THE EVOLVING ROLE OF STATE CONSTITUTIONAL LAW IN DEATH PENALTY ADJUDICATION

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I. INTRODUCTION

A unique feature of citizenship in the United States is its duality. Unlike the natives of the United Kingdom or Germany for example, citizens of the United States may look to both the federal and state governments for the protection of rights.[1] A vindication of these rights will occur, most often, in the respective court systems of these governmental entities. Federal citizenship rights will generally trump any attempted diminution of those rights by a state, but the reverse is not true. A state, and in particular the highest court of a state, may interpret state constitutional law to confer rights above the floor of constitutional liberties found in the U.S. Constitution. In a sense this principle, oft-times referred to as "new federalism," is but a corollary of the well established premise of federal constitutional law that federal courts, including the U.S. Supreme Court, will defer to interpretation of state law as expounded by the highest court of a particular state.[2]

Although the concept of federalism has been part of the constitutional landscape since the earliest days of the Republic, its current blossoming is generally traced to Justice William Brennan who, in a 1977 law review article, encouraged state courts to assert

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1. In actuality a citizen of the U.S. may enjoy other levels of citizenship rights (and duties) in addition to those conferred by state law. Local law may also be a source of rights. This discussion, however, will be limited to examining the federal-state relationship.

2. Richard A. Matasar & Gregory S. Bruch, *Procedural Common Law, Federal Jurisdictional Policy, and Abandonment of the Adequate and Independent State Grounds Doctrine*, 86 COLUM. L. REV. 1291, 1372 (1986). It has been suggested that the principle is self-imposed and born of prudential consideration rather than constitutional norms. *Id.* at 1294.

residual state constitutional rights.[3] Prior to that time many lawyers and judges had assumed that state and federal definitions of individual rights had equivalent meanings. Although critics have asserted that Justice Brennan's views were simply a reaction to the dilution of federal constitutional protections by the rulings of his most recent colleagues, particularly in the area of defendants' rights in criminal prosecutions, the movement has assumed a natural ferment and has attracted adherents both in academia and in the courts.

Justice Brennan's encouragement to state courts to embark on the separate exposition of state constitutional rights has recently found support from disparate allies, including Chief Justice William Rehnquist.[4] In any event, the "new federalism" is now well established. In the past twenty years state courts have issued hundreds of opinions reflecting, with varying results, the application of state constitutional standards to fill in the perceived interstices of federal law. This Article will attempt to determine whether there is a functioning role for the new federalism in the application of capital punishment standards. In other words, are there any gaps in Eighth Amendment jurisprudence as announced by the U.S. Supreme Court that would permit the highest courts of the states to draw upon the residuum of state constitutional or statutory law to afford greater protection to defendants facing the death penalty? I conclude that while state decisional law is still developing, the uncertainty of capital punishment jurisprudence at the federal level may offer the prospect of increased state law application, particularly in the area of comparative proportionality in sentencing.

II.
THE HISTORICAL UNDERPINNINGS OF THE "OLD FEDERALISM"

Today, a defendant in criminal proceedings, even in a state court, will look to federal constitutional standards as the primary source of his entitlement to both substantive and procedural protections. It is a given that a state must comply with those principles of due process incorporated in the Fourteenth Amendment.[5] But it was not always so.

3. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 502–03 (1977).

4. *See, e.g.*, G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 169 (1998).

5. "A State's enforcement of its criminal laws must comply with the principles of substantial equality and fair procedure that are embodied in the Fourteenth

When the thirteen colonies broke free at the time of the American Revolution they asserted their sovereignty in various forms. For most, the expression of independence came in the form of constitutions, enacted in at least twelve of the colonies. Each of the early state constitutions sought to establish a framework for government, defining the relationship between branches and designating the powers of elected or appointed offices, but the structures were not uniform.[6] The most striking feature of these early state constitutions was the inclusion of a statement or declaration of the rights to be enjoyed by its citizens vis-à-vis the newly established governmental entity. The Virginia Declaration of Rights inaugurated the practice and seems to have become the model for most of the other original states.[7]

