ARTICLES

UNFAIR AND CAN'T BE FIXED: THE MACHINERY OF DEATH IN OHIO

Alice Lynd[*]

[*] * Written with the assistance of Staughton Lynd and helpful suggestions from colleagues. As volunteer attorneys for the American Civil Liberties Union of Ohio, the Lynds were two of the lawyers representing prisoners at the Ohio State Penitentiary in a class action that established due process rights for prisoners in supermaximum security confinement. Austin v. Wilkinson, 189 F.Supp 719 (N.D. Ohio 2002), *aff'd in part, rev'd in part*, 545 U.S. 209 (2005). Death row prisoners became members of the class when death row was transferred from the Mansfield Correctional Institution to the Ohio State Penitentiary in 2005.

INTRODUCTION

IN October 2009, the American Law Institute (ALI) withdrew the death penalty provisions of its Model Penal Code.[1] Ohio's death penalty statute, like the capital sentencing provisions of many other states, is based on this section of the Model Penal Code[2] now repudiated by its immensely prestigious drafters.[3]

[1] . *Message From ALI Director Lance Liebman*, AM. L. INST. [hereinafter *ALI Resolution*], *available at* http://www.ali.org/_news/10232009.htm (last visited July 26, 2012) ("On October 23, 2009, the ALI Council voted overwhelmingly, with some abstentions, to accept the resolution of the capital punishment matter as approved by the Institute's membership at the 2009 Annual Meeting in May."). For supporting documents, see *id.* (follow "Capital Punishment" hyperlink to access REPORT OF THE COUNCIL TO THE MEMBERSHIP OF THE AMERICAN LAW INSTITUTE ON THE MATTER OF THE DEATH PENALTY (Apr. 15, 2009) [hereinafter ALI REPORT TO THE MEMBERSHIP], which includes Annex A, § 210.6, MODEL PENAL CODE; Annex B, Carol S. Steiker & Jordan M. Steiker, *Report to the ALI Concerning Capital Punishment* (Nov. 2008), *reprinted in* 89 TEX. L. REV. 367 (2010) [hereinafter Steiker & Steiker]; and Annex C, *Status Report on Capital Punishment* (Apr. 2008).

[2] . Henry J. Lehman & Alan E. Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEV. ST. L. REV. 8, 16 (1974). The guidelines for use by a jury or panel of judges in determining whether a convicted murderer should live or die were based on standards found in the American Law Institute's MODEL PENAL CODE § 210.6 (Proposed Official Draft 1962). Alan Norris was a sponsor and Henry Lehman was a co-sponsor of H.B. No. 511, a bill to amend the Ohio Criminal Code, which was introduced in 1971 and, after amendments in both the Ohio House of Representatives and the Ohio Senate, was passed and signed by the governor in 1972. The sections pertaining to the death penalty became effective on Jan. 1, 1974. Norris was also the chairman of the Criminal Law Section of the House Judiciary Committee. *Id.* at 8-11.

[3] . ALI's self-description reads:

> The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law. The Institute (made up of 4000 lawyers, judges, and law professors of the highest qualifications) drafts, discusses, revises, and publishes Restatements of the Law, model statutes, and principles of

The ALI also decided it would be futile to attempt to revise or replace the death penalty provisions of the Model Penal Code[4] "in light of the intractable … obstacles to ensuring a minimally adequate system for administering capital punishment."[5]

The major obstacle pinpointed by the ALI is a constitutional impasse addressed by several justices of the Supreme Court of the United States that has not been part of the death penalty debate in Ohio. Briefly,

- There is an irreconcilable conflict between the constitutional requirements of defined standards with regard to eligibility for the death penalty and absolute discretion when it comes to deciding whether or not to impose the death penalty;
- Any statute that provided defined standards with regard to eligibility for the death penalty would be so restrictive that the sentencer could not fully consider the unique characteristics of the offense and of the offender;
- Any statute that provided sufficient discretion fully to consider the unique characteristics of the offense and of the offender would open the door to arbitrary, discriminatory, inconsistent, and unreliable sentencing.[6]

This is an extraordinary moment. The death penalty, previously a political "third rail" that few legislators dared to touch, has been abolished by the states of New Jersey, New Mexico, Illinois, and Connecticut, and the governor of Oregon has announced that he will not allow further executions while he is governor.

In January 2011, Ohio Supreme Court Justice Paul Pfeifer, who helped to draft Ohio's death penalty statute, publicly called for its abolition. Almost at the same time, Terry Collins, former director of the Ohio Department of Rehabilitation and Correction, who witnessed more than thirty executions, publicly took the same position.

In March 2011, a bill was introduced in the 2011-2012 Regular Session of the Ohio House of Representatives "to abolish the death penalty"[7] and to "declare

> law that are enormously influential in the courts and legislatures, as well as in legal scholarship and education.…

ALI Overview, AM. L. INST., http://www.ali.org/index.cfm?fuseaction=about.overview (last visited July 26, 2012).

[4] . ALI REPORT TO THE MEMBERSHIP, *supra* note 1, at 4; Steiker & Steiker, *supra* note 1, at 371.

[5] . *ALI Resolution*, *supra* note 1.

[6] . The ideas explored in this article were stimulated by the paper prepared by Carol Steiker and Jordan Steiker at the request of the Director of the ALI. *See* ALI REPORT TO THE MEMBERSHIP, *supra* note 1, at 5. The author of this paper seeks to show the applicability of the Steikers' work to the administration of the death penalty in Ohio.

[7] . H.B. 160, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=129_HB_160.pdf. Section 1 of H.B. 160, to amend Ohio Rev. Code Section 2929.02(G) states: "Capital punishment is hereby abolished. A trial court that sentenced an offender to death prior to the effective date of this amendment shall conduct a hearing to resentence the offender. At the resentencing hearing, the court shall impose upon the offender a sentence of life imprisonment without parole." *Id.* § 1. A companion bill, S.B. 270,

an emergency" so as "to preserve life by preventing the execution of death sentences imposed before the effective date of this act but not yet carried out."[8] The bill, if enacted, would save the lives of close to 150 inmates who are sentenced to death but still alive.[9] Meanwhile, the State of Ohio continues to schedule executions.[10]

It is no longer the case that opposition to the death penalty amounts to political suicide in Ohio. All ten Catholic bishops of Ohio have expressed their support for its abolition.[11] Since the legislature made life imprisonment available as an alternative to execution, the number of death sentences handed down by juries has dropped precipitously.[12]

containing the same provision, was introduced in the Ohio Senate in December 2011. S.B. 270, 129th Gen. Assemb., Reg. Sess. (Ohio 2011), *available at* http://www.legislature.state.oh.us/bills.cfm?ID=129_SB_270.

[8] . H.B. 160 § 4; S.B. 270 § 4.

[9] . *Death Row Inmates*, OHIO DEP'T OF REHABILITATION & CORRECTION, http://www.drc.ohio.gov/Public/deathrow.htm (last updated Apr. 26, 2012).

[10] . *Searchable Execution Database*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/executions (last visited July 26, 2012). Ohio scheduled ten executions in 2011 of which five were carried out. Ohio scheduled eleven executions in 2010 of which eight were carried out. Ohio was second only to Texas in the number of executions carried out in 2010. *See also Death Row Residents Executed Under 1981 Law*, OFFICE OF THE OHIO PUB. DEFENDER, http://www.opd.ohio.gov/DP_ResidentInfo/dp_ExecutedUnder1981.pdf (last visited July 26, 2012) (showing eight executions in 2010, and five in 2011 out of 46 executions in Ohio beginning in 1999); Tracy L. Snell, *Capital Punishment, 2010—Statistical Tables*, U.S. DEP'T OF JUSTICE 2 (Dec. 2011), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/cp10st.pdf ("Between January 1 and December 19, 2011, 13 states executed 43 inmates …. Three states accounted for more than half of those executions …: [Texas (13), Alabama (6), and Ohio (5)].").

As of January 2012, Ohio had scheduled 14 executions to take place between January 2012 and January 2014. *See 2011 Execution Schedule* [sic], OHIO DEP'T OF REHABILITATION & CORRECTION, http://www.drc.ohio.gov/Public/executionschedule.htm (updated Jan. 5, 2012). *Accord Upcoming Scheduled Executions in the U.S.*, AMNESTY INT'L USA, http://www.amnestyusa.org/our-work/issues/death-penalty/us-scheduled-executions (last updated July 25, 2012) (showing 9 Ohio inmates scheduled for execution between September 2012 and January 2014).

[11] . Press Release, Catholic Conference of Ohio, Catholic Bishops of Ohio Call Upon Governor Kasich & Legislative Leaders to End the Death Penalty (Feb. 4, 2011), http://www.ohiocathconf.org/i/dp/pressreleaseDP2711.pdf.

[12] . *See* Paul E. Pfeifer, *Retire Ohio's Death Penalty*, CLEVELAND.COM (Jan. 26, 2011, 4:00 AM), http://www.cleveland.com/opinion/index.ssf/2011/01/retire_ohios_death_penalty_pau.html. *See also Death Row Current Residents*, OFFICE OF OHIO PUB. DEFENDER, http://opd.ohio.gov/DP_ResidentInfo/dp_CurrentResidents.pdf (last visited Aug. 5, 2012) (listing 48 defendants sentenced to death between 2002 and 2011, of whom 19 were sentenced within the last five years); *Former Death Row Residents Under 1981 Law*, OFFICE OF OHIO PUB. DEFENDER, http://www.opd.ohio.gov/DP_ResidentInfo/dp_FormerResidents.pdf (last visited Aug. 5, 2012) (listing 7 more defendants who were sentenced to death between 2002 and 2011, of whom 3 were executed, 1 committed suicide, and 3 had their sentences vacated).

A study by the Death Penalty Information Center showed 78 people were sentenced to lethal injection in 2011 (as of Dec. 15, 2011). This is the first time that number has dropped below 100 since the death penalty was reinstated in 1976. *The Death Penalty in 2011: Year End Report*, DEATH PENALTY INFO. CTR. (Dec. 2011), http://www.deathpenaltyinfo.org/documents/2011__Year__End.pdf. There were 112 death sentences in 2010. Death sentences have declined by nearly 75% from 15 years ago when more than 300 individuals were condemned. Executions

In September 2011, Ohio's Chief Justice O'Connor announced that the Supreme Court of Ohio and the Ohio State Bar Association were forming a Joint Task Force to Review the Administration of Ohio's Death Penalty and "to determine if the criteria, laws, and procedures regarding the imposition of the death penalty in Ohio are in need of attention."[13] When the Joint Task Force convened, the chairman questioned whether the standard of proof in capital cases should be changed to "beyond all doubt" instead of "beyond a reasonable doubt."[14]

In what follows, Part I sketches the constitutional constraints that Ohio legislators took into consideration when drafting Ohio's death penalty statute, and the failure of such statutes to overcome arbitrary, capricious, and discriminatory death sentencing.

Part II looks at how Ohio's death penalty is being administered in light of the systemic problems identified by the American Bar Association in its assessment of the Ohio capital punishment process.

Part III presents additional structural obstacles affecting not only Ohio but all of the United States, identified by the American Law Institute when it decided in 2009 to withdraw from its Model Penal Code the provisions on which Ohio's death penalty statute is based.

Part IV encapsulates the views of Ohio Supreme Court Justice Pfeifer and the former Director of the Ohio Department of Rehabilitation and Correction, and rationales offered by governors in other states when they approved the new laws of their states abolishing the death penalty. If the Ohio legislature and governor were to abolish the death penalty in Ohio, they would be in the company of other legislators and governors who have concluded, whether for moral or practical reasons or both, that their states would be better served by replacing the death penalty with imprisonment for life.

were down 56% from 12 years ago. *Id.* at 3. A CNN/Opinion Research Poll in October 2011 "found that for the first time in recent memory, more Americans favor a sentence of life in prison over the death penalty for murderers—50% to 48%." Bill Mears, *Public Discomfort Leads to Plunge in Death Sentences*, CNN.COM (Dec. 15, 2011, 2:20 PM), http://www.cnn.com/2011/12/15/justice/us-death-penalty-year-ender/index.html?hpt=hp_c2 (citing the Death Penalty Information Center study).

[13] . *Chief Justice Maureen O'Connor: First State of the Judiciary Address*, SUPREME COURT OF OHIO & THE OHIO JUD. SYS. (Sept. 8, 2011), http://www.sconet.state.oh.us/PIO/Speeches/2011/SOJ_090811.asp ("[The Task Force] will review the ABA death Penalty Report and identify areas in need of action and recommend the course of action."). She made clear, however, that the Task Force was not charged with making "a judgment on whether Ohio should or should not have the death penalty." *Id*.

[14] . Alan Johnson, *Panel Convenes on Death Penalty*, COLUMBUS DISPATCH, Nov. 4, 2011, at 1B, *available at* http://www.dispatch.com/content/stories/local/2011/11/04/panel-convenes-on-death-penalty.html. *But see* Andrew Welsh-Huggins, *Ohio Prosecutor: Give Victims Death Sentence Voice*, NBC4I.COM (Jan. 12, 2012), http://www2.nbc4i.com/news/2012/jan/12/ohio-prosecutor-give-victims-death-sentence-voice-ar-894365/. Hamilton County prosecutor Joe Deters, who is a member of the Task Force, "wants more factors to be considered, such as statements from family members, a defendant's criminal record and any evidence of posing a future danger. He also says a jury shouldn't have to vote unanimously for a death sentence to prevent 'rogue jurors' from thwarting the majority's wishes." *Id*. *See also Ohio Study Commission Meets*, STANDDOWN TEXAS PROJECT (Jan. 13, 2012), http://standdown.typepad.com/weblog/2012/01/Ohio-study-commission-meets.html.

Conclusion: Capital punishment is not being fairly administered in the State of Ohio. For the same reasons that the American Law Institute withdrew the death penalty provisions from the Model Penal Code,[15] Ohio cannot remedy by legislative or judicial action the arbitrary, inconsistent, and discriminatory administration of the death penalty. The time has come to abolish the death penalty in Ohio.

I. AN IRRECONCILABLE CONFLICT OF MANDATORY CONSTITUTIONAL REQUIREMENTS

This section sketches the constitutional constraints that Ohio legislators took into consideration when drafting Ohio's death penalty statute, and the failure of such statutes to overcome arbitrary, capricious, and discriminatory death sentencing.

The tension between narrowing the crimes for which an offender could be sentenced to death, and individualized consideration of circumstances that could lead to a sentence less than death, has been and is still at the heart of an unresolved constitutional debate.

A. United States Supreme Court Cases

1. *McGautha v. California*

A year before the Supreme Court of the United States invalidated the death penalty in 1972,[16] the Court reasserted the constitutionality of the death penalty as it was then being administered in California and Ohio.[17] In *McGautha v. California*, the Supreme Court addressed two issues: one, affecting both California and Ohio, whether the jury could impose the death penalty without any governing standards; and the other, affecting only Ohio, whether the jury could determine guilt and sentence the defendant to death in a single proceeding.[18]

Justice Harlan, writing for a majority of the Supreme Court in *McGautha*, traced the history of capital punishment for homicides under the common law in England and subsequently in the United States. "This history reveals continual efforts, uniformly unsuccessful, to identify before the fact those homicides for which the slayer should die."[19] The Court quoted the conclusion of the British Home Office: "'No simple formula can take account of the innumerable degrees

[15] . A draft of the sentencing provisions of the Model Penal Code issued in March 2011 states: "The new Code will contain no death penalty." MODEL PENAL CODE: SENTENCING § 6.06 (Tentative Draft No. 2, 2011), *available at* http://www.ali.org/00021333/Model%20Penal%20Code%20TD%20No%202%20-%20online%20version.pdf.

[16] . Furman v. Georgia, 408 U.S. 238, 239-40 (1972).

[17] . *See* McGautha v. California, 402 U.S. 183, 185-86 (1971) (reviewing the Ohio Supreme Court's decision in State v. Crampton, 18 Ohio St. 2d 182 (1969), and finding no constitutional infirmity in Ohio's death penalty procedures).

[18] . *Id*. at 185.

[19] . *Id.* at 197.

of culpability, and no formula which fails to do so can claim to be just or satisfy public opinion.'"[20] Thus, according to the Supreme Court, history demonstrates: "To identify before the fact those characteristics of criminal homicides and their perpetrators which call for the death penalty, and to express these characteristics in language which can be fairly understood and applied by the sentencing authority, appear to be tasks which are beyond present human ability."[21] These prophetic words by Justice Harlan have haunted the Supreme Court over the years.

Because every case is different, and no system could be devised that could fairly determine in advance what should be taken into account, the Supreme Court concluded in *McGautha* that giving the jury absolute, untrammeled discretion to pronounce life or death in capital cases did not violate the Constitution.[22]

At the time *McGautha* was decided, California had a "bifurcated" trial procedure. The jury first determined guilt or innocence. If the defendant was found guilty, the jury heard further testimony as to why the defendant should or should not be sentenced to death.

In Ohio, guilt and punishment were determined in a single proceeding.[23] The Ohio defendant argued that if he testified as to why he should not be sentenced to death, it would prejudice his case on guilt. But if he remained silent on the issue of guilt, he would not be able to plead his case on the issue of punishment.[24] If the defendant told the jury that the gun went off accidentally

[20] . *Id.* at 204-05 (quoting 1-2 ROYAL COMM'N ON CAPITAL PUNISHMENT, MINUTES OF EVIDENCE 13 (1949)).

[21] . *Id.* at 204.

[22] . *Id.* at 207-08.

> In light of history, experience, and the present limitations of human knowledge, we find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.… For a court to attempt to catalog the appropriate factors in this elusive area could inhibit rather than expand the scope of consideration, for no list of circumstances would ever be really complete.

Id. Further, Justice Harlan wrote:

> The only other significant discussion of standardless jury sentencing in capital cases in our decisions is found in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In reaching its conclusion that persons with conscientious scruples against the death penalty could not be automatically excluded from sentencing juries in capital cases, the Court relied heavily on the fact that such juries "do little more–and must do nothing less–than express the conscience of the community on the ultimate question of life or death." The Court noted that "one of the most important functions any jury can perform in making such a selection is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

Id. at 201-02 (internal citations omitted).

[23] . *Id.* at 191-92.

[24] . *Id.* at 210-11. *See also* Lehman & Norris, *supra* note 2, at 16 (quoting Ohio Legislative Serv. Comm'n, Proposed Ohio Criminal Code 282 (1971) (If the question of guilt and the question of penalty are considered by the jury at the same time, the defense is "in the position of having to

and killed the victim,[25] he would be admitting guilt; but if he did not testify, the jury would not hear his defense that he killed the victim accidentally. The *McGautha* Court concluded that there was "no constitutional infirmity" in having the issues of guilt and punishment determined in a single trial, rather than focusing the jury's attention on punishment after the issue of guilt was determined.[26]

In reaching its decision, the Supreme Court considered the death penalty section of the Model Penal Code, which provided for bifurcated trials and criteria for jury sentencing discretion.[27] The 1962 Proposed Official Draft of the Model Penal Code (which differs little from the provisions withdrawn in 2009) was attached as an Appendix to the *McGautha* opinion.[28] At that time, none of the states had adopted the criteria for imposing the death penalty that were proposed in the Model Penal Code.[29]

Even though guilt and punishment are now considered in separate phases of a capital trial, to this day juries have absolute discretion when deciding whether to recommend a sentence of life or death.[30] Justice Harlan retired before the Court's next major death penalty decision.

2. *Furman v. Georgia*

In 1972, the United States Supreme Court held in *Furman v. Georgia* "that the imposition and carrying out of the death penalty … constitute[d] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments."[31] The death penalty was being imposed in an arbitrary, capricious and wanton manner, with no rationality, consistency or predictability.

plead for the accused's life at the same time he is trying to convince the jury that he is not guilty in the first instance. The two arguments are not always compatible, and in a given case a plea for mercy can subtly incline the jury toward rendering a verdict of guilty.").

[25] . *See McGautha*, 402 U.S. at 194.

[26] . *Id.* at 186, 221.

[27] . McGautha v. California, 402 U.S. 183, 221 (1971).

> It may well be, as the American Law Institute and the National Commission on Reform of Federal Criminal Laws have concluded, that bifurcated trials and criteria for jury sentencing discretion are superior means of dealing with capital cases if the death penalty is to be retained at all. But the Federal Constitution, which marks the limits of our authority in these cases, does not guarantee trial procedures that are the best of all worlds ….

Id.

[28] . The Proposed Official Draft of the Model Penal Code § 210.6, with changes as of July 30, 1962, appears as an Appendix to the Opinion of the Court in *McGautha*, 402 U.S. at 222-25. When compared with § 210.6 of the Model Penal Code as of October 2009 (*see* Annex A, *supra* note 1), the text is the same (except that the Appendix in *McGautha* omits an alternative formulation of Subsection (2)).

[29] . *McGautha*, 402 U.S. at 203.

[30] . *Id.* at 208 ("[W]e find it quite impossible to say that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is offensive to anything in the Constitution.").

[31] . 408 U.S. 238, 239-40 (1972).

Each of the nine justices wrote his own opinion, five concurring and four dissenting. Justice White, who was one of the five concurring justices in *Furman*, later wrote for a majority of the Court in *Pulley v. Harris*: "The death penalty was being imposed so discriminatorily (Douglas, J., concurring), so wantonly and freakishly (Stewart, J., concurring), and so infrequently (White, J., concurring), that any given death sentence was cruel and unusual."[32]

Justice Stevens found two basic defects in the statutes invalidated by *Furman*: the death penalty was permitted for too many classes of offenses, and juries and trial judges were given "unfettered discretion" to impose a death sentence. "Given these defects, arbitrariness and capriciousness in the imposition of the punishment were inevitable, and, given the extreme nature of the punishment, constitutionally intolerable."[33]

Furman stands for the proposition that there should be definite standards, "guided discretion," as to who is eligible for the death penalty.[34] "*Furman* mandates 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."[35]

3. *Gregg v. Georgia*

After *Furman*, the legislatures of at least 35 states enacted new statutes permitting the death penalty for at least some crimes that resulted in the death of another person.[36] Most states were guided by the death penalty provisions in the American Law Institute's Model Penal Code that proposed certain "aggravating" and "mitigating" circumstances.[37] The Model Penal Code also recommended a "bifurcated" trial: the jury would decide guilt or innocence during the first phase of the trial and, if the defendant were found guilty, the jury would hear evidence relevant to sentencing during the second phase of the trial.[38]

[32] . Pulley v. Harris, 465 U.S. 37, 44 (1984) (citing *Furman*) (citations omitted)). *See also id.* at 60 (Brennan, J., dissenting, joined by Marshall, J.) ("[T]he Court [in *Furman*] was convinced that death sentences were being imposed in a manner that was so arbitrary and capricious that no individual death sentence could be constitutionally justified.").

[33] . *Id*. at 55 (Stevens, J., concurring in part and concurring in the judgment).

[34] . *See* Gregg v. Georgia, 428 U.S. 153, 199 (1976) (plurality opinion).

> *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant.

Id.

