

1984

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Recommended Citation

Rutgers Law Journal, Vol. 15, Issue 2 (Winter 1984), pp. 399-442

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PROPORTIONALITY REVIEW IN NEW JERSEY: AN INDISPENSABLE SAFEGUARD IN THE CAPITAL SENTENCING PROCESS

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I. INTRODUCTION

On October 4, 1983, at about 11:00 p.m. in Texas, James D. Autry, one of the approximately 1300 inmates¹ housed on death row in America, lay

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1. As of March 1, 1984, according to records kept by the NAACP Legal Defense and Education Fund, Inc., there were 1311 inmates on death row as follows:

RACES

State	No.	Black	White	Hisp.	Native American	Asian	Unkn	Method of Execution
Alabama	71	47	24					Electrocution
Arizona	50	5	39	5	1			Gas Chamber
Arkansas	23	8	14	1				Lethal Injection (or choice of electrocution if sentenced before 3/24/83)
California	153	56	65	25	4	3		Gas Chamber
Colorado	2		2					Gas Chamber
Delaware	6	3	3					Lethal Injection
Florida	203	83	115	5				Electrocution
Georgia	114	54	60					Electrocution
Idaho	9		8	1				Lethal Injection or Firing Squad
Illinois	59	33	22	4				Lethal Injection
Indiana	25	11	14					Electrocution
Kentucky	19	2	17					Electrocution

strapped to a hospital gurney, intravenous tubes in place in his right arm, waiting for the lethal gas mixture to begin its deadly flow.² At the last

State	No.	RACES					Method of Execution
		Black	White	Hisp.	Native American	Asian Unkn	
Louisiana	36	15	21				Electrocution
Maryland	13	9	4				Gas Chamber
Mississippi	38	21	16			1	Gas Chamber
Missouri	23	2	11				Gas Chamber
Montana	4	1	3				Hanging or Lethal Injection
Nebraska	11	3	7		1		Electrocution
Nevada	20	6	12	2			Lethal Injection
New Jersey	5	4	1				Lethal Injection
New Mexico	6	1	3	2			Lethal Injection
New York	1	1					Electrocution
North Carolina	34	18	15		1		Lethal Injection
Ohio	21	12	9				Electrocution
Oklahoma	40	8	29		3		Lethal Injection
Pennsylvania	56	32	23	1			Electrocution
South Carolina	33	15	18				Electrocution
Tennessee	38	13	24		1		Electrocution
Texas	172	62	87	19	3	1	Lethal Injection
Utah	4	3	1				Firing Squad
Virginia	21	11	8			1	Electrocution
Washington	4		3			1	Hanging or Lethal Injection
Wyoming	3		3				Gas Chamber
Connecticut	0						
Massachusetts	0						
New Hampshire	0						
South Dakota	0						
Vermont	0						
TOTAL	1311	555	669	66	12	7	2

(Alaska, District of Columbia, Hawaii, Iowa, Kansas, Maine, Michigan, Minnesota, North Dakota, Oregon, Rhode Island, West Virginia and Wisconsin have no death penalty.)

2. New Jersey is one of six states which have enacted statutes adopting lethal injection as the approved method of execution. N.J. STAT. ANN. § 2C:49-1 to -12 (West Supp. 1984-1985). However, the Food and Drug Administration (FDA) has yet to look into this practice. The United States Court of Appeals for the District of Columbia recently held that the FDA's refusal to investigate this unapproved use of approved drugs is an arbitrary and capricious refusal to exercise its regulatory jurisdiction. *Chaney v. Heckler*, 718 F.2d 1174 (D.C. Cir. 1983), *cert. granted*, 104 S. Ct. 3532 (1984).

Inasmuch as the FDA admitted that it had jurisdiction over all state laws "that purport[] to legitimize the lawful shipment of an unapproved drug in interstate commerce, or that purport[] to permit its misbranding after shipment," the *Chaney* majority determined that the FDA must have jurisdiction here, where the state's lethal injection laws purport to mandate the use of certain prescription drugs for a purpose

instant,³ United States Supreme Court Justice Byron R. White stayed Autry's execution,⁴ pending the Court's decision in *Pulley v. Harris*.⁵ In *Pulley*, the Supreme Court granted certiorari to consider whether the United States Constitution requires state appellate review of state-imposed death sentences to determine if such sentences are disproportionate to sentences imposed on others convicted of similar crimes. Thus, "proportionality" became the point upon which new battle lines were drawn by those charged with the duty of representing mostly indigent defendants charged with capital crimes.⁶

not listed on their label. 718 F.2d at 1182. The majority rejected the argument that state-sanctioned use of certain prescription drugs for lethal injections, a purpose not listed on their labels, comes within the "practice-of-medicine" exemption of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 301 (1982). The court ruled that the agency's failure to meet its statutory responsibility was sufficient to invalidate the FDA's inaction, warning that this failure "may well place constitutionally impermissible burdens on the eighth amendment rights of appellants." *Id.* at 1192.

The mandate in *Chaney* was stayed by the United States Supreme Court, pending the government's application for a writ of certiorari. *See O'Bryan v. McKaskle*, 729 F.2d 991 (5th Cir. 1984) (denying O'Bryan's action for relief based upon 42 U.S.C. § 1983 and the *Chaney* decision. The court noted Chief Justice Burger's stay of the mandate of *Chaney*, *id.* at 993, and denied the application for a stay of execution.). O'Bryan's petition for emergency relief based on *Chaney* was denied by the Supreme Court. *O'Bryan v. Heckler*, 104 S. Ct. 1698 (1984).

3. *To Die or Not to Die*, Newsweek, Oct. 17, 1983, at 43 [hereinafter cited as *To Die*]. Two days before Autry's scheduled execution, in an unsigned five to four opinion, the Supreme Court denied a stay of execution even though Autry still had a month within which to file a petition for certiorari from the denial of his federal habeas corpus petition below. *Autry v. Estelle*, 104 S. Ct. 20 (1983). *See also infra* note 4. This was the first time that the Supreme Court had refused to stay an execution where the condemned had not filed at least one Supreme Court appeal. Previously, stays had been so routinely granted at this stage that the Texas Attorney General's office did not oppose Autry's application. *See Greenhouse, A New Angrier Mood on Death Penalty Appeals*, N.Y. Times, Nov. 11, 1983, at A22, col. 3. Following the Supreme Court's reversal of *Pulley v. Harris*, 104 S. Ct. 871 (1984), Autry once again petitioned the Supreme Court for a stay of execution. This petition was denied. *Autry v. McKaskle*, 104 S. Ct. 1462 (1984).

4. The Supreme Court's unprecedented denial of the stay led to frantic last ditch efforts culminating in Justice White's order staying the execution on papers handwritten on a yellow legal pad. *To Die, supra* note 3, at 43. *See Barefoot v. Estelle*, 103 S. Ct. 3383 (1983) (approving procedure by which the Texas Court of Criminal Appeals expedites the prosecution of habeas corpus appeals so that the merits may be considered at the same time as the application for a stay of execution). However, expedited appellate procedures are not always in the best interest of condemned appellants, and have been characterized as an unseemly "rush to kill." *Why the Rush to Kill?*, N.Y. Times, Oct. 6, 1983, at A30 (editorial). *See Maggio v. Williams*, 104 S. Ct. 311, 317 (1983) (Brennan, J., dissenting) (characterizing the Court's approach as displaying "an unseemly and unjustified eagerness to allow the state to proceed with Williams' execution").

5. 104 S. Ct. 871 (1984).

6. *See generally Sherrill, Death Row on Trial*, N.Y. Times, Nov. 13, 1983, (Magazine), at 80. Sherrill's article focuses on Florida's death row population, and

The requirement of proportionality in sentencing, founded on the eighth amendment's proscription against cruel and unusual punishments,⁷ appeared to rest on firm ground.⁸ The words of Chief Justice Burger that "[t]he signals from this Court . . . have not always been easy to decipher,"⁹ however, proved true again. Despite solid precedent to the contrary,¹⁰ the Court denied the existence of a federal constitutional right to proportionality review of death sentences.¹¹ Indeed, less than a month after staying Autry's Texas death sentence pending its decision in *Pulley*, the Supreme Court vacated a stay previously granted in a Louisiana case raising virtually the identical issue.¹²

contains that white, affluent prisoners have the greatest likelihood of avoiding the death penalty.

7. The prohibition against cruel and unusual punishments in the eighth amendment is the foundation for the principle of proportionality, which mandates that the punishment "fit the crime." Thus, a disproportionate punishment is "cruel and unusual." See, e.g., *Solem v. Helm*, 103 S. Ct. 3001 (1983); *Enmund v. Florida*, 458 U.S. 782 (1982); *Weems v. United States*, 217 U.S. 349 (1910).

Another aspect of proportionality, however, requires that similarly-situated offenders receive similar punishments. This is the principle of comparative proportionality, which finds its support in the equal protection clause of the fifth and fourteenth amendments. Under traditional equal protection analysis, the infringement of the right to life, a fundamental right, must be justified by a compelling state interest. While the penological purposes of deterrence and retribution may arguably constitute compelling state interests, "neither deterrence nor retribution can justify a capital sentencing system which results in different sentences for similarly situated capital defendants." Goodpaster, *Judicial Review of Death Sentences*, 74 J. CRIM. L. & CRIMINOLOGY 786, 802 (1983). Thus, according to Goodpaster, the constitutional requirement of equal protection mandates comparative proportionality review. Only proportionality review would expose instances of the unfair imposition of the death penalty for crimes which juries normally treat less harshly.

8. See, e.g., *Solem v. Helm*, 103 S. Ct. 3001 (1983) (sentence of life imprisonment for passing "no account" check found "significantly disproportionate" despite defendant's prior convictions); *Enmund v. Florida*, 458 U.S. 782 (1982) (death penalty cruel and unusual punishment for one convicted of felony murder who did not actually kill victim); *Coker v. Georgia*, 433 U.S. 584, 596-97 (1977) (death penalty cruel and unusual punishment for rape conviction).

9. *Lockett v. Ohio*, 438 U.S. 586, 602 (1978).

10. Indeed, in *Proffitt v. Florida*, a plurality of the Court had complimented the Florida courts for performing a proportionality review "with a maximum of rationality and consistency," even though such review was not mandated by the Florida statute. 428 U.S. 242, 258-59 (1976). The Court noted approvingly that the Florida Supreme Court "has several times compared the circumstances of a case under review with those of previous cases in which it has assessed the imposition of death sentences. By following this procedure the Florida court has in effect adopted the type of proportionality review mandated by the Georgia statute." *Id.* at 259 (citations omitted). See also *Gregg v. Georgia*, 428 U.S. 153 (1976) (decided on the same day as *Proffitt*).

11. *Pulley*, 104 S. Ct. at 879.

12. *Maggio v. Williams*, 104 S. Ct. 311 (1983). In *Maggio*, the Supreme Court noted that it had previously agreed to decide whether the proportionality review of death sentences is mandated by the Constitution, but nevertheless refused to stop the execution of Williams, vacating a previous stay granted by the Fifth Circuit. *Id.* at

Ten weeks later, the Supreme Court issued its opinion in *Pulley*, holding that the federal Constitution contained no requirement that the individual states must conduct proportionality review of capital sentences.¹³ While the ruling in *Pulley* further limits the range of federal relief open to the condemned, it serves to underscore the importance of New Jersey's statutorily required proportionality review,¹⁴ and of the New Jersey Constitution as a guarantor of proportionality review, both through the constitution's "cruel and unusual punishments" clause¹⁵ and through the broad powers vested in the New Jersey Supreme Court to act as a "court of last resort."¹⁶ The New Jersey Supreme Court has long been a leader in affording state citizens *greater* protection under the state constitution than that mandated under parallel provisions of the federal Constitution.¹⁷

314-15. The court of appeals had concluded that a stay was necessary because it anticipated that the Supreme Court in *Pulley* would undertake a complete review of the law of proportionality review. *Id.* at 312-13. The *Maggio* Court distinguished Williams' situation from that of Autry's by the fact that Williams' sentence had undergone proportionality review in the district court while Autry's sentence never received a proportionality review. The Supreme Court's conclusion that Williams' proportionality claim, which was almost identical to that raised in *Pulley*, did not warrant a stay of his execution was a clear signal that the anticipated decision in *Pulley* would not be a welcome one for those advocates battling for the lives of their condemned clients. Williams was executed on December 14, 1983.

13. In *Pulley*, the Court held that even though proportionality review is an important element of meaningful appellate review of death sentences, it is not a constitutionally indispensable element, 104 S. Ct. at 879. See *infra* notes 40-82 and accompanying text.

14. N.J. STAT. ANN. § 2C:11-3e (West 1982) ("Every judgment of conviction which results in a sentence of death under this section may be appealed . . . to the Supreme Court, which shall also determine whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.").

15. N.J. CONST., art. I, para. 12 (West 1971).

16. N.J. CONST., art. VI, § 2, para. 2 (West 1971).

17. For examples of this "more expansive grant of rights," see, e.g., *State v. Bruzzese*, 94 N.J. 210, 216, 463 A.2d 320, 323 (1983) (search and seizure); *Right to Choose v. Byrne*, 91 N.J. 287, 301, 450 A.2d 925, 931-32 (1982) (medicaid funding of abortions); *In re Grady*, 85 N.J. 235, 249, 426 A.2d 467, 474 (1981) (privacy); *State v. Schmid*, 84 N.J. 535, 555, 423 A.2d 615, 625 (1980) (free speech), *appeal dismissed and cert. denied sub nom. Princeton Univ. v. Schmid*, 455 U.S. 100 (1982); *State v. Baker*, 81 N.J. 99, 112-13, 405 A.2d 368, 374 (1979) (zoning); *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 174-75, 336 A.2d 713, 725 (zoning), *appeal dismissed and cert. denied*, 423 U.S. 808 (1975), *modified and enforced*, 161 N.J. Super. 317, 391 A.2d 935 (1978), *aff'd in part and rev'd in part*, 92 N.J. 158, 456 A.2d 390 (1983). *Robinson v. Cahill*, 62 N.J. 473, 490, 303 A.2d 273, 282 (education), *cert. denied*, 414 U.S. 976 (1973). See generally Brennan, *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977) (Justice Brennan argues in support of states granting more rights under their state constitution); Pollock, *State Constitutions as Separate Sources of Fundamental Rights*, 35 RUTGERS L. REV. 707 (1983) (stressing the need for state courts to rely on their state constitutions as a way to afford greater protection of basic fundamental rights to its citizens); Note, *The New Jersey Supreme Court's Interpretation and Application of the State Constitution*, 15 RUTGERS L.J. 491 (1984).

The impact of *Pulley* is not merely academic. Within days of the *Pulley* decision, the New Jersey State Prosecutor's Association called for the repeal of that portion of the state death penalty statute mandating proportionality review,¹⁸ characterizing the provision as "needless" and "unnecessary."¹⁹ Although that repeal has not yet taken place,²⁰ and although there are certain critical distinctions between the California statutory scheme upheld in *Pulley* and the New Jersey statute,²¹ this prosecutorial attitude requires a careful examination of both the *Pulley* decision and its expected impact on New Jersey practice.

