitutional on their face. Only rigorous appellate review and proportionality review can ensure that contemporary standards are consistently applied and that similarly situated capital defendants are treated similarly.

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145 *See* State v. McIlvoy, 629 S.W.2d 333 (Mo. 1982).

146 *Cf.* Miller v. State, 415 So. 2d 1262 (Fla. 1982) (defendant given death sentence to avoid disproportionality); Smith v. Commonwealth, 634 S.W.2d 411 (Ky. 1982)(defendant excused from death sentence to avoid disproportionality).

IV. THE NATURE OF CONSTITUTIONALLY REQUIRED DEATH SENTENCE REVIEW

A. PROBLEMS IN JUDICIAL REVIEW OF DEATH SENTENCES

Although current appellate review of capital sentencing has detected some unprincipled death sentences, it has not been as effective as it could be.[147] Most state review techniques are simply elaborations of traditional criminal appeal review procedures. The problems associated with traditional review are familiar: inconsistent application and insufficient rigor of application. Concurrently, trial courts fail to impose procedural devices that would facilitate accurate and intelligent judicial review of capital sentences.[148] These problems are correctable only with strict adherence to explicit constitutional requirements.

Proportionality review occupies a special status among appellate review procedures and presents special problems. It is the only review technique which tests capital sentences against accumulated evidence of contemporary mores. Important in its own right, it can also serve as a cross-check on the effectiveness of other review techniques. However, although it has similarities with common law use of case precedent,[149] it is a new and unfamiliar review technique. Thus, courts have yet to develop it into a truly effective instrument for reducing arbitrariness in capital sentencing.

Problems in the use of proportionality review are both readily identifiable and correctable. The major problems are: (1) determination of the relevant comparative pool of cases; (2) proper characterization of cases as similar or dissimilar; and (3) consideration of all relevant variables.

1. The relevant comparative pool of cases

A critical but unresolved question in proportionality review of capital sentences is the nature of the pool of cases to be used to detect excessiveness. The problem has two distinct levels. First, it is necessary to establish the initial source or general pool of capital cases from which cases may be chosen for comparison to the case under review. For example, the general pool could be: all capitally charged cases, regardless of sentence; all appealed capital cases; capital cases in which a death sentence is returned; or other possible groupings.

Once this general pool is established, a smaller pool of cases, specifically selected because of similarity to the case under review, must be

147 *See* Dix, *supra* note 64, at 159; *see also supra* notes 135-50.
148 *See* Dix, *supra* note 64, at 159; *see also supra* notes 135-50.
149 Baldus, *supra* note 123.

chosen for comparison. For example, if the case under review is a robbery-murder, the specific comparative pool might be all robbery-murder cases, or it might be all felony cases, or perhaps felony-murder cases where the defendant had an intent to kill, and so on.

State court practices in choosing these two pools vary and are inconsistent. For example, some courts may use all cases in which a defendant is convicted of a crime which is capitally chargeable, whether actually capitally charged or not.[150] Others use all appealed capital cases in the state, regardless of sentence, as the general pool.[151] Still others use only appealed cases from the same judicial district as the case under review rather than a statewide pool.[152] Finally, some courts consider only cases in which a death sentence was imposed.[153]

Each method has important consequences for its ultimate use as a data base for comparing sentences. For example, as all but one of the foregoing pools comprise less than all capitally charged crimes in the jurisdiction, each sample may be skewed. Examination of patterns of treatment and sentencing in all capital-eligible cases is important in that it allows courts to keep abreast of actual community sentiment and revise capital sentences where they appear aberrant. All capital-eligible cases would include plea-bargained cases and cases in which the trier of fact found a capitally charged defendant guilty of a lesser included offense. To include such cases allows jury and prosecutorial leniency in similar cases to affect the propriety of a death sentence in a particular case.

While such a pool would include all relevant cases, it is unclear whether the Constitution requires it. In *Gregg*, the plurality expressly rejected arguments that unfettered prosecutorial discretion to plea bargain potential capital cases or jury discretion to return lesser-included offense sentences violated the Constitution. The plurality in *Gregg* stated:

> At each of these [discretionary] stages an actor in the criminal justice system makes a decision which may remove a defendant from consideration as a candidate for the death penalty. *Furman*, in contrast, dealt with the decision to impose the death sentence on a specific individual who had been convicted of a capital offense. Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution. *Furman* held only that, in order to minimize the risk that the

150 *See, e.g.*, WASH. REV. CODE ANN. § 10.95.130(b)(1981).

