Ending the Death Lottery: A Case Study of Ohio's Broken Proportionality Review

WILLIAM W. BERRY III*

When the Supreme Court reinstated the death penalty in 1976, it did so under the assumption that certain safeguards would remedy the arbitrariness of capital sentencing. Comparative proportionality review, in which the state supreme court would review jury sentences to ensure a modicum of consistency, was a central part of many states' attempts to comply with the Eighth Amendment. In Ohio, however, this safeguard is illusory; the state supreme court has never reversed a capital case on proportionality grounds, despite reviewing almost three hundred cases.

This Article explores this unfortunate phenomenon. Using a quantitative methodology, this Article assesses the degree to which Ohio capital cases sentenced after the adoption of life-without-parole (between 1996–2011) are comparatively proportionate.

After finding that over forty percent of Ohio's capital cases during that period were comparatively excessive, the Article argues that Ohio's current use of the death penalty contravenes the Eighth Amendment and is therefore unconstitutional. The Article then proposes two alternative remedies to solve this problem: (1) institute meaningful proportionality review with the aid of social science or (2) abolish the death penalty. Finally, the Article considers the consequences of this study for the almost two-thirds of death penalty states that use comparative proportionality review.

Part II of the paper briefly traces the requirements of the Eighth Amendment and the origins of proportionality review. Part III describes Ohio's use of proportionality review and explains why it is largely a matter of form over substance. Part IV presents the empirical study of Ohio's capital cases from 1996-2011 and highlights its central conclusions. Part V argues that these results show that Ohio's capital system violates the Eighth Amendment. Next, Part VI proposes ways to remedy the constitutional shortcoming. Finally, Part VII explores the applicability of the study to the large majority of death penalty jurisdictions that currently use proportionality review.

TABLE OF CONTENTS

---

* Assistant Professor and Beccaria Scholar in Criminal Law, University of Mississippi School of Law; D.Phil. (Oxon), J.D. (Vanderbilt), B.A. (Virginia). The author would like to thank Andrew Ashworth, Carolyn Hoyle, Roger Hood, Julian Roberts, Christopher Slobogin, and Jack Wade Nowlin for helpful suggestions at various stages of the research and writing process. The author would also like to thank the University of Oxford Centre for Criminology for its support of this research.

I. INTRODUCTION

"The history of liberty has largely been the history of the observance of procedural safeguards."
– Felix Frankfurter

In capital cases, most states use juries to determine whether a defendant convicted of aggravated murder should receive the death penalty or some form of life sentence.[1] At first glance, this seems comforting, as jurors reside in the county where the heinous crime occurred and can serve as the conscience of the community.[2] Jurors likewise face no political pressure in making their decision, unlike state court judges,[3] and thus have no inherent bias.[4] Indeed,

[1] Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, 954 n.4 (2003).

[2] Meghan J. Ryan, *Juries and the Criminal Constitution*, 65 ALA. L. REV. 849, 878–87 (2014).

[3] *See, e.g.*, Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 B.U. L. REV. 759, 779, 792 (1995); Richard C. Dieter, *Killing for Votes: The Dangers of Politicizing the Death Penalty Process*, DEATH PENALTY INFORMATION CENTER (Oct.

the voir dire process excludes potential jurors who oppose capital punishment.[5]

But jurors only decide one case. They have no point of reference for determining which offenders deserve death and which ones do not.[6] The result is wide disparity in outcomes, reflective of the eccentricities of each jury.[7]

Such disparity and wobble might be tolerable in the criminal justice system and perhaps in law more generally,[8] but as the Supreme Court has often emphasized, "death is different."[9] In other words, arbitrary and random outcomes resulting from differences in jury composition become much less palatable when the life of a criminal offender rests on these differences. A decision that the government should kill one of its citizens merits more

---

1996), http://www.deathpenaltyinfo.org/node/379, *archived at* http://perma.cc/MK7M-Y96M.

[4] This is true at least in theory, although in practice bias appears to be present in many forms. *See, e.g.*, Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 J. LEGAL STUD. 277, 279 (2001); Scott E. Sundby, *The Capital Jury and Empathy: The Problem of Worthy and Unworthy Victims*, 88 CORNELL L. REV. 343, 344 (2003).

[5] Of course, this is problematic on a number of levels. *See, e.g.*, Brooke M. Butler & Gary Moran, *The Role of Death Qualification in Venirepersons' Evaluations of Aggravating and Mitigating Circumstances in Capital Trials*, 26 LAW & HUM. BEHAV. 175, 176 (2002); Craig Haney, *On Selection of Capital Juries: The Biasing Effects of the Death-Qualification Process*, 8 LAW & HUM. BEHAV. 121, 122 (1984).

[6] Indeed, research shows that jurors often abjure any moral responsibility for the capital sentencing decision. *See* Joseph L. Hoffman, *Where's the Buck?—Juror Misperception of Sentencing Responsibility in Death Penalty Cases*, 70 IND. L.J. 1137, 1137 (1995).

[7] Furman v. Georgia, 408 U.S. 238, 249–51 (1972); *see, e.g.*, William J. Bowers & Glenn L. Pierce, *Arbitrariness and Discrimination Under Post*-Furman *Capital Statutes*, 26 CRIME & DELINQ. 563, 569–70 (1980); Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27, 31, 36 (1984); Mary Sigler, *Contradictions, Coherence, and Guided Discretion in the Supreme Court's Capital Sentencing Jurisprudence*, 40 AM. CRIM. L. REV. 1151, 1153 (2003). Even more disturbing than the arbitrariness is the amount of error in capital cases. *See, e.g.*, Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 J. EMPIRICAL LEGAL STUD. 209, 213–17 (2004).

[8] Scott E. Sundby, *Moral Accuracy and "Wobble" in Capital Sentencing*, 80 IND. L.J. 56, 56–57 (2005).

[9] Justice Brennan's concurrence in *Furman v. Georgia*, 408 U.S. 238 (1972), is apparently the origin of the Court's death-is-different capital jurisprudence. *See id.* at 286 (Brennan, J., concurring) ("Death is a unique punishment in the United States."); *see also* Jeffrey Abramson, *Death-Is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117, 117 (2004) (discussing the Court's death-is-different jurisprudence); Carol S. Steiker & Jordan M. Steiker, *Sober Second Thoughts: Reflections on Two Decades of Constitutional Regulation of Capital Punishment*, 109 HARV. L. REV. 355, 370 (1995) (crediting Justice Brennan as the originator of this line of argument).

accuracy and consistency precisely because infliction of death is final and irrevocable.[10]

In *Furman v. Georgia,* the Supreme Court held that the death penalty was a cruel and unusual punishment, as applied, because of this type of disparity in jury outcomes.[11] Justice Stewart likened a death sentence to being "struck by lightning"—an outcome that depended more on random or arbitrary factors than a principled judicial decision.[12]

In response, states rushed to pass new statutes to cure these defects and save the death penalty.[13] Among these reforms was the creation of automatic review of death sentences by state supreme courts.[14] This review in many cases included comparative proportionality review as a safeguard against disparity in sentencing outcomes.[15]

The goal of comparative proportionality review was to have a single institution review jury sentences in capital cases to achieve consistency in capital sentencing.[16] The state supreme court, then, was to review each case, and in light of the other cases, determine whether the death sentence was consistent with other sentences in capital cases.[17] Where outliers existed, the court would vacate the death sentence and remand the case for resentencing.[18]

---

[10] *See, e.g.*, Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that "death is not reversible," so DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming); Spaziano v. Florida, 468 U.S. 447, 460 n.7 (1984) ("[T]he death sentence is unique in its severity and in its irrevocability . . . ."); Gregg v. Georgia, 428 U.S. 153, 187 (1976) ("There is no question that death as a punishment is unique in its severity and irrevocability."); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Brennan, J., concurring) (death differs from life imprisonment because of its "finality"); Spaziano v. Florida, 468 U.S. 447, 460, n.7 (1984) ("the death sentence is unique in its severity and in its irrevocability . . . ."); Ring v. Arizona, 536 U.S. 584, 616–17 (2002) (Breyer, J., concurring) (noting that "death is not reversible," DNA evidence that the convictions of numerous persons on death row are unreliable is especially alarming).

[11] *Furman*, 408 U.S. at 240.

[12] *Id.* at 309 (Stewart, J., concurring).

[13] Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1, 48 (2007).

[14] *See, e.g.*, *Gregg*, 428 U.S. at 198.

[15] *Id.*; DAVID C. BALDUS, GEORGE WOODWORTH & CHARLES A. PULASKI, JR., EQUAL JUSTICE AND THE DEATH PENALTY 22–24 (1990); William W. Berry III, *Practicing Proportionality*, 64 FLA. L. REV. 687, 696 (2012).

[16] *See Gregg*, 428 U.S. at 198. *See generally* Susan R. Klein & Jordan M. Steiker, *The Search for Equality in Criminal Sentencing*, 2002 SUP. CT. REV. 223, 240–42.

[17] *See Gregg*, 428 U.S. at 198; Walker v. Georgia, 555 U.S. 979 (2008) (statement of Stevens, J.); BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 198–228; Berry, *supra* note 15, at 697.

[18] *See Gregg*, 428 U.S. at 168; *Walker*, 555 U.S. at 980 (statement of Stevens, J.); BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 198–228; Berry, *supra* note 15, at 696.

Use of the death penalty still remains concentrated in the states of the Confederacy, and for some, remains a vestige of the Old South.[19] Ohio, though, is the exception to this trend.[20] A bell-weather political state, Ohio is among the national leaders in executions over the past five years and has a large death row.[21]

Like many other death penalty states, Ohio maintains a statutory requirement that its supreme court conduct proportionality review in each capital case.[22] Despite reviewing almost three hundred death sentences, the court has never reversed a case for being comparatively disproportionate. As explained below, this is because the review that the Supreme Court of Ohio conducts is one of form, not substance.