Full examination of the *Pulley* case, its antecedents, the constitutional history of proportionality and sentence review, and the general role of the appellate judiciary in New Jersey will reveal three principles: (1) repeal of proportionality review in New Jersey is not mandated by *Pulley*; (2) repeal would be contrary to the heritage of both state case law and constitutional developments, as the concept of proportionality is deeply embedded in the fabric of the state's legal system; and (3) repeal would be contrary to the notion of fundamental fairness which is an essential element of the state's criminal justice system.

II. *Pulley* AND ITS ANTECEDENTS

A. *The Law Before Pulley*

The United States Supreme Court recognized the principle of proportionality as an inherent component of the eighth amendment's proscription against cruel and unusual punishments long before the current debate began. The first Supreme Court opinion addressing the concept of proportionality within the ambit of the eighth amendment was *Weems v. United States*.²² In *Weems*, a dispensing officer for the Coast Guard was convicted in a Philippine

18. N.J. STAT. ANN. § 2C:11-3e.

19. See Schwaneberg, *Prosecutors Seek Death Law Revision*, Newark Star-Ledger, Feb. 7, 1984, at 20, col. 5.

20. No vote has yet been taken on S. 1479, which would eliminate the proportionality requirement in New Jersey. See Schwaneberg, *Senate Panel Debates Measure to Eliminate Review of Death Sentences*, Newark Star-Ledger, Apr. 26, 1984, at 21, col. 1. The Department of the Public Advocate testified at the hearing in opposition to the bill, characterizing the proportionality requirement as "an indispensable device [to ensure] fairness and consistency in the application of our death penalty statute." *Id.*

21. For discussion of the California statute, see *infra* notes 66-72 and accompanying text.

22. 217 U.S. 349 (1910). See White, *Disproportionality and the Death Penalty: Death as a Punishment for Rape*, 38 U. PITT. L. REV. 145 (1976); Note, "Down the Road Toward Human Decency": Eighth Amendment Proportionality Analysis and *Solem v. Helm*, 18 GA. L. REV. 109, 115 (1983) [hereinafter cited as Note, *Human Decency*]; Note, *Disproportionality and the Death Penalty in Rape Cases*, 38 U. PITT. L. REV. 145 (1976).

court of falsifying his cash book outlays.²³ The court sentenced the officer to fifteen years of *cadena temporal* — imprisonment at hard labor and permanent deprivation of specific basic rights such as property ownership.²⁴ In striking down the statute, the Supreme Court compared Weems' punishment with the sanctions imposed by other jurisdictions for the same crime and with sanctions imposed in the same and other jurisdictions for more serious crimes.²⁵

In two more recent opinions, the Court focused on the importance of comparative proportionality review in the context of death penalty statutes. In *Gregg v. Georgia*,²⁶ the statute in question provided for state supreme court review, requiring that court to examine whether the sentence was disproportionate when compared with sentences imposed in similar cases. The Court made special note of this "important additional safeguard"²⁷ and viewed it as a "check against the random or arbitrary imposition of the death penalty."²⁸ The Court stated:

In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. If a time comes when juries generally do not impose the death sentence in a certain kind of murder case, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.²⁹

In *Proffitt v. Florida*,³⁰ the Court scrutinized a statutory provision which mandated automatic review³¹ but did not specify the form of review which the Florida Supreme Court was to conduct. As the United States Supreme Court observed, the Supreme Court of Florida "considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case. . . .'"³² The plurality opinion in *Proffitt* highlighted the proportionality review as evidence that "the Florida court has undertaken responsibly to perform its function of death sentence review with a maximum of rationality and consistency."³³ The Court focused on this part of the review

23. 217 U.S. at 357, 362-63.

24. *Id.* at 364-65.

25. *Id.* at 377-80.

26. 428 U.S. 153 (1976).

27. *Id.* at 198.

28. *Id.* at 206.

29. *Id.*

30. 428 U.S. 242 (1976).

31. *Id.* at 250-51.

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

33. *Id.* at 259. *But see* Radelet & Vandiver, *The Florida Supreme Court and Death Penalty Appeals*, 74 J. CRIM. L. & CRIMINOLOGY 913, 926 (1983) ("[I]t

process again, stating that "[the] reasons [for the death sentence], and the evidence supporting them, are conscientiously reviewed by a court which, *because of its statewide jurisdiction*, can assure consistency, fairness, and rationality in the even-handed operation of the state law."³⁴ Certainly, the significance which the Supreme Court has assigned to proportionality review as an effective measure in eliminating comparatively excessive death sentences is ample reason for its inclusion in a state statute intended "to cover every possible contingency for the protection of the defendant."³⁵ Indeed, the Supreme Court itself has utilized a form of proportionality review in its disposition of challenged death sentences.³⁶

Although the Supreme Court failed specifically to address the proportionality issue for fifty years following *Weems*, individual states filled this gap through constitutional and statutory provisions designed to protect their citizens from excessive sentences.³⁷ This protection frequently took the form of statutes which, in effect, provided appellate courts with the power to modify excessive sentences.³⁸ The absence of clearly articulated majority opinions in almost all of the Supreme Court's more recent death penalty cases has frustrated attempts to identify exactly what the federal Constitution requires.³⁹ Particularly in a situation where a life may hang in the balance, it is necessary for state courts to respond to the Court's mixed messages in a manner which affords its citizens the benefit of any constitutional doubts.

B. *The Pulley Decision*

Robert Alton Harris was sentenced to death under California's capital punishment statute,⁴⁰ following his conviction on two counts of first degree murder.⁴¹ On appeal to the state supreme court, he argued that the statute was unconstitutional for the reason that it failed to require the California Supreme Court to compare his sentence with those imposed in similar capital

is clear that either the state supreme court or, in its opinion, the trial courts are *not* applying the death penalty consistently in Florida.") (emphasis added).

34. *Id.* at 259-60 (emphasis added). Of course, this "statewide" perspective essential to assuring proportionate sentencing is absent from an isolated jury determination.

35. Goodpaster, *supra* note 7. According to Goodpaster, the Supreme Court implicitly provides support for the requirement of proportionality review. *Id.* at 796-97.

36. See *Enmund v. Florida*, 458 U.S. 782 (1982); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Coker v. Georgia*, 433 U.S. 584 (1977).

37. See Note, *Human Decency*, *supra* note 22, at 117-19.

38. *Id.* at 119 n.34.

39. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 99-100 (1979).

40. CAL. PENAL CODE §§ 190-190.6 (West 1977), *repealed by* CAL. PENAL CODE §§ 190-190.7 (West 1984).

41. *Pulley*, 104 S. Ct. at 873 n.1. Harris was also convicted of robbery and kidnapping.

cases. This argument was rejected by the state court,⁴² as was his state habeas corpus application.⁴³

Harris' federal habeas claim was rejected in the federal district court. On appeal, the Ninth Circuit addressed the necessity and the scope of proportionality review.⁴⁴ The court granted Harris a stay based on two grounds: first, that California case law indicated that the California Supreme Court would undertake a proportionality review in every death case;⁴⁵ and, second, that *Gregg* and *Proffitt* required a proportionality review.⁴⁶ The Ninth Circuit instructed the district court to vacate the sentence unless the California Supreme Court conducted a proportionality review within 120 days⁴⁷ and reached a decision consistent with *Proffitt* and *Gregg*.⁴⁸

The United States Supreme Court granted the state's certiorari petition⁴⁹ and reversed in *Pulley v. Harris*.⁵⁰ After rejecting Harris' argument that the case could properly be returned to the state courts "because state law may entitle him to the comparative proportionality review that he has unsuccessfully demanded,"⁵¹ the Court moved on to the federal constitutional question. Attempting to "more clearly identify the issue"⁵² before it, the Court distinguished "death penalty proportionality"⁵³ from "traditional

42. *People v. Harris*, 28 Cal. 3d 935, 623 P.2d. 240, 171 Cal. Rptr. 679, *cert. denied*, 454 U.S. 882 (1981).

43. *Harris v. California*, 457 U.S. 1111 (1982).

44. *Harris v. Pulley*, 692 F.2d 1189, 1196-97 (9th Cir. 1982), *rev'd*, 104 S. Ct. 871, *on remand*, 726 F.2d 569 (9th Cir. 1984).

45. *Id.* at 1196. The court cited *People v. Frierson*, 25 Cal. 3d 142, 599 P.2d 587, 158 Cal. Rptr. 281 (1979), and *People v. Jackson*, 28 Cal. 3d. 264, 618 P.2d 149, 168 Cal. Rptr. 603 (1980), *cert. denied*, 450 U.S. 1035 (1981).

46. *See supra* notes 26-36 and accompanying text. The court noted that California's death penalty statute, like Florida's, provides for automatic appeal to the state supreme court without defining the type of review the court must conduct. 692 F.2d at 1193-93.

47. *Id.* at 1196. The court did not provide clear guidelines to the district court on how to examine the state's proportionality review. The court did give the following helpful advice: "It must be recognized, however, that given the broad range of considerations relevant in determining whether to impose the death penalty, any statistical showing based on a particular selection of 'similar' cases may not be conclusive of the usual practice." 692 F.2d at 1196-97.

48. *Id.* at 1192. This decision is in conflict with the decisions of the Fifth Circuit Court of Appeals, which has consistently upheld district-wide rather than state-wide review. *See Baldwin v. Maggio*, 715 F.2d 152, 155 (5th Cir. 1983); *Williams v. Maggio*, 679 F.2d 381 (5th Cir. 1982), *aff'd*, 103 S. Ct. 3553 (1983).

49. *Pulley v. Harris*, 103 S. Ct. 1425 (1983).

50. 104 S. Ct. 871 (1984).

51. *Id.* at 875. The Court held that "[a] federal court may not issue the writ on the basis of a perceived error of state law." *Id.* (citing 28 U.S.C. § 2241(c)(3) (1976)).

52. *Id.*

53. The Court stated "this sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire whether the penalty is nonetheless unacceptable in a particular case because

proportionality,"⁵⁴ and posed the following question: "whether the Eighth Amendment, applicable to the states through the Fourteenth Amendment, requires a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner."⁵⁵

The Court then reviewed the recent history of death penalty litigation, focusing upon the 1976 trilogy of cases⁵⁶ which upheld three state statutes drafted in response to *Furman v. Georgia*.⁵⁷ In *Furman*, the Court held that the death penalty as then administered was unconstitutionally cruel and unusual by federal constitutional standards.⁵⁸ The Court in *Pulley* cautioned that although "[m]ost" state statutes require the reviewing court to determine whether a sentence is disproportionate,⁵⁹ and although some state courts perform proportionality review despite the absence of a statutory requirement, such review is not necessarily indispensable.⁶⁰

While the opinions in *Gregg* greatly emphasized statutorily required proportionality review,⁶¹ and the *Pulley* Court characterized such review as "an additional safeguard against arbitrary or capricious sentencing,"⁶² the Court found that it was not "so critical that without it the Georgia statute would not have passed constitutional muster."⁶³ The essential element of propor-

disproportionate to the punishment imposed on others convicted of the same crime." *Id.* at 876. See *supra* note 7.

54. This analysis can be abstracted from the following quote:

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.

Id. at 875 (citing, *inter alia*, *Solem v. Helm*, 103 S. Ct. 3001 (1983)). The Court noted that the death penalty "is not in all cases a disproportionate penalty in this sense." 104 S. Ct. at 875 (citing *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (Stewart, J.)).

55. 104 S. Ct. at 876.

56. *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

57. 408 U.S. 238 (1972).

58. *Id.* at 240-41.

59. 104 S. Ct. at 876. According to a recent study, over 30 states require some sort of proportionality review. Goodpaster, *supra* note 7, at 793 n.61.

60. 104 S. Ct. at 876.

61. *Id.* at 877 (citing *Gregg*, 428 U.S. at 198, 204-06, 222-23).

62. *Id.* at 879.

63. *Id.* The Court went on to note that in *Jurek*, it upheld a death sentence based on neither statutory nor caselaw mechanisms for proportionality review, but which *otherwise* "provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law." *Id.* at 878 (quoting *Jurek*, 428 U.S.

tionality review identified in *Gregg* and *Proffitt* was "the provision of some sort of prompt and automatic appellate review."⁶⁴ The Court thus found no basis in its decisional law "for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."⁶⁵

Finally, the Court scrutinized the entire California statute, assuming that there could be a capital sentencing system so lacking in other checks on arbitrariness that it could not pass constitutional muster without comparative proportionality review.⁶⁶ After a detailed examination of the full statutory scheme,⁶⁷ including the necessity of separate determinations as to the presence of special⁶⁸ or aggravating and mitigating circumstances,⁶⁹ the Court concluded that the statute sufficiently guided jury discretion, decreased the chance of arbitrary infliction of the death penalty, and guaranteed that jury decisions be principled and deliberate.⁷⁰ As the jury's "discretion [was thus] suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action,"⁷¹ the Court determined that it could not "say that the California procedures provided Harris inadequate protection against the evil identified in *Furman*."⁷²

Justice Stevens concurred, relying on *Gregg*, *Proffitt* and *Jurek* for the proposition that "the case law does establish that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia* and hence that some form of meaningful appellate review is constitutionally required."⁷³

at 276). Under such a scheme, proportionality review "would have been constitutionally superfluous." 104 S. Ct. at 879. *But see* Baldus, Pulaski & Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 728 (1983) (Georgia system continues to uphold death sentences identified as presumptively excessive; "[t]he Georgia Supreme Court has never vacated a death sentence imposed in a murder case on the grounds that it was excessive or disproportionate because of the infrequency of death sentencing among similar cases.").

64. 104 S. Ct. at 879.

65. *Id.* The Court also rejected Harris' argument that its most recent decision in *Zant v. Stephens*, 103 S. Ct. 2733 (1983), compelled a mandatory proportionality finding. While *Zant* did stress the importance of mandatory appellate review under the Georgia statute, *id.* at 2742, the focus of its holding was "on the constitutionally necessary narrowing function of statutory aggravating circumstances." *Pulley*, 104 S. Ct. at 879. Again, proportionality review was characterized merely as an "additional safeguard against arbitrarily imposed death sentences." *Id.*

66. 104 S. Ct. at 880.

67. *Id.* at 880-81 and nn.13-14.

68. CAL. PENAL CODE §§ 190.2 (West 1983). The "special circumstances" are listed in *Pulley*, 104 S. Ct. at 880 n.13.

69. CAL. PENAL CODE §190.3. These circumstances are listed in *Pulley*, 104 S. Ct. at 880 n.14.

70. 104 S. Ct. at 881 (citing *Harris v. Pulley*, 692 F.2d at 1194-95).

71. *Id.* (quoting *Gregg*, 428 U.S. at 189).

72. 104 S. Ct. at 881.

73. *Id.* at 881-82 (Stevens, J., concurring) (citation omitted).

