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Capital Punishment in Ohio: Aggravating Circumstances

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NOTES

CAPITAL PUNISHMENT IN OHIO: AGGRAVATING CIRCUMSTANCES

I. INTRODUCTION	495
II. HISTORY OF AGGRAVATING CIRCUMSTANCES	500
III. SCRUTINY BY THE INDIVIDUAL JUSTICES	503
IV. EVALUATION OF AGGRAVATING CIRCUMSTANCES	510
A. <i>Individual Examination</i>	510
1. <i>Aggravating by Victim</i>	512
a. <i>Political Official</i>	512
b. <i>Peace Officer</i>	515
c. <i>Witness</i>	517
2. <i>Aggravated by Felony</i>	518
B. <i>In the Aggregate</i>	521
V. CONCLUSION	527

I. INTRODUCTION

IN *GREGG V. GEORGIA*,¹ *PROFFITT V. FLORIDA*² AND *JUREK V. TEXAS*,³ the United States Supreme Court decided that the punishment of death in and of itself is not inherently cruel and unusual in violation of the eighth amendment to the United States Constitution.⁴ However, the Court has provided that the procedure for determining whether to impose the death penalty must conform to certain minimum constitutional standards.⁵ In

¹ 428 U.S. 153 (1976).

² 428 U.S. 242 (1976).

³ 428 U.S. 262 (1976).

⁴ The eighth amendment provides that: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The eighth amendment is applicable to the states through the fourteenth amendment. See *Robinson v. California*, 370 U.S. 660, 666-67 (1962).

⁵ See *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (family history and emotional disturbance, as relevant mitigating factors, may not be precluded from the sentencer's consideration as a matter of law); *Estelle v. Smith*, 451 U.S. 454 (1981) (information obtained by court-appointed psychiatrist who did not advise defendant of his fifth and sixth amendment rights cannot be used at the sentencing hearing); *Beck v. Alabama*, 447 U.S. 625 (1980) (precluding instruction to capital jury on lesser-included offense violates due process); *Godfrey v. Georgia*, 446 U.S. 420 (1980) (a broad and vague construction of the statutory aggravating circumstances violates the eighth and fourteenth amendments); *Lockett v. Ohio*, 438 U.S. 586 (1978) (limiting range of mitigating factors to be considered violates the eighth and fourteenth amendments); *Gardner v. Florida*, 430 U.S. 349 (1977) (un-

Gregg and *Proffitt*, the Court approved the listing and utilization of aggravating and mitigating circumstances.⁶ The aggravating specifications permit the trier of fact to consider the circumstances of the crime, and the mitigating factors allow consideration of the defendant's character. Both circumstances and character must be considered and weighed against each other before imposing the death sentence.

Two years after *Gregg*, in *Lockett v. Ohio*⁷ and *Bell v. Ohio*,⁸ the Supreme Court held that Ohio's death penalty statute was unconstitutional. At that time, the statute permitted consideration of only a limited range of mitigating circumstances at the sentencing phase of a capital case.⁹ The

disclosed portion of presentence investigation report cannot be relied upon in deciding to impose the death penalty); *Roberts v. Louisiana*, 428 U.S. 325 (1976) (mandatory death penalty statute is unconstitutional); and *Woodson v. North Carolina*, 428 U.S. 280 (1976) (mandatory death penalty statute is unconstitutional).

⁶ *Gregg v. Georgia*, 428 U.S. 153, 197-98 (1976); *Proffitt v. Florida*, 428 U.S. 242, 248-51 (1976).

⁷ 438 U.S. 586 (1978). Sandra Lockett, the driver of the getaway car in a planned robbery of a pawn shop, was convicted of aggravated murder with the aggravating circumstances (1) that the murder was committed for the purpose of escaping detection, apprehension, trial or punishment for aggravated robbery, and (2) that the murder was committed while committing, attempting to commit or fleeing immediately after committing or attempting to commit aggravated robbery pursuant to OHIO REV. CODE ANN. § 2929.03-.04 (Page 1975) (repealed 1978). *Id.* at 589. The sentence of death was upheld by the Supreme Court of Ohio. *State v. Lockett*, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976).

⁸ 438 U.S. 637 (1978). Willie Lee Bell was convicted of aggravated murder with the aggravating circumstance that it occurred during a kidnapping, and he was sentenced to death. His death sentence was upheld by the Ohio Court of Appeals and the Supreme Court of Ohio. *Bell v. Ohio*, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1978).

⁹ The 1974 Ohio death penalty statute required that once a defendant was found guilty of aggravated murder with at least one aggravating circumstance contained in OHIO REV. CODE ANN. § 2929.04(A) (Page 1975) (repealed 1978), the death penalty would be imposed unless:

considering the nature and circumstances of the offense and the history, character, and condition of the offender, one or more of the following is established by a preponderance of the evidence: (1) The victim of the offense induced or facilitated it. (2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation. (3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity.

Id. § 2929.04(B).

The aggravating circumstances in the 1974 death penalty statute were:

(1) The offense was the assassination of the president of the United States or person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or of the governor-elect or lieutenant governor-elect, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or

Court concluded that "the Eighth and Fourteenth Amendments require 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."¹⁰ As a result, Ohio's amended statute requires consideration of several specific mitigating factors and "[a]ny other [mitigating] factors that are relevant to the issue of whether the offender should be sentenced to death."¹¹

Perhaps because of *Lockett* and the concerns involving the mitigating factors as a component of individualized sentencing, little attention has been given to analyzing the aggravating circumstances of death penalty statutes. The aggravating circumstances, however, are very important because the death penalty may not be imposed unless the indictment contains one or more of the enumerated aggravating circumstances.¹² Thus,

general election, or if he campaigns as a write-in candidate in a primary or general election.

(2) The offense was committed for hire.

(3) The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender.

(4) The offense was committed while the offender was a prisoner in a detention facility as defined in section 2929.01 of the Revised Code.

(5) The offender has previously been convicted of an offense of which the gist was the purposeful killing of or attempt to kill another, committed prior to the offense at bar, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

(6) The victim of the offense was a law enforcement officer whom the offender knew to be such, and either the victim was engaged in his duties at the time of the offense, or it was the offender's specific purpose to kill a law enforcement officer.

(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary.

OHIO REV. CODE ANN. § 2929.04(A)(1)-(7) (Page 1975) (repealed 1978). For a discussion of prior revisions to the aggravating circumstances provision of the statute by the Senate Judiciary Committee and, subsequently, by the Committee on Conference, see Lehman & Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEV. ST. L. REV. 8, 18-23 (1974).

¹⁰ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original). For a more comprehensive analysis of *Lockett* and *Bell*, see Note, *Constitutional Criminal Law—The Role of Mitigating Circumstances in Considering the Death Penalty*, 53 TUL. L. REV. 608 (1979); Comment, 12 AKRON U.L. REV. 360 (1978).

¹¹ OHIO REV. CODE ANN. § 2929.04(B)(7) (Page 1982). For an excellent analysis of how the mitigating factors of Ohio's new statute affect its constitutionality, see Note, *Fact or Fiction: Mitigating the Death Penalty in Ohio* (Mar. 28, 1983) (unpublished manuscript on file at the CLEV. ST. L. REV.).

¹² *Id.* § 2929.04(A).

indicted individuals are subject to capital punishment only if the indictment meets the criteria established by the legislature.¹³

The state of Ohio enacted a new death penalty statute which became effective October 19, 1981.¹⁴ As of January 18, 1983, eighty-three defendants had been indicted under the new statute.¹⁵ It is, therefore, both

¹³ *Id.* § 2929.03(C)(2). One commentator has categorized capital sentencing procedures into two stages: (1) the definition stage, where the legislature identifies the class of those who may die, for example, by enumerating aggravating circumstances; and (2) the selection stage, where the legislature through the specific arrangement of its sentencing process can affect the risk of execution. Gillers, *Deciding Who Dies*, 129 U. PA. L. REV. 1 (1980).

¹⁴ OHIO REV. CODE ANN. §§ 2313.37, 2903.01, 2929.02, 2929.02.1, 2929.02.2, 2929.02.3, 2929.02.4, 2929.03, 2929.04, 2929.05, 2929.06, 2929.41, 2941.14, 2945.06, 2945.18, 2945.19, 2945.21, 2945.24, 2945.25, 2953.02, 2967.13, 2967.19, 2967.26, 2967.27 (Page 1982). For an examination of the new statutes see THE OHIO DEATH PENALTY TASK FORCE, OHIO DEATH PENALTY MANUAL II (1981); Benson, *Constitutionality of Ohio's New Death Penalty Statute*, 14 U. TOL. L. REV. 77 (1982); Note, *S.B. 1 Ohio Enacts Death Penalty Statute*, 7 U. DAYTON L. REV. 531 (1982).

The majority of the states have enacted death penalty statutes containing enumerated aggravating circumstances. ALA. CODE § 13A-5-49 (1982); ARIZ. REV. STAT. ANN. § 13-703(F) (Supp. 1982-83); ARK. STAT. ANN. § 41-1303 (1977); CAL. PENAL CODE § 190.2 (West Supp. 1982); COLO. REV. STAT. § 16-11-103(6) (1978 & Supp. 1981); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1982); DEL. CODE ANN. tit. 11, § 4209(e) (1979); FLA. STAT. ANN. § 921.141(5) (West Supp. 1982); GA. CODE ANN. § 27-2534.1 (Supp. 1982); IDAHO CODE § 19-2515(f) (1979); ILL. ANN. STAT. ch. 38, § 9-1(b) (Smith-Hurd Supp. 1982-83); IND. CODE ANN. § 35-50-2.9(b) (Burns 1979); KY. REV. STAT. ANN. § 532.025(2)(a) (Baldwin 1981); LA. CODE CRIM. PROC. ANN. art. 905.4 (West 1981); MD. ANN. CODE art. 27, § 413(d) (1982); MISS. CODE ANN. § 99-19-101(5) (1979); MO. ANN. STAT. § 565.012(2) (Vernon Supp. 1982); MONT. CODE ANN. § 46-18-303 (1981); NEB. REV. STAT. § 29-2523(1) (1979); NEV. REV. STAT. § 200.033 (1981); N.H. REV. STAT. ANN. § 630:5-II(a) (Supp. 1981); N.M. STAT. ANN. § 31-20A-5 (1981); N.C. GEN. STAT. § 15A-2000(e) (Supp. 1981); OHIO REV. CODE ANN. § 2929.04(A) (Page 1982); OKLA. STAT. ANN. tit. 21, § 701.12 (West Supp. 1981-1982); S.C. CODE ANN. § 16-3-20(C)(a) (Law. Co-op. 1981); S.D. CODIFIED LAWS ANN. § 23A-27A-1 (Supp. 1982); TENN. CODE ANN. § 39-2404(i) (Supp. 1981); WASH. REV. CODE ANN. § 9A.32.045 (1977); WYO. STAT. § 6-4-102(h) (1977 & Supp. 1982).

Utah has criminalized its eight aggravating circumstances into the substantive offense of murder in the first degree. UTAH CODE ANN. § 76-5-202 (1978).

Virginia will not impose a sentence of death unless the court or jury finds "a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." VA. CODE § 19.2-264.2 (Supp. 1982). See Gillers, *supra* note 13, at 101 app. for a thorough analysis of state capital punishment statutes.