[35] . *Id.* at 189 (Stewart, J., writing for the plurality) (quoted by Stevens, J., writing for a majority of the Court in Zant v. Stephens, 462 U.S. 862, 874 (1983)).

[36] . *Id.* at 179-80.

[37] . *Id.* at 193 (referring to a comment in the 1959 Tentative Draft No. 9 of the MODEL PENAL CODE, and at 193 n.44 quoting the proposed aggravating and mitigating circumstances therein).

[38] . *Id*. at 195.

In 1976, the U.S. Supreme Court reviewed five states' new death penalty statutes.[39] The Supreme Court held in *Gregg v. Georgia* "that the death penalty is not a form of punishment that may never be imposed, regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it."[40] The Court "adhere[d] to *Furman*'s determination that where the ultimate punishment of death is at issue a system of standardless jury discretion violates the Eighth and Fourteenth Amendments."[41]

The Supreme Court in *Gregg* held that the statutory system under which Gregg was sentenced to death did not violate the Eighth and Fourteenth Amendments to the Constitution.[42] Georgia's new death penalty statute was an example of a state death penalty statute based on the Model Penal Code: it provided for bifurcated trials,[43] with aggravating and mitigating factors being weighed against each other during a separate sentencing procedure after determining guilt.[44] The sentencing procedures would "focus the jury's attention

[39] . The "1976 cases" decided by the Supreme Court on the same day are: *Gregg v. Georgia*, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976), and Roberts v. Louisiana, 428 U.S. 325 (1976).

[40] . *Gregg*, 428 U.S. at 187. *See also id.* at 169 ("We now hold that the punishment of death does not invariably violate the Constitution.").

[41] . *Id.* at 195 n.47.

[42] . *Id.* at 162, 207 (referring to the Eighth and Fourteenth Amendments). Justice Stewart wrote the plurality opinion for himself, Justice Powell and Justice Stevens. Justice White, writing for a majority of the Court in *Pulley*, summarized the opinions in *Gregg* as follows:

> In *Gregg*, six Justices concluded that the Georgia system adequately directed and limited the jury's discretion. The bifurcated proceedings, the limited number of capital crimes, the requirement that at least one aggravating circumstance be present, and the consideration of mitigating circumstances minimized the risk of wholly arbitrary, capricious, or freakish sentences. In the opinion announcing the judgment of the Court, three Justices concluded that sentencing discretion under the statute was sufficiently controlled by clear and objective standards. In a separate concurrence, three other Justices found sufficient reason to expect that the death penalty would not be imposed so wantonly, freakishly, or infrequently as to be invalid under *Furman*.

Pulley v. Harris, 465 U.S. 37, 45 (1984) (citing *Gregg*, 428 U.S. at 197-98, 222).

[43] . *Gregg*, 428 U.S. at 195.

> [C]oncerns expressed in *Furman* that the death penalty not be imposed in an arbitrary or capricious manner … are best met by a system that provides for a bifurcated proceeding at which the sentencing authority is apprised of the information relevant to the imposition of sentence and provided with standards to guide its use of the information.

Id.

[44] . Gregg v. Georgia, 428 U.S. 153, 196-97 (1976) (plurality opinion) ("Georgia did act … to narrow the class of murderers subject to capital punishment by specifying 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before a death sentence can ever be imposed."). The majority opinion in *Zant v. Stephens* further supported Georgia's death penalty statute in ruling:

> The [Georgia] statute does not, however, follow the Model Penal Code's recommendation that the jury's discretion in weighing aggravating and mitigating circumstances against each other should be governed by specific standards. Instead, … the aggravating circumstance merely performs the function of narrowing the category of persons convicted of murder who

on the particularized nature of the crime and the particularized characteristics of the individual defendant."[45] And, "[a]s an important additional safeguard against arbitrariness and caprice, the Georgia statutory scheme provides for automatic appeal of all death sentences to the State's Supreme Court."[46]

The premise that the jury must consider the particularized nature of the crime and the particularized characteristics of the individual defendant was developed more fully in *Woodson v. North Carolina*.[47]

4. *Woodson v. North Carolina*

In *Woodson v. North Carolina*, the Supreme Court held that North Carolina's mandatory death sentence for first-degree murder violated the Eighth and Fourteenth Amendments.[48]

Justice Stewart, writing for a plurality of the Court, stated that in capital cases "consideration of the character and record of the individual offender and the circumstances of the particular offense [are] a constitutionally indispensable part of the process."[49] Because death is "qualitatively different" from any other

> are eligible for the death penalty.
>
> …[T]he Court approved Georgia's capital sentencing statute even though it clearly did not channel the jury's discretion by enunciating specific standards to guide the jury's consideration of aggravating and mitigating circumstances.

462 U.S. 862, 875 (1983) (citing *Gregg*, 428 U.S. at 193).

[45] . *Gregg*, 428 U.S. at 206. *See also id.* at 189 (in support of the proposition that sentences should take into account the circumstances of the offense together with the character and propensities of the offender, Justice Stewart cites the American Bar Association Project on Standards for Criminal Justice, Sentencing Alternatives and Procedures (Approved Draft 1968), and a comment in the American Law Institute's Model Penal Code (Tentative Draft No. 2, 1954)).

> While some have suggested that standards to guide a capital jury's sentencing deliberations are impossible to formulate, the fact is that such standards have been developed. When the drafters of the Model Penal Code faced this problem, they concluded "that it is within the realm of possibility to point to the main circumstances of aggravation and of mitigation that should be weighed *and weighed against each other* when they are presented in a concrete case." While such standards are by necessity somewhat general, they do provide guidance to the sentencing authority and thereby reduce the likelihood that it will impose a sentence that fairly can be called capricious or arbitrary. Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner.

Id. at 193-95 (citing McGautha v. California, 402 U.S. 183, 204-07 (1971) and MODEL PENAL CODE § 210.6 cmt. 3, at 71 (Tentative Draft No. 9, 1959)). The aggravating and mitigating circumstances proposed by the ALI in § 210.6 of the 1962 Proposed Official Draft of the Model Penal Code are quoted in *Gregg*, 428 U.S. at 193 n.44.

[46] . *Gregg*, 428 U.S. at 198. *See also id.* at 207.

[47] . 428 U.S. 280, 303 (1976).

[48] . *Id.* at 305.

[49] . *Id.* at 304. Justice Stewart continues:

> This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more

punishment, a jury must consider both the circumstances of the crime and also the character and record of the offender when it decides whether or not to impose the death penalty.[50]

5. *Lockett v. Ohio*

After the United States Supreme Court's decision in *Furman v. Georgia* in 1972, Ohio passed a new death penalty law that was in effect from January 2, 1974 until July 3, 1978, the date on which *Lockett v. Ohio* was decided.[51] Ohio's 1974 death penalty statute listed seven aggravating factors, at least one of which must have been found, but the sentencing judge could consider only three statutory mitigating factors.[52] If none of those three mitigating factors were present, a death sentence was mandatory.[53] In Ms. Lockett's case, none of those mitigating factors were present.[54]

As explained in *Lockett*, *Woodson* held that the mandatory death penalty statute was invalid because it permitted *no* consideration of relevant facets of the

> from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Id. at 305. Justice Rehnquist, in his dissent, explained that the irreversible aspect of the death penalty has no connection with any requirement for individualized sentencing, and that death was not a cruel and unusual penalty for first-degree murder:

> One of the principal reasons why death is different is because it is irreversible …. This aspect of the difference between death and other penalties would undoubtedly support statutory provisions for especially careful review of the fairness of the trial, the accuracy of the fact-finding process, and the fairness of the sentencing procedure where the death penalty is imposed.…
>
> The second aspect of the death penalty which makes it "different" from other penalties is the fact that it is indeed an ultimate penalty, which ends a human life rather than simply requiring that a living human being be confined for a given period of time in a penal institution.…

Id. at 323 (Rehnquist, J., dissenting).

[50] . *Woodson*, 428 U.S. at 304-05.

[51] . 438 U.S. 586 (1978).

[52] . *Id*. at 607.

[53] . *Id*. at 608. Pertinent provisions of Ohio's 1975 death penalty statute appear as an Appendix to Opinion of the Court. *See id.* at 609-13.

> [O]nce it is determined that the victim did not induce or facilitate the offense, that the defendant did not act under duress or coercion, and that the offense was not primarily the product of the defendant's mental deficiency the Ohio statute mandates the sentence of death. The absence of direct proof that the defendant intended to cause the death of the victim is relevant for mitigating purposes only if it is determined that it sheds some light on one of the three statutory mitigating factors. Similarly, consideration of a defendant's comparatively minor role in the offense, or age, would generally not be permitted, as such, to affect the sentencing decision.

Id. at 608.

[54] . *Id.* at 592-94.

character and record of the individual offender or the circumstances of the particular offense.[55]

Lockett held that, to meet constitutional requirements, a death penalty statute must not preclude consideration of *any* relevant mitigating factors.[56] The Supreme Court found: "The Ohio death penalty statute does not permit the type of individualized consideration of mitigating factors we now hold to be required by the Eighth and Fourteenth Amendments in capital cases."[57] And held, "[t]he limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments."[58]

Lockett stands for the rule that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[59]

B. Death Penalty Provisions in the Ohio Revised Code

After the Supreme Court of the United States struck down Ohio's 1974 death penalty statute in *Lockett v. Ohio*, the Ohio legislature enacted the death penalty provisions that have been in effect, with several amendments, since 1981.[60]

Pursuant to *Furman* and *Gregg*, it was incumbent upon the Ohio legislature to determine which homicides would be defined as murder (as opposed to manslaughter or other lesser offenses), and to determine which murderers were eligible for the death penalty (as opposed to a sentence of a term of years or life imprisonment).

In Ohio, as in other states that adopted provisions from the Model Penal Code, the legislature defined certain factors as "aggravating circumstances" set forth in the Ohio Revised Code.[61] Ohio's aggravating circumstances include murder for hire; murder while a prisoner; murder of a law enforcement officer; murder with a prior conviction for attempted murder or murder or as part of a

[55] . *Id.* at 604 (explaining that in *Woodson*, the Supreme Court did not indicate which facets of an offender or offense it deemed relevant, or what degree of consideration it would require).

[56] . *Id.* at 604, 608.

[57] . *Id.* at 606.

[58] . *Id.* at 608.

[59] . *Id.* at 604. *See also* McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (quoting *Lockett* in a majority opinion by Justice Powell); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) ("By holding that the sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in *Lockett* recognizes that a consistency produced by ignoring individual differences is a false consistency.").

[60] . *Lockett*, 438 U.S. at 608; OHIO REV. CODE ANN. § 2929.04(A) (West 2010). Significant amendments since 1981 include the provision for life without parole as an alternative to life with parole eligibility after serving a certain number of years, and the elimination of direct appeal to an intermediate court of appeals before mandatory appeal to the Supreme Court of Ohio. *See* OHIO REV. CODE ANN. §§ 2929.03(D)(2)-(3), 2929.05(A) (West 2010).

[61] . OHIO REV. CODE ANN. § 2929.04(A).

course of conduct involving the killing of two or more persons; and murder in the course of committing a felony.[62]

Thus, Ohio provides for "narrowing" the class of murderers eligible for the death penalty.[63] The prosecution may seek the death penalty only if there are aggravating circumstances. However, if there are aggravating circumstances, the prosecution has absolute discretion as to whether or not to seek the death penalty in a particular case.[64]

Relevant "mitigating factors" pertain to the nature and circumstances of the offense and the history, character, and background of the offender. Since 1981, statutory mitigating factors have included youth of the offender, lack of a significant history of prior criminal convictions, strong provocation, and degree of participation in the acts that led to the death of the victim.[65] There is also a catch-all provision for "[a]ny other factors that are relevant to the issue of whether the offender should be sentenced to death."[66]

The jury considers the relevant evidence presented in both the guilt and sentencing phases of the trial. The jury weighs the aggravating circumstances against the mitigating factors,[67] and then determines whether the aggravating circumstances are sufficient to outweigh the mitigating factors.[68]

[62] . *See* Elaine C. Hilliard, Note, *Capital Punishment in Ohio: Aggravating Circumstances*, 31 CLEV. ST. L. REV. 495, 498, 510-11 (1982) (evaluating the aggravating circumstances that became effective on October 19, 1981, both separately and in the aggregate).

[63] . *See* State v. Murphy, 747 N.E.2d 765, 812 (Ohio 2001) (Pfeifer, J., dissenting) ("The constitutional purpose of statutory aggravating circumstances is to narrow the class of murderers to those deserving society's ultimate punishment, the death penalty.") (citing Zant v. Stephens, 462 U.S. 862, 877 (1983); *id.* at 813 ("When Ohio's death penalty statute was enacted, it was designed to be narrowly tailored to allow the execution of only the most vile and evil murderers.").

[64] . *See id.* ("The statute does not *require* prosecutors to seek the death penalty whenever an aggravating circumstance can be proven beyond a reasonable doubt; it simply prohibits them from seeking the death penalty absent a statutory aggravating circumstance. Prosecutors are expected to exercise their discretion when seeking the death penalty."). *See also McCleskey*, 481 U.S. at 357 (Blackmun, J., dissenting) ("[A]t every stage of a prosecution, the Assistant District Attorney exercised much discretion.") (internal citations omitted); *id*. ("There were no guidelines as to when [prosecutors] should seek an indictment for murder, as opposed to lesser charges; when they should recommend … acceptance of a guilty plea to a lesser charge, reduction of charges, or dismissal of charges at the postindictment-preconviction stage; or when they should seek the death penalty.") (internal citations omitted); *id.* at 358 (explaining that prosecutors were not required to make a record of why they sought an indictment for murder, why they did not seek the death penalty, or why they recommended a certain plea) (internal citations omitted).

[65] . OHIO REV. CODE ANN. § 2929.04(B)(2), (4), (5), (6) (West 2010).

[66] . *Id.* § 2929.04(B)(7).

[67] . *Id.* § 2929.04(B).

[68] . *Id.* § 2929.03(D)(2). *See also* State v. Jenkins, 473 N.E.2d 264, 277 n.10 (Ohio 1984) ("The concept of 'weighing' aggravating circumstances and mitigating factors as contained under R.C. 2929.03(D)(2) was approved in *Gregg*, wherein the court cited with approval the suggestion in the Model Penal Code that aggravating circumstances and mitigating factors 'should be weighed *and weighed against each other*.'") (citing Gregg v. Georgia, 428 U.S. 153, 193 (1976)). *But see* State v. Hill, 661 N.E.2d 1068, 1076 (Ohio 1996):

> [T]here is no constitutional requirement that aggravating circumstances be 'weighed against' mitigating factors.… The Eighth Amendment to the United States Constitution does require, however, that a defendant be found guilty of at least one valid, limiting, statutory aggravating circumstance, and that the defendant be provided full opportunity to present evidence in

If the jury unanimously finds that the aggravating circumstances outweigh the mitigating factors, the jury recommends a sentence of death.[69] If the jury cannot agree on death, the jury recommends life without parole or life with parole eligibility after serving twenty-five or thirty full years of imprisonment.[70]

On the verdict forms the jury states its conclusions that the defendant was or was not guilty as charged; whether they do or do not find the existence of each aggravating circumstance; and whether the defendant shall be sentenced to death, or to life without parole, or to life with eligibility for parole after serving a certain number of full years.[71] The jury does not state what facts it found to be persuasive in determining guilt. The jury does not state what mitigating evidence it considered when weighing the aggravating and mitigating circumstances, nor does it make any statement of reasons for why it recommended a sentence of life or death.

The trial court is required to make its own weighing of the aggravating and mitigating circumstances. If the jury recommends death, the trial court can then sentence the defendant either to death or to life imprisonment.[72]

To assist the appellate courts, the trial court is required to write an opinion setting forth the aggravating circumstances, its specific findings as to the existence of any mitigating factors, and the reasons why the aggravating circumstances were or were not sufficient to outweigh the mitigating factors.[73]

mitigation.

Id. (citing *Zant*, 462 U.S. 862).

[69] . OHIO REV. CODE ANN. § 2929.03(D)(2) (West 2010) (effective Oct. 19, 1981).

[70] . *Id*. § 2929.03(D)(2)-(3) (revised effective July 1, 1996). For offenses committed prior to July 1, 1996, § 2929.03(D) provided for life imprisonment with eligibility for parole after serving twenty or thirty years. Effective July 1, 1996, the options became life imprisonment without parole, or life imprisonment with parole eligibility after twenty-five or thirty years. *See Jenkins*, 473 N.E.2d at 278 (quoting OHIO REV. CODE ANN. § 2929.03(D)(2)). *See also* Margery B. Koosed, *On Seeking Controlling Law and Re-Seeking Death Under Section 2929.06 of the Ohio Revised Code*, 46 CLEV. ST. L. REV. 261, 266 (1998) ("Because the crime was committed after July 1, 1996, the effective date of Senate Bill 2 and Senate Bill 269, the penalties actually available under section 2929.03 were life imprisonment with parole eligibility after serving twenty-five (not twenty) full years, life imprisonment with parole eligibility after serving thirty full years, LWOP, or death.") (footnotes omitted); State v. Raglin, 699 N.E.2d 482, 489 (Ohio 1998) (sentencing provisions of S.B. No. 2 apply only to those crimes committed on or after July 1, 1996).

[71] . OHIO REV. CODE ANN. § 2929.03(D)(2).

[72] . *Id.* § 2929.03(D)(2)-(3). If the jury recommends a life sentence, the trial judge must impose the sentence recommended by the jury. *Id.* § 2929.03(D)(2)(c).

[73] . *Id.* § 2929.03(F). *See also* Pulley v. Harris, 465 U.S. 37, 56 (1983) (Stevens, J., concurring in part and concurring in the judgment) (observing that in *Proffitt v. Florida*, 428 U.S. 242 (1976), "'meaningful appellate review' was made possible by the requirement that the trial judge justify the imposition of a death sentence with written findings"). *But see* Brief of Am. Civil Liberties Union of Ohio Foundation, Inc. et al. as Amici Curiae Supporting Appellant at 75, *Jenkins*, 473 N.E.2d at 264 [hereinafter ACLU Amici Brief] (arguing that "[m]eaningful appellate review is impossible without a detailed statement by the jury describing how it weighed these factors…. Critical decisions on life or death questions implicating constitutionally protected rights are made in a vacumn [sic], with no standard and no record…."). *See also* State v. Maurer, 473 N.E.2d 768, 778 (Ohio 1984) ("[F]ailure of a trial court to comply [with its duty under OHIO REV. CODE ANN. § 2929.03(F) to articulate its reasoning] disrupts the review procedures enacted by the General Assembly by depriving the defendant and subsequent reviewing courts of the trial court's

The Supreme Court of Ohio is required to "review and independently weigh all of the facts and other evidence disclosed in the record in the case and consider the offense and the offender to determine whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors in the case, and whether the sentence of death is appropriate."[74] This is a *de novo* reweighing of the aggravating and mitigating circumstances.[75]

"[S]ome form of meaningful appellate review is constitutionally required."[76] Meaningful appellate review is essential to correct error at the trial level.[77]

Furthermore, although not constitutionally required,[78] the Ohio Revised Code requires the Ohio Supreme Court to perform a "proportionality review" to

perceptions as to the weight accorded all relevant circumstances. In a closer case, those perceptions could make a difference in the manner in which a defendant pursues his appeal and in which a reviewing court makes its determination.").

[74] . OHIO REV. CODE ANN. § 2929.05(A) (West 2010). In cases where a sentence of death was imposed for an offense committed before January 1, 1995, the Court of Appeals conducted an independent review before the case went up to the Supreme Court of Ohio. Death penalty cases now go directly from the trial court to the Supreme Court of Ohio.

> Article IV, Section 2(B)(2)(c) of the Ohio Constitution was amended, effective on January 1, 1995, to require direct review of death penalty cases by the Ohio Supreme Court; review by the courts of appeal was abolished. The amendment was implemented through RC 2929.05 and 2953.02. Appeals of murder convictions, where the killing took place before January 1, 1995, are not affected by the change; the initial appeal is filed in the court of appeals with a right of appeal in the Supreme Court if the conviction is affirmed at the first appeal.

LEWIS R. KATZ ET AL., BALDWIN'S OHIO PRACTICE: CRIMINAL LAW § 126.2 (2012). *See also* Joseph E. Wilhelm & Kelly L. Culshaw, *Ohio's Death Penalty Statute: The Good, the Bad, and the Ugly*, 63 OHIO ST. L.J. 549, 596 (2002).

> Under the 1981 version of Ohio's death penalty statute and the Ohio Constitution, a capital defendant convicted and sentenced to death had an appeal as of right both to the courts of appeals and the state supreme court.… [F]or cases in which the date of the alleged offense occurs on or after January 1, 1995, the capital defendant may appeal only to the Supreme Court of Ohio ….

Id.

[75] . *See* Bies v. Bagley, 519 F.3d 324, 336 (6th Cir. 2008), *rev'd on other grounds sub nom.* Bobby v. Bies, 556 U.S. 825 (2009).

> This independent review of the aggravating circumstances and mitigating factors is far more rigorous than the deferential standard of review which appellate courts normally apply to findings of fact by a trial court—even amounting to *de novo* review on both issues of law and issues of fact. Indeed, the Supreme Court of Ohio's reconsideration of the mitigating factors weighing against a death sentence "parallels that of a jury when the sentence of death is imposed ...."

Id. (internal citations omitted).

[76] . *Pulley*, 465 U.S. at 54 (Stevens, J., concurring in part and concurring in the judgment). *See also id.* at 59 (Brennan, J., dissenting) ("[O]ur decision certainly recognized what was plain from *Gregg*, *Proffitt*, and *Jurek*: that some form of meaningful appellate review is an essential safeguard against the arbitrary and capricious imposition of death sentences by individual juries and judges."); *Maurer*, 473 N.E.2d at 777-78 ("The United States Supreme Court has consistently given favorable endorsement to those aspects of state death penalty statutes which incorporate meaningful

determine whether death is the appropriate sentence.[79] Presumably, if the death penalty had been imposed for discriminatory reasons, it would be corrected on appellate review where the court, unlike a jury,[80] would be aware of comparable offenses and could recognize a sentence that was excessive when compared with the circumstances in other capital cases.

But Ohio does not consider any cases without death penalty specifications when it considers the appropriateness of a death penalty.[81] And, since 1987, the Ohio Supreme Court looks only at cases where the death penalty was imposed. They do not consider cases where there were death penalty specifications but the sentence was life imprisonment.[82]

appellate review of sentencing. The purpose of these provisions is to insure that the death penalty is not being arbitrarily or disproportionately imposed by juries.") (internal citations omitted).

[77] . *See Maurer*, 473 N.E.2d at 778 (stating that the purpose of an independent review is to correct omissions by the trial court). *See also* State v. Lott, 555 N.E.2d 293, 304 (Ohio 1990) (citing Clemons v. Mississippi, 494 U.S. 738 (1990)); State v. Fox, 631 N.E.2d 124, 131 (Ohio 1994) (citing *Maurer*, 473 N.E.2d at 778, and *Lott*, 555 N.E.2d at 304-06) (holding that independent review of the evidence and reweighing by the Supreme Court of Ohio will cure any flaws in the trial court's opinion).

