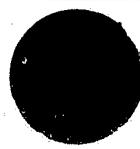


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EVALUATION OF PROPORTIONALITY REVIEW
PROCEDURES OF DEATH PENALTY CASES
IN STATE APPELATE COURTS

Final Report

1005001

Submitted to:

National Institute of Justice

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EVALUATION OF PROPORTIONALITY REVIEW PROCEDURES
OF DEATH PENALTY CASES IN STATE APPELLATE COURTS

ABSTRACT

The National Center for State Courts has developed a model proportionality review system to be used by state appellate courts. Twenty-two states require that each the death penalty case be reviewed and compared with the sentences among similar cases, to determine if the death sentence is disproportionate considering the circumstances of the crime and defendant. The model proportionality review system includes a background paper providing guidelines for handling critical issues in proportionality reviews, a prototype questionnaire for gathering case data, and a computerized system for storing, selecting, and presenting information on death-eligible cases. The Institute for Social Analysis conducted a preliminary evaluation of the development and use of the prototype system, primarily through interviews with potential users. The proportionality review system was determined to be a sound, sophisticated system with the potential of assisting state appellate courts with proportionality reviews. Weaknesses seen in the system stem from the complexity of conducting proportionality reviews and the subsequent complexity of the system itself -- difficulties were seen in data collection and the application of scientific techniques to judicial concerns. Implementation of the system has begun in two states, but wide adoption is apt to be very slow. This is primarily due to a recent Supreme Court ruling stating proportionality reviews are not constitutionally required, lack of need in small states, data collection problems in large states, public attitudes toward the death penalty, and minor problems in the system itself. Recommendations for the system's application and further research are made in the evaluation report.

EVALUATION OF PROPORTIONALITY REVIEW PROCEDURES OF DEATH PENALTY CASES IN STATE APPELLATE COURTS

Introduction

In the 1972 case of Furman v. Georgia,¹ the U.S. Supreme Court ruled that existing capital punishment statutes had been applied arbitrarily and capriciously, rendering the death penalty cruel and unusual punishment in violation of eighth amendment guarantees. Since then, 38 states have revised and reinstated death penalty statutes to conform to standards set by the Furman and other decisions.² The revised statutes are designed to minimize the risk of arbitrary and capricious impositions of the death penalty. Many states have patterned their statutes after Georgia's, which was upheld by the U.S. Supreme Court in Gregg v. Georgia³ in 1976. To address the problem posed by the Furman decision, these statutes require that each death sentence be reviewed by an appellate court to ensure that it is not excessive or "disproportionate" considering sentences given in similar cases. The states have encountered obstacles in conducting these proportionality reviews to meet U.S. Supreme Court standards for a constitutionally acceptable capital punishment process as well as thorny problems inherent in the review process itself.⁴

In response to these problems, the National Institute of Justice provided funding to the National Center for State Courts (NCSC) in 1982 "to design and test methods for providing appellate courts with the capacity to conduct effective reviews of the comparative excessiveness of death sentences sufficient to meet the standards of the U.S. Supreme Court."⁵ The goals of the 18-month project were:

- To devise systematic procedures for collecting information on specific case characteristics.
- To develop management information systems for appellate courts which can provide easy access to case data, and present data in a useful comprehensive way.
- To apply techniques for identifying similar cases and explore the potential utility of several methods -- both quantitative and qualitative -- for measuring comparative excessiveness of sentences.

These goals were to be accomplished through the following eight activities:

1. A background review of court decisions, research and legal literature, and the aggravating and mitigating factors listed in state death penalty statutes.
2. Data collection development (identifying the sources and types of information to be collected on the crime).
3. The design and development of an information management system by which the relevant data on the crime can be obtained and used.
4. Development of a methodology for selecting the appropriate group of cases to be used to compare to the case being reviewed.
5. Development of quantitative and qualitative methods for measuring proportionality.
6. A review and possible modification of current procedures used by appellate courts to review death sentence cases.
7. Provision of technical assistance to three states in implementing proportionality review systems as developed by the National Center for State Courts.
8. Monitoring and assessment of the operation of the proportionality review process and its elements (this step was to become the responsibility of the evaluation).

The products of the proportionality review procedures (PRP) project -- a prototype questionnaire, a model information system for storing and selecting similar cases, and a background paper covering issues and procedures -- were completed in August 1984. This prototype proportionality review system is intended to be adaptable to local conditions and thus usable by all states. Three states -- Louisiana, New Jersey, and South Dakota -- participated in the project's developmental and implementation phases.

The Institute for Social Analysis was awarded a grant from the National Institute of Justice in June 1983 to evaluate the PRP project, to assess the operations and impact of the proportionality review system in the three participating sites. The two original goals of the evaluation were to:

- Document and assess the design and development of the proportionality review systems. The basic elements of the model proportionality review system are the data collection forms and procedures, information management system(s), similarity methodology, proportionality measures, and procedures for implementing the system. The evaluation documented the design of these elements and how they were developed.

- Monitor and assess the operation of the proportionality review systems. The evaluation was designed to focus on the perceived utility of the proportionality review systems to be appellate courts after they were implemented in the three participating states. The evaluation was to study changes in similarity factors and proportionality measures over time, the proportionality review system's impact on consensus on death penalty cases, the perceived effect of the system on its users (judges, prosecutors, etc.), costs of implementation, and particulars of which criminal justice officials should gather case information and the most useful forms of the collected information and management information systems.

These goals could not be fully met because, as will be explained below, the prototype proportionality review system is not operational in any states at this time. Since we could not directly assess and monitor the operation of the proportionality review system, interviews were held with Supreme Court Justices, prosecutors, public defenders, and court officials in 10 states, to gather their perceptions of the content, structure, and perceived utility of the system. The interviewees included key persons from the participating states and others who have been closely involved with or interested in the PRP project over the past two years.

Overview of this Report

While this is a final evaluation report, it is by no means a conclusive assessment of the National Center for State Court's prototype proportionality review system. The report describes the origin and underlying issues of proportionality reviews for death penalty cases, summarizes the design and procedures of the prototype system, discusses the system's implementation in the participating states, and presents the perceptions of court officials regarding the system. Current progress and potential obstacles to implementation will be discussed, but the impact of the proportionality review system cannot be assessed for some years to come. Many forces -- some external to the project and some inherent in proportionality review procedures and the prototype system itself -- bear on the issue of whether or not the proportionality review system will be implemented by a given state and how it is used. This report will assess the system as it now exists and provide information and guidance to those considering its implementation.

Roots of Proportionality Reviews of Death Cases

In June 1972 the U.S. Supreme Court announced its decision in Furman v. Georgia and two companion cases, invalidating the death sentences imposed under the state laws of Georgia and Texas. A bare majority held that the death penalty was so often imposed in an arbitrary and capricious manner that, as applied, it constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments. The Court's action was uniformly regarded as indicating that all then-existing death penalty procedures violated these constitutional amendments and all state death penalty statutes were invalidated. In the Furman decision, the Court required the states to institute procedures which would guard against the freakish imposition of the death penalty and that would provide "a meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it was not."⁶

Most state legislatures responded to the Furman decision by enacting new death penalty statutes to limit jury discretion and avoid arbitrary and inconsistent results. The Court's decision in Furman was articulated in separate opinions by each of the nine Justices and few guidelines were provided to the states in their drafting of new death penalty statutes. In late 1975, the Court granted certiorari in five cases -- Woodson v. North Carolina,⁷ Roberts v. Louisiana,⁸ Gregg v. Georgia,⁹ Proffitt v. Florida,¹⁰ and Jurek v. Texas¹¹ -- which constituted a representative sample of the new death penalty statutes.¹²

In reviewing the five state statutes enacted in response to the Furman decision, the Court found that judges and juries could impose the death penalty as long as they were given adequate information and guidance for determining whether the sentence was appropriate in a given case. Three of the state statutes, those of Georgia, Florida, and Texas, were upheld, while the Louisiana and North Carolina statutes were struck down. The Louisiana and North Carolina statutes imposed mandatory death penalties for capital crime convictions.

The Georgia statute upheld in Gregg v. Georgia has been copied by a majority of states with death penalty statutes. Three elements of the Georgia statute were found to be important by the Court. Georgia's capital sentencing system included bifurcated trials separating the guilt and penalty phases, and required that a sentencer find at least one of ten aggravating circumstances present in a capital case beyond a reasonable doubt while allowing the sentencer to weigh mitigating factors against aggravating evidence. Georgia's statute also contained a provision for state supreme court reviews of all cases in which the death penalty was imposed, not only to consider trial errors but whether the death sentence had been imposed arbitrarily or disproportionately. The Georgia supreme court must determine whether each death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. This provision was given special notice by the U.S. Supreme Court in the Gregg opinion. In Florida, the appellate court performs proportionality reviews in the absence of a statutory requirement, but Texas does not. None of the statutes touched on prosecutorial discretion in charging decisions or executive clemency in death cases.

Thus, in following Georgia's lead proportionality reviews (also called comparative reviews) for all death penalty cases became requirements in the statutes of 22 states, and several more conduct such reviews in the absence of legislation.¹³ The essence of proportionality reviews is to determine whether the death penalty has been generally imposed in cases similar to the case under review; if life sentences are generally given, the death penalty would be deemed disproportionate. The U.S. Supreme Court did not provide any guidelines or definitions for the conduct of proportionality reviews. Left up to the states were the questions of where the line falls between the excessive and the proportionate sentence, how similar cases should be defined and selected, and what procedures should be followed in the review process.

