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

Executive Summary

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EVALUATION OF PROPORTIONALITY REVIEW PROCEDURES
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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.

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EXECUTIVE SUMMARY

Issues surrounding the death penalty -- whether it should be imposed and, if so, under what circumstances -- have been the subject of heated debate in our society for many years. Since the capital punishment statutes were ruled unconstitutional by the United States Supreme Court in 1972 in Furman v. Georgia¹, the death penalty has been re-established in 38 states. The resurgence in the application of the death penalty is a reflection of the view of the American public that (a) some crimes are so heinous that capital punishment is the only adequate response, and that (b) the death penalty operates, to some degree, as a deterrent to premeditated crimes.

In reinstating the death penalty, the states revised their statutes to decrease the risk of arbitrary and capricious impositions of the death penalty, following Supreme Court guidelines in Gregg v. Georgia and succeeding cases.² 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. Such a proportionality review involves the comparison of a given death penalty case to other similar cases to determine whether the death penalty is excessive or proportionate considering the circumstances of the crime and the defendant. However, the implementation of an effective proportionality review system is no simple matter. For example, since death penalty cases must be compared to other similar cases, a proportionality review system has to address such thorny problems as which cases are to be compared to the death penalty case and how the comparison is to be made.

In response to these problems, the National Center for State Courts sought 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."³ As envisioned by the

National Institute of Justice (NIJ), the sponsor of the project, the effort would devise procedures for collecting information on specific case characteristics, develop management information systems for appellate courts that would organize and present the information in a useful way, and explore techniques for identifying similar cases and measuring comparative excessiveness of sentences. Accordingly, the National Center for State Courts (NCSC) produced at project's end a prototype questionnaire for gathering case information, a model information system for storing and selecting similar cases, and a background paper addressing central issues and procedures.

Shortly after the start of the NCSC project, NIJ also awarded a grant to the Institute for Social Analysis to assess the development and operation of the proportionality review system. Our basic task was to determine how NCSC developed the prototype system -- what issues were addressed, what methods were considered, etc. -- and how, in the end, the proportionality system performed in three experimental sites (state appellate courts). Unfortunately, these goals could not be fully met because, for reasons mostly outside the control of NCSC, the prototype proportionality system was not implemented in the three experimental states during the course of this study. Nonetheless, we concluded that the proportionality review system developed by the National Center for State Courts is basically a sound approach, and that state appellate courts and others interested in death penalty review issues could benefit from knowledge of the review system and how it was developed. Moreover, as the evaluation progressed, it became clear that the full impact of the prototype review system will not be evident for some years: the consideration and adoption of proportionality review procedures occurs at an understandably deliberate pace.

Background of the Proportionality Review Project

In the Furman decision a bare majority held that the death penalty was so often imposed in an arbitrary and capricious manner that it constituted cruel and unusual punishment in violation of the eighth amendment. The U.S. Supreme Court called on

the states to institute procedures for imposing the death penalty that would provide "a meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not."⁴ New statutes written to meet this requirement were patterned after the Georgia statute upheld in the Gregg decision of 1976. A critical part of the Georgia statute requires the state supreme court to determine whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. Thus, proportionality reviews were included in the death penalty statute of 22 states.

For the past eight years, proportionality reviews have been conducted in a traditional judicial manner. A group of similar cases is selected and the justices conduct a subjective analysis and reading of the facts and background of the similar cases and the case under review. Few standard definitions exist -- the universe of cases from which similar cases are drawn usually includes all murder cases, but is not uniform; case information is not standardized; similar cases are identified haphazardly (most are other death penalty cases); and the means for determining proportionality are not explicit. Several researchers⁵ have studied the impact of proportionality reviews and found them wanting; Bowers and Pierce concluded they have done "little, if anything to remedy the ills of the pre-Furman era."⁶

The National Center for State Courts set out to develop a prototype proportionality review system that would meet U.S. Supreme Court guidelines and provide a "principled" approach to conducting reviews. Three states -- Louisiana, New Jersey, and South Dakota -- agreed to participate in the project and implement the prototype system. A nine-member representative Task Force was created to provide guidance to the project, particularly in identifying and considering the legal and technical issues in proportionality reviews. The project's progress was slow due to the deliberation of the Pulley v. Harris⁷ case in which the constitutionality of proportionality reviews was the central issue. Although the Pulley decision in early 1984 decreed proportionality reviews were not constitutionally required, the project products were nearly complete and offered to the states to meet their own

statutory requirements.