¹⁵ According to information provided by the Ohio Public Defender Commission, the following capital indictments have been filed with the Ohio Supreme Court as of Jan. 18, 1983: State v. Ageel, No. B823360 (C.P. Hamilton County); State v. Balfour, No. 171152 (C.P. Cuyahoga County); State v. Bright, Nos. 175776, 175882 (C.P. Cuyahoga County); State v. Brooks, No. CR172340 (C.P. Cuyahoga County); State v. Brown, No. CR178023B (C.P. Cuyahoga County); State v. Camp-

bell, No. CR172249 (C.P. Cuyahoga County); State v. Canadix, No. CR177792B (C.P. Cuyahoga County); State v. Carver, No. 81-CR329 (C.P. Richland County); State v. Cobble, No. CR170365 (C.P. Cuyahoga County); State v. Collins, No. CR175633 (C.P. Cuyahoga County); State v. Corky, No. CR175147 (C.P. Cuyahoga County); State v. Craig, No. 177-628 (C.P. Cuyahoga County); State v. Cross, No. CR-179001 (C.P. Cuyahoga County); State v. Curtis, No. 82-CR-11-3886 (C.P. Franklin County); State v. Daiden, No. 82-CR-347 (C.P. Allen County); State v. Davidson, No. 177628 (C.P. Cuyahoga County); State v. Dillard, No. 176128 (C.P. Cuyahoga County); State v. Dillon, No. 82-CR-19 (C.P. Lawrence County); State v. Edwards, No. 174350 (C.P. Cuyahoga County); State v. D. Evans, No. 170885D (C.P. Cuyahoga County); State v. T. Evans, No. CR175146 (C.P. Cuyahoga County); State v. Fellows, No. 82-CR-470 (C.P. Trumbull County); State v. Fields, No. CR176754 (C.P. Cuyahoga County); State v. Ford, No. CR178023 (C.P. Cuyahoga County); State v. Forney, No. 82-443B (C.P. Summit County); State v. Freeman, No. 170885A (C.P. Cuyahoga County); State v. Garland, No. B825419 (C.P. Hamilton County); State v. Glenn, No. 81CR933 (C.P. Mahoning County); State v. Grant, No. 170885B (C.P. Cuyahoga County); State v. Griffin, No. 174350 (C.P. Cuyahoga County); State v. Grosjean, No. CR-82-6432 (C.P. Lucas County); State v. Harvey, No. CR177792A (C.P. Cuyahoga County); State v. Henderson, No. 82 CR 16 (C.P. Adams County); State v. Holbrook, No. 82-CR-018 (C.P. Wayne County); State v. Holland, No. 8920 (C.P. Fairfield County); State v. Hughes, No. 5891-CR-82-130 (C.P. Crawford County); State v. Hunrer, No. CR82-214 (C.P. Scioto County); State v. Jenkins, No. CR168784 (C.P. Cuyahoga County); State v. Johnson, No. 176802 (C.P. Cuyahoga County); State v. Jones, No. CR81-89 (C.P. Lawrence County); State v. Jordan, No. CR168784 (C.P. Cuyahoga County); State v. Kiser, No. 82CR69 (C.P. Ross County); State v. Limle, No. 82CR051834 (C.P. Franklin County); State v. Lowery, No. CR173004-A (C.P. Cuyahoga County); State v. Maurer, No. 822545 (C.P. Stark County); State v. Miller, No. 82-06-0762 (C.P. Summit County); State v. Mitchell, No. 82-CR-229 (C.P. Richland County); State v. Moore, No. 82-3-339 (C.P. Summit County); State v. Mullins, No. 5941 (C.P. Ashland County); State v. Nagy, No. CR169581 (C.P. Cuyahoga County); State v. Patterson, No. CR169381 (C.P. Cuyahoga County); State v. Penly, No. 82CR241 (C.P. Clark County); State v. Penn, No. 5941 (C.P. Union County); State v. Riffe, No. CR82-67 (C.P. Lawrence County); State v. A. Robinson, No. 82-443-C (C.P. Summit County); State v. J. Robinson, No. 171267 (C.P. Cuyahoga County); State v. B. Rogers, No. CR81-6906 (C.P. Lucas County); State v. D. Rogers, No. 82-443-A (C.P. Summit County); State v. J. Rogers, No. 82-CR-86 (C.P. Hardin County); State v. S. Rogers, No. CR177376 (C.P. Cuyahoga County); State v. Rucker, No. 82-CR-017 (C.P. Wayne County); State v. Russell, No. 82-CR-5246 (C.P. Clermont County); State v. Sarkis, No. 172742 (C.P. Cuyahoga County); State v. Seal, No. B825419 (C.P. Hamilton County); State v. Shaeffer, No. 82-06-0787 (C.P. Summit County); State v. Shields, No. CR173004-B (C.P. Cuyahoga County); State v. Shugar, No. CR169829 (C.P. Cuyahoga County); State v. Slaughter, No. CR 174675 (C.P. Cuyahoga County); State v. Smith, No. 170365 (C.P. Cuyahoga County); State v. Spisak, Nos. 176517, 176716 (C.P. Cuyahoga County); State v. Staffen, No. B824004 (C.P. Hamilton County); State v. Steward, No. 170385-C (C.P. Cuyahoga County); State v. Stuber, No. 82-8-1011 (C.P. Summit County); State v. Sykes, No. 81-CR-951 (C.P. Mahoning County); State v. Thompson, Nos. CR173611, CR174799 (C.P. Cuyahoga County); State v. D. Thompson, Nos. 176813-C, CR178023-C (C.P. Cuyahoga County); State v. J. Thompson, No. 82A15216 (C.P. Licking County); State v. R. Thompson, No. CR172810 (C.P. Cuyahoga County); State v. Tribble, No. 826519 (C.P. Lucas County); State v. Watson, No. 169470 (C.P. Cuyahoga County); State v. Whitley, No. C81CR-12-4375 (C.P. Franklin County); State v. Willingham, No. 171420 (C.P. Cuyahoga County); State v. Woods, No. CR177550 (C.P. Cuyahoga County); State v. Wright, No. 177628

necessary and timely to evaluate Ohio's statutory delineation of who may die and its effect for compliance with constitutional mandates. This Note sets forth the hypotheses and supporting legal authority for analyzing Ohio's statutory aggravating circumstances individually and in the aggregate on equal protection and procedural due process grounds.

II. HISTORY OF AGGRAVATING CIRCUMSTANCES

The United States Supreme Court has not expressly made the inclusion of aggravating circumstances or specifications a necessity or prerequisite to the constitutionality of any state's death penalty statute. Rather, aggravating circumstances have become one of the legislative responses to the Supreme Court's decision in *Furman v. Georgia*.¹⁶ The listing of aggravating circumstances obviates arbitrary and capricious decisions to inflict the death penalty by narrowing and guiding a jury's discretion.¹⁷ The legislatures have thereby eliminated the first element of possible arbitrariness by pre-selecting for the jury those criminal activities which subject the offender to the death penalty.¹⁸ In effect, legislative discretion is substituted for jury discretion. Various forms of statutes developed across the country in response to *Furman*. Some states adopted aggravating circumstances as a narrowing device and other states adopted mandatory death sentence statutes to bridle jury discretion in its entirety.

(C.P. Cuyahoga County); *State v. Zak*, No. 173910 (C.P. Cuyahoga County). Ohio Public Defender Commission, Columbus, Ohio.

In the *Jenkins* case, Cuyahoga County Common Pleas Judge David T. Matia overruled a motion to declare Ohio's new death penalty statute unconstitutional. No. CR168784A (C.P. Cuyahoga County, Feb. 19, 1982). Judge Matia said that "Ohio's new death penalty law is even more protective of a defendant's rights than the death penalty statutes of several other states that have been upheld by the U.S. Supreme Court." The *Clev. Press*, Feb. 20, 1982, at A18, col. 3.

Leonard Jenkins was accused of killing a Cleveland police officer in a gun battle following a bank robbery on October 21, 1981. Jenkins, who is paralyzed from a spinal injury suffered in the gun battle, was the first person to be tried under Ohio's new death penalty statute. *Id.* The jury found him guilty and recommended the sentence of death. The *Plain Dealer*, Apr. 8, 1982, at A1, col. 4. Judge David T. Matia upheld the jury's verdict and sentence recommendation. The *Clev. Press*, Apr. 16, 1982, at A1, col. 1. The case is currently on appeal. *State v. Jenkins*, No. 45231 (Ohio 8th Dist. Ct. App., filed Apr. 16, 1982) (Cuyahoga County).

Since *Jenkins*, four men have been sentenced to die in Ohio's electric chair. *State v. Maurer*, No. 82-2545 (C.P. Stark County 1983); *State v. Penix*, No. 82-CR-241 (C.P. Clark County 1983); *State v. Glenn*, No. 81CR933 (C.P. Mahoning County 1982); *State v. Rogers*, No. 81-6906 (C.P. Lucas County 1982). For an analysis of the written opinions of the trial judges in these cases and in *State v. Kiser*, No. 82-CR69 (C.P. Ross County 1982) and *State v. Jenkins*, No. CR168784A (C.P. Cuyahoga County 1982), see Note, *supra* note 11.

¹⁶ 408 U.S. 238 (1972).

¹⁷ *Gregg v. Georgia*, 428 U.S. 153, 192-95 (1976).

¹⁸ *Id.* at 195.

The Supreme Court struck down mandatory death penalty statutes in *Woodson v. North Carolina*¹⁹ and *Roberts v. Louisiana*,²⁰ but upheld statutes limiting jury discretion through the use of aggravating circumstances in *Gregg v. Georgia*²¹ and *Proffitt v. Florida*.²² While still not expressly required, it is reasonable to assume that aggravating circumstances have been implied in the Court's decisions,²³ and that their form has been expressly adopted as appropriate and constitutional in an effort to guide jury discretion.²⁴

Narrowing discretion in the determination of a particular punishment is not a novel proposition.²⁵ "[J]ustice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender."²⁶ What is unique about capital punishment cases, however, is that the *jury* under most statutes is permitted to recommend a particular sentence, namely, life or death.²⁷ Among

¹⁹ 428 U.S. 280 (1976).

²⁰ 428 U.S. 325 (1976).

²¹ 428 U.S. 153 (1976). For excellent analyses of Supreme Court interpretations from *Furman* through *Gregg*, see England, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of Distinctions Between Furman and Gregg*, 52 NOTRE DAME LAW. 596 (1977); Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989 (1978); Tao, *The Constitutional Status of Capital Punishment: An Analysis of Gregg, Jurek, Roberts, and Woodson*, 54 U. DET. J. URB. L. 345 (1977); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 56, 63-76 (1976).

²² 428 U.S. 242 (1976).

²³ *Furman v. Georgia*, 408 U.S. 238, 310 (1972) (Douglas, J., concurring); *Id.* at 313 (White, J., concurring).

²⁴ *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

²⁵ *Gregg*, 428 U.S. at 189.

²⁶ *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937). See generally Berger, *Equal Protection and Criminal Sentencing: Legal and Policy Considerations*, 71 NW. U.L. REV. 29 (1976) (viable challenge to criminal sentencing disparities on equal protection grounds).

²⁷ The following state statutes require the judge, in a case tried to a jury, to impose the sentence recommended by the jury: ARK. STAT. ANN. § 41-1302 (1977); CAL. PENAL CODE § 190.3 (West Supp. 1982); COLO. REV. STAT. § 16-11-103(4) (Supp. 1981); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1981); DEL. CODE ANN. tit. 11, § 4209(d) (1979); GA. CODE ANN. § 27-2534.1(c) (Supp. 1982); ILL. ANN. STAT. ch. 38, § 9-1(g) (Smith-Hurd Supp. 1982-83); KY. REV. STAT. ANN. § 532.025 (Baldwin Supp. 1981); LA. CODE CRIM. PROC. ANN. art. 905.8 (West Supp. 1981); MD. ANN. CODE art. 27, § 413(k) (1982); MISS. CODE ANN. § 99-19-101 (1979); MO. ANN. STAT. § 565.008 (Vernon 1979); NEV. REV. STAT. § 175.554 (1981); N.H. REV. STAT. ANN. § 630:5-IV (1979); N.M. STAT. ANN. § 31-20A-3 (Supp. 1981); OKLA. STAT. ANN. tit. 21, § 701.11 (West 1981); S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 1981); S.D. CODIFIED LAWS ANN. § 23A-27A-4 (1979); TENN. CODE ANN. § 39-2404(g) (Supp. 1981); TEX. CRIM. PROC. CODE ANN. art. 37.071(e) (Vernon Supp. 1981); UTAH CODE ANN. § 76-3-207(2) (1978); WASH. REV. CODE ANN. § 9A.32.040(1) (Supp. 1981); WYO. STAT. § 6-4-102(f) (1977).

