

A REPLY TO PROFESSOR MANDERY

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I am very grateful to my colleague, Evan Mandery, for devoting so much time and effort to responding to my article on proportionality review. While we may not agree on proportionality review in capital cases, or on the death penalty itself, we very much agree about the nature of the academic enterprise. We both think that scholars should be able to engage on the battleground of ideas and remain able to work together harmoniously as colleagues.

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In my article, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)*, I stated that “comparative proportionality review is constitutionally unwarranted, methodologically unsound, and theoretically incoherent, and, therefore, should be abolished.”¹ Evan Mandery seems to concur. “If a state undertakes comparative proportionality review,” he says, “failure is inevitable.” “Whether a comparison of the reprehensibility of defendants might be desirable from the standpoint of fairness, Professor Latzer is almost certainly right that it is not possible to make meaningful empirical comparisons of defendants’ degrees of wrongdoing.”²

Mandery goes on to develop an alternative to comparative review, which he calls *specific* proportionality review (SPR). As I understand it, specific review is the same as what I described in my article as “inherent proportionality review,” except that the SPR

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¹ Barry Latzer, *The Failure of Comparative Proportionality Review of Capital Cases (With Lessons From New Jersey)*, 64 ALB. L. REV. 1161, 1162 (2001).

² Evan Mandery, *In Defense of Specific Proportionality Review*, 65 ALB. L. REV. 883, 911 (2002).

claim is based on very specific characteristics of the defendant.³ Inherent review applies the Eighth Amendment to certain broad classes of defendants or crimes, such as rapists,⁴ felony-murderers⁵ or adolescent murderers.⁶ If, based on contemporary standards, the class of defendants in question is found to be inherently non-deathworthy, the courts will prohibit a death sentence from being imposed on members of the class. Deathworthiness is determined by collecting statutes or jury decisions that authorize a sentence of death for the group in question. The relative dearth of such statutes or jury decisions is taken as an indicator of societal disapproval.

Mandery's construct, specific proportionality review, also determines the deathworthiness of a class of defendants, except that the class is created out of the specific characteristics of the SPR appellant. "Under specific review," Mandery says, "a murderer is not simply a murderer, but a non-triggerman felony murderer, or a murderer motivated by jealousy, or a female murderer, or some combination of any or all of these traits: a female non-triggerperson felony murderer motivated by jealousy."⁷ A second difference is that it is unlikely that SPR will determine deathworthiness by collecting statutes, as statutes are too general to be relevant to the specific characteristics raised in such a claim. Instead, SPR will probably have to rely primarily, if not exclusively, on jury decisions in cases with defendants with the same characteristics as the SPR claimant.⁸

Mandery thinks that SPR can avoid many of the pitfalls of comparative proportionality review (CPR) because "the court conducting comparative review . . . must impose its own notions of culpability to make sense of the verdicts" whereas "[s]pecific review requires no such value judgments."⁹ That is, comparative review asks "whether a particular defendant has been treated fairly as compared to other similarly situated defendants," while specific

³ See Latzer, *supra* note 1, at 1190-94.

⁴ See *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (holding that the death penalty for rape is disproportionate punishment).

⁵ See *Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the death penalty for certain felony-murderers is disproportionate punishment).

⁶ See *Thompson v. Oklahoma*, 487 U.S. 815, 838 (1988) (holding that the death penalty is disproportionate punishment for persons under age sixteen at the time of their offense).

⁷ Mandery, *supra* note 2, at 928.

⁸ Mandery says that specific proportionality review (SPR) relies on "jury verdicts and other empirical indicators of contemporary standards of decency," but he does not say what these "other empirical indicators" might be. *Id.* at 888.

⁹ *Id.* at 888.

review “asks a purely empirical question: How often have some set of offenders sharing a particular trait or traits been sentenced to die?”¹⁰ Professor Mandery contends that SPR was endorsed by the United States Supreme Court¹¹ and can be fruitfully employed by state appeals courts.¹²

My views are as follows. While Mandery’s construct is a theoretical improvement over comparative review, I have serious reservations about its implementation. Used in a small number of cases in which a colorable claim could be made respecting the proportionality of the death penalty, and used without rigid reliance on statistical methods, specific review might have its place. Indeed, it isn’t much different than inherent review, which is a legitimate Eighth Amendment doctrine. If, however, SPR were used routinely—and it has, I fear, the potential to stimulate claims in virtually every capital appeal—it would only add to the already overburdened appellate process in death penalty cases. Furthermore, overreliance on statistics could lead to the same bog that the New Jersey Supreme Court fell in with comparative review.