In a sharply-worded dissent, Justice Brennan, writing for himself and Justice Marshall, repeated his view that the death penalty is invariably cruel and unusual punishment prohibited by the eighth and fourteenth amendments.⁷⁴ Justice Brennan also focused his attention specifically on the proportionality issue:

Upon the available evidence . . . I am convinced that the Court is simply deluding itself, and also the American public, when it insists that those defendants who have already been executed or are today condemned to death have been selected on a basis that is neither arbitrary nor capricious, under any meaningful definition of those terms.⁷⁵

Justice Brennan characterized the concerns articulated in *Furman* as premised on actual experience with the administration of the penalty by the various states:⁷⁶ "if any principle is an accepted part of the Court's death penalty decisions during the past 12 years, it is that the irrational application of the death penalty, as evidenced by examination of when the death penalty is actually imposed, cannot be constitutionally defended."⁷⁷

Justice Brennan also noted that several factors contribute to the "irrationality" which currently surrounds the imposition of the death penalty.⁷⁸ First, Justice Brennan reviewed the "rapidly expanding body of literature" on "systemic racial discrimination" in the administration of the death penalty, and concluded that the race of the defendant and of the victim are crucial but impermissible considerations in capital sentencing.⁷⁹ Moreover, gender, socio-economic status and intrastate geographical location may also be sources of arbitrariness.⁸⁰ According to Justice Brennan:

[I]f the Court is going to fulfill its constitutional responsibilities, then it cannot sanction continued executions on the unexamined assumption that the death penalty is being administered in a rational, nonarbitrary, and noncapricious manner. Simply to assume that the procedural protections mandated by this Court's prior decisions eliminate the irrationality underlying application of the death penalty is to ignore the holding of *Furman* and whatever constitutional difficulties may be inherent in each State's death penalty system.⁸¹

74. *Id.* at 884 n.1 (Brennan, J., dissenting) (citing *Furman*, 408 U.S. at 257 (Brennan, J., concurring) and *Gregg*, 428 U.S. at 229 (Brennan, J., dissenting)).

75. 104 S. Ct. at 885 (Brennan J., dissenting).

76. *Id.* at 886 (Brennan, J., dissenting).

77. *Id.*

78. *Id.* at 887 (Brennan, J., dissenting).

79. *Id.* at 888 (Brennan, J., dissenting).

80. *Id.*

81. *Id.*

Since proportionality review serves to eliminate some of the irrationality that infects the current imposition of death sentences throughout the various states, Justice Brennan concluded that comparative proportionality review is thus mandated by the federal Constitution.⁸²

C. *The Impact of Pulley on New Jersey Capital Jurisprudence*

Nothing in *Pulley* suggests or requires the elimination of proportionality review in the New Jersey capital punishment system. First, and most important, the fact that proportionality review may not be mandated by the federal Constitution does not decide the question of whether the New Jersey Constitution imposes such an obligation.⁸³ This is a critical distinction in a state such as New Jersey, where the state supreme court has established a variety of protections under the state charter that far exceeds federal constitutional requirements.⁸⁴ Second, *Pulley* itself is inconsistent with the Court's prior death penalty jurisprudence. The *Pulley* majority relied on a distorted reading of the Court's conclusions in *Gregg v. Georgia*.⁸⁵ While acknowledging the importance of comparative proportionality review in both the plurality and concurring opinions in *Gregg*, the *Pulley* Court asserted that this review was actually "considered an *additional* safeguard against arbitrary or capricious sentencing."⁸⁶ As noted above,⁸⁷ the Court's sudden demotion to "secondary" importance of the *Gregg* proportionality review can hardly be justified by a careful reading of *Gregg*.

The Supreme Court itself has engaged in proportionality review to ensure a fair result. The Court has compared the sentence in question with penalties provided for similar statutory offenses in other jurisdictions and with penalties provided for more serious statutory offenses in the same jurisdiction.⁸⁸ In

82. *Id.* Justice Brennan focused on proportionality review as a mechanism designed to root out the case of the defendant "whose crime does not seem so aggravated when compared to those of many who escaped the death penalty." *Id.* at 889 (quoting Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L.F. 555, 576). He noted that the "best evidence" of the value of proportionality review is the recognition that in Georgia (where proportionality review is statutorily mandated, see GA. CODE ANN. § 17-10-35(c)(3) (1984)), at least seven death sentences have been vacated because that state's supreme court "was convinced that they were comparatively disproportionate." 104 S. Ct. at 890-91 (Brennan, J., dissenting) (citing cases from Georgia and eight other states whose supreme courts have vacated death sentences as a result of required proportionality review). *Pulley* is criticized sharply in Special Project, *Capital Punishment in 1984: Abandoning the Pursuit of Fairness and Consistency*, 69 CORNELL L. REV. 1129, 1198-1201 (1984).

83. See Special Project: *The Constitutionality of the Death Penalty in New Jersey*, 15 RUTGERS L.J. 261, 310-24 (1984).

84. See Special Project, *supra* note 83, at 323-24.

85. 428 U.S. 153 (1976).

86. 104 S. Ct. at 877 (emphasis added).

87. See *supra* note 63.

88. See *supra* note 8.

addition, the Court has considered the extent to which juries actually apply the death penalty, evaluating whether the sentence is at variance with what society apparently feels is just.⁸⁹ The Court's willingness to dismiss comparative proportionality review as merely an option in state court proceedings is ironic in light of these decisions.

Third, *Pulley* does not retreat from *Zant v. Stephens*,⁹⁰ or any of the Court's line of cases which affirms the central focus of *Furman* as restated in *Gregg*: "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."⁹¹ This inquiry — a determination of the *degree* of risk of "wholly arbitrary and capricious action" — remains an ongoing concern. Under no circumstances should *Pulley* be seen as the death knell of United States Supreme Court proportionality analysis. As Professor Martin Shapiro recently noted:

Coker v. Georgia, striking down the death penalty as a punishment for rape, however, shows us that equality is not the value at play. Instead, *the value appears to be some sort of Aristotelian proportionality*. The Court dons the robes of the Mikado to decide when the punishment fits the crime. It feels in its bones that rape is not serious enough to warrant the death penalty.⁹²

The *Coker* decision⁹³ demonstrates that the Court has employed proportionality review to strike down particular punishments for particular crimes, *e.g.*, the death penalty for rape. Having done so, the Court leaves open the continuing possibility that it will find certain crime/punishment relationships to be *per se* disproportionate and violative of the eighth amendment.

Finally, the Court stressed that its decision was premised on the fact that the *California* statute included other checks on arbitrariness.⁹⁴ The Court did

89. See White, *supra* note 22, at 159; Note, *Cruel and Unusual Punishment: The Taming of the Proportionality Test*, 7 RUTGERS L.J. 722, 723 (1976).

90. 103 S. Ct. 2733 (1983).

91. *Id.* at 2741 (Stewart, J.) (quoting *Gregg*, 428 U.S. at 189).

92. Shapiro, *Fathers and Sons: The Court, The Commentators and the Search for Values*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 236 (V. Blasi ed. 1983) (footnote omitted) (emphasis added).

93. *Coker v. Georgia*, 433 U.S. 584 (1977).

94. The Supreme Court noted that under the California statute, capital murder was limited to those cases where the state proved, at the guilt phase, the existence of one or more "special circumstances" which greatly reduced the number of defendants eligible for the sentencing phase. The Court noted:

By requiring the jury to find at least one special circumstance beyond a reasonable doubt, the statute limits the death sentence to a small sub-class

not eliminate the possibility that a statute lacking proportionality review will ever be invalidated under the federal Constitution, but merely concluded that the constitutionality of *this* statute — like the statutes upheld in *Gregg*, *Proffitt* and *Jurek* — was not dependent on the presence or absence of a comparative review provision.⁹⁵ Nothing in *Pulley* suggests that the Court will not decide in the future that a New Jersey law lacking proportionality review does not sufficiently reduce the risk of arbitrariness condemned in *Furman* so as to be unconstitutional under federal standards.⁹⁶

III. PROPORTIONALITY REVIEW IN NEW JERSEY

A. *An Historical Perspective*

The phrase “cruel and unusual punishments” first appeared in the English Declaration of Rights of 1689 as an indirect result of the ascension of William and Mary to the throne of England.⁹⁷ The unsteady reign of King James II ended in December of 1688 when the King, under attack by William of Orange and his forces, threw the great seal of England into the Thames and fled to France.⁹⁸ In response to the “selective or irregular application of harsh penalties”⁹⁹ imposed during James’ reign, the English Bill of Rights was drafted and ratified by the new monarchy of William and Mary. It contained the

of capital-eligible cases. The statutory list of relevant factors, applied to defendants within this sub-class, “provide[s] jury guidance and lessen[s] the chance of arbitrary application of the death penalty.”

104 S. Ct. at 881 (citations omitted). By contrast, the New Jersey statute does not attempt to define capital and non-capital murder. Since the New Jersey death penalty statute is otherwise “substantially identical” to the Georgia statute approved in *Gregg*, including a statutorily mandated proportionality review, it can hardly be said that this statutory requirement is suddenly “unnecessary.”

95. 104 S. Ct. at 881.

96. Note, *Furman v. Georgia — Deathknell for Capital Punishment?*, 47 ST. JOHN’S L. REV. 107, 109-10 & n.28 (1972).

97. Granucci, “*Nor Cruel and Unusual Punishments Inflicted:*” *The Original Meaning*, 57 CALIF. L. REV. 839, 852-53 (1969). See generally *Furman*, 408 U.S. at 242-43 (Douglas, J., concurring).

98. Granucci, *supra* note 97, at 853 n.61 (citing R. PERRY, *SOURCES OF OUR LIBERTIES* 4 (1959)).

99. *Id.* at 853-56. James II ascended the throne after his brother Charles II died in February, 1685. Charles’ eldest illegitimate son, James, Duke of Monmouth, led an invasion force which landed in England on June 11, 1685. Monmouth proclaimed himself King and led a brief rebellion which lasted about a month before he was captured and executed. The King set about to prosecute the captured rebels swiftly. Towards that end, mass plea-bargaining was employed in which all those who pleaded guilty would be spared execution; the penalty for treason was to be carted to the gallows, hanged by the neck, cut down while still alive, disembowelled, with the entrails burnt before the condemned who was then beheaded and quartered. See also *Furman*, 408 U.S. at 253-55 (Douglas, J., concurring).

following clause: "That excessive bail ought not to be required, nor excessive fines imposed; nor cruel and unusual punishments inflicted."¹⁰⁰

While many legal commentators generally agreed that the phrase "cruel and unusual punishments" was created as a reaction to the reign of terror of 1685 (the Bloody Assize),¹⁰¹ another view emerged. What was to be condemned as "cruel and unusual" was not merely barbarous punishments, but also sentences which were cruel because they were disproportionately severe compared to the gravity of the crime committed.¹⁰² On June 12, 1776, Virginia adopted a Declaration of Rights which included verbatim the cruel and unusual punishments prohibition of the English Bill of Rights of 1689.¹⁰³ In 1791, it became the eighth amendment to the United States Constitution.¹⁰⁴

While the first constitution of the State of New Jersey, adopted June 2, 1776, did not copy the English Bill of Rights' proscription against cruel and unusual punishments as did other states,¹⁰⁵ the principle that a punishment should be proportionate to the crime is firmly grounded in New Jersey's

100. Granucci, *supra* note 97, at 853.

101. See Mulligan, *Cruel and Unusual Punishments: The Proportionality Rule*, 47 *FORDHAM L. REV.* 639 (1979).

In 1678, Titus Oates, a minister of the Church of England, proclaimed the existence of a "Popish Plot," a Catholic plan to assassinate King Charles II. According to Oates, following the assassination, a Catholic army would invade England in order to install James (later named James II) as King. Oates was a liar and the "Popish Plot" a hoax. Nevertheless, for political reasons, Oates was supported and 15 influential Catholics were executed for treason. After James II became King, evidence of Oates' perjury was adduced and he was convicted and sentenced to be fined, whipped, pillored, defrocked and incarcerated for life. Oates appealed the sentence to both houses of Parliament, arguing that his sentence was "inhumane and unparalleled." The House of Lords rejected Oates' contention, but a minority dissented, using the term "cruel and unusual" to describe Oates' sentence. The House of Commons agreed with the dissenters in the House of Lords. Thus, Granucci argues persuasively that the real meaning of the term "cruel and unusual punishment," as adopted by the American framers of the Constitution, was based on their misinterpretation of the true intent of the drafters of the English Bill of Rights: the eighth amendment therefore prohibits excessive penalties as well as barbarous methods of punishment, where excessiveness is measured in terms of disproportionality to the crime committed. Granucci, *supra* note 97, at 856-60. See also Comment, *The Eighth Amendment, Beccaria and the Enlightenment: An Historical Justification for the Weems v. United States Excessive Punishment Doctrine*, 24 *BUFFALO L. REV.* 783 (1975).

102. Granucci, *supra* note 97, at 840.

103. *Solem v. Helm*, 103 S. Ct. 3001, 3007 n.101 (1983).

104. U.S. CONST. amend. VIII provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

105. N.J. CONST. art XXII (1776) provided:

Common and statute law of England, how far to be in force; trial by jury confirmed.

jurisprudence. This principle traces its origins to both common and statutory law of England, beginning with the Magna Carta,¹⁰⁶ and the First Statute of Westminster.¹⁰⁷ On September 2, 1844, a new constitution was adopted in New Jersey which provided: "*Excessive bail or fines; cruel and unusual punishments*. Excessive bail shall not be required, excessive fines shall not be imposed, and cruel and unusual punishments shall not be inflicted."¹⁰⁸ This language was continued without change in the present New Jersey Constitution.¹⁰⁹

That the common law of England, as well as so much of the statute law, as have been heretofore practiced in this colony, should still remain in force, until they shall be altered by a future law of the legislature; such parts only excepted, as are repugnant to the rights and privileges contained in this chapter; and that the inestimable right of trial by jury shall remain confirmed, as part of the law of this colony, without repeal, forever.

106. See *Solem*, 103 S. Ct at 3006 nn.8-9. Three chapters of the Magna Carta were devoted to a rule against excessive "amercements," similar to modern day fines, which were the most common sanction in 13th century England. *Id.* at 3006 n.8.

107. *Id.* at 3007 (citing 3 Edw. I, ch. 6 (1275)).

108. N.J. CONST. art. I, § 15 (1844). The commentary notes the following:

The Eighth Amendment to the Constitution of the United States, provides that "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." The Act of Congress of July 13, 1787, known as the Ordinance of 1787, declared in Article 2 that "All fines shall be moderate, and no cruel or unusual punishments shall be inflicted."

The language in question was drafted by the Committee on Bill of Rights and was incorporated into the 1844 Constitution without change. See PROCEEDINGS OF THE NEW JERSEY STATE CONSTITUTIONAL CONVENTION OF 1844 51-53 (1942).

109. N.J. CONST. art. I, § 12 (1947). During the 1947 constitutional convention debates, it was merely noted that the language in question "was a time-tested principle of merit." 3 RECORD, STATE OF N.J. CONSTITUTIONAL CONVENTION OF 1947 9 (1952). The commentary to article I notes specifically:

While there is a good deal of similarity in the provisions of the statements found in the various state constitutions, the particular expression of these ideas found in the constitution of any given state is likely to be vigorously defended by its citizens. It has strength which comes from long usage; the clarity which comes from its having been judicially interpreted, and the veneration and respect which people give to institutions tried and proved.

Bills of rights have grown through the years . . . men have sought to preserve the rights that they have already won, and to secure guarantees in their fundamental law of those rights which, at the time, seem vital, but which have not, heretofore, been so generally recognized or so commonly observed.

Graves, *What Should a Constitution Contain?*, in THE GOVERNOR'S COMMITTEE ON PREPARATORY RESEARCH FOR THE NEW JERSEY CONSTITUTIONAL CONVENTION 2-4 (Goldmann ed. 1947).

