Assessing Proportionality in Capital Cases: A Case Study of Ohio

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ABSTRACT

When the United States Supreme Court approved the reinstatement of the death penalty in the United States in 1976, it did so based on the promise of new safeguards against comparative excessiveness and relative disproportionality resulting from jury sentencing in capital cases. As Justice Stevens noted in 2008, one of these safeguards – meaningful appellate review of death sentences – is, in practice, non-existent.

This thesis examines the use of this purported safeguard by the Ohio Supreme Court, in the form of comparative proportionality review, to determine the degree to which Ohio capital cases are 'relatively proportionate' in the time period after the state adopted life without parole as a sentencing option in 1996. Specifically, this thesis employs two approaches to identifying 'similar' cases – the overall aggravation approach (through logistic regression analysis) and the fact specific approach – and then compares each death sentence to its group of 'similar' cases to determine whether it is relatively proportionate, given the death sentencing ratio of its comparable group.

After establishing that at least forty per cent of Ohio cases were relatively disproportionate, the thesis argues that Ohio's current approach violates the requirements of the Eighth Amendment. In particular, the Court's failure to examine cases sentenced to life as part of its proportionality review and its use of the precedent-seeking approach has the outcome of ignoring death sentences that are comparatively excessive.

Finally, the thesis concludes by offering a normative model by which Ohio can improve its administration of comparative proportionality review. The thesis advocates the use of a 'purposive' approach, defining 'similarity' on the basis of the intended purpose of punishment, and suggesting that just deserts retribution provides the best approach for determining 'similarity'.

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> Particularly troubling is that the shortcomings of the Georgia Supreme Court's [proportionality] review are not unique to this case … And the likely result of such a truncated [proportionality] review—particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors—is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.
>
> -- Justice John Paul Stevens[1]

A. Background

On October 20, 2008, in his dissent to the denial of certiorari in *Walker v. Georgia*, United States Supreme Court Justice John Paul Stevens excoriated the Georgia Supreme Court, taking issue with the manner in which it has conducted comparative proportionality review in its recent capital cases.[2] Over thirty years earlier, Stevens was one of the three member plurality of the Supreme Court who wrote the controlling opinion in *Gregg v. Georgia*, the landmark 1976 case that reinstated the death penalty in the United States, based in part on the adoption of comparative proportionality review.[3]

In *Furman v. Georgia*, decided four years earlier, the United States Supreme Court had held that the death penalty, as applied in Georgia, violated the Eighth Amendment's prohibition against 'cruel and unusual' punishments.[4] While not

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[1] *Walker v Georgia* 555 US 355 (2008) (Stevens J, dissenting).

[2] Ibid.

[3] 428 US 153 (1976).

[4] 408 US 238. The Eighth Amendment to the Constitution of the United States of America provides that 'cruel and unusual punishments' shall not be 'inflicted' by the federal government and, through the Fourteenth Amendment, by the respective state governments. US Const Amend VIII.

finding the death penalty *per se* unconstitutional, a majority of the Court in *Furman* instead determined that '[t]he decisive grievance ... is that the present system of discretionary sentencing in capital cases has failed to produce even-handed justice ... [and] that the selection process has followed no rational pattern'.[5] At the heart of the Court's concern was the absence of any intelligible guidance as to the exercise of jury discretion (or appellate review of such discretion) in determining whether to sentence a convicted murderer to death.[6] As Justice Douglas explained,

> Rather, we deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws, no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.[7]

And Justice Brennan added,

> For this Court has held that juries may, as they do, make the decision whether to impose a death sentence wholly unguided by standards governing that decision. In other words, our procedures are not constructed to guard against the totally capricious selection of criminals for the punishment of death.[8]

Thus, because the state death penalty statutes did not provide sufficient guidance to juries in determining whether a particular defendant should receive a life sentence or a death sentence, the Court held that capital punishment systems were so arbitrary that the death sentences constituted cruel and unusual punishment. Justice Stewart likened the random imposition of the death penalty to being struck by lightning:

> These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual. For, of all the people convicted of

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[5] *Furman* (n 4) 398-99 (Burger C J, dissenting). Justices Marshall and Brennan found the death penalty to be a *per se* violation of the Eighth Amendment, but the other seven justices did not. *Furman* (n 4).

[6] Ibid.

[7] *Furman* (n 4) 253 (Douglas J, concurring).

[8] *Furman* (n 4) 295 (Brennan J, concurring).

> rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed . . . . I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.[9]

As virtually every other state's capital system was similar to that of Georgia, the effect of *Furman* was the abolition of the death penalty in the United States. The ban on capital punishment in the United States, though, was short-lived. States rushed to pass new statutes in response to the decision in *Furman*, seeking to remedy the concerns of the Supreme Court through new statutory schemes.[10]

Four years later, in *Gregg v. Georgia*, the Court reviewed the amended Georgia statute, holding that it satisfied the Eighth Amendment concerns of *Furman* 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'.[11] Specifically, the Georgia system provided two crucial safeguards that, for the Court, addressed its prior concerns in *Furman v. Georgia*: (1) 'specific jury findings as to the circumstances of the crime or the character of the defendant,' and (2) 'the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate'.[12] Thus, the remedy approved by the Court circumscribed the discretion of the capital jury and provided

[9] *Furman* (n 4) 309-10 (Stewart J, concurring).

[10] Corinna Barrett Lain, 'Furman Fundamentals' (2007) 82 Washington L Rev 1.

[11] *Gregg* (n 3) 189.

[12] *Furman* (n 4) 198.

direct review by the state's highest court in order to eliminate the broad discrepancy and arbitrariness in sentencing outcomes.

Following *Furman*, many states adopted a system similar to Georgia, using comparative proportionality review of capital sentences by the state supreme court as a safeguard against excessive or 'unusual' sentences. The issue of proportionality was not a question of absolute proportionality, that is, whether the punishment (death) fit the crime.[13] Instead, comparative proportionality review, perhaps better termed 'comparative excessiveness,' sought to measure the relative proportionality of a given case, as compared to 'similar' or 'comparable' cases, such that the sentence in any one case is not excessively dissimilar.[14]

As is discussed herein, the problem of determining what constitutes a 'similar' or 'comparable' case for purposes of comparative proportionality review is at the heart of the inquiry. Indeed, in order to determine whether a case is relatively proportionate to other cases, the theoretical frame used to identify 'similar' cohorts of cases is of paramount importance. As explained below, the lack of robustness in

[13] The Supreme Court has interpreted the Eighth Amendment to bar to death sentences based on absolute proportionality grounds in cases of adult rape (*Coker v. Georgia* 433 US 584 (1977), where the defendant is an accomplice to a felony murder (*Enmund v. Florida* 458 US 782 (1982)), where the offender is mentally retarded (*Atkins v. Virginia* 536 US 304 (2002)), where the offender is a juvenile at the time of the crime (*Roper v. Simmons* 543 US 551 (2005)), and most recently, child rape (*Kennedy v. Louisiana* 554 US 408 (2008)). As explained below, absolute proportionality as conceived of by the Supreme Court is not limited to 'just deserts' retribution. Instead, it encompasses both retributive and utilitarian goals of punishment. Alice Ristroph, 'Proportionality as a Principle of Limited Government' (2005) 55 Duke L J 63; William W Berry III, 'Promulgating Proportionality' (2011) 46 Georgia L Rev (forthcoming).

[14] The words similar and comparable are in quotations because, in order to perform comparative proportionality review, one must determine what constitutes a similar or comparable case. As this study will demonstrate, this inquiry may be undertaken in a variety of ways, and determining what makes cases 'similar' drives the outcome in determining the relative proportionality or comparative excessiveness of a death case.

the consideration of relative proportionality by state courts may be attributed, at least in part, to the difficulty in determining 'similarity.'

There are three primary ways in which state supreme courts have attempted to review death sentences for comparative excessiveness. First, courts have used a 'reasonableness' approach in which the court reweighs the aggravating and mitigating circumstances and asks whether a given death sentence is disproportionate based on generalized notions of reasonableness.[15] Second, courts have employed a 'precedent-seeking' approach, in which the court, after weighing aggravating and mitigating circumstances, identifies one or more comparable cases.[16] To support its decision that the case is not excessive, the court will thus cite one or more 'similar' cases where the defendant received a death sentence.[17]

Finally, courts have used a 'frequency' approach, which provides a truer determination of comparative excessiveness.[18] Under the frequency approach, the court first determines which features of the case under review will be applied to determine which other cases are 'similar'. The court next identifies all 'similar' cases and determines the frequency with which defendants in such cases received a

[15] David C Baldus, George Woodworth, and Charles Pulaski, 'Comparative Review of Death Sentences: The Georgia Experience' (1983) 74 Journal of Criminal Law and Criminology 661. This *de novo* review simply decides whether, under the circumstances, death appears to be a reasonably appropriate sanction.

[16] David C Baldus, George Woodworth, and Charles Pulaski, 'Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach' (1980) 33 Stanford L Rev 1.

[17] Conversely, if the court finds the sentence to be excessive, the court will cite 'similar' case(s) in which the defendant(s) received a life sentence. As discussed below, courts rarely reverse death sentences using a 'precedent-seeking' approach David Baldus, George Woodworth and Charles Pulaski, *Equal Justice and the Death Penalty* (Northeastern 1990).

[18] Baldus et al (n 16).

death sentence. Then, the court determines whether trial courts (usually juries) imposed death sentences so infrequently to the class of 'similar' cases such that the imposition of the death penalty in the case before the court would be comparatively excessive.[19]

Because the 'frequency' approach requires a survey of all 'similar' cases on appeal, and not just one or two (as with the 'precedent-seeking' approach), it provides the only true comparative sentence review. As a result, the 'frequency' approach is the only method that can adequately address the question of comparative excessiveness.[20]

As Justice Stevens properly pointed out in *Walker v. Georgia*, the courts have failed to provide adequate comparative proportionality review in most cases, choosing not to apply the frequency approach in most circumstances.[21] Indeed, only four states out of the thirty-three states that still use capital punishment have used some type of frequency approach, and even those states do not catalogue the complete group of 'similar' cases.[22]

Even worse, most state supreme courts have restricted their comparative excessiveness review to cases in which the 'comparable' defendants received death sentences.[23] Thus, in such situations, a state supreme court's comparative proportionality review of a given case asks only whether a 'comparable' case exists

[19] Baldus et al. (n 15).

[20] Ibid.

[21] 555 US 355.

[22] See Baldus et al. (n 17).

[23] Ibid.

in which a death sentence was given. It ignores the 'comparable' cases in which the defendant received a sentence of life imprisonment.

The State of Ohio has employed a proportionality review scheme similar to that of Georgia since *Gregg*. Despite hearing the appeals of over two hundred fifty death sentences since *Gregg*, the Ohio Supreme Court has never found a sentence to be relatively disproportionate—that is—comparatively excessive. This may be attributed in part to its use of only a few death cases as points of comparison.

Unlike other states, however, the comparative proportionality review conducted by the Ohio Supreme Court has never been studied empirically.[24] As a northern state that has been a political bell-weather in recent years, Ohio ironically mirrors its southern counterparts in its use of the death penalty and has more executions scheduled in the next few years than any state besides Texas.

Further, none of the 'proportionality review' studies in other states were conducted with a sample in which the jury had the option of sentencing the defendant to life without the possibility of parole.[25] This is important because the option of life without parole can significantly change the sentencing calculus of the jury. When life without the possibility of parole is not a sentencing option, the jury must choose between death and the possibility that the offender will re-join society, albeit after a significant time in prison. With those two choices, the perceived dangerousness of an offender can play a significant role in the sentencing decision

[24] Indeed, the proportionality review schemes of Georgia, California, South Carolina, and most recently, Maryland have all been the subject of empirical study. Rachel Philofsky, 'The Maryland Proportionality Review Project' (Master's Thesis, University of Maryland 2006).

[25] Ohio adopted life without the possibility of parole as an available punishment in aggravated murder cases on July 1, 1996. Ohio Rev Code 2929.02.

of the jury.[26] If, on the other hand, life without the possibility of parole is an available sentencing option, considerations of the future dangerousness of the offender become, at least in theory, virtually irrelevant.[27] This is because the jury has a sentencing option, life without the possibility of parole, which gives it the ability to protect society from an offender *without* sentencing him to death.[28] Ohio's relatively recent adoption of life without the possibility of parole in July, 1996 creates a new category of capital cases that have not been studied in the academic literature.

B. Research Motivation

Given the foregoing, it is clear that Ohio's proportionality review scheme does little to investigate whether cases are indeed relatively proportional. The purpose of this thesis is to explore the need for the Ohio Supreme Court (and similar state supreme courts throughout the United States), to engage in the statutorily-required proportionality review in a more robust and complete manner, by doing just that—engaging in a more thorough study of the degree to which Ohio death sentences are relatively proportionate. In doing so, the thesis seeks to engage in a deeper theoretical and empirical inquiry into the concept of relative proportionality

[26] John Blume, Stephen P Garvey, and Sheri Lynn Johnson, 'Future Dangerousness in Capital Cases: Always "At Issue"' (2001) 86 Cornell L Rev 397.

[27] William W Berry III, 'Ending Death by Dangerousness' (2010) 52 Arizona L Rev 889; but see Christopher Slobogin, 'Capital Punishment and Dangerousness' in *Mental Disorder and Criminal Law: Responsibility, Punishment, and Competence*, R Schopp ed (Springer 2008) (arguing that dangerousness is a valid aggravating factor).

[28] Some have argued rightly that life without the possibility of parole is its own sort of death sentence but that question is beyond the scope of what is considered here. Catherine Appleton and Bent Grøver, 'The Pros and Cons of Life Without Parole', (2007) 47 British J of Criminology 597.

and attempt to develop a normative model by which state supreme courts can adequately measure the relative proportionality of a death case on appeal.

Empirical studies of the adequacy of comparative proportionality review in a given state have been done before, but no published study of comparative proportionality review has been done in over twenty years. In addition, there have been no studies of the Ohio Supreme Court's comparative proportionality review of capital cases.

Perhaps even more important, the application of the death penalty has shifted significantly since the time period of the earlier studies for two reasons: the rise of life without parole as an alternative to the death penalty and the increasing discovery of innocent individuals on death row in the United States.

With the widespread adoption of life without parole, jurors no longer must choose between a life sentence with parole and death.[29] The use of life without parole as a sentencing alternative to death is now common throughout the United States, with every state having a life-without-parole statute, except Alaska and New Mexico, both of which are non-capital states.[30] It has been available to juries in Ohio since July 1, 1996. As a result, the influence of jurors' perceptions of the future dangerousness of the offender has decreased.[31] For many years, it was this perception, more than anything, which determined whether a jury would sentence a

[29] In 1913, 'life' in the federal system officially meant fifteen years. Peter B Hoffman, 'History of the Federal Parole System: Part 1 (1910–1972)' (1997) 61 Federal Probation 23. Most states had similar systems. Andrew M Hladio and Robert J Taylor, 'Parole, Probation and Due Process' (1999) 70 Pennsylvania Bus Assoc Q 168.

[30] Richard Deiter, 'Death Penalty Information Center' <http://www.deathpenaltyinfo.org> accessed 10 September 2011.

[31] Berry (n 27).

defendant to death, because of the possibility of parole.[32] Evidence from both the Capital Jury Project and the behavior of prosecutors during sentencing both strongly reinforced this notion.[33] As a result, with the availability of life without parole, dangerousness may play a less significant a role in some jurisdictions.

Further, the issue of innocence has also significantly changed the landscape in terms of the contextual background of juror decision-making. In a phenomenon beginning in the late 1990s, a series of events increasingly began to raise doubts about the use of the death penalty, including the possibility of the execution of an innocent individual.[34]

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[32] Blume et al. (n 26); Berry (n 27).

[33] Blume et al. (n 26).

[34] In many ways, these events also parallel those in Europe with the EU's abolition of the death penalty. Roger Hood and Carolyn Hoyle, *The Death Penalty: A World-wide Perspective* (Oxford, OUP 4th ed 2008); Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Palgrave Macmillan 2010); David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Belknap Harvard 2011). For discussions of the likelihood of the United States following the same trajectory toward abolition as the United Kingdom and the European Union, see David Garland, *Peculiar Institution: America's Death Penalty in an Age of Abolition* (Belknap Harvard 2011); Andrew Hammel, *Ending the Death Penalty: The European Experience in Global Perspective* (Palgrave Macmillan 2010); Susan A Bandes, 'The Heart Has Its Reasons: Examining the Strange Persistence of the American Death Penalty', in *Criminal Law Conversations* (Paul H Robinson, Stephen P Garvey and Kimberly Kessler Ferzan eds, OUP 2009); David F Greenberg and Valerie West, 'Siting the Death Penalty Internationally' (2008) 33 Law and Soc Inquiry 295; William W Berry III, 'American Procedural Exceptionalism: A Deterrent or a Catalyst for Death Penalty Abolition?' (2008) 17 Cornell J L and Pub Pol'y 481; Carol Steiker, 'Capital Punishment and American Exceptionalism', in *American Exceptionalism and Human Rights* (Michael Ignatieff ed, Princeton 2005); David Garland, 'Capital Punishment and American Culture' (2005) 7 Punishment and Soc'y 347; James Q. Whitman, Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe (2003); Franklin E Zimring, The Contradictions of American Capital Punishment (2003); William Schabas, 'American Exceptionalism?', in *The Barbaric Punishment: Abolishing the Death Penalty* (William Schabas ed, Martinus Nijhoff 2003) 21; Nora V Demleitner, 'The Death Penalty in the United States: Following the European Lead?' (2002) 81 Or L Rev 131; Carol S Steiker, 'Capital Punishment and American Exceptionalism' (2002) 81 Or L Rev 97.

United States Supreme Court justices Louis Powell, Harry Blackmun, and John Paul Stevens all renounced the death penalty, at different times, based on their perceptions of error in capital cases.[35] In 2000, Governor George Ryan imposed a moratorium on the death penalty in Illinois after a study discovered that eighteen residents of death row were actually innocent.[36] Columbia law professor James Liebman's landmark study revealed an error rate (including procedural and substantive error) of 68% in capital cases.[37] New Jersey, New Mexico, Illinois, and most recently, Connecticut abolished capital punishment, with a number of other state legislatures having discussions about abolition.[38] A series of lawsuits challenged the constitutionality of lethal injection as a method for execution, leading to a temporary moratorium on capital punishment for over a year while the Supreme Court considered the issue.[39] The case of Cameron Todd Willingham in Texas

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[35] Austin Sarat, 'Recapturing the Spirit of Furman: The American Bar Association and the New Abolitionist Politics' (1998) 61 Law and Contemporary Problems 5; William W Berry III, 'Repudiating Death' (2011) 101 Journal of Criminal L and Criminology 441.

[36] Governor George Ryan, 'I Must Act', Address at Northwestern University School of Law (11 January 2003), reprinted in Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution* (Princeton 2003). Maryland Governor Parris Glendening also declared a moratorium on executions in his state on May 9, 2002. Dieter (n 30).

[37] James S Liebman, 'Capital Attrition: Error Rates in Capital Cases, 1973-1995' (2000) 78 Texas Law Review 1839. The American Bar Association has also conducted a number of studies of the death penalty in individual states that reach similar conclusions. American Bar Association, 'Death Penalty Representation Project' <http://www.americanbar.org/advocacy/other_aba_initiatives/death_penalty_representation/resources.html> accessed 11 September 2011.

[38] Dieter (n 30).

[39] The Supreme Court upheld the constitutionality of lethal injection in *Baze v. Rees*, but the method of execution still remains a contentious issue in many states, with many states moving to a single drug protocol. Douglas Berman, 'Sentencing Law and Policy Blog' (2011) <http//:sentencing.typead.com> accessed 25 September 2011.

provided the most persuasive evidence to date that an innocent man has been executed.[40] And the use of the death penalty, both in terms of new sentences and actual executions, decreased to levels not seen since *Furman v. Georgia*.[41] Thus, the rise of life without parole and the increasing questions concerning executing innocent individuals mean that the context for jury decision-making in capital cases is drastically different than it was at the time of the earlier proportionality review studies.

Finally, none of the earlier studies have moved beyond identifying the problem—the inefficacy of current methods of comparative proportionality review—to offer a theoretical framework by which the state supreme courts could use comparative proportionality review in a more effective manner such that it could better identify 'unusual' cases and achieve some level of relative proportionality.

C. Research Questions

This thesis attempts to answer two central questions and assess their implications for reform. First, the thesis asks to what degree are Ohio jury sentences of death 'comparatively excessive' for death sentences imposed and appealed during the fifteen year period from 1996-2011. In other words, the question is, for each death case in Ohio, whether it is relatively proportionate to the class of 'similar' cases.

Second, the thesis explores the question of how, assuming the Ohio Supreme Court's approach is flawed, to best determine a class of 'similar' cases for purposes of proportionality review. Specifically, I ask what method best identifies, in a practical manner, 'similar' cases in order to achieve the goal of determining

[40] David Grann, 'Trial by Fire', The New Yorker, 7 September 2009.

[41] Dieter (n 30).

comparative excessiveness. In light of this inquiry, I aim to offer a normative approach that the Ohio Supreme Court can employ to provide more accurate comparative proportionality reviews in capital cases and achieve a greater overall level of relative proportionality.

D. Overview of Data Collection

This thesis includes all cases in which an Ohio jury considered whether to sentence the defendant to life with possibility of parole, life without possibility of parole, or death for aggravated murder in the fifteen year period from July 1, 1996—July 1, 2011. It is important to note, as explained below in chapter two, that not all aggravated murders are eligible for the death penalty. Only those cases in which a jury found a death specification beyond a reasonable doubt can the death penalty be an available sentence. This thesis contains only cases in which the jury had the option of sentencing the offender to death.

In addition, as in the Baldus studies, I limited the cohort of cases, to cases in which the defendant appealed the sentence.[42] Appeal is automatic under the statute for cases where the offender received a death sentence, but in rare cases such defendants waive their appeals. Offenders who receive life without the possibility of parole sentences or life with the possibility of parole sentences do not have automatic appeals, and in a few cases, choose not to appeal their case. An overwhelming majority of the defendants do appeal their case.

This sample of cases consists of one hundred forty-three cases, of which forty-nine received a death sentence.[43] I obtained the data in large measure from the

[42] Baldus et al (n 15); Baldus et al (n 16).

[43] The South Carolina study mentioned below considered a similar number of cases. Raymond Paternoster and Annmarie Kazyaka, 'An Examination of Comparatively

appellate opinions of the Ohio Court of Appeals and the Ohio Supreme Court, as well as the court's pre-sentencing reports and case files, which provided factual narratives that describe the characteristics of the defendant, the details of the crime committed, the evidence presented at trial, and highlight the reasons that the Court used to find death cases to be relatively proportional.[44] In order to maintain consistency, I used the same questionnaire in my review of these opinions and files. In preparing my questionnaire, I referenced the categories included in prior Georgia, South Carolina, and Maryland studies.

E. Overview of Methodology

In answering the question of whether, and to what degree, Ohio death sentences were relatively proportionate to 'similar' aggravated murder cases during the relevant time period, I used a frequency approach. The frequency approach matched each death case to a pool of 'similar' cases and used the death sentencing frequency of that group to determine whether a death sentence was relatively proportionate.

As relative disproportionality is much easier to define and identify at the extremes than in the cases where the death penalty is sometimes imposed, I adopted the same working quantitative definition of excessive death sentence used in all of the prior studies – thirty-five per cent (35%).[45] Thus, under either approach, I

Excessive Death Sentences in South Carolina, 1979-87,' (1990) 17 NYU Review of Law and Social Change 490.

[44] As the thesis attempts to make the same determination that the Ohio Supreme Court should make—relative proportionality—the data collection contained only information available to the Ohio Supreme Court on appeal.

[45] Paternoster and Kazyaka (n 42). As this figure was based on the Georgia system, which is in many ways comparable to the Ohio system studied here, the same figure is appropriate. Baldus, et al. (n 15); Paternoster and Kazyaka (n 42).

determined a death sentence to be excessive (presumptively relatively disproportionate) where the death sentencing rate in the pool of comparable cases was 0.35 or less. By the same token, where the death sentencing rate in the pool of comparable cases was 0.80 or higher, meaning that 80% of the comparable cases received the death penalty, I deemed the death cases to be presumptively relatively proportionate.

As the question of 'similarity' drives the determination of whether cases are relatively proportionate, I used several different methods to classify the cases into 'similar' groups. First, I used logistic regression analysis to group all of the cases in the study based on the variables that 'predict' an outcome of death.[46] This grouping mechanism, then, relied on the factors that Ohio juries deemed important (as best as can be empirically determined) to identify groups of 'similar' cases. From this grouping of 'similar' cases, I determined the relative proportionality of the Ohio death cases.

Second, I used the same indicia used by the Ohio Supreme Court in its relative proportionality review—aggravating factors.[47] I grouped the cases

[46] All of the earlier studies used this same type of analysis. Baldus et al (n 16); Baldus, et al. (n 15); Paternoster and Kazyaka (n 42); Philofsky (n 24).

[47] Unlike the Court, though, I used a frequency approach, not a precedent seeking approach. An example of the Ohio Supreme Court's approach is as follows:

> we have concluded that the aggravating circumstance of Barton's aggravated murder of Kim with prior calculation and design, together with his prior conviction for attempted murder, outweighs the mitigating factors in this case … Upon review, we have concluded that the death penalty is not disproportionate in this case when compared with other convictions for aggravated murder involving a previous conviction for attempted murder or purposeful killing. See, e.g., *State v. Taylor* (1997), 78 Ohio St.3d 15, 676 N.E.2d 82; *State v. Davis* (1992), 63 Ohio St.3d 44, 584 N.E.2d 1192.

State v. Barton, 844 N E 2d 307, 319 (Ohio 2008).

according to aggravating factors in several ways—total number of aggravating factors, presence of each individual aggravating factor, and exact collection of particular aggravating factors. In addition, I employed several other methods by which to group the cases qualitatively, including certain victim-based factors, crime-based factors, and purpose of punishment-based factors (absolute proportionality criteria). For each different grouping of 'similar' cases, I measured the relative proportionality of each Ohio death case based on the frequency of death cases in the comparable pool.

Having assessed the overall relative proportionality of the Ohio death cases through a number of different approaches, I then asked the normative question of which method of determining 'similarity' can best achieve the goal of relative proportionality in practice. In doing so, I drew on the results of the various means employed to determine 'similarity' in capital cases.

F. Overview of Conclusions

I found consistently that, for all methods of determining similarity, a significant number of the Ohio death cases were relatively disproportionate and should have been reversed. Ultimately, this result exposes the wide disparity in sentencing outcomes in Ohio cases during the period studied (1996-2011). Further, it emphasizes the importance of the Ohio Supreme Court modifying its current approach towards comparative proportionality review in order to remedy the arbitrariness and disparity in capital sentencing outcomes in Ohio. Indeed, failure to remedy its approach causes the Court to be in violation of Ohio statutes and, as explained below, the Eighth Amendment requirement of relative proportionality.

1. Relative Disproportionality in Ohio Cases

In determining 'similarity', the logistic regression analysis identified four variables were statistically significant predictors of an Ohio capital defendant receiving the death penalty. The Ohio juries were more likely to give a defendant a death sentence where (1) the crime was of a brutal nature (involving more than one type of physical injury); (2) the defendant had a prior intimate relationship with the victim; (3) the victim was elderly (age 65 and over); (4) the jury found two or more aggravating factors.

Interestingly, a number of factors that had been predictive of death in other studies, including the number of victims and the race of the victim, were not significant predictors of death in my Ohio study. As explained below, the availability of life without parole as a sentencing option potentially curtails the influence of future dangerousness in sentencing, a fact that may explain the decreased significance of the race of the victim in sentencing determinations.[48]

After grouping the cases in terms of the presence of these variables (weighted based on their level of relative strength as a predictor), I determined that 40.8% (twenty out of forty nine) of death cases were presumptively relatively disproportionate. In addition, 28.6% (fourteen out of forty nine) of death cases were found to be presumptively relatively proportionate using the same methodology.

Using the qualitative methods of determining similarity, I likewise found a significant number of cases to be relatively disproportionate. For example, in cases that had the presence of the same aggravating factor, 17% of the cases were

[48] As explained below, other studies have clearly established a relationship between the race of the victim and the capital sentencing outcome, demonstrating a clear correlation in sentencing outcomes, with jurors significantly more likely to sentence murderers of white individuals to death than murderers of black victims. See e g, David Baldus, George Woodworth, Charles A Pulaski Jr, *Equal Justice and the Death Penalty* (Northeastern 1990).

presumptively relatively disproportionate. In cases with the same combination of aggravating factors, 33% of the death cases (sixteen of forty-nine) were presumptively relatively disproportionate. In cases with the same number of aggravating circumstances, 29% of death cases (fourteen of forty-nine) were presumptively relatively disproportionate. Likewise, when using the total number of death specifications as the basis for determining similarity, I found that 37% (eighteen of forty-nine) of the death cases were presumptively relatively disproportionate.

When using the presence of certain criminal act factors, the State of Ohio fared somewhat better in terms of relative proportionality. In determining the relative proportionality of such indicia, the study counted only the affirmative group (where the criminal act factor was present) because the negative group (where the criminal act factor was not present) was so clearly disparate in terms of cases.

In cases involving sexual assault murder (sixteen cases), none of the cases were either presumptively relatively proportionate or disproportionate. In other words, where the category of sexual assault murders was the basis for determining similarity, no death cases were comparatively excessive. None of the cases involving arson received the death penalty, so any future case receiving the death penalty would be presumptively relatively disproportionate if arson was the indicia used to determine similarity.

In cases involving robbery murder, all of the cases were presumptively relatively proportionate (twelve death cases). Similarly, all of the cases involving kidnapping murder (fifteen cases) were presumptively relatively disproportionate as only 34% of kidnapping murder cases received the death penalty.

In addition to using aggravated factors and crime-based indicia of similarity, I also used a number of victim-based indicia to determine similarity in measuring the relative proportionality of Ohio death cases. First, I used the number of victims that the offender murdered as a criterion for similarity. I found that 37% of the death cases (eleven out of forty nine death cases) were presumptively relatively disproportionate when grouped based on the number murdered.

In cases involving the death of a minor (individual under eighteen), none of the eleven death cases were presumptively relatively proportionate or disproportionate. In cases involving the murder of a child and a sexual assault, none of the three death cases were presumptively relatively proportionate or disproportionate. In cases involving the murder of an elderly (age 65 and over) victim, none of the eight death cases were presumptively relatively proportionate or disproportionate. In cases involving the murder of a family member or relative, none of the fifteen death cases were presumptively relatively proportionate or disproportionate. Finally, in cases involving the murder of a spouse or girlfriend, none of the eleven death cases were presumptively relatively proportionate or disproportionate. Thus, for these categories of victims (children, sexually assaulted children, elderly individuals, family members, and spouses / girlfriends), none of the classes of cases had a death sentencing rate of less than thirty-five per cent or more than eighty per cent.

2. Identifying a Method for Determining 'Similarity'

Given the clear disparity in death sentencing outcomes, I next asked the question of what approach the Ohio Supreme Court should use in conducting proportionality review. First, I concluded that, given the diversity of circumstances in the cases, the quantitative methodology provided a successful means by which to

identify ‘similar’ cases. This was despite the inherent inconsistency in the jury sentencing outcomes themselves—from a qualitative perspective it appeared that many of the ‘worst’ cases received sentences of life without parole, while comparatively less ‘worse’ cases received the death penalty. In addition, the Ohio Supreme Court did not correct any of the death cases by reversing them on appeal for being relatively disproportionate.

Nonetheless, this approach had some limitations. First, with a pool of almost one hundred and fifty cases, there was a wide range of factual circumstances surrounding the various aggravated murders such that certain categories or factors that might have been predictive of death simply did not have a large enough sample size to be significant.[49]

The other significant shortcoming of the quantitative approach (as a method by which to determine ‘similarity’ for purposes of comparative proportionality review) is its feasibility in practice. The resources and effort required to maintain a database of all capital cases upon which to run logistical regression analyses in order to identify ‘similar’ cases to each death case on appeal, while possible, is unlikely given the other demands on the state supreme court.

In addition, the qualitative approach of using aggravating factors or single variables, whether crime-based or victim-based, likewise seems inadequate to determine ‘similarity’. As explained below, these single factors do not seem to

[49] The best example of this would be murders of police officers. In the study, only two cases involved murders of police officers. Both cases had sentencing outcomes of death.

capture important differences between cases that detract from the concept of similarity.[50]

Given the seeming limitations of the approaches used in the earlier studies, I then offer a new qualitative approach by which state supreme courts can conduct comparative proportionality review. As explained herein, I theorise that the best way to determine 'similarity' is to consider the applicable purposes of punishment (absolute proportionality) as a means to identify 'similar' cases to determine the relative proportionality of a given death case. Specifically, the study considers retribution and deterrence as possible purposes of using the death penalty, and suggests that retribution provides the most easily used theoretical framework by which to determine relative proportionality. The ability to derive an ordinal ranking (or grouping) of cases in terms of their 'just deserts' by measuring the culpability of the offender and the harm caused by the offense has been established in the academic literature and is consistent with the kind of common law reasoning that courts have engaged in traditionally.[51]

It is important to note that even when using this method, I found that a significant number of Ohio cases were presumptively relatively disproportionate. Using 'just deserts' criteria to determine similarity resulted in 63% of the death cases (thirty-one out of forty nine) being presumptively relatively disproportionate. Thus, for almost all measures of similarity, a significant number of Ohio death sentences were presumptively relatively disproportionate.

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[50] For example, two cases involving robbery-murder might be more different than similar in important ways. Likewise, two murders of elderly victims might also be quite different.

[51] Andrew Von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005).

Thus, the thesis will demonstrate that (1) the comparative proportionality review of the Ohio Supreme Court is inadequate to safeguard against disparity in jury sentencing and creates a strong possibility that its current system violates both Ohio statutes and the Eighth Amendment's prohibition against 'cruel and unusual' punishment; (2) many of the capital sentences handed down in Ohio between 1996-2011 are relatively disproportionate whether 'similarity' was measured in terms of the probability of receiving a death sentence, salient factors, or other qualitative measures; (3) Ohio's comparative proportionality review methodology needs immediate revision; (4) the comparative proportionality review in Ohio can be best improved by adopting retribution—in the form of offender culpability and harm to the victim—as a method by which to compare cases, and using a frequency approach that includes both life and death cases in its analysis.

G. Overview of Chapters

In chapter two, the thesis will provide an overview of Ohio's capital system, its history, and its method for using comparative proportionality review. In chapter three, the thesis will explain the theoretical and philosophical origins of relative proportionality and comparative proportionality review, and explain the United States Supreme Court's development of these concepts in its application of the Eighth Amendment.

In chapter four, the thesis will provide a review of the proportionality review literature, discussing the four previous proportionality review studies and their findings as well as highlighting the limited academic literature concerning the use of proportionality review in various state courts. In chapter five, the thesis will describe the quantitative and qualitative methodologies used in the study.

In chapter six, the thesis will give the results of the determining relative proportionality using quantitative analysis to define 'similarity' and explore the meaning of those results. In chapter seven, the thesis will provide the results of the determination of relative proportionality by using various qualitative approaches to define 'similarity'.

In chapter eight, the thesis will discuss the results of both the quantitative and qualitative approaches to determining 'similarity' before considering the broader theoretical implications of these outcomes. In doing so, the thesis will offer a novel approach to conducting comparative proportionality review. Finally, in chapter nine, the thesis will conclude by recapitulating my core findings, emphasizing the need for reform and the way to achieve it, and offering some thoughts about the future of comparative proportionality review.

CHAPTER TWO: PROPORTIONALITY REVIEW AND THE OHIO CAPITAL SYSTEM

> *It seems we've drifted [in our proportionality review]… rather than doing our own independent analysis of the cases.*
>
> *~ Ohio Supreme Court Justice Paul Pfeifer*

Before examining the relative proportionality of the Ohio capital cases decided during the period from 1996 to 2011, it is useful to understand something about the state's history of using the death penalty. In addition, to assess the State's use of comparative proportionality review, it is essential to explain not only what the state law requires and how it works in practice, but also the broader procedural framework to which this appellate review belongs. As demonstrated below, the historical and procedural contexts of Ohio's death penalty reveal the importance of comparative proportionality review to its fair administration.

A. A Brief History of the Death Penalty in Ohio

1. Early History

The first government-sanctioned execution occurred in Ohio on 15 November 1792, almost ten years before it became part of the United States, when officials hanged James Mays in Hamilton County, Ohio.[52] An act by the state legislature in 1835 provided that 'the punishment of death sentence shall in all cases be by hanging by the neck until dead, by the sheriff,' and as a result, permitted public executions, the typical method of hanging.[53] And it is common knowledge

[52] Interestingly, Hamilton County, which includes the City of Cincinnati, is among the leading counties in the state in number of executions.

[53] *Webster v. State*, 4 NE 92, 93-94 (Ohio 1885).

that executions during this era were a popular public spectacle, with many travelling far to join large crowds in witnessing the hanging.[54]

The last Ohio public execution was also the first known execution of a woman in Ohio. On 9 February 1844, William Clark, a white man, and Esther Foster, a black woman, were executed.[55] Both were inmates in the Ohio Penitentiary at the time they committed the murders Ohio executed them. Clark killed one of the prison guards, Cyrus Sells, with a cooper's axe, while Esther beat a white female prisoner to death with a fire shovel.[56] Despite being in no way connected, Ohio prosecutors tried and convicted both prisoners during the same term of the court, as the crimes happened within a few months of each other. Historian William T Martin suggested that 'doubts were entertained by some whether either should have been convicted and executed' based on Clark's purported insanity and the absence of premeditation on the part of Esther, making her murder not one in the first degree.[57] Nonetheless, the execution was a public spectacle in Columbus as 'the occasion allied together an immense crowd of people, both male and female, and it was a day of much noise, confusion, drunkenness and disorder.'[58]

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[54] Lawrence M Friedman, *Crime and Punishment in American History* (HarperCollins 1993). The gallows served both the purpose of creating suspense and excitement for the audience while theoretically providing a visual image that would deter future capital crimes. Friedman 75-76.

[55] William T Martin, *History of Franklin County,* (Columbus 1858, rpt. 1969) 421-22.

[56] A newspaper that studied her case sixty years later had the following to report: 'The Foster woman was not mentally bright and the chronicles of those days tell that she sold her body to a surgeon for all the candy she could eat from the time of the making of the bargain until she was hanged.' Laura James, 'CLEWS' <http://laurajames.typepad.com/clews/2005/10/women_and_the_d.html> accessed 11 September 2011).

[57] Ibid.

[58] Ibid.

The State of Ohio abolished public executions on 12 March 1844, requiring all executions to be held in private.[59] The abolition of public executions echoed the broader sentiment in some parts of the United States against the death penalty.[60] Just two years later, the State of Michigan became the first government in the world to abolish capital punishment.[61]

From 1803 until 1885, Ohio carried out executions by hanging offenders in the county where they committed the crime.[62] In 1885, the Ohio legislature passed its first state wide statute regulating the administration of the death penalty in the state, requiring that executions to take place at the Ohio Penitentiary in Columbus.[63]

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[59] Webster (n 65) 93-94.

[60] Indeed, Alexis de Tocqueville wrote at the time:

> Although the Americans have, in a manner, reduced egotism to a social and philosophical theory, they are nevertheless extremely open to compassion. In no country is criminal justice administered with more mildness than in the United States. Whilst the English seem disposed carefully to retain the bloody traces of the dark ages in their penal legislation, the Americans have almost expunged capital punishment from their codes.

Democracy in America, Book III, Chapter 1 (1835).

[61] Roger Hood and Carolyn Hoyle, *The Death Penalty: A World-Wide Perspective* (Clarendon 4th ed 2008). Rhode Island (1852) and Wisconsin (1853) soon followed, abolishing capital punishment. Iowa, Maine, and Colorado also abolished the death penalty in the 1850's, but each later reinstated the death penalty.

[62] 1835 Ohio Acts p. 41 S 40 ('An Act Providing for the Punishment of Crimes') (hanging).

[63] The 1885 statute provided that:

1. The mode of inflicting the punishment of death shall be by hanging by the neck until the person is dead; and the warden of the Ohio penitentiary, or in case of his death, inability or absence, a deputy warden, shall be the executioner; and when any person shall be sentenced, by any court of the state having competent jurisdiction, to be hanged by the neck until dead, such punishment shall only be inflicted within the walls of the Ohio penitentiary, at Columbus, Ohio, within an enclosure to be prepared for that purpose under the direction of the warden of the penitentiary and the board of managers thereof, which enclosure shall be higher than the gallows, and so constructed as to exclude public view.

Valentine Wagner, a resident of Morrow County, became the first individual executed at the Penitentiary, when Ohio hanged him on 13 July 1885 for the murder of his brother-in-law Daniel Shehan. Ohio executed twenty-eight individuals by hanging at the Ohio Penitentiary between 1885 and 1896.[64]

In 1897, the electric chair, aptly nicknamed 'Old Sparky,' replaced the gallows, as the state government determined that electrocution provided a more technologically advanced and humane form of execution.[65] The first two electric chair executions in Ohio took place in Columbus on 21 April 1897. Seventeen year old Hamilton County resident William Haas, who had murdered Mrs William Brady, was the first offender that Ohio electrocuted. William Wiley, who had murdered his wife, was the second.

Despite the idea that the electric chair provided a more humane means of execution, the 'smell of burning flesh,' arcing electricity and the 'death reflexes' of the doomed often 'discommoded' those who gathered at the old Ohio Penitentiary in Columbus' to watch executions.[66] As a result, a broom maker named Charles Justice, an inmate incarcerated at the time for robbery and burglary, volunteered to improve the quality of the experience for the spectators. Using his basic knowledge

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2. All executions of the death penalty by hanging shall take place according to the provisions of this act, and on the day designated by the judge passing sentence, but before the hour of sunrise of the designated day, and the warden or a deputy warden executing the sentence shall receive for his services fifty dollars, to be paid out of any fund on hand appropriated for the maintenance and support of the Ohio penitentiary.

Ohio Gen. Code § 7338 (1885).

[64] David L Hoeffel, 'Ohio's Death Penalty: History and Current Developments,' (2003) 31 Capital U L Rev 659; Ohio Dept Rehab and Corr, 'Capital Punishment in Ohio' <http://www.drc.state.oh.us/public/capital.htm> accessed 11 September 2011.

[65] 1896 Ohio Laws p. 159 s. 1.

[66] Bob Herbert, 'In America', *Akron Beacon Journal* (1 March 1998).

of electricity, Justice designed iron clamps to fasten prisoners to Old Sparky, making the electrocution more effective and eliminating the flopping around of the inmate during the electrocution.[67] In part because of his work on the chair, Justice received early parole in April 1910.[68] His work did not serve as much of a deterrent, however, as he committed first degree murder not long after his release.[69] In an unfortunate irony, Ohio electrocuted Justice in the same chair that he had helped make more lethal on 27 October 1911.[70] Between 1897 and 1963, Ohio executed three hundred twelve men and three women by electrocution at the Ohio Penitentiary.[71] Twenty-nine year old Donald L Reinbolt was the last victim of Old Sparky, on 15 March 1963, resulting from his conviction for the murder of Edgar L. Weaver, a Columbus, Ohio grocer. In 1972, the State of Ohio moved death row from Columbus to the newly opened Southern Ohio Correctional Facility in Lucasville.

That same year, the United States Supreme Court decided *Furman v. Georgia*, which held that capital punishment violated the 'cruel and unusual' punishment clause of the Eighth Amendment to the United States Constitution.[72] As with most states, Ohio immediately passed a new capital statute designed to remedy the problems identified in *Furman*. As explained in chapter three, the Court

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[67] Ibid. See also Ohio Dept of Rehab and Corr <http://www.drc.state.oh.us/public/capital.htm> accessed 11 September 2011.

[68] Herbert (n 78).

[69] Ibid.

[70] Ibid.

[71] Hoeffel (n 76).

[72] 408 US 238 (1972).

reinstated the death penalty four years later in 1976 through its decision in *Gregg v. Georgia* and its companion cases.[73]

2. Ohio Capital Punishment post-*Furman*

The first man Ohio sentenced to death under the 1981 law was Leonard Jenkins, after his conviction for murdering a Cleveland police officer during a robbery. Ten years later, outgoing Ohio Governor Richard Celeste, with only four days remaining in his term, commuted Jenkins' sentence to life in prison. At the same time, Celeste granted clemency to sixty seven other state prisoners, including seven capital defendants.[74]

Celeste's decision to commute these sentences did not go unchallenged. On 14 February 1982, over a year later, the Franklin County Court of Common pleas held that the Celeste had improperly granted seven of the eight death penalty commutations (including Jenkins) and reinstated the death sentences in those cases. The return to death row for these seven individuals was short lived; the Ohio Court of Appeals overturned the Court of Common Pleas and reinstated the commutations.[75] In *State ex rel. Maurer v. Sheward*, the Ohio Supreme Court affirmed the appellate court decision, holding that the Governor's power to pardon is generally not subject to legislative limitations. The Court explained that the Ohio Constitution does not permit the state legislature to circumscribe the Governor's

[73] 428 US 153 (1976).

[74] See Daniel T Kobil, 'Do the Paperwork or Die: Clemency, Ohio Style?' (1991) 52 Ohio St L J 655; Paul Mahoney, 'List of Celeste Pardons, Commutations Grows to 68', Cleveland Plain Dealer (16 February 1991).

[75] At the time of this writing, Leonard Jenkins remains incarcerated in Marion, Ohio at the North Central Correctional Institution.

power to commute sentences.[76] Celeste thus did not exceed his power by commuting the sentences of the eight death row inmates.[77]

On 2 July 1993, the State of Ohio passed a law permitting a capital offender to choose between lethal injection and the electric chair as the means of his or her execution.[78] Interestingly, if the inmate refused to choose, the State of Ohio would execute the inmate by electrocution. The impetus to add lethal injection as a potential method of execution had started in 1985 when Republican State Representative John Galbraith claimed that 'death by lethal injection is a more humane method, that is quick and painless, and the cost is minimal'.[79] The bill passed both houses in 1989, but then-Governor Celeste vetoed the bill, and contended that lethal injection was no more than a 'façade to make people feel more comfortable about capital punishment'.[80]

In 1994, as part of a proposition to demonstrate toughness on crime, then-Governor George Voinovich proposed a ballot initiative to remove the review of death sentences by the Ohio Court of Appeals, instead having direct appeals from

[76] *Maurer v. Sheward* 644 N E 2d 369 (Ohio 1994).

[77] Ibid.

[78] 1993 Ohio Laws 38 s 1; Ohio Rev Code Ann. S. 2929.22(A-B) (West 1997).

[79] U Press Int'l (6 February 1985). See Deborah W Denno, 'Getting to Death: Are Executions Constitutional?' (1997) 82 Iowa L Rev 319.

[80] Lee Leonard, 'New Law Permits Execution by Lethal Injection', Columbus Dispatch (7 July 1993).

the trial court to the Ohio Supreme Court.[81] The ballot initiative passed, and thus removed one level of direct review in capital cases.[82]

The most significant change in Ohio's capital punishment scheme occurred in 1995. During that year, the legislature adopted life without parole as a possible sentence in capital cases. The statute went into effect on 1 July 1996. Whereas Ohio had formerly required a capital jury to choose between a death sentence and a life sentence with the possibility of parole in as few as ten years, the amended capital statute allowed the jury to give a life sentence without the possibility of parole. This change is significant because it allows jurors who are concerned about the future dangerousness of the defendant to sentence him/her to prison without concern of early release. Currently, the Ohio capital statute allows the jury to choose between four sentencing options in aggravated murder cases with death specifications: (1) the death penalty; (2) life without the possibility of parole; (3) life with the possibility of parole after thirty years; (4) life with the possibility of parole after twenty five years.[83]

During the late 1990s, the Ohio Legislature broadened the reach of its aggravating factor provisions. In 1996, the Ohio General Assembly added the unlawful termination of another's pregnancy as a type of aggravated murder,[84] and

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[81] See Stephen B Bright, 'The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases' (1994) 31 Houston L Rev 1105.

[82] Barry Kawa, 'Bottlers Toast Victory in Tax Repeal', Cleveland Plain Dealer (9 November 1994).

[83] Ohio Rev Code § 2929.03 (West 2007).

[84] S.B. 158, 121st Gen. Assem., Reg. Sess. (Ohio 1996); OHIO REV CODE § 2903.01(A)-(C) (West 1996).

in 1997, made the purposeful causing of the death of individuals under age thirteen an aggravating factor.[85]

3. Post-*Furman* Executions

Notwithstanding the existence of the present capital statute since 1981, the first post-*Furman* execution did not occur in Ohio until 1999.[86] On 19 February 1999, Wilford Berry became the first individual that the State of Ohio executed in over thirty years (since 1963). Berry, 38, had 'volunteered' for the execution by waiving all of his rights to appeal.[87] He chose lethal injection as the method of punishment. Berry, a resident of Cuyahoga County, had been on death row for almost ten years, since 30 November 1989, for the murder of Cleveland bakery owner Charles Mitroff.[88]

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[85] S.B. 32, 122d Gen Assem, Reg Sess (Ohio 1997); Ohio Rev Code § 2903.01(A)-(C) (West 1997).

[86] Ohio amended its initial post-*Furman* capital statute in 1981 after the United States Supreme Court's decision in *Lockett v. Ohio*, where the Court held that state statutes could not place limitations on the kind or nature of mitigating factors used by defendants in capital sentencing proceedings. 438 US 586 (1978).

[87] Berry's story is indeed an unfortunate one. He was apparently eleven years old at the time of his first suicide attempt, and was diagnosed as suffering from a severe schizoid personality disorder that was never treated. See Ohio Death Row, <http://www.ohiodeathrow.com/wilford_lee_berry.htm> accessed on 11 September 2011). At trial, Berry refused to cooperate with his defense attorneys and repeatedly asked the jury to impose the death penalty. Ibid.

[88] Berry's death was not without significant controversy, as his mother and sister petitioned the US District Court in February 1998 for a temporary stay because they both thought that Berry was incompetent. T C Brown and Mary Beth Lane, 'US Court Postpones Execution of Berry,' Cleveland Plain Dealer (28 February 1998). After the district court granted the stay and required Berry to undergo psychological testing, the Sixth Circuit Court of Appeals lifted the stay after finding that Berry's mother and sister did not have standing to challenge the Ohio Supreme Court's determination that Berry was competent. *Franklin v. Francis*, 144 F3d 429 (6th Cir 1998).

The execution of Berry resulted in widespread reaction within the State of Ohio. Of these public responses, one of the most surprising was that of Ohio Supreme Court justice Paul Pfeifer, who had co-written Ohio's death penalty statute in 1981 while serving as the Republican chairman of the Ohio Senate Judiciary Committee. On 17 February 1999, two days prior to Berry's execution, Pfeifer questioned the effectiveness of the death penalty and emphasized his growing sympathy towards arguments that the death penalty is immoral.[89] He explained, 'I guess I've come to the conclusion that the state would be better off without [the death penalty] and should impose a life sentence without the possibility of parole . . . What is going to be the great benefit for the state when Wilford Berry dies?'[90]

Pfeifer expressed particular concern with the role the Ohio Supreme Court had taken in capital cases, noting that it had reversed only three capital cases over the twenty year period from 1981-2000. [91] Pfeifer cited the Court's comparative proportionality review, and the ineffectiveness of such review, as the prime example of the state supreme court's failure to perform its required function.[92] Pfeifer lamented, 'It seems we've drifted … rather than doing our own independent analysis

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[89] Joe Hallett, 'Death Penalty Isn't Effective, Law's Co-Author Now Believes', Columbus Dispatch, 18 February 1999 (stating that based on his personal knowledge now, he would not sign the same death penalty law). See Jeffrey L Kirchmeier, 'Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States' (2002) 73 U Colorado L Rev 1.

[90] T C Brown, 'Repeal Death Penalty, Original Sponsor Urges', Plain Dealer (19 February 1999). Pfeifer is not alone among Ohio judges in expressing doubts about the use of the death penalty. After sentencing Quisi Brown to death, Cuyahoga County Common Pleas Judge Daniel Gaul likewise denounced the death penalty. See Karl Turner, 'Judge Orders Killer's Death, Decries Death Penalty', Cleveland Plain Dealer (17 November 2000).

[91] Chris Adams, 'Death Watch', 12 CHAMPION (July 2001).

[92] Ibid.

of the cases.'[93] Indeed, in the two hundred and eighty-nine cases in which the Ohio Supreme Court has conducted comparative proportionality review, the Court has never reversed a sentence for being comparatively excessive (relatively disproportionate).

On 14 June 2001, following two last minute stays of execution, Ohio executed Jay D. Scott of Cuyahoga County, its first involuntary execution since 1963. The state killed Scott by lethal injection for the 6 May 1983 murder of Cleveland delicatessen owner Vinnie Prince.[94] On 21 November 2001, Governor Bob Taft signed legislation prohibiting the use of the electric chair or any other forms of execution except lethal injection, and removing the ability of capital inmates to 'pick their poison'.[95]

4. Lethal Injection Controversy

Beginning in 2006, litigation in Ohio and throughout the United States began to challenge the use of lethal injection as an acceptable execution method. In August, 2006, the Ohio Supreme Court placed a moratorium on executions as a result of this pending litigation.[96]

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[93] Ibid.

[94] Scott spent most of his life incarcerated with only twenty-eight months out of State custody over a thirty-five year period between 1966, when he entered the juvenile justice system at age 13, and 2001, when he was executed. Ohio Death Row, <http://www.ohiodeathrow.com/jay_d.htm> accessed 11 September 2011. Scott suffered from mental illness, as he was diagnosed with chronic undifferentiated schizophrenia, and he was reported as having hallucinations, hearing voices, and having severe psychotic episodes. Ibid.

[95] Ohioans to Stop Executions, 'Death Penalty in Ohio', <http://www.ohiocathconf.org/i/dp/deathpenhistpic.pdf> accessed 11 September 2011.

[96] Douglas Berman, Sentencing Law and Policy Blog, <http://sentencing.typepad.com/sentencing_law_and_policy/2006/10/uncovering_let

The three drug protocol used by Ohio and all other states allegedly created an unnecessary risk of pain and suffering during executions.[97] The first drug, sodium thiopental, is a barbiturate that is designed to put the prisoner to sleep, and therefore anesthetize them so that they do not feel anything.

The second drug, pancuronium bromide, is a paralytic that prevents the condemned prisoner from twitching, convulsing, or indicating any discomfort. The third drug, potassium chloride, stops the heart. Capital inmates in a number of jurisdictions challenged the procedure on the grounds that if the first drug, the anesthetic, had not taken effect before the second and third drugs were administered, the condemned prisoner could suffer significant pain. The pancuronium bromide will have the effect of making the condemned prisoner feel as if he is suffocating, and the third drug will be excruciatingly painful, making the prisoner feel as if his veins are on fire. The problem is that there is no way to tell whether the anesthetic has taken effect once the state administers the second drug because it paralyzes the prisoner.

The effect of the nationwide litigation over this procedure was an almost one year moratorium on the use of the death penalty while a lethal injection case from Kentucky challenging the three drug protocol was pending before the United States Supreme Court.[98] In *Baze v. Rees*, however, the Court upheld the constitutionality

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h.html> accessed 4 September 2011 (describing the Court's decision not to schedule two executions in light of the lethal injection controversy).

[97] At the time, thirty-six out of the thirty-seven death penalty states used the same lethal injection protocol.

[98] While Ohio's procedures for execution are not identical to Kentucky, it used the same three drug protocol for its executions.

of the three drug lethal injection procedure under the Eighth Amendment.[99] The Court explained that the possibility of improper administration of the drugs did not create a 'substantial risk of harm' such that the protocol violated the Eighth Amendment's prohibition against 'cruel and unusual punishment.'[100]

Ohio, however, decided to alter its procedure anyway in November 2009, adopting a one-drug protocol to replace the three-drug protocol.[101] The decision to do so was a combination of botched injections and ongoing litigation in Ohio federal court challenging aspects of the three drug protocol not addressed by the Supreme Court in *Baze*.

B. Ohio Procedure in Capital Cases

1. Trial Requirements

A person is eligible for the death penalty in Ohio only if a jury or three judge panel finds him[102] guilty of aggravated murder with at least one capital specification.[103] In order to be death-eligible, prosecutors must identify the crime

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[99] 553 US 35 (2008).

[100] Ibid.

[101] Columbus Dispatch, <http://www.dispatch.com/live/content/local_news/stories/2009/11/13/execute.html?sid=101> (Columbus Dispatch report of the change in protocol) accessed 4 September 2011.

[102] Throughout this chapter, the gender of the defendant will be in the masculine form, as almost every capital defendant in Ohio is male with a few notable exceptions. Indeed, for an interesting examination of the few females that Ohio has executed, see Victor Streib, *The Fairer Death*: *Executing Women in Ohio* (Ohio University Press, 2006).

[103] Ohio Rev Code § 2929.02 (West 2008). Specification here means aggravating circumstance. Ohio Rev Code § 2941.14(A) (West 2008). The aggravating circumstances are as follows:

(1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the

offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

specifications in the indictment.[104] A grand jury must issue the aggravated murder indictment[105] containing a statement that the defendant has committed a public offense, specifying the alleged aggravating factors, and including the signature of the prosecuting attorney.[106]

Once a prosecutor files an indictment, the police present the accused to a court or magistrate. During this initial appearance, the court or magistrate advises the accused of (1) the charges against him, (2) the right to have counsel, (3) that he need not make a statement that can be used against him, (4) the consequences of the various pleas, and (5) the nature and extent of the possible punishment if convicted.[107] After the initial appearance, the court subsequently arraigns the accused, at which time the indictment is read to the accused in open court. During this initial appearance, the accused must enter a plea.[108]

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(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

Ibid. These aggravating factors are similar to those adopted in most death penalty jurisdictions. Richard Dieter, 'Death Penalty Information Center' <http://www.deathpenaltyinfo.org> accessed 10 September 2011.

[104] Ohio R Crim P 7 (A).

[105] In Ohio, fifteen qualified citizens (pursuant to Ohio Revised Code § 2313.42) sit on a grand jury with at least twelve required to concur in the allegations in order to issue an indictment. Ohio Rev Code § 2939.20 (West 2008); Ohio R Crim P 7 (A).

[106] Ohio R Crim P 6 (F); Ohio R Crim P 7 (B); Ohio Rev Code § 2941.14 (B) (West 2008).