The Declaration of Rights and Fundamental Rules of the Delaware State, enacted on September 11, 1776, is fairly typical of the formal statements of rights adopted by several of the colonies following the Virginia model. In addition to defining the right of citizens to religious freedom, access to the legislature for redress of grievances and guaranteeing the "liberty of the press," the Delaware Declaration spelled out in detail the entitlements of citizens in criminal prosecutions. Thus, Section 14 provided:

> That in all prosecutions for criminal offences, every man hath a right to be informed of the accusation against him, to be allowed counsel, to be confronted with the accusers or witnesses, to examine evidence on oath in his favour, and to a speedy trial by an impartial jury, without whose unanimous consent he ought not to be found guilty.[8]

Amendment." McCoy v. Court of Appeals of Wis., Dist. 1, 486 U.S. 429, 435 (1988).

6. Among the enthusiasts for the variety of state constitutions was Thomas Paine, who wrote of "the happy opportunity of trying variety in order to discover the best . . . . By diversifying the several constitutions, we shall see which State flourish the best, and out of the many posterity may choose a model . . . ." THOMAS PAINE, A SERIOUS ADDRESS TO THE PEOPLE OF PENNSYLVANIA ON THE PRESENT SITUATION OF THEIR AFFAIRS (1778), *reprinted in* 2 THE COMPLETE WRITINGS OF THOMAS PAINE 277, 281 (Philip S. Foner ed., 1945).

7. *See* TARR, *supra* note 4, at 75–76. Tarr notes that only four states failed to include a declaration of rights in their first constitutions and, drawing upon the Virginia declaration, "their protections often match each other word for word." *Id.*

8. DECLARATION OF RIGHTS AND FUNDAMENTAL RULES OF THE DELAWARE STATE § 14 (1776).

Other provisions secured rights against self-incrimination, unlawful search and seizure, excessive bail, and the infliction of "cruel or unusual punishment."[9]

It is now acknowledged that when the delegates to the Federal Constitutional Convention gathered in Philadelphia in 1787 to draft the constitution for a national government to replace the ineffectual terms of the Articles of Confederation, they looked to their own respective state constitutions for guidance, particularly in the area of individual rights.[10] The later adoption of the first ten amendments to the Federal Constitution as a Bill of Rights was the key to ratification by all the states. As originally drafted, of course, the Bill of Rights was not directed to the states but only to the newly formed federal government.[11] Not until the adoption of the Fourteenth Amendment's Due Process Clause did the focus of restraint on governmental action extend to the states. Still, the restriction was mainly conceptual until the U.S. Supreme Court employed the notion of incorporation to apply the rights vouchsafed in the first ten amendments in full force against the activities of state governments. The incorporation of provisions of the Bill of Rights resulted, over time, from a series of rulings by the Supreme Court elaborating on defendants' rights in criminal cases.[12] Prior to the incorporation rulings most death penalty cases were finally adjudicated at the state level with little federal oversight.[13]

The Eighth Amendment prohibition on cruel and unusual punishment came into direct focus under the due process clause

9. *Id.* §§ 15–17.

10. The Articles of Confederation, adopted on November 15, 1777, was essentially a war-enabling agreement, binding the States "into a firm league of friendship" which conferred limited power to the newly established Congress. ARTICLES OF CONFEDERATION art. III (1777). The sole reference to criminal proceedings seems to address the requirement of extradition of persons "guilty of or charged with treason, felony, or high misdemeanor in any State . . . ." *Id.* art. IV.

11. The U.S. Supreme Court later confirmed that restriction in *Barron v. Mayor of Baltimore*, 32 U.S. (7 Pet.) 243, 247 (1833).

12. *See* RONALD D. ROTUNDA & JOHN E. NOWAK, 2 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 15.6, 423–24 (2d ed. 1992). When a provision of the Bill of Rights is made applicable to the states it comes encumbered with all previous federal interpretations under a "bag and baggage" theory. *Id.* at 427.