If tried by a jury, Ohio permits the trial jury to recommend a sentence of death. The court is then permitted to make an independent determination of

the problems created by jury sentencing is that as a result of a particular jury's obvious inexperience in sentencing, the jury may not use the information properly. The jury's sentencing decision may then result in an arbitrary or capricious decision to condemn a particular defendant to death. If a jury is given guidance in its decision-making, the theory is that the risk of wholly arbitrary or capricious action on the part of the jury is minimized.²⁸

A specific area of concern immediately surfaces: What standards, if any, can be developed to guide the jury's sentencing deliberations? In *McGautha v. California*,²⁹ Justice Harlan opined that it would be impossible to formulate such standards. He stated that it was beyond present human ability "[t]o 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."³⁰

Contrary to Justice Harlan's contention in *McGautha*, the drafters of the Model Penal Code had developed standards which included "circumstances of aggravation and of mitigation that should be weighed and weighed against each other"³¹ The Court in *Gregg* thus concluded that even though the listing of aggravating and mitigating circumstances was somewhat general, such a standard would provide guidance to the jury, thereby reducing the likelihood that a jury would impose a capricious or arbitrary sentence.³² The Court did not suggest that the listing of aggravating and mitigating circumstances would inevitably satisfy the concerns of *Furman* regarding arbitrary and capricious decision-making or that such listing was the only acceptable way to provide standards for the jury. What the Court ultimately decided was that it would not be impossible to draft such standards.³³ Once drafted, the standards would be subject to judicial examination.³⁴

whether the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors. If not, the court is permitted to vacate the jury's recommended sentence of death. OHIO REV. CODE ANN. § 2929.03(D)(2)-(3) (Page 1982). For an indication and discussion of how the trial judges are weighing the aggravating and mitigating factors against each other, see Note, *supra* note 11.

²⁸ *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

²⁹ 402 U.S. 183 (1971), *vacated sub nom.*, *Crampton v. Ohio*, 408 U.S. 941 (1972).

³⁰ 402 U.S. at 204. The failure of appellate review of death penalties may be due to the fact that objective standards are impossible to achieve. Dix, *Appellate Review of the Decision to Impose Death*, 68 GEO. L.J. 97, 161 (1979). For a discussion of jury sentencing standards, see RAOUL BERGER, *DEATH PENALTIES* 139-42 (1982).

³¹ MODEL PENAL CODE § 201.6, comment 3 (Tent. Draft No. 9, 1959) (emphasis in original), *quoted in* *Gregg v. Georgia*, 428 U.S. 153, 193 (1976). The standards referred to may be found at MODEL PENAL CODE § 210.6 (Official Draft 1980).

³² *Gregg*, 428 U.S. at 193-95.

³³ *Id.* at 195.

³⁴ *Id.*

The type of standard approved in *Gregg* was the listing of aggravating circumstances which narrowed the class of defendants subject to capital punishment.³⁵ In addition, the statute authorized the jury to consider mitigating circumstances.³⁶ In this way, the jury is required to consider the circumstances of the crime and the criminal before recommending a sentence, thereby having its discretion "controlled by clear and objective standards so as to produce non-discriminatory application."³⁷ The importance then of the "clear and objective standards" becomes manifest. Equally important is the type of review, if any, to be accorded these legislative standards imposed upon the jury.

III. SCRUTINY BY THE INDIVIDUAL JUSTICES

The judicial review accorded death penalty statutes has been unclear and inconsistent. Most of the Justices have vacillated in different cases so that it is not surprising that death penalty statutes, and/or the death penalty itself as a form of punishment, have been held to be both constitutional³⁸ and unconstitutional³⁹ within a period of only five years.

Within the present Court, Justices Brennan and Marshall have remained consistent in their approach to capital punishment cases. They find the death penalty cruel and unusual punishment whether the attack on the particular statute is substantive or procedural. In particular, Justice Brennan advocates an activist role by claiming that the Supreme Court "inescapably has the duty, as the ultimate arbiter of the meaning of our Constitution, to say whether . . . the punishment of death . . . is no longer morally tolerable in our civilized society."⁴⁰ This duty of the Court is not "only permitted but compelled by the [eighth amendment]."⁴¹

For purposes of eighth amendment analysis to ensure that its interpretations reflect "the evolving standards of decency that mark the progress of a maturing society,"⁴² Justice Brennan adopted the following test: A punishment will be unconstitutional if: (1) it does not comport with human dignity;⁴³ and (2) it is excessive.⁴⁴ To meet part one of the test, the punish-

³⁵ *Id.* at 165 n.9.

³⁶ *Id.* at 166-67, 211.

³⁷ *Coley v. State*, 231 Ga. 829, 834, 204 S.E.2d 612, 615 (1974).

³⁸ *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *McGautha v. California*, 402 U.S. 183 (1971), *vacated sub nom.*, *Crampton v. Ohio*, 408 U.S. 941 (1972).

³⁹ *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Furman v. Georgia*, 408 U.S. 238 (1972).

⁴⁰ *Gregg*, 428 U.S. at 229. See Tao, *Beyond Furman v. Georgia: The Need for a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAW. 722, 736 (1976).

⁴¹ *Gregg*, 428 U.S. at 230.

⁴² *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (Warren, C.J., plurality opinion).

⁴³ *Gregg*, 428 U.S. at 229 (Brennan, J., dissenting).

⁴⁴ *Id.* at 230.

ment must not be so severe as to be degrading,⁴⁵ the punishment must not be inflicted arbitrarily,⁴⁶ and the punishment must be acceptable to contemporary society.⁴⁷ To comply with part two, the punishment must serve a penal purpose more effectively than some less severe punishment.⁴⁸ Justice Brennan, in effect, has adopted a state compelling interest/least restrictive means analysis.⁴⁹

Justice Marshall concluded that the death penalty is cruel and unusual punishment because: (1) it is excessive; and (2) it is morally unacceptable.⁵⁰ In determining excessiveness, Justice Marshall questions whether the death penalty is necessary to accomplish the legitimate legislative purposes of punishment or whether a less severe penalty would suffice.⁵¹ He measures moral acceptability by whether an *informed* citizenry would consider the death penalty shocking and unjust.⁵² As to the role of the judiciary with regard to legislative enactments, Justice Marshall has stated that:

The point has now been reached at which deference to the legislatures is tantamount to abdication of our judicial roles as factfinders, judges, and ultimate arbiters of the Constitution. We know that at some point the presumption of constitutionality accorded legislative acts gives way to a realistic assessment of those acts. This point comes when there is sufficient evidence available so that judges can determine, not whether the legislature acted wisely, but whether it had any rational basis whatsoever for acting.⁵³

While Justice Marshall has couched his evaluation in terms of a rational basis test, it is apparent that he will require more than mere rationality when evidence is advanced in opposition to the purpose(s) of the legislation.⁵⁴

Moreover, Justice Marshall drew a parallel between his method of eighth amendment analysis and the method of analysis used in striking down legislation on the ground that it violates fourteenth amendment concepts of substantive due process. In drawing the analogy, he set forth

⁴⁵ *Furman v. Georgia*, 408 U.S. 238, 271 (1972) (Brennan, J., concurring). Physical pain may be considered as well as severe mental pain. *Id.*

⁴⁶ *Id.* at 274.

⁴⁷ *Id.* at 277.

⁴⁸ *Id.* at 282, 286.

⁴⁹ Radin, *supra* note 21, at 1005.

⁵⁰ *Gregg*, 428 U.S. at 231-32 (Marshall, J., dissenting).

⁵¹ *Id.* at 233.

⁵² *Id.* at 232. See Sarat & Vidmar, *Public Opinion, The Death Penalty, and The Eighth Amendment: Testing the Marshall Hypothesis*, 1976 WIS. L. REV. 171.

⁵³ *Furman*, 408 U.S. at 359 (Marshall, J., concurring).

⁵⁴ In *Gregg*, evidence of deterrent value was presented, but Justice Marshall attacked the statistics as unfounded without even considering whether the legislature had a rational basis for its actions. 428 U.S. at 233-36.

the following substantive due process argument which reiterates what is essentially the primary purpose of the eighth amendment—to prohibit punishment more severe than necessary to serve the state's legitimate penological goals: "Because capital punishment deprives an individual of a fundamental right (i.e., the right to life), . . . the State needs a compelling interest to justify it."⁵⁵ Using that approach, the burden would be upon the state to justify the legislation rather than requiring the defendant to advance evidence in opposition to the statute.

Chief Justice Burger and Justice Rehnquist have consistently deferred to state legislatures regarding capital punishment.⁵⁶ As a result, both Justices are willing to uphold mandatory death penalty statutes⁵⁷ and the punishment of death for crimes not involving the death of the victim.⁵⁸ Both Justices are also willing to uphold death sentences for felony murder "even though the defendant did not actually kill or intend to kill his victims."⁵⁹ However, Chief Justice Burger is more apt to entertain procedural attacks than Justice Rehnquist as evidenced by his decision in

⁵⁵ *Furman*, 408 U.S. at 359 n.141. Chief Justice Burger would not accept the least restrictive means analysis since any punishment could be subjected to such a constitutional challenge. *Id.* at 395-96 (Burger, C.J., dissenting).

In *Johnson v. Zerbst*, 304 U.S. 458, 462 (1938), Justice Black held that the assistance of counsel is necessary to ensure the fundamental rights of *life* and liberty. Life has been expressly recognized as a fundamental right by the Supreme Judicial Court of Massachusetts in *Commonwealth v. O'Neal*, 369 Mass. 242, 339 N.E.2d 676 (1975) (Tauro, C.J., concurring). Judge Tauro did not share Chief Justice Burger's concern since the penalty of death is unique. *Id.* at 246 n.2, 339 N.E.2d at 678 n.2. A person who receives a less severe sentence does retain some basic rights. *Id.* See, e.g., *Procunier v. Martinez*, 416 U.S. 396 (1974). One who is executed retains no rights. Where absolute deprivations are involved, courts allow a more exacting scrutiny. *O'Neal*, 369 Mass. at 246 n.2, 339 N.E.2d at 678 n.2 (Tauro, C.J., concurring). See also *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). Judge Tauro concluded that "the compelling State interest and least restrictive means analysis is particularly congruent with the absolute and irreversible deprivation resulting from a mandatory death penalty, whereas the less absolute features of routine punishments do not demand, and will not be given, such exacting scrutiny." *O'Neal*, 369 Mass. at 246 n.2, 339 N.E.2d at 678 n.2 (Tauro, C.J., concurring). See generally *Fletcher, The Right to Life*, 13 GA. L. REV. 137 (1979) (development of theory refuting the argument that aggressors forfeit their right to life).

⁵⁶ *Furman*, 408 U.S. at 404-05 (Burger, C.J., dissenting); *Id.* at 465-70 (Rehnquist, J., dissenting). See Radin, *supra* note 21, at 1004.

⁵⁷ *Woodson v. North Carolina*, 428 U.S. 280, 306-07 (1976) (White, J., with whom the Chief Justice and Mr. Justice Rehnquist joined, dissenting); *Id.* at 308 (Rehnquist, J., dissenting); *Roberts v. Louisiana*, 428 U.S. 325, 337-39 (1976) (White, J., with whom the Chief Justice, Mr. Justice Blackmun and Mr. Justice Rehnquist joined, dissenting).

⁵⁸ *Coker v. Georgia*, 433 U.S. 584, 604 (1977) (Burger, C.J., with whom Mr. Justice Rehnquist joined, dissenting).

⁵⁹ *Enmund v. Florida*, 458 U.S. ___, ___, 102 S.Ct. 3368, 3392 (1982) (O'Connor, J., with whom the Chief Justice, Justice Powell and Justice Rehnquist joined, dissenting).

Lockett where he held that the failure to permit consideration of all mitigating factors during the sentencing phase in a capital case violated the eighth and fourteenth amendments.⁶⁰

Justice Rehnquist has uniformly exercised and advocated judicial restraint. He finds it less serious to err on the side of deference to legislative judgments, even when the rights of an individual are concerned, so that the right of the people to govern themselves is preserved and saved from the judicial activism of a majority of the Court.⁶¹ As a result, Justice Rehnquist will reject challenges to capital punishment both substantively and procedurally utilizing cruel and unusual punishment arguments⁶² as well as due process⁶³ and equal protection⁶⁴ arguments.