151 McCaskill v. State, 344 So. 2d 1276 (Fla. 1977); Ross v. State, 233 Ga. 361, 365, 211 S.E.2d 356, 359 (1974), *cert. denied*, 428 U.S. 910 (1976).

152 Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982)(en banc); State v. Williams, 383 So. 2d 369 (La. 1980)(both cases rejecting arguments that state-wide review is constitutionally required).

153 State v. Williams, 305 N.C. 656, 292 S.E.2d 243 (1982).

> death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.[154]

Gregg's focus on the sentencing authority's decisions suggests that the constitutionally appropriate comparative capital pool is all cases in which a sentencer actually decided whether to impose a death sentence.[155] Any lesser pool would inadequately reflect sentencer sentiment and would result in inaccurate principles of aggravation and mitigation. Similarly, pools excluding cases in which a life sentence was imposed preclude an informed consideration of whether equivalently circumstanced capital defendants were treated similarly.

In addition to determining the composition of the general pool, a court must decide whether it may be geographically limited to a general capital pool derived only from the same judicial district in which the defendant was convicted. Essentially, the issue is whether the relevant community mores for capital sentencing purposes means the state mores or those of trial districts within the state.

Since a death sentence can be imposed for only principled reasons, defined initially as statutory aggravating circumstances, the whole state must be the relevant community. The people, speaking through their legislators as representatives, have collectively defined the circumstances under which a death sentence should be imposed at the state level. Statutory aggravating circumstances, however, no matter how strictly defined, allow considerable sentencer interpretation. Interpretations of community values based upon decisions of a geographic capital pool smaller than the whole state risk overvaluation of non-representative decisions. Any significant disparity between state judicial districts in the application of the death penalty will magnify any underlying arbitrariness. Whether a defendant lives or dies might come to depend in large measure upon where he was tried in the state.[156] Therefore, the only justifiable general capital comparative pool is *all* state capital cases where a sentencer made a choice whether to impose a capital sentence.

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154 Gregg v. Georgia, 428 U.S. 153, 199 (1976) (plurality opinion).

155 There are a number of unresolved constitutional issues relating to prosecutorial discretion to plea bargain capital cases. Most important are those relating to fair treatment of co-defendants or similarly situated defendants. This is an undeveloped area of law, and the capital case demonstrating arbitrariness through prosecutorial discretion has yet to be made. *See supra* note 144. *But see* Baldus, *supra* note 123, at 731.

Because the law regarding exercise of prosecutorial discretion in capital cases is so undeveloped, I have at present chosen to assert only that the smallest constitutionally mandated comparative pool is all cases in which the sentencer has made a life or death decision. Should it become possible to review prosecutorial discretion in capital cases, the larger pool, which included such arbitrary cases, would appear to be constitutionally required.

156 *See infra* text accompanying notes 172-74.

It is the only geographic pool that will automatically neutralize nonrepresentative and aberrant decisions.

2. *Determining similarity*

Although it is possible to define the appropriate composition of the general pool, selection of the specific pool for comparison presents different problems. One must first determine which cases are sufficiently similar for comparative purposes and next determine a sentencer's reasons for imposition or non-imposition of the death penalty.

a. *Establishing relevant comparative characteristics.* In reviewing a death sentence, the relevant characteristics which establish the class of similar cases are those of the case under review. It is difficult to determine which of countless case characteristics are relevant for comparative purposes. There are no set procedures for this determination, and there may be equally valid ways to describe the same case. Take, for example, the following descriptions of the same case: (A) Victim died from loss of blood after defendant stabbed her; (B) Victim, a fifteen year old girl, died from loss of blood when defendant stabbed her repeatedly after strangling and beating her. This simple example shows that the same case can be described on different levels of generality or detail through factual inclusion or deletion. Cases are not inherently similar or dissimilar, but can be made to seem so by a careful selection of characteristics said to be relevant.

b. *Determining reasons for the sentence*. Determining similarity carries with it the necessity of finding the principled basis for the sentence chosen. If a capital sentencer hears aggravating and mitigating evidence and returns a death sentence, it must be presumed that the aggravating evidence outweighed the mitigating. If it returns a life sentence, the reverse is true. In either situation, however, a reviewing court will not know which circumstances the sentencer found to be present or *why* and *how* the sentencer determined that the one set of circumstances outweighed the other. Even when the sentencer returns a death sentence based upon the express finding of a statutory aggravating circumstance, the specific reason for imposing a death sentence may be unclear since an aggravating circumstance only allows a death sentence; it does not necessitate one.