This Article explores this unfortunate phenomenon. Using a quantitative methodology, this Article assesses the degree to which Ohio capital cases sentenced after the adoption of life-without-parole (between 1996–2011) are comparatively proportionate.

After finding that over forty percent of Ohio's capital cases during that period were comparatively excessive, the Article argues that Ohio's current use of the death penalty contravenes the Eighth Amendment and is therefore unconstitutional. The Article then proposes two alternative remedies to solve this problem: (1) institute meaningful proportionality review with the aid of social science or (2) abolish the death penalty. Finally, the Article considers the consequences of this study for the *almost two-thirds of death penalty states* that use comparative proportionality review.

Part I of the paper briefly traces the requirements of the Eighth Amendment and the origins of proportionality review. Part II describes Ohio's use of proportionality review and explains why it is largely a matter of form over substance. Part III presents the empirical study of Ohio's capital cases from 1996-2011, and highlights its central conclusions. Part IV argues that these conclusions show that Ohio's capital system violates the requirements of the Eighth Amendment. Next, Part V proposes ways to remedy the constitutional shortcoming. Finally, Part VI explores the applicability of the

---

[19] *See* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT 11, 228 (2003). *But see* DAVID GARLAND, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION (2010).

[20] DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (Dec. 19, 2014) [hereinafter DPIC, FACTS], *available at* http://www.deathpenaltyinfo.org/documents/FactSheet.pdf, *archived at* http://perma.cc/YL9V-99DV (showing Ohio as the only Northern state among leaders in capital sentences and executions); *see also* DEATH PENALTY INFO. CTR., NUMBER OF EXECUTIONS BY STATE AND REGION SINCE 1976 (Dec. 10, 2014) [hereinafter DPIC, NUMBER], *available at* http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976, *archived at* http://perma.cc/EW5B-BMND.

[21] DPIC, FACTS, *supra* note 20; *see also* DPIC, NUMBER, *supra* note 20.

[22] OHIO REV. CODE ANN. § 2929.05(A) (West 2012). The statute states that the court "shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases." *Id.*

study to the large majority of death penalty jurisdictions that currently use proportionality review.

II. EIGHTH AMENDMENT PROPORTIONALITY REVIEW

A. *Two Doctrines of Proportionality*

The Supreme Court has developed two doctrines of proportionality in its Eighth Amendment cases.[23] First, the Court has held that certain punishments are excessive in certain contexts, making them "cruel and unusual."[24] This concept of absolute proportionality assesses whether the punishment is proportionate to the characteristics of the crime and the offender.[25] In recent years, for instance, the Court has held that the death penalty is an excessive punishment[26] for non-homicide crimes,[27] juvenile offenders,[28] and mentally retarded offenders.[29]

The second concept of proportionality is a relative one, concerned with whether the sentence is comparatively excessive.[30] In other words, the concept of comparative proportionality assesses not whether the sentence is excessive in the abstract, but whether the sentence is excessive by comparison to similarly situated offenders.[31]

To avoid engaging in messy factual determinations, the Court has focused its relative proportionality doctrine on procedure, asking whether the procedure used by the state in its capital trial and sentencing has adequate

---

[23] William W. Berry III, *Promulgating Proportionality*, 46 GA. L. REV. 69, 72 (2011).

[24] *See, e.g.*, Miller v. Alabama, 132 S. Ct. 2455 (2012) (banning mandatory juvenile life-without-parole sentences); Graham v. Florida, 130 S. Ct. 2011 (2010) (banning life-without-parole sentences for juvenile offenders in non-homicide crimes); Kennedy v. Louisiana, 554 U.S. 407 (2008) (banning the death penalty for non-homicide crimes); Roper v. Simmons, 543 U.S. 551 (2005) (banning the death penalty for juvenile offenders); Atkins v. Virginia, 536 U.S. 304 (2002) (banning the death penalty for mentally retarded offenders).

[25] *See* Berry, *supra* note 23, at 91.

[26] Typically, the Court has restricted such determinations to capital cases. *See* Rachel Barkow, *The Court of Life and Death: The Two Tracks of Constitutional Sentencing Law and the Case for Uniformity,* 107 MICH. L. REV. 1145, 1145 (2009). But the Court has recently applied the Eighth Amendment to restrict juvenile life-without-parole sentences. *See Miller*, 132 S. Ct. 2455 (banning mandatory juvenile life-without-parole sentences); *Graham*, 130 S. Ct. 2011 (banning life-without-parole sentences for juvenile offenders in non-homicide crimes).

[27] *Kennedy*, 554 U.S. 407 (banning the death penalty for non-homicide crimes).

[28] *Roper*, 543 U.S. 551 (banning the death penalty for juvenile offenders).

[29] *Atkins*, 536 U.S. 304 (banning the death penalty for mentally retarded offenders).

[30] Berry, *supra* note 23, at 93. *See generally* Furman v. Georgia, 408 U.S. 238 (1972).

[31] Berry, *supra* note 23, at 93.

safeguards to ensure a constitutionally sufficient level of comparative proportionality.[32]

Initially emphasized by the dissenting justices in *McGautha v. California*, the question of whether jury-sentencing determinations created disparate outcomes is at the heart of the Court's relative proportionality inquiry.[33] After dismissing this as a Fourteenth Amendment concern in *McGautha*,[34] the Court held a year later in *Furman v. Georgia* that inadequate jury guidance in capital sentencing violated the Eighth Amendment.[35]

Specifically, the Court highlighted the use of unitary trials (combining guilt and sentencing determinations into one hearing), the absence of any formal guidance at sentencing, and the failure of state capital statutes to narrow the class of murderers eligible for the death penalty.[36] In other words, the Eighth Amendment required some degree of relative proportionality in capital sentencing outcomes such that the results were not random or arbitrary.[37]

In response to *Furman*, states created new procedures in capital cases to, among other things, circumscribe jury discretion in capital cases.[38] States created bifurcated trials, enacted statutory aggravating and mitigating circumstances, and adopted relative proportionality review.[39]

B. *The Origins of Proportionality Review*

The concept of proportionality review centered on the idea that the state supreme court would solve the problem of disparity in sentences arising from juries by reviewing each case on appeal.[40] State supreme courts would then remand for resentencing cases that were comparatively excessive.[41]

In *Gregg v. Georgia*, the Court described how proportionality review helped to address the problem of relative disproportionality identified in *Furman*.[42] Justice Stewart's plurality opinion explained:

---

[32] *See, e.g.*, Pulley v. Harris, 465 U.S. 37, 43 (1984); Gregg v. Georgia, 428 U.S. 153, 168 (1976).

[33] McGautha v. California, 402 U.S. 183, 226–312 (1971) (Douglas & Brennan, JJ., dissenting).

[34] *Id.*

[35] *Furman*, 408 U.S. at 240.

[36] *Id.*

[37] *Id.*; Berry, *supra* note 23, at 96.

[38] *See* Lain, *supra* note 13, at 57; Pulley v. Harris, 465 U.S. 37, 44 (1984).

[39] Lain, *supra* note 13, at 48; Gregg v. Georgia, 428 U.S. 153 (1976).

[40] *Gregg*, 428 U.S. 153; Walker v. Georgia, 555 U.S. 979 (2008) (statement of Stevens, J.); BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 198–228; Berry, *supra* note 15, at 696.

[41] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 198–228.

[42] *Gregg*, 428 U.S. at 206.

> The provision for appellate review in the Georgia capital-sentencing system serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury. *If a time comes when juries generally do not impose the death sentence in a certain kind of murder case*, the appellate review procedures assure that no defendant convicted under such circumstances will suffer a sentence of death.[43]

Justice White's concurring opinion in *Gregg* developed the concept of relative proportionality further.[44] As he indicated in *Furman*, White believed that the constitutional flaw went beyond randomness and included lack of utility.[45] In other words, what made a particular death sentence "cruel and unusual" was the rarity that similar cases received the same sentence.[46] His approach rested in part on his view that deterrence justified capital punishment,[47] but where such sentences lacked regular application, a capital sentence in a rare case became unconstitutional because it served no deterrent purpose.[48]

Thus, for White, comparative excessiveness relates to situations where juries do not impose a death sentence in a "substantial portion" of capital cases with similar circumstances.[49] Where, then, the frequency of death sentences in an identifiable class is something less than substantial, a death sentence becomes unconstitutionally excessive because it loses its deterrent value.[50]

C. *Threats to Proportionality Review*

After the Court in *Gregg* approved proportionality review as a means to satisfy the constitutional problem of relative disproportionality created by jury sentencing, many states, including Ohio, adopted such statutes.[51] Nonetheless, the Court later clarified in *Pulley v. Harris* that the Eighth Amendment did not mandate proportionality review per se, but rather some safeguard to address

---

[43] *Id.* (emphasis added).

[44] *Id.* at 221–23 (White, J., concurring).

[45] Furman v. Georgia, 408 U.S. 238, 312 (1972) (White, J., concurring).

[46] *Id.*; BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 198–228.

[47] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 77 n.50.

[48] *Id.*

[49] *Gregg*, 428 U.S. at 222 (White, J., concurring); BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 77 n.50.

[50] *Furman*, 408 U.S. at 312. Query, however, whether the death penalty deters at all. *Compare* Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703 (2005), *with* Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005).