13. A notable exception was the ruling of the U.S. Supreme Court in the "Scottsboro Boys" case, in which the Court twice reversed death penalty convictions on due process grounds. Norris v. Alabama, 294 U.S. 587, 596 (1935) (reversing conviction because of racial discrimination in jury selection); Powell v. Alabama, 287 U.S. 45, 71 (1932) (reversing conviction because of denial of counsel to the accused).

when the Supreme Court struck down state laws mandating death sentences for certain crimes.[14] In the same year, the Court upheld state statutes which allowed the discretionary imposition of the death penalty under certain controlled standards.[15]

Since those landmark decisions in 1976, the U.S. Supreme Court has become the primary source of capital punishment jurisprudence. Until recently, the federal government had no statutory basis for imposing the death penalty[16] and thus the limits fixed by the Supreme Court in this area had become the paradigmatic example of federal regulation of state action. The Court's more recent rulings have been directed at trials conducted in the 38 states that now permit capital punishment. In *Ring v. Arizona*, decided in June 2002, the Court invalidated the death penalty process in one state and cast doubt on its viability in others.[17] With the large number of inmates on death row, particularly in California, Texas, and Florida, the debate over the standards for the implementation of the death penalty promises to continue. That debate should not be confined to the federal courts. State courts of last resort surely have a role to play. The effectiveness of their participation, however, is limited by the procedural restriction that state courts exercise state authority in a specific and definitive fashion.

III.
THE INDEPENDENT STATE GROUNDS UNDER TRADITIONAL FEDERALISM

As previously noted, the U.S. Supreme Court's primacy in reviewing issues of federal law that have arisen in state courts, after

14. *See*, *e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

15. Proffitt v. Florida, 428 U.S. 242, 259–60 (1976); Jurek v. Texas, 428 U.S. 262, 276 (1976); Gregg v. Georgia, 428 U.S. 153, 206–07 (1976). Four years earlier, in *Furman v. Georgia*, 408 U.S. 238 (1972), the Court had invalidated the imposition of death sentences on Eighth Amendment grounds in a wide variety of circumstances. But the five to four decision, supported by nine separate opinions, provided limited guidance as to whether the death penalty could be applied under acceptable standards.

16. Congress enacted a federal death penalty measure in 1994 through the Federal Death Penalty Act of 1994 (FDPA), but there have been few executions under the statute. Pub. L. No. 103-322, Title VI, §§ 60001–26, 108 Stat. 1959 (1994) (codified at 18 U.S.C. §§ 3591–98 (2000)). At least two lower federal courts have opined that its enforcement is of doubtful constitutionality. *See* United States v. Quinones, 196 F. Supp. 2d, 416, 420 (S.D.N.Y. 2002), *rev'd*, United States v. Quinones, 313 F.3d 49 (2d Cir. 2002); United States v. Fell, 217 F. Supp. 2d 469 (D. Vt. 2002). The Second Circuit, however, recently reversed one of those cases. *See* United States v. Quinones, 313 F.3d 49 (2d Cir. 2002).

17. Ring v. Arizona, 122 S. Ct. 2428, 2443 (2002).

appellate review by the highest court of a state, is the bedrock principle of federalism. Over time confusion arose, however, when the highest state court attempted to apply a bifurcated standard to defendants' rights by using the state's own constitutional norms as well as those established by federal decisional law. Often, the bifurcated analysis was ill-defined and ambiguous. In 1983, the U.S. Supreme Court attempted to provide a template for resolving the ambiguity in its seminal decision of *Michigan v. Long*.[18]

In *Michigan v. Long*, the Court reviewed a decision of the Michigan Supreme Court examining the authority of a police officer to search the passenger compartment of a motor vehicle incident to a *Terry*-type search following a traffic stop.[19] Because the Michigan Court invalidated the search on both Fourth Amendment grounds and a comparable provision of the Michigan Constitution, Long sought to preclude further review by the U.S. Supreme Court by arguing that the State court holding was based on a non-federal ground.[20] Writing for the majority, Justice O'Connor acknowledged that in previous cases the Court's "ad hoc method" of attempting to fix the limits of its review had been inconsistent and unsatisfactory, and had ill-served the Court's policy of refusing to decide cases on non-federal grounds.[21] Henceforth, the majority ruled, the Court would assume the state court relied upon principles of federal law, even if it sought to apply its own law, unless the state court made a "plain statement" that its holding rested upon adequate and independent state grounds.[22]

The "plain statement" requirement announced in *Michigan v. Long* has been the subject of considerable debate over whether it unduly restricts the efforts of state courts to apply separate constitutional rights.[23] As the evolutionary process of state constitutional

18. 463 U.S. 1032 (1983).

