

Comparative Proportionality Review: Will the Ends, Will the Means

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I. INTRODUCTION

The Washington Supreme Court finds it acceptable when one defendant is sentenced to death, while five equally culpable defendants are not.¹ On its face, this is grossly unfair to the defendant singled out to die while his brethren live out their lives in prison. While paying lip service to the elimination of arbitrary death sentences, the Washington Supreme Court continues to do nothing to solve this problem. Perhaps most unfortunate for those defendants disproportionately sentenced is that the means for a more rational application of the death sentence is already present in Washington's death penalty statute. This means is "comparative proportionality review."² Used correctly by the judiciary, this tool has the potential to make real progress toward nonarbitrary, nondiscriminatory, and fair death sentences.

Comparative proportionality review determines whether a given death sentence is "excessive or disproportionate" compared to the penalty imposed in "similar cases."³ The Washington Supreme Court conducts comparative proportionality review in all cases in which the death sentence is imposed.⁴ Ideally, if the Court finds that a jury has arbitrarily sentenced a defendant to death compared to other defendants, the review should provide the procedural means to alter a death sentence to a sentence of life in prison. Comparative proportionality review legislation finds its origin in the United States Supreme Court case *Furman v. Georgia*.⁵

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1. This Comment will argue that *State v. Benn* is such a case. See *infra* note 199.

2. See *infra* note 199 (describing the distinction between "traditional proportionality review" and "comparative proportionality review.").

3. WASH. REV. CODE § 10.95.130(2)(b) (1994).

4. WASH. REV. CODE § 10.95.100 (1994).

5. 408 U.S. 238 (1972) (per curiam). See *infra* text accompanying notes 37-57.

In 1972, *Furman v. Georgia* invalidated several states' death penalty statutes as violating the Eighth Amendment's prohibition against cruel and unusual punishment.⁶ Some of the common themes among the concurring justices were that death sentences were being imposed in an arbitrary, discriminatory, and random fashion.⁷ Because many states had similar statutory schemes, *Furman* can be said to have briefly eliminated the death penalty in the United States.⁸ Even today, the concerns of the *Furman* court continue to haunt the application of the death penalty.⁹ Comparative proportionality review was one common procedural method by which many states attempted to bring their death penalty statutes into compliance with *Furman*.¹⁰

In *State v. Benn*,¹¹ a case involving a grisly double murder, the Washington Supreme Court demonstrated the difficulty of applying comparative proportionality review in practice. In *Benn*, six justices, in a majority and concurring opinion, agreed that a sentence of death was "proportionate," while three justices vigorously disagreed. The various procedures used by the justices to reach their conclusions were dissimilar, making this case an excellent vehicle for examining comparative proportionality review. *Benn* demonstrates some of the many flaws inherent in the Washington Supreme Court's use of comparative proportionality review including (1) the use of inconsistent logic to rationalize whether a particular case is "similar," (2) the lack of any methodology for the comparison of "similar" cases, and (3) the fact that no clear consensus exists about what comparative proportionality review is attempting to accomplish. These flaws are fatal to the application of comparative proportionality review; as a result, the review is merely a means by which the judges may arbitrarily decide whether or not a death sentence is appropriate.

6. See *infra* text accompanying notes 13-36.

7. See *id.*

8. See *Furman*, 408 U.S. at 411-12 (Blackmun, J., dissenting) (arguing that *Furman* invalidates every death penalty statute in the country); *State v. Baker*, 81 Wash. 2d 281, 282, 501 P.2d 284, 284 (1972) (declaring Washington's death penalty statute unconstitutional).

9. In 1994, Justice Blackmun, who wrote a dissenting opinion in *Furman*, reversed himself and concluded "[i]t is virtually self-evident to me now that no combination of procedural rules or substantive regulation ever can save the death penalty from its inherent constitutional deficiencies." *Callins v. Collins*, 114 S. Ct. 1127, 1130 (1994) (Blackmun, J., dissenting from denial of certiorari). See generally David C. Baldus et al., *Reflections on the "Inevitability" of Racial Discrimination in Capital Sentencing and the "Impossibility" of its Prevention, Detection, and Correction*, 51 WASH. & LEE L. REV. 359 (1994); Samuel R. Gross and Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984).

10. See *infra* text accompanying notes 37-57.

11. 120 Wash. 2d 631, 845 P.2d 289, *cert. denied*, 114 S. Ct. 382 (1993).

Although Washington's present statutory death penalty scheme would almost certainly pass constitutional scrutiny on its face,¹² this Comment will argue that Washington's application of comparative proportionality review does little to protect defendants from discriminatory, arbitrary, or unfair death sentences. However, if comparative proportionality review was used properly by the Washington Supreme Court, it could be a powerful tool to address some of these concerns.

This Comment attempts to achieve several objectives. Part II discusses the reasons that the death penalty was found to be unconstitutional in *Furman v. Georgia*. Part III reviews several post-*Furman* Supreme Court cases and the revised death penalty statutes that were deemed to satisfy the procedural inadequacies found in pre-*Furman* death sentence statutes. This Part also discusses the role proportionality review plays in making a death penalty statute constitutional. Part IV examines the development of comparative proportionality review in the State of Washington. *State v. Benn* will serve as the focus of this discussion. Part V demonstrates that Washington's application of comparative proportionality review is seriously flawed in several respects. These flaws include both the procedural means that the court has used to choose similar cases, and substantive concerns that the court has never clearly defined the purpose of comparative proportionality review. Finally, Part VI of this Comment will advocate a more suitable method for applying comparative proportionality review, paying special attention to the reasoning of the *Furman* court and the flaws that caused the 1972 U.S. Supreme Court to find several states' death penalty statutes unconstitutional.

II. BACKGROUND—*FURMAN V. GEORGIA*

Under the Eighth Amendment to the Constitution, punishment may not be cruel and unusual.¹³ In the watershed case *Furman v. Georgia*,¹⁴ the U.S. Supreme Court was asked to determine whether the death penalty, as applied in two states, violated this amendment.¹⁵ The Court produced a brief per curiam in which the nine justices wrote separate opinions. Five concurring justices concluded that the

12. Georgia's death penalty scheme, which is facially similar to Washington's, was held constitutional. See *infra* text accompanying notes 43-48.

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

14. 408 U.S. 238 (1972) (per curiam). The defendant *Furman* was convicted of rape in Georgia and was sentenced to death. *Id.* at 239.

15. See *id.* The Georgia and Texas death penalty statutes were found to be unconstitutional. *Id.* at 239-40.

death penalty was unconstitutional.¹⁶ Comparative proportionality review was a direct response to *Furman*,¹⁷ and thus, it is important to understand the rationale these justices used in reaching their conclusion. Through such an understanding, comparative proportionality review can best be utilized to remedy the constitutional flaws found by the *Furman* court. Each concurring opinion in *Furman* will be examined in turn.

Marshall and Brennan argued that the death penalty was unconstitutional in all cases.¹⁸ Brennan believed that a penalty was violative of the Eighth Amendment's restriction against cruel and unusual punishment when it did not "comport with human dignity."¹⁹ He also characterized the application of the death penalty as "freakishly" or "spectacularly" rare.²⁰ Finally, Brennan argued that the worst crimes were not those punished by death. He stated that "[n]o one has yet suggested a rational basis that could differentiate in those terms the few who die from the many who go to prison."²¹

Similarly, Marshall viewed the death penalty as being constitutional at one time, but becoming cruel and unusual due to the evolving nature of our society.²² He was also concerned with the discriminatory application of the death penalty and stated: "Regarding discrimination, it has been said that '[i]t is usually the poor, the illiterate, the underprivileged, the member of the minority group—the man who,

16. *Id.* at 240 (Douglas, J., concurring); *id.* at 257 (Brennan, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring); *id.* at 314 (Marshall, J., concurring).

17. See *infra* text accompanying notes 37-57.

18. *Furman*, 408 U.S. at 257 (Brennan, J., concurring); *id.* at 314 (Marshall, J., concurring).

19. *Id.* at 270 (Brennan, J., concurring). He also viewed the death penalty as unique in its "extreme severity," and pronounced: "Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity. No other existing punishment is comparable to death in terms of physical and mental suffering." *Id.* at 287.

20. *Id.* at 293. Justice Brennan went on to state that "[w]hen the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system." *Id.*

21. *Id.* at 294. Brennan declared:

{T}here is a strong probability that [death] is inflicted arbitrarily; its rejection by contemporary society is virtually total; and there is no reason to believe that it serves any penal purpose more effectively than the less severe punishment of imprisonment. The function of these principles is to enable a court to determine whether a punishment comports with human dignity. Death, quite simply, does not.

Id. at 305.

22. *Id.* at 329 (Marshall, J., concurring).

because he is without means, and is defended by a court-appointed attorney—who becomes society's sacrificial lamb"²³

The concurring opinions of Justices Stewart, White, and Douglas²⁴ are probably the most important in *Furman* because they did not advocate the elimination of the death penalty per se.²⁵ These justices were concerned with the lack of procedural safeguards and the blatant unfairness that was so readily apparent in the application of death penalty statutes of this time. However, they left the door open for an improved procedural process in future death penalty statutes.²⁶

Justice Stewart viewed the death penalty as being substantially different from other forms of punishment.²⁷ He found the imposition of the death penalty to be "cruel and unusual in the same way that being struck by lightning is cruel and unusual," and concluded that a penalty "so wantonly and so freakishly imposed" does not comply with the Eighth and Fourteenth Amendments.²⁸

Justice White addressed only the narrow question of whether the challenged death penalty statutes were constitutional.²⁹ He answered this question in the negative for three reasons. First, he argued that a penalty imposed so infrequently no longer serves the traditional purposes of criminal justice.³⁰ Second, he was concerned with the arbitrary nature of the sentence and stated that "there is no meaningful basis for distinguishing the few cases in which it is imposed from the

23. *Id.* at 364. Justice Marshall went on to state:

Indeed, a look at the bare statistics regarding executions is enough to betray much of the discrimination. A total of 3,859 persons have been executed since 1930, of whom 1,751 were white and 2,066 were Negro. Of the executions, 3,334 were for murder; 1,664 of the executed murderers were white and 1,630 were Negro; 455 persons, including 48 whites and 405 Negroes, were executed for rape.

Id. (citations deleted).

24. *Id.* at 240 (Douglas, J., concurring); *id.* at 306 (Stewart, J., concurring); *id.* at 310 (White, J., concurring).

25. *See id.* at 256-57 (Douglas, J., concurring); *see id.* at 310 (Stewart, J., concurring); *id.* at 310-11 (White, J., concurring).

26. *See supra* note 24.

27. *Furman*, 408 U.S. at 306 (Stewart, J., concurring). He stated that:

The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

Id.

28. *Id.* at 309-10 (Stewart, J., concurring).

29. *Id.* at 311 (White, J., concurring).