Justices Stevens and Powell have adopted a moderately active approach in scrutinizing death penalty statutes. While deferring to the legislatures in finding that the death penalty is not unconstitutional per se, both Justices accord active judicial review to the procedural aspects of the sentencing system.⁶⁵ In addition, regarding the punishment itself, in *Coker v. Georgia*,⁶⁶ in an opinion written by Justice White in which Justice Stevens joined, execution for the crime of rape was found to be disproportionate to the crime and therefore inappropriate. It was stated that even taking into account the attitudes and actions of the legislatures and the sentencing juries, the ultimate decision as to the acceptability of the death penalty resides with the Court.⁶⁷ Justice Powell in *Coker* also expressed the view that final resolution of death penalty punishments for certain crimes rests with the judiciary.⁶⁸

Justice White, moderately active since *Gregg*,⁶⁹ while rejecting a due process fundamental fairness attack on the entire system,⁷⁰ will examine death penalty statutes procedurally and substantively under the eighth amendment.⁷¹ In *Enmund v. Florida*,⁷² Justice White embraced the prin-

⁶⁰ *Lockett v. Ohio*, 438 U.S. 586 (1978).

⁶¹ *Furman*, 408 U.S. at 468 (Rehnquist, J., dissenting).

⁶² *Id.* at 465.

⁶³ *Id.* at 469-70.

⁶⁴ *Id.* at 470.

⁶⁵ *Gardner v. Florida*, 430 U.S. 349 (1977).

⁶⁶ 433 U.S. 584 (1977).

⁶⁷ *Id.* at 597.

⁶⁸ *Id.* at 603 n.2 (Powell, J., concurring in part and dissenting in part). See Radin, *supra* note 21, at 1008.

⁶⁹ Compare *Roberts v. Louisiana*, 428 U.S. 325, 355 (1976) (White, J., dissenting) (the judiciary should accept the reasonable conclusions of the legislature) with *Coker v. Georgia*, 433 U.S. 584, 597 (1977) (in the end the Court must decide the acceptability of the death penalty under the eighth amendment). See Radin, *supra* note 21, at 1002-04.

⁷⁰ *Gregg v. Georgia*, 428 U.S. 153, 226 (1976) (White, J., concurring).

⁷¹ *Gardner*, 430 U.S. at 364 (White, J., concurring).

⁷² 458 U.S. ___, 102 S.Ct. 3368 (1982).

ciple that the Court is to be the ultimate arbiter of the acceptability of the death penalty as a punishment⁷³ without reference to whether the state legislature had acted irrationally in permitting the sentence of death for the crime of felony murder for one who did not kill or intend to kill.

Even though Justice White accepts the death penalty as an effective deterrent for murder, he accepts the notion that when it is infrequently imposed, the punishment loses its deterrent value.⁷⁴ Therefore, Justice White would presumably be willing to look not only at the face and substance of a particular statute, but to the *effect* of enacted statutes to measure that effect upon legislative goals. A statute that merely bears a rational relation to a state interest, but does not demonstrate a nondeterrent element in its imposition, would not survive Justice White's scrutiny. The result of this type of review is similar to that espoused by Justice Marshall.

Justice Blackmun, although expressing his personal opposition to the death penalty,⁷⁵ clothed his dissent in *Furman* with deference to the legislature and would not strike down capital punishment *per se*.⁷⁶ However, Justice Blackmun is willing to recognize limitations upon legislative authority. For example, in *Coker*, he agreed that it was disproportionate to sentence one to death for committing the crime of rape when no life was taken.⁷⁷ Moreover, in *Lockett*, Justice Blackmun expressly recognized that there are occasions where the Court must interfere with the legislative judgment of the states by "setting some limit to the method by which the States assess punishment for actions less immediately connected to the deliberate taking of human life."⁷⁸ Justice Blackmun prescribed no test to measure legislative decisions, but the *Lockett* opinion is indicative of his willingness to disengage himself from a strict adherence to a legislative deference/mere rationality scheme.

Justice O'Connor first expressed concern over the procedural aspect of death penalty cases in *Eddings v. Oklahoma*.⁷⁹ In that case she concurred in remanding for consideration of all factors of Eddings' background in deciding whether to impose the death penalty. Her purpose in remanding was to eliminate the risk of imposing the death penalty despite possible mitigating factors which might justify a less severe penalty.⁸⁰ While not directly involved in deciding the constitutionality of capital punishment *per se*,⁸¹ Justice O'Connor is willing to review a sentencing procedure

⁷³ *Id.* at ___, 102 S.Ct. at 3376; 433 U.S. at 597.

⁷⁴ *Furman*, 408 U.S. at 312 (White, J., concurring).

⁷⁵ *Id.* at 405-06 (Blackmun, J., dissenting).

⁷⁶ *Id.*

⁷⁷ 433 U.S. 584 (1977).

⁷⁸ *Lockett v. Ohio*, 438 U.S. 586, 616 (1978) (Blackmun, J. concurring in part and concurring in the judgment).

⁷⁹ 455 U.S. 104, 117 (1982).

⁸⁰ *Id.* at 119.

⁸¹ Justice O'Connor joined the majority opinion in *Eddings* in remanding, but

to "ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice or mistake."⁸² Her scrutiny is careful and deliberate as evidenced by her dissenting opinion in *Enmund*.⁸³ Even though she disagreed with the majority's opinion that a death sentence was disproportionate to the crime of felony murder, Justice O'Connor urged remand because the trial judge's view of the facts effectively prevented consideration of the defendant's mitigating circumstance.⁸⁴ Justice O'Connor is therefore willing to actively protect procedural fairness.

While it is virtually impossible to synchronize the various concepts which have evolved into eighth amendment analyses, it is possible to predict a certain amount of active judicial review for procedural aspects of death penalty statute applications. Procedural attacks, therefore, will be the turning point for Ohio's new statute.

When the issue of whether Ohio's death penalty statute is constitutional reaches the Supreme Court, only Justices Brennan and Marshall will oppose it since they both find the death penalty cruel and unusual punishment.⁸⁵ Justice Rehnquist, exercising judicial restraint, will undoubtedly uphold Ohio's statute.⁸⁶ Justice Blackmun will probably uphold Ohio's statute since the constitutional infirmities he pointed out in *Lockett v. Ohio*⁸⁷ have been corrected. For example, an aider or abettor to a felony may no longer be sentenced to death without having intended to cause the death of another⁸⁸ and without the character of the offender's *mens*

stated in her concurring opinion that the majority opinion did not alter previous Supreme Court decisions "establishing the constitutionality of the death penalty" *Id.* Moreover, six months after *Eddings* was decided, Justice O'Connor "conclude[d] that the death penalty [was] not disproportionate to the crime of felony murder, even though the defendant did not actually kill or intend to kill his victims." *Enmund*, 458 U.S. at ___, 102 S.Ct. at 3392 (O'Connor, J., dissenting). It is evident, therefore, that Justice O'Connor concurs with the majority that the death penalty as a form of punishment is neither cruel nor unusual.

⁸² 455 U.S. at 118 (O'Connor, J., concurring).

⁸³ 458 U.S. at ___, 102 S.Ct. at 3379 (O'Connor, J., dissenting).

⁸⁴ *Id.* at ___, 102 S.Ct. at 3394. The trial judge believed that the defendant shot both victims to eliminate them as witnesses. This erroneous belief prevented the trial judge from considering in mitigation of the death penalty that defendant's role in the capital felonies was minor since he was in the getaway car when the victims were shot. Defendant offered no other mitigating factors. *Id.* at ___, 102 S.Ct. at 3393-94.

⁸⁵ See *supra* notes 40-55 and accompanying text.

⁸⁶ See *supra* notes 61-64 and accompanying text.

⁸⁷ 438 U.S. 586, 613-19 (1978) (Blackmun, J., concurring in part and concurring in the judgment).

⁸⁸ OHIO REV. CODE ANN. § 2903.01(D) (Page 1982). Other state statutes requiring some form of intent include: ALA. CODE §§ 13A-2-23, 13A-5-40(a)(2), 13A-6-2(a)(1) (1982); ILL. REV. STAT., ch. 38, §§ 9-1(a)(3), 9-1(b)(6) (1979); LA. REV. STAT. ANN. § 14:30(1) (West Supp. 1982); N.M. STAT. ANN. §§ 30-2-1(A)(2),

rea being considered by the sentencer.⁸⁹ Additionally, no longer is it possible for only the defendant who elects a jury trial to be sentenced to death. Even those pleading guilty may be candidates for the death penalty.⁹⁰

There is a possibility for swaying Justice Blackmun. Ohio's new statute contains an aggravating circumstance which permits imposition of death for the killing of a peace officer when the defendant knew of the victim's identity or when the defendant had only reasonable cause to know the victim's identity.⁹¹ Thus, the aggravating circumstances may apply when the defendant is negligent. While Justice Blackmun did not require an actual intent to kill, but only that the character of the *mens rea* be allowed to be considered, an analogy to the peace officer aggravating circumstance is useful and applicable as follows. Once the aggravating circumstance is proven beyond a reasonable doubt, whether knowledge, recklessness or negligence is shown, there is no specific mitigating factor for the jury to consider regarding the actual state of the offender's *mens rea* as in the case of the felony aider or abettor. Once the jury finds that the defendant did not know the victim's identity but had reasonable cause to know the victim's identity, it is doubtful that the jury will consider any further *mens rea* arguments even though such factors may be "relevant to the issue of whether the offender should be sentenced to death."⁹² This type of argument may again trigger Justice Blackmun to set a "limit to the method by which . . . [Ohio] assess[es] punishment"⁹³

Chief Justice Burger and Justices White, Powell, Stevens, and O'Connor are receptive to procedural attacks.⁹⁴ Because the new statute complies with earlier Supreme Court decisions involving basic procedural issues, original issues need to be raised to trigger the scrutiny of these Justices.

With procedural attacks as a starting point, efforts may again turn to constitutional scrutiny of death as a form of punishment. It may prove impossible to construct a procedurally sound death penalty statute which does not violate the mandates of *Furman*⁹⁵ even with the inclusion of aggravating circumstances. An example of such an outcome becomes apparent in scrutinizing the aggravating circumstances in Ohio's death penalty statute.

31-18-14(A), 31-20A-5 (1978 & Supp. 1981); TEX. PENAL CODE ANN. §§ 19.02(a), 19.03(a)(2) (1974); UTAH CODE ANN. § 76-5-202(1) (1978); VA. CODE § 18.2-31(d) (1982). For a discussion of state and federal felony murder sentences see *Enmund*, 458 U.S. ___, 102 S.Ct. at 3368 (1982).

⁸⁹ OHIO REV. CODE ANN. § 2929.04(B)(6) (Page 1982).

⁹⁰ *Id.* § 2929.02(A).

⁹¹ *Id.* § 2929.04(A)(6).

⁹² *Id.* § 2929.04(B)(7).

⁹³ *Lockett*, 438 U.S. at 616.

⁹⁴ See *supra* notes 60, 65-74, 79-84 and accompanying text.

⁹⁵ 438 U.S. at 623 (White, J., concurring in part, dissenting in part).

IV. EVALUATION OF AGGRAVATING CIRCUMSTANCES

Two basic approaches can be utilized in scrutinizing legislative choices of aggravating circumstances: (1) an individual examination, where each aggravating circumstance is attacked on constitutional grounds such as overbroadness or vagueness; and (2) an aggregate examination,⁹⁶ where the aggravating circumstances are analyzed as a whole to determine the aggregate effect on who will eventually be considered for death. For example, do the aggravating circumstances as a whole significantly disadvantage a suspect class or economically-disadvantaged people so that the risk of death is significantly higher for only certain groups of people? In effect, the individualized approach will result in only a specific portion of the entire statute being declared invalid; whereas, the aggregate analysis will impact upon the entire statute.

A. *Individual Examination*

The aggravating circumstances of Ohio's death penalty statute are: assassination of various political officials, officials-elect, or candidates,⁹⁷ murder for hire,⁹⁸ murder to escape detection, apprehension, trial, or

⁹⁶ Two subcategories can be established within the aggregate examination: (1) consideration of the total aggravating circumstances separate and distinct from the entire sentencing statute; or (2) consideration of the total aggravating circumstances as a comprehensive part of the sentencing statute. For purposes of the instant evaluation, the distinction is not relevant. It becomes relevant, however, when addressing an attack on the system as a whole and when addressing such attack on varied grounds. In *Gregg v. Georgia*, 428 U.S. 153 (1976), the petitioner argued that there was "an unconstitutional amount of discretion in the system which separates those suspects who receive the death penalty from those who receive life imprisonment, a lesser penalty, or are acquitted or never charged . . ." *Id.* at 225-26. Justice White, in a concurring opinion, rejected this challenge as not having constitutional merit. *Id.* at 226. The simple "assertion of lack of faith in the ability of the system of justice to operate in a fundamentally fair manner" does not justify interference "with the manner in which Georgia has chosen to enforce [its] laws . . ." *Id.* In *Gregg*, the attack was not targeted at any particular portion of the statute. Instead, the attack was one of open-ended discretion based upon the entire system, both statutory and nonstatutory, as denying fundamental fairness as opposed to a narrower attack on many grounds.