THEORETICALLY SOUND

Professor Mandery suggests that specific proportionality review is an Eighth Amendment requirement.¹³ His claim is that *Pulley v. Harris*¹⁴ may have deconstitutionalized a *procedural* right to comparative review, but it left intact a *substantive* right to a proportional death sentence.¹⁵ He is correct on this. *Pulley* never said or implied that sentences may no longer be challenged on grounds of disproportionality. There remains, after *Pulley*, an

¹⁰ *Id.* at 888.

¹¹ *See id.* at 904–05.

¹² *See id.* at 909–10. “The New Jersey experience shows, in short, that proportionality review understood as an attempt to evaluate community standards of decency with precision is a worthwhile enterprise that state courts have demonstrated they can perform well.” *Id.* at 913.

¹³ Mandery seems a bit tentative in proclaiming SPR a constitutional requirement. He says that SPR “is consistent with Eighth Amendment jurisprudence” and that the Supreme Court “requires specific proportionality review,” but he also thinks SPR is defensible “[w]hether required by the Constitution or not.” *Id.* at 909–10.

¹⁴ 465 U.S. 37 (1984).

¹⁵ See Mandery, *supra* note 2, at 900, discussing his view on how to interpret the case: *Pulley* is best interpreted as a rejection of the procedural right of a capital defendant to have his or her sentence comparatively reviewed by a state appellate court. The decision does nothing to alter the substantive right of a capital defendant to have the proportionality of death for his or her crime determined by reference to the specific facts of their case.

Id.

Eighth Amendment right to argue that one's death sentence is constitutionally disproportionate. The Court is quite clear, of course, that this means proportionality in the "traditional" or "inherent" sense, not in the comparative sense.¹⁶ That is, one may argue that a death sentence is cruel and unusual (as Justice White put it) "when imposed for a particular crime or category of crime," but not that it is "disproportionate to the punishment imposed on others convicted of the same crime."¹⁷

Mandery seeks to reconcile specific review with *Pulley* by constructing SPR so that it is not a form of comparative review, i.e., so that it does not determine if the defendant's sentence is evenhanded. Instead, specific review asks whether the sentence is cruel and unusual or disproportionate in the traditional sense. The new wrinkle is the focus on very specific defendant characteristics. SPR measures the proportionality of the death sentence for a very particular set of defendants—in Mandery's example, "a female non-triggerperson felony murderer motivated by jealousy."¹⁸ In essence, SPR is a method of determining disproportionality in the traditional sense where the claim concerns detailed characteristics of the defendant.

Because SPR is a variation on the inherent proportionality review theme, Mandery is correct to suggest that it is consistent with *Pulley*. But he is pushing his luck when he claims that the *Pulley* Court consciously endorsed specific review.¹⁹ Nevertheless, by avoiding the hopeless and inappropriate enterprise of determining whether similar defendants were treated alike, SPR is a marked improvement over comparative review.

¹⁶ See *Pulley*, 465 U.S. at 43, discussing the difference between inherent and comparative review:

[T]his Court has occasionally struck down punishments as inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime. . . .

The proportionality review sought by Harris, required by the Court of Appeals, and provided for in numerous state statutes is of a different sort. This sort of proportionality review presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular case because disproportionate to the punishment imposed on others convicted of the same crime.

Id. (footnotes omitted).

¹⁷ *Id.*

¹⁸ Mandery, *supra* note 2, at 928.

¹⁹ *Id.* at 904 ("It is further evident that while the *Pulley* Court rejected the notion that a defendant has a right to have proportionality review conducted by any particular court, it understood specific proportionality review to be the substantive right of every defendant.").