Several researchers have studied the impact of the new death penalty statutes requiring proportionality reviews, and found that they do not live up to the expectations voiced in the Supreme Court's decisions in July 1976. The proportionality review systems in Georgia, Florida, and Texas, the three states whose death sentencing schemes survived Supreme Court scrutiny, were examined.¹⁴ It was found that the state appellate courts rarely invalidated death penalties, suggesting an absence of rigorous review; that the proportionality reviews provided little basis for encouraging proper and consistent sentencing practices; and that the courts have not resolved procedural problems related to a consistent and appropriate application of the death penalty. This study concluded that objective standards for death penalty cases and uniformity within a system of individualized discretion may be impossible goals. Baldus, Pulaski, and Woodworth¹⁵ tested the effectiveness of Georgia's proportionality review system and concluded it was not effective -- that Georgia's system continues to impose death sentences which the researchers identify as excessive in a number of ways. These researchers and others^{16,17} have noted the disproportionate number of defendants sentenced to death who have killed white victims; the race of the victim is more significant in death cases than the race of the defendant. Bowers and Pierce examined arbitrariness and discrimination under capital statutes in four states accounting for 70% of death sentences nationwide and concluded that they have done "little, if anything, to remedy the ills of the pre-Furman era."¹⁸ Bowers and Pierce noted consistent differential treatment in capital cases by race of the offender and victim and by judicial circuit. Arkin found no evidence of discrimination in Florida's death penalty impositions, but did document both selectivity and arbitrariness.¹⁹ Inconsistencies in capital sentencing were also found under Pennsylvania death penalty statutes.²⁰ Professor Charles L. Black, Jr., has also roundly criticized the Texas statute upheld in Jurek and finds the Georgia and Florida schemes wanting also.²¹

It was against this backdrop that the National Center for State Courts proposed the development of a prototype proportionality review system to enable appellate courts to meet the Supreme Court's mandate of devising "principled" ways of distinguishing among the few who are sentenced to death and the many who are not.²² The Conference of Chief Justices, which has had a continuing interest in the administration of the death penalty, asked Professor Baldus to present his findings regarding proportionality reviews at a conference in late 1981. Baldus raised a number of issues central to proportionality reviews which were summarized in his 1983 article,²³ and formulated several recommendations for developing a sound review system. Baldus suggested the NCSC might assist in applying his findings²⁴ and subsequently became a key consultant to the project.

The National Center surveyed state supreme courts, and 13 of the 38 states with death penalty laws expressed interest in the project. Three states -- Louisiana, New Jersey, and South Dakota -- subsequently became participants. The National Center formed a nine member Task Force to provide guidance and direction to the project, particularly in identifying and considering the legal and technical issues associated with proportionality reviews and reviewing all project products. The Task Force included representatives from the three participating states (state Supreme Court administrative staff), and a prominent prosecutor, defense attorney, law professor, statistician, private attorney, and social scientist. Observers from four other states and consultants also participated on the Task Force.

As the project unfolded, the constitutional question of proportionality reviews for death sentences was raised again. The U.S. Supreme Court, in the Gregg, Proffitt, and Jurek decisions, held that the elements of the pertinent capital sentencing schemes were constitutionally satisfactory but did not conclude the particular elements -- including proportionality reviews -- were constitutionally required. This question was considered in Pulley v. Harris,²⁵ which was granted certiorari by the Supreme Court in early 1983. Harris was convicted of murder and sentenced to death in a California court; the California state supreme court

affirmed the sentence without conducting a proportionality review. The PRP staff and Task Force speculated that the Pulley v. Harris decision might well find proportionality reviews to be constitutionally required, based on their readings of the Gregg and more recent decisions, and might provide guidelines regarding how they should be done. The wait for the Harris decision slowed the progress of the project, as the Task Force and participating states waited for direction from the Court.

In January 1984 the Supreme Court announced its decision: proportionality reviews are not required under the eighth amendment for every case. Proportionality reviews were considered an "additional safeguard against arbitrary or capricious sentencing"²⁶ but not indispensable. The prototype system was virtually completely developed when the Harris decision was announced. The need for developing effective proportionality reviews procedures remained, due to the large number of states required to conduct such reviews under their own statutes.

Proportionality Review Procedures Since 1976

How proportionality reviews are typically conducted. Before discussing in more detail the central issues in proportionality reviews, Louisiana's usual process of conducting reviews will be summarized. Louisiana's reviews are representative of the traditional, intuitive approaches most appellate courts have taken.

Louisiana's death penalty statute has been in effect since 1976. It was the result of a state supreme court rule, rather than legislation, although it was patterned after the Georgia statute. No reviews were conducted prior to 1976, and the state supreme court has made minor changes in the review procedures over time.

The statute requires that all death sentences be reviewed by the state supreme court to determine if (1) the evidence supports at least one aggravating circumstance, (2) arbitrary factors were present, and (3) the sentence is proportional to similar cases. The court has decided that the universe of cases, from which similar cases are drawn, is to be all first degree murder prosecutions, regardless of the

final outcome of the case. Approximately 55 first degree murder convictions with death penalties have been reviewed since 1976; both the conviction and sentence are reviewed by the supreme court. In 25 of these cases, both the conviction and sentence were affirmed. In 12, the conviction was affirmed, while the sentence was reversed. Only one or two of these sentences were vacated due to proportionality issues -- the majority of the sentences were reversed due to trial errors. After resentencing, it appears that about half receive death sentences again and the others get life sentences. In five cases, both the conviction and sentence were reversed and the cases were retried. The rest of the cases to be reviewed (about 10) were pending as of March 1984. Two districts (nearly synonymous with parishes) account for the majority of the death sentences -- these are the Orleans and East Baton Rouge districts.

The basic steps of the current proportionality review procedures are as follows:

1. The trial judge in each case which ends in a death sentence completes a Uniform Capital Sentencing (UCS) Report with the help of the district attorney, defense counsel, and the Department of Probation and Parole. The UCS Report includes information on the crime, defendant, and victim. Each trial judge is also required to complete a sentence investigation report, which is often actually done by the Department of Probation and Parole. In addition to these reports, the state supreme court also receives a verbatim transcript of the sentencing hearing and record. The UCS and sentence investigation reports can be reviewed by both the defense counsel and the district attorney; reviews are only rarely made by the defense counsel. The district attorney and defense counsel may also file their own sentence review memoranda, but usually only the district attorney does so.

2. The next step in Louisiana's review is a comparison of the death penalty case at hand to similar cases. At this time, the comparison cases are drawn only from the district of the death penalty case (i.e., a death penalty case from Orleans district is compared to other first degree murder convictions in that district

since 1976). The district attorney maintains a list of first degree murder convictions along with brief summaries of each case. Information on life sentence cases consists primarily of a brief paragraph of the facts of the case and the background of the defendant. The information on life and death cases is not uniform.

It appears that the comparison cases are selected on the basis of factual similarities -- armed robbery murders are compared to other armed robbery murders -- but the selection process is not definitively detailed. The Court relies on its staff to identify the similar cases to be used in a given review. The review is not limited strictly to factually similar cases within a single district -- each judge may review and draw on other case information (e.g., the trial transcript or case summary) and consider other murder cases from other districts. If there are few cases of a given type within a district, cases from other districts will be included in the review.

3. The proportionality review itself is carried out by the state supreme court Justices through a subjective case analysis and reading and sifting of the facts and background of the case. The process involves some informal weighing of the different aspects of the case on an individual basis. Much of the critical deliberation of proportionality is conducted in private and the Justices meet in conference to discuss the issues and outcome.

Louisiana's review procedures are different in one respect from other states, namely that Louisiana's reviews are done on a districtwide rather than a statewide basis. Otherwise, Louisiana's review is representative of the way other states, including Georgia, conduct proportionality reviews. Baldus, Pulaski, and Woodworth have described the comparative sentence review process in Georgia.²⁷

Although the Georgia statute does not explicitly define the universe of potentially similar cases to be included in the proportionality review, it suggests that the universe should include all murder convictions in which the sentence was imposed after January 1, 1970. In practice, according to Baldus and his

colleagues, the court includes only murder cases in which the defendant appealed the convictions. Summaries of more than 700 cases are kept on file, and administrative staff manually search through these cases to identify similar cases to be compared against the case under review. It appears as though the Georgia supreme court has no common method for selecting similar cases but their opinions indicate that a fact-specific approach is frequently used (meaning that, again, robbery-murder cases are compared to other robbery-murder cases). Several of the Georgia supreme court opinions reflect that mitigating factors appear to play a minor role in proportionality review and there is some evidence for the use of an overall culpability method for selecting comparable cases. The court reviews the case summaries in a subjective fashion and determines whether the review case has been proportionately sentenced or not. Baldus, Pulaski, and Woodworth found that, of the 120 cases reviewed by the Georgia court, only two were vacated on the grounds that they were excessive or disproportionate. Their research also indicates that for 88% of the cases reviewed, every case cited as similar was a death sentence case.

It appears that Louisiana and Georgia represent a "traditional" approach to proportionality reviews. The supreme court Justices are given case information on a number of murder cases thought to be similar to the case under review. The Justices review the cases in the traditional judicial way, reading and sifting through information in an unobservable fashion. After reviewing the similar case summaries, a court decision is made as to whether the sentence in the review case was disproportionate or not.

This traditional approach to conducting proportionality reviews does not define the critical issues involved in such a review, or at least does not make the definitions public or readily understandable. The proportionality review process is typically a private matter conducted by the Justices behind closed doors. At present, no state employs an empirically developed proportionality review system. Below we will review the major issues of proportionality reviews and then describe

how the National Center for State Courts addressed these issues.

Central issues in proportionality reviews. We see three central issues critical to proportionality reviews that are not resolved by death penalty statutes and other capital sentencing schemes. These are the definition of the universe of cases to be considered in a proportionality review, the selection process for choosing similar cases, and the determination of proportionality.