In 1796, the state legislature ordered that capital punishment in New Jersey be administered by hanging.¹¹⁰ That form of execution prevailed until March 1, 1907, when the Electrocution Act¹¹¹ went into effect, making death by the electric chair the sole form of capital punishment in New Jersey. As the United States Supreme Court had already held that the eighth amendment proscription against cruel and unusual punishments was inapplicable to the individual states,¹¹² the first challenge to electrocution as cruel and unusual punishment to reach the New Jersey high court relied solely on state constitutional grounds. In *State v. Tomassi*,¹¹³ appellant challenged electrocution as a cruel and unusual punishment in contravention of the New Jersey Constitution.¹¹⁴

The New Jersey Supreme Court recognized the dilemma it faced in attempting to define what punishments may be "cruel and unusual" within the state constitutional prohibition. It stated that "[i]n a limited sense, anything is cruel which is calculated to give pain or distress, and since punishment imparts pain or suffering to the convict, it may be said that all punishments are in some sense cruel."¹¹⁵ However, the court noted that the legislature had proclaimed that murder in the first degree should be a capital offense. When the legislature replaced hanging with electrocution in an attempt to effect executions as speedily¹¹⁶ as possible, the court concluded that it could not assume that electrocution was unconstitutionally "cruel."¹¹⁷

Tomassi argued further that other aspects of the Electrocution Act — mandating solitary confinement for the condemned following issuance of the death warrant, and prohibiting visitors (save prison officers, counsel, physicians, clergy and members of the family) except by court order — were also cruel under the state constitution. The court rejected this contention, noting

110. Bedau, *Death Sentences in New Jersey, 1907-1960*, 19 RUTGERS L. REV. 1 & n.2 (1964).

111. N.J. STAT. ANN. § 2A:165-1 (West 1971), *repealed by* N.J. STAT. ANN. § 2C:98-2 (West 1979).

112. *In re Kemmler*, 136 U.S. 436 (1890). The Court denied relief under the following theory: "The decision of the state courts sustaining the validity of the act under the state constitution is not re-examinable here, nor was that decision against any title, right, privilege, or immunity specially set up or claimed by the petitioner under the Constitution of the United States." *Id.* at 447. The eighth amendment was subsequently incorporated through the fourteenth amendment so as to apply to the states. *See, e.g., Robinson v. California*, 370 U.S. 660 (1962).

113. 75 N.J.L. 739, 69 A. 214 (E. & A. 1908).

114. *Id.* at 746, 69 A. at 217.

115. *Id.* at 747, 69 A. at 218.

116. Presumably the word "speedily" was equated with "humanely" in the statute. *See id.* ("the punishment of death must be inflicted 'by causing to pass through the body of the convict a current of electricity of sufficient intensity to cause death as speedily as possible' "). Subsequent electrocution developments belied that assumption. *See, e.g., The Execution Trend*, N.Y. Times, Sept. 14, 1983, at E14.

117. *Tomassi*, 75 N.J.L. at 747, 69 A. at 218.

that since even more stringent provisions were contained in prior law, the court could not rule that the new statute was unconstitutionally "cruel."¹¹⁸

Although the statute was upheld, this challenge foreshadowed the circular development of the law regarding fundamental rights. The cycle began with reliance on the various state constitutions, a shift to the federal Constitution then occurred, and now the state courts have come full circle to recognize once again their state constitutions as sources of individual rights.¹¹⁹ For the balance of this century, it can be expected that state constitutions in general, and the New Jersey Constitution in particular, will play an important role in guaranteeing fundamental rights, surpassing the federal Constitution in the scope and breadth of protection afforded individual liberties.¹²⁰ This analysis will be seen frequently in the area of the death penalty as it is to be applied in New Jersey.¹²¹

B. *The New Jersey State Courts and Proportionality*

There can be little question that the concept of proportionality is rooted deeply in state law. As early as 1886, the New Jersey Supreme Court contrasted early "English criminal jurisprudence," where the accused often faced a punishment *disproportionate to his crime*, with what it characterized as "[our] more humane system of criminal law . . . which *graduates the punishment according to the magnitude of the offense*."¹²² This concept has been reaffirmed by the state supreme court in unequivocal terms on at least two separate instances over the past fifteen years. In the first case, the defendant's driver's license was suspended for one year following her conviction for marijuana use.¹²³ The supreme court provided the following framework for assessing proportionality of punishments:

[A] court will pit the offense against the form of punishment. If one is greatly disproportionate to the other, or if the punishment goes beyond what appears to be a reasonable expedient to achieve

118. *Id.*

119. *See, e.g.*, cases cited *supra* at note 17.

120. *See, e.g.*, Pollock, *supra* note 17, at 707.

121. With each Supreme Court decision denying a challenge to a particular state's death penalty statute, the universe of federal issues shrinks dramatically. *See Greenhouse, As Appeals Hit Final Stage, Life on Death Rows Runs Out*, N.Y. Times, Dec. 18, 1983, at E5.

Justice Rehnquist, dissenting from a denial of certiorari in *Coleman v. Balkcom*, lamented that the exhaustive appeal process in death cases had made the existence of the death penalty "virtually an illusion." 451 U.S. 949, 958 (1981). Three years later, amidst the shrinking universe of federal relief, the death penalty is an illusion no more.

122. *Patterson v. State*, 48 N.J.L. 381, 383, 4 A. 449, 450 (1886).

123. *State v. Smith*, 58 N.J. 202, 276 A.2d 369 (1971).

the public purpose as it may be deduced from the legislation, then the penalty will be condemned.¹²⁴

The other case involved a conviction for kidnapping, assault and other crimes.¹²⁵ The court rephrased the test, emphasizing that the focus should be on whether comparison shows the punishment and offense to be grossly disproportionate, and whether the punishment exceeds that which is necessary to achieve a "legitimate penal aim."¹²⁶ This traditional role of the proportionality inquiry in the state criminal justice system cannot be questioned.

The concept of proportionality is further reflected in the general approach to excessive sentences of both the New Jersey state courts and legislature. The leading case of *State v. Johnson*¹²⁷ relied on an 1886 case to support its holding that the courts may revise a sentence which is manifestly excessive, though within authorized statutory limits.¹²⁸ This holding has been affirmed repeatedly by the state supreme court,¹²⁹ and has been codified in the New Jersey Court Rules,¹³⁰ with the caution that "it is only in the exceptional case that the trial judge's use of discretion should be reversed. . . ."¹³¹ In fact, in recent years only about five percent of all sentences appealed from have been so modified.¹³²

More recently the legislature established, through a new penal code,¹³³ a sentencing model "based on notions of proportionality and desert,"¹³⁴ structured to prevent "excessive, *disproportionate* or arbitrary punishment."¹³⁵ In *State v. Roth*,¹³⁶ the supreme court identified "appellate review of sentences to provide a greater degree of uniformity" as a central issue in sentencing

124. *Id.* at 212, 276 A.2d at 374.

125. *State v. Hampton*, 61 N.J. 250, 294 A.2d 23 (1972).

126. *Id.* at 273-74, 294 A.2d at 36.

127. 67 N.J. Super. 414, 170 A.2d 830 (App. Div. 1961).

128. *Id.* at 432, 170 A.2d at 840. *Johnson* cited *Patterson* as authority to "root out those anachronisms which would subvert our 'more humane system of criminal law'" so as to avoid imposing on any prisoner a disproportionate punishment. *Id.* at 429, 170 A.2d at 839.

129. *See State v. Leggeadrine*, 75 N.J. 150, 156-57, 380 A.2d 1112, 1116 (1977), and cases cited therein.

130. N.J. Ct. R. 2:10-3 (1984).

131. S. PRESSLER, CURRENT N.J. COURT RULES, Comment to R.2:10-3 (1985), at 341.

132. *State v. Whitaker*, 79 N.J. 503, 513, 401 A.2d 509, 514 (1979) (30 of 628 such appeals were successful in the court year ending in August 1977, 41 of 652 in the following year).

133. N.J. STAT. ANN. § 2C:1-1 (West 1982).

134. *State v. Roth*, 95 N.J. 334, 355, 471 A.2d 370, 381 (1984) (quoting von Hirsch, *Utilitarian Sentencing Resuscitated: The American Bar Association's Second Report on Criminal Sentencing*, 33 RUTGERS L. REV. 772, 773 (1980)).

135. N.J. STAT. ANN. § 2C:1-2(b)(4) (emphasis added).

136. 95 N.J. 334, 471 A.2d 370 (1984).

reform.¹³⁷ In a companion case, *State v. Hodge*,¹³⁸ the court reaffirmed the principle that statutes establishing penalties "must be construed 'so as to avoid the unfairness of arbitrary enforcement.'" ¹³⁹

In short, the concepts of proportionality and fairness permeate the sentencing provisions of the new code and contemporaneous judicial interpretations. It would be a cruel irony if persons sentenced for non-capital offenses are afforded review of the excessiveness of their sentences while individuals sentenced to the "qualitatively" more serious penalty of death are denied a comparable review. Under *any* sentencing statute, the appellate judiciary will modify a death sentence if it is felt to be grossly disproportionate.¹⁴⁰ The formal requirement of proportionality review merely enables the courts to satisfy this concern in a way that maintains the integrity of both the statute and the entire criminal justice system.

Since the late 1950's, the New Jersey Supreme Court has recognized that the amount of discretion and responsibility vested in juries in death cases reaches the same implied standard that guides trial judges in judicial sentencing: after consideration of all the evidence,¹⁴¹ "the determination of that sentence within statutory limits which best serves the interests of justice as between society and the defendant."¹⁴² In *State v. Mount*,¹⁴³ the state supreme court again sanctioned explicitly the introduction of a full range of evidence as to the defendant's background so as to best serve "the true interests of the State in seeking a sound measure of justice as between society and the wrongdoer."¹⁴⁴

This approach to capital cases reflects a greater degree of caution and special concern for procedures than that traditionally exercised by appellate courts.¹⁴⁵ This policy, coupled with the general appellate power to revise sentences evidencing a clear showing of abuse of discretion,¹⁴⁶ led the state supreme court in 1968 to rule that it had the power to *substantively* review jury determinations of punishment either (1) to remedy procedural error in

137. *Id.* at 361, 471 A.2d at 385. Among the sentence review functions of the appellate court is the determination whether "even though the court sentence is in accordance with the [sentencing] guidelines, nevertheless the application of the guidelines to the facts . . . makes the sentence clearly unreasonable so as to shock the judicial conscience." *Id.* at 364-65, 471 A.2d at 387.

138. 95 N.J. 369, 471 A.2d 389 (1984).

139. *Id.* at 374, 471 A.2d at 392 (quoting, in part, *State v. Maguire*, 84 N.J. 508, 514 n.6, 423 A.2d 294, 297 n.6 (1980)).

140. See *supra* notes 37-39 and accompanying text.

141. *State v. White*, 27 N.J. 158, 178-80, 142 A.2d 65, 76-77 (1958).

142. *State v. Johnson*, 34 N.J. 212, 230, 168 A.2d 1, 10, *cert. denied*, 368 U.S. 933 (1961).

143. 30 N.J. 195, 152 A.2d 343 (1959).

144. *Id.* at 219, 152 A.2d at 355.

145. *State v. Wolf*, 46 N.J. 301, 309, 216 A.2d 586, 590 (1966).

146. *State v. Tyson*, 43 N.J. 411, 417, 204 A.2d 864, 867 (1964).

the course of the trial, or (2) to reduce death verdicts unwarranted by the evidence.¹⁴⁷

In *State v. Laws*,¹⁴⁸ the supreme court reviewed the case law and held it was "firmly convinced of the sufficiency of our appellate power to modify a discretionary sentence *whenever the interests of justice so require*."¹⁴⁹ The defendants in *Laws* had been convicted of first-degree murder and sentenced to death. On appeal, the supreme court found that their guilt had been firmly established at trial but that error had been committed in the imposition of the death penalty. Instead of ordering a "burdensome" and "costly" retrial, the court ruled that it had the power to modify the defendants' discretionary sentences in the interest of justice, particularly since the prosecutor had agreed to waive the death penalty.¹⁵⁰ The court emphasized that the "delegates who drafted the 1947 Constitution deliberately vested this Court with sweeping judicial power to the end that it would be fully equipped to see that justice is soundly administered."¹⁵¹ The *Laws* decision stands for the proposition that rigorous appellate review of death sentences is essential to avoid arbitrary and inconsistent application of the death penalty.¹⁵²

In a review of the *Laws* case, one commentator wrote:

[The decision] suggests a sympathy for the appellate practice of "finding" procedural error where the real ground for reversal is the court's belief that the sentence is too severe. One possible implication of this attitude is that, although the court is empowered to lower a death sentence on the ground of manifest excessiveness, it may instead reduce the sentence by stretching the law or magnifying errors it would ordinarily deem harmless. Overt sentence review has at least two advantages over this technique. It avoids making bad law, and, by achieving justice in a more direct manner, it permits both counsel and court to focus upon the real issue — whether the death penalty is unwarranted by the evidence.¹⁵³

147. *State v. Laws*, 51 N.J. 494, 242 A.2d 333 (1968).

148. 51 N.J. 494, 242 A.2d 333 (1968).

149. *Id.* at 509-10, 242 A.2d at 342 (emphasis added). The decision also noted the then-current ABA standards suggesting that "since sentencing in each case by a different jury contributes significantly to unfounded disparity between sentences, there is 'all the more reason for judicial review in those cases where the jury participates in sentencing.' " *Id.* at 510, 242 A.2d at 342 (quoting, in part, ABA PROJECT ON MINIMUM STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO APPELLATE REVIEW OF SENTENCES 17 (1968)). Although the *Laws* court construed the issue before it more narrowly, nothing in the court's opinion suggests a rejection of the ABA approach.

150. *Id.* at 515, 242 A.2d at 344-45.

151. *Id.* at 515, 242 A.2d at 344.

152. Note, *State v. Laws: Appellate Power to Reduce Jury-Determined Death Sentences*, 23 RUTGERS L. REV. 490, 528 (1969).

153. *Id.* at 529.

The *Laws* holding was reaffirmed in a flurry of supreme court cases, similarly modifying other death sentences.¹⁵⁴ There has been no indication that this line of reasoning would be rejected by the current supreme court in the wake of the *Pulley* decision. Articulation of a proportionality requirement indeed allows the courts to avoid making bad law by focusing judicial review on the real injustice presented in death cases where sentences are arguably excessive. By acknowledging the real injustice of disproportionate or excessive sentencing instead of exaggerating procedural flaws or substantive errors, capital criminal procedures are more easily identified and reach just results more directly.¹⁵⁵

The authority of the state courts to apply proportionality review to sentences extends beyond that arising from the cruel and unusual punishments clause of the state constitution¹⁵⁶ or from the general appellate power to examine criminal sentences to determine if they are manifestly excessive.¹⁵⁷ The state constitution, through article VI, provides an additional independent source of power by providing that the supreme court "would be in a fair position to insure that justice is truly and equally done."¹⁵⁸ Article VI vests the New Jersey Supreme Court "with wide judicial power, perhaps more sweeping than that granted to any other court of last resort."¹⁵⁹ The new judicial article of the 1947 constitution "purposefully modernized and greatly strengthened our judicial system."¹⁶⁰ Under article VI, the state supreme court "shall exercise appellate jurisdiction in the last resort in all causes provided in this Constitution."¹⁶¹ It is also specified that appeals may be taken to the supreme court "in capital causes."¹⁶² The supreme court is also empowered, as is the Appellate Division of the Superior Court, to "exercise such original jurisdiction as may be necessary to the complete determination of any cause on review."¹⁶³

This broad-based appellate review has been characterized as "a remedial procedure secured against legislative interference,"¹⁶⁴ and as one which was drafted "to provide a review of matters of fact as well as of law, in accordance

154. See, e.g., *State v. Holland*, 59 N.J. 451, 463, 283 A.2d 897, 903 (1971); *State v. Conyers*, 58 N.J. 123, 147, 275 A.2d 721, 733 (1971); *State v. Royster*, 57 N.J. 472, 491, 273 A.2d 574, 584 (1971).