⁹⁷ The offense was the assassination of the president of the United States or a person in line of succession to the presidency, or of the governor or lieutenant governor of this state, or of the president-elect or vice president-elect of the United States, or the governor-elect or lieutenant governor-elect of this state, or of a candidate for any of the foregoing offices. For purposes of this division, a person is a candidate if he has been nominated for election according to law, or if he has filed a petition or petitions according to law to have his name placed on the ballot in a primary or general election, or if he campaigns as a write-in candidate in a primary or general election.

OHIO REV. CODE ANN. § 2929.04(A)(1) (Page 1982).

⁹⁸ "The offense was committed for hire." *Id.* § 2929.04(A)(2).

punishment for another offense,⁹⁹ murder while a prisoner,¹⁰⁰ murder with a prior conviction for attempted murder or murder,¹⁰¹ murder endangering two or more people,¹⁰² murder of a peace officer,¹⁰³ felony murder,¹⁰⁴ and murder of a witness.¹⁰⁵

It is difficult to examine individually each aggravating circumstance in the abstract. A bare analysis, however, is set forth below utilizing four of the aggravating circumstances.¹⁰⁶ The felony murder specification is discussed because it will probably be the most frequently charged circumstance. The other three specifications involve victim identities and are discussed to illustrate the wide variability among them.

⁹⁹ "The offense was committed for the purpose of escaping detection, apprehension, trial, or punishment for another offense committed by the offender." *Id.* § 2929.04(A)(3).

¹⁰⁰ "The offense was committed while the offender was a prisoner in a detention facility as defined in section 2921.01 of the Revised Code." *Id.* § 2929.04(A)(4).

¹⁰¹ Prior to the offense at bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill another, or the offense at bar was part of a course of conduct involving the purposeful killing of or attempt to kill two or more persons by the offender.

Id. § 2929.04(A)(5).

¹⁰² *Id.*

¹⁰³ The victim of the offense was a peace officer, as defined in section 2935.01 of the Revised Code, whom the offender had reasonable cause to know or knew to be such, and either the victim, at the time of the commission of the offense, was engaged in his duties or it was the offender's specific purpose to kill a peace officer.

Id. § 2929.04(A)(6).

¹⁰⁴ The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary, and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

Id. § 2929.04(A)(7).

¹⁰⁵ The victim of the aggravated murder was a witness to an offense who was purposely killed to prevent his testimony in any criminal proceeding and the aggravated murder was not committed during the commission, attempted commission, or flight immediately after the commission or attempted commission of the offense to which the victim was a witness or the victim of the aggravated murder was a witness to an offense and was purposely killed in retaliation for his testimony in any criminal proceeding.

Id. § 2929.04(A)(8).

¹⁰⁶ Professor Lawrence Herman raised a constitutional challenge to a fifth aggravating circumstance, when aggravated murder is committed by a prisoner in a detention facility. THE OHIO DEATH PENALTY TASK FORCE, OHIO DEATH PENALTY MANUAL II-19-25 (1981).

1. Aggravating by Victim

a. *Political Official*

One of the ways an offender may become a candidate for the death penalty in Ohio is to murder a particular political official, official-elect, or candidate.¹⁰⁷ Only California¹⁰⁸ and Tennessee¹⁰⁹ have aggravating circumstances defined in terms of political offices, not including the offices of prosecutors or judges. However, Ohio is the only state which makes the identity of a political figure alone suffice to condemn a person to death. For example, California requires the death to be "intentionally carried out in retaliation for or to prevent the performance of the victim's official duties."¹¹⁰ Tennessee requires not only a causal connection between the death and "the official's lawful duties or status"¹¹¹ but also knowledge on the part of the defendant that "the victim was such an official."¹¹² The Ohio aggravating circumstance does not require either knowledge of the identity of the political official beforehand or a purpose to serve as a causal connection for the death of the official.¹¹³ Thus, this aggravating specification is unique among all the death penalty statutes in the United States.

Without requiring knowledge or purpose, from which knowledge may be inferred, this criminal sentencing feature, which could lead to the death of an individual sentenced thereunder, serves no penological goal. "The death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders."¹¹⁴ Because retribution is no longer the dominant objective of criminal sentencing,¹¹⁵

¹⁰⁷ OHIO REV. CODE ANN. § 2929.04(A)(1) (Page 1982).

¹⁰⁸ CAL. PENAL CODE § 190.2 (West Supp. 1982).

¹⁰⁹ TENN. CODE ANN. § 39-2404(i) (Supp. 1981).

¹¹⁰ CAL. PENAL CODE § 190.2(a)(13) (West Supp. 1982).

¹¹¹ TENN. CODE ANN. § 39-2404(i)(11) (Supp. 1981).

¹¹² *Id.*

¹¹³ Perhaps the knowledge requirement could even be inferred if a causal connection was required.

¹¹⁴ *Gregg*, 428 U.S. at 183. Justice Marshall has recognized six conceivable purposes for capital punishment: "retribution, deterrence, prevention of repetitive criminal acts, encouragement of guilty pleas and confessions, eugenics, and economy." *Furman v. Georgia*, 408 U.S. 238, 342 (1972) (Marshall, J., concurring). The penological goals in Ohio are to punish those convicted, to deter others from committing crimes and to protect society. *State v. Meyer*, 163 Ohio St. 279, 287, 126 N.E.2d 585, 589 (1955). Another goal is to deter a convicted defendant from further criminal activities. *State v. Staten*, 18 Ohio St. 2d 13, 19, 247 N.E.2d 293, 298 (1969).

¹¹⁵ *Williams v. New York*, 337 U.S. 241, 248 (1949). Reformation and rehabilitation are important goals; retribution is not the dominant objective. *In re Lamb*, 34 Ohio App. 2d 85, 88, 296 N.E.2d 280, 284 (1973) (quoting from *Williams*, 337 U.S. at 248).

if the penalty does not deter,¹¹⁶ retribution alone should not suffice as the reason for executing anyone.¹¹⁷ If an offender takes the life of a victim without knowledge of the victim's identity or without knowledge that the victim has filed a petition to run for an office, there is no deterrent value to prospective offenders if the perpetrator is not cognizant of the victim's identity, which identity is the sole criterion for imposing death.

Of the three Ohio aggravating circumstances based on the identity of a victim, the political office specification is the only one which does not require any additional proof beyond the identity of the victim. The other two victim-defined specifications in Ohio's statute have required elements of either knowledge or purpose or both to be proven beyond a reasonable doubt before they may be invoked for death penalty purposes. For example, if a witness is killed, the state must prove beyond a reasonable doubt not only the identity of the victim as a witness to an offense, but also that the witness was killed purposely to prevent his testimony or in retaliation for his testimony.¹¹⁸ Additionally, if a peace officer is killed, the state must prove beyond a reasonable doubt not only the identity of the victim as a peace officer, but also that the offender knew or had reasonable cause to know the victim was a peace officer, and either the victim was engaged in his duties at the time he was killed or the offender specifically had the purpose to kill a peace officer.¹¹⁹ Without requiring additional proof beyond the identity of the victim, the legislature has, in effect,

¹¹⁶ Research indicates that capital punishment laws in Ohio do not deter homicides in Ohio. Bailey, *The Deterrent Effect of the Death Penalty for Murder in Ohio: A Time-Series Analysis*, 28 CLEV. ST. L. REV. 51 (1979). Further, the Ohio legislature did not make any finding that capital punishment is a better deterrent than life imprisonment or life imprisonment without the possibility of parole. THE OHIO DEATH PENALTY TASK FORCE, OHIO DEATH PENALTY MANUAL II-46 (1981). For a discussion of the empirical evidence supporting and refuting the deterrent effect of the death penalty see Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177, 1196-1224 (1981).

¹¹⁷ *Furman*, 408 U.S. at 363 (Marshall, J., concurring) (the legislature cannot constitutionally pursue retribution as its sole justification for capital punishment); see also *id.* at 305 (Brennan, J., concurring) (history demonstrates that society harbors no desire to kill criminals simply to get even with them); *cf. id.* at 308 (Stewart, J., concurring) (retribution is a permissible ingredient in the imposition of punishment); and *id.* at 394 (Burger, C.J., dissenting) (retribution is a legitimate dimension of the punishment of crimes); but *cf. id.* at 453 (Powell, J., dissenting) ("[w]hile retribution alone may seem an unworthy justification [for punishment] in a moral sense, its utility in a system of criminal justice requiring public support has long been recognized"). See generally Lempert, *Desert and Deterrence: An Assessment of the Moral Bases of the Case for Capital Punishment*, 79 MICH. L. REV. 1177 (1981) (analyses concluding that retribution cannot justify state executions and deterrence evidence is insufficient for capital punishment to withstand moral scrutiny).

¹¹⁸ OHIO REV. CODE ANN. § 2929.04(A)(8) (Page 1982).

¹¹⁹ *Id.* § 2929.04(A)(6).

decided that only these political officials are deserving of the highest degree of possible protection, thus assuming some inherent deterrent value. But again, deterrent value here is dubious. The risk of having a victim identified later as a political official is low so that deterrence remains low and therefore ineffective. Moreover, the argument is tenuous that there is a presumption that the identities of these political officials are known to all since the specification also includes a person, sometimes virtually an unknown person, who files a petition to run for office. In this context, a person who kills a candidate for the office of lieutenant governor without knowing the victim's identity is more deserving of the death penalty according to the state legislature than a person who, *with prior calculation and design*, murders a young child on her way to school. The latter offender might not even be eligible for the death penalty under Ohio's law.

By focusing on the identity of the victim,¹²⁰ the legislature effectively ignores the substance of the crime and any particular heinousness of the offense.¹²¹ For example, other than distinguishing between felonies and misdemeanors, the legislature has not tried to deter burglaries on the

¹²⁰ The following state statutes which enumerate aggravating circumstances do not contain victim-defined specifications: ALA. CODE § 13A-5-49 (1982); ARIZ. REV. STAT. ANN. § 13-703(F) (1981); ARK. STAT. ANN. § 41-1303 (1977); CONN. GEN. STAT. ANN. § 53a-46a (West Supp. 1982); FLA. STAT. ANN. § 921.141(5) (West Supp. 1982); MISS. CODE ANN. § 99-19-101(5) (1979); N.H. REV. STAT. ANN. § 630:5-II(a) (Supp. 1981).

¹²¹ The following state statutes which enumerate aggravating circumstances contain a specification (or specifications) which permits consideration of the substance of the crime, including heinousness and/or torture: ALA. CODE § 13A-5-49(8) (1982); ARIZ. REV. STAT. ANN. § 13-703(F)(6) (1978 & Supp. 1982-83); CAL. PENAL CODE § 190.2(a)(18) (West Supp. 1982); COLO. REV. STAT. § 16-11-103(6)(i) (1978); CONN. GEN. STAT. ANN. § 53a-46a(g)(4) (West Supp. 1982); DEL. CODE ANN. tit. 11, § 4209(e)(1), (n) (1979); FLA. STAT. ANN. § 921.141(5)(h) (West Supp. 1982); GA. CODE ANN. § 27-2534.1(b)(7) (Supp. 1982); IDAHO CODE § 19-2515(f)(5), (6) (1979); LA. CODE CRIM. PROC. ANN. art. 905.4(g) (West Supp. 1982); MISS. CODE ANN. § 99-19-101(5)(h) (Supp. 1981); MO. ANN. STAT. § 565.012.2(7) (Vernon 1979 & Supp. 1982); MONT. CODE ANN. § 46-18-303(3) (1981); NEB. REV. STAT. § 29-2523(1)(d) (1979); NEV. REV. STAT. § 200.033(8) (1981); N.H. REV. STAT. ANN. 630:5-II(a)(7) (Supp. 1981); N.C. GEN. STAT. § 15A-2000(e)(9) (Supp. 1981); OKLA. STAT. ANN. tit. 21, § 701.12(4) (West 1981); S.C. CODE ANN. § 16-3-20(C)(a)(1) (Law. Co-op. Supp. 1981); S.D. CODIFIED LAWS ANN. § 23A-27A-1(6) (Supp. 1982); TENN. CODE ANN. § 39-2404(i)(5) (Supp. 1981); WYO. STAT. § 6-4-102(h)(vii) (1977 & Supp. 1982).