If the reviewing court cannot detect the reason for a sentence, it cannot compare the case with others to see if the same reason was outcome-determinative in those other cases. A court may have to scan the record and attempt an informed guess regarding the reason for the sentence. When the facts are complex and there is significant aggravating

or mitigating evidence, a reviewing court's guess is merely speculation.[157] When this occurs, cases compared for review may be decisionally incomparable, and the reviewing court is comparing fictions of its own making. Speculation undermines proportionality review.

c. *Appellate review problem illustration*. A case which illustrates both the characterization and speculation problems of proportionality review is *Moore v. State*.[158] Moore planned to rob Stapleton in his home. Moore entered the home at night through a bedroom window. Although Moore later said he had no intention to kill, he had a pistol with him in case he encountered opposition. After Moore's entry, Stapleton surprised Moore and fired a shotgun at him. Moore fired several shots in response, two of which hit and killed Stapleton. Moore then took $5,700 he found on Stapleton. When subsequently arrested, he surrendered all of the money and evidence in his possession and generally cooperated with the police.

Moore pled guilty to capital charges before a judge. The judge convicted him, specifically finding that Moore had committed "malice murder, while in the commission of another capital crime, armed robbery," a statutory aggravating factor under Georgia law.[159] In mitigation, the judge noted:

> You, in my opinion, did everything that a man could do after you were caught and do [sic] an honorable thing insofar as your true statements made, your cooperation with officials, pleading guilty to the mercy of the Court, and placing an awesome responsibility on me.[160]

Nonetheless, the judge found that the aggravating circumstances outweighed the mitigating circumstances. He felt that armed robbery and homicide in the victim's home was so serious that the offender should automatically receive the death penalty.[161] In other words, the specific reason for the imposition of the death sentence was that it was a killing, during the course of an armed robbery, *in the victim's home*.

Because the trial judge specified his reason for imposing a death

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157 The purpose of requiring a sentencing jury to provide written findings in support of a death sentence is to enable appellate courts to ensure that the jury's discretion was properly exercised and that the sentence was not arbitrary or capricious. In the absence of such written findings, the reviewing court can only assume that the jury acted within its instructions. While that assumption is commonly employed in reviewing general verdicts of guilt, it is not a permissible basis for approval of a death sentence.
Harris v. Pulley, 692 F.2d 1189, 1204 (9th Cir. 1982) (Canby, J., concurring), *cert. granted*, 103 S. Ct. 1425 (U.S. Mar. 21, 1983)(No. 82-1095).

158 233 Ga. 861, 213 S.E.2d 829 (1975), *cert. denied*, 428 U.S. 910 (1976), *reh'g denied*, 239 Ga. 67, 235 S.E.2d 519, *cert. denied*, 434 U.S. 874 (1977), *rev'd sub nom.* Blake v. Zant, 513 F. Supp. 772, 803-18 (S.D. Ga. 1981).

159 Blake v. Zant, 513 F. Supp. at 810.

160 *Id.*

161 *Id.* at 811.

sentence, the reviewing court in *Moore* was in a position to compare the case with others having the same critical variables of a killing during an armed robbery of the victim's home. If, as is usually the case, the trial judge had not given his specific reason for imposing death, the reviewing court would have had to guess the reason from the record. Yet an examination of the record discloses other facts which might also have been determinative of penalty: the robbery was planned well in advance; Moore carried a gun with him and therefore may have planned to kill; Moore fired four or five shots; it was a killing during an armed robbery, regardless of location.[162] In the usual case, finding these factors in the record, a reviewing court would simply have to assume which of them, or which combination of them, were outcome-determinative. Incorrect guesses would lead to improper selection of cases for comparison.

In conclusion, where the record does not clearly disclose the specific basis for the sentence in a capital case, there is a significant risk that the reviewing court will assign the wrong reason and therefore pick the wrong set of cases for proportionality review. Principled and consistent capital sentencing cannot then result.