19. *Id.* at 1036–37. A *Terry*-type search is one in which a police officer may engage in a protective search for weapons in the absence of probable cause to arrest. *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968).

20. *Long*, 463 U.S. at 1037–38; *see also* People v. Long, 320 N.W.2d 866, 870 (Mich. 1982).

21. Michigan v. Long, 463 U.S. at 1039.

22. *Id.* at 1041. Justice Stevens, in his dissent, criticized the Court's assumption of federal jurisdiction, protesting that "the final outcome of the state processes offended no federal interest whatever" and that ultimately Michigan had "simply provided greater protection to one of its citizens than some other State might provide, or, indeed, than this Court might require throughout the country." *Id.* at 1068.

23. *See, e.g.*, Ann Althouse, *How to Build a Separate Sphere: Federal Courts and State Power*, 100 HARV. L. REV. 1485, 1509 (1987) (arguing that *Long* encourages uniformity and proper allocation of power between federal and state courts); Ran-

definition continues, however, there is clearly a need for lines of demarcation which establish the limits of federal review. Moreover, state courts seeking to define rights under state law that may exceed the federal floor are on clear notice that such rights must be announced in unambiguous language and precise terms. Thus, whether *Michigan v. Long* is considered a doctrinal statement under traditional notions of federalism, or part of the new federalism approach, it remains an important guide in measuring the extent to which the decisions applying state constitutional standards may provide guidance.

IV.
WHAT REMAINS FOR STATE REGULATION OF CAPITAL PUNISHMENT?

To the extent that the current view of federalism assumes federal oversight will ensure a minimum of individual rights and the states are free to experiment, the question naturally arises as to what the states may do in their laboratories under the aegis of state constitutions. Where individual rights are implicated in the application of capital punishment, the question extends, of course, to the role played by the states in the formulation of non-federal standards in the imposition of the death penalty.

Any comment on the role of the states in the area of capital punishment must begin with the premise that whether capital punishment may be imposed for commission of an offense is a matter, in the first instance, for a state to determine. While the U.S. Supreme Court appears to have restricted the imposition of capital punishment under due process standards, federal law obviously has not mandated its use in any respect. For the most part, the role of federal law, particularly at the level of judicial review, has been one of oversight of capital punishment convictions imposed in state courts.[24] When one speaks of the implementation of state constitu-

dall K. L. Collins, *Reliance on State Constitutions—The Montana Disaster*, 63 TEX L. REV. 1095, 1107–08 (1985) (arguing that *Long* imposes standards that restrict state court definition of rights); Robert C. Welsh, *Reconsidering the Constitutional Relationship Between State and Federal Courts: A Critique of* Michigan v. Long, 59 NOTRE DAME L. REV. 1118, 1121 (1984) (arguing against the "interstitial model" advocated in *Long*).

24. Even though the federal judiciary has assumed a dominant role, Congress has become indirectly involved in federal review of capital punishment convictions through recent efforts to restrict the use of *habeas corpus* to gain access to federal courts. Through passage of the Antiterrorism and Effective Death Penalty Act (AEDPA), Congress imposed time limits as well as substantive restrictions on the use of *habeas corpus* by defendants seeking federal court review of state imposed

tional law, it should be noted that state institutions responsible for implementing state law, whether in the area of capital punishment or otherwise, include more than just the judiciary. Legislators, who exercise the basic law-enacting function, will initially determine whether the organic or substantive law of the state authorizes the imposition of capital punishment. Furthermore, state legislatures, through statutory amendments, may limit or broaden the use of capital punishment. In certain states the governor, whether acting alone or in concert with executive agencies such as a Board of Pardons (or some analogous body) may, through the power of clemency, affect the frequency of the actual imposition of capital punishment.[25] The involvement of the non-judicial branches of state governments has been most noticeable in the current debate over whether the death penalty is fairly imposed. For the most part, however, state courts of last resort, exercising final review authority under state constitutional provisions, continue to be the principal fora for testing the legality of death sentences.[26]

