Comments

The Constitutionality of Ohio's Death Penalty

In July 1976, the Supreme Court of the United States decided that the punishment of death is not in and of itself a cruel and unusual punishment in violation of the eighth and fourteenth amendments to the United States Constitution.[1] The Court went on, however, to decide that the method for determining which convicted criminals are to suffer the death penalty must conform to certain standards in order to escape constitutional infirmity. The Court held permissible those death penalty schemes that require the determination to be made on the basis of explicit guidelines, which focus on the particular characteristics of the defendant and of the crime for which he stands convicted.[2] But the Court struck down mandatory death penalty schemes.[3] The Court warned, however, that each death penalty scheme must be individually examined and its constitutionality individually decided.[4]

In November 1976, the Supreme Court of Ohio held that "Ohio's statutory framework[5] for the imposition of capital punishment is constitutional and does not impose cruel and unusual punishment within the meaning of the Eighth Amendment."[6] In reaching that conclu-

1. Gregg v. Georgia, 428 U.S. 153, 169, 187 (1976). The eighth amendment reads: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. It is applicable against the states through the fourteenth amendment. Robinson v. California, 370 U.S. 660 (1962).

2. Gregg v. Georgia, 428 U.S. 153, 195 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Jurek v. Texas, 428 U.S. 262 (1976).

3. Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The Court declined to express an opinion on the constitutionality of a statute providing for a mandatory death penalty for those convicted of a narrow category of homicide, for example, murder by a prisoner serving a life sentence. Woodson v. North Carolina, 428 U.S. at 287 n.7. The Court, however, has since held that certain such statutory provisions are unconstitutional. Harry Roberts v. Louisiana, 97 S. Ct. 1993 (1977), held that a mandatory death penalty for the intentional killing of an on-duty peace officer violates the eighth amendment. But the Court again reserved the issue of mandatory death sentences for prisoners serving life sentences. *Id.* at 1996 n.5. Other recent cases dealing with mandatory death penalties include Washington v. Louisiana, 428 U.S. 906 (1976), and Wetmore v. North Carolina, 428 U.S. 905 (1976).

4. Gregg v. Georgia, 428 U.S. 153, 195 (1976).

5. OHIO REV. CODE ANN. §§ 2929.02-.04 (Page 1975).

6. State v. Bayless, 48 Ohio St. 2d 73, 87, 357 N.E.2d 1035, 1046 (1976). *Bayless* was the first case decided by the Ohio Supreme Court in which the court discussed the constitutionality of Ohio's death penalty scheme. Other cases dealing with the eighth amendment issue and other constitutional challenges are: State v. Shelton, 51 Ohio St. 2d 68, 364 N.E.2d 1152 (1977); State v. Downs, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977); State v. Jackson, 50 Ohio St. 2d 253, 364 N.E.2d 236 (1977); State v. Weind, 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977); State v. Carl Osborne, 50 Ohio St. 2d 211, 364 N.E.2d 216 (1977); State v. Miller, 49 Ohio St. 2d 198, 361 N.E.2d 419 (1977); State v. Alberta Osborne, 49 Ohio St. 2d 135, 359 N.E.2d

sion, however, the court dealt inadequately and unconvincingly with some very difficult constitutional problems presented by Ohio's death penalty statutes. The court's determination merits consideration, because the court failed to articulate adequate support for it, and because the lives of those convicted of a capital crime in Ohio depend on whether that determination can be supported. In the near future, the court's determination will receive that consideration, for the Supreme Court of the United States is reviewing to hear the cases of two Ohio defendants whose death sentences were recently affirmed by the Ohio Supreme Court.[7]

This Comment will analyze the Ohio Supreme Court's defense of the constitutionality of Ohio's death penalty scheme in light of the constitutional standards for the imposition of the death sentence recently articulated by the Supreme Court of the United States. The analysis will point out the weaknesses and deficiencies of the Ohio Supreme Court's treatment of the issues raised by Ohio's death penalty statutes, and consider in greater depth whether the statutes indeed conform with eighth amendment standards.

Ohio's death penalty scheme presents a number of other constitutional problems which, although not directly related to the eighth amendment issues addressed by the United States Supreme Court in *Gregg* and the allied cases, must nevertheless be considered in assessing the scheme's constitutionality. The problems concern the right to a jury trial and the allocation of the burden of proving mitigation. This Comment will consider these related constitutional problems and assess the Ohio Supreme Court's resolution of them in light of the applicable constitutional principles set forth by the Supreme Court of the United States.

I. THE CONSTITUTIONAL STANDARDS FOR THE IMPOSITION OF THE DEATH SENTENCE

A. *Furman v. Georgia*[8]

In *Furman v. Georgia*, the United States Supreme Court ad-

78 (1976); State v. Lane, 49 Ohio St. 2d 77, 358 N.E.2d 1081 (1976); State v. Sandra Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *cert. granted*, 98 S. Ct. 261 (1977); State v. Edwards, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976); State v. Perryman, 49 Ohio St. 2d 14, 358 N.E.2d 1040 (1976); State v. Lytle, 48 Ohio St. 2d 391, 358 N.E.2d 623 (1976); State v. Royster, 48 Ohio St. 2d 381, 358 N.E.2d 616 (1976); State v. Harris, 48 Ohio St. 2d 351, 359 N.E.2d 67 (1976); State v. Hall, 48 Ohio St. 2d 325, 358 N.E.2d 590 (1976); State v. Bell, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976), *cert. granted*, 97 S. Ct. 2971 (1977); State v. Black, 48 Ohio St. 2d 262, 358 N.E.2d 551 (1976); State v. Hancock, 48 Ohio St 2d 147, 358 N.E.2d 273 (1976); State v. Woods, 48 Ohio St. 2d 127, 357 N.E.2d 1059 (1976), *petition for cert. filed*, 45 U.S.L.W. 3696 (U.S. March 21, 1977) (No. 76-1308); State v. Strodes, 48 Ohio St. 2d 113, 357 N.E.2d 375 (1976).

7. State v. Sandra Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *cert. granted*, 98 S. Ct. 261 (1977); State v. Bell, 48 Ohio St. 2d 270, 358 N.E.2d 551 (1976), *cert. granted*, 97 S. Ct. 2971 (1977).

8. 408 U.S. 238 (1972). For a discussion of the Court's decision, see *The Supreme Court,*

dressed the question whether the sentence of death itself could constitute a cruel and unusual punishment in violation of the eighth and fourteenth amendments.[9] Although the per curiam decision held only "that the imposition and carrying out of the death penalty *in these cases* constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments,"[10] the reasoning contained in the separate opinions of the five justices concurring in the decision[11] necessarily had an impact on many other defendants awaiting execution. The opinions ranged so broadly that the ultimate fate of capital punishment in the United States after *Furman* could indeed have been said to be in an "uncertain limbo."[12] Two persons reading the opinions in the case could have reached polar conclusions about the issue: one might have legitimately speculated that the Court would ultimately hold the death penalty itself unconstitutionally cruel and unusual,[13] and another that only mandatory death penalty schemes

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1971 Term, 86 HARV. L. REV. 76-85 (1972). Other literature discussing *Furman* includes: Goldberg, *The Death Penalty and the Supreme Court*, 15 ARIZ. L. REV. 355 (1973); Junker, *The Death Penalty Cases: A Preliminary Comment*, 48 WASH. L. REV. 95 (1972); Tao, *Beyond* Furman v. Georgia: *The Need for a Morally Based Decision on Capital Punishment*, 51 NOTRE DAME LAW. 722 (1976); Vance, *The Death Penalty After* Furman, 48 NOTRE DAME LAW. 850 (1973); Wollan, *The Death Penalty After Furman*, 4 LOY. CHI. U.L.J. 339 (1973); Comment, *Furman v. Georgia: A Postmortem on the Death Penalty*, 18 VILL. L. REV. 678 (1973); Note, *The Death Penalty—The Alternatives Left After Furman v. Georgia*, 37 ALB. L. REV. 344 (1973); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690 (1974); Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651 (1974); Note, Furman v. Georgia—*Deathknell for Capital Punishment?*, 47 ST. JOHN'S L. REV. 107 (1972); 23 CLEV. ST. L. REV. 172 (1974); 47 TUL. L. REV. 1167 (1973); 42 U. CIN. L. REV. 172 (1973).

9. In prior cases, the Supreme Court had dealt with ancillary issues regarding the death penalty, such as the method used to inflict death. *See, e.g.*, Louisiana ex rel. Francis v. Resweber, 329 U.S. 459 (1947); In re Kemmler, 136 U.S. 436 (1890); Wilkerson v. Utah, 99 U.S. 130 (1879). The Court also passed on the procedures for determining which of those convicted of a capital crime would be punished by death. McGautha v. California, 402 U.S. 183, 185 (1971) (The due process clause of the fourteenth amendment is not violated when "the decision whether a defendant should live or die [is] left to the absolute discretion of the jury.").

Each of these decisions is premised on the assumption that death is a constitutionally permissible punishment. Indeed, in *In re Kemmler*, the Court stated that "the punishment of death is not cruel within the meaning of that word as used in the Constitution." 136 U.S. at 447. The Court felt that an unconstitutionally "cruel" punishment involved "something more than the *mere* extinguishment of life." *Id.* (emphasis added).