1. Definition of the universe. To conduct a proportionality review, the court must first of all determine what universe of cases constitutes the group from which similar cases are to be identified. The definition of the universe of cases has important consequences for comparative sentence review.

A guiding principle suggested by Baldus, Pulaski, and Woodworth is that the universe should include all cases within a jurisdiction in which a sentencing authority actually considered whether to impose a death sentence or not.²⁸ This means the universe would encompass all cases with a capital charge, regardless of the outcome, including life sentence cases, cases in which pleas were made to lesser charges, cases in which prosecutors did not seek the death sentence in a death eligible case, and so on. It is a broad definition of the universe of cases. Some states use only cases in which the death penalty has been imposed as their universe of cases. This latter definition appears to be inconsistent with the entire purpose of proportionality reviews, in that a disproportionate sentence is one in which a death penalty is imposed in a certain case, while similar cases result in life sentences. Excluding cases in which life sentences were imposed seems to many to be contrary to the ultimate purpose for proportionality reviews.

Several other more minor questions have also been raised in relation to defining the universe of cases. One question is whether or not cases decided prior to the Furman decision should be included. Since the U.S. Supreme Court has said that the penalty of death should be in line with community standards and public attitudes, which have been shown to change on this issue over time, most states look only at cases decided after their post-Furman death penalty statutes were enacted.

Another issue is whether or not to include cases which were not appealed. Many life sentences are not appealed, and it is sometimes difficult to gather complete information on such cases. A final issue relevant to defining the universe of cases is whether proportionality reviews should be conducted within a judicial district, as they are in Louisiana, or whether they should be statewide reviews. The issue of statewide reviews touches on problems of caseload size and difficulties in gathering information, as well as the need to be cognizant of community standards.

Van Duizend, in his published version of the background paper for the proportionality review system,²⁹ reports that 22 states have defined the universe of cases either by statute, decision, or judicial practice. Fourteen of the states include all first degree murder cases in which the death penalty was an issue, regardless of the final outcome of the case. Eight states limit their reviews only to cases in which the death penalty has been imposed.

The research studies cited in the previous section of this report conclude that death penalty sentences are rarely determined to be disproportionate. Several studies attribute this in part to a narrow definition of the universe.

2. Selecting similar cases for review. Most of the state statutes governing death penalties require that the review case be compared to other similar cases, "considering both the crime and the defendant." These statutes do not specify how cases should be compared or how similarity should be determined.

Baldus and his colleagues have suggested that there are two primary methods for selecting similar cases for review.^{30,31,32} One has been called "the fact-specific" method for identifying similar cases, and the other is to look at the overall level of aggravation or culpability. The fact-specific method means that cases will be selected on the basis of similar factors, usually some combination of statutory aggravating and mitigating circumstances. For example, if the case under review is a case in which a murder was committed in the course of a residential burglary by a youthful defendant with a history of drug abuse, the similar cases would be selected by matching these significant characteristics. This method has

also been called the "salient features" approach by Baldus³³ in that it relies on intuition and experience in selecting the factual characteristics of similar cases. In practice, it is typically the court's administrative staff who cull through the universe of cases to identify the smaller group of similar cases to be used in a given review. A more rigorous way for identifying important case characteristics has been suggested by Baldus and his colleagues, called the "main determinants" approach.³⁴ This approach seeks to identify the characteristics of the crime and the defendant which actually influenced sentencing decisions in the jurisdiction under scrutiny. Multiple regression analysis is used to identify those significant characteristics.

The second basic method for identifying similar cases is to estimate the overall net level of aggravation or culpability in the case under review and to compare it to cases with a similar level of aggravation. In practice, this seems to mean that the court must balance aggravating and mitigating factors in each case to assess overall culpability. While this appears to be used less frequently than the fact-specific approach, it is a method used implicitly by courts from time to time in their proportionality reviews. Baldus, Pulaski, and Woodworth state that the overall culpability of each case should be estimated in quantifiable form to make comparisons more rigorous.³⁵

3. Determining proportionality. Once the universe of cases is defined, critical data are collected and summarized on each case in that universe, and similar cases are selected for a particular review, the court is left with the problem of determining whether a sentence is in fact disproportionate or not. As an illustration, consider a situation in which a court is reviewing a death penalty case. Of the 10 cases selected as being similar from the universe of cases, seven received life sentences, and three received death sentences. Is the death penalty in the case under review disproportionate or not?

This issue has not been addressed in any rigorous or quantitative way. No U.S. Supreme Court or other court opinion has quantified excessiveness, or defined what

a "infrequent" or "abhorrent" imposition of the death penalty is. Justices tend to protect their discretionary powers in areas such as this one.

Once again Baldus and his colleagues have been most active in studying and writing on this issue. While Baldus, Pulaski, and Woodworth use seven different measures of comparative excessiveness in their own study,³⁶ they report that there are currently three primary approaches to determining proportionality in death sentences. The first is one called "the reasonableness" approach in which the state supreme court decides whether a particular death sentence is disproportionate or not on the basis of generalized notions of reasonableness. The court weighs the aggravating and mitigating circumstances of the case under review and decides whether death appears to be a reasonably appropriate sanction. The court relies on its own values, experience, and familiarity with prior cases to make this determination and makes no reference to sentences imposed in similar cases in its written opinion.

A second method for determining proportionality has been called the "precedent-seeking" approach. In this approach, the court identifies relevant aggravating and mitigating circumstances in the case under review and judges whether the sentence is appropriate or not. The court also typically identifies one or more other similar cases which it cites as support for its decision regarding the case under review.

The third and more truly comparative approach to proportionality review is the "frequency" approach. In this approach, the court identifies the group of similar cases and determines the frequency with which death and life sentences were imposed. The court then decides whether death has been imposed so infrequently as to make a death sentence disproportionate for these types of similar cases. No court has specified in quantitative terms what "infrequent" means or how to interpret a death/life sentence ratio in determining proportionality. In a bold move, Baldus, Pulaski, and Woodworth used a quantified measure of proportionality in their reanalysis of Georgia's cases;³⁷ a death sentence was deemed excessive if the death

sentencing rate among similar cases was less than .35.

The Prototype Proportionality Review System

The prototype proportionality review system developed by the National Center for State Courts is designed to meet the requirements expressed in the various Supreme Court decisions since Furman and to be adaptable to the particular statute or practices of any given state. An "issue paper" has been written, discussing the central issues of proportionality reviews and providing guidelines for handling them. These issues are the determination of comparative excessiveness, the basis on which similar cases should be defined, how they should be compared, and what the universe of cases should be.

The National Center for State Courts' proportionality review system consists of a prototype questionnaire and complete documentation and actual software (designed for microcomputers) for a computerized case storage and retrieval system. The system was developed with an eye to providing appellate courts with a rigorous, principled approach to conducting proportionality reviews and to developing a system which would have the capability of demonstrating the rigor and principle that underlies such an approach. The system is designed to articulate or demonstrate the bases and definitions underlying a state's proportionality review procedures, provide an empirical basis for determining proportionality, and be technically defensible. The final product is a very thick "user's manual", which contains the issue paper, the prototype questionnaire, and the computerized system documentation.

It appears to us -- having attended two Task Force meetings, been privy to internal project memoranda, and interviewed the project director at length -- that the developmental process for the proportionality review system involved substantial research, analysis, and development by NCSC staff and consultants of the issues and practice of proportionality reviews followed by discussion, comment, and approval by the Task Force. It should be mentioned here -- as it is in the issue

paper -- that the Task Force members did not give unanimous approval to all decisions and procedures.

Guidelines for Addressing the Three Central Issues

The PRP Task Force considered the three central issues of proportionality reviews at some length and proposed ways of defining and settling those issues. The guidelines are summarized below and form the major portion of the issue paper.

The universe of cases. In determining the best definition of the universe of cases from which similar (or "comparison") cases will be drawn, the central issue in the eyes of the Task Force was whether to include death-eligible cases where life sentences were imposed or to restrict the universe to only those with actual death penalties. While the latter definition makes the size of the universe and thus the data gathering process more manageable,

it fails to address the question framed by Justice White in Furman -- how can the few cases in which a death sentence is imposed be "meaningfully distinguished" from the many apparently similar cases that resulted in a life sentence? Although the case under review may be similar to another death case, it may also be similar to thirty life cases.³⁸

Although the Task Force and project staff recognized some of the problems involved in gathering information on all death-eligible cases, the consensus was that the universe of cases should be "all cases in which the indictment included a death-eligible charge, and a homicide conviction was obtained."³⁹ This definition would include, in most jurisdictions, all cases with first- or second-degree murder or manslaughter convictions. Included would be cases in which defendants pled guilty and those resulting in life sentences, whether appealed or not. The definition was modified slightly by including a guideline whereby cases in which the conviction or sentence is reversed on appeal would not be included in the universe, regardless of the grounds for reversal. This modification was deemed necessary because of the unknown effect an error during the trial -- resulting in the reversal -- may have had on the sentencing decision.

The PRP project also suggested that the universe include all appropriate cases decided subsequent to a state's passage of their post-Furman death penalty statute,

but recognized that limiting the universe to more recent sentencing decisions would be preferable to including cases with incomplete information. The definition proposed by the PRP Task Force is to be considered a minimum standard to be expanded where desirable. For example, a state concerned with the exercise of prosecutorial discretion or particular types of murder cases might want to include all murder indictments in the universe.

Selecting similar cases. The issue paper for the proportionality review system states that the fact-specific method is the "simplest and most direct manner" of selecting similar cases, and the computerized system is designed to select cases in this manner. The system asks the user to identify the primary aggravating and mitigating circumstances in the case under review, and then similar cases are selected which match these factors and the percentage of life and death sentences among the similar cases is displayed. The system is flexible and allows the user to change, expand, or narrow the mitigating and aggravating factors used.