While it is perhaps too soon to draw the conclusion that increased restrictions on the use of federal *habeas corpus* will reduce federal oversight of convictions in death penalty cases, that development must be factored into any discussion of the future role of state courts in the overall review of capital punishment convictions. Ironically, one feature of the restrictive approach adopted by Congress actually increases the effectiveness of state court review. Under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA),[27] certain restrictions on the granting of *habeas* relief to death penalty defendants apply only where the state has established procedures for affording competent representation in post-conviction proceedings at the state level.[28] This provision may provide an incentive to states to preclude federal *habeas* relief through a

death penalties. *See* Pub. L. No. 104-132, Title VII, 110 Stat. 1216 (1996) (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C., and 28 U.S.C.).

25. Beyond the granting of clemency in individual cases, governors in certain states, such as Illinois and Maryland, have ordered moratoriums through Executive Orders which have the effect of staying the imposition of capital punishment in an array of cases. *See, e.g.*, Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES, Feb. 1, 2000, at A1; Francis X. Clines, *Death Penalty is Suspended in Maryland*, N.Y. TIMES, May 10, 2002, at A20.

26. *See* James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX L. REV. 1839, 1847 (2000) (collecting data demonstrating that over forty percent of all capital sentences reviewed on direct appeal by state high courts were overturned on the basis of "serious error").

27. *See* Pub. L. No. 104–32, Title VII, 110 Stat. 1216 (codified as amended in scattered sections of 8 U.S.C., 18 U.S.C, and 28 U.S.C.).

28. 28 U.S.C. §§ 2261–66 (1994).

searching and more meaningful review of death penalty cases at the state level.

A. The Unanimity Requirement

Federal law firmly establishes that to prove guilt in a capital case the fact finder, whether judge or jury, must be satisfied as to the defendant's guilt beyond a reasonable doubt.[29] There remain, however, significant facets of the fact-finding process in capital cases, which have heretofore been, and remain, subject to state law definition. Among these is the unanimity requirement.

The requirement of jury unanimity is not mandated by federal law but is required in most states, either through constitutional requirement or statutory directive.[30] The unanimity requirement has been said to have its roots in the entitlement to trial by jury as it existed at common law. The basis for trial by jury under the Federal Constitution is not co-extensive with the historical underpinnings of that right under state law. For example, in *Claudio v. State*,[31] the Delaware Supreme Court, referring to the language of the U.S. Supreme Court in *Williams v. Florida*,[32] noted that the Court had found no basis to hold that the Federal Constitution sought to equate constitutional and common law characteristics of the jury.[33] In *Claudio*, the Delaware Supreme Court determined that Delaware's constitutional requirement that trial by jury be "as heretofore" included all the elements of the common law jury, including a unanimous verdict. Applying this standard, the court ruled that replacing a juror with an alternate after deliberations violated the Delaware Constitution.[34]

B. Evidentiary Rulings

In the area of evidentiary rulings, the decisions of state courts interpreting state constitutional law can have an indirect, but nonetheless significant, impact on death penalty cases. To the extent that state courts of last resort have imposed higher standards for the admissibility of evidence than those mandated by the U.S. Su-

29. The U.S. Supreme Court has recently emphasized the scope of this bedrock standard in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), by ruling that even sentence enhancements beyond the prescribed statutory maximum may be viewed as elements of the offense requiring proof beyond a reasonable doubt.

30. *See* Apodoca v. Oregon, 406 U.S. 404, 406 (1972).

31. 585 A.2d 1278 (Del. 1991).

32. 399 U.S. 78, 90 (1970).

33. *Claudio*, 585 A.2d at 1288.