10. 408 U.S. at 239-40 (emphasis added). The grant of certiorari had likewise been limited to the question: "Does the imposition and carrying out of the death penalty in [these cases] constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments?" 403 U.S. 952 (1971). *Furman* was decided together with *Jackson v. Georgia* and *Branch v. Texas*. Furman had been convicted of murder, Branch and Jackson of rape.

11. The five justices concurring in the judgment were Douglas, Brennan, Stewart, White, and Marshall. None joined in the opinion of any other. The dissenting justices were Blackmun, Powell, Rehnquist, and Chief Justice Burger. Each filed a separate opinion in which, except for the opinion of Justice Blackmun, all the dissenting justices joined.

12. Furman v. Georgia, 408 U.S. at 403 (Burger, C.J., dissenting).

13. A careful head count of the justices in *Furman*, however, indicates that, absent a change of personnel or of heart, such a conclusion might not be reached. The four dissenters certainly would not agree with such a holding, and Justice White, for one, strongly intimated

would survive judicial scrutiny.[14]

After the decision in *Furman*, state courts and legislatures in particular were faced with the challenging task of sifting through the voluminous opinions of the majority in order to determine what constitutional standards would in the future govern the validity of death penalty statutes.[15] A careful reading of the opinions, however, reveals that, despite the disparity of their reasoning, the justices of the majority relied either partly or wholly on the perception that the statutes under consideration permitted the death penalty to be arbitrarily and/or discriminatorily inflicted.

Focusing on the fact that the death penalty was infrequently imposed and that the statutes involved provided no standards for choosing between death and imprisonment as a penalty in any given case, the justices reasoned that the statutes sanctioned a capricious selection of defendants for capital punishment. Under such statutes, a defendant convicted of a capital crime could be sentenced to die for *any* reason, or for *no* reason. In the words of Justice Brennan:

> When the punishment of death is inflicted in a trivial number of the cases in which it is legally available, the conclusion is virtually inescapable that it is being inflicted arbitrarily. Indeed, it smacks of little more than a lottery system. . . . When the rate of infliction is at this low level, it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment.[16]

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that he did not feel death is a constitutionally impermissible penalty under all circumstances:

> The facial constitutionality of statutes requiring the imposition of the death penalty for first-degree murder, for more narrowly defined categories of murder, or for rape would present quite different issues under the Eighth Amendment than are posed by the cases before us. In joining the Court's judgments, therefore, I do not at all intimate that the death penalty is unconstitutional *per se* or that there is no system of capital punishment that would comport with the Eighth Amendment.

408 U.S. at 310-11 (White, J., concurring). Justice White, along with Justice Rehnquist and Chief Justice Burger, concurred in *Gregg v. Georgia*, which upheld Georgia's death penalty scheme.

14. A survey of the opinions in *Furman* indicates that a mandatory death penalty would present a close question. Justices Brennan and Marshall at least among the majority would be opposed to such a scheme, and Chief Justice Burger and Justice Blackmun among the dissenters indicated disfavor for that type of penalty. *See, e.g.*, 408 U.S. at 402 (Burger, C.J., dissenting): "I could more easily be persuaded that mandatory sentences of death, without the intervening and ameliorating impact of lay jurors, are so arbitrary and doctrinaire that they violate the Constitution." Both Chief Justice Burger and Justice Blackmun, however, later dissented in *Woodson v. North Carolina*, *Stanislaus Roberts v. Louisiana*, and *Harry Roberts v. Louisiana*, in which mandatory death penalty schemes were struck down.

15. *See, e.g.*, Ohio Legislative Service Commission, *Capital Punishment: Legislative Implications of United States Supreme Court Decision* in Furman v. Georgia, Staff Research Report No. 107 (1972). It suggested two approaches to the problem of interpreting *Furman*. One approach was to analyze the opinions of the three justices who declined to reach the broader question of the death penalty's per se constitutionality, since the votes of these justices were vital to the judgment. The other approach suggested was to isolate and analyze the factors common to the majority's opinions.

16. Furman v. Georgia, 408 U.S. 238, 293, 294 (1972) (Brennan, J., concurring). The constitutional test employed by Justice Brennan reflected "[t]he primary principle . . . that a punishment must not be so severe as to be degrading to the dignity of human beings." *Id.* at 271.

Justice Stewart noted: "For of all the people convicted of rapes and murders in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[17] Justice White's view was in the same vein: "[T]he death penalty is exacted with great infrequency even for the most atrocious crimes and . . . there is no meaningful basis for distinguishing the few cases in which it is imposed from the many in which it is not."[18]

Such statutes not only permitted the death sentence to be inflicted *randomly*, but *discriminatorily* as well. Justice Douglas focused on the circumstance that sentencing authorities under such statutes were free to use any basis for granting or withholding mercy, including such factors as race or social status.

> Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position.[19]

In a footnote, Justice Douglas stated: "[T]he Leopold and Loebs, the Harry Thaws, the Dr. Sheppards and the Dr. Finchs of our society are never executed, only those in the lower strata, only those who are members of an unpopular minority or the poor and despised."[20] Justice Marshall also recognized that the opportunity for discrimination along racial or other lines was given maximum play in statutes such as those reviewed in *Furman*.[21]

The test to determine whether a given punishment complies with that principle was defined as follows: "It is a denial of human dignity for the State arbitrarily to subject a person to an unusually severe punishment that society has indicated it does not regard as acceptable, and that cannot be shown to serve any penal purpose more effectively than a significantly less drastic punishment." *Id.* at 286. The punishment of death, according to Justice Brennan, is cruel and unusual under that test.

17. *Id.* at 309-10 (Stewart, J., concurring) (footnotes omitted). Justice Stewart "simply conclude[d] that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed." *Id.* at 310.

18. *Id.* at 313 (White, J., concurring). Justice White concluded: "[A]s the statutes before us are now administered, the [death] penalty is so infrequently imposed that the threat of execution is too attenuated to be of substantial service to criminal justice." *Id.* According to Justice White, "[a] penalty with such negligible returns to the State would be patently excessive and cruel and unusual punishment violative of the Eighth Amendment." *Id.* at 312.

19. *Id.* at 255 (Douglas, J., concurring).

20. *Id.* at 248 n.10 (Douglas, J., concurring).

21. Justice Marshall noted that "capital punishment is imposed discriminatorily against certain identifiable classes of people." *Id.* at 364 (Marshall, J., concurring). He added: "Racial or other discriminations should not be surprising. In *McGautha v. California* . . . , this Court held 'that committing to the untrammeled discretion of the jury the power to pronounce life or death in capital cases is [not] offensive to anything in the Constitution.' This was an open invitation to discrimination." *Id.* at 365. Justice Marshall concluded that the death penalty is excessive because it does not fulfill valid legislative purposes better than other punishments, *id.* at 342-59, and that it is "morally unacceptable to the people of the United States at this time in their history," *id.* at 360.

Thus, every justice of the majority felt that the arbitrary and/or discriminatory manner in which the penalty of death was imposed under the statutes at hand was responsible for, or at least contributed to, the unconstitutionality of those statutes. At the very least then, the Court seemed to be indicating that a death penalty statute, in order to survive constitutional attack, must somehow guide the discretion of the sentencing authority in deciding whether or not to impose capital punishment, so as to avoid arbitrary or discriminatory sentencing.[22] That this was the thrust of *Furman* became apparent in *Gregg v. Georgia.*

B. *Gregg v. Georgia and the Allied Cases*[23]

After the Court's decision in *Furman*, many legislatures attempted to draft death penalty statutes that would comply with *Furman*'s mandate.[24] Many states enacted mandatory death sentence legislation, thereby removing all discretion from the hands of the sentencing authority.[25] Other states chose to retain some discretion in the sentencing scheme, but channeled that discretion by including standards to guide the sentencing authority in its life or death decision.[26] The

22. This message rests uncomfortably with the Court's prior holding in McGautha v. California, 402 U.S. 183 (1971), discussed at note 9 *supra.* Several justices commented on the apparent inconsistency. *See, e.g.*, note 21 *supra.* Chief Justice Burger stated:

> Although the Court's decision in *McGautha* was technically confined to the dictates of the Due Process Clause of the Fourteenth Amendment, rather than the Eighth Amendment as made applicable to the States through the Due Process Clause of the Fourteenth Amendment, it would be disingenuous to suggest that today's ruling has done anything less than overrule *McGautha* in the guise of an Eighth Amendment adjudication.

Furman v. Georgia, 408 U.S. at 400 (Burger, C.J., dissenting). The Court later acknowledged that *Furman* had severely limited *McGautha*'s holding. Gregg v. Georgia, 428 U.S. at 195 n.47.

23. For a discussion of the Court's decisions, see *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 63-76 (1976). Other literature dealing with *Gregg* and the allied cases includes: Black, *Due Process for Death:* Jurek v. Texas *and Companion Cases*, 26 CATH. U.L. REV. 1 (1976); England, *Capital Punishment in the Light of Constitutional Evolution: An Analysis of the Distinctions Between* Furman *and* Gregg, 52 NOTRE DAME LAW. 596 (1977); Tao, *The Constitutional Status of Capital Punishment: An Analysis of* Gregg, Jurek, *and* Woodson, 54 U. DET. J. URB. L. 345 (1977); Comment, *Resurrection of Capital Punishment – The 1976 Death Penalty Cases*, 81 DICK. L. REV. 543 (1977); Comment, *Death Penalty Statutes: A Post-*Gregg v. Georgia *Survey and Discussion of Eighth Amendment Safeguards*, 16 WASHBURN L.J. 497 (1977); Note, Gregg v. Georgia: *The Search for the Civilized Standard*, 1976 DET. C. L. REV. 645 (1976); Note, *Capital Punishment: A Review of Recent Supreme Court Decisions*, 52 NOTRE DAME LAW. 261 (1976); Note, *Constitutional Law—Capital Punishment and the Eighth Amendment*, 51 TUL. L. REV. 360 (1977); 8 TEX. TECH. L. REV. 515 (1976).