The PRP Task Force recognized that even in states with a large universe of cases, the matching of cases on facts alone may produce an insufficient number of similar cases to allow a meaningful review. It is suggested that courts may want to "draw analogies among factually related but not identical cases." Several other methods for identifying similar cases were also suggested, including looking at cases with similar levels of aggravation. These methods are closely related to determining proportionality.

The issue paper presents four alternative methods for selecting similar cases. These methods have been used implicitly by courts in conducting reviews and may be useful in situations where only a handful of cases match the review case. They are presented as alternatives and their presentation is accompanied by warnings regarding their use.

One method is labeled "empirical analysis" and was developed by Arnold Barnett, a consultant to the Task Force. Barnett developed this method by reading the summaries of several hundred death-eligible cases from Georgia, to attempt to

differentiate cases resulting in life versus death sentences. The cases appeared to differ along three dimensions: the certainty that the defendant killed deliberately, the relationship between the victim and the defendant, and the heinousness of the killing. A two- or three-point scale was developed for each dimension. To use this empirical analysis method, the court would classify each case under review on these three dimensions. Cases having the same configuration of scores on the three dimensions would be used as similar cases for proportionality reviews.

A second method suggested in the issue paper is the "level of aggravation" method. Using this method, cases sharing a particular aggravating or mitigating factor are placed in one of three categories of the most aggravated, typical, and least aggravated cases, according to criteria determined by the court. Cases within each category can be differentiated further by using a narrower set of criteria for a second ranking. To conduct a proportionality review, a court would compare the review case to other cases at the same level of aggravation or at an adjoining level within the appropriate category.

The "main-determinants" method was also suggested for selecting similar cases and determining proportionality. This method uses statistical techniques such as regression analysis to identify the factors most influential in imposing sentences in capital cases in a jurisdiction. The sentence in the review case is compared to the sentences of cases with the same combination of significant factors (i.e., main determinants).

Finally, the index method was suggested in the issue paper. In the index method, individual cases are examined and a positive weight is assigned to aggravating circumstances and a negative weight is assigned to mitigating circumstances. The weights are determined through judicial deliberation or statistical analysis of actual cases, to determine the relative importance of certain circumstances. The result is a number for each case and the higher the number, the more likely the case will result in the death sentence. Review cases are compared

to cases with similar scores in order to assess proportionality.

The issue paper presents these four alternative methods as valuable tools for providing appellate courts with a clear understanding of their death sentencing practices, and for validating determinations of similarity based upon fact-specific comparisons. These methods are recommended in states where a limited number of cases makes the matching process difficult, and can be used without computers or extensive experience in statistical analysis.

Determining proportionality. The prototype proportionality review system is designed to use the frequency approach to determining excessiveness. Although the two other main approaches -- generalized notions of reasonableness and the precedent-seeking approach -- are mentioned in the background issue paper, the Task Force clearly advocated the use of the frequency approach. The frequency approach to determining proportionality may be used after similar cases are selected by the fact-specific method or any of the four alternatives.

The frequency approach simply refers to the process whereby similar cases are selected and then the frequency of life and death sentences among them is determined. The PRP Task Force did not specify how frequent death sentences should be in a group of similar cases to conclude that the death sentence in the review case is proportionate. In discussions, the Task Force expressed opinions that this determination must be left to the discretion of the appellate courts. The only objective guideline we have seen suggests that if death is imposed in less than 35% of the comparison cases, the death sentence in the review case is disproportionate.⁴⁰

The issue paper does provide some guidelines for determining proportionality in the "grey" cases -- those in which death sentences are imposed in between one of every four or two of every five instances among the comparison cases. Extreme cases, in which death is imposed in as high as four out of five comparison cases or as seldom as perhaps once in every forty or fifty cases, involve a fairly simple determination of proportionality. For the grey cases in the middle, the PRP

project suggests one look to the state's capital punishment statute to discern the purpose it was meant to serve. Determining the purpose of the death penalty can be a guide to defining the frequency of imposition of the death penalty required to meet that purpose.

The U.S. Supreme Court has offered two views of the purpose of the death penalty, deterrence and retribution,⁴¹ although others may be present also. The issue paper states that if a state's statutory mitigating and aggravating circumstances imply deterrence is the primary function (for example, if an aggravating factor is the killing of a police officer), the death penalty must be imposed "sufficiently often, at least for certain classes of murders, for there to be some deterrent effect." No definition is offered for "sufficiently often." If the death penalty is to serve retributive purposes (referring to statutes which include a factor permitting a death sentence for murders that are particularly heinous, cruel, or vile), it is stated that regular imposition of the death penalty becomes far less important. The issue paper suggests that for retribution effects, the death penalty might be reserved for all but the extreme cases, while guarding against the aberrant case.

To decide the proportionality of the first case, the prototype system suggests three options. One is to use pre-Furman cases for comparison if the post-Furman statute was enacted quickly after the Furman decision and was not drastically altered when re-enacted. The second option is to use comparison cases from a state similar in terms of statutes, procedures, and demographic characteristics. The third and simplest option suggested is to wait until a number of death sentences have been imposed before conducting a proportionality review.

The Elements of the Prototype Proportionality Review System

The user's manual for the proportionality review system includes a prototype questionnaire, step-by-step instructions regarding the use of the case selection and retrieval system, and programs and sample printouts for the automated system.

The prototype questionnaire. The questionnaire offered as a sample form for

the proportionality review system was developed following an examination of analogous questionnaires used in 12 states, death penalty statutes in 37 states, and Baldus' research on Georgia's cases. The questionnaire was reviewed several times by Task Force members, followed by revisions and refinements. The questionnaire and narrative summary are expected to be altered by states prior to implementation, to conform to local conditions and state statutes. They are intended to be completed for every case in the universe of cases. For existing death sentence cases, the questionnaire data will have to be extracted from trial transcripts, sentencing reports, etc. The completion of the questionnaire and summary should be the responsibility of the trial court (trial judge and his or her staff), with the likely assistance of departments of probation and parole. Completed questionnaires should be submitted to defense counsel and prosecuting attorney for review and comment, then certified by the trial judge prior to forwarding them to the state supreme court.

The full questionnaire is composed of 49 closed-ended items, an outline for guiding a narrative summary of the cases, and a brief form to be used to summarize the defendant's sentencing history. The items cover:

1. A procedural summary of the case (crime convicted of, sentence, trial information, etc.).
2. Information on the offense, including the location, degree of planning, precipitating events, victim's capacity to resist, and the extent of the defendant's and co-defendant's participation.
3. Trial data, focusing on aggravating and mitigating circumstances (instructed, found, and established; statutory and non-statutory), contemporaneous offenses (committed, charged, and convicted), and the strength of the evidence.
4. Victim data, including demographic information (race, age, occupation, and relationship to the defendant).
5. Defendant data, including demographic information, mental health information, and prior criminal history.

The narrative summary is to be used to summarize the facts of the case in 100-200 words according to the evidence presented at the trial. The outline provides guidelines for describing the offense, defendant, and presentation of evidence at

the trial and sentencing phases. Two outlines are provided, one with substantially more guidelines for the information in each category. The sentencing history form asks for the year of sentencing, most serious offense, total number of counts, and the maximum sentences imposed.

The case selection system. The proportionality review system stores, sorts, selects, and analyzes the information gathered by the questionnaires. Both automated (designed for a microcomputer) and manual (punched cards) systems have been developed to house a database of the universe of death-eligible cases. A manual system is suggested as sufficient when the universe contains 100 or fewer cases. A computerized system is probably more effective and efficient for larger universes.

Building the system requires, first of all, that questionnaires be completed for each case in the universe. The questionnaire data are then entered into the computer system or punched cards in the manual system. The user's manual provides detailed information on entering and editing case data, with the computerized system receiving the most attention.

To use the case selection system once the database is ready, the court or its staff first select the fact-specific features of the review case deemed important by the court or suggested by counsel in appellate briefs. Manually or automatically, the system then quickly sorts through the universe of cases and identifies the matching similar cases. The computerized system then displays or prints out any information desired on the similar cases (sentence, mitigating circumstances, etc.) and presents the percentage of life and death sentences among the similar cases. This process can be repeated using additional or different features until the court is satisfied the group of similar cases is appropriate.

In demonstrations given by the NCSC staff of the computerized system, it has performed well. The sorting process is "user-friendly" and "menu-driven" -- meaning that the user is guided by screen instructions through the entire process. No programming or other experience is necessary to use the system for sorting and

selection.

Once the similar cases are selected (through the fact-specific approach described above or any of the four alternative methods), the user is advised to review their narrative summaries and, if necessary, other case records. This subjective examination is needed to determine if indeed the review case is distinguishable in meaningful ways from similar cases which received life sentences. The system is merely a tool to help in decision-making -- it is a storage and retrieval mechanism which selects appropriate cases which must then be subjected to traditional legal analysis and judgment.

It is recommended that the system be readily accessible to appellate counsel, both defenders and prosecutors. Counsel should be informed of the selection criteria and analytic methods available to and used by the courts. The project Task Force concluded that "the proportionality review process will work most effectively and fairly when counsel for both parties are able to conduct analyses using the same pool of cases, information, and techniques available to the appellate court."

Evaluation Results

In this section we will present the results of the evaluation of the full proportionality review system. The status of implementation in the three participating states will be described first, along with the views of the court regarding the system and its guidelines. This discussion will be followed by a presentation of the survey results covering the perceptions of the system held by potential users.