[51] Berry, *supra* note 15, at 696; BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 22–39.

the issue of relative proportionality.[52] In upholding California's capital statute despite the absence of a proportionality review requirement, the Court explained that its prior decisions upholding other schemes established "[t]here is thus no basis in our cases for holding that comparative proportionality review by an appellate court is required in every case in which the death penalty is imposed and the defendant requests it."[53]

To be clear, the *Pulley* court did not foreclose the possibility that comparative proportionality review, if used, could comprise a constitutionally indispensable part of the constitutional requirement of meaningful appellate review. Indeed, Justice Stevens's concurrence developed this idea, explaining that

> While the cases relied upon by respondent do not establish that comparative proportionality review is a constitutionally required element of a capital sentencing system, I believe the case law does establish that appellate review plays an essential role in eliminating the systemic arbitrariness and capriciousness which infected death penalty schemes invalidated by *Furman v. Georgia*, and hence that some form of meaningful appellate review is constitutionally required.[54]

After *Pulley*, some states abandoned relative proportionality review, but most kept it as a constitutional safeguard.[55] The practice of proportionality review, however, grew in many states to be one of form rather than substance.[56]

In *Walker v. Georgia*, Justice Stevens emphasized this point, criticizing the proportionality review of the Supreme Court of Georgia in his dissent to denial of certiorari.[57] Stevens, one of the three-justice plurality that approved proportionality review as an adequate safeguard in *Gregg*, indicated that the Georgia proportionality review had strayed far from what the Court had envisioned twenty years earlier.[58]

Stevens wrote the following:

> Rather than perform a thorough proportionality review to mitigate the heightened risks of arbitrariness and discrimination in this case, the Georgia Supreme Court carried out an utterly perfunctory review. Its undertaking consisted of a single paragraph, only the final sentence of which considered whether imposition of the death penalty in this case was proportionate as compared to the sentences imposed for similar offenses. And even then the court stated its review in the most conclusory terms: "The cases cited in the Appendix support our conclusion that [petitioner's] punishment is not

---

[52] Pulley v. Harris, 465 U.S. 37, 43–44 (1984).

[53] *Id.* at 50–51.

[54] *Id.* at 54 (Stevens, J., concurring) (citation omitted).

[55] Berry, *supra* note 15, at 697; BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 280.

[56] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 280–93.

[57] Walker v. Georgia, 555 U.S. 979, 980 (2008) (statement of Stevens, J.).

[58] *Id.* at 982.

> disproportionate in that each involved a deliberate plan to kill and killing for the purpose of receiving something of monetary value." The appendix consists of a string citation of 21 cases in which the jury imposed a death sentence; it makes no reference to the facts of those cases or to the aggravating circumstances found by the jury.[59]

Thus, the Georgia proportionality review was insufficient both in its conclusory nature and in its failure to compare the facts and circumstances of the underlying case to the purportedly similar capital cases.[60] Most importantly, the court only considered other cases in which the defendant received a death sentence. It did not determine whether a defendant received a life sentence under similar facts.

Without adequate proportionality review or some other procedure to address the problem of disparity in jury sentencing, Stevens reasoned, the Georgia capital system violated the Eighth Amendment.[61] Thus, "[t]he Georgia Supreme Court's failure to acknowledge these or any other cases outside the limited universe of cases in which the defendant was sentenced to death creates an unacceptable risk that it will overlook a sentence infected by impermissible considerations."[62] In other words, the Eighth Amendment requires some procedure by which states seek to mitigate the disparity inherent in capital sentencing by juries in order to prevent the arbitrary imposition of the death penalty.[63]

III. OHIO'S PROPORTIONALITY REVIEW

Ohio's capital system functions in a very similar way to Georgia's system, at least with respect to proportionality review.[64] The relevant Ohio statute mandates that the Supreme Court of Ohio "shall consider whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."[65]

Its proportionality review, like Georgia's, consists of finding a few "similar" cases that received death sentences.[66] Its analysis is typically no

---

[59] *Id.* (alteration in original) (internal citation omitted)

[60] *Id.*

[61] *Id.* at 983.

[62] *Id.*

[63] Pulley v. Harris, 465 U.S. 37, 54 (1984) (Stevens, J., concurring); Furman v. Georgia, 408 U.S. 238 (1976); Gregg v. Georgia, 428 U.S. 153 (1976); BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 10–15.

[64] *See* OHIO REV. CODE ANN. § 2929.05(A) (West 2012).

[65] *Id.*

[66] AMERICAN BAR ASSOCIATION, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE OHIO DEATH PENALTY ASSESSMENT REPORT 240 (2007) [hereinafter ABA PROJECT], *available at* http://www.americanbar.org/groups/individualrights/projects/deathpenaltydueprocessreviewproject/deathpenaltyassessments/ohio.html, *archived at* http://perma.cc/B47P-LSFQ.

more than a paragraph or two.[67] As a result, its method contains two obvious fundamental flaws.

First, it only uses "death" cases—cases in which the jury selected a death sentence—as comparable cases.[68] By ignoring cases in which the offender received a life sentence, the court has no way of knowing whether the majority of other similar cases received the death penalty.[69]

Importantly, the Supreme Court of Ohio has ruled that in making a comparative proportionality review, reviewing courts do not have to compare or even consider cases in which the jury imposed a life sentence,[70] either by a jury or as the result of a prosecutorial charging decision.[71] The court has determined that it can satisfy the Ohio statutory requirement of proportionality review by a review of only a few "similar" cases in which the court has upheld the death penalty.[72]

Second, the cases that the court uses as comparable cases often do not resemble the appealed case under proportionality review. This is because the court only looks to whether the cases have the same aggravating factor.[73] But, the presence of the same aggravating factor does not in itself make the case comparable in terms of either offender characteristics or characteristics of the offense.[74]

The case of Grady Brinkley illustrates this disconnect.[75] Mr. Brinkley was on bond after police arrested him for armed robbery of Rick's City Diner.[76] While out of jail, he went to the house of his ex-girlfriend, Shantae Smith, and killed her because he heard that she had been dating another man.[77] As an afterthought, he stole her ATM card and winter coat because he had decided to flee bond to Chicago.[78] The Supreme Court of Ohio found the case to be

---

[67] *Id.* at 242.

[68] *Id.* at 240.

[69] *Id.*

[70] Some counties in Ohio allow the defendant to choose between a jury and a three-judge panel as a sentencer in capital cases. *Id.* at 16.

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

[72] *Id.*

[73] On occasion, the Court will identify a sub-category of cases within an aggravating factor when the case involves felony murder. Thus, the Court will identify similar robbery-murders, arson-murders, or rape-murders. These categories, however, are quite broad and, in many cases, serve as a poor proxy for similarity in terms of facts of cases.

[74] This is because the statutory aggravating circumstances are broad categories which allow for very different cases to fall under the same aggravating circumstance. Berry, *supra* note 15, at 702. Felony murder is the most obvious example of this problem. *Id.* at 703.

[75] State v. Brinkley, 824 N.E.2d 959, 966 (Ohio 2005).

[76] *Id.*

[77] *Id.*

[78] *Id.* at 988–89.

relatively proportionate.[79] Its entire comparative proportionality review analysis was as follows:

> Additionally, we find that the death penalty is proportionate when compared with similar robbery-murder cases, some of which featured strong mitigating evidence. See, e.g., *State v. Myers,* 97 Ohio St.3d 335, 2002-Ohio-6658, 780 N.E.2d 186; *State v. Murphy* (2001), 91 Ohio St.3d 516, 547, 747 N.E.2d 765 (deprived childhood, remorse); *State v. Smith* (2000), 89 Ohio St.3d 323, 338, 731 N.E.2d 645 (21-year-old defendant, deprived childhood, "psychotic episodes"); *Baston*, 85 Ohio St.3d at 430–431, 709 N.E.2d 128 (20-year-old defendant, neglected in childhood, remorse); *McNeill*, 83 Ohio St.3d at 453–454, 700 N.E.2d 596 (troubled upbringing, 19-year-old defendant, "borderline intelligence"); *State v. Raglin* (1998), 83 Ohio St.3d 253, 270, 699 N.E.2d 482 (troubled upbringing, 18-year-old defendant, mental problems); *State v. Benge* (1996), 75 Ohio St.3d 136, 147, 661 N.E.2d 1019 (troubled upbringing, prior good character, hard worker, lack of prior criminal convictions); *Woodard*, 68 Ohio St.3d at 79, 623 N.E.2d 75 (troubled upbringing, 19-year-old defendant); *Green*, 66 Ohio St.3d at 152–153, 609 N.E.2d 1253 (terrible childhood, IQ of 66).[80]

A cursory examination of two of the "similar" cases reveals that they are not similar at all to the *Brinkley* case. The *Myers* case (cited above by the court) involved the abduction of a woman from a bar, where the offender led the woman down to some nearby railroad tracks, sexually assaulted her, strangled her, and stabbed her to death in the temple with a railroad spike before stealing her wallet.[81]

Similarly, the *Murphy* case (also cited above by the court) involved an attempted robbery of a victim's gold necklace.[82] The offender pulled a gun on the victim and requested his jewelry.[83] While the victim was removing the necklace, the offender's gun accidentally discharged.[84] He shot the victim again, and fled with his jewelry.[85]

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

---

[79] *Id.*

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

[81] State v. Myers, 780 N.E.2d 186 (Ohio 2002).

[82] State v. Murphy, 747 N.E.2d 765 (Ohio 2001).

[83] *Id.*

[84] *Id.* at 777.