24. At the time *Gregg* was decided, at least thirty-five states had enacted new death penalty statutes. Gregg v. Georgia, 428 U.S. 153, 179 n.23 (1977). Congress had also enacted a criminal law providing for a death penalty. Antihijacking Act of 1974, 49 U.S.C. § 1472 (i), (n) (Supp. IV 1974). *See generally* Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651 at 670-84 (1974).

25. *See, e.g.*, DEL. CODE ANN. tit. 11 § 4209 (Cum. Supp. 1976); IDAHO CODE § 18-4004 (Cum. Supp. 1977); LA. REV. STAT. ANN. § 14:30 (West 1974); MISS. CODE ANN. §§ 97-3-19, 97-3-21, 97-25-55 (Cum. Supp. 1977); MO. ANN. STAT. §§ 559.005, 559.009 (Vernon Supp. 1976); N.C. GEN. STAT. § 14-17 (Cum. Supp. 1975).

26. *See, e.g.*, ALA. CODE tit. 15 §§ 342(3)-342(9) (Interim Supp. 1975); ARIZ. REV. STAT. ANN. §§ 13-452 to 13-454 (Supp. 1973); ARK. STAT. ANN. §§ 41-1301 to 41-1304, 41-4706 (Ark.

United States Supreme Court eventually was called upon to decide whether several such statutes achieved what in theory they were designed to achieve—compliance with the eighth amendment standards contained in *Furman*.

In *Gregg v. Georgia*, Georgia's new death penalty scheme, enacted after its old scheme was effectively scrapped by *Furman*,[27] was subjected to scrutiny. This time the Supreme Court upheld the statute's constitutionality. In cases handed down at the same time, the Court likewise upheld the death penalty statutes of Florida[28] and Texas,[29] but struck down those of North Carolina[30] and Louisiana.[31]

In *Gregg* and the cases decided along with it, the Supreme Court[32] made clear that death is a constitutionally permissible punishment, at least for the crime of murder.[33] In arriving at this conclusion, the

Crim. Code 1975); CAL. PENAL CODE §§ 190.1, 209, 219 (West Supp. 1974); CONN. GEN. STAT. ANN. §§ 53a-46a, 53a-54b (1975); FLA. STAT. ANN. §§ 782.04, 921.141 (Cum. Supp. 1975-76); GA. CODE ANN. §§ 26-3102, 27-2528, 27-2534.1, 27-2537 (Supp. 1975); TEX. PENAL CODE ANN. § 19.03(a) (Vernon 1974).

27. For cases dealing with *Furman's* effect on Georgia's death penalty scheme, see, Watson v. State, 229 Ga. 787, 194 S.E.2d 407 (1972); Mitchell v. Smith, 229 Ga. 781, 194 S.E.2d 414 (1972); Sullivan v. State, 229 Ga. 731, 194 S.E.2d 410 (1972).

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

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

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

31. Stanislaus Roberts v. Louisiana, 428 U.S. 325 (1976).

32. *Gregg*, *Proffitt*, and *Jurek* were all 7-2 decisions. Justice Stewart wrote an opinion in *Gregg*, Justice Powell in *Proffitt*, and Justice Stevens in *Jurek*, with each justice joining in the opinions of the other two. Chief Justice Burger and Justices Rehnquist, White, and Blackmun concurred in each case, with the Chief Justice and Justice Rehnquist joining in an opinion written by Justice White. Justices Brennan and Marshall dissented in each case. Therefore, no opinion commanded a majority or even a plurality of the Court.

The concurring opinions written by Justice White, however, stress the same points as the Stewart-Stevens-Powell opinions, particularly with regard to the decision in *Furman*. The difference between the opinions is primarily that in *Gregg* Justice Stewart articulated in some detail an eighth amendment test for determining the constitutionality of death penalty statutes, while Justice White's only reference to eighth amendment standards was to *Furman*'s denunciation of arbitrary sentencing. Justice White, however, wrote the opinion in a subsequent case that utilized the constitutional test set out by Justice Stewart in *Gregg*. Coker v. Georgia, 97 S. Ct. 2861, 2865-66 (1977). References in this Comment, therefore, are generally to the opinions of Justices Stewart, Stevens, or Powell.

Woodson and *Stanislaus Roberts* were 5-4 decisions. Once again, Justices Powell, Stevens, and Stewart joined in opinions authored by Justice Stewart and Justice Stevens respectively. Justices Brennan and Marshall concurred separately. Justices White, Blackmun, Rehnquist, and Chief Justice Burger dissented, with the Chief Justice and Justice Rehnquist joining in an opinion written by Justice White. References are generally to the Powell-Stewart-Stevens opinions. (Recently, the Court in Harry Roberts v. Louisiana, 97 S. Ct. 1993 (1977), struck down a mandatory death penalty on the authority of *Woodson* and *Stanislaus Roberts* in a 5-4 per curiam decision.)

33. The petitioner in each of these five cases had been convicted of, and sentenced to death for, the crime of murder. The Supreme Court explicitly stated that its views pertained only to the appropriateness of death as punishment for murder:

> We do not address here the question whether the taking of the criminal's life is a proportionate sanction where no victim has been deprived of life—for example, when capital punishment is imposed for rape, kidnapping, or armed robbery that does not result in the death of any human being.

Gregg v. Georgia, 428 U.S. 153, 187 n.35 (1976). The Supreme Court has since struck down the use of the death penalty for the crime of raping an adult woman. Coker v. Georgia, 97 S. Ct. 2861 (1977).

Court proceeded through a two-step analysis. The Court prefaced its analysis by noting that although the eighth amendment was designed primarily to proscribe various barbarous forms of punishment,[34] its meaning has not been so confined. Instead, the eighth amendment "has been interpreted in a flexible and dynamic manner."[35] The cruel and unusual punishments clause has been said to "acquire meaning as public opinion becomes enlightened by a humane justice."[36] Indeed, far from being static, the eighth amendment "must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."[37] Therefore, step one of the Court's analysis involved "an assessment of contemporary values concerning the infliction of [the] challenged sanction."[38] That assessment was made by "look[ing] to objective indicia that reflect the public attitude toward [the] given sanction."[39]

The Court's view of the objective evidence before it led to the conclusion that capital punishment is not morally unacceptable to the American people at the present stage of the nation's history. The Court relied on the fact that at least thirty-five states re-enacted death penalties after *Furman*,[40] and that juries—"a significant and reliable index of contemporary values"[41]—imposed capital punishment with some frequency after *Furman*.[42] Moreover, in "the only statewide referendum occurring since *Furman*" of which the Court was aware, "the people of California adopted a constitutional amendment that authorized capital punishment, in effect negating a prior ruling by the Supreme Court of California."[43]

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34. *See generally* Furman v. Georgia, 408 U.S. at 316-22 (Marshall, J., concurring); Granucci, *"Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning*, 57 CALIF. L. REV. 839 (1969).

35. Gregg v. Georgia, 428 U.S. 153, 171 (1976).

36. Weems v. United States, 217 U.S. 349, 378 (1910). In *Weems*, the Court held that the punishment of *cadena temporal*—a punishment involving imprisonment for at least twelve years and one day in chains at hard and painful labor, loss of civil liberties, and lifelong surveillance– was so out of proportion to the crime of falsifying an official document that it constituted a cruel and unusual punishment in violation of the Philippine bill of rights.

37. Trop v. Dulles, 356 U.S. 86, 101 (1958). In *Trop*, the Court held that a federal statute providing for the forfeiture of the citizenship of a convicted deserter who received a dishonorable discharge from military service violated the cruel and unusual punishments clause of the eighth amendment.

38. Gregg v. Georgia, 428 U.S. 153, 173 (1976).

39. *Id. See* Coker v. Georgia, 97 S. Ct. 2861, 2865-68 (1977):

> [T]hese Eighth Amendment judgments should not be, or appear to be, merely the subjective views of individual Justices; judgment should be informed by objective factors to the maximum possible extent. To this end, attention must be given to the public attitudes concerning a particular sentence—history and precedent, legislative attitudes, and the response of juries reflected in their sentencing decisions are to be consulted.

Id. at 2865-66.

40. Gregg v. Georgia, 428 U.S. at 179-80.

41. *Id.* at 181.

42. *Id.* at 182.

43. *Id.* at 181. The California Supreme Court had held that state's death penalty

In step two of its analysis, the Supreme Court pointed out that "public perceptions of standards of decency with respect to criminal sanctions are not conclusive," for the "penalty must also accord with 'the dignity of man,' which is the 'basic concept underlying the Eighth Amendment.' "[44] In order for a penalty to comply with the second prong of the Court's analysis, it must "not be 'excessive.' "[45] The Court set forth a bifurcated test for excessiveness: "First, the punishment must not involve the unnecessary and wanton infliction of pain. . . . Second, the punishment must not be grossly out of proportion to the severity of the crime."[46]

In the Court's view, the punishment of death can meet both prongs of this test. The Court declined to find that the imposition of death is "so totally without penological justification that it results in the gratuitous infliction of suffering."[47] The Court noted that the death penalty purportedly serves the social purposes of retribution and general deterrence.[48] The Court felt that whether the death penalty serves those purposes or serves them better than less drastic punishments is a debatable question.[49] But, in the absence of convincing data to the contrary, the Court was unwilling to assume that a legislative determination "that capital punishment may be necessary in some cases is clearly wrong."[50]

> Considerations of federalism, as well as respect for the ability of a legislature to evaluate, in terms of its particular State, the moral consensus

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statute invalid under the California constitution. People v. Anderson, 6 Cal. 3d 628, 493 P.2d 880, 100 Cal. Rptr. 152, *cert. denied*, 406 U.S. 958 (1972).