[107] Ohio Rev Code § 2937.02 (West 2008); Ohio R Crim P 5 (A).

[108] Ohio Rev Code § 2935.03 (West 2008); Ohio R Crim P 10 (A).

In addition, Ohio has extensive rules concerning the appointment of counsel in death penalty cases. The court must appoint two attorneys who are certified to represent capital defendants under Rule 20 of the Rules of Superintendence for the Courts of Ohio.[109] In order to be certified, defence attorneys must meet a series of qualifications, including having five years of litigation experience, have specialized training in the defence of capital crimes, and have prior experience in capital cases if designated as the lead counsel.[110] Further, the court in each county has adopted a local rule concerning the appointment of trial counsel for indigent defendants in death cases, specifying the procedure for selecting appointees from an approved list, the procedure by which the Court reviews such appointments, and the manner and rate of compensation for appointed attorneys.[111]

During the period between the arraignment and the trial, both the prosecution and the defendant have an opportunity to file pre-trial motions in which they can raise defences, objections, or evidentiary issues. These issues may include defences and objections based on the indictment, motions to suppress evidence improperly obtained, and requests for discovery.[112]

In the United States, pursuant to the Sixth Amendment to the United States Constitution, every individual charged with a capital crime possesses a right to a

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[109] Rules of Superintendence for the Cts of Ohio R 20 (I) (A)-(C).

[110] Rules of Superintendence for the Cts of Ohio R 20. The Ohio Supreme Court Committee on the Appointment of Counsel for Indigent Defendants in Capital Cases has recently proposed changes to Rule 20 that would significantly strengthen Ohio's qualification requirements. See American Bar Association, 'Evaluating Fairness and Accuracy in State Death Penalty Systems: The Ohio Death Penalty Assessment Report', (2007) 181 n 96.

[111] Rules of Superintendence for the Cts of Ohio R 8 (B).

[112] Ohio R Crim P 12 (C).

trial by jury.[113] In Ohio, a defendant may 'knowingly, intelligently and voluntarily' waive the right to trial by jury, in which case a three-judge panel will hear the case.[114] In the sentencing phase of a capital trial, the same three judge panel (or jury if not waived) determines the appropriate sentence.[115] Under current Ohio law, the sentencer may choose death, life imprisonment without parole, life imprisonment with parole after thirty years, or life imprisonment with parole after twenty-five years.[116]

2. Direct Appeal

Currently, individuals guilty of aggravated murder who receive the death penalty have automatic appeals to the Ohio Supreme Court.[117] Both the state and the defendant have an opportunity to file appellate briefs and make oral arguments before the Ohio Supreme Court.[118]

In addition to the review it performs in other criminal cases, the Ohio Supreme Court (and also formerly the Court of Appeals) must, consistent with

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[113] US Const amend V; Ohio Const. art I § 5; Ohio Rev Code § 2945.17 (West 2008). In a jury trial, the court, in conjunction with the prosecution and defense, selects twelve jurors. Ohio Rev Code § 2929.022 (B) (West 2008); Ohio R Crim P 23; *see also* Ohio Rev Code § 2945.23 (West 2008). As part of the process of juror selection, the court will exclude any juror that unequivocally states that under no circumstances will he or she follow the judge's instructions and consider the imposition of a death sentence in a particular case. Ohio Rev Code § 2945.25 (C) (2007); See also *Wainwright v. Witt*, 469 US 412, 424 (1985) (establishing the standard for when a potential juror may be excluded for his/her views on the death penalty).

[114] Ohio Rev Code § 2945.05 (West 2008); Ohio R Crim P 23.

[115] Ohio Rev Code § 2929.03 (C) (2) (b) (West 2007).

[116] Ohio Rev Code § 2929.03 (West 2007).

[117] Ohio Rev Code §§ 2953.02, 2953.05 (A) (West 2007). In addition, Ohio law provides a right to counsel for indigent defendants. Ohio Sup Ct Rules of Practice R XIX (2); *see also* Rules of Superintendence for the Cts of Ohio R 20.

[118] Ohio R App P 16; Ohio Sup Ct Rules of Practice R XIX (5).

Furman v. Georgia, *Gregg v. Georgia*, and *Woodson v. North Carolina*, make several additional inquiries.[119] First, the Court must review and independently weigh all of the facts and circumstances in the trial court record.[120] Second, the Court must determine, based on the offense and offender, whether the aggravating circumstances outweigh the mitigating circumstances.[121] Finally, the Court 'shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases.'[122]

Importantly, the Ohio Supreme Court has ruled that in making a comparative proportionality review, reviewing courts do not have to compare or even consider cases in which a life sentence was imposed, either by a jury or as the result of a prosecutorial charging decision. The Court has determined that it can satisfy the Ohio statutory requirement of proportionality review by a review of only a few 'similar' cases in which the Court has upheld the death penalty.[123]

If a court finds that the death sentence is relatively disproportionate, the court must vacate the death sentence and remand the case to the trial court for re-sentencing.[124] The trial court may resentence the defendant to (1) life imprisonment

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[119] See discussion in chapter three of these requirements.

[120] Ohio Rev Code § 2929.05(A) (West 2007).

[121] Ibid.

[122] Ibid.

[123] *State v. Steffen* 509 N E 2d 383, 395 (1987) (the Court explained, '[W]e are persuaded that the proportionality review contemplated by [the statute] should be limited to cases already decided by the reviewing court in which the death penalty has been imposed . . . No reviewing court need consider any case where the death penalty was sought but not obtained or where the death sentence could have been sought but was not.').

[124] Ohio Rev Code § 2929.06 (A) (West 2007).

without parole, (2) life imprisonment with parole after twenty-five years, or (3) life imprisonment with parole after thirty years.[125]

Once the Ohio Supreme Court affirms the conviction and death sentence of an appellant, the appellant has a period of ninety days to file an appeal with the United States Supreme Court, a petition for a writ of *certiorari*.[126] The review by the United States Supreme Court is discretionary, and the Court will decide whether to accept the appellant's case for review.[127]

3. State Post-Conviction Appeals

Under Ohio law, a convicted individual with a death sentence can file for state post-conviction relief from his or her sentence. This relief takes the form of a collateral appeal in which a defendant requests that the court render void or voidable the judgment with respect to the aggravated murder conviction and/or the death specification.[128] In the collateral or *habeas corpus* proceeding, the defendant cannot directly challenge his or her conviction or sentence.[129] Instead, the defendant must claim that the procedure under which the State convicted him and/or sentenced him to death violated his state or federal constitutional rights.[130]

As with the initial trial, the state or the petitioner may move for summary judgment at the post-conviction trial stage. The state will often do this as the

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[125] Ibid.

[126] 28 USC § 1257 (2007). In addition, at this stage the appellant can file a 'Murnahan appeal' raising the claim that his or her appellate counsel provided ineffective assistance in the appeal proceeding before the Court of Appeals (pre-1994), or the Ohio Supreme Court. Ohio Sup Ct Rules of Practice R XI (6) (A).

[127] Sup Ct R 16.

[128] Ohio Rev Code § 2953.21 (A) (1) (a), (A) (3) (West 2007).

[129] Ohio Rev Code § 2953.21 (A) (1) (a) (West 2007).

[130] Ibid.

underlying facts will not have changed since trial.[131] In deciding whether to grant a petition for post-conviction relief, the court reviews the petition, the supporting affidavits, the documentary evidence, the entire record of the decision that is the subject of the petition, including the indictment, the trial court's journal entries, the records of the clerk of court, and the trial transcript.[132] The court then dismisses the petition, with the requirement that it make findings of fact and/or conclusions of law explaining its decision to dismiss the petition, or holds a hearing to consider the merits of each claim.[133] After hearing oral arguments and reviewing the evidence, the court will then either grant relief or will deny relief, explaining the grounds for denial as to each claim of the petition.[134] The relief granted consists of either a discharge, re-sentencing, or granting of a new trial.[135]

If the state trial court denies a post-conviction petition, the petitioner has a right to appeal the decision to the Ohio Court of Appeals. On appeal, the Court of Appeals uses an abuse of discretion standard of review.[136] Appeals to the Ohio Supreme Court for post-conviction relief are discretionary.[137] If the Ohio Court of Appeals and the Ohio Supreme Court affirm the denial of the petition for post-conviction relief, the petitioner can appeal to the United States Supreme Court for a

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[131] Ohio Rev Code § 2953.21 (D) (West 2007).

[132] Ohio Rev Code § 2953.21 (C) (West 2007).

[133] Ibid.; Ohio R. App. P. 12 (A) (1); Ohio Rev Code § 2953.21 (E) (West 2007).

[134] Ohio Rev Code § 2953.21 (C) (West 2007); Ohio R. App. P. 12 (A) (1); Ohio Rev Code § 2953.21 (E) (West 2007).

[135] Ohio Rev Code § 2953.21 (G) (West 2007). The trial court can also exercise its power on tangential matters, such as bail, custody, and re-arraignment. Ibid.

[136] *State v. Back*, 2006 WL 2575961, *2 (Ohio Ct. App. 10th Dist. Aug. 31, 2006). Note the marked shift from direct review, which is *de novo*.

[137] Ohio Const art IV, §§ 2-3.

grant of *certiorari*.[138] The denial of *certiorari* by the United States Supreme Court (or an affirmance if it decides to hear the case) ends the petitioner's state post-conviction appeal.

Under Ohio law, the petitioner may file a second or successive post-conviction petition to challenge the denial of post-conviction relief of the first post-conviction petition. If the second post-conviction petition or motion merely makes the same claims as the first petition, the second petition will be barred.[139] Likewise, if the claims could have been raised in the first petition, the petitioner's motion for relief will be barred.[140] In order to have the court consider a second or successive petition for post-conviction relief, the petitioner must show one of the following:

> (1) the petitioner was 'unavoidably prevented from discovery of the facts upon which the petitioner must rely to present the claim for relief;'
>
> (2) 'the United States Supreme Court recognized a new federal or state right that applies retroactively to persons in the petitioner's situation, and the petition asserts a claim based on that right;'
>
> (3) 'by clear and convincing evidence that, but for constitutional error at trial, no reasonable factfinder would have found the petitioner guilty of the offense of which the petitioner was convicted or, if the claim challenges a sentence of death that, but for constitutional error at the sentencing hearing, no reasonable factfinder would have found the petitioner eligible for the death sentence;'
>
> (4) 'the results of the DNA testing establish, by clear and convincing evidence, actual innocence of that felony offense or, if the person was sentenced to death, establish, by clear and convincing evidence, actual innocence of the aggravating circumstance or circumstances the person was found guilty of committing and that is or are the basis of that sentence of death.'[141]

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[138] 28 USC § 1257 (2004).

[139] Ohio Rev Code § 2953.23 (West 2007).

[140] Ibid.

[141] Ibid.

There is no requirement that the state trial court, under section 2953.23, hold an evidentiary hearing for a second or successive petition for post-conviction relief.[142]

A second or successive *habeas* appeal in state court follows the same path as the initial post-conviction petition, with the trial court hearing the initial petition, and the Ohio Court of Appeals and Ohio Supreme Court providing appellate review. That being said, the appellate courts give full review of second or successive petitions only when the petitioner can establish one of the four statutory bases listed above for further appeal.

After a petitioner has exhausted all of his state law claims, he may appeal to federal court. The federal trial court and federal appellate court hear any claims that the state proceedings (on direct appeal and in state habeas) violated the petitioner's constitutional rights or that the petitioner is actually innocent. After the federal courts reject petitioner's federal habeas petition, the state supreme court will then work to schedule an execution date. This entire process from jury sentence to execution takes, on average, between ten and fifteen years.

Having explored the full capital process, one can see the importance of comparative proportionality review to fairness in capital sentencing. That initial review is in many ways the last best chance to avoid arbitrary results, as the standard of proof becomes much higher for the petitioner in habeas, and the ability to establish a claim successfully typically diminishes throughout the appeal process based on shifting burdens of proof and procedural bars.

Ohio's history demonstrates a clear willingness to use capital punishment, and its current death row population and execution schedule suggests that it will

[142] Ohio Rev Code § 2953.23 (West 2007).

continue to use the death penalty in the next decade. The decision to wait until 1999 to execute any offenders sentenced to death since 1981 has left Ohio with a significant death row population. Indeed, particularly in light of Ohio's past capital history and present capital reality, the need for safeguards against arbitrary infliction of the death penalty is both obvious and clear. Thus, the mechanisms for safeguarding against arbitrariness in sentencing outcomes are safeguards that must be monitored carefully.

And, as the procedural overview has indicated, comparative proportionality review provides the one opportunity for the state supreme court to limit the potential arbitrariness—relative disproportionality—that can occur in jury sentencing. To understand the importance of relative proportionality (and the need for robust comparative proportionality review), it is instructive to examine its origins and its relationship to the concept of absolute proportionality.

CHAPTER THREE: THE PHILOSOPHICAL AND JURISPRUDENTIAL CONTEXTS OF PROPORTIONALITY REVIEW

> *Exceptions are not always the proof of the old rule; they can also be the harbinger of a new one.*
>
> *– Marie von Ebner-Eschenbach*

Having explored the history of Ohio's capital system and its current procedural framework, it is important next to understand the broader philosophical and jurisprudential contexts of comparative proportionality review. Specifically, this chapter presents an overview of the applicable United States Supreme Court jurisprudence from which the concept of proportionality review originated. In exploring this broader context, it is helpful to define first the broader theoretical justifications for the death penalty, the Supreme Court's response to these possible justifications, and the way in which this response enabled the Court to develop two distinct conceptions of proportionality, one relative and one absolute.

A. Philosophical Foundations of Capital Punishment in the United States

1. Theories of Punishment

The general justification for punishment, that is, why persons who have committed prohibited conduct should receive state-imposed criminal sanctions, has traditionally been either to prevent crime or to punish offenders.[143] The former, an instrumental justification, views punishment as a means to achieve general

[143] Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005). The ongoing debate between retributivists and utilitarians has deep historical roots which have not been resolved. See, e g, H L A Hart, 'The Aims of the Criminal Law' (1958) 23 Law and Contemp Prob 401; Herbert Packer, *The Limits of the Criminal Sanction* 37-39 (Stanford 1968); Morris R Cohen, *Reason and Law* 41-44 (Glencoe 1950); Report of Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, 52, 17-18 (1953); H L A Hart, 'Murder and the Principles of Punishment: England and the United States' (1957) 52 Northwestern U L Rev 433, 446-455; H L A Hart, *Law, Liberty and Morality* 60-69 (Stanford 1963).

deterrence (negative general prevention) or as a means to reinforce the internal norms of citizens against harmful conduct (positive general prevention).[144] The latter, a retributive justification, conceptualizes punishment as the appropriate moral response to repay the offender for the harm caused or as a means to offset an unfair advantage gained by the offender in committing the deviant act.[145] While these justifications alone can be problematic in many ways, they together inform the dual concepts of censure and deprivation that constitute the core of the criminal sanction.[146]

The blaming response to the proscribed conduct – censure – is the moral communication to the offender that conveys the critical normative message that his or her conduct is unacceptable.[147] This message is crucial both in providing the offender with an opportunity to respond as a moral agent capable of deliberation and in communicating to third parties the punishable nature of the conduct at issue. The ensuing hard treatment, or deprivation, serves to show that the censure is meant seriously and to provide a future disincentive for offending.[148]

Given that appropriate criminal sanctions require elements of both censure and deprivation,[149] the state interests in creating and operating the system that imposes penal sanctions is threefold. First, the state has an interest in crime prevention in order to encourage a peaceful environment in which its citizens can

[144] Von Hirsch and Ashworth (n 148); Paul H Robinson, *Distributive Principles of Criminal Justice: Who Should Be Punished How Much?* (OUP 2008).

[145] Ibid.

[146] Ibid.

[147] Ibid.

[148] Ibid.

[149] Ibid.

prosper.[150] The state also has an interest in providing a response to disapproved conduct and recognizing its wrongful character.[151] Finally, the state has an interest in providing a *public valuation* of such conduct – a response *on behalf of* its citizens.[152]

As H L A Hart has pointed out, these general justifications for state-imposed punishment do not necessarily speak to the principles governing the allocation of criminal penalties.[153] Accordingly, a state's interest in imposing a criminal sentence of a particular severity or duration may rely more on the retributive or utilitarian sentencing objective that it has adopted than on its broader interest in punishing criminal offenders generally.[154] As a result, it is possible for the state to sacrifice its interest in achieving a particular sentencing objective without abdicating its broader interest in punishing wrongdoers generally. In other words, a state's interest in the punishment of criminal offenders is generally independent of its interest in the *quantity* of punishment for a given offender.

When determining the appropriate quantum of a sentence for a defendant who has murdered another, then, the State must consider the appropriate theoretical

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[150] Ibid.

[151] Ibid.

[152] Ibid.

[153] H L A Hart, *Punishment and Responsibility* (OUP 1968).

[154] Indeed, as Justice Marshall pointed out in *Furman v. Georgia*, 'most people confuse the question 'why do men in fact punish?' with the question 'what justifies men in punishing?' Men may punish for any number of reasons, but the one reason that punishment is morally good or morally justifiable is that someone has broken the law.' See Hart, 'Murder and the Principles of Punishment: England and the United States' (1957) 52 Northwestern U L Rev 433, 448; Report of Royal Commission on Capital Punishment, 1949-1953, Cmd. 8932, 52-53, 17-18 (1953). See generally, William O Reichert, 'Capital Punishment Reconsidered' (1959) 47 Kentucky L J 397, 399.

basis for determining how to achieve the required censure and deprivation. Four purposes of punishment have dominated sentencing in the United States: retribution, deterrence, rehabilitation, and incapacitation.[155] Each will be briefly discussed in turn.

The sentencing goal of retribution, as described by 'just deserts' theorists, contemplates that the criminal sentence be proportional to the offense committed, with the punishment being the 'just deserts' of the offender.[156] The culpability of the offender and the harm caused or risked by the offender determine the degree of blameworthiness of the offender and the magnitude of the proportional punishment.[157] The determination of culpability includes consideration of the offender's motives for committing the crime, the offender's intent to commit harm, the offender's capacity to obey the law, and the offender's role in the offense.[158]

The concept of proportionality in the 'just deserts' context serves two important purposes. First, it creates a 'rank-ordering' of penalties, with punishments arranged such that their relative severity corresponds with the comparative

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[155] See, e g, Michael Tonry, *Sentencing Matters* (OUP 1996); 18 USC §3553 (codifying these purposes as the bases by which all federal sentences shall be administered and indicating that these purposes are to serve as the bases for the federal sentencing guidelines). For a thorough discussion of each of these principles see Andrew Ashworth, *Sentencing and Criminal Justice* 75–87 (4th ed Cambridge 2005).

[156] Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005). While others have fashioned more broad or narrow conceptions of retribution, the 'just deserts' model is discussed here as it best approximates the manner in which most of the Supreme Court justices have employed the concept in the capital punishment context. See discussion below of *Furman v. Georgia*, 408 US 238 (1972).

[157] Andrew von Hirsch, *Censure and Sanctions* (OUP 1993); Robinson (n 149).

[158] Ibid.

seriousness of the offense.[159] Second, it limits the absolute magnitude of punishments.[160] The penalty scale must maintain a reasonable proportion between the gravity of the crimes involved and the corresponding quantum of punishment.[161] The scale should not be either inflated so as to make the sanction too severe for the crime or deflated so as to make the sanction too lenient.[162]

Utilitarian sentencing principles—rehabilitation, incapacitation, and deterrence—focus on using criminal sanctions to prevent or reduce the seriousness of future acts by the offender and/or other potential offenders.[163] A rationale of rehabilitation determines the length and type of penal sanction upon the treatment required to prevent the offender from committing future crime.[164] Incapacitation, another utilitarian objective, seeks to prevent crime by imprisoning potential

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[159] Richard G. Singer, *Just Deserts* (Ballinger 1979).

[160] Ibid. It is worth noting that other conceptions of retribution exist that do not impose such a limit. These conceptions, such as the one that Justice Marshall adopted in *Furman v. Georgia* (see discussion below), base the concept of retribution on revenge and thus have no apparent bound to the appropriate amount of vengeance in a given situation.

[161] Ibid.

[162] Ibid.

[163] Andrew Ashworth, *Sentencing and Criminal Justice* (n 160).

[164] Ibid. Indeed, for most of the twentieth century, the rehabilitative or "medical" model of sentencing prevailed in the federal and state courts in the United States. See, e g, Francis A Allen, *The Decline of the Rehabilitative Ideal: Penal Policy and Social Purpose* 5 (Yale 1981) (discussing twentieth century expressions of the rehabilitative ideal prior to its decline in the 1970s); Pamela L. Griset, *Determinate Sentencing: The Promise and the Reality of Retributive Justice* 1, 11–12 (Albany 1991) (discussing the rise of rehabilitative design from 1870 to 1970). This model viewed criminal deviance like a medical condition, with individualized treatment being a combination of deterrence motivated by the fearful prospect and unpleasant experience of incarceration, and personal renewal spurred by counseling, drug treatment, job training and similar programs. Frank O. Bowman, III, 'The Failure of the Federal Sentencing Guidelines: A Structural Analysis' (2005) 105 Colum L Rev 1315, 1321 (2005).

offenders.[165] As advocated by Jeremy Bentham,[166] deterrence[167] aims to prevent potential offenders, as rational beings, from committing crime based on the pain of the potential penalty for the crime.[168]

All three of the utilitarian sentencing principles rely on certain assumptions in order to be effective.[169] Each one of these rationales presumes that certain individuals have an elevated risk of offending that can be identified in advance.[170] In addition, rehabilitation assumes that the offender has problems which can be pinpointed and remedied through the criminal sentence.[171] Incapacitation correspondingly assumes both that the prison sentence will not make the offender more likely to commit crime and that the offender will not be replaced by other

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[165] Andrew Ashworth, *Sentencing and Criminal Justice* (n 160).

[166] Jeremy Bentham, *Of the Influence of Time and Place in Matters of Legislation, Edinburgh* (William Tait 1843).

[167] Deterrence can take two forms – general or specific – but as general deterrence is more often the focus of the utilitarian approach, it is the sole focus here. See Andrew Ashworth, *Sentencing and Criminal Justice* (n 160).

[168] See, e g, Franklin E Zimring and Gordon J Hawkins, *Deterrence: The Legal Threat in Crime Control* 92, 224 (Chicago 1973). General deterrence can depend on a number of factors including

> the severity of the penalty; the swiftness with which it is imposed; the probability of being caught and punished; the target group's perceptions of the severity, swiftness, and certainty of punishment; the extent to which members of the target group suffer from addiction, mental illness, or other conditions which significantly diminish their capacity to obey the law; and the extent to which these would-be offenders face competing pressures or incentives to commit crime.

Richard S Frase, 'Punishment Purposes' (2005) 58 Stanford L Rev 67, 71.

[169] Richard S Frase, 'State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, in: Symposium, Sentencing: What's At Stake for the States?' (2005) 105 Columbia L Rev 1190.

[170] Ibid.

[171] Ibid.

offenders in light of potential opportunities for crime.[172] Deterrence relies on the assumption that the threat of criminal sanctions can actually deter offenses and offenders.[173]

2. Adopting Philosophical Justifications for Capital Punishment

Not surprisingly, three competing justifications for capital punishment[174] have emerged in the Supreme Court's jurisprudence on the death penalty: retribution, general deterrence, and to a lesser degree, future dangerousness.[175] In the landmark opinions of *Furman v. Georgia* and *Gregg v. Georgia* (discussed below), in which the Court struck down and subsequently reinstated the death penalty, the justices of the Supreme Court grappled with whether there existed valid philosophical justifications for the death penalty. In exploring the Court's analysis, it is important to remember that '[t]he question … is not whether death serves these

[172] James Q Wilson, *Thinking About Crime* (Vintage 1983).

[173] It is certainly true that certain offenses and offenders are essentially undeterrable. Richard S Frase, 'State Sentencing Guidelines: Diversity, Consensus, and Unresolved Policy Issues, in: Symposium, Sentencing: What's At Stake for the States?' (2005) 105 Columbia L Rev 1190.

[174] While Justice Marshall postulated that 'there are six purposes conceivably served by capital punishment: retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy,' *Furman v. Georgia* 342 (Marshall, J, concurring), it is clear that '[t]wo of the several aims of punishment are generally associated with capital punishment – retribution and deterrence.' *Furman v. Georgia* 394 (Burger, C J, dissenting).

[175] Although less discussed by the Court as a theoretical matter, it is clear that incapacitation plays a practical, if not dominant, role in capital sentencing. See, e g, John H Blume, Stephen P Garvey, and Sheri Lynn Johnson, 'Future Dangerousness in Capital Cases: Always "At Issue,"' (2001) 86 Cornell L Rev 397; William W Berry III, 'Ending Death by Dangerousness' (2010) 52 Arizona L Rev 889. On the other hand, the inability to rehabilitate an offender cannot be a valid justification for capital punishment, as capital punishment makes the issue of rehabilitation moot.

supposed purposes of punishment, but whether death serves them more effectively than imprisonment.'[176]

a. Is Retribution a Valid Justification for Capital Punishment?

In *Furman v. Georgia*, Justice Marshall argued that retribution was not a valid justification for capital punishment. Noting that '[r]etaliation, vengeance, and retribution have been roundly condemned as intolerable aspirations for a government in a free society,' and that '[p]unishment as retribution has been condemned by scholars for centuries',[177] Marshall argued that the Founders adopted the Eighth Amendment's prohibition against 'cruel and unusual punishments' (see discussion below) 'to prevent punishment from becoming synonymous with vengeance.'[178] Unlike the just deserts view of retribution that limits the appropriate criminal sanction to a proportional punishment,[179] Marshall's conception of retribution is one without a clear limit as to the available punishment. Marshall explained:

> Retribution surely underlies the imposition of some punishment on one who commits a criminal act. But the fact that *some* punishment may be imposed does not mean that *any* punishment is permissible. If retribution alone could serve as a justification for any particular penalty, then all penalties selected by the legislature would, by definition, be acceptable means for designating society's moral approbation of a particular act.[180]

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[176] *Furman v. Georgia* 303 (Brennan J, concurring).

[177] See, e g, Cesare Beccaria, *On Crimes and Punishment* (tr by H. Paolucci 1963); 1 Archibold, *On the Practice, Pleading, and Evidence in Criminal Cases* §§ 11-17, XV-XIX (T Waterman 7th ed 1860).

[178] *Furman v. Georgia*, 408 US at 343 (Marshall J, concurring).

[179] See, e g, Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005).

[180] *Furman v. Georgia* 344 (Marshall J, concurring).

Thus, Marshall reasons, if retribution allows any punishment to be permissible, no punishment is therefore cruel and unusual and the Eighth Amendment is devoid of meaning.[181] Accordingly, in the opinion of Justice Marshall, retribution is not a valid justification for capital punishment.[182]

Justice Brennan adopted a view of retribution more consistent with the 'just deserts' conception, but nonetheless arrived at the same conclusion that retribution alone could not justify the use of capital punishment. He explained that 'retribution in this context means that criminals are put to death because they deserve it.'[183] Brennan then questioned whether death was 'the only fit punishment for capital crimes and that this retributive purpose justifies its infliction,' suggesting instead that life imprisonment could be a proportional punishment for a capital crime as 'no immutable moral order requires death for murderers and rapists.'[184]

Justice Brennan concluded that 'the punishment of death cannot be justified as a necessary means of exacting retribution from criminals.'[185] He argued that '[w]hen the overwhelming number of criminals who commit capital crimes go to prison, it cannot be concluded that death serves the purpose of retribution more effectively than imprisonment.'[186] As 'the asserted public belief that murderers and rapists deserve to die is flatly inconsistent with the execution of a random few,'

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[181] Ibid.

[182] Ibid.

[183] *Furman v. Georgia* 304 (Brennan J, concurring).

[184] *Furman v. Georgia* 305 (Brennan J, concurring). Brennan emphasized that the absolute proportionality analysis rested upon underlying moral beliefs, noting that 'the claim that death is a just punishment necessarily refers to the existence of certain public beliefs,' to which Brennan clearly did not subscribe. Ibid.

[185] Ibid.

[186] Ibid.

Brennan held that a just deserts conception of retribution alone was an inadequate basis for capital punishment.[187] Put differently, Brennan did not believe that offenders 'deserved' capital punishment for *any* crime as a matter of 'just deserts' retribution.

Justices Marshall and Brennan, however, were in the minority in their view that retribution was inadequate to justify the use of the death penalty.[188] Justice Stewart explicitly validated a conception of 'just deserts' as a retributive basis for the death penalty:

> I cannot agree that retribution is a constitutionally impermissible ingredient in the imposition of punishment. The instinct for retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they 'deserve,' then there are sown the seeds of anarchy -- of self-help, vigilante justice, and lynch law.[189]

Justice White similarly found that, '[i]t is perhaps true that, no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received.'[190]

Similarly, the four dissenting justices in *Furman* agreed that retribution was a valid justification for capital punishment. In response to Marshall, they wrote:

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[187] Ibid.

[188] In *Furman*, all nine justices wrote opinions, with five (Brennan, Marshall, Stewart, White, and Douglas), voting to strike down the death penalty, albeit based on different rationales. Of the five, two found retribution to be invalid as a purpose for using the death penalty, while the other three found using retribution acceptable as a basis for capital punishment.

[189] *Furman v. Georgia* 308 (Stewart J, concurring).

[190] *Furman v. Georgia* 311 (White J, concurring).

> There is no authority suggesting that the Eighth Amendment was intended to purge the law of its retributive elements, and the Court has consistently assumed that retribution is a legitimate dimension of the punishment of crimes. *See Williams v. New York*, 337 U. S. 241, 337 U. S. 248 (1949); *United States v. Lovett*, 328 U. S. 303, 328 U. S. 324 (1946) (Frankfurter, J., concurring). Furthermore, responsible legal thinkers of widely varying persuasions have debated the sociological and philosophical aspects of the retribution question for generations, neither side being able to convince the other. It would be reading a great deal into the Eighth Amendment to hold that the punishments authorized by legislatures cannot constitutionally reflect a retributive purpose.[191]

Justice Powell likewise emphasized that while the Court had previously acknowledged that '[r]etribution is no longer the dominant objective of the criminal law' and that '[r]eformation and rehabilitation of offenders have become important goals of criminal jurisprudence,'[192] the Court 'did not reject retribution altogether.'[193] Powell also affirmed Lord Denning's view that '[t]he truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrongdoer deserves it, irrespective of whether it is a deterrent or not.'[194]

b. Is Deterrence a Valid Justification for Capital Punishment?

In addition to his failed challenge to retribution as a theoretical justification for capital punishment, Justice Marshall also questioned whether the purpose of deterrence was adequately served by capital punishment. At the heart of his objection was the inconclusive nature of this inquiry. As Marshall explained, '[t]here is no more complex problem than determining the deterrent efficacy of the death penalty.'[195] On its face, according to Marshall, '[c]apital punishment has

[191] *Furman v. Georgia* 394-95 (Burger C J, dissenting).

[192] *Williams v. New York*, 337 US 241, 248 (1949).

[193] *Furman v. Georgia* 452 (Powell J, concurring).

[194] *Furman v. Georgia* 453 (Powell J, concurring).

[195] *Furman v. Georgia* 347 (Marshall J, concurring).

obviously failed as a deterrent when a murder is committed. We can number its failures. But we cannot number its successes. No one can ever know how many people have refrained from murder because of the fear of being hanged.'[196]

Chief Justice Burger similarly recognized the conundrum in assessing whether capital punishment deterred crime: '[t]hose favoring abolition find no evidence that it does. Those favoring retention start from the intuitive notion that capital punishment should act as the most effective deterrent, and note that there is no convincing evidence that it does not.'[197]

In *Gregg v. Georgia*, Justice Stewart's plurality opinion settled this question as a matter of the Court's jurisprudence, but only after again acknowledging that, despite all of the statistical analysis, 'the results simply have been inconclusive.'[198] Thus, while 'there is no convincing empirical evidence either supporting or refuting this view, Stewart posited that:

> '[w]e may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act. And there are some categories of murder, such as murder by a life prisoner, where other sanctions may not be adequate.[199]

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[196] Ibid.

[197] *Furman v. Georgia* 394-95 (Burger C J, dissenting).

[198] *Gregg v. Georgia*, 428 US 153, 184-85 (1976). Indeed, the debate as to the deterrent effect of the death penalty has not subsided. See, e g, Carol S Steiker, 'No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty' (2005) 58 Stanford L Rev 751; Cass Sunstein and Adrian Vermeule, 'Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs' (2005) 58 Stanford L Rev 847.

[199] *Gregg v. Georgia*, 428 US 153, 185-86 (1976).

For all of these reasons, then, the Court found deterrence to be an acceptable basis for the death penalty, so that 'the infliction of death as a punishment for murder is not without justification.'[200]

c. Is Dangerousness a Valid Justification for Capital Punishment?

While the rationales of retribution and general deterrence tend to permeate the public's understanding of the justification for the state's use of the death penalty against its citizens, a closer examination of the various capital schemes of death penalty jurisdictions quickly reveals that dangerousness is in fact a primary determinant in the sentencing process.

In *Furman* and *Gregg*, unlike the much-debated justifications of retribution and deterrence, incapacitation was barely mentioned as a justification for the death penalty. Justice Marshall dismissed incapacitation as a valid rationale in *Furman*:

> Much of what must be said about the death penalty as a device to prevent recidivism is obvious – if a murderer is executed, he cannot possibly commit another offense. The fact is, however, that murderers are extremely unlikely to commit other crimes either in prison or upon their release. For the most part, they are first offenders, and when released from prison they are known to become model citizens. Furthermore, most persons who commit capital crimes are not executed. . . . In light of these facts, if capital punishment were justified purely on the basis of preventing recidivism, it would have to be considered to be excessive; no general need to obliterate all capital offenders could have been demonstrated, nor any specific need in individual cases.[201]

Justice White's concurrence likewise stated that while

> executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime, . . . when imposition of the penalty reaches a certain degree of infrequency . . . . Nor could it be said with confidence that society's need for specific deterrence justifies death for so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient.[202]

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[200] *Gregg v. Georgia* 187.

[201] *Furman v. Georgia*, 408 US 238, 355 (1972) (Marshall J, concurring).

[202] *Furman v. Georgia*, 408 US 238, 311–12 (1972) (White J, concurring).

Further, in *Gregg*, Justice Stewart's plurality opinion dismissed incapacitation as a valid purpose for using the death penalty.[203] In footnote 28, he cited two cases, *People v. Anderson*[204] and *Commonwealth v. O'Neal*,[205] both of which explain why incapacitation does not justify use of the death penalty. In *People v. Anderson*, the California Supreme Court explained that

> [a]dmittedly, isolation of the offender from society is a proper and often necessary goal of punishment and death does effectively serve that purpose. Society can be protected from convicted criminals, however, by far less onerous means than execution. In no sense can capital punishment be justified as 'necessary' to isolate the offender from society.[206]

Similarly, in *Commonwealth v. O'Neal*, the Supreme Judicial Court of Massachusetts stated that

> [w]hile isolating convicted murderers from society in order to prevent their commission of similar crimes in the future is a legitimate objective of punishment, it seems clear that this goal can be effectively served by means less restrictive than death. 'The sufficient answer (to the claim that the infliction of death is necessary to stop those convicted of murder from committing further crimes) . . . is that if a criminal convicted of a capital crime poses a danger to society, effective administration of the State's pardon and parole laws can delay or deny his release from prison, and techniques of isolation can eliminate or minimize the danger while he remains confined.'[207]

Nonetheless, in *Jurek v. Texas*, decided the same day as *Gregg*, the Court approved Texas' new capital statute which based the determination of whether the offender would be sentenced to death on a jury determination of that individual's

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[203] *Gregg v. Georgia*, 428 US 153 (1976).

[204] 6 Cal 3d 628, 651, 100 Cal Rptr 152, 493 P 2d 880, 896, *cert. denied*, 406 US 958, 92 S Ct 2060, 32 L Ed 2d 344 (1972).

[205] 339 NE 2d, at 685–686 (1975) (permitting a due process challenge to a mandatory death statute for rape-murder to proceed).

[206] 6 Cal 3d 628, 651, 100 Cal Rptr 152, 493 P.2d 880, 896, *cert denied*, 406 US 958, 92 SCt 2060, 32 L Ed 2d 344 (1972).

[207] *O'Neal* 685–686 (1975).

likelihood of committing future crimes (his future dangerousness).[208] Based on the approval of the Texas capital punishment system, the Court began to assume that incapacitation was a valid justification for capital punishment. In *Spaziano v. Florida*, for instance, the Court explained,

> Although incapacitation has never been embraced as a sufficient justification for the death penalty, it is a legitimate consideration in a capital sentencing proceeding.[209]

Similarly, in *Simmons v. South Carolina*, the Court emphasized that

> [t]his Court has approved the jury's consideration of future dangerousness during the penalty phase of a capital trial, recognizing that a defendant's future dangerousness bears on all sentencing determinations made in our criminal justice system.[210]

Thus, despite the present availability of life without parole, the speculative nature of future dangerousness determinations, and the argument that the evolving standards of decency may prohibit the use of incapacitation as a rationale for capital

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[208] 428 US 262 (1976). Writing for a three justice plurality, Stevens explained,

> It is, of course, not easy to predict future behavior. The fact that such a determination is difficult, however, does not mean that it cannot be made. Indeed, prediction of future criminal conduct is an essential element in many of the decisions rendered throughout our criminal justice system. . . .The task that a Texas jury must perform in answering the statutory question in issue is thus basically no different from the task performed countless times each day throughout the American system of criminal justice. What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine. Texas law clearly assures that all such evidence will be adduced.

Ibid.

[209] 468 US 447 (1984).

[210] *Simmons v. South Carolina* , 512 US 154, 162 (1984).. The Court cited the language from *Jurek* v. *Texas* that 'any sentencing authority must predict a convicted person's probable future conduct when it engages in the process of determining what punishment to impose'. 428 US 262, 275 (1976). It also cited *California* v. *Ramos* and its explanation that it is proper for a sentencing jury in a capital case to consider "the defendant's potential for reform and whether his probable future behavior counsels against the desirability of his release into society" 463 US 992, 1003, n. 17 (1983).

punishment, the Court's decisions to date indicate that, for now, future dangerousness remains a valid justification for the use of capital punishment.[211]

B. The Jurisprudential Origins of Proportionality Review

It was amidst the discussion of these theoretical underpinnings – the justifications for capital punishment – that the Court undertook its analysis as to whether the Constitution permitted capital punishment, and if so, what procedural safeguards were required to satisfy the broad theoretical justifications of retribution and deterrence. The first of these eventually led to the development of comparative proportionality review.

The concept of comparative proportionality review in capital cases in the United States is a relatively recent one, which the states adopted in the 1970s. In order to understand the context in which states adopted it and the way in which it was originally intended to function, it is instructive to explore its place in the evolving jurisprudence of the Supreme Court that interprets the Eighth Amendment of the United States Constitution. As explained below, the Court initially conceptualized the Eighth Amendment in terms of 'absolute proportionality,' that is, a prohibition of punishments that were grossly disproportionate (based on the applicable purpose of punishment) to the criminal act committed.[212] The Supreme Court reiterated this idea in *Pulley v. Harris*:

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[211] See William W Berry III, 'Ending Death by Dangerousness' (2010) 52 Arizona L Rev 889 (arguing for the elimination of dangerousness from capital proceedings); Christopher Slobogin, 'Capital Punishment and Dangerousness' in *Mental Disorder and Criminal Law: Responsibility, Punishment, and Competence*, R Schopp ed (Springer 2008) (arguing that dangerousness is a valid aggravating factor).

[212] The principle of absolute proportionality as construed by the Supreme Court is broader than the retributive concept of 'just deserts' – it encompasses all of the purposes of punishment. See, e g, Alice Ristroph, 'Proportionality as a Principle of Limited Government', (2005) 55 Duke L J 263; William W Berry III, 'Promulgating Proportionality, (2011) 46 Georgia L Rev (forthcoming). It seeks to sentence the

> Traditionally, 'proportionality' has been used with reference to an abstract evaluation of the appropriateness of a sentence for a particular crime. Looking to the gravity of the offense and the severity of the penalty, to sentences imposed for other crimes, and to sentencing practices in other jurisdictions, this Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime.[213]

As the Court has explained, however, 'the death penalty is not in all cases a disproportionate penalty in this sense.'[214]

From this initial understanding, the Court developed two additional framing principles in applying the Eighth Amendment. First, the Supreme Court has implemented the principle of individualized sentencing determinations, such that each defendant receives a sentence based on the individual characteristics of the crime committed and the defendant.[215] Second, the Court has adopted the principle of treating cases which are factually similar in the same way, such that similar

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defendant in a manner consistent with what the defendant merits based on the chosen purpose of punishment. Thus, the application of this concept by the United States Supreme Court is not entirely identical with the approaches adopted by retributive ('just deserts') theorists (see, e g, Von Hirsch and Ashworth n 60), which define proportionality in terms of the culpability of the defendant and the harm caused, and generally exclude other factors from the determination of a proportional sentence. The difference is that the Court, in determining whether a sentence is disproportionate as an absolute, as opposed to a relative matter, has not explicitly limited itself to this retributive purpose of punishment, sometimes allowing other utilitarian considerations into its sentencing calculus. For competing views on whether the 'original' meaning understanding of the Eighth Amendment contemplates a conception of absolute proportionality that is limited to 'just deserts' retribution or a more broad conception, see John F Stinneford, 'Rethinking Proportionality Under the Cruel and Unusual Punishments Clause (2011) 97 Virginia L Rev 899; William W Berry III, 'Separating Retribution from Proportionality' (2011) 97 Virginia L Rev In Brief 61.

[213] 465 US 37, 42-43 (1984). See, e.g., *Solem v. Helm*, 463 US 277 (1983); *Enmund v. Florida*, 458 US 782 (1982); *Coker v. Georgia*, 433 US 584 (1977).

[214] *Gregg v. Georgia*, 428 US 153, 187 (1976) (Stewart, Powell, and Stevens, JJ); *Furman v. Georgia* 226 (White J, concurring).

[215] See discussion below of *Woodson v. North Carolina*, 428 US 280 (1976), and *Lockett v. Ohio*, 438 US 586 (1978).

crimes receive similar sentences.[216] This broad concern of treating 'like cases alike' stems from the aspiration to avoid arbitrary outcomes in the sentencing of criminal defendants. It is from the latter of these two concerns that the concept of relative proportionality, that is, whether a sentencing decision in a capital case by a jury is 'comparatively excessive,' has emerged.

1. The Eighth Amendment and the principle of absolute proportionality

The Eighth Amendment to the United States Constitution prohibits the infliction of 'cruel and unusual punishments.'[217] For over 100 years after the adoption of the United States Constitution in 1787, the Supreme Court gave almost no meaningful interpretation as to how the 'cruel and unusual punishment' clause should be applied, if at all, to limit the power of state governments and the federal government to inflict punishment upon its citizens for crimes.

a. Weems v. United States

The Supreme Court's first serious attempt to define the 'cruel and unusual punishment' prohibition of the Eighth Amendment came in the 1910 case of *Weems v. United States*.[218] Weems was sentenced to fifteen years of 'hard and painful labor' in ankle chains for the falsification of a public record in the Philippines Territory.[219] The Court held that the sentence was unconstitutional because the

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[216] See discussion below of *Furman v. Georgia*, 408 US 238 (1972), and *Gregg v. Georgia*, 428 US 153 (1976).

[217] US Const Amend XIV.

[218] 217 US 349 (1910).

[219] *Weems v. United States* 366. The punishment, known as 'cadena temporal,' had a sentencing range of twelve to twenty-one years and provided that the inmate 'shall labor for the benefit of the state. They shall always carry a chain at the ankle, hanging from the wrists; they shall be employed at hard and painful labor, and shall receive no assistance whatsoever from without the institution.' *Weems v. United States* 364.

punishment was 'cruel and unusual' in relation to the crime committed. Comparing the crime of Weems (falsifying a single public record) with a litany of other more serious crimes (including some types of murder), the Supreme Court held that the sentence prescribed by the statute was disproportionate – the sentence for the crime committed was unduly excessive and thus disallowed in all situations.

In addition to establishing that the Eighth Amendment prohibited certain punishments for certain crimes when the punishment was disproportionate to the crime, the *Weems* Court importantly established that the concept of 'cruel and unusual punishments' was not a static one. In other words, the Court could, as it saw fit over time, determine that certain punishments were disproportionate (and thus unconstitutionally excessive) for certain crimes, even if such punishments had historically been administered for such crimes. The Court explained:

> Legislation, both statutory and constitutional, is enacted, it is true, from an experience of evils, but its general language should not, therefore, be necessarily confined to the form that evil had theretofore taken. Time works changes, brings into existence new conditions and purposes. Therefore a principle, to be vital, must be capable of wider application than the mischief which gave it birth. This is peculiarly true of constitutions. They are not ephemeral enactments, designed to meet passing occasions. They are, to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as human institutions can approach it.' The future is their care, and provision for events of good and bad tendencies of which no prophecy can be made. In the application of a constitution, therefore, our contemplation cannot be only of what has been, but of what may be. Under any other rule, a constitution would indeed be as easy of application as it would be deficient in efficacy and power. Its general principles would have little value, and be converted by precedent into impotent and lifeless formulas. Rights declared in words might be lost in reality. And this has been recognized. The meaning and vitality of the Constitution have developed against narrow and restrictive construction.

Thus, after *Weems*, the Eighth Amendment provided not only a means of prohibiting disproportionate penalties, but one that could (and would) evolve over time.

b. Trop v. Dulles

In *Trop v. Dulles*, decided almost fifty years later, the U S Supreme Court

broadened these principles in considering whether a punishment of loss of United States citizenship for court-martial conviction for wartime desertion constituted 'cruel and unusual' punishment in violation of the Eighth Amendment to the United States Constitution.[220] As in *Weems*, the Supreme Court held that the punishment (expatriation) was unconstitutionally severe for the crime committed (wartime desertion).[221] While recognizing that this punishment had not been historically deemed absolutely disproportionate to the crime committed, the Court recognized that 'the words of the [Eighth] Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.'[222]

c. Modern Application (*Coker, Enmund, Atkins, Roper*, and *Kennedy*)

The principle of absolute proportionality remains vital in the application of the Eighth Amendment to criminal sentences, although it has been applied almost exclusively to capital cases since *Trop*.[223] When applying the evolving standards of

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[220] 356 US 86 (1958).

[221] *Trop v. Dulles* 102. The Court explained,

> This punishment is offensive to cardinal principles for which the Constitution stands. It subjects the individual to a fate of ever-increasing fear and distress. He knows not what discriminations may be established against him, what proscriptions may be directed against him, and when and for what cause his existence in his native land may be terminated. He may be subject to banishment, a fate universally decried by civilized people. He is stateless, a condition deplored in the international community of democracies. It is no answer to suggest that all the disastrous consequences of this fate may not be brought to bear on a stateless person. The threat makes the punishment obnoxious.

Ibid.

[222] *Trop v. Dulles* 101.

[223] This is in large part attributable to the Court's adoption of the principle that 'death is different' and as a result, the scrutiny and procedural protections afforded to capital cases ought to be significantly more rigorous than that in non-capital

decency concept from *Trop*, the Supreme Court has articulated two standards to aid in the determination of whether a punishment is 'absolutely' disproportionate for a given crime. First, the Court examines objective, majoritarian criteria, looking to the sentencing schemes of state legislatures, jury sentencing decisions, and sometimes to international norms and standards to determine what the 'evolving standards of decency' demonstrate to be proportional.[224] Second, the Court applies its own subjective judgment to determine whether to follow the prevailing trend of its objective indicia.[225]

Using this analysis, the Court has held that the death penalty is an absolutely disproportionate penalty for the rape of an adult (with no killing),[226] for juveniles

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cases. See Jeffrey Abramson, 'Death-is-Different Jurisprudence and the Role of the Capital Jury' (2004) 2 Ohio St J Crim L 117. See, e g, *Gregg v. Georgia*, 428 US 153, 187 (1976) ('There is no question that death as a punishment is unique in its severity and irrevocability.'); *Woodson v. North Carolina*, 428 US 280, 305 (1976) (death differs from life imprisonment because of its 'finality'); *Spaziano v. Florida*, 468 US 447, 460 n 7 (1984) ('the death sentence is unique in its severity and in its irrevocability'); *Ring v. Arizona*, 536 US 584, 616-17 (2002) (Breyer, J, concurring) (as 'death is not reversible,' DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming).

[224] This is an interesting approach given that the Constitution (and the rights that it affords) is in many ways designed to protect the rights of political minorities against the tyranny of the political majority.

[225] The Court has, thus far, always followed the approach suggested by the objective indicia. Its application of the objective indicia, however, has not been immune from criticism. See, e g, *Atkins v. Virginia,* 536 US 304 (2002) (Scalia, J, dissenting) ('Today's decision is the pinnacle of our Eighth Amendment death-is-different jurisprudence. Not only does it, like all of that jurisprudence, find no support in the text or history of the Eighth Amendment; it does not even have support in current social attitudes regarding the conditions that render an otherwise just death penalty inappropriate. Seldom has an opinion of this Court rested so obviously upon nothing but the personal views of its members.'). Others have warned of the dangers of non-democratic elites substituting their own values in place of popular ones. See, e.g., John Hart Ely, 'The Supreme Court, 1977 Term – Foreword: On Discovering Fundamental Values' (1978) 92 Harv L Rev 5, 51.

[226] *Coker v. Georgia*, 433 US 584 (1977).

(under eighteen at the time of the commission of the crime),[227] for mentally retarded individuals,[228] for felony murder robbery where the participant had no intent to kill and did not kill,[229] and, most recently, for the rape of a child.[230]

2. The Eighth Amendment and the principle of relative proportionality

Despite the Court's ability to use the Eighth Amendment to ensure absolute proportionality in sentencing, the Court faced a second problem – ensuring some modicum of consistency between sentences. The Court found this issue to be particularly important in capital cases, both because juries, not judges, sentenced offenders (arguably creating greater disparity) and because the potential sentence was the death penalty.[231] The Eighth Amendment issue, then, was whether death sentences constituted 'cruel and unusual punishment' because they were inflicted arbitrarily.

Thus, the question was not one of absolute disproportionality, but of relative disproportionality – comparative excessiveness. One way to measure such comparative excessiveness is for a state supreme court to conduct proportionality review. In *Pulley v. Harris*, the Supreme Court distinguished this from the concept of absolute proportionality described above:

> This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire

[227] *Atkins v. Virginia*, 536 US 304 (2002).

[228] *Roper v. Simmons*, 543 US 551 (2005).

[229] *Enmund v. Florida*, 458 US 782 (1982).

[230] *Kennedy v. Louisiana*, 554 US 407 (2008).

[231] To be fair, the concern about disparity, particularly in federal courts, was not limited to capital cases. See, e g, Marvin E Frankel, *Criminal Sentences: Law Without Order* 21 (Hill and Wang 1972) (complaining that the 'almost wholly unchecked and sweeping' discretion of federal judges at sentencing was 'terrifying and intolerable for a society that professes devotion to the rule of law.').

> instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.[232]

Such review becomes particularly important where a jury determines the appropriate sentence in a given case. The question of how to frame jury discretion in capital cases, and indeed, whether to give juries discretion at all, is one that the Supreme Court has addressed on more than one occasion.

a. McGautha v. California

The Court first addressed this question in *McGautha v. California*,[233] where a 6-3 majority of the Supreme Court reaffirmed the Court's traditional faith in the reliability of jury decisions, rejecting the petitioners' claim that the state jury procedures in their respective capital cases violated the procedural due process requirements of the Fourteenth Amendment to the United States Constitution.[234] As the Fourteenth Amendment requires that no State shall 'deprive any person of life, liberty, or property, without due process of law,'[235] the Court in *McGautha* considered whether the broad sentencing discretion afforded to the jury, ranging from a short prison sentence to the death penalty violated the petitioner's right to due process.

The Court held that the Constitution did not require any restriction of the discretion of juries in capital trials or the bifurcation of such trials into guilt and

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[232] *Pulley v. Harris* 43.

[233] An Ohio case, *Crampton v. Ohio*, was a companion case to *McGautha* and was decided as part of the opinion. As with California, the Court held that the broad discretion afforded to Ohio juries did not violate the petitioner's due process rights under the Fourteenth Amendment.

[234] 402 US 183, 196 (1971).

[235] US Const Amend XIV.

punishment phases.[236] Acknowledging its belief in the jury system, the Court explained that '[i]n light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.'[237]

Despite the outcome in *McGautha*, the opinions of the dissenting justices expressed serious apprehension about the state sentencing procedures, given their absence of any limitation on jury discretion and their combination of guilt and punishment determinations into a single trial deliberation.[238] Justice Brennan's concern with the open-ended jury discretion in the state sentencing schemes at issue in *McGautha* was that they were inadequate because they were not 'designed to control arbitrary action and also to make meaningful the otherwise available mechanism for judicial review.'[239] Thus, for both the majority and the dissenters,

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[236] *McGautha v. California* 207, 221. The Court rejected the argument a unitary trial violated the Constitution by forcing a defendant to decide whether to 'remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment.' *McGautha v. California* 211, 213.

[237] *McGautha v. California* 207.

[238] *McGautha v. California* 248, 309 (Brennan J, dissenting) ('The question that petitioners present for our decision is whether the rule of law, basic to our society and binding upon the States by virtue of the Due Process Clause of the Fourteenth Amendment, is fundamentally inconsistent with capital sentencing procedures that are purposely constructed to allow the maximum possible variation from one case to the next, and provide no mechanism to prevent that consciously maximized variation from reflecting merely random or arbitrary choice.'). See also John M Harlan, 'Thoughts at a Dedication: Keeping the Judicial Function in Balance,' in *The Evolution of a Judicial Philosophy* 289, 291–292 (David L Shapiro ed., 1969) ('Our scheme of ordered liberty is based, like the common law, on enlightened and uniformly applied legal principle, not on ad hoc notions of what is right or wrong in a particular case.').

[239] *McGautha v. California* 268 (Brennan, J, dissenting). Brennan is not questioning the role of the jury here as the arbiter of the decision concerning life and death; rather, he is simply arguing for greater guidance from the state in the decision-

their respective views of the fairness of the jury procedure and its relative consistency from case to case, and not their overall view concerning the propriety of the death sentences with respect to the crime committed in the cases before them, dictated their respective opinions in this case.[240]

b. Furman v. Georgia

In 1972, the United States Supreme Court decided *Furman v. Georgia*, in which it held that the death penalty as administered violated the Eighth Amendment's prohibition against cruel and unusual punishment.[241] Initially understood by many to signal the abolition of capital punishment in the United States, a plurality of the justices in *Furman* instead focused on the flaws in process,

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making process and for greater ability to review the rationales underlying the jury's verdict. *McGautha v. California* 311 ('Finally, I should add that for several reasons the present cases do not draw into question the power of the States that should so desire to commit their criminal sentencing powers to a jury. For one thing, I see no reason to believe that juries are not capable of explaining, in simple but possibly perceptive terms, what facts they have found and what reasons they have considered sufficient to take a human life. Second, I have already indicated why I believe that life itself is an interest of such transcendent importance that a decision to take a life may require procedural regularity far beyond a decision simply to set a sentence at one or another term of years.').

[240] As to the concept of a unitary trial, Justice Douglas wrote:

The unitary trial is certainly not 'mercy' oriented. That is, however, not its defect. It has a constitutional infirmity because it is not neutral on the awesome issue of capital punishment. The rules are stacked in favor of death. It is one thing if the legislature decides that the death penalty attaches to defined crimes. It is quite another to leave to judge or jury the discretion to sentence an accused to death or to show mercy under procedures that make the trial death oriented. Then the law becomes a mere pretense, lacking the procedural integrity that would likely result in a fair resolution of the issues. In Ohio, the deficiency in the procedure is compounded by the unreviewability of the failure to grant mercy. *McGautha v. California* 247 (Douglas, J, dissenting, joined by Brennan, J and Marshall, J).

[241] 408 US 238 (1972).

particularly with respect to the guidance provided to the jury with which to determine the appropriate sentence.[242]

Specifically, the Court took issue with the broad discretion given to a jury, both in terms of range of potential sentence and lack of guidance as to when a death sentence was proper, as well as the absence of bifurcation between the guilt and sentencing phases of trial.[243] Justice White found that 'the death penalty is exacted with great infrequency even for the most atrocious crimes, and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.'[244] Justice Stewart likewise concluded that the death penalty *as applied* constituted cruel and unusual punishment because the death penalty was 'so wantonly and so freakishly imposed.'[245] He found that 'these death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.'[246] Justice Brennan similarly explained that the Eighth Amendment 'reveals a particular concern with the establishment of a safeguard against arbitrary punishments.'[247] Thus, 'when the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily.'[248]

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[242] Ibid.

[243] Ibid.

[244] *Furman v. Georgia* 314 (White, J, concurring).

[245] Ibid.

[246] *Furman v. Georgia* 309 (Stewart, J, concurring).

[247] *Furman v. Georgia* 275 (Brennan, J, concurring).

[248] *Furman v. Georgia* 294 (Brennan, J, concurring) (Brennan further commented that 'Indeed, [the administration of the death penalty] smacks of little more than a lottery system.').

At its heart, the *Furman* decision found the death penalty unconstitutional *because* there was no rhyme or reason in separating the few murderers who received the death penalty from the many that did not. Specifically, there were no indicia or standards determining how to draw the line between murders that warranted a punishment of death and those that did not. Justice Brennan explained,

> No one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison. Crimes and criminals simply do not admit of a distinction that can be drawn so finely as to explain, on that ground, the execution of such a tiny sample of those eligible. Certainly the laws that provide for this punishment do not attempt to draw that distinction; all cases to which the laws apply are necessarily 'extreme.' Nor is the distinction credible in fact. If, for example, petitioner Furman or his crime illustrates the 'extreme,' then nearly all murderers and their murders are also 'extreme.'[249]

Thus, the Court in *Furman* highlighted the absence of a principle by which to separate murders deserving death from 'ordinary' murders that deserved a lesser sentence. The *Furman* decision resulted in the suspension of capital punishment in the United States for several years, with no executions occurring for almost a decade.[250] Thus, because the death sentences were arbitrary *relative to* the many other similar cases that did not receive the death penalty, these sentences were 'cruel and unusual' under the Eighth Amendment.

c. Gregg v. Georgia

In 1976, the United States Supreme Court reinstated the death penalty through its holding in *Gregg v. Georgia*, a case that validated the Georgia death penalty statutes that were amended after *Furman*.[251] On the same day, the Supreme

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[249] *Furman v. Georgia* 294 (Brennan, J, concurring).