[85] *Id.*

In addition, there is no evidence that the court is attempting to equate the cases based on some broader conception of "similarity" that would not require factual similarity, as in the frequency conceptions described below. Instead, the Supreme Court of Ohio is presuming factual similarity *based on the similarity in aggravating factors*, and in doing so, uses dissimilar cases as points of comparison.[86]

Further, the Supreme Court of Ohio engages in no *analysis* of comparative proportionality other than citing "similar" cases. Another example of its cursory proportionality review is the case of *State v. Group*.[87]

The entirety of the Supreme Court of Ohio's proportionality review in that case was as follows:

> We further find that the death sentence in this case is proportionate to sentences we have upheld in similar cases. We have affirmed death sentences in cases with course-of-conduct specifications where the defendant killed one victim and tried to kill a second. In one such case, the course-of-conduct specification was combined with an aggravated-robbery specification. See *State v. Dennis* (1997), 79 Ohio St.3d 421, 683 N.E.2d 1096. See, also, *State v. O'Neal* (2000), 87 Ohio St.3d 402, 721 N.E.2d 73 (course of conduct and aggravated burglary). Moreover, in *State v. Sowell* (1988), 39 Ohio St.3d 322, 530 N.E.2d 1294, we affirmed a death sentence with only a course-of-conduct specification. We have also affirmed a death sentence in a factually similar case with only an aggravated-robbery specification. See *State v. Hamblin* (1988), 37 Ohio St.3d 153, 524 N.E.2d 476.[88]

Again, the Supreme Court of Ohio focuses on finding cases with the same aggravating factors—course of conduct murder and aggravating robbery.[89] The court does not attempt to explore the degree to which the *Group* case it is deciding is similar to the cases it cites.[90] Indeed, there is no discussion in this case (or any other) about what the parameters of similarity are or ought to be.[91]

Even more importantly, the Supreme Court of Ohio ignores life cases in its analysis.[92] As mentioned above, it looks only to other death cases as potential similar cases.[93] Thus, if it can identify one or more remotely "similar" cases (many of which are actually dissimilar) that received the death penalty, then the Supreme Court of Ohio will determine that the case on appeal is relatively

---

[86] *Id.* at 791–92.

[87] State v. Group, 781 N.E.2d 980 (Ohio 2002). There is nothing unique about the Ohio cases described here. The Supreme Court of Ohio conducts the same cursory one paragraph proportionality review in *every* death case. *See* ABA PROJECT, *supra* note 66, at 242.

[88] *Group*, 781 N.E.2d at 1006.

[89] *Id.*

[90] *See id.*

[91] *See id.*

[92] *E.g.*, *id.*; ABA PROJECT, *supra* note 66, at 240.

[93] *See, e.g.*, *Group*, 781 N.E.2d at 1006; ABA PROJECT, *supra* note 66, at 240.

proportionate, even though a vast majority of truly similar cases did not receive the death penalty. Indeed, as explored below, in the forty-nine death cases included in the study, the Supreme Court of Ohio never discussed a life case as a point of comparison for purposes of comparative proportionality review—it limited its comparative proportionality review to a small number of death cases.[94]

Finally, as indicated before, the Supreme Court of Ohio has never reversed a case based on its relative disproportionality.[95] In other words, the Supreme Court of Ohio's comparative proportionality review *always* finds cases to be relatively proportionate.[96]

IV. A CASE STUDY OF COMPARATIVE PROPORTIONALITY IN OHIO

Given the Supreme Court of Ohio's obvious failure to conduct meaningful comparative proportionality review, this Article engages in its own proportionality review to determine the degree to which Ohio capital cases are comparatively proportionate. In other words, if the Supreme Court of Ohio had conducted a robust proportionality review, how many cases should it have reversed?

Using an established quantitative methodology,[97] this study is the first to engage in a quantitative proportionality review examining cases where life-without-parole was a sentencing option,[98] and the first to examine Ohio's proportionality review.

---

[94] I am not the first to argue that the failure to consider life cases inhibits the reliability of its comparative proportionality review. *See* BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 283–84; ABA PROJECT, *supra* note 66, at 246.

[95] ABA PROJECT, *supra* note 66, at 240.

[96] This approach is not unique to Ohio. Most capital states conduct comparative proportionality review in a similar manner. *See* BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 282; Berry, *supra* note 15, at 707.

[97] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 40–79; David C. Baldus, Charles Pulaski & George Woodworth, *Comparative Review of Death Sentences: An Empirical Study of the Georgia Experience*, 74 J. CRIM. L. & CRIMINOLOGY 661, 679–98 (1983) [hereinafter Baldus, *Georgia Experience*]; David C. Baldus, Charles A. Pulaski, Jr., George Woodworth & Frederick D. Kyle, *Identifying Comparatively Excessive Sentences of Death: A Quantitative Approach*, 33 STAN. L. REV. 1, 36–52 (1980) [hereinafter Baldus, *Quantitative Approach*]; Raymond Paternoster & AnnMarie Kazyaka, *An Examination of Comparatively Excessive Death Sentences in South Carolina 1979-1987*, 17 N.Y.U. REV. L. & SOC. CHANGE 475, 482–93 (1989–90); *see also* Rachel B. Philofsky, The Maryland Proportionality Review Project 21–28 (2006) (unpublished M.A. Thesis, University of Maryland), *available at* http://drum.lib.umd.edu/bitstream/1903/4067/1/umi-umd-3812.pdf, *archived at* http://perma.cc/59WR-YF8M.

[98] As explained below, life-without-parole changes the sentencing calculus by eliminating dangerousness as a consideration at sentencing. *See* William W. Berry III, *Ending Death by Dangerousness: A Path to the De Facto Abolition of the Death Penalty*, 52 ARIZ. L. REV. 889, 904 (2010). Indeed, life-without-parole has arguably played a major role in the decrease of capital sentences in the United States over the past fifteen years. *See*

Ohio's life-without-parole statute became effective on July 1, 1996,[99] and the study contains all of the cases[100] in which a jury[101] had the option to sentence an offender to death from the effective date through 2011.[102] The option of sentencing an offender to life-without-parole changes the calculus for the jury in several important ways. First, the availability of such sentences reduces the degree to which future dangerousness, at least in theory, motivates a death sentence, as there is a way to incapacitate the offender forever without inflicting the death penalty.[103] Second, the availability of life-without-parole sentences has also arguably been an important reason for the decrease in capital sentences over the past decade.[104]

A. *Methodology*

1. *The Frequency Method*

Courts have used three methods to determine the relative proportionality of a given case: a reasonableness approach, a precedent-seeking approach, and

---

Note, *A Matter of Life and Death: The Effect of Life-Without-Parole Statutes on Capital Punishment*, 119 HARV. L. REV. 1838, 1850 (2006).

[99] ABA PROJECT, *supra* note 66, at 25. Thus, the study includes cases sentenced on or after July 1, 1996, but not cases sentenced on June 30, 1996, or before.

[100] The sample includes 143 cases, in which forty-nine defendants received death sentences. The study does not include cases in which the defendant entered a plea bargain. It also only includes cases where the defendant appealed the sentence. The study does not include cases reversed on appeal based on error.

[101] The study also includes cases sentenced by a three-judge panel because such panels were rare (less than ten cases), and did not involve the same panels on more than one occasion.

[102] It is important to note that the time needed for appeal, oral argument, and review by the Ohio Court of Appeals (life sentence) or the Supreme Court of Ohio (death sentence) is such that most decisions are not completed until at least a year or more after the initial jury sentencing verdict, even though such appeals are direct to the Supreme Court of Ohio from the trial court.

[103] *See* Berry, *supra* note 98, at 904.

[104] *See* Note, *supra* note 98, at 1850. Indeed, if the jury's perception of dangerousness does have a significant role in capital sentencing as the data from the Capital Jury Project has indicated, John H. Blume et al., *Future Dangerousness in Capital Cases: Always "At Issue,"* 86 CORNELL L. REV. 397, 404 (2001), then this emphasis could explain, in part, the findings of Baldus's famous *McCleskey* study concerning the impact of race in capital cases. McCleskey v. Kemp, 481 U.S. 279, 286–99 (1987). Where a white juror must consider whether an offender ought to get the death penalty, he or she may be more likely to find that an offender who killed someone like him (in terms of race) is more dangerous and thus more worthy of death. Berry, *supra* note 98, at 902–03.

a frequency approach.[105] As explained below, this study used the frequency approach, as it provides the best indicator of similarity among cases.[106]

The reasonableness approach looks at the appealed case and makes a subjective judgment as to whether the offender deserves the death penalty in light of the nature of the crime and the offender's characteristics.[107] The precedent-seeking approach follows the reasonableness approach, but also looks to other cases as a point of comparison.[108] Under this approach, the court will likewise apply its own subjective judgment to the case in assessing whether this particular offender deserves death.[109] The court will then identify one or more similar cases to justify its decision as to whether or not death is a comparatively excessive sentence in the case.[110]

As opposed to the reasonableness and precedent-seeking approaches, which aim to make a subjective judgment based on one or more cases, the frequency approach employs an externally oriented, empirically based approach to determine case comparability by capturing all comparable cases.[111]

The biggest difference between the frequency approach and the other two approaches is that it attempts to compare the case at issue with the *entire class* of similar cases, using the frequency of death sentencing in the similar class as the barometer for determining whether the case at issue is relatively proportionate to the comparable class.[112] It is essential, then, to capture *all* of the relevant cases in the group of similar cases, as each individual sentencing outcome bears upon the overall frequency of death sentences for the class.[113]

The first step of the frequency approach is to determine the sub-group of similar cases most comparable to the case under review.[114] As in prior studies, this study used logistic regression analysis to determine both (1) the

---

[105] Baldus, *Georgia Experience*, *supra* note 97, at 668–71; Paternoster & Kazyaka, *supra* note 97, at 483.

[106] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 208; Paternoster & Kazyaka, *supra* note 97, at 486.