[78] . The Ohio Supreme Court cites *Pulley* in support of the conclusion that, although commendable, proportionality review is not a constitutional requirement. *See* State v. Jenkins, 473 N.E.2d 264, 278-79 (Ohio 1984).

> The fundamental purpose behind proportionality review is to ensure that sentencing authorities do not retreat to the pre-*Furman* era when sentences were imposed arbitrarily, capriciously and indiscriminately. To achieve this result, state courts traditionally compare the overall course of conduct for which a capital crime has been charged with similar courses of conduct and the penalties inflicted in comparable cases.

Id. at 279 (citing Gregg v. Georgia, 428 U.S. 153, 204-06 (1976), and Proffitt v. Florida, 428 U.S. 242, 259-60 (1976)). *See also Pulley*, 465 U.S. at 59 (Stevens, J., concurring in part and concurring in the judgment) ("[P]roportionality review was viewed as an effective, additional safeguard against arbitrary and capricious death sentences.").

[79] . OHIO REV. CODE ANN. § 2929.05(A) (West 2010).

[80] . AM. BAR ASS'N, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE OHIO DEATH PENALTY ASSESSMENT REPORT, AN ANALYSIS OF OHIO'S DEATH PENALTY LAWS, PROCEDURES, AND PRACTICES 228 (Sept. 2007), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/assessmentproject/ohio/finalreport.authcheckdam.pdf [hereinafter ABA OHIO DEATH PENALTY ASSESSMENT] ("In most capital cases, juries determine the sentence, yet they are not equipped and do not have the information necessary to evaluate the propriety of that sentence in light of the sentences in similar cases.").

[81] . *Jenkins*, 473 N.E.2d at 304 ("[Ohio Revised Code] 2929.05 does not require a comparison of sentences in non-capital murder cases for proportionality review ...."). *See also* ACLU Amici Brief, *supra* note 73, at 48 (citing Hilliard, *supra* note 62, at 523) (pointing out that the Ohio system fails to track "aggravated murder cases which could have been capitally tried but which the prosecutor decided not to charge as such."). *See also* Hilliard, *supra* note 62, at 528 (concluding that "[w]hen, as in Ohio, there is unchecked prosecutorial discretion at the charging stage without an adequate tracking system, coupled with evidence of past discriminatory application involving substantially the same aggravating circumstances, the Supreme Court must take notice and act with the rights of the individual in mind.").

[82] . In 1987, the Ohio Supreme Court excluded from proportionality review cases where the defendant was indicted with capital specifications, but was sentenced to less than death. State v. Steffen, 509 N.E.2d 383, 395 (Ohio 1987) ("No reviewing court need consider any case where the

The pool for comparison excludes cases where there may have been comparable or greater culpability that did not result in a death sentence.[83] The Ohio Supreme Court apparently has never found a death sentence to be disproportionate.[84]

death sentence could have been sought but was not obtained ….”). Offenders whose criminal behavior was arguably more reprehensible than those sentenced to death may not have been indicted or found guilty with death penalty specifications.

> [In 1998, former Ohio Attorney General Anthony J. Celebreeze Jr.] offered 15 examples of Ohio crimes “in which aggravated murder could have been charged but was not” or “in which aggravated murder was proved but life sentence was imposed.” [In one of these cases], he said two murderers “stalked their victims like wild game animals and shot them with arrows from crossbows. They were not charged with death penalty specifications.”

Bill Sloat, *Former Attorney General Calls Death Penalty Racist*, PLAIN DEALER (Cleveland, Ohio), Nov. 18, 1998, at 5B. *See also* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at xix (Recommendation #1) (recommending that “direct appeals courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not” to “prevent discrimination from playing a role in the capital decision making process.”). *Accord id.* at 228, 240, 246-47.

[83] . *See* Getsy v. Mitchell, 495 F.3d 295, 306-07 (6th Cir. 2007). Getsy was convicted of murder for hire and sentenced to death. *Id.* at 303. But Santine, who hired and controlled Getsy, was tried after Getsy. Santine was acquitted on the murder-for-hire specification so was not sentenced to death. *Id.* at 304. A majority of the Sixth Circuit Court of Appeals, en banc, was troubled by the inconsistent sentencing but concluded there was no clearly established law from the U.S. Supreme Court that would permit them to overturn Getsy’s death sentence. *Id.* at 309. A minority dissented:

> [T]he defendant with the lesser culpability received the harsher sentence—the death penalty. … (“[S]imilarly situated codefendants should not be given arbitrarily or unreasonably disparate sentences.”) (“When a codefendant ... is equally as culpable or more culpable than the defendant, disparate treatment of the codefendant may render the defendant’s punishment disproportionate.”)…. The principle requiring rational, *proportionate punishment* is the essence of the rule of law.

Id. at 324 (Merritt, J., dissenting) (internal citations omitted).

[84] . *See* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 240 (“While the Ohio Supreme Court has reviewed over 250 death-imposed cases since the law requiring proportionality review went into effect, it has never vacated a death sentence on this ground.”).

C. Reliance on United States Supreme Court Opinions to Affirm Constitutionality

The Supreme Court of Ohio affirmed the constitutionality of the 1981 death penalty statute in *State v. Jenkins* and, three days later, in *State v. Maurer*.[85] The Ohio Supreme Court relied on cases decided by the United States Supreme Court.

> The Supreme Court has stressed the necessity of "genuinely narrow[ing] the class of persons eligible for the death penalty,"[86] while requiring the capital sentencing procedure guide and focus "the jury's objective consideration of the particularized circumstances of the individual offense and the individual offender before it can impose a sentence of death."[87]
>
> ….
>
> …Other factors which minimize the risk of arbitrary and capricious sentencing include bifurcated proceedings, the limited number of chargeable capital crimes, the requirement that at least one aggravating circumstance be found to exist and the consideration of a broad range of mitigating circumstances. In conjunction with prior United States Supreme Court decisions, the General Assembly incorporated the aforementioned factors into Ohio's death penalty statutes, as well as providing proportionality review—a meaningful function which reduces the arbitrary and capricious imposition of death sentences.[88]

And in *Maurer* the Supreme Court of Ohio stated, "The United States Supreme Court has consistently given favorable endorsement to those aspects of state death penalty statutes which incorporate meaningful appellate review of sentencing …. The purpose of these provisions is to insure that the death penalty is not being arbitrarily or disproportionately imposed by juries."[89]

It is apparent that the Supreme Court of Ohio assumed that a death penalty statute that was structured along lines already approved by the Supreme Court of

85 . *Jenkins*, 473 N.E.2d at 269-70 (para. 1 of the Court's syllabus), 281 ("Ohio's statutory framework for imposition of capital punishment, as adopted by the General Assembly effective October 19, 1981 … does not violate the Eighth and Fourteenth Amendments to the United States Constitution or any provision of the Ohio Constitution.") (quoted in State v. Maurer, 473 N.E.2d 768, 772 (para. 1 of the Court's syllabus), 774 (Ohio 1984). *See also* Hilliard, *supra* note 62, at 500 n.15 (noting that Jenkins was the "first person to be tried under Ohio's new death penalty statute").

86 . *Jenkins*, 473 N.E.2d at 273; Zant v. Stephens, 462 U.S. 462, 877 (1983) ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty, and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder."). *See also* Callins v. Collins, 510 U.S. 1141, 1152 (1993) (Blackmun, J., dissenting) ("In the first stage of capital sentencing, the demands of *Furman* are met by 'narrowing' the class of death-eligible offenders according to objective, fact-bound characteristics of the defendant or the circumstances of the offense.").

87 . *Jenkins*, 473 N.E.2d at 273 (quoting Jurek v. Texas, 428 U.S. 262, 273-74 (1976)).

88 . *Id.* at 279.

89 . State v. Maurer, 473 N.E.2d 768, 777-78 (Ohio 1984) (citing Gregg v. Georgia, 428 U.S. 153 (1976), and Proffitt v. Florida, 428 U.S. 242 (1976)).

the United States would, in fact, solve the problem of arbitrary, capricious, and discriminatory administration of the death penalty.[90] However, the premises on which those cases rested have been shown in practice not to have achieved their intended goals of rationality, consistency, predictability, and fairness.[91]

D. Failure of the Model Penal Code to Eliminate Arbitrariness and Discrimination

Adoption of the death penalty provisions of the Model Penal Code "rested on the false assumption that carefully-worded guidance to capital sentencers would meaningfully limit arbitrariness and discrimination in the administration of the American death penalty."[92] Having been guided by the provisions of the Model Penal Code, Ohio legislators made the same false assumption.

Eight years after the U.S. Supreme Court approved the constitutionality of death penalty statutes along the lines proposed by the American Law Institute in the Model Penal Code, Justice Brennan wrote that he thought the Supreme Court and the American public were deluding themselves if they thought the death penalty was being imposed by the states in a rational and nondiscriminatory way.[93]

[90] . The Supreme Court of Ohio dismissed numerous objections raised by the death-sentenced appellants in *Jenkins* and *Maurer*. *See* ACLU Amici Brief, *supra* note 73, at 8 (citing studies that demonstrate that the process of death-qualifying a jury has a clear tendency to suggest that the accused is guilty; and that death-qualified jurors are more prone to convict). The Ohio Supreme Court held in *Jenkins*, 473 N.E.2d at 270 (para. 2 of the Court's syllabus), 288, and in *Maurer*, 473 N.E.2d at 772 (para. 2 of the Court's syllabus), 776 (following *Jenkins*) ("To death-qualify a jury prior to the guilt phase of a bifurcated capital prosecution does not deny a capital defendant a trial by an impartial jury."); ACLU Amici Brief, *supra* note 73, at 27 (challenging the designation of felony murder as a capital offense. "[P]roof of the underlying felony may be used three times: first, as an individual offense; second, as the basis for purposeful murder committed in the course of the felony; and third, as an aggravating circumstance in the determination of the death or life sentence."); Hilliard, *supra* note 62, at 519 (asserting that the principal in a felony murder is afforded harsher treatment than the principal in a premeditated, cold-blooded killing). The Ohio legislature elevated felony murder to a capital offense. For other killings, additional factors must be present before the offense becomes a capital offense. But the offender who carefully plans to kill another is arguably more blameworthy than a person who, during the course of a robbery or flight, pulls the trigger because he has panicked. *Id.* at 518-20. *See also Jenkins*, 473 N.E.2d at 279-80 (concluding that the General Assembly set forth in detail when a murder in the course of a felony rises to the level of a capital offense, narrowing the class of homicides for which the death penalty become an available option); State v. Henderson, 528 N.E.2d 1237, 1238 (para. 1 of the Court's syllabus), 1243 (Ohio 1988) (following *Jenkins*) ("Ohio's capital sentencing scheme does not violate the Ohio or United States Constitutions even if the aggravating circumstances for felony murder are identical to the elements of aggravated murder.") (internal citations omitted).

[91] . *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104, 112 (1982) ("[T]he rule in *Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all.").

[92] . Steiker & Steiker, *supra* note 1, at 373.

[93] . Pulley v. Harris, 465 U.S. 37, 60 (1984) (Brennan, J. dissenting, joined by Marshall, J.).

> Upon the available evidence, … I am convinced that the Court is simply deluding itself, and also the American public, when it insists that those defendants who have already been executed or are today condemned to death have been selected on a basis that is neither arbitrary nor capricious, under any meaningful definition of those terms.

"[S]ince *Gregg v. Georgia* and its companion cases," Justice Brennan continued:

> [The Supreme Court] has allowed executions to take place and death rows to expand without fully examining the results …. Indeed, the Court seems content to conclude that, so long as certain procedural protections exist, imposition of the death penalty is constitutionally permissible. But a sentencer's consideration of aggravating and mitigating circumstances combined with some form of meaningful appellate review does not by itself ensure that a death sentence in any particular case, or the death penalty in general, is a constitutional exercise of the State's power. Given the emotions generated by capital crimes, it may well be that juries, trial judges, and appellate courts considering sentences of death are invariably affected by impermissible considerations. Although we may tolerate such irrationality in other sentencing contexts, the premise of *Furman* was that such arbitrary and capricious decisionmaking is simply invalid when applied to *"a matter [as] grave as the determination of whether a human life should be taken or spared.'" As executions occur with more frequency, therefore, the time is fast approaching for the Court to reexamine the death penalty, not simply to ensure the existence of adequate procedural protections, but more importantly to re-evaluate the imposition of the death penalty for the irrationality prohibited by our decision in* Furman.[94]

In Justice Brennan's view, "[t]he most compelling evidence that the death penalty continues to be administered unconstitutionally relates to the racial discrimination that apparently, and perhaps invariably, exists in its application."[95] Racial discrimination, however, was not the only irrationality that Justice Brennan believed was infecting the death penalty as it was being applied.

> [I]f the Court is going to fulfill its constitutional responsibilities, then it cannot sanction continued executions on the unexamined assumption that the death penalty is being administered in a rational, nonarbitrary, and noncapricious manner. Simply to assume that the procedural protections mandated by this Court's prior decisions eliminate the irrationality underlying application of the death penalty is to ignore the holding of Furman and whatever constitutional difficulties may be inherent in each State's death penalty system.[96]

E. Guided Versus Standardless Discretion

The American Law Institute is not alone in concluding that the constitutional requirements of guided discretion (as to death penalty eligibility), and absolute discretion (as to whether or not the death penalty shall by imposed

Id.

94 . *Id.* at 64 (quoting *Zant*, 462 U.S. at 886-87) (other internal citations omitted).

95 . *Id.* at 65.

96 . *Id.* at 67.

in an individual case) are in irreconcilable conflict. Numerous U.S. Supreme Court Justices have reached the same conclusion.[97]

As early as 1983, Justice Marshall decried, all the state has to do is require the jury to find one aggravating circumstance.

> Once that finding is made, the jurors can be left completely at large, with nothing to guide them but their whims and prejudices. They need not even consider any statutory aggravating circumstances that they have found to be applicable. Their sentencing decision is to be the product of their discretion and of nothing else.
>
> If this is not a scheme based on "standardless jury discretion," I do not know what is.…
>
> …The only difference between Georgia's pre-*Furman* capital sentencing scheme and the "threshold" theory that the Court embraces today is that the unchecked discretion previously conferred in all cases of murder is now conferred in cases of murder with one statutory aggravating circumstance.[98]

In 1987, Justice Blackmun, writing for a minority of four justices, identified what he called the "inherent tension between the discretion accorded capital sentencing juries and the guidance for use of that discretion that is constitutionally required."[99]

In 1990, Justice Scalia articulated what he perceived to be the irreconcilable conflict between the constitutional requirements of defined standards with regard to eligibility for the death penalty and absolute discretion when it comes to deciding whether or not to impose the death penalty.[100] "To acknowledge that 'there perhaps is an inherent tension' between" two lines of cases that "cannot be reconciled," "is rather like saying that there was perhaps an inherent tension between the Allies and the Axis Powers in World War II."[101]

97 . *See* ALI REPORT TO THE MEMBERSHIP, *supra* note 1, at 5 (listing the first reason for concern about whether death-penalty systems in the United States can be made fair as "the tension between clear statutory identification of which murders should command the death penalty and the constitutional requirement of individualized determination").

98 . Zant v. Stephens, 462 U.S. 862, 910-11 (Marshall, J., dissenting) (quoting Gregg v. Georgia, 428 U.S. 153, 195 n.47 (1976)).

99 . McCleskey v. Kemp, 481 U.S. 279, 363 (1987) (Blackmun, J., dissenting). *See also* State v. Haight, 649 N.E.2d 294, 313 (Ohio Ct. App. 1994):

> [T]he guidance from the Supreme Court of the United States involves two magnetic poles which at times pull in different directions. The states are expected to allow consideration of all potential mitigating factors and therefore to maximize discretion and individualization of sentencing. At the same time, the states are expected to ensure that discrimination is not involved, which requires restriction to avoid jurors voting their prejudices in the jury room. The tension between the forces from those two poles led one justice of the Supreme Court of the United States to abandon the effort to reconcile them.

Id.

100 . Walton v. Arizona, 497 U.S. 639, 662-64 (1990) (Scalia, J., concurring in part and concurring in the judgment).

101 . *Id.* at 664. *See id.* at 656 ("Today a petitioner before this Court says that a State sentencing court (1) had unconstitutionally broad discretion to sentence him to death instead of imprisonment, and (2) had unconstitutionally *narrow* discretion to sentence him to imprisonment instead of death.").

> Pursuant to *Furman*, … we require that States "channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance.'" In the next breath, however, we say that "the State *cannot* channel the sentencer's discretion … to consider any relevant [mitigating] information offered by the defendant," and that the sentencer must enjoy unconstrained discretion to decide whether any sympathetic factors bearing on the defendant or the crime indicate that he does not "deserve to be sentenced to death." The latter requirement quite obviously destroys whatever rationality and predictability the former requirement was designed to achieve.[102]

The Supreme Court's jurisprudence contains "the contradictory commands that discretion to impose the death penalty must be limited but discretion not to impose the death penalty must be virtually unconstrained,"[103] Justice Scalia continued. "One cannot have discretion whether to select the one yet lack discretion whether to select the other."[104]

> I cannot continue to say, in case after case, what degree of "narrowing" is sufficient to achieve the constitutional objective enunciated in *Furman* when I know that that objective is in any case impossible of achievement because of *Woodson-Lockett*. And I cannot continue to say, in case after case, what sort of restraints upon sentencer discretion are unconstitutional under *Woodson-Lockett* when I know that the Constitution positively *favors* constraints under *Furman*…. Since I cannot possibly be guided by what seem to me incompatible principles, I must reject the one that is plainly in error.
>
> ….
>
> …Accordingly, I will not, in this case or in the future, vote to uphold an Eighth Amendment claim that the sentencer's discretion has been unlawfully restricted.[105]

In 1994, Justice Blackmun analyzed the problem similarly:

> [T]he consistency promised in *Furman* and the fairness to the individual demanded in *Lockett* are not only inversely related, but irreconcilable in the context of capital punishment. Any statute or procedure that could effectively eliminate arbitrariness from the administration of death would also restrict the sentencer's discretion to such an extent that the sentencer would be unable to give full consideration to the unique characteristics of each defendant and the circumstances of the offense. By the same token, any statute or procedure that would provide the sentencer with sufficient discretion to consider fully and act upon the unique circumstances of each defendant would "throw[] open the back door to arbitrary and irrational sentencing." All efforts to strike an appropriate balance between these conflicting constitutional commands are futile because there is a heightened need for both in the administration of death.[106]

102 . *Id.* at 664-65 (citations omitted).

103 . *Id.* at 668.

104 . *Id.* at 656.

105 . *Id.* at 673.

Justices Scalia and Blackmun agreed that the constitutional commands are irreconcilable. But Justice Scalia and Justice Blackmun did not agree on the appropriate response. Justice Scalia declared, "I will no longer seek to apply one of the two incompatible branches of that jurisprudence,"[107] to which Justice Blackmun responded:

> [T]he proper course when faced with irreconcilable constitutional commands is not to ignore one or the other, nor to pretend that the dilemma does not exist, but to admit the futility of the effort to harmonize them. This means accepting the fact that the death penalty cannot be administered in accord with our Constitution.[108]

F. Narrowing Is Too Broad

Narrowing has not served its intended purpose of limiting the class of murderers eligible for the death penalty to the worst of the worst. "[N]o state has successfully confined the death penalty to a narrow band of the most aggravated cases."[109] One of the American Law Institute's reasons for concern about whether death-penalty systems in the United States can be made fair is "the difficulty of limiting the list of aggravating factors so that they do not cover … a large percentage of murderers."[110] It remains an elusive task to specify in advance which murders are the "worst of the worst."[111]

Aggravating circumstances, such as felony murder and murder for pecuniary gain, are so widespread and the scope of death eligibility so broad[112] that most murderers are eligible for the death penalty.[113] If there is one

[106] . Callins v. Collins, 510 U.S. 1141, 1155 (1994) (Blackmun, J., dissenting) (quoting Graham v. Collins, 506 U.S. 461, 494 (1993) (Thomas, J., concurring)).

[107] . *Walton*, 497 U.S. at 656-57. Justice Scalia continued, concluding that he was:

> willing to adhere to the precedent established by our *Furman* line of cases, and to hold that, when a State adopts capital punishment for a given crime but does not make it mandatory, the Eighth Amendment bars it from giving the sentencer unfettered discretion to select the recipients, but requires it to establish in advance, and convey to the sentencer, a governing standard.

Id. at 671 (Scalia, J., concurring in part and concurring in judgment).

[108] . *Callins*, 510 U.S. at 1157.

[109] . Steiker & Steiker, *supra* note 1, at 399.

[110] . ALI REPORT TO THE MEMBERSHIP, *supra* note 1, at 5.

[111] . Steiker & Steiker, *supra* note 1, at 400.

[112] . *See id.* at 395 (stating that "political pressure to expand the ambit of the death penalty" is, like mission creep, inevitable and intractable). In the five years after *Gregg v. Georgia*, "over 90% of persons sentenced to death before *Furman* would also be deemed death-eligible under the post-*Furman* Georgia statute." *See id.* at 379.

[113] . The Ohio State Bar Association Criminal Justice Law Committee recommended in 1997 that the felony murder death penalty specification in O.R.C. 2929.04(A)(7) be eliminated. OHIO STATE BAR ASS'N CRIMINAL JUSTICE LAW COMM., OHIO'S DEATH PENALTY PROCESSES FAIL TO GUARANTEE RELIABLE, CONSISTENT, AND FAIR CAPITAL SENTENCES. NO EXECUTIONS SHOULD TAKE PLACE UNTIL THESE PROCESSES ARE CORRECTED 13 (June 5, 1997) [hereinafter OSBA REPORT] ("Ohio has not adequately narrowed the class of offenders who are eligible for death, but rather continually expands the situations in which death is a possible sentence."). The June 5, 1997 report was expanded and reviewed by the Committee on September 27, 1997, a summary of which

aggravating factor in the case, the prosecutor has unrestricted discretion to decide whether or not to charge the offender with capital specifications.[114]

Justice Stevens, for many years, recommended narrowing to the point where the death penalty would apply only to those cases just below the tip of a pyramid.[115] Cases where there was no aggravating factor would be at the base of the pyramid and the death penalty could not be imposed. If there were at least one aggravating factor, the case would enter the area of the factfinder's discretion and the factfinder would decide whether or not the case passed into the area in which the death penalty would be imposed.[116] Justice Stevens wrote in rebuttal to Justice Scalia:

> Justice Scalia ignores the difference between the base of the pyramid and its apex. A rule that forbids unguided discretion at the base is completely consistent with one that requires discretion at the apex. After narrowing the class of cases to those at the tip of the pyramid, it is then appropriate to allow the sentencer discretion to

was adopted by the OSBA Council of Delegates on November 8, 1997. *Summary of the Ohio State Bar Association Report Calling for Review of Ohio's Death Penalty System in Order to Remedy Defects in the Existing Law that Undermine the Fairness and Reliability of Capital Prosecutions and Sentences in Ohio*, OHIO ST. B. ASS'N CRIM. JUST. L. COMM. (Nov. 8, 1997).