34. This violation was held, however, to be harmless error. *See id.* at 1304.

preme Court, death penalty prosecutions originating in certain states might be affected, at least in the guilt phase of a capital case.

The disparity between federal and state admissibility standards varies depending on whether the highest court of a particular state has opted to interpret its state counterpart to the federal Bill of Rights in lockstep with the U.S. Supreme Court. Where this parallelism exists, the resolution of a criminal defendant's claim of infringement of rights will not vary, even when review is sought under comparable provisions of state constitutions. Indeed, certain states have enacted constitutional amendments to require conformity by restricting state courts from interpreting state constitutional exclusionary standards beyond that announced by the U.S. Supreme Court.[35]

Although interpretive variations have arisen in several aspects of Fourth Amendment jurisprudence, the difference is best illustrated by the debate over the "good faith" exception to the search warrant requirement. In 1984, the U.S. Supreme Court decided in *United States v. Leon* that if there is good faith on the part of law enforcement personnel in relying on a search warrant that is technically defective, the evidence seized thereby is not subject to suppression.[36] The rationale adopted by the majority in *Leon* was that since the primary justification for judicial adoption of the exclusionary rule was to deter police misconduct, deterrence is not advanced where good faith on the part of the police is established.

The "good faith" exception announced in *Leon* has received a mixed reception at the state level. Some courts have construed their own constitutional restrictions on search and seizure as not

35. In Florida the federal interpretation is the "floor" as well as the "ceiling," with no allowance for departure. For example, the Florida constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. *This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.* Articles of information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decision of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

FLA. CONST. art. I, § 12 (emphasis added).

36. 468 U.S. 897, 919–23 (1984).

accommodating a good faith exception.[37] Other jurisdictions have embraced the *Leon* good faith exception, either as a matter of choice or because parallelism was mandated by a specific state constitutional provision.[38]

The refusal of state courts, applying their own constitutions, to accept federally announced constitutional standards as fixing the limits of the exclusionary rule is somewhat peripheral to the continuing debate on the legal efficacy of the death penalty. This development is nevertheless significant. The extent to which many state courts have been unwilling to follow the federal lead in lockstep fashion strongly suggests that there is an emerging trend of increased use of state law in the area of individual rights. The role this development may play in death penalty cases will ultimately depend on the willingness of state courts of last resort to look to their own constitutional roots.[39]

C. Proportionality Review as an Exclusive State Function

As previously noted, most state constitutions contain restrictions against cruel and unusual punishment, which appear to parallel the Eighth Amendment. Since the death penalty has been a permissible punishment since the earliest days of the Republic, such parallel provisions have rarely been construed as *per se* prohibitions on the imposition of the death penalty.[40] Nevertheless, state

37. *See, e.g.*, Mason v. State, 534 A.2d 242, 254 (Del. 1987) (holding that the good faith exception does not excuse failure to comply with statutory requirements); State v. Marsala, 579 A.2d 58, 68 (Conn. 1990) (finding that the validity of search warrants should not be determined under a standard of "close enough is good enough" but rather, under the state constitutional mandate of probable cause); State v. Guzman, 842 P.2d 660, 671 (Idaho 1992) (holding that the exclusionary rule has broader purpose than deterrence of police conduct).

38. *See, e.g.*, Crayton v. Commonwealth, 846 S.W.2d 684, 688–89 (Ky. 1992) (applying good faith standard to state constitutional analysis); State v. Kingston, 617 So.2d 414 (Fla. Ct. App. 1993) (adopting *Leon* exception).

39. In rejecting the *Leon* cost/benefit analysis, the Vermont Supreme Court noted in *State v. Oakes*, 598 A.2d 119, 122 (Vt. 1991), that the empirical assessment mandated by the federal decision:

> can inform this Court's decision on the good faith exception only to the extent that it is persuasive. If the assessment is flawed, this Court cannot simply accept the conclusion the Supreme Court draws from it. To do so would be contrary to our obligation to ensure that our state exclusionary rule effectuates Article 11 rights, and would disserve those rights.

Id.