A broad and vague construction of Georgia's statute permitting the penalty of death for murder offenses which are "outrageously or wantonly vile, horrible or inhuman" violates the eighth and fourteenth amendments. *Godfrey v. Georgia*, 446 U.S. 420 (1980). *Cf. People v. Superior Court of Santa Clara Cty.*, 31 Cal. 3d 797, 801, 647 P.2d 76, 79, 183 Cal. Rptr. 800, 801 (1982) (statutory special circumstances permitting death for murder that is "'especially heinous, atrocious, or cruel, manifesting exceptional depravity'" is unconstitutionally vague violating due process standards).

basis of the identity of the stolen goods by requiring longer sentences for those stealing diamonds rather than stereos.

Obviously, all potential murderers pose a threat to society. But few would disagree that as a first step toward reducing the crime of murder, the murderer who purposely tortures his victim should be one of the first for the legislature to try to deter with a death penalty statute. The substance of that offense is especially heinous no matter who the victim is.

In addition, the murderer who plots and plans his offense should be a potential candidate for a sentence of death. The murderer who plans the crime may be the most easily deterred since he contemplates the intended victim and the method of attack. Ohio has not required a death sentence trial based on the substance of an offense utilizing prior calculation and design. The legislature has decided not to protect society at this elevated level, but instead has decided to protect society from one who murders a person who has filed a petition to run for an office regardless of the murderer's knowledge of the victim's status. Since the legislature has chosen to provide special protection for certain political officials, officials-elect, and candidates, rather than focusing on the substance of the crime, it would be advisable for the public to file petitions to run for office to obtain the desired protection from potential murderers. This result is irrational. The legislature should be required to consider the substance or heinousness of a crime and the effective deterrent value of the punishment to be inflicted before condemning a person to death.

b. *Peace Officer*

Another aggravating circumstance provides special protection for peace officers.¹²² Justification for the inclusion of the murder of peace officers as an aggravating circumstance in death penalty statutes has been expressly recognized by the Supreme Court in *Roberts v. Louisiana*.¹²³ The Court found "a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety

¹²² OHIO REV. CODE ANN. § 2929.04(A)(6) (Page 1982). A peace officer includes: A sheriff, deputy sheriff, marshal, deputy marshal, member of the organized police department of any municipal corporation, state university law enforcement officer appointed under section 3345.04 of the Revised Code, a police constable of any township, and, for the purpose of arrests within those areas, and for the purposes of Chapter 5503 of the Revised Code, and the filing of and service of process relating to those offenses witnessed or investigated by them, includes the superintendent and patrolmen of the state highway patrol.

Id. § 2935.01(B).

¹²³ 431 U.S. 633 (1977). In *Roberts*, the Court affirmed its decision in *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976), that a mandatory death penalty statute violates the eighth and fourteenth amendments since such a statute does not allow for consideration of particularized mitigating factors in deciding whether the death sentence should be imposed. The fact that Harry Roberts killed a police officer did not change the Court's position as to mandatory death penalties.

of other persons and property."¹²⁴ In fact, four members of the Court found that a *mandatory* death sentence for the killing of a peace officer was justified.¹²⁵ A broad attack, therefore, on the ground of the peace officer status alone is virtually moot.

This section can be challenged, however, on the basis of its substance; it permits a defendant to be executed not only for knowing of the official identity of the victim, but also for his negligence in this respect, i.e., when a defendant *should be aware* that the victim is a peace officer.¹²⁶ In this context, it is not the crime of aggravated murder alone which could justify the imposition of death, but the possible recklessness of shooting an undercover policeman which would trigger the death penalty.

This is the only aggravating circumstance where a negligence standard has been specifically incorporated to justify a sentence of death. If the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society,"¹²⁷ the punishment of death for negligently being unaware of someone's identity exceeds contemporary societal boundaries of decency. Killing a police officer, knowing he is a police officer, is more reprehensible than killing a police officer without knowledge of his identity.

Moreover, because the state must prove the negligence standard beyond a reasonable doubt,¹²⁸ in effect, the state is also proving that there is no deterrent value in executing a particular offender for a negligent state

¹²⁴ 431 U.S. at 636. Policemen on the beat are exposed, in the service of society, to all the risks entailed in preventing crime and apprehending criminals. "Because these people are literally the foot soldiers of society's defense of ordered liberty, the State has an especial interest in their protection." *Id.* at 646-47 (Rehnquist, J., dissenting).

¹²⁵ Chief Justice Burger dissented on the basis of his dissent in *Stanislaus Roberts v. Louisiana*, 428 U.S. 325 (1976). *Roberts*, 431 U.S. at 638. Justice Blackmun, with whom Justices White and Rehnquist joined in dissent, found that the killing of a peace officer falls within the narrow category of homicide for which a mandatory death sentence is constitutional. *Id.* at 641. Justice Rehnquist, with whom Justice White joined in dissent, found that "the arguments weighing in favor of society's determination to impose a mandatory sentence for the murder of a police officer in the line of duty are far stronger than in the case of an ordinary homicide." *Id.* at 643.

Louisiana made it a crime to be punished by death when the offender possessed "a specific intent to kill . . . a peace officer who was engaged in the performance of his lawful duties." LA. REV. STAT. ANN. § 14:30(2) (West 1974).

¹²⁶ THE OHIO DEATH PENALTY TASK FORCE, OHIO DEATH PENALTY MANUAL II-25 (1981). Significantly, only five of thirty-three states with death penalty statutes include a negligence standard for peace officers: CAL. PENAL CODE § 190.2(a)(7) (West Supp. 1982); ILL. ANN. STAT. ch. 38, § 9-1(b)(1) (Smith-Hurd Supp. 1982); NEV. REV. STAT. § 200.033(7) (1981); TENN. CODE ANN. § 39-2404(i)(9) (Supp. 1981); WASH. REV. CODE ANN. § 9A.32.045(1) (1977).

¹²⁷ *Trop v. Dulles*, 356 U.S. 86, 101 (1958). *Cf. Robinson v. California*, 370 U.S. 660, 666 (1962).

¹²⁸ OHIO REV. CODE ANN. § 2929.04(A) (Page 1982).

of mind as to his victim's identity. If an offender is unaware of the identity of his victim, and that is the determining factor for whether death can be imposed, without such knowledge there is nothing from which to deter.

The negligence standard, therefore, serves nothing more than a retributive function. That purpose alone may not suffice as a reason for execution.¹²⁹ If the reason for listing the killing of peace officers as an aggravating circumstance is to afford "protection to these public servants,"¹³⁰ the inclusion of a negligence standard does not serve the legislative purpose.

c. *Witness*

The last victim-defined aggravating circumstance is written to provide special protection for witnesses willing to testify and for witnesses who have already testified.¹³¹ Unlike the other two victim-defined aggravating circumstances discussed above, this specification requires a more exacting burden of proof. Not only must the identity of the victim as a witness to an offense be established, but it must be proven beyond a reasonable doubt that the witness was purposely killed for specific reasons, i.e., to prevent testimony or in retaliation for testimony. When a witness to an offense has been killed to prevent testimony, there is the additional limitation that the aggravated murder not be committed immediately before, during or after the offense to which the victim was a witness.

This latter limitation has the implied significance of preventing overlapping of the aggravating circumstances themselves to obviate the automatic cumulation of factors against a defendant.¹³² In this way, arbitrary and capricious decisions are reduced because the likelihood that a particular sentence of death will be excessive in comparison to similar cases is substantially decreased. The limitation, however, was not written into other aggravating circumstances, but its express inclusion in this one denotes an awareness of the problem of cumulation by the legislature and should be urged to apply to all the aggravating circumstances so they may comply with the constitutional procedural fairness requirements of the eighth amendment.¹³³

The language of this aggravating circumstance is overbroad and vague. There is no language defining or limiting "witness to an offense."¹³⁴ Therefore, this phrase could apply to a lifetime in which one offense or

¹²⁹ See *supra* notes 114-17 and accompanying text.

¹³⁰ *Roberts*, 431 U.S. at 636.

¹³¹ OHIO REV. CODE ANN. § 2929.04(A)(8) (Page 1982).

¹³² *State v. Goodman*, 298 N.C. 1, 28, 257 S.E.2d 569, 587 (1979).

¹³³ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹³⁴ Offense is defined in conjunction with Chapter 2935 to include "felonies, misdemeanors, and violations of ordinances of municipal corporations and other public bodies authorized by law to adopt penal regulations." OHIO REV. CODE ANN. § 2935.01(D) (Page 1982).

many offenses may have been witnessed. The only nexus between the "witness to an offense" and the defendant is that the witness be killed to prevent testimony in *any* criminal proceeding, but not the specific proceeding taking place at the time of the witness' death. In other words, there is no requirement that the offense witnessed have any connection with the criminal proceeding under way or a criminal proceeding against the particular defendant at any time.

There is also no limitation that the offense witnessed be one in which the defendant partook. Perhaps this will be advantageous to a defendant in that it will be more difficult for the state to prove beyond a reasonable doubt the purpose of the killing where there is no nexus to the defendant. However, proof advantages should not foreclose a declaration of unconstitutionality based on overbreadth or vagueness, especially when the outcome is life determinative.

Additionally, the victim who did not witness an offense, but who was killed to prevent testimony, is not covered by this section. There is also no protection afforded the witness to an offense who is killed to prevent testimony in a civil proceeding. The circumstance is thus underinclusive.

Because this circumstance presents vagueness, overbreadth and underinclusiveness problems, a court should be urged to adopt the narrowest interpretation. Ohio has codified the rule of strict construction, not only for the defining of offenses, but also for the defining of penalties.¹³⁵ Requiring a nexus between the offense witnessed and the defendant for which there is a reasonable time lapse would satisfy the statutory strict construction requirement.

2. Aggravated by Felony

Another aggravating circumstance is to commit aggravated murder during the commission of certain enumerated felonies.¹³⁶ This aggravating circumstance may be unconstitutional since it inflicts the penalty of death upon a principal in a felony murder based upon the felony murder itself; whereas, before a principal in a premeditated, cold-blooded aggravated murder can be capitally tried, an additional aggravating factor must be proved by the state beyond a reasonable doubt.¹³⁷ The scenario is set forth below.

The two forms of aggravated murder in Ohio are: (1) the purposeful killing of another with prior calculation and design;¹³⁸ and (2) the purposeful

¹³⁵ "Sections of the Revised Code defining offenses or penalties shall be strictly construed against the state, and liberally construed in favor of the accused." OHIO REV. CODE ANN. § 2901.04(A) (Page 1982).

¹³⁶ *Id.* § 2929.04(A)(7).

¹³⁷ THE OHIO DEATH PENALTY TASK FORCE, OHIO DEATH PENALTY MANUAL II-25-27 (1981).

¹³⁸ OHIO REV. CODE ANN. § 2903.01(A) (Page 1982).

killing of another during the commission of a felony.¹³⁹ Prior calculation and design is not statutorily defined; however, the Supreme Court of Ohio has stated that:

Prior calculation and design means that the purpose to kill was reached by a definite process of reasoning in advance of the killing which process of reasoning must have included a mental plan involving studied consideration of the method and the means or instrument with which to kill another.

No definite period of time must elapse and no particular amount of consideration must be given to the prior calculation and design to kill. Acting on the spur of the moment or after momentary consideration of the purpose to kill is not sufficient to constitute the kind of prior calculation and design required for aggravated murder. However, neither the degree of care nor the length of time the offender takes to ponder the crime beforehand are critical factors in themselves, but they must amount to more than momentary deliberation.¹⁴⁰

Offender A commits aggravated murder in a well-planned, cold-blooded fashion. Before he can be capitally tried, one of eight additional *new* factors must be alleged in the indictment and proven beyond a reasonable doubt. Offender B commits aggravated murder during the commission of a felony. On that fact alone, Offender B can be capitally tried without any additional proof of any new factor since felony murder is itself one of the eight aggravating circumstances. If the state proves that element beyond a reasonable doubt in the guilt phase of the trial, that element automatically carries over to the penalty phase of the trial as a given for the state. None of the aggravating factors include elements of the offense committed with prior calculation and design; all of the aggravating circumstances introduce new factors when a person is indicted under the prior calculation and design form of aggravated murder. Thus, the principal in a felony murder is afforded harsher treatment than the principal in a premeditated, cold-blooded killing.