[107] Baldus, *Georgia Experience*, *supra* note 97, at 668; Paternoster & Kazyaka, *supra* note 97, at 483.

[108] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 206; Paternoster & Kazyaka, *supra* note 97, at 483–84.

[109] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 206; Paternoster & Kazyaka, *supra* note 97, at 483–84.

[110] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 206; Paternoster & Kazyaka, *supra* note 97, at 484.

[111] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 206–08; Paternoster & Kazyaka, *supra* note 97, at 484–85.

[112] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 208; *see* Paternoster & Kazyaka, *supra* note 97, at 486.

[113] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 208; Paternoster & Kazyaka, *supra* note 97, at 486.

[114] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 207; Paternoster & Kazyaka, *supra* note 97, at 485.

aggravation factors that were used to determine which cases are comparable and (2) the overall measure of the degree to which such factors, when weighted, predict an outcome of death for each case.[115]

The second step of the frequency approach requires a determination, for each sub-group, of the proportion of cases that received death.[116] One can then assess, given the proportion of cases within the group of comparable cases that received the death penalty, whether the case under review is comparatively excessive.[117]

If the group of comparable cases rarely received the death penalty, then one can conclude that the sentence in the case at issue is presumptively relatively disproportionate.[118] Such a sentence would violate the Eighth Amendment because its imposition is so rare or irregular as to constitute a cruel and unusual punishment incompatible with the community's moral values as encompassed in the concept of evolving standards of decency.[119] By contrast, if the group of comparable cases almost all received the death penalty, then one can conclude that the sentence in the case at issue is presumptively relatively proportionate, and not in contravention of the Eighth Amendment.

2. *Defining Comparative Excessiveness*

The next question is what percentage indicates constitutional infirmity of a death sentence within a particular sub-group. As with other proportionality review studies, this study adopted a probability value of 0.35.[120] This means for groups of comparable cases where the probability of receiving death was less than 35%, the study classifies death cases in that group as comparatively excessive. This is because, in that group, more than 65% of the cases in the group would not have received death.

Initially used in the first proportionality review study conducted by David Baldus and his colleagues, the 0.35 figure came from the Georgia case of *Coley v. State*.[121] A 1974 non-homicide rape case in which the Supreme Court of Georgia vacated the death sentence because of comparative excessiveness, the court in *Coley* based its decision on its calculation that only 36% of similar

---

[115] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 56–57; *see* Paternoster & Kazyaka, *supra* note 97, at 490.

[116] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 207.

[117] *Id.*

[118] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 207; Paternoster & Kazyaka, *supra* note 97, at 485.

[119] Paternoster & Kazyaka, *supra* note 97, at 479–80.

[120] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 84; Paternoster & Kazyaka, *supra* note 97, at 492.

[121] Coley v. State, 204 S.E.2d 612, 618–19 (Ga. 1974) (Nichols, J., dissenting).

defendants received a death sentence.[122] Baldus and his colleagues used this holding as the basis for deciding that 35% was an appropriate level below which cases would be presumptively relatively disproportionate.[123]

As Ohio has not defined comparative excessiveness in its statutes or case law, this study uses the same value of 0.35. While somewhat arbitrary, this measure is conservative in its estimation of comparative excessiveness.[124] Further, all of the previous studies use this same cutoff value.[125] Finally, when more than two-thirds of similar cases do not receive the death penalty, it seems that giving an individual the death penalty may be excessive by comparison.

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

None of the earlier studies address the situation in the middle—when the death sentence rate in the comparable group is between 35% and 80%.[126] As discussed below, this is where the state supreme court can do its most important work in its assessment of relative proportionality. A rate of 50% seems little better than random—like the flip of a coin—and may be more likely to be relatively disproportionate. On the other hand, a rate of 75% seems much closer to relative proportionality. In these situations, though, it is incumbent on the reviewing court to examine the individual cases within the comparable group to better assess whether a sentence of death is comparatively disproportionate.

3. *Quantitative Analysis*

To measure the relative proportionality of Ohio death cases, I first employed logistic regression analysis to identify and group similar cases, defining similarity in terms of predictability of a death sentence. Using a frequency approach, I then assessed the degree to which cases were comparatively proportionate based on the similar cases in the group.

---

[122] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 74 n.50; Paternoster & Kazyaka, *supra* note 97, at 492.

[123] Paternoster and Kazyaka decided to use the same measure of comparative excessiveness (0.35) because South Carolina case law and statutory guidelines are silent when it comes to defining comparative excessiveness and Georgia and South Carolina's death penalty statutes were quite similar. Paternoster & Kazyaka, *supra* note 97, at 492–93. Similarly, Philofsky used the same measure (0.35) because Maryland did not statutorily define comparative excessiveness. Philofsky, *supra* note 97, at 58–59.

[124] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 74 n.50.

[125] *See* Baldus, *Georgia Experience*, *supra* note 97, at 698; Baldus, *Quantitative Approach*, *supra* note 97, at 74.

[126] *See* BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 74 n.50; Baldus, *Georgia Experience*, *supra* note 97, at 698; Philofsky, *supra* note 97, at 60.

I collected over 250 variables for each of the 143 cases in the study, using judicial opinions as my primary source of data. Variables included various characteristics of the crime, the offender, and the victim.

I first measured the significance of each of the above-listed variables in the study to determine which variables significantly correlated to the sentencing outcome (life or death).

After inputting the data into the regression model, I constructed a logistic regression equation using explanatory variables and a death sentence as the outcome variable. I chose the explanatory variables based on their statistical significance[127] after exploring the level of correlation between each variable and the outcome variable (the sentence of death). After running numerous regressions, I derived the variables that gave the "best-fit" equation in terms of predicting the sentencing outcome. For each variable in the equation, I calculated, using SPSS, a logistic coefficient value, which reflected the relative weight of each variable based on its predictive importance in the equation.

Having determined which combination of variables best predicted an outcome of death, I then measured the relative proportionality of the forty-nine Ohio death cases. Using the logistic regression equation, which included a constant and a coefficient for each variable based on its relative influence in predicting sentencing outcomes, I calculated the "propensity score" for each case. The higher the propensity score, the more likely the logistic regression equation would predict a sentencing outcome of death. In other words, the propensity score is "the estimated conditional probability of the defendant being sentenced to death."[128] I then grouped cases with the same propensity scores together, such that comparable cases were cases with the same likelihood of receiving the death penalty under the adopted regression model.

Under this approach, I used the same method for determining the relative proportionality of the Ohio death sentences. Where the propensity score was less than 35%, I categorized that death case as comparatively excessive. By contrast, where the propensity score was 80% or more, I categorized that death case as presumptively relatively proportional. I repeated this exercise for all forty-nine death cases to determine the number of death cases that were (1) presumptively relatively excessive and (2) presumptively relatively proportionate.

---

[127] In determining statistical significance, I followed the practice of the other studies, requiring $P < 0.10$. As explained below, all of the variables in the final equation except one had a P value of less than 0.05. The earlier studies used either 0.10 or 0.05 as their value for determining significance. *See* BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 72 n.42; Philofsky, *supra* note 97, at 77.

[128] Paternoster & Kazyaka, *supra* note 97, at 491.

B. *Results*

This study has three major findings. First, only four variables, as discussed below, predicted a death sentence: intimate relations with the victim, an elderly victim, a brutal crime, or two or more aggravating factors. Second, over 40% of Ohio death cases were comparatively excessive. Finally, geography seems to play a significant role in capital sentencing outcomes in Ohio. Each of these is discussed in turn.

1. *The Variables That Predict Death in Ohio*

The results of the regression analysis indicated that four variables predicted a death sentence. The variables predictive of death were (1) the presence of a prior intimate relationship between the offender and the victim; (2) the victim was elderly (age 65 or older); (3) the crime was brutal in that it involved more than one kind of physical harm to the victim; and (4) there were two or more aggravating factors found by the jury.

Before discussing the relative proportionality of the death cases, it is interesting to reflect upon the variables that were significant here as well as those that were not. The brutality category has precedent in two prior studies.[129] This category makes sense as an indicator that would raise the probability of a death sentence from a jury. In Ohio, it was a particularly strong indicator, with all but two of the cases categorized as brutal receiving death.

While not having precedent in other proportionality review studies, the category of elderly victims also makes sense as a factor that might increase the probability of a jury giving a defendant the death penalty. Elderly victims are often less able to defend themselves and juries can perceive such individuals as weaker and more vulnerable. In other words, elderly victims are often easier targets than younger individuals and, as a result, criminal behaviour toward such individuals can be seen as creating more harm or being more blameworthy from the perspective of a capital jury.

The second category of victims—individuals with whom the defendants had intimate relations—seems less obvious than elderly victims to result in a higher probability of a death sentence, but is explainable nonetheless. Where the defendant has a personal, intimate relationship with the victim, the presence of such a relationship can serve to make the defendant seem more culpable or more egregious in some cases. Alternatively, murders by strangers may in some ways seem more brutal or less excusable than a murder of someone with a closer relationship as the likelihood that such a killing occurring in the heat of passion may be higher. An examination of the cases involving spouses, girlfriends, and ex-girlfriends reveals that many of these

---

[129] *See* BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 22–23; Philofsky, *supra* note 97, at 38.

murders were particularly brutal, involving strangulation and sexual abuse in a number of cases.

In addition, the raw number of aggravating factors was predictive of death where the case involved two or more aggravating factors. This finding is consistent with one prior study.[130] This makes sense as jurors might attribute some weight to having more than one aggravating factor proved by the government.