40. The highest courts of California and Massachusetts sought to invalidate the death penalty as cruel and unusual punishment under parallel provisions of their respective constitutions, but their rulings were subsequently nullified by con-

courts have applied the principle of proportionality to examine whether the imposition of the statutorily-authorized penalty for a designated offense is, *per se*, impermissible, or by examining the culpability of the defendant in comparison to that of other defendants similarly convicted. Instances of state courts declaring a statute unconstitutional because it imposes the death penalty for offenses not causing death are rare.[41] Of greater interest are the proportionality cases, which seek to examine the appropriateness of the death penalty on a comparative basis.

The principle of proportionality, as applied in state court review of death penalty cases, arises most often in claims that the punishment imposed was not proportionate to the level of the defendant's culpability when measured against similar crimes committed by other defendants. The analysis may be conducted under state constitutional standards or, where directed, by statute mandating direct review of death penalty convictions. The impetus for state court application of proportionality review is said to have resulted from the default position taken by the U.S. Supreme Court in *Pulley v. Harris* where the Court opined that there was no federal constitutional requirement for comparative proportionality review in death penalty cases.[42]

While proportionality review offers state appellate courts a theoretical non-federal mechanism for determining whether the death penalty has been appropriately imposed in a particular case, appellate courts attempting to conduct comparative proportionality review have struggled to devise a workable methodology. The principal argument advanced in favor of comparative proportionality review is that it acts as a safeguard against the arbitrary and excessive imposition of the death penalty. It has been contended that a jury, sitting in a single case, lacks the experience needed to evaluate the appropriateness of imposing the death penalty. Appellate judges, however, can measure the result in a specific case against

stitutional amendments. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS, AND DEFENSES § 13-3(a)(2) (3d ed. 2000).

41. *But see* State v. Gardner, 947 P.2d 630 (Utah 1997) (holding that statute authorizing death penalty for conviction of aggravated assault by prisoner violated state constitutional prohibition against cruel and unusual punishment).

42. 465 U.S. 37, 50–51 (1984). It has been argued, however, that while the Supreme Court has eschewed comparative proportionality review it has retained a form of inherent proportionality review for death penalty defendants based on mental capacity and age. *See* Atkins v. Virginia, 536 U.S. 304 (2002); Thompson v. Oklahoma, 487 U.S. 815, 838 (1988).

similar cases they have encountered in the criminal justice system.[43] Moreover, because they are removed from the emotional trial setting, appellate judges can exercise this function more aggressively.

It is true that appellate judges, sitting *en banc* as required by statute, will in most instances bring to the task of comparative proportionality review a cross-section of informed judgment and experience. The difficulty in application lies not in the ability of appellate judges to undertake such review, but in determining both the range of cases used for comparison and the weighing of the factors in an analysis of like cases and/or like defendants. Thus, devising a proper universe of cases remains the most challenging task in proportionality review. Should the comparison be limited to those cases in which the defendant actually received the death sentence? Or should it include those cases in which the defendant was charged with a death-eligible offense but received life imprisonment by reason of a jury verdict, or as occurs more often, because of a negotiated guilty plea?

The most troubling aspect of constructing a universe of cases is accounting for the element of prosecutorial discretion. The first level in the death penalty process is the charging step—a factor entirely within the control of the prosecutor. The factors that influence the prosecutor's use of discretion to charge, or not to charge, may vary. The motivation for aggressive charging of capital crimes is also open to serious question.[44]

The Supreme Court of New Jersey has struggled to frame a workable construct upon which to fashion review under a New Jersey statute which appeared to restrict the court's use of cases against which a comparison can be made. The task facing the New Jersey court, and other state courts attempting proportionality review, has been complicated by the need to define the universe of

43. *See, e.g.*, Penny J. White, *Can Lightning Strike Twice?: Obligation of State Courts After* Pulley v. Harris, 70 U. COLO. L. REV. 813, 816 (1999).