[114] . Steiker & Steiker, *supra* note 1, at 400. *See also* ACLU Amici Brief, *supra* note 73, at 49-50:

> The existence of selective enforcement by the prosecutor injects arbitrary and capricious factors into the determination of who is to be selected for capital prosecution. This standardless exercise of unbridled discretion creates a risk of arbitrary, capricious and discriminatory application, excludes relevant cases from proportionality review, and deprives the accused of protection from cruel and unusual punishment.
> …That discretion operates in an absolute void that is not subject to review by the judiciary to check arbitrary and capricious exercise of that power.

See also Hilliard, *supra* note 62, at 522-23:

> [T]here is no process by which a prosecutor's discretion need be guided. That discretion, which could ultimately mean death to a particular offender, is totally unchecked and could be based on purely racist motives or purposes totally immaterial to the ends of justice and penological theories of punishment. Ohio's statute permits such unchecked discretion to exist and flourish.

See also id. at 524 ("The initial phase of deciding whether to seek a capital indictment is wrought with unfettered discretion."); *id.* at 528 ("[D]iscretion enables the death penalty to be applied selectively against the poor, racial minorities, unpopular groups, or those lacking political clout.").

[115] . Walton v. Arizona, 497 U.S. 639, 716 (1990) (Stevens, J., dissenting) (relying on his opinion for the majority in *Zant v. Stephens*, 462 U.S. 862, 872 (1983)).

[116] . *Zant*, 462 U.S. at 872. *See also* McCleskey v. Kemp, 481 U.S. 279, 308 n.29 (1987) ("McCleskey's case falls in [a] grey area where ... you would find the greatest likelihood that some inappropriate consideration may have come to bear on the decision.").

> [T]here exist certain categories of extremely serious crimes for which prosecutors consistently seek, and juries consistently impose, the death penalty without regard to the race of the victim or the race of the offender. If Georgia were to narrow the class of death-eligible defendants to those categories, the danger of arbitrary and discriminatory imposition of the death penalty would be significantly decreased, if not eradicated.

Id. at 367 (Stevens, J., dissenting).

> show mercy based on individual mitigating circumstances in the cases that remain.[117]

However, shortly before he retired, Justice Stevens abandoned that argument. "Our decisions in 1976 upholding the constitutionality of the death penalty relied heavily on our belief that adequate procedures were in place that would avoid the danger of discriminatory application, … arbitrary application, … and of excessiveness …."[118]

As was explained to the membership of the American Law Institute, the conflict between guidance and individualization has not been resolved by strict narrowing. Instead of narrowing the class of murderers to a subset who are death eligible, the Supreme Court has reduced the requirement of guidance to a mere formality: finding an aggravating factor.

> [T]he aggravator can duplicate an element of the offense of capital murder (in which case the aggravator adds nothing to the conviction). After this fairly undemanding finding, the inquiry opens up into pre-*Furman* sentencing according to conscience: the sentencer is asked whether any mitigating circumstances of any type, statutory or non-statutory, call for a sentence less than death.[119]

Narrowing the class of death-eligible offenders "simply reduces, rather than eliminates, the number of people subject to arbitrary sentencing."[120]

G. Discretion Invites Discrimination

"No matter how narrowly the pool of death-eligible defendants is drawn according to objective standards," Justice Blackmun concluded in 1994, "*Furman*'s promise still will go unfulfilled so long as the sentencer is free to exercise unbridled discretion within the smaller group and thereby to discriminate. "'The power to be lenient [also] is the power to discriminate.'"[121]

Justice Douglas, concurring in *Furman*, objected to leaving to the uncontrolled discretion of judges or juries the determination of whether defendants should die or be imprisoned.[122] Citing authoritative sources, Justice Douglas asserted that most of those executed were poor, young, and ignorant. Where white and Negro co-defendants were given separate trials, the white was sentenced to life imprisonment or a term of years and the Negro was given the death penalty.[123]

117 . *Walton*, 497 U.S. at 718.

118 . Baze v. Rees, 553 U.S. 35, 84 (2008) (internal citations omitted).

119 . Steiker & Steiker, *supra* note 1, at 379 (footnote omitted).

120 . Callins v. Collins, 510 U.S. 1141, 1152 (1994) (Blackmun, J., dissenting).

121 . *Id.* at 1153 (quoting *McCleskey*, 481 U.S. at 312).

122 . Furman v. Georgia, 408 U.S. 238, 253 (1972).

123 . *Id.* at 248-55 (Douglas, J., concurring). *See also* Pulley v. Harris, 465 U.S. 37, 67 (1984) (Brennan, J., dissenting) (concluding, after reviewing the results of scholarly research, that "[a]lthough research methods and techniques often differ, the conclusions being reached are relatively clear: factors crucial, yet without doubt impermissibly applied, to the imposition of the death penalty are the race of the defendant and the race of the victim."). In *McCleskey*, a five-to-

> [W]e know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[124]

Discretionary statutes, Justice Douglas concluded, "are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on 'cruel and unusual' punishments."[125]

Denouncing the Supreme Court's holding in *McGautha*, Justice Marshall observed in *Furman* that committing the power to pronounce life or death to the "untrammeled discretion of the jury" is an "open invitation to discrimination."[126] Justice Marshall called attention to the fact that capital punishment is imposed discriminatorily against certain identifiable classes of people. The burden of capital punishment falls upon the poor, the ignorant, and the under-privileged members of society, and members of minority groups who are least able to voice their complaints while the wealthier, better-represented, just-as-guilty person can escape. Negroes are executed far more often than whites in proportion to the percentage of the population. The death penalty is employed disproportionately against men rather than women.[127]

four majority of the Supreme Court determined that a multiple regression statistical analysis of 2,000 murder cases that occurred in Georgia during the 1970s, which indicated that racial considerations entered into capital sentencing determinations, did not demonstrate a constitutionally significant risk of racial bias affecting the Georgia capital sentencing process. This study, known as the Baldus study, found that black defendants who killed white victims had the greatest likelihood of receiving the death penalty. *McCleskey*, 481 U.S. 279, 286-87, 291, 313. *See also* Steiker & Steiker, *supra* note 1, at 381 (discussing racial discrimination in capital jury selection). Dissenting in *McCleskey*, Justice Blackmun referred to a concession in the majority's opinion that discretionary authority can be discriminatory authority. *McCleskey*, 481 U.S. at 364 (Blackmun, J., dissenting) (citing *id.* at 312) ("Prosecutorial decisions may not be 'deliberately based on an unjustifiable standard such as race, religion, or other arbitrary classification.'"). Justice Powell, author of the majority opinion, later repudiated his vote in *McCleskey*. *See* Steiker & Steiker, *supra* note 1, at 382 & n.46.

124 . *Furman*, 408 U.S. at 255. *See also id.* (Douglas, J., concurring) (suggesting that under ancient Hindu law, punishment increased in severity as social status diminished). "We have, I fear, taken in practice the same position, partially as a result of making the death penalty discretionary and partially as a result of the ability of the rich to purchase the services of the most respected and most resourceful legal talent in the Nation." *Id.* at 255-56.

125 . *Id.* at 256-57. *See also Pulley*, 465 U.S. at 65 (Brennan, J., dissenting) ("The most compelling evidence that the death penalty continues to be administered unconstitutionally relates to the racial discrimination that apparently, and perhaps invariably, exists in its application.").

126 . *Furman*, 408 U.S. at 365 (Marshall, J., concurring). Justice Marshall further stated in *Zant*:

> The basic teaching of *Furman* is that a State may not leave the decision whether a defendant lives or dies to the unfettered discretion of the jury, since such a scheme is "pregnant with discrimination," 408 U.S. at 257 (Douglas, J., concurring), … and for which "there is no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." *Id.* at 408 U.S. 313 (White, J., concurring).

Zant, 462 U.S. at 907 (Marshall, J., dissenting) (alteration in original).

127 . *Furman*, 408 U.S. at 364-66 (Marshall, J., concurring).

Justice Blackmun was similarly troubled. "*Furman* aspired to eliminate the vestiges of racism and the effects of poverty in capital sentencing."[128] More than twenty years after *Furman*, Justice Blackmun wrote, "[t]he arbitrariness inherent in the sentencer's discretion to afford mercy is exacerbated by the problem of race."[129]

> Even under the most sophisticated death penalty statutes, race continues to play a major role in determining who shall live and who shall die. Perhaps it should not be surprising that the biases and prejudices that infect society generally would influence the determination of who is sentenced to death, even within the narrower pool of death-eligible defendants selected according to objective standards.[130]

Quite apart from the discretion that juries may exercise in recommending a death sentence, it was predicted as early as 1982 that Ohio's aggravating circumstances would disadvantage racial minorities. "This type of discrimination is difficult to prove because a discriminatory purpose must be found. Discriminatory impact alone is not determinative; the Court must look to other evidence."[131] Even though Ohio's death penalty statute is neutral on its face, it would have an adverse impact on black and economically disadvantaged defendants.

> The aggravating circumstances listed by Ohio will most likely result in black defendants, as well as economically-disadvantaged defendants, being executed in significantly disproportionate numbers. Because of social pressures, some of which are state-induced, it is inevitable that the particular types of circumstances adopted will indict black and economically-disadvantaged defendants significantly more often or exclusively. For example, because the amount of crime in a ghetto is higher than in a middle-class suburb, the chances are greater that a ghetto resident will be fleeing from the scene of a crime. The chances are greater that a policeman will be killed by a black defendant, not only because there are more policemen patrolling black communities, but because of police attitudes toward black offenders in general and the resulting induced disrespect for the police in the black community. Without a more complete tracking system for capital cases, a member of a suspect or unpopular minority is at the mercy of the prosecutor and subject to any of his personal prejudices.[132]

[128] . *Callins*, 510 U.S. at 1148 (Blackmun, J., dissenting).

[129] . *Id.* at 1153.

[130] . Callins v. Collins, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting).

[131] . Hilliard, *supra* note 62, at 525. For cases more recent than those cited on the requirement of proving discriminatory purpose, see Miller-El v. Cockrell, 537 U.S. 322, 338 (2003), following Batson v. Kentucky, 476 U.S. 79 (1986). *See also* State v. Zuern, 512 N.E.2d 585, 586 (syllabus by the Court) (Ohio 1987) (following *McCleskey v. Kemp*) ("There can be no finding that the death penalty is imposed in a discriminatory fashion absent a demonstration of specific discriminatory intent.").

[132] . Hilliard, *supra* note 62, at 525-26 (footnotes omitted).

H. The Futility of Tinkering with the Machinery of Death

As early as 1978 when the Supreme Court decided *Lockett v. Ohio*, then-Associate Justice Rehnquist protested that in its death penalty jurisprudence, "the Court has gone from pillar to post, with the result that the sort of reasonable predictability upon which legislatures, trial courts, and appellate courts must of necessity rely has been all but completely sacrificed."[133] Quoting this passage in 1990, Justice Scalia observed, "[t]he simultaneous pursuit of contradictory objectives necessarily produces confusion."[134] He continued:

> Repeatedly over the past 20 years, state legislatures and courts have adopted discretion-reducing procedures to satisfy the *Furman* principle, only to be told years later that their measures have run afoul of the *Lockett* principle. Having said in *Furman* that unconstrained discretion in capital sentencing was unacceptable, we later struck down mandatory schemes, adopted in response to *Furman* because they constrained sentencing discretion.[135]

Justice Scalia deplored the effects of this uncertainty and unpredictability: "For state lawmakers, the lesson has been that a decision of this Court is nearly worthless as a guide for the future; though we approve or seemingly even require some sentencing procedure today, we may well retroactively prohibit it tomorrow."[136]

As Justice Scalia pointedly remarked, the ultimate choice in capital sentencing is the choice between death and imprisonment.[137] "The effects of the uncertainty and unpredictability," he wrote, "are evident in this Court alone, even though we see only the tip of a mountainous iceberg.… In my view, it is time for us to reexamine our efforts in this area and to measure them against the text of the constitutional provision on which they are purportedly based."[138]

Justice Blackmun, quoting *Furman* and *Eddings*, repeated: "The death penalty must be imposed 'fairly, and with reasonable consistency, or not at all.'"[139] It seemed to Justice Blackmun "that the decision whether a human being should live or die is so inherently subjective—rife with all of life's understandings, experiences, prejudices, and passions—that it inevitably defies the rationality and consistency required by the Constitution."[140]

> [E]ven if the constitutional requirements of consistency and fairness are theoretically reconcilable in the context of capital punishment, it is clear that this Court is not prepared to meet the challenge. In apparent frustration over its inability

133 . 438 U.S. 586, 629 (1978) (Rehnquist, J., dissenting).

134 . Walton v. Arizona, 497 U.S. 639, 667 (1990) (Scalia, J., dissenting).

135 . *Id.* (internal citations omitted).

136 . *Id.* at 668.

137 . *Id.* at 656.

138 . *Id.* at 669.

139 . *Callins*, 510 U.S. at 1144 (Blackmun, J., dissenting) (citing Furman v. Georgia, 408 U.S. 238 (1972); Eddings v. Oklahoma, 455 U.S. 104 (1982)).

140 . Callins v. Collins, 510 U.S. 1141, 1153 (1994) (Blackmun, J., dissenting).

> to strike an appropriate balance between the *Furman* promise of consistency and the *Lockett* requirement of individualized sentencing, the Court has retreated from the field, allowing relevant mitigating evidence to be discarded, vague aggravating circumstances to be employed, and providing no indication that the problem of race in the administration of death will ever be addressed.[141]

Furthermore, he concluded,

> Because I no longer can state with any confidence that this Court is able to reconcile the Eighth Amendment's competing constitutional commands, or that the Federal Judiciary will provide meaningful oversight to the state courts as they exercise their authority to inflict the penalty of death, I believe that the death penalty, as currently administered, is unconstitutional.[142]

"I no longer shall tinker with the machinery of death,"[143] Justice Blackmun concluded in 1994:

> For more than 20 years, I have endeavored—indeed, I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved and the need for regulation eviscerated, I feel morally and intellectually obligated simply to concede that the death penalty experiment has failed. It is virtually self-evident to me now that no combination of procedural rules or substantive regulations ever can save the death penalty from its inherent constitutional deficiencies. The basic question—does the system accurately and consistently determine which defendants "deserve" to die?—cannot be answered in the affirmative.… The problem is that the inevitability of factual, legal, and moral error gives us a system that we know must wrongly kill some defendants, a system that fails to deliver the fair, consistent, and reliable sentences of death required by the Constitution.[144]

II. DEATH WITHOUT JUSTICE IN OHIO

In June 1997, the Ohio State Bar Association Criminal Justice Law Committee issued a report that highlighted "significant defects that contribute to an overall absence of fairness and due process in death penalty cases. These problems make the system unreliable, arbitrary, capricious, and cruel."[145] Although it recommended legislative reforms, the Committee asserted that neither the courts nor the legislature have found Ohio's death sentencing system satisfactory "for it is subject to constant tinkering by both the legislative and judicial branches.… Denial of meaningful assistance of counsel, under funding

141 . *Id.* at 1156 (footnotes omitted).
142 . *Id.* at 1158-59.
143 . *Id.* at 1145.
144 . *Id.* at 1145-46 (footnotes omitted).
145 . *See* OSBA Report, *supra* note 113, at 3.

the defense, arbitrary influences on decision making, and separate systems of appeal and granting stays make Ohio's capital sentencing system unreliable, unpredictable and unfair."[146]

In 2007, the American Bar Association published an assessment of administration of the death penalty in Ohio.[147] The assessment concluded that Ohio suffers from very serious problems. While some of these problems could be tempered by legislation,[148] others cannot.

A. The Administration of the Death Penalty in Ohio Lacks Fairness and Accuracy

In 2007, the ABA's Ohio Death Penalty Assessment Team "concluded that the State of Ohio fails to comply or is only in partial compliance with many of [its] recommendations and that many of these shortcomings are substantial."[149]

Among the problem areas identified by the Ohio Team were the following:[150]

- Inadequate procedures to protect the innocent;
- Inadequate access to experts and investigators;
- Inadequate qualification standards for defense counsel;
- Insufficient compensation for defense counsel representing indigent capital defendants and death-row inmates;
- Inadequate appellate review of claims of error;
- Lack of meaningful proportionality review of death sentences;
- Virtually nonexistent discovery provisions in state post-conviction;[151]

146 . *Id.* at 33.

147 . *See* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, Executive Summary at i (Protocols for the ABA's assessment of state law and practice were set forth in ABA Section of Individual Rights and Responsibilities, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (2001)). For the ABA's *Assessment Guide* pertaining to the "Collection of Information on Ohio's Death Penalty System," see http://www.americanbar.org/content/dam/aba/migrated/2011_build/death_penalty_moratorium/ohio_assessmentguide.authcheckdam.pdf (last visited June 4, 2011). *See also* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 3-6 (listing members of the Ohio Death Penalty Assessment Team: professors of law Phyllis Crocker (chair), Mark Godsey, Margery M. Koosed, and Geoffrey S. Mearns; former Ohio Supreme Court Justice J. Craig Wright and Magistrate Judge Michael R. Merz; criminal defense attorneys S. Adele Shank and David C. Stebbins; State Senator Shirley A. Smith and U.S. Congresswoman Stephanie Tubbs Jones).

148 . For example, effective July 6, 2010, the Ohio Revised Code was amended with respect to submission, collection and testing of DNA specimens; custodial interrogations; preservation of biological evidence; eyewitness identification procedures in lineups; and other procedures. *See* David M. Gold, Ohio Legislative Service Commission, Rev. Final Analysis, Sub. S. 77, 128th Gen. Assemb. (Ohio 2010), http://www.lsc.state.oh.us/analyses128/10-sb77-128.pdf. Rule 16 of the Ohio Rules of Criminal Procedure on Discovery and Inspection was amended effective July 1, 2010.

149 . ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, Executive Summary at iii.

150 . *Id.* Executive Summary at iv-v.

151 . *See id.* Executive Summary at xxi, 265-67 (Recommendation #2) ("The State should provide meaningful discovery in post-conviction proceedings" wherein evidence not in the record

- Racial disparities in Ohio's capital sentencing;
- Geographic disparities in Ohio's capital sentencing; and
- Death sentences imposed and carried out on people with severe mental disability (some of whom were disabled at the time of the offense and others of whom became seriously ill after conviction and sentence).

The Ohio Team warned that the harms are cumulative and that problems in one area can undermine sound procedures in others.[152]

As will be shown below, studies by other entities illustrate and corroborate the findings of the ABA Ohio Assessment Team.

B. Geographic and Racial Disparities

It has long been recognized that decisions on which cases and which defendants will be prosecuted as death penalty cases depends on the prosecutor, the ability of the county to afford the cost, and the race of the victim. The report adopted by the Ohio State Bar Association Criminal Justice Law Committee in 1997 states that prosecutors in some counties charge capital specifications in order to coerce pleas to lesser crimes and thus avoid the time and expense of trials, and that innocent defendants sometimes plead guilty to a crime to avoid a death sentence.[153] The Prosecuting Attorney in Hamilton County stated that he would seek a death penalty indictment in every case that fits the statutory parameters, but in fifty-six Ohio counties not one capital case had been prosecuted under Ohio's 1981 death penalty statute.[154] Furthermore, citing testimony before the Ohio Commission on Racial Fairness in 1994, the Ohio State Bar Association concluded, "If, as appears to be the case, racial bias is a factor in sentencing one race in some counties and another race in others, the

in direct appeal may be presented to the trial court). The Executive Summary states:

> Despite the fact that prior to obtaining an evidentiary hearing in state post-conviction a death-sentenced inmate must allege all available grounds for relief and state the specific facts that support those grounds for relief, the State of Ohio denies petitioners access to the discovery procedures necessary to develop those claims. This is exacerbated by the fact that Ohio statutes and case law prohibit a petitioner from using the public records laws to obtain materials in support of post-conviction claims ….

Id. at v; discussed more fully, *id.* at 265-67.

[152] . *Id.* Executive Summary at iii.

[153] . OSBA REPORT, *supra* note 113, at 11-12.

[154] . *Id.* at 12 ("Hamilton County Prosecuting Attorney Joseph Deters has stated that he will seek a death penalty indictment in every case that fits the statutory parameters. Plea agreements will be available only in the most extraordinary of cases. The only exception to his indictment rule is that a death sentence would not be sought, regardless of the facts of the crime, if he does not believe he can win the case."). *See also* Johnson, *supra* note 14 ("Deters said he has just one rule for seeking the ultimate punishment: guilt. He said he does not offer plea deals in such cases because that 'borders on immoral.'"); Associated Press, *Death-penalty Bargaining Chip Draws Fire*, May 17, 2012, *available at* http://www.vindy.com/news/2012/may/17/death-penalty-bargaining-chip-draws-fire/?print ("'To use the death penalty to force a plea bargain, I think it's unethical to do that,' Deters said.").

arbitrariness caused by our inability to leave prejudice outside the courtroom doors requires that no execution take place under the system as it now stands."[155]

In 1998, former Ohio Attorney General Anthony J. Celebrezze Jr., who had steadfastly supported capital punishment, asserted that the death penalty was racially biased against blacks, and was not uniformly applied throughout the 88 counties.[156] Too often, "blacks get death sentences while whites face lesser charges. Similar crimes resulted in death sentences in some areas of Ohio but were treated as lesser offenses in others."[157]

In the year 2000, Columbia University Law Professor James Liebman[158] and two colleagues reported a study of capital verdicts imposed in the 34 states and 1004 counties in the United States that used the death penalty during the 23 year period between 1973 and 1995.[159] Testifying before the Ohio Criminal Justice Committee of the Ohio House of Representatives, Professor Liebman reported that Hamilton County (Cincinnati) had the seventh highest death-sentencing rate in the nation among relatively populous counties. Hamilton County had twice the death-sentencing rate of Cuyahoga County (Cleveland) and the state as a whole, and nearly three times the death-sentencing rate of Franklin County (Columbus).[160] Such high rates of death sentencing are likely to result in high rates of error.[161]

In 2002, University of Cincinnati Political Science Professor Howard Tolley found that, at a time when Hamilton County had less than 8% of Ohio's population, over 23% of the men on death row were from Hamilton County.[162]

155 . OSBA REPORT, *supra* note 113, at 20.

156 . *See* Sloat, *supra* note 82.

157 . *Id.* (referring to a document filed on November 17, 1998 in a U.S. District Court in the case of Michael Benge). Celebrezze stated that "county prosecutors were given too much latitude in death cases because they have 'virtually uncontrolled discretion' over what charges to file." And he contends that the state's courts, including the Ohio Supreme Court, have failed "to guard against arbitrary and disproportionate punishments." *Id.*

158 . Professor Liebman is co-author of *Federal Habeas Corpus Practice and Procedure*, the most authoritative treatise on federal habeas corpus litigation. RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE (6th ed. 2011).

159 . JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), *available at* http://www2.law.columbia.edu/instructionalservices/liebman/.

160 . *The Risk of Serious Error in Ohio Capital Cases, and the Need for Additional Study: Hearing on H.B. 502 Before the Ohio Criminal Justice Committee of the Ohio House of Representatives*, 124th Gen. Assemb. 4 (June 4, 2002) [hereinafter Liebman Testimony], *available at* http://netk.net.au/USA/Ohio.pdf (testimony of James S. Liebman in support of bill).