EXCESSIVE LITIGATION

Death-sentenced defendants have, to put it mildly, compelling incentives to file appellate claims. Even if they are unsuccessful, the sheer delay in the carrying out of their sentences is patently beneficial. If I were appellate counsel for a death row inmate, I'd jump at the chance to file a specific review claim, either as a stand-alone appeal or as part of direct review or some other post-conviction process. Mandery's proposal has the potential to stimulate an SPR claim in every death sentence case. Because it is based on the peculiar circumstances of each case, SPR appellants could cobble together a defendant-specific claim unique to each case ("black impoverished twenty-eight-year-old killer with learning disabilities"), demand that the reviewing court try to collect matching cases, and clog the courts with this new species of Eighth Amendment appeal.

Mandery anticipates the problem (to some extent), and suggests that the SPR "court could act as a screen for proposed subcategories that had no reasonable bearing on deathworthiness."²⁰ How this would work isn't quite clear, since the appellant would have to prepare and file the claim before the reviewing court could screen it. At any rate, there would have to be some effective limit on SPR if we are to avoid a serious floodgate problem.

This is no mere mechanical issue. The capital appeals process is already bloated—beyond, in my view, what is necessary for even the most meticulous review. Ten years—the average time period from sentence to execution—simply is too long for a fair and efficient system of review.²¹ If we are to avoid making a bad system worse, SPR or any novel ground for appeal needs to be constructed so as to minimize spurious claims. I'm not convinced that Mandery's screen proposal is sufficient.

REPEATING THE METHODOLOGICAL NIGHTMARE

There is a real risk that SPR will be saddled with many of the methodological flaws of CPR. Professor Mandery tells us that specific review and comparative review use the same methods. "The

²⁰ *Id.* at 930.

²¹ TRACY L. SNELL, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 2000, at 12 (2001) (stating that the average elapsed time from sentence to execution, 1977–2000, was 121 months).

two inquiries have different aims, but the analyses engaged are indistinguishable.”²² He illustrates:

For example, a murderer who admits guilt and has a history of drug abuse is relevantly categorized as a murderer. Operating on the presumption that the execution of anyone belonging to the universe of murderers is just, the court engaging in comparative review asks whether this defendant has been treated similarly to others murderers who have admitted guilt and possess histories of drug abuse. By contrast, specific proportionality review defines the relevant universe as murderers who have admitted guilt and have a history of drug abuse. It then asks whether the death penalty is suitable for such individuals, answering the question by reference to jury verdicts and other empirical indicators of contemporary standards of decency.²³

To engage in specific proportionality review, Mandery says that the court must look “to jury verdicts to see how similarly situated defendants have been treated, for the purpose of assessing whether standards of decency support the [death] penalty for this type of offender.”²⁴ If appeals courts were to take this seriously, they would have to collect, read, and code trial transcripts in all of a state’s homicide cases for the entire time period during which the state had a death penalty.²⁵ The reason for such a comprehensive case collection is to ensure that the analysis takes account of all cases with the relevant characteristics, and further to ensure an accurate assessment of the sentencing outcomes in those cases. Anything less would bias the results.

Assuming this monumental task could be accomplished, the reviewing court would then have to select out all cases regardless of sentence in which the defendant’s characteristics were similar to those of the appellant. This would require the development of a protocol for each SPR appeal as it arose, because each appeal, based as it is on specific defendant characteristics, will be *sui generis*. Finally, the reviewing court would have to assess outcomes (death or non-death) and make the difficult judgment as to whether there

²² Mandery, *supra* note 2, at 897.

²³ *Id.* at 888 (footnote omitted).

²⁴ *Id.* at 897.

²⁵ They might need plea hearing transcripts as well, although it is not clear whether Mandery thinks that prosecutorial decisions to accept a plea of guilty are an appropriate indicator of societal standards of decency.

were enough death sentences to support or overturn the sentence in the case under review.

Some of the comparative review methodologies—what the New Jersey Supreme Court called “frequency analysis”—may be unnecessary for specific review. On the other hand, maybe not. For instance, Mandery says that the so-called “salient factors test,” a statistical analysis, is the “most consistent with specific proportionality review.”²⁶ In my article on proportionality review I explored at great length the many problems created by these statistical methods and there is no need to revisit all that here.²⁷ I would simply remind readers that in New Jersey the initial case collection took four years,²⁸ errors in the coding of cases were common and serious,²⁹ and, in the end, the collected cases were insufficient for meaningful statistical analysis.³⁰ It seems safe to conclude that SPR presents a real risk of recreating many of the difficulties that New Jersey has been wrestling with for decades. The onerous case collection requirements alone should be enough to discourage state courts (outside of New Jersey, where the work has already been done) from undertaking such an analysis.