Views and Uses of the System in Participating States

Louisiana. Louisiana's procedures for proportionality reviews have already been described as representative of the traditional approach used by the majority of states. In a September 1983 site visit to Louisiana, the present proportionality review processes were discussed with the senior staff attorney to the

supreme court, three supreme court Justices, three trial judges who had tried death penalty cases, two prosecutors, and defense counsel.

The state supreme court Justices had mixed views of their current proportionality review system, with a majority stating that it was adequate as is. A minority felt some changes were necessary, the central change being a shift from district-wide reviews to state-wide reviews. Several Justices felt that the information provided them on cases to be reviewed and similar cases was not sufficient or systematic enough. The Justices expressed a desire for guidance on proportionality reviews, particularly guidelines from the federal Supreme Court on what the constitutional requirements for reviews are, and specifically how they should be conducted (i.e., determining what the group of comparison cases should be, etc.). The U.S. Supreme Court denied certiorari in Louisiana's State v. Frason⁴² and State v. Williams⁴³ cases (Williams was executed in December 1983). In both these cases, it was argued that a state-wide review, rather than the more limited district level review, should have been completed.

The Chief Justice instigated Louisiana's involvement in the proportionality review project and was the only member of the court who reviewed project materials as they were developed. No testing of the prototype questionnaire or other active participation occurred during the project period. Toward the end of the project, in the summer of 1984, the NCSC staff conducted a full demonstration of the proportionality review system for the Louisiana state supreme court; one Justice did not attend.

Telephone interviews with four of the Justices in November 1984 indicated that no changes in the state's proportionality review procedures have been made to date -- indeed, the court has not formally discussed the prototype system since the demonstration. The Justices had quite favorable views of the proportionality review system yet agreed that its implementation is unlikely. The primary reasons are that the Harris decision is viewed as reducing the need for proportionality reviews, the public in Louisiana is strongly in favor of the death penalty, and the

supreme court Justices are elected officials. Combined, these reasons militate against the implementation of a rigorous state-wide system.

The Chief Justice and other Justices see positive benefits of the prototype system, however. These include making the reviews scientific, eliminating inconsistency, and supplying a database and system which would serve as a decision-making tool. The Justices seem to favor implementation of the system although they vary in the strength of their conviction. Several would like to have the system to aid their work while at least one would favor using it only if proportionality reviews are retained in Louisiana and conducted on a state-wide basis, an event also considered unlikely. All interviewed agreed the reviews should be done state-wide, and alluded that in essence they sometimes are. The supreme court Justices recall the range of cases they have heard when reviewing a case within a district.

The separate elements of the system -- the frequency approach to determining proportionality, the questionnaire, definitions of the universe and matching process, and computer system -- were generally favorably viewed. There was one strong vote against the definition of the universe, that it was too broad. One Justice felt that proportionality reviews have a limited role in Louisiana due to the state's death penalty rule, which requires that at least one aggravating circumstance be found in both phases of the bifurcated trial process. He believed this resulted in little variation among death cases and that mitigating circumstances become the only real issues in proportionality reviews. The other justices did not concur -- they see more inconsistencies in penalties and cases and one suggested that a sophisticated data system would enable them to see if in fact death cases are a narrow group.

One practical problem militates against the implementation of the prototype system in Louisiana. All the Justices referred to the difficulties of gathering data on old cases and the effort needed to build the system. Building a computerized system is generally viewed as not feasible due to the large number of cases, unavailability of staff, and lack of political and public impetus for it.

In summary, it appears unlikely that Louisiana will adopt new procedures patterned after the prototype system. This is largely due to reasons outside the proposed system, namely the Harris decision, public attitudes toward the death penalty, and support for the status quo within the court. Some problems are seen in the system itself, primarily in the difficulties of gathering the historical case data.

South Dakota. South Dakota's post-Furman death penalty statute went into effect in July 1979. The statute is patterned after the Georgia statute upheld by the federal Supreme Court in Gregg v. Georgia. The statute requires a proportionality review for all death penalty cases, considering circumstances of both the crime and defendant, and lists aggravating and mitigating circumstances.

No one has received a death sentence in South Dakota since the new statute has been in effect. According to the Chief of Legal Research for the State Supreme Court, prosecutors are increasingly asking for the death penalty, yet one is expected only about every ten years. When the statute went into effect in 1979 the supreme court, particularly the then Chief Justice, began to consider the development of a proportionality review system. When the court learned of the proportionality review project, they felt it would help them to be involved. The court has begun to consider the issues involved in proportionality reviews, such as the information needed, comparison cases, etc., and is in the early stages of developing formal proportionality review procedures. Several steps have been taken:

1. The questionnaire prototype has been revised to fit local conditions in South Dakota. After review and approval by the state supreme court Justices, the questionnaire will be tested on a sample of comparison cases. The questionnaire may be first tested on a case which recently reached the penalty phase but did not receive a death sentence. The trial judge and attorneys will complete the questionnaire in this initial test.
2. The Justices have informally decided what the universe of comparison cases will be. The group will consist of all death-eligible cases (murder cases in which death might have been imposed) since July 1979, which is estimated to be about 30 cases. It is expected that the appropriate trial judges or their staff will complete the questionnaire

on these comparison cases, and the information will probably be kept manually.

Other critical questions to be decided about the proportionality reviews, namely how similarity factors will be identified and how proportionality or disproportionality will be determined, have not been discussed by the state supreme court. It is probable that these decisions will not be made until the Court actually conducts the first review. In the meantime, the supreme court staff hopes to begin collecting information on the old comparison cases as well as new ones as they come in, to be prepared for the first proportionality review.

Two supreme court Justices, one the former Chief, were interviewed about their views of the prototype system. Both think it is a very good system and that their court will implement most of it. Their only concerns grew from the small number of death-eligible cases in South Dakota. The Justices felt that computerization may be unwarranted and that the process of matching cases based on fact-specific criteria may be problematic due to the low caseload.

Both Justices felt the proportionality review system was important as a safeguard to weed out arbitrariness and capriciousness and avoid affirming an unjustified death sentence. They felt it would be useful to them personally and would provide adequate information for comparing sentences. On the less positive side, the system was also seen as too complicated and statistically bound for a state with so few death cases. One Justice reiterated his view that proportionality reviews should rely on deductive reasoning and not be too cold and factually oriented. The questionnaire has already been adapted for South Dakota and the universe decided upon matches the Task Force's definition. A broad universe was seen as necessary for South Dakota, given the small numbers and disparity in sentencing among trial judges. The computerization and fact-specific analysis raised some concerns due to the few cases, as already mentioned. There was also concern that some judges might resist computer assistance and view the system as a threat to their discretion.

In summary, it appears that South Dakota will implement a proportionality review system much like the prototype, slowly and carefully. The need for it at

this time is low, but preparations are underway.

New Jersey. New Jersey instituted a death penalty statute in July 1982; prior to that date, there had been no death penalty statute in the state since the 1950s. Like Georgia's, the statute requires that death penalty cases be reviewed by the state supreme court for proportionality, considering both the crime and the defendant. The statute lists aggravating and mitigating circumstances for death penalty cases, but does not specify how proportionality reviews should be conducted. While New Jersey is expected to have between 200 and 250 death-eligible cases per year, only three death penalties have been imposed since July 1982. These three cases were recently decided and are in the appeals process; it will be some time before they reach a proportionality review, if ever.

In anticipation of a review of death penalty cases, the state supreme court staff and a committee of trial and appellate court judges have been developing proportionality review instruments and procedures. The committee involved -- the Committee on Justice on Capital Cases -- is a standing committee originally formed to adapt the court system to new laws and statutes. Interest in proportionality issues has been increasing as the need for a review system grows closer. New Jersey became a participant in the PRP project to help them move quickly and to keep abreast of national efforts related to proportionality review, although the state supreme court is not yet involved in the developmental process.

The following issues have been resolved to date:

1. A detailed questionnaire for gathering information on all cases to be used for comparison purposes has been reviewed and revised several times, and has been approved for use by the Committee. The questionnaire will be reviewed by the state supreme court and tested on the Ramseur case (the first death penalty) and several other death-eligible cases which received life sentences.

The questionnaire will be completed by the appropriate trial judge for the comparison cases and the probation department. The New Jersey court system has a sophisticated computerized case information system which will house the death

penalty questionnaire data. No data collection problems are anticipated due to the court officials' familiarity with such routines. The questionnaire will serve other purposes in addition to its use in proportionality reviews.

2. The Committee also decided what the universe of cases should be -- namely all capital murder indictments since July 1982 in which the death penalty was possible whether a death sentence resulted or not.

The Committee declined to make any further decisions about the conduct of proportionality reviews, concluding that they should be made in the course of court decisions and not administratively. Yet to be decided are the issues of how similar cases should be selected to review a particular case (i.e., what the similarity factors should be) and how proportionality or disproportionality should be determined.

The development of New Jersey's procedures proceeded slowly due to the Pulley v. Harris deliberation -- the New Jersey officials wanted to be able to meet any requirements put forth by the federal Supreme Court. It appears that the proportionality review project has been a source of information and guidance. The questionnaire is patterned after the prototype, and the NCSC staff have been involved in meeting New Jersey's needs. For example, the New Jersey Committee wanted to leave an open door regarding conducting the actual proportionality review; they wanted to have several alternative ways of determining proportionality. NCSC staff have provided assistance in considering the incorporation of a culpability analysis into the New Jersey questionnaire and automated selection system.

It has been impossible to assess state supreme court perceptions of the proportionality review system. The court has yet to see either the project's products or the system under development by their own administrative staff, as far as we know. When interviewed, the chair of the Committee of Judges reported that the Committee had made suggestions regarding the proportionality system, identified valid considerations, and initiated the gathering of appropriate information.

He declined to provide his opinion of the prototype system and referred questions to the administrative staff.