[250] This was in part because there were no executions for five years before *Furman v. Georgia*. So there were no executions in the United States between 1967 and 1977.

[251] 428 US 153 (1976).

Court also decided several companion cases assessing the death penalty schemes adopted after *Furman* in other jurisdictions.[252]

Gregg cited several features of the new Georgia sentencing procedure that alleviated the concern in *Furman* of arbitrary sentencing outcomes resulting from unfettered jury discretion.[253] The Georgia statute first bi-furcated the sentencing procedure, separating the sentencing determination from the determination of guilt.[254] Second, the statute created ten aggravating factors, at least one of which had to be proven beyond a reasonable doubt before death became a potential sentence.[255] In addition, the statute required the jury to weigh the aggravating factors against any mitigating factors offered into evidence at sentencing.[256]

Finally, 'as an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provide[d] for automatic appeal of all death sentences to the State's Supreme Court.'[257] The Georgia Supreme Court was 'required by statute to review each sentence of death and determine whether it was imposed under the influence of passion or prejudice, whether the evidence supports

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[252] See *Woodson v. North Carolina*, 428 US 280 (1976) (holding North Carolina's new capital statute unconstitutional); *Jurek v. Texas*, 428 US 262 (1976) (upholding Texas's new capital statute); *Roberts v. Louisiana*, 428 US 325 (1976) (holding Louisiana's new capital statute unconstitutional); *Proffitt v. Florida*, 428 US 242 (1976) (upholding Florida's new capital statute).

[253] Ibid.

[254] Ibid.

[255] Ibid.

[256] Ibid.

[257] *Gregg v. Georgia* 198 (citing Ga Code Ann § 27-2537 (c) (Supp 1975)).

the jury's finding of a statutory aggravating circumstance, and whether the sentence is disproportionate compared to those sentences imposed in similar cases.'[258]

The Court in *Gregg* concluded that because 'Georgia's new sentencing procedures require, as a prerequisite to the imposition of the death penalty, specific jury findings as to the circumstances of the crime or the character of the defendant, and … the Supreme Court of Georgia compares each death sentence with the sentences imposed on similarly situated defendants to ensure that the sentence of death in a particular case is not disproportionate' the new procedures satisfied the concerns of *Furman.*[259] As a result, the Court found that the procedures provided a 'meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not.'[260]

One question, though, remained open after the Court's decision in *Gregg*: what constitutes excessiveness (or relative disproportionality)? Justice Stewart's plurality opinion offered one approach:

> 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 come when juries 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.[261]

[258] Ibid.

[259] Ibid.

[260] Ibid.

[261] *Gregg v. Georgia* 206 (emphasis added).

Stewart's perception of relative disproportionality, then, seems to view comparative sentence review as a safeguard only against the lightning-strike type of aberrant death sentence that concerned him in *Furman*.[262]

By contrast, Justice White, as indicated in his concurring opinion in *Gregg*, conceptualized relative proportionality (and comparative excessiveness) more expansively.[263] As he indicated in *Furman*, White believed that the constitutional flaw was not randomness, but under-utility.[264] In other words, what made a particular death sentence 'cruel and unusual' was the rarity that similar cases received the same sentence.[265] His approach was based on a view that deterrence justified capital punishment, but where such sentences were not regularly applied, a capital sentence in a single or rare case became unconstitutional because it served no deterrent purpose.

Thus, for White, comparative excessiveness relates to situations where a death sentence is not imposed in a 'substantial portion' of capital cases with similar aggravating circumstances. Where, then, the frequency of death sentences in an identifiable class is something less than substantial, a death sentence becomes unconstitutionally excessive because it loses its deterrent value.

Viewing the requirement of relative proportionality from the perspective of regularity of imposition, as opposed to eliminating randomness, creates a heightened

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[262] David C Baldus, George Woodworth, and Charles Pulaski, 'Comparative Review of Death Sentences: The Georgia Experience', (1983) 74 Journal of Criminal Law and Criminology 661. See *Furman v. Georgia*, 309 (Stewart J, concurring).

[263] 428 US at 222.

[264] See *Furman v. Georgia,* 312 (White J, concurring).

[265] David C Baldus, George Woodworth, and Charles Pulaski, 'Comparative Review of Death Sentences: The Georgia Experience', (1983) 74 Journal of Criminal Law and Criminology 661.

requirement of proportionality in one's consideration of excessiveness. Importantly, the method by which one conceives the requirements of *Furman* dictates the degree to which state supreme courts should implement comparative proportionality review, as a narrow or broad safeguard against relatively disproportionate outcomes.

At the heart, then, of the remedy for the problem of arbitrary sentencing was the adoption of comparative proportionality review.[266] The general approach, under Georgia's system and that of Ohio, was to require that the state supreme court consider (upon mandatory appeal) whether the sentence imposed by the jury is comparatively excessive (relatively disproportionate). Comparative proportionality review, then, served as a means to cure the potential for arbitrariness that had previously resulted from sentencing by juries in capital cases.

3. Questions as to the Implementation of Proportionality Review

Even as states adopted comparative proportionality review, however, doubts as to its efficacy and the degree to which the Eighth Amendment required it in capital cases percolated. These doubts have shifted, however, to doubts as to whether state supreme courts are properly administering it.

a. Woodson v. North Carolina

On the same day that it decided *Gregg*, the Supreme Court decided *Woodson v. North Carolina*.[267] In *Woodson*, the Court struck down the North Carolina death penalty scheme in which all individuals convicted of first-degree murders received a mandatory sentence of death.[268] The Court explained that '[t]he inadequacy of

[266] See also *Proffitt v. Florida*, 428 US 242 (1976) (upholding Florida's system of proportionality review).

[267] *Woodson v. North Carolina*, 428 US 280 (1976).

[268] Ibid. The North Carolina statute provided:

distinguishing between murderers solely on the basis of legislative criteria narrowing the definition of the capital offense' was the very reason that 'led the States to grant juries sentencing discretion in capital cases.'[269] The Court also emphasized the likelihood of juries declining to find a defendant guilty where they believed that the death penalty was not the appropriate sentence.[270]

Given these deficiencies, the Court found that unlike Georgia, the North Carolina system failed to address the concerns of *Furman*.[271] As Justice Stewart stated,

> In view of the historic record, it is only reasonable to assume that many juries under mandatory statutes will continue to consider the grave consequences of a conviction in reaching a verdict. North Carolina's mandatory death penalty statute provides no standards to guide the jury in its inevitable exercise of the power to determine which first-degree murderers shall live and which shall die. And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of that power through a review of death sentences.[272]

In combination with *Gregg*, then, the holding in *Woodson* made clear that the Court believed that constitutional capital punishment schemes must both (1) give juries (or trial judges) a way to differentiate meaningfully between first-degree murders in

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> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, kidnapping, burglary, or other felony, shall be deemed to be murder in the first degree and shall be punished with death. All other kinds of murder shall be deemed murder in the second degree, and shall be punished by imprisonment for a term of not less than two years nor more than life imprisonment in the State's prison.

N.C. Gen. Statute Sec. 14-17 (Cum. Supp. 1975).

[269] *Woodson v. North Carolina* 291.

[270] *Woodson v. North Carolina* 295-98.

[271] *Woodson v. North Carolina* 301-02.

[272] *Woodson v. North Carolina* 303.

determining a sentence and (2) provide judicial review of the exercise of the discretion by the jury. These requirements were consistent with the broad principle that capital sentencing decisions required, in order to pass muster under the Eighth Amendment, individualized sentencing determinations. In other words, the characteristics of the crime and the individual defendant must be considered by the sentencer – broad categories articulated by the legislature were an insufficient basis for alone determining whether death was an appropriate sentence in a particular case.[273]

In dissent, Justice Rehnquist referenced the Georgia system of proportionality review, claiming it to be a flawed approach in comparison to North Carolina's mandatory sentencing system. His criticism, albeit in dicta, suggested that because no one could ever really know why a particular jury decided to give a particular defendant 'life' or 'death,' and in particular what underlying facts drove that decision, seeking to determine whether one case was proportional to another was a fruitless exercise. He explained:

> But this is still far from a guarantee of any equality in sentencing, and is likewise no guarantee against juror nullification. Under the Georgia system, the jury is free to recommend life imprisonment, as opposed to death, for no stated reason whatever. The Georgia Supreme Court cannot know, therefore, when it is reviewing jury sentences for life in capital cases, whether the jurors found aggravating circumstances present, but nonetheless decided to recommend mercy, or instead found no aggravating circumstances at all, and opted for mercy. So the 'proportionality' type of review, while it would perhaps achieve its objective if there were no possible factual *lacunae* in the jury verdicts, will not achieve its objective, because there are necessarily such *lacunae.*

Despite this criticism, comparative proportionality review still serves the broader purpose of identifying cases where similar circumstances resulted in disparate

[273] The Court struck down a similar scheme in a companion case, *Roberts v. Louisiana*, 428 US 325 (1976).

outcomes. Were one to adhere to Rehnquist's view, the Eighth Amendment principle of individualized determinations would be abandoned. Further, a mandatory sentencing scheme such as the North Carolina one that he defends can only treat 'like cases alike' and avoid arbitrariness to the degree to which the statute can anticipate and properly define similar cases. A broadly worded statute like the one struck down in *Woodson* surely would not accomplish such a purpose. Finally, even though it may not be perfect, if one allows for jury decision-making, comparative proportionality review at least allows one check on such decisions in order to reduce arbitrariness.[274]

b. Pulley v. Harris

In *Pulley*, the Court considered whether the Eighth Amendment required comparative proportionality review, reviewing a claim by a California offender. In concluding that the Eighth Amendment did not require proportionality review of death sentences, the Supreme Court based its opinion on the idea that while such review was valuable, it was not an indispensable constitutional requirement. The Court's holdings in *Furman* and *Gregg* simply required that the state employ meaningful checks on the arbitrariness of jury verdicts in capital cases. Such checks could include aggravating and mitigating circumstances, findings of special circumstances, capacity for a jury override by the trial judge, and some form of meaningful appellate review. Further, the Court in *Pulley* left open the possibility that 'there could be a capital sentencing system so lacking in other checks on

[274] As the Court has explained, 'there can be "no perfect procedure for deciding in which cases governmental authority should be used to impose death."' *Pulley v. Harri*s 54.

arbitrariness that it would not pass constitutional muster without comparative proportionality review.'[275]

While the Court did not find comparative proportionality review to be constitutionally required, it certainly reinforced the concept of relative proportionality generally and comparative proportionality review specifically as an acceptable (and even encouraged) means by which states address the concerns of *Furman.*[276] Thus, the Court still considered comparative proportionality review to be an important 'additional safeguard against arbitrarily imposed death sentences.'[277]

Despite the Court's ruling in *Pulley*, most states that had comparative proportionality review as part of their post-*Furman* statutory scheme have kept it in place. Indeed, a majority of capital punishment states still use proportionality review.[278]

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[275] Ibid. at 51.

[276] See *Walker v. Georgia*, 555 US 355 (2008) (Stevens J, dissenting) ('But that assertion [in *Pulley*] was intended to convey our recognition of differences among the States' capital schemes and the fact that we consider statutes as we find them, *Ibid.*, at 45; it was not meant to undermine our conclusion in *Gregg* and *Zant* that such [proportionality] review is an important component of the Georgia scheme.').

[277] Ibid.

[278] Since *Furman*, proportionality review has been widely adopted. See Ala Code §13A-5-53(b)(3) (Supp 1986); Conn. Gen Stat. §53a-46b(b)(3)(1987); Del Code Ann. tit. 11 §4209(g)(2) (Supp. 1986); Ga Code Ann §17-10-35(c) (Supp 1987); Idaho Code §19-2927(c)(3) (1987); Ky Rev Stat. Ann §532.075(3)(c) (Michie Bobbs-Merrill Supp. 1987); La Code Crim Proc Ann art §905.9.1(1)(c) (West 1987); Miss Code Ann §99-19-105(3)(c) (Supp. 1985); Mo Ann Code art 27 §414(e)(4) (Supp. 1985); Mo Ann Stat §565.035(3)(3) (1984); Mont Code Ann §46-18-310(3) (1985); Neb Rev Stat §29-2521.03 (1984); Nev Rev Stat §177.055(2)(d) (repealed 1985); N H Rev Stat Ann §630:5(VII)(c); N J Stat. Ann. §2C:11-3e (West Supp. 1985) (repealed 2007); N M Stat Ann §31-20A-4(c)(4) (Supp. 1986); N C Gen Stat §15A-2000(d)(2) (Supp. 1985); Ohio Rev Code Ann. §2929.05(A) (Anderson 1987); Okla Stat Ann tit 21, §701.13(c)(3) (repealed 1985); Pa Cons Stat Ann tit 42, §9711(h)(3)(iii) (Purdon Supp. 1987); S C Code Ann §16-3-25(c)(3) (Supp. 1986);

c. Walker v. Georgia

Over twenty years later, comparative proportionality review has again been re-examined as a result of Justice Stevens' dissent to the denial of certiorari in the case of *Walker v. Georgia* in October 2008.[279] The petitioner in that case raised the failure of the Georgia Supreme Court to conduct proper proportionality review of his sentence. He unfortunately waived his claim by not raising it in state court, and as a result, the United States Supreme Court determined that procedural bars precluded it from addressing the merits.[280]

Even so, Justice Stevens wrote a lengthy dissent explaining the shortcomings in the method by which comparative proportionality review had been applied by Georgia in the twenty years since *Gregg*. Stevens, who was part of the plurality in *Gregg*, explained that the Court 'assumed that the court would consider whether there were "similarly situated defendants" who had *not* been put to death because that inquiry is an essential part of any meaningful proportionality review.'[281]

In this case, however, Stevens found that:

> Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review. Its undertaking consisted of a single paragraph, only the final sentence of which considered whether imposition of the death penalty in this case was proportionate as

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S D Codified Laws Ann §23A-27A-12(3) (Supp. 1987); Tenn Code Ann §39-2-205(c)(4) (Supp. 1987); Va Code Ann §17-110.1(c)(2) (Supp. 1987); Wash Rev Code §10.95.130(2)(b) (1985); Wyo Stat §6-2-103(d)(iii) (Supp. 1987).

[279] 555 US 355 (2008).

[280] As a procedural matter, defendants must raise their claims such as this on their initial round of state habeas appeals or their claim is waived. Consistent with the value of finality, this rule is designed to prevent the defendant from reserving valid claims in order to drag out litigation endlessly to avoid execution. Here, petitioner raised his claim for the first time in federal court *after* the completion of his state appeals, and as a result, was procedurally barred from making the claim.

[281] Ibid. (quoting *Gregg v. Georgia* 198).

> compared to the sentences imposed for similar offenses. And even then the court stated its review in the most conclusory terms: 'The cases cited in the Appendix support our conclusion that [petitioner's] punishment is not disproportionate in that each involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value.' *Id.*, at 782, 653 S. E. 2d, at 447–448. The appendix consists of a string citation of 21 cases in which the jury imposed a death sentence; it makes no reference to the facts of those cases or to the aggravating circumstances found by the jury.[282]

According to Stevens, the consequence of this cursory review was that the Court ignored 'numerous cases involving offenses very similar to petitioner's in which the jury imposed a sentence of life imprisonment,' as well as a number of similar cases in which the state did not even seek death.[283] As a result,

> The Georgia Supreme Court's failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations.[284]

Even more troubling was Stevens' determination that this case is not a unique one. The Georgia Supreme Court's comparative proportionality review, like that of Ohio, consists only of examining 'comparable' cases in which a jury awarded a sentence of death.[285] Thus, according to Stevens, 'the likely result of such a truncated review … is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.' After *Walker*, then, proportionality review remains an

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[282] Ibid.

[283] Ibid. Indeed, Stevens cited the following group of cases with life sentences as similar: *Jones* v. *State*, 279 Ga 854, 622 S E 2d 1 (2005); *Spickler* v. *State*, 276 Ga 164, 575 S E 2d 482 (2003); *Cross* v. *State*, 271 Ga 427, 520 S E 2d 457 (1999); *Jenkins* v. *State*, 268 Ga 468, 491 S. E. 2d 54 (1997); *LeMay* v. *State*, 265 Ga 73, 453 S E 2d 737 (1995) (the circumstances of the offense are described in *LeMay* v. *State*, 264 Ga 263, 443 S E 2d 274 (1994)); *Cobb* v. *State*, 250 Ga 1, 295 S E 2d 319 (1982). Ibid.

[284] Ibid.

[285] By examining only 'death' cases, the likelihood of finding a sentence to be comparatively excessive becomes quite remote. Nonetheless, the following courts consistently include only death cases in their comparison pools: Georgia, Kentucky, Mississippi, Ohio, South Carolina, and Tennessee.

important safeguard, where statutorily required, and accordingly must be applied such that it achieves the effect of reducing arbitrariness in capital sentencing.

This chapter has established both the philosophical and jurisprudential origins and underpinnings of comparative proportionality review. Having covered the procedural framework in Ohio as well, it is instructive to examine how researchers have assessed comparative proportionality review in the past as well as consider the academic response to the philosophical and jurisprudential contexts described in this chapter before exploring the degree to which the Ohio cases in this study are relatively proportionate.

CHAPTER FOUR: THE PROPORTIONALITY REVIEW LITERATURE

In theory there is no difference between theory and practice. In practice there is.

-- *Yogi Berra*

In light of the jurisprudential requirement of relative proportionality under the Eighth Amendment and the Ohio procedure described above, this chapter examines the academic response to the comparative proportionality review. Specifically, the academic literature has sought both to analyze the concept of comparative proportionality review and to measure its efficacy in practice.

The academic literature concerning comparative proportionality review in capital cases in the United States consists of (1) theoretical articles assessing the propriety and utility of comparative proportionality review as a tool to limit arbitrariness and (2) the empirical studies that have attempted to assess the proportionality reviews performed by the supreme courts of various states. Despite the high volume of comparative proportionality reviews conducted by state supreme courts (a majority of capital cases since 1976), the academic literature is quite sparse, with the empirical investigation into comparative proportionality review being even more rare.

A. Academic Literature

The commentary on the use of comparative proportionality review falls into three broad categories: (1) the efficacy of proportionality review itself, (2) responses to the Court's decision in *Pulley*, and (3) criticisms of the use of proportionality review. Each of these is discussed in turn.

The initial question in the academic literature is whether comparative proportionality review is a futile enterprise. In particular, scholars have seized upon Justice Rehnquist's dissent in *Woodson v. North Carolina,* where he questions

whether it is possible to ascertain why a specific jury chose death in a specific case.[286] As a result, for an appellate court to try to determine which cases were, as a matter of relative proportionality, more deserving of death would be a futile inquiry from Rehnquist's perspective.[287] Texas Professor George Dix likewise concluded, after an examination of appellate review by state supreme courts, that comparative proportionality review could not achieve the goal of uniformity in sentencing.[288] His impossibility thesis argued that it was impossible to achieve consistency in sentencing outcomes because of the Eighth Amendment requirement that the jury make an individualized sentencing determination in each case, including considering all available mitigating evidence.[289]

Upon closer examination, part of what appears to be driving this concern is a fear on the part of pro-death penalty advocates that a more robust comparative proportionality review would result in the abolition of the death penalty.[290] Both David Baldus and pro-death penalty Judge Alex Kozinski disagree with such an

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[286] 428 US 280, 316 (1976) (Rehnquist J, dissenting); George E Dix, 'Appellate Review of the Decision to Impose Death' (1978) 68 Georgetown L J 97, 160-61; Ellen Liebman, 'Appellate Review of Death Sentences: A Critique of Proportionality Review (1985) 18 U C Davis L Rev 1433; Bruce Gilbert, 'Comparative Proportionality Review: Will the Ends, Will the Means' (1995) 18 Seattle U L Rev 593.

[287] 428 US 280, 316 (1976) (Rehnquist J, dissenting).

[288] Dix (n 291) 160-61.

[289] Dix (n 291) 160-61; *Woodson v. North Carolina*, 428 US 280 (1976); *Lockett v. Ohio*, 438 US 586 (1978). As mentioned above, *Woodson* prohibited the use of a mandatory death penalty because it did not allow for individualized consideration of the characteristics of the defendant. *Lockett* took this concept a step further by prohibiting any limitation on the kind or type of mitigating evidence offered during the sentencing phase of a capital trial.

[290] David C Baldus et al, 'Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction' (1994) 51 Wash. and Lee L. Rev. 359, 418.

assessment, and argue that using comparative proportionality review to narrow the use of the death penalty to the 'worst of the worst' would improve the administration of the death penalty and not necessarily abolish it.[291]

The other similar issue highlighted in the literature,[292] as well as by Justice Scalia in his concurrence in *Walton v. Arizona*, is the seemingly inherent incompatibility between the dual sentencing purposes of consistency in sentencing

[291] David C Baldus, 'When Symbols Clash: Reflections on the Future of the Comparative Proportionality Review of Death Sentences' (1996) 26 Seton Hall L Rev 1582; Alex Kozinski and Sean Gallagher, 'Death: The Ultimate Run on Sentence' (1995) 46 Case Western Res L Rev 1.

[292] Many commentators have shared Scalia's view that this "conflict" is irreconcilable. See Steven G Gey, 'Justice Scalia's Death Penalty' (1992) 20 Florida St U L Rev 67 (agreeing with Justice Scalia that the Court's capital sentencing jurisprudence is contradictory, but concluding that the Court should declare capital punishment unconstitutional); Louis D Bilionis, 'Moral Appropriateness, Capital Punishment, and the Lockett Doctrine' (1991) 82 Journal of Crim L and Criminology 283, 327-28 (suggesting the two principles are not fundamentally irreconcilable); Scott W Howe, 'Resolving the Conflict in the Capital Sentencing Cases: A Desert-Oriented Theory of Regulation' (1992) 26 Georgia L Rev 323, 327 (stating that the Court's two inconsistent lines of decisions create serious problems); Scott E Sundby, 'The Lockett Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing' (1991) 38 UCLA L Rev 1147, 1161 (asking if the tension between 'individual consideration' and 'guided discretion' can be reconciled); Robert Weisberg, 'Deregulating Death' 1983 Sup Ct Rev 305, 325-26 (arguing that the two principles are inconsistent and efforts to reconcile them are based on questionable rationalizations); Carol S Steiker and Jordan M Steiker, 'Let God Sort Them Out? Refining the Individualization Requirement in Capital Sentencing' (1992) 102 Yale L J 835, 860 (noting the long-observed tension between the two principles) (reviewing Beverly Lowry, *Crossed Over: A Murder, A Memoir* (Vintage 1992)). But see David R Dow, 'The Third Dimension of Death Penalty Jurisprudence' (1994) 22 Am J Crim L 151 (arguing for a three dimensional approach to harmonize the conflict); Ronald J Mann, The Individualized-Consideration Principle and the Death Penalty as Cruel and Unusual Punishment, 29 Hous. L. Rev. 493, 497 (1992) (arguing that the cases are not inconsistent but tied to the text of the Eighth Amendment); William W Berry III, 'Promulgating Proportionality' (2011) 46 Georgia L Rev (forthcoming) (using the conceptions of relative and absolute proportionality to reconcile the tension).

and requiring juries to make individualized sentencing determinations based on facts unique to them, including mitigating evidence.[293] Scalia explained that

> [O]ur jurisprudence and logic have long since parted ways . . . The latter requirement [individualized factual determinations] quite obviously destroys whatever rationality and predictability the former requirement [limitations on jury discretion] was designed to achieve . . .[294]

Scalia observed that after the Court used factors to create consistency in sentencing, namely aggravating factors, allowing the jury to consider individualized characteristics would undermine whatever consistency aggravating factors had achieved. He further added,

> To acknowledge that 'there perhaps is an inherent tension' between this line of cases [*Woodson-Lockett*] and the line stemming from *Furman* is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II.[295]

Upon closer examination, however, comparative proportionality review can actually relieve this purported tension instead of exacerbating it. From Scalia's perspective, aggravating circumstances serve to create some level of relative proportionality in capital cases—sentencing consistency by separating 'death-worthy' cases from 'death-unworthy' cases.[296] When a jury uses individual factual

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[293] *Walton v. Arizona*, 497 US 664–65 (1990) (Scalia J, concurring).

[294] *Walton v. Arizona*, 497 US 664–65 (1990) (Scalia J, concurring).

[295] *Walton v. Arizona*, 497 US 664 (1990) (Scalia J, concurring).

[296] In practice, the use of aggravating factors to create consistency is a myth. As explained in chapter eight, the number and breadth of the aggravating factors in most state sentencing schemes does little to sort out more serious murders from less serious ones. See, e g, Chelsea Creo Sharon, 'The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes,' (2011) 46 Harvard Civil Rights.-Civil Liberties L Rev 223 (arguing that the proliferation of aggravating factors has rendered them useless as a means by which to narrow the class of murderers eligible for the death penalty); Kathleen D Weron, 'Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances' (1994)

circumstances to mitigate some of these cases, it thus, in theory, undermines the consistency achieved between the cases.

But comparative proportionality exists to ensure that relative proportionality exists between the cases for which the jury sentences the defendant to death. Whatever disparity exists in the remaining pool of cases, the state supreme court can correct this problem by reversing cases that are relatively disproportionate. Thus, the comparative proportionality review uses a consistent standard to remedy any disparity created by the consideration of individual offender characteristics at sentencing. In order then to have true narrowing of the class of murderers eligible for death, comparative proportionality review is an essential component necessary to restrict disparity and arbitrariness.

In addition to the discussions about comparative proportionality review and its overall role as a safeguard after *Gregg*, there are a number of articles that address the Supreme Court's decision in *Pulley v. Harris*, where the Court held that the Eighth Amendment did not require relative proportionality review. The articles generally reach two important conclusions. First, several articles argue that the Supreme Court decided *Pulley* wrongly because it is very difficult to ensure relative proportionality among capital sentences without reviewing those sentences comparatively.[297] Second, and more important, the literature emphasizes that *Pulley*, despite its narrow holding, did not diminish the Eighth Amendment requirement of relative proportionality in capital cases.[298] These articles focus in

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1994 Utah L Rev 1107 (arguing that Utah's system of aggravating factors is unconstitutional).

[297] See, e g, Penny J White, 'Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris' (1999) 70 University of Colorado L Rev 813.

[298] Ibid.

particular on Justice Stevens' concurrence in *Pulley*, where he explains that the Eighth Amendment mandates some kind of meaningful appellate review designed to achieve some level of relative proportionality.[299]

Finally, the academic literature has generally decried the modern use of comparative proportionality review by the state supreme courts, finding it to be completely lacking as an inquiry.[300] First, commentators have emphasized the continued reluctance of courts to consider how to eliminate the influence of race and geography in sentencing disparity.[301] In addition, commentators have argued that the failure to consider life sentences as part of comparative proportionality review undermines the efficacy of the entire comparative appellate process, rendering it meaningless.[302] Further, several articles, including those by David Baldus, emphasize the importance of using a frequency approach—examining an entire class of 'similar' cases—rather than simply finding one or two 'similar' cases in using a

[299] See, e g, Penny J White, 'Can Lightning Strike Twice? Obligations of State Courts After Pulley v. Harris' (1999) 70 University of Colorado L Rev 813.

[300] See, e g, Leigh Bienen, 'The Proportionality Review of Capital Cases by State High Courts After *Gregg*: Only the "Appearance of Justice"' (1996) 87 Journal of Crim L and Criminology 130; Ellen Liebman, 'Appellate Review of Death Sentences: A Critique of Proportionality Review', (1985) 18 U C Davis L Rev 1433.

[301] See, e g, Adam Gershowitz, 'Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty' (2010) 63 Vanderbilt L Rev 307; Robert J. Smith, 'The Geography of the Death Penalty and its Ramifications' (2011) Boston Univ L Rev (forthcoming); David C Baldus, 'When Symbols Clash: Reflections on the Future of Comparative Proportionality Review of Death Sentences', (1996) 26 Seton Hall L Rev 1582; Samuel R Gross and Robert Mauro, 'An Analysis of Racial Disparities in Sentencing and Homicide Victimization' (1984) 37 Stanford L Rev 27.

[302] See, e g, Bienen (n 297); Liebman (n 297); Phillip L Durham, 'Review in Name Alone: The Rise and Fall of Comparative Proportionality Review by the Supreme Court of Florida', (2004) 17 St Thomas L Rev 299.

'precedent-seeking' approach.[303] Ultimately, many commentators express the view that the current implementation of proportionality review by most states violates the Eighth Amendment, or at the very least, does virtually nothing to safeguard against arbitrariness and disparity in capital sentencing.[304]

The suggested remedy, though, is not an abandonment of comparative proportionality review. Instead, commentators argue for renewing efforts to improve comparative proportionality review by making it more robust.[305]

While these articles clearly demonstrate the flaws of current practices of comparative proportionality review, they do not address, in any significant detail the problem of 'similarity'. In other words, the academic literature is descriptive as to the problem of comparative proportionality review, but is prescriptive only in suggesting consideration of 'life' cases and use of a 'frequency' approach.[306] The theoretical literature does not focus on the central problem of what makes two cases

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[303] David C Baldus, 'When Symbols Clash: Reflections on the Future of Comparative Proportionality Review of Death Sentences', (1996) 26 Seton Hall L Rev 1582; Donald H Wallace and Jonathon R. Sorensen, 'Missouri Proportionality Review: An Assessment of a State Supreme Court's Procedures in Capital Cases' (1994) 8 Notre Dame Journal of Law, Ethics, and Public Policy 281.

[304] See, e g, Bidish J Sarma, Robert J Smith, and G Ben Cohen, 'Struck by Lightning: *Walker v. Georgia* and Louisiana's Proportionality Review of Death Sentences', (2009) 37 Southern University L Rev 65.

[305] See, e g, Bidish Sarma, *Furman*'s Resurrection: Proportionality Review and The Supreme Court's Second Chance to Fulfill *Furman's* Promise' (2009) 2009 Cardozo L Rev de novo 238; Evan J Mandery, 'In Defense of Specific Proportionality Review,' (2002) 65 Albany L Rev 883; Robert Mark Carney, 'Capital Sentencing: The Case for Statewide Proportionality Review', (1984) 59 Notre Dame L Rev 1412; Claudia Flores, 'Comparative Proportionality Reviews Reconceptualized: Categorizing Mitigation and Satisfying the Eighth Amendment in the Death Penalty' (2002) 27 New York University Rev of Law and Social Change 139.

[306] Stephanie E Carlson, 'State v. Pack: Proportionality of Sentences – Should It Be a Necessary Factor in Determining Whether a Sentence "Shocks the Conscience" of the Court?' (1995) 40 San Diego L Rev 130; Carney (n 305); Mandery (n 305).

'similar'. As discussed below, however, the empirical literature attempts to measure 'similarity' in several ways.

B. Empirical Studies

In addition to the sparse theoretical academic literature, there have been several empirical studies that have attempted to assess the quality of the courts' proportionality reviews using quantitative methods.[307] Three published studies – one in California,[308] one in Georgia,[309] and one in South Carolina[310] – employ variations of the same general methodology to measure the efficacy of the comparative proportionality review of the state supreme courts. Rachel Philofsky did a fourth proportionality review study, analyzing Maryland's capital punishment system. Her study, which was completed in 2006, has not yet been published.[311]

1. California Proportionality Review

In a landmark *Stanford Law Review* article, David C Baldus and his colleagues Charles A Pulaski Jr, George Woodworth, and Frederick D Kyle developed a method by which to evaluate the comparative excessiveness of death

[307] Indeed, this study seeks in part to duplicate their efforts in a modern, post-life without parole context.

[308] David C Baldus, George Woodworth, and Charles Pulaski, 'Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach' (1980) 33 Stanford L Rev 1.

[309] David C Baldus, George Woodworth, and Charles Pulaski, 'Comparative Review of Death Sentences: The Georgia Experience' (1983) 74 Journal of Criminal Law and Criminology 661.

[310] Raymond Paternoster and Annmarie Kazyaka, 'An Examination of Comparatively Excessive Death Sentences in South Carolina, 1979-87,' (1990) 17 NYU Review of Law and Social Change 490.

[311] Rachel Philofsky, 'The Maryland Proportionality Review Project' (Master's Thesis, University of Maryland 2006). A copy is on file with the author.

sentences in California.[312] They considered three possible approaches, and used data from a 1969 *Stanford Law Review* study to demonstrate the strengths and weaknesses of each approach.[313] Specifically, the article outlined (1) two methods for selecting the factual characteristics that define a similar set of cases, (2) three possible measures of excessiveness, and (3) the strengths and weaknesses of each approach.

Importantly, as this study used data gathered prior to the Supreme Court's decisions in *Furman v. Georgia* and *Gregg v. Georgia*, it did not evaluate the appellate decisions by the State Supreme Court of California, because comparative proportionality review had not yet been adopted by any of the states. Rather, this study provided methodological examples of how comparative proportionality review could be performed in a quantitative and systematic way to further consistency in jury sentencing outcomes.[314] Given the temporal proximity of the study (four years after) to the Supreme Court's acceptance of the use of comparative proportionality review in *Gregg v. Georgia* (1976), there is little doubt that Baldus and his colleagues were trying to offer one way to measure the efficacy of comparative proportionality review in practice.

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[312] David C Baldus, George Woodworth, and Charles Pulaski, 'Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach' (1980) 33 Stanford L Rev 1.

[313] The *Stanford Law Review* study ('Stanford Study') examined the fairness of juror decision-making in 239 California murder cases. Note, 'A Study of the California Penalty Jury in First-Degree Murder Cases' (1969) 21 Stanford Law Review 1297.

[314] As explained in chapter three, the concept of proportionality review was developed by the states as one of the proffered safeguards that would protect against the arbitrariness in capital sentencing that had resulted in the abolition of the death penalty, as applied, in *Furman v. Georgia*.

In selecting the factual characteristics that define a 'similar' set of cases, Baldus and his colleagues proposed the 'main determinants' approach and the 'salient factors' approach.[315] The main determinants approach 'requires the collection of data on every variable that could conceivably influence the sentencing decision'.[316] By subjecting the variables to logistic regression analysis, Baldus and his colleagues then identified the variables with the greatest impact (in terms of probability) on the actual sentencing decision.[317]

By contrast, the 'salient factors' approach outlined by Baldus and his colleagues identified 'similar' cases by selecting 'those facts and circumstances which appear to be the chief aggravating and mitigating features in the death penalty decision under review'.[318] This approach ranks the features of the case by their perceived relative importance in order to identify 'similar' cases.

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[315] David C Baldus, George Woodworth, and Charles Pulaski, 'Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach' (1980) 33 Stanford L Rev 1.

[316] Ibid. 23. The Stanford Study, for instance, considered over 150 potentially influential factors in each case. Note, 'A Study of the California Penalty Jury in First-Degree Murder Cases' (1969) 21 Stanford Law Review 1297.

[317] In a study done by Baldus and his colleagues using the California data, the following factors were statistically significant in juror decisions in capital sentencing: number of victims, defendant's past criminal record, the existence of a contemporaneous felony, the motive of the defendant, the presence of mitigating circumstances, the wounding of others by co-perpetrators, whether alcohol was consumed by defendant, history of defendant's past drug use, the murder weapon, whether the crime was premeditated, the employment status of the defendant, and the job history of the defendant. David C Baldus, George Woodworth, and Charles Pulaski, 'Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach' (1980) 33 Stanford L Rev 1, 25.

[318] Ibid. 33. According to Baldus and his colleagues, these features can either be the features of the case that the reviewing authority believes to be most important or the features of the case believed to be the most influential on the sentencing juries in the jurisdiction. Ibid.

According to Baldus and his colleagues, the advantage of the main determinants approach is that it provides the reliability inherent in a quantitative approach. Its disadvantage is its insensitivity to factual circumstances that may be important in a given case but rare in the population of comparable cases.[319] By contrast, the salient factors approach, in relying largely on intuition, is able to capture significant aggravating or mitigating factors in a given case. It suffers, however, from the opposite shortcoming – the *ad hoc* nature of the approach lacks the systematic thoroughness of the main determinants approach.

Once the 'similar' cases have been identified, the approach of Baldus and his colleagues offers three ways to measure excessiveness in determining whether a death sentence in a given case would be relatively disproportionate. The three methods are: (1) the overall culpability measure, (2) the fact-specific main determinants measure, and (3) the salient features measure.

The first of these, the overall 'culpability' measure, uses the main determinants of a death sentence to calculate a 'culpability' score for each offender. It is important to note that this approach was not a true measure of culpability. Instead, it assumed that the factors present in the death cases (and presumably used by the juries) that predicted death related to the culpability of the offender.

To measure whether a sentence in a given case is excessive, this technique used the 'culpability' scores to identify a subgroup of 'similar' cases. It then divided the cases into subgroups, and determined the proportion of those cases which received the death penalty.[320]

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[319] This may be particularly true with mitigating circumstances that may make what appears to be a comparable case quite different. Ibid.

[320] A ninety-five per cent confidence coefficient for each subgroup was also calculated. Ibid.

The second method, the fact-specific main determinants measure uses specific facts of the most important main determinants to identify which cases should be grouped together. Again, after grouping the cases, Baldus and his colleagues identified the proportion of death cases in each sub-group.

Finally, the salient feature matching approach follows the same approach as the main determinants approach, but uses salient features in the place of main determinants. Again, as noted above, the salient features approach often produces statistically insignificant results, particularly when the salient features in a given case are unusual. Similarly, the main determinants approach can have limited relevance to cases with special or unique circumstances.

In applying the excessiveness measures, Baldus and his colleagues concluded that a low proportionality score was strong evidence of excessiveness in a given case.[321] In addition, the greater the consistency produced across the three methods of calculation, the greater the confidence in the outcomes.[322]

Finally, Baldus and his colleagues demonstrated how, applying the outcomes from the above methods, one could measure system-wide excessiveness. This is performed by plotting the actual cases against the predicted outcomes under the applied methodology, demonstrating the degree to which the system applies its sentencing decisions in an even-handed manner.

Baldus and his colleagues' contribution, then, was to demonstrate the utility of quantitative methods in assessing the proportionality of a given case in light of

[321] Ibid.

[322] Baldus and his colleagues also noted that the greater the number of factors (whether main determinants or salient factors) in a sub-group, the greater reliability in results. Ibid.

the statutory requirement that state supreme courts perform proportionality review in many cases.

2. Georgia Proportionality Review

The first significant empirical inquiry into the proportionality reviews performed by state supreme courts using data from the period after the *Furman* and *Gregg* decisions was performed by David Baldus, Charles Pulaski, and George Woodworth.[323] Baldus and his colleagues chose to study Georgia, one of the first states to adopt proportionality review in response to *Furman*. Under the Georgia statute, the Georgia Supreme Court applied an approach similar to the salient factors approach described above, comparing the case on appeal to between five and twenty-five 'similar cases'.[324]

Baldus and his colleagues sought to measure the comparative excessiveness of the death sentences in Georgia since the death penalty had been reinstated after *Furman*. In that time period, from 1972 until 1983, the Supreme Court of Georgia had reviewed one hundred and twenty death sentences, finding only two that were 'comparatively excessive' or 'disproportionate'.[325] Baldus' study considered only appealed cases.

Interestingly, Baldus and his colleagues sought to replicate the comparative proportionality review techniques used by Georgia and other states performing

[323] David C Baldus, George Woodworth, and Charles Pulaski, 'Comparative Review of Death Sentences: The Georgia Experience' (1983) 74 Journal of Criminal Law and Criminology 661.

[324] Baldus (n 306).

[325] As indicated earlier, the comparative proportionality review assessment by the State Supreme Court looks to relative proportionality, not absolute proportionality.

comparative proportionality reviews, albeit in a more reliable and thorough way.[326] As a result, his study relied on multiple ways of measuring excessiveness, both from an individual case perspective and from a systemic perspective.

Building on the techniques described in their earlier article concerning the application of such empirical methods to the pre-*Furman* California cases, Baldus and his colleagues applied three different methods of measuring excessiveness in individual cases: the salient factors method, the main determinants method, and the index method.[327] This 'tri-angulation' method was useful given each of the respective shortcomings of the three methods and provided a way to 'cross-check' outcomes to promote greater reliability in the conclusions about the relative proportionality of each case.[328]

As in the California study, the salient factors approach identified specific factors in cases that seem most likely to have affected the jury's sentencing decision. As Baldus and his colleagues noted, the aggravating factors adopted in a given case were a logical starting point to identify such salient factors, but also should include other factors that seem particularly relevant to the death-sentencing decision in the case under proportionality review.[329]

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[326] Baldus (n 312).

[327] Baldus (n 312).

[328] David C Baldus, George Woodworth, and Charles Pulaski, 'Comparative Review of Death Sentences: The Georgia Experience' (1983) 74 Journal of Criminal Law and Criminology 661.

[329] Baldus and his colleagues adopted this approach in part because of the Supreme Court's language in *Godfrey v. Georgia* requiring that a death sentence 'be and appear to be, based on reason rather than caprice or emotion.' 446 US 420, 433 (1980).

For each case, the researchers developed a short narrative and then grouped cases based on the similarity in narrative. The death frequency was then calculated for each group. In performing this salient factors analysis, Baldus and his colleagues also emphasized that the requirement for certain factual similarities between cases may need to be relaxed in order to create subgroups of sufficient size. Such an approach was permissible so long as the overall circumstances between cases were similar.

The main determinants approach is similar to the salient factors in that it groups similar cases, but it uses 'main determinants' instead of 'salient factors.' The main determinants approach used a regression analysis of the jury decisions in capital cases to identify the 'main determinants' of cases that received death.

In Georgia, the main determinants in capital cases were: (1) how many people the defendant killed (none, one, or two or more), (2) whether the case involved a serious contemporaneous offense (armed robbery, rape, or kidnapping), (3) whether the case involved one or more of several major aggravating factors, (4) whether the defendant had a felony conviction for, or a record of, violent personal crimes, (5) whether the case involved one or more of several mitigating factors, and (6) whether the case involved one or more of several minor aggravating factors.[330] Using these determinants, Baldus and his colleagues were able to separate the cases into groups of 'similar' cases.

According to Baldus and his colleagues, the salient factors and the main determinants approaches seem to complement each other well. The salient factors approach successfully isolates individual characteristics in a given case, but fails to account for the average impact of such characteristics. The main determinants

[330] Baldus (n 312).

approach, on the other hand, successfully accounts for the average impact of different criteria in the cases, but cannot capture characteristics in a given case that may make it more likely to receive a death sentence.

The third case specific method that Baldus and his colleagues used was the index method. The index method classifies cases as 'similar' by using a single criterion, the probability in each case that the defendant will receive a death sentence.[331] The comparable cases, then, to the case undergoing proportionality review are those that have a predicted likelihood closest to the case being reviewed. As with the main determinants approach, Baldus and his colleagues calculated the predicted likelihood of death using multiple regression analysis. Interestingly, Baldus and his colleagues used data from the pre-*Furman* time period as well because the Georgia Supreme Court purportedly references such cases. In addition, the researchers did not factor race into their final determinations of the probability of death for each case because race is not a rational sentencing factor, as required by *Godfrey v. Georgia*, and thus should not be considered.[332]

As explained by Baldus and his colleagues, the advantage of the index method is that it allows one to match cases based on a large number of core characteristics, rather than one or two salient factors or main determinants.[333] The weakness of the index method is that cases that have very different factual scenarios may have similar or identical probability scores.

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[331] Baldus (n 312).

[332] 446 US 420 (1980). Baldus and his colleagues did this even though their data showed that race, particularly the race of victim, had an impact on the probability of death in a given case. Baldus (n 312). In fact, Baldus and his colleagues attributed the 'low' capital sentencing rate in Georgia to the frequency of jury decisions not to sentence individuals to death who murdered African-Americans.

[333] Baldus (n 312).

In addition to the three methods of case specific proportionality review, Baldus and his colleagues conducted two types of analyses of system-wide comparative excessiveness: legislative criteria measures and regression based scales. The legislative case selection criteria matched (1) all cases in which the same statutory aggravating circumstance is present, and (2) cases in which an equal number of statutory aggravating circumstances is present. The regression based scales used the index method to divide the cases into eight groups to explore the system-wide consistency.

Both of these methods, however, have significant limitations according to Baldus and his colleagues. The legislative criteria measures clearly omit some relevant aggravating and mitigating factors. And the regression based scales tend to over-exaggerate the consistency within their results based on the inherent circularity of using the predictive criteria to measure consistency.

Before examining the results of the Georgia proportionality review, it is important to examine the manner in which Baldus and his colleagues defined 'excessiveness.' In other words, how much of an outlier does a specific case have to be to be relatively disproportionate? In addition to the impossibility of defining an exact quantification of excessiveness, there is the additional problem of deciding how to define relative 'excessiveness' generally. As explained in chapter three, Justice Stewart would choose only 'lightning-strike,' aberrant cases as comparatively excessive, while Justice White would choose all cases that did not follow a 'substantial' number of other cases in finding a death verdict.[334]

[334] *Furman v. Georgia* 309 (Stewart, J, concurring); *Furman v. Georgia* 312 (White, J, concurring).

Baldus and his colleagues adopted a conservative estimate, attempting to fall between Stewart's 'aberrant' approach and White's 'even-handed' approach.[335] They defined cases to be comparatively excessive where the similar cases had a death frequency of less than 0.35 (or thirty-five per cent). The researchers also adopted the death frequency figure of 0.80 and greater (or eighty per cent) as a presumptive indicator that a given sentence was not comparatively excessive.

The systemic results of the Baldus study of comparative proportionality review revealed that twenty-six per cent of the cases in which the defendant received the death sentence fell below the 0.35 threshold. This meant that, from a systemic perspective, twenty-six per cent of the cases were comparatively excessive.[336] In addition, only twenty-six per cent of defendants who received the death penalty had a death frequency ratio of 0.80 or greater. As a result, only twenty-six per cent of the death sentences were presumptively not excessive.

Under the case specific measures, the salient factors approach found that for twenty-five per cent of the death cases, the frequency ratio was below 0.35, meaning that twenty five per cent of the cases were presumptively relatively disproportionate.[337] In addition, only ten per cent of the death cases had a frequency ratio of 0.80 or greater, meaning that only ten per cent of the cases were presumptively relatively proportionate.

The main determinants method, by contrast, found that twenty-two per cent of the cases had a frequency ratio of below 0.35, and were thus presumptively

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[335] Baldus (n 312).

[336] As noted above, this figure is a low estimate, given the consistency bias of the regression analysis. Baldus (n 312).

[337] Baldus (n 312).

excessive.[338] This method also found that thirty per cent of the cases were presumptively even-handed, with a death frequency ratio of 0.80 or greater.

The index method yielded results that were the most even-handed. With an average death frequency ratio of .68, half of the death cases were presumptively relatively proportionate using the index method.[339] Further, only thirteen per cent of the cases had a frequency ratio of below 0.35 and were thus comparatively excessive.

Overall, Baldus and his colleagues found that the decision of the Georgia Supreme Court to find none of the death cases in the study to be comparatively excessive (and thus disproportionate) does not alone suggest that the case review is in some way flawed. Instead, it highlighted the problem of identifying 'similar' cases. The Georgia Supreme Court's method for choosing 'similar' cases resulted in its misapplication of the review approved of in *Gregg*, likely indicated a bias for choosing death cases as similar cases.[340] Thus, Georgia's system, as it was constituted at the time, did not employ comparative proportionality review in such a way as to capture cases that were, by any of the researchers' several methods, comparatively excessive.[341]

3. South Carolina Proportionality Review

In 1990, almost ten years after Baldus and his colleagues performed a proportionality review on Georgia cases, Raymond Paternoster and AnnMarie

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[338] Baldus (n 312).

[339] Baldus (n 312).

[340] As explored later, the Ohio Supreme Court uses only cases where the offender received a death sentence in its determination of whether the case on appeal is 'proportional'.

[341] Indeed, this is at the heart of Justice Stevens' criticism of Georgia's capital system in *Walker v. Georgia*, as explained in chapter three.

Kazyaka performed a similar study on cases from South Carolina decided after *Gregg.*[342] Their study considered all capital murders reviewed by the South Carolina Supreme Court between 1979-1987 covering defendants convicted of capital homicide between 1977-81.

Following and building upon the methodological approaches of the Baldus studies, Paternoster and Kazyaka employed three different measures to determine case comparability.[343] First, they used a fact-specific frequency method of comparability that paralleled the salient factors approach utilized by Baldus and his colleagues. As the South Carolina Supreme Court makes no explicit statement of the salient factors considered in its proportionality review, Paternoster and Kazyaka relied upon the Court's factual descriptions of the circumstances underlying the death sentences, as presumably those facts were the ones that justified the Court's finding of relative proportionality.[344]

Paternoster and Kazyaka noted that the fact-specific approach became more difficult to employ as the number of cases and the corresponding variety of factors increased. In other words, it became difficult to group cases as 'similar' as the number and diversity of salient factors increased. Accordingly, following both suggestions by Baldus and Rosenbaum and Rubin on the use of multivariate techniques in observational research, Paternoster and Kazyaka derived an empirical measure of case comparability, the propensity score, similar to Baldus' index

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[342] Raymond Paternoster and Annmarie Kazyaka, 'An Examination of Comparatively Excessive Death Sentences in South Carolina, 1979-87,' (1990) 17 NYU Review of Law and Social Change 490.

[343] Ibid. Unlike Baldus and his colleagues, Paternoster and Kazyaka did not employ any method to measure the comparative excessiveness of South Carolina death cases from a systemic, as opposed to case-specific approach.

[344] Paternoster and Kazyaka (n 331).

approach.[345] The propensity score is derived to reflect the probability of each case resulting in a death sentence given a set of predictors or covariates. The product of logistic regression, these scores reflect calculations of the conditional probability of being sentenced to death given a set of covariates, with the relevant covariates determined based on the prior capital sentencing outcomes.

This model of logistic regression provides information both as to which variables are the best predictors of a death sentence and of their independent impact, known as logistic coefficients. The adequacy of the matching model can then be determined by its predictive validity and the degree to which it reflects a good fit. Once Paternoster and Kazyaka obtained this model, with its list of explanatory factors called significant determinants, they used it to identify comparable cases in two ways.[346]

First, like Baldus and his colleagues, Paternoster and Kazyaka scored cases based on the number of significant factors present, as in the main determinants approach described above.[347] Similar cases would then be ones with the same number of significant factors.

Second, Paternoster and Kazyaka used the results of the logistic regression model to weight differentially each factor according to its predictive importance.[348] In this 'weighted index' measure, the researchers assigned each case a weighted

[345] Baldus (n 312); Paul R Rosenbaum and Donald B Rubin 'The Central Role of the Propensity Score in Observational Studies for Causal Effects' (1983) 70 *Biometrika* 41; Paul R Rosenbaum and Donald B Rubin, 'Constructing a Control Group Using Multivariate Matched Sampling Methods that Incorporate the Propensity Score' (1985) 39 *American Statistician* 35.

[346] Paternoster and Kazyaka (n 331).

[347] Paternoster and Kazyaka (n 331).

[348] Paternoster and Kazyaka (n 331).

score, which is the conditional probability that a given case will receive the death penalty. Paternoster and Kazyaka then grouped the cases according to their weighted index value. This method is similar to the index method used by Baldus and his colleagues.

Paternoster and Kazyaka explain that this regression based method of identifying similar cases is superior to the general method of matching on the presumed important features of the case because it replaces the subjective judgment of the researcher with an empirical, non-subjective assessment of which offender / offense characteristics are most influential in predicting death sentences.

Before describing the results of their regression analyses, Paternoster and Kazyaka examined the approach of the South Carolina Supreme Court in its proportionality review.[349] Like Ohio, the South Carolina Supreme Court did not reverse any of the cases on the grounds that the case was relatively disproportionate.

Paternoster and Kazyaka found that the Court adopted either the reasonableness approach or the precedent-seeking approach in its proportionality review.[350] The reasonableness approach used by the South Carolina Supreme Court consisted simply of a subjective determination by the Court as to whether the particular case was worthy of death given the aggravating and mitigating factors presented at sentencing. According to Paternoster and Kazyaka, the Court used the reasonableness approach in thirty-two per cent of the death cases.[351]

The results of the empirical approach employed by Paternoster and Kazyaka in the South Carolina cases were similar to those found by Baldus and his colleagues

[349] Paternoster and Kazyaka (n 331).

[350] Paternoster and Kazyaka (n 331).

[351] Paternoster and Kazyaka (n 331).

in the Georgia cases. Under the fact specific approach, Paternoster and Kazyaka found that thirty-five per cent of the cases were comparatively excessive.[352] Interestingly, there was a clear divide among cases in which the jury was prone to give death. Cases that involved rape or gratuitous violence were substantially more likely to receive a death sentence in South Carolina.[353]

In the overall aggravation approach, Paternoster and Kazyaka used the logistic coefficients from the regression analysis to construct an equation that included the factors that influenced the decision to give death the most and the amount of their comparative influence. The factors that were significantly predictive of death were: the number of offenders, the presence of certain factors in mitigation, the use of a handgun in the killing, the brutality of the homicide, and the number of felony offenses committed by the offender during the murder. As with the fact-specific analysis, Paternoster and Kazyaka concluded that the data revealed the reluctance of South Carolina jurors to give the death penalty until a murder becomes highly aggravated, at which point they consistently impose death.[354]

Paternoster and Kazyaka then measured the results by creating sub-groups based on (1) the total number of relevant aggravation factors (as indicated by the regression analysis) and (2) the propensity score derived from the logistic regression coefficient equation. Under these measures, seventy-three per cent of the death cases were found to be comparatively excessive under the aggravation factor approach, and sixty-two per cent of the death cases were found to be comparatively excessive under the propensity score analysis. The comparable results of these two

[352] Paternoster and Kazyaka (n 331).

[353] Paternoster and Kazyaka (n 331).

[354] Paternoster and Kazyaka (n 331).

approaches were not surprising as Paternoster and Kazyaka derived them from the same regression analysis.[355] Paternoster and Kazyaka concluded that the deficiency in South Carolina's proportionality review started with its failure, like Ohio, to consider 'life' cases in its analysis of the relative proportionality of a given case.[356]

4. Maryland Proportionality Review

In 2006, Rachel Philofsky performed a proportionality review on Maryland capital cases from 1979 to 1999.[357] This study replicated the South Carolina proportionality review in its methodology, performing both fact-specific and cumulative proportionality reviews of Maryland capital cases. Interestingly, Maryland required comparative proportionality review of death cases from 1979-1992, but abolished that requirement, and thus had no comparative proportionality review for the second period of the data, 1992-99.[358]

Philofsky's study first used the fact-specific approach to determine the relative proportionality of the Maryland capital cases. Using the same measure as Baldus et al. and Paternoster and Kazyaka of under 0.35 as a basis for comparative excessiveness, she found that forty-two per cent of the affirmed death cases were relatively disproportionate during the proportionality review era of 1979-92.[359]

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[355] Paternoster and Kazyaka (n 331).

[356] Paternoster and Kazyaka (n 331).

[357] Rachel Philofsky, 'The Maryland Proportionality Review Project' (Master's Thesis, University of Maryland 2006). Ms. Philofsky performed this study as a thesis for a master's of criminology at the University of Maryland. Although she plans to publish her results, they are currently unpublished. Her study was supervised by Ray Paternoster, who performed the South Carolina proportionality review, and she relied on his Maryland data in her analysis. Ibid.

[358] Ibid.

[359] Ibid.

Further, none of the cases during that period were presumptively proportional (value of 0.80 or greater). From 1992-97, sixty-two per cent of the Maryland capital cases were presumptively relatively disproportionate according to the fact-specific approach, with no cases being presumptively relatively proportionate.[360]

Under the overall aggravation propensity score approach, Philofsky found nine independent variables that had a statistically significant influence on the probability of receiving a death sentence: the defendant expressed pleasure for the killing, multiple victims were killed, there was evidence that the defendant had an adult criminal record, the defendant is alleged to have committed additional crimes in the time period immediately before or after the homicide, the victim suffered multiple trauma (shot and stabbed, stabbed and choked), the victim and offender were not acquainted prior to the homicide – they were strangers, total number of aggravating circumstances, the defendant maintains his/her innocence, and the crime occurred in the home of the victim or the home of the victim's family. Applying the overall propensity score with the weighted variables, Philofsky found that an astonishing eighty five per cent (thirty three out of thirty nine) of the 'death' cases in Maryland were presumptively relatively disproportionate.[361]

Given the background of the academic literature and the previous studies of comparative proportionality, the next step is to examine the methodology that this thesis employs. As explained in chapter five, this thesis seeks to build upon this prior experience and knowledge both theoretically and empirically, replicating the prior approaches in a new jurisdiction under new circumstances and exploring the practical ramifications of such findings.

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[360] Ibid.

[361] Ibid.

CHAPTER FIVE: METHODOLOGY

Having outlined in the previous chapters the relevant historical, procedural, theoretical, and academic background, I provide, in this chapter, a detailed summary of the methodological approaches used in this thesis. Specifically, I explain the mixed-methods approaches that I used to measure the relative proportionality of Ohio death cases through different conceptions of 'similarity'. Finally, I describe the practical method that I am proposing the Ohio Supreme Court and other state supreme courts use to improve their respective comparative proportionality reviews.

A. Selecting the Applicable Data

The first question in the study was which jurisdiction to analyze. I chose Ohio as the source of data for my comparative proportionality review for several reasons. First, scholars have not researched or studied Ohio's capital punishment system as extensively as other jurisdictions in the United States.[362] This may be, in part, because Ohio's first execution after the Supreme Court reinstated the death penalty in 1976 did not occur until 1999.[363] Currently, though, Ohio trails only Texas in its number of annual executions.[364] Further, it is the only Northern state that is currently executing a significant number of inmates on an annual basis.[365]

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[362] In fact, the only extensive study of the Ohio system is the American Bar Association's recent study, completed as part of its death penalty project. See <http://www.abanet.org/moratorium/assessmentproject/ohio.html> accessed 12 September 2011.

[363] See Richard Dieter, 'Death Penalty Information Center, <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> accessed 12 September 2011 (showing that Ohio was second behind Texas in number of executions in 2009-10).

[364] Ibid.