As indicated below, though, this trend does not continue as the overall number increases. The cases with only one aggravating factor were less likely than those cases with two or more to receive the death penalty. But the cases with three aggravating factors were not more likely than those with two aggravating factors. One explanation for this is the duplicative nature of the aggravating factors themselves. In many cases, the same conduct can fall under more than one aggravating factor. For instance, a killing in the "course of conduct" of criminal behavior will also, in many cases, be a "felony murder." Because of this potential for overlap, increasing the number of aggravators from two to three may not indicate a significant difference in offender culpability or harm caused.

Interestingly, a number of variables that were significant in other studies were not significant in the logistic regression analysis in this study. First, individual aggravating factors and death penalty specifications did not correlate to the sentencing outcome in the case. Second, variables related to race did not have a significant influence on the sentencing outcome in the case.

Upon closer examination, the lack of influence of individual aggravating factors can also be explained by the breadth of the categories. The felony murder category (statutory aggravating factor number 5) captured a large number of cases that were very different in terms of offender culpability and brutality of crime. Similarly, the seventh aggravating factor, including both pre-meditated killings and multiple killings in the course of criminal conduct, encompassed a wide variety of cases. The other aggravating factors did not, for the most part, contain a significant enough number of cases to affect the model. Aggravating factor number nine—the killing of a police office—covered only two cases, both of which received the death penalty, but not a critical mass of cases that affected the overall logistical regression model.

The number of specifications—the number of counts of aggravating factors proved to the jury—seems, in theory, to be a better predictor of the severity of the crime and thus of a death sentence. Indeed, the number of specifications has, in other studies, been predictive of death.[131] Here, though, the number of specifications did not have a significant positive correlation to the sentencing outcome. This is in part understandable because some of the worst cases involved a small number of specifications—cases involving simple (with less concurrent criminal activity) but brutal murders.

---

[130] Philofsky, *supra* note 97, at 29–30.

[131] *See id.*

Perhaps most importantly, the data did not reveal that race had a significant impact on the sentencing outcome. Past studies have almost uniformly demonstrated that the race of the victim, and to a lesser extent, the race of the defendant, have a significant correlation with the sentencing outcome in capital cases.[132] In particular, cases in which a black defendant murders a white victim are significantly more likely to receive the death penalty than cases in which a white defendant murders a black victim.[133] In this Ohio study, race did not have a significant correlation to the sentencing outcome.

Two possible explanations seem reasonable in understanding this outcome. First, this study, unlike prior studies, examined cases only after the adoption of life-without-parole. Life-without-parole affects, at least to some degree, the tendency of jurors to rely on the perceived dangerousness of the offender as a justification for sentencing an offender to death. The Capital Jury Project, in particular, has demonstrated the heavy influence of dangerousness in capital sentencing decisions by jurors.[134] To the extent that jurors believe that defendants have no possibility of rejoining society having received a sentence of life-without-parole, the influence of dangerousness is lessened and becomes less a part of the sentencing calculus.[135]

Dangerousness, in theory, can serve as part of the explanation for why the race of the victim has played such a significant role in sentencing prior to the adoption of life-without-parole.[136] As jurors in the United States are predominately white, jurors tend to give the death penalty to defendants who murder individuals who are "like" them, that is, white victims, particularly when the defendants have the possibility of being paroled at some point in the future.[137] Conversely, jurors tend to give the death penalty less to those who murder individuals "unlike" them, that is, black victims.[138]

When dangerousness becomes less a part of the sentencing calculus, then, jurors may be less likely to use the race of the victim as a basis for sentencing. If the defendant can never escape custody, the racial identity of the victim becomes less of a concern because the juror has no fear that the defendant will

---

[132] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 253–67; Baldus, *Georgia Experience*, *supra* note 97, at 707–10; William W. Berry III, *Repudiating Death*, 101 J. CRIM. L. & CRIMINOLOGY 441, 459 n.91 (2011); Philofsky, *supra* note 97, at 83.

[133] BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 266.

[134] Blume et al., *supra* note 104, at 398–99.

[135] Berry, *supra* note 98, at 893, 904; *see* Blume et al., *supra* note 104, at 404.

[136] Berry, *supra* note 98, at 902–03.

[137] *Id.*

[138] *See id.* In addition, this may also be attributable in part to the well-chronicled empathy gap between whites and blacks, with white jurors tending to perceive black defendants as more dangerous than white defendants. *See, e.g.*, Craig Haney, *Condemning the Other in Death Penalty Trials: Biographical Racism, Structural Mitigation, and the Empathic Divide*, 53 DEPAUL L. REV. 1557, 1582–88 (2004). *But see* Mona Lynch & Craig Haney, *Mapping the Racial Bias of the White Male Capital Juror: Jury Composition and the "Empathic Divide,"* 45 LAW & SOC'Y REV. 69, 89 (2011).

kill again. Thus, the presence of life-without-parole as a sentencing option will have the likely effect of diminishing dangerousness in the sentencing calculation which will, in turn, diminish the influence of the race of the victim.

A second explanation for the absence of a statistically significant influence of race is the small sample size of interracial murders. In over 95% of the cases, whites murdered whites or blacks murdered blacks. The small sample size of interracial murders thus was not significant enough to determine that the white defendant–black victim murders were less likely than the black defendant–white victim murders to receive the death penalty.

This does not mean that race does not continue to play a role in the Ohio capital system. Indeed, the study did not include any analysis of the prosecutorial decision-making made prior to the jury decision-making. It is possible, and perhaps even likely, that the decisions of Ohio prosecutors may exacerbate the overall influence of race on capital punishment in Ohio. Prosecutors may, for instance, be more likely to seek the death penalty in cases with white victims and/or black defendants.

As explained above, I included a large number of additional variables measuring various characteristics of the offender, characteristics of the victim, and characteristics of the crime in the regression analysis, but those variables were not significant predictors of the sentencing outcome. There are three explanations for the lack of significance of such variables. First, the variable actually did not play a role in sentencing, and in any case, is not predictive in any way of the sentencing outcome. Second, the variable was present in almost every case (such as prior criminal history and the catch-all mitigating factor) such that it did not impact the outcome. Third, the variable was too scarce to be meaningful. Two examples of this are the murder of an inmate and the murder of a police officer. Both categories could be predictive of death (defendants who acted in this way received the death penalty in each of the two cases in each category), but the sample size was too small to have an impact. Indeed, as discussed above, the central weakness of the overall aggravation approach to defining similarity in this study is that the diversity of factors makes it likely that, for some meaningful predictors, the sample size of a particular factor will be too small to be significant enough to be included in the analysis.

2. *Over Forty Percent of Death Cases are Comparatively Excessive*

Having explored the variables predictive of death, this Article now reports the results of my measurement of relative proportionality of Ohio death cases using the frequency method. As mentioned before, this method relies on *actual jury sentencing outcomes* and the corresponding factors present or absent in each case as the basis for determining which cases are comparable.

As explained above, in order to determine the degree to which cases are relatively proportionate using the frequency approach, one must first identify the factors that predict death. In other words, the logistic regression analysis

seeks to isolate the variables that have a significant correlation to the sentencing outcome across the 143 cases in the study, such that they cumulatively best predict the sentencing outcome. Having identified such factors, one can then group the cases according to their probability of receiving a death sentence to determine the penalty's relative proportionality.

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

There are four independent variables in this equation that best explain the sentencing outcome—whether the defendant would receive a death sentence—in the cases.[139] As reported above, the variables in the equation are as follows: (1) the defendant had an intimate physical relationship with the victim prior to the incident; (2) the victim was elderly (age 65 or over) at the time of the crime; (3) the crime was brutal, in that the victim suffered multiple types of physical trauma (shot and stabbed; stabbed and strangled); and (4) the jury found two or more statutory aggravating factors beyond a reasonable doubt.

As explained above, one can determine the propensity score for each case using the logistic regression model described above. One can use the predictive variables and their respective coefficients to derive an equation that allows for the calculation of the probability of receiving the dependent variable outcome (sentence of death) for each case.

Thus, each case had a percentage value of its likelihood of resulting in a death sentence based on the presence or absence of the predictive variables discussed above. As shown below in Figure 1, the propensity scores ranged from 0.12751 to 0.98453, which reflect the "probability" of death for each case.

---

[139] For purposes of the regression analysis, I did not distinguish between cases in which the jury sentenced the defendant to a life-without-parole sentence and cases in which the jury sentenced the defendant to a life-with-parole sentence.

Figure 1: *Grouping the Cases by Predicted Probability of Death*

Predicted Probability of Death *culp_group Crosstabulation

Count

		culp_group				
		1.00	2.00	3.00	4.00	Total
Predicted probability of death	.12751	64	0	0	0	64
	.28868	0	40	0	0	40
	.38898	0	0	3	0	3
	.53589	0	0	3	0	3
	.63872	0	0	8	0	8
	.74360	0	0	3	0	3
	.76228	0	0	6	0	6
	.83416	0	0	0	1	1
	.88955	0	0	0	10	10
	.97229	0	0	0	4	4
	.98453	0	0	0	1	1
Total		64	40	23	16	143

Having calculated the propensity scores for all forty-nine of the Ohio death cases, I could then answer the question of the degree to which these death sentences were relatively proportionate under the frequency method.

I grouped the cases into four categories in Figure 1 based upon their predicted probability of death: (1) lowest through 0.19, (2) 0.20 through 0.34, (3) 0.35 through 0.79, and (4) 0.80 and above.

I then calculated the number of life and death cases in each of the four groups as indicated in Figure 2. For instance, in the cases which had a propensity score (or predicted probability) of 0.20 to 0.35, 14 of the 40 cases received the death penalty.