44. Gregg v. Georgia, 428 U.S. at 173. *See* Coker v. Georgia, 97 S. Ct. 2861, 2868 (1977): "These recent events evidencing the attitude of state legislatures and sentencing juries do not wholly determine this controversy, for the Constitution contemplates that in the end our own judgment will be brought to bear on the question of the acceptability of the death penalty under the Eighth Amendment."

45. 428 U.S. at 173.

46. *Id.* *See* Coker v. Georgia, 97 S. Ct. 2861, 2865 (1977).

47. 428 U.S. at 183.

48. *Id.* Of the goal of retribution, the Court said:

> "Retribution is no longer the dominant objective of the criminal law," . . . but neither is it a forbidden objective nor one inconsistent with our respect for the dignity of men. . . . Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.

Id. at 183-84 (footnote omitted).

49. "Statistical attempts to evaluate the worth of the death penalty as a deterrent to crimes by potential offenders have occasioned a great deal of debate. The results simply have been inconclusive." *Id.* at 184-85 (footnote omitted). "Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view." *Id.* at 185 (footnote omitted).

50. *Id.* at 186.

> concerning the death penalty and its social utility as a sanction, require us to conclude, in the absence of more convincing evidence, that the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe.[51]

Nor could the Court agree with the petitioners that death is a punishment disproportionate to the crime of murder: "[W]hen a life has been taken deliberately by the offender, we cannot say that the punishment is invariably disproportionate to the crime. It is an extreme sanction, suitable to the most extreme of crimes."[52]

The Supreme Court thus decided that death is not itself an unconstitutionally cruel and unusual punishment. The question remained, however, whether the procedures for determining which convicted criminals would suffer the ultimate sanction were constitutionally acceptable. To answer this question, the Court had to turn again to *Furman* and articulate the constitutional propositions for which that case stands.

The petitioners in *Gregg* and the allied cases in effect argued that *Furman* mandated what no system conceived and operated by human beings could achieve—the complete elimination of every possibility for arbitrariness in the imposition of the death sentence. The petitioners urged that no process could eliminate arbitrary results in the selection of individuals to die because, at all stages of the criminal justice system, opportunities for discretionary action exist that divert potential candidates for capital punishment from its ultimate imposition.[53] The prosecutor's unfettered discretion to charge and to plea bargain, the jury's discretion to convict on a lesser included offense, and the governor's discretion to grant executive clemency were alleged to be avenues by which an individual could escape capital punishment even though the facts in his case warranted it. Therefore, the petitioners argued, arbitrariness was built into the system, precluding uniform imposition of the death penalty.

The United States Supreme Court rejected this thesis. Believing the argument to be "based on a fundamental misinterpretation

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51. *Id.* at 186-87. The Court further stated:

> The value of capital punishment as a deterrent of crime is a complex factual issue the resolution of which properly rests with the legislatures, which can evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.

Id. at 186.

52. *Id.* at 187 (footnote omitted). *See* note 33 *supra.*

53. *See, e.g.*, Brief for the Petitioner at 18, Gregg v. Georgia, 428 U.S. 153 (1976):

> Arbitrary selection operates well before sentencing to spare a substantial portion of Georgia capital defendants, although others similarly situated are ultimately sentenced to death. The principal importance of these pre-sentence selective mechanisms is that they provide an arbitrary sparing for all but a relative handful of defendants originally charged with capital crimes.

See generally Note, *Capital Punishment Statutes After Furman*, 35 OHIO ST. L.J. 651, 652-62 (1974).

of *Furman*,"[54] the Court stated flatly: "Nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."[55] The concern of *Furman*, the Court felt, was only the arbitrariness in the *sentencing* decision, after an individual had been convicted of a capital crime.

Having decided that the death penalty was an acceptable punishment and that the existence of discretionary "filtering" prior to or after the sentencing decision does not in itself render the imposition of death unconstitutionally arbitrary, the Court set forth the criteria for determining whether a given death penalty statute is constitutionally acceptable. As a starting place for its analysis, the Court articulated what it felt to be the teaching of *Furman*: "*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."[56]

In order to achieve an adequate channeling of discretion, the sentencing authority must be "given guidance regarding the factors about the crime and the defendant that the State, representing organized society, deems particularly relevant to the sentencing decision."[57] To insure that information relevant to the sentencing decision is not improperly used in the guilt-determining decision, a bifurcated proceeding—"one in which the question of sentence is not considered until the determination of guilt has been made"[58]—was recommended.[59]

The three statutes upheld by the Court all provide for a bifurcated procedure in capital cases, with one part devoted to the determination of guilt, the other to the selection of sentence. Moreover, each of the statutes focuses attention on the defendant and the nature of the crime he committed, either by narrowing the definition of capital murder[60] or by adopting statutorily defined aggravating circumstances,

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54. Proffitt v. Florida, 428 U.S. 242, 254 (1976).

55. Gregg v. Georgia, 428 U.S. at 199. The Court also stated: "The petitioner's argument is nothing more than a veiled contention that *Furman* indirectly outlawed capital punishment by placing totally unrealistic conditions on its use." *Id.* at 199 n.50. Justice White made the same point: "Petitioner has argued, in effect, that no matter how effective the death penalty may be as a punishment, government, created and run as it must be by humans, is inevitably incompetent to administer it. This cannot be accepted as a proposition of constitutional law." *Id.* at 226 (White, J., concurring).

56. *Id.* at 189. Justice White's version was this: "In *Furman*, this Court held that as a result of giving the sentencer unguided discretion to impose or not to impose the death penalty for murder, the penalty was being imposed discriminatorily, wantonly and freakishly, and so infrequently that any given death sentence was cruel and unusual." *Id.* at 220-21 (White, J., concurring) (footnotes omitted).

57. *Id.* at 192.

58. *Id.* at 190-91.

59. *Id.* at 195.

60. TEX. PENAL CODE ANN. § 19.03 (Vernon 1974).

at least one of which must be proved beyond a reasonable doubt before the death penalty can be imposed.[61]

Not only particular aggravating circumstances, but also mitigating circumstances are to be taken into consideration under the three statutes upheld by the Court. In each statute, the sentencing authority is authorized to decline to impose the death penalty if the mitigating circumstances so require.[62] Thus, the sentencing authority will "consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed."[63]

Indeed, the *failure* to permit the sentencing authority to consider the circumstances in mitigation of the death sentence was held by the Court to be a violation of the eighth amendment. In *Woodson v. North Carolina* and *Stanislaus Roberts v. Louisiana*, the Court struck down the death penalty statutes of North Carolina and Louisiana because they, by making the death sentence mandatory for each individual convicted of capital murder, failed to "focus on the circumstances of the particular offense and the character and propensities of the offender."[64] The Court found that mandatory death penalties historically have been rejected as unduly harsh, and are incompatible with contemporary standards concerning the death penalty. Furthermore, the rigidity of mandatory death penalties encourages juries to violate their oaths and refuse to convict of capital murder, even though conviction is warranted by the evidence, in order to avoid imposing the death sentence. Thus, the mandatory statutes of North Carolina and Louisiana, rather than alleviating the arbitrary results condemned in *Furman*, "simply papered over the problem of unguided and unchecked jury discretion."[65]

Another factor deemed significant by the Court in upholding the statutes of Georgia, Florida, and Texas was the provision for appellate review of all cases in which the death sentence had been imposed.[66] Such review, at least under the Florida and Georgia statutes,

61. GA. CODE ANN. § 27-534.1 (Supp. 1977); FLA. STAT. ANN. § 921.141(5) (West Supp. 1976-77).

62. For example, the Florida statute sets out seven mitigating circumstances. FLA. STAT. ANN. § 921.141(6) (West Supp. 1976-77). The jury is to consider after a hearing whether the aggravating circumstances are outweighed by sufficient mitigating circumstances. If so, the sentence, which is imposed by the trial judge, would be life imprisonment, unless the trial judge feels that the facts warranting the death penalty are so clear that no reasonable person could differ. Proffitt v. Florida, 428 U.S. 242, 248-49 (1976).

63. Jurek v. Texas, 428 U.S. 262, 271 (1976).

64. Stanislaus Roberts v. Louisiana, 428 U.S. 325, 333 (1976).

65. Woodson v. North Carolina, 428 U.S. 280, 302 (1976).

66. Gregg v. Georgia, 428 U.S. at 204-06; *id.* at 222-24 (White, J., concurring); Jurek v. Texas, 428 U.S. at 276; Proffitt v. Florida, 428 U.S. at 250-51, 253. *See* Woodson v. North Carolina, 428 U.S. at 303 (referring to Gregg v. Georgia, 428 U.S. at 204-06).