[365] Ibid. The Southern states in the United States of America have executed significantly more individuals than the Northern states since the reinstatement of the death penalty in *Furman v. Georgia*. Ibid. Scholars have debated the degree to

Finally, Ohio's Supreme Court has never reversed a case for being relatively disproportionate, raising the question as to whether its review is more than simply *pro forma*.

As indicated above, this result does not appear to be from erroneous analysis, but from a lack of analysis entirely. This is particularly true because the comparative proportionality review of the Ohio Supreme Court ignores cases in which the jury gave a sentence of life, comparing the appealed case only to a small number of other death cases. This absence of analysis raises the question of whether there is significant harm caused by the process as it is currently constituted. This study seeks to measure, using a more thorough comparative proportionality review, the degree to which Ohio capital cases are in fact relatively disproportionate.

After limiting the data set to Ohio, the next question was how to limit the volume of the cases, given the time and resource limitations of this project. As mentioned in earlier chapters, one major factor that differentiates this study from prior published studies of comparative proportionality review, other than the jurisdiction, is the presence of life without parole as a sentencing option. Life without parole lessens the emphasis on the dangerousness of the offender in the jury deliberation, as there is a guarantee that the offender will either die through execution or die in custody. Indeed, along with the increasing discovery of innocent individuals on death row,[366] the rise of life without parole may be predominately

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which this trend reflects the history of slavery and lynching in the South. See Franklin Zimring, *The Contradictions of American Capital Punishment* (OUP 2003); David Garland, *Peculiar Institution: America's Death Penalty in An Age of Abolition* (Belknap Harvard 2011).

[366] See, e g, Governor George Ryan, 'I Must Act', Address at Northwestern University School of Law (11 January 2003), reprinted in Austin Sarat, *Mercy on Trial: What It Means to Stop an Execution* (Princeton 2003); David Grann, 'Trial by Fire', The New Yorker, 7 September 2009.

responsible for the decrease in the number of capital sentences in recent years.[367] In other words, the availability of life without parole ('LWOP') significantly alters the calculus for jurors at sentencing, and thus, creates a situation different from those considered in the earlier published studies. As a result, comparing pre-LWOP cases with post-LWOP cases may not be an accurate way to assess relative proportionality.

For the starting date, then, I chose 1 July 1996, the date that the Ohio life-without-parole statute went into effect.[368] For the end date, I chose 1 July 2011, which was the latest date that I could include data before completing the thesis. I did not include cases that had received a sentence but had not yet had an appeal. It is important to note that the time needed for appeal, oral argument, and review by the Ohio Court of Appeals (life sentence) or the Ohio Supreme Court (death sentence) is such that most decisions are not completed until at least a year or more after the initial jury sentencing verdict, even though such appeals are direct from the trial court.

Within the chosen time period from 1996-2011, there were several additional decisions that I made that resulted in narrowing the number of cases included in the study. First, the thesis includes only cases of aggravated murder – cases in which

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[367] See Note, 'A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment' (2006) 119 Harvard L Rev 1838. Indeed, if the jury's perception of dangerousness does have a significant role in capital sentencing as the data from the Capital Sentencing Project has indicated, then this emphasis could explain, in part, the findings of Baldus' famous study concerning the impact of race in capital cases. Where a white juror must consider whether an offender ought to get the death penalty, he/she may be more likely to find that an offender who killed someone like him (in terms of race) is more dangerous and thus more worthy of death. Blume et al. (n 300).

[368] Thus, I included cases sentenced on or after 1 July 1996, but not cases sentenced on 30 June 1996 or before.

the jury had the option of sentencing the offender to death.[369] The study did not include murder cases in which the prosecutor chose not to charge the offender with a capital crime. Cases in which the prosecutor exercised such discretion not only were difficult to identify, but the decision-making process of the office of the prosecutor is private and not subject to any review. In addition, courts performing comparative proportionality review would not easily be able to identify such cases, and thus such cases seem less relevant to the overall inquiry of relative proportionality, at least on a practical level.[370]

I also did not include cases in which the offender entered into a plea bargain as to his sentence. There were a couple of rare cases in which the result of the plea bargain was a death sentence, but I did not include those death cases as the purpose of a plea bargain typically is to receive a lesser sentence. It appeared in those cases that the offender was a 'volunteer', someone who expected to receive the death penalty and pled accordingly. In such cases, there is no comparative proportionality review by the Ohio Supreme Court, as waiver of appeal is a pre-requisite to entering into such plea bargains.[371] In addition, in cases where the plea bargain results in a sentence of less than death, the same absence of data problem (and lack of appellate record) discussed above exists. Many of the variables that are part of the study

[369] The United States Supreme Court has held that the Eighth Amendment prohibits the use of the death penalty for non-homicide crimes. *Kennedy v. Louisiana*, 554 US 407 (2008).

[370] Ideally, all crimes should be compared as the Court has made clear that the restrictions of the Eighth Amendment aim to ensure that only the "worst of the worst" receive a death sentence. See, e g, *Kansas v. Marsh*, 548 US 163 (2006) (Souter, J, dissenting).

[371] Indeed, the only possible challenge on appeal for a defendant who accepts a plea bargain is the voluntariness of the defendant in entering into the waiver of appeals.

simply are not available in such cases, either to researchers or to the Ohio appellate courts.

I also limited the study to cases that the defendant appealed. In cases with a sentence of death, there is no comparative proportionality review in the absence of appellate review. Almost all of the death cases fall into this category of 'appealed' cases, though, as appellate review by the Supreme Court is mandatory unless the offender waives all of his appeals and 'volunteers' for death.[372] I likewise considered only appealed 'life' sentence cases, as without an appeal, there is not the same record to allow for sufficient comparative proportionality review. The Ohio Supreme Court, even if it did consider all 'life' cases, does not have the time, resources, or inclination to consider cases in its comparative proportionality review that do not have an appellate record. For much the same reasons, the prior published comparative proportionality review studies have likewise excluded cases that offenders did not appeal.[373]

Finally, the study excluded cases that the Ohio Supreme Court reversed or a later court reversed on collateral appeal for procedural errors at trial or sentencing. The errors in such cases made the jury determinations incomparable to the other cases in the study, as presumably the error poisoned the procedure such that the outcome would not be a reliable indicator as to whether the case was 'similar'.

[372] Unsurprisingly, these 'volunteering' individuals, such as Wilford Berry, tend to be the first inmates executed based on their decision to forego their appeals.

[373] See Rachel Philofsky, 'The Maryland Proportionality Review Project' (Master's Thesis, University of Maryland 2006).

Including such cases would clearly have the potential to skew the results of the proportionality review.[374]

After limiting the pool of cases to those appealed aggravated murders that Ohio courts sentenced during the period from 1996-2011, I considered one additional potential criterion for exclusion: the identity of the sentencing body. In Ohio, some counties allow the offender to elect to have the sentencing decision be made by a three-judge panel instead of a jury. Given that part of the purpose of comparative proportionality review is to limit jury arbitrariness, it makes sense at first glance to exclude the 'judge panel' sentenced cases.

After further consideration, however, I decided to include such cases in the study.[375] First, even within a given jurisdiction, the same three judges do not sit on every capital case. In addition, in such jurisdictions, a capital jury, not a three judge panel, sentences most cases, meaning that there is no consistent sentencing body in any jurisdiction in Ohio. Further, a majority of counties do not use three judge panels. As a result, the judge panels theoretically offer an additional element of potential arbitrariness in capital sentencing and the Ohio Supreme Court should not exclude such cases from its comparative proportionality review.[376] Thus, in order to

[374] Earlier research has shown, on the other hand, a tendency for state supreme courts to reverse cases on procedural grounds when they are perceived to be comparably excessive (or perhaps it is such errors that allows relatively disproportionate cases to receive a death sentence in the first place). See George E Dix, 'Appellate Review of the Decision to Impose Death', (1979) 68 Georgetown L J 97.

[375] Three judge panels sentenced nine of the 143 cases in the study.

[376] And this seems to be the case, as the Court's proportionality review never considers the identity of the sentencing body in its proportionality review.

best consider the relative proportionality of the entire pool of cases, I decided to include the three judge panel cases in the data set. [377]

As described above, then, the data in this study includes all cases in Ohio from 1996-2011 in which a jury or three judge panel convicted an individual of aggravated murder and had the choice of whether to sentence that offender to death, where the offender then appealed the sentence to the Ohio Court of Appeals and / or the Ohio Supreme Court.[378] The sample includes 143 cases, of which 49 received death sentences.

B. Data Collection

For each case, I collected data using an instrument that I developed which was similar to the ones used in the earlier studies.[379] The instrument asked numerous questions and included over 250 potential variables, most of which concerned either characteristics of the offender, characteristics of the victim, or characteristics of the offense. These categories built upon the findings of the earlier studies, including all variables previously found to be significant.

Specifically, the instrument started with an internal case number and then required the compilation of general facts about the case, including the sentencing outcome, the county of the trial, the date of the indictment and trial, and the names

[377] The identity of the sentencing body did not have any significant correlation to the sentencing outcomes in the study.

[378] These include cases both from juries and three judge panels. In addition, unlike the Ohio Supreme Court, this study includes both death and non-death cases.

[379] Raymond Paternoster and Annmarie Kazyaka, 'An Examination of Comparatively Excessive Death Sentences in South Carolina, 1979-87,' (1990) 17 NYU Review of Law and Social Change 490; Rachel Philofsky, 'The Maryland Proportionality Review Project' (Master's Thesis, University of Maryland 2006). Both of their instruments appear to be drawn partly from the earlier work of Baldus and his colleagues. David C Baldus, George Woodworth, and Charles Pulaski, 'Comparative Review of Death Sentences: The Georgia Experience' (1983) 74 Journal of Criminal Law and Criminology 661.

of the main participants, including the trial judge and lawyers for both sides. The instrument then asked a series of questions concerning the trial, including the aggravating factor(s) and mitigating factor(s) presented at sentencing and the findings of the jury or judges as to the existence of aggravating and/or mitigating factors. The instrument also asked which other crimes, if any, the defendant had been convicted of at trial.

The second major category which the instrument addressed, other than the basic facts of trial and sentencing, was the characteristics of the defendant. These included the age, gender, race, and religion of the defendant, the defendant's county of residence, the defendant's education, the defendant's marital and familial status at the time of the crime, and the defendant's recent employment history.

The third major category of questions in the instrument related to the victims of the crime. These included the number of victims, the age, gender, and race of the victim(s), and the marital and familial status of the victim(s). In addition, the instrument provided for identification of the relationship, if any, between the offender and the victim.

The final category of questions in the instrument related to the crime itself. The instrument asked how the killing occurred, where the killing occurred, and the weapon(s) used in the killing. Such questions also included the circumstances surrounding the killing, any related felony behavior, the presence or absence of sexual assault, and the presence or absence of torture. Finally, the instrument allowed for the participation of a co-perpetrator and the identification of the role of the offender in the killing.

I collected data from several sources. A majority of the data came from appellate opinions of the Ohio Court of Appeals and the Ohio Supreme Court. In

these cases, the Court engaged in a lengthy recitation of the relevant facts of the case, focusing on the facts that appeared determinative at sentencing. In the death cases, the Ohio Supreme Court specifically identified the facts it believed warranted the application of the aggravating factors. In addition, the Court discussed the relevant mitigating factors as well, as part of its appeal process is to engage in a *de novo* reweighing of the evidence.

As the Court typically would not have access to the underlying data in the 'comparable' cases that it is using in its comparative proportionality review, there is a strong case for limiting the data collection exclusively to the opinions. I, though, have also compiled additional information using the instrument described above by examining media reports of the cases and excerpts of case files in order to capture some categories that are sometimes omitted from the appellate opinions. In particular, the race of the parties is typically not included in the court's opinion, but as discussed above, has been shown to be predictive of outcomes in capital cases, particularly the race of the victim.[380]

Nonetheless, as Baldus and his colleagues have argued, the comparative proportionality review by the state supreme courts must presume that the jury decided cases based on legitimate factors.[381] It undermines the Court's application of comparative proportionality review if the Court attempts to divine what irrational or improper facts (including race) the jury may have relied upon in sentencing the defendant to death. Thus, as Baldus has counseled, an assessment of comparative

[380] See, e g, *McCleskey v. Kemp*, 481 US 279 (1981); David C Baldus, George Woodworth, Charles A Pulaski Jr, *Equal Justice and the Death Penalty* (Northeastern 1990).

[381] See *Godfrey v. Georgia*, 446 US 420, 433 (1980).

excessiveness through comparative proportionality review should be limited to legitimate and lawful considerations, and ignore improper motivations.[382]

I entered the collected data into a Microsoft Excel database, which I then transferred to SPSS for logistic regression analysis. In addition, I drafted a brief one paragraph narrative for each case that I used to help in grouping the cases based on different parameters as discussed below.

C. Variables Included in the Study

Not every variable included in the questionnaire became part of the final statistical database. I included only variables for which a significant number (at least five) cases contained relevant information. In addition, I excluded categories from the questionnaire where the case files and appellate opinions simply did not provide such information in a consistent enough manner for it to be statistically significant. The final database that I used in the regression analysis contained the list of variables shown below in Figure 5.1.

Figure 5.1: Variables included in the Regression Analysis

Topic	**Variable**	**Categories**	**Descriptor**
Sentence	DEATH		Sentenced to death
	LWOP		Sentenced to life without parole
	LWP		Sentenced to life with parole after 30 years
The Defendant			
	AGE		Defendant's age at time of crime
		18-20	
		21-25	

[382] Baldus (n 381). While it seems astounding that the capital sentencing process should continue in its current format given the widespread evidence of race as a factor in sentencing, the outcome of the Court's decision in *McCleskey v. Kemp*, 481 US 279 (1989), has been a continuation of the same judicial structure with no additional safeguards added. Tellingly, Justice Powell, who wrote the 5-4 decision, later admitted regretting his decision in the case John C Jeffries Jr, *Justice Lewis F Powell: A Biography* (Fordham 2001); William W Berry III, 'Repudiating Death' (2011) 101 Journal of Crim L and Criminology 439.

		26-35	
		36-50	
		over 50	
	OLDER		Defendant over 50 at time of crime
	DFEM		Female defendant
	YNGADLT		Defendant aged 18-25 at time of crime
	DRGHIS		Defendant had history of drug or alcohol abuse
	DPOLSEC		Defendant police / security guard
	FELREC		Prior felony record
The Victim			
	FEMVIC		One or more female victims
	OLDVIC		One or more victims 65 or older
	VICPREG		One or more victims pregnant or disabled
	YNGVIC		One or more victims 13 or younger
	VICREL		One or more victims related to killer (including lovers)
	VICDDGANG		One or more victims are drug dealers or gang members
	VICINTIM		One or more victims had prior intimate relations with killer
	TWOVIC		Two or more victims killed during crime by defendant and co-perpetrator
	TWOVICAL		Two or more victims killed by defendant
	NUMDEAD		Number of Victims dead
	1DEAD	1	One victim dead
	2DEAD	2	Two victims dead
	3PLUSDEAD	3	Three or more victims dead
The Crime			
	RESIDENCEV		Crime occurred in residence of victim
	RESIDENCED		Crime occurred in residence of defendant
	CAR		Crime occurred in a car
	PUBLIC		Crime occurred in a public place (bar, parking lot, street, etc.)
	NUMAF		Number of Aggravating Factors Found by Jury
	NUMAF1		One Aggravating Factor Found by Jury
	NUMAF2		Two Aggravating Factors Found by Jury
	AF2PLUS		Two or more Aggravating Factors Found by Jury
	AF1		Murder of an elected official
	AF2		Murder for hire
	AF3		Murder to escape detection
	AF4		Murder while in detention
	AF5		Purposeful killing; course of conduct; two or more killed
	AF6		Murder of law enforcement officer
	AF7		Felony murder
	AF8		Murder of a witness to another crime
	AF9		Caused death of a person under 13
	AF10		Terrorism
	NUMSPEC		Total Number of Aggravating Factor

			Specifications Found by Jury
	NUMSPEC1	1	One specification
	NUMSPEC2	2	Two specifications
	NUMSPEC3	3	Three specifications
	NUMSPEC4	4	Four specifications
	NUMSPEC5	5	Five specifications
	NUMSPEC6	6	Six specifications
	NUMSPEC7	7	Seven specifications
	NUMSPEC8	8	Eight specifications
	NUMSPEC9	9	Nine specifications
	NUMSPEC10PLUS	10 or more	Ten or more specifications
	ADDLCRIM		Committed additional non-homicide crimes
	NUMADDLCRIM		Number of additional crimes
	AGGROB		Aggravated robbery
	AGGRAPE		Aggravated rape
	AGGBURG		Aggravated burglary
	ARSON		Arson
	KIDNAP		Kidnapping
	ASSAULT		Assault
	PRISON		Killing occurred in prison
	BEAT		Killed by beating
	STABBED		Killed by stabbing
	POISON		Killed with poison
	STRANG		Killed by strangulation
	BRUTAL		Killed by more than one method (shot and stabbed; strangled and shot, etc)
	AMBUSH		Defendant lying in wait
	REVENGE		Revenge motive
	JEALOS		Jealousy motive
	OBTMON		Money motive
	SEXMT		Sex motive
	FORHIRE		Murder for hire
	SILWIT		Victim killed because a witness
	DKILLER		Defendant co-equal participant
	DLEADMF		Defendant was leader
	DFOLLOW		Defendant was follower, lesser participant
	NOKILL		Defendant was not triggerman, did not kill
	ONESHOT		Defendant fired one shot
	SHOT5		Defendant fired five or more shots
	ALONE		Defendant acted alone
	RISK5		Five or more individuals put at risk by conduct
	STMIT1		The victim induced or facilitated the offense
	STMIT2		The offender was under duress, coercion, or strong provocation
	STMIT3		The offender, because of mental disease or defect, lacked capacity to appreciate criminality
	STMIT4		The youth of the offender
	STMIT5		The offender's lack of a significant criminal history
	STMIT6		If not the principal offender, degree to which actions contributed to victim's death

	STMIT7		Any other relevant factors to the issue of whether offender should receive death penalty
	NUMSTMIT		Total number of statutory mitigating circumstances
	0 STATMIT		No statutory mitigating circumstances
	1 STATMIT		One statutory mitigating circumstance
	2 STATMIT		Two statutory mitigating circumstances
	3 PLUS STATMIT		Three or more statutory mitigating circumstances
	DEFREM		Defendant expressed remorse
	DEFPLEAS		Defendant expressed pleasure in the killing
	VBDBLD		Bad blood between victim and defendant
	VICCLOSE		Victim was friend, relative, or intimate acquaintance
	VICSTRAN		Victim was a stranger
	VILE		Killing was particularly vile or brutal
	FEMALED		Female defendant
	BLACKD		Black defendant
	WHVICRC		One or more white victims
	BLVICRC		One or more black victims
	BLDWHV		Black defendant, white victim
	WHDWHV		White defendant, white victim
	BLDBLV		Black defendant, black victim
	WHDBLV		White defendant, black victim
	KILLEDPOLICE		Killed a police officer

D. Potential Approaches to Conducting Comparative Proportionality Review

As highlighted by both Baldus and his colleagues and Paternoster and Kazyaka, there are three methods courts have used to determine the relative proportionality (or comparative excessiveness) of a given case: a reasonableness approach, a 'precedent-seeking' approach, and a frequency approach.[383] The reasonableness approach looks at the appealed case and makes a subjective judgment as to whether the offender deserves the death penalty in light of the nature of the crime and the offender's characteristics.[384] This method involves little more than reweighing the aggravating and mitigating circumstances in the case and making a subjective assessment as to whether this is the type of murderer that

[383] Baldus (n 381); Paternoster and Kazyaka (n 381).

[384] Baldus (n 381).

deserves death. In the reasonableness approach, the court does not rely on any specific factor but instead determines whether a case is comparatively excessive on the basis of the perceived fairness of the death sentence.

The second approach, the 'precedent-seeking' approach, follows the reasonableness approach, but also looks to other cases as a point of comparison. The Court will apply its own subjective judgment to the case in assessing whether this particular offender deserves death. The Court will then identify one or more 'comparable' death cases to justify its decision as to whether or not death is a comparatively excessive sentence in the case.

In practice, courts have implemented the precedent-seeking approach in two different ways.[385] The first variant looks to similar specific facts, much as with the salient factors 'narrative' approach applied by Baldus and his colleagues.[386] Thus, under the precedent-seeking 'fact-specific' approach, comparable cases would involve the same type of circumstances, for example, killing a single person during an armed robbery involving multiple offenders.[387]

The second variant looks more to the overall level of harm or seriousness, rather than directly comparing the specific factual circumstances of the case. This precedent-seeking 'overall aggravation' method thus finds comparable cases on the basis of a broader measure of harm and culpability.[388] An armed robbery might be 'similar' and thus 'comparable' to a kidnapping murder with a single victim

[385] Paternoster and Kazyaka (n 381).

[386] Baldus (n 381).

[387] Paternoster and Kazyaka (n 381).

[388] Paternoster and Kazyaka (n 381).

involving multiple offenders where the overall circumstances were comparably egregious, such that they are equally predictive of a sentence of death.

In addition to the 'reasonableness' and 'precedent-seeking' approaches, the 'frequency' approach provides another method of determining whether a case is comparatively excessive or relatively proportional.[389] The 'frequency-seeking' approach possesses fundamental differences from either of the other approaches in that it employs an externally-oriented, empirically-based approach to determine case comparability.[390]

The biggest difference between the frequency approach and the other two approaches is that it attempts to compare the case at issue with the *entire class* of 'similar' cases, using the frequency of death sentencing in the 'similar' class as the barometer for determining whether the case at issue is relatively proportionate to the comparable class. It is essential, then, to capture *all* of the relevant cases in the group of 'similar' cases, as each individual sentencing outcome bears upon the overall 'frequency' of death sentences for the class.

The first step in the frequency approach is to determine the limitations of the large category of cases from which one will identify the sub-groups of 'similar' cases.[391] As discussed above, this requires decisions concerning whether to include all cases charged with capital homicide, or to narrow the group of cases based on some objective indicia, such as whether the offender appealed the case, whether the case involved a plea bargained sentence, whether the sentencing body was a judge or jury. Clearly, the manner in which a court restricts the large group of cases bears

[389] Paternoster and Kazyaka (n 381).

[390] Paternoster and Kazyaka (n 381).

[391] Paternoster and Kazyaka (n 381).

directly on the overall structuring of comparative proportionality review and the determination of whether a specific case is comparatively excessive.

The second step of the frequency approach is to determine the sub-group of 'similar' cases most comparable to the case under review.[392] As with the precedent-seeking approach, one can determine the sub-group by either (1) comparable salient facts or by (2) comparable overall egregiousness. Both the comparative proportionality studies of Baldus and his colleagues and Paternoster and Kazyaka used some form of logistic regression analysis to determine either (1) the aggravation factors that should be used to determine which cases are 'comparable' or (2) the overall measure of the degree to which such factors, when weighted, predict an outcome of death for each case.[393]

The third step of the frequency approach requires a determination, for each sub-group, of the proportion of cases that received death. One can then assess, given the proportion of cases within the group of 'similar' cases that received the death penalty, whether the case under review is comparatively excessive (or presumptively relatively disproportionate). To do so, one must determine how low the proportion must be to indicate comparative excessiveness. If the group of 'comparable' cases rarely received the death penalty, then one can conclude that the sentence in the case at issue is presumptively relatively disproportionate under the Eighth Amendment because it is so irregularly imposed as to constitute a 'cruel and unusual' punishment incompatible with the community's moral values as encompassed in the concept of evolving standards of decency. By contrast, if the group of 'comparable cases almost all received the death penalty, then one can

[392] Paternoster and Kazyaka (n 381).

[393] Baldus (n 381); Paternoster and Kazyaka (n 381).

conclude that the sentence in the case at issue is presumptively relatively proportionate (and not comparatively excessive).

Thus, the frequency approach constitutes two different possible methods – fact specific and cumulative – monikers that refer to the method by which the cases are separated into sub-groups of 'comparable' cases. As discussed below, these methods successfully complement each other to provide a robust assessment of the relative proportionality of a particular case.

Each of the three broad approaches to comparative proportionality review — reasonableness, precedent-seeking, and frequency — has its own respective limitations.[394] The reasonableness approach is the least likely of the three approaches to accurately identify comparably excessive cases because it does not engage in any direct comparison with other cases. It relies solely on the subjective moral judgment of the court in the given case, irrespective of past cases. Under this approach, then, the determination of the comparative proportionality of a death sentence potentially ignores the broader community standard (from prior jury sentencing outcomes) of applying the death penalty in 'similar' cases.

The precedent-seeking approaches suffer from several limitations. First, the non-systematic availability of appellate opinions in 'life' cases, cases where the jury opted to give the offender a life sentence (whether with or without parole), makes it less likely, as a practical matter, that courts will investigate such cases.[395] This is presumably, as described below, the situation in Ohio.

[394] Baldus (n 381); Paternoster and Kazyaka (n 381).

[395] Paternoster and Kazyaka (n 381).

In addition, each of the precedent-seeking approaches, as described by Baldus and his colleagues has its own unique limitations.[396] The strength of the precedent-seeking fact specific approach is that it captures the factual nuances of given cases that might be the very factors that give rise to the death penalty. This virtue, however, is also a vice, as the focus on the facts either creates 'comparable' case groups that are too small to be statistically significant, or omits cases that are similar in terms of culpability or egregiousness as possible cases for comparison. Also, the precedent-seeking fact specific approach is rendered useless for a case in which there are unique factual circumstances to which there are no (or very few) cases with comparable facts.

The precedent-seeking 'overall aggravation' method addresses the weakness in the 'fact-specific' approach, but suffers from the opposite limitation. The underlying facts do not limit the 'overall aggravation' method – it can look to the overall culpability or egregiousness of the case. On the other hand, it is desensitized to some possible comparable cases where the facts are very similar but the overall culpability is not congruent.

Finally, the precedent-seeking approach is limited in its efficacy because it gives no guidance on how to decide the outcome when faced with several comparable cases. For instance, if there are four 'comparable' cases – two of which are 'death' cases and two of which are 'life' cases, it is not clear under this approach how one determines whether or not the given case is comparatively excessive. Under the precedent-seeking approach, the court presumably can decide which cases are 'more comparable' and choose to ignore other comparable cases in its

[396] Baldus (n 381).

determination. The subjectivity in choosing what is comparable arguably undermines the reliability of such determinations of comparative excessiveness.

The frequency approach does not suffer from the same limitations as the reasonableness and the precedent-seeking approach because it adopts a holistic approach to assessing relative proportionality by attempting to consider all of the relevant variables. The fact specific frequency approach, like the fact specific precedent-seeking approach, has the advantage of capturing factual nuances of a given case, but compares them to a group of similar cases, not just one or two precedents.

This approach likewise suffers from the subjective nature of the inquiry needed to pinpoint which factors are salient, that is, which facts should be regarded as relevant in separating cases into different 'comparable' case groups. In addition, the number of similar factual cases can significantly limit this approach. Where a case has unique factual circumstances, it is hard to find enough comparable cases to use the fact specific approach effectively. Finally, the fact specific approach allows for some level of bias on the part of the individual grouping of the cases.

The cumulative, overall aggravation frequency method cures many of the shortcomings of the fact specific approach by employing a rigorous quantitative approach in identifying (1) the factors that are predictive of a death sentence and (2) the degree to which each factor influences death. Its limitations come in its inability to address cases with unique factual circumstances or in factual scenarios that simply are not duplicated within the dataset. As a result, the propensity score may underestimate the relative disproportionality of a case because its factual scenario is unique or rare.[397]

[397] Baldus (n 381).

Together, however, these approaches complement each other and provide for a dual analysis of the relative proportionality of a group of cases. Given the previously described shortcomings of the reasonableness and precedent-seeking approaches, I modeled this study after the South Carolina and Maryland studies, using the frequency approach, both the fact specific and the overall aggravation variants, to determine the comparative excessiveness of Ohio cases. As explained below, I broadened the fact specific inquiry to consider a variety of potentially relevant facts. Finally, I offer my own normative approach to conducting comparative proportionality review, the 'purposive' approach, which defines similarity in terms of the purposes of punishment.

E. Defining Comparative Excessiveness

Before explaining how the study was conducted, it is important to explain the overall measure used to determine comparative excessiveness (relative disproportionality). Like Baldus and his colleagues, Paternoster and Kazyaka, and Philofsky, this study has adopted a probability value of 0.35. This means for groups of 'similar' cases where the probability of receiving death was less than 35%, the study classifies death cases in that group were deemed comparatively excessive. This is because, in that group, more than 65% of the cases in the group would not have received death.

Initially used by Baldus and his colleagues, the 0.35 figure came from the Georgia case of *Coley v. State*.[398] A 1974 non-homicide rape case in which the Georgia State Supreme Court vacated the death sentence because of comparative excessiveness, the Court in *Coley* based its decision on its calculation that only 36%

[398] 204 S E 2d 612 (1974).

of similar defendants received a death sentence.[399] Baldus and his colleagues used this holding as the basis for deciding that 35% was an appropriate level below which cases would be presumptively relatively disproportionate.

Paternoster and Kazyaka decided to use the same measure of comparative excessiveness (0.35) because South Carolina case law and statutory guidelines are silent when it comes to defining comparative excessiveness and Georgia and South Carolina's death penalty statutes were quite similar.[400] Similarly, Philofsky used the same measure (0.35) because Maryland did not statutorily define comparative excessiveness for proportionality review.[401]

As Ohio has not defined comparative excessiveness in its statutes or case law, this study uses the same value of 0.35. While somewhat arbitrary, this measure is conservative in its estimation of comparative excessiveness.[402] Further, it has the legitimizing factor of being used consistently as the cutoff value in all of the previous studies. Finally, when more than two-thirds of 'similar' cases do not receive the death penalty, it seems that giving an individual the death penalty may be excessive by comparison.

This study likewise uses a value of 0.80 (or 80%) to determine presumptive relative proportionality. When a group of 'similar' cases has a death sentence rate of eighty per cent, the presumption about the death case at issue is that it is *not* comparatively excessive – it is presumptively relatively proportionate. Both Baldus

[399] Philofsky (n 381).

[400] Paternoster and Kazyaka (n 381).

[401] Philofsky (n 381).

[402] Baldus (n 381).

and his colleagues and Philofsky chose the same 0.80 value.[403] Again, there is no established justification for the cutoff of 0.80, other than it is conservative and follows the tradition in the earlier studies. It makes sense, though, that where eighty per cent or more of 'similar' cases receive the death penalty, it would strain credulity to preclude a death sentence in the case at issue based on the grounds that such a sentence would be relatively disproportionate.

None of the earlier studies address the situation in the middle – when the death sentence rate in the comparable group is between 35% and 80%. As discussed below, this is where the state supreme court can do its most important work in its assessment of relative proportionality. A rate of 50% seems little better than random – like the flip of a coin – and may be more likely to be relatively disproportionate. On the other hand, a rate of 75% seems much closer to relative proportionality. In these situations, though, it is incumbent on the reviewing court to examine the individual cases within the comparable group to better assess whether a sentence of death is comparatively disproportionate. I explore how this might work in practice more fully below.

F. Summary of the Ohio Supreme Court's Proportionality Review

To allow for a comparison between the use of the reasonableness and precedent-seeking approaches and the frequency approach, as well as to reinforce the utility of the frequency approach, I commenced my data analysis by cataloging of the methods of proportionality review used in each of the 49 death cases appealed from 1996-2011. Specifically, I reviewed the discussion of proportionality review

[403] Baldus (n 381); Philofsky (n 381). Rather than choose an upper limit, Paternoster and Kazyaka instead decided to establish .6 as a value of proportionality. Thus, where 60% of the cases in a group get the death penalty, a death sentence is relatively proportionate. Paternoster and Kazyaka (n 381).

in each case to determine whether the Ohio Supreme Court used the reasonableness approach, the fact specific precedent-seeking approach, or the overall aggravation precedent-seeking approach.[404]

The Ohio Supreme Court consistently used a fact specific precedent-seeking approach in all 49 of the death cases included in the study. As explained above, the comparative proportionality review of the Ohio Supreme Court consists of identifying one or more cases that used the same aggravating factor. On occasion, the Court will identify a sub-category of case within an aggravating factor when the case involves felony murder. Thus, the Court will identify 'similar' robbery-murders, arson-murders, or rape-murders. These categories, however, are quite broad and, in many cases, serve as a poor proxy for 'similarity' in terms of facts of cases.

The Ohio Supreme Court's fact specific precedent-seeking approach possesses two significant shortcomings. First, it only uses 'death' cases, cases in which the jury selected a death sentence, as 'comparable' cases, and as a result, has never reversed a case on the grounds that it is comparatively excessive. Second, the cases that the Court uses as 'comparable' cases often do not resemble the case under proportionality review. This is because it only looks to whether the cases have the same aggravating factor. But, the presence of the same aggravating factor does not in itself make the case 'comparable' in terms of either offender characteristics or characteristics of the offense.

The case of Grady Brinkley illustrates this disconnect.[405] Mr. Brinkley was on bond after police arrested him for armed robbery of Rick's City Diner. While out

[404] It is clear from the cases that the Ohio Supreme Court has never used the frequency approach.

of jail, he went to the house of his ex-girlfriend, Shantae Smith, and killed her because he heard that she had been dating another man. As an afterthought, he stole her ATM card and winter coat because he had decided to flee bond to Chicago. The Ohio Supreme Court found the case to be relatively proportionate. Its entire comparative proportionality review analysis is as follows:

> Additionally, we find that the death penalty is proportionate when compared with similar robbery-murder cases, some of which featured strong mitigating evidence. See, e.g., *State v. Myers*, 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186; *State v. Murphy* (2001), 91 Ohio St.3d 516, 547, 747 N.E.2d 765 (deprived childhood, remorse); *State v. Smith* (2000), 89 Ohio St.3d 323, 338, 731 N.E.2d 645 (21-year-old defendant, deprived childhood, "psychotic episodes"); *Baston*, 85 Ohio St.3d at 430-431, 709 N.E.2d 128 (20-year-old defendant, neglected in childhood, remorse); *McNeill*, 83 Ohio St.3d at 453-454, 700 N.E.2d 596 (troubled upbringing, 19-year-old defendant, "borderline intelligence"); *State v. Raglin* (1998), 83 Ohio St.3d 253, 270, 699 N.E.2d 482 (troubled upbringing, 18-year-old defendant, mental problems); *State v. Benge* (1996), 75 Ohio St.3d 136, 147, 661 N.E.2d 1019 (troubled upbringing, prior good character, hard worker, lack of prior criminal convictions); *Woodard*, 68 Ohio St.3d at 79, 623 N.E.2d 75 (troubled upbringing, 19-year-old defendant); *Green*, 66 Ohio St.3d at 152-153, 609 N.E.2d 1253 (terrible childhood, IQ of 66).[406]

A cursory examination of two of the 'similar' cases reveals that they are not similar at all to the Brinkley case. The *Myers* case (cited above by the Court) involved the abduction of a woman from a bar, where the offender led the woman down to some nearby railroad tracks, sexually assaulted her, strangled her, and stabbed her to death in the temple with a railroad spike before stealing her wallet.

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[405] *State v. Brinkley*, 824 N E 2d 959 (Ohio 2005).

[406] Ibid. While the Court typically does not cite to mitigating evidence in its proportionality review, it did so here because the dissent argued that the mitigating evidence outweighed the aggravating evidence. The focus of the Court's concept of similarity though, as in every case, is on the 'robbery-murder' — the aggravating factor.

Similarly, the *Murphy* case (also cited above by the Court) involved an attempted robbery of a victim's gold necklace. The offender pulled a gun on the victim and requested his jewelry. While the victim was removing the necklace, the offender's gun accidentally discharged. He shot the victim again, and fled with his jewelry.

Both of these cases, like several of the others cited by the Court, are fundamentally distinct factual scenarios that are clearly more 'different' than 'similar.' The point of comparison that the Court uses is the aggravating factor – aggravated robbery murder. But, these cases clearly involve different situations such that they appear to be poor indicia of similarity for purposes of comparative proportionality review.

In addition, there is no evidence that the Court is attempting to equate the cases based on some broader conception of 'similarity' that would not require factual similarity, as in the 'overall aggravation' conceptions described above. Instead, the Ohio Supreme Court is presuming factual similarity *based on the similarity in aggravating factors*, and in doing so, uses dissimilar cases as points of comparison.

Further, the Ohio Supreme Court engages in no *analysis* of comparative proportionality other than citing 'similar' cases. Another example of its cursory proportionality review is the case of *State v. Group*.[407] The entirety of the Ohio Supreme Court's proportionality in that case was as follows:

> We further find that the death sentence in this case is proportionate to sentences we have upheld in similar cases. We have affirmed death sentences in cases with course-of-conduct specifications where the defendant killed

[407] There is nothing unique about the Ohio cases described here. The Ohio Supreme Court conducts the same cursory one paragraph proportionality review in *every* death case.

> one victim and tried to kill a second. In one such case, the course-of-conduct specification was combined with an aggravated-robbery specification. See *State v. Dennis* (1997), 79 Ohio St.3d 421, 683 N.E.2d 1096. See, also, *State v. O'Neal* (2000), 87 Ohio St.3d 402, 721 N.E.2d 73 (course of conduct and aggravated burglary). Moreover, in *State v. Sowell* (1988), 39 Ohio St.3d 322, 530 N.E.2d 1294, we affirmed a death sentence with only a course-of-conduct specification. We have also affirmed a death sentence in a factually similar case with only an aggravated-robbery specification. See *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476.[408]

Again, the focus of the Ohio Supreme Court is on finding cases with the same aggravating factors – course of conduct murder and aggravating robbery. The Court makes no attempt to explore the degree to which the *Group* case it is deciding is 'similar' to the cases it cites. Indeed, there is no discussion in this case (or any other) about what the parameters of 'similarity' are or ought to be.

Even more importantly, the Ohio Supreme Court is ignoring 'life' cases in its analysis. As mentioned above, it is only looking to other 'death' cases as potential 'similar' cases. Thus, if it can identify one or more remotely 'similar' cases (many of which are actually dissimilar) that received the death penalty, then the Ohio Supreme Court will determine that the case on appeal is relatively proportionate, even though a vast majority of truly 'similar' cases did not receive the death penalty. In the 49 death cases included in the study, the Ohio Supreme Court never discussed a 'life' case as a point of comparison for purposes of comparative proportionality review—it limited its comparative proportionality review to a small number of 'death' cases.[409]

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[408] *State v. Group*, 781 N E 2d 980 (Ohio 2002).

[409] I am not the first to argue that Ohio's failure to consider 'life' cases inhibits the reliability of its comparative proportionality review. See <http://www.abanet.org/moratorium/assessmentproject/ohio.html> accessed 12 September 2011.

Finally, as indicated before, the Ohio Supreme Court has never reversed a case based on its relative disproportionality. In other words, the Ohio Supreme Court's comparative proportionality review *always* finds cases to be relatively proportionate.[410]

G. Techniques of Data Analysis

In my study, I used three different techniques to identify 'similar' cases in measuring relative proportionality of Ohio death cases. First, I used logistic regression analysis to identify and group 'similar' cases, defining similarity in terms of predictability of a death sentence in undertaking an overall aggravation approach to comparative proportionality.

Second, I used specific facts (salient factors) to determine similarity, using a number of different indicia for similarity, including aggravating factors, the number of specifications, the presence of certain crime-based factors, victim-based factors, and race-based factors.

Finally, I developed my own approach to determining 'similarity', partly in response to the inherent weaknesses in the first two approaches described below. My approach, termed the 'purposive' approach, is more broadly qualitative and relies on a purpose of punishment (just deserts retribution provides the most optimal approach) to determine similarity. I describe each of these approaches in detail below.

1. Overall Aggravation Proportionality Review

I first used the overall aggravation frequency method of comparative proportionality review to assess the relative proportionality of the Ohio death cases. This method, pioneered by Baldus and his colleagues, refined by Paternoster and

[410] This approach is not unique to Ohio. Most capital states conduct comparative proportionality review in a similar manner. Baldus (n 381).

Kazyaka, and replicated by Philofsky in the study of Maryland death sentences, is a quantitatively-based method of identifying 'similar' cases for purposes of determining relative proportionality.[411]

I first measured the significance of each of the above-listed variables in the study to determine which variables significantly correlated to the sentencing outcome (life or death). I used both continuous and categorical variables (mostly categorical) in attempting to determine which variables best predicted the actual sentencing outcomes in the cases.

After inputting the data into the regression model, I constructed a logistic regression equation using explanatory variables and a death sentence as the outcome variable. I chose the explanatory variables based on their statistical significance, after exploring the level of correlation between each variable and the outcome variable (the sentence of death). After running numerous regressions, I derived the variables that gave the 'best-fit' equation in terms of predicting the sentencing outcome. For each variable in the equation, I calculated, using SPSS, a logistic coefficient value – a value reflecting the relative weight of each variable based on its predictive importance in the equation.

In determining statistical significance, I followed the practice of the other studies, requiring $P < 0.10$.[412] As explained in chapter six, all of the variables in the final equation had a P value of less than 0.05.

Having determined which combination of variables best predicted an outcome of death, I then measured the relative proportionality of the 49 Ohio death

[411] Baldus (n 381); Paternoster and Kazyaka (n 381); Philofsky (n 381).

[412] The earlier studies used either 0.10 or 0.05 as their value for determining significance. Baldus (n 381); Paternoster and Kazyaka (n 381); Philofsky (n 381).

cases.[413] There were four variables, or 'aggravation factors' that were predictive of death – (1) the presence of a prior intimate relationship between the offender and the victim, (2) the victim was elderly (age 65 or older), (3) the crime was brutal in that it involved more than one kind of physical harm to the victim, (4) there were two or more aggravating factors found by the jury.

I used SPSS to calculate the 'propensity score' for each case. The higher the 'propensity score' the more likely the logistic regression equation would predict a sentencing outcome of death. In other words, the propensity score is 'the estimated conditional probability of the defendant being sentenced to death'.[414]

Where the propensity score was less than 35%, I categorized that death case as comparatively excessive. By contrast, where the propensity score was 80% or more, I categorized that death case as presumptively relatively proportional. I repeated this exercise for all 49 death cases to determine the number of death cases that were (1) presumptively relatively excessive and (2) presumptively relatively proportionate.

2. Fact Specific Frequency Proportionality Review

As with the 'overall aggravation' approach, all of the prior studies conducted some type of fact specific comparative proportionality review.[415] The first question when electing to use this fact specific approach is how one identifies the facts one uses to define 'similar' cases. I used several methods of defining 'similarity', attempting to reflect, as best as possible, the concepts that the Ohio Supreme Court

[413] Paternoster and Kazyaka (n 381).

[414] Paternoster and Kazyaka 491 (n 381).

[415] Baldus (n 381); Paternoster and Kazyaka (n 381); Philofsky (n 381).

highlights in its comparative proportionality review (even though it does not use a frequency approach or consider 'life' cases).

As indicated by Baldus and his colleagues, using the aggravating factors alone does not serve as a reliable indicator of relative proportionality.[416] But, it does provide one way of defining 'comparable' cases, and is the method that the Ohio Supreme Court utilizes most often. The ten statutory aggravating factors in Ohio are:

> (1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.
>
> (2) The offense was committed for hire.
>
> (3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.
>
> (4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, "detention" has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:
>
> (a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.
>
> (b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

[416] Baldus (n 381).

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.

(9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.

(10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

To measure the relative proportionality of the death cases using the aggravating factors, the study grouped all 143 of the death and life cases according to aggravating factors in three different ways. I grouped 'similar' cases based on aggravating factors in terms of (1) presence of a particular aggravating factor, (2) the presence of the same combination of aggravating factors, and (3) the total number of

aggravating factors present.[417] For each of these respective 'similarity' groupings, I assessed the relative proportionality of each death case, and then determined the overall number of cases that were comparatively excessive (below 0.35), presumptively proportionate (0.80 or greater), or somewhere in between.

Because Ohio juries determine not only the presence of an aggravating factor, but the number of counts (or 'specifications') of a particular aggravating factor, I also defined 'similarity' in terms of the total number of specifications in the case. I thus grouped cases together where the cases had the same number of specifications. I repeated the method explained above to determine the relative proportionality of the death cases using number of specifications as the measure of similarity.

As the Ohio Supreme Court sometimes cites sub-groupings of aggravating factors in its comparative proportionality review, I used the same method to measure comparative proportionality based on a number of different crime-based and victim-based indicia. I calculated similarity based on the following subsets of felony murder: (1) sexual assault murder, (2) arson, (3) robbery murder, and (4) kidnapping murder. I further separated robbery murder into three categories: (1) brutal home robbery murders, (2) drug related robbery murders, and (3) other robbery murders.

My victim-based indicia were as follows: (1) number of aggravated murder victims, (2) aggravated murder of a child (under eighteen),[418] (3) aggravated murder

[417] All of the life cases, by definition, had aggravating factors, as the study only included cases where the defendant had been found guilty of aggravated murder.

[418] I chose age eighteen because one of the aggravating factors (number nine) is murder of a child under thirteen.

of an elderly (65 and over) victim, (4) aggravated murder of a family member,[419] and (5) aggravated murder with respect to gender. I further subdivided the aggravated murder of a child category based on the presence or absence of sexual assault. In addition, I subdivided the aggravated murder of a family member category based on whether the victim was a spouse / girlfriend or not.

Finally, even though courts should not use such indicia in comparative proportionality review, I created categories of similar cases based on race. I did this in several ways — I classified 'similar' cases in terms of (1) the race of the offender, (2) the race of the victim, and (3) the race groupings between offender and victim (white offender – white victim, white offender – black victim, black offender – black victim, black offender – white victim).

As with the earlier groupings of 'similar' cases, I determined the relative proportionality of each death case, and calculated the total number of Ohio death cases that were comparatively excessive (ratio of less than 0.35) and presumptively relatively proportionate (ratio of 0.80 or greater). I performed this exercise separately for each different method of grouping similar cases.

3. The 'Purposive' Approach to Comparative Proportionality Review

Upon completion of my analysis of the relative proportionality of the Ohio death cases, I then questioned how the Ohio Supreme Court might conduct proportionality review in practice. Both the overall aggravation approach and the fact specific approach seemed inadequate, from a practical perspective, to determine relative proportionality.

[419] I included girlfriends as family members as many people now live together without being married.

As to the overall aggravation approach, the idea of the Ohio Supreme Court engaging in logistic regression analysis seems far-fetched, both in terms of resources and inclination, as it is unwilling to even analyse the cases (and their purported similarity) that it is using in its current precedent-seeking approach. Also, as explained above, the lack of frequency of certain variables depends on the facts of the cases – some types of cases may be underrepresented in the sample, such that the logistic regression does not capture the predictive influence of a particular variable. Thus, while a robust methodological approach, the overall aggravation method may not necessarily be the best way to measure relative proportionality, particularly from a practical standpoint.

The fact specific approach is even worse in that it clearly cannot capture all of the 'similar' cases in the same group. Its efficacy is only in the 'in' group – the cases in which the characteristic is present. Nonetheless, as demonstrated in chapter seven, the fact specific approach is of limited utility because it cannot capture factual nuances that might drive the outcome in a given case.

In light of these shortcomings, this thesis offers the 'purposive' approach as an alternative. The 'purposive' approach, as explained more fully in chapter eight, defines similarity in terms of the purposes of punishment – retribution, future dangerousness, deterrence, and rehabilitation. This 'purposive' method requires the court to choose one of these purposes, and then group the cases according to the degree to which a death sentence in that particular case would achieve the selected purpose.

For instance, if a court chose retribution as the purpose of punishment, then the court would group the cases according to the culpability of the offender and the harm caused by the crime (the measures of just deserts). 'Similar' cases would then

be cases in which the culpability and harm were comparable. The process would be the same irrespective of the purpose of punishment that a court chose.

Once the court had grouped the cases in light of the applicable purpose of punishment, the court would then conduct the same assessment as described above, determining for each death case whether it was comparatively excessive (ratio of below 0.35), presumptively relatively proportionate (ratio of 0.80 or greater), or somewhere in between.

To demonstrate how this approach could work in practice, I grouped the cases in light of one of the purposes of punishment: retribution. Specifically, I grouped the cases into four categories using the culpability of the offender and the harm caused. I also asked ten of my law students to perform the same exercise so that the reliability of my ranking could be assessed. For this grouping of 'similar' cases, I determined the relative proportionality for each death case, and assessed the total level of relative proportionality for the death cases collectively.

Having explained the various methodological approaches, the remainder of the thesis examines the results of each approach. Chapter six provides the results of the overall aggravation approach, and chapter seven provides the results of the various fact specific approaches. Finally, chapter eight explains the theoretical justifications for using the 'purposive' approach and demonstrates how it might work in practice.

CHAPTER SIX: OVERALL AGGRAVATION PROPORTIONALITY REVIEW

Having explained the methodological approaches used in this thesis in chapter five, this chapter reports the results of my measurement of relative proportionality of Ohio death cases using the overall aggravation method – the first of the three different approaches to determining case 'similarity'. As mentioned before, this method relies on *actual jury sentencing outcomes* and the corresponding factors present or absent in each case as the basis for determining which cases are 'similar'. Finally, this chapter explores the conclusions one can draw from the data, as well as looking beyond the data to more broadly understand the sentencing trends in Ohio capital cases.

As explained in chapter five, in order to determine the degree to which cases are relatively proportionate using the overall aggravation method, one must first identify the factors that predict death. In other words, the logistic regression analysis seeks to isolate the variables that have a significant correlation to the sentencing outcome across the 143 cases in the study, such that they cumulatively best predict the sentencing outcome. Having identified such factors, one can then group the cases according to their probability of receiving a death sentence to determine the relative proportionality of each death case.

Thus, the overall aggravation propensity score method estimates the conditional probability of a jury sentencing a defendant to death based on significant independent variables assigned a weight based on their predictive importance. I determined the most predictive independent variables in a logistic regression equation with the sentence—death or less than death—as the outcome, or dependent, variable.

There are four independent variables in this equation that best explain the sentencing outcome — whether the defendant would receive a death sentence – in the cases. For purposes of the regression analysis, I did not distinguish between cases in which the jury sentenced[420] the defendant to a life without parole sentence and cases in which the jury sentenced the defendant to a life with parole sentence.

As reported below, the variables in the equation are as follows: (1) the victim had an intimate physical relationship with the victim prior to the incident; (2) the victim was elderly (age 65 or over) at the time of the crime; (3) the crime was brutal, in that the victim suffered multiple types of physical trauma (shot and stabbed; stabbed and strangled); (4) the jury found two or more statutory aggravating factors beyond a reasonable doubt.

A. Assessing the Predictive Variables

Before exploring the consequence of the findings of the logistic regression equation on the assessment of the relative proportionality of the death cases, it is interesting to consider the variables that were significant here as well as those that were not. The brutality category has precedent in both the Baldus (Georgia) and Philofsky (Maryland) studies. This category makes sense as an indicator that would raise the probability of a death sentence from a jury. In Ohio, it was a particularly strong indicator, with all but two of the cases categorized as brutal receiving death.

While not having precedent in other proportionality review studies, the category of elderly victims also makes sense as a factor that might increase the probability of a jury giving a defendant the death penalty. Elderly victims are often less able to defend themselves and juries can perceive such individuals as weaker

[420] As explained earlier, a three judge panel, and not a jury, sentenced the defendant in a few (less than ten) cases. For ease of reference, I describe all sentencing in this chapter as 'jury' sentencing.

and more vulnerable. In other words, elderly victims are often easier targets than younger individuals and, as a result, criminal behaviour toward such individuals can be seen as creating more harm or being more blameworthy from the perspective of a capital jury.

The second category of victims — an individual with whom the defendant has had intimate relations — seems less obvious than elderly victims to result in a higher probability of a death sentence, but is explainable nonetheless. Where the defendant has a personal, intimate relationship with the victim, the presence of such a relationship can serve to make the defendant seem more culpable or more egregious in some cases. Alternatively, murders by strangers may in some ways seem more brutal or less excusable than a murder of someone with a closer relationship as the likelihood that such a killing may be in the heat of passion may be higher. An examination of the cases involving spouses / girlfriends / ex-girlfriends reveals that many of these murders were particularly brutal, involving strangulation and sexual abuse in a number of cases.

In addition, the raw number of aggravating factors was predictive of death where the case involved two or more aggravating factors. This finding is consistent with the Philofsky (Maryland) study. This makes sense as jurors might attribute some weight to having more than one aggravating factor proved by the government.

As indicated in chapter seven, though, this trend does not continue as the overall number increases. The cases with less than two aggravating factors were less likely than those cases with two or more to receive the death penalty. But the cases with three aggravating factors were not more likely than those with two aggravating factors. One explanation for this is the duplicative nature of the aggravating factors themselves. In many cases, the same conduct can fall under more than one

aggravating factor. For instance, a killing in the 'course of conduct' of criminal behaviour will also, in many cases, be a 'felony murder'. Because of this potential for overlap, increasing the number of aggravators from two to three may not indicate a significant difference in offender culpability or harm caused.

Interestingly, a number of variables that were significant in other studies were not significant in the logistic regression analysis in this thesis. First, individual aggravating factors and death penalty specifications did not correlate to the sentencing outcome in the case. Second, variables related to race did not have a significant influence on the sentencing outcome in the case.

Upon closer examination, the lack of influence of individual aggravating factors can also be explained by the breadth of the categories. The felony murder category (statutory aggravating factor #5) captured a large number of cases that were very different in terms of offender culpability and brutality of crime. Similarly, the seventh aggravating factor, including both pre-meditated killings and multiple killings in the course of criminal conduct, encompassed a wide variety of cases. The other aggravating factors did not, for the most part, contain a significant enough number of cases to affect the model. Aggravating factor number nine — the killing of a police office — covered only two cases, both of which received the death penalty, but not a critical mass of cases that affected the overall logistical regression model.

The number of specifications — the number of counts of aggravating factors proved to the jury — seems, in theory, to be a better predictor of the severity of the crime and thus of a death sentence. Indeed, the number of specifications has, in other studies (Philofsky), been predictive of death. Here, though, the number of specifications did not have a significant positive correlation to the sentencing

outcome. This is in part understandable because some of the worst cases involved a small number of specifications — cases involving simple (with less concurrent criminal activity) but brutal murders.

Perhaps most importantly, the data did not reveal that race had a significant impact on the sentencing outcome. Past studies have almost uniformly demonstrated that the race of the victim, and to a lesser extent, the race of the defendant, have a significant correlation with the sentencing outcome in capital cases.[421] In particular, cases in which a black defendant murders a white victim are significantly more likely to receive the death penalty than cases in which a white defendant murders a black victim.[422] In this Ohio study, race did not have a significant correlation to the sentencing outcome.

Two possible explanations seem reasonable in understanding this outcome. First, this study, unlike prior studies, examined cases only after the adoption of life without parole. Life without parole affects, at least to some degree, the tendency of jurors to rely on the perceived dangerousness of the offender as a justification for sentencing an offender to death. The Capital Jury Project, in particular, has demonstrated the heavy influence of dangerousness in capital sentencing decisions by jurors.[423] To the extent that jurors believe that defendants have no possibility of re-joining society having received a sentence of life without parole, the influence of dangerousness is lessened and becomes less a part of the sentencing calculus.[424]

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[421] Baldus, et al. (n 312); Paternoster and Kazyaka (n 381); Philofsky (n 381).

[422] Baldus (n 312).

[423] Blume (n 26).

[424] Blume (n 26); Berry (n 27).

Dangerousness, in theory, can serve as part of the explanation for why the race of the victim has played such a significant role in sentencing prior to the adoption of life without parole. As jurors in the United States are predominately white, jurors tend to give the death penalty to defendants who murder individuals who are 'like' them, that is, white victims, particularly when the defendants have the possibility of being paroled at some point in the future. Conversely, jurors tend to give the death penalty less to those who murder individuals 'unlike' them, that is, black victims.[425]

When dangerousness becomes less a part of the sentencing calculus, then, jurors may be less likely to use the race of the victim as a basis for sentencing. If the defendant can never escape custody, the racial identity of the victim becomes less of a concern because the juror has no fear that the defendant will kill again. Thus, the presence of life without parole as a sentencing option will have the likely effect of diminishing dangerousness in the sentencing calculation which will, in turn, diminish the influence of the race of the victim.

A second explanation for the absence of a statistically significant influence of race is the small sample size of inter-racial murders. In over 95% of the cases, whites murdered whites or blacks murdered blacks. The small sample size of inter-racial murders thus was not significant enough to determine that the white defendant-black victim murders were less likely than the black defendant-white victim murders to receive the death penalty.

[425] In addition, this may also be attributable in part to the well-chronicled empathy gap between whites and blacks, with white jurors tending to perceive black defendants as more dangerous than white defendants. See, e g, Craig Haney, 'Condemning the other in death penalty trials: Biographical racism, structural mitigation, and the empathic divide' (2004) 53 DePaul L Rev 1557; Mona Lynch and Craig Haney, 'Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the Empathic Divide' (2011) 45 Law & Society Rev 69.

This does not mean that race does not continue to play a role in the Ohio capital system. Indeed, the study did not include any analysis of the prosecutorial decision-making made prior to the jury decision-making. It is possible, and perhaps even likely, that the decisions of Ohio prosecutors may exacerbate the overall influence of race on capital punishment in Ohio. Prosecutors may, for instance, be more likely to seek the death penalty in cases with white victims and / or black defendants.

As explained in chapter five, I included a large number of additional variables measuring various characteristics of the offender, characteristics of the victim, and characteristics of the crime in the regression analysis, but those variables were not significant predictors of the sentencing outcome. There are three explanations for the lack of significance of such variables. First, the variable actually did not play a role in sentencing, and in any case, is not predictive in any way of the sentencing outcome. Second, the variable was present in almost every case (such as prior criminal history, the catch-all mitigating factor) such that it did not impact the outcome. Third, the variable was too scarce to be meaningful. Two examples of this are the murder of an inmate and the murder of a police officer. Both categories could be predictive of death (defendants who acted in this way received the death penalty in each of the two cases in each category), but the sample size was too small to have an impact. Indeed, as discussed in chapter five, the central weakness of the overall aggravation approach to defining similarity in this study is that the diversity of factors makes it likely that, for some meaningful predictors, the sample size of a particular factor will be too small to be significant enough to be included in the analysis.

B. Logistic Regression Analysis

Before discussing how the variables and the logistic regression equation help to determine the comparative relative proportionality of the Ohio death cases in the study, it is instructive to examine the results of the regression analysis. In the logistic regression, the significant variables had the values as indicated below in Figure 6.1.