155. Note, *supra* note 152, at 528-29.

156. See generally *supra* notes 122-26 and accompanying text.

157. See generally *supra* notes 127-36 and accompanying text.

158. *Laws*, 51 N.J. at 500, 242 A.2d at 337.

159. *Id.*

160. *Id.*

161. N.J. CONST. art. VI, §2, para. 2 (1947).

162. N.J. CONST. art. VI, §5, para. 1(c) (1947). See also N.J. CT. R. 2:2-1(a)(3) (specifying that such appeal is "as of right" in a case "where the death penalty has been imposed").

163. N.J. CONST. art VI, §5, para. 3 (1947).

164. *Hager v. Weber*, 7 N.J. 201, 205, 81 A.2d 155, 157 (1951).

with the historic function of an 'appeal.'"¹⁶⁵ Indeed, the 1947 constitution was deliberately drafted to provide "[the supreme court] with sweeping judicial power to the end that it would be fully equipped to see that justice is soundly administered."¹⁶⁶

An examination of the debate on the Judiciary Article reveals that there was never any question in the minds of the 1947 constitutional convention delegates that the supreme court would have the power to review fully all aspects of all capital cases. Of special interest are the comments of then-Governor Alfred E. Driscoll. Governor Driscoll supported a plan whereby "only cases of major importance . . . such [as those involving] . . . the death penalty . . . need be taken up to the top court."¹⁶⁹ To insure equality and uniformity in treatment of criminal defendants, the Governor also endorsed an integrated court system in language directly on point in any proportionality inquiry:

Ever since the days of Aristotle mankind has thought in terms of equality before the law. Equality is not achieved in a system that is as disjointed as is our system. Let me give you three cases involving these men who were found guilty of murder in the second degree. These men had reasonably comparable minor criminal records prior to their conviction for second degree murder. The sentences imposed in these three cases were as follows: Mr. "A" received a sentence of from six to eight years; Mr. "B" received a sentence of from 15 to 20 years; Mr. "C" received a sentence of from 25 to 30 years.

Now members of the Committee, may I make it perfectly clear that I recognize that circumstances alter cases and that trial judges confronted with one of the most serious assignments that can be given to any man or woman, namely, that of sending a convicted criminal to jail, must be given considerable latitude in determining the appropriate sentence. Nonetheless, in an integrated court system, with proper administrative authority vested in a Chief Justice, we can come closer to achieving the degree of uniformity that is so highly desirable in a republic than is evidenced in the cases that I have just cited.¹⁷⁰

165. *Id.* at 211, 81 A.2d at 160. On this point, the *Hager* court cited *Vaill v. McPhail*, a case suggesting that the scope of appeal will depend upon "the nature of the questions carried to the appellate court, the extent of the jurisdiction of the appellate court over the cause, and as to the procedure in that court." 34 R.I. 361, 366, 83 A. 1075, 1077 (1912).

166. *Laws*, 51 N.J. at 514, 242 A.2d at 344.

167. *See, e.g., Report of the Comm'n on Revision of the New Jersey Constitution (1942), reprinted in 4 RECORD, STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947* 556, 559 (1952); *id.* at 266-67 (statement of William H. Wurts); *id.* at 178 (colloquy between Judge Daniel Brennan and Judiciary Comm. member Thomas J. Brogan).

168. *Id.* at 427-45.

169. *Id.* at 432.

170. *Id.* at 434-35.

In construing this power, the supreme court has focused on the unrestricted provision of appeal as of right in capital cases,¹⁷¹ noting specifically that:

Nowhere in . . . [the history of capital cases in New Jersey] is there any suggestion of either legislative authority or purpose to curb appellate powers; indeed all of it may be searched in vain for any indication whatever that, in fixing and altering the penalty for murder, the legislators ever gave any thought to or ever entertained any restrictive views with respect to the court's authority on appeal.¹⁷²

Vigorous exercise of this judicial authority further reduces the legislature's authority and its effect on defendants' appeals in criminal cases.¹⁷³

Given this sweeping and unfettered grant of review power, any suggestion that an exception exists for proportionality review would be anomalous. The power to reduce death sentences which are disproportionate to other death sentences is precisely the power "to insure that justice is truly and equally done."¹⁷⁴

IV. PROPORTIONALITY AND FUNDAMENTAL FAIRNESS IN NEW JERSEY

Beyond the state constitutional mandates discussed above, other compelling public policy rationales exist for retaining proportionality review in New Jersey. First, proportionality review is necessary to insure the avoidance of arbitrariness "inherent in the processing of any murder case."¹⁷⁵ Also, proportionality review imposes no significant burden on the judiciary. Further, the limited empirical evidence currently available indicates that proportionality will be an issue in the first wave of state death penalty reviews.¹⁷⁶ Finally, its presence enables the judiciary to provide for fundamental fairness in death penalty reviews in a way that best maintains the integrity of the state statutory scheme and the entire criminal justice system.

171. *Laws*, 51 N.J. at 501, 242 A.2d at 337.

172. *Id.* at 502, 242 A.2d at 338. *Cf.* *King v. South Jersey Nat'l Bank*, 66 N.J. 161, 330 A.2d 1 (1974) (citation omitted):

The power of the Court to enforce rights recognized by the New Jersey Constitution, even in the complete absence of implementing legislation, is clear. . . . Just as the Legislature cannot abridge constitutional rights by its enactments, it cannot curtail them through its silence, and the judicial obligation to protect the fundamental rights of individuals is as old as this country.

Id. at 177, 330 A.2d at 9-10 (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803)). *See also* *Peper v. Princeton Univ. Bd. of Trustees*, 77 N.J. 55, 77 389 A.2d 465, 476 (1978).

173. *Laws*, 51 N.J. at 500-01, 242 A.2d at 337.

174. *Id.* at 500, 242 A.2d at 337.

175. *Gregg*, 428 U.S. at 199.

176. *See, e.g., McCrary v. State*, 97 N.J. 132, 478 A.2d 339 (1984).

A. Identifying Arbitrariness

The Supreme Court in *Gregg v. Georgia*¹⁷⁷ identified three discretionary stages inherent in the processing of murder cases under post-*Furman*¹⁷⁸ death penalty statutes: prosecutorial discretion, jury discretion and discretionary gubernatorial commutation.¹⁷⁹ In theory, proportionality review at the appellate level, if conducted properly, will expose disproportionality in the areas of prosecutorial discretion in seeking death penalty and jury discretion in imposing the death sentence in the penalty phase after guilt has been determined. Discretionary gubernatorial decisions as to commutation of death sentences would be unaffected by any proportionality review.¹⁸⁰ Commutation thus paradoxically remains at once the greatest threat to the even-handed application of death penalty as well as the last bastion of mercy.¹⁸¹

1. Prosecutorial Discretion

While it is clear that a mandatory death penalty for murder is unconstitutional,¹⁸² it is also clear that unfettered discretion in the imposition of the death penalty is constitutionally impermissible.¹⁸³ Thus, in an effort to constitutionally "tailor"¹⁸⁴ the discretion inherent in the prosecutorial function, the New Jersey statute contains the following aggravating factors by which homicide cases are to be measured — those few¹⁸⁵ which may be appropriate for capital prosecutions are to be culled from the vast majority of non-capital prosecutions:

- (a) The defendant has previously been convicted of murder;

177. 428 U.S. 153 (1976).

178. *Furman v. Georgia*, 408 U.S. 238 (1972).

179. See generally Sheloff, *The Arbitrariness of the Arbitrary Rule in Death Penalty Cases in the United States*, 11 ISRAEL Y.B. ON HUM. RTS. 217 (1981).

180. Commutation has been provided for in the state constitution since 1776. See N.J. CONST. art. V, § 2, para. 1 (1947). Between 1907 and 1960 there were 232 death sentences handed down in New Jersey of which 157 resulted in execution and 34 in commutation. See Bedau, *supra* note 110, at 6-7.

181. As Justices Brennan and Marshall highlighted in their dissent in *Pulley*, 104 S. Ct. at 888-90 & n.5, if ever there were a death case which epitomized the disproportionate application of the ultimate penalty, it was the case of John Spinkellink. *Spinkellink v. State*, 313 So. 2d 666 (Fla. 1975), *cert. denied*, 428 U.S. 911 (1976), and *Spinkellink v. Wainwright*, 578 F.2d 582 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). Commutation would have been particularly appropriate in this case. See Sherrill, *supra* note 6, at 82-83.

182. See *Roberts v. Louisiana*, 428 U.S. 325, 337 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

183. See *Furman*, 408 U.S. at 245 (citing *McGautha v. California*, 402 U.S. 183 (1971)).

184. *Id.* at 255-57 (Douglas, J., concurring).

185. The New Jersey system was intended to produce death sentences in less than one percent of all murder cases tried. N.Y. Times, May 7, 1983, at B3.

(b) In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim;

(c) The murder was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(d) The defendant committed the murder as consideration for the receipt, or in the expectation of the receipt of anything of pecuniary value;

(e) The defendant procured the commission of the offense by payment or promise of payment of anything of pecuniary value;

(f) The murder was committed for the purpose of escaping detection, apprehension, trial, punishment or confinement for another offense committed by the defendant or another;

(g) The offense was committed while the defendant was engaged in the commission of, or an attempt to commit, or flight after committing or attempting to commit robbery, sexual assault, arson, burglary or kidnapping;

(h) The defendant murdered a public servant, as defined in 2C:27-1, while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant.¹⁸⁶

In view of the number of factors and the generality of the language used to prescribe them, it is nearly impossible to imagine a homicide that could not be made to fall within the ambit of at least one of the statutory aggravating factors.¹⁸⁷ Prosecutorial discretion to choose who will face death penalty

186. N.J. STAT. ANN. § 2C:11-3(c)(4) (West 1982).

187. Moreover, the individual factors themselves are so broadly defined as to provide virtually no guidance as to which defendant comes within their scope and which does not. Even a very cursory comparison of the New Jersey statute with equivalent provisions in the Georgia statute reveals the poor drafting of New Jersey's aggravating factors. For example, N.J. STAT. ANN. § 2C:11-3(c)(4)(b) provides: "In the commission of the murder, the defendant purposely or knowingly created a grave risk of death to another person in addition to the victim." By contrast, the equivalent Georgia provision reads: "The offender by his act of murder . . . knowingly created a great risk of death to more than one person in a public place by means of a weapon or device which would normally be hazardous to the lives of more than one person." GA. CODE ANN. § 27-2534.1(b)(3) (1981).

N.J. STAT. ANN. § 2C:11-3(c)(4)(h) states: "[T]he defendant murdered a public servant as defined in 2C:27-1 while the victim was engaged in the performance of his official duties, or because of the victim's status as a public servant." N.J. STAT. ANN. § 2C:27-1(g) (West 1982) defines a "public servant" as: "*any officer or employee of government*, including legislators and judges, and any person participating as juror, adviser, consultant or otherwise, in performing a governmental function, but the term does not include witnesses" (emphasis added). Under this broad formulation, anyone who works for a government agency such as street-cleaners, road maintenance workers,

prosecution and who will not is, therefore, at least potentially, unfettered.¹⁸⁸

Prosecutorial charging in capital cases when there is no meaningful basis for distinguishing the accused from others charged with similar offenses violates due process, and discriminates invidiously against the accused in several ways. First, in such prosecutions jurors are subjected to a death qualification process¹⁸⁹ which excludes from jury service those who believe either that they

typists, file clerks, etc., would come within the ambit of the New Jersey aggravating factors. By contrast, the equivalent Georgia aggravating factors, GA. CODE ANN. §27-2534.1(b)(5) and (8), specifically limit "public servants" to judicial officers, district attorneys, district solicitors, peace and correction officers, and firemen.

Aggravating factor (d) in the New Jersey statute states: "The defendant committed the murder as consideration for the receipt, or *in the expectation* of the receipt of any thing of pecuniary value" (emphasis added). The Georgia provision, GA. CODE ANN. § 27-2534.1(b)(4), reads: "The offender committed the offense of murder for himself or another *for the purpose of* receiving money or any other thing of monetary value (emphasis added).

The contrast between the relative specificity of the Georgia statute and the vaguely drafted New Jersey provisions is evident. The broad scope of the factors in the New Jersey statute, coupled with the number of aggravating factors, demonstrate that although in form the New Jersey statute purports to penalize only "aggravated" murders, in substance, it encompasses any homicide, and provides "no meaningful basis for distinguishing the few cases in which [the death penalty] . . . is imposed from the many cases in which it is not." *Furman*, 408 U.S. at 313 (White, J., concurring). *But see* *State v. Bass*, 189 N.J. Super. 445, 460 A.2d 214 (Law Div. 1983). For a comprehensive and exhaustive study which concludes that the New Jersey death penalty statute is unconstitutional, see Comment, *Constitutional Infirmities of the Capital Punishment Act*, 13 SETON HALL L. REV. 515 (1983).

188. There is more than a semantic difference between "discretion" and what prosecutors prefer to call "professional judgment." However, there can be no argument that if, indeed, the New Jersey death penalty statute is applied unevenly from county to county, it is arbitrary and, therefore, unconstitutional. *See* Schwaneberg, *Prosecutors Strive for Consistency in Cases Involving the Death Penalty*, Newark Star-Ledger, Aug. 7, 1983, § 1, at 41, col. 1. *See generally* Special Project, *supra* note 83, at 342-47.

On the question of racial discrimination and prosecutorial discretion, see Pater-noster, *Race of Victim and Location of Crime: The Decision to Seek the Death Penalty in South Carolina*, 74 J. CRIM. L. & CRIMINOLOGY 754, 784 (1983) (prosecutor's decision to seek the death penalty in South Carolina" is significantly related to the race of the victim"); *see also* Radelet & Vandiver, *supra* note 33 (greatest impact of racial variables in Florida death penalty cases may be at prosecutorial and sentencing phases).

189. Death qualification in New Jersey is authorized by N.J. STAT. ANN. § 2C:11-3c(1) (West 1982). *See* *State v. Bass*, 189 N.J. Super. 461, 460 A.2d 223 (Law Div. 1983) (upheld federal constitutionality of death qualified jury in guilt determination phase); *see also* *Witherspoon v. Illinois*, 391 U.S. 510 (1968) (constitutional for death qualified jury to determine guilt and sentence of defendant). *Cf.* *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983) (unconstitutionality of death qualified jury at sentencing and at guilty determination phase), *stay granted*, 583 F. Supp. 629 (E.D. Ark. 1983); *People v. Pacheco*, 116 Cal. App. 3d 617, 172 Cal. Rptr. 269 (1981) (death qualified jury allowed at guilt determination phase by federal and state constitution only in cases which are certain to reach the sentencing phase).

would automatically vote against the death penalty or that they might not vote impartially on the issue of guilt.¹⁹⁰ This procedure, which eliminates certain jurors because of their political, religious or moral opposition to the death penalty, affects significantly the pool from which jurors are selected for trial.¹⁹¹ Studies indicate that death-qualified juries are significantly more likely to return guilty verdicts than non-death qualified juries.¹⁹² Also, death qualified juries are significantly more likely to reject the insanity defense in cases of non-organic mental disorders.¹⁹³ This process of "death qualification," and the

190. The United States Supreme Court has granted certiorari on an Eleventh Circuit habeas corpus case which held that, under *Witherspoon*, a juror was improperly excused where she did not "unequivocally" state that she would automatically be unable to impose death sentence. *Witt v. Wainwright*, 714 F.2d 1069 (11th Cir. 1983), *cert. granted*, 104 S. Ct. 2168 (1984), *oral argument heard*, 53 U.S.L.W. 3263 (U.S. Oct. 9, 1984).