44. A study of the capital punishment system in Virginia, authorized by the state legislature in 2000, included, *inter alia*, an examination of the prosecutorial process of capital crimes in that state. The study reviewed the exercise of discretion by the Commonwealth's attorneys in each capital-eligible case both at the indictment-seeking stage and at the death-penalty-seeking stage. The report noted a significant disparity between high density population areas and low or medium density areas in the decision of the prosecution to seek the death penalty. The report concluded that a defendant's chance of being prosecuted for capital murder increases if he is being prosecuted in a low or medium density area. *See* Herman J. Hoying, *A Positive First Step: The Joint Legislative Audit and Review Commission's Review of Virginia's System of Capital Punishment*, 14 CAP. DEF. J. 349 (2002).

cases.[45] The court's efforts resulted in the appointment of a special master to examine the current methodology underlying proportionality review and to test its assumptions.[46] The court later accepted certain recommendations of the special master while rejecting others.[47]

There are significant problems in devising a workable methodology for applying comparative proportionality at the level of state appellate court review. But, if fairly conducted through the use of a reliable methodology, this form of state court review could provide the state judiciary with an opportunity to insure that the death penalty is fairly imposed.

V.
CONCLUSION

The new federalism fostered by the U.S. Supreme Court offers the opportunity for state courts—applying state constitutional norms as well as statutory standards—to play an increasingly active role in death penalty adjudication. Much of state-developed jurisprudence, particularly in the area of higher state standards for search and seizure, is peripheral. Other developments, however, have the potential for significant impact in death penalty cases. Since the overwhelming majority of death penalty cases are prosecuted at the state level, state courts have the opportunity, through an improved proportionality exercise, to perform a greater role in selecting "the few cases in which [the death penalty] is imposed from the many cases in which it is not."[48] If the states are successful in devising reliable techniques for dealing with the issue of excessiveness and arbitrariness in the imposition of capital punishment, they will have made a significant contribution to the primary goal of the new federalism—shared adjudication.

There are, however, two important caveats which must be expressed when one considers the role to be played by state courts under the new federalism. Federal constitutional standards have proven effective because of their permanency. Decisions of the

45. For example, the Delaware Supreme Court is required to conduct proportionality review in every death penalty case incident to a mandatory appeal. The statutory directive requires the Court to determine: "Whether . . . the death penalty was . . . disproportionate to the penalty recommended or imposed in similar cases . . . ." DEL. CODE ANN. tit. 11, § 4209(g)(2)(a) (2001).

46. State v. Loftin, 724 A.2d 129, 135 (N.J. 1999).

47. *In re* Proportionality Rev. Project, 735 A.2d 528 (N.J. 1999).

48. Godfrey v. Georgia, 446 U.S. 420, 427 (1980), *quoting* Gregg v. Georgia, 428 U.S. 153, 188 (1976).

U.S. Supreme Court defining individual rights retain a long shelf life primarily because they can be modified only by constitutional amendment—an unlikely event—or by the Court's retreat from its own established principles, a process that tends to span many years. State constitutions, on the other hand, are more easily changed and amendments undoing judicial decisions are not unusual, as the Florida and California experiences indicate. Secondly, there is the acknowledged tendency of state court judges, particularly those subject to the election process, to respond to political pressure and perceived voter reaction. Judges, even at the state supreme court level, have paid a price for exercising their duties in capital cases.[49]

The role to be played by state courts in the development of capital punishment jurisprudence under the new federalism remains unsettled but, nevertheless, certain tentative conclusions may be drawn. First, state courts seeking to apply separate state standards in capital cases must do so in the specific fashion mandated by *Michigan v. Long*. Secondly, some state courts will continue to define individual rights in criminal cases above the "floor" established by federal courts where the federal decisions are not persuasive or are found at odds with specific provisions of state constitutions. Finally, state courts seeking to establish the propriety of the death penalty in specific cases using proportionality review will succeed only to the extent they are able to craft a consistent and understandable methodology for comparison of cases. The debate fostered by the new federalism promises to continue.

49. For example, it is widely acknowledged that Justice Penny White was defeated for re-election to the Supreme Court of Tennessee primarily because she was perceived as "having a problem" with the death penalty. *See* John Gibeaut, *Taking Aim*, A.B.A.J., Nov. 1996, at 50.