Figure 6.1: Variables in Regression Equation

Variables in the Equation

	B	Sig.	Exp(B)	95% C.I.for EXP(B)	
				Lower	Upper
Jury found two or more aggravating factors (AF2PLUS)	1.021	.020	2.777	1.177	6.533
Murder of an elderly (over 65) victim (OLDVIC)	2.067	.006	7.901	1.821	34.272
Murder of a victim with a prior intimate relationship with defendant (VICINTIM)	1.472	.023	4.356	1.228	15.450
Murder was particularly brutal (BRUTAL)	2.988	.000	19.845	4.058	97.045
Constant	-1.923	.000	0.146		

In Figure 6.1, the 'B' value is the logistic coefficient for the variable in the regression equation. The higher the absolute value, the greater the predictive impact on the sentencing outcome. Where the value is positive, the variable *predicted* the sentencing outcome of death; where the value is negative, the variable *predicted* the sentencing outcome of life.[426] As indicated in Figure 6.1, brutality was the strongest predictor of a death sentencing outcome, followed by murder of an elderly victim, prior intimate relationship with the victim, and a jury finding of two or more aggravating factors.

[426] Again, 'life' includes both life without parole and life with parole sentences.

The second column, 'Sig.' reflects the measurement of the significance of the variable. The lower the number in the 'Sig.' column, the higher the degree of significance the variable has in terms of predicting the sentencing outcome. All of the variables had a very high degree of significance ($p < .05$), less than the value used in the Baldus studies ($p < .10$)[427]

The third column, 'Exp (B)', presents the extent to which to which raising the corresponding measure by one unit (adding one more case with that characteristic) influences the odds ratio. Thus, 'Exp (B)' reflects the change in odds, with a figure above 1 indicating that the odds of the outcome occurring increases (a death sentence) and a figure below 1 indicating that the predictor decreases the odds of the outcome occurring (a life sentence). The brutal crime variable has the highest 'Exp (B)' value because it is the strong predictor of a 'death' sentence outcome.

The final two columns '95% C. I. for Exp (B)' indicates the range of values for Exp (B) in the cases in the study, with a confidence interval of 95%. The further away from 1, the more significant the impact of the predictor on the odds of the sentencing outcome occurring.

In addition to the data in Figure 6.1, there are several other indicators of the strength of the variables (in terms of their ability to predict the sentencing outcome). First, one can test the overall significance of the predictive equation using what SPSS calls the *Model Chi square,* derived from the likelihood of observing the actual data under the assumption that the model that has been fitted is accurate. In the study, this Omnibus Test of Model Coefficients (Figure 6.2) indicates a significance of $p < 0.000$ for the model, forming a basis for rejecting the null hypothesis (that the constant model and the equation model are not significantly

[427] Baldus (n 312).

different), and demonstrating that the model is significant in predicting the outcome of the case.

Figure 6.2: Omnibus Tests of Model Coefficients

Omnibus Tests of Model Coefficients

		Chi-square	Df	Sig.
Step 1	Step	49.274	4	.000
	Block	49.274	4	.000
	Model	49.274	4	.000

The degrees of freedom ('df') indicate inclusion of all four variables in the calculation. The chi-square value (49.274) reflects the difference between the -2LL (-2 log likelihood) value in the constant model (183.836) reflected in Figure 6.3 and the -2LL value in the model with the four variables (134.562) reflected in Figure 6.4. This chi-square value indicates that the equation makes a significant improvement in predictability of sentencing outcome over the constant model (no variables).

Figure 6.3: Iteration History

Iteration History[a,b,c]

Iteration		-2 Log likelihood	Coefficients Constant
Step 0	1	183.852	-.629
	2	183.836	-.651
	3	183.836	-.651

a. Constant is included in the model.

b. Initial -2 Log Likelihood: 183.836

c. Estimation terminated at iteration number 3 because parameter estimates changed by less than .001.

Figure 6.4: Model Summary

Model Summary

Step	-2 Log likelihood	Cox & Snell R Square	Nagelkerke R Square
1	134.562[a]	.291	.403

a. Estimation terminated at iteration number 5 because parameter estimates changed by less than .001.

Figure 6.4 also provides another measure of the degree to which the equation fits the data or the overall 'goodness of fit'. This *Model Summary* (see Figure 6.2), provides information concerning the goodness-of-fit of the equation in the form of the Cox & Snell R Square figure and the Nagelkerke R Square figure. Unlike linear regression, logistic regression does not allow for the calculation of an R^2 figure. These tests provide alternatives that attempt to do the same thing – measure the degree to which the model fits the data (and predicts the actual sentencing outcomes).

The Cox & Snell R Square figure attempts to imitate multiple R-Square based on 'likelihood', but its maximum can be (and usually is) less than 1.0, making it difficult to interpret. Here, the value of 0.291 indicates that 29.1% of the variation in the sentencing outcomes can be explained by the model.

The *Nagelkerke* modification, which also ranges from 0 to 1, is a more reliable measure of the relationship between the variables in the model and the sentencing outcomes. The most reported of the R-squared estimates, *Nagelkerke's* R^2 will normally be higher than the *Cox and Snell* measure. Here, it is 0.403, indicating a somewhat strong relationship of 40.3% between the predictors and the prediction.

An alternative measure of the goodness of fit to model chi square is the *Hosmer and Lemeshow* Test. The *Hosmer and Lemeshow* Test divides subjects into 10 ordered groups of subjects and then compares the number actually in the each group (observed) to the number predicted by the logistic regression model (predicted), as indicated below in Figure 6.6. It creates the 10 ordered groups based on their estimated probability; those with estimated probability below 0.1 form one group, and so on, up to those with probability 0.9 to 1.0. Each of these categories is further divided into two groups based on the actual observed outcome variable (success, failure). The expected frequencies for each of the cells are obtained from the model. A probability (p) value is computed from the chi-square distribution to test the fit of the logistic model.

If the *Hosmer and Lemeshow* goodness-of-fit test statistic is greater than 0.05, as one wants for well-fitting models, one fails to reject the null hypothesis that there is no difference between observed and model-predicted values, implying that the model's estimates fit the data at an acceptable level. That is, well-fitting models show non-significance on the *Hosmer and Lemeshow* goodness-of-fit test. This desirable outcome of non-significance indicates that the model prediction does not significantly differ from the observed. The Hosmer and Lemeshow Test indicated that the model is significantly predictive of the outcome, with a significance value of 0.575 (much greater than 0.05).

Figure 6.5: Hosmer and Lemeshow Test

Hosmer and Lemeshow Test

Step	Chi-square	Df	Sig.
1	1.988	3	.575

Figure 6.6: Contingency Table for Hosmer and Lemeshow Test

Contingency Table for Hosmer and Lemeshow Test

		DEATH = 0		DEATH = 1		
		Observed	Expected	Observed	Expected	Total
Step 1	1	58	55.840	6	8.160	64
	2	26	28.453	14	11.547	40
	3	6	6.116	8	7.884	14
	4	2	2.361	8	7.639	10
	5	2	1.231	13	13.769	15

A final way to assess the adequacy of the model in terms of its fit to the data is to examine the degree to which it can successfully predict the sentencing outcomes. As indicated in Figure 6.8, the model successfully predicts 78.3% of the sentencing outcomes. This result is consistent with that achieved by Paternoster and Kayzaka.[428] In addition, it is significantly higher than the 65.7% prediction rate of the constant model (Figure 6.7).

Interestingly, the model was much better at predicting life cases (90.4%) than death cases (55.1%). This indicates that the absence of the predictive variables was stronger in determining the sentencing outcome of life than the presence of the predictive variables was in determining death. In 9 of the cases for which the model predicted life, the jury awarded a death sentence; in 22 of the cases for which the model predicted death, a jury awarded a life sentence.

[428] Paternoster and Kazyaka (n 381).

Figure 6.7: Classification Table (Constant Model)

Classification Table[a,b]

Observed			Predicted		
			DEATH		
			0	1	Percentage Correct
Step 0	DEATH	0	94	0	100.0
		1	49	0	.0
	Overall Percentage				65.7

a. Constant is included in the model.

b. The cut value is .500

Figure 6.8: Classification Table (Logistic Equation Model)

Classification Table

Observed			Predicted		
			DEATH		
			0	1	Percentage Correct
Step 1	DEATH	0	85	9	90.4
		1	22	27	55.1
	Overall Percentage				78.3

C. Similarity Based on Propensity Score

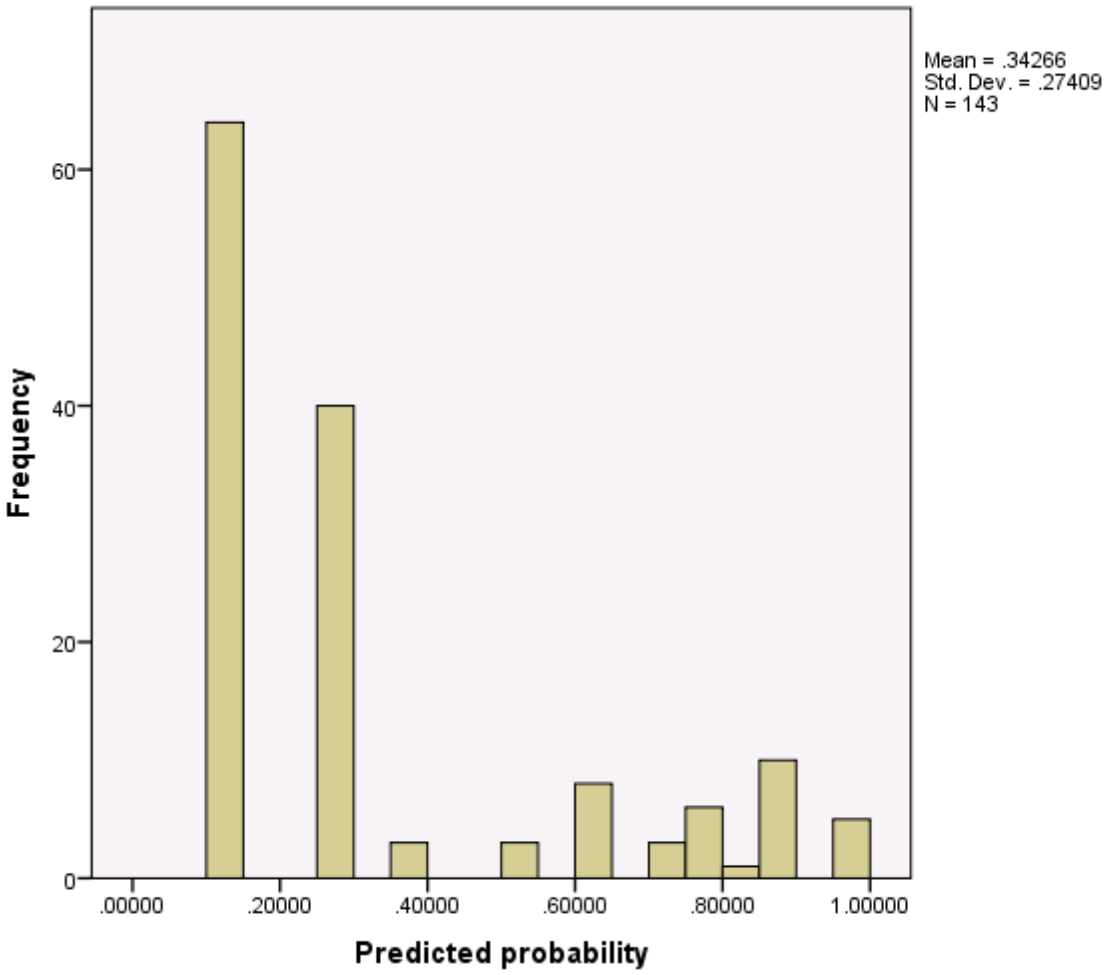
As explained in chapter five, one can determine the propensity score for each case (the probability that the case will receive a death sentence) from the logistic regression model using SPSS. As shown below in Figure 6.9, the propensity scores ranged from 0.12751 to 0.98453, which reflect the 'probability' of death for each case. Appendix A provides the propensity score (probability of a death sentence) for all 143 cases in the study. Figure 6.10 is a histogram showing the distribution of cases according to their propensity score.

Figure 6.9: Predicted Probabilities of Death

Predicted probability of death

		Frequency	Percent	Valid Percent	Cumulative Percent
Valid	.12751	64	44.8	44.8	44.8
	.28868	40	28.0	28.0	72.7
	.38898	3	2.1	2.1	74.8
	.53589	3	2.1	2.1	76.9
	.63872	8	5.6	5.6	82.5
	.74360	3	2.1	2.1	84.6
	.76228	6	4.2	4.2	88.8
	.83416	1	.7	.7	89.5
	.88955	10	7.0	7.0	96.5
	.97229	4	2.8	2.8	99.3
	.98453	1	.7	.7	100.0
	Total	143	100.0	100.0	

Figure 6.10: Histogram of Predicted Probabilities of Death



Having calculated the propensity scores for all 49 of the Ohio death cases (starting in 1996), I could then answer the question of the degree to which these death sentences were relatively proportionate under the overall aggravation 'propensity score' method.

Using SPSS, I grouped the cases into four categories in Figure 6.11 based upon their predicted probability of death: (1) lowest through 0.19, (2) 0.20 through 0.34, (3) 0.35 through 0.79, and (4) 0.80 and above.

Figure 6.11: Grouping the Cases According to Predicted Probability of Death

Predicted probability of death * culp_group Crosstabulation

Count

		culp_group				
		1.00	2.00	3.00	4.00	Total
Predicted probability of death	.12751	64	0	0	0	64
	.28868	0	40	0	0	40
	.38898	0	0	3	0	3
	.53589	0	0	3	0	3
	.63872	0	0	8	0	8
	.74360	0	0	3	0	3
	.76228	0	0	6	0	6
	.83416	0	0	0	1	1
	.88955	0	0	0	10	10
	.97229	0	0	0	4	4
	.98453	0	0	0	1	1
Total		64	40	23	16	143

I then used SPSS to calculate the number of life and death cases in each of the four groups as indicated in Figure 6.12. For instance, in the cases which had a propensity score (or predicted probability) of 0.20 to 0.35, 26 of the 40 cases received the death penalty.

Interestingly, where cases had less than a 0.35 probability of death, 41% of the cases (12.2% + 28.6%) received the death penalty. By contrast, where the model predicted a 0.80 or higher probability of death, 87.5% of the cases received the death penalty.

Figure 6.12: Comparison of Actual versus Predicted Death Sentences

DEATH * Predicted probability of death grouped (culpability) Crosstabulation

			Predicted probability of death grouped (culpability)				
			Lowest thru .19	.20 thru .34	.35 thru .79	.80 thru highest	Total
DEATH	Not death	Count	58	26	8	2	94
		% within DEATH	61.7%	27.7%	8.5%	2.1%	100.0%
		% within Predicted probability of death grouped (culpability)	90.6%	65.0%	34.8%	12.5%	65.7%
	Death	Count	6	14	15	14	49
		% within DEATH	12.2%	28.6%	30.6%	28.6%	100.0%
		% within Predicted probability of death grouped (culpability)	9.4%	35.0%	65.2%	87.5%	34.3%
Total		Count	64	40	23	16	143
		% within DEATH	44.8%	28.0%	16.1%	11.2%	100.0%
		% within Predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%

As explained in earlier chapters, where the probability of a death sentence in is less than thirty-five per cent (0.35), a death sentence is presumptively relatively disproportionate. By contrast, where the probability of a death sentence is greater than eighty per cent (0.80), the case is presumptively relatively proportionate.

As indicated in Figure 6.13, 20 of the 49 death sentenced cases (40.8%) in the study were presumptively relatively disproportionate, but only 14 of the 49 cases were presumptively relatively proportionate — 28.6% of the cases. The remaining 15 cases were in the middle, and would require closer qualitative analysis to determine relative proportionality.

Figure 6.13: Comparative Proportionality Review Based on Regression

Probability of Death Sentence	**Death Cases in Category**	**Per cent of Death Cases**
less than 0.35	20/49	40.8%
0.80 or greater	14/49	28.6%

The results of the overall aggravation 'propensity score' are that 40.8% of Ohio capital cases — decided beginning with the adoption of life without parole in 1996 — are relatively disproportionate. As a matter of relative proportionality, 20 of the death cases *did not warrant the death penalty*. Further, these results indicate that the Supreme Court of Ohio's decision to affirm these cases on comparative proportionality grounds is clearly right or accurate *less than 30% of the time*.

D. Considering the Role of Geography

While geography is not a valid variable for predicting outcomes in capital cases, as indicated above, cross-referencing the results reported above with the geography of the courts deciding the cases offers some interesting insights into Ohio's use of the death penalty since 1996. The three largest counties, Cuyahoga (Cleveland), Franklin (Columbus), and Hamilton (Cincinnati), decided a significant number of cases in the study (60 of 143). As northern metropolitan areas, Cuyahoga and Franklin counties have the reputation of being more politically liberal. Hamilton, in the southern part of the state, has the reputation of being more politically conservative.

Figure 6.14 groups the cases into three groups, (1) cases decided in Cuyahoga and Franklin counties, (2) cases decided in Hamilton county, and (3) cases decided in counties other than Cuyahoga, Franklin, or Hamilton, and then cross-references the cases with the predicted probabilities of a death sentence based on the propensity scores of each case.

Figure 6.14: Predicted Probability of Death grouped by Geography

DEATH * Predicted probability of death grouped (culpability) * county_new Crosstabulation

county_new				Predicted probability of death grouped (culpability)				
				Lowest thru .19	.20 thru .34	.35 thru .79	.80 thru highest	Total
Other counties	DEATH	Not death	Count	28	15	6	0	49
			% within DEATH	57.1%	30.6%	12.2%	0.0%	100.0%
			% within Predicted probability of death grouped (culpability)	87.5%	55.6%	35.3%	0.0%	59.0%
		Death	Count	4	12	11	7	34
			% within DEATH	11.8%	35.3%	32.4%	20.6%	100.0%
			% within Predicted probability of death grouped (culpability)	12.5%	44.4%	64.7%	100.0%	41.0%
	Total		Count	32	27	17	7	83
			% within DEATH	38.6%	32.5%	20.5%	8.4%	100.0%
			% within Predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%
CuyaFrank	DEATH	Not death	Count	28	10	2	2	42
			% within DEATH	66.7%	23.8%	4.8%	4.8%	100.0%
			% within Predicted probability of death grouped (culpability)	100.0%	90.9%	40.0%	33.3%	84.0%
		Death	Count	0	1	3	4	8
			% within DEATH	0.0%	12.5%	37.5%	50.0%	100.0%
			% within Predicted probability of death grouped (culpability)	0.0%	9.1%	60.0%	66.7%	16.0%
	Total		Count	28	11	5	6	50
			% within DEATH	56.0%	22.0%	10.0%	12.0%	100.0%
			% within Predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%
Hamilton	DEATH	Not death	Count	2	1	0	0	3
			% within DEATH	66.7%	33.3%	0.0%	0.0%	100.0%
			% within Predicted probability of death grouped (culpability)	50.0%	50.0%	0.0%	0.0%	30.0%
		Death	Count	2	1	1	3	7
			% within DEATH	28.6%	14.3%	14.3%	42.9%	100.0%
			% within Predicted probability of death grouped (culpability)	50.0%	50.0%	100.0%	100.0%	70.0%
	Total		Count	4	2	1	3	10
			% within DEATH	40.0%	20.0%	10.0%	30.0%	100.0%
			% within Predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%
Total	DEATH	Not death	Count	58	26	8	2	94
			% within DEATH	61.7%	27.7%	8.5%	2.1%	100.0%
			% within Predicted probability of death grouped (culpability)	90.6%	65.0%	34.8%	12.5%	65.7%
		Death	Count	6	14	15	14	49
			% within DEATH	12.2%	28.6%	30.6%	28.6%	100.0%
			% within Predicted probability of death grouped (culpability)	9.4%	35.0%	65.2%	87.5%	34.3%
	Total		Count	64	40	23	16	143
			% within DEATH	44.8%	28.0%	16.1%	11.2%	100.0%
			% within Predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%

This table provides several interesting results. In Cuyahoga and Franklin counties combined, only 1 of 39 cases with a death probability of less than 0.35 received a death sentence. In Hamilton County, 3 out of 6 cases with a predicted death probability of less than 0.35 received the death penalty.[429] In the rest of the state, 16 out of 69 (23%) with a predicted probability of less than 0.35 received the death penalty. Of cases with a predicted probability of 0.80 or higher, 4 out of 6 in cases in Cuyahoga and Franklin counties received a death sentence. In Hamilton County, all 3 cases with a predicted probability of 0.80 or higher received a death sentence. In the rest of the state, all 7 cases with a predicted probability of 0.80 received a death sentence.

Clearly, these results indicate that geography does play a role in capital sentencing in Ohio. Although a small sample of cases, juries in Cuyahoga and Franklin counties appear less inclined to give the death penalty, particularly in cases with a death probability lower than 35%. In Hamilton County, the converse is true, as juries were more likely to give the death penalty, even in cases where the model predicted a low probability of a death sentence.

E. Conclusion

On the whole the results in this chapter demonstrate, at the very least, that there is significant sentencing disparity in these cases. While perhaps not as arbitrary as being struck by lightning, these results demonstrate that the jury gets the outcome 'wrong,' at least by comparison, in *over 40% of the cases*. Not only, then, does the Ohio Supreme Court get its comparative proportionality review clearly

[429] Interestingly, all three cases were felony murder cases in which the murder resulted from a robbery.

'wrong' in close to one-third of the cases, it is only getting its comparative proportionality review 'right' in *less than 30% of the cases*.

At the very least, these results indicate that the Court should modify its comparative proportionality review to conduct a more rigorous investigation into the relative proportionality of each death case. Based on this inquiry, it is clear that the safeguards adopted by Ohio after the Supreme Court's decision in *Furman* are inadequate to achieve a constitutionally permissible level of consistency. And while a particular form of comparative proportionality review is not constitutionally required, safeguards that achieve some level of relative proportionality are clearly mandated by the Supreme Court's prior precedents as detailed in chapter three. Based on these findings, it is fair to say that Ohio's capital system, therefore, is unconstitutional as it is currently being applied, with its arbitrariness in violation of the requirements of the Eighth Amendment. Because it is currently so arbitrarily applied, Ohio's use of the death penalty is 'cruel and unusual'.

CHAPTER SEVEN: FACT SPECIFIC PROPORTIONALITY REVIEW

Having presented the results to the first approach to similarity (overall aggravation) in chapter six, in this chapter I provide the results of a second approach to similarity, fact specific proportionality review. While the overall aggravation approach provides a reasonable estimate of 'similarity' based on the jury sentencing outcomes in the cases, it is very different from the approach used by the Ohio Supreme Court. The results presented in this chapter, through the use of fact specific comparative proportionality review, aim to measure relative proportionality in light of the Court's own view of the criteria for similarity.

Another reason to go beyond the overall aggravation approach is the inherent difficulty for the Ohio Supreme Court to employ such methods. Courts are much more accustomed to common law comparisons of cases than to the comparison of cases based on statistical data, particularly where such comparison requires logistic regression analysis. Indeed, it is extremely unlikely that the Ohio Supreme Court, which currently only engages in cursory relative proportionality review, would have the time, resources, or willingness to employ a multi-variable quantitative regression analysis to assess the relative proportionality of a given death sentence. On the other hand, all of the methods mirror those that the Court actually uses. Such approaches require a type of analysis much more germane to courts — engaging in common law reasoning and comparing cases to 'similar' cases.[430]

[430] Indeed, the familiarity with common law reasoning may explain in part why courts tend to use the precedent-seeking approach when engaging in comparative proportionality review. Baldus (n 381). Admittedly, the frequency approach would require additional work on the part of the court, but keeping track of prior cases in terms of specific facts would be a much simpler enterprise than engaging in logistic regression analysis in each case.

Before going further, it is useful to examine again the Ohio Supreme Court's method of comparative proportionality review. The Ohio Supreme Court, as discussed above in chapter two, only seeks to identify one or more cases with the same aggravating circumstance, ignoring the broader class of potentially similar cases. An example of the Ohio Supreme Court's comparative proportionality review would be as follows in *State v. Adams* (almost all death cases in the study follow the same general pattern):

> We find that the death penalty for the aggravated murder of Esther Cook and the death penalty for the aggravated murder of Ashley Cook are proportionate when compared with other 'course of conduct' murders. See, e.g., State v. Vrabel, 99 Ohio St.3d 184, 2003 Ohio 3193, 790 N.E.2d 303; State v. Braden, 98 Ohio St.3d 354, 2003-Ohio-1325, 785 N.E.2d 439; State v. Cornwell, 86 Ohio St.3d 560, 715 N.E.2d 1144; State v. Clemons (1998), 82 Ohio St.3d 438, 696 N.E.2d 1009; State v. Keith, 79 Ohio St.3d 514, 684 N.E.2d 47; State v. Awkal (1996), 76 Ohio St.3d 324, 667 N.E.2d 960; State v. Allard (1996), 75 Ohio St.3d 482, 663 N.E.2d 1277; and State v. Combs (1991), 62 Ohio St.3d 278, 581 N.E.2d 1071. We find that the death sentence is also proportionate when compared with other cases involving 'course of conduct' murders committed during a burglary. See, e.g., State v. Hughbanks, 99 Ohio St.3d 365, 2003-Ohio-4121, 792 N.E.2d 1081; State v. Hessler, 90 Ohio St.3d 108, 734 N.E.2d 1237.
>
> Additionally, we find that the death penalty for the murder of Ashley is neither excessive nor disproportionate when compared with similar felony-murder cases involving rape of a child victim, implicating both R.C. 2929.04 (A) (7) and (A) (9). See, e.g., State v. Lynch, 98 Ohio St.3d 514, 2003-Ohio-2284, 787 N.E.2d 1185; State v. Smith, 97 Ohio St.3d 367, 2002-Ohio-6659, 780 N.E.2d 221.[431]

These two paragraphs are the entire comparative proportionality review. There is no additional analysis or further explanation by the Ohio Supreme Court.

As demonstrated in the *Adams* case, then, as in the other examples of Ohio comparative proportionality review in earlier chapters of this thesis, the aggravating factors in the case drive the analysis of 'similarity'. The Court also, though, focuses

[431] *State v. Adams*, 103 Ohio St 3d 508 (2004).

on subsets of the aggravating factors, taking into account both offense characteristics (particularly the kind of felony murder) and victim characteristics.

As a result, the comparative proportionality review inquiry in this chapter attempts to replicate the considerations that the Ohio Supreme Court uses in its analysis. Accordingly, the fact specific proportionality review starts with the aggravating factors, using several different methods to identify 'similarity' based on these factors (total number of aggravating factors, the presence of a specific aggravating factor, the combination of particular aggravating factors, and the total number of specifications – number of counts of aggravating factors). Second, I also measure similarity in terms of certain criminal act characteristics (robbery murder, sexual assault murder, arson, and kidnapping murder). Again, these subsets are ones that the Ohio Supreme Court has used in its comparative proportionality review.

In addition, I measure similarity in terms of various victim characteristics (minor victim (under 18), elderly victim, family member, and female victim). I also, in a couple of cases, use subsets of a particular category where the Ohio Supreme Court has done so (location of robbery murder, sexual assault of a child, and spouse / girlfriend). Finally, I examine similarity in terms of race. While this is clearly not a proper factor for consideration of similarity, it is worth measuring given the well-documented influence of race in capital cases.[432]

On the whole, the main difference between the approach employed in this chapter and the Court's proportionality review in practice, as previously explained, is the use of a frequency approach that includes all of the relevant cases (life and death) instead of a precedent-seeking approach that considers only death cases. As explained in chapter five, the frequency approach and the inclusion of life cases

[432] Baldus, et al. (n 312).

provide a much more accurate measurement of the relative proportionality of a death case. Given that difference, though, the question remains whether the death cases are relatively proportionate if one measures 'similarity' in terms of specific facts, as the Ohio Supreme Court does.

Again, it is important to reiterate that the general purpose is to identify comparable cases in order to measure the relative proportionality of death sentences to the class of similar cases. As there are a number of different ways to define cases as 'similar', the fact specific comparative proportionality reviews herein attempt to provide a different approach, similar to the Ohio Supreme Court's analysis, to evaluate the relative proportionality of Ohio death cases.

As explained in chapter two, once an Ohio trial court (usually a jury) finds an offender guilty of aggravated murder with specifications, there are three sentencing options: (1) death, (2) life without possibility of parole, (3) life with possibility of parole after thirty years, and (4) life without the possibility after twenty-five years. In addition, as indicated previously, the class of cases in this study includes all Ohio cases where a jury had the choice of these three sentencing options. This pool of cases is made up of all aggravated murder cases with specifications for crimes committed on or after 1 July 1996, the effective date of the Ohio life-without-parole statute, until the present, which have been appealed.

As with the overall aggravation approach used in chapter six, the fact specific comparative proportionality review analysis assesses the relative proportionality of each Ohio death case based on each different approach to determining similarity. As before, where the group of 'similar' cases has a death sentencing ratio of 0.35 or less, the death case at issue is presumptively relatively disproportionate. By contrast, where the group of 'similar' cases has a death

sentencing ratio of more than 0.80, the death sentence at issue is presumptively relatively proportionate.

Finally, it is also important to note one key difference between the fact specific approaches to determining 'similarity' and the overall aggravation approaches in chapter six. Where one finds the presence of a specific fact, it is reasonable to characterize the two cases as 'similar'. The cases not in the 'similar' group, however, are not, by definition, 'similar' for purposes of comparative proportionality review.

For instance, when I used murders involving a minor (under 18) victim as the criterion for 'similarity', it is reasonable for comparative proportionality review purposes to define the cases where that factor is present as 'similar' and group them accordingly. On the other hand, the cases in which the factor was absent (none of the victims were minors) are not necessarily 'similar' for relative proportionality purposes, and as a result, cannot be counted as such. As demonstrated below, then, one can evaluate the relative proportionality of the death cases that have the factor, but not the cases where the factor is absent. This only happens where the similarity inquiry asks a yes / no, 'zero sum' question (as opposed to aggravating factors, where each case has its own group). Thus, for purposes of fact specific relative proportionality review, the presence of a particular factor can be the basis for a determination of relative proportionality, and the absence of a particular characteristic cannot.

A. Aggravating Factors

The analysis begins with aggravating factors, the most widely used indicia in the Ohio Supreme Court's past and current comparative proportionality review. As discussed in chapter five, there are several ways to group cases as 'comparable'

cases in terms of statutory aggravating factors proved beyond a reasonable doubt at trial. It is important to recall, as detailed in chapter two, that not all Ohio aggravated murder cases are capital cases. In order to give the jury an opportunity to sentence an offender to death, the state must first prove one or more death aggravating factors to the jury during the guilt phase of the trial. The jury will decide, then, whether an offender is guilty of aggravated murder *and* whether the offender is guilty of one or more specifications. It is only when an offender is guilty of one or more of these specifications that death becomes available during the sentencing phase of the bifurcated trial.

It is likewise important to note that for each aggravating factor, there may be a number of instances that a particular offender violated such an aggravating factor. For instance, in a felony murder case, an offender may have committed burglary, robbery, and sexual assault, resulting in three 'death specifications' under the one aggravating factor. Similarly, where there are multiple victims, each count against the offender under a particular aggravating factor may have its own separate specification. Thus, while most cases only have two or three alleged aggravating factors, cases may have a much larger number of alleged specifications.

For purposes of this study, the number and type of aggravating factors, as well as the total number of specifications, are what a jury found beyond a reasonable doubt at trial, not what the State of Ohio alleged in the indictment. Many Ohio prosecutors (and many other prosecutors as well) have a history of alleging as many counts of aggravated murder, aggravating factors, death penalty specifications as possible in order to facilitate a plea bargain with the offender.[433] Often, the fear of

[433] This is particularly true in Cuyahoga County, near Cleveland, where prosecutors almost always charge offenders with capital offenses, and almost never go to trial, using the threat of the death penalty as an incentive for a plea bargain.

facing the death penalty can encourage an offender to plead guilty to a crime in exchange for removal of the death penalty as a possible sentence. Accordingly, I have included only the aggravated murder counts, aggravating factors, and specifications found by the jury to be proved beyond a reasonable doubt. Indeed, during the sentencing proceeding, it is these counts, factors, and specifications that are exclusively considered (as opposed to other counts, factors, and specifications) when determining whether an offender merits a death sentence.

I used several approaches to identify 'similar' cases in terms of aggravating factors. First, I grouped the 'similar' cases in terms of the presence of aggravating factors, that is, all cases that have a particular aggravating factor, irrespective of whether other aggravating factors are present. Second, I grouped 'similar' cases based on having an identical group of aggravating factors. Third, I grouped 'similar' cases in terms of the aggregate number of aggravating factors proved at trial. Finally, I grouped 'similar' cases in terms of the aggregate number of specifications, that is, counts of the aggravating factors, proved at trial. I provide the results of all four approaches below.

It is important to note that I numbered the results in conjunction with the statutory number of each aggravating factor in the Ohio statute under section 2929.04 (A). The Ohio statutory aggravating factors are as follows:

> **2929.04 Criteria for imposing death or imprisonment for a capital offense**
>
> (A) Imposition of the death penalty for aggravated murder is precluded unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:
>
> (1) The offense was the assassination of the president of the United States or a person in line of succession to the presidency, the governor or lieutenant governor of this state, the president-elect or vice president-elect of the United States, the governor-elect or lieutenant governor-elect of this state, or a

candidate for any of the offices described in this division. For purposes of this division, a person is a candidate if the person has been nominated for election according to law, if the person has filed a petition or petitions according to law to have the person's name placed on the ballot in a primary or general election, or if the person campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was under detention or while the offender was at large after having broken detention. As used in division (A)(4) of this section, ‘detention’ has the same meaning as in section 2921.01 of the Revised Code, except that detention does not include hospitalization, institutionalization, or confinement in a mental health facility or mental retardation and developmentally disabled facility unless at the time of the commission of the offense either of the following circumstances apply:

(a) The offender was in the facility as a result of being charged with a violation of a section of the Revised Code.

(b) The offender was under detention as a result of being convicted of or pleading guilty to a violation of a section of the Revised Code.

(5) Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer, as defined in section 2911.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be a law enforcement officer as so defined, and either the victim, at the time of the commission of the offense, was engaged in the victim's duties, or it was the offender's specific purpose to kill a law enforcement officer as so defined.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

(8) The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent the victim's testimony in any criminal proceeding and the aggravated murder was not committed during the

> commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness, or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for the victim's testimony in any criminal proceeding.
>
> (9) The offender, in the commission of the offense, purposefully caused the death of another who was under thirteen years of age at the time of the commission of the offense, and either the offender was the principal offender in the commission of the offense or, if not the principal offender, committed the offense with prior calculation and design.
>
> (10) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit terrorism.

Thus, the number of aggravating factor in each of the below Figures corresponds to its statutory aggravating factor number.

1. Cases with the presence of the same individual aggravating factor

My first grouping of 'similar' cases relied on the presence of an aggravating factor to group the cases. Because many cases had more than one aggravating factor, the total number of cases in the analysis (232) far exceeds the number of cases in the study (143). Likewise the total number of death cases (92) far exceeds the number of death cases in the study (49), as some death cases get counted multiple times (once for each aggravating factor).

The results of grouping the cases in terms of sentences compared to individual aggravating factors are as indicated below in Figure 7.1.

Figure 7.1: Individual Aggravating Factor Proportionality Review

Individual Aggravating Factors	**LWP**	**LWOP**	**Death**	**Overall**	**Ratio**
1 (murder of an elected official)	0	0	0	0/0	0.00
2 (murder for hire)	0	3	1	1/4	0.25
3 (murder to escape detection)	1	9	12	11/22	0.50
4 (murder while in detention)	0	2	2	2/4	0.50
5 (purposeful killing; course of conduct; two or more)	9	32	29	29/70	0.41
6 (murder of law enforcement officer)	0	0	2	2/2	1.00
7 (felony murder)	16	56	38	38/110	0.34
8 (murder of a witness to another crime)	1	2	1	1/4	0.25
9 (caused death of person under 13)	1	7	8	8/16	0.50
10 (terrorism)	0	0	0	0/0	0.00

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.43	(40/92)
0.80 or greater (presumptively proportionate)	0.02	(2/92)

Figure 7.1 demonstrates several interesting details about the cases. First, for two aggravating factors, murder of an elected official (number 1) and terrorism (number 10), there were no cases. In addition, two aggravating factors - course of conduct (number 5) and felony murder (number 7) - far exceed the other factors in terms of number of cases. The State of Ohio proved these two aggravating factors beyond a reasonable doubt in 49% (70 of 143) and 77% (110 of 143) of the cases, respectively. There were only two other categories of the ten aggravating factors that had a significant number of cases – murder to escape detection (22 of 143 or 15% of the cases) and murder of a person under the age of 13 (16 of 143 or 11% of the cases).

Using this fact specific approach, I found that 43% of the death cases (40 of 92) were presumptively relatively disproportionate. In addition, only 2% of the death cases (2 of 92) were presumptively relatively proportionate. These cases involved murder of a law enforcement officer (aggravating factor number 6), where the juries sentenced the offender to death in both cases.

Interestingly, the percentage of presumptively relatively proportionate cases is much lower (2% versus 14-22%). A cursory examination into the 'in-between' cases, those with a death sentencing probability of 0.35 up to less than 0.80, also indicates this difference. Another 29 cases have a ratio of 0.41, and 90 out of the 92 cases (98%) have a ratio of 0.50 or less. This means that a court could deem almost every death case relatively disproportionate. Put differently, only 2% of the cases (2 of 92) indicate clear relative proportionality.

It is also worth noting that, in practice, it may be difficult to assess the relative proportionality of cases based on aggravating factors which do not have a significant number of 'similar' cases. For instance, for cases involving a murder of another while in detention, there are four cases, two of which received the death penalty. It is hard to say, using only the aggravating factor as the indicator of 'similarity', whether another death case would be relatively proportionate or not given the small sample size of four 'comparable' cases.

2. Cases with the same combination of aggravating factors

Another way to use aggravating factors to identify similar cases is to use the combination of aggravating factors in a particular case, rather than just the presence of the aggravating factor itself, to group 'similar' cases. This approach has the advantage of looking at the aggravating factors, to the extent that they actually reflect underlying circumstances, in a more specific way that, in theory, one can use

to better group ‘similar’ cases than the presence of the aggravating factor itself. This approach also has the disadvantage of slicing the cases into smaller groups, such that many groups have a small or insignificant number of cases.

Again, using only aggravating factors that the jury found at trial, I grouped the cases based on their respective combinations of aggravating factors. For instance, I grouped a case involving only felony murder (aggravating factor number 7) separately from a case involving felony murder (aggravating factor number 7) and murder of a victim under the age of 13 (aggravating factor number 9). As demonstrated below, some combinations of aggravating factors did not exist in the cases, and other combinations existed with quite differing frequencies.

The sentencing results classified in terms of identical groupings of aggravating factors are indicated below in Figure 7.2.

Figure 7.2: Aggravating Factor Combination Proportionality Review

Aggravating Factor Combinations	**LWP**	**LWOP**	**Death**	**Overall**	**Ratio**
2 (murder for hire)	0	1	0	0/1	0.00
5 (purposeful killing; course of conduct; two or more)	4	10	4	4/18	0.22
7 (felony murder)	11	31	10	10/52	0.19
8 (murder of a witness to another crime)	1	0	0	0/1	0.00
9 (caused death of person under 13)	0	1	0	0/2	0.00
2,5 (murder for hire and purposeful killing; course of conduct; two or more)	0	1	0	0/1	0.00
2,7 (murder for hire and felony murder)	0	1	1	1/2	0.50
3,7 (murder to escape detection and felony murder)	0	2	4	4/6	0.67
3,8 (murder to escape detection and murder of a witness to another crime)	0	1	0	0/1	0.00
4,7 (murder while in detention and felony murder)	0	1	0	0/1	0.00
5,7 (purposeful killing; course of conduct; two or more and felony murder)	3	12	14	14/29	0.48
5,9 (purposeful killing; course of conduct; two or more and caused death of person under 13)	0	2	3	3/5	0.60
7,8 (felony murder and murder of a witness to escape another crime)	0	0	1	1/1	1.00

7,9 (felony murder and caused death of person under 13)	0	2	1	1/3	0.33
3,5,6 (murder to escape detection and purposeful killing; course of conduct; two or more and murder of law enforcement officer)	0	0	1	1/1	1.00
3,5,7 (murder to escape detection and purposeful killing; course of conduct; two or more)	1	4	3	3/8	0.38
3,5,8 (murder to escape detection and purposeful killing; course of conduct; two or more and felony murder)	0	1	0	0/1	0.00
3,7,9 (murder to escape detection and felony murder and caused death of a person under 13)	0	1	2	2/3	0.67
4,5,7 (murder while in detention and purposeful killing; course of conduct; two or more and felony murder)	0	1	0	0/1	0.00
5,7,9 (purposeful killing; course of conduct; two or more and felony murder and caused death of person under 13)	1	1	1	1/3	0.33
3,5,7,9 (murder to escape detection and purposeful killing; course of conduct; two or more and felony murder and caused death of person under 13)	0	0	1	1/1	1.00

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:

Less than 0.35 (presumptively disproportionate)	0.33	(16/49)
0.80 or greater (presumptively proportionate)	0.06	(3/49)

Under this fact specific approach which defines similarity based on the same combination of aggravating factors in a case, 16 of the 49 death sentence cases (33%) were presumptively relatively disproportionate. Only 3 cases (6%) were presumptively relatively proportionate. Again, these results are similar to the fact specific individual aggravating factor analysis above.

As before, it is instructive to examine the breakdown of cases under various combinations of aggravating factors. The largest categories were felony murder (number 7), purposeful killing / course of conduct and felony murder (numbers 5 and 7), and purposeful killing / course of conduct (number 5). These three

categories made up 99 of the 143 cases (62%). Interestingly, juries sentenced only 28 of these 99 (28%) defendants to death, and *half* of those cases involved *both* of the two aggravating factors (numbers 5 and 7). Juries were thus unlikely (less than 20% of the time) to sentence a defendant to death in cases involving only one of the two aggravating factors, resulting in groups that were presumptively relatively disproportionate.

One explanation for these low yields could be that cases with only one aggravating factor are less likely to receive a death sentence. While weighing aggravating and mitigating circumstances is not supposed to be a mathematical exercise, it is possible that jurors may be less inclined to find a death sentence where only one aggravating circumstance is present, even when instructed otherwise. This is partially confirmed by the results below, which indicate that of the seventy four cases with only one aggravating circumstance proven beyond a reasonable doubt to the jury, only 14 (0.19 or 19%) received a death sentence.

Another explanation could again be the broad nature of the aggravating factor categories themselves. As with the disparity in the type of cases that constitute felony murder, the group covered by statutory aggravating factor number five can equally be broad. Aggravated murder in a course of conduct - for instance, one individual shot killed during a series of robberies - can be very different than murder of two or more individuals, such as stabbing, dismembering and torturing two individuals before burning their bodies. Again, the wide disparity covered by the particular aggravating circumstance seems to make it a poor predictor of similar cases.

Two categories, albeit with small sample sizes, have a majority of offenders receiving a death sentence. The first group is statutory aggravating factors five and

nine (purposeful killing / course of conduct and caused death of person under 13), with three out of five receiving the death penalty. Such crimes can be particularly serious (involving aggravated murder of two or more children), perhaps explaining the propensity for a death sentence, but here still only had a death rate of 60% with a sample size of five cases. The second group is the combination of statutory aggravating factors three and seven (murder to escape detection AND felony murder) which perhaps reflects a heightened culpability for killing to escape detection while in the process of committing other felonies. This group had a death rate of 67%, with four out of six cases receiving the death penalty.

Neither of these categories reached the threshold of 0.80, meaning that neither category consisted of cases that were presumptively relatively proportionate, even with small sample sizes. In fact, each of the 6% of death cases (four cases) that was presumptively proportionate was in its own class — with no other case with identical aggravating factors.

One other interesting consequence to note is that the difference between two and three aggravating factors does not always increase the probability of a death sentence. For instance, where the aggravating factor combination was 3 & 7, the probability of death was 67% (4 out of 6 cases), while the combination of 3, 5 & 7, resulted in a probability of death of 38% (3 out of 8 cases). Similarly, the combination of 5 & 9 resulted in a probability of death of 60% (3 out of 5 cases), the combination of 5, 7 & 9 resulted in a probability of death of 33% (1 of 3 cases).

There are several possible explanations for this phenomenon. The easiest one is that the number of cases is so small as to have only limited statistical significance. Putting that aside, though, another explanation for this is the potential overlap in the aggravating factors such that the difference between two and three,

under these circumstances, may not indicate additional criminal behaviour warranting further aggravation.

In the first example, the 'third' aggravator was 'purposeful killing; course of conduct; killing of two or more victims'. Much of this conduct may have in one or more cases been no different from the conduct falling under the 'felony' murder aggravator already in the group. In other words, the additional aggravating factor may not have reflected additional bad conduct, but instead offered a duplicative way to categorize the same conduct.

In the second example, the same is true. The 'third' aggravating circumstance there was 'felony murder' which may not reflect a significant difference in conduct from the two circumstances already present, 'murder to escape detection' and 'purposeful killing; course of conduct; killing two or more victims'. Given then, the potential overlap in aggravating circumstances, a consequence of their definitional breadth, the difference between two and three aggravating factors in terms of the offender's conduct may not be significant in some cases. The next subsection demonstrates this point.

3. Cases with the same number of aggravating factors

In addition to grouping the cases by the specific aggravating factors, whether by their presence or in combination (individually and collectively), one can also assess the 'similarity' of the cases in terms of the overall number of aggravating factors present in each case. As previously, I grouped the cases according to the criteria for 'similarity', here the number of aggravating factors, before assessing the relative proportionality of each Ohio death case in light of the group of 'similar' cases. Every case had, by definition, at least one aggravating factor, with only one case having as many as four different aggravating factors.

The results for Ohio capital sentencing outcomes in cases based on the number of aggravating factors found by a jury is as indicated below in Figure 7.3.

Figure 7.3: Total Aggravating Factor Proportionality Review

Total Number of Aggravating Factors	LWP	LWOP	Death	Overall	Ratio
1	16	44	14	14/74	0.19
2	3	21	27	27/51	0.53
3	2	8	7	7/17	0.44
4	0	0	1	1/1	1.00

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.29	(14/49)
0.80 or greater (presumptively proportionate)	0.02	(1/49)

Overall, as with the other fact specific measures of aggravating factors, a significant number of cases (14 of 49 or 29%) were presumptively relatively disproportionate, with only one of the cases (2%) being presumptively relatively proportionate. Indeed, an examination of the 'in between' cases, those with death sentencing ratios greater than 0.35 but less than 0.80, reveals that all of the 33 remaining death cases had ratios of 0.44 or 0.53, meaning that a court could find any of these cases relatively disproportionate. In other words, only one case under this approach would clearly be relatively proportionate.

In addition, the number of aggravating factors in each case appears to have some correlation to the likelihood of receiving a death sentence, albeit a weak one. Cases with only one proven aggravating factor received death sentences in only 19% of the cases (14 out of 74), while cases with more than one aggravating factor received death sentences in 51% of the cases (35 out of 69 cases). Of the cases with more than one aggravating factor, cases with two aggravating factors received a

death sentence at a slightly higher percentage (0.51 or 51%) than cases with three aggravating factors (0.44 or 44%). This result demonstrates the limit of the numerical value of aggravating factors as an influencing factor on receiving a death sentence. In other words, there is an increased likelihood of a death sentence between one aggravating factor and more than one aggravating factor, but not between two and three aggravating factors. The one case with four aggravating factors received a death sentence, but without further similar cases, little can be derived from this outcome.

While there seems to be a correlative effect of having more than one aggravating factor (as opposed to one) and an award of a death sentence, this effect falls far short of predictive, with just over half of such cases (51%) receiving the death penalty. In other words, the group of cases where a jury finds more than one aggravating factor falls far short of the ratio (0.80) needed to state that such cases are presumptively relatively proportionate. Further, the cases with only one aggravating factor proven that receive death are presumptively relatively disproportionate. There were 14 of these cases, constituting 0.29 (or 29%) of the 49 death penalty sentences.

Finally, it is worth noting that 16 of the 21 life with parole cases had only one aggravating factor. As a result, cases that have more than one aggravating factor are much more likely to receive a life without parole or death sentence.

4. Cases with the same number of capital specifications

A final way of assessing the relative proportionality using aggravating factors is to look at the actual number of death specifications that juries found in a given case. While a case may only have one to four distinct aggravating factors, it may have a much larger number of specifications in light of the number of instances

of such conduct, and the various types of conduct that fall under the same aggravating factor. For example, a crime with only a felony murder aggravating factor could have several specifications based on the multiple different types of felony murder behaviour that the offender engaged in, such as robbery, rape, burglary, arson, and / or kidnapping. Likewise, where an offender committed a felony against several individuals, such as multiple sexual assaults, each instance garners its own specification.

On its face, an approach using the number of specifications appears to better identify 'similarity' than just using the number of aggravating factors because specifications can better estimate the overall impact of the crime in terms of gross number of violations of the aggravating factors. Killing more individuals, committing more concurrent crimes, and taking into account each victim of the criminal conduct has the potential to better separate the most egregious aggravated murders from the comparatively less egregious aggravated murders, perhaps grouping the cases in a more accurate way.

As before, I grouped the cases based on the number of specifications in each case. I then determined the relative proportionality of each death case based on the ratio of death sentences in its group of 'similar' cases – cases with the same number of specifications. The results of my grouping and relative proportionality assessment are in Figure 7.4.

Figure 7.4: Total Death Specification Proportionality Review

Total Number of Death Specifications	LWP	LWOP	Death	Overall	Ratio
1	10	19	2	3/31	0.10
2	5	22	13	13/40	0.33
3	1	5	4	4/10	0.40
4	0	14	14	14/28	0.50
5	0	1	1	1/2	0.50
6	3	2	1	1/6	0.17
7	0	1	1	1/2	0.50
8	0	4	2	1/6	0.17
9	0	0	2	2/2	1
10 or more	2	5	9	9/16	0.56

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.37	(18/49)
0.80 or greater (presumptively proportionate)	0.00	(0/49)

I found that 18 of the 49 death cases (37%) were presumptively relatively disproportionate, with none of the cases being presumptively relatively proportionate. In addition, the 'in-between' cases (a ratio of between 0.35 and 0.80) all had ratios of 0.56 or lower. This means that, under this approach to 'similarity', all of the death cases could, in theory, be relatively disproportionate.

Overall, the number of specifications only loosely correlates to the outcome of death sentences. Cases with only one specification were very unlikely to receive a death sentence, with just below 10% (3 of 31) receiving a death sentence. Cases with two, three, and four specifications each had a significant number of cases — 40, 10, and 28, respectively — but none had more than 50% death sentences. Even the highest category, cases with ten or more specifications only had a death sentencing rate of 0.56 or 56% (9 of 16), falling far short of the 0.80 threshold for presumptive proportionality.

Increasing the number of specifications did little to adjust the percentage of cases receiving the death penalty. Cases with four specifications had virtually the same percentage of death cases (50%) as cases with 10 or more specifications (56%). Likewise, grouping all of the cases with four or more specifications did not achieve a higher percentage of death cases, either, with 47% receiving death (29 of 62), still less than 50%.

Again, the results as to the relative disproportionality of the case are remarkably consistent among all the inquiries described in this chapter. The small number of presumptively relatively proportionate cases (here, none) is consistent with the other three fact specific aggravating factor approaches.

B. Criminal Act Factors

As indicated above, the Ohio Supreme Court on occasion focuses on sub-divisions of aggravating factors, citing them as indicia of 'similarity', when conducting its comparative proportionality review. This occurs almost exclusively with the category of felony murder, which can encompass a number of different criminal acts based on the underlying felony. In this section, I use different criminal act factors, subsets of felony murder, to define similarity.

Specifically, I measure similarity in terms of (1) sexual assault murder, (2) arson, (3) robbery murder, and (4) kidnapping murder. In addition, as robbery murder encompasses a large cohort of cases, I sub-divided it into three categories based on the cases – brutal home robbery,[434] drug related robbery, and other robberies.

Unlike the aggravating factor fact specific proportionality reviews above, these determinations of 'similar' cases involve the determination of an 'in' or 'yes'

[434] I explain the difference between these categories below.

group (indicating the presence of the relevant factual circumstance) and an 'out' or 'no' group (indicating the absence of the relevant factual circumstance). As explained above, this assessment of similarity allows for the comparative proportionality review of death cases that fall in the 'in' or 'yes' group, but not death cases that fall in the 'out' or 'no' group. This makes sense as it seems reasonable to say that death cases are 'similar' (for purposes of comparative proportionality review) because they all involved a sexual assault. By contrast, it seems less reasonable to conclude that a group of cases are 'similar' (for purposes of comparative proportionality review) because they did not involve a sexual assault. One could be a kidnapping murder and another a robbery murder, so concluding that they are 'similar' because neither involved a sexual assault would result in inaccurate outcomes (based on the chosen indicia of similarity).

1. Sexual Assault Murder

In this first category of sexual assault murder, I grouped cases together in which the offender committed a sexual assault or rape precedent to, but during the same time frame, as the aggravated murder. All of the cases that fall in this category have hard evidence of the commission of a sexual crime.[435] The results of the jury sentences in such cases, and my corresponding comparative proportionality review are in Figure 7.5.

I found that 10 of the 16 cases (63%) of sexual assault murder received the death penalty. As a result, none of these 10 death cases were presumptively relatively disproportionate (ratio of 0.35 or less) or presumptively relatively proportionate (ratio of 0.80 or greater). The high percentage of death sentences for

[435] At the very least, all of the cases counted as the sexual assault murder category involved the removal of the victim's clothing, and in almost every case additional evidence of sexual assault or rape.

murders involving sexual assault is unsurprising, as they are often more serious crimes than other murders given the increased harm, both psychological and physical, that victims of such crimes typically suffer.

Figure 7.5: Sexual Assault Murder Proportionality Review

Sexual Assault-Murder?	LWP	LWOP	Death	Overall	Ratio
Yes	1	5	10	10/16	0.63
No	20	68	39	39/127	0.31

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:

Less than 0.35 (presumptively disproportionate)	0.00	(0/10)[436]
0.80 or greater (presumptively proportionate)	0.00	(0/10)

2. Arson

A second crime-based category for isolating 'similar' cases for comparative proportionality review purposes is aggravated murder involving arson. The use of fire to murder others is an aggravating fact, with some jurisdictions (not Ohio) even giving arson its own aggravating factor.

As with sexual assault murder, I counted the cases involving arson and grouped them, before then assessing their relative proportionality. Figure 7.6 contains the results of my comparative proportionality review of Ohio cases using arson as the indicia for determining 'similarity.'

[436] For several of the categories in this section and the victims section below, the affirmative cohort will be the only one taken into account in terms of relative proportionality. This is because the negative cohort - here cases without a child being murdered - is not thought of as a cohesive class that reflects ascertainable 'similarity'.

Figure 7.6: Arson Proportionality Review

Arson	LWP	LWOP	Death	Ratio	Value
Yes	4	3	0	0/7	0.00
No	17	70	49	49/136	0.36

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.00	(0/0)
0.80 or greater (presumptively proportionate)	0.00	(0/0)

None of the seven aggravated murder arson cases in Ohio received the death penalty, meaning that there are no cases to assess for comparative proportionality review. These were all serious cases, involving significant disregard for human life. Nonetheless, Ohio juries did not deem them to be worthy of death, nor, in a majority of such cases, life without parole. Five involved the death or deaths of young children, including two fires set by the mothers of the young children (*State v. Garcia*[437]; *State v. Roseborough*[438]) and two fires set by offenders throwing 'Molotov cocktails' into houses late at night (*State v. Simpson*[439]*; State v. Samuel Williams*[440]). And the other two cases were even more brutal, with one individual burning his father to death after beating him to incapacitation (*State v. Jonathan Anderson*[441]), and the other burning an elderly woman to death after a brutal physical assault (*State v. Weatherford*[442]).

[437] 2002 WL 1874535.

[438] 2006 WL 1214952.

[439] 2002 WL 1625559.

[440] 2002 WL 1594013.

[441] 2004 WL 2294475.

[442] 2005 WL 2087827.

3. Robbery Murder

Having examined the relative proportionality of sexual assault and arson cases, I next measured the relative proportionality of Ohio aggravated murder robbery cases. As before, I counted the number of robbery murder cases and grouped them together as 'similar' cases. I then calculated the relative proportionality of the death sentence cases using robbery murder as my indicia for similarity.

Figure 7.7 provides the sentencing outcomes in the Ohio robbery murder cases and the comparative proportionality review outcomes for the death cases involving robbery murder.

Figure 7.7: Robbery Murder Proportionality Review

Robbery Murder	LWP	LWOP	Death	Overall	Ratio
Yes	9	32	12	12/53	0.23
No	12	41	37	37/90	0.41

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:

Less than 0.35 (presumptively disproportionate)	1.00	(12/12)
0.80 or greater (presumptively proportionate)	0.00	(0/12)

All of the robbery murder cases that received the death penalty are presumptively relatively disproportionate. Only 22% of such cases (12 of 53) received the death penalty, significantly less than the 0.35 ratio. Further, none of the cases were presumptively relatively proportionate.

This outcome makes sense, as robbery alone does not seem to have the same degree of aggravation that sexual assault does. It seems likely that a simple robbery

murder might be unlikely to receive the death penalty without additional aggravating circumstances.

Based both on this intuition and the significant number of robbery murder cases (53), I decided to sub-divide this group to gain additional insight as to which cases received the death penalty.[443]

I first isolated 'drug-related' robbery murders, involving the robbery of a drug dealer and / or his home. The idea here is that, to the extent that jurors may perceive murdering a drug dealer as less severe than a non-drug dealer, such cases might be less likely to receive a death sentence.

Then, I isolated, from the remaining cases, 'brutal home' murders in which the offender broke into the victim's home, held the victim hostage, inflicted significant physical pain on the victim(s), and / or killed more than one victim in the house. The idea here was that, given the notion that a man's home is his castle, aggravated murders inside one's home involving excessive violence, holding individuals hostage, and/or shooting at multiple individuals may be more likely to receive a death sentence. Finally, the third group consists of the remaining robbery murder cases that do not fall under either of the first two categories. I provide the results of this sub-division of the robbery murder cases below in Figure 7.8.