161 . *Id. See also* JAMES S. LIEBMAN ET AL., A BROKEN SYSTEM, PART II: WHY THERE IS SO MUCH ERROR IN CAPITAL CASES, AND WHAT CAN BE DONE ABOUT IT (Feb. 11, 2002), *available at* http://www2.law.columbia.edu/brokensystem2/report.pdf. The more often counties impose death verdicts, the more likely it is that any given capital verdict will be flawed. Jurisdictions that impose the death penalty broadly, in weak as well as strong cases, are especially prone to unreliability, cost and delay. *Id.* at ii, iv.

162 . Affidavit of Howard Tolley, Jr. (June 25, 2002), ¶ 3. In his Affidavit, Prof. Tolley reported that of 203 men then on death row, 47 were from Hamilton County, nine more than from Cuyahoga County (Ohio's largest county). *See* News Release, U.S. Census Bureau, U.S. Census Bureau Delivers Ohio's 2010 Census Population Totals, Including First Look at Race and Hispanic Origin Data for Legislative Redistricting (Mar. 9, 2011), http://www.census.gov/newsroom/releases/archives/2010_census/cb11-cn72.html (according to 2010 U.S. Census data, Ohio's largest county

At approximately the same time, the Ohio Department of Rehabilitation and Correction listed 201 men and no women on Ohio's death row: 99 were black, 95 white, 3 Hispanic, and 4 Other.[163]

In 2005, the Ohio Associated Press published an extensive study on Ohio's death penalty system. The AP concluded that capital punishment is applied unequally in Ohio as to race of victim, plea-bargains, and geography. Defendants charged with capital murder for killing a white person were twice as likely to be sentenced to death as defendants charged with killing a black person. Defendants most likely to be sentenced to death were those who killed white victims, and defendants who killed black victims were least likely to get the death penalty. Nearly half of the cases with death penalty specifications ended with a plea bargain and a sentence less than death, many for very serious crimes. Among those charged with capital offenses in Cuyahoga County, 8.5% were sentenced to death, while in Hamilton County, 43% were sentenced to death.[164]

In 2007, the American Bar Association conducted a study of geographical and racial disparities among Ohio's death sentences. For the period between 1981 and 2005, the ABA found that 60% of Ohio's capital indictments came from three of Ohio's major metropolitan areas: 37% from Cuyahoga County; 17% from Franklin County; and 5% from Hamilton County. Over 50% of the death sentences in Ohio came from four counties: 19.7% from Cuyahoga County; the same number, 19.7%, from Hamilton County; 7.2% from Lucas County; and

is Cuyahoga (despite a decrease in population of 8.2% since 2000), followed by Franklin (increased 8.8%), Hamilton (decreased 5.1%), Summit (decreased 0.2%), and Montgomery (decreased 4.3%)).

[163] . *Death Row Inmates* (current as of June 13, 2002), OHIO DEP'T OF REHABILITATION & CORRECTION, http://www.drc.ohio.gov/Public/deathrow.htm (visited June 20, 2002).

[164] . Andrew Welsh-Huggins, *Ohio AP Study*, CINCINNATI ENQUIRER, May 7-9, 2005, http://news.cincinnati.com/apps/pbcs.dll/article?AID=/20050507/NEWS01/505070402. *See also Ohio AP Study*, DEATH PENALTY INFO. CTR., http://deathpenaltyinfo.org/node/1447 (summarizing results reported in a three-part series, *Death Penalty Unequal*); ANDREW WELSH-HUGGINS, NO WINNERS HERE TONIGHT: RACE, POLITICS, AND GEOGRAPHY IN ONE OF THE COUNTRY'S BUSIEST DEATH PENALTY STATES 80-83 (2009).

> An analysis of the first two decades of capital indictments under Ohio's current law, from 1981 through 2002, found that just 5 percent of capital punishment cases in Franklin County ended with an actual death sentence. Compare that to conservative Hamilton County, which sentenced 43 percent of its death penalty defendants to die over the same period.

Andrew Welsh-Huggins, *The Death of the Death Sentence*, COLUMBUS MONTHLY, Dec. 2011, *available at* http://www.columbusmonthly.com/December-2011/The-death-of-the-death-sentence/. *See also id.* (as of December 2011, "the last time someone from Franklin County received a death sentence was 2003, when two men were sent to death row"); RICHARD C. DIETER, DEATH PENALTY INFO. CTR., STRUCK BY LIGHTNING: THE CONTINUING ARBITRARINESS OF THE DEATH PENALTY THIRTY-FIVE YEARS AFTER ITS RE-INSTATEMENT IN 1976, at 22, 24 (2011), *available at* http://www.deathpenaltyinfo.org/documents/StruckByLightning.pdf (discussing the Welsh-Huggins findings as showing that "the death penalty had been applied in an uneven and arbitrary fashion," with regard to the race of the victim and the interaction with geography).

> The study also pointed to other indicators of arbitrariness–some of the worst offenders did not receive the death penalty. Nearly half of the 1,936 capital punishment cases ended with a plea bargain to a sentence less than death, including 131 cases in which the crime involved two or more victims and 25 involving at least 3 victims.

Id. at 35 n.88.

6.5% from Franklin County. The percentage of capital indictments that resulted in death sentences were 37% for Hamilton County; 19% for Lucas County; 16.6% for Summit County; 5.4% for Cuyahoga County; and 3.9% for Franklin County.[165]

As part of the ABA's Ohio Death Penalty Assessment, the ABA studied homicides in Ohio between 1981 and 2000, to determine whether racial and geographic factors correlate with the decision to sentence defendants to death. The ABA found:

> (1) those who kill Whites are 3.8 times more likely to receive a death sentence than those who kill Blacks and (2) the chances of a death sentence in Hamilton County are 2.7 times higher than in the rest of the state, 3.7 times higher than in Cuyahoga County, and 6.2 times higher than in Franklin County.[166]

The study concluded that racial and geographic bias does exist in Ohio's capital system.[167]

Capital punishment continues to affect African-Americans disproportionately. African-Americans account for approximately 12% of Ohio's population,[168] but 51% of the men on death row and 39 % of the 45 men executed in Ohio between February 1999 and November 2011 were African-

[165] . ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 9-10 (based on data available on line from the Office of the Ohio Public Defender). Of Ohio's 88 counties, 51 counties had no one on death row. *See Number of Death Sentences Per County*, OFFICE OF OHIO PUB. DEFENDER, http://www.opd.ohio.gov/DP_ResidentInfo/dp_No_CurrentPerCounty.pdf (last visited July 30, 2012). At a time when there were 154 death-sentenced prisoners, 29 were from Hamilton County, 24 from Cuyahoga County, and 12 from Franklin County.

> Defense attorneys long have contended that Franklin County's considerable white collar workforce … created jury pools more likely to opt for lesser sentences or, since 1996, life without parole. (In fact, research on the socioeconomic background of death penalty juries is scant. Studies have found that more ethnically diverse juries and jurors with higher education are less likely to vote for a death sentence, which is probably the case in Franklin County.)

Welsh-Huggins, *Death of the Death Sentence*, *supra* note 164. A low percentage of death sentences may be the result of a high percentage of plea bargains.

[166] . ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 357; *id.* Executive Summary at v. *See also* AM. CIV. LIBERTIES UNION OF OHIO, REFORM CANNOT WAIT: A COMPREHENSIVE EXAMINATION OF THE COST OF INCARCERATION IN OHIO FROM 1991-2010, at 12 (2010), *available at* http://www.acluohio.org/issues/criminaljustice/reformcannotwait2010_08.pdf ("If a homicide victim is white, the perpetrator is 3.8 times more likely to receive a death sentence, and 6 times more likely to be executed than if the victim was a person of color.").

[167] . ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 357; *id.* Executive Summary at v.

[168] . According to U.S. Census figures, 12.2% of Ohio's population was reported as black or African-American (and not mixed race) in 2010. *2010 Census Data*, UNITED STATES CENSUS 2010, http://2010.census.gov/2010census/data/ (click on Ohio on United States map) (last visited July 30, 2012). This represents an increase in Ohio's African-American population compared with 11.5% in 2000. *Census 2000: Ohio Profile*, U.S. CENSUS BUREAU, http://www2.census.gov/geo/maps/special/profile2k/OH_2K_Profile.pdf. Ohio's white population decreased from 85.0% in 2000, *id.*, to 82.7% in 2010. *2010 Census Data*, *supra*.

American.[169] As of February 1, 2012, the Ohio Department of Rehabilitation and Correction listed 148 inmates on death row: 1 Caucasian woman and 147 men. Of the men, 75 were African-American, 65 were Caucasian, 4 were Hispanic, 1 was Native American, and 2 were Arab American.[170]

C. Inadequacies Affecting Counsel for Indigent Defendants

The 2005 Associated Press study also found that compensation for lawyers who represent poor defendants varied drastically from county to county. "Generally, death penalty cases place an enormous strain on the resources of a small county court as opposed to a large county court. Rural judges reported having to dedicate all their resources for months on end when capital cases came through their courts."[171]

In 2008, the National Legal Aid and Defender Association (NLADA) produced a report on behalf of the Hamilton County Board of Commissioners describing grave problems for defendants facing criminal charges who cannot afford an attorney. Major defects include crippling caseloads, lack of training and standards, and abysmal pay rates that force lawyers to cut corners or lose money. "Attorneys can spend only a fraction of the time needed per case. The weakened system also burdens packed court dockets, overcrowded jail cells, and looming budget deficits."[172] The NLADA attributed many of the problems to factors affecting more than Hamilton County.

The NLADA assessment notes that the laws of Ohio require county governments to pay for defense attorneys for the indigent.[173]

> [T]here is little doubt that poor people charged with crimes facing a potential loss of liberty are not afforded the constitutional protections demanded by the United States Constitution. However, NLADA finds that the majority of the responsibility for

[169] . *Ohio Executions—1999 to Present*, OHIO DEP'T OF REHABILITATION & CORRECTION, http://www.drc.ohio.gov/web/Executed/executed25.htm (as of Feb. 1, 2012). As of November 2011, the Office of the Ohio Public Defender reported 46 executions of whom 18 were African-American and 28 were Caucasian men. *Death Penalty Information*, OFFICE OF OHIO PUB. DEFENDER, http://www.opd.ohio.gov/dp/dp_MoreInfo.htm (follow "Proportionality Statistics" hyperlink) (as of Feb. 1, 2012). Thus, 39.1% of the men executed were African-American.

[170] . *Death Row Inmates*, OHIO DEP'T OF REHABILITATION & CORRECTION, http://www.drc.ohio.gov/Public/deathrow.htm (as of Sept. 30, 2011) (showing that 75 of the 147 inmates on death row, or 51%, were African-American). Because death row statistics change, and sources are not updated in synchrony with each other, it is not always the latest sources but those available contemporaneously that are cited.

[171] . *Issues of Fairness: Racial Bias and Quality of Legal Representation*, ENCYCLOPEDIA.COM (2008), http://www.encyclopedia.com/doc/1G2-3078400013.html (scroll down to *An Ohio Study*).

[172] . Press Release, Ohio Justice & Policy Center, Report Indicts Public Defender System in Hamilton County, Ohio: Overworked Attorneys, Inadequate Support Violate Sixth Amendment (July 13, 2008), *available at* http://www.ohiojpc.org/text/press/07.13.08.pdf (summarizing a report by National Legal Aid and Defender Association).

[173] . NAT'L LEGAL AID & DEFENDER ASS'N, EVALUATION OF THE OFFICE OF THE HAMILTON COUNTY PUBLIC DEFENDER: TAKING GIDEON'S PULSE, AN ASSESSMENT OF THE RIGHT TO COUNSEL IN HAMILTON COUNTY, OHIO, Executive Summary at i (July 2008), http://www.nlada.net/sites/default/files/oh_takinggideonspulsejseri07-2008_report.pdf.

> this failure lies with the State of Ohio and not with Hamilton County.… [M]any of the problems identified in this report are beyond the ability of the County and the Public Defender Office to solve on their own …. Hamilton County's policymakers are in the unenviable "between a rock and a hard place" position of having to either fund public defender services at an adequate level (thus threatening the county's fiscal health) or face expensive systemic class action lawsuits or other costly court action to ensure a meaningful right to counsel for the poor (also threatening its fiscal health).[174]
>
> ….
>
> But the failure of the right to counsel in Hamilton County is not merely about a lack of funding. Were policy-makers at either the state or local level able to simply increase resources without contemporaneously assuring a structure for delivery systems to meet nationally-recognized standards of justice, the right to counsel crisis would still not be abated. The American Bar Association's *Ten Principles of a Public Defense Delivery System* constitute the fundamental standards that a public defense delivery system should meet if it is to deliver—in the ABA's words —"effective and efficient, high quality, ethical, conflict-free representation to accused persons who cannot afford to hire an attorney." The public defense delivery system in Hamilton County fails the vast majority of the ABA *Ten Principles* ….[175]

Among the failures to meet the ABA principles cited by the NLADA were: failure to ensure that public defenders are shielded from undue judicial and political interference; failure to control defense attorneys' workload; and failure to ensure parity between defense counsel and the prosecution with respect to salaries and resources.[176]

Furthermore, "ineffective assistance of counsel" claims are usually based on evidence that is *not* in the record, such as information the defense attorney failed to discover or failed to introduce at trial, objections not made or questions not asked during the trial.[177] Such claims are presented to the trial court on post-conviction review and the trial court's decisions may be appealed to the state's court of appeals. But the Supreme Court of Ohio can and always does refuse to reconsider the case after new evidence is presented on post-conviction review.[178]

The U.S. Supreme Court recognizes that inadequate counsel undermines the validity of a capital conviction.[179] But in most cases the standard for ineffectiveness is too difficult to establish. It is presumed that defense counsel made reasonable strategic choices, and "the enormous deference to 'strategic

174 . *Id.*

175 . *Id.* at ii-iii. The ABA *Ten Principles of a Public Defense Delivery System* appear as Appendix A to the NLADA Assessment. *Id.* at 69 app. A.

176 . *Id.* at iii.

177 . Steiker & Steiker, *supra* note 1, at 387.

178 . *See* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 268 ("Capital petitioners may appeal the denial of their post-conviction petition as a matter of right to the Ohio Court of Appeals, with an additional discretionary appeal to the Ohio Supreme Court."). *See also id.* at n.126 ("The Ohio Supreme Court has never taken such an appeal, however.").

179 . Strickland v. Washington, 466 U.S. 668 (1984).

choices' allows attorneys who wish to justify their decisions at a later date an obvious means to do so."[180] Furthermore, the defendant has to show that the outcome would probably have been different but for counsel's ineffective assistance.[181]

The Supreme Court of the United States has repeatedly endorsed the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* as a benchmark for assessing the reasonableness of attorney performance in capital cases.[182] However, of the eight states studied by ABA assessment teams as of 2007, not a single state was found to be fully "in compliance" with any aspect of the ABA *Guidelines*.[183]

D. Prosecutorial Misconduct

The Ohio Supreme Court has repeatedly admonished prosecutors for misconduct, but finds "harmless error" in cases where, in its opinion, the outcome of the case would not have been different. Professor Tolley lists fourteen death penalty cases in a twelve-year period from 1988 to 2000 in which the Ohio Supreme Court found improper statements to the jury by Hamilton

[180] . Steiker & Steiker, *supra* note 1, at 386 n.65.

[181] . State v. Bradley, 538 N.E.2d 373, 375 (para. 2 of the Court's syllabus) (Ohio 1989), ("Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St. 2d 391; *Strickland v. Washington* [1984], 466 U.S. 668 followed.")); *id.* (para. 3 of the Court's syllabus) ("To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."). *See also id.* at 380.

[182] . Am. B. Ass'n, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 914 (2003) [hereinafter ABA *Guidelines for Appointment and Performance*]. ABA *Guidelines* are guides to determining what is reasonable. *Strickland*, 466 U.S. at 688. *See also* Steiker & Steiker, *supra* note 1, at 407, 406 n.141 (citing Williams v. Taylor, 529 U.S. 362, 396 (2000) (ABA Standards for Criminal Justice); Wiggins v. Smith, 539 U.S. 510 (2003) (1989 ABA death penalty Guidelines); Rompilla v. Beard, 545 U.S. 374 (2005) (citing 1989 and 2003 death penalty Guidelines)); *id*. at 407 (ABA *Guidelines* set the minimum necessary conditions for the operation of the capital justice process in a fashion that adequately guarantees fairness and due process).

But see Bobby v. Van Hook, 130 S. Ct. 13, 16-17 (2009) (criticizing the Court of Appeals for the Sixth Circuit for treating the ABA's 2003 Guidelines not merely as evidence of what reasonably diligent attorneys would do, but as inexorable commands with which all capital defense counsel "must fully comply." *Strickland* stressed that the ABA standards are only guides to what reasonableness means and the Supreme Court regarded them as such in *Wiggins*.). *See also Van Hook*, 130 S. Ct. at 17 n.1 (citing *Strickland*, 466 U.S. at 688-69) ("Guidelines must reflect '[p]revailing norms of practice' and must not be so detailed that they would "interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.'"). In *Van Hook*, the Supreme Court expressed "no views" on whether the ABA's 2003 Guidelines meet these criteria.

[183] . The eight states assessed by the ABA were Alabama, Arizona, Florida, Georgia, Indiana, Ohio, Pennsylvania, and Tennessee. ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, Executive Summary at i; Steiker & Steiker, *supra* note 1, at 406 & n.142 (citing http://www.abanet.org/moratorium/).

County prosecutors, but in each case a majority concluded those remarks did not merit a new trial.[184]

> Writing for the majority in a Hamilton County case Justice Francis Sweeney declared: "We express our deep concern over some of the remarks and misstatements made by the prosecutors involved in this case." In a dissent joined by Justice Paul Pfeifer, Ohio Chief Justice Thomas Moyer found the prosecutors "unabashedly cross the line of vigorous but proper advocacy…." and he criticized the "fundamental unfairness of a trial riddled with prosecutorial misconduct …." A year later, Justice Moyer found continuing overzealous advocacy and wrote: "How do we stop prosecutors from engaging in conduct that we tell them time and again is improper?"[185]

E. Costs

Costs are disproportionate in capital cases with serious consequences for the entire criminal justice system. Capital prosecutions generate higher costs at every stage of the proceedings. "[I]t appears that the cost of a capital case far exceeds the cost of a case seeking a life sentence."[186] Total costs are considerably greater than non-capital cases that result in life sentences even when costs of incarceration are included.[187]

184 . Tolley Affidavit, *supra* note 163, ¶ 5. *See also* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, Executive Summary at xx, 247 (recommending that the Ohio Supreme Court decrease the use of the harmless error standard of review); *id.* at 237 (providing an explanation of Criminal Rule 52(A), noting that the reviewing court must find an "error" (deviation from a legal rule), and determine whether the error affected "substantial rights" of the defendant (prejudicial, affecting the outcome of the trial court proceedings)).

185 . Tolley Affidavit, *supra* note 162, ¶ 6 (internal citations omitted) (quoting State v. Fears, 715 N.E.2d 136, 155 (Ohio 1999) & State v. Jones, 739 N.E.2d 300 (Ohio 2000)).

186 . ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, Executive Summary at iii. *See also* JIM PETRO & NANCY PETRO, FALSE JUSTICE: EIGHT MYTHS THAT CONVICT THE INNOCENT 104 (2011) ("An Indiana gubernatorial commission's research concluded in 2003 that it is about a third more expensive to pursue a capital case to its conclusion than to house a person sentenced to life without parole.").

187 . Steiker & Steiker, *supra* note 1, at 405. The Death Penalty Information Center provides Financial Facts about the Death Penalty:

- •A new study in California revealed that the cost of the death penalty in the state has been over $4 billion since 1978. Study considered pre-trial and trial costs, costs of automatic appeals and state habeas corpus petitions, costs of federal habeas corpus appeals, and costs of incarceration on death row. (Alarçon & Mitchell, 2011).
- •In Maryland, an average death penalty case resulting in a death sentence costs approximately $3 million. The eventual costs to Maryland taxpayers for cases pursued 1978-1999 will be $186 million. Five executions have resulted. (Urban Institute 2008).
- •In Kansas, the costs of capital cases are 70% more expensive than comparable non-capital cases, including the costs of incarceration. (Kansas Performance Audit Report, December 2003).
- •Enforcing the death penalty costs Florida $51 million a year above what it would cost to punish all first-degree murderers with life in prison without parole. Based on the 44 Executions Florida had carried out since 1976, that amounts to a cost of $24 million for each execution. (Palm Beach Post, January 4, 2000).

> Although the data are often incomplete or difficult to disaggregate, it appears that the lion's share of additional expenses occurs during the trial phase of capital litigation, as a result of a longer pre-trial period, a longer and more intensive voir dire [jury selection] process, longer trials, more time spent by more attorneys preparing cases, more investigative and expert services, and an expensive penalty phase trial that does not occur at all in non-death penalty cases. Appellate and especially post-conviction costs are also considerably greater than in non-capital cases, though they tend to make up a smaller share of the total expense of capital litigation.[188]

Because the character and record of the individual defendant must be considered by the jury in the penalty phase, it is necessary for a mitigation specialist to interview family members, to obtain school and social services records, medical and mental health records, and sometimes to obtain testing or evaluation by other specialists or experts.[189]

Testifying in 2002, Professor Liebman estimated the cost per execution at about $23 million.[190] In 2011, Terry Collins, former director of the Ohio Department of Rehabilitation and Correction, wrote:

> •The most comprehensive study in the country found that the death penalty costs North Carolina $2.16 million per execution *over* the costs of sentencing murderers to life imprisonment. The majority of those costs occur at the trial level. (Duke University, May 1993).
>
> •In Texas, a death penalty case costs an average of $2.3 million, about three times the cost of imprisoning someone in a single cell at the highest security level for 40 years. (Dallas Morning News, March 8, 1992).

DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY 4 http://www.deathpenaltyinfo.org/FactSheet.pdf (updated July 19, 2012). *See also* Arthur L. Alarçon & Paula M. Mitchell, *Executing the Will of the Voters?: A Roadmap to Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 LOY. L.A. L. REV. S41, S41 [Special Issue, Dec. 2011], http://media.lls.edu/documents/LoyolaLawReview_CADeathPenalty.pdf ("Since reinstating the death penalty in 1978, California taxpayers have spent roughly $4 billion to fund a dysfunctional death penalty system that has carried out no more than 13 executions."); *The Cost of the Death Penalty in Maryland*, URBAN INST. JUST. POL'Y CENTER at Abstract (Mar. 2008), http://www.urban.org/UploadedPDF/411625_md_death_penalty.pdf ("An average capital-eligible case resulting in a death sentence will cost approximately $3 million, $1.9 million more than a case where the death penalty was not sought. In these cases, prison costs total about $1.3 million while the remaining $1.7 million are associated with adjudication.").