Even with knowledge of the basis for the imposition of the sentence, a reviewing court may misuse proportionality review in such a way as to destroy its effectiveness as a review technique. In *Moore*, commission of the homicide *in the home* was the known critical factor. It would be reasonable to conclude that the specific pool of cases for comparison would be those involving homicides during armed robberies of the victim's home. The Georgia Supreme Court concluded that the death sentence was not disproportionate in his case.[163] However, in conducting its proportionality review, the court considered twenty-three cases. Only three of these twenty-three cases involved victims killed in their homes, and in only one of the three was a death penalty returned.[164] In the two cases in which a life sentence was returned, the defendants, unlike Moore, had prior felony convictions and each killed *two* victims in their homes.[165] The trial judge was therefore wrong when he opined that killing a victim in his home was so serious that it would automatically entail the death penalty;[166] two juries had concluded otherwise. Since more culpable offenders killing two victims in the home had received a life sentence, it would follow that death may have been an inappropriate sentence for Moore.

The Georgia Supreme Court's misuse of proportionality review in

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162 *Id.* at 803-04.
163 *Id.* at 815.
164 *Id.*
165 *Id.*
166 *Id.* at 811.

Moore shows how result-oriented such review can be. Twenty of the cases it selected for similarity were dissimilar on the critical factor. In the three cases that were similar, two did not support the conclusion that death was an appropriate sentence. Proportionality review when misused has no value as a check on rationality and consistency in sentencing. For proportionality review to work properly, principled and objective determinations must govern every step of the process.

3. Failure of appellate courts to consider all relevant capital sentencing variables

Appellate courts seem to be failing to discover arbitrariness and discrimination in the imposition of capital sentences because they do not systematically look at all relevant variables.[167]

The race of the victim is a particularly important variable. Killers of whites are far more likely to receive a death sentence than killers of blacks.[168] Of these, black killers of whites are most likely to receive a death sentence.[169] The data

> reflect a twofold departure from even-handed justice which is consistent with a single underlying racist tenet: that white lives are worth more than black lives. From this tenet it follows that death as punishment is more appropriate for the killers of whites than for the killers of blacks and more appropriate for black than for white killers.[170]

The likelihood of an aggravating circumstance finding, which death-qualifies the crime, is also greater for blacks who kill whites than for any other grouping:

> [T]he effect of race of victim among blacks convicted of first degree murder far exceeds the impact of an accompanying felony charge. Indeed, among blacks charged with an accompanying felony, virtually half were found to have an aggravating felony circumstance by sentencing authorities if their victims were white, while not one was found to have such an accompanying circumstance if the victim were black.[171]

Within any state, there may also be serious discrimination by place of conviction. The chance of a death sentence for the same underlying offense differs greatly between different regions of the same state. For example, "[f]or felony-type murder in Florida, the death sentence in the panhandle is four to five times more likely than in the southern and

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167 Baldus, *supra* note 123; Bowers & Pierce, *Arbitrariness and Discrimination under Post-*Furman *Capital Statutes*, 26 CRIME & DELINQ. 563 (1980).

168 Bowers & Pierce, *supra* note 167, at 593-601; *see also* Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981).

169 Bowers & Pierce, *supra* note 167, at 595.

170 *Id.* at 601.

171 *Id.* at 615.

northern regions of the state . . . ."[172] In Georgia, "[c]ourts in the central, southwestern, and southeastern regions are three to four times more likely to impose the death sentence for felony murder than those in northern Georgia, and about eight times more likely to do so than those in Fulton County [where Atlanta is located]."[173]

Furthermore, the effects of differential imposition of the death sentence in accordance with race or place, when taken together, produce even more extreme disparities. "For [felony-murder] killings under similar circumstances the death sentence is roughly thirty times more likely for the killer of a white in the panhandle [of Florida] than for a killing of a black in the northern region."[174]

Finally, traditional appellate review of capital sentences, which is supposedly a check on discrimination in sentencing, has "no tendency . . . to correct the racial differences in treatment, whether at the sentencing or the presentencing stages of the process."[175] Traditional appellate review also does not correct and, indeed, may worsen, intra-state regional disparities in the imposition of death sentences.[176]

In conclusion, researchers have found that "race is truly a pervasive influence on the criminal justice processing of potentially capital cases. . . . And it is an influence that persists despite separate sentencing hearings, explicitly articulated sentencing guidelines, and automatic appellate review of all death sentences."[177]

While it may be impossible to eliminate completely the discriminatory effects of race and place, appellate courts must demand principled and nondiscriminatory sentences, and must vacate death penalties imposed for either reason.