Description of the Proportionality Review System

The prototype proportionality review system developed by the National Center for State Courts is composed of three parts: (1) an issue paper which provides guidelines for addressing the central issues of proportionality reviews, (2) a questionnaire to be used for gathering information on death-eligible cases, and (3) a computerized system for storing, selecting, and reviewing the case information.

The Task Force to the project identified three issues central to proportionality reviews and provided guidelines for resolving those issues.⁸ The first issue is how to define the "universe of cases" -- the group of cases that form the database of a proportionality review system and from which similar cases are selected to be compared with the case under review. The universe of cases was defined as "all cases in which the indictment included a death-eligible charge, and a homicide conviction was obtained," excluding cases reversed on appeal. This broad definition means the universe should include cases with guilty pleas and life sentences, whether appealed or not.

A second issue considered was how to select cases similar to the case under review. The "fact-specific" method was suggested as the simplest and most direct manner for selecting cases. Using this method, cases are selected by matching their primary aggravating and mitigating circumstances with those in the case under review. Thus, a review case in which a first-time offender committed a murder during a robbery would be compared to cases with similar factors. Four alternative methods for selecting similar cases were also suggested.

The third issue considered by the Task Force was how to determine proportionality and the "frequency approach" was suggested. 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 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, feeling that

this determination must be left to the discretion of the appellate courts and their interpretation of the intended purpose of their state's death penalty statute.

A sample questionnaire was developed for gathering information on the universe of cases. It consists of 49 closed-ended items covering information on the offense, trial data, and victim and defendant data, and guidelines for a narrative summary and the defendant's sentencing history.

The computerized system stores, sorts, selects, and presents the information gathered via the questionnaires. A manual system using punched cards could be used instead, if desired. The building and use of the computerized system is completely described in a large user's manual. The system sorts and selects cases quickly and displays desired information on the similar cases, particularly the percentage of life and death cases. The system is "menu-driven" and easy for a novice to use.

Evaluation Results

The original goal of the evaluation was to assess the use of the proportionality review system in the three participating states -- Louisiana, New Jersey, and South Dakota. Because of the lack of implementation in these sites, a telephone survey was also conducted with potential users of the system who were well acquainted with its content and structure.

At the close of the proportionality review project, South Dakota and New Jersey had yet to impose a death penalty under their post-Furman statute. Both states, however, had begun the development of a rigorous system based on the National Center for State Court's work. Both had adapted the prototype questionnaire to meet their state's needs and defined the universe of cases in accordance with NCSC's guidelines. Data collection on the universe of cases is planned for the near future. Implementation has been very slow, due to the wait for the Pulley v. Harris decision and the lack of need.

Louisiana has conducted proportionality reviews since 1976 in the traditional manner, except cases are reviewed on a district-wide, rather than a state-wide basis. While the state supreme court justices were appreciative of the National

Center's work, it appears somewhat doubtful that the prototype review system will be implemented in Louisiana. This is largely due to the lack of impetus from the U.S. Supreme Court, public attitudes favoring the death penalty (Louisiana's justices are elected), support for the status quo within the court, and a perception that gathering information on past cases will be a formidable task.

Maryland's Public Defender Office has begun implementing the prototype proportionality system for use in appealing death penalty cases. The Court of Appeals (Maryland's highest court) limited the universe of cases for reviews to death sentences only in Tichnell v. State, but agreed to consider others on appeal.⁹ The Public Defender's Office has expanded the universe to include life sentences and has begun collecting information with a revised questionnaire.