30. *Id.* at 313. White argued that penalties are cruel and unusual when "imposition would then be the pointless and needless extinction of life with only marginal contributions to any discernible social or public purposes." *Id.* at 312.

many cases in which it is not."³¹ Finally, Justice White was troubled by the legislature delegating its authority, and essentially allowing judges and juries unguided discretion. He pointed out that no matter what the circumstances, a judge or jury could find the sentence of death appropriate or inappropriate "without violating [the legislature's] trust or any statutory policy."³²

Justice Douglas' arguments paralleled those of Justice White, as he pointed to evidence of discriminatory application of the death penalty,³³ and uncontrolled judge and jury discretion.³⁴ He argued that a law that stated on its face that only poor, uneducated blacks could be executed would plainly fail the "cruel and unusual" punishment clause of the Eighth Amendment.³⁵ And any law that reached the same result in practice "has no more sanctity than a law which in terms provides the same."³⁶

By finding that Georgia's discretionary death penalty statute, with its complete lack of procedural safeguards, violated the Eighth Amendment to the Constitution, the U.S. Supreme Court sent the states scurrying to alter their death penalty statutes. As these revised statutes were challenged, the U.S. Supreme Court began to paint a clearer picture of what was required to make a death penalty statute constitutionally valid.

III. POST-FURMAN SUPREME COURT CASES

States quickly changed the procedures in their death penalty statutes in an attempt to remedy the many flaws addressed by the *Furman* court. For example, the revised Georgia death penalty statute provided for a separate sentencing hearing where the defendant could only be sentenced to death if at least one of ten statutorily defined aggravating circumstances was proven beyond a reasonable doubt.³⁷ The defendant was allowed to show evidence of mitigating circumstances and was given substantial latitude as to the types of evidence

31. *Id.* at 313.

32. *Id.* at 314.

33. *Id.* at 250 n.15 (Douglas, J., concurring). Justice Douglas argued, "[i]t would seem to be incontestable that the death penalty inflicted on one defendant is 'unusual' if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices." *Id.* at 242.

34. *Id.* at 253. He said that "[p]eople live or die, dependent on the whim of one man or 12." *Id.*

35. *Id.* at 256.

36. *Id.*

37. See *Gregg v. Georgia*, 428 U.S. 153, 163-64 (1976) (citing GA. CODE ANN. § 27-2503 (Supp. 1975)).

that he could introduce.³⁸ Additionally, the statute required that the state supreme court perform comparative proportionality review for all death sentences and to determine whether the sentence was disproportionate to those sentences imposed in similar cases.³⁹ Four years after *Furman*, the U.S. Supreme Court was asked to decide whether the new death penalty statutes in Georgia,⁴⁰ Florida,⁴¹ and Texas⁴² were constitutional. *Gregg v. Georgia* addressed Georgia's new death penalty statute.

Three justices that were at odds with each other in *Furman* wrote a decisive plurality opinion in *Gregg*.⁴³ They concluded that Georgia's revised statute adequately directed and limited judge or jury discretion, and held that the statute was constitutional.⁴⁴ The Court was impressed with several features of Georgia's statutory plan. First, the Court believed that the bifurcated proceedings and enumerated aggravating circumstances helped guide the jury, and hence, reduced the arbitrary imposition of the death penalty.⁴⁵ Second, comparative proportionality review was deemed to provide a safeguard against an "aberrant" jury.⁴⁶ And finally, the statute provided flexible and individualized procedures for determining whether the death penalty was being imposed in an arbitrary and capricious manner.⁴⁷ Washington's death penalty statute is similar to Georgia's constitutionally valid statute.⁴⁸

While *Gregg* established that Georgia's death penalty statute was constitutional,⁴⁹ it did not answer the question of whether any of the particular procedural mechanisms used by Georgia were constitutionally required. The Supreme Court case *Pulley v. Harris*⁵⁰ directly addressed whether comparative proportionality review was a prerequisite to a constitutional death penalty statute, and therefore, is helpful

38. *Id.*

39. *See id.* at 198 (citing GA. CODE ANN. § 27-2537(c) (Supp. 1975)).

40. *See Gregg v. Georgia*, 428 U.S. 153 (1976).

41. *See Proffitt v. Florida*, 428 U.S. 242 (1976).

42. *See Jurek v. Texas*, 428 U.S. 262 (1976).

43. *See* 428 U.S. at 158 (Stewart, Powell, and Stevens, JJ.).

44. *Id.* at 197, 207.

45. *Id.* at 187-98.

46. *Id.* at 206.

47. *Id.* at 193-99. The court stated that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189.

48. *See infra* note 59.

49. *Gregg*, 428 U.S. at 207.

50. 465 U.S. 37 (1984).

in determining what procedural mechanisms must be included in a death penalty statute. The *Pulley* court held that, despite the approval of comparative proportionality review in *Gregg*, comparative proportionality review is not indispensable.⁵¹ *Pulley* concluded that no particular review procedure is required, there must simply be "a means to promote the evenhanded, rational, and consistent imposition of death sentences."⁵² It is also likely that some form of "meaningful" appellate review is required.⁵³

In summary, if death penalty statutes promote an evenhanded, consistent application of the sentence, they will pass constitutional scrutiny.⁵⁴ *Furman* and *Gregg* indicate several factors that contribute to making a death penalty statute unconstitutional. These include a lack of legislative guidance and a lack of a rational means for distinguishing between the few criminals who receive the death penalty and those who do not.⁵⁵ Additionally, the U.S. Supreme Court is concerned with discrimination and the arbitrary and capricious imposition of the death penalty.⁵⁶ *Pulley* establishes that comparative proportionality review is not constitutionally required.⁵⁷ However, in many states, comparative proportionality review is one of the procedural means by which the legislature has tried to eliminate the arbitrary imposition of death. And while the review itself may not be required, if death penalty statutes, including Washington's, do not have working safeguards to protect defendants from the systematic defects that haunted pre-*Furman* death sentences, the statutes will not be constitutionally valid.

51. *Id.* at 45.

52. *Id.* at 49 (quoting *Jurek v. Texas*, 428 U.S. at 276).

53. *See id.* at 54 (Stevens, J., concurring).

54. *See generally* *State v. Bartholomew*, 98 Wash. 2d 173, 654 P.2d 1170 (1982) (providing background discussion of *Furman* and *Gregg*), *vacated mem.*, 463 U.S. 1203 (1983).

55. *See supra* text accompanying notes 13-48.

56. *See id.*

57. *See supra* text accompanying notes 50-53.

IV. WASHINGTON STATE

A. Background

Washington's current statutory scheme for the imposition of the death penalty was enacted in 1981.⁵⁸ Similar to Georgia's death penalty statute,⁵⁹ the scheme provides guidance to judge and jury, in an attempt to prevent arbitrary and discriminatory sentences of death.

Washington's statutory scheme limits the sentence of death to those found guilty of aggravated murder.⁶⁰ A person is guilty of aggravated murder if he or she commits murder in the first degree and one or more of ten statutorily defined aggravating circumstances are present.⁶¹ At a minimum, a person found guilty of aggravated

58. Act of May 14, 1981, ch. 138, 1981 WASH. LAWS 535 (codified at WASH. REV. CODE § 10.95 (1994)).

59. Washington's statutorily required mandatory sentence review, which includes comparative proportionality review, is patterned after Georgia's death penalty statute. *Bartholomew*, 98 Wash. 2d at 191, 654 P.2d at 1181. The Washington Supreme Court stated that "[a]t least in broad outline, the [Washington] statute corresponds quite regularly to the schemes approved by the [U.S. Supreme] Court, in particular the Georgian statute upheld in *Gregg v. Georgia*." *Id.* at 187, 654 P.2d at 1179. While acknowledging that differences existed between Washington's death penalty statute and any the U.S. Supreme Court had directly reviewed, *see id.*, the Washington Supreme Court concluded that Washington's death penalty statute was constitutionally valid. *See id.* at 176, 654 P.2d at 1173. However, the court slightly modified the statute to preserve that constitutionality. *See id.* at 198-99, 654 P.2d at 1185.

60. *See* WASH. REV. CODE § 10.95.030 (1994).

61. WASH. REV. CODE § 10.95.020 (1994). The aggravating circumstances are:

- (1) The victim was a law enforcement officer, corrections officer, or fire fighter who was performing his or her official duties at the time of the act resulting in death and the victim was known or reasonably should have been known by the person to be such at the time of the killing;
- (2) At the time of the act resulting in the death, the person was serving a term of imprisonment, had escaped, or was on authorized or unauthorized leave in or from a state facility or program for the incarceration or treatment of persons adjudicated guilty of crimes;
- (3) At the time of the act resulting in death, the person was in custody in a county or county-city jail as a consequence of having been adjudicated guilty of a felony;
- (4) The person committed the murder pursuant to an agreement that he or she would receive money or any other thing of value for committing the murder;
- (5) The person solicited another person to commit the murder and had paid or had agreed to pay money or any other thing of value for committing the murder;
- (6) The victim was:
 - (a) A judge; juror or former juror; prospective, current, or former witness in an adjudicative proceeding; prosecuting attorney; deputy prosecuting attorney; defense attorney; a member of the intermediate sentence review board; or a probation or parole officer; and
 - (b) The murder was related to the exercise of official duties performed or to be performed by the victim;

murder shall serve a life sentence without the possibility of release.⁶² At the prosecutor's discretion, a special sentencing proceeding may be sought to impose the penalty of death.⁶³ Generally, the same jury that heard and determined the guilt of the defendant is asked whether they are "convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency."⁶⁴ In making this determination, the jury is to consider eight statutorily defined mitigating circumstances.⁶⁵ Also, all relevant evidence with probative

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- (7) The person committed the murder to conceal the commission of a crime or to protect or conceal the identity of any person committing a crime;
 - (8) There was more than one victim and the murders were part of a common scheme or plan or the result of a single act of the person;
 - (9) The murder was committed in the course of, in furtherance of, or in immediate flight from one of the following crimes:
 - (a) Robbery in the first or second degree;
 - (b) Rape in the first or second degree;
 - (c) Burglary in the first or second degree or residential burglary;
 - (d) Kidnapping in the first degree; or
 - (e) Arson in the first degree;
 - (10) The victim was regularly employed or self-employed as a newsreporter and the murder was committed to obstruct or hinder the investigative, research, or reporting activities of the victim.

Id.

62. WASH. REV. CODE § 10.95.030(1) (1994).

63. WASH. REV. CODE § 10.95.040(1) (1994); *see* Campbell v. Kincheloe, 829 F.2d 1453, 1465 (9th Cir. 1987) (concluding that the code section that allowed prosecutorial discretion in deciding to seek the death penalty was constitutional; the prosecutor is not permitted to seek the death penalty unless there is reason to believe there are not sufficient mitigating circumstances to merit leniency), *cert. denied*, 488 U.S. 948 (1988).

64. WASH. REV. CODE § 10.95.060(4) (1994).

65. *See* WASH. REV. CODE § 10.95.070 (1994). Those mitigating circumstances are:

- (1) Whether the defendant has or does not have a significant history, either as a juvenile or an adult, of prior criminal activity;
- (2) Whether the murder was committed while the defendant was under the influence of extreme mental disturbance;
- (3) Whether the victim consented to the act of murder;
- (4) Whether the defendant was an accomplice to a murder committed by another person where the defendant's participation in the murder was relatively minor;
- (5) Whether the defendant acted under duress or domination of another person;
- (6) Whether, at the time of the murder, the capacity of the defendant to appreciate the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of law was substantially impaired as a result of mental disease or defect. However, a person found to be mentally retarded under RCW 10.95.030(2) may in no case be sentenced to death;
- (7) Whether the age of the defendant at the time of the crime calls for leniency; and
- (8) Whether there is a likelihood that the defendant will pose a danger to others in the future.