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172 *Id.* at 604.

173 *Id.* at 605.

174 *Id.* at 607.

175 *Id.* at 622-23.

> [The] flaws in the system of capital punishment may not often nor necessarily be evident in the details of a specific case; they may only be exposed in the aggregate, over a number of cases. The evidence . . . surely indicates that the appellate courts have failed to meet their responsibility to remove strong and systematic extralegal influences on the imposition of the death penalty.

Id. at 625. Much of the racial disparity in capital sentencing is explainable by deep and perhaps unconscious racial attitudes and fears:

> [P]eople will be more shocked and outraged by crimes that victimize members of the dominant racial group, by crimes that are perpetrated by members of the . . . subordinated racial group, and especially by killings in which a minority group offender crosses racial boundaries to murder a majority group victim.

Id. at 630-31.

176 *Id.* at 623-25.

177 *Id.* at 616.

D. IMPROVING THE ABILITY OF APPELLATE COURTS TO DETECT ARBITRARINESS IN CAPITAL SENTENCING

To resolve proportionality review problems of characterization, uncertainty, and failure to consider all relevant variables, one may rely on: (1) the courts, newly informed of the problems, to use more care and rigor in their reviews; (2) quantitative methods; (3) corrective procedural mechanisms, such as requiring a sentencer statement of reasons for a sentence, standardized statements of salient features of all capital cases made a public record, or an appellate adversarial hearing on issues of "similarity," "dissimilarity," and excessiveness.

Of these alternatives, reliance on courts, regardless of their integrity, seems the least satisfactory solution. Appellate review of capital sentencing has been demonstrably deficient.[178] Courts have been highly subjective in their case characterizations,[179] and have resisted efforts to objectify the case comparison process.[180] Further, no amount of care in appellate review will solve the uncertainty problem. Only a change in procedural requirements, imposing an obligation on the sentencer to give reasons for its sentence, can solve it.[181]

Existing quantitative methods offer more promise. Data for each capital case can be collected on all significant factors. Through statistical analysis of the cases, one can determine which factors, or which combination of factors, appear to explain the verdicts.[182] Combined with qualitative review, quantitative methods would greatly assist a reviewing court in focusing on significant sentencing factors.[183] The specific reason for a particular sentence would still not be known definitively, but would be effectively "triangulated."[184] In addition, an apparent and possibly improper reason such as race or place of conviction would be discovered by a reviewing court and sentences based on such factors could be overturned.

Quantitative methods would help to reduce arbitrariness and iden-

178 Baldus, *supra* note 123; Bowers & Pierce, *supra* note 167, at 625, Dix; *supra* note 64, at 159.

179 *Id.*; *see also* Proffitt v. Wainwright, 685 F.2d 1227, 1268-69 (11th Cir. 1982); Blake v. Zant, 513 F.Supp. 772, 815-18 (S.D. Ga. 1981); State v. Newlon, 627 S.W.2d 606, 628, 633 (Mo. 1982)(Seiler, J., concurring in part); Coleman v. State, — Mont. —, —, 633 P.2d 624, 663 (1981)(Shea, J., dissenting).

180 *See, e.g.*, Smith v. Balkcom, 671 F.2d 858 (5th Cir. 1982); Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978); Thomas v. State, 421 So. 2d 160 (Fla. 1982); Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980); *Ex parte* Farley, 570 S.W.2d 617 (Ky. 1978).

181 Some states require such an obligation. *See, e.g.*, State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973); FLA. STAT. § 921.141(b)(Supp. 1982); N.C. GEN. STAT. § 15A-2000(c) (Supp. 1981). *But see* State v. Rook, 304 N.C. 201, 283 S.E.2d 732 (1981).

182 Baldus, *supra* note 123.

183 *Id.*

184 *Id.*

tify excessiveness in capital sentencing. Such techniques are commonly used in jury selection, employment, gender discrimination, and other cases,[185] and have been devised for capital cases as well.[186] No court, however, appears to have adopted them for use in capital cases.[187] This is in part because the constitutional status of capital appellate review is unclear. Further, a system of standardized data collection and computer based statistical analysis might seem burdensome to a court inexperienced with such systems. Nonetheless, if the United States Supreme Court holds, as its prior cases suggest it should, that some form of capital proportionality review is constitutionally required, quantitative methods offer an effective means of conducting such review.