One is compelled to conclude that, given the importance attached by the Court to the existence of appellate review in capital cases, such review is constitutionally required. Indeed, statewide appellate review would seem to be the only way to avoid the arbitrariness in sentencing decisions condemned in *Furman*. (*See, e.g.*, Woodson v. North Carolina, 428 U.S.

requires the appellate court to determine whether the evidence supports the jury's sentence of death *and* whether that sentence is disproportionate in comparison to sentences generally imposed in similar cases. Thus, "appellate review . . . serves as a check against the random or arbitrary imposition of the death penalty. In particular, the proportionality review substantially eliminates the possibility that a person will be sentenced to die by the action of an aberrant jury."[67]

In sum, then, the Court found that death is an appropriate sanction for the crime of murder so long as it is not arbitrarily or capriciously imposed. It refused to find that the opportunity for discretionary action makes impossible the administration of a system that does not unconstitutionally select individuals to die. To minimize discretion, however, the Court required that the system provide guidelines to which the sentencing authority must look in making its life or death decision. The guidelines must be flexible enough to permit an individualized consideration of the offender and the offense of which he has been convicted, but not so flexible as to permit an arbitrary and capricious selection of offenders for the ultimate sanction. Finally, the system must provide for a uniform self-examination to make certain that there is indeed some "meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many in which it is not."[68]

II. OHIO'S DEATH PENALTY SCHEME AND THE EIGHTH AMENDMENT

Since the constitutionality of each death penalty scheme must be independently determined,[69] there is no definite way to tell whether Ohio's statutes conform with eighth amendment standards until they are reviewed by the United States Supreme Court. A rough index of how they will fare on review, however, can be gleaned by comparing Ohio's statutes with those upheld and those struck down in *Gregg* and the allied cases. Do the Ohio statutes operate more like a manda-

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at 303 (footnote omitted): "And there is no way under the North Carolina law for the judiciary to check arbitrary and capricious exercise of [the jury's] power [to impose capital punishment] through a review of death sentences.") Justice Rehnquist, however, noted that appellate review of criminal cases has generally not been thought to be constitutionally required of the states: "It is even less clear that any provision of the Constitution can be read to require such appellate review. If the States wish to undertake such an effort, they are undoubtedly free to do so, but surely it is not required by the United States Constitution." Woodson v. North Carolina, 428 U.S. at 319 (Rehnquist, J., dissenting).

67. Gregg v. Georgia, 428 U.S. at 206. Indeed, Georgia's Supreme Court had vacated the death sentence on the robbery counts—of which Gregg had also been convicted, as well as of murder—on the ground that the death sentences on the robbery counts "are unusual in that they are rarely imposed for this offense." Gregg v. State, 233 Ga. 117, 127, 210 S.E.2d 659, 667 (1974).

68. Furman v. Georgia, 408 U.S. 238, 313 (1972) (White, J., concurring).

69. *See* note 4 *supra* and accompanying text.

tory death penalty scheme, or do they permit a consideration "on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed?"[70] Do the Ohio statutes authorize an adequate appellate review of capital cases? To answer these questions, a close look at how the Ohio statutes operate is necessary.

A. *The Statutes*

Ohio's death penalty statutes[71] were enacted in 1972[72] in light of the Supreme Court's decision in *Furman*.[73] Under section 2929.02,[74] the crime of aggravated murder[75]—the only capital crime in Ohio—is punishable by death or by life imprisonment. The death penalty is available, however, only when the defendant is found guilty beyond a reasonable doubt of the principal charge of aggravated murder and at least one of seven aggravating circumstances.[76] The seven aggravating circumstances are: assassination of various officials, officials-elect,

70. Jurek v. Texas, 428 U.S. 262, 271 (1976).

71. OHIO REV. CODE ANN. §§ 2929.02-.04 (Page 1975).

72. The Ohio death penalty statutes were enacted as part of a major revision of the Ohio Criminal Code. They did not become effective until January 1, 1974. The former death penalty statutes were declared unconstitutional under *Furman* in State v. Leigh, 31 Ohio St. 2d 97, 285 N.E.2d 333 (1972).

73. For a legislative history of the genesis of Ohio's death penalty statutes, see Lehman & Norris, *Some Legislative History and Comments on Ohio's New Criminal Code*, 23 CLEV. ST. L. REV. 8, 15-23 (1974). Mr. Norris and Mr. Lehman were sponsor and cosponsor of House Bill No. 511 to amend the Ohio Criminal Code.

74. OHIO REV. CODE ANN. § 2929.02 (Page 1975) reads in relevant part:

2929.02 Penalties for murder

(A) Whoever is convicted of aggravated murder in violation of section 2903.01 of the Revised Code shall suffer death or be imprisoned for life, as determined pursuant to sections 2929.03 and 2929.04 of the Revised Code. In addition, the offender may be fined an amount fixed by the court, but not more than twenty-five thousand dollars.

75. The offense of aggravated murder is defined as follows:

2903.01 Aggravated murder

(A) No person shall purposely, and with prior calculation and design, cause the death of another.

(B) No person shall purposely cause the death of another while committing or attempting to commit, or while fleeing immediately after committing or attempting to commit kidnapping, rape, aggravated arson or arson, aggravated robbery or robbery, aggravated burglary or burglary, or escape.

OHIO REV. CODE ANN. § 2903.01 (Page 1975).

76. *Id.* § 2929.04(A):

(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code, and is proved beyond a reasonable doubt:

(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 of this state, or of a candidate for any of the foregoing offices. For the 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.

or candidates; murder for hire; murder to escape detection, apprehension, trial, or punishment for another offense; murder while a prisoner; repeat murder or multiple murder; murder of a law enforcement officer; and felony murder.

In the guilt-determining stage, the defendant may be tried by a jury[77] or, if he waives his right to a jury trial,[78] by a panel of three judges.[79] The verdict must state whether or not the accused was found guilty of the principal charge of aggravated murder.[80] If the defendant is found guilty on that charge, the verdict must also state which, if any, of the specifications of aggravating circumstances were found to exist.[81] If the defendant is found guilty of the principal charge, but innocent of any specified aggravating circumstances, he is sentenced to life imprisonment.[82] If the defendant is found guilty of both the principal charge of aggravated murder and at least one aggravating circumstance, the death sentence is an available punishment. Whether it will actually be imposed is to be determined by the trial judge, if the defendant was tried by a jury, or by the three-judge panel that tried the defendant, if he waived his right to a jury trial.[83] The defendant will not suffer death if the existence of at least one of three mitigating factors is established by a preponderance of the evidence. The mitigating factors are:

(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.[84]

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(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 2921.01 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.

77. OHIO REV. CODE ANN. § 2945.17 (Page 1975).

78. *Id.* § 2945.05.

79. *Id.* § 2945.06.

80. *Id.* § 2929.03(B).

81. *Id.*

82. *Id.* § 2929.03(C).

83. *Id.*

84. *Id.* § 2929.04(B).

To aid the court in making its decision on mitigation, a presentence investigation and a psychiatric examination must be made and reports submitted.[85] The court then "shall hear testimony and other evidence, the statement, if any, of the offender, and the arguments, if any, of counsel for the defense and prosecution, relevant to the penalty which should be imposed on the offender."[86] The court is required to take the reports, testimony, statement of the offender, arguments of counsel, and other evidence into consideration in determining whether any of the mitigating circumstances has been proved by a preponderance of the evidence.[87] If no mitigating circumstance has been so proved, the defendant must be sentenced to death.[88]

The Ohio Constitution provides for a right of appeal to the Ohio Supreme Court for all cases in which the death penalty has been imposed.[89] The scope of that review, however, is not set forth in either the statutes or constitution.[90]

Essentially, the Ohio statutes contemplate a bifurcated trial, one part of which is dedicated to the determination of guilt of the principal charge and of any aggravating circumstances, and the other part to a determination of sentence. Before a defendant can be sentenced to death, he must be found guilty beyond a reasonable doubt of both the principal charge of aggravated murder and at least one aggravating circumstance, *and* he must have failed to prove by a preponderance of the evidence the existence of one or more mitigating circumstances. Every defendant sentenced to death has a right of appeal to the Ohio Supreme Court.

B. *The Ohio Supreme Court's Analysis*

In *State v. Bayless*, the Ohio Supreme Court addressed the question "whether the Ohio statutes imposing the death penalty are constitutional in light of [*Gregg*, *Proffitt*, *Jurek*, *Woodson*, and *Roberts*]."[91] In the court's opinion, the statutes comply with the eighth amendment standards set forth in *Gregg* and the cases allied with it, and thus are constitutional. In arriving at this conclusion, the court relied primarily on three factors: (1) the statutes provide for a bifurcated trial, so that guilt and sentencing are determined in separate

85. *Id.* § 2929.03(D).

86. *Id.*

87. *Id.* § 2929.03(E).