188 . Steiker & Steiker, *supra* note 1, at 405. An article in the *Economist* noted:

> Studies show that administering the death penalty is even more expensive than keeping someone in prison for life. The intensive jury selection, trials and appeals required in capital cases can take over a decade and run up a huge tab for the state. Death row, where prisoners facing execution are kept in separate cells under intense observation, is also immensely costly.

Saving Lives and Money: States Plagued by Fiscal Woes Rethink Their Stance on the Death Penalty, THE ECONOMIST, Mar. 12, 2009, at 32, *available at* http://www.economist.com/node/13279051.

189 . *See* S. Adele Shank, *The Death Penalty in Ohio: Fairness, Reliability, and Justice at Risk-A Report on Reforms in Ohio's Use of the Death Penalty Since the 1997 Ohio State Bar Association Recommendations Were Made*, 63 OHIO ST. L.J. 371, 377 (2002).

190 . Liebman Testimony, *supra* note 160, at 4.

> It costs millions of dollars to execute people in Ohio, more than life imprisonment. Those costs begin at the trial phases and continue through appeals to pay for lawyers, judges and prisons. The expense of county and state resources that go into two separate trials in death penalty cases (one to decide innocence or guilt and the second to decide life or death) adds up quickly before anyone spends a single day on Death Row. Then the appeals begin, compounding these enormous costs. It is also expensive to maintain Death Rows once offenders begin to serve their time there.[191]

When Ohio decided to move its death row to the Ohio State Penitentiary in 2005, Terry Collins testified on behalf of the Ohio Department of Rehabilitation and Correction that as a rule death row prisoners are not a high security risk.[192]

In cases where the death sentence is commuted to a life sentence, the prisoner's security level is usually reduced from death row status to Level 3 defined as "close" security.[193] Incarceration costs are far higher for prisoners on death row than on Level 3. Although the cost per day per prisoner is calculated for all security levels in one prison, when the cost of maintaining a prisoner on death row is compared with the cost of maintaining a prisoner at a lower security facility, the disparity in cost is enormous.[194]

[191] . Terry Collins, *Justice System Can Be Improved by Removing Ultimate Penalty*, COLUMBUS DISPATCH (Jan. 25, 2011, 5:57 AM), http://www.dispatch.com/content/stories/editorials/2011/01/25/justice-system-can-be-improved-by-removing-ultimate-penalty.html. *See also* Steiker & Steiker, *supra* note 1, at 419 ("Indigent defense is notoriously underfunded in both capital and non-capital cases[;] … death penalty cases impose daunting costs on local prosecutors and their county budgets.").

[192] . Austin v. Wilkinson, No. 4:01-cv-071, ECF No. 624, at 4 (N.D. Ohio Sept. 30, 2005) ("As described by Department Assistant Director Terry Collins: 'most inmates on Death Row have not created problems' and 'have been a relatively peaceful group.'").

[193] . *INMATE SECURITY CLASSIFICATION: LEVELS 1 THROUGH 4* (53-CLS-01), OHIO DEP'T OF REHABILITATION & CORRECTION (May 23, 2012), http://www.drc.ohio.gov/web/drc_policies/documents/53-CLS-01.pdf. The Ohio Department of Rehabilitation and Correction assigns non-death row prisoners to one of five security levels subject to annual review. These levels range from Level 1, minimum security, to Level 5, high maximum security. *Id*. at 2-3.

[194] . Before Death Row was moved from the Mansfield Correctional Institution (ManCI) to the Ohio State Penitentiary (OSP) in 2005, the daily cost of housing an inmate at OSP was $167.33, in contrast to $58.14 at ManCI. *Austin*, No. 4:01-cv-071, ECF No. 624, at 4 n.4 (explaining that from October 2005 through December 2011, most death-sentenced prisoners were housed at OSP). As of December 2011, even though 37.5% of the total population at OSP were men in the minimum security camp, the daily cost per inmate was $149.48, well over twice the cost per day of institutions that house predominately Level 3 prisoners. By way of contrast, at ManCI, where 27 "seriously mentally ill" death row prisoners were housed, 16.3 % were minimum security prisoners, and 78.2% were on Level 3, the daily cost per inmate was $53.58. At Trumbull Correctional Institution, where 97.9% of the population was on Level 3, the daily cost per inmate was $60.84. At Toledo Correctional Institution, where 96.8% of the prisoners were on Level 3 and which also housed a Protective Control unit, the daily cost per inmate was $67.39. At Lebanon Correctional Institution, where 87.6% of the prisoners were on Level 3, the daily cost per inmate was $45.60. Current data are available at *Correctional Institutions Map*, OHIO DEP'T OF REHABILITATION & CORRECTION, http://www.drc.ohio.gov/web/prisprog.htm (click on particular institution) (last visited Aug. 7, 2012).

In Ohio, as in other states, "[t]he provision of the resources necessary for fair capital trials and appeals may simply not be possible, or not possible without substantial diversion of public funds from other sources[.]"[195] Any resources spent on corrections are not available for other purposes.

Resources devoted to the capital side often come at the expense of the non-capital side.[196] Death penalty cases clog state and federal courts and burden their ability to manage their civil cases as well as their non-capital criminal cases.[197]

"[S]eldom mentioned," wrote Justice Stevens, "is the impact on the conscientious juror obliged to make a life-or-death decision despite residual doubts about a defendant's guilt."[198]

And, as Terry Collins points out, "There is another cost that we do not always consider: that borne by victims' families. It is emotionally traumatic for the families of victims to be recalled into courts year after year because of so many death-penalty appeals."[199]

III. THE AMERICAN LAW INSTITUTE HAS WITHDRAWN THE CAPITAL PUNISHMENT PROVISIONS OF THE MODEL PENAL CODE

Fifteen years after Justice Blackmun came to the conclusion that no combination of procedural rules or substantive regulations could save the death penalty from its inherent constitutional deficiencies,[200] the American Law Institute withdrew the death penalty provisions from the Model Penal Code "in light of the current intractable institutional and structural obstacles to ensuring a minimally adequate system for administering capital punishment[.]"[201]

The ALI also decided that it would be futile either to revise or replace the death penalty provisions of the Model Penal Code.[202] Because the ALI was not

195 . Steiker & Steiker, *supra* note 1, at 407. *See generally* Alarçon & Mitchell, *supra* note 187, at S192.

196 . Steiker & Steiker, *supra* note 1, at 419-20.

197 . *Id.* at 420 ("[T]he death penalty makes extraordinary demands on the American courts and threatens the quality of justice for all litigants, including those outside the capital process."). *See also* John Paul Stevens, *On the Death Sentence*, N.Y. REV. OF BOOKS, Dec. 23, 2010, http://www.nybooks.com/search/?q=Stevens+Garland+death+sentence&origin=magazine (reviewing David Garland, PECULIAR INSTITUTION: AMERICA'S DEATH PENALTY IN AN AGE OF ABOLITION) (Garland estimates that financial costs of death penalty cases are at least double those of non-capital murder cases. "While support of the death penalty wins votes for some elected officials, all participants in the process must realize the monumental costs that capital cases impose on the judicial system.").

198 . Stevens, *supra* note 197, at 10.

199 . Collins, *supra* note 191, at 2.

200 . Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

201 . *ALI Resolution*, *supra* note 1.

202 . ALI REPORT TO THE MEMBERSHIP, *supra* note 1, at 4. *See also* Steiker & Steiker, *supra* note 1, at 371.

> [The ALI found that the American Bar Association had] already done the important work of promulgating norms and standards for the capital justice process. After a great deal of study, reflection and consultation with experts, the ABA has made comprehensive and sensible recommendations for the reform of capital sentencing proceedings, and there seems little that an ALI study could usefully add…. [E]ven if the ALI came up with different or additional

confident that it could recommend procedures that would meet the most important of its concerns, the ALI decided not to recommend any other procedures.[203]

The "Report to the ALI Concerning Capital Punishment," prepared at the request of the ALI director, concludes, "the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved."[204] The Report explains:

> The guided discretion experiment has not solved the problems of arbitrariness and discrimination that figured so prominently in *Furman*; nor has the Court's regulation proven able to ensure the reliability of verdicts or the protection of fundamental due process in capital cases. An abundant literature … reveals the continuing influence of arbitrary factors (such as geography and quality of representation) and invidious factors (most prominently race) on the distribution of capital verdicts. Most disturbing is the evidence of numerous wrongful convictions of the innocent, many of whom were only fortuitously exonerated before execution, and the continuing concern about the likelihood of similar miscarriages of justice in the future. These failures of constitutional regulation are due in part to the inherent difficulty and complexity of the task of rationalizing the death penalty decision, given the competing demands of even-handed administration and individualized consideration. Moreover, such a difficult task is compounded by deeply rooted institutional and structural obstacles to an adequate capital justice process. Such obstacles include the intense politicization of the capital justice process, the inadequacy of resources for capital defense services, and the lack of meaningful independent federal review of capital convictions.[205]

In March 2011, the ALI issued Tentative Draft No. 2 of the sentencing provisions of the Model Penal Code:

> reform proposals, the lack of resources or the political will to generate the necessary resources stands in the way of any substantial reform of the capital justice process.

Id. at 408.

[203] . ALI REPORT TO THE MEMBERSHIP, *supra* note 1, at 4 ("The Institute should not engage in a project on capital punishment, either to revise or replace § 210.6 or to draft a separate model statutory provision.").

[204] . Steiker & Steiker, *supra* note 1, at 421. The Report concludes:

> The foregoing review of the unsuccessful efforts to constitutionally regulate the death penalty, the difficulties that continue to undermine its administration, and the structural and institutional obstacles to curing those ills forms the basis of our recommendation to the Institute. The longstanding recognition of these underlying defects in the capital justice process, the inability of extensive constitutional regulation to redress those defects, and the immense structural barriers to meaningful improvement all counsel strongly against the Institute's undertaking a law reform project on capital punishment, either in the form of a new draft of § 210.6 or a more extensive set of proposals. Rather, these conditions strongly suggest that the Institute recognize that the preconditions for an adequately administered regime of capital punishment do not currently exist and cannot reasonably be expected to be achieved.

Id.

[205] . *Id.* at 369-70.

> With one narrow exception the revised Code continues the policy judgment of the original Code that the most severe sanction in the criminal law should be a life prison term with a meaningful possibility of release before the prisoner's natural death. In a departure from the Institute's previous position, the Code now also concedes the policy advisability of life prison sentences with no prospect of release —the equivalent of "life without parole" in some systems—but only when this sanction is the sole alternative to a death sentence.[206]
>
> ….
>
> The Institute's new position has been forged with reluctance.… [I]f capital punishment were not part of the nation's legal landscape, the Institute would not endorse penalties of life imprisonment with no chance of release. Natural-life sentences rest on the premise that an offender's blameworthiness cannot change substantially over time.… It also assumes that rehabilitation is not possible or will never be detectable in individual cases.…
>
> Despite these concerns, the Institute recognizes the advisability of the penalty of life imprisonment with no chance of release when it is the only alternative to the death penalty.…[207]

Three problem areas identified by the ALI and of major importance to Ohio are: causes of wrongful conviction; restrictions on federal habeas corpus review; and the death qualified jury.

A. Causes of Wrongful Convictions

Six men sentenced to death in Ohio were later exonerated.[208] Exonerations raise questions as to the causes of wrongful convictions.[209]

[206] . MODEL PENAL CODE: SENTENCING, *supra* note 15, at 12.

[207] . *Id.* at 14.

[208] . *Innocence: List of Those Freed From Death Row*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-list-those-freed-death-row (last updated Jan. 23, 2012). Ohio has released 7 out of a nationwide total of 140 death row defendants who were exonerated based on evidence of innocence: acquitted, Gary Beeman after 3 years on death row; charges dropped, Dale Johnston, Gary LaMar James, Timothy Howard, Derrick Jamison, and Joe D'Ambrosio after 6, 26, 26, 20, and 23 years respectively. *See Innocence Cases: 2004-Present*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/innocence-cases-2004-present (last visited July 30, 2012). A seventh man may soon be added to the list of Ohio exonerees. In September 2012, all charges against Michael Keenan, D'Ambrosio's co-defendant, were dismissed. Peter Krouse, *Michael Keenan Freed, Murder Charge from 24 Years Ago Dismissed by Cuyahoga County Judge*, PLAIN DEALER (Cleveland, Ohio) (Sept. 6, 2012, 1:36 PM), http://www.cleveland.com/metro/index.ssf/2012/09/michael_keenan_1.html.

[209] . *The Causes of Wrongful Conviction*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/ (last visited July 30, 2012) (listing the seven most common causes of wrongful convictions, many cases involving a combination of causes: eyewitness misidentification, unvalidated or improper forensic science, false confessions/admissions, government misconduct, informants or snitches, and bad lawyering). *See also* PETRO & PETRO, *supra* note 186, at viii, ch. 21 (on common contributors to wrongful convictions in Ohio: false confessions, use of unreliable informants and snitches, bad lawyering, unreliable science, government misconduct, and mistaken eyewitness testimony).

DNA cases have demonstrated numerous causes of wrongful conviction.[210] DNA testing can eliminate the possibility that some individuals were culpable,[211] but there is no DNA evidence in most cases.[212]

The National Registry of Exonerations, a joint project of the University of Michigan Law School and the Center on Wrongful Convictions, issued its first report on exonerations in United States in May 2012. Findings are based on 873 exonerations between January 1989 and the end of February 2012 of which 416 (48%) were homicides and 101 (12%) involved death sentences.[213]

> For all exonerations, the most common causal factors that contributed to the underlying false convictions are perjury or false accusation (51%), mistaken eyewitness identification (43%) and official misconduct (42%)—followed by false or misleading forensic evidence (24%) and false confession (16%). The frequencies of these causal factors vary greatly from one type of crime to another.
>
> Homicide exonerations:
>
> - The leading contributing cause is ***perjury or false accusation*** (66%)—mostly ***deliberate misidentifications*** (44%).
> - Homicide case[s] also have a high rate of ***official misconduct*** (56%).
> - Homicide exonerations include 76% of all ***false confessions*** in the data.[214]

Erroneous convictions occur disproportionately in capital cases because of special circumstances such as greater incentives for the real killers and others to offer perjured testimony, greater use of coercive or manipulative interrogation techniques,[215] greater publicity and public outrage, and greater willingness by

[210] . *The Causes of Wrongful Conviction*, *supra* note 209 ("In each case where DNA has proven innocence beyond doubt, an overlapping array of causes has emerged—from mistakes to misconduct to factors of race and class.").

[211] . For a simple explanation of DNA evidence, how it may be used or misused, and questions regarding interpretation of DNA evidence, see PETRO & PETRO, *supra* note 186, at 37-39, 109-10, 123-26, 144-45, 236.

[212] . *The Causes of Wrongful Conviction*, *supra* note 209 ("For every case that involves DNA, there are thousands that do not."). *See also* PETRO & PETRO, *supra* note 186, at 123 (relying on the Innocence Project's research) ("Fully 90 percent to 95 percent of criminal cases have no biological evidence for DNA testing.").

[213] . *Exonerations in the United States, 1989-2012: Key Findings*, NAT'L REGISTRY OF EXONERATIONS 1-2 (May 20, 2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_summary.pdf. For the full report, see SAMUEL R. GROSS & MICHAEL SHAFFER, EXONERATIONS IN THE UNITED STATES, 1989-2012: REPORT BY THE NATIONAL REGISTRY OF EXONERATIONS (2012), http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

[214] . *Id.* at 2 (table reference omitted). *See also* PETRO & PETRO, *supra* note 186, at 119 (summarizing CTR. ON WRONGFUL CONVICTIONS, NORTHWESTERN UNIV. SCHOOL OF LAW, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW (2005), http://www.law.northwestern.edu/wrongfulconvictions/issues/causesandremedies/snitches/SnitchSystemBooklet.pdf) (stating that during years when there were 111 death row exonerations, 51 (or 45.9%) involved testimony from an informant or snitch, and among capital punishment exonerations, the use of snitches was the most frequent contributor).

[215] . Bennett L. Gershman, *Witness Coaching by Prosecutors*, 23 CARDOZO L. REV. 829, 839 (2002) ("A prosecutor, through the use of questions and suggestions has the ability to influence a witness to remember facts and fill gaps that may be inaccurate, but which the witness may come to

defense counsel to compromise the guilt phase in order to avoid death in the sentencing phase.[216] In order to avoid the death penalty, an offender may have taken a plea bargain, or agreed to be a witness for the prosecution against the defendant in order to gain a reduced sentence, dropped charges, parole, or other benefit for himself or herself.

1. *Heightened Reliability Is Vital in Capital Cases*

The principle is not in dispute that, because death is different in its severity and finality, heightened reliability is of vital importance in capital cases.[217] Convictions based on eyewitness testimony, or the testimony of accomplices or informants who are offered reduced charges, parole, or other benefits in return for their testimony, is inherently unreliable in the absence of independent and objective corroborating evidence connecting the defendant to the crime.[218]

The Supreme Court of the United States has recognized the fallibility of testimony by eyewitnesses or jailhouse snitches. However, such testimony is usually not excluded because defense counsel can cross-examine the witness, the court may issue a cautionary jury instruction[219] and, except where law

believe is the truth.").

[216] . Steiker & Steiker, *supra* note 1, at 409 (citing Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996)).

[217] . *See* Woodson v. North Carolina, 428 U.S. 280, 303-05 (1976); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Beck v. Alabama, 447 U.S. 625, 637-38 (1980).

[218] . Christine J. Saverda, Note, *Accomplices in Federal Court: A Case for Increasing Evidentiary Standards*, 100 YALE L.J. 785, 787 (1990) ("The fact that accomplice testimony is presumptively unreliable has never been disputed."). *See also* AM. BAR ASS'N SECTION OF CRIMINAL JUSTICE, REPORT TO THE HOUSE OF DELEGATES (Feb. 2005), *available at* http://meetings.abanet.org/webupload/commupload/CR209700/relatedresources/ABAInformant'sRecommendations.pdf (adopted by the House of Delegates) ("RESOLVED, That the American Bar Association urges federal, state, local, and territorial governments to reduce the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, by ensuring that no prosecution should occur based solely upon uncorroborated jailhouse informant testimony."); Henry Weinstein, *Limited Use of Jail Informants Urged*, L.A. TIMES, Nov. 22, 2006, at B4 (reporting that the California Commission on the Fair Administration of Justice recommended limited use of jail informants and laws requiring corroborating evidence if such testimony is offered). The California Commission on the Fair Administration of Justice recommended:

> A conviction can not be had upon the testimony of an in-custody informant unless it be corroborated by such other evidence as shall independently tend to connect the defendant with the commission of the offense or the special circumstance or the circumstance of aggravation to which the in-custody informant testifies. Corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance or the circumstance in aggravation. Corroboration of an in-custody informant cannot be provided by the testimony of another in-custody informant.

CAL. COMM'N ON THE FAIR ADMIN. OF JUSTICE, REPORT AND RECOMMENDATIONS REGARDING INFORMANT TESTIMONY 8 (2006) [hereinafter CAL. COMM'N REPORT], *available at* http://www.ccfaj.org/documents/reports/jailhouse/official/official%20report.pdf.

[219] . *See, e.g.*, OHIO REV. CODE ANN. § 2923.03(D) (West 2010) (requiring the following charge to the jury when an alleged accomplice testifies against a defendant who is charged with complicity: "The testimony of an accomplice does not become inadmissible because of his

enforcement has tainted the process, it is the role of the jury to make credibility determinations.[220]

But cross-examination and cautionary jury instructions are not sufficient to ensure reliability, particularly in capital cases where heightened reliability is necessary to avoid conviction and execution of the innocent.

> Cross-examination and cautionary jury instructions do not adequately correct for the distortions created by the government's power to compensate cooperating witnesses because they cannot effectively penetrate the process by which the government selects, prepares, and evaluates those witnesses. Under current rules, the processes by which prosecutors or law enforcement officers make decisions about what targets are most culpable and whose testimony is most useful, prepare cooperating witnesses for trial, and dole out immunity and plea bargains accordingly, are largely undiscoverable. Even that which is discoverable often remains resistant to realistic portrayal at trial.[221]

Given the need for heightened reliability in capital cases, where a sentence of life or death is in the balance, evidence that is concededly untrustworthy

complicity, moral turpitude, or self-interest, but the admitted or claimed complicity of a witness may affect his credibility and make his testimony subject to grave suspicion, and require that it be weighed with great caution.").

[220] . There is no question that testimony by eyewitnesses, accomplices and jailhouse informants is unreliable. The question considered by the Supreme Court is what procedures are necessary to ensure that the defendant has a fair trial? In a case where a defendant was accused of breaking into cars, opening the trunk of one and removing a box containing car-stereo speakers, the Court ruled:

> We do not doubt either the importance or the fallibility of eyewitness identifications. Indeed, in recognizing that defendants have a constitutional right to counsel at postindictment police lineups, we observed that "the annals of criminal law are rife with instances of mistaken identification." Wade, 388 U.S. at 228.
>
> We have concluded in other contexts, however, that the potential unreliability of a type of evidence does not alone render its introduction at the defendant's trial fundamentally unfair. See, e.g., Ventris, 556 U.S. at 594, n. (declining to "craft a broa[d] exclusionary rule for uncorroborated statements obtained [from jailhouse snitches]," even though "rewarded informant testimony" may be inherently untrustworthy); Dowling, 493 U.S. at 353 (rejecting argument that the introduction of evidence concerning acquitted conduct is fundamentally unfair because such evidence is "inherently unreliable"). We reach a similar conclusion here: The fallibility of eyewitness evidence does not, without the taint of improper state conduct, warrant a due process rule requiring a trial court to screen such evidence for reliability before allowing the jury to assess its creditworthiness.

Perry v. New Hampshire, 132 S. Ct. 716, 728 (2012). The majority held in *Perry*:

> When no improper law enforcement activity is involved, we hold, it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt.

Id. at 721; *id*. at 730 ("[W]e hold that the Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement.").

[221] . George C. Harris, *Testimony for Sale: The Law and Ethics of Snitches and Experts*, 28 PEPP. L. REV. 1, 53 (2000).

should not be heard by the jury in the absence of independent, objective corroborating evidence. The Supreme Court has recognized this problem but does not have an adequate solution for untrustworthy witness testimony in capital cases.[222]

A study of 173 men on Ohio's Death Row in 2003 found that 75 of the cases relied in some part on the testimony of in-custody informants, eyewitnesses, and accomplices, and in 43 of these cases defendants maintain their innocence.[223] "[T]he Ohio Case Study illustrates that the death penalty in Ohio contains a likelihood of executing the innocent, a high rate of reversible error, and an arbitrariness in the application of the death penalty."[224]

2. *Eyewitnesses Are Fallible in Perception and Memory*

The Supreme Court of the United States concluded in *Manson v. Brathwaite*:

> [R]eliability is the linchpin in determining the admissibility of identification testimony …. The factors to be considered … include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation. Against these factors is to be weighed the corrupting effect of the suggestive identification itself.[225]

The unreliability of eyewitness testimony has been treated more comprehensively by the New Jersey Supreme Court in *State v. Henderson*. Both perception at the time of the event and memory are implicated.