CONCLUSION

Specific proportionality review already is a possibility. Defendants are free, based on a quasi-inherent review theory, to raise Eighth Amendment challenges fashioned out of specific details of their cases. And appeals courts are free to take these claims seriously and to collect and compare outcomes in similar cases. This is what Professor Mandery hopes courts will do. Appeals courts are also free to summarily dismiss such claims or resolve them without elaborate case collection and statistical analysis. That is the route I recommend.

To establish a full-blown specific review process in a jurisdiction is to invite the second-guessing of sentencing juries in virtually

²⁶ See Mandery, *supra* note 2, at 916.

²⁷ See Latzer, *supra* note 1, at 1203–34.

²⁸ *Id.* at 1205.

²⁹ *Id.* at 1208.

³⁰ See, e.g., *id.* at 1221–22. Although some of the methods used in New Jersey for comparative proportionality review (CPR) would be inappropriate for SPR, the problem of insufficient cases is likely to plague SPR because of the narrow basis for case-selection. The more unusual the defendant characteristics that form the basis for an SPR appeal, the fewer comparison cases there will be. Similarly, the greater the number of characteristics combined for SPR review, the fewer the number of comparison cases with that particular combination of characteristics.

every death sentence case. We should remind ourselves that in every death penalty case, a jury will have heard first-hand all of the testimony in appellant's case, will have observed appellant every day for weeks throughout the presentation of that testimony, may well have heard him give his version of events or plead for their mercy, and then, following a painstaking examination of all the particulars of defendant's case, will have performed the solemn duty of rendering judgment on defendant's deathworthiness. And who better to judge that deathworthiness? Is it prudent to overturn *that* jury's judgment because of non-death sentences in *other* cases involving (in part) different facts and circumstances? To my thinking, the answer is clear. The judgment of the SPR appellant's jury should be reversed only in the most exceptional cases.

AN AFTERWORD ON PROSECUTORIAL DISCRETION

I cannot pass up this opportunity, graciously afforded me by the *Albany Law Review*, to respond to one other of Professor Mandery's criticisms, even though it scarcely relates to specific proportionality review, which is the focus of his article and my reply.

Mandery thinks my concern with the failure of comparative review to take account of prosecutorial discretion is misplaced. In my article of last year, I noted that comparative review was incapable of taking into consideration many perfectly legitimate reasons for seeking a non-death sentence, reasons that might, however, have nothing to do with a defendant's blameworthiness.³¹ Consequently, I complained, the life-sentence case total may be inflated with defendants who deserve death sentences, but do not get them for reasons unrelated to desert. Since comparative review requires the vacation of a death sentence when there are "too many" life sentences, CPR is biased against death sentences.

Mandery says that this is a "red herring" because any inflation due to prosecutorial discretion will manifest itself across the board, affecting the ratio of death-to-life cases in defendant's subcategory no more or less than the ratio of death-to-life cases in the entire case pool.³² That is, if the subcategory ratio is overstated by twenty percent, the total case pool is also likely to be overstated by twenty percent, and when the two ratios are compared they will stand in

³¹ See *id.* at 1235–39.

³² "On average, one would expect that the percentage of cases in which the death penalty was not sought for extrajudicial reasons would be the same as in the overall pool. Thus, accurate accounting for prosecutorial discretion will not change a defendant's ability to show disproportionality." Mandery, *supra* note 2, at 927.

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the same relationship as they would have had there been no inflation.

The short answer is that Professor Mandery does not know how prosecutorial discretion will affect the cases. There is no more reason to think that it will affect all case categories and the entire case pool equally than there is to believe that death sentences will be equally distributed across categories. If culpability considerations affect the categories differently—an essential premise of comparative review—then why shouldn't extrajudicial or provability considerations do likewise? The burden of proof should be on Professor Mandery to demonstrate that prosecutorial discretion has a negligible impact. I think the safer conclusion is that any process that fails to take account of what is concededly a major factor in the disposition of cases should be scrapped.