88. *Id.* If the sentencing decision is made by a panel of three judges, they must unanimously find that no mitigating circumstances have been proved. *Id.* This provision is discussed in section III.C. *infra.*

89. OHIO CONST. art. IV, § 2 (B)(2)(a)(ii).

90. The scope of appellate review in Ohio capital cases, and the constitutionality thereof, is discussed in section II.C.2. *infra.*

91. 48 Ohio St. 2d 73, 79, 357 N.E.2d 1035, 1042 (1976).

proceedings; (2) the mitigating circumstances spelled out in the statute guide the sentencing authority in its decision whether to impose the death sentence; and (3) every defendant sentenced to death has a right of appeal to the Ohio Supreme Court, where the aggravating and mitigating circumstances will be independently reviewed in light of the facts of each case.[92]

The court noted: "This statutory scheme differs somewhat from any of those considered by the United States Supreme Court in its July 2, 1976, decisions, but it is basically similar to the Georgia, Florida, and Texas statutes which the court found to be constitutional."[93] The court felt that the mitigating circumstances provided for in the Ohio statute "are basically reasonable and similar to those approved in *Proffitt v. Florida*."[94] It conceded that the Florida statute includes more mitigating circumstances than does the Ohio statute[95] and that the Georgia statute upheld in *Gregg* does not list specific, exclusive mitigating circumstances,[96] but refused to attach significance to those facts.[97] Noting that the mitigating circumstances must be "strictly construed in favor of the defendant, to allow the broadest consideration of mitigating circumstances consistent with their language,"[98] the court concluded: "We perceive no distinction of con-

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92. *Id.* at 86, 357 N.E.2d at 1045.

93. *Id.* at 83, 357 N.E.2d at 1044.

94. *Id.* at 86, 357 N.E.2d at 1045.

95. *Id.* at 86, 357 N.E.2d at 1045-46. The mitigating circumstances in the Florida statute include:

> (a) The defendant has no significant history of prior criminal activity.
> (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
> (c) The victim was a participant in the defendant's conduct or consented to the act.
> (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
> (e) The defendant acted under extreme duress or under the substantial domination of another person.
> (f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired.
> (g) The age of the defendant at the time of the crime.

FLA. STAT. ANN. § 921.141(6) (West Supp. 1976-77). There is reason to believe that the Florida statutes would permit consideration of nonstatutory mitigating circumstances. *See* Proffitt v. Florida, 428 U.S. 242, 250 n.8 (1976).

96. 48 Ohio St. 2d at 86, 357 N.E.2d at 1046. Georgia's statutes are described in *Gregg v. Georgia* as follows:

> [T]he jury is authorized to consider any other appropriate aggravating or mitigating circumstances. . . . The jury is not required to find any mitigating circumstance in order to make a recommendation of mercy that is binding on the trial court. . . . but it must find a *statutory* aggravating circumstance before recommending a sentence of death.

428 U.S. at 197.

97. 48 Ohio St. 2d at 86, 357 N.E.2d at 1045-46.

98. *Id.*, 357 N.E.2d at 1046.

stitutional dimensions between Ohio's mitigating factors, so construed, and those upheld in *Proffitt v. Florida*."[99]

By comparing the Ohio death penalty statutes with those reviewed by the United States Supreme Court in July 1976, the Ohio Supreme Court decided that Ohio's statutes are more like the statutes upheld in *Gregg*, *Proffitt*, and *Jurek*, than like the statutes struck down in *Woodson* and *Stanislaus Roberts*, and thus are consistent with eighth amendment standards. In reaching its conclusion, however, the Ohio Supreme Court engaged in a superficial analysis that failed to grasp or adequately respond to the weighty and difficult eighth amendment issues presented by Ohio's death penalty scheme. Although the court in later cases has attempted to revamp its initial defense of Ohio's statutes, the court's analysis has been unconvincing throughout. The next section of this Comment will explore the eighth amendment issues presented by Ohio's death penalty statutes and point out the inadequacies of the court's treatment of those issues.

C. *The Issues*

1. *The Constitutional Adequacy of the Mitigating Circumstances*

The United States Supreme Court has mandated that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."[100] In striking down statutes that permit no such consideration the Court eloquently stated:

> A process that accords no significance to relevant factors of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind. It treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.[101]

Thus, it is clear that any death penalty statute, to survive judicial scrutiny, must require the sentencing authority to impose sentence on the basis of a particularized consideration of the characteristics of the offense and the offender.

The question arises, then, whether the Ohio statutes authorize

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99. *Id.* at 86-87, 357 N.E.2d at 1046 (footnote omitted).

100. Woodson v. North Carolina, 428 U.S. 280, 304 (1976). *See* Harry Roberts v. Louisiana, 97 S.Ct. 1993, 1995 (1977) (quoting this language).

101. Woodson v. North Carolina, 428 U.S. 280, 304 (1976).

an adequate inquiry into the relevant characteristics of the crime and of the accused prior to sentencing.[102] As previously noted, the Ohio Supreme Court expressed the view that, although the Ohio General Assembly might have included more or different mitigating circumstances in the Ohio death penalty statutes,[103] its failure to do so is not of constitutional significance. The court felt that the mitigating circumstances "which are listed do direct inquiry both to the circumstances of the crime and to the individual culpability of the defendant, and so adequately guide the decision of the sentencing authority."[104] To test this assertion, it is necessary to examine each of the three mitigating circumstances individually to determine the scope of each.

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102. For an excellent treatment of this issue, see Brief of Amicus Curiae American Civil Liberties Union of Ohio Foundation, Inc. at 4-47, State v. Carl Osborne, 50 Ohio St. 2d 211, 364 N.E.2d 216 (1977) [hereinafter cited as Brief of Amicus Curiae].

103. The early draft of the Ohio death penalty statutes passed by the Ohio House of Representatives called for a system in which the jury or panel of three judges had the power to recommend mercy. The sentencing authority was required to give "due consideration" to statutory criteria in determining sentence. Those criteria—not controlling, but to be considered in favor of recommending mercy—were:

(1) The offense was the result of circumstances unlikely to recur.
(2) The victim of the offense induced or facilitated it;
(3) There are circumstances tending to mitigate the offense, though failing to establish a defense.
(4) The offender acted under strong provocation;
(5) The offender has no history of prior offenses of violence;
(6) The offender is likely to respond affirmatively to rehabilitative treatment.

Sub. H.B. No. 511, 109th Gen'l Assembly § 2929.03(C) (1971-72). These criteria were "not to be construed to limit the matters which may be considered in determining whether or not to recommend that mercy be shown an offender for a capital offense." *Id.* § 2929.03(D). Compare OHIO REV. CODE ANN. § 2951.02(B)(2)-(7) (Page 1975), setting forth the considerations for putting an offender on probation rather than imprisoning him.

The Ohio Senate adopted instead the present truncated version of the statute. Lehman & Norris, *supra* note 73, indicate that the intervening *Furman* decision was responsible for the change:

> The Senate Judiciary Committee, in the midst of its consideration of Sub. H.B. 511, could not await the analyses, standards, and guidelines that would come from law review and bar association articles and comments that follow major decisions of the Supreme Court. At this point, working from models prepared by the staff of the Legislative Service Commission, there appeared to be four basic choices under the *Furman* case available to the Committee:
>
> (1) Abolish the death penalty.
> (2) Retain the death penalty, but make its imposition mandatory in specified cases.
> (3) Retain the death penalty and permit the judge or jury to decide if it is to be imposed in a given case, but provide criteria to guide the jury or judge in making the decision. This had been, in essence, the approach of the House of Representatives.
> (4) Refine the House position by retaining the death penalty, but remove from the judge and jury as much discretion as possible in the punishment determining procedure.
>
> Mindful of the action taken by the House of Representatives in retaining capital punishment and sensing a similar attitude by the members of the Senate, the Senate Judiciary Committee opted for the last described alternative.

Id. at 19-20 (footnotes omitted).

104. State v. Bayless, 48 Ohio St. 2d 73, 86, 357 N.E.2d 1035, 1046 (1976).

a. "The victim of the offense induced or facilitated it."[105] The first mitigating circumstance requires a determination whether the "victim of the offense induced or facilitated it."[106] The meaning of this provision is not immediately evident.[107] Two possibilities come to mind: (1) the victim of the offense "induced" it by provoking his assailant (provocation); or (2) the victim "induced or facilitated" the offense by asking to be killed (mercy killing).[108] Turning to the first possibility, it must be noted that the second statutory mitigating circumstance includes "strong provocation."[109] It would be very unlikely that the Ohio legislature would have included in two separate provisions mitigating circumstances that are equivalent. Presumably then, "induced or facilitated" does not refer to provocation.

The other possibility for mitigation under this provision is that the murder was a mercy killing. On the surface, it might appear logical and in accord with modern perceptions of just punishment that a mercy killer not be sentenced to death. By focusing on a relevant characteristic of the offense, then, this mitigating circumstance would seem to permit the kind of individualized sentencing contemplated by the United States Supreme Court in *Gregg*.

In reality, however, this mitigating circumstance has an extremely limited application. Apart from the fact that mercy killing is not the typical homicide, this mitigating circumstance does not come into play until *after* the defendant is proved guilty beyond a reasonable doubt of aggravated murder, *and* at least one aggravating specification. The matter in mitigation must be interpreted in light of the aggravating circumstances set forth in the statute.[110] Mercy killing is by its nature so at odds with those aggravating circumstances—assassination, murder for hire, murder by a prisoner, murder of a law enforcement officer, mass murder, and so on—that it would be a rare case

105. For a discussion of the scope of this mitigating circumstance, see Brief of Amicus Curiae, *supra* note 102, at 6-10.

106. OHIO REV. CODE ANN. § 2929.04(B)(1) (Page 1975).

107. Indeed, one of the constitutional problems with this mitigating circumstance is that its meaning is unclear. *See* text accompanying notes 161-62 *infra*.