> The process of remembering consists of three stages: acquisition—"the perception of the original event"; retention—"the period of time that passes between the event and the eventual recollection of a particular piece of information"; and retrieval—the "stage during which a person recalls stored information." Elizabeth F. Loftus, *Eyewitness Testimony* 21 (2d ed. 1996). As the Special Master observed,

222 . *See* Manson v. Brathwaite, 432 U.S. 98, 113 (1977).

> It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness….
>
> Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification—including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.

Id. at 113 n.14 (citation omitted).

223 . Ohio Death Row Research Group, The Center for Law and Justice, *Death Row in Ohio, 2003: The Case for a Study Commission*, 72 U. CIN. L. REV. 223, 238-42 (2003).

224 . *Id.* at 244. *See also Eyewitness Misidentification*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php (last visited July 30, 2012) ("Eyewitness misidentification is the single greatest cause of wrongful convictions nationwide, playing a role in more than 75% of convictions overturned through DNA testing.").

225 . *Manson*, 432 U.S. at 114.

> [a]t each of those stages, the information ultimately offered as "memory" can be distorted, contaminated and even falsely imagined.… [M]emory rapidly and continuously decays; retained memory can be unknowingly contaminated by post-event information; [and] the witness's retrieval of stored "memory" can be impaired and distorted by a variety of factors, including suggestive interviewing and identification procedures conducted by law enforcement personnel.[226]

On the basis of exhaustively cited studies, the Court found the following "estimator variables" to be "capable of affecting an eyewitness' ability to perceive and remember an event" and to be "beyond the control of the criminal justice system":[227]

- Stress. High levels of stress can diminish an eyewitness's ability to make an accurate identification and to recall crime-related details.
- Weapon Focus. When a visible weapon is used during a crime, it can distract a witness and draw his or her attention away from the culprit. When the interaction is brief, the presence of a visible weapon can affect the reliability of an identification and the accuracy of a witness's description of the perpetrator.
- Duration. The amount of time an eyewitness has to observe an event may affect the reliability of an identification. Witnesses consistently tend to overestimate short durations, particularly where much was going on or the event was particularly stressful.
- Distance and Lighting. It is easier to recognize a person when close. Clarity decreases with distance. Poor lighting makes it harder to see well. Thus, greater distance between a witness and a perpetrator and poor lighting conditions can diminish the reliability of an identification. People have difficulty estimating distances.
- Witness Characteristics. A witness's age and level of intoxication can affect the reliability of an identification. Children are more likely to make incorrect identifications than adults. Witness accuracy declines with age: young adults are more likely to be accurate than older witnesses. People are better at recognizing people of their own age than people of other ages.
- Characteristics of Perpetrator. Disguises, such as hats, or changes in facial features, such as a beard, reduce identification accuracy.
- Memory Decay. Memories fade with time. Memories never improve. Delays between the commission of a crime and the time an identification is made can affect reliability.
- Race-bias. A witness may have more difficulty identifying a person of another race.

[226] . State v. Henderson, 27 A.3d 872, 894-95 (N.J. 2011) (internal citations omitted). *See also* PETRO & PETRO, *supra* note 186, at 142-43, 145-46.

[227] . *Henderson*, 27 A.3d at 904.

- Private Actors. Memories can be altered when a witness is exposed to opinions, descriptions, identifications by other witnesses, photographs or newspaper accounts, feedback and suggestions from others. Co-witnesses can influence memory and recall, especially if the witnesses were previously acquainted. A witness may be more confident if a co-witness agrees, and less confident if co-witnesses disagree.[228]

Eyewitness testimony has been shown to be responsible for more cases of wrongful conviction in Ohio than all other causes combined.[229]

3. *Testimony by Accomplices and Other Prisoner Informants in Exchange for Lenient Treatment Is Inherently Unreliable*

Testimony by accomplices and other prisoner informants, especially those who receive lenient treatment in exchange for their testimony, is inherently unreliable.[230] Modern prosecutors have virtually unlimited discretion to offer immunity or lenient treatment to a defendant or target in exchange for testimony.[231] Lenient treatment may take the form of a grant of immunity or non-prosecution agreement resulting in no charges being brought, dismissal of pending charges, acceptance of a plea to reduced charges, and agreement that statements made will not be used against the potential cooperator.[232] Whenever the government provides rewards for prison informer testimony, there is a real inducement to perjury.[233]

Prosecutors rather than jurors often make crucial decisions regarding culpability and truthfulness. Typically the prosecutor attempts to convince the potential cooperator that he or she faces certain conviction and only by cooperation can the sentence be mitigated. For such a defendant or target, facing a lengthy prison sentence or even death, lenient treatment will likely be a more valued form of compensation than money. The controlling principle is that the prosecutor will only give something in order to get something. "Whether the

228 . *Id.* at 904-09.

229 . *Death Row in Ohio, 2003*, *supra* note 223, at 241.

230 . Cool v. United States, 409 U.S. 100, 103 (1972) (accomplice may have a special interest in testifying, thus casting doubt upon his veracity); On Lee v. United States, 343 U.S. 747, 757 (1952) (use of informers, accessories, accomplices, false friends, or any of the other betrayals which are "dirty business" may raise serious questions of credibility); Holmgren v. United States, 217 U.S. 509, 524 (1910) (better practice is to caution juries against too much reliance upon the testimony of accomplices, and to require corroborating testimony before giving credence to them); Crawford v. United States, 212 U.S. 183, 204 (1909) (accomplice testimony ought to be received with suspicion). *See also* CAL. COMM'N REPORT, *supra* at note 218, at 6 ("The Commission concluded that the testimony of in-custody informants potentially presents even greater risks than the testimony of accomplices, who are incriminating themselves as well as the defendant.").

231 . Harris, *supra* note 221, at 13, 16.

232 . *Id.* at 16-17. *See, e.g.*, STAUGHTON LYND, LUCASVILLE: THE UNTOLD STORY OF A PRISON UPRISING 99-111 (2d ed. PM Press 2011) (2004).

233 . Welsh S. White, *Regulating Prison Informers Under the Due Process Clause*, 1991 SUP. CT. REV. 103, 138. *See also id.* ("The government practice of offering rewards to prisoner informants in exchange for their testimony precipitates unreliable prison informer testimony.").

cooperator has given 'truthful' testimony will be determined by the prosecutor,"—that is—consistent with the prosecution's theory of the case.[234]

> Dependence on accomplice testimony and use of cooperation agreements are most likely to occur, moreover, in just those cases where the extrinsic evidence is not sufficient, or only marginally sufficient to convict any suspected accomplice. The same lack of evidence will make it difficult or impossible for the prosecutor to determine with any assurance which suspected accomplice or accomplices are telling the truth (or the closest approximation of the truth), and for the prosecutor to make the correct determination of their relative culpability. Particularly in the case of violent or high-profile crimes, these determinations will often be made under pressure to resolve the case by convicting someone.[235]

Furthermore, the option to offer such compensation is available only to the prosecution and not to the defense.[236]

Accomplices have strong incentives to lie, to minimize their own role and to exaggerate the roles of co-conspirators. An accomplice may have escaped indictment by telling a story that exonerates himself and shifts the blame to the accused.[237] Accomplice testimony is often the most damaging evidence against a defendant because the cooperator has first-hand knowledge of the pattern of criminal activity. "Consequently, a cooperator can manipulate the details of the events without arousing much, if any, suspicion and still be believable to a jury."[238]

Prisoner informants' motive for presenting false testimony is simple: they hope to receive some benefit from the government such as the dismissal of charges or a substantial reduction of prison time.[239] Most prisoners have an overwhelming desire to reduce their prison time.[240] Under the special circumstances of the prison environment, "the smallest material comfort may seem priceless and 'protection' in any form may appear indispensable."[241]

Furthermore, the jury will find it difficult to assess the credibility of a typical prison informer. There is a grave danger that the jury will under-estimate the unreliability of such testimony. "Even cross-examination that effectively brings out the informer's incentives for obtaining the particular incriminating statements is unlikely to reveal to the jury the high probability that the informer's testimony is false."[242]

234 . Harris, *supra* note 221, at 17. *See also id*. at 13, 16-17, 57.

235 . *Id.* at 53-54 (footnotes omitted).

236 . *Id.* at 49. *See also* Saverda, *supra* note 218, at 785 n.7 (stating that because the prosecutor can provide the motive to lie, the prosecutor has a power that the defendant does not have).

237 . Saverda, *supra* note 218, at 786.

238 . Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917, 921 (1999) (citing Saverda, *supra* note 218, at 787).

239 . White, *supra* note 233, at 130, 139.

240 . *Id.* at 139.

241 . *Id.* at 122.

242 . *Id.* at 136.

4. *Other Factors Contributing to Unreliability Are Beyond the Control of the Criminal Justice System*

Jurors often assume that the prosecution has made the correct choices as to relative culpability and truthfulness[243] and that the prosecutor would not have brought the case if the defendant were not guilty. Additional flaws in jury decisionmaking include the propensity of jurors to decide punishment during the guilt or innocence phase of the trial, inability to grasp the concept of mitigating evidence, unwillingness to consider a life verdict, and underestimating the length of time a defendant will remain in prison if not sentenced to death.[244]

Political concerns intrude and lead to arbitrary, capricious, and discriminatory imposition of the death penalty that cannot be eradicated by restructuring the state's statutory death penalty provisions.[245] The existence of the death penalty blunts arguments about the excessive punitiveness of non-capital sanctions.[246] Arguments in favor of life without parole deflect arguments about the ways in which lengthy incarceration imposes substantial costs and is a problem in itself.[247] Excessive punishments encourage false confessions and plea-bargaining. Problems of racial disparities in punishment,[248] the high rate of

243 . Harris, *supra* note 221, at 56.

244 . Steiker & Steiker, *supra* note 1, at 402-03.

245 . *See* Dan Horn, *The Politics of Life and Death: An Inmate's Fate Often Hinges on Luck of the Draw*, CINCINNATI ENQUIRER, Apr. 15, 2007, at A1, *available at* http://lethal-injection-florida.blogspot.com/2007/04/inmates-fate-often-hinges-on-luck-of.html. The United States Court of Appeals for the Sixth Circuit that decides death penalty cases from Ohio, Kentucky and Tennessee, is a deeply divided court. An *Enquirer* analysis showed that judges appointed by Republican presidents voted to deny inmate appeals 85% of the time; judges appointed by Democrats voted to grant at least some portion of those appeals 75% of the time. Thus, life-and-death decisions often hinge on the luck of the draw.) *Id*. *See also* DIETER, *supra* note 164, at 24-25 (discussing the *Enquirer* findings and concluding that statistics like these strongly suggest judgments in death penalty cases are subjective and influenced by factors that interject a high degree of arbitrariness into the process).

246 . *See* MICHELLE ALEXANDER, THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS 89 (2012) (noting that mandatory sentencing laws have forced judges to impose sentences for drug crimes that are often longer than those violent criminals receive).

247 . Steiker & Steiker, *supra* note 1, at 417 ("[L]engthy incarceration is viewed as a 'lesser' evil instead of an evil in itself."). The MODEL PENAL CODE: SENTENCING:

> [G]overnments should be especially cautious in the use of their powers when imposing penalties that deprive offenders of their liberty for a substantial portion of their adult lives. [Section 305.6] reflects a profound sense of humility that ought to operate when punishments are imposed that will reach nearly a generation into the future, or longer still.

MODEL PENAL CODE: SENTENCING, *supra* note 15, at 78. *See also id*. at 80 ("[S]ocietal assessments of offense gravity and offender blameworthiness sometimes shift over the course of a generation or comparable periods … for example, … when a battered spouse kills an abusive husband.").

248 . Steiker & Steiker, *supra* note 1, at 416 (noting that one in nine black males between the ages of 20 and 34 are behind bars).

incarceration,[249] and the endless war on drugs are obscured when the spotlight is focused on the death penalty.[250]

Elected prosecutors, judges and governors are under intense pressures because of popular fears of violent crime and support for law and order. These pressures contribute to inadequate representation, wrongful convictions and disparate racial impact.[251] Election of prosecutors generates the geographic disparities that may be one of the sources of persistent racial disparities in the administration of capital punishment.[252] Conscious or unconscious bias makes it extraordinarily difficult to disentangle race from the administration of the American death penalty.[253]

"When the state takes a life on behalf of justice, there is no room for error," says Ohio's former Attorney General Jim Petro.[254] "The error rate in the justice system … would not be even remotely tolerated in the U.S. food industry or the U.S. pharmaceutical industry," he declares.[255] A claim of actual innocence that can be proved is like finding a needle in a haystack.[256]

> Innocent people in prison number in the thousands (our belief) because they have been misidentified by a witness. Or because a snitch saw an opportunity to improve his or her own situation. Or because they confessed in order to bargain for a better sentence or because they were psychologically beaten down or were a juvenile or were of diminished cognitive capacity. Or because they pled to a lesser crime rather than gamble away most or all of their lives with a jury. Or because a past mistake put them on a permanent list of go-to suspects. Or because they had a worthless lawyer, or even just one who was overly busy or underpaid. Or because they drew a county prosecutor who was particularly rigid or arrogant or superficial —or up for re-election that year. Or because a forensic scientist was lazy or incompetent or fudged the numbers to help make the case.[257]

249 . *Id.* ("[T]he United States … has an incarceration rate that is five to eight times higher than other Western industrialized nations ….") . *See also* ALEXANDER, *supra* note 246, at 6 ("The United States now has the highest rate of incarceration in the world, dwarfing the rates of nearly every developed country, even surpassing those in highly repressive regimes like Russia, China, and Iran.").

250 . Steiker & Steiker, *supra* note 1, at 418. *See also* ALEXANDER, *supra* note 246, at 6 ("The impact of the drug war has been astounding. In less than thirty years, the U.S. penal population exploded from around 300,000 to more than 2 million, with drug convictions accounting for the majority of the increase."). *See also id.* at 7 (citations omitted) (noting that people of all colors use and sell illegal drugs at remarkably similar rates; surveys suggest that whites, particularly white youth, are more likely to engage in drug crime than people of color). "In some states, black men have been admitted to prison on drug charges at rates twenty to fifty times greater than those of white men." *Id.*

251 . Steiker & Steiker, *supra* note 1, at 390.

252 . *Id.* at 390-91.

253 . *Id.* at 401.

254 . PETRO & PETRO, *supra* note 186, at 107.

255 . *Id.* at 108.

256 . *Id.* at 223 (citing 2005 Feature Story: *A Passion for Justice*, UNIV. OF TEX. AT AUSTIN, www.utexas.edu/features/archive/2005/innocence.html (last updated Oct. 9, 2008)).

257 . PETRO & PETRO, *supra* note 186, at 222-23.

Legislative and judicial reforms cannot correct such endemic flaws in the administration of the death penalty.

B. Federal Habeas Corpus Review

The availability of federal habeas review has been sharply curtailed.[258] Concerns about the length of time between the imposition of death sentences and executions have led to stringent procedural and substantive limits on the availability of federal habeas review for state prisoners.[259] With very narrow exceptions, if inmates do not raise federal constitutional claims in state court they are foreclosed from raising them in federal court.[260] Near blanket prohibition against litigating claims defaulted[261] in state proceedings encourages state courts to resolve claims on procedural grounds.[262] The net effect of judicial and statutory refinements has been to dilute the limited constitutional protections that the Court has developed.[263]

In 1993, the U.S. Supreme Court "assumed for the sake of argument" in *Herrera v. Collins* that "in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim."[264] But the standard of review in such a case would be "extraordinarily high."[265] A year later, Justice Blackmun wrote:

> The Court's refusal last Term to afford Leonel Torres Herrera an evidentiary hearing, despite his colorable showing of actual innocence, demonstrates just how far afield the Court has strayed from its statutorily and constitutionally imposed obligations. In *Herrera*, only a bare majority of this Court could bring itself to state forthrightly that the execution of an actually innocent person violates the Eighth Amendment. This concession was made only in the course of erecting nearly insurmountable barriers to a defendant's ability to get a hearing on a claim of actual innocence. Certainly there will be individuals who are actually innocent who will be unable to make a better showing than what was made by Herrera without the benefit of an evidentiary hearing. The Court is unmoved by this dilemma, however; it prefers "finality" in death sentences to reliable determinations of a capital defendant's guilt.[266]

258 . Steiker & Steiker, *supra* note 1, at 411.

259 . *Id.* at 419.

260 . *Id.* at 411-12.

261 . Procedural default occurs when counsel does not timely present the factual and legal basis for a claim in state court. *See* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 234 ("As a general rule an appellate court will not consider an alleged error that the complaining party did not bring to the trial court's attention at the time the alleged error is said to have occurred.") (citing State v. Slagle, 65 Ohio St. 3d 597, 604 (Ohio 1992)).

262 . Steiker & Steiker, *supra* note 1, at 412.

263 . *Id.* at 411.

264 . Schlup v. Delo, 513 U.S. 298, 314 n.28 (1995) (quoting Herrera v. Collins, 506 U.S. 390, 417 (1993)).

265 . *Id.* at 316 (quoting *Herrera*, 506 U.S. at 426 (O'Connor, J., concurring)).

The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) has further restricted the availability and scope of federal review.[267] There are tight restrictions on the availability of evidentiary hearings to develop facts not presented in state court proceedings.[268] And federal courts must defer to wrong but "reasonable" decisions by state courts.[269] The rate of reversals by federal courts in capital cases has dropped from 40% prior to the AEDPA to 12.5% during the post-AEDPA period.[270]

Changes permitting or requiring courts to decline consideration of valid constitutional claims have been justified as necessary to discourage frivolous claims in federal courts; but the principal effect has been to prevent death-row inmates from having valid claims heard or reviewed at all, even when compelling new evidence of innocence comes to light.[271]

Although the scope of federal habeas review is subject to legislative or judicial revision, the politicization of criminal justice issues makes it extraordinarily difficult to expand review and unlikely that meaningful reform will be forthcoming. Litigation is directed toward overcoming procedural barriers rather than enforcing the underlying substantive rights of death-sentenced inmates.[272]

C. Death-Qualified Jury

Some aspects of the administration of the death penalty are not beyond the possibility of change, but the prospects of changing them are remote. Among the

[266] . Callins v. Collins, 510 U.S. 1141, 1158-59 (1994) (Blackmun, J., dissenting) (internal citations omitted); *id*. at n.8 ("Even the most sophisticated death penalty schemes are unable to prevent human error from condemning the innocent…."). *See also* Valle v. Florida, 132 S. Ct. 1, 2 (2011) (Breyer, J., dissenting) (where the issue was whether execution following decades of incarceration on death row is cruel and unusual punishment, the dissenting opinion noted that the basic difficulty is "reconciling the imposition of the death penalty as currently administered with procedures necessary to assure that the wrong person is not executed").

[267] . The AEDPA provides:

> An application for a writ of habeas corpus … pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). *See also id.* § 2254(e)(1) ("[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.").

[268] . *See* 28 U.S.C. § 2254(e)(2).

[269] . *See* Steiker & Steiker, *supra* note 1, at 413; ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 249.

[270] . Steiker & Steiker, *supra* note 1, at 387 n.70 (citing LIEBMAN ET AL., *supra* note 159, and NANCY KING ET AL., HABEAS LITIGATION IN U.S. DISTRICT COURTS (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/219559.pdf).

[271] . ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 249-50.

[272] . Steiker & Steiker, *supra* note 1, at 414-15.

longstanding and deeply entrenched practices is that of selecting jurors who are willing to consider signing a verdict calling for the death penalty.

During the process of selecting a "death-qualified jury," potential jurors in a death penalty case are questioned about their views on capital punishment. A person who strongly supports the death penalty may be permitted to serve if he or she answers yes to the question, would you follow the instructions of the judge? Persons who strongly oppose the death penalty may be excluded from serving on the jury on the ground that their views on capital punishment "would prevent or substantially impair" their ability to follow the instructions of the judge.[273]

Studies cited by the American Bar Association and the American Law Institute indicate that the process of selecting a death-qualified jury produces juries that are more likely to convict the defendant during the guilt phase, and more likely to impose the death penalty during the sentencing phase of the trial. The exclusion of potential jurors who oppose capital punishment "effectively skews the jury pool not only as to imposition of the death penalty but as to conviction."[274]

[273] . Wainwright v. Witt, 469 U.S. 412, 424 (1985). *See also* OHIO REV. CODE ANN. § 2945.25(C) (West 2010); State v. Steffen, 509 N.E.2d 383, 393 (Ohio 1987) (quoting State v. Rogers, 17 Ohio St. 3d 174, 174 (Ohio 1985)) ("The proper standard for determining when a prospective juror may be excluded for cause based on his views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath.").

The seminal U.S. Supreme Court cases on the death-qualified jury are *Witherspoon v. Illinois*, 391 U.S. 510, 519-23 (1968); *Wainwright*, 469 U.S. 412; and *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

In 1984, the Supreme Court of Ohio rejected the argument that a death-qualified jury is predisposed to convict. State v. Jenkins, 473 N.E.2d 264, 281 (Ohio 1984). But Justice Brennan warned in 1985 that death-qualification "is a tool with which the prosecutor can create a jury perhaps predisposed to convict and certainly predisposed to impose the ultimate sanction." *Wainwright*, 469 U.S. at 460 (Brennan, J., dissenting, joined by Marshall, J.). Since the Supreme Court's 1968 decision in *Witherspoon*, Justice Brennan wrote, "numerous studies have all but confirmed that death-qualified juries are conviction-prone" and "[s]ome studies have even suggested that the process of death-qualification tends to bias remaining jurors toward the prosecution." *Id.* at 460 n.11.

[274] . Commentary to Guideline 10.10.2, ABA *Guidelines for Appointment and Performance*, *supra* note 182, at 1052. The accompanying footnote in support of this statement begins with the following quote:

> [E]xposure to the death qualification process makes a juror more likely to assume the defendant will be convicted and sentenced to death; more likely to assume that the law disapproves of persons who oppose the death penalty; more likely to assume that the judge, prosecutor, and defense attorney all believe the defendant is guilty and will be sentenced to die; and more likely to believe that the defendant deserves the death penalty.

Id. at 1052 n.261 (quoting John H. Blume et al., *Probing "Life Qualification" Through Expanded Voir Dire*, 29 HOFSTRA L. REV. 1209, 1232 (2001)). The ABA footnote then refers to an article by James S. Liebman:

> (discussing studies demonstrating that death qualification process produces juries more likely to convict than non-death-qualified juries, and that repeated discussion of death penalty during voir dire in capital cases makes jurors substantially more likely to vote for death). Nonetheless, the current state of Supreme Court case law is that a jurisdiction does not violate the federal constitution by using the death qualification process.