The fourteenth amendment provides, in pertinent part, that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws."¹⁴¹ A classification of aggravated murder has been established which subjects its perpetrators to a particular punishment. All aggravated murderers are subject to the maximum sentence of life imprisonment with eligibility for parole in twenty years¹⁴² absent aggravating factors unless

¹³⁹ *Id.* § 2903.01(B).

¹⁴⁰ *State v. Pierce*, 64 Ohio St. 2d 281, 286-87, 414 N.E.2d 1038, 1042 (1980). See *State v. Robbins*, 58 Ohio St. 2d 74, 388 N.E.2d 755 (1979); *State v. Cotton*, 56 Ohio St. 2d 8, 381 N.E.2d 190 (1978).

¹⁴¹ U.S. CONST. amend. XIV, § 1.

¹⁴² OHIO REV. CODE ANN. § 2929.03(A) (Page 1982).

an offender is within the subclassification of felony murder. Because felony murder is both an element of the substantive offense and an aggravating factor, it automatically subjects the offender to the maximum penalty of death or life imprisonment without eligibility for parole until either twenty or thirty years.¹⁴³

The classification itself is not in question.¹⁴⁴ It reasonably promotes the governmental purpose of protecting its citizenry by classifying certain conduct inapposite to an orderly society. The disparate treatment of those within the class subject to the death penalty warrants judicial review. The state should be called upon to justify why the premeditating cold-blooded killer is less culpable and therefore is not to be sentenced to death when the principal in a felony murder is.

The Supreme Court of North Carolina met this type of a challenge in *State v. Cherry*¹⁴⁵ where the defendant was convicted of first degree felony murder and was sentenced to death. The court held that since the possibility of being sentenced to death was disproportionately higher for those convicted of felony murder than those convicted of a premeditated killing due to the automatic aggravating circumstance, the underlying felony could not be submitted to the jury as an aggravating circumstance.¹⁴⁶ The court found it highly incongruous that a defendant convicted of a felony murder will have one aggravating circumstance pending for no other reason than the nature of the conviction while a defendant convicted of a premeditated and deliberate killing will have no strikes against him based upon the nature of his offense.¹⁴⁷

What the Ohio legislature has done, in effect, is to elevate felony murder into a capital offense in and of itself while for other killings with aggravation, additional factors must be present before the offense becomes a capital one. Such disparate treatment between felony murder and premeditated murder defendants is wholly unjustified. The offender who carefully plans to kill another is arguably more blameworthy than a person who, during the course of a robbery or flight therefrom, pulls the trigger because he has panicked. The deterrent value would seem to be greater to protect society from those who will take the time to carefully plot a murder.

The two subclasses of aggravated murderers should be subjected to similar treatment when such a fundamental right is at stake. Because an essential element of the crime is not an aggravating circumstance for

¹⁴³ *Id.* § 2929.03(D)(2).

¹⁴⁴ The equal protection clause of the fourteenth amendment does not prevent a state legislature from recognizing degrees of evil. *Truax v. Raich*, 239 U.S. 33, 43 (1915). See *Miller v. Wilson*, 236 U.S. 373 (1915).

¹⁴⁵ 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941 (1980). See *State v. Goodman*, 298 N.C. 1, 14-15, 257 S.E.2d 569, 579 (1979).

¹⁴⁶ 298 N.C. at 113, 257 S.E.2d at 567-68.

¹⁴⁷ *Id.*

an aggravated murder with prior calculation and design, the underlying felony which is an essential element of the crime of felony murder should not be submitted to the jury as an aggravating circumstance.

B. *In the Aggregate*

Following *Furman*, legislatures began narrowing the class of murderers subject to the death penalty by incorporating aggravating circumstances into their capital punishment statutes to be considered with mitigating factors to guide jury discretion. When the death penalty statutes were upheld in Florida,¹⁴⁸ Georgia¹⁴⁹ and Texas,¹⁵⁰ and struck down in Louisiana¹⁵¹ and North Carolina,¹⁵² the other state legislatures had models for their own statutes. The majority of states adopted the listing of specific aggravating circumstances.¹⁵³ Each state, however, has fashioned its own specific aggravating circumstances so that most of the statutes vary significantly.

When the form of statutes listing aggravating circumstances passed constitutional muster, the Court admitted that just because another state's statute is modeled after the ones declared constitutional, it does not necessarily mean that it too will satisfy the concerns of *Furman*.¹⁵⁴ The Court stated that "each distinct system must be examined on an individual basis."¹⁵⁵ With that in mind, it is appropriate to scrutinize the aggravating circumstances in Ohio's death penalty statute as a whole. Do the clear and objective standards, which are provided to guide jury discretion, produce discriminatory results?¹⁵⁶ It is proffered that Ohio's statutory aggravating circumstances will have a disproportionate impact on the black racial minority and economically-disadvantaged people¹⁵⁷ in that those people will be executed most often or exclusively under Ohio's statute.

¹⁴⁸ *Proffitt v. Florida*, 428 U.S. 242 (1976).

¹⁴⁹ *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁵⁰ *Jurek v. Texas*, 428 U.S. 262 (1976).

¹⁵¹ *Roberts v. Louisiana*, 428 U.S. 325 (1976).

¹⁵² *Woodson v. North Carolina*, 428 U.S. 280 (1976).

¹⁵³ See *supra* note 14.

¹⁵⁴ *Gregg*, 428 U.S. at 195.

¹⁵⁵ *Id.*

¹⁵⁶ Justice Marshall indicated that despite clear and objective standards, the death penalty is still imposed disproportionately upon racial minorities. *Godfrey v. Georgia*, 446 U.S. 420, 439 (1980) (Marshall, J., with whom Justice Brennan joined, concurring).

¹⁵⁷ Although the economically-disadvantaged have not been recognized as a suspect class for equal protection analysis, *e.g.*, *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973), the fact remains that "[t]he disgraceful distorting effects of racial discrimination and poverty continue to be painfully visible in the imposition of death sentences." *Godfrey v. Georgia*, 446 U.S. 420, 439 (1980) (Marshall, J., with whom Justice Brennan joined, concurring) (emphasis added) (footnote omitted). See Richards, *Human Rights and the Moral Foundations of the*

In order to subject a law to equal protection scrutinization, the law must classify people in some manner. A classification may then discriminate in one of three ways.¹⁵⁸ First, a statute may discriminate on its face.¹⁵⁹ Second, a statute may discriminate in its application although neutral on its face.¹⁶⁰ Third, a statute may be neutral on its face, be applied evenhandedly, but have a disadvantaging effect on racial minorities.¹⁶¹ In this latter category, a showing of disproportionate impact alone will not suffice. A discriminatory intent or purpose must be shown.¹⁶²

Ohio's aggravating circumstances do not discriminate on their face. They do not, for example, permit only Caucasians who commit aggravated murder for hire to be considered for the death penalty. The other two forms of discrimination are possible, however, under Ohio's statute.

Even though neutral on their face, the aggravating circumstances may be discriminatory in their application. Generally, this is shown through the administration of the law by those whose responsibility it is to enforce the law. Death penalty statutes afford great discretion to the prosecutor who decides whether to charge a defendant with a capital crime. Not all aggravated murderers are subject to the death penalty; only those who are charged with an aggravating circumstance may be considered for death.¹⁶³ The Court, however, is not amenable to an argument based on the assumption of improper prosecutorial discretion in the charging phase or plea bargaining process.¹⁶⁴ It does not violate the Constitution when an offender is removed from consideration as a candidate for the death penalty.¹⁶⁵ What the Court fails to acknowledge is that there 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.¹⁶⁶

Substantive Criminal Law, 13 GA. L. REV. 1395, 1444-45 (1979). See also THE DEATH PENALTY IN AMERICA 351 (H.A. BEDAU 3d ed. 1982) (the economically poor are sentenced to death discriminately).

¹⁵⁸ J.E. NOWAK, R.D. ROTUNDA & J.N. YOUNG, HANDBOOK ON CONSTITUTIONAL LAW, ch. 16, at 597 (1978).

¹⁵⁹ *Strauder v. West Virginia*, 100 U.S. 303 (1880).

¹⁶⁰ *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

¹⁶¹ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

¹⁶² *Washington v. Davis*, 426 U.S. 229 (1976). See *Rogers v. Herman Lodge*, 458 U.S. ___, 102 S.Ct. at 3272 (1982).

¹⁶³ OHIO REV. CODE ANN. § 2929.03 (Page 1982).

¹⁶⁴ "Absent facts to the contrary, it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts." *Gregg*, 428 U.S. at 225 (White, J., concurring).

¹⁶⁵ *Id.* at 199 (opinion of Stewart, Powell and Stevens, JJ.).

¹⁶⁶ V.L. SWIGERT & R.A. FARRELL, MURDER, INEQUALITY, AND THE LAW (1976). Black and economically disadvantaged individuals whose behavior and appearance

Ohio's statute permits such unchecked discretion to exist and flourish.

One of the concerns in *Furman* was unevenhanded application.¹⁶⁷ The unevenhanded application in *Furman* was found to occur as a result of arbitrary and capricious sentencing by juries without guidelines. One of the ways to avoid unevenhanded application is to provide automatic appellate review. The reviewing court can then determine whether similarly situated defendants are receiving the death sentence in like situations. By comparing death penalty cases a court can ascertain whether there is evenhanded administration.

Ohio's statute provides for such a tracking mechanism. The Ohio supreme court is to receive notice within fifteen days of the filing of a capital indictment.¹⁶⁸ If a defendant pleads guilty or no contest, or if the indictment is dismissed, the supreme court again receives notice of such action within fifteen days.¹⁶⁹ Additionally, the court, or the panel of three judges if tried without a jury, must file an opinion with the court of appeals and the supreme court when it imposes sentence. The court or panel must detail why the aggravating circumstances were found to outweigh the mitigating circumstances in the case of death or why the aggravating circumstances did not outweigh the mitigating circumstances in the case of life imprisonment.¹⁷⁰ Then, upon appeal,¹⁷¹ the court of appeals and the supreme court, in determining whether death is appropriate, must consider "whether the sentence is excessive or disproportionate to the penalty imposed in similar cases."¹⁷²

What the Ohio system fails to track are aggravated murder cases which could have been capitally tried but which the prosecutor decided not to charge as such.¹⁷³ The Ohio tracking system only checks those cases which have begun passage through the death penalty system. Before a thorough examination can be made as to discriminatory application, a comprehensive tracking system is needed for all aggravated murders containing ag-

identify them with the criminal image are selected out for differential treatment. *Id.* at 69. See Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456, 467 (1981).

¹⁶⁷ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹⁶⁸ OHIO REV. CODE ANN. § 2929.021(A) (Page 1982).

¹⁶⁹ *Id.* § 2929.021(B).

¹⁷⁰ *Id.* § 2929.03(F).

¹⁷¹ The defendant has a right to review by the district court of appeals if a death sentence is imposed at the trial level and, if affirmed, a defendant has a right of review by the Supreme Court of Ohio. OHIO CONST. art. IV, § 2(B)(2)(a)(ii).

¹⁷² OHIO REV. CODE ANN. § 2929.05(A) (Page 1982).

¹⁷³ Professor Lawrence Herman has noted other defects in Ohio's tracking system. For example, no notice is required when a jury imposes a life sentence or when an appellate court sets aside a death sentence as inappropriate. No requirement exists that an appellate court be notified of capital indictments filed within its territorial jurisdiction. THE OHIO DEATH PENALTY TASK FORCE, OHIO DEATH PENALTY MANUAL II-14-17 (1981).

gravating circumstances, even those which a prosecutor decides not to capitally charge. Because a discriminatory administration can occur at this initial stage which could result in an individual's life being taken by the state, special care must be afforded at all stages of the process.¹⁷⁴ The elimination of unfettered jury discretion does not remove unfettered discretion from the entire system. The initial phase of deciding whether to seek a capital indictment is wrought with unfettered discretion. The prosecuting authorities should either be required to charge a capital offense whenever there is a capital murder or be required to comply with a comprehensive tracking process. In this way, capital murders not charged as such could be reviewed along with capitally-charged murders. The reviewing courts would have all the information available to them to decide whether any individual or any class of individuals have been discriminated against in the application of Ohio's death penalty statute.