Some states, such as California,[188] conduct complex reviews of noncapital sentences in order "to eliminate disparity of sentences and to promote uniformity of sentencing."[189] The California Board of Prison Terms compares the facts of each case, defendants' backgrounds, and other relevant information. Then, through detailed statistical analysis, the Board identifies typical sentencing patterns and cases varying from those patterns.[190] Once the Board determines that a case is disparate, it

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185 *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321, 329-30 (1977); Hazelwood School Dist. v. United States, 433 U.S. 299, 302-13 (1977); International Brotherhood of Teamsters v. United States, 431 U.S. 324, 336-43 (1977); Castaneda v. Partida, 430 U.S. 482, 485-92 (1977); Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 268-71 (1977); Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 610-12, 619-21 (1974); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 11-15 (1973); Alexander v. Louisiana, 405 U.S. 625, 626-32 (1972); Furman v. Georgia, 408 U.S. 238, 249-51 (1972); Griggs v. Duke Power Co., 401 U.S. 424, 430-32 (1971); *see also* Ballew v. Georgia, 435 U.S. 223 (1978); Craig v. Boren, 429 U.S. 190 (1976).

186 Baldus, Pulaski, Woolworth & Kyle, *supra* note 46, at 1; Baldus, *supra* note 123. *See generally* D. BALDUS & J. COLE, STATISTICAL PROOF OF DISCRIMINATION (1980).

187 *See, e.g.*, Smith v. Balkcom, 671 F.2d 858, 859 (5th Cir.), *cert. denied*, 103 S. Ct. 181 (1982); Spinkellink v. Wainwright, 578 F.2d 582, 612-16 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979); Pickens v. Lockhart, 542 F. Supp. 585, 608-09 (E.D. Ark. 1982); Ross v. Hopper, 538 F. Supp. 105, 107 (S.D. Ga. 1982); Mitchell v. Hopper, 538 F. Supp. 77, 90-91 (S.D. Ga. 1982); McCorquodale v. Balkcom, 525 F. Supp. 431, 434 (N.D. Ga. 1981)(all cases rejecting statistical data).

188 "In all cases the Board of Prison Terms shall, not later than one year after the commencement of the term of imprisonment, review the sentence and shall by motion recommend that the court recall the sentence . . . and resentence the defendant . . . if the Board determines the sentence is disparate." CAL. PEN. CODE § 1170(f)(Supp. 1982); *see also* Cassou & Taugher, *Determinate Sentencing in California, The New Numbers Game*, 9 PAC. L.J. 5, 56 (1978).

189 CAL. PEN. CODE § 1170(f)(Supp. 1982).

190 The following is the California Board of Prison Terms' own description of its procedures in disparate sentence review:

> The Board obtains information on individual cases from documents prepared during the course of the judicial process: the Abstract of Judgment; the charging document; the probation officer's report; the transcript of the proceedings at the time of sentencing; and the CII report ('rap sheet'). Board analysts trained to read and interpret information from these sources read these documents to collect over 150 pieces of information on the case, including extensive information regarding the prisoner's adult and juvenile criminal histories, social and demographic history, and the nature and extent of the pris-

refers the case back to the sentencing court so that it may determine whether the sentence is truly disparate and whether the sentence should be recalled.[191] The California practice demonstrates the feasibility of quantitative methods as a technique to ensure sentence uniformity. If a state can do this for its non-capital cases, similar analyses are feasible for a state's far more limited number of capital cases.

A less sophisticated and perhaps more familiar solution is to mandate procedural rules for capital judgments and for determination of which cases to use for comparative purposes. Corrective procedural mechanisms appear to be a good practical solution to the problems of uncertainty and characterization. If sentencers had to state their reasoning, the reviewing court would know exactly why defendant received the sentence he or she received.

Knowing the reason for a given sentence helps to resolve the characterization problem, but does not do so completely, as disclosed by the *Moore* case discussed above.[192] In addition, even the similarity of stated reasons may not be readily apparent and it may be necessary to weigh reasons against each other to determine their similarity or dissimilarity. Thus, even when the reasons for given sentences are provided, characterization cannot be wrung from the system.