191. Through the sixth amendment, made applicable to the states by the fourteenth amendment, see *Gideon v. Wainwright*, 372 U.S. 335 (1963), a criminal defendant is entitled to a "jury drawn from a fair cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 527 (1978). In *Ballew v. Georgia*, the Court recognized the critical importance of the cross-section requirement, stressing that meaningful community participation cannot be attained with the exclusion of minorities or other identifiable groups from jury service. 435 U.S. 223, 236-37 (1978). The sixth amendment forbids "systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels," because all groups have "the right to participate in the overall legal processes by which criminal guilt and innocence are determined." *Apodaca v. Oregon*, 406 U.S. 404, 413 (1972).

192. Courts have been presented with studies documenting this common sense notion in the context of death penalty cases with differing interpretations of their import. See *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983); *Hovey v. Superior Court*, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980). For a discussion of the death qualification process in the context of New Jersey law, see generally *Special Project*, *supra* note 83, at 370-75. See also Boehm, *Mr. Prejudice, Miss Sympathy, and the Authoritarian Personality: An Application of Psychological Measuring Techniques to the Problem of Jury Bias*, 1968 Wis. L. Rev. 734 (juror's political ideology has systemic effect on behavior as juror); Goldberg, *Toward Expansion of Witherspoon: Capital Scruples, Jury Bias, and Use of Psychological Data to Raise Presumptions in the Law*, 5 HARV. C.R.-C.L. L. REV. 53 (1970) (tendency for pro-death penalty jurors to assert guilt of defendant); Jurov, *New Data on the Effect of a "Death Qualified Jury" on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971) (death-qualified jury is a conviction-prone jury); Rokeach & McLellan, *Dogmatism and the Death Penalty: A Reinterpretation of the Duquesne Poll Data*, 8 DUQUESNE L. REV. 125 (1969-70) (referring to data reported at Comment, 7 DUQUESNE L. REV. 414 (1969)); WHITE, *The Constitutional Invalidity of Convictions Imposed by Death Qualified Juries*, 58 CORNELL L. REV. 1176 (1973) (reporting the 1971 Harris study). The more recent studies, particularly those by Dr. Phoebe Ellsworth and her associates, are discussed in Cowan, Thompson & Ellsworth, *The Effect of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUMAN BEHAV. 53 (1984).

193. Ellsworth, Butaky, Cowan & Thompson, *The Death Qualified Jury and the Defense of Insanity*, 8 LAW & HUMAN BEHAV. 81 (1984). See generally Jacoby & Pater-noster, *Sentencing Disparity and Jury Packing: Further Challenges to the Death Penalty*, 73 J. CRIM. L. & CRIMINOLOGY 379 (1982) (arguing that cases such as *Witherspoon*,

subtle pro-prosecution bias on the part of juries which have been death-qualified, deprive the capital defendant of his or her right to a fair and impartial jury.¹⁹⁴ Therefore, the decision to charge a criminal defendant with a capital crime in order to seek the death penalty has immense impact on the jury which will serve in any given case.

While it would appear that the appropriate time to resolve the problem of prosecutorial discretion as a potential source of proportionality-offending arbitrariness is pre-trial, this is not the current state of the law in New Jersey.¹⁹⁵ In *State v. Bass*,¹⁹⁶ Renee Nicely, an Essex County mother, was indicted with a co-defendant for her son's death stemming from on-going child abuse. The State sought the death penalty, relying on the sole aggravating factor that the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim."¹⁹⁷

The defense investigation revealed that since the enactment of the New Jersey death penalty on August 5, 1983, there were at least nineteen other child abuse-related deaths reported to the Office of the Child Abuse Control of the Division of Youth and Family Services. Neither the Essex County Prosecutor's Office nor any other prosecutor's office in New Jersey sought the death penalty against any person other than defendant Nicely in a child abuse-related death.¹⁹⁸ Defense counsel then served subpoenas on various New Jersey agencies, seeking documents relevant to all child deaths involving abuse, abandonment, cruelty or neglect after the death penalty became effective,¹⁹⁹ in order to support the contention that the numerous similar or more egregious cases of homicide stemming from child abuse throughout the State were not being treated as death penalty cases.²⁰⁰

rather than eliminating racial bias, have simply cast discrimination and bias into more "sophisticated forms"; procedures may produce racially unrepresentative juries and jurors biased towards conviction and death — precisely what *Witherspoon* was "designed" to eliminate).

194. See *Irvin v. Dowd*, 366 U.S. 717 (1961) (due process requires fair and impartial jury to try issues of fact); *Grigsby v. Mabry*, 569 F. Supp. 1273 (E.D. Ark. 1983) (death qualified jury for determining defendants' guilt or innocence violates defendants' right to fair trial and due process).

195. See *infra* text accompanying notes 197-202. A pre-penalty proportionality review, however, was approved in *Smith v. Commonwealth*, 634 S.W.2d 411, 413-14 (Ky. 1982). A recent New Jersey decision provides that a defendant may challenge, prior to trial, the sufficiency of evidence supporting the prosecution's alleged aggravating factors. See *State v. McCrary*, 97 N.J. 132, 478 A.2d 339 (1984). For a discussion of this case and prosecutorial discretion in New Jersey, see generally *Special Project*, *supra* note 83, at 342-47.

196. 191 N.J. Super. 347, 466 A.2d 978 (Law Div. 1983).

197. N.J. STAT. ANN. § 2C:11-3c(4)(c) (West 1982).

198. Information on file with the Office of the Public Defender, Trenton, New Jersey, 08625.

199. 191 N.J. Super. at 349, 466 A.2d at 979.

200. In support of this contention, the defense learned that the capriciousness

The subpoenaed parties moved to quash the subpoenas, and the trial court granted the motion. Significantly, the trial court found that the subpoenas did not "need" to be honored at that time²⁰¹ and denied defendant relief. This was *not* because the claim of disproportionality could never be supported by the subpoenaed documents but because, pursuant to the New Jersey death penalty statute, disproportionality is to be "considered only *after* the death penalty is imposed."²⁰² Thus, while the state supreme court has yet to review its first appeal from a death penalty case, the emerging jurisprudence of death penalty litigation in New Jersey contemplates a proportionality review of the prosecutorial decision to seek the death penalty. Such review may result in the reversal of a conviction if the prosecutorial judgment to seek the death penalty was found to be the result of unfettered discretion.

True proportionality review necessarily requires a review of *all* homicide cases statewide, regardless of whether the death penalty was sought, to analyze the application of the death penalty statewide as well as country-wide.²⁰³ In addition, individual defendants must be compared²⁰⁴ to insure that elements of sexual,²⁰⁵ racial²⁰⁶ and socio-economic discrimina-

with which the death penalty was sought by the State extended to cases within the Essex County Prosecutor's Office itself. The prosecutor did not seek the death penalty where another defendant was charged with child abuse and purposeful and knowing murder of her nine month old daughter. The child died as a result of burns on the body surface and fractures of the skull with subdural hemorrhage inflicted at least 24 hours before the burns. In addition, the child had numerous older injuries, including cigarette burns on the buttocks at least three weeks old.

201. 191 N.J. Super. at 352, 466 A.2d at 981.

202. *Id.* at 350, 466 A.2d at 980. The court found it unnecessary to define proportionality review other than to note that such review is effected by "comparing factors relating to the particular case and the defendant before the court with the evidence and sentence in similar cases." *Id.* Interestingly, the defendant was convicted of murder but was not sentenced to the ultimate penalty by the jury.

203. *See, e.g., Hearings on S. 112 Before the N.J. Senate Judiciary Comm.*, 200th Leg., 2nd Sess. 20-21 (1982) [hereinafter cited as *1982 Hearings*] (statement of the Director of Division of Criminal Justice Edwin H. Stier, speaking on behalf of New Jersey Attorney General Irwin I. Kimmelman: proportionality review should be applied on a state-wide basis "to guard against an imbalance, a disproportionate imposition of the death penalty in any one area").

204. *Bass*, 191 N.J. Super. at 350, 466 A.2d at 980.

205. *See* Bedau, *supra* note 110, at 11. From 1907 to 1960, three women were sentenced to death and all had their sentences commuted. The last woman to be executed in New Jersey was Bridget Dergan, who was hanged on August 30, 1867. *Id.* Twenty-six women received life sentences for murder between 1907 and 1956. *Id.* at 12. Of 3,812 executions in 42 states and the District of Columbia between 1930-1962, only 30 or 0.8%, were women. *Id.* *See* Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918, 922 (1981) (the death penalty is almost never imposed in primary relationships where the accused and the victim knew each other).

206. The most compelling evidence that the death penalty continues to be administered unconstitutionally relates to the racial discrimination that

tion²⁰⁷ do not invidiously infect the prosecutorial charging decision. Upon a showing of unfettered prosecutorial discretion, the New Jersey Supreme Court should not hesitate to vacate a death penalty as a result of its proportionality review.

2. Jury Discretion

A major federal constitutional defect of the death penalty statutes invalidated by the United States Supreme Court in 1972²⁰⁸ was their failure to guide juries in the exercise of their discretion. This failure created an unconstitutional opportunity for discrimination.²⁰⁹ Indeed, Justice Douglas' concurring opinion in *Furman* thoroughly documented the pattern of racially discriminatory sentencing in capital cases.²¹⁰ Discrimination was not restricted to the South; rather, several scholarly works have documented patterns of discrimination in applying the former New Jersey death penalty statute.²¹¹

After the Supreme Court's decisions in *Gregg v. Georgia*²¹² and *Proffitt v. Florida*,²¹³ it was expected that racial discrimination would not infect the application of the new death penalty statutes because of their supposed objec-

apparently, and perhaps invariably, exists in its application. . . . Furthermore, the scholarly research necessary to support a claim of systematic racial discrimination is currently being pursued and the results of that research are being compiled into a rapidly expanding body of literature.

Pulley, 104 S. Ct. at 887 (Brennan, J., dissenting). See *infra* note 217 and accompanying text.

207. "The defendant of wealth and position never goes to the electric chair or the gallows' . . . [I]t is more likely to be applied to the ignorant, the poor and the friendless." Bedau, *supra* note at 110, at 27. Testifying at the 1972 death penalty legislation hearings, Stephen Nagler, then-executive director of the New Jersey chapter of the American Civil Liberties Union, quoted Michael V. DiSalle, former Governor of Ohio:

The men in death row in the Ohio State Penitentiary today, as during my administration, have one thing in common, they are penniless. I have never seen a person of means go to the chair. It is the poor, the illiterate, the underprivileged, the member of the minority group who become society's blood sacrifice.

Hearings on S. 799 and A. 556, A. 1318 Before the N.J. Assembly Judiciary Comm. 10 (1972) [hereinafter cited as 1972 *Hearings*].

208. See *Furman v. Georgia*, 408 U.S. 238 (1972).

209. *Id.* at 365 (Marshall, J., concurring).

210. *Id.* at 249-52 (Douglas J., concurring).

211. See Wolf, *Abstract of Analysis of Jury Sentencing in Capital Cases: New Jersey 1937-61*, 19 RUTGERS L. REV. 56, 60 (1964) (black person convicted of murder had 47.5% chance of receiving death penalty; white defendant had 30.4% chance); Bedau, *supra* note 110, at 19 (non-white defendant has only one-half the chance of receiving clemency as white person).

212. 428 U.S. 153 (1976).

213. 428 U.S. 242 (1976).

tive eligibility criteria and the safeguard of meaningful appellate review. In one case, a federal court of appeals refused even to consider the merits of an argument that the death penalty continued to be imposed in "an arbitrary, capricious, and irrational manner," finding that, in a properly-drawn statute, the "arbitrariness and capriciousness condemned in *Furman* have been conclusively removed."²¹⁴

While current evidence of discriminatory application of the death penalty is not wholly conclusive,²¹⁵ a number of studies have concluded that the death penalty continues to be applied in the same racially discriminatory manner as in the past.²¹⁶ For example, there is evidence that blacks are more likely than other racial groups to be indicted for and convicted of capital murder, more likely to receive the death sentence and, once sentenced to death, less likely to have the sentence commuted.²¹⁷

The focus on jury discretion is also significant for other reasons: (1) no individual juror or jury can have a full grasp of the "big picture" of sentencing, nor will the jury necessarily reflect dominant community sentiment;²¹⁸

214. *Spinkellink v. Wainwright*, 578 F.2d 582, 604-05 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979). *But see Pulley*, 104 S. Ct. at 889 & n.5 (Brennan, J., dissenting), and *supra* note 181.

215. *Pulley*, 104 S. Ct. at 887 (Brennan, J., dissenting).

216. See Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQUENCY 563, 629 (1980); Jacoby & Paternoster, *supra* note 193, at 380; Reidel, *Discrimination in the Imposition of the Death Penalty: A Comparison of the Characteristics of Offenders Sentenced Pre-Furman and Post-Furman*, 49 TEMPLE L.Q. 261, 282-83 (1976); Zeisel, *Race Bias in the Administration of the Death Penalty: the Florida Experience*, 95 HARV. L. REV. 456, 459 (1981). See also Joyner, *Legal Theories For Attacking Racial Disparity in Sentencing*, 18 CRIM. L. BULL. 101 (1982):

Glaring disparities in the sentencing of poor and minority defendants, as compared to those convicted of crimes who are affluent and white, lack a principled basis, . . . undermines the integrity of the entire criminal justice process, implicates the court in racial and economic discrimination and are a major cause of prison unrest and community disrespect for the legal process.

Id. at 101-02 (quoting NATIONAL MINORITY ADVISORY COUNCIL ON CRIMINAL JUSTICE, THE INEQUALITY OF JUSTICE: A REPORT ON CRIME AND THE ADMINISTRATION OF JUSTICE IN THE MINORITY COMMUNITY 219-24 (1980)).

217. See Jordan, *Study Reveals Victim's Race Affects Penalty Verdict*, 113 N.J.L.J. 319 (1984). See, e.g., Lempert, *Capital Punishment in the 80's: Reflections on the Symposium*, 74 J. CRIM. L. & CRIMINOLOGY 1101 (1983) ("Greater retribution is demanded when whites are victims than when blacks are victims because the white dominated society values innocent white lives more than innocent black ones. . . . To execute one whose victim is white when he would have been spared had his victim been black is intolerable in a system that demands equality and fairness, however understandable or even admirable the process that led to the distinction."). *Id.* at 1107, 1114.