The capital sentencing scheme in Ohio, absent the tracking of capital cases not charged as such, is fundamentally unfair. The scheme constitutes a denial of due process because the system provides and espouses that an individual will not be put to death where others in similar situations have been permitted to live. The Supreme Court has acknowledged an obligation to reexamine sentencing procedures against evolving standards of procedural fairness.¹⁷⁵ The sentencing process, as well as the trial itself, must satisfy due process requirements.¹⁷⁶ In *Gardner v. Florida*,¹⁷⁷ the petitioner was sentenced to death by the trial judge after a jury recommended life on the basis of confidential information contained in a presentence report not disclosed to him or his counsel. The Court found the state's justifications¹⁷⁸ unwarranted to deprive a person of life. One of the arguments presented by the state was that the trial judges of Florida could be trusted to exercise their discretion in a responsible man-

¹⁷⁴ Capital punishment has consistently been recognized as requiring special consideration by the Court. *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Furman v. Georgia*, 408 U.S. 238, 286 (1972).

¹⁷⁵ *Gregg*, 428 U.S. at 171-73, 179-81 (1976); *Furman*, 408 U.S. at 299-300 (1972) (Brennan, J., concurring); *McGautha v. California*, 402 U.S. 183, 197-203 (1971); *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968).

¹⁷⁶ *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

¹⁷⁷ 430 U.S. 349 (1977).

¹⁷⁸ The state of Florida offered the following justifications:

(i) an assurance of confidentiality is necessary to enable investigators to obtain relevant but sensitive disclosures about a defendant's background or character; (ii) full disclosure of a presentence report will unnecessarily delay the proceeding; (iii) such full disclosure, which often includes psychiatric and psychological evaluations, will occasionally disrupt the rehabilitation process; and (iv) trial judges can be trusted to exercise their sentencing discretion in a responsible manner, even though their decisions may be based on secret information.

Id. at 349-50.

ner, even though they may base their decisions on confidential information.¹⁷⁹ The Court found that argument foreclosed by its decision in *Furman*.¹⁸⁰

Two aspects of *Gardner* can be analogized and made applicable to Ohio's death penalty statute. The first is that if it cannot be assumed that a trial court will exercise discretion in a responsible manner, then there is no basis for assuming that a prosecutor will act in a responsible manner when deciding who will be capitally charged. The second is that in order for a reviewing court to determine whether a state's capital sentencing procedure is administered with an even hand, it is essential that the reviewing court have the complete record of all similar cases before it, and this should include those cases of capital status which are not so charged. Otherwise, the cases considered are unreliable and will produce invalid decisions since the cases will not represent the entire population of capitally-triable cases.

The second manner in which Ohio's death penalty denies equal protection is that even though neutral on its face and assuming evenhanded application, it has a disadvantaging effect on 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.¹⁸¹

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,¹⁸² the chances are greater that a ghetto resident will be fleeing from the scene of a crime.¹⁸³ 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

¹⁷⁹ *Id.* at 360.

¹⁸⁰ *Id.*

¹⁸¹ *Arlington Heights v. Metropolitan Housing Corp.*, 429 U.S. 252 (1977). See *Rogers v. Herman Lodge*, 458 U.S. ___, 102 S.Ct. at 3272 (1982). Justice Stevens is critical of the Court's emphasis on a showing of subjective intent or purpose in equal protection analyses. *Id.* at ___, 102 S.Ct. at 3283 (Stevens, J., dissenting).

¹⁸² G.M. SYKES, *THE FUTURE OF CRIME* 11-16 (1980).

¹⁸³ "Murder, rape, burglary, larceny and robbery are all far more likely to be committed by individuals from lower economic strata than by those higher on the social scale." *Id.* at 28. Minorities, especially blacks, are often poor, and the variables of poverty and race overlap. S.T. REID, *CRIME AND CRIMINOLOGY* 300 (1976). See V.L. SWIGERT & R.A. FARRELL, *MURDER, INEQUALITY, AND THE LAW* (1976).

for the police in the black community.¹⁸⁴ 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.

The state of Ohio has a history of a racially-discriminatory application of prosecutorial discretion resulting in the discriminatory infliction of the death penalty.¹⁸⁵ The race of the offender appears to be a critical factor. In 1977, 41.4% of all offenders categorized in murder cases were black.¹⁸⁶ However, the commitment rate to death row in 1977 was 64% black.¹⁸⁷

When the *victim's* race is considered, a subtle form of discrimination becomes apparent. Not one white offender was sentenced to death for the aggravated murder of a black from January 1, 1974, to July 3, 1978.¹⁸⁸ Only twelve black offenders with black victims were sentenced to death while fifty black offenders with white victims were sentenced to death.¹⁸⁹ Significantly, the race of the offender in relation to the race of the victim is a subtle yet critical factor in determining whether a death sentence is imposed.¹⁹⁰

¹⁸⁴ Blacks are also disadvantaged [in the system of criminal justice] because of their perceptions of the police and the courts. In a 1969 study, 224 respondents from a black ghetto neighborhood, a white working-class neighborhood, and a middle class white neighborhood, were interviewed concerning their attitudes toward police. They were asked about the ideal policeman and then asked what they think is actually characteristic of policemen. On all measures, there was a statistically significant difference between the responses of blacks and whites

S.T. REID, *CRIME AND CRIMINOLOGY* 300-01 (1976).

¹⁸⁵ THE DEATH PENALTY IN AMERICA 208-11 (H.A. BEDAU 3d ed. 1982); Maynard, *Ohio's Other Lottery System—The Death Penalty* (1980) (available from the Am. Civ. Lib. Union in Columbus, Ohio).

¹⁸⁶ Maynard, *supra* note 185, at 8.

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 9.

¹⁸⁹ *Id.* It appears as if the state of Ohio places a higher value on the life of a white person than on the life of a black person. *Id.* at 10.

¹⁹⁰ THE DEATH PENALTY IN AMERICA 206-24, 367-68 (H.A. BEDAU 3d ed. 1982). See Zeisel, *Race Bias in the Administration of the Death Penalty: The Florida Experience*, 95 HARV. L. REV. 456 (1981); Zimring, Eigen & O'Malley, *Punishing Homicide in Philadelphia: Perspectives on the Death Penalty*, 43 U. CHI. L. REV. 227 (1976). See generally Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade County, Florida, 1973-1976*, 33 STAN. L. REV. 75, 88 (1980) (cases with white victims resulted in death penalty convictions significantly more often than cases with black victims when no distinction is made between felony and non-felony murders).

Factors with no statistical significance in the use of the death penalty in Ohio were marital status, education, religion, sex of the victim and age of the victim. Maynard, *supra* note 185, at 8-15. The sex of the offender, however, is significant. Of the 343 prisoners executed in Ohio, three were female. *Id.* at 2. Of the 105 death-row prisoners studied, four were female. *Id.* at 10. All of the prisoners currently on death row are men.

The discretion of the prosecutor is highly relevant.¹⁹¹ The facts of a case or the weight of the state's evidence are not always considered by the prosecutor when deciding whether to charge a capital offense.¹⁹² The state's fiscal policy¹⁹³ and the prosecutor's possible racial prejudices should not be discounted.¹⁹⁴ However, the focal point for the possible infliction of punishment as severe as death should be the act and substance of the crime itself. Fiscal policy and prejudice should play no part when deciding among similarly-situated defendants in terms of the crime committed who may or may not die.

V. CONCLUSION

Three proposals to eliminate the discriminatory effect of the specified aggravating circumstances in Ohio's statute are as follows. First, the aggravating circumstances may be eliminated so that the jury can determine all aggravating factors, just as it considers all mitigating factors. This alternative is impermissible since it restores jury discretion in a disguised fashion.

Second, the aggravating circumstances may be revised to specify only the most heinous aggravated murders. This alternative would require the inclusion of torture, all aggravated murders with prior calculation and design, mass murders and murders for hire. The aggravating circumstances should be based on the seriousness of the offense, not the identity of the victim. Otherwise, there is no reason for excluding from protection particularly defenseless individuals such as children or the elderly.¹⁹⁵

The third solution is to implement a comprehensive tracking system for aggravated murder cases to ensure adequate appellate review for discriminatory application. By recognizing the uniqueness of the penalty itself,¹⁹⁶ the Supreme Court has, in effect, given a form of heightened scrutiny to claims arising under state death penalty statutes. Since the penalty itself is not unconstitutional, the Supreme Court has declared that the judiciary will review death penalty cases to assure that any par-

¹⁹¹ Maynard, *supra* note 185, at 25-31. See Zeisel, *supra* note 190, at 466-68.

¹⁹² Maynard, *supra* note 185, at 26. A prosecutor's concern for effective caseload management to maximize public acceptance may affect a decision to charge a capital offense. Zeisel, *supra* note 190, at 466.

¹⁹³ Maynard, *supra* note 185, at 26.

¹⁹⁴ Zeisel, *supra* note 190, at 467.

¹⁹⁵ The following state statutes provide protection for certain defenseless individuals: CAL. PENAL CODE § 190.2(a)(17)(v) (West Supp. 1982) (child); DEL. CODE ANN. tit. 11, § 4209(e), (q), (r), (s) (1979) (pregnant victim; handicapped, disabled, elderly; defenseless victim); ILL. ANN. STAT. ch. 38, § 9-1(b)(6)(c) (Smith-Hurd Supp. 1982-83) (child); IND. CODE ANN. § 35-50-2-9(b)(1) (Burns 1979) (child); MD. ANN. CODE art. 27, § 413(d)(5) (1982) (child).

¹⁹⁶ *Lockett v. Ohio*, 438 U.S. 586, 605 (1978); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977).

ticular death sentence was not imposed on the basis of whim, mistake, passion or prejudice.¹⁹⁷ Therefore, it is urged that careful and heightened scrutiny by the court be given to discriminatory application allegations of any state's death penalty statute, even when the burden of proving a discriminatory purpose, if necessary, cannot quite be met at the time of any one individual's trial or appeal. Because the Supreme Court recognizes the severity of this particular punishment, the state should bear the burden of eliminating *any* potential discriminatory application. When, as in Ohio, there is unchecked prosecutorial discretion at the charging stage without an adequate tracking system,¹⁹⁸ coupled with evidence of past discriminatory application¹⁹⁹ involving substantially the same aggravating circumstances,²⁰⁰ the Supreme Court must take notice and act with the rights of the individual in mind.

It is unfortunate if the judiciary closes its doors to scrutiny of death penalty statutes when the life of any individual is at stake and where there is any possibility that discriminatory application may occur. Because discretion enables the death penalty to be applied selectively against the poor, racial minorities, unpopular groups, or those lacking political clout,²⁰¹ the judiciary has the duty to require that state statutes comply with constitutional mandates to protect individual rights. It is an affront to our system of justice that so many may have to die before a requisite burden of proof is accumulated.²⁰² Justice Douglas recognized that there is no permissible "caste" aspect of law enforcement in a nation committed to equal protection of the laws.²⁰³ It is for this reason that the Supreme Court must apply close scrutiny to Ohio's new death penalty statute before individuals die at the hands of the state under a statute which may later be recognized as denying due process and equal protection.

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¹⁹⁷ *Eddings v. Oklahoma*, 455 U.S. 104, 117 (1982) (O'Connor, J., concurring).

¹⁹⁸ See *supra* notes 173-80 and accompanying text.

¹⁹⁹ See *supra* notes 185-94 and accompanying text.

²⁰⁰ Compare *supra* note 9 (Ohio's 1974 aggravating circumstances), with OHIO REV. CODE ANN. § 2929.04(A) (Page 1982) (Ohio's 1981 aggravating circumstances).

²⁰¹ *Furman*, 408 U.S. at 255 (Douglas, J., concurring).

²⁰² Significantly, after admitting to past discrimination in earlier death penalty cases, government officials will contend that the data is insufficient to support allegations of continuing racial discrimination in current death penalty cases. Zeisel, *supra* note 190, at 458.

²⁰³ *Furman*, 408 U.S. at 255 (Douglas, J., concurring).