Figure 2: *Comparison of Actual Versus Predicted Death Sentences*

DEATH Predicted Probability of Death Grouped (culpability) Crosstabulation

			Predicted probability of death grouped (culpability)				
			Lowest thru 19	.20 thru .34	.35 thru .79	.80 thru highest	Total
DEATH	Not death	Count	58	26	8	2	94
		% within DEATH	61.7%	27.7%	8.5%	2.1%	100.0%
		% within Predicted probability of death grouped (culpability)	90.6%	65.0%	34.8%	12.5%	65.7%
	Death	Count	6	14	15	14	49
		% within DEATH	12.2%	28.6%	30.6%	28.6%	100.0%
		% within Predicted probability of death Grouped (culpability)	9.4%	35.0%	65.2%	87.5%	34.3%
Total		Count	64	40	23	16	143
		% within DEATH	44.8%	28.0%	16.1%	11.2%	100.0%
		% within Predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%

As explained above, where the probability of a death sentence is less than 35% (0.35), a death sentence is presumptively relatively disproportionate. By contrast, where the probability of a death sentence is greater than 80% (0.80), the case is presumptively relatively proportionate.

As indicated in Figure 3, twenty of the forty-nine death cases (40.82%) in the study were presumptively relatively disproportionate. In addition, fourteen of the forty-nine cases were presumptively relatively proportionate—28.57% of the cases. The remaining fifteen cases were in the middle, and would require closer qualitative analysis to determine relative proportionality.

Figure 3: *Comparative Proportionality Review Based on Regression*

Probability of Death Sentence	Death Cases in Category	Percent of Death Cases
Less than 0.35	20/49	40.8%
0.80 or greater	14/49	28.6%

The results of the overall aggravation "propensity score" are that 40.82% of Ohio capital cases—decided beginning with the adoption of life-without-parole in 1996—are relatively disproportionate. As a matter of relative proportionality, twenty of the death cases *did not warrant the death penalty*. Further, these results indicate that the Supreme Court of Ohio's decision to affirm these cases on comparative proportionality grounds is clearly right or accurate *less than 30% of the time*.

3. *Considering the Role of Geography*

While geography is not a valid variable for predicting outcomes in capital cases, cross-referencing the results reported above with the geography of the courts deciding the cases offers some interesting insights into Ohio's use of the death penalty since 1996. The three largest Counties, Cuyahoga (Cleveland), Franklin (Columbus), and Hamilton (Cincinnati), decided a significant number of cases in the study (60 of 143). As northern metropolitan areas, Cuyahoga and Franklin counties have the reputation of being more politically liberal. Hamilton, in the southern part of the state, has the reputation of being more politically conservative.

Figure 4 groups the cases into three groups: (1) cases decided in Cuyahoga and Franklin counties, (2) cases decided in Hamilton County, and (3) cases decided in Counties other than Cuyahoga, Franklin, or Hamilton, and then cross-references the cases with the predicted probabilities of a death sentence based on the propensity scores of each case.

Figure 4: *Predicted Probability of Death Grouped by Geography*

				Predicted probability of death grouped (culpability)				
County New				Lowest thru .19	.20 thru .34	.35 thru .79	.80 thru highest	Total
Other Counties	DEATH	Not death	Count	28	15	6	0	49
			% within DEATH	57.1%	30.6%	12.2%	0.0%	100.0%
			% within predicted probability of death grouped (culpability)	87.5%	55.6%	35.3%	0.0%	59.0%
		Death	Count	4	12	11	7	34
			% within DEATH	11.8%	35.3%	32.4%	20.6%	100.0%
			% within predicted probability of death grouped (culpability)	12.5%	44.4%	64.7%	100.0%	41.0%
	Total		Count	32	27	17	7	83
			% within DEATH	38.6%	32.5%	32.4%	20.6%	100.0%
			% within predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%
Cuya Frank	DEATH	Not death	Count	28	10	2	2	42
			% within DEATH	66.7%	23.8%	4.8%	4.8%	100.0%
			% within predicted probability of death grouped (culpability)	100.0%	90.9%	40.0%	33.3%	84.0%
		Death	Count	0	1	3	4	8
			% within DEATH	0.0%	12.5%	37.5%	50.0%	100.0%
			% within predicted probability of death grouped (culpability)	0.0%	9.1%	60.0%	66.7%	16.0%
	Total		Count	28	11	5	6	50
			% within DEATH	56.0%	22.0%	10.0%	12.0%	100.0%
			% within predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%

Hamilton	DEATH	Not death	Count	2	1	0	0	3
			% within DEATH	66.7%	33.3%	0.0%	0.0%	100.0%
			% within predicted probability of death grouped (culpability)	50.0%	50.0%	0.0%	0.0%	30.0%
		Death	Count	2	1	1	3	7
			% within DEATH	28.6%	14.3%	14.3%	42.9%	100.0%
			% within predicted probability of death grouped (culpability)	50.0%	50.0%	100.0%	100.0%	70.0%
	Total		Count	4	2	1	3	10
			% within DEATH	40.0%	20.0%	10.0%	31.0%	100.0%
			% within predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%
Total	DEATH	Not death	Count	58	26	8	2	94
			% within DEATH	61.7%	27.7%	8.5%	2.1%	100.0%
			% within predicted probability of death grouped (culpability)	90.6%	65.0%	34.8%	12.5%	65.7%
		Death	Count	6	14	15	14	49
			% within DEATH	12.2%	28.6%	30.6%	28.6%	100.0%
			% within predicted probability of death grouped (culpability)	9.4%	35.0%	65.2%	87.5%	34.3%
	Total		Count	64	40	23	16	143
			% within DEATH	44.8%	28.0%	16.1%	11.2%	100.0%
			% within predicted probability of death grouped (culpability)	100.0%	100.0%	100.0%	100.0%	100.0%

This table provides several interesting results. In Cuyahoga and Franklin Counties combined, only one of thirty-nine cases with a death probability of less than 0.35 received a death sentence. In Hamilton County, three out of six

cases with a predicted death probability of less than 0.35 received the death penalty.[140] In the rest of the state, sixteen out of fifty-nine (23%) with a predicted probability of less than 0.35 received the death penalty. Of cases with a predicted probability of 0.80 or higher, four out of six in cases in Cuyahoga and Franklin Counties received a death sentence. In Hamilton County, all three cases with a predicted probability of 0.80 or higher received a death sentence. In the rest of the state, all seven cases with a predicted probability of 0.80 received a death sentence.

Clearly, these results indicate that geography does play a role in capital sentencing in Ohio. Although a small sample of cases, juries in Cuyahoga and Franklin Counties appear less inclined to give the death penalty, particularly in cases with a death probability lower than 35%. In Hamilton County, the converse is true, as juries are more likely to give the death penalty, even in cases where the model predicted a low probability of a death sentence.

V. WHY OHIO'S COMPARATIVE PROPORTIONALITY REVIEW VIOLATES THE EIGHTH AMENDMENT

Dating back to the Court's decision in *Furman*, the Eighth Amendment requires some procedural safeguard against disparity in jury sentences.[141] While *Pulley* made clear that proportionality review was not the only permissible method of providing such a safeguard, it remains the most common method used by states to address the problem of relative proportionality.[142] The Court's cases make clear that, at the very least, there must be some meaningful appellate review of the cases.[143] And the meaningful appellate review concerns whether the case, as compared to similarly situated cases, deserves the death penalty.[144]

In Ohio, though, the court's proportionality review clearly fails to provide any safeguard at all. The cursory manner of review itself predetermines that every case will be relatively proportional. In addition to the Court's unwillingness to examine the facts of the cases it uses as points of comparison, it ignores a majority of the comparable cases—cases where the offender received some kind of life sentence—in determining that every case is relatively proportional.

What the quantitative study shows, however, is that there is wild disparity in capital sentencing outcomes. Using the factors that juries deemed important

---

[140] Interestingly, all three cases were felony murder cases in which the murder resulted from a robbery.

[141] *See generally* Furman v. Georgia, 408 U.S. 238 (1972).

[142] Pulley v. Harris, 465 U.S. 37, 44 (1984); *infra* Part V (listing the states that still use proportionality review).

[143] Sochor v. Florida, 504 U.S. 527, 529 (1992); Parker v. Dugger, 498 U.S. 308, 321 (1991); *Pulley*, 465 U.S. at 44; Jurek v. Texas, 428 U.S. 262, 276 (1976); Gregg v. Georgia, 428 U.S. 153, 155 (1976).

[144] *See Pulley*, 465 U.S. at 44.

as the basis for grouping similar cases, the study found, as noted above, that over 40% of the cases that received the death penalty were, by comparison, excessive. This is because most of the other similar cases did not receive the death penalty.

To be clear, the study grouped the cases into four levels based on seriousness. At the least serious level, six of the cases received the death penalty. At the second least serious level, another fourteen cases received the death penalty. According to the regression analysis, the factors predicted a less than 35% probability of such cases receiving death. This group of twenty cases made up over 40% of the cases in the study that received the death penalty (20/49).

On the other end of the spectrum, only fourteen cases had an 80% probability of receiving the death penalty. This means that only fourteen of forty-nine cases (29%), as a matter of relative proportionality, presumptively deserved death. Of the forty-nine cases, then, thirty-five of them merited further review by the Supreme Court of Ohio. None of them received meaningful review.

The reason that the Ohio capital punishment system violates the Eighth Amendment is that it leaves to the discretion of the jury all outcomes in capital cases without providing any oversight. Prior studies have demonstrated the potential for bias in jury determinations, as well as use of inappropriate factors by juries in making sentencing decisions.[145] By eschewing their role as reviewer of these decisions and extending almost complete deference to juries, the Supreme Court of Ohio has enabled significant disparity to exist in capital sentencing outcomes.