Id.

value is admissible, whether or not the evidence was admissible during the original trial.⁶⁶

If the jury does not grant leniency, the sentence of death is imposed. The Washington Supreme Court must then undertake a mandatory review of the death sentence.⁶⁷ In this review, the court determines: (1) whether there was sufficient evidence to forego leniency, (2) whether the sentence of death is excessive or disproportionate, (3) whether the sentence of death was brought about through passion or prejudice, and (4) whether the defendant was mentally retarded.⁶⁸ The legislature clearly has attempted to eliminate arbitrary death sentences by limiting the discretion of both judge and jury.⁶⁹ Comparative proportionality review plays an important role in this scheme, it is the only procedure that allows any sort of comparison with previously decided cases.

In Washington, comparative proportionality review is statutorily required.⁷⁰

[T]he supreme court of Washington shall determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. For the purposes of this subsection, "similar cases" means cases reported in the Washington Reports or Washington Appellate Reports since January 1, 1965, in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, and cases in which reports have been filed with the supreme court under RCW 10.95.120.⁷¹

The plain language of this statute sets out minimal guidelines for determining whether a defendant's sentence is excessive or disproportionate to penalties imposed in similar cases. First, the statute mandates that the court consider both the crime and the defendant. Second, the statute indicates where "similar cases" are to be found.

66. WASH. REV. CODE § 10.95.060(3) (1994).

67. WASH. REV. CODE § 10.95.100 (1994).

68. WASH. REV. CODE § 10.95.130(2) (1994).

69. *State v. Campbell* illustrates this point:

At four specific points, the statutory scheme narrows the class of persons subject to the death penalty: first, on the basis of specific elements of aggravated murder; second, with the prosecutor's decision to seek the death penalty for lack of mitigating circumstances; third, with the jury's consideration of mitigating circumstances; and fourth, with [the Supreme Court's] ultimate review of the prior proceedings.

State v. Campbell, 103 Wash. 2d 1, 40, 691 P.2d 929, 952, (1984) (Rosellini, J., concurring), cert. denied, 471 U.S. 1094 (1985).

70. See WASH. REV. CODE §§ 10.95.100, .130(2)(b) (1994).

71. WASH. REV. CODE § 10.95.130(2)(b) (1994).

Finally, "similar cases" are defined as cases in which the death penalty was considered.

The Washington Supreme Court has struggled in its attempt to apply comparative proportionality review. To emphasize what the court has done in the past, a brief history of the court's use of comparative proportionality review, the standard for when a sentence is proportionate, along with the methodology formulated to group similar cases, is described in the following text.

The Washington Supreme Court first applied comparative proportionality review in *State v. Campbell*.⁷² Campbell committed three extremely brutal murders, in which at least four aggravating factors were present.⁷³ These included killing a witness and murdering to protect his identity.⁷⁴ The very fact that Campbell's crimes were so heinous made comparative proportionality review difficult. The court could not find any similar cases, and stated that it would be difficult "to find killings more premeditated and revengeful than those committed by defendant."⁷⁵ The court held that the penalty of death was not disproportionate.⁷⁶

In *State v. Harris*,⁷⁷ the Washington Supreme Court began to refine the standard for determining when a sentence is proportionate. The court acknowledged that the language of Washington's statute was identical to Georgia's statute, and decided that it might be helpful to use Georgia's interpretation of its own statute as a guideline.⁷⁸ *State v. Rupe* continued this refinement stating that "a death sentence must not be affirmed where death sentences have not generally been imposed in similar cases, nor where it has been 'wantonly and freakishly

72. See 103 Wash. 2d 1, 691 P.2d 929 (1984).

73. *Id.* at 13, 691 P.2d at 937.

74. *Id.*

75. *Id.* at 30, 691 P.2d at 946.

76. *Id.*

77. 106 Wash. 2d 784, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940 (1987), *amended and superseded by* *Harris v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994) (overruling the Washington Supreme Court's application of comparative proportionality review). For a further discussion of why the federal court concluded that the Washington Supreme Court did not carry out its statutory mandate, see *infra* note 173 (last two paragraphs).

78. *Id.* at 798, 725 P.2d at 982. In Georgia, the test for proportionality included a consideration of whether death sentences have been imposed "generally" in similar cases. *Id.* (citing *Moore v. State*, 233 Ga. 861, 864, 213 S.E.2d 829 (1975)).

imposed."⁷⁹ The court also stated that an occasional aberrational outcome does not require reversal.⁸⁰

The Washington Supreme Court has developed an unstructured methodology for the selection of similar cases. This selection process is crucial to performing meaningful comparative proportionality review. Without a subset of truly similar cases, it is impossible to determine whether a particular sentence is proportionate to other similarly situated defendants. The court often begins this process of grouping similar cases by comparing the statutory aggravating factors associated with the crime.⁸¹ *Rupe* is a good example of this process.

Rupe murdered two adult female victims during a bank robbery.⁸² Aggravating circumstances included concealment of identity, existence of multiple victims, and that the murders were committed in the course of a robbery.⁸³ In selecting similar cases for the purpose of applying comparative proportionality review, the Washington Supreme Court found; (1) one case with the same combination of aggravating factors, (2) six cases with two of the aggravating factors, and (3) one case where two of the aggravating factors were alleged.⁸⁴ In four of the eight cases the death penalty was imposed; hence, the *Rupe* court found that the sentence was not disproportionate.⁸⁵

The Washington Supreme Court has often tried to distinguish cases that it views as dissimilar, even if the cases have roughly the same number or type of aggravating circumstances.⁸⁶ In doing so, the court has considered factors such as the age or number of the victims, mental illness, brutality, and the degree of suffering.⁸⁷ Additionally, the court will consider whether the characteristics of the defendants are similar.⁸⁸ For example, a court could find a case dissimilar based on the fact that a defendant had several mitigating circumstances.

79. *State v. Rupe*, 108 Wash. 2d 734, 767, 743 P.2d 210, 229 (1987) (citing *State v. Harris*, 106 Wash. 2d at 798, 725 P.2d at 982), cert. denied, 486 U.S. 1061 (1988)).

80. *Id.* at 767, 743 P.2d at 229. Citing *Pulley v. Harris*, 465 U.S. 37, 54 (1984), the court stated that "any capital sentencing scheme may produce aberrational outcomes on occasion, and that such inconsistencies are not like the major systematic defects the Court identified in *Furman v. Georgia*." *Id.*

81. *See id.* at 768, 743 P.2d at 229.

82. *Id.* at 738, 743 P.2d at 214.

83. *Id.* at 768, 743 P.2d at 229.

84. *Id.* at 768-69, 743 P.2d at 229-30.

85. *Id.* at 770, 743 P.2d at 230.

86. *See State v. Rice*, 110 Wash. 2d 577, 627-28, 757 P.2d 889, 916 (1988), cert. denied, 491 U.S. 910 (1989).

87. *Id.*

88. *See Rupe*, 108 Wash. 2d at 770, 743 P.2d at 230; *State v. Mak*, 105 Wash. 2d 692, 724, 718 P.2d 407, 427, cert. denied, 479 U.S. 995 (1986).

In 1991, the Washington Supreme Court attempted to clarify the statutory terms "excessive" and "disproportionate"⁸⁹ in *State v. Lord*.⁹⁰ Acknowledging that the statute provided little guidance in interpreting when a death sentence becomes disproportionate, the court began by looking to what it perceived to be the purpose of comparative proportionality review.⁹¹ In the majority's opinion, comparative proportionality review was designed to alleviate the major systematic problems identified by the U.S. Supreme Court in *Furman*, specifically the arbitrary and discriminatory imposition of the death penalty.⁹² The court stated that "[o]ur review is not intended to ensure that there can be no variation on a case-by case basis, nor to guarantee that the death penalty is always imposed in superficially similar circumstances."⁹³ It concluded that such a review would effectively eliminate the death penalty.⁹⁴

The court also recognized that a formalistic, mathematical approach to finding similar cases was unworkable. Death penalty crimes "are unique and cannot be matched up like so many points on a graph."⁹⁵ The court advocated an approach of looking for a "family resemblance" among death penalty cases.⁹⁶ This approach acknowledged that death penalty cases that do not necessarily have the same attributes or characteristics can still be somehow related.⁹⁷ While the court did not specifically define "family resemblance," the approach apparently rejects a systematic process, and advocates a loose, unstructured means for determining whether a case is generally similar.

Since comparative proportionality review became statutorily required in Washington, the Washington Supreme Court has performed the review ten times.⁹⁸ The sentence of death was found

89. See WASH. REV. CODE § 10.95.130(2)(b) (1994).

90. 117 Wash. 2d 829, 822 P.2d 177 (1991), *cert. denied*, 113 S. Ct. 164 (1992).

91. *Id.* at 907-10, 822 P.2d at 221-23.

92. *Id.* at 910, 822 P.2d at 223.

93. *Id.*

94. *Id.* The court was apparently reasoning that if no variation on a case-by case basis was allowed, because there is a large number of death-sentence eligible defendants who received the sentence of life in prison, the death sentence would never be proportionate.

95. *Id.*

96. *Id.* at 911, 822 P.2d at 223.

97. *Id.*

98. *State v. Campbell*, 103 Wash. 2d 1, 691 P.2d 929 (1984), *cert. denied*, 471 U.S. 1094 (1985); *State v. Jeffries*, 105 Wash. 2d 398, 717 P.2d 722, *cert. denied*, 479 U.S. 922 (1986); *In re Jeffries*, 114 Wash. 2d 485, 789 P.2d 731 (1990); *State v. Harris*, 106 Wash. 2d 784, 725 P.2d 975 (1986), *cert. denied*, 480 U.S. 940 (1987), *amended and superseded by Harris v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994); *State v. Mak*, 105 Wash. 2d 692, 718 P.2d 407, *cert. denied*, 479 U.S. 995 (1986); *State v. Rupe*, 108 Wash. 2d 734, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988); *State v. Rice*, 110 Wash. 2d 577, 757 P.2d 889 (1988), *cert. denied*, 491 U.S.

to be proportionate in all of these cases. *State v. Benn* is the most recent case in which the Supreme Court held that a sentence of death was proportionate.⁹⁹ This Comment will use *Benn* as a vehicle to examine the problems, and potential cures, of the application of comparative proportionality review.