Figure 7.8: Robbery Murder Proportionality Review (subcategories)

Robbery Murder	LWP	LWOP	Death	Overall	Ratio
Brutal Home	3	5	5	5/13	0.38
Drug-Related	2	14	4	4/20	0.20
Other	4	13	3	3/20	0.15

[443] In addition, the Ohio Supreme Court often looks for additional indicia of similarity besides robbery murder in such cases.

For the robbery murder cases involving a drug related robbery murder, all four of the death sentences were presumptively relatively disproportionate, as only 20% of such cases (4 out of 20) received the death penalty. None of the cases in that group were presumptively relatively proportionate.

For the robbery murder cases involving a non-drug related brutal home robbery murder, none of the five death sentences were presumptively relatively disproportionate, with 38% of the cases in the group (5 out of 13) receiving the death penalty. None of the cases in that group were presumptively relatively proportionate.

For the 'other' robbery murder cases, all of the death sentences were presumptively relatively disproportionate, with 15% of the cases (3 out of 20) receiving the death penalty. None of the cases in that group were presumptively relatively proportionate.

The result of isolating these sub-categories of robbery murder demonstrated that brutal home robberies slightly increased the likelihood of death for robbery murders (38% v. 24% overall). Even then, this sub-category is very close to presumptively relatively disproportionate (38% v. 35%). Finally, the presence of drugs in a robbery murder had an almost negligible effect, slightly decreasing the likelihood of death for robbery murder (20% v. 24% overall).

4. Kidnapping murder

The final category of crime-based factors that I include in the thesis is the category of kidnapping-murder, in which the offender takes control of the victim's person for a period of time prior to murdering them. As with sexual assault, kidnapping is a significant aggravating circumstance, as such deprivation can result

in both physical and psychological harm for the victim. Certainly, such cases are often much more serious than a simple shooting.

As before, I grouped the kidnapping murder cases together, and determined the relative proportionality of the kidnapping murder death cases in light of these 'similar' cases. Figure 7.9 details the Ohio sentencing outcomes in kidnapping murder cases and provides the results of the comparative proportionality review of such cases.

Figure 7.9: Kidnapping Murder Proportionality Review

Kidnapping Murder	LWP	LWOP	Death	Overall	Ratio
Yes	5	24	15	15/44	0.34
No	16	49	34	34/99	0.34

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:

Less than 0.35 (presumptively disproportionate)	1.00	(15/15)
0.80 or greater (presumptively proportionate)	0.00	(0/15)

As with the robbery murder cases, all of the kidnapping murder cases that receive death sentences are presumptively relatively disproportionate, with a death sentencing ratio of 34% (15 of 44 cases). None of the kidnapping murder cases were presumptively relatively proportionate. When considered in light of the overall death sentencing rate for the entire cohort of cases (35%), kidnapping murder, perhaps surprisingly, does not seem to have any effect on the probability of receiving a death sentence.

Using 'in / out' or 'yes / no' indicia for similarity resulted in some interesting outcomes for the various crime-based fact specific assessments of relative

proportionality. None of the sexual assault murders were presumptively relatively disproportionate, but *all* of the arsons, robbery murders, and kidnapping murders were presumptively relatively disproportionate. None of the death cases were presumptively relatively proportionate using these indicia of similarity, although a significant majority of sexual assault murders (63%) received the death penalty.

These findings have significant implications for the comparative proportionality review of the Ohio Supreme Court. For the three crime-based categories for which *all* cases were presumptively relatively disproportionate (arson, robbery murder, and kidnapping murder), the Ohio Supreme Court cannot use their presence in a death case as a basis for declaring a case to be relatively proportionate. Where the Court states that a death sentence is relatively proportional based on the presence of one of these indicia in a prior 'similar' case, it is ignoring the fact specific determination that such cases are, by definition, relatively disproportionate.[444] Indeed, sexual assault murder is the only crime-based factor (of the four considered here) that the Court can use as part of a determination of relative proportionality.

C. Victim Factors

In addition to aggravating factors and crime-based facts, the Ohio Supreme Court also considers, on occasion, victim-based factors in its comparative proportionality review. In doing so, the Ohio Supreme Court will occasionally cite specific victim facts as subsets of 'similar' types of murders under a particular aggravating factor, using such facts as a basis for showing that the case at bar is

[444] To be clear, all robbery murders (or arsons or kidnapping murders) are not necessarily relatively disproportionate in all situations; using those categories, though, to determine 'similarity' means that one must conclude such cases are relatively disproportionate.

proportional to other Ohio death cases. This most commonly occurs where there are multiple victims (for example, a course of conduct murder with three victims), the victim is a child (for example, a sexual assault of a child), or is elderly (for example, a robbery-murder of an elderly couple).

In light of the Court's approach, I used the fact specific approach to identify 'similar' cases in terms of the character and person of the victim, as well as his or her relationship to the offender. As with aggravating factors, there are a number of ways to group cases as 'similar' in terms of victim characteristics. In addition, the rise of the victims' rights movement and the increasing role that the families of victims have attempted to play in capital cases provides an additional reason to investigate victim characteristics as a basis for assessing 'similarity'.[445] Indeed, victim impact evidence plays an increasingly important role in capital cases after the Supreme Court approved its use in 1991.[446]

This fact specific approach examines victims from several different perspectives. First, it examines the overall number of victims of aggravated murder. Second, it surveys the use of the death penalty where the aggravated murder involved the death of a minor. Third, it examines the use of the death penalty in cases involving the death of an elderly victim, aged 65 or older. Fourth, it observes the use of the death penalty in cases involving the death of a related family member, and further explores the use of the death penalty when that family member is a

[445] See Paul H Robinson, 'Should the Victims' Rights Movement Have Influence Over Criminal Law Formulation and Adjudication?' (2003) 33 McGeorge L Rev 749; George P Fletcher, *With Justice for Some: Victims' Rights in Criminal Trials* (Addison Wesley 1995).

[446] *Payne v. Tennessee*, 501 US 808 (1991). In *Payne*, the Court overruled its earlier holdings in *Booth v. Maryland*, 482 US 496 (1987) and *South Carolina v. Gathers*, 490 US 805 (1989) that had restricted the use of victim impact evidence in capital cases.

girlfriend or spouse. Finally, this approach examines the use of the death penalty in light of gender and race.[447]

1. Number of aggravated murder victims

Other studies have indicated that the number of individuals killed during the commission of a crime can serve as a predictor of whether a jury will elect to sentence a particular offender to death.[448] It likewise makes sense that crimes involving 'mass murder,' defined by the Ohio courts as killing two or more people, could in many cases be much more brutal and severe than the average murder.

As before, I grouped the cases using the number of murder victims (the number dead) to define 'similarity'. There were only a few cases in which the offender murdered more than three victims, so I chose to have three groups – one murder victim, two murder victims, and three or more murder victims. I then calculated the relative proportionality for each of the Ohio death cases based on these parameters for defining similarity. Figure 7.10 provides the results of the groupings of the cases and the comparative proportionality review of the Ohio death cases.

[447] Law enforcement officers would also be another logical category here. As explained above, there were only two such cases, both of which received the death penalty. Further analysis is thus unnecessary.

[448] Paternoster and Kazyaka (n 381).

Figure 7.10: Total Number Murdered Proportionality Review

Total Number Murdered	LWP	LWOP	Death	Ratio	Value
1	13	46	34	34/93	0.37
2	7	21	11	11/39	0.28
3 or more	1	6	4	4/11	0.36

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.37	(11/49)
.80 or greater (presumptively proportionate)	0.00	(0/49)

I found that 11 of the 49 Ohio death cases (37%) were presumptively relatively disproportionate. Again, this result mirrors the results of the fact specific aggravating factors approach used earlier in this chapter.

None of the death cases were presumptively relatively proportionate. Further, all of the 'in-between' cases, with ratios greater than 0.35 but less than 0.80, were very close to being presumptively relatively disproportionate, with ratios of 0.36 and 0.37. Using this criterion of similarity – the number dead – a court could find *all* of the death cases relatively disproportionate.

Surprisingly, then, the number of murder victims seems to have no correlation to the likelihood of an offender receiving a death sentence. The cases where there were two murder victims had a lower sentencing rate (0.28 or 28%) than those with only one murder victim (0.37 or 37%). Even if you group the cases with more than one murder victim together, the group still has a lower capital sentencing rate (0.30 or 30%) than cases where only one victim died.

2. Aggravated murder involving the death of a minor

Another possible approach to determining 'similarity' is to use the murder of a minor as the criterion for fact specific comparative proportionality review based on victim characteristics.[449] I defined 'minor' or 'child' under this category to include all murder victims under the age of eighteen at the time of the murder. I chose not to further separate this class into a younger age group because the ninth statutory aggravating factor in Ohio is that the victim was under the age of thirteen.[450]

Such murders are, in theory, more serious than adult murders for several reasons. First, minors typically are more vulnerable, less able to defend themselves, and less cognitively aware than adults. In addition, murdered children, particularly young children, have much more of their life lost in most cases than murdered middle aged people. To underscore the sentiment, particularly in the United States, that harming children is significantly worse than harming adults, one need only look at the recent spike in adoption of the death penalty for child rapists in states such as Louisiana during the late 1990s.[451]

As before, I grouped the cases based on whether one or more of the murdered victims were under eighteen. Having used this criterion to determine 'similarity', I then measured the relative proportionality of the death cases involving a minor victim. For the reasons explained previously, I did not consider the cases in the 'out' or 'no' group, where there was not a minor victim, to be 'similar' for

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[449] Here, children are individuals who are 13 and under. This definition was chosen to be consistent with the Ohio aggravating factor number nine, which defines children in that manner.

[450] The earlier analysis concerning aggravating factors in this chapter thus captures this potential 'similar' group.

[451] The United States Supreme Court declared such statutes unconstitutional in *Kennedy v. Louisiana* in 2008. 554 US 407.

purposes of relative proportionality. Figure 7.11 provides the results of my categorizing of similar cases and my comparative proportionality review.

Figure 7.11: Child Murdered Proportionality Review

Child Murdered	LWP	LWOP	Death	Ratio	Value
Yes	2	12	11	11/25	0.44
No	19	61	38	38/118	0.32

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.00	(0/11)
0.80 or greater (presumptively proportionate)	0.00	(0/11)

None of the death cases involving a minor child are presumptively relatively disproportionate or presumptively relatively proportionate as 44% of the cases (11 out of 25) received the death penalty. These cases all fall in the 'in between' category, with some potentially being relatively disproportionate given the death sentencing ratio for the group of 0.44.

The outcome here indicates that child murderers are more likely to receive the death penalty than the average case (44% as opposed to 34%). On some level, this is not surprising because, as mentioned above, murdering a child seems more serious than murdering an adult.

Having found above that sexual assault murders are more likely to receive the death penalty (63% of cases) than the average murder case (34% of cases), I decided to sub-divide the minor victim cases into cases involving sexual assault.

Interestingly, the outcome did not change, when I sub-divided the cases using sexual assault of a minor as my criterion for similarity. Figure 7.12 details the results of this inquiry.

Figure 7.12: Child Murdered with Sexual Assault Proportionality Review

Child Murdered with Sexual Assault?	LWP	LWOP	Death	Ratio	Value
Yes	0	4	3	3/7	0.43
No	2	8	8	8/18	0.44

As with the broader category of murders of minors, none of the cases here were presumptively relatively proportionate or presumptively relatively disproportionate, with 43% of the child sexual assault cases (3 of 7) receiving the death penalty. As all of these cases fell in the 'in between' category with a ratio of 0.43, courts might find one or more of the cases to be relatively disproportionate.

The percentage of death sentences (44%) is almost identical in these two groups, albeit with a somewhat smaller sample size (7 cases and 18 cases). In examining the four life-without-parole cases in the sexual assault group, the first three, *State v. Bruce*,[452] *State v. Foster*,[453] and *State v. Satta*,[454] involved very similar circumstances — abduction, rape and brutal murder of a white little girl (ages 5, 9, and 10, respectively) — and largely mirrored the three cases where the offender received the death penalty. The fourth case, *State v. Biggs*,[455] involved the rape and murder of an infant (four month old) daughter, perhaps distinguishing that case.[456] Thus, even among cases that many might consider the 'worst of the worst,'

[452] 2008 WL 3971088.

[453] 2001 WL 1647177.

[454] 2002 WL 31114690.

[455] 2009 WL 5108485.

[456] To be fair, I am not sure if the factual differences in this case make it more or less deserving of death. All of these cases seem, by comparison, particularly egregious but nonetheless do not have a high death sentencing ratio.

the presence of these facts (sexual assault and murder of a child) was not enough to result in a majority of death sentences within that group.

3. Aggravated murder involving an elderly victim

Having performed comparative proportionality review of the victim-based categories of number of victims and minor victims, I next used older victims as a category for 'similarity'. I defined 'older' or 'elderly' victim here as a murder victim aged 65 or over at the time of the murder.

As with murders of children, murders of elderly (over age sixty-five) seem to be more serious, relatively speaking, than an average aggravated murder. Again, this is in part because elderly individuals often have diminished capacity, and can be both infirm and less able to protect themselves.

As before, I grouped the cases based on the presence or absence of an elderly murder victim. I then measured the relative proportionality of the death cases involving an elderly victim. Figure 7.13 provides the results of my grouping of the cases and my comparative proportionality review.

Figure 7.13: Elderly Murdered Proportionality Review

Elderly Murdered	LWP	LWOP	Death	Ratio	Value
Yes	1	2	8	8/11	0.73
No	20	71	41	41/132	0.31

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.00	(0/11)
0.80 or greater (presumptively proportionate)	0.00	(0/11)

As with child victims and the number of victims, none of the death cases were presumptively relatively proportionate or presumptively relatively

disproportionate, as 73% of the cases (8 of 11) received the death penalty. Given the high percentage of death cases in the group, it is unlikely that a court would find any of the cases relatively disproportionate where elderly victim is the criterion for similarity.

Interestingly, the three elderly victim cases that did not receive the death penalty seem as aggravated as the eight that did, if not worse. In *State v. Siller*,[457] the defendant and a co-conspirator tied up an elderly woman in her house, gagged her, and beat her to death before robbing her home. The other two cases, *State v. Burrows*[458] and *State v. Worley*,[459] involved the same incident. The two co-conspirators robbed an elderly couple in their home. They then murdered an elderly woman, kidnapped her husband in the couple's car, and drove to another state where they shot the husband 'execution-style'.

4. Aggravated murder of a family member

The fourth category of victim-based indicia that I chose to use as a basis for similarity was the murder of a family member. For purposes of this inquiry, I defined 'family member' broadly, including live-in girlfriends, partners, and in-laws.

Unlike children and elderly individuals, the murder of a family member or relative may not always be an aggravating fact.[460] In certain situations, the

[457] 2003 WL 1894573.

[458] 2002 WL 605106.

[459] 2002 WL 2022742.

[460] For purposes of this study, family member includes girlfriend—someone with whom the offender lives with and/or has repeated conjugal relations—as many people now live together in 'marital' type relationships without actually being married.

proximity of such relationships can be mitigating facts in two different respects. First, where there is an abusive or difficult family relationship, such a relationship may serve as a mitigating, rather than aggravating concept. Jurors may be more sympathetic to offenders in such cases. Also, given that murders of family members result in a loss for the offender, and even though the offender is directly responsible for the loss, such a relationship may decrease the likelihood a jury will sentence an offender to death. This can also, of course, have the opposite effect, with the aggravated murder of a family member reflecting a greater depravity on the part of the offender because of the closeness of the relationship, and resulting in a jury finding the offender to be more, not less, culpable.

As before, I grouped the cases depending on whether one or more of the murder victims had a 'family' relationship with the offender. I then determined the relative proportionality of the death cases that involved the murder of a family member. Figure 7.14 displays the results of my groupings and my comparative proportionality review.

Figure 7.14: Family Member Murdered Proportionality Review

Family Member	LWP	LWOP	Death	Ratio	Value
Yes	2	11	15	15/28	0.54
No	19	62	34	34/116	0.30

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.00	(0/28)
0.80 or greater (presumptively proportionate)	0.00	(0/28)

As with all of the other victim-based categories, none of the cases were presumptively relatively disproportionate or presumptively relatively proportionate, with 54% (15 out of 28 cases) receiving a death sentence. As all of the cases are 'in

between' cases, the 0.54 ratio means that court could find some of the cases relatively disproportionate, but probably not a large number.

Given the wide variety of circumstances that might surround the murder of a family member, it is not clear why such murders are more likely to receive the death penalty (54%) than the average case in the study (35%). In order to better understand this death sentencing ratio, I decided to sub-divide the family member murder cases into cases where the victim was a girlfriend or spouse as an additional measure of 'similarity'.

As before, I grouped the family murder cases according to whether or not the victim was a girlfriend or spouse, and then assessed the relative proportionality of the death cases in each group. Figure 7.15 displays the results of these enquiries.

Figure 7.15: Spouse / Girlfriend Murdered Proportionality Review

Family Member	LWP	LWOP	Death	Ratio	Value
Spouse / Girlfriend	0	6	11	11/17	0.65
Other	2	5	4	4/11	0.36

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.00	(0/17)
0.80 or greater (presumptively proportionate)	0.00	(0/17)

Again, none of these cases were presumptively relatively disproportionate or presumptively relatively proportionate, as the death sentencing ratio for spouse / girlfriend murders was 0.65 (11 out of 17). And, courts are unlikely to reverse these 'in between' cases because the death sentencing rate is so high (65%).

Examining these cases, though, sheds additional light on the familial cases that give rise to a higher death sentence rate, as isolating the cases in which the

offender murdered his spouse or girlfriend yields a much higher sentencing ratio (0.65) than the cases not involving the murder of a spouse or girlfriend (0.36). Further, none of these cases received a life with possibility of parole sentence, reinforcing the jury view of the heightened seriousness of such cases. Thus, familial cases involving the murder of a spouse or girlfriend are twice as likely to receive the death penalty as cases involving the murder of some other family member.

While the 0.65 death sentencing ratio value falls short of presumptive relative proportionality, this figure provides the best indicator so far (other than elderly victims) of an element of a case that in part indicates a high likelihood of a death sentence (and a high degree of relative proportionality). This finding is consistent with chapter six, which found similar categories (elderly victims and victims with whom the offender had an intimate relationship) to be predictive of sentencing outcomes of death.

5. Aggravated murder with respect to gender

The next category of victims that I chose as a basis for similarity was female victims, with the question being whether cases involving the murder of a female are more likely to receive a death sentence than those which do not. While certainly not falling in the category of infirm or defenceless that the elderly or children do, females certainly are, in many cases, more sympathetic victims than males. This may be, in part, attributed to the reality that an overwhelming majority of murderers are males. In this study, 97% of the offenders (138 of 143) were male offenders.

As before, I grouped the cases in terms of the gender of the victim, and then calculated the relative proportionality of the death cases where one or more murder victims were female. Figure 7.16 provides the results of my grouping and comparative proportionality review.

Figure 7.16: Female Murdered Proportionality Review

Female Murdered	LWP	LWOP	Death	Ratio	Value
Yes	6	31	31	31/68	0.46
No	15	42	18	18/75	0.24

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:

Less than 0.35 (presumptively disproportionate)	0.00	(0/31)
0.80 or greater (presumptively proportionate)	0.00	(0/31)

As with all of the other victim-based sentencing categories, none of the death cases were presumptively relatively proportionate or presumptively relatively disproportionate, as the death sentencing ratio was 0.46 (31 out of 68 cases). With a lower death sentencing ratio of 0.46, it is possible that a court could find that several of these 31 'in between' cases were relatively disproportionate.

Interestingly, cases involving a female victim were twice as likely to receive a death sentence as those cases which did not. In addition to being more likely than cases with only male victims to receive the death penalty, cases with a female murder victim, as a class are as likely to merit a death sentence as cases with a child victim. Like child victim aggravated murder cases, the female victim cases are above the overall mean likelihood of a death sentence in capital cases in the study (34%), but still receive a death sentence in less than half of the cases.

6. Aggravated murder with respect to race

Although not a valid factor to consider when identifying 'similar' cases for comparative proportionality review, race is nonetheless important to consider as part of the analysis. Indeed, I chose to perform a fact specific comparative

proportionality review to assess whether sentencing outcomes differed based on race.

Unlike gender, prior studies have demonstrated a correlation between race and death sentencing.[461] The strongest correlation in other studies has been the relationship between the race of the victim of the murder and the death sentence.[462] Offenders that murder white victims have been found to be significantly more likely than those who murder non-white victims to receive the death penalty.[463]

The race of the offender also has been shown to have an effect on the likelihood of a death sentence, but it has been largely in relation to the race of the victim.[464] Where whites murder non-whites, the death sentencing rate has been shown to be significantly lower than in cases where non-whites murder whites.[465] Because individuals are significantly more likely to murder individuals of their own race, the overall number of death sentences results in more white individuals on most death rows in the United States.[466]

Further, it is worth pointing out that race cannot serve as a basis for choosing who should receive the death penalty, and should play no role in the sentencing decision of a jury. Despite the United States Supreme Court's holding in *McCleskey v. Kemp* that allowed the Georgia capital system (and McCleskey's sentence) to survive powerful evidence of racial bias in sentencing, the Constitution still requires

[461] Baldus et al. (n 312).

[462] Ibid.

[463] Ibid.

[464] Baldus et al. (n 312).

[465] Ibid.

[466] Ibid.

that race not be a factor in capital sentencing, regardless of what the practical reality might reflect.[467]

Given this background, it is worth exploring whether this past trend has continued in Ohio cases from 1996-2011. As before, I grouped the cases in terms of the race of the victim. As a few cases involved both a white and a black victim, I asked whether a victim had a particular race in defining similarity. I thus grouped the cases first in terms of whether any of the murder victims were white. I then assessed the relative proportionality of the death cases in that group. Figure 7.17 displays the results of this first enquiry.

Figure 7.17: White Murdered Proportionality Review

White Victim Murdered?	LWP	LWOP	Death	Ratio	Value
Yes	10	35	26	26/71	0.37
No	11	38	23	23/72	0.32

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:

Less than 0.35 (presumptively disproportionate)	0.00	(0/26)
0.80 or greater (presumptively proportionate)	0.00	(0/26)

The results here reflect the same trend as identified before — that offenders who murder white victims are more likely to receive the death penalty than those who do not — but the difference is *very slight* between the two groups. Cases where offenders murdered white victims received the death penalty in 37% of cases (26 of 71), while cases where offenders murdered non-white victims received the death penalty in 32% of cases (23 of 72). Given the average death sentencing rate of 34%,

[467] 481 US 279 (1987).

it appears that the effect of the race of the victim in this cohort of cases is very slight if not negligible.

The group of death cases involving white murder victims is not presumptively relatively disproportionate or presumptively relatively proportionate. In considering these 'in between' cases, though, a court would be likely to find a significant number of the cases relatively disproportionate given its low death sentencing ratio of 0.37.

I next grouped the cases in terms of 'similarity' based on the presence of a black victim, and assessed the relative proportionality of death cases in that group. Figure 7.18 documents these results, which are very similar (almost a mirror image) to the cases where the victim was white.[468] These results are documented in Figure 7.18.

Figure 7.18: Black Murdered Proportionality Review

Black Victim Murdered?	**LWP**	**LWOP**	**Death**	**Ratio**	**Value**
Yes	12	40	23	23/75	0.31
No	9	33	26	26/68	0.38

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	1.00	(23/23)
0.80 or greater (presumptively proportionate)	0.00	(0/23)

All 23 of the death cases involving a black victim are presumptively relatively disproportionate, as 31% of such cases (23 of 75) received the death penalty. Cases that involve the murder of a black victim result in an even lower percentage of death sentences (31%) than cases involving white victims (37%).

[468] Note that a couple of cases had victims of both races.

Thus, cases with black victims are slightly less likely than the average case (34%) to receive the death penalty.

In addition to examining the outcomes of Ohio death cases and their relative proportionality in terms of the race of the victim, I grouped the cases based on the combination of the race of the offender and the race of the victim. I grouped as 'similar' cases in which (1) a white offender murdered a white victim and (2) a black offender murdered a white victim, sub-dividing my first enquiry in this sub-section. I next grouped as 'similar' cases in which (1) a white offender murdered a black victim and (2) a black offender murdered a black victim, sub-dividing my second enquiry in this subsection. As before, I assessed the comparative proportionality of each group of 'similar' cases. Figure 7.19 provides these results.

Figure 7.19: Race of Victim and Offender Proportionality Review

White Murdered	LWP	LWOP	Death	Ratio	Value
By White	9	29	21	21/59	0.36
By Black	1	6	5	5/12	0.42

Black Murdered	LWP	LWOP	Death	Ratio	Value
By White	1	2	3	3/6	0.50
By Black	11	38	20	20/69	0.29

The findings here are, for the most part, consistent with earlier research, but the race-based differences seem to exist to a much lesser degree.[469] Of the four groups of cases (black offender-white victim, white offender-white victim, black offender-black victim, and white offender-black victim), the inter-racial murder

[469] Baldus (n 381).

groups have the highest death sentencing rates — white offender-black victim (0.50) and black offender-white victim (0.42).

The white offender-black victim percentage is surprisingly high, given the prior research, but this may be explained in part by the small number of cases (3 out of 6). Indeed, the rate would be identical to the black offender-white victim rate with one more death sentence in such cases (6 of 12 instead of 5 of 12).

The black offender-white victim death sentencing rate (0.42) is higher than the white offender-white victim death sentencing rate (0.36). The significant drop off, consistent with earlier studies, is in black offender-black victim cases, which have a death sentencing rate (0.29) significantly lower than the other groups. Further evidence of this bias against death in such cases is the high number of life with the possibility of parole cases.

There are several possible explanations for the muting of the effect of race in capital sentencing seen in this cohort of cases. The presence of life without the possibility of parole as a sentencing option is the primary difference between this group of cases and prior studies of the influence of race in capital cases. The potential effect of the availability of life without parole on the influence of race in capital cases can be best understood in light of the role of future dangerousness in capital cases.[470]

To the degree that much of jury sentencing in capital cases is based on the individual jurors' perception of the future dangerousness of the offender, the effect of life without parole as a sentencing option can be quite significant.[471] Where jurors once faced the two-fold choice of death or the possibility of parole for a

[470] Berry (n 27).

[471] Blume (n 26).

murderer, the potential dangerousness and likeliness of future criminal behaviour was an important factor to consider when deciding whether an offender should be put to death. With life without parole and the guarantee of a sentencing option *other than the death penalty* that will ensure that the offender will never see the light of day, dangerousness becomes a much less important, and arguably, irrelevant consideration.[472]

Dangerousness matters in the context of explaining influence of the race of the victim in sentencing because dangerousness partially explains that particular bias.[473] Jurors, who are predominately white, are much more likely to fear offenders who have murdered individuals like them and of their same race (white) than offenders who have murdered non-white victims.[474] As a result, with life with the possibility of parole as the only alternative, jurors perhaps have been more likely to sentence offenders who kill whites to death than those who kill non-whites.[475]

To the extent that dangerousness can explain the presence of racial bias related to the race of the victim, then, the elimination of the relevance of dangerousness as a sentencing motivation can correspondingly curb, at least in part, the influence of the race of the victim on sentencing.[476] In cases where there are white victims, as here, the death sentencing rates are perhaps lower than they

[472] Berry (n 27).

[473] Blume (n 26).

[474] See, e g, Craig Haney, 'Condemning the other in death penalty trials: Biographical racism, structural mitigation, and the empathic divide' (2004) 53 DePaul L Rev 1557; Mona Lynch and Craig Haney, 'Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the Empathic Divide' (2011) 45 Law & Society Rev 69.

[475] Ibid.

[476] Berry (n 27).

otherwise might be because jurors have the security of knowing that they can lock offenders away permanently without having to choose a death sentence.

On the other end of the spectrum, cases where black offenders have killed black victims have less of a change in percentage (still low death sentencing rate) because white jurors are less likely to view such offenders as personally dangerous to them. Thus, where dangerousness may have previously had a significant impact on the award of death sentences – in cases with white victims – such an impact may be muted with the availability of life-without-parole sentences. By contrast, where dangerousness may have had less of an effect – cases with black victims – the effect on the death sentencing rate would be minimal with the adoption of life-without-parole.[477]

In sum, the findings of the study indicate that race does still play a role in sentencing, but not to the degree previously seen, a possible consequence of the availability of life-without-parole sentences. The reduction of this effect makes finding comparative proportionality perhaps an easier endeavour, as the skewing effect of race has been somewhat diminished.

This chapter has assessed the relative proportionality of Ohio death cases through the lens used by the Ohio Supreme Court – specific factual circumstances related to its aggravating factors. When I defined similarity in terms of various iterations of aggravating factors, the results were similar to those in the overall aggravation method used in chapter six – over forty per cent of the cases were presumptively relatively disproportionate. In addition, a lesser percentage of such cases were presumptively relatively proportionate. These findings reinforce the

[477] Another possibility is that, over time, racial bias within the United States is diminishing. There is no evidence supporting this possibility, at least in the State of Ohio.

determination in chapter six that Ohio's approach to comparative proportionality review is flawed, and that *over forty per cent* of the Ohio death sentences in the study are *relatively disproportionate*.

Most of the crime-based factors and the victim-based factors used opt-in approaches, surveying the 'in' cases for relative proportionality but not the 'out' cases. For the crime-based factors, all of the robbery murder and kidnapping murder cases were presumptively relatively disproportionate. Only the sexual assault category had death cases that could be relatively proportionate.

The majority of the victim-based categories yielded groups of cases that were neither presumptively relatively disproportionate nor presumptively relatively proportionate. The categories of murder of an elderly victim and murder of a spouse / girlfriend were the closest to be relatively proportionate; most of the other categories were closer to being relatively disproportionate.

Having exhausted both the prior empirical methods for determining relative proportionality and the Court's approaches for determining relative proportionality, the thesis concludes by assessing the enterprise of proportionality review as a whole. Chapter eight reconsiders the problem of assessing 'similarity' for purposes of comparative proportionality review. In doing so, it builds on the analysis in chapters six and seven, proposing a normative model by which courts can engage in a more effective version of comparative proportionality review.

CHAPTER EIGHT: THE 'PURPOSIVE' APPROACH TO RELATIVE PROPORTIONALITY

The results of the comparative proportionality reviews in chapters six and seven demonstrate that the sentencing outcomes in Ohio's capital cases, during the period from 1996-2011, are relatively disproportionate. Indeed, chapter six indicated that 40% of 'death' cases are presumptively relatively disproportionate, meaning that those death sentences are comparatively excessive in violation of the Eighth Amendment's prohibition against 'cruel and unusual' punishments.

It is clear, at the very least, that the Ohio Supreme Court should alter its practice of comparative proportionality review in two important ways. First, the Court needs to adopt a frequency approach to comparative proportionality review, examining all of the 'similar' capital cases. Its current precedent-seeking approach allows it to eschew any true comparative analysis of the death case on appeal and prior cases. Further, it results in a determination that *every* case is relatively proportionate, even though, as this thesis has demonstrated, that is certainly not the case.

Second, the Ohio Supreme Court should consider cases that received a life sentence in its comparative proportionality review. By comparing the death case on appeal only to other cases that received the death penalty, the Ohio Supreme Court does not allow for the possibility that the case may be *more similar* to the cases that did not receive the death penalty than those that did. Failure to consider the life sentence cases as 'similar' cases for purposes of comparative proportionality review all but ensures that the Court will find *every* case to be relatively proportionate, as it has done previously.

That being said, there still remains the core question about implementing comparative proportionality review – how should the state supreme courts define the

concept of 'similarity'? None of the prior proportionality review studies discussed in chapter five has offered a normative model by which courts can effectively conduct robust comparative proportionality review.[478] Indeed, these studies have sought only to measure the relative proportionality of the sentencing outcomes in capital cases, not offer a broad theoretical paradigm for remedying the flawed approaches to comparative proportionality review.

This thesis demonstrates two potential methods of determining 'similarity' in chapters six and seven – the overall aggravation approach and the fact specific approach. Neither of these approaches, though, appears to provide a feasible practical solution for state supreme courts. Conducting logistic regression analysis, while certainly possible, seems outside of the type of analysis that courts typically employ. In addition, the resources required to perform such an analysis in each case may exceed those of state courts.[479] Further, while this approach is helpful to gain a snapshot of the relative proportionality of the death cases, the logistic regression model will shift over time based on jury sentencing outcomes, meaning that the criteria for comparative proportionality review may also shift. Even more problematic is that the facts of the aggravated murder cases may unduly influence the model depending on the frequency of certain factual scenarios. Finally, if the model shifts, the concept of relative proportionality may likewise shift, meaning that

[478] David C Baldus, George Woodworth, and Charles Pulaski, 'Comparative Review of Death Sentences: The Georgia Experience' (1983) 74 Journal of Criminal Law and Criminology 661; Raymond Paternoster and Annmarie Kazyaka, 'An Examination of Comparatively Excessive Death Sentences in South Carolina, 1979-87' (1990) 17 NYU Review of Law and Social Change 490; Rachel Philofsky, 'The Maryland Proportionality Review Project' (Master's Thesis, University of Maryland 2006).

[479] Using the overall aggravation approach in practice would require the state supreme court to update the data continually and adjust the regression model over time to account for variations in jury sentencing practices.

the time in which the state supreme court reviews a case could affect its assessment of relative proportionality and create inconsistency in the court's comparative proportionality review.

The fact specific approach seems even less suited to adoption as the preferred method of comparative proportionality review. As demonstrated in chapters six and seven, most of the facts that the Ohio Supreme Court relies on in its comparative proportionality review are not predictive of the sentencing outcome. These facts also, in many ways, are not good proxies for 'similarity', or at the very least, are incomplete proxies. Aggravating factors, as explained below, are particularly poor indicia of similarity. Other facts, such as victim characteristics and crime characteristics seem more germane to the concept of 'similarity', but individually seem to fall short of providing a workable definition that can truly isolate groups of 'similar' cases for purposes of relative proportionality review.

In this concluding chapter, this thesis offers a normative solution – the 'purposive' approach – to the problem of determining 'similarity' in comparative proportionality review. As explained below, the 'purposive' approach looks to the purposes of punishment – retribution, deterrence, incapacitation, and rehabilitation – as tools by which a court can group 'similar' cases. This approach seeks to use the knowledge and information garnered to this point of the thesis as the basis for this model.

Before explaining the theoretical model (the 'purposive' approach) and providing an example of how it could work with the Ohio death cases, it is important to situate the model within the broader context of the Eighth Amendment. Chapter three has discussed the relevant theoretical background, including the origin of the

concept of relative proportionality and the relationship of the purposes of punishment to the death penalty.

I begin below, though, by exploring how this concept has worked *in practice*. In other words, I explore the degree to which the promise of *Gregg v. Georgia* has been realized, and the degree to which the adopted safeguards of aggravating factors and comparative proportionality review have (or have not) achieved the goal of relative proportionality in capital cases. In light of this history, then, I propose my normative model, the 'purposive' approach, and demonstrate how it can serve to remedy the continuing and widespread problem of relative disproportionality in capital cases.

A. The Flawed Use of Relative Proportionality by the States

The United States Supreme Court's decision to reinstate the death penalty in 1976 rested in large part on the promise of safeguards that would remedy the disparate imposition of the death penalty by state juries.[480] Two principles — the narrowing of offenders eligible for the death penalty and meaningful appellate review of jury sentencing — were the cornerstones of the state statutory schemes approved by the United States Supreme Court that year.[481] Again, these safeguards sought to achieve the goal of relative proportionality by bringing some level of continuity to the sentencing outcomes of similarly situated offenders.[482]

Thirty years later, it is abundantly clear that neither of these safeguards limit disparity in capital sentencing. Indeed, the use of the death penalty is, in many

[480] *Gregg v. Georgia*, 428 US 153 (1976); see discussion in chapter three.

[481] Ibid.

[482] Ibid.

ways, much the same as at the time *Furman* was decided in 1972.[483] The current number of death sentences and the annual number of executions have decreased to a level similar to that of the early 1970s.[484] As a result, the use of the death penalty is exceedingly rare in light of the number of homicides committed in the United States on an annual basis.[485]

More than ever, commentators have recognized that there is no way to distinguish the cases that receive the death penalty from those that do not.[486]

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[483] I am certainly not the first to observe the general regression toward a pre-*Furman* era. See, e g, John H Blume, et al., 'When Lightning Strikes Back: South Carolina's Return to the Unconstitutional, Standardless Sentencing Regime of the Pre-Furman Era' (2010) 4 Charleston L Rev 479 (arguing that South Carolina's system has returned to its pre-Furman status); Kristen Nugent, 'Proportionality and Prosecutorial Discretion: Challenges to the Constitutionality of Georgia's Death Penalty Laws and Procedures Amidst the Deficiencies of the State's Mandatory Appellate Review Structure' (2009) 64 University of Miami L Rev 175 (arguing that Georgia has returned to its pre-Furman status); Bill Rankin et al., 'A Matter of Life or Death: Death Still Arbitrary', *Atlanta Journal-Constitution*, 23 September 2007, at A1 (reporting that 56% of all murders in a decade studied in Georgia were eligible for death, including hundreds of moderately aggravated cases); John Seigenthaler, 'Deeper Look Shows Even More Cases of Unequal Justice', *Tennessean*, 10 January 2010 (reporting on the striking differences in sentences that state judges and juries gave women convicted of killing their abusive husbands in Tennessee).

[484] Richard Dieter, 'Death Penalty Information Center', <http://www.deathpenaltyinfo.org> accessed 21 September 2011.

[485] Ibid. See, e g, John H Blume, 'Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the Modern "Era" of Capital Punishment in South Carolina' (2002) 54 South Carolina L Rev 285 (providing data concerning the number of death sentences as compared to the number of homicides. The death sentencing rate is around twenty death sentences for every one thousand homicides). See also Alex Kozinski and Sean Gallagher, Death: The Ultimate Run-On Sentence' (1995) 46 Case Western Reserve L Rev 1 (complaining about the infrequency with which capital punishment is used).

[486] See, e g, Joseph E Jacoby & Raymond Paternoster, 'Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty' (1982) 73 J. Crim. L. & Criminology 379; William Bowers, et al., *Legal Homicide: Death as Punishment in America, 1864-1962* (Northeastern 1984); Samuel Gross & Robert Mauro, *Death and Discrimination: Racial Disparities in Capital Sentencing* (Northeastern 1989); David Baldus et al., 'Arbitrariness and Discrimination in the Administration of the Death Penalty' (1986) 15 Stetson L Rev 133; David Baldus et al., Comparative

Geography is as significant a factor as any in distinguishing which cases receive death from those that do not.[487] Geographical differences occur most obviously on a state level, where Texas still accounts for the vast majority of executions.[488] Murderers who commit crimes in former Confederate states are much more likely to receive the death penalty than those convicted elsewhere.[489] More disturbing, though, is that such disparities are even more pronounced on a county level.[490] Within a given capital state, one's chances of receiving a capital sentence vary drastically depending on the county in which one commits the crime.[491] Indeed, the results of the overall aggravation method discussed in chapter six reflected this, with

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Review of Death Sentences: An Empirical Study of the Georgia Experience' (1983) 74 Journal of Criminal L & Criminology 661; David Baldus et al., 'Monitoring and Evaluating Contemporary Death Sentencing Systems: Lessons from Georgia (1985) 18 U C Davis L Rev 1275; David Baldus, 'Race Discrimination in the Administration of the Death Penalty' (2003) 39 Crim L Bull 194 (2003); David Baldus & George Woodworth, 'Race Discrimination' (2004) 39 Crim L Bull 214; William Bowers, 'The Persuasiveness of Arbitrariness and Discrimination Under Post-Furman Capital Statutes' (1983) 74 Journal of Criminal Law & Criminology 1067, 1071-72; William Bowers & Glenn Pierce, 'Arbitrariness and Discrimination Under Post-Furman Capital Statutes' (1980) 26 Crime & Delinquency 563.

[487] Adam Gershowitz, 'Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty' (2010) 63 Vanderbilt L Review 307; Raymond Paternoster et al., 'Justice by Geography and Race: The Administration of the Death Penalty in Maryland, 1978-1999' (2004) 4 Margins: Maryland L Journal of Race, Religion, Gender & Class 1; Kathleen Barnes, David Sloss & Stephen Thaman, 'Place Matters (Most): An Empirical Study of Prosecutorial Decision-making in Death-Eligible Cases' (2009) 51 Arizona L Review 305.

[488] Richard Dieter, 'Death Penalty Information Center', <http://www.deathpenaltyinfo.org> accessed 21 September 2011.

[489] Ibid.

[490] Adam Gershowitz, 'Statewide Capital Punishment: The Case for Eliminating Counties' Role in the Death Penalty' (2010) 63 Vanderbilt L Review 307.

[491] See, e g, John H Blume, 'Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the Modern "Era" of Capital Punishment in South Carolina' (2002) 54 South Carolina L Rev 285; Alex Kozinski and Sean Gallagher, 'Death: The Ultimate Run-On Sentence' (1995) 46 Case Western Reserve L Rev 1 (complaining about the infrequency with which capital punishment is used).

Hamilton County cases being more likely than other Ohio cases to receive the death penalty, and Franklin County and Cuyahoga County cases being less likely than other Ohio cases to receive the death penalty.

In addition, the persistence of racial discrimination in the administration of the death penalty has been widely documented.[492] In many jurisdictions, the race of the victim, and to a lesser extent, the race of the defendant, both significantly influence the likelihood of a death sentence.[493] In addition, studies have consistently shown that race plays a significant role in prosecutorial decision-making, with cases involving an African-American defendant and a white victim being significantly more likely to be prosecuted as a death case than cases involving an African-American victim and a white defendant.[494]

These disparities persist in large part because the purported safeguards of aggravating factors and appellate review do little to minimize the disparities in jury sentencing.[495] To understand why this is the case, it is useful to first examine how states use relative proportionality in capital cases.

1. Aggravating Factors

As previously explained, aggravating factors are prerequisites to death sentences. After *Furman*, most capital jurisdictions adopted such factors as a barrier

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[492] David C Baldus, George Woodworth, and Charles A Pulaski Jr, *Equal Justice and the Death Penalty* 281 (Northeastern 1990).

[493] Although, this seems to be less the case in Ohio during the past fifteen years, as explained in chapters six and seven.

[494] Ibid.

[495] To be fair, such disparities can also result from prosecutorial discretion and resource disparities among counties, but as explained below, comparative proportionality review can serve to cure such disparities.

to death-eligibility.[496] In other words, the state must prove that a defendant has committed an aggravated murder which involved one or more aggravating factors or circumstances in order for the defendant to be eligible for a death sentence.

States typically have ten or more aggravating factors.[497] The most common examples of statutory aggravating factors include the murder of an elected official, law enforcement officer, or other public official; murder of two or more individuals; felony murder; especially heinous, atrocious, cruel, or depraved murders; murder committed to prevent arrest; murder committed to silence a witness; murder committed for pecuniary gain; murder of a minor, elderly, pregnant, or disabled victim; the offender created risk of death for one or more individuals other than the victim; the offender has committed a prior murder; the offender committed the murder while in custody or on parole; the offender killed the victim while lying in wait; the murder was committed after substantial premeditation; offender was a drug dealer; offender committed crime as part of gang activity.[498]

The goal of aggravating factors is the separation of death-eligible cases from non-death-eligible cases and promotion of consistency in sentencing by restricting the cases that come before a jury.[499] In practice, as discussed below, such separation rarely occurs.[500]

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[496] Corinna Barrett Lain, 'Furman Fundamentals' (2007) 82 Washington L Rev 1, 45–55.

[497] Ohio's aggravating factors are listed in chapter two. For a complete list of aggravating factors listed by state, *see* Richard Dieter, 'Death Penalty Information Center' <http://www.deathpenaltyinfo.org/aggravating-factors-capital-punishment-state> accessed 21 September 2011.

[498] Ibid.

[499] The Supreme Court has consistently emphasized the importance of aggravating factors as a constitutional safeguard. See, e g, *Kansas v. Marsh*, 548 US 163, 173-74 (2006) ('[A] state capital sentencing system must: (1) rationally narrow the class of

A cursory examination of the purported safeguard of aggravating factors demonstrates that it is currently inadequate to achieve its intended purpose.[501] These

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death-eligible defendants; and (2) permit a jury to render a reasoned, individualized sentencing determination based on a death-eligible defendant's record, personal characteristics, and the circumstances of his crime.'); *Buchanan v. Angelone*, 522 US 269, 275 (1998) ('In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances.'); *Tuilaepa v. California*, 512 US 967, 972 (1994) ('As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder.'); *Arave v. Creech*, 507 US 463, 474 (1993) ('If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.'); *Lowenfield v. Phelps*, 484 US 231, 244 (1988) ('The use of 'aggravating circumstances' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion.'); *Spaziano v. Florida*, 468 US 447, 460 (1984) ('If a State has determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that can rationally distinguish between those individuals for whom death is an appropriate sanction and those for whom it is not.'). The Supreme Court of the United States has further limited the scope of the death penalty in recent decisions holding that persons who rape a child but do not kill, persons with intellectual disability, and persons under the age of eighteen cannot be sentenced to death. See *Kennedy v. Louisiana*, 554 US 407 (2008) (child rape), *Roper v. Simmons*, 543 US 551, 578-79 (2005) (under eighteen); *Atkins v. Virginia*, 536 US 304, 321 (2002) (intellectual disability). In doing so, the Court noted that the categorical exclusions were necessary in order to ensure 'that only the most deserving of execution are put to death.' *Atkins*, 536 US at 319.

[500] A recent study in Missouri concluded that 76% of those convicted of homicide were death eligible under the state's statute. Kathleen Barnes, David Sloss & Stephen Thaman, 'Place Matters (Most): An Empirical Study of Prosecutorial Decision-making in Death-Eligible Cases' (2009) 51 Arizona L Review 305, 309. In California, more than 90% of adults convicted of first-degree murder are death eligible. Steven Shatz, Summary of Testimony at the Public Hearing on the Fair Administration of the Death Penalty 1 (2008), available at <http://www.ccfaj.org/documents/reports/dp/expert/Shatz% 20Testimony.pdf> accessed 21 September 2011.

[501] See, e g, Chelsea Creo Sharon, 'The "Most Deserving" of Death: The Narrowing Requirement and the Proliferation of Aggravating Factors in Capital Sentencing Statutes' (2011) 46 Harvard Civil Rights – Civil Liberties L Rev 223 (arguing that the proliferation of aggravating factors has rendered them useless as a means by which to narrow the class of murderers eligible for the death penalty); Kathleen D Weron, 'Rethinking Utah's Death Penalty Statute: A Constitutional Requirement for the Substantive Narrowing of Aggravating Circumstances' 1994 Utah L Rev 1107 (arguing that Utah's system of aggravating factors is unconstitutional).

aggravating factors suffer from three fundamental weaknesses. First, the individual categories themselves are broad enough to allow a wide variety of 'different' cases to reach the jury for capital sentencing. Second, the categories themselves use indicia that are unhelpful in excluding cases that should not be eligible for a capital sentence. Third, when viewed holistically, the collective breadth of the cohort of aggravating factors in a state mean that almost any homicide can be eligible for death.[502]

The first problem — the scope of the individual aggravating factor categories — occurs most prominently in the felony murder category.[503] Most capital states have felony murder provisions that allow for a case to become death-eligible if the homicide occurs during the commission of a felony.[504] A significant majority of homicides occur during the commission of a felony.[505] In many cases, possession of

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[502] Indeed, reform commissions in Illinois (before it abolished the death penalty) and Massachusetts have recommended reducing statutory lists of aggravators to just five or six factors. See Report of the Governor's Commission on Capital Punishment 23-24 (2002), available at http://www.idoc.state.il.us/ccp/ccp/reports/commission_report/summary_recommendations.pdf; Mass. Governor's Council on Capital Punishment, Final Report 6-12 (2004), available at <http://www.lawlib.state.ma.us/docs/5-3-04Governorsreportcapitalpunishment.pdf> accessed 21 September 2011.

[503] Felony murder has long been criticized as an acceptable barometer of determining which offenders should be eligible for the death penalty and which should not. See, e g , Steven F Shatz, 'The Eighth Amendment, the Death Penalty, and Ordinary Robbery-Burglary Murderers: A California Case Study' (2007) 59 Florida L Rev 719, 749 (arguing that California's felony murder statute creates disproportionate outcomes in capital cases); Nelson E Roth and Scott E Sundby, 'The Felony-Murder Rule: A Doctrine at the Constitutional Crossroads' (1985) 70 Cornell L Rev 446.

[504] See, e g, John H Blume, 'Twenty-Five Years of Death: A Report of the Cornell Death Penalty Project on the Modern "Era" of Capital Punishment in South Carolina' (2002) 54 South Carolina L Rev 285; Alex Kozinski and Sean Gallagher, 'Death: The Ultimate Run-On Sentence' (1995) 46 Case Western Reserve L Rev 1 (complaining about the infrequency with which capital punishment is used).

a firearm by the offender is a felony. In addition, many homicides occur when burglaries or robberies go awry. Likewise, many crimes also have a sexual motive, again making such crimes qualify as felony murder.

Because felony murder does not require intent, the range of individuals who are charged with felony murder can include an individual who commits a brutal pre-meditated murder and an individual who, at the last minute, agrees to be the getaway driver in a convenience store robbery.[506] This aggravating factor does nothing to distinguish between such cases.

Similarly, many states have an aggravating factor based on the heinousness of the crime using language such as 'outrageously or wantonly vile, horrible and inhuman.'[507] In a series of cases, the Supreme Court established that such vague

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[505] See, e g, David C. Baldus, Charles A. Pulaski, Jr. and George Woodworth, Arbitrariness and Discrimination in the Administration of the Death Penalty: A Challenge to State Supreme Courts, 15 Stetson L. Rev. 133, 138 n.14 (1986) (describing such results in a variety of studies); Kathleen Barnes, David Sloss & Stephen Thaman, 'Place Matters (Most): An Empirical Study of Prosecutorial Decision-making in Death-Eligible Cases' (2009) 51 Arizona L Review 305, 323 tbl.2.2 (noting that felony murder aggravator is present in over 52% of all cases); David McCord, 'Should Commission of a Contemporaneous Arson, Burglary, Kidnapping, Rape, or Robbery Be Sufficient to Make a Murderer Eligible for a Death Sentence?--An Empirical and Normative Analysis' (2009) 49 Santa Clara L Rev 1 (noting that more than 60% of defendants committed murder in the course of one of five predicate felonies, triggering death eligibility under the felony murder aggravator).

[506] This was the case of Sandra Lockett, who faced the death penalty for being a getaway car driver until her case was reversed by the Supreme Court because the Ohio statute prohibited consideration of certain types of mitigating evidence. *Lockett v. Ohio*, 438 US 586 (1978).

[507] The Supreme Court's continued acceptance of this principle has drawn significant (and mostly critical) academic commentary. See, e g, Richard A Rosen, 'The "Especially Heinous" Aggravating Circumstance in Capital Cases – the Standardless Standard' (1986) 64 North Carolina L Rev 941; Laurel L Cleek, 'The Constitutionality of the "Heinous, Atrocious, or Cruel" Aggravating Circumstance in Death Penalty Cases and Its Interpretation by Tennessee Courts' (2001) 31 University of Memphis L Rev 939; Richard Garnett, 'Depravity Thrice Removed:

aggravating factors are valid under the Eighth Amendment so long as the state trial court gives some limiting construction further defining the factor.[508] Even with these limiting constructions, such aggravating factors provide very little guidance to juries, as the limiting constructions are notoriously vague.[509] As with felony murder, the 'heinousness' aggravators can capture a broad cohort of cases and are unable to identify effectively death-eligible cases.

The second significant problem with states' current usage of aggravating factors is that the more objective indicia are unable to separate cases that are clearly 'different' in terms of relative proportionality. Killing a police officer, for instance, will more likely garner a death sentence than a typical murder, partially because the state wants to deter such crimes and partially because killing an officer of the peace is more offensive to society.[510] Nonetheless, two capital murder cases could have

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Using the "Heinous, Cruel or Depraved" Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases' (1994) 103 Yale L J 2471.

[508] See, e g, *Godfrey v. Georgia*, 446 US 420 (1980) (invalidating 'outrageously or wantonly vile' factor for vagueness); *Proffitt v. Florida*, 428 US 242 (1976) (holding that the Florida aggravating and mitigating circumstances were not vague and overbroad because of limiting instructions on 'heinous' aggravator); *Maynard v. Cartwright*, 486 US 356 (1988) (striking down 'especially heinous' circumstance for vagueness); *Walton v. Arizona*, 497 US 639 (1990) (upholding 'heinous, cruel, or depraved aggravating circumstance because of limiting instruction).

[509] Richard A Rosen, 'The "Especially Heinous" Aggravating Circumstance in Capital Cases – the Standardless Standard' (1986) 64 North Carolina L Rev 941.

[510] For purposes of this discussion, death worthiness is a relative concept. Indeed, one could argue that the death penalty is never an appropriate punishment. *See Gregg*, 428 US at 231 (Marshall, J., dissenting) ('In *Furman v. Georgia*, I set forth at some length my views on the basic issue presented to the Court in these cases. The death penalty, I concluded, is a cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments. That continues to be my view.'); 428 US at 227, 231 (Brennan, J., dissenting) ('I therefore would hold … that death is today a cruel and unusual punishment prohibited by the Clause. Justice of this kind is obviously no less shocking than the crime itself, and the new 'official' murder, far from offering redress for the offense committed against society, adds instead a second defilement to the first.') (internal citation omitted). Indeed, Justices Powell,

drastic differences, particularly where an officer is undercover. A driver who shoots an approaching officer in cold blood after the officer has pulled his car over is not sufficiently 'similar' (in terms of relative proportionality) to a robber who inadvertently shoots an undercover police officer while holding up a cash register.[511]

The aggravating factor of killing two or more individuals has similar problems. It is easy to identify these cases, but they are not necessarily 'similar.' The levels of culpability and harm between two cases involving multiple deaths could be very different, as could be the levels of deterrence, if any, one might achieve by executing the two 'different' defendants.

The third problem is the cumulative over breadth of the cohort statutory aggravating factors within each state.[512] Collectively, the aggravating factors cover such a wide variety of situations and circumstances that most homicides can be considered 'death-eligible' in most jurisdictions.[513] This means the aggravating

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Blackmun, and Stevens eventually also came to this same conclusion. For an exploration into their parallel repudiation of the death penalty, *see* William W. Berry III, 'Repudiating Death' (2011) 101 Journal of Criminal L and Criminology 441.

[511] In theory, a jury would 'get it right,' sentencing the first case to death and the second case to life. In practice, though, two different juries could arrive at opposite results, with the second case receiving death and the first receiving life, creating relatively disproportionate outcomes.

[512] See, e g, John H Blume, Stephen P Garvey and Sheri Lynn Johnson, 'Future Dangerousness in Capital Cases: Always "At Issue"' (2001) 86 Cornell L Rev 397, 494 (2001) ('The more narrowly a state's statutory aggravating factors are construed, the more likely its scheme as a whole is to satisfy the requirements of the Eighth Amendment. Conversely, the more broadly aggravating factors establishing death-eligibility are construed, the greater the likelihood that the state's capital sentencing scheme will violate the requirements established in Gregg.'); *Zant v. Stephens*, 462 US 862, 876-77 (1983) ('To avoid this constitutional flaw, an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.').

[513] See Barnes et al (n 504); Shatz (n 504).

factors are ineffective in the separation of cases that is needed to create consistency in jury sentencing.[514]

In addition to these inherent shortcomings, the United States Supreme Court has set the bar quite low for requiring a death sentence to relate to the charged aggravating factor. For instance, in *Zant v. Stephens* and *Barclay v. Florida*, the Supreme Court upheld death sentences even though it invalidated one of the underlying aggravating factors upon which the jury based its sentence.[515] Similarly, the Court suggested in *Ramos v. California* that juries may rely on factors wholly outside the scope of the statutory aggravating factors as long as one aggravating factor is present.[516] These cases largely undermine the significance of aggravating factors as criteria for separating cases deserving death from those that do not.[517]

Instead, the aggravating factor requirement has become a relatively easy requirement for the prosecution to satisfy in capital cases in order to achieve a death sentence. It is evident, then, that aggravating factors offer insufficient guidance and

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[514] Indeed, this is the very purpose of the aggravating factors in the first place. See, e g, Bruce S Ledewitz, 'The New Role of Statutory Aggravating Circumstances in American Death Penalty Law' (1984) 22 Duquesne L Rev 317, 351 ('[T]here are two requirements for a valid statutory aggravating circumstance: first, it must limit the class of murders numerically and, second, it must represent a 'good reason' for choosing this defendant to be eligible for death.'); Richard A Rosen, 'Felony Murder and the Eighth Amendment Jurisprudence of Death', (1990) 31 Boston College L Rev 1103, 1125 (referring to a 'quantitative requirement' that prohibits including 'too many defendants' and a 'qualitative requirement[ ]' that prohibits including defendants 'who are not necessarily more deserving of the death penalty').

[515] 462 US 862 (1983); 463 US 939 (1983).

[516] 463 US 992 (1983).

[517] See, e g, Jeffrey L Kirchmeier, 'Casting a Wider Net: Another Decade of Legislative Expansion of the Death Penalty in the United States' (2006) 34 Pepperdine L Rev 1, 25; Jeffrey L Kirchmeier, 'Aggravating and Mitigating Factors: The Paradox of Today's Arbitrary and Mandatory Capital Punishment Scheme' (1998) 6 William and Mary Bill of Rights J 345, 397-99.

provide an inadequate safeguard against rampant disparity in sentencing outcomes.[518] Indeed, for any level of relative proportionality to be achieved, other structural safeguards are necessary – making the adoption of a more robust form of comparative proportionality review paramount.

2. Appellate Review (Comparative Proportionality Review)

As with aggravating factors, mandatory appellate review of death sentences is a requirement in all capital jurisdictions. At the very least, state supreme courts review the aggravating and mitigating evidence before affirming death sentences. Such review, though, does not mean that the state supreme courts measure, in any way, the relative proportionality of the case on appeal.