Fortunately, evaluating cases for their similarities and dissimilari-

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oner's participation in the criminal activity resulting in the DSL commitment to state prison.

The Board utilizes an automated screening procedure to sort cases by principal convicted offense, to identify the range of possible sentences for a particular offense group, and to compute the relative likelihood that each of the possible sentences will occur. The result of this process is called a sentence distribution and is derived from observed sentencing practices in DSL cases received in prison between July 1, 1977 and January 31, 1981, and previously reviewed by the Board . . . . The Board uses the automated sentence review only to identify cases for further scrutiny by Board staff.

The automated screening procedure employs a computer simulation technique which uses the facts of each case to produce 10,000 theoretical sentencings for that case. If, according to this simulation technique, fewer than 10.5% of those repeated sentencings would have resulted in a sentence as high as or higher or as low as or lower than the actual sentence imposed in the case, the case is identified as requiring further review.

. . .

Cases identified for further scrutiny by the automated screening procedure are referred to the Sentence Review Unit for further review as "variant" cases. A "variant" case is one whose sentence differs from that of other comparable cases. The Sentence Review Unit reviews pertinent documents from the case file, examines closely important facts of the case and important components of the sentence structure, and compares the individual case with other similar cases. If the Sentence Review Unit believes the case to be disparate after this review, it prepares a detailed analysis of the case . . . for presentation to a Board panel of two members and one hearing representative. The determination that a case is disparate and should be referred to the sentencing court results from the exercise of this panel's discretion.

California Board of Prison Terms Memorandum, filed in People v. Rivera, 141 Cal. App. 3d 1001, 192 Cal. Rptr. 1 (1983), in support of a Board motion to recall a prisoner's sentence.

191 People v. Herrera, 127 Cal. App. 3d 590, 601, 179 Cal. Rptr. 694, 700 (1982).

192 *See supra* notes 158-66 and accompanying text.

ties is exactly what lawyers and judges do all the time. However, the same cases can be construed in quite different ways. Therefore, the process of determining the legal meaning of case law is an adversary process. There is nothing about the nature of the decisions made under proportionality review which makes it less suitable than other legal decisions for adversary resolution. The characterization problem can thus be solved by appellate adversary proceedings concerning which cases should serve as the specific comparative pool for the case under review. In order for this system to work, advocates for the appellant and the state must have access to detailed case summaries of all cases in the general pool. Thus, systematic data collection and retrieval would be a necessary component of the system.[193]

Either of the methods detailed—statistical analysis or mandated procedural changes in capital sentencing—or a combination of them would make proportionality review a more effective check on arbitrariness in capital sentencing. The Constitution requires capital sentencing systems that reduce the risk of arbitrariness. An effective system of proportionality review would contribute significantly to that end. The Constitution seems to require effective proportionality review of capital sentences. Such an interpretation would permit the states latitude to adopt the best of the described methods, or to combine them.

V. CONCLUSION

Capital sentencing continues to be arbitrary in constitutionally objectionable ways. Rigorous techniques of appellate and proportionality review, which are implied by constitutional principles regarding the imposition of death sentences, can reduce this arbitrariness. Proportionality review also ensures that capital sentencing will reflect current community mores regarding the death sentence and helps to guarantee equal protection for capital defendants. For these reasons, the United States Supreme Court should hold that rigorous appellate review, and in particular, proportionality review are constitutionally required.

Those who assert that rigorous appellate and proportionality review are not constitutionally required must claim either that there is no arbitrariness in state court decisions or that an arbitrary imposition of death is proper. They must say that although the Constitution requires capital sentencing systems which minimize the risk of arbitrariness, it does not also require effective means which ensure that minimization.

193 Unfortunately, courts have resisted disclosing summaries of general pool cases as well as their methods of choosing cases to compare with the case under review. *See, e.g.,* Brown v. Wainwright, 392 S.2d 1327 (Fla. 1981); Gall v. Commonwealth, 607 S.W.2d 97 (Ky. 1980); *Ex parte* Farley, 570 S.W.2d 617 (Ky. 1978).

They must argue that those capitally convicted felons who now live because a state supreme court determined that their sentences were imposed arbitrarily should have died anyway, and that defendants similarly sentenced in the future should die. If this is what the Constitution permits, there can be no guarantee of principled, consistent, and just imposition of death sentences.