B. *State v. Benn*

1. Facts

Gary Michael Benn was convicted of two counts of aggravated first degree murder.¹⁰⁰ His victims, one of whom was his half brother, were each shot twice, once in the back of the head and once in the chest.¹⁰¹ The motive for the murders was never determined, though a jail house informant claimed that the victims were going to expose a phony insurance claim in which Benn was involved.¹⁰²

Because Benn was found guilty of aggravated murder, he was eligible for the sentence of death.¹⁰³ There were two aggravating circumstances in Benn's crime: the existence of multiple victims and a common scheme.¹⁰⁴ The court concluded that Benn did not have a mental disease or defect, and that he was competent to stand trial.¹⁰⁵ Benn's prior criminal record consisted of several property crimes,¹⁰⁶ and the only mitigating circumstances offered in Benn's defense were his good character and the negative impact his death would have on his family.¹⁰⁷ After the jury concluded that there were no mitigating circumstances sufficient to merit leniency, Benn was sentenced to death.¹⁰⁸ In undertaking the mandatory review of Benn's death sentence, the Washington Supreme Court addressed the issue of comparative proportionality review.¹⁰⁹ In majority, concur-

910 (1989); *State v. Lord*, 117 Wash. 2d 829, 822 P.2d 117 (1991), *cert. denied*, 113 S. Ct. 164 (1992); *State v. Benn*, 120 Wash. 2d 631, 845 P.2d 289, *cert. denied*, 114 S. Ct. 382 (1993).

99. During the final stages of writing this Comment, the Washington Supreme Court again held that a sentence of death was proportionate. *State v. Gentry*, 129 Wash. 2d 570, ___ P.2d ___ (1995). In *Gentry*, the court addressed the issue of comparative proportionality review in a manner very similar to the *Benn* court.

100. *Benn*, 120 Wash. 2d at 638, 845 P.2d at 295.

101. *Id.* at 640, 845 P.2d at 295.

102. *Id.* at 641, 845 P.2d at 296.

103. See WASH. REV. CODE § 10.95.030 (1994).

104. *Benn*, 120 Wash. 2d at 647, 845 P.2d at 299.

105. *Id.*

106. *Id.* at 699, 845 P.2d at 327 (Durham, J., concurring).

107. *Id.* at 647, 845 P.2d at 299.

108. *Id.*

109. *Id.* at 678, 845 P.2d at 316.

ring, and dissenting opinions, the court grappled with a myriad of issues.

2. Application of Comparative Proportionality Review

In each of the various opinions in *Benn*, the Washington Supreme Court struggled with several issues. These included how to choose similar cases, what cases are actually similar, and what makes a sentence disproportionate. Notice that the majority and dissent essentially agreed as to the process by which similar cases should be chosen, but disagreed as to which cases are actually similar. The concurrence, on the other hand, disagreed with the methodology that the majority used, and advocated a process that seemingly does not involve detailed factual comparisons between cases.

The majority opinion concluded that *Benn's* death sentence was comparatively proportionate.¹¹⁰ Advocating the "family resemblance" scheme set out in *Lord*, the court began its search for similar cases by acknowledging that it had historically grouped similar cases in terms of aggravating factors.¹¹¹

As a starting point, the court summarized thirty multiple-murder cases occurring in Washington since 1981 which were potentially similar to *Benn's*.¹¹² For example, Darrin Hutchinson shot two deputies in the head at close range and was sentenced to life without parole.¹¹³ The only aggravating factor was multiple victims, while a 79 IQ, and intoxication, were offered as mitigating circumstances.¹¹⁴ The majority's search for similar cases was an exhaustive process, as the court used eight pages to examine thirty potentially similar cases.¹¹⁵

In reducing this large number of multiple-murder cases to a workable group of similar cases, the court acknowledged the inherent difficulties in identifying similar cases.¹¹⁶ As a general rule, three factors seemed to influence whether or not a particular defendant received the death penalty: mental defects or disturbances, youthful-

110. *Id.* at 693, 845 P.2d at 324. Only two justices, Guy and Dore, signed this portion of the majority opinion. See *id.* at 637, 695 (Durham, J., concurring), 696 (Utter, J., dissenting), 845 P.2d at 289, 325, 326.

111. *Id.* at 680-81, 845 P.2d at 317.

112. *Id.* at 681-88, 845 P.2d at 318-21.

113. *Id.* at 684, 845 P.2d at 319.

114. *Id.*

115. *Id.* at 681-88, 845 P.2d at 318-21.

116. *Id.* at 691, 845 P.2d at 323.

ness of the defendant, or a plea of guilty.¹¹⁷ While realizing that there are exceptions to this rule, the court apparently eliminated several potentially similar cases on these grounds.¹¹⁸

Out of the thirty cases described in the majority opinion, seven defendants were sentenced to death.¹¹⁹ In four of these cases, the crimes committed by Campbell, Mak, Rice and Dodd were deemed by the court to "differ greatly" from Benn's crime and were not similar.¹²⁰ The other three cases where the defendant was sentenced to death were all found to be similar to Benn's.¹²¹ Out of the twenty-three cases described in which the defendant was not sentenced to death, four cases were found to be similar.¹²² In sum, seven of the thirty multiple murder cases were grouped together as similar to Benn's case, and three of those seven defendants were sentenced to death. Stating "[w]e have not sought to substitute this court's judgment for that of the jury,"¹²³ the majority found three death sentences out of seven similar cases to be comparatively proportionate,¹²⁴ and Benn's sentence of death was upheld.¹²⁵

The concurring opinion did not agree with the methodology used by the majority in determining comparative proportionality.¹²⁶ They claimed that *Lord* specifically rejected an approach that would require "endless pages of comparisons to particular cases."¹²⁷ According to the

117. *Id.* The court surmised that a guilty plea may indicate remorse by the defendant, and could be viewed as a significant mitigating factor. *Id.*

118. The court does not specify why many of the thirty described cases are not "similar" to Benn's. But several defendants, such as Sanders, who raped and killed two 14 year old girls, and Stevenson, who was convicted of three murders, were not included in the final pool of similar cases. *Id.* at 687-88, 845 P.2d at 321. The difference between these crimes and Benn's crime was apparently that Sanders pleaded guilty, and that Stevenson was 16 years old. *Id.*

119. *Id.* at 681-88, 845 P.2d at 318-22.

120. *Id.* at 689, 845 P.2d at 322. These crimes were more brutal than Benn's crime. For example, Mak was convicted in the murder of thirteen victims. *Id.* at 685, 845 P.2d at 319-20. The victims were hog-tied prior to their execution-like murders. *Id.* Rice murdered two adults and two children, and all four victims were bludgeoned and stabbed to death. *Id.* at 687, 845 P.2d at 321.

121. *Id.* at 692, 845 P.2d at 323. The names of the defendants who were sentenced to death and whose cases were found to be similar to Benn's are Hazen, Jeffries, and Rupe. *Id.*

122. *Id.* The names of the defendants who were not sentenced to death and whose cases were found to be similar to Benn's are McKinley, Runion, Strandy, and Thompson. *Id.*

123. *Id.* at 693, 845 P.2d at 324.

124. *Id.*

125. *Id.* at 695, 845 P.2d at 325.

126. *Id.* at 695, 845 P.2d at 325 (Durham, J., concurring). This concurrence gathered the most support on the court as to how comparative proportionality review should be applied. It was signed by four justices, Durham, Brachtenbach, Dolliver, and Andersen. *See id.* at 696, 845 P.2d at 325-26.

127. *Id.* at 695, 845 P.2d at 325.

concurrence, *Lord* proposed that proportionality does not require uniform results in "superficially similar circumstances," and the majority's search for exact matches is exactly what the "family resemblance" approach was trying to avoid.¹²⁸ The concurrence advocated a less exacting approach to comparative proportionality review, and argued that the "family resemblance" approach is only a search for broad tendencies to insure that the "death penalty has been imposed *generally* and not 'wantonly and freakishly.'"¹²⁹

Finally, in a powerful dissenting opinion, Justice Utter argued that Benn's sentence of death was disproportionate.¹³⁰ In his search for similar cases, Justice Utter quickly dismissed the "family resemblance" approach as "not sound,"¹³¹ and listed several factors which could potentially make a case similar. These factors included the age of the defendant and victim(s), the number of victims, the amount of conscious suffering, the defendant's criminal record, and mitigating circumstances.¹³² Agreeing with the majority, Justice Utter excluded young defendants, and those with mental defects, from his pool of similar cases.¹³³ He also did not include cases where the defendant pleaded guilty.¹³⁴

Justice Utter argued that one of the majority's similar cases should not have been included in the majority's pool of similar cases.¹³⁵ That case involved an eighteen year old named Hazen who was sentenced to death for murdering two of his neighbors.¹³⁶ First, because Hazen committed suicide in prison, his death sentence was never reviewed, making its reliability questionable.¹³⁷ Second, Justice Utter found Hazen's crime to be more brutal and involve more aggravating factors than Benn's.¹³⁸ Finally, because the majority

128. *Id.* at 695-96, 845 P.2d at 325. For a further discussion of the "family resemblance" approach see *supra* text accompanying notes 93-97.

129. *Id.* at 696, 845 P.2d at 325.

130. *Id.* at 709, 845 P.2d at 332 (Utter, J., dissenting). Justice Utter's dissent was joined by two other justices, Smith and Johnson. *Id.* at 712, 845 P.2d at 334.

131. *Id.* at 699, 845 P.2d at 327. Justice Utter said that "[t]he majority in this case correctly refers to the family resemblance approach as impressionistic. A better approach would be for us to focus initially on a few salient factors in this case in developing a pool of similar cases." *Id.*

132. *Id.*

133. *Id.*

134. *Id.* Justice Utter was hesitant to exclude these cases and pointed out that the majority had cited no authority that supports excluding cases where the defendant had pleaded guilty. *Id.*

135. *Id.* at 700, 845 P.2d at 327.

136. *Id.* at 683-84, 845 P.2d 319.

137. *Id.* at 700, 845 P.2d at 327 (Utter, J., dissenting).

138. *Id.*

excluded other young murderers who did not receive the death penalty from the pool of similar cases, Hazen's inclusion was inconsistent.¹³⁹

Additionally, Justice Utter decided that the majority failed to include fifteen post-1981 cases that were similar to Benn's,¹⁴⁰ two of which were not even mentioned by the majority as potentially similar cases.¹⁴¹ In all fifteen of these cases, the defendants were sentenced to life without the possibility of parole.¹⁴² Next, after criticizing the majority's failure to consider pre-1981 cases, Justice Utter concluded that six pre-1981 cases were similar to Benn's.¹⁴³ One of the defendants in these cases was sentenced to death.¹⁴⁴

Of the twenty-seven total cases deemed by Justice Utter to be similar to Benn's, only three defendants were sentenced to death.¹⁴⁵ If only post-1981 cases are considered, the ratio is even lower (two of twenty-one).¹⁴⁶ Applying the often cited rule that a sentence is proportionate if it is "imposed 'generally' in similar cases," Justice Utter argued that the term "generally" means significantly more than fifty percent.¹⁴⁷ Clearly, three sentences of death out of twenty-seven similar cases does not meet this standard.

The results obtained by the majority, concurrence, and dissent, in the application of comparative proportionality review, were shockingly dissimilar. The majority found seven similar cases of which three defendants were sentenced to death.¹⁴⁸ In stark contrast, the dissent

139. *Id.*

140. *Id.* at 700, 845 P.2d at 328.

141. The majority opinion did not consider the Stephen Carey or the George Russell cases to see if they were similar to Benn's. *See id.* at 701-03, 845 P.2d 328-29.

142. *Id.* at 701, 845 P.2d at 328.