218. Goodpaster, *supra* note 7, at 798.

(2) there is some evidence that jurors, aware of the significant number of reversals in the capital sentencing process,²¹⁹ "may suppress doubts about imposing the death penalty because they think someone else will rescind the order to execute,"²²⁰ and (3) under the sort of statute sanctioned in *Pulley* — requiring jurors to perform a subtle balancing test between aggravating and mitigating factors²²¹ — there is still ample room for arbitrariness to invade the decision-making process. Proportionality review can also detect those instances in which the imposition of the death penalty results from an improper weighing of these competing factors. In short, in the area of jury discretion, proportionality provides an independent form of review that other forms of review cannot duplicate. Such review is essential for detecting errors.²²²

As Justice Brennan pointed out in his dissent in *Pulley*,²²³ our courts can no longer ignore these discriminatory sentencing patterns. Indeed, the Eleventh Circuit Court of Appeals has recently ordered an evidentiary hearing on the question of racial discrimination in sentencing patterns,²²⁴ and the Supreme Court has stayed at least one execution²²⁵ until this question is resolved.

Proportionality review by the New Jersey Supreme Court will be the key factor in the identification and elimination of racially discriminatory results in the application of the New Jersey death penalty statute. New Jersey has a proud record of being in the vanguard of assuring that no citizen is treated unfairly because of race or ethnic background. Since 1947, the state constitution has provided that "[n]o person shall be denied the enjoyment of any civil . . . right, nor be discriminated against . . . because of religious principles, race, color, ancestry or national origin."²²⁶ The application of these principles can be no less stringent when a life is at stake.

The scope of the proportionality review conducted by the New Jersey Supreme Court must necessarily be broad-based, unrestricted, and bold in scope. This is so, not only because death is qualitatively different from other

219. See Marshall, Remarks Delivered at Dedication Ceremony for 1983 Volume of the *Annual Survey of American Law* (April 9, 1984), at 5 (defendants prevailed in 46% of all federal courts of appeals challenges to district court denials of habeas corpus relief in death penalty cases last year).

220. Greenberg, *Capital Punishment as a System*, 91 YALE L. REV. 908, 927 (1982).

221. Cf. N.J. STAT. ANN. § 2C:11-3(c)(4), (5).

222. Goodpaster, *supra* note 7, at 813.

223. 104 S. Ct. at 887 (Brennan, J., dissenting).

224. Spencer v. Zant, 715 F.2d 1562, 1582-83 (11th Cir. 1983).

225. Stephens v. Kemp, 104 S. Ct. 562 (1983). Interestingly, it has been reported that the State of Georgia has been unable to locate an expert who could testify that the arbitrary results produced by the statute are *not* the result of racial discrimination. Bruck, *Decisions of Death: The Lottery of Capital Punishment is Rigged by Race*, New Republic, Dec. 12, 1983, at 18, 21.

226. N.J. CONST. art. I, para. 5 (1947). This section was considered carefully and debated at great length at the 1947 Constitutional convention. For a full listing of all commentary, see 5 RECORD, STATE OF NEW JERSEY CONSTITUTIONAL CONVENTION OF 1947 1014-15 (1952).

punishments²²⁷ and is "unique in its severity and irrevocability"²²⁸ but because death penalty statutes in general, and New Jersey's in particular, mandate an individualized sentencing procedure,²²⁹ emphasizing discretion.²³⁰

Indeed, to be constitutionally valid, a modern death penalty statute, following the rulings of *Lockett v. Ohio*²³¹ and *Green v. Georgia*,²³² must not stop the sentencer from "considering *any aspect* of the defendant's character and record or *any circumstances* of his offense as an independently mitigating factor" to be weighed against the imposition of death.²³³ For example, the Georgia statute contains a provision wherein "the jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court."²³⁴ The New Jersey statute contains no such provision and may well thus be unconstitutional.²³⁵ However, the New Jersey statute does authorize, within the context of its statutory mitigating factors, consideration of *any* factor in mitigation so long as it is somehow relevant to the defendant's character, record, or the circumstances of the crime.²³⁶ To fulfill the proportionality mandate, this section must be given the expansive reading required by *Lockett*.

B. Other Factors

Proportionality review is also essential to insure the implementation of a death penalty statute that meets minimal criteria of fairness and justice. Even absent the factors of discrimination and bias, the fact that fallible human beings — members of juries and trial judges — are entrusted with life and death decisions necessitates inquiry as to whether a sentence is excessive or disproportionate as compared with the punishment meted out to others for similar crimes. Atlantic County Prosecutor Joseph Fusco has candidly iden-

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

228. *Gregg*, 428 U.S. at 187.

229. *Furman* not only invalidated the two death penalty statutes in the cases before the court, but also indicated that the death penalty can only be constitutionally valid if the procedure by which the ultimate sentence is imposed is a guided, individualized one where the "makeup and situation of each offender" is carefully weighed. Subsequent decisions reaffirmed the basic premise that criminal defendants may be sentenced to death only if the sentencing decision was guided and individualized. See, e.g., *Lockett v. Ohio*, 438 U.S. 586, 601-04 (1978). See *Dix*, *supra* note 39.

230. *Dix*, *supra* note 39.

231. 442 U.S. 95 (1979).

232. 438 U.S. 586, 604-05 (1978).

233. *Id.* at 607 (emphasis added). See Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 CALIF. L. REV. 317 (1981).

234. *Gregg*, 428 U.S. at 196-99.

235. Cf. *State v. Bass*, 189 N.J. Super. 445, 455, 460 A.2d 214, 220 (Law. Div. 1983).

236. N.J. STAT. ANN. § 2C:11-3(c)(5)(h).

tified this dilemma: "We are trying to be uniform, . . . but we are human beings talking about complex fact patterns."²³⁷

A proportionality review mechanism will not burden the judiciary in assessing death sentences. As indicated above, the state constitution explicitly allows an automatic appeal to the state supreme court in all capital cases,²³⁸ a requirement incorporated in the death penalty statute by the legislature.²³⁹ If the statute is being administered properly so that the death sentence is only being imposed in the most extreme and unusually aggravated cases, in reality few cases will be considered disproportionate.²⁴⁰ In a case where the system does malfunction, as a result of human error or otherwise, proportionality review provides a mechanism for the appellate court to weed out inappropriate death verdicts.²⁴¹

This protection at the final stage of the capital trial is as essential to the ultimate goals of fairness and justice as the safeguards in the pre-trial and trial stages, which are intended to avoid errors. In the short time since New Jersey has resurrected capital punishment, there have been at least two cases of wrongly accused death penalty defendants,²⁴² a pattern which merely replicates the history of capital punishment enforcement in this country.²⁴³ The presence of proportionality review helps insure a system that, to the greatest extent possible, avoids arbitrariness and ensures even-handedness.²⁴⁴

237. Schwaneberg, *supra* note 188.

238. N.J. CONST., art VI, § 5, para. 1(c) (1947).

239. N.J. STAT. ANN. § 2C:11-3(e).

240. *Cf.*, *Pulley*, 104 S. Ct. at 888 (Brennan, J., dissenting) (arguing that proportionality review is constitutionally required even if it eliminates "only a small part of the irrationality that infects the current imposition of death sentences throughout the various states").

241. *See, e.g.*, Kaplan, *supra* note 82, at 576. *See also* Joyner, *supra* note 216, at 116 (suggesting that judicial review will actually lead to judicial economy: "[i]f judges know that their sentencing decisions will be subject to judicial scrutiny, future sentences may not reflect the disparate character of the past").

242. *See, e.g.*, Leusner, *Mistaken Identity: Man Jailed Nine Months Cleared in Slay Case*, Newark Star-Ledger, Jan. 5, 1984, at 1, col. 4; Leusner, *Persevering Mom Helped Clear 'Wrong Man' of Murder*, Newark Star-Ledger, Jan. 6, 1984, at 6, col. 1. *See also* Kaplan, *supra* note 82, at 570 ("the more people we execute, the greater the chances of committing an error in one or more of their cases. Moreover, when we make it easier to apply the death penalty by doing away with 'unnecessary rules', it may no longer be true — if it is today — that nobody innocent is executed.").

243. *See, e.g.*, E. BORCHARD, CONVICTING THE INNOCENT (1932); 1982 *Hearings*, *supra* note 203, at 21A-22A (testimony of Isadore Zimmerman); 1972 *Hearings*, *supra* note 207, at 13-14 (testimony of Mr. Stephen Nagler).

244. *See, e.g.*, Fahringer, *We Who Are About to Die Salute You: Sentencing in Criminal Cases*, 19 TRIAL 72, 77 (1983):

Inequality in sentencing corrodes the basic structural prop of equity supporting our sense of justice. This principle gains its primary impulse from the constitutional concept of equal protection under the law and a desire to

The evidence is overwhelming that the death penalty has been applied in a racially discriminatory manner elsewhere.²⁴⁵ A similar early pattern has emerged in New Jersey: four of the first five persons sentenced to death in New Jersey are black.²⁴⁶ Although this fact alone does not mean the death penalty is being administered arbitrarily, it nevertheless raises the spectre of race discrimination in capital trials in New Jersey. Clearly, some sort of statutory safeguard is needed so that the penalty is not imposed disproportionately on the basis of race, gender or socio-economic class.²⁴⁷

Other early death penalty cases in New Jersey reveal an additional distressing pattern: there have been cases where individuals either have been subject to the death penalty or sentenced to death even though their crimes are factually indistinguishable from those committed by individuals charged with non-capital crimes or sentenced to life. In a Camden County case,²⁴⁸ two co-defendants were charged with the stabbing murder of the common law husband of the sister of one of the defendants, James Hunt. The victim died from twenty-four stab wounds, but there was material doubt as to whether the principal perpetrator was defendant Hunt or the co-defendant. The co-defendant was allowed to plead guilty and received a life sentence while Hunt was sentenced to death after a jury trial.

The case of Renee Nicely, the co-defendant in *State v. Bass*,²⁴⁹ reflects the same capriciousness. Although her life was spared, that in no way allows for a prediction that others prosecuted under the death penalty law for crimes that are identical to those generally treated as non-capital offenses would be dealt with in a similar fashion. In cases such as Nicely's, proportionality review would allow the supreme court to consider whether these results are freakishly disproportionate and violative of the principle of even-handedness that should underlie any death penalty statute.

It is clear that, in the appropriate circumstances, appellate judges will strain to find reasons for reversing a conviction or death sentence they feel to be

reduce the appalling disparity in many sentences imposed on defendants who have committed identical crimes. . . .

. . .

[S]entencing is too often a projection of the judge's own value system. . . .

245. See *Pulley*, 104 S. Ct. at 887-88 (Brennan, J., dissenting), and literature cited therein.

246. *Hearings on S. 1479 Before the N.J. Senate Judiciary Comm.* 13 (1984) (testimony of Joseph H. Rodriguez).

247. See, e.g., Jacoby & Paternoster, *supra* note 193, at 380 ("defendants charged with killing whites were substantially more likely to receive death one found guilty than were defendants charged with killing blacks").

248. All information on the cases discussed in the text is on file in the Office of the Public Defender, Trenton, New Jersey, 08625.

249. See *supra* notes 196-202 and accompanying text.

disproportionate. Specifically articulated statutory review provisions²⁵⁰ ensure that this process will be conducted in accordance with prescribed standards. Such provisions also enable the judiciary to satisfy this concern in an open manner that preserves the integrity of the entire criminal justice system. Without this mechanism, courts may be compelled to find procedural error or distort the law when the real ground for reversal is the judicial belief that the sentence is too severe. Explicit appellate review of death sentences for disproportionality "achiev[es] justice in a more direct manner" and allows courts to focus upon the fundamental issue of "whether the death penalty is unwarranted by the evidence."²⁵¹

V. STATE MODELS FOR PROPORTIONALITY REVIEW

In undertaking proportionality review, the New Jersey Supreme Court can look to the experiences and dilemmas of other states. One of the issues which often arises under state proportionality review is whether a comparison must be made on a state-wide basis. A second issue is whether such a comparison must consider all first degree murder prosecutions or whether the "pool" of similar cases may be more limited, even to the extent that only affirmed death penalty cases are used for comparison. The experiences of two states, South Carolina and Louisiana, illustrate these issues.

In *State v. Copeland*,²⁵² the South Carolina Supreme Court set out the scope of the proportionality review required under its statute.²⁵³ The court stated that three issues must be addressed: first, whether the death sentence was imposed "under the influence of passion, prejudice, or any other arbitrary factor";²⁵⁴ second, whether the evidence supports the findings of a statutory aggravating factor;²⁵⁵ and third, "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."²⁵⁶ The third question constitutes the proportionality review and thus is the focus of the inquiry. The court noted that defining similar cases might be impossible, at least to the extent that a heinous crime is beyond comparison.²⁵⁷ In discussing the United States Supreme Court's

250. See e.g., N.J. STAT. ANN. § 2C:11-3(e).

251. See Note, *supra* note 152, at 529.

252. 278 S.C. 572, 300 S.E.2d 63 (1982), *cert. denied*, 103 S. Ct. 1802 (1983). Defendants Copeland and Roberts were convicted of armed robbery of a gas station, kidnapping the two men who worked there and shooting them to death. *Id.* at 576-77, 300 S.E.2d at 66. Later that same night, the defendants robbed another gas station, kidnapped a worker there and shot him as well. *Id.*

253. S.C. CODE ANN § 16-3-25(c) (Law. Co-op. Cum. Supp. 1983) requires mandatory review of death sentences by the state supreme court.

254. 278 S.C. at 586, 300 S.E.2d at 72.

255. *Id.*

256. *Id.*

257. *Id.* at 587, 300 S.E.2d at 72.

decisions regarding such review, the court found implicit in these decisions the tension between the unique consideration in sentencing and the comparison with similar cases.²⁵⁸ The court stated: "Clearly, a comparative review cannot be permitted to diminish the particularized quality of sentencing, since the latter is now an absolute command of the U.S. Constitution."²⁵⁹ Concluding that the states have been left to design their own proportionality review, the court went on to define a procedure which would resolve the uniform-individualized tension. The court began its search for similar cases with cases in which there was an actual conviction and sentence of death.²⁶⁰ To expand the universe of cases, the court reasoned, invites pure conjecture as to why a jury chose not to give a death sentence.²⁶¹ The South Carolina Supreme Court further limited the universe of similar cases to those in which the death sentence has been upheld on appeal.²⁶²

The South Carolina Supreme Court's decision limited the number of cases to be compared with Copeland's to five.²⁶³ The court discussed these five cases and concluded that none of the previous death sentence cases in South Carolina was similar to the present case.²⁶⁴ The court reached this result despite its previous declaration that "a meaningful sample [of similar cases] lies ready at hand in . . . cases where the jury has spoken unequivocally."²⁶⁵ Future proportionality reviews in South Carolina will be directed toward the particular circumstances of a crime and the specific character of the defendant,²⁶⁶ and comparisons with other cases will be undertaken *if possible*.²⁶⁷ The court noted that its universe of similar cases will expand as more death sentences are affirmed.²⁶⁸

In summary, South Carolina's comparative review provides for the comparison of a defendant's sentence with other sentences in cases in which the crimes shared similar circumstances and the defendants were of a similar character. Also, the similar case must be one in which the death sentence was imposed and upheld.²⁶⁹ Thus, if a defendant in South Carolina is afforded an adequate proportionality review of his death sentence, it is almost certain

258. *Id.*

259. *Id.* at 587-88, 300 S.E.2d at 72.

260. *Id.* at 591, 300 S.E.2d at 74.

261. *Id.* Under the South Carolina statute, a jury is not required to state its reasons for failing to recommend death. *Id.*

262. *Id.* at 597, 300 S.E.2d at 75.