Because it was not possible to assess an operational system, key officials in ten states were interviewed regarding their perceptions of the content and utility of the prototype system. The survey included state supreme court justices, court administrators, public defenders, and prosecutors. In general, these respondents viewed the proportionality review system favorably. They felt it was a highly sophisticated and comprehensive system that would be useful in conducting proportionality reviews. Objections to the system typically revolved around its complexity and the effort required to build and maintain a computerized system. States with a large number of death eligible cases were apt to view the data collection process as difficult if not impossible, while states with few death cases felt the system was unnecessarily cumbersome and complex. Several respondents felt that adoption of the system would be unlikely in view of the Harris decision, while others felt it would be useful to help them conform to their own state statutes.

The survey respondents raised some problems related to the application of social science techniques to a traditional, judicial value-sifting process. The system was viewed as somewhat difficult to comprehend, but there was no resistance to the computerization beyond perceived problems of building the database.

Conclusions and Implications

In an overall sense, the NCSC 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 essentially meets the objectives and implicit requirements for proportionality reviews: it suggests means for resolving 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. Although the proportionality review system is a true 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 -- it should serve as the basic building block for states desiring to implement a rigorous proportionality review system.

Still, the application of the proportionality review system has been slow, a function mainly of forces external to the NCSC effort rather than major deficiencies of the system itself. 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. 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. The system's unexpected application in Maryland is also an indication of its potential for multi-faceted uses.

But in current form the prototype system may be viewed by some states as unnecessarily complicated and burdensome. On the one hand, states with few death penalty cases are especially prone to viewing the prototype system as unnecessarily detailed, even though building and maintaining the database is a relatively simple task for these states. Indeed, it is unfortunate that more attention was not paid to the development of a simple manual review system, which might be more appealing for states with few death cases. On the other hand, 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.

In a similar vein, the "packaging" of the system could probably be improved. 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 other than the individual who will actually construct the 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. Yet some of the terminology used in the issue paper -- "frequency approach", "strict empiricism", "main-determinants methods", etc. -- may be too academically oriented and not

readily understood by the judicial community.

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

Reference Notes

1. Furman v. Georgia, 408 U.S. 238 (1973).
2. Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).
3. National Center for State Courts (April 1982). Proportionality review of death sentences for state appellate courts. Proposal submitted to the National Institute of Justice.
4. Supra note 1, at 313 (White, J., concurring).
5. See Baldus, D., Pulaski, C., Jr., and Woodworth, G. (1983). Comparative review of death sentences: An empirical study of the Georgia experience. Journal of Criminal Law and Criminology, 74 (3), 661-753; Dix, G. (1979). Appellate review of the decision to impose death. Georgetown Law Journal, 68, 97-161; Zeisel, H. (1981). Race bias in the administration of the death penalty: The Florida experience. Harvard Law Review, 95 (2), 456-468; Arkin, S. (1980). Notes: Discrimination and arbitrariness in capital punishment: An analysis of post-Furman murder cases in Dade County, Florida, 1973-1976. Stanford Law Review, 33, 75-101; Zimring, F., Eigen, J., and O'Malley, S. (1976). Punishing homicide in Philadelphia: Perspectives on the death penalty. University of Chicago Law Review, 43 (2), 227-252; Black, C., Jr. (1976). Due process for death: Jurek v. Texas and companion cases. Catholic University Law Review, 26, 1-16.
6. Bowers, W. and Pierce, G. (1980). Arbitrariness and discrimination under post-Furman capital statutes. Crime and delinquency, 26, 563-635.
7. Pulley v. Harris, ___ U.S. ___, 104 S. Ct. 871 (1984)(No. 82-1095).
8. Van Duizend, R. (1984). Comparative proportionality review in death sentence cases: What? How? Why? State Court Journal, Summer 1984, 9-13, 21-23.
9. Tichnell v. State, 297 Md. 1, 468 A. 2d 1 (1983).

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