143. *Id.* at 704, 845 P.2d at 330. Justice Utter acknowledged that there are inherent problems in using pre-1981 cases. *Id.* at 705, 845 P.2d at 330. These problems include the lack of detailed information to make comparisons, and the fact that Washington's pre-1981 death sentence statute was unconstitutional. *Id.*

144. *Id.* at 704, 845 P.2d at 330.

145. *Id.* at 705, 845 P.2d at 330.

146. *Id.*

147. *Id.* at 706, 845 P.2d at 331. Justice Utter disagreed with the majority's approach: The majority fails to address the issue of whether the death penalty has been generally applied in similar cases. It simply inquires whether there is an "arbitrary frequency of life without parole sentences over death sentences" among cases similar to Benn's. It cites no authority for this approach, and gives no reasons for departing from the standard we and other states with similar statutes have adopted.

Id. (citations omitted). Justice Utter argued that the majority's version of proportionality review is inconsistent with that employed by North Carolina, Pennsylvania, and Georgia, all of which have virtually identical comparative proportionality review statutes to Washington's. *Id.* "In these other states, the death penalty is deemed proportionate if it is applied in the vast majority of similar cases." *Id.*

148. *See supra* text accompanying notes 110-25.

found twenty-seven similar cases where three defendants were sentenced to death.¹⁴⁹ Finally, the concurrence discussed zero similar cases, but argued that there was a "family resemblance" between Benn's crime and others where the sentence of death was imposed.¹⁵⁰ It seems unlikely that a procedure that can be so easily manipulated to achieve any result adds to the prospects of an evenhanded and rational application of the death sentence. The disparity in judiciary opinion found in *Benn* hints at some of the deep rooted flaws in the court's current application of comparative proportionality review.

V. PROBLEMS WITH THE WASHINGTON SUPREME COURT'S APPLICATION OF COMPARATIVE PROPORTIONALITY REVIEW

A. Procedural Problems With Proportionality Review

A key issue to comparative proportionality review is how the court should choose a group of similar cases, as a defendant's life literally depends upon the justices' proclivities for finding "similar cases." The legislature has not provided any guidance in determining what features make a case similar.¹⁵¹ Therefore, the court has been left with the duty of developing a process that comports with the legislature's general intentions in enacting comparative proportionality review.¹⁵²

149. See *supra* text accompanying notes 130-47.

150. See *supra* text accompanying notes 126-29.

151. See WASH. REV. CODE § 10.95.130(2)(b) (1994).

152. Several commentators have suggested changes in procedures that would improve comparative proportionality review. For the most part, these commentators have focused on the problem of finding similar cases for comparison, and have suggested that by carefully categorizing the various factors of all potentially similar cases, a court performing comparative proportionality review could create a set methodology for determining what cases are similar and whether an individual case is proportionate. This would clearly limit judiciary discretion in determining whether a sentence was proportionate. See W. Ward Morrison, Jr., Comment, *Washington's Comparative Proportionality Review: Toward Effective Appellate Review of Death Penalty Cases Under the Washington State Constitution*, 64 WASH. L. REV. 111 (1989) (criticizing the way proportionality review is conducted in Washington and advocating the formulation of specific guidelines); David Baldus & George Woodworth, *Proportionality: The View of the Special Master*, CHANCE, Summer 1993, at 9. But see Herbert I. Weisberg, *Proportionality: An Alternative View*, CHANCE, Summer 1993, at 18.

One of the most interesting attempts at defining a procedure for comparative proportionality review was undertaken by the New Jersey Supreme Court. See Baldus and Woodworth, *supra*. In anticipation of conducting comparative proportionality review, a special master was appointed by the New Jersey Supreme Court to recommend various procedural methods. *Id.* at 9. After completing extensive research on death sentence cases, the special master categorized various factors that were indicative of culpability and moral blameworthiness. *Id.* at 12. Several different statistical methods, including multiple discriminant analysis, were used to reach a conclusion as to the proportionality of a defendant's death sentence. *Id.* at 13. In conclusion, the special master found that the methods developed would be useful, and would at least "expose to the light of day

Comparative proportionality review was included in Washington's statutory scheme to help rectify the procedural flaws found in the unconstitutional pre-*Furman* death penalty statutes.¹⁵³

Unfortunately, the Washington Supreme Court has neither developed nor articulated a process that adequately safeguards defendants from arbitrary death sentences. The method of comparative proportionality review that the court currently utilizes is in and of itself extremely arbitrary and susceptible to misuse.¹⁵⁴ In fact, it is difficult to conceive of a scenario in which a judge could not find a sentence of death proportionate. Only extremely heinous crimes can ever reach the stage in which the penalty of death is an option.¹⁵⁵ And because there is a relatively large group of potentially similar cases, a judge can always find superficially similar cases to rationalize a finding of proportionality. With so little legislative guidance as to what makes a sentence proportionate, the judges are essentially allowed to decide for themselves the fate of a particular defendant. The Washington Supreme Court's application of comparative proportionality review is as arbitrary as a jury's sentence, and therefore, is not presently a viable tool to prevent an arbitrary death sentence.

the decision-making process in individual cases that, in most states, is largely opaque." *Id.* at 17.

153. *State v. Lord*, 117 Wash. 2d 829, 908, 822 P.2d 177, 222 (1991), *cert. denied*, 113 S. Ct. 164 (1992).

154. For the purposes of this Comment, the term "misuse" is used to indicate that a judge can use comparative proportionality review to reach any conclusion he or she wishes, even if based on impermissible reasons. For example, even if a jury has arbitrarily sentenced a defendant to die while many similarly situated defendants were sentenced to life in prison, if a judge wishes to uphold the defendant's sentence of death, for whatever reason, comparative proportionality review, as currently applied, would not provide a meaningful safeguard to the defendant.

155. By creating a statutory scheme in which death is a possible penalty for certain crimes, the legislature has already determined that the penalty of death is appropriate for the crime committed. One of the main problems pointed to by the *Furman* court was that juries had uncontrolled discretion to decide the fate of an individual defendant. See *supra* text accompanying notes 24-36. This left states with two options to correct their death penalty statutes. First, as discussed in this Comment, states could develop various procedures to guide and limit jury discretion. Second, states could make the penalty of death mandatory for certain classes of crimes. In *Woodson v. North Carolina*, the U.S. Supreme Court found unconstitutional a statute that made the death penalty mandatory for those convicted of "any . . . kind of willful, deliberate and premeditated killing." 428 U.S. 280, 286 (1976) (quoting N.C. Gen. Stat. § 14-17 (Cum. Supp. 1975)). The opinion noted that the unique nature of the death penalty required that applicable defendants be given individualized consideration. *Id.* at 303-05. Washington also briefly experimented with a mandatory death penalty statute for certain types of first degree murder. See WASH. REV. CODE § 9A.32.046 (1975). After *Woodson*, the Washington Supreme Court held that this statute was unconstitutional. *State v. Green*, 91 Wash. 2d 431, 446-47, 588 P.2d 1370, 1379 (1979).

In ten opportunities to find a sentence disproportionate, the court has never done so.¹⁵⁶ This bare statistic hints at some of the problems with the court's current process of gathering a pool of similar cases. The next section will discuss some of these problems, along with some of the mistakes the court has made.

1. Inconsistencies in Choosing Similar Cases

The failure of the Washington Supreme Court to develop a consistent procedure for selecting a pool of similar cases has led to inconsistencies and unfairness to individual defendants. Many of the difficulties associated with choosing similar cases are closely related to the problem of finding a sufficient number of similar cases. Clearly, one "very" similar case alone is not sufficient to find a case proportionate or disproportionate. A lone case could be disproportionate itself, or some factor, unforeseen by the judges, may actually distinguish the case. The chance of this type of error is reduced by choosing a larger sample of similar cases.

But when one chooses a large sample of similar cases, because of the relative infrequency of aggravated murder and the fact-specific nature of the crime, it becomes easy to manipulate the process of choosing similar cases. In other words, when the judiciary has a large amount of discretion in choosing similar cases due to the necessity of obtaining a fairly large group of similar cases, it becomes increasingly easy to choose similar cases based on impermissible reasons. Upon examining the court's methodology for selecting similar cases, it is difficult to escape the conclusion that their decisions are often influenced by whether the justices are for, or against, capital punishment.¹⁵⁷

156. See *supra* note 98. The Supreme Court found the sentence of death proportionate in all of these cases.

157. While justices are certainly entitled to an opinion on capital punishment, their opinions should not be relevant for implementing comparative proportionality review. The court has a statutory duty to compare a given death sentence with "similar" cases. WASH. REV. CODE § 10.95.100 (1994). It is a violation of this duty to let one's personal feelings on capital punishment interfere with this selection process. The Washington Legislature enacted Washington's death penalty statute to make sure that the death penalty was, as constitutionally required, handed out in an evenhanded and fair manner. See *supra* text accompanying notes 37-57. Allowing subjective biases to creep into the selection process is clearly a violation of the requirement to be evenhanded. Additionally, the Washington Supreme Court should not be influenced by a desired result because comparative proportionality review was developed, at least partially, as a response to the *Furman* court's concern about excess judge and jury discretion. See *supra* text accompanying notes 24-36. Comparing a given death sentence to similar cases supposedly creates an objective procedure, uninfluenced by the biases of judge or jury, to determine if the sentence is appropriate. Comparative proportionality review will not be applied

There are several ways in which the Washington Supreme Court has manipulated the process of selecting similar cases. It is common for the justices to focus on a certain characteristic of the defendant that makes a death sentence unlikely. For example, the youth of the defendant is a powerful mitigating circumstance, and is almost certainly a common reason for a jury to grant leniency.

In *Benn*, where the defendant was middle-aged, the majority excluded young defendants who did not receive the death penalty from its pool of similar cases.¹⁵⁸ This decision rested on the premise that these cases were not similar, due to the young age of the defendants. And then, without any explanation, the majority included in its pool of similar cases a case where an eighteen-year-old named Hazen was sentenced to death.¹⁵⁹ As Justice Utter pointed out in the dissent, this is simply inconsistent.¹⁶⁰ When cases are excluded from the pool of similar cases solely because of a certain factor, all cases that have that factor must be excluded.¹⁶¹ By excluding all young defendants who did not receive the death penalty from the pool of similar cases, the majority was essentially saying that when a young defendant is sentenced to death it is disproportionate. When the majority included Hazen, they were using a disproportionate case to prove proportionality. The only plausible reason that the Hazen case was included by the majority was to make *Benn*'s sentence appear more proportionate.

This is an extreme example of how the selection of similar cases may be manipulated to avoid invalidating a jury-imposed death sentence. But because it is easy to make factual distinctions among heinous crimes, this error is committed to a lesser degree all too

objectively if judges are influenced by their personal beliefs about capital punishment.

158. *Benn*, 120 Wash. 2d at 691, 845 P.2d at 323 (majority opinion).

159. *Id.* at 692, 845 P.2d at 323.

160. *Id.* at 700, 845 P.2d at 327 (Utter, J., dissenting).