In addition to reweighing aggravating and mitigating factors, most states also use some form of comparative proportionality review in assessing capital sentences.[519] As described above, there are two basic approaches to comparative proportionality review — the frequency approach and the precedent-seeking approach.[520]

The frequency approach, as explained in chapter five, identifies both life and death cases comparable to the case being reviewed, determines the proportion of defendants in those 'similar' cases who received a death sentence, and makes a legal judgment as to whether the relative frequency of death within the group is large

[518] Indeed, many jurors do not understand aggravating factors or give them significant weight at trial. See, e g, Theodore Eisenberg and Martin T Wells, 'Deadly Confusion: Juror Instructions in Capital Cases,' (1993) 79 Cornell L Rev 1, 10 (finding 20% of jurors on capital juries believe that an aggravating factor can be established by a preponderance of the evidence or only to a juror's personal satisfaction).

[519] David C Baldus, George Woodworth, and Charles Pulaski, 'Comparative Review of Death Sentences: The Georgia Experience' (1983) 74 Journal of Criminal Law and Criminology 661.

[520] Ibid.

enough to warrant affirming the death sentence.[521] The precedent-seeking approach, on the other hand, identifies one or two death-sentence cases that seem comparable.[522] In other words, so long as death sentences have occurred in one or more similar prior cases, the case before the court is deemed relatively proportionate.[523]

Of the states that use comparative proportionality review, almost all of them use the precedent-seeking approach.[524] In fact, only Virginia, Louisiana, North Carolina, and Pennsylvania use a frequency approach.[525] None of these courts, however, quantifies the death sentence frequencies observed among similar cases.[526] In addition, neither the North Carolina nor the Virginia court documents its analysis with sufficient specificity to calculate the frequencies it observes.[527] Only Pennsylvania reports the number of death and life cases in the pool of similar cases.[528] In all other jurisdictions, the court has either adopted a precedent-seeking approach or has left the matter of basic approach unclear.[529]

If aggravating factors set a low bar to protect against arbitrary death sentences, then appellate review is a virtually non-existent safeguard against

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[521] Ibid.

[522] Ibid.

[523] Ibid.

[524] Ibid.

[525] Ibid.

[526] Ibid.

[527] Ibid.

[528] Ibid.

[529] Ibid.

disparate jury verdicts. States almost never reverse cases on the grounds of relative disproportionality.[530] Despite the Court's concern in *Furman* with disparity in jury verdicts and the well-known evidence of systemic racial discrimination in capital cases,[531] state supreme courts are loath to question the decision-making of capital juries, much less reverse their decisions.[532]

There are no useful barometers by which state supreme courts currently evaluate the relative proportionality of a given case. For the state supreme courts that use proportionality review, several core tendencies fundamentally flaw their analysis.

First, most states use the precedent-seeking approach. This approach, as discussed above in chapter five, looks for one or more cases that are 'similar' to the case on review to justify the imposition of death. It is quite easy for state supreme courts to find one or more 'similar' death cases, particularly given their criteria for 'similar' as discussed below. The presence of one 'similar' case, though, does not establish relative proportionality.[533] On the contrary, the 'similar' case could be an

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[530] David C Baldus, George Woodworth, and Charles A Pulaski Jr, *Equal Justice and the Death Penalty* 281 (Northeastern 1990) (finding less than twenty-five cases reversed on comparative proportionality review grounds in the fifteen years after Gregg was decided).

[531] *McCleskey v. Kemp*, 481 US 279 (1987).

[532] David C Baldus, George Woodworth, and Charles A Pulaski Jr, *Equal Justice and the Death Penalty* (Northeastern 1990).

[533] See, e g, John H Blume, Stephen P Garvey and Sheri Lynn Johnson, 'Future Dangerousness in Capital Cases: Always "At Issue"' (2001) 86 Cornell L Rev 397, 402 (2001) (discussing the omnipresence of future dangerousness during jury deliberations in a capital trial) ('The only logical method for an adequate proportionality review is to engage in a comparison not only of similar cases in which the death penalty was imposed but similar cases in which the death penalty was not imposed').

outlier, for which death is a relatively disproportionate outcome. Out of the hundred 'similar' cases, it may be the only one that has received the death penalty.

The better approach, as explained throughout the thesis, is the frequency-seeking approach, which identifies a class of similar cases and the frequency of death sentences for that class of cases.[534] This approach allows for a more accurate determination of relative proportionality by comparing the case on appeal to a cohort of 'similar' cases.

Second, and perhaps more importantly, almost all of the courts that engage in comparative proportionality review examine only cases that received death as 'similar' or 'comparable' cases.[535] They ignore the 'similar' cases in which the jury gave the offender a life sentence. By failing to consider the life sentence cases, the state supreme courts virtually assure that almost every case will be proportionate.[536]

Finally, when undertaking comparative proportionality review, the courts often use the aggravating factors proved at trial (and general underlying facts) to identify 'similar' cases.[537] The presence of a particular aggravating factor cannot be the only indicia of evaluating whether a particular offender deserves death.[538] It is

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[534] David C Baldus, George Woodworth, and Charles A Pulaski Jr, *Equal Justice and the Death Penalty* (Northeastern 1990).

[535] David C Baldus, George Woodworth, and Charles A Pulaski Jr, *Equal Justice and the Death Penalty* (Northeastern 1990).

[536] Ibid.

[537] Ibid.

[538] The United States Supreme Court has clearly established that the Eighth Amendment prohibits the use of the mandatory death penalty. See *Woodson v. North Carolina*, 428 US 280 (1976); *Roberts v. Louisiana*, 428 US 325 (1976).

not an effective tool to assess relative proportionality, because, as stated above, a wide variety of 'different' cases can fall under the same aggravating factor.

Indeed, determining which cases are relatively proportionate based on aggravating factors combined with the underlying facts (for example, felony murder involving a rape), also does very little to group 'similar' cases, as demonstrated in chapter seven. Two cases that fall under the same aggravating factor parameters can be quite different in severity and in worthiness of the death penalty.[539] Both the felony murder and killing police officer examples above illustrate this point.

Given the cursory and flawed methods of comparative proportionality review, it is not surprising that very few cases have been reversed on grounds of relative disproportionality. According to one study, less than twenty-five cases have been reversed on such grounds since the death penalty was reinstated after *Gregg* in 1976.[540]

In short, the promise of safeguards to protect against the latent relative disproportionality identified in *Furman* has failed. Despite the widespread acknowledgement of the failure of these safeguards and the difficulty of achieving sentencing consistency in capital cases, there has been no movement to remedy these defects.

This final chapter of the thesis and the 'purposive' model it proposes attempt to remedy this problem. As explained below, comparative proportionality review

[539] The 'purposive' model offered below attempts to define similarity in a more effective and useful way.

[540] David C Baldus, George Woodworth, and Charles A Pulaski Jr, *Equal Justice and the Death Penalty* (Northeastern 1990).

provides states the best opportunity to minimize disparity among cases and accord an offender meaningful appellate review.[541]

B. Practicing 'Purposive' Proportionality

In order to improve the relative proportionality of capital cases and minimize the disparity that currently exists in capital sentencing, several potential reforms are available. One option is to require a more specific definition of aggravating factors and limit the available categories of aggravating factors.[542] While the Eighth Amendment and *Furman v. Georgia*[543] could provide a clear basis for the Supreme Court to establish restrictions on aggravating factors in the name of sentencing consistency, the Court seems unlikely to follow this path in the near future. Further, in the absence of a Supreme Court mandate, the political and practical hurdles to such a change seem insurmountable.

A second possible reform that could improve the ability of states to achieve some modicum of relative proportionality in sentencing would be to adopt a racial justice act. Such an act would impose requirements both on prosecutors and courts to guard against racial discrimination in capital sentencing. Two states have recently adopted such reforms, and legislative movement in that direction could do

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[541] See, e g, Evan J Mandery, 'In Defense of Specific Proportionality Review' (2002) 65 Albany L. Rev 883; Robert Mark Carney, 'Capital Sentencing: The Case for Statewide Proportionality Review' (1984) 59 Notre Dame L Rev 1412.

[542] Richard A Rosen, 'The "Especially Heinous" Aggravating Circumstance in Capital Cases – the Standardless Standard' (1986) 64 North Carolina L Rev 941; Laurel L Cleek, 'The Constitutionality of the "Heinous, Atrocious, or Cruel" Aggravating Circumstance in Death Penalty Cases and Its Interpretation by Tennessee Courts' (2001) 31 University of Memphis L Rev 939; Richard Garnett, 'Depravity Thrice Removed: Using the "Heinous, Cruel or Depraved" Factor to Aggravate Convictions of Nontriggermen Accomplices in Capital Cases' (1994) 103 Yale L J 2471.

[543] 408 US 238 (1972).

much to alleviate the problem of racial discrimination present in capital cases.[544] Nonetheless, even if such acts could entirely eliminate racial disparity, there would still be the problem of disparity based on juries.

While legislative reform could have a significant impact, improving the appellate review of capital cases appears to be a more attainable goal in the short term. Every state has some sort of appellate review in place, with a majority of states engaged in comparative proportionality review.[545] In addition, the Eighth Amendment requires some sort of meaningful appellate review.[546] As a result, the mechanism for reform already exists.

The greatest impediment to a more robust review of capital cases by state supreme courts appears to be the lack of an effective model for courts to follow in reviewing cases.[547] Courts are accustomed to comparing cases, but only by

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[544] Kentucky and North Carolina have enacted such statutes. See Ky Rev Stat Ann § 532.200 (West 2006); N C Gen Stat Ann §§ 15A-2010 -- 15A-2012 (West 2009). For a detailed discussion on the merits of a racial justice act, see, e g, Erwin Chemerinsky, 'Eliminating Discrimination in Administering the Death Penalty: The Need for a Racial Justice Act' (1995) 35 Santa Clara L Rev 519. A racial justice act could also require more transparency in prosecutorial decision making by imposing reporting requirements. Several states have imposed reporting requirements in an effort to combat racial profiling in the context of traffic stops. *See, e g*, David A Harris, 'The Reality of Racial Disparity in Criminal Justice: The Significance of Data Collection' (2003) 66 Law and Contemporary Problems 71, 73.

[545] Richard Dieter, 'Death Penalty Information Center', <http://www.deathpenaltyinfo.org> accessed 21 September 2011.

[546] *Gregg v. Georgia*, 428 US 153 (1976); *Pulley v. Harris*, 467 US 37 (1984) (Stevens, J concurring).

[547] Another impediment could be the political pressure on state supreme court justices, most of whom are popularly elected, to affirm jury verdicts. While in the past such political pressures have had unfortunate practical consequences, the climate surrounding the death penalty has changed in recent years. Especially with its abolition in New Jersey, New Mexico, and Illinois, and the rise of doubt as to the fairness of the administration of capital punishment in the United States, state

examining one or two similar precedents. The adoption of a broader, frequency based model of review is not an inherently obvious enterprise. In an effort to provide clarity, consistency, and accuracy in comparative proportionality review, this chapter offers a more effective model – the 'purposive' approach.

1. The Theoretical Model

The 'purposive' theoretical model for achieving relative proportionality through comparative proportionality review consists of two steps — (1) identifying a group of 'similar' cases and (2) comparing the case on appeal to the group of 'similar' cases.[548] As explained below, the model first requires the state supreme court to gather the previous capital cases including both life and death cases, beginning with sentences handed down after the state's adoption of life without parole. The state supreme court will then group these cases according to a standard metric that identifies 'similarity.' The concept of absolute proportionality, through the purposes of punishment, provides an ideal method to group 'similar' cases. In other words, the 'purposive' model defines 'similarity' in terms of the intended goal of punishment.

As explained below, the preferred punitive goal (or aspect of absolute proportionality) for grouping 'similar' cases is retribution, defined as the combination of the culpability of the offender and the harm caused by the crime.[549] This approach provides the most accurate method of determining similarity, as

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supreme courts may face less external pressure if they choose to conduct more rigorous proportionality review.

[548] For consistency and clarity, this section fully explains the concepts in the model, even though many of them have been discussed previously.

[549] Richard Frase, 'Punishment Purposes', 58 Stanford L Rev 67 (2005); Andrew Von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005); Paul Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* (OUP 2008).

explained below, because it allows the state supreme court to assess past events, and avoids speculation about future deterrent effects, offender dangerousness, or the ability to rehabilitate offenders.

Once the state supreme court groups the prior cases (life and death) in terms of the combination of offender culpability and harm caused, the court then must determine which group of cases is most 'similar' to the case on appeal. After identifying the group of 'similar' cases, the state supreme court then determines the frequency of death sentences in the 'similar' group.

Consistent with the approaches of chapters six and seven, this model adopts the same measures of relative proportionality. Thus, where the percentage of death sentences is less than thirty-five per cent, the death sentence on review is presumptively relatively disproportionate. Where the percentage of death sentences is greater than eighty per cent, the death sentence on review is presumptively relatively proportionate. And, where the death sentencing rate in the cohort of 'similar' cases falls between thirty-five and eighty per cent, the state supreme court must use its discretion to determine whether the death sentence under review is relatively proportionate.

Thus, in order to determine whether a death verdict is relatively proportionate as required by the Eighth Amendment, a court must first identify a class of similar cases. Then, a court must assess whether that class allows for a death sentence, or whether such a sentence would be relatively disproportionate.

Identifying which cases are 'similar' is the more complicated inquiry of the two, but it is manageable in practice because it is based on the common law decision-making reasoning that courts have engaged in for centuries. Indeed, the formalistic common law case method of comparing competing precedents in order

to determine which to follow strongly parallels the inquiry here. Using certain indicia, the court must identify a group of cases that is 'similar' to the case on appeal.

Using the class to determine the proportionality of the sentence will require that the court keep records of prior decisions in capital jury trials. This will not be difficult, though, as most capital cases, whether death or life, are appealed and catalogued in appellate opinions of the state supreme court or state court of appeals.

Once the court ascertains the group of similar cases, the court's analysis consists simply of determining whether a death sentence is relatively disproportionate based on the percentage of cases in the 'similar' cohort that received a death sentence.

a. Identifying 'similar' cases

In theory, there are many ways to determine whether two cases are 'similar,' and ultimately to identify a cohort of 'similar' cases. As discussed above, the court could use aggravating factors or vague factual labels to identify similarity. Both of these are problematic because they allow for the grouping of cases that are fundamentally 'different.' The court could also use a more detailed factual approach by trying to find cases in which the actions of the offender and the circumstances of the crime are very similar. Such an approach would identify 'similar' cases more effectively, but might suffer from a lack of a sufficiently large cohort of cases by which to determine relative proportionality. For instance, if there were only two cases in which a perpetrator stabbed a victim on the side of the road in order to steal her purse, with one receiving death and the other receiving life, it would be difficult to say whether a third 'similar' case would be disproportionate.

The 'purposive' model proposed here advocates using the purposes of punishment — retribution, deterrence, incapacitation, and rehabilitation — as the tool for defining similarity. In other words, 'similar' cases would be those that achieve the same punitive goal, or achieve that goal to the same degree. If these purposes are indeed the states' justification for punishing criminals, it makes sense for the sentencing determination to have some link to the intended purpose. Indeed, the United States Congress has adopted a similar approach in federal criminal cases. It requires the federal courts to consider the purposes of punishment in sentencing offenders under the now-advisory Sentencing Guidelines.[550]

Grouping 'similar' cases in terms of the degree to which they achieve the purposes of punishment requires the state supreme court to identify which purpose of punishment should apply. Choosing more than one purpose is unacceptable because the purposes advocate contradictory outcomes.[551] For instance, a death sentence might achieve the goal of retribution in that it gives the offender his just deserts, but it may not be an effective deterrent because the offender committed a

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[550] 18 USC §3553 (a) provides, in part:

> [T]he court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—
> (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
> (2) the need for the sentence imposed—
> (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
> (B) to afford adequate deterrence to criminal conduct;
> (C) to protect the public from further crimes of the defendant; and
> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

[551] William W Berry III, 'Discretion without Guidance' (2008) 40 Connecticut L Rev 631; Andrew Ashworth, *Sentencing and Criminal Justice* (OUP 2005).

unique crime or has a unique personal background. Therefore, state supreme courts can use only one purpose of punishment to identify the class of similar cases.

In choosing a purpose, a state supreme court could, in theory, have a different purpose for each case or adopt a single purpose for all cases. For the purposes of consistency in review, though, it would be better for the court to adopt one purpose by which to achieve consistency in capital sentencing.

Under that approach, the next question is which purpose is best suited to make such determinations of similarity. Rehabilitation seems an unlikely candidate, as the ability to be rehabilitated is typically not a consideration when a jury chooses between a life without parole sentence and a death sentence. Either sentence, by definition, is a determination on some level that the offender is unable to ever be rehabilitated, and will never again live outside state custody.[552] Further, unless the defendant included significant mitigating evidence related to his potential for rehabilitation during the capital sentencing proceeding, state supreme courts would likely not have the information on appeal to make such a determination anyway.

Incapacitation, or future dangerousness, is a second ill-suited purpose for identifying 'similar' cases. Future dangerousness is a moot consideration in capital cases because of the availability of a sentence of life without parole in every capital jurisdiction.[553] In addition, social science research has consistently demonstrated that such determinations are highly speculative and often inaccurate, even when

[552] Rehabilitation has long been disfavoured as a purpose of punishment in the United States, but to the extent it should play a role in a decision to sentence an individual to death, it ought to be given more prominence at a preliminary stage of the capital proceeding, such as at the aggravating factor stage.

[553] William W Berry III, 'Ending Death by Dangerousness' (2010) 52 Arizona L Rev 889 (2010); but see Christopher Slobogin, 'Capital Punishment and Dangerousness' in *Mental Disorder and Criminal Law: Responsibility, Punishment, and Competence*, R Schopp ed (Springer 2008) (arguing that dangerousness is a valid aggravating factor).

made by trained psychologists.[554] It is therefore unlikely that state supreme courts could accurately and consistently group offenders in terms of their potential for future dangerousness.

Further, as a practical matter, it is difficult to group the prior aggravated murder cases in terms of the dangerousness of the offender. Supreme Court justices do not have the benefit of having even been in the physical presence of such defendants, much less observed them in such a way as to assess their future dangerousness. In addition, it is virtually impossible to discern, based merely on the reading of a case file, whether a particular offender is more dangerous than another. Any attempt to conduct such a grouping of cases for purposes of proportionality review based on future dangerousness seems to be a very speculative endeavor if based only upon the information available on appellate review.

Retribution and deterrence are thus the only legitimate choices for grouping cases for purposes of determining relative proportionality. Either choice appears to be an acceptable option for use by state supreme courts. Retribution would group the cases in terms of the two primary indicia underlying the theory of just deserts —

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[554] Ibid. The American Psychiatric Association maintains that such determinations are wrong in two out of every three cases. Brief of the American Psychiatric Ass'n as Amicus Curiae Supporting Petitioner at 3, *Barefoot v. Estelle*, 463 US 880 (1983) (No. 82-6080), <http://www.psych.org/MainMenu/EducationCareerDevelopment/Library/BernsteinReferenceCenter/AmicusCuriae_1.aspx> accessed 11 September 2011 ('The large body of research in this area indicates that, *even under the best conditions*, psychiatric predictions of long-term future dangerousness are wrong in at least two out of every three cases.') (emphasis added)). *See also* John Monahan, The Clinical Prediction of Violent Behavior 47–49 (1981) (listing the rate at which predictions turned out to be wrong at about 60% or 70%); John Monahan, et al., *An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders*, 56 Psychiatric Servs. 810, 814 tbl.2 (2005) (noting a 49% false positive rate using modern risk assessment instruments).

the culpability of the offender and the harm caused by the criminal act.[555] Deterrence would group the cases in terms of their perceived general deterrent effect.

Upon close examination, retribution provides the best method for grouping the cases for several reasons. First, it examines what has already happened by identifying and making sense of past events. In addition, the academic literature has established the ability to group cases in terms of relative proportionality, not by linking a particular quantum of punishment to a particular level of culpability, but by identifying one defendant as more culpable than another.[556] Put differently, retribution allows the comparative ranking of cases in terms of culpability and harm. While not mandating a particular punishment, retribution certainly permits the ranking of cases in terms of desert such that the state supreme court can group 'similar' cases. Despite its inability to dictate a cardinal amount of punishment, retribution can achieve the ordinal ranking necessary to group the cases in such a way as to ascertain whether a case is relatively proportional to the state's prior cases.

Finally, state supreme courts will certainly have access to the information needed to determine the culpability of the defendant and the amount of harm he has caused in the case at bar. The court will also have the information needed to determine the relative level of desert for other offenders in 'similar' life and death cases.[557]

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[555] Richard Frase, 'Punishment Purposes' (2005) 58 Stanford L Rev 67 (2005); Andrew Von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005); Paul H Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* (OUP 2008).

[556] Ibid.

[557] This information is available in appellate opinions reviewing life and death sentences in capital cases.

Deterrence, on the other hand, invites a much more speculative inquiry by the state supreme court in its attempt to identify 'similar' cases. To begin with, scholars still debate whether the death penalty has any deterrent effect at all, with a consensus suggesting that there is no concrete evidence that the death penalty actually deters crime.[558] Even if the death penalty did have a deterrent effect on future crime, it is difficult to identify which cases will provide this deterrence. The literature suggests that issues such as temporal proximity of the execution and the media coverage of the execution, two issues over which the state supreme court has virtually no control, may influence the deterrent effect more than any indicia the court may use to attempt to group cases in terms of similar level of deterrent effect. Finally, predicting the deterrent effect of an execution requires the state supreme court to estimate future events. This is a much more difficult and speculative enterprise than looking back at past events, as retribution requires. Given the shortcomings of rehabilitation, incapacitation, and deterrence, retribution thus provides the best barometer for determining 'similar' cases. How it might operate in practice is explored below.

I have chosen not to attempt to determine 'similarity' based upon deterrence of others or the future dangerousness of the offender for many of the reasons explained previously. My attempts at such groupings reinforced to me the purely speculative nature of such an inquiry. Without more evidence as to the nature of the

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[558] Compare Cass R Sunstein and Adrian Vermeule, 'Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs' (2006) 58 Stanford L Rev 703 with Carol S Steiker, 'No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty' (2006) 58 Stanford L Rev 751. See also John J Donohue and Justin Wolfers, 'Uses and Abuses of Empirical Evidence in the Death Penalty Debate' (2006) 58 Stanford L Rev 791 (noting that 'existing evidence for deterrence is surprisingly fragile').

individual's psychological state (future dangerousness) or additional research on the degree to which death sentences imposed on certain kinds of cases deter murder (a speculative proposition given that there is no clear evidence that the death penalty is marginally more effective in deterring murder than a long term of imprisonment), it is difficult to group cases as 'similar' in any intellectually rigorous manner. Thus, as demonstrated below, the retributive approach is the only one employed here.

Before describing the 'purposive' model further, it is worth noting one other important consideration in identifying 'similar' cases — the sentencing change that has occurred in almost every state over the past twenty years — the availability of life-without-parole sentences. Cases in which the only sentencing options were life *with* the possibility of parole and death are fundamentally different from those that also include life without parole as a sentencing option.

In the former context, the possibility that the offender may one day be free can impact on the jury's sentencing decision.[559] Studies by the Capital Jury Project have confirmed that this dangerousness concern animates much of the thought process of capital jurors in sentencing.[560] In theory, the availability of life without parole should alter the sentencing calculus in capital cases.[561] Because the

[559] Indeed, jurors tend to wildly overpredict future dangerousness. See, e g, Rocky L Pilgrim and Jonathan R Sorensen, 'Jury Deliberations on Future Dangerousness' (1999) (unpublished study presented at the annual conference of the American Society of Criminology in Toronto, 15-19 November 1999); Jonathan R Sorensen et al., 'An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants' (2000) 90 Journal of Criminal L and Criminology 1251 (study conducted by capital juror exit polls).

[560] See, e g, John H Blume, Stephen P Garvey and Sheri Lynn Johnson, 'Future Dangerousness in Capital Cases: Always "At Issue"' (2001) 86 Cornell L Rev 397, 402 (2001) (discussing the omnipresence of future dangerousness during jury deliberations in a capital trial).

[561] William W Berry III, 'Ending Death by Dangerousness' (2010) 52 Arizona L Rev 889 (2010).

availability of certain sentencing options influences sentencing decisions, state supreme courts should exclude all cases sentenced prior to the adoption of life without parole when identifying 'similar' cases.[562]

b. Comparing the case on review to the class of 'similar' cases

Once a state supreme court identifies 'similar' cases, it can then group them to provide a basis for comparison for the case under review. It is important to have a critical mass of cases (at least twenty if possible) in each category as a point of comparison.

The court must examine the ratio of life sentences to death sentences in those 'similar' cases to ascertain the past practice of juries sentencing 'similar' cases to death. Generally, the fewer death sentences there are in the class of 'similar' cases, the more likely the court should be to find the case on appeal relatively disproportionate. In other words, where most of the cases in the cohort received death, the case on appeal is relatively proportionate; where most of the cases in the cohort received a life sentence, the case on appeal is relatively disproportionate.

As in chapters six and seven, the question would be whether the case was relatively proportionate based on the death sentencing ratio of the comparable group. Where the ratio is less than 0.35, the case would be presumptively relatively disproportionate. Where the ratio is greater than 0.80, the case would be presumptively relatively proportionate. And where the ratio was between 0.35 and 0.80, the court would have to look to other factors of similarity to assess relative proportionality.

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[562] For a discussion of why life without parole is significant enough to warrant its own category of Eighth Amendment review, see William W Berry III, 'More Different than Death, Less Different than Life' (2010) 71 Ohio State L J 1009.

2. The Practical Application of the Model

Given this theoretical background, it is not difficult to explain how comparative proportionality review can function in a robust and meaningful manner to ensure relative proportionality. The state supreme court would need to initially review all of the cases in which death was a sentencing option for the jury, regardless of whether the actual sentence was a life or death sentence. For the reasons explained above, this review should only include cases that were sentenced *after* the state's adoption of the life-without-parole sentencing option.[563]

Once the court has identified these cases, it needs to group them according to some meaningful parameter. As discussed above, just deserts retribution provides a backward-looking set of indicia that allows the court to engage in the common law reasoning with which it has long been familiar. Using this approach, the court would separate the cases into several groups based on its assessment of the comparative culpability of the offender and the harm caused by the crime. Examining culpability would include considering the intent of the offender and his overall blameworthiness.[564] In examining the harm caused, the court would look to the number of victims, the manner in which the offender murdered the victims, and the overall pain and damage caused by the offender. These two categories are not mutually exclusive but tend to overlap in many situations (the degree of harm can often be an indicator of culpability).

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[563] For dates of adoption of life without parole for each state, s*ee* Richard Dieter, 'Death Penalty Information Center' <http://www.deathpenaltyinfo.org> accessed 21 September 2011.

[564] Richard Frase, 'Punishment Purposes' (2005) 58 Stanford L Rev 67 (2005); Andrew Von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (OUP 2005); Paul H Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* (OUP 2008).

The state supreme court could group the cases into several levels of desert – the 'worst of the worst' (most deserving of death in terms of culpability and harm); the 'really bad'; the 'bad'; the 'not so bad'. As the level of desert descended, the likelihood of a death sentence would also decrease, with an established threshold under which cases would be presumptively disproportionate.

As discussed below, I rated these categories as follows: category 4 (most culpability, most harm), category 3 (more culpability, more harm), category 2 (less culpability, less harm), and category 1 (least culpability, least harm). Given that all of the cases are aggravated murders, all of the offenders possess some degree of culpability and caused some harm (at least the death of one person), so these determinations are relative to each other.

For example, cases that are the 'worst of the worst' would involve a more culpable state of mind, clear premeditation, a defenseless victim, multiple victims, torture and dismemberment, and / or sexual assault of a minor. Cases that are in the 'not so bad' category might involve a shooting where a drug deal went bad, a convenience store robbery where the offender did not premeditate murder before entering, and / or a response to a provocation by a third party.

Figure 8.1 provides some examples of Ohio cases that I rated as category 4 ('worst of the worst'). A complete listing of all of the cases is in Appendix B. Characteristics common in the category 4 cases included sexual assault, brutality (shooting and some other physical harm), murder of multiple victims (three or more), murder of a child, murder of an elderly victim.

Figure 8.1: Examples of Category 4 Cases

		Level 4 Cases (Worst of the Worst)		
Name		**Factual Description**	**Sentence**	**Rating**
Lindsey	**Bruce**	Offender abducted, raped, and killed 5 year old girl by severing her head.	LWOP	4
Sean	**Carter**	Offender murdered his 68-year-old adoptive grandmother at her home. Upon his release from jail for theft, she had refused to allow offender to live with her. Offender raped, beat, and stabbed victim 18 times and also stole her money. DNA testing proved that the sperm, recovered from victim's rectum, belonged to offender.	Death	4
James	**Frazier**	Offender sexually assaulted and killed neighbor with cerebral palsy by strangulation and slit to throat.	Death	4

The *Bruce* case, for instance, merited a rating of 4 given the culpability of the offender and the harm caused. The premeditated, intentional abduction of a child for sexual purposes constitutes the highest level of culpability, and the physical harm caused to the child, including the sexual assault was quite high. The *Carter* case involved similar behavior, except that the victim was elderly, instead of a child. Nonetheless, a premeditated, brutal physical attack on an elderly woman, involving anal rape and extensive physical trauma indicates both a very high level of harm caused and a high level of culpability. Finally, the *Frazier* case similarly involved a sexual attack and murder of a weak victim, in this case an individual with cerebral palsy. Again, the combination of a sexual attack followed by a brutal murder makes this case one of the 'worst' in terms of culpability and harm.

Figure 8.2 provides some examples of cases that I rated as category 3. Common characteristics of these cases included a brutal crime with some mitigating element that provided context to the offender's actions and resulted in a slight decrease in perceived culpability. Such mitigating elements included prior child abuse of the offender, lesser participation by the offender in the crime, or some action by the victim that created the offender's animus.

Figure 8.2: Examples of Category 3 cases

		Level 3 Cases		
Name		Factual Description	Sentence	Rating
Stephen	Everett	Offender beat, raped and strangled woman to death. Offender suffered from bipolar disorder, had juvenile criminal past and treatment, and had suffered extensive abuse as a young child.	LWOP	3
Calvin	Horton	Offender and co-conspirator hire two men to kill witness to prior crime. The men bring the witness to offender and co-conspirator. Co-conspirator murders witness with an pickax.	LWOP	3
Richard	Nields	Offender murdered his 59-year-old girlfriend at their home. Girlfriend had asked offender to move out of the house. Offender beat girlfriend, strangled her with his hands, and stole her car and travelers' checks.	Death	3

I classified the *Everett* case as a category 3 case, despite his actions being similar to some of the category 4 cases discussed above. His case received a category 3 rating because, unlike the other cases, he demonstrated significant mitigating circumstances — his abusive childhood and bipolar disorder — that indicated that his culpability was less than others who caused a similar amount of harm. The *Horton* case involved the premeditated decision to hire two men to murder a witness in another case — a high level of culpability. When the two men brought the witness to the offender and his co-conspirator, the offender did not participate in the murder, which was perpetrated by his co-conspirator, who was clearly the leader. Because the offender did not directly cause the harm, his case was a level 3. Finally, the *Nichols* case warranted a category 3 rating because, while very serious, it did not involve the same level of harm (there was no sexual assault) as the category 4 cases. In addition, there was evidence in the case that the offender was attempting to respond to his girlfriend's decision to break up with him, slightly lowering the level of culpability, albeit still high.

Figure 8.3 provides some examples of cases that I rated as category 2. Common characteristics of these cases included a less brutal crime (often a shooting), a primary motive other than murder, murders that occurred during robberies, and murders of normal (as opposed to weaker) victims. In addition, some of these cases involved a higher degree of aggravation on the part of the victim.

Figure 8.3: Examples of Category 2 cases

		Level 2 Cases		
Name		**Factual Description**	**Sentence**	**Rating**
Stephen	**Byerly**	Offender murdered former best friend who was having an affair with his wife. Wife had gotten restraining order against offender based on past history of abuse. Offender came into trailer anyway and shot former best friend at point blank range.	LWP	2
Angelo	**Fears**	Offender murdered man in an apartment. Offender and co-conspirator went to rob victim who had recently purchased $21,000 worth of crack cocaine. Offender stole $2,000 and some jewelry in addition to the crack cocaine before shooting victim at point blank range as he pleaded for his life.	Death	2
Delano	**Hale**	Offender went to sing for victim, male voice teacher. Victim allegedly sexually propositioned offender. Offender shot victim with victim's gun four times in side of head from point blank range. Offender then used victim's credit card.	Death	2

I rated the *Byerly* case in category 2 because of the offender's motive—to take revenge against his best friend for having an affair with his wife. Although clearly premeditated, this offender's actions seem less culpable, by comparison, to those in categories 3 and 4. The level of harm is also less in that the case involved a single gunshot and the victim's actions placed him at risk of danger. The *Fears* case is also a category 2 case because of its relation to the sale of drugs. As the victim is not physically weak, as the category 4 victims above, and also creates danger by engaging in illegal activity, the harm caused here is lower than in the cases described above. In addition, the level of offender culpability is less because the

primary motive here was to steal, not to kill. Finally, the *Hale* case involved a situation in which the offender felt threatened by the victim's homosexual advances. While the killing was premeditated, the threat to the offender lowers his culpability here. His repeated shots to the head, though, make this case clearly not a category 1 case.

Figure 8.4 provides some examples of cases I rated in category 1. The cases in category 1 are the 'least bad' of the aggravated murders. Almost all of these cases involved robberies in which the killing only occurred when the robbery did not go as planned. While still possessing a high level of culpability and harm, these aggravated murders, by comparison, seemed to deserve a lesser sentence.

Figure 8.4: Examples of Category 1 cases

		Level 1 Cases		
Name		**Factual Description**	**Sentence**	**Rating**
Ronald	**Hodge**	Offender robs hotel late at night and shoots the night clerk, killing him when he threatened to call the police.	LWOP	1
Troy	**Fox**	Murder of a drug dealer by gunshot when deal went awry.	LWOP	1
Jonathan	**Clay**	Offender shot victim in the neck as he stood outside an apartment complex in drive-by shooting.	LWP	1

The *Hodge* case involved a robbery in which the killing was not the primary motive of the offender. The level of culpability is lower than in the other examples provided above. In addition, the killing was a single gunshot, resulting in a lower level of harm than some of the brutal attacks in other cases. Similarly, the *Fox* case was also a robbery that resulted from a failure to co-operate by the victim, who was a drug dealer. Again, this is certainly a serious crime, but by comparison, the level of culpability and harm is lower here. Finally, the *Clay* case, involving a killing by a stray bullet in a drive-by shooting, displays conduct on the part of the offender that

is more reckless than premeditated. Indeed, there is no evidence of an intent to kill on the part of the offender in this case, making it a category 1 case.

As discussed above, once the state supreme court categorizes the cases, it can determine whether each new death case on appeal is relatively proportionate to the others in its category. Of course, the real work of the state supreme court would be in analyzing cases that fall between the category that is presumptively relatively disproportionate (less than thirty-five per cent or more) and presumptively relatively proportionate thresholds (eighty per cent or higher). It is here that all of the other relevant considerations related to death (but not necessarily just deserts retribution) come into play. The state supreme court should ask whether there are characteristics related to the offender or the offense that would make death in this case relatively disproportionate or unusual. The state supreme court could also look at the case to see whether it is more 'like' the cohort of 'similar' cases that received life, or those that received death. This comparative reasoning is, as explained above, very similar to the common law reasoning that courts are accustomed to and should thus be relatively easy to put into practice.

The state supreme court is in an ideal position to review capital cases and separate out unusual jury verdicts by classifying cases in the manner described above. Unlike habeas corpus review, the court is able to review these cases in a relatively short time (one to five years) after the jury verdict, while the relevant evidence and information is still fresh and available.

In addition, in reviewing a series of capital cases, the state supreme court can ensure that death is reserved for the worst of the worst.[565] By reviewing cases one at

[565] Even leading supporters of the death penalty agree that its use must be limited to the most culpable offenders. See, e g, Alex Kozinski and Sean Gallagher, Death: The Ultimate Run-On Sentence; (1995), 46 Case Western Reserve L Rev 1, 29

a time and comparing them against past precedent, the state supreme court can reverse cases that are not the worst of the worst and cure jury verdicts that over-punish certain defendants.

C. Consequences of Practicing 'Purposive' Proportionality

As explained, the current *status quo* in capital cases fails to achieve any level of relative proportionality among death sentences. Were states to adopt a more rigorous form of appellate review for death sentences, they could achieve several important outcomes and improve their adjudication of capital cases.

First, the states could address the problem of disparity in capital sentencing. As explained above, the current safeguards of aggravating factors and comparative proportionality review are ineffective in achieving any consistency in sentencing. As a central court reviewing every capital case, a state supreme court could, without significant effort, mandate consistency in sentencing among death-eligible cases. By using standard indicia, such as the just deserts approach highlighted above, the court could ensure that only those cases with the requisite culpability and harm received the death penalty.

Achieving some level of uniformity is critically important given the widespread evidence that other, illegitimate factors often influence outcomes in capital cases. The influence of race, for instance, could be mitigated and perhaps eliminated with the application of an objective, neutral standard. Likewise, a state supreme court could eliminate the influence of geography, at least within a state, by applying a consistent standard.

('[W]idening the circumstances under which death may be imposed ... will not do a single thing ... to ensure that the very worst members of our society ... are put to death.'); Robert Blecker, 'Among Killers, Searching for the Worst of the Worst', *Washington Post*, 3 December 2000, at B1 ('Our responsibility is to figure out who should be included in the small minority -- the very worst of the worst -- who deserve to die.')

Second, widespread use of robust comparative proportionality review, as advocated above, would create a common law of capital sentencing. Over time, the court would develop a set of precedents that regularized the use of the death penalty. With a common law set of precedents among the state courts, greater consistency across jurisdictions could be achieved as well.

Third, having state supreme courts review capital cases in a more robust way could help ensure that only the 'worst of the worst' receive the death penalty. Currently, many of the individuals who are executed committed far less serious crimes than individuals who are serving life sentences. A meaningfully applied comparative proportionality review would enable state courts to remedy this shortcoming.

Finally, adopting meaningful comparative proportionality review could lead to the abolition of the death penalty. As relative proportionality is applied, the number of cases that are consistently viewed as worthy of death will decrease in light of the growing hesitancy of jurors to apply the death penalty. Without a critical mass of cases, the penalty of death may ultimately become relatively disproportionate itself.

D. Practicing 'Purposive' Proportionality in Ohio

Having explained the 'purposive' model, it is interesting to assess how it might work with the Ohio data considered in the earlier chapters of the thesis. As mentioned above, the first step of the analysis is to group the cases based on their 'similarity'. Using just deserts retribution, the criteria for determining similarity are the culpability of the offender and the harm caused by the criminal act.[566]

[566] Richard Frase, 'Punishment Purposes' (2005) 58 Stanford L Rev 67 (2005); Andrew Von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the*

In the context of capital sentencing, the question of culpability includes the cold-blooded and calculating nature of the crime, the cruelty and depraved heart of the offender, the extent to which the offender is blameworthy for the act and the level of blame, including the degree of premeditation. The culpability assessment also includes any mitigating factors that limit the blameworthiness of the offender, including mental incapacity.

The harm caused includes the number of victims. It also requires consideration of the manner in which the offender murdered the victim(s) including the type and extent of physical pain, psychological pain, and torture that the offender caused.

Using these two indicia – culpability and harm – I divided the cases into four levels of desert, with level one including the most culpable offenders and the crimes that included the highest degree of harm, and each level having a lesser degree of culpability and harm. While not an exact science, the separation of cases based on levels of desert was not inherently difficult because it only required broad differentiations between cases, grouping them into one of four categories.

In addition, to eliminate any bias in determining the outcomes, I enlisted ten law students to rank and group the cases according to the purposive approach. Using an instrument that I provided which contained a short description of each case, the students ranked the cases according to culpability and harm, grouping them in the same four groups I outlined previously. These rankings were done blindly; that is, the students had no knowledge of the sentencing outcome in the case.

Appendix B contains the complete chart of the cases, indicating the following: (1) the name of the case; (2) the sentence; (3) the qualitative description

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Principles (OUP 2005); Paul H Robinson, *Distributive Principles of Criminal Law: Who Should Be Punished How Much?* (OUP 2008).

of the key facts of the case; (4) my ranking of the case. Appendix C compares (1) each individual student's ranking of the case; and (2) the average student rank for the case, and (3) my ranking of the case. As mentioned above, the ranking scale is as follows: 4 (worst of the worst; most culpable; most harm), 3 (really bad; more culpable; more harm); 2 (bad; less culpable; less harm); 1 (not so bad; least culpable; least harm). It is also important to note that these monikers are relative in nature – almost all aggravated murders have both a significant degree of culpability and harm.

The actual grouping is an inexact qualitative methodology, but allows for broad groupings based on 'similarity'. As Appendix B shows, each case received a value from 1-4, with 1 being the least culpable / least harm caused and 4 being the most culpable / most harm caused. The chart reflects the overall consistency of scoring the cases given the qualitative descriptions.

Having grouped them into four categories, I then assessed the relative proportionality of the Ohio death cases as done previously in chapters six and seven, comparing each death case to the corresponding group of 'similar' cases. Figure 8.5 provides the results of my comparative proportionality review using the 'purposive' approach.

Figure 8.5: Retribution 'Purposive' Proportionality Review (My Results)

Level of Desert	Life	Death	Overall	Ratio
4 (most culpable / most harm)	11	18	18/29	0.62
3 (more culpable / more harm)	37	18	18/55	0.33
2 (less culpable / less harm)	37	13	13/50	0.26
1 (least culpable / least harm)	9	0	0/9	0.00

Number and Proportion of Death Sentence Cases for Which the Death Sentencing Frequency in Similar Cases Was:		
Less than 0.35 (presumptively disproportionate)	0.63	(31/49)
0.80 or greater (presumptively proportionate)	0.00	(0/49)

In my 'purposive' comparative proportionality review, 63% of the Ohio death cases (31 out of 49) were presumptively relatively disproportionate. Only category 4, most culpable and most harm, had a majority of cases that received the death penalty.

To cross-check the validity of my classifications (and minimize any potential bias), I then compared my results with those of my law students. Figure 8.6 displays these results and Appendix C provides the valuation of each student in each case.

Figure 8.6: Cross-Check of Purposive Proportionality Review

Name		Sentence	My Rating	4	3	2	1	% Agree with Berry	Average
Stanley	**Adams**	Death	4	8	2	0	0	80%	3.80
Nawaz	**Ahmed**	Death	4	4	6	0	0	40%	3.40
Sean	**Carter**	Death	4	10	0	0	0	100%	4.00
Jessie	**Cowans**	Death	4	6	3	1	0	60%	3.50
Donald	**Craig**	Death	4	10	0	0	0	100%	4.00
Kelly	**Foust**	Death	4	10	0	0	0	100%	4.00
Antonio	**Franklin**	Death	4	6	4	0	0	60%	3.60
James	**Frazier**	Death	4	9	1	0	0	90%	3.90
Larry	**Gapen**	Death	4	8	2	0	0	80%	3.80
Brett	**Hartman**	Death	4	9	1	0	0	90%	3.90

Patrick	**Leonard**	Death	4	7	3	0	0	70%	3.70
Ralph	**Lynch**	Death	4	9	1	0	0	90%	3.90
Scott	**Mink**	Death	4	7	3	0	0	70%	3.70
Frederick	**Mundt**	Death	4	10	0	0	0	100%	4.00
Steven	**Smith**	Death	4	10	0	0	0	100%	4.00
Raymond	**Tibbetts**	Death	4	6	4	0	0	60%	3.60
James	**Trimble**	Death	4	6	4	0	0	60%	3.60
Robert	**Williams**	Death	4	10	0	0	0	100%	4.00
Jay	**Biggs**	LWOP	4	9	1	0	0	90%	3.90
Lindsey	**Bruce**	LWOP	4	10	0	0	0	100%	4.00
Terrance	**Davis**	LWOP	4	8	2	0	0	80%	3.80
George	**Foster**	LWOP	4	9	1	0	0	90%	3.90
Robert	**Luke**	LWOP	4	6	3	1	0	60%	3.50
Kevin	**Neal**	LWOP	4	6	4	0	0	60%	3.60
Patrick	**Rafferty**	LWOP	4	7	3	0	0	70%	3.70
Rose Kate	**Roseborough**	LWOP	4	7	3	0	0	70%	3.70
Barry	**Satta**	LWOP	4	10	0	0	0	100%	4.00
Samuel	**Williams**	LWOP	4	5	4	1	0	50%	3.40
Phillip	**Gammalo**	LWP	4	7	3	0	0	70%	3.70
David	**Braden**	Death	3	0	8	2	0	80%	2.80
Grady	**Brinkley**	Death	3	1	7	2	0	70%	2.90
Douglas	**Coley**	Death	3	0	8	2	0	80%	2.80
Jeronique	**Cunningham**	Death	3	2	7	1	0	70%	3.10
Roland	**Davis**	Death	3	2	6	2	0	60%	3.00
Phillip	**Elmore**	Death	3	2	6	2	0	60%	3.00
Clarence	**Fry**	Death	3	4	5	1	0	50%	3.30
Scott	**Group**	Death	3	1	6	3	0	60%	2.80
Gerald	**Hand**	Death	3	3	5	2	0	50%	3.10
James	**Hanna**	Death	3	3	5	2	0	50%	3.10
Cleveland	**Jackson**	Death	3	1	8	1	0	80%	3.00
Rayshawn	**Johnson**	Death	3	1	6	3	0	60%	2.80
Odraye	**Jones**	Death	3	1	4	3	2	40%	2.40
James	**Jordan**	Death	3	2	8	0	0	80%	3.20
Gregory	**McKnight**	Death	3	1	9	0	0	90%	3.10
Richard	**Nields**	Death	3	1	7	2	0	70%	2.90
Michael	**Scott**	Death	3	1	8	1	0	80%	3.00
James	**Taylor**	Death	3	2	7	1	0	70%	3.10
Anthony	**Anderson**	LWOP	3	2	7	1	0	70%	3.10
Lewis	**Brown**	LWOP	3	1	6	2	1	60%	2.70
Scott	**Burrows**	LWOP	3	0	7	3	0	70%	2.70
Kevin	**Calwise**	LWOP	3	1	6	3	0	60%	2.80
Ricky	**Conner**	LWOP	3	0	5	3	2	50%	2.30
Vincent	**Doan**	LWOP	3	0	6	4	0	60%	2.60
Stephen	**Everett**	LWOP	3	2	5	1	1	50%	3.00
Michael	**Glenn**	LWOP	3	0	10	0	0	100%	3.00

Eric	**Harmon**	LWOP	3	0	5	4	1	50%	2.40
Nathan	**Herring**	LWOP	3	1	7	2	0	70%	2.90
Edward	**Hodge**	LWOP	3	1	7	2	0	70%	2.90
Calvin	**Horton**	LWOP	3	1	5	4	0	50%	2.70
Thomas	**Lewers**	LWOP	3	0	7	3	0	70%	2.70
Jermaine	**McKinney**	LWOP	3	4	6	0	0	60%	3.40
Richard	**Miller**	LWOP	3	2	7	1	0	70%	3.10
Timothy	**Moulder**	LWOP	3	0	7	3	0	70%	2.70
Gregg	**Myers**	LWOP	3	0	7	3	0	70%	2.70
Redan	**Norman**	LWOP	3	1	6	3	0	60%	2.80
James	**O'Hara**	LWOP	3	2	5	3	0	50%	2.90
James	**Schaar**	LWOP	3	1	5	4	0	50%	2.70
Ray	**Smith**	LWOP	3	1	4	5	0	40%	2.60
Vernon	**Spence**	LWOP	3	1	5	4	0	50%	2.70
Montez	**Taylor**	LWOP	3	0	9	1	0	90%	2.90
Eroge	**Thomas**	LWOP	3	2	7	1	0	50%	3.10
Angel	**Torres**	LWOP	3	2	8	0	0	80%	3.20
Charles	**Weatherford**	LWOP	3	0	7	1	2	70%	2.50
Toby	**Wilcox**	LWOP	3	2	7	1	0	70%	3.00
George	**Williams**	LWOP	3	0	7	3	0	70%	2.70
Mark	**Worley**	LWOP	3	0	8	2	0	80%	2.80
Curtis	**Young**	LWOP	3	4	5	1	0	50%	3.30
Jonathan	**Anderson**	LWP	3	0	6	3	1	60%	2.50
Michael	**Davis**	LWP	3	4	5	1	0	50%	3.30
Lamar	**Florence**	LWP	3	0	6	3	1	60%	2.50
Angela	**Garcia**	LWP	3	2	7	1	0	70%	3.10
Thomas	**Siller**	LWP	3	2	7	1	0	70%	3.10
Donovan	**Simpson**	LWP	3	2	4	4	0	40%	2.80
Joseph	**Taylor**	LWP	3	0	8	2	0	80%	2.80
Rocky	**Barton**	Death	2	0	5	4	1	40%	2.40
August	**Cassano**	Death	2	3	4	3	0	30%	3.00
James	**Conway**	Death	2	1	5	4	0	40%	2.70
Kareem	**Jackson**	Death	2	0	6	4	0	40%	2.60
Ulysses	**Murphy**	Death	2	1	5	3	1	30%	2.60
Quisi	**Bryan**	Death	2	0	3	4	3	30%	2.00
James	**Conway**	Death	2	2	3	3	2	30%	2.50
John	**Drummond**	Death	2	0	4	6	0	60%	2.40
Angelo	**Fears**	Death	2	0	5	5	0	50%	2.50
Delano	**Hale**	Death	2	1	1	7	1	70%	2.20
Ahmad	**Issa**	Death	2	0	4	5	1	50%	2.30
Carl	**Lindsey**	Death	2	1	4	5	0	50%	2.60
Kerry	**Perez**	Death	2	0	3	7	0	70%	2.30
Craig	**Anderson**	LWOP	2	0	1	8	1	80%	2.00
Gerald	**Brown**	LWOP	2	0	4	6	0	60%	2.40
Javon	**Byrd**	LWOP	2	0	5	5	0	50%	2.50

William	**Calhoun**	LWOP	2	0	3	5	2	50%	2.10
Shawn	**Collins**	LWOP	2	0	1	6	3	60%	1.80
Jamel	**Curtis**	LWOP	2	0	1	5	4	50%	1.70
Dontay	**Ellenwood**	LWOP	2	0	2	5	3	50%	1.90
Wayne	**Ervin**	LWOP	2	0	2	6	2	60%	2.00
Eric	**Gibbs**	LWOP	2	0	3	7	0	70%	2.30
Shondale	**Gibson**	LWOP	2	0	2	5	3	50%	1.90
Ramon	**Gray**	LWOP	2	0	3	5	2	50%	2.00
Duane	**Gregley**	LWOP	2	0	1	4	3	40%	1.80
Marcus	**Harris**	LWOP	2	0	1	9	0	90%	2.10
Gregory	**Hicks**	LWOP	2	0	1	8	1	80%	2.00
Kevin	**Hubbard**	LWOP	2	0	3	4	2	40%	2.10
Marvin	**Martin**	LWOP	2	0	2	5	3	50%	1.90
Tina	**McDowell**	LWOP	2	0	5	5	0	50%	2.50
Clive	**Melhado**	LWOP	2	0	2	8	0	80%	2.20
Clarence (Skip)	**Roberts**	LWOP	2	0	4	6	0	60%	2.40
Jermane	**Scott**	LWOP	2	1	4	5	0	50%	2.60
Ronald	**Shaffer**	LWOP	2	0	4	6	0	60%	2.40
Kenneth	**Tucker**	LWOP	2	0	2	7	1	70%	2.10
Tinotchy	**Ward**	LWOP	2	0	2	6	2	60%	2.00
Dwight	**Whatley**	LWOP	2	0	3	4	3	40%	2.00
Cameron	**Williams**	LWOP	2	0	4	6	0	60%	2.40
Lana	**Williams**	LWOP	2	1	4	5	0	50%	2.60
Lawrence	**Williams**	LWOP	2	0	2	7	1	70%	2.10
Jeffrey	**Zenowicz**	LWOP	2	0	3	7	0	70%	2.30
Stephen	**Byerly**	LWP	2	0	2	6	2	60%	2.00
Ian	**Duran**	LWP	2	0	4	5	1	50%	2.30
Douglas	**Evans**	LWP	2	0	1	6	3	60%	1.90
Daniel	**Grant**	LWP	2	0	3	5	2	50%	2.10
Sam	**Hairston**	LWP	2	0	1	6	3	60%	1.80
Justin	**Lucas**	LWP	2	0	4	5	1	50%	2.30
Kristoffer	**Morris**	LWP	2	0	4	6	0	60%	2.40
Bryan	**Singleton**	LWP	2	1	1	7	1	70%	2.20
Dennis	**Williams**	LWP	2	1	1	7	1	70%	2.20
Jason	**Betts**	LWOP	1	0	2	3	5	50%	1.70
Mark	**Ducic**	LWOP	1	0	2	4	4	40%	1.80
Troy	**Fox**	LWOP	1	0	0	5	5	50%	1.50
Ronald	**Hodge**	LWOP	1	0	4	3	3	30%	2.10
Omar	**Jastrow**	LWOP	1	0	2	3	5	50%	1.70
Donald	**Butts**	LWP	1	0	3	2	5	50%	1.80
Jonathan	**Clay**	LWP	1	0	1	4	5	50%	1.60
Anthony	**Cockroft**	LWP	1	0	1	4	5	50%	1.60
Leon	**Hawkins**	LWP	1	0	2	4	4	40%	1.80

Overall, students agreed with my rating of the case (on a scale of 1-4) 63% of the time. Figure 8.7 examines in more detail where the students were more likely to agree with me. For each category, I determined the average percentage of students who agreed with me in my ranking of the case.

Figure 8.7: Law Student Results by Category

Category	Death	Life	%avg
4	18	11	79%
3	18	37	64%
2	13	37	55%
1	0	9	46%

In the category 4 (most culpability / harm cases), 79% of the students agreed, on average, with my ranking of the cases. By contrast, only 46% of the students agreed, on average, with my ranking of the cases in the lowest category, category 1. Indeed, as the seriousness decreased, the percentage of students who agreed with me also decreased, from 79% (category 4) to 64% (category 3) to 55% (category 2) to 46% (category 1).

These results demonstrate that it was easier to separate the 'worst' cases from the pool than to differentiate between cases of lesser culpability and harm. In other words, there was significantly more consensus in determining the category 4 cases than separating the category 2 from the category 3 cases.

As this approach is, admittedly, an inexact science, finding some disparity in determinations among the lesser culpable (and lesser harm) cases is not troubling. With the overall goal of simply isolating the cases that are 'similar' and separating out those that are the most culpable (and cause the most harm), the level of consensus demonstrated here (almost 80%) suggests that the Ohio Supreme Court could perform the same task with a sufficient degree of accuracy. In other words,

the cross-check demonstrates consensus on which cases, as a matter of just deserts, were the 'worst of the worst.'

The results, then, were generally consistent between my rankings and the student rankings, as Figures 8.5 and 8.6 reveal. Again, the purpose is to establish groupings of 'similar' cases, and this method clearly demonstrates that such groupings are possible.

Further, this result showed that, compared with the findings of the comparative proportionality review based on regression analysis of all cases in chapter six (which found that 41% of the death sentences imposed were relatively disproportionate), the presumptive method produced a considerably higher proportion of 63 per cent. In addition, using the purposive method, none of the Ohio cases were presumptively relatively proportionate, with the highest desert group (level 4) having a death sentencing ratio of 0.62, whereas the regression method had found that almost 30 per cent were presumptively relatively proportionate.

Having examined the 'purposive' approach and how it might work in Ohio, the thesis concludes in chapter nine by summarizing the findings of the thesis and assessing the possibilities for reform in Ohio.

CHAPTER NINE: CONCLUSION

Our remedies oft in ourselves do lie, which we ascribe to heaven.

- William Shakespeare, *All's Well that Ends Well*, 1.1

As indicated in chapter one, this thesis has sought to answer several questions. First, the thesis asked whether Ohio's use of the death penalty resulted in sentencing outcomes that are relatively proportionate during the period from 1996-2011, after Ohio adopted life without parole. Second, in light of the results of the empirical study of Ohio death cases, the thesis sought to propose a normative approach to determining 'similar' cases for purposes of comparative proportionality review.

Returning, then, to the initial research questions, this thesis has clearly established that the death sentencing outcome in Ohio capital cases from 1996-2011 are, as a group, relatively disproportionate. The various approaches of measuring 'similarity' based on consideration of all 49 cases sentenced to death in Ohio yielded an estimate that between 41 and 63 per cent were presumptively relatively disproportionate, and less than 30 per cent of Ohio death cases were presumptively relatively proportionate.

Using the overall aggravation method, I determined, using logistic regression analysis, that four factors best predicted the sentencing outcomes in Ohio cases (in the order of their influence): (1) the murder was particularly brutal, (2) the murder victim was elderly, (3) the murder victim had a prior intimate relationship with the offender, and (4) the jury found two or more aggravating factors. In addition, I determined that factors which had been predictive of death in other jurisdictions did not have a significant influence in Ohio, particularly race. As explained before, I

attributed the decrease in the influence of race on the sentencing outcomes in Ohio capital cases to the availability of life without parole.

The fact specific comparative proportionality analysis considered various aggravating, crime-based, and victim-based factors. With the exception of elderly victims and victims that were spouses or girlfriends of the offenders, the groups of 'similar' cases did not have high death sentencing rates. As a result, most of these facts, particularly when isolated, seem to be poor predictors of 'similarity'.

In light of the practical difficulties related to the possible implementation of the overall aggravation approach or the fact specific approach, I proposed my own normative approach to conducting proportionality review – the 'purposive' approach. As explained above, this approach uses the level of the desired purpose of punishment (preferably just deserts retribution) to separate cases into 'similar' groups. This method provides both a practical and easy to apply remedy to the problem of eliminating sentencing disparity and achieving relative proportionality.

In the final analysis, this thesis demonstrates the dire need of the Ohio Supreme Court (and other state supreme courts) to remedy the flawed appellate review of capital cases, adopting a more rigorous form of comparative proportionality review to eliminate arbitrariness and disparity in capital sentencing. As explained in chapter six, failure to do so would continue to validate 'cruel and unusual' punishments that are comparatively excessive.

Having demonstrated the problems with current methods of comparative proportionality and offered one possible approach to remedying these problems, I conclude by considering the likelihood of reform. Namely, what indicia exist to suggest that Ohio might reform its current method of comparative proportionality review? And further, given that most states that conduct comparative

proportionality review do so in a manner similar to Ohio (precedent seeking approach), to what extent is national reform possible?