108. There is a third possibility that was accepted in an unreported opinion of an Ohio court of appeals. In the consolidated cases of State v. Hines, No. CA-634 (Ct. App. Ashland County, Feb. 25, 1977) and State v. Lucas, No. CA-639 (Ct. App. Ashland County, Feb. 25, 1977), the victim believed the defendants were going to sell him some marijuana, when in fact they were planning to rob him. During the robbery, the victim, who was armed, fired at the defendants, who returned his shots, killing him. The court held that the victim of the felony murder had induced the offense by being willing to engage in a criminal act and by being armed.

This interpretation of the first mitigating circumstance is problematic. First, the fact situation it embraces is rare. Second, the fact that the victim was armed suggests provocation, which, in light of the phrase "strong provocation" in the second mitigating circumstance, is presumably not included in the first mitigating circumstance. Third, to the extent that the court focused on the bad character of the victim, it ascribed to the legislature an intent to assign comparative values to the lives of victims.

109. OHIO REV. CODE ANN. § 2929.04(B)(2) (Page 1975).

110. The aggravating circumstances are listed in note 76 *supra*.

in which an individual would be proved guilty of aggravated murder, *and* of a specification, *and* still be able to prove by a preponderance of the evidence that the victim of the offense "facilitated" it. While it is possible to imagine a case in which, for example, an individual was hired to commit a mercy killing, such a case would undoubtedly occur very infrequently.

As further indication of the limited applicability of this provision, it should be noted that it has not been at issue in any of the cases decided by the Ohio Supreme Court.[111] Its scope, then, is really a matter of conjecture, since the court has not yet interpreted it. If the scope of this provision is as narrow as it appears to be, it seems clear that consideration of this circumstance will not actually serve to focus the attention of the sentencing authority on the characteristics of the offense or the offender in any meaningful way in the vast number of cases. Thus, the first mitigating circumstance, in most if not all cases, is illusory.

b. Duress, Coercion, or Strong Provocation.[112] The second mitigating circumstance permits the sentencing authority to inquire whether "[i]t is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation."[113] In order to determine the scope of this mitigating circumstance, it is necessary to first determine what other effect the presence of duress, coercion, or strong provocation might have on a defendant's criminal liability for taking the life of another. Turning first to provocation, it must be noted that under Ohio law, homicide liability falls into several categories: aggravated murder, composed of premeditated murder and felony murder;[114] murder;[115] voluntary manslaughter;[116] and involuntary manslaughter.[117] A killing "while under extreme emotional stress brought on by serious provocation reasonably sufficient" to incite the use of deadly force is voluntary manslaughter,[118] not aggravated murder. Although the term "strong provocation" is suggestive of the term "serious provocation reasonably sufficient" to incite the use of deadly force, the two terms must not

111. The issue was raised in *State v. Hines* and *State v. Lucas*, note 108 *supra*, but those cases are not being appealed to the Ohio Supreme Court. *See* note 108 *supra*.

112. For a discussion of the scope of this mitigating circumstance, see Brief of Amicus Curiae, *supra* note 102, at 23-31.

113. OHIO REV. CODE ANN. § 2929.04(B)(2) (Page 1975).

114. *Id.* § 2903.01.

115. *Id.* § 2903.02.

116. *Id.* § 2903.03.

117. *Id.* § 2903.04.

118. *Id.* § 2903.03:

(A) No person, while under extreme emotional stress brought on by serious provocation reasonably sufficient to incite him into using deadly force, shall knowingly cause the death of another.

(B) Whoever violates this section is guilty of voluntary manslaughter, a felony of the first degree.

be equivalent since the presence of reasonable serious provocation will reduce a charge of aggravated murder to voluntary manslaughter,[119] thereby eliminating the need for mitigation. Of necessity, then, reasonable provocation, since it acts as a reductive factor, cannot operate also as a mitigating factor.

Presumably the term "strong provocation" is designed to encompass those states of emotional upset that fall short of the reductive factor of reasonable serious provocation—states that might loosely be referred to as "unreasonable provocation." The existence of unreasonable provocation, however, may cast doubt on the defendant's ability to premeditate.[120] If the defendant is charged with premeditated murder, the prosecution must prove premeditation, a statutory element of the crime, beyond a reasonable doubt.[121] If the fact that the defendant was provoked, even unreasonably, at the time of the killing raises a reasonable doubt about the defendant's ability to premeditate, the charge presumably would be reduced from aggravated murder to murder. In this context, provocation could not operate as a mitigating factor since, by virtue of a reasonable doubt of its existence, the defendant would not be convicted of aggravated murder in the first instance.

If the defendant is charged with felony murder rather than premeditated murder, however, the possible relationship between provocation and premeditation is irrelevant, since premeditation is not an element of the crime of felony murder.[122] It is possible to argue that, since proof of provocation would not negate the principal charge of felony murder, provocation could operate as a mitigating circumstance. Again, however, this mitigating circumstance must be read in conjunction with the aggravating circumstances. Several of the aggravating specifications—assassination, murder for hire, murder to escape detection or apprehension for another offense—seem so at odds

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119. The Legislative Service Commission Note explaining § 2903.03, *reprinted following* OHIO REV. CODE ANN. § 2903.03 (Page 1975), states:

> [V]oluntary manslaughter remains a lesser included offense of both aggravated murder and murder. For example, in the trial of a charge of aggravated murder, if the jury finds that the killing was purposely done, but was not done with prior calculation or design or under circumstances constituting felony murder, it would be bound to return a verdict of guilty of murder. If, in addition, the jury found that the killing was done while the offender was under extreme emotional stress brought on by sufficient and adequate provocation, the jury would be bound to return a verdict of guilty of voluntary manslaughter.

120. W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW § 76 at 581 (1972).

121. OHIO REV. CODE ANN. § 2901.05(A) (Page 1975); Patterson v. New York, 97 S. Ct. 2319 (1977); In re Winship, 397 U.S. 358 (1970).

122. *Compare* OHIO REV. CODE ANN. § 2903.01(A) (Page 1975) (premeditated murder) *with id.* § 2903.01(B) (felony murder) (both provisions set out at note 75 *supra*). *See* Fouty v. Maxwell, 174 Ohio St. 35, 37, 186 N.E.2d 623, 625 (1962), which interpreted a similar felony murder statute in the prior Ohio Criminal Code: "Where murder is committed . . . during the perpetration or attempted perpetration of a felony, deliberation and premeditated malice is not an essential element of the crime . . . ."

with provocation as to preclude its existence once guilt of both the charge and specification has been proved beyond a reasonable doubt. Thus, provocation as a mitigating circumstance would appear to be applicable in few and limited situations.

Duress and coercion[123] under Ohio law may also operate as reductive factors to a charge of aggravated murder.[124]

> In the case of the most common type of aggravated murder, purposely causing death in connection with certain felonies, if the defendant has a valid defense of duress to the underlying crime, he can, at most, be convicted of the murder, and he would not then be subject to the death penalty.[125]

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123. At common law, the defense of duress was established by proof of "threatening conduct which produces in the defendant (1) a reasonable fear of (2) immediate (or imminent) (3) death or serious bodily harm." W. LAFAVE & A. SCOTT, *supra* note 120, § 49 at 377 (footnotes omitted). Compare the formulation of the defense of duress contained in Model Penal Code § 2.09(1).

Coercion refers to the common-law rule that a married woman was not punishable for a crime, other than murder or treason, if she acted under the domination of her husband. If a woman committed such a criminal act in the presence of her husband, there was a rebuttable presumption that she was coerced by him. W. LAFAVE & A. SCOTT, *supra* note 120, § 49 at 380-81. *See* the Ohio cases dealing with coercion listed in note 124 *infra*. The Model Penal Code § 2.09(3) abolished the common-law presumption.

124. There are no Ohio cases dealing squarely with this issue. Several Ohio cases apparently treat duress and coercion as defenses to crimes other than homicide: State v. Sappienza, 84 Ohio St. 63, 95 N.E. 381 (1911) (duress as a defense to a charge of robbery); Tabler v. State, 34 Ohio St. 127 (1877) (coercion as a defense to a charge of foeticide); Davis v. State, 15 Ohio St. 72 (1846) (coercion as a defense to a charge of arson); State v. Good, 110 Ohio App. 415, 165 N.E.2d 28 (1960) (duress as a defense to a charge of illegal possession and sale of narcotics); State v. Milam, 108 Ohio App. 254, 254, 156 N.E.2d 840 (1959) (syllabus 4) ("affirmative defense of coercion and duress to a charge of robbery"); Mayer v. State, 4 Ohio L. Abs. 170 (Ct. App. 1925) (coercion as a defense to a charge of illegal possession of alcohol); Miller v. State, 3 Ohio L. Abs. 107 (Ct. App. 1924) (same). *Contra*, Opritza v. City of Youngstown, 6 Ohio L. Abs. 475 (Ct. App. 1928) (refusing to apply common-law presumption that woman committing crime in husband's presence does so under coercion, to a charge of illegal possession of alcohol).

The Ohio Supreme Court, however, conceded in *State v. Woods* that duress would reduce a charge of felony murder to murder. *See* note 125 *infra* and accompanying text.

125. State v. Woods, 48 Ohio St. 2d 127, 135, 357 N.E.2d 1059, 1065 (1976) (footnote omitted), *petition for cert. filed*, 45 U.S.L.W. 3696 (U.S. March 21, 1977) (No. 76-1308). While the Ohio Supreme Court was willing to concede that proof of duress or coercion would *reduce* a charge of aggravated murder, it was unwilling to state that such proof would completely exonerate a defendant from criminal liability for homicide: "There is strong precedent for holding that duress is not a defense to murder, but that question has not been decided in Ohio. At common law, no person can excuse himself for taking the life of an innocent person on the grounds of duress." *Id.* at 135 n.3, 357 N.E.2d at 1065 n.3.