161. It may be useful to examine a hypothetical at this point. Assume that there are three defendants who have committed identical crimes. Defendant 1 (or case 1) is 45 years old, and was recently sentenced to death by a jury. Defendant 2 (or case 2) is 13 years old and was sentenced to life in prison for his or her crime. Defendant 3 (or case 3), on the other hand, is also 13 years old, but was sentenced to death. The Washington Supreme Court is performing comparative proportionality review for defendant 1, and defendant's 2 and 3 are both potentially similar cases.

The court might very well conclude that case 2 is not similar to case 1. In other words, since defendant 2 was so young, as opposed to defendant 1, the court could find that this mitigating factor distinguishes the two cases. But in doing so, the court cannot then turn around and find that case 3 is similar to case 1. Defendant 3 has the same mitigating circumstance as defendant 2, and therefore, would not have been included in the pool of similar cases if he had been sentenced to life. Including defendant 3 in the pool of similar cases unfairly biases the pool in favor of finding a sentence proportionate.

frequently. Interestingly, Justice Utter made the same mistake just paragraphs after criticizing the majority. In developing his own pool of similar cases, he found fifteen "similar" murders, several of which "were much more brutal [than Benn's murder], involving substantial conscious suffering before death."¹⁶² But if this was true, these cases should not have been included in his pool of similar cases. Presumably, due to the "more brutal" character of these crimes, Justice Utter would not have found these cases similar if the defendants had been sentenced to death.¹⁶³ This is inconsistent and biases the pool of similar cases in favor of finding a sentence disproportionate.¹⁶⁴

Another problem with the method the court uses to choose similar cases is the entirely arbitrary manner in which the court deals with mitigating circumstances. Since Washington's comparative proportionality review statute requires that the court consider "the defendant,"¹⁶⁵ a defendant's mitigating circumstances may be used to distinguish potential similar cases.¹⁶⁶ *State v. Rupe*¹⁶⁷ is a good example of this process.

Mitchell Rupe was convicted of killing two females during a bank robbery, and was sentenced to death.¹⁶⁸ It is hard to imagine a defendant with a greater number of mitigating circumstances. During

162. *Benn*, 120 Wash. 2d at 701, 845 P.2d at 328 (Utter, J., dissenting).

163. Since it is impossible to find exactly similar cases, it is not always inconsistent for more brutal cases to be included in the pool of similar cases. Cases where defendants commit more brutal murders must be treated consistently. In other words, the suitability for a case's inclusion in the pool of similar cases should not depend upon whether or not that defendant received the death penalty. But if cases are truly distinguishable because of their more brutal nature, they should not be included in the pool of similar cases. This is because it biases the pool in favor of making a sentence disproportionate to include "more brutal" crimes when the defendant is sentenced to life, and not to include "more brutal" crimes when the defendant is sentenced to death.

The problem of being consistent inherently conflicts with making sure that there is an adequate number of similar cases. For example, if you eliminate all potentially similar cases where the crime is slightly more brutal than the crime committed by the defendant, the pool of similar cases may be so small as to make any decision based on such a pool unreliable. The short answer to this problem is that a court may use cases that are slightly more or less brutal than the defendant's when it is necessary to obtain a sufficient number of cases, and all such cases are included in the pool. This is clearly less than a perfect solution because even the inclusion of all such cases will bias the pool in one direction or the other.

164. There probably were cases that were "more brutal" than Benn's where the defendant was sentenced to death, that did not get into Justice Utter's pool of similar cases because of their more brutal nature. In fact, Justice Utter claimed that Hazen should not be included in the pool of similar cases at least partially on the basis that his crime was "much more brutal." *Benn*, 120 Wash. 2d at 699, 845 P.2d at 327 (Utter, J., dissenting).

165. See WASH. REV. CODE § 10.95.070 (1994).

166. See *id.*

167. 108 Wash. 2d 734, 743 P.2d 210 (1987), *cert. denied*, 486 U.S. 1061 (1988).

168. *Id.* at 738, 743 P.2d at 214.

Rupe's sentencing hearing, approximately fifty people testified on Rupe's behalf.¹⁶⁹ These included friends and co-workers that he had known for his entire life. Rupe was well-liked and involved in many activities, including the Boy Scouts, the Civil Air Patrol, and the Mason County Search and Rescue Council.¹⁷⁰ He had served throughout the world in the army, had never committed a prior crime, and the dissent argued that there was strong evidence that Rupe was mentally disturbed.¹⁷¹ While the majority acknowledged that Rupe's background was uncommon for those sentenced to die, they nevertheless found the sentence proportionate.¹⁷² The court did not even discuss the fact that far more mitigating circumstances existed in Rupe's case than in any other case where proportionality review was performed.

While there is nothing inherently wrong with finding Rupe's sentence proportionate, it is interesting that powerful mitigating circumstances had no effect. In *Benn*, there were few mitigating circumstances,¹⁷³ and the court used this fact to distinguish, and thus eliminate from comparison, several potentially similar cases where the defendant did not receive the death penalty.¹⁷⁴ This is an example of the court unfairly applying comparative proportionality review. While a defendant's mitigating circumstances appear to be almost irrelevant for finding his own sentence disproportionate, they are readily used to distinguish cases in which the death sentence was not imposed.

Additionally, when a case like *Rupe* is used as a similar case, the court must be very careful to remain consistent. *Benn* exemplifies this potential problem. Presumably, *Benn*'s lack of mitigating circumstances eliminated several cases with mitigating circumstances from the majority's pool of similar cases. For example, if a defendant who had considerable mitigating circumstances did not receive the death penalty,

169. *Id.* at 780, 743 P.2d at 235 (Pearson, C.J., dissenting).

170. *Id.* at 780, 743 P.2d at 235-36.

171. *Id.* at 782, 743 P.2d at 236-37.

172. *Id.* at 770, 743 P.2d at 230. Rupe was 27 years old; therefore, he did not have the mitigating circumstance of youthfulness. Additionally, it is certainly conceivable that a crime could be so outrageous that any amount of mitigation would not matter. For example, if three children are raped, tortured, and killed, the sentence of death would probably be proportionate regardless of the mitigating factors offered (except perhaps the age of the defendant). See *State v. Dodd*, 120 Wash. 2d 1, 838 P.2d 86 (1992). Rupe was not such a case. Only three aggravating factors were present, and the victims did not undergo any conscious suffering. *Rupe*, 108 Wash. 2d at 783, 743 P.2d at 237 (Pearson, C.J., dissenting).

173. 120 Wash. 2d at 678, 845 P.2d at 316.

174. *Id.* at 690-91, 845 P.2d at 322-23. Mitigating circumstances can also make two cases similar. *Id.* at 684, 845 P.2d at 319.

Benn's lack of mitigating circumstances could be used to distinguish the former case. In *Benn*, *Rupe* is used as a similar case in which the defendant was sentenced to death.¹⁷⁵ The use of *Rupe* in *Benn* is inconsistent if a case identical to *Rupe*, except that the defendant did not receive the death penalty, would have been excluded from the majority's pool of similar cases based on the differing amounts of mitigation. This asymmetrical application of mitigating circumstances is inconsistent and unfairly biases the pool of similar cases in favor of finding a sentence proportionate.

Some of the arguments used by the court to rationalize the grouping of similar cases are simply not credible.¹⁷⁶ And upon

175. *Id.* at 692, 845 P.2d at 323.

176. For example, in *Rupe*, the court distinguished a potentially similar case on the grounds that only one juror did not vote for the death penalty. *Rupe*, 108 Wash. 2d at 769, 743 P.2d at 229. Surely, this is not a permissible means to distinguish a case, for our criminal justice system requires juror unanimity. Another questionable argument is used in *Rice*. The defendant in *Rice* suffered from a mental illness, and in distinguishing two cases where mentally ill defendants did not receive the death penalty, the court stated "it is difficult to determine the extent to which the defendants' mental disturbance caused the juries to grant leniency; thus, they are not very useful as comparison cases for the issue at hand." *Rice*, 110 Wash. 2d at 627, 757 P.2d at 916. This logic, taken to an extreme, would eliminate all consideration of mitigating circumstances from the selection of similar cases. For it is never possible to know precisely why a jury granted leniency, and it is not acceptable to use this excuse to distinguish potentially similar cases.

Another example involves *Rupe* and *Rice*. Due to the time delay between the trial court's sentencing decision and the mandatory appellate review of death penalty cases, both *Rupe* and *Rice* were sentenced to death at the trial court level before either sentence was reviewed at the appellate level. The court in *Rice* used the *Rupe* case as a similar case where the death penalty was imposed. *Rice*, 110 Wash. 2d at 625-26, 757 P.2d at 915. The court in *Rupe* used the *Rice* case as a similar case where the death penalty was imposed. *Rupe*, 108 Wash. 2d at 768, 743 P.2d at 229. This "bootstrapping" is clearly impermissible as it results in two cases, in and of themselves, making each other proportionate.

Recently, a federal district court concluded that the Washington Supreme Court performed an inadequate proportionality review and thereby violated the defendant's due process rights. *Harris v. Blodgett*, 853 F. Supp. 1239 (W.D. Wash. 1994), *amending and superseding* *State v. Harris*, 106 Wash. 2d 784, 725 P.2d 975 (1986). This case involved a defendant named Harris who was convicted of soliciting a killing and was sentenced to death. When the Washington Supreme Court performed comparative proportionality review, it stated that there were no similar cases where the death penalty was considered for a solicited killing. *Id.* at 1288.

The district court was troubled by several aspects of the Washington Supreme Court's decision. First, the district court acknowledged that Washington's death penalty statute does not define a similar case and it is difficult to ascertain what makes a case similar. The district court asked what factors can be considered in determining whether a case is similar. "What about age? Race? Sex? Pregnancy? . . . Disability? Mental Status? Diminished capacity? Emotional status? Competence of counsel? Delay in prosecution? Motive? Acquittals of co-defendants?" *Id.* at 1289. Second, the district court noted that there was no procedure for the parties to be notified as to which cases the court may consider similar until the parties received the court's ultimate decision. *Id.* Next, the district court noted that the death penalty statute provided for no alternative procedures if no similar cases could be found, and did not give a standard for reviewing selected cases. *Id.* The district court asked why several solicitation cases where the

reading several opinions, it is difficult to escape the conclusion that the lack of any consistent procedure makes a mockery of the idea of disciplined proportionality review. While one might argue that the best type of appellate review would be for the justices to simply decide if they believe the sentence of death is appropriate, *Furman* required more than this. One of the key flaws that compelled the U.S. Supreme Court to find several death penalty statutes unconstitutional was unguided jury and judge discretion.¹⁷⁷ The Washington Supreme Court's failure to apply any consistent procedures to choosing similar cases has resulted in comparative proportionality review where judges have unguided discretion and may almost choose similar cases at will. The Washington Supreme Court's failure to develop a consistent procedure is a direct result of never defining what objectives comparative proportionality review should address.

B. Substantive Purpose of Proportionality Review

The Washington Supreme Court has never clearly defined what makes a sentence proportionate. To do so, it must first determine what objectives are being furthered by comparative proportionality review.