It appears that New Jersey will implement a system similar to the prototype, but it is also possible that developmental plans could be halted or changed when the supreme court becomes involved.

Maryland. Maryland has not been an official participant in the project, but is included here because of its unique involvement and interest in the proportionality review system. Maryland's death penalty has an expressed proportionality provision and requires the Court of Appeals, the state's highest court, to promulgate rules implementing the statute. In its review of five death penalty cases, the Court of Appeals has adopted the frequency approach to determining proportionality. The Court conducts their reviews in the traditional manner, with no automated database of cases in use.

The universe of cases has been defined by the Court of Appeals as those cases in which the death penalty was actually sought by the prosecution, which excludes many death-eligible cases and particularly life sentences. In Tichnell v. State,¹ the Court did rule that other non-capital but death-eligible cases could be brought to the Court's attention by appellate counsel.

The state's Public Defender Office accepted the challenge. The head of the Office's Capital Crime Division began attending Task Force meetings to learn of the development of the prototype proportionality review system. The Public Defender's Office decided to implement and maintain their own proportionality review system to be used in conjunction with appealing death sentences. The universe of cases has been expanded to include cases in which first degree murder indictments were returned and which are "death-qualified" under the statute's provisions (this excludes defendants who were not first degree principals in a murder, youth under 18, cases with no statutory aggravating factors, and defendants who were acquitted).

The proportionality system under development by the Public Defender's Office

is openly modeled after the prototype system. A lengthy questionnaire has been developed, based on the NCSC prototype and incorporating elements needed for Maryland. After participating in a demonstration of the automated system, the Public Defenders agreed to build their own computer system as a storage and retrieval mechanism. Their plans are to prepare a "proportionality workup" for all death sentence cases, which will select similar cases and subject the review case to the types of proportionality analyses suggested by the project. Questionnaires for the similar cases and supporting documentation will be included as appendices to the appellate brief.

The Public Defender's Office believes there are about 1,200 death-eligible cases suitable for inclusion in their system at this point, and anticipate about 200 per year out of approximately 550 murder cases. Questionnaires are now complete for about 150 cases but no computer system is being used as yet.

The Public Defender's Office has several concerns related to their clearly non-neutral stance and the views the court and opposition may hold about any proportionality system developed by the defender organization. To assure the integrity and completeness of their data, the questionnaire requires that the source of virtually every item be cited (e.g., the appellate brief, trial transcript, etc.). A copy of the completed questionnaire will be sent to the prosecuting attorney for comment and correction. A "Quality of evidence" section has been included to indicate the strength of the State's case. The Public Defender's Office is also willing to share their system with the Court of Appeals and Attorney General's Office.

We tried to interview key members of the Court of Appeals and Attorney General's Office to gather their perceptions of the system proposed by the Public Defenders, but it is too early in the developmental process to gather valid data. The Chief Judge of the Court of Appeals declined to have the Court included at this point. An Assistant Attorney General interviewed felt, not surprisingly, that the universe of cases should not be expanded and that doing so is interfering with the

discretion of prosecutors and juries. He also felt that historical data retrieval will be difficult to do accurately and that a computerized system is only necessary if the universe is expanded, which he would not advocate.

Thus, it appears the prototype proportionality review system has proved valuable to Maryland's Public Defenders in an unanticipated way. A law professor on Ohio's State Public Defender Commission and coordinator of Ohio's Death Penalty Task Force has also been interested in the system. Ohio's death penalty statute requires proportionality reviews but the professor reports they are not done by the state supreme court. The state Public Defender's Office has revised the prototype questionnaire to fit the Ohio statute and hopes the supreme court will consider its use.

Survey Results: Perceptions of the Content and Utility of Prototype System

The main thrust of our evaluation as proposed was to assess the prototype system after implementation in the three participating states. It can be readily seen from the preceding section that none of the three states is close to having a working system. Since studying the systems in use was not possible, we elected to conduct interviews with key officials in the participating states and with others who were involved in the project or expressed great interest in the system. Four states sent observers to Task Force meetings to stay abreast of developments. An advisor to the evaluation, an expert in death penalty and sentencing guidelines practice and research, also reviewed the system's user's manual. Telephone interviews were conducted with:

| <u>Capacity</u> | <u>State</u> | <u>Role in project</u> |
|-----------------------------------------------|--------------|------------------------|
| Supreme Court Justices (4) | Louisiana | Participating state |
| Assistant Attorney General Public Defender | Maryland | Interested state |
| Court Administrator Trial Judge | New Jersey | Participating state |
| Supreme Court Justices (2) | South Dakota | Participating state |
| Chief Deputy Clerk, Supreme Court | Delaware | Observer to Task Force |

| | | |
|------------------------------------------------------|----------------|------------------------|
| Special Assistant Attorney General | North Carolina | Task Force member |
| Law Professor, Public Defender's state commission | Ohio | Interested party |
| Administrative Director of the Courts | California | Observer to Task Force |
| Administrator of Courts | Nebraska | Observer to Task Force |
| Assistant Director of Courts | Illinois | Observer to Task Force |

Several other Justices and court officials were contacted, but could not provide informed opinions because their knowledge of the prototype system was very limited.

The interviewees represent state supreme courts, prosecutors, public defenders, and court officials -- the range of individuals who might build, use, or be affected by a proportionality review system. Their views are colored by their official capacities, their state's death penalty statutes, number of death cases, and most likely, their personal attitudes toward the death penalty. Their views of the content and potential utility of the NCSC proportionality review system are summarized below. The various elements and definitions of the system will be covered first, followed by the respondents' overall perceptions of the system, its strengths and weaknesses, and its value to them and their state.

Elements of the Proportionality Review System

The final product of the proportionality review system is a user's manual the size of a large metropolitan city's yellow pages. Much of it is taken up with the computer system's documentation, including instructions, copies of every screen, and complete program. The elements of interest to potential users of the system and our interview respondents are the prototype questionnaire and the issue paper which defines the universe of cases, means for determining proportionality, and process of selecting similar cases for comparison.

Definitions of the universe, proportionality, and similar cases. The National Center for State Courts' definition of the universe of cases to be included in a proportionality review is "all cases in which the indictment

included a death-eligible charge, and a homicide conviction was obtained." This definition was somewhat controversial in the minds of our respondents. About half of them agreed that it was an appropriate definition. Those in favor of it included most of the Supreme Court Justices interviewed and those from Public Defenders Offices. These individuals tended to believe that a broad universe is desirable to make proportionality review meaningful, particularly due to the substantial amount of disparity in sentencing among trial judges. Problems were foreseen in some states where comparisons will be difficult to make if the universe is large, and information may be lacking on certain cases that do not go to a death penalty hearing.

On the other side, about half of our respondents felt the definition of the universe was not appropriate. This view is particularly strong among prosecutors, who felt that life sentences, for the most part, should not be included. Prosecutors are apt to feel that their discretion in making capital charges is overruled if a broad universe of cases is used for proportionality reviews. The definition of the universe was also criticized by several respondents for going beyond the mandates of some state statutes. For example, in Louisiana, one Justice felt that the narrowly-defined death penalty statute already limits the number of cases to be included in a proportionality review, and no further expansion is desirable. Of course, a state adopting the prototype proportionality review system can define the universe in any way they see fit.

The system provides procedures for selecting similar cases for review based on fact-specific criteria, matching cases according to their aggravating and mitigating factors. There was general agreement that the fact-specific method is indeed the best approach. None of our respondents expressed strong disagreement with the approach, but several stressed that one cannot allow a computer to make one's decisions, but that the selection of matching factors, etc., must be decided by the court. There were also several comments that this approach results in some loss of information, but that the narrative to be written on every case mitigates

this concern somewhat. The narratives will allow judges to consider the degree of heinousness and cruelty should they desire to do so.

One objection to the approach of matching cases according to aggravating and mitigating factors is that every case may be seen as unique. It is true that, particularly in a state with a small number of murder cases, if one includes several factors one quickly eliminates cases, resulting in no similar cases to be used for comparison purposes. The system is designed to allow the user to change the factors at will and look at the group of comparison cases in any manner desired.

The issue paper and computer system suggest that the "frequency approach" is the best way for determining proportionality or excessiveness. Our respondents had some difficulty in considering the appropriateness of the frequency approach when viewing it in the abstract. A number of them thought it was a legitimate approach for determining proportionality. The respondents commented that it may be the best way to determine proportionality, but it does have problems related to small numbers of cases and judges and juries who make subjective determinations based on the nature of the crime. Determining proportionality is a subjective process closely guarded by supreme court Justices, who want to continue to make that decision based on their judicial experience and review. While they appreciate guidelines for determining proportionality, they feel any proportionality review system should be viewed as merely a tool to guide their decisions.

The prototype questionnaire. The prototype questionnaire is a lengthy document which gathers information on the crime, trial, victim, and defendant. In three states (South Dakota, New Jersey, and Maryland) the questionnaire has already been revised to conform to their state statutes and needs.

The reaction to the questionnaire among the survey respondents was mixed. Several respondents felt that the questionnaire was a thorough instrument that would have to be used before its worth could truly be judged. A number of the respondents raised questions about the ability of court officials to gather complete information at the level and detail called for in the questionnaire.

Gathering information on closed cases was particularly viewed as a problem. Much of the information should be in the trial judge's report and other court documents, but it was perceived that some of the subjective information would be difficult to retrieve.

Several respondents stated in no uncertain terms that the questionnaire was too detailed and long. They felt that its length would make data collection more difficult and that trial judges would balk at the effort required. There were also questions raised about the reliability of information collected, since it is likely to be done by probation officers, paralegals, and others, rather than trial judges, prosecutors, and public defenders. Another criticism was that there were too many questions requiring judgments which could lead to unreliable information.