Justice Stevens discussed the death-qualified jury first among "endorsed procedures that provide less protection to capital defendants than to ordinary offenders":

> Of special concern to me are rules that deprive the defendant of a trial by jurors representing a fair cross section of the community. Litigation involving both challenges for cause and peremptory challenges has persuaded me that the process of obtaining a "death qualified jury" is really a procedure that has the purpose and effect of obtaining a jury that is biased in favor of conviction. The prosecutorial concern that death verdicts would rarely be returned by 12 randomly selected jurors should be viewed as objective evidence supporting the conclusion that the penalty is excessive."[275]

"Another serious concern," continued Justice Stevens, was "that the risk of error in capital cases may be greater than in other cases because the facts are often so disturbing that the interest in making sure the crime does not go unpunished may overcome residual doubt …."[276] He explained, "[o]ur former emphasis on the importance of ensuring that decisions in death cases be adequately supported by reason rather than emotion … has been undercut by more recent decisions placing a thumb on the prosecutor's side of the scales."[277]

D. Other Procedural Hurdles

There are other procedural hurdles that are likely to continue.

A defendant is regarded as "innocent until proven guilty." But once found guilty, it is assumed that the jury resolved any conflicting evidence in favor of the prosecution,[278] even though the jury provides no findings of fact as to what testimony it believed, what evidence it found conclusive, and does not state what its reasoning was. "[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact

James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2097 & n.164 (2000) (internal citation omitted). *See also* Steiker & Steiker, *supra* note 1, at 403 (stating that Capital Jury Project findings "point to the skewing of capital juries through death-qualification").

275 . Baze v. Rees, 553 U.S. 35, 84 (2008) (Stevens, J., concurring in the judgment). *See id.* at 84 n.18 (quoting Uttecht v. Brown, 551 U.S. 1, 35 (2007) (Stevens, J., dissenting) ("A cross section of virtually every community would include citizens who firmly believe the death penalty is unjust but who are nevertheless qualified to serve as jurors in capital cases.")).

276 . *Id.* at 84.

277 . *Id.* at 84-85 (citing Gardner v. Florida, 430 U.S. 349, 358 (1977). Justice Stevens' third significant concern was "the risk of discriminatory application of the death penalty. While that risk has been dramatically reduced, the Court has allowed it to continue to play an unacceptable role in capital cases." *Id.* at 85.

278 . Jackson v. Virginia, 443 U.S. 307, 326 (1979) ("[A] federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume–even if it does not affirmatively appear in the record–that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.") (followed in State v. Jenks, 61 Ohio St. 3d 259 (para. 2 of the Court's syllabus), 259-60 (Ohio 1991), ("The relevant inquiry is whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt.")).

could have found the essential elements of the crime beyond a reasonable doubt."[279]

Meaningful appellate review has been gutted by procedural hurdles. The Supreme Court of Ohio on direct appeal considers only what is in the record it receives from the trial court. Evidence not heard by the jury, and sometimes not available at the time of trial, is subject to procedural hurdles, first in the state courts;[280] then federal courts defer to the state courts' factual and legal conclusions.[281] As discussed above, federal habeas corpus review is limited to constitutional violations already established by the U.S. Supreme Court, and it is nearly impossible to prove actual innocence.

E. Reasons for Withdrawal of Death Penalty Provisions from Model Penal Code

The Report to the ALI Concerning Capital Punishment recommended withdrawal of Section 210.6 from the Model Penal Code, stating:

> The case for withdrawal is compelling and reflects a consensus among the Institute's members who have spoken to the issue thus far.… [S]pecific defects could be corrected, but more fundamentally [Section] 210.6 is simply inadequate to address the endemic flaws of the current system. Section 210.6, which in many respects provided the template for contemporary state capital schemes, represents a failed attempt to rationalize the administration of the death penalty and … its adoption rested on the false assumption that carefully-worded guidance to capital sentencers would meaningfully limit arbitrariness and discrimination in the administration of the American death penalty. [282]

The Council of the American Law Institute subsequently explained to its membership its reasons for withdrawal of the death penalty provisions from the Model Penal Code. First among those reasons was the following:

> Section 210.6 was an untested innovation in 1962. We now have decades of experience with death-penalty systems modeled on it. The section played an influential role in the evolution of American capital-punishment systems and capital-punishment law over the last half century. However, since the provision was approved by ALI, U.S. Supreme Court decisions have reshaped the constitutional landscape with respect to sentencing generally and the death penalty specifically …. [O]n the whole the section has not withstood the tests of time and experience.[283]

279 . *Jackson*, 443 U.S. at 319.

280 . *See* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 249 ("Due to doctrines of exhaustion and procedural default, [meritorious constitutional claims], no matter how valid, must almost always be presented first to the state courts before they may be considered in federal habeas corpus proceedings.").

281 . *See id.* ("[A] requirement in some circumstances that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal courts conclude that the rulings are erroneous.").

282 . Steiker & Steiker, *supra* note 1, at 373.

283 . ALI REPORT TO THE MEMBERSHIP, *supra* note 1, at 4.

IV. REASONS FOR ABOLISHING THE DEATH PENALTY IN OHIO

A. Ohio Supreme Court Justice Paul E. Pfeifer

Senior justice of the Ohio Supreme Court Paul E. Pfeifer has gone through an evolution in his views since 1981 when, as a Republican senator, he helped to draft Ohio's death penalty statute. He now believes the time has come to abolish the death penalty in Ohio. In January 2011, Justice Pfeifer wrote:

> As a state senator in 1981, I helped draft our current law. Now, for the past 18 years, I have served as a justice on the Ohio Supreme Court, where we render the final judgment on death penalty appeals.
>
> I helped craft the law, and I have helped enforce it. From my rather unique perspective, I have come to the conclusion that we are not well served by our ongoing attachment to capital punishment.[284]

Justice Pfeifer explained that the 1981 statute was designed to provide safeguards and extensive due process for accused murderers, but "the death penalty law is not being applied as we originally intended."[285] He gave three reasons.

First, Ohio legislators intended that only the worst of the worst would be eligible for the death penalty. Justice Pfeifer wrote:

> [W]e did not mean for all—or even most—murderers to be eligible for the death penalty. The law was meant to be employed only when a certain set of aggravating circumstances warranted execution. But over the years, the death penalty has come to be applied more pervasively than we ever intended.[286]

Second, according to Justice Pfeifer: "We also wanted a review process implemented in which the Ohio Supreme Court, in addition to considering death penalty appeals, would monitor death sentences across the state to verify that they were being evenly and fairly applied. Simply put, that hasn't happened."[287]

As noted above, the ABA Ohio Assessment Team found that the Ohio Supreme Court has never vacated a death sentence on the ground that it was disproportionate.[288]

284 . Pfeifer, *supra* note 12. *See also* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 245 (citing an article in the PLAIN DEALER (Cleveland, Ohio) (Apr. 23, 2001). Ohio Supreme Court Justice Paul Pfeifer chaired the Senate committee that helped shape Ohio's death penalty when he was serving as a legislator in 1981.

285 . Pfeifer, *supra* note 12.

286 . *Id.*

287 . *Id.*

288 . *See* ABA OHIO DEATH PENALTY ASSESSMENT, *supra* note 80, at 240 ("While the Ohio Supreme Court has reviewed over 250 death-imposed cases since the law requiring proportionality review went into effect, it has never vacated a death sentence on this ground."). *See also* State v. Murphy, 747 N.E.2d 765, 814 (Ohio 2001) (Pfeifer, J., dissenting) (footnote omitted) ("We must be willing to do serious proportionality review. Even though approximately two hundred males currently reside on death row, this court has never overturned a death sentence based on proportionality review.").

Third, Justice Pfeifer observed, life without parole offers a viable alternative to the death penalty. Since that alternative became available, according to Justice Pfeifer, the number of death sentences has dropped precipitously.[289] He states:

> Prosecutors and jurors have told us—by their actions—that life without the possibility of parole is a more desirable outcome to a murder trial than a death sentence…. [E]ven supporters of capital punishment feel uneasy about sitting on a jury that votes to take a human life.… [L]ife without parole now offers us a viable alternative to the death penalty, and it's an opportunity that can satisfy our desire to punish killers for their crimes. There are, however, dozens of inmates on death row who were convicted before that option was available. How many of them would have been sentenced to death if the life-without-parole option had been available at the time? No one knows. All we know is that there are many people who will be put to death because they were convicted at the wrong time. So, I ask: Do we want our state government—and thus, by extension, all of us—to be in the business of taking lives in what amounts to a death lottery?… I believe the time has come to abolish the death penalty in Ohio.[290]

B. Terry Collins, Former Director of the Ohio Department of Rehabilitation and Correction

Also in January 2011, Terry Collins, former director of the Ohio Department of Rehabilitation and Correction, declared that Ohio's justice system can be improved by removing the death penalty. Mr. Collins attended the execution of 33 men from 2001 to 2010.

> All 33 times, in the back of my mind I questioned: Had all the reviews and appeals got this case right? Did the process make certain, absolutely, there was no mistake or error? I wondered that because I had previously walked people out of prison who were found not guilty after years of incarceration. *What if we got it wrong for those we executed?*
>
> …[W]e continue to be one of the few industrialized nations to carry out the death penalty when we know mistakes happen.
>
> ….
>
> The death penalty is expensive, often inefficient and always time-consuming. Too often our justice system does not place the worst of the worst on Death Row. I saw some of the worst offenders in our prison system, and often they were not on Death Row. It surprised me, at times, to see who did end up on Death Row. I think this disparity is important for state leaders to address.
>
> I am convinced that the death penalty is not a fiscally responsible policy for Ohio.… Costs related to the death penalty should be of serious concern, given our state's need for cost-effective judicial reform.
>
> …I observed firsthand the emotions of the victims' families. An increasing number of families ask the state not to pursue the death penalty so that they are not faced with the painful task of attending appeals hearings, and so they can achieve closure. Life

289 . Pfeifer, *supra* note 12. *See also* MODEL PENAL CODE: SENTENCING, *supra* note 15, at 13 ("In opinion surveys over the past 15 years, public support for capital punishment has been shown to drop markedly when survey respondents are told that life without parole may be substituted for execution.").

290 . Pfeifer, *supra* note 12.

> imprisonment without parole offers justice that is swift, certain, effectively severe and perhaps more sensitive to the needs of healing victims' families.
>
> ….
>
> …My experience tells me that our justice system can be even more effective and fair without Death Rows and the death penalty.[291]

Ohio's ten Catholic bishops support the positions taken by Justice Pfeifer and Mr. Collins.[292]

C. Other States

In recent years, New Jersey, New Mexico, Illinois, and Connecticut have abolished the death penalty and the governor of Oregon has announced that he will not allow further executions while he is governor. Reasons that led state legislators and governors to decide to abolish the death penalty include:

- the risk of executing the innocent;
- exorbitant cost;[293]
- racial and geographic disparities and other inconsistencies in who is faced with capital charges;
- lack of evidence that the death penalty is more of a deterrent than life without parole;
- the effect of the long and complex death penalty process on the families of murder victims;
- opposition to "state-endorsed violence";
- declining support for capital punishment.[294]

[291] . Collins, *supra* note 191.

[292] . Press Release, *supra* note 11 (agreeing with Justice Pfeifer and former Director Collins "that Ohio's elected legislative leaders ought to debate and ultimately abolish the death penalty").

[293] . According to an article in the *Economist*:

> As state governments confront huge budget deficits, eight more states have proposed an unusual measure to cut costs: eliminate the death penalty.
>
> ….
>
> Colorado, one of the states that has introduced a bill to overturn the death penalty, intends to spend the money it will save each year by eliminating capital punishment on an investigations unit.…

Saving Lives and Money, *supra* note 188. *See also* Alarçon & Mitchell, *supra* note 187, at S42 ("[I]f [California voters] do not want to be taxed to fund the needed reforms, they must recognize that the only alternative is to abolish the death penalty and replace it with a sentence of life imprisonment without the possibility of parole.").

[294] . A post on the *Human Rights Now* blog reports:

> [M]ore than half the states in the country have either abolished the death penalty, or have carried out fewer than 10 executions in the last 30 years. Only 9 states carried out executions last year.
>
> ….
>
> …Skepticism about capital punishment is making inroads everywhere, *even in the South, where the vast majority of executions take place*. Texas juries are doing what juries are doing nationwide, handing down fewer and fewer death sentences (there were 11 in 2008, as compared to 48 back in 1999). And North Carolina, which has carried out 43 executions since reinstatement, had only one death sentence last year.

In 2000, the New Hampshire legislature voted to abolish capital punishment, but the bill was vetoed by the governor. However, New Hampshire has not executed anyone since 1939.[295]

In 2002, the governor of Maryland imposed a moratorium on executions in anticipation of a comprehensive study of the death-sentencing process in Maryland. The study found:

> Maryland prosecutors were far more likely to seek the death penalty in cases where black defendants were accused of killing white victims and that geography—the particular county in which a case was prosecuted and the attitudes of prosecutors in that county—was a major factor affecting whether a defendant faced capital charges.[296]

In 2007, legislation to replace the death penalty with life parole failed by a single vote in a Maryland Senate committee. However, Maryland restricts capital punishment to murder cases with biological evidence such as DNA, videotaped evidence of a murder, or a videotaped confession.[297] Maryland now has a *de facto* moratorium on executions.[298]

In 2004, in New York the state's highest court declared New York's 1995 death penalty law unconstitutional. Since then, the New York legislature has rejected every effort to pass a new law.[299]

In 2007, New Jersey became the first state to repeal capital punishment since *Gregg v. Georgia* permitted re-establishment of the death penalty.[300] In January 2006, Governor Richard Codey signed a bill that created the New Jersey Death Penalty Study Commission and instituted a moratorium while the commission examined the fairness and expense of the state's death penalty. The thirteen-member commission heard testimony by legal experts, religious leaders, murder victims' family members, and exonerees. It considered a report on innocence cases that listed causes of wrongful convictions including eyewitness error, false testimony, and a focus on winning instead of seeking justice.[301] The commission recommended elimination of the death penalty, citing risks of

Brian Evans, *New Mexico Abolishes Death Penalty!*, AMNESTY INT'L (Mar. 18, 2009, 8:09 PM), http://blog.amnestyusa.org/deathpenalty/new-mexico-abolishes-death-penalty/.

295 . Kenneth C. Haas, *The Emerging Death Penalty Jurisprudence of the Roberts Court*, 6 PIERCE L. REV. 387, 429 (2008).

296 . *Id.* at 430.

297 . Alarçon & Mitchell, *supra* note 187, at S210.

298 . Haas, *supra* note 295, at 430 (explaining that Maryland's highest court halted executions because the state's lethal injection procedures were not approved according to the state Administrative Procedures Act, resulting in a de facto moratorium). *See also Death Penalty in Flux*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/death-penalty-flux (last updated July 27, 2012) (de facto moratorium still in effect).

299 . Haas, *supra* note 295, at 431. *See also* Evans, *supra* note 294 ("New York's death penalty was declared unconstitutional and its death row closed in 2007….").

300 . Haas, *supra* note 295, at 430. *See also* Press Release, Death Penalty Info. Ctr., Governor Corzine's Remarks on Eliminating Death Penalty in New Jersey (Dec. 17, 2007), *available at* http://www.deathpenaltyinfo.org/node/2236.

301 . *Legislative Activity-New Jersey*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/legislative-activity-new-jersey (last visited Feb. 9, 2012).

wrongful executions, exorbitant costs of capital litigation, and lack of evidence that the death penalty deters murder any more effectively than life imprisonment.[302] It also recommended, "that any cost savings resulting from abolition of the death penalty be used for benefits and services for survivors of victims of homicides."[303] In December 2007, the New Jersey Senate voted 21 to 16 in favor of a bipartisan bill to abolish the death penalty and replace it with life without parole; the New Jersey Assembly approved the bill by a vote of 44 to 36.[304] Governor Jon Corzine signed the bill on December 17, 2007. He explained:

> I will sign this law abolishing the death penalty because I and a bipartisan majority of our legislature … believe a nonviolent sentence of life in prison without parole best captures our State's highest values and reflects our best efforts to search for true justice, rather than state-endorsed killing.
>
> ….
>
> I believe society must first determine if its endorsement of violence begets violence–and–if violence undermines our commitment to the sanctity of life.
>
> To these questions, I answer "Yes," and therefore I believe we must evolve to ending that endorsement.[305]

The New Jersey governor also believed:

- "[G]overnment cannot provide a foolproof death penalty that precludes the possibility of executing the innocent";
- "[L]oved ones of victims may be more deeply hurt by long delays and endless appeals than they would be if there were certainty of life in prison with no possibility of parole";
- "[I]t is economic folly to expend more State resources on legal processes in an attempt to execute an inmate than keeping a criminal incarcerated for life";
- "It is estimated that it cost the State of New Jersey more than a quarter-billion dollars, above and beyond incarceration, to pursue the death penalty since it was reinstated in 1982–a significant sum that could have effectively been used in supporting and compensating victims' families."[306]

In 2009, Governor Bill Richardson signed a bill repealing the death penalty in New Mexico. In a statement released by his office on March 18, 2009, Governor Richardson explained that he had been and still is a firm believer in the death penalty for the most heinous crimes. But he was troubled by the possibility that he might sign a death warrant leading to the execution of an innocent person who was wrongfully convicted. "Once a conclusive decision has been made and

302 . Haas, *supra* note 295, at 431.

303 . Alarçon & Mitchell, *supra* note 187, at S208 (citing NEW JERSEY DEATH PENALTY STUDY COMM'N, NEW JERSEY DEATH PENALTY STUDY COMMISSION REPORT (2007)).

304 . Haas, *supra* note 295, at 431.

305 . Press Release, *supra* note 300.

306 . *Id.*

executed, it cannot be reversed. And it is in consideration of this, that I have made my decision."[307]

> Regardless of my personal opinion about the death penalty, I do not have confidence in the criminal justice system as it currently operates to be the final arbiter when it comes to who lives and who dies for their crime. If the State is going to undertake this awesome responsibility, the system to impose this ultimate penalty must be perfect and can never be wrong.
>
> But the reality is the system is not perfect …. DNA testing has proved that.
>
> …Evidence, including DNA evidence, can be manipulated. Prosecutors can still abuse their powers. We cannot ensure competent defense counsel for all defendants.…
>
> And it bothers me greatly that minorities are overrepresented in the prison population and on death row.
>
> ….
>
> Faced with the reality that our system for imposing the death penalty can never be perfect, my conscience compels me to replace the death penalty with a solution that keeps society safe.
>
> The bill I am signing today … replaces the death penalty with true life without the possibility of parole—a sentence that ensures violent criminals are locked away forever, yet can be undone if an innocent person is wrongfully convicted.…[308]

In 2011, Illinois Governor Pat Quinn signed legislation abolishing the death penalty in Illinois. By way of explanation, he wrote:

> Since our experience has shown that there is no way to design a perfect death penalty system, free from the numerous flaws that can lead to wrongful convictions or discriminatory treatment, I have concluded that the proper course of action is to abolish it. With our broken system, we cannot ensure justice is achieved in every case. For the same reason, I have also decided to commute the sentences of those currently on death row to natural life imprisonment, without the possibility of parole or release.[309]

[307] . Press Release, State of New Mexico Governor Bill Richardson, Governor Bill Richardson Signs Repeal of the Death Penalty (Mar. 18, 2009), *available at* http://www.deathpenaltyinfo.org/documents/richardsonstatement.pdf.

[308] . *Id.* *See also* Alarçon & Mitchell, *supra* note 187, at S208-09.

[309] . Press Release, Statement from Illinois Governor Pat Quinn on Senate Bill 3539 (Mar. 9, 2011), http://www.illinois.gov/PressReleases/PrintPressRelease.cfm?SubjectID=2&RecNum=9265. *See also* Press Release, Death Penalty Info. Ctr., Illinois Legislature Votes to Repeal the Death Penalty, Continuing a National Trend away from Capital Punishment (Jan. 11, 2011), http://www.deathpenaltyinfo.org/documents/ILPressRelease.pdf (becoming the sixteenth state to abandon capital punishment, resulting in the fewest number of states with the death penalty since 1978).

On April 25, 2012, Governor Malloy of Connecticut signed legislation replacing the death penalty with life without parole.[310] Governor Malloy explained:

> My position on the appropriateness of the death penalty in our criminal justice system evolved over a long period of time. As a young man, I was a death penalty supporter. Then I spent years as a prosecutor and pursued dangerous felons in court, including murderers. In the trenches of a criminal courtroom, I learned first hand that our system of justice is very imperfect. While it's a good system designed with the highest ideals of our democratic society in mind, like most of human experience, it is subject to the fallibility of those who participate in it. I saw people who were poorly served by their counsel. I saw people wrongly accused or mistakenly identified. I saw discrimination. In bearing witness to those things, I came to believe that doing away with the death penalty was the only way to ensure it would not be unfairly imposed.[311]

On November 22, 2011, Governor Kitzhaber of Oregon released a statement in which he said that the death penalty as practiced in Oregon is neither fair nor just; it is not swift or certain; it is not applied equally to all; it is expensive and unworkable. Two volunteers were executed while he was governor. He observed, "the nature of their crimes was not different from other murderers, some of whom are sentenced to death but never executed and others who are sentenced to life in prison."[312] "I will not allow further executions while I am Governor," he asserted, "it is clear the system is broken."[313]

If the Ohio legislature and governor were to abolish the death penalty in Ohio, they would be in the company of other legislators and governors who have struggled with the question and concluded, whether for moral or practical reasons

310 . An Act Revising the Penalty for Capital Felonies, 2012 Ct. ALS 5 (did not commute the sentences of eleven men then on death row in Connecticut). *But see* Connecticut v. Santiago, SC 17413, 2012 Conn. LEXIS 218, at *386 (Conn. May 29, 2012) (reversing the death sentence of one of those eleven men on Connecticut's death row, and remanding the case to the trial court for a new sentencing phase hearing). *See also id.* at *387 (Harper, J., concurring in part and dissenting in part) ("It is clear to me both that capital punishment violates our state's constitutional prohibition against cruel and unusual punishment and that this punishment is systemically plagued by an unacceptable risk of arbitrary and racially discriminatory imposition that undermines the fairness and integrity of Connecticut's criminal justice system as a whole."); *id.* at *390 ("I find myself inexorably led to the conclusion that the death penalty is inherently cruel, offensive to the evolving standards of our community's human decency and utterly without legitimate justification."); *New Voices: Connecticut Supreme Court Justice Says Death Penalty 'Incompatible with Standards of Human Decency,'* DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/new-voices-connecticut-supreme-court-justice-says-death-penalty-incompatible-standards-human-decency (last visited July 20, 2012).

311 . Press Release, State of Connecticut Governor Dannel P. Malloy, Gov. Malloy on Signing Bill to Repeal Capital Punishment (Apr. 25, 2012), *available at* http://www.governor.ct.gov/malloy/cwp/view.asp?A=4010&Q=503122&pp=12&n=1.

312 . Press Release, State of Oregon, Governor Kitzhaber Issues Reprieve—Calls for Action on Capital Punishment (Nov. 22, 2011), http://cms.oregon.egov.com/gov/media_room/pages/press_releasesp2011/press_112211.aspx.

313 . *Id.*

or both, that their states would be better served by replacing the death penalty with imprisonment for life.

CONCLUSION

Capital punishment is not being fairly administered in the State of Ohio. For the same reasons that the American Law Institute withdrew the death penalty provisions from the Model Penal Code, Ohio cannot remedy by legislative or judicial action the arbitrary, inconsistent, and discriminatory administration of the death penalty. The time has come to abolish the death penalty in Ohio.