One possible objective of comparative proportionality review is to safeguard the defendant who has received an aberrational sentence compared to a group of similarly situated defendants. That is, there should not be instances when a defendant has been sentenced to death, while many (perhaps ten) defendants who have committed the same type of crime under similar circumstances have been given more lenient sentences. This Comment will refer to this possible objective as the "outlier" case.¹⁷⁸

death penalty was not sought were not compared to Harris' case, and noted, "[a]t best, this analysis appears superficial and incomplete" *Id.* Finally, after commenting that the majority simply listed reasons why the death penalty was not "freakishly imposed," without actually comparing facts to similar cases, the court stated "the majority decision can be characterized as a traditional review, rather than a comparative review." *Id.* at 1289-90; *see infra* note 189. In sum, the district court concluded that the Washington Supreme Court had not fulfilled "the essential function of ensuring the 'evenhanded, rational, and consistent imposition of death sentences . . .'" *Id.* at 1291 (citing *Campbell v. Blodgett*, 997 F.2d 512, 522 n.12 (9th Cir. 1992)).

177. *Furman*, 408 U.S. at 314; *Woodson*, 428 U.S. at 303-05.

178. An outlier has been defined as "an observation that does not conform to the pattern established by other observations." RICHARD O. GILBERT, *STATISTICAL METHODS FOR ENVIRONMENTAL POLLUTION MONITORING* 186 (1987) (quoting W.F. HUNT, JR., ET AL., *ENVIRONMENTAL PROTECTION AGENCY, U.S. ENVIRONMENTAL PROTECTION AGENCY INTRA-AGENCY TASK FORCE REPORT ON AIR QUALITY INDICATORS, EPA-450/4-81-015* (1981)). This is analogous to its use in this Comment, because the "outlier" case deals with death

Another possible objective of comparative proportionality review is to safeguard the individual who has been sentenced to death, while the majority (fifty-one percent) of the defendants committing the same type of crime have not. Clearly, fewer defendants would be sentenced to death under this scheme than the "outlier" case. This Comment will refer to this second possible objective of comparative proportionality review as the "majority" case.

Comparative proportionality review in Washington realistically addresses only the "outlier" case. This is shown in *Benn*, where the majority's pool of similar cases includes three of seven defendants sentenced to death.¹⁷⁹ Since three of seven is less than fifty-one percent, the court obviously is not attempting to solve the "majority" case. Additionally, only the "outlier" case defendant would have any practical chance of having the court reduce his sentence by way of comparative proportionality review. The procedural defects discussed earlier insure that only in the "outlier" case will justices be at all constrained to find enough similar cases to find a sentence of death proportionate.¹⁸⁰

Post-*Furman* death penalty statutes must promote the evenhanded, nonarbitrary application of the death sentence.¹⁸¹ Specifically, the *Furman* court was concerned with discrimination, the lack of legislative guidance, and a rational means for distinguishing the few who receive the death penalty and those who do not.¹⁸² Each of these specific concerns will be examined in the following sections. By determining which of the two possible objectives of comparative proportionality review are more in line with the concerns of the *Furman* court, it becomes clear that Washington's review must change.

sentences that do not conform to the sentences of other similarly situated defendants.

179. *Benn*, 120 Wash. 2d at 692, 845 P.2d at 323.

180. See *supra* text accompanying notes 153-56. In *Benn*, the majority found three of seven similar cases where the death sentence was imposed. The dissent found three of twenty-seven. See *supra* notes 148-50. If the process can be this easily manipulated, only the defendant who is sentenced to death, where the vast majority of similarly situated defendants are not, could have any expectation that the Washington Supreme Court would find his sentence disproportionate.

181. See *supra* text accompanying notes 13-57.

182. See *id.*

1. Discrimination

Comparative proportionality review that strives only to rectify the "outlier" case does not address discriminatory application of the death penalty. This can be seen more clearly through the use of a hypothetical. Suppose a jury sentences a poor African-American to death, while under similar circumstances a Caucasian-American would have received life in prison. With a large pool of superficially similar cases, the court could almost certainly find two or three similar cases from which to conclude that the death sentence was proportionate.¹⁸³ But since only two or three similar cases are required, it seems very possible that these cases themselves could have been based on discrimination.

This problem is magnified for two reasons. First, because Washington's death penalty statute defines similar cases as those being reported since 1965,¹⁸⁴ many potentially similar death penalty cases were decided under an unconstitutional death penalty statute. Therefore, if you assume some of these unconstitutional pre-*Furman* cases were influenced by discrimination, then it is likely that there are cases based on discrimination which could potentially be used to find a sentence proportionate.¹⁸⁵ Second, there is no room for error in the present system. If two or three discriminatory death sentences pass judicial scrutiny, like a few bad apples fouling the barrel, they will enter the domain of potentially similar cases, where they may be used in perpetuity to affirm the proportionality of other discriminatory death sentences.

If comparative proportionality review is used to address the "majority" case, discriminatory death sentences will be reduced. In order to meet the fifty-one percent requirement, in any given group of similar cases, the "majority" case will require more similar cases in

183. See *Benn*, 120 Wash. 2d at 682-92, 845 P.2d at 318-23. In thirty multiple-murder cases, the court found only three similar cases where the defendant was sentenced to death. Twenty-three of the multiple-murder cases in which the defendants were not sentenced to death were found dissimilar. This was enough for the majority to find the sentence proportionate. *Id.*

184. WASH. REV. CODE § 10.95.130(2)(b) (1994); see *Benn*, 120 Wash. 2d at 705, 845 P.2d at 330 (Utter, J., dissenting).

185. This is probably a relatively minor problem. The majority opinion in *Benn* does not use any pre-1981 cases in determining whether the death sentence is proportionate. See *Benn*, 120 Wash. 2d at 704, 845 P.2d at 329 (Utter, J., dissenting). Nonetheless, the legislature should amend the proportionality statute to make sure that judges do not use pre-*Furman* cases to prove proportionality.

which the defendant was sentenced to death than the "outlier" case.¹⁸⁶ If more cases are required, then the results will not be so easily influenced by a few cases decided in a discriminatory fashion.

2. Jury Discretion

The *Furman* court pointed to excessive jury discretion as yet another flaw in the application of pre-1972 death penalty statutes. Comparative proportionality review is one way that Washington's death penalty statute limits jury discretion.¹⁸⁷ It does so by giving the court the power to overturn jury decisions when they are disproportionate to similar cases. As described below, excessive jury discretion could be further limited if comparative proportionality review addressed the "majority" case.

In either the "outlier" case or the "majority" case, judges have the power to alter "aberrational" death sentences. So in this sense, both types of cases limit jury discretion to some degree. Clearly, the "majority" case would further limit jury discretion because a court needs more similar cases in which the defendant was sentenced to death to uphold a death sentence.

The Washington Supreme Court has been reluctant to use comparative proportionality review to take the sentencing decision out of the jury's hands. As the majority stated in *Benn*, "[w]e have not sought to substitute this court's judgment for that of the jury."¹⁸⁸ This statement apparently indicates that the majority believes that jury autonomy is a valid reason for a reduced role for comparative proportionality review. This is simply wrong. The jury has not decided the issue of comparative proportionality review. The jury has never made a factual determination on the proportionality of the

186. This point can be illustrated by examining *Benn*, where there were three defendants sentenced to death in seven similar cases. See *Benn*, 120 Wash. 2d at 692, 845 P.2d at 323. Since three sentences of death out of seven similar cases (forty-three percent) does not make a sentence of death an aberration, the defendant's sentence of death should be found proportionate under the "outlier" case. In the "majority" case, four sentences of death in seven similar cases would be required to find a sentence proportionate. Under the "majority" case, since forty-three percent is less than fifty-one percent, the court would have found *Benn*'s sentence of death disproportionate. Clearly, more cases in which the defendant received the death penalty are required to find a sentence proportionate using the "majority" case than the "outlier" case.

187. Jury discretion may also be limited by requiring aggravating circumstances, bifurcated proceedings, mandatory appellate review, and separate consideration of mitigating circumstances. See WASH. REV. CODE §§ 10.95.020, .050, .070, .100 (1994).

188. *Benn*, 120 Wash. 2d at 693, 845 P.2d at 324. This is another indication that the Washington Supreme Court's application of comparative proportionality review only addresses the "outlier" case. If it also addressed the "majority" case, more jury decisions would be overruled.

sentence. They have looked at no similar cases, and are presumably basing their decision solely on the facts of their individual case. While the presumption that a jury sentence is valid is relevant to whether the defendant deserves to die, or any other factual determination that the jury has been asked to decide, comparative proportionality review is not such a determination. Furthermore, comparative proportionality review is not making a value judgment on whether the jury was "wrong,"¹⁸⁹ it is simply determining whether similarly situated defendants have been similarly sentenced to die. Comparative proportionality review is unrelated to any decision that the jury has made.

Jury discretion would be reduced if the Washington Supreme Court stopped deferring to the jury's ultimate decision on whether the sentence of death is warranted when the court performs comparative proportionality review. Additionally, adopting the "majority" case objective would further limit jury discretion by raising the standard of when a sentence is proportionate.

189. There is a distinction between traditional proportionality review and comparative proportionality review of a death sentence. Traditional proportionality review asks whether a given sentence is appropriate for a particular crime. *Pulley*, 465 U.S. at 42-43. Comparative proportionality review inquires into whether the death penalty in a particular case is unacceptable because disproportionate to the punishment imposed on others convicted of the same crime. *Id.* at 43. In fact, comparative proportionality review presumes that the death sentence is not traditionally disproportionate. *Id.*

The legislature, in writing a death penalty statute, has already determined that the punishment of death is traditionally proportionate for the crime of aggravated murder. Thus, the jury cannot be "wrong" in sentencing to death a defendant who has committed such a crime. However, comparative proportionality review is a separate issue from anything that the jury has been asked to decide, and should be treated as such by the Washington Supreme Court.

3. Distinguishing Those Who Receive the Death Penalty From Those Who Do Not

The infrequency of modern day executions led the *Furman*-court to conclude that no rational basis existed for distinguishing the few who were sentenced to death from those who were not.¹⁹⁰ Because comparative proportionality review is the one procedural safeguard that allows comparisons with other cases, it is uniquely capable of addressing this problem.

The "outlier" case objective protects defendants whose sentences of death were an aberration. But just because a sentence of death is not an aberration does not make a defendant's sentence distinguishable from others who did not receive the death penalty. The "majority" case, on the other hand, provides a meaningful basis for distinguishing between those who live and those who die. If a majority of similarly situated defendants receive the death sentence, the very fact that the defendant is among this majority provides the meaningful basis for his sentence. In other words, the defendant will not be placed in a situation where he is sentenced to death and five equally culpable defendants are not. The fact that under the "majority" case, a defendant sentenced to die will be similarly situated with similar defendants, at least means that a rational explanation can be made as to why a particular defendant has been chosen to die.

In sum, the "majority" case approach approximates the objectives of the *Furman* court much more closely than the "outlier" case approach. While Washington's death penalty statute is probably facially constitutional, the Washington legislature adopted the current statute in response to the constitutional infirmities identified by the *Furman* court.¹⁹¹ Thus, to comply with the legislature's intentions, and as a matter of basic fairness to those sentenced to death, Washington must alter its application of comparative proportionality review. Comparative proportionality review that addresses the "majority" case

190. *Furman*, 408 U.S. at 313 (White, J., concurring). Justice White stated: [A]nd I can do no more than state a conclusion based on 10 years of almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty. That conclusion, as I have said, is that the death penalty is exacted with great infrequency even for the most atrocious crimes and that there is no meaningful basis for distinguishing the few cases in which it is imposed from the many cases in which it is not.