The computerized storage and retrieval system. The majority of our respondents have seen a demonstration of the computerized system or have worked with it directly themselves. We asked several questions of our respondents about the feasibility of computerization in their states.

Views toward computerization were related to the respondent's perceived need for such a system, particularly considering the number of potential cases which would be entered into the system. Those who felt that computerization is not necessary are typically from states with a small number of cases. On the other hand, these respondents also felt that because the few cases, computerization would be feasible and they would have the staff time to implement the system. Others who felt the computerized system would be helpful to their work often mentioned the cost and drawbacks to entering large numbers of cases into the system. In Louisiana, for example, it was felt that the job of computerization would be very large and without additional money or political pressure, such a system would not be implemented.

The Justices and other court officials did not seem to be opposed in any way by computerization per se. They all stressed that the computer system would simply be a tool which would not interfere with judicial discretion. Problems with

resistance to record-keeping in general were raised but these problems are not specific to proportionality review systems.

Overall Perceptions of the Proportionality Review System

In general, the respondents had favorable opinions of the proportionality review system developed by the National Center for State Courts. On the positive side, respondents felt that it was a highly sophisticated and comprehensive system which should be built and maintained. Several of those who felt that the system is appropriate and useful also believed that because of the Harris decision, it has been merely an exercise. They have doubts that it will be implemented in many states.

Several respondents, while commenting on the worth of the system, felt that the whole concept is somewhat problematic. There were objections to the effect that social science cannot deal with an issue which is so difficult to objectify. In this view, each case is seen as different and unique, defying logical classification and comparative review.

The majority of the respondents favored implementation of the system to meet their state statutory requirements. However, none recommend rapid implementation, but rather see it as a future desirability. There were several respondents who felt that there was no need for implementation, and that the current procedures were adequate to meeting requirements for proportionality reviews. These respondents felt they conform to federal Supreme Court guidelines at the current time, can handle proportionality reviews in the traditional way, and that their caseload does not justify a sophisticated computerized system.

The complexity of the proportionality review system was mentioned most frequently as its major problem or weakness. The system is viewed as somewhat difficult to comprehend and statistically bound, particularly for judges and administrators who may not take the time to educate themselves about the system's usefulness. There were concerns that the complexity of the system requires too many resources for implementation and that volume of cases does not justify the

costs.

The strengths or advantages seen in the proportionality review system relate to the overall purpose of the study. The system was seen as a tool which will eliminate inconsistency in sentencing and make proportionality reviews more scientific. Most of the supreme court Justices referred to the safeguards provided by such a proportionality review system which will help them avoid arbitrariness, capriciousness, and unjustified death sentences. The system was viewed as a helpful and reasonable way to approach proportionality reviews and to focus on factors which might be overlooked. Another strength of the system is its use as an information system, making data available for future use and general court record-keeping.

Discussion and Summary

Evaluation Findings: Issues and Implications

The purpose of the evaluation as originally conceived was two-fold: (1) to assess the design of the prototype proportionality review system and (2) to monitor and assess its operation and immediate effects in three states. The second half of this evaluation is incomplete because of the very slow consideration and implementation of the system. Yet this study of the system's design and development and the assessment of potential users' perceptions of its value and utility will provide information for those considering adoption of the new system. Several issues grew in prominence as the evaluation results were examined. These issues have implications for the acceptance and use of the prototype system and are discussed below.

1. Overall, the National Center for State Courts' prototype proportionality review system is a thoughtfully developed system with substantial potential for assisting appellate courts in the determination of comparative excessiveness of death sentences. The system appears to meet the objectives and implicit requirements for proportionality reviews: it suggests resolutions for the central

issues of proportionality reviews, provides a principled, explicit approach to the conduct of reviews, appears to comport with constitutional and statutory requirements, and provides appellate courts with the technical tools needed for conducting effective and efficient reviews.

The issue paper which defines the system provides guidelines for settling the central issues of proportionality reviews -- the universe of cases, selecting similar cases, and determining proportionality. In the main, the potential users of the system we surveyed felt those definitions were appropriate. Most controversial was the definition of the universe, which several respondents felt was too broad. Individuals' views of the universe as defined were related to their court positions and perhaps underlying personal philosophies -- prosecutors were apt to prefer a narrow definition of the universe of cases, usually limited to death penalty cases only, while defense attorneys favored a broad definition including all life sentence cases. The frequency approach to determining proportionality and the fact-specific method of selecting similar cases were generally accepted as sound and meritorious strategies.

It should be remembered that the proportionality review system is truly a prototype: it is the first of its kind, an original model designed to be tested and revised by the states as they adapt it to their particular statutes and needs. The prototype system should serve as the basic building block for states desiring to implement a rigorous proportionality review system. Although the system presents the states with guidelines for the structure and qualities a model review system should have, according to its developers, the states are free to alter the definitions and procedures as they see fit.

One strength of the prototype system is that it makes explicit the procedures and definitions underlying proportionality reviews which have remained clothed in judicial secrecy. The system provides a principled approach to proportionality reviews that can be demonstrated and defended. This observable, understandable process for reviewing death penalty cases may meet U.S. Supreme Court guidelines

apparent in the Furman and Gregg decisions.

At the start of the project, the intention was to develop a system that would enable appellate courts to meet U.S. Supreme Court standards for proportionality reviews. We believe that, in light of the Harris decision, these standards have been exceeded. Furthermore, the roots of proportionality review lie in the general feeling -- supported by empirical research -- that the death penalty has been applied capriciously and arbitrarily. That view will not vanish with the Harris decision. The statutes in 22 states will ensure that some proportionality review is conducted; other states may follow suit. Moreover, the current tough stance toward crime taken by a sizable segment of the population -- a stance which probably undergirds support for both the death penalty and the feeling that retributive justice should not be strung out through complicated and unnecessary appeal procedures -- should not be viewed as permanent. Indeed, given the facts of the matter (i.e., the data on death penalty decisions), there now seems to be a good probability that the general public and legislators will want a more "proportionate" application of the death penalty in the future.

Rigorous proportionality reviews have been advocated in order to impose death sentences fairly, consistently, and in accord with contemporary standards.⁴⁵ Because 22 states require proportionality reviews by statute, the prototype system may prove to be extremely useful to them in undertaking a rational review of death sentences. To some degree, the system structures what appellate courts say they do in practice, but it holds the promise of doing this with more complete information and analysis. The system may also prove valuable to courts as an information system to help track death-eligible cases and answer other questions for appellate courts.

Legitimate questions may be raised about the neutrality of the prototype system. Is it designed to eliminate arbitrariness and capriciousness in death penalties, or is it intended to serve as ammunition for abolishing the death penalty (or, at minimum, add another layer to appeals and delays)? It is our personal view that the majority opinion among the Task Force members was anti-death

penalty, although opposing views were also evident. The final products, however, appear to be neutral and generally accepted in the main, with the exception of the guideline for determining the universe of cases. The broad definition of the universe is a liberal one, at a time when the U.S. Supreme Court and American public appear to be growing more conservative on the issue of the death penalty.

2. The implementation of the proportionality review system has been slow to non-existent. This appears to be due primarily to forces external to the proportionality review project rather than to major deficiencies of the system itself. Implementation and testing of the prototype system by the states is undoubtedly going to be a long slow process. Judicial agreement and acceptance of the concepts and procedures must be achieved first, but the practical and financial aspects of building a comprehensive system are important considerations also.

a. External forces. In the wake of the Harris decision removing the threat of a constitutional mandate for proportionality reviews, the states may be resistant to changing current practices. It has been speculated that some states may reconsider their state statutes and eliminate proportionality reviews or may conduct them with even less vigor. Yet at this time there are 22 states with statutory requirements for proportionality reviews and the provisions of these statutes must be met. In addition to the lack of judicial pressure to conduct more rigorous proportionality reviews, there are practical situations which inhibit implementation.

The three participating states provide us meager information regarding the use of the prototype system. The National Center for State Courts asked for volunteers for the study and it is not clear how the selection was made. It would have been much more helpful to the project and evaluation if other states had been selected, particularly those with large numbers of death cases and statutory proportionality reviews.

The prototype system may be viewed by some states as unnecessarily complicated and burdensome, especially to those who feel they currently perform a very diffi-

cult task as effectively as it can be performed. States with few death penalty cases are especially prone to viewing the prototype system as unnecessarily detailed. On the other hand, building and maintaining the database is a relatively simple task for these states. South Dakota, one of the participating states, has accumulated a small universe of about 30 life cases and no death cases in the five years their death penalty statute has been in effect. The South Dakota Supreme Court takes its requirement for proportionality review very seriously and is developing a manual system following the proportionality review project guidelines. Little attention was paid to developing a manual information system which may prove unfortunate. States with few death cases may be looking for a simple manual system for proportionality reviews.

States with large numbers of death-eligible cases may feel the prototype system is needed yet balk at the data collection effort required. Louisiana's situation reflects this -- the court feels that building the system would be difficult because of lack of staff time and money. Yet, particularly if the reviews are expanded to statewide, an automated storage and selection system may be necessary. Members of the court also welcomed a data collection and analysis system which would provide solid information about death sentencing statewide. New Jersey has had their first three death sentences imposed very recently and expects them to occur regularly. The court is beginning data collection now, plans to implement a system patterned after the prototype, and wants to avoid being in Louisiana's position two or three years from now.