As a result, some offenders received the death penalty, even though a majority of those who committed a similar crime did not. This is the type of random imposition of the death penalty that the Court highlighted in *Furman*.

VI. PROPOSALS FOR REFORM

A. *Social Science Based Proportionality Review*

If Ohio continues to use the death penalty, it must cure the constitutional problems identified in this Article. At the very least, the Supreme Court of Ohio should engage in a more robust version of the precedent-seeking approach it currently employs. Indeed, the court should examine the underlying facts and circumstances of cases it characterizes as comparable precedents, to ensure that the cases are indeed comparable in a meaningful way.

More importantly, the court needs to use cases in which the offender did not receive the death penalty as points of comparison. By expanding its

---

[145] *See generally* BALDUS, WOODWORTH & PULASKI, JR., *supra* note 15, at 80–98, 229–67.

proportionality review to include "life" cases the court will at least create the possibility of finding a case is relatively disproportionate.

Even better, though, the court should engage in frequency review, taking a holistic look at all of the comparable cases to determine whether a particular death sentence is an outlier. The court enhances ability to assess relative proportionality in an accurate and defensible manner when it endeavors to examine all of the relevant comparable cases.

Social science provides the most objective way to develop groups of comparable cases, as indicated above. It also opens the door to a creation of a common law of capital sentencing, in which the court, using jury verdicts over time, starts to delineate the line between excessive and acceptable outcomes.

Such an approach has several advantages. First, it is not the court exercising its independent discretion, but rather the court compiling the jury sentences and drawing lines based upon those patterns. It would help to ensure that only the worst of the worst, as decided by the collective wisdom of juries, received the death penalty. This approach would also prevent outlier cases from receiving the death penalty, creating some level of consistency in outcomes in capital cases. Certainly, such an approach would be similar to what the Supreme Court envisioned in *Gregg*, as emphasized by Stevens over twenty years later in *Walker*.[146]

B. *Abolition of the Death Penalty*

Alternatively, the state could abolish the death penalty. There are several reasons that this might be a reasonable conclusion in light of the problem of relative proportionality.

First, the court resources and financial cost of employing social science methodology might be prohibitive, or at the very least unlikely to happen. The welfare of aggravated murderers typically does not garner much political support, and public support for reducing disparity among jury verdicts might fall far behind other priorities.

Second, even the best social science methods will not be perfect in grouping the cases. There are clear limitations to the approach advocated here, resting largely in the volume of cases that reach sentencing. With only 150 cases, the sample size might not accord significance to factors that otherwise might matter.

Third, as Justice Rehnquist noted in *Woodson v. North Carolina*,[147] the problem of mercy will always exist. As a result, the exercise of mercy by juries may create disparities that will be difficult for the state supreme court to identify.

---

[146] Walker v. Georgia, 555 U.S. 979, 980 (2008) (statement of Stevens, J.).

[147] *See* Woodson v. North Carolina, 428 U.S. 280, 318 (1976) (Rehnquist, J., dissenting).

Given the impossibility of assuring that the death penalty achieves an adequate level of consistency, the only solution might be to abandon it. New Jersey, one of the few states that have attempted to implement robust proportionality review, decided to abolish the death penalty in part for this reason.

Ironically, three justices who supported the use of capital punishment at the time of *Furman* and *Gregg*—Blackmun, Powell, and Stevens—all concluded at different times that the impossibility of administering the death penalty fairly justified its abolition.[148] As Blackmun famously concluded in *Callins v. Collins*, "From this day forward, I no longer shall tinker with the machinery of death."[149]

VI. BROADER APPLICABILITY OF THE STUDY ON DEATH PENALTY STATES

The core findings of this study with respect to the likely variations in jury sentencing have significant impact for all capital states that engage in comparative proportionality review. A second observation, that proportionality review that does not examine life cases will hide clear disparities in jury verdicts, also has important consequences.

Of the thirty-six jurisdictions that retain the death penalty, nineteen still use proportionality review. These states include Alabama,[150] Connecticut, Delaware,[151] Georgia,[152] Idaho,[153] Kentucky,[154] Louisiana,[155] Mississippi,[156] Missouri,[157] Montana,[158] Nebraska,[159] Nevada,[160] New Hampshire,[161] North Carolina,[162] Oklahoma, Pennsylvania, South Carolina,[163] South Dakota, [164] Tennessee,[165] Virginia,[166] Washington,[167] and Wyoming.

---

[148] Berry, *supra* note 132, at 461, 471, 482.
[149] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).
[150] ALA. CODE § 13A–5–53(b)(3) (LexisNexis 2005).
[151] DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (2007).
[152] GA. CODE ANN. § 17–10–35(c)(3) (2013).
[153] IDAHO CODE ANN. § 19–2827(c)(3) (Supp. 2014).
[154] KY. REV. STAT. ANN. § 532.075(3)(c) (LexisNexis 2014).
[155] LA. CODE CRIM. PROC. ANN. art. 905.9 (Supp. 2014).
[156] MISS. CODE ANN. § 99–19–105(3)(c) (West 2006).
[157] MO. ANN. STAT. § 565.035(3)(3) (West Supp. 2014).
[158] MONT. CODE ANN. § 46–18–310(1)(c) (2013).
[159] NEB. REV. STAT. ANN. § 29–2521.03 (LexisNexis 2009).
[160] NEV. REV. STAT. ANN. § 177.055(2)(e) (LexisNexis Supp. 2013).
[161] N.H. REV. STAT. ANN. § 630:5(XI)(c) (2007).
[162] N.C. GEN. STAT. § 15A–2000(d)(2) (2013).
[163] S.C. CODE ANN. § 16–3–25(C)(3) (2003).
[164] S.D. CODIFIED LAWS § 23A–27A–12(3) (Supp. 2014).
[165] TENN. CODE ANN. § 39–13–206(c)(1)(D) (2014).
[166] VA. CODE ANN. § 17.1–313(C)(2) (2010).
[167] WASH. REV. CODE ANN. § 10.95.130(2)(b) (West Supp. 2015).

Like Ohio, South Carolina,[168] Tennessee,[169] and Alabama[170] all rely solely upon other death cases to conduct this review. The result is a proportionality review that is suspect under the Eighth Amendment. Indeed, two of the five justices on the Tennessee Supreme Court recognized this in a recent case, *State v. Pruitt*, dissenting in part because of the shoddy proportionality review of the majority.[171]

None of the states, however, uses any statistical tool to measure comparative proportionality, and almost none examine a series of cases to determine the death sentencing rate for a group of similar cases. Given this study's findings about the state of proportionality review in Ohio, it raises important questions about the efficacy of the use of proportionality review in nineteen jurisdictions, almost two-thirds of the remaining states that permit capital punishment.

Combined with the findings in earlier studies in Georgia, South Carolina, and Maryland, this study suggests that state supreme courts need to review their procedures for comparative proportionality review, both to comply with applicable state law as well as to abide by the requirements of the Eighth Amendment. To be sure, state supreme courts are, in most cases, failing to cure the disparities in jury sentencing outcomes first noted in *Furman*.

As this study has demonstrated, such review is even more important with the rise of life-without-parole as a sentencing alternative to the death penalty. Its use has only made the application of the death penalty more haphazard, random, and arbitrary.

VIII. CONCLUSION

This Article is the first to examine Ohio's comparative proportionality review, and the first study of proportionality review after the adoption of life-without-parole. Using a quantitative methodology, the Article concluded that over 40% of Ohio's capital sentences from 1996–2011 were comparatively disproportionate with respect to all of the cases in which Ohio juries sentenced capital murderers.

The study found that four factors—the existence of a prior intimate relationship with the victim, elderly victims, brutal crimes, and cases with two or more aggravating factors—had a statistically significant relationship with the sentencing outcome and predicted an outcome of death. The presence or

---

[168] *See, e.g.*, State v. Koon, 328 S.E.2d 625, 626 (S.C. 1984); State v. Copeland, 300 S.E.2d 63, 74 (S.C. 1982); State v. Yates, 310 S.E.2d 805, 813–14 (S.C. 1982).

[169] *See, e.g.*, State v. Smith, 695 S.W.2d 954, 960 (Tenn. 1985); State v. King, 694 S.W.2d 941, 947 (Tenn. 1985); State v. Matson, 666 S.W.2d 41, 44 (Tenn. 1984).

[170] *See, e.g.*, Beck v. State, 396 So. 2d 645, 664 (Ala. 1980); Clisby v. State, 456 So. 2d 102, 104 (Ala. Crim. App. 1983); Dobard v. State, 435 So. 2d 1338, 1345 (Ala. Crim. App. 1982).

[171] State v. Pruitt, 415 S.W.3d 180, 233–37 (Tenn. 2013) (Koch & Lee, JJ., concurring and dissenting).

absence of these factors, weighted according to their significance, provided the basis for identifying similar cases.

In light of the need for some safeguard against comparatively disproportionate sentences in capital cases, this Article argues that the Ohio capital system, as currently constituted, violates the requirements of the Eighth Amendment. The Supreme Court of Ohio's failure to employ a method that utilizes similar cases, including ones with life sentences, to measure proportionality results in a review that is one of form, not substance.

The Article concluded by suggesting two possible reforms. First, the Article suggests that the Supreme Court of Ohio should employ social science methods, as done in the study, to develop its own common law of capital sentencing. Such an approach would create some level of consistency between cases, and enable the court to remand outliers. Even if the court is unwilling to go this far, it at least should engage in a more thorough proportionality review, including considering similar cases which received life sentences.

Second, the Article advocates for abolition of the death penalty, as implementing robust proportionality review seems unlikely and perhaps unworkable. The difficulties in administering capital punishment in a fair and evenhanded manner suggest that abolition may be the best option.