263. *Id.*

264. *Id.* at 592-95, 300 S.E.2d at 75-77.

265. *Id.* at 591, 300 S.E.2d at 74. The court stated: "In view of the facts set forth above, however, we are satisfied that the sentences of death imposed on each of these appellants was appropriate and neither excessive nor disproportionate in light of the crime and their respective characters." *Id.* at 595, 300 S.E.2d at 77.

266. *Id.*

267. *Id.*

268. *Id.* at 596, 300 S.E.2d at 77.

269. South Carolina's statute is identical to Georgia's statute and Louisiana's Rule

that the court will uphold the sentence; the court would only be comparing the defendant's case with similar cases in which death sentences were affirmed. Although the court recognized that a proportionality review is mandated under the statute, a death sentence may be upheld merely by the court's conclusion that it was not excessive. South Carolina's scheme fails because the court cannot reconcile the desire for uniform sentencing with the focus on the individual. This failure is belied by the court's inability to articulate objective factors which could be used to compare various capital cases.

The problem of finding similar cases has also plagued the Louisiana Supreme Court. The legislature revamped the Louisiana death penalty statute after the United States Supreme Court held that the death sentence imposed in *Roberts v. Louisiana*²⁷⁰ constituted cruel and unusual punishment.²⁷¹ The new statute was modeled after the Georgia statute upheld in *Gregg v. Georgia*.²⁷² Louisiana's statute provides for a bifurcated trial and requires a jury to find at least one statutory aggravating factor before recommending a death sentence.²⁷³ The Louisiana Supreme Court must review every death sentence for excessiveness.²⁷⁴ The appellate review has been expanded to include a determination whether the sentence is disproportionate to the penalties imposed in similar cases, considering both the crime and the defendant.²⁷⁵

The Louisiana court begins its comparisons by looking at other first degree murder cases from the same parish or district where the defendant's death sentence was imposed.²⁷⁶ Uniformity in sentencing is required on a parish-wide basis. The court then considers the particular characteristics of the defendant and the murder and compares them with characteristics in the eligible cases. If these other cases are deemed similar, the court will continue with the comparison. The difficulty in finding similar cases suggests that this procedure is inadequate to guarantee uniform and consistent sentencing.

A Louisiana case, *State v. Sonnier*,²⁷⁷ highlights the problems with this

28, yet South Carolina is the only state which begins its search for similar cases with cases that upheld death sentences.

270. 428 U.S. 325 (1976) (statute imposed a mandatory death sentence).

271. *Id.* at 336.

272. 428 U.S. 153 (1976).

273. LA. CODE CRIM. PROC. ANN. art. 905.9 (West 1984).

274. *Id.*

275. LA. SUP. CT. R. 28 (1978). Section 4(b) requires the district attorney to include in his sentence review memorandum a synopsis of each first degree murder case in the district in which sentence was imposed after January 1, 1976.

276. *State v. Sonnier*, 379 So. 2d 1336, 1362 (La. 1980).

277. 379 So. 2d 1336 (La. 1980), *aff'd after remand*, 402 So. 2d 650 (La. 1981), *cert. denied*, 103 S. Ct. 3571 (1983). In this case, two brothers, Elmo, the defendant, and Eddie Sonnier, kidnapped a young couple while posing as police officers. *Id.* at 1342. The victims, an 18 year old girl and a 16 year old boy, were driven to an isolated oilfield where Elmo and then Eddie raped the girl. *Id.* The girl consented to intercourse with Eddie in exchange for their release. Elmo then forced the two on the ground and shot both in the back of the head several times, killing them. *Id.* Eddie Sonnier held a flashlight while his brother shot the victims. *Id.*

procedure. Since there were no other death sentences from the district where the defendant's death sentence was imposed, the court compared the sentence with three other first degree murder prosecutions from that parish.²⁷⁸ The court decided that none of these other cases was similar to the defendant's case.²⁷⁹ The court concluded: "We are, therefore, unable to say that the sentence is disproportionate to the penalty in similar cases. . . ."²⁸⁰ This conclusion distorts the purpose of the proportionality review. The court did not test whether the defendant's death sentence was the sentence a jury would generally impose in a similar case. In *Sonnier's* second appeal,²⁸¹ the Louisiana Supreme Court compared his death sentence with life sentences imposed in two additional cases and again upheld the death sentence as not disproportionate.²⁸²

Louisiana's appellate review in capital cases is modeled after Georgia's statute.²⁸³ The Georgia Supreme Court has chosen to interpret its statute differently from the manner in which the Louisiana Supreme Court has interpreted its statute by requiring state-wide comparison of all similar cases — those in which life and death sentences were recommended.²⁸⁴ This scheme has the advantage of United States Supreme Court approval.²⁸⁵ The Georgia Supreme Court has articulated its test for proportionality as follows: a death sentence will not be upheld "unless in similar cases throughout the state the death penalty has been imposed generally. . . ."²⁸⁶ The Louisiana Supreme

278. *Id.* at 1363. In the first case, the defendant beat a larger man to death with a club after the two had an altercation. *Id.* This defendant was convicted of second degree murder and was sentenced to life in prison. *Id.* In the second case, the defendant was evicted from his residence because of an argument he had had with another tenant. *Id.* The defendant returned to the residence with a gun and beat and then shot the victim, killing her as she tried to escape. *Id.* This defendant was convicted of first degree murder and was sentenced to life in prison. *Id.* The third case was that of Eddie *Sonnier* who was appealing his death sentence. *Id.* at 1364.

279. *Id.* The court stated that in the first two cases, the murders occurred after previous altercations between the defendants and their victims. *Id.* The court did not attempt to distinguish Eddie *Sonnier's* sentence during their appellate review of Elmo *Sonnier's* sentence.

280. *Id.* The court's statement was accurate because, according to the court, there were no similar cases.

281. 402 So. 2d 650 (La. 1981), *cert. denied*, 103 S. Ct. 3571 (1983). In the first appeal, the court affirmed the conviction but reversed the sentence because of an error in the jury instruction. 379 So. 2d at 1369-72. The death sentence was again imposed by the jury. 402 So. 2d at 653.

282. 402 So. 2d at 661. *Sonnier's* death sentence was never compared to another death sentence that the court upheld. Eddie *Sonnier's* death sentence was reversed by the Louisiana Supreme Court because he lacked the intent to kill and he played a relatively minor role in the murders. *State v. Sonnier*, 380 So. 2d 1, 8-9 (La. 1980).

283. See *State v. Sonnier*, 379 So. 2d 1336, 1358 (La. 1979). "This is the same procedure for review authorized by [the] Georgia statute approved by the United States Supreme Court in *Gregg v. Georgia*" *Id.*

284. See *Gregg*, 428 U.S. at 204-06.

285. *Id.*

286. *Moore v. State*, 233 Ga. 861, 864, 213 S.E.2d 829, 832 (1975), *cert. denied*, 428 U.S. 910 (1976).

Court, which has defended its death penalty statute by noting its similarity to Georgia's approved scheme, has failed to follow Georgia's procedures for appellate review. *Sonnier* demonstrates the flaws in Louisiana's scheme: not only was the comparison limited to cases in a particular parish, but *Sonnier's* sentence was not shown to be the one imposed generally in similar cases.²⁸⁷

Proportionality reviews in Louisiana and South Carolina were designed to play an important part in eliminating arbitrarily imposed death sentences. A meaningful comparison of a death sentence with other sentences in similar cases would allow a court to determine if the jury was justified in pronouncing such a serious penalty and would add predictability to the sentencing procedure. However, the flaws in the administration of comparative reviews by the courts in South Carolina and Louisiana have rendered the procedures worthless. In neither state can a defendant predict when the appellate court will find his sentence disproportionate. The decisions as to which cases are similar are made in an arbitrary manner without identifying objective factors which distinguish one case from another.²⁸⁸ Even though proportionality review is

287. See *supra* notes 92-98 and accompanying text. The Georgia Supreme Court would have likely reversed *Sonnier's* death sentence because in similar cases throughout the state, the jury has not generally imposed the death sentence.

Louisiana's district-wide comparison has been criticized by Justice Dennis of the Louisiana Supreme Court. In *State v. Prejean*, 379 So. 2d 240, 249-52 (La. 1979), *cert. denied*, 449 U.S. 891 (1980), Justice Dennis dissented and concluded that Louisiana's appellate review, modeled after Georgia's, constitutionally requires state-wide proportionality review. The district-wide procedure has also been criticized in Note, *Capital Sentencing Review Under Supreme Court Rule 28*, 42 LA. L. REV. 1100, 1117-19 (1982).

The ineffectiveness of Louisiana's parish-wide proportionality review is indicated by the evidence that disproportionality was a factor in the court's reversal of death sentences for only one defendant, Eddie *Sonnier*. 380 So. 2d at 7-8. Disproportionality has been a factor in reversals of death sentences by the Georgia Supreme Court in seven cases. See *Hall v. State*, 241 Ga. 252, 258-60, 244 S.E.2d 833, 838-39 (1978); *Ward v. State*, 239 Ga. 205, 208-09, 236 S.E.2d 365, 368 (1977); *Jarrell v. State*, 234 Ga. 410, 424-25, 216 S.E.2d 258, 270 (1975), *cert. denied*, 428 U.S. 910 (1976); *Floy v. State*, 233 Ga. 280, 285, 210 S.E.2d 810, 814 (1974), *cert. denied*, 431 U.S. 949 (1977); and *Gregg v. State*, 233 Ga. 117, 127, 210 S.E.2d 659, 667 (death sentence for armed robbery conviction reversed as being disproportionate but death sentence for murder is upheld), *aff'd*, 428 U.S. 153 (1976); *contra* *High v. State*, 247 Ga. 289, 297, 276 S.E.2d 5, 14 (proportionality review applied but death sentence upheld), *cert. denied* 455 U.S. 927 (1982), *rev'd on other grounds* in *Wilson v. Zant*, 249 Ga. 373, 290 S.E.2d 442 (1982).

If the Louisiana Supreme Court was performing its review in the manner approved by the United States Supreme Court, the disparity between its cases and Georgia's, whose review procedure it adopted, would not be so dramatic.

288. A model for conducting a proportionality review based on objective criteria was proposed in Baldus, Pulaski, Jr., Woodworth & Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1 (1980). This model identifies several factors in each case, such as the number of persons killed, presence of criminal record, and the manner of killing. *Id.* at 32. These factors are

not required by the federal Constitution, if Louisiana and South Carolina have erroneously relied upon the procedure to validate their death statutes and sentences imposed thereunder, then their death penalty statutes are defective as applied, and death sentences imposed pursuant to these statutes are unconstitutionally arbitrary.

Other states will likely face similar problems with performing their proportionality reviews. It is nearly impossible to compare murder cases and then decide that a life sentence in one case was appropriate while the death sentence in another was also proper, particularly in states such as New Jersey, where the supreme court has yet to decide a capital appeal under the new statute. The New Jersey Supreme Court must conduct a proportionality review if a death sentence is appealed.²⁸⁹ Since there are relatively few death sentences in New Jersey, the court should be more expansive than the South Carolina Supreme Court in establishing the "universe of cases" to be used for comparison. If it appears that the case on appeal is more similar to cases in which defendants received life sentences, the death sentence should be vacated. The court should be able to articulate objective facts which distinguish the death sentence case from others with lesser sentences before it can affirm the irreversible sentence. Consistency and predictability in imposing death sentences are vital if the system has any hope of eliminating arbitrary decision-making.

VI. CONCLUSION

Basic to the New Jersey Supreme Court's review of death sentences must be the realization that capital prosecution is the limited, narrow exception whereby less than one percent of all murder cases will produce a death sentence to review.²⁹⁰ Therefore, the basic universe of comparison must be all homicide cases arising since the effective date of our capital statute, not just those tried as capital cases. Such a review will expose those cases capitally prosecuted which are disproportionate by comparison to factually similar cases. It will also insure that the ultimate penalty is imposed only in the exceptional case. This is the touchstone of a constitutionally acceptable scheme for proportionality review purposes.

To this end, the New Jersey Supreme Court should welcome the use of

ranked in order of importance to a sentencing jury. *Id.* at 34. A percentage of defendants who receive the death sentence where each factor in present or absent is then determined. *Id.* at 40-45. By examining objective factors, similar cases are identified and statistically evaluated to determine if there was consistency in sentencing. One problem with this model is that it is often impossible to determine how a particular factor influenced a jury. Another problem, which would prevent the states from adopting the model, is that the model provides too much uniformity and statistical evaluation and eliminates the focus on the individual defendant and crime. Statistical models cannot be reconciled with constitutionally mandated individualized sentencing.

289. N.J. STAT. ANN. § 2C:11-3(e) (West 1982).

290. See *supra* note 184.

mathematical as well as statistical models involving scientific techniques to aid it in analyzing a death case for disproportionality. Because life is at stake, the proportionality review of a sentence of death must be unrestricted and creative, or impermissible considerations of race, sex, or socio-economic status will infect the jury decision of who shall live and who shall die.

Proportionality review is embedded deeply in the fabric of New Jersey law. Its roots are found in the state constitution, in decisional law, and in the state criminal justice system's long-standing and fundamental commitment to fairness in the criminal process. It assures that a sense of proportion, balance and equity is an indispensable part of any application of the New Jersey death penalty statute. Nothing in the United States Supreme Court's decision in *Pulley v. Harris*²⁹¹ suggests that evisceration of the proportionality requirement is either mandated or wise. In the wake of *Pulley*, an effort has begun to eliminate proportionality review in New Jersey. That effort is short-sighted and contrary to the intentions of the state legislature's articulated attempts to draft a statute which insures fundamental fairness prior to the imposition of the death penalty.²⁹²

Elements of prejudice and irrationality exist throughout our society. Their continued existence, while strengthening our resolve to eradicate them, also serves to highlight the realization that they will continue to infect the fair administration of justice. In death penalty litigation, no execution must be permitted to occur where the underlying conviction and/or jury determination of death is infected by prejudice or by irrationality. Toward this end, proportionality review of the sentence of death by the New Jersey Supreme Court will eliminate such unfairness in this State.

291. 104 S. Ct. 871 (1984).

292. It should be noted that the proportionality requirement was added to the death penalty bill by the State Judiciary Committee as the result of an amendment proposed by the State Attorney General:

[W]e would like to suggest that in addition to the other matters that the Supreme Court consider in its review of cases where the death penalty has been imposed, that the court consider the proportionality of the death sentences which have been imposed throughout the State, that is, to make sure that these sentences are being meted out in a fair, even-handed way throughout the State, and that we do not have either classes of individuals or areas in the State which appear to be arbitrary one way or the other.

1982 Hearings, *supra* note 203, at 6 (testimony of Mr. Stier) (emphasis added). Senator John Russo, then-chairman of the Judiciary Committee, indicated that any death penalty statute must "cover every possible contingency for the protection of the defendant and hopefully . . . will be utilized only in the most extreme cases." *Id.* at 1. In response to testimony by former Public Defender Stanley C. Van Ness, Senator Russo noted that he attempted to "draw this bill so tight and so limited that at least [the] risk [of convicting an innocent person] will be minimized." *Id.* at 30.

In his statement accompanying the enactment of the bill into law, Gov. Thomas Kean emphasized the proportionality requirement as one which would "ensure fairness and equity under the new statute." *Governor's Statement* (August 6, 1982), at 1.