The prototype proportionality review system was developed for use by state appellate courts, but also has considerable value to prosecuting and defense attorneys. The adoption of the system by Maryland's Public Defender's Office illustrates one other use of the system -- its use in appealing death penalty cases. The prototype system may be used as a management information system for any state court, as well as judges, prosecutors, public defenders, and other court officials. The system will make practices and decisions explicit, demonstrate consistency or

inconsistency in sentencing, and serve as a record-keeping system for capital cases. We can only speculate about the effect a system might have on a court if it were to demonstrate a history of inconsistent -- perhaps capricious -- death sentencing. We do know that the evidence of racially biased and inconsistent impositions of the death penalty has had little or no impact in Georgia; Baldus' research on capital sentencing in Georgia was also submitted in a brief to the U.S. Supreme Court in Pulley v. Harris.

Based on our research, we feel that prosecutors and trial judges may be less than enthusiastic about the system as a whole. In addition to bearing a large burden of the data collection task, trial judges seldom look with favor upon being reviewed on appeal. Prosecutors are apt to be displeased with review procedures they see as encroachments on their discretionary purview. Defense attorneys, in contrast, tend to view the system very positively, as an aid to their task. Appellate court judges are apt to have heterogeneous views, depending on their attitudes, caseload, state laws, etc.

In summary, there are several strong external forces working against the adoption of the prototype proportionality review system. We know little about how the system might actually operate, but we predict that most implementation will be a slow, probably uphill battle. The experiences of the three participating states provide forewarning that judicial consideration of the system's elements is likely to be slow and deliberate and the practical tasks of building a system will be time-consuming.

b. Potential problems in the prototype system. Proportionality reviews present appellate judges with a very difficult task. They are accustomed to conducting them in a traditional, intuitive, judicial value-sifting manner. Objectifying the review process and applying what may seem like esoteric social scientific and statistical techniques may engender some resistance in judicial circles.

We found evidence that the prototype system may be viewed as complicated and

cumbersome. The user's manual is a formidable document, thick and unintelligible to those who are not computer programmers. Much of the manual is of no interest to anyone outside of the creator of a state's system. The issue paper and questionnaire alone should provide sufficient information for those considering the system's implementation, or those interested in proportionality review processes. The issue paper is intended for a wide audience; it defines proportionality issues and describes the system and its workings. Some of the terminology used in the issue paper -- "frequency approach", "strict empiricism", "main-determinants method", etc. -- may be too academically oriented and not readily understood by the judicial community, another factor which may decrease acceptance.

While statistical techniques were de-emphasized in favor of more readily understood methods (for example, regression-based techniques for identifying key case factors were suggested only as one alternative; traditional judicial determination of similarity factors accompanied by simple matching techniques was recommended) the system may be viewed by some as an inappropriate social science approach to a judicial matter. The same forces that militate against sentencing guidelines in general -- judges and policy-makers limited ability to understand statistical models and a lack of constitutional requirements, for example⁴⁶ -- may come into play here. While there appears to be a widespread view that proportionality reviews are a welcome safeguard against disproportionate capital sentencing, there is also resistance to matching cases on the basis of similarities of the crime, victim, and defendant. There are those who will continue to insist that every case is unique and the deeper one probes the more different each case appears.

Conclusions

This evaluation is a preliminary assessment of the National Center for State Court's prototype proportionality review system that should provide guidance to courts and states as they consider the development of a review system or study

capital sentencing decisions. This section presents the major conclusions of the evaluation, drawn from the results and findings just discussed.

- The National Center for State Courts has met its proposed goals for the development of a prototype proportionality review system, except for the objective of testing the system in the participating states.

The National Center articulated three primary goals for the proportionality review project to be accomplished through eight activities, which are listed in the introduction to this report. These goals and objectives have been ably met for the most part. Background research into the literature and current practice of proportionality reviews led the Task Force to consider and settle the critical issues in proportionality reviews. The prototype questionnaire and case storage and selection system were carefully developed and appear acceptable and useful to practitioners. Technical assistance was offered and accepted by the three participating states and they report the project was valuable in their consideration of proportionality reviews. The only major failure of the proportionality review project was the inability to test the system under real-life conditions.

- The proportionality review system developed by the National Center for State Courts is a sound, comprehensive system which appears to provide the structure and procedures necessary for appellate courts to conduct effective reviews of death penalty cases.

The prototype system is a conceptual and technological advance in the area of proportionality reviews. The system provides answers or guidelines for formerly undefined issues which viewers see as sound and helpful, albeit somewhat liberal. The prototype questionnaire and case selection system provide the field with the tools needed for an effective proportionality review and, at the same time, make the process explicit and defensible.

- Implementation of the prototype system has proceeded very slowly to date, due primarily to the lack of external pressure to improve or institute review procedures and the states' internal situations related to capital sentencing. Future implementation and use unknown, but is likely to be very slow and gradual.

The prototype system is in the very early stages of implementation in three states -- in New Jersey and South Dakota under the auspices of the state supreme

court and in Maryland by the Office of the Public Defender. The slowness of implementation in the states participating in the proportionality review project is due primarily to a perceived lack of need -- no constitutional requirement is forcing the issue, two of the three states have yet to review a single death case, and the third state (Louisiana) is reluctant to change its current, traditional review procedures.

Future adoption of the system is unknown, but based on the evaluation results so far, is likely to be considered by states desiring to have a solid system in place for conducting proportionality reviews. There are minor flaws in the system itself which may slow implementation. It is complicated in concept and somewhat bound by social science technology, factors which may be minor inhibitors to its use.

Recommendations

Based upon the findings of the evaluation, the following recommendations are made:

- Information on the prototype proportionality review system should be disseminated to all state appellate courts, emphasizing its application and use in terms of relevant state law and functions. It is recommended that states consider implementing the system in a form designed to meet their needs.

All state appellate courts could benefit from knowledge of the system and procedures for proportionality reviews which have been developed by the National Center for State Courts. At minimum, the appellate courts should be cognizant of the issues and procedures raised and discussed in the background paper. At present, the background paper relies on U.S. Supreme Court jurisprudence and federal constitutional requirements in discussing proportionality reviews. Since the constitutional question has been answered, the prototype proportionality review system should be presented in terms of current state law and policy. A special effort should be made to reach the states which account for the majority of death sentences -- Florida, Georgia, Texas, and California.

This recommended dissemination of the proportionality review system is

already underway through the National Center for State Courts' sponsorship of the project and regular communication network with its constituency, state courts. The issue paper has been published in the State Court Journal⁴⁷ and the National Center stands ready to provide additional information about the system or proportionality review in general, as well as technical assistance in adapting and implementing the system in a particular state.

Several minor modifications in the system may enhance its implementation. Reducing social science terminology would help. Attention should be paid to simplifying the system overall, for example, by placing more emphasis on a simple, manual system for case selection. The user's manual could be reduced in size and complexity as well. Finally, a marketing strategy should be developed to "sell" the system to potential users. A presentation for conferences or small groups should be prepared, which highlights the important elements of the system, includes a short and simple demonstration, and is delivered by a dynamic spokesperson articulate in the issues of proportionality reviews.

Without field testing of the prototype system we hesitate to advocate too strongly its adoption. Yet our evaluation of the system's development, design, and perceived utility leads us to believe it is worthy of serious consideration and pilot testing.

- Assistance to the states currently implementing the system should be continued.

New Jersey, South Dakota, and Maryland have adapted the prototype questionnaire, defined the universe of cases, and are poised for data collection. The proportionality review project has been very helpful to these states, and we recommend that technical assistance continue if at all possible. A pilot test of the system for actually conducting a proportionality review appears to be most likely in New Jersey; monitoring the system as it becomes operational there would add considerable knowledge about the system's use.

- Consideration should be given to the use of the prototype system by elements of the judicial community outside the appellate courts, particularly public defenders, prosecutors, and the academic law community. Other uses of the system by appellate courts beyond proportionality reviews should also be considered.

The system's adaptation and implementation by Maryland's Public Defender's Office is an indication that the system has a wider application than simply appellate proportionality reviews. The system could be revised and expanded to serve as an information base for a variety of purposes, including appeals, case tracking, court monitoring, death penalty research, and so on. The system could evolve into a helpful management tool for state courts to use for all capital cases.

- A long-term evaluation of the prototype system's impact should be considered, to monitor and assess the operation of the proportionality review system.

A long-term evaluation would assess the implementation and utility of the system as planned in this evaluation, but which was thwarted due to factors beyond our or the National Center's control. It should also go beyond the scope of our original plan, to assess the impact of the system on capital sentencing decisions within states. We currently have preliminary information regarding the potential utility of the complex system; it is now time to examine closely the impact of the system in use. The original intent of the project was to implement and monitor the system in the three participating states, revising the various elements of the system as necessary over time. This testing and revising phase is still needed.

An impact evaluation, perhaps in one or two states, would answer many questions, including:

- 1) How helpful is the system to its users?
- 2) Has the system increased consensus on death penalty cases?
- 3) Do similarity factors and proportionality measures changed over time?
- 4) What are the costs and problems of collecting case information for the universe of cases?
- 5) Is the case information complete, valid, and reliable? What or who are the best sources of information?

- 6) In which local situations is a manual or computerized system preferred? What are the costs, advantages and disadvantages, and obstacles to the two forms?
- 7) Does the system enable the appellate court to explain its decisions and meet the requirements of state laws, past judicial opinions, and constitutional mandates?

In addition to specific questions focused on utility and operations, an impact evaluation should study the system's impact on sentencing decisions. Does the system show sentencing has been consistent or arbitrary? Does it indeed identify the inappropriate imposition of a death sentence? If the system indicates past inconsistencies and disproportionate sentences, what are the effects? What long-term effects does the system have on prosecutorial charging discretion, trial judge decisions, jury sentencing, and sentencing practices in general? This type of evaluation is complex, but would not have to be terribly costly. Given the relative rarity of death sentences, however, it would have to be conducted over a number of years.

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