Id.

191. See *supra* text accompanying notes 37-57.

would go a long way towards solving many of the *Furman*-related problems.

VI. CONCLUSION

It is time for the Washington Supreme Court to change its method of conducting comparative proportionality review. The court should implement the "majority" case by unequivocally declaring that a death sentence will be found proportionate only if a majority of similar cases have been decided the same way.¹⁹² The court must change the focus of comparative proportionality review from safeguarding the rare case when a jury decision is an aberration, to a means for protecting defendants given inequitable sentences.

Comparative proportionality review should be affirmatively and liberally used to insure that no Washington defendant will be sentenced to die arbitrarily. The review needs to become a barrier that must be surmounted if the state wishes to execute one of its citizens. Those sentenced to die deserve more out of comparative proportionality review than a meaningless pooling of "similar cases," where the result of proportionality is a foregone conclusion. Perhaps all that this Comment advocates is that the court recognize the potential of comparative proportionality review to answer many of the problems in today's death penalty cases.

192. One result that might occur by categorically adopting the "majority" case is the freezing of the status quo. For example, if juries represent the current views of society, it seems inappropriate to overturn a jury sentence based on past cases; it is possible that society's opinions have changed since the jury from the past made its decision. While this argument can be used against any form of comparative proportionality review, it is particularly applicable for the "majority" case. This is because the "majority" case does more than attempt to reign in an aberrant jury, but tries to create a means for distinguishing those who are sentenced to death and those who are not. The "majority" case would make it impossible for a jury to expand the death penalty based on the changing mores of society.

There are several counter arguments to this premise. First, since the death penalty is inherently different from any other type of penalty, perhaps the Eighth Amendment's guarantee against cruel and unusual punishment requires procedures that insure that the death penalty will never be inflicted arbitrarily. The "majority" case version of comparative proportionality review may come as close as any procedure can, absent the elimination of the death penalty, to making this guarantee. Justice Marshall hinted at the difficulty of eliminating the systematic defects that were present in *Furman*, and said that "the task of eliminating arbitrariness in the infliction of capital punishment is proving to be one which our criminal justice system—and perhaps any criminal justice system is unable to perform." *Godfrey v. Georgia*, 446 U.S. 420, 440 (1980) (Marshall, J., concurring).

Second, the "majority" case would only freeze the status quo in one direction. In other words, juries would still be perfectly capable of further limiting the application of the death penalty. If you assume that society will one day conclude that there is a better means of dealing with society's worst criminals than killing them, it is not inappropriate to restrict juries from sentencing defendants to death.

The procedural framework for determining which cases are "similar," illustrated in the *Benn* majority opinion, is satisfactory, but the court must pay more attention to fairness and detail. While judicial discretion in this area may not be entirely advisable, the alternative of a formalistic grouping and categorizing of cases is either unfair or unworkable.¹⁹³ Simply stated, assuming one could develop a procedure that defines when a case is similar and when one is not, such a procedure would only lead to unfairness in individual cases.¹⁹⁴ The "family resemblance" approach to choosing similar cases, advocated by the *Benn* concurrence, is unacceptable. Using vague terminology such as "family resemblance" adds nothing to determining whether an individual's sentence is similar to others, and seems frighteningly close to simply allowing judges to decide if the sentence of death is appropriate. Nonetheless, there are several ways that the Washington Supreme Court can improve its current approach.

First of all, the court must adhere to and remain absolutely consistent in its rationale. For example, if the court decides that a case in which the defendant received life in prison is not similar solely because of his youth, it cannot then turn around and use a young defendant who was sentenced to death as a similar case.¹⁹⁵ It is absolutely essential that the court include specific explanations of why certain cases were included or excluded to insure that the judiciary has

193. See *supra* note 152.

194. The categorical approach to finding similar cases is an apparent attempt to equate procedural methodology with fairness. Commentators that advocate this approach assume that a consistent procedure will result in a fair selection of similar cases. Unfortunately, it is simply not possible to develop a procedure that can account for the infinite varieties of murder. For example, even if the many varieties of murders could be categorized in terms that are indicative of moral culpability, there are ranges in each of these categories. For instance, the potential category of victim suffering clearly presents a wide range of the possible amounts and degrees of suffering.

It is impossible to imagine an equation that fairly defines proportionality. And it would be the pinnacle of unfairness to develop a restrictive methodology for choosing similar cases that could lead to less deserving defendants being sentenced to die. There is simply no way to get around allowing discretion in the choosing of similar cases, so it does not make sense to artificially force judges to work through procedures that add nothing to the prospects of fairness. Therefore, neither the legislature nor the judiciary should develop a restrictive methodology for determining when a case is similar. See generally Morrison, *supra* note 149, at 121 (the process of choosing similar cases often involves "the comparison of incomparables").

195. This is an easy example of an often difficult problem. For example, maybe the defendant who is sentenced to death, unlike the defendant serving life in prison, had a prior criminal record. The court could use the defendant who is sentenced to death as a similar case if it was the lack of criminal record that made the first case dissimilar. But the court must consider these possibilities, for it is impermissible to include the defendant who is sentenced to death in the pool of similar cases if the same defendant would have been excluded had he received a life sentence.

thought about the issue of consistency.¹⁹⁶ And while advocating that the court remain consistent may be advocating the obvious, the court has not been consistent in the past.¹⁹⁷

Second, the court should strictly scrutinize whether the death sentence is proportionate, and eliminate any presumption that the jury's sentencing decision was correct. The jury's sentencing decision is relevant to whether the defendant deserves to die, but has nothing to do with the issue of comparative proportionality review. Allowing judges to consider the jury's sentence is inconsistent with *Furman*. Simply put, the problem of excessive jury discretion is not limited if the court, in applying comparative proportionality review, gives deference to a jury decision that is entirely unrelated to the issue of comparative proportionality review.

Third, the court should make every effort to obtain a large pool of similar cases. To do so, the court should only distinguish cases based on broad categories that have a direct relationship to the moral culpability of the actor. Torture, age of defendant, number of victims and mental disturbance clearly fit under this category. Occasionally, there may still be insufficient similar cases to have confidence in the accuracy of the review. Under these circumstances, a court should use cases in which the crime was objectively not as bad.¹⁹⁸ The pool of similar cases will be biased in favor of finding a sentence disproportional.

196. It has been a common practice of the Washington Supreme Court to first list potentially similar cases and then list the cases that actually are similar. See, e.g., *Benn*, 120 Wash. 2d at 692, 845 P.2d at 323. There is often little or no explanation of how certain cases got from one list to the other or why certain cases were not included in the final list of similar cases. See *id.* This practice is absolutely unacceptable. This vague style makes it virtually impossible to determine what characteristics of a case lead to its inclusion or exclusion from the final pool of similar cases.

This Comment advocates specific explanations of why cases are included or excluded from the pool of similar cases. There are several reasons for this requirement. First, the requirement insures that the justices will think about the issue of consistency. Second, it will allow attorneys to determine why individual cases were included or excluded, making it possible in the future to argue where the justices have made mistakes or have been logically inconsistent. Finally, a strict explanation requirement addresses the *Furman* court's concern about excessive discretion by the judiciary. In other words, it will be much more difficult for the judiciary to be motivated by a desired result, or other impermissible reason, when they are forced to show their work.

197. See *supra* text accompanying notes 157-77.

198. For example, other factors being equal, a murder involving no torture is objectively not as bad as a murder involving torture. While allowing judges to choose which cases are "objectively not as bad" will allow the judiciary some discretion, it is the only alternative that does not unfairly prejudice the defendant. If the court explains, in detail, why certain cases were chosen as "similar," this will at least provide some assurance that the judiciary is remaining consistent and fair.

tionate, but this is a more acceptable result than using an unreliably small sample size or biasing the sample to favor the death sentence.

If the Washington Supreme Court alters comparative proportionality review in the manner described above, the review will be a powerful tool that can be used to protect the constitutional rights of defendants sentenced to death. The sentence of death is substantially different from any other type of sentence. And because the penalty is issued so rarely, in order to satisfy our basic notions of fairness, it must be applied in an evenhanded manner. Bringing comparative proportionality review to the forefront of determining when the sentence of death is appropriate will help solve the problem of arbitrary and unfair sentences of death.¹⁹⁹

199. This Comment concludes that Benn's sentence of death was disproportionate compared to the penalty imposed in similar cases. Without having the detailed factual record from which to truly perform comparative proportionality review, it is nonetheless easy to find, even giving the majority opinion the benefit of the doubt, that Benn's sentence was disproportionate.

The majority opinion in *Benn* found seven similar cases. *Benn*, 120 Wash. 2d at 692, 845 P.2d at 323. Three of these defendants were sentenced to death and at least two of these choices were questionable. The majority in *Benn* clearly excluded several potentially similar cases on the basis of the youth of the defendant. *Id.* at 691, 845 P.2d at 323. Including Hazen in the pool of similar cases is inconsistent unless the majority can rationally distinguish Hazen from the several young defendants left out of the pool of similar cases (Hazen was sentenced to death for a crime committed at the age of 18). Additionally, Rupe, who was sentenced to death, was included in the pool of similar cases despite considerable mitigating circumstances. *Id.* at 692, 845 P.2d at 323; see *Rupe*, 108 Wash. 2d at 780, 743 P.2d at 235 (Pearson, C.J., dissenting). Since the majority considered mitigating circumstances relevant in including Jeffries as a similar case, *Benn*, 120 Wash. 2d at 684, 845 P.2d at 319, the court needs to determine if Rupe would have been distinguished from Benn, on the basis of mitigation, if Rupe would have received life in prison. If so, Rupe is not a similar case.

The majority opinion also needs to discuss the four similar cases where the defendant was sentenced to life in prison. See *id.* at 692, 845 P.2d at 323. For example, it is possible that the crimes committed by these defendants were significantly "worse" than Benn's, and therefore, would have been excluded from the pool of similar cases had they received the death sentence. This appears unlikely, but maybe Runion, who killed one more person than Benn, might fall into this category. See *id.* at 687, 845 P.2d at 321.

Finally, the court needs to discuss why cases were excluded from the pool of similar cases. It appears that all the other potentially similar cases in which the defendant was sentenced to death were significantly more brutal than Benn's crime, and therefore, are distinguishable. See *id.* at 689-72, 849 P.2d at 322-23. There are several potentially similar cases where the defendant was not sentenced to death that do need to be further distinguished. Examples of these are Kenneth Peterson, who murdered a husband and wife, and William Kincaid, who murdered his wife and sister-in-law after a marital breakup. See *id.* at 702, 845 P.2d at 328-29 (Utter, J., dissenting).

Even assuming that the majority finds the same seven cases similar, under the advocated "majority" approach, fifty-one percent of similarly situated defendants must be sentenced to death if the court is to find a sentence proportionate. In this case, three of seven (forty-three percent) similar cases imposed the death penalty, and since forty-three percent is less than fifty-one percent, Benn's sentence was disproportionate. Benn should die a natural death in prison.