First, with respect to Ohio, the Ohio Supreme Court could reform its approach to comparative proportionality review. Ohio Supreme Court Justice Paul Pfeifer, who ironically drafted the Ohio death penalty statute as a legislator in 1981, has called for reform of the Court's approach to comparative proportionality review.[567] In the last two years, he has further argued for the adoption of a panel to review all of the Ohio death cases, believing that many who are on death row should not be there. Earlier this year, he argued for the abolition of the death penalty in Ohio altogether, noting that abolition was the only way to prevent injustice in capital cases. Pfeifer, though, does not seem to have any other peers that agree with his view of Ohio's comparative proportionality review or broader view of the death penalty. To effect change, he would need three more justices to agree with his perspective (there are seven on the Ohio Supreme Court, including Pfeifer).

The broader political climate in Ohio, particularly in light of its political diversity, may be favorable to death penalty reform, including reform of comparative proportionality review. Current Governor John Kasich has recently commuted two death sentences, and his predecessor, Ted Strickland, also commuted several capital cases during his time as governor.[568]

The willingness to commute death sentences and vocally oppose the death penalty (as a state supreme court justice) indicate an environment where the political consequence of opposing the death penalty, narrowing its scope, or reversing capital

[567] Douglas Berman, 'Sentencing Law and Policy', <sentencing.typepad.com> accessed 30 September 2011.

[568] Ibid.

cases is not severe enough to prohibit such action. Indeed, there is no evidence of political backlash or negative consequence for these actions by the respective Governors or Justice Pfeifer.

On the other hand, state politicians, whether elected to serve in the judiciary as judges or in the legislature as representatives, may be hesitant to alter the status quo. This is particularly true in the death penalty context, as it remains a politically charged issue. The idea that the Ohio Supreme Court will begin to reverse significant numbers of cases on relative proportionality grounds seems somewhat implausible, given the likely negative reaction of prosecutors and the general public.

Indeed, there currently appears to be little movement toward death penalty reform in Ohio, and certainly not concerning its comparative proportionality review scheme. Without a high profile case that demonstrates the flaws of Ohio's comparative proportionality, legislative reform seems unlikely.

Nonetheless, the Ohio Supreme Court could reform its use of comparative proportionality review immediately, most likely without negative political repercussions. As argued previously, the Court should, at the very least, (1) move away from its precedent-seeking approach to a frequency approach and (2) consider life cases in its analysis.

In addition, the Ohio legislature (and other state legislatures) could provide its own reforms in the area of comparative proportionality review, by requiring the Ohio Supreme Court to conduct a more robust proportionality review in each case. Without some triggering event, though, it seems unlikely that such a reform would get enough political support, particularly given the controversial nature of capital punishment.

Nationally, state legislatures likewise appear to have little inclination to reform comparative proportionality review. Abolitionists would rather spend political capital on attempting to abolish capital punishment altogether than argue for improved safeguards in state capital punishment systems. Death penalty advocates likewise would be hesitant to promote reform where the outcome is that state appellate courts reverse more death sentences, even if sentencing consistency improves.

Having examined the possibility of reform in Ohio, I conclude by exploring whether the United States Supreme Court might play a role in reforming comparative proportionality review through its review of capital cases. As mentioned in chapter six, most of the states that conduct comparative proportionality review may be doing so in violation of the Eighth Amendment. While *Pulley v. Harris* makes clear that the Constitution does not require comparative proportionality review, it is clear that the appellate review of death cases by many states fails to achieve any level of relative proportionality as required by *Gregg v. Georgia*. Nonetheless, this does not mean that the United States Supreme Court would necessarily be receptive to an argument that state courts must conduct truly meaningful appellate review.

Justice Stevens' opinion in *Walker v. Georgia* provides a recent litmus test of the Supreme Court's views on the current use of comparative proportionality review by state supreme courts.[569] As explained earlier in the thesis, Justice Stevens reaches the same conclusion that I do about comparative proportionality review – that, as currently practiced, it does virtually nothing to safeguard against disparate

[569] 555 US 355 (2008).

results in capital sentencing. Chastising the 'perfunctory' approach to comparative proportionality review of the Georgia Supreme Court, he explained,

> And the likely result of such a truncated review—particularly in conjunction with the remainder of the Georgia scheme, which does not cabin the jury's discretion in weighing aggravating and mitigating factors—is the arbitrary or discriminatory imposition of death sentences in contravention of the Eighth Amendment.

Stevens thus expresses the view that the Georgia capital scheme, that he voted to approve as part of the plurality in *Gregg*, may violate the Eighth Amendment because of its failure to provide some measure of relative proportionality.

It is clear from this thesis that Stevens' complaints about the Georgia capital scheme are equally applicable to Ohio's approach to comparative proportionality review. Ohio's comparative proportionality review, as explained above, is as cursory as Georgia's approach, citing a handful of 'similar' death cases without any degree of analysis.

Stevens' criticism of the Georgia comparative proportionality review scheme does not appear to have additional support on the Supreme Court. Although his opinion was simply in response to the denial of certiorari in *Walker*, no other justices joined in his opinion. This failure to sign on to his opinion may not be ultimately significant, as the Court dismissed the case on other procedural grounds, but there was silence nonetheless. In addition, in the three years since *Walker*, Justice Stevens has retired from the Supreme Court.

Interestingly, at the heart of the issue concerning the Supreme Court's consideration of whether state comparative proportionality review schemes violate the Eighth Amendment, is the degree to which the Court believes it ought to defer to the states in their administration of capital punishment. Indeed, as explained earlier,

the Court appeared to soften its stance toward the safeguards – aggravating factors and appellate review – approved in *Gregg* during the two decades that followed.

In his last few years on the Court, Stevens had clearly abandoned his prior view that the Court ought to defer to state legislatures and courts in the administration of the death penalty. In *Baze v. Rees*, Stevens cited both the inadequacy of the safeguards against arbitrariness and the high degree of error, including the risk of executing innocent individuals in arguing that the death penalty should be abolished under the Eighth Amendment.[570] Interestingly, Justice Stevens was the third justice to follow this same shift – Justices Powell and Blackmun had both, in recent years, repudiated the death penalty for similar reasons.[571]

Thus, the likelihood of the Court mandating reform of safeguards such as comparative proportionality review depends on other Justices following the trajectory of Stevens, Powell, and Blackmun in abandoning a deferential approach to state capital schemes. Part of any movement in this direction may result from the overall national climate toward the death penalty. In recent years, the United States has moved subtly in the direction of abolition, with five jurisdictions – Connecticut, Illinois, New Jersey, New York, and New Mexico – abolishing the death penalty. In addition, high profile cases of presumably innocent individuals – like Cameron Todd Willingham and Troy Davis – being executed can only further the national doubt about the fairness of the death penalty.

Even so, the Supreme Court seems more likely to restrict the use of the death penalty through additional categorical exclusions of groups of individuals or crimes from the death penalty by expanding its evolving standards of decency

[570] 553 US 35 (2008).

[571] Berry (n 35).

jurisprudence, rather than through comparative proportionality review. In other words, the Court appears more likely to restrict the use of the death penalty on absolute proportionality grounds, not relative proportionality grounds.

Reform of comparative proportionality review, though, may provide a feasible path to abolition. By requiring states to demonstrate relative proportionality in capital sentences, the Court can itself reverse and force the states to reverse, a number of cases on relative proportionality grounds. Were the Supreme Court (and by cause-and-effect, the state supreme courts) to take the concept of relative proportionality seriously, the consequence would be an exponential effect in reversal of jury sentences of death. A survey of the capital cases since the adoption of life without parole in most states indicates both (1) a small percentage of cases receive the death penalty and (2) a decreasing percentage (since 2000) of cases receive the death penalty.

As in Ohio, without any robust appellate review, many jurisdictions will have significant disparities in jury sentencing outcomes. This is particularly likely to be true given the empirical evidence of the influence of factors such as race and geography on capital sentencing outcomes. Implementing robust proportionality review would result in a significant percentage of groups of 'similar' cases having a low (below 0.35) death sentencing ratio. Many of the new death cases on appeal would then be relatively disproportionate. Further, as the Court increasingly reversed cases on such grounds, the overall number of death cases would decrease, lowering the death sentencing frequency within each comparable group. This could continue until *no* capital cases are relatively proportionate, resulting in the *de facto* abolition of the death penalty.

Following this hypothetical analysis a bit further, if the Court enforces its relative proportionality requirement and the overall number of death sentences in the United States continues to decrease toward a negligible level, the Supreme Court will have a much easier time coming to the conclusion that the death penalty violates the evolving standards of decency because it will have the required objective evidence that the use of death penalty has significantly diminished.

Despite the disinclination toward reform, the concept of relative proportionality remains important to assure any level of sentencing consistency in capital cases. Indeed, the concept of relative proportionality remains an important safeguard against arbitrariness and discriminatory sentencing outcomes. As this thesis has demonstrated, it is an area in which immediate reform is needed to avoid the continuation of constitutionally impermissible sentencing outcomes in capital cases.

APPENDIX A

Case		Sentence	Propensity Score
Raymond	Tibbetts	Death	98.45%
Nawaz	Ahmed	Death	97.23%
Larry	Gapen	Death	97.23%
Brett	Hartman	Death	97.23%
Patrick	Leonard	Death	97.23%
Stanley	Adams	Death	88.95%
Quisi	Bryan	Death	88.95%
James	Conway	Death	88.95%
Donald	Craig	Death	88.95%
Kelly	Foust	Death	88.95%
Ralph	Lynch	Death	88.95%
Frederick	Mundt	Death	88.95%
Steven	Smith	Death	88.95%
Lindsey	Bruce	LWOP	88.95%
Dennis	Williams	LWP	88.95%
David	Braden	Death	83.42%
Jessie	Cowans	Death	76.22%
Roland	Davis	Death	76.22%
Antonio	Franklin	Death	76.22%
Scott	Mink	Death	76.22%
Scott	Burrows	LWOP	76.22%
Mark	Worley	LWOP	76.22%
James	Conway	Death	74.36%
Delano	Hale	Death	74.36%
Ulysses	Murphy	Death	74.36%
Grady	Brinkley	Death	63.88%
Phillip	Elmore	Death	63.88%
Clarence	Fry	Death	63.88%
James	Trimble	Death	63.88%
Terrance	Davis	LWOP	63.88%
Mark	Ducic	LWOP	63.88%
Michael	Glenn	LWOP	63.88%
Jeffrey	Zenowicz	LWOP	63.88%
Sean	Carter	Death	53.59%
Robert	Williams	Death	53.59%
Thomas	Siller	LWP	53.59%
Rocky	Barton	Death	38.91%
Richard	Nields	Death	38.91%
Vincent	Doan	LWOP	38.91%

Carl	Lindsey	Death	28.86%
August	Cassano	Death	28.86%
Jeronique	Cunningham	Death	28.86%
John	Drummond	Death	28.86%
Angelo	Fears	Death	28.86%
Scott	Group	Death	28.86%
James	Hanna	Death	28.86%
Cleveland	Jackson	Death	28.86%
Kareem	Jackson	Death	28.86%
Odraye	Jones	Death	28.86%
James	Jordan	Death	28.86%
Gregory	McKnight	Death	28.86%
Kerry	Perez	Death	28.86%
Michael	Scott	Death	28.86%
Kevin	Hubbard	LWOP	28.86%
Anthony	Anderson	LWOP	28.86%
Jay	Biggs	LWOP	28.86%
Gerald	Brown	LWOP	28.86%
Javon	Byrd	LWOP	28.86%
Kevin	Calwise	LWOP	28.86%
Wayne	Ervin	LWOP	28.86%
George	Foster	LWOP	28.86%
Eric	Harmon	LWOP	28.86%
Marcus	Harris	LWOP	28.86%
Nathan	Herring	LWOP	28.86%
Jermaine	McKinney	LWOP	28.86%
Richard	Miller	LWOP	28.86%
Timothy	Moulder	LWOP	28.86%
Gregg	Myers	LWOP	28.86%
Kevin	Neal	LWOP	28.86%
Rose Kate	Roseborough	LWOP	28.86%
Ronald	Shaffer	LWOP	28.86%
Vernon	Spence	LWOP	28.86%
Angel	Torres	LWOP	28.86%
Kenneth	Tucker	LWOP	28.86%
Toby	Wilcox	LWOP	28.86%
Curtis	Young	LWOP	28.86%
Douglas	Evans	LWP	28.86%
Angela	Garcia	LWP	28.86%
Daniel	Grant	LWP	28.86%
Ahmad	Issa	Death	12.75%
Douglas	Coley	Death	12.75%

James	Frazier	Death	12.75%
Nathaniel	Jackson	Death	12.75%
Rayshawn	Johnson	Death	12.75%
James	Taylor	Death	12.75%
Craig	Anderson	LWOP	12.75%
Jason	Betts	LWOP	12.75%
Lewis	Brown	LWOP	12.75%
William	Calhoun	LWOP	12.75%
Shawn	Collins	LWOP	12.75%
Ricky	Conner	LWOP	12.75%
Jamel	Curtis	LWOP	12.75%
Dontay	Ellenwood	LWOP	12.75%
Stephen	Everett	LWOP	12.75%
Troy	Fox	LWOP	12.75%
Eric	Gibbs	LWOP	12.75%
Shondale	Gibson	LWOP	12.75%
Ramon	Gray	LWOP	12.75%
Duane	Gregley	LWOP	12.75%
Gregory	Hicks	LWOP	12.75%
Edward	Hodge	LWOP	12.75%
Ronald	Hodge	LWOP	12.75%
Calvin	Horton	LWOP	12.75%
Omar	Jastrow	LWOP	12.75%
Thomas	Lewers	LWOP	12.75%
Robert	Luke	LWOP	12.75%
Marvin	Martin	LWOP	12.75%
Tina	McDowell	LWOP	12.75%
Clive	Melhado	LWOP	12.75%
Redan	Norman	LWOP	12.75%
James	O'Hara	LWOP	12.75%
Patrick	Rafferty	LWOP	12.75%
Clarence (Skip)	Roberts	LWOP	12.75%
Barry	Satta	LWOP	12.75%
James	Schaar	LWOP	12.75%
Jermane	Scott	LWOP	12.75%
Ray	Smith	LWOP	12.75%
Montez	Taylor	LWOP	12.75%
Eroge	Thomas	LWOP	12.75%
Tinotchy	Ward	LWOP	12.75%
Charles	Weatherford	LWOP	12.75%
Dwight	Whatley	LWOP	12.75%
Cameron	Williams	LWOP	12.75%

George	Williams	LWOP	12.75%
Lana	Williams	LWOP	12.75%
Lawrence	Williams	LWOP	12.75%
Samuel	Williams	LWOP	12.75%
Jonathan	Anderson	LWP	12.75%
Donald	Butts	LWP	12.75%
Stephen	Byerly	LWP	12.75%
Jonathan	Clay	LWP	12.75%
Anthony	Cockroft	LWP	12.75%
Michael	Davis	LWP	12.75%
Ian	Duran	LWP	12.75%
Lamar	Florence	LWP	12.75%
Phillip	Gammalo	LWP	12.75%
Sam	Hairston	LWP	12.75%
Leon	Hawkins	LWP	12.75%
Justin	Lucas	LWP	12.75%
Kristoffer	Morris	LWP	12.75%
Donovan	Simpson	LWP	12.75%
Bryan	Singleton	LWP	12.75%
Joseph	Taylor	LWP	12.75%

APPENDIX B

		Level 4 Cases (Worst of the Worst)		
Name		**Factual Description**	**Sentence**	**Rating**
Stanley	**Adams**	Offender murdered woman using blunt force trauma. Offender also raped and killed twelve year old daughter by strangling with a phone cord.	Death	4
Nawaz	**Ahmed**	Offender murdered estranged wife, father, sister-in-law and two year old niece, before attempting to flee to another country. Victims each died from skull fracture and a single laceration to the neck.	Death	4
Jay	**Biggs**	Offender raped four month old daughter and killed her.	LWOP	4
Lindsey	**Bruce**	Offender abducted, raped, and killed 5 year old girl by severing her head.	LWOP	4
Sean	**Carter**	Offender murdered his 68-year-old adoptive grandmother at her home. Upon his release from jail for theft, she had refused to allow offender to live with her. Offender raped, beat, and stabbed victim 18 times and also stole her money. DNA testing proved that the sperm, recovered from victim's rectum, belonged to offender.	Death	4
Jessie	**Cowans**	Offender murdered 69-year-old female acquaintance in her home. Offender, who had been to victim's home twice before, strangled her with a purse strap and hung her from her refrigerator door with an electrical cord. He then stole several items from her house including some clown figurines and jewelry.	Death	4
Donald	**Craig**	Offender abducted, raped, and strangled 12 year old girl, killing her.	Death	4
Terrance	**Davis**	Offender shot pregnant ex-girlfriend six times in stomach in parked car, killing her and fetus. Offender's motive was to avoid additional child support and maintain relationship with new girlfriend, whom he would lose if baby was proven to be his.	LWOP	4
George	**Foster**	Offender raped and killed 10 year old girl.	LWOP	4
Kelly	**Foust**	Offender broke into house and killed 54-year old man with repeated hammer blows to the head. He then repeatedly raped daughter (17) and tried to kill her by tying her up and setting house on fire. She survived.	Death	4

Antonio	**Franklin**	Offender murdered his grandmother, his grandfather, and his uncle, Anthony Franklin, in their home. Offender beat his uncle and grandmother with a baseball bat, shot his grandmother in the forehead, beat his grandfather in the head with another object, and set the house on fire.	Death	4
James	**Frazier**	Offender sexually assaulted and killed neighbor with cerebral palsy by strangulation and slit to throat.	Death	4
Phillip	**Gammalo**	Offender brutally raped and murdered a woman near railroad tracks.	LWP	4
Larry	**Gapen**	Offender killed ex-wife and her first husband with an axe. He also killed her daughter (child) with an axe.	Death	4
Brett	**Hartman**	Offender murdered a 46-year-old female acquaintance in her apartment. He tied her to her bed with a pair of pantyhose, raped her, stabbed her 138 times, slit her throat and cut off her hands, which were never found. Police arrested Hartman after he made several anonymous 911 calls to police, admitting that he was in the apartment and revealing the exact location of her body in her apartment.	Death	4
Patrick	**Leonard**	Offender murdered his former girlfriend, 23-year-old woman, in her home. Offender was angry at her because she had ended their relationship and refused to reconcile. Offender followed her into her house, handcuffed her, tried to choke her with the necklace she was wearing, attempted to rape her and shot her three times in the face, neck and the back of her head.	Death	4
Robert	**Luke**	Offender murdered his infant son smothering in his sleep.	LWOP	4
Ralph	**Lynch**	Offender murdered his neighbor, a 6-year-old girl, in his apartment. He lured her into his apartment and began sexually molesting her, which caused her to scream. He then choked her with his hands for 3 minutes, placed her body in his bathtub and inserted his finger into Mary's vagina until it bled. Offender confessed to police and directed them to a wooded area where he had hidden her body.	Death	4

Scott	**Mink**	Offender murdered his 70 year old parents at their home. Offender was angry at his parents because they would hide their car keys to prevent him from leaving the house to purchase drugs and alcohol. When his parents were sleeping, offender beat them with a claw hammer, until the hammer broke, next he beat them with cutting boards, until they broke, and then he repeatedly stabbed his parents with kitchen knives and strangled his mother with an electrical cord. Offender then stole his parents' credit cards and sold their belongings to purchase crack cocaine.	Death	4
Frederick	**Mundt**	Offender murdered his girlfriend's daughter, 7-year-old girl near a well. The girl had been living with offender in his home for the past five years, along with her mother and siblings. When offender was babysitting girl, he raped her, beat her about the head, face and body with rocks and concrete and drowned her in a covered well.	Death	4
Kevin	**Neal**	Offender abducted and killed children of his ex-wife.	LWOP	4
Patrick	**Rafferty**	Offender and co-conspirators beat and shot victim, decapitated him and set his body on fire.	LWOP	4
Rose Kate	**Roseborough**	Offender set fire to her own house, killing her 11 month old twins.	LWOP	4
Barry	**Satta**	Offender abducted seven year old girl from house, sexually assaulted, and strangled with a necktie. Offender was under influence of drugs.	LWOP	4
Steven	**Smith**	Offender murdered his girlfriend's 6-month-old daughter in his girlfriend's home. Offender brutally raped and beat girl, which inflicted extensive trauma to her head and body and caused her to suffocate. Offender's girlfriend woke up and saw him standing naked beside her bed, trying to lay baby's nude body next to her.	Death	4
Raymond	**Tibbetts**	Offender murdered his 42-year-old wife and 67-year-old man at man's home. The male victim, who suffered from emphysema, had hired wife as a caretaker and had allowed her and offender to live with him. During an argument about offender's crack cocaine habit, offender cracked wife's head open with a baseball bat, and stabbed her several times. Offender then stabbed male victim, who was connected to an oxygen tank.	Death	4

James	**Trimble**	Offender murdered his live-in girlfriend and her 7-year-old son, after she threatened to leave him. He fired 13 rounds from his assault rifle toward her, with several passing through her body and striking and killing her young son. The next morning, offender shot and killed female college student after holding her hostage inside her apartment.	Death	4
Robert	**Williams**	Offender murdered 88-year-old woman in her apartment, in same building as Offender's friend's mother. Offender broke into apartment, stuffed a rag into victim's mouth, raped her, beat her in the face, strangled her to death with a pair of her pantyhose and stole $300 from her purse.	Death	4
Samuel	**Williams**	Offender went with friend to recover stolen drugs. Threw Molotov cocktails into house to set on fire and flush out victim to recover drugs. Victim escaped, but fire killed five other occupants in home including four children.	LWOP	4
Curtis	**Young**	Offender kills pregnant girlfriend, shooting her in her car. Bullet goes through her and strikes eight year old son, killing him also.	LWOP	4
		Level 3 Cases		
Name		**Factual Description**	**Sentence**	**Rating**
Anthony	**Anderson**	Offender break in to steal drugs. Shot pregnant woman, second woman, and two children (killing one).	LWOP	3
Jonathan	**Anderson**	Offender murdered father by setting fire to his house.	LWP	3
David	**Braden**	Offender murdered his 43 year old girlfriend and her 83 year old father at their home. Girlfriend had tried to end her relationship with offender. Offender and girlfriend had been seen and heard arguing several hours before the murders. Offender shot girlfriend in the back of the head and shot father in the chest, eye, neck, and shoulder.	Death	3
Grady	**Brinkley**	Offender robbed diner and was arrested. When out on bail, offender strangled girlfriend, and then slashed throat of girlfriend, killing her, and stole her property and ATM card. Offender had told fellow prisoner of plans to murder girlfriend who had new boyfriend.	Death	3

Lewis	**Brown**	Offender and co-conspirator followed store owner home, robbed him, and killed him with six gunshots. Offender was primary perpetrator, shot gun, and expressed desire to kill prior to robbery.	LWOP	3
Scott	**Burrows**	Offender murdered 75 year old wife and abducted husband. Stole money and their car, drove husband to another state and then shot him.	LWOP	3
Kevin	**Calwise**	Offender and co-conspirator shot pregnant woman and two young children, killing woman and one child. Shots occurred during robbery of home of known drug dealer. Co-conspirator was primary perpetrator.	LWOP	3
Douglas	**Coley**	Offender and an accomplice murdered 21-year-old woman in an alley behind an apartment building. The perpetrators abducted the victim, shot her in the head at close range, and stole her car. Offender was also convicted for the attempted murder, robbery, and kidnapping of another man in a separate carjacking incident that occurred days before the murder of woman.	Death	3
Ricky	**Conner**	Under influence of drugs, offender shot three friends to death after getting out of a car that all were in.	LWOP	3
Jeronique	**Cunningham**	Offender and co-conspirator went to house of drug dealer, robbed eight people, and then fired guns toward group at close range. Shots killed 17 year old girl and 3 year old.	Death	3
Michael	**Davis**	Offender set house on fire to retaliate for stolen cell phone. Fire killed 6 people from carbon dioxide poisoning, including four young children.	LWP	3
Roland	**Davis**	Offender broke into apartment of 86 year old woman. He stabbed her in the neck and chest, killing her. He then robbed her and left.	Death	3
Vincent	**Doan**	Offender abducted girlfriend and murdered in car. Past history of abuse by offender toward girlfriend.	LWOP	3
Phillip	**Elmore**	Offender broke into ex-girlfriend's house and waited for her return. He murdered her by strangling her and hitting her in the head with a pipe. He stole her purse and car.	Death	3
Stephen	**Everett**	Offender beat, raped and strangled woman to death. Offender suffered from bipolar disorder, had juvenile criminal past and treatment, and had suffered extensive abuse as a young child.	LWOP	3

Lamar	**Florence**	Offender kills ex-girlfriend (and mother of child)'s new boyfriend, hitting him in the temple with his gun and shooting him in the back of the head.	LWP	3
Clarence	**Fry**	Offender has history of domestic abuse with girlfriend. While on bond, he stabbed four times, killing her in front of grandchildren. He also robbed her after killing her.	Death	3
Angela	**Garcia**	Offender committed arson. Fire killed her two daughters aged 2 and 3.	LWP	3
Michael	**Glenn**	Offender went to house of ex-girlfriend and daughter to demand money for drugs. He used a heavy stick to bludgeon both to death.	LWOP	3
Daniel	**Grant**	Robbery of convenience store. Three workers shot (one throat slit), two die and one survives. No evidence that offender shot victims.	LWP	3
Scott	**Group**	Offender murdered 56-year-old man at bar owned by victim and wife. Offender, who was a delivery man for wine distributor made weekly deliveries to the bar. On the day of the murder, Group went to the bar to review some invoices. He forced the owners into the bathroom at gunpoint, shot them in the head, and stole between $1,200 and $1,300 cash from the bar. The wife survived and called for help.	Death	3
Gerald	**Hand**	Offender hired victim 2 to kill his wife. Offender shot both victim 2 and wife. Victim 2 had strangled offenders' prior two wives twenty years earlier. Motive was insurance money from wife's death.	Death	3
James	**Hanna**	Offender attacked his 18-year-old cellmate at Correctional Institution. Offender thrust a sharpened paintbrush into victim's eye and hit him in the head with a padlock placed in a sock. Victim died as a result of his injuries.	Death	3
Eric	**Harmon**	Offender killed 2 people, one was minor. Offender had mental issues, but was found to be competent.	LWOP	3
Nathan	**Herring**	Offender and co-conspirator broke into victims' home and abducted 2 men. They robbed them and drove them 2 states away, where they got them out of the car, took to a hill, and shot and killed them at point blank range.	LWOP	3

Edward	**Hodge**	Offender and two co-conspirators decide to rob cocaine dealer. They rob him and his wife, duct taping them to each other. Then, offender shoots both multiple times and kills them.	LWOP	3
Calvin	**Horton**	Offender and co-conspirator hire two men to kill witness to prior crime. The men bring the witness to offender and co-conspirator. Co-conspirator (the leader) murders witness with an pickax.	LWOP	3
Cleveland	**Jackson**	Offender and co-conspirator went to house of drug dealer, robbed eight people, and then fired guns toward group at close range. Shots killed 17 year old girl and 3 year old.	Death	3
Rayshawn	**Johnson**	Offender murdered his neighbor, 28-year-old woman, in her home. After victim's husband left for work, offender entered the home and found victim upstairs in the bedroom. He hit her on the head several times with a baseball bat, killing her, and then stole money from her purse.	Death	3
Odraye	**Jones**	Offender murdered police officer, shooting him as he responded to a dispatcher's call to arrest offender, who had several outstanding felony warrants. Offender fled on foot as the officer approached him, and a pursuit commenced. Soon thereafter, offender pulled a gun from his pocket and fired several shots at the officer, killing him.	Death	3
James	**Jordan**	Offender murdered 69-year-old woman and 72-year-old man in their home. Offender beat them with a blunt object (lamp) and stabbed them several times. He then stole several personal objects from their home.	Death	3
Thomas	**Lewers**	Offender murdered wife's lover, premeditated. Shot ten times at point blank range.	LWOP	3
Jermaine	**McKinney**	Offender murdered woman and elderly mother, beating them with a crowbar, and left their bodies to be burned in the furnace.	LWOP	3
Gregory	**McKnight**	Offender murdered 20-year-old female acquaintance near his trailer home. She worked with offender at a restaurant near the college where she was a student. Offender kidnapped her, shot her in the head, and wrapped her body inside a roll of carpet. Offender also convicted of murder of a man (body found buried on his property).	Death	3

Richard	**Miller**	Offender robbed victim, slit throat, stabbed 14 times in the back and left him to die.	LWOP	3
Timothy	**Moulder**	Offender commits armed robbery. Store owner reports to police. A year later, offender murders store owner, execution style, with three bullets to the back of the head.	LWOP	3
Gregg	**Myers**	Offender shoots and kills his father and his step-mother while sleeping in their bed.	LWOP	3
Richard	**Nields**	Offender murdered his 59-year-old girlfriend at their home. Girlfriend had asked offender to move out of the house. Offender beat girlfriend, strangled her with his hands, and stole her car and travelers' checks.	Death	3
Redan	**Norman**	Offender shoots acquaintance after acquaintance choked his girlfriend.	LWOP	3
James	**O'Hara**	Offender murdered victim in his own home, slitting his throat and stabbing him multiple times.	LWOP	3
James	**Schaar**	Offender slit jugular vein of landlord, killing him after rent dispute.	LWOP	3
Michael	**Scott**	Offender murdered 21-year-old male. Offender was teaching victim and his girlfriend how to drive a stick-shift, thinking that the couple wanted to buy his car. Offender shot victim six times in the back of the head, dumped his body in the woods and stole his car. Offender had also committed a second recent murder, shooting a man after a disagreement.	Death	3
Thomas	**Siller**	Offender beat and murdered elderly woman, and then robbed her.	LWP	3
Donovan	**Simpson**	Offender and two co-conspirators threw two Molotov cocktails into house. Five year old girl died in fire.	LWP	3
Ray	**Smith**	Offender murdered restaurant supervisor brutally by stabbing her with a knife at the end of his shift.	LWOP	3
Vernon	**Spence**	Three man robbery of residence to obtain marijuana. Offender knew three victims, two men and a woman from prior dealings. Offender shot and killed all three to hide identity.	LWOP	3

James	**Taylor**	Offender murdered 51-year-old man his 57 year old wife. Offender also and attempted to murder his estranged wife, and her friend, a 38-year-old man. Offender blamed couple for his marital problems, and couple had allowed estranged wife to move into their home. After hiring a private investigator to locate his wife, offender confronted wife, shot at her but missed, fatally shot the couple each in the head, and shot wife's male friend when he tried to restrain offender.	Death	3
Joseph	**Taylor**	Offender murdered victim during home robbery. Offender and co-perpetrators held victim hostage to get numbers for safe. Offender shot victim four times as they were leaving.	LWP	3
Montez	**Taylor**	Offender has verbal altercation with victim. Offender shoots victim from car in oncoming traffic. Victim crashes car. Offender stops and shoots victim and passenger again, killing them both.	LWOP	3
Eroge	**Thomas**	Offender was a kitchen orderly. He snapped and murdered his female supervisor. He struck her in the temple, threw plates at her, and then stabbed her repeatedly.	LWOP	3
Angel	**Torres**	Offender stabbed woman and her sister-in-law repeatedly.	LWOP	3
Charles	**Weatherford**	Offender stalked older (59) woman. Offender wanted to date but she resisted. She was killed by blunt trauma to the head and/or strangulation. Offender removed her clothes, but no evidence of sexual assault. Offender stole prescription drugs and money. Offender returned and set fire to house. Offender molested by older woman as a child.	LWOP	3
Dwight	**Whatley**	Robbery of convenience store. Three workers shot (one throat slit), two die and one survives. No evidence that offender shot victims.	LWOP	3
Toby	**Wilcox**	Victims were marijuana dealer and infant (33 day old) son. Mother of child also shot but survived. Offender was one of two perpetrators in drug robbery.	LWOP	3
George	**Williams**	Offender and co-conspirators attempt to rob cab driver. Offender shot driver four times at point blank range and killed.	LWOP	3

Mark	**Worley**	Offender and co-conspirator murdered 75 year old husband and wife, robbing them, stealing their car and abducting husband. Offender guilty of aggravated murder of wife, not husband.	LWOP	3
Jeffrey	**Zenowicz**	Offender murdered two women, shooting them after robbing them at gunpoint.	LWOP	3
		Level 2 Cases		
Name		**Factual Description**	**Sentence**	**Rating**
Craig	**Anderson**	Offender shot victim in back of neck, kneeling. Offender wrongfully believed that victim had stolen his motorcycle and money. Offender claimed gun accidentally discharged.	LWOP	2
Rocky	**Barton**	Offender shot wife at point-blank range with shotgun with clear premeditation.	Death	2
Gerald	**Brown**	Offender and co-conspirators attack neighbors of girlfriend. Offender shot one man several times, killing him. Offender and co-conspirators also attacked another man, beating him severely, but he survived.	LWOP	2
Quisi	**Bryan**	Offender shot and killed police officer after being pulled over for expired tags (warrant for offender's arrest for drug sales and robberies).	Death	2
Stephen	**Byerly**	Offender murdered former best friend who was having an affair with his wife. Wife had gotten restraining order against offender based on past history of abuse. Offender came into trailer anyway and shot former best friend at point blank range.	LWP	2
Javon	**Byrd**	Offender shot victim 1 after card game dispute, but victim 1 escaped. Several weeks later offender shot and killed victim 2 and also shot victim 3, based on knowledge that victim 2 planned to turn him into the police to receive a crime stoppers reward.	LWOP	2
William	**Calhoun**	Offender and co-conspirator shot victim multiple times while he was parked in his car in his driveway.	LWOP	2
August	**Cassano**	Offender murdered his cellmate, at correctional institution, by stabbing 75 times with a shank (prisoner-made knife). Offender was serving a life sentence at the time for an aggravated murder he committed. He had also previously stabbed another cellmate several years before.	Death	2

Shawn	**Collins**	Offender and co-conspirator opened fire on two people in a parked car, killing the driver. Driver had previously pulled gun on offender in bathroom, and driver attempted to shoot offender from car, but his gun jammed. All involved were gang members.	LWOP	2
James	**Conway**	Offender murdered victim with a pickaxe in a cornfield. Victim was unconscious from drug overdose.	Death	2
James	**Conway**	Fight outside bar at 2:30 am. Victim 1 slashes offender's brother with knife across stomach. Offender returns with gun and starts shooting at victim 1. Victim 1 grabs innocent bystander, victim 2 and uses him as a shield. Offender keeps shooting (8 shots in all). Victim 2 is murdered, victim 1 survives.	Death	2
Jamel	**Curtis**	Offender shot store owner during robbery.	LWOP	2
John	**Drummond**	Drive by shooting by gang member. Shot killed three month old baby inside house.	Death	2
Ian	**Duran**	Offender murdered victim by gunshot to prevent victim implicating him in another crime.	LWP	2
Dontay	**Ellenwood**	Offender shot drug accomplices after buying crack with them, killed one.	LWOP	2
Wayne	**Ervin**	Multiple offender convenience store hold up and murder of 2, attempted murder of third person. Not principal offender. Low IQ, parentless childhood, drug dealing family.	LWOP	2
Douglas	**Evans**	Store shooting; robbery at closing time.	LWP	2
Angelo	**Fears**	Offender murdered man in an apartment. Offender and co-conspirator went to rob victim who had recently purchased $21,000 worth of crack cocaine. Offender stole $2,000 and some jewelry in addition to the crack cocaine before shooting victim at point blank range as he pleaded for his life.	Death	2
Eric	**Gibbs**	Offender's pregnant girlfriend had close relationship with former boyfriend. Offender decided to kidnap/attack former boyfriend. Offender shot and killed former boyfriend during altercation.	LWOP	2
Shondale	**Gibson**	Offender home break-in and shot victim; related to failure to pay drug money.	LWOP	2

Ramon	**Gray**	Offender and co-conspirator in parking lot fight with 2 others. Offender shoots and kills both men.	LWOP	2
Duane	**Gregley**	Convenience store shooting during robbery of two individuals.	LWOP	2
Sam	**Hairston**	Illicit drug deal gone bad. Offender's co-conspirator shot one person; offender allegedly shot other in order to keep identity unknown.	LWP	2
Delano	**Hale**	Offender went to sing for victim, male voice teacher. Victim allegedly sexually propositioned offender. Offender shot victim with victim's gun four times in side of head from point blank range. Offender then used victim's credit card.	Death	2
Marcus	**Harris**	Offender and co-conspirator went to rob acquaintance and his wife. After holding at gunpoint, acquaintance started to struggle with offender. Acquaintance was killed with 2 gunshots.	LWOP	2
Gregory	**Hicks**	Offender robbed woman in her home after she returned from grocery store. When he accosted her to steal her purse, he strangled her. The force was enough to kill her.	LWOP	2
Kevin	**Hubbard**	Offender shot victim execution style in the back of the head. Murder was in connection with a drug trafficking enterprise.	LWOP	2
Ahmad	**Issa**	Offender, having been hired, instructed, and given a weapon by third party, murdered two men in the parking lot of their store after robbing them.	Death	2
Kareem	**Jackson**	Offender murdered two male acquaintances by shooting them at their apartment, of whom was an. Offender and three co-conspirators went to the apartment to rob the men of drugs. After robbing them of $40, some marijuana and a cellular phone, Offender shot the two men in the head because they "knew his name."	Death	2
Carl	**Lindsey**	Offender murdered 36-year-old man in a parking lot outside a bar. Offender shot victim in the face while victim sat in his car. After victim got out of his car, Lindsey shot him again in the forehead and stole $1,257 from his wallet.	Death	2
Justin	**Lucas**	Offender and girlfriend decided to rob an acquaintance. Offender shot victim three times at point blank range during alley robbery.	LWP	2

Marvin	**Martin**	Offender shot former brother-in-law in the forehead with a single shot.	LWOP	2
Tina	**McDowell**	Offender and co-conspirator walk victim home from party in order to steal money for drugs. A fight ensues, and offender beats victim to death with a lamp.	LWOP	2
Clive	**Melhado**	Offender lost lots of money to victim in dice game. Offender goes to car to retrieve gun. Offender returns and asks victim for a loan, then shoots him fatally from 3 feet away.	LWOP	2
Kristoffer	**Morris**	Offender and co-conspirator broke into victim's house. Offender started firing gun, killing two and wounding another.	LWP	2
Ulysses	**Murphy**	Offender murdered 25-year-old man outside a bar in Columbus. Victim and his sister were heading to their car in the parking lot when offender approached them from behind and demanded victim's jewelry. Offender shot victim twice in the back after yelling that victim was moving too slow.	Death	2
Kerry	**Perez**	Offender murdered 43-year-old man during an attempted robbery of a bar. Offender shot victim in the back. Perez and an accomplice pulled a series of liquor establishment robberies, one of which involved the attempted murder of another individual .	Death	2
Clarence (Skip)	**Roberts**	Offender robbed and stabbed drug dealer to death.	LWOP	2
Jermane	**Scott**	Offender murdered his retired school teacher, shooting him in his home and robbing him.	LWOP	2
Ronald	**Shaffer**	Offender and co-conspirator come into house with guns to rob it during a small get-together. They shoot several individuals, killing two men.	LWOP	2
Bryan	**Singleton**	Convenience store robbery; offender shot and killed the clerk after he panicked.	LWP	2
Kenneth	**Tucker**	Pawn shop robbery. Defendant accidentally shot first worker; second worker arrived. Defendant then shot second worker to eliminate witnesses. First worker died; second worker lived.	LWOP	2
Tinotchy	**Ward**	Offender shot driver of delivery truck delivering money to bank during robbery attempt.	LWOP	2
Cameron	**Williams**	Offender shot ex-girlfriend's lover in bed 3-4 four times, killing him. Not in heat of passion, as they had threatened each other for 2 years prior.	LWOP	2

Dennis	**Williams**	Offender killed girlfriend's neighbors, shooting them, after verbal dispute outside house.	LWP	2
Lana	**Williams**	Offender and victim spent three days drinking and smoking crack cocaine. They went to a convenience store to get food to trade for more crack. They start fighting in parking lot, and offender lights victim on fire using lighter and gasoline can. Victim dies in hospital from injuries.	LWOP	2
Lawrence	**Williams**	Offender interacts with girl whose car he damages (he owes her $). When she returns, boyfriend and other drunk friends are upset at how long she is gone. They verbally berate offender. Offender pulls out gun and shoots the two men, killing both of them.	LWOP	2
		Level 1 Cases		
Name		**Factual Description**	**Sentence**	**Rating**
Jason	**Betts**	Offender caught victim outside of a bar in an alley and shot him.	LWOP	1
Donald	**Butts**	Neighborhood dispute likely involving drugs. Offender pulls up to house and shoots two men.	LWP	1
Jonathan	**Clay**	Offender shot victim in the neck as he stood outside an apartment complex in drive-by shooting.	LWP	1
Anthony	**Cockroft**	Four men decided to rob two Mexican men. Robbery went awry, turned into fight. Offender shot both men, killing one.	LWP	1
Mark	**Ducic**	Offender overdosed two different drug user "friends" on two different occasions.	LWOP	1
Troy	**Fox**	Murder of a drug dealer by gunshot when deal went awry.	LWOP	1
Leon	**Hawkins**	Offender enters known drug house. Shoots and kills dealer and tries to shoot girlfriend before running away.	LWP	1
Ronald	**Hodge**	Offender robs hotel late at night and shoots the night clerk, killing him.	LWOP	1
Omar	**Jastrow**	Offender killed neighbor who was member of Khmer Rouge, ruling class in Cambodia that had persecuted offender and his family.	LWOP	1

APPENDIX C

Name		My Rating	4	3	2	1	% Agree with Berry	Average	1	2	3	4	5	6	7	8	9	10
Stanley	**Adams**	4	8	2	0	0	80%	3.80	4	4	4	4	4	3	3	4	4	4
Nawaz	**Ahmed**	4	4	6	0	0	40%	3.40	3	4	3	4	4	3	3	3	3	4
Sean	**Carter**	4	10	0	0	0	100%	4.00	4	4	4	4	4	4	4	4	4	4
Jessie	**Cowans**	4	6	3	1	0	60%	3.50	2	3	3	3	4	4	4	4	4	4
Donald	**Craig**	4	10	0	0	0	100%	4.00	4	4	4	4	4	4	4	4	4	4
Kelly	**Foust**	4	10	0	0	0	100%	4.00	4	4	4	4	4	4	4	4	4	4
Antonio	**Franklin**	4	6	4	0	0	60%	3.60	3	4	3	4	4	3	4	3	4	4
James	**Frazier**	4	9	1	0	0	90%	3.90	4	4	3	4	4	4	4	4	4	4
Larry	**Gapen**	4	8	2	0	0	80%	3.80	4	4	4	3	4	4	4	3	4	4
Brett	**Hartman**	4	9	1	0	0	90%	3.90	4	4	4	4	4	4	4	4	4	3
Patrick	**Leonard**	4	7	3	0	0	70%	3.70	4	4	3	3	4	4	3	4	4	4
Ralph	**Lynch**	4	9	1	0	0	90%	3.90	4	3	4	4	4	4	4	4	4	4
Scott	**Mink**	4	7	3	0	0	70%	3.70	4	3	3	4	4	4	4	4	3	4
Frederick	**Mundt**	4	10	0	0	0	100%	4.00	4	4	4	4	4	4	4	4	4	4
Steven	**Smith**	4	10	0	0	0	100%	4.00	4	4	4	4	4	4	4	4	4	4
Raymond	**Tibbetts**	4	6	4	0	0	60%	3.60	3	3	3	3	4	4	4	4	4	4
James	**Trimble**	4	6	4	0	0	60%	3.60	3	4	4	3	3	4	3	4	4	4
Robert	**Williams**	4	10	0	0	0	100%	4.00	4	4	4	4	4	4	4	4	4	4
Jay	**Biggs**	4	9	1	0	0	90%	3.90	4	4	4	4	4	4	3	4	4	4
Lindsey	**Bruce**	4	10	0	0	0	100%	4.00	4	4	4	4	4	4	4	4	4	4
Terrance	**Davis**	4	8	2	0	0	80%	3.80	4	4	4	3	4	4	4	3	4	4
George	**Foster**	4	9	1	0	0	90%	3.90	4	4	4	4	4	4	3	4	4	4
Robert	**Luke**	4	6	3	1	0	60%	3.50	4	4	3	3	4	2	3	4	4	4
Kevin	**Neal**	4	6	4	0	0	60%	3.60	3	4	4	3	4	4	3	4	4	3
Patrick	**Rafferty**	4	7	3	0	0	70%	3.70	4	3	4	3	4	4	4	4	4	3
Rose Kate	**Roseborough**	4	7	3	0	0	70%	3.70	4	3	4	3	4	3	4	4	4	4
Barry	**Satta**	4	10	0	0	0	100%	4.00	4	4	4	4	4	4	4	4	4	4
Samuel	**Williams**	4	5	4	1	0	50%	3.40	3	3	4	2	4	4	4	3	4	3
Phillip	**Gammalo**	4	7	3	0	0	70%	3.70	4	4	4	3	4	3	3	4	4	4
David	**Braden**	3	0	8	2	0	80%	2.80	3	3	3	2	2	3	3	3	3	3
Grady	**Brinkley**	3	1	7	2	0	70%	2.90	2	3	3	2	3	3	3	3	4	3
Douglas	**Coley**	3	0	8	2	0	80%	2.80	3	3	3	2	2	3	3	3	3	3
Jeronique	**Cunningham**	3	2	7	1	0	70%	3.10	3	3	4	3	3	4	2	3	3	3
Roland	**Davis**	3	2	6	2	0	60%	3.00	2	3	2	3	4	3	3	3	3	4
Phillip	**Elmore**	3	2	6	2	0	60%	3.00	2	3	2	3	4	3	3	3	4	3
Clarence	**Fry**	3	4	5	1	0	50%	3.30	3	3	3	2	4	3	3	4	4	4
Scott	**Group**	3	1	6	3	0	60%	2.80	3	3	3	2	2	3	2	3	4	3
Gerald	**Hand**	3	3	5	2	0	50%	3.10	3	4	3	2	3	3	2	3	4	4
James	**Hanna**	3	3	5	2	0	50%	3.10	3	3	2	2	4	4	3	3	4	3

Cleveland	**Jackson**	3	1	8	1	0	80%	3.00	3	3	3	3	2	4	3	3	3	3
Rayshawn	**Johnson**	3	1	6	3	0	60%	2.80	2	3	3	2	3	3	3	2	4	3
Odraye	**Jones**	3	1	4	3	2	40%	2.40	3	3	3	2	1	2	1	3	4	2
James	**Jordan**	3	2	8	0	0	80%	3.20	3	3	3	3	3	3	3	3	4	4
Gregory	**McKnight**	3	1	9	0	0	90%	3.10	3	3	3	3	3	3	3	3	4	3
Richard	**Nields**	3	1	7	2	0	70%	2.90	3	3	2	2	4	3	2	3	4	3
Michael	**Scott**	3	1	8	1	0	80%	3.00	3	3	3	2	3	3	3	3	4	3
James	**Taylor**	3	2	7	1	0	70%	3.10	3	3	3	3	2	3	3	4	4	3
Anthony	**Anderson**	3	2	7	1	0	70%	3.10	3	3	4	3	2	4	3	3	3	3
Lewis	**Brown**	3	1	6	2	1	60%	2.70	2	3	3	2	1	3	3	3	4	3
Scott	**Burrows**	3	0	7	3	0	70%	2.70	2	3	3	2	2	3	3	3	3	3
Kevin	**Calwise**	3	1	6	3	0	60%	2.80	3	2	4	2	3	3	3	3	2	3
Ricky	**Conner**	3	0	5	3	2	50%	2.30	3	3	3	1	2	3	1	2	2	3
Vincent	**Doan**	3	0	6	4	0	60%	2.60	2	3	2	2	3	2	3	3	3	3
Stephen	**Everett**	3	2	5	1	1	50%	3.00	3	4	3	3	4	1	3	4	3	2
Michael	**Glenn**	3	0	10	0	0	100%	3.00	3	3	3	3	3	3	3	3	3	3
Eric	**Harmon**	3	0	5	4	1	50%	2.40	3	3	3	2	2	1	2	3	3	2
Nathan	**Herring**	3	1	7	2	0	70%	2.90	2	3	3	2	3	3	3	3	4	3
Edward	**Hodge**	3	1	7	2	0	70%	2.90	3	3	3	2	2	3	3	3	4	3
Calvin	**Horton**	3	1	5	4	0	50%	2.70	3	2	3	2	3	2	2	3	4	3
Thomas	**Lewers**	3	0	7	3	0	70%	2.70	3	3	3	2	3	3	3	2	2	3
Jermaine	**McKinney**	3	4	6	0	0	60%	3.40	3	3	3	3	4	4	4	3	4	3
Richard	**Miller**	3	2	7	1	0	70%	3.10	3	3	3	2	4	3	3	3	4	3
Timothy	**Moulder**	3	0	7	3	0	70%	2.70	3	3	3	2	2	2	3	3	3	3
Gregg	**Myers**	3	0	7	3	0	70%	2.70	3	3	3	2	2	3	3	2	3	3
Redan	**Norman**	3	1	6	3	0	60%	2.80	3	3	3	2	3	2	3	3	4	2
James	**O'Hara**	3	2	5	3	0	50%	2.90	2	3	3	2	4	3	3	3	4	2
James	**Schaar**	3	1	5	4	0	50%	2.70	2	3	3	2	3	3	2	2	4	3
Ray	**Smith**	3	1	4	5	0	40%	2.60	2	3	3	2	3	2	3	2	4	2
Vernon	**Spence**	3	1	5	4	0	50%	2.70	3	4	2	2	3	2	2	3	3	3
Montez	**Taylor**	3	0	9	1	0	90%	2.90	3	3	3	3	2	3	3	3	3	3
Eroge	**Thomas**	3	2	7	1	0	50%	3.10	3	3	3	3	4	3	3	2	4	3
Angel	**Torres**	3	2	8	0	0	80%	3.20	3	3	3	3	4	3	3	3	4	3
Charles	**Weatherford**	3	0	7	1	2	70%	2.50	3	3	3	3	3	1	3	1	2	3
Toby	**Wilcox**	3	2	7	1	0	70%	3.00	3	3	3	3	2	4	2	3	3	4
George	**Williams**	3	0	7	3	0	70%	2.70	2	3	3	2	2	3	3	3	3	3
Mark	**Worley**	3	0	8	2	0	80%	2.80	2	3	3	2	3	3	3	3	3	3
Curtis	**Young**	3	4	5	1	0	50%	3.30	3	4	4	2	3	4	3	4	3	3
Jonathan	**Anderson**	3	0	6	3	1	60%	2.50	2	2	3	1	3	2	3	3	3	3
Michael	**Davis**	3	4	5	1	0	50%	3.30	3	3	4	2	3	4	4	3	4	3
Lamar	**Florence**	3	0	6	3	1	60%	2.50	1	3	3	2	3	3	2	3	3	2
Angela	**Garcia**	3	2	7	1	0	70%	3.10	3	3	4	2	3	3	3	3	3	4
Thomas	**Siller**	3	2	7	1	0	70%	3.10	3	3	3	3	3	3	2	3	4	4
Donovan	**Simpson**	3	2	4	4	0	40%	2.80	3	2	3	2	2	4	3	4	2	3
Joseph	**Taylor**	3	0	8	2	0	80%	2.80	3	3	3	2	2	3	3	3	3	3

Rocky	**Barton**	2	0	5	4	1	40%	2.40	3	3	2	2	1	2	3	2	3	3
August	**Cassano**	2	3	4	3	0	30%	3.00	2	3	2	3	4	2	4	3	4	3
James	**Conway**	2	1	5	4	0	40%	2.70	2	3	2	2	4	3	3	3	2	3
Kareem	**Jackson**	2	0	6	4	0	40%	2.60	3	3	3	2	2	3	2	2	3	3
Ulysses	**Murphy**	2	1	5	3	1	30%	2.60	2	3	3	2	1	3	2	3	4	3
Quisi	**Bryan**	2	0	3	4	3	30%	2.00	2	2	3	1	1	2	1	2	3	3
James	**Conway**	2	2	3	3	2	30%	2.50	3	2	2	3	4	4	1	3	1	2
John	**Drummond**	2	0	4	6	0	60%	2.40	2	2	3	2	2	3	2	3	3	2
Angelo	**Fears**	2	0	5	5	0	50%	2.50	2	3	2	2	3	2	2	3	3	3
Delano	**Hale**	2	1	1	7	1	70%	2.20	2	2	2	2	2	1	3	2	4	2
Ahmad	**Issa**	2	0	4	5	1	50%	2.30	3	3	2	2	2	3	2	2	1	3
Carl	**Lindsey**	2	1	4	5	0	50%	2.60	2	3	2	2	2	3	2	3	4	3
Kerry	**Perez**	2	0	3	7	0	70%	2.30	3	2	2	2	2	2	2	3	2	3
Craig	**Anderson**	2	0	1	8	1	80%	2.00	1	3	2	2	2	2	2	2	2	2
Gerald	**Brown**	2	0	4	6	0	60%	2.40	2	3	3	2	2	2	2	2	3	3
Javon	**Byrd**	2	0	5	5	0	50%	2.50	2	3	3	2	2	2	2	3	3	3
William	**Calhoun**	2	0	3	5	2	50%	2.10	2	3	2	1	1	3	2	2	3	2
Shawn	**Collins**	2	0	1	6	3	60%	1.80	2	2	2	1	2	2	1	1	3	2
Jamel	**Curtis**	2	0	1	5	4	50%	1.70	1	2	2	1	1	2	1	2	3	2
Dontay	**Ellenwood**	2	0	2	5	3	50%	1.90	2	3	3	1	1	2	1	2	2	2
Wayne	**Ervin**	2	0	2	6	2	60%	2.00	2	2	3	2	2	1	3	2	1	2
Eric	**Gibbs**	2	0	3	7	0	70%	2.30	2	3	2	2	2	3	2	3	2	2
Shondale	**Gibson**	2	0	2	5	3	50%	1.90	1	3	2	1	1	2	2	2	3	2
Ramon	**Gray**	2	0	3	5	2	50%	2.00	3	3	3	1	2	2	1	1	2	2
Duane	**Gregley**	2	0	1	4	3	40%	1.80	2	2	2	1	1	2	1	2	3	2
Marcus	**Harris**	2	0	1	9	0	90%	2.10	2	2	2	2	2	3	2	2	2	2
Gregory	**Hicks**	2	0	1	8	1	80%	2.00	2	2	2	2	3	1	2	2	2	2
Kevin	**Hubbard**	2	0	3	4	2	40%	2.10	1	3	3	2	1	2	2	2	3	2
Marvin	**Martin**	2	0	2	5	3	50%	1.90	1	2	3	1	1	2	2	2	3	2
Tina	**McDowell**	2	0	5	5	0	50%	2.50	2	3	2	3	3	2	2	2	3	3
Clive	**Melhado**	2	0	2	8	0	80%	2.20	2	3	2	2	2	2	2	2	3	2
Clarence (Skip)	**Roberts**	2	0	4	6	0	60%	2.40	2	3	2	2	2	2	2	3	3	3
Jermane	**Scott**	2	1	4	5	0	50%	2.60	2	3	2	2	2	2	3	3	4	3
Ronald	**Shaffer**	2	0	4	6	0	60%	2.40	2	3	2	2	2	2	3	3	2	3
Kenneth	**Tucker**	2	0	2	7	1	70%	2.10	2	2	2	2	2	1	2	3	2	3
Tinotchy	**Ward**	2	0	2	6	2	60%	2.00	2	3	2	1	1	2	2	2	3	2
Dwight	**Whatley**	2	0	3	4	3	40%	2.00	2	1	3	2	3	1	2	2	3	1
Cameron	**Williams**	2	0	4	6	0	60%	2.40	2	3	3	2	2	2	3	2	2	3
Lana	**Williams**	2	1	4	5	0	50%	2.60	2	2	3	3	3	4	2	2	2	3
Lawrence	**Williams**	2	0	2	7	1	70%	2.10	3	2	2	2	2	1	2	2	3	2
Jeffrey	**Zenowicz**	2	0	3	7	0	70%	2.30	2	3	2	2	2	2	2	2	3	3
Stephen	**Byerly**	2	0	2	6	2	60%	2.00	1	3	2	1	2	2	2	2	3	2
Ian	**Duran**	2	0	4	5	1	50%	2.30	3	3	2	2	1	2	2	2	3	3
Douglas	**Evans**	2	0	1	6	3	60%	1.90	1	3	2	1	1	2	2	2	3	2

Daniel	**Grant**	2	0	3	5	2	50%	2.10	2	1	3	2	3	2	2	2	3	1
Sam	**Hairston**	2	0	1	6	3	60%	1.80	2	2	3	1	1	2	1	2	2	2
Justin	**Lucas**	2	0	4	5	1	50%	2.30	2	3	3	2	1	2	2	2	3	3
Kristoffer	**Morris**	2	0	4	6	0	60%	2.40	2	3	3	2	2	2	2	3	2	3
Bryan	**Singleton**	2	1	1	7	1	70%	2.20	2	2	2	2	1	2	2	2	4	3
Dennis	**Williams**	2	1	1	7	1	70%	2.20	2	3	2	1	2	2	2	2	4	2
Jason	**Betts**	1	0	2	3	5	50%	1.70	1	3	2	1	1	2	1	1	3	2
Mark	**Ducic**	1	0	2	4	4	40%	1.80	2	2	2	1	2	1	1	1	3	3
Troy	**Fox**	1	0	0	5	5	50%	1.50	1	2	2	1	1	2	1	1	2	2
Ronald	**Hodge**	1	0	4	3	3	30%	2.10	1	3	2	1	1	3	2	2	3	3
Omar	**Jastrow**	1	0	2	3	5	50%	1.70	1	3	1	2	3	1	2	1	1	2
Donald	**Butts**	1	0	3	2	5	50%	1.80	1	3	3	1	1	2	1	1	3	2
Jonathan	**Clay**	1	0	1	4	5	50%	1.60	1	2	2	1	1	2	1	1	3	2
Anthony	**Cockroft**	1	0	1	4	5	50%	1.60	2	2	2	1	1	3	1	2	1	1
Leon	**Hawkins**	1	0	2	4	4	40%	1.80	1	3	2	1	1	2	1	2	3	2

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