The court's observation is somewhat of a misstatement of the common law. At common law, duress could not excuse one for the *intentional* taking of another's life, "but it is a defense to a killing done by another in the commission of some lesser felony participated in by the defendant under duress." W. LAFAVE & A. SCOTT, *supra* note 120, § 49 at 377. This situation presumably would not arise under Ohio's aggravated murder statute, however, since felony murder is defined as a purposeful killing. OHIO REV. CODE ANN. § 2903.01(B) (Page 1975). *But see* State v. Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *cert. granted*, 98 S. Ct. 261 (1977), discussed in section III.C.2. *infra*, holding that purpose to kill of one other than the principal must be inferred from the aider's knowledge that the principal was using a deadly weapon in the commission of the felony.

A contrary result was reached in State v. Milam, 108 Ohio App. 254, 156 N.E.2d 840 (1959), involving a charge of first degree murder against an aider and abettor for "the killing of a person while in the perpetration of a robbery." *Id.* at 255, 156 N.E.2d at 840. "[A]n affirmative defense of coercion and duress to the robbery appears made out and the defendant's

If duress or coercion will reduce a charge of felony murder to murder, it would seem that either might also reduce a charge of premeditated murder to murder, inasmuch as proof of duress or coercion might negate the element of premeditation.[126]

In order for duress or coercion to operate as mitigating circumstances, then, their scope must be broader than when they operate as reductive factors.[127]

> This is particularly true since the defendant is required to establish duress or coercion by a preponderance of the evidence for purposes of mitigation, whereas during trial he is required only to present evidence sufficient to raise such an affirmative defense, and the burden of disproving it beyond a reasonable doubt remains with the prosecution.[128]

In *State v. Woods*, the Ohio Supreme Court attempted to give these terms the broadest possible meaning by defining them with regard to their meanings in civil actions as well as their ordinary dictionary meanings.[129] The court construed the mitigating circumstances of duress and coercion as follows:

> The essential characteristic of coercion which emerges from these

participation in the robbery excused, and a judgment of first degree murder for the killing of such arresting police officer which results when defendant's companions attempt to escape is contrary to the evidence and will be reversed." *Id.* at 254 (syllabus 4). The court, however, ordered that the defendant be retried on the murder charge, with the jury to consider "whether the robbery was still continuing or ended when the homicide occurred." *Id.* at 268-69, 156 N.E.2d at 848.

126. W. LAFAVE & A. SCOTT, *supra* note 120, § 49 at 379. At any rate, as the court noted, premeditated murder is not the most common type of aggravated murder, and premeditated murder coupled with duress would undoubtedly occur infrequently. Witness the fact that there are no Ohio cases dealing with this issue. Note 124 *supra*. Thus, even if duress is not a defense to premeditated murder, and therefore could operate as a mitigating circumstance, it would come into play very infrequently.

127. State v. Woods, 48 Ohio St. 2d at 135, 357 N.E.2d at 1065: "Accordingly, to have any effective meaning, the terms 'duress' and 'coercion' in R. C. 2929.04 (B) must be construed, if possible, more broadly than when used as a defense in criminal cases."

128. *Id.* The first part of this quotation was purportedly overruled in State v. Downs, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977) (syllabus 1). In *Downs*, the Supreme Court of Ohio held that the mitigation hearing in a capital case is not adversary in nature and therefore the trial court is required to consider evidence in mitigation of punishment regardless of whether the defendant offers any such evidence himself. The court felt this observation required overruling the language quoted from *Woods*. But the *Downs* case makes clear that mitigation must be proved by a preponderance and "that if the evidence is in equilibrium, the risk of non-persuasion falls upon the defendant." *Id.* at 55, 364 N.E.2d at 1146. Since nothing in the language quoted in the text conflicts with *Downs*, it is difficult to understand why the court felt that it should be overruled. Presumably, the court merely wanted to indicate that the defendant does not bear the burden of initially producing mitigating evidence, an observation that in no way impairs the validity of the quotation for the purposes of indicating the relationship between proving mitigating duress and proving the defense of duress.

For its discussion of the burden of proving duress as an affirmative defense during the trial, the court in *Woods* cited as authority State v. Robinson, 47 Ohio St. 2d 103, 351 N.E.2d 88 (1976), which held that, under Ohio Revised Code § 2901.05, the defendant has only the burden of going forward with sufficient evidence to raise the issue of self-defense and does not bear the burden of proof on that issue. Previously, the defendant bore the burden of proving duress by a preponderance of the evidence. State v. Sappienza, 84 Ohio St. 63, 95 N.E. 381 (1911).

129. 48 Ohio St. 2d at 135-36, 357 N.E.2d at 1065-66.

> definitions is that force, threat of force, strong persuasion or domination by another, necessitous circumstances, or some combination of those, has overcome the mind or volition of the defendant so that he acted other than he ordinarily would have acted in the absence of those influences.[130]

While this definition may seem generous and to focus upon the particular characteristics of the accused, it has not been liberally applied by the court. Although asserting that "the purpose of mitigation is to recognize that the punishment assigned for a criminal act may, for ethical and humanitarian reasons, be tempered out of consideration of the individual offender and his crime,"[131] in the three cases in which the issue of duress or coercion was raised, the court virtually deemed evidence of the defendant's susceptibility to influence or domination irrelevant. For example, in *State v. Woods*,[132] the defendant Woods and his companion Reaves participated in an attempted robbery that culminated in the death of a police officer. The court conceded that

> the evidence establishes a consistent portrait of Woods as a young man with no previous criminal record but one who was easily led and who came under the influence of Reaves, the brother of the woman he was living with. It appears likely that it was the influence of Reaves which persuaded Woods to agree to participate in a robbery, to acquiesce and cooperate in the purchase of the gun, and to remain at the scene of the attempted robbery despite his reluctance.[133]

The psychiatrist who examined Woods "testified further that Woods was a person 'dependent on other people's opinions and leadership,' that he 'would not offer much objection to being dominated or controlled,' and that he probably would not have committed the crime if he had not been under duress, coercion, or strong provocation."[134] Yet, this evidence did not, in the court's opinion, make it more likely than not that Woods was acting under "strong persuasion or domination by another," or "other than he ordinarily would have acted." For, the court explained:

> [T]he hard fact remains that when the opportunity to abandon the robbery, to surrender to the police, to flee, or even to refrain from firing, was presented, Woods nevertheless opened fire on the wounded officer, despite the fact that Woods was not ordered or even urged to do so. In committing that act, for which punishment under law must now be set,

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130. *Id.* at 137, 357 N.E.2d at 1066. Although the quotation refers specifically only to "coercion," it is apparent from the context that the definition is intended as a composite one that encompasses both "duress" and "coercion." It should be noted that the definition shades over into the defense of necessity as well.

131. *Id.* at 137, 357 N.E.2d at 1066.

132. 48 Ohio St. 2d 127, 357 N.E.2d 1059 (1976), *petition for cert. filed*, 45 U.S.L.W. 3696 (U.S. March 21, 1977) (No. 76-1308).

133. *Id.* at 137-38, 357 N.E.2d at 1066.

134. *Id.* at 134, 357 N.E.2d at 1064.

> defendant Woods was under neither coercion nor duress, and we can accordingly find no grounds for reducing the sentence of death imposed upon him.[135]

Similarly, in *State v. Bell*,[136] the court reiterated the breadth of these mitigating circumstances, intimating that the age and prior criminal record of the defendant could be taken into consideration in determining the existence of duress or coercion.[137] Again, however, the court gave these circumstances little or no weight in actually deciding whether mitigation had been proved. The defendant Bell was sixteen years old at the time of the offense. "There was evidence in the psychiatric reports that [Bell] was perhaps easily led by Hall [Bell's adult companion in the murder]."[138] The court even conceded that "[w]hen combined with appellant's age, it is conceivable that all characteristics could establish the mitigating circumstance defined by R. C. 2929.04(B)(2)."[139] Yet, the court found these facts insufficient to establish the mitigating circumstance by a preponderance of the evidence. The court said:

> However, we believe the panel was justified and correct in finding that this mitigating circumstance was not established by the evidence. Even if it were believed that [Bell] was apprehensive of Hall and was "forced" to go along with the crimes, the hard fact remains that [Bell] could have

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135. *Id.* at 138, 357 N.E.2d at 1066.

> According to Woods' testimony, Reaves bragged of his criminal past and owned a sawed-off shotgun with "initials" cut in the stock for men he had killed. Woods did not claim that he was actually threatened by Reaves, but did assert that he was intimidated by him, wished to back out of the planned robbery, and went along with it unwillingly only after Reaves placed the gun in his hands and told him that all he had to do was stay on the sidewalk and watch for the police. Woods testified that he was reluctant to stay, but that he was afraid of what Reaves might do because of his violent reputation, and that when they were walking away he was only going to talk to the policeman, but that Reaves pushed Woods back and started shooting. Woods said that he had shot at the policeman because he was scared.

Id. at 133-34, 357 N.E.2d at 1064.

In both *Woods* and State v. Bell, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976), *cert. granted*, 97 S. Ct. 2971 (1977), discussed in the text accompanying notes 136-140 *infra*, the court seemed to be importing into the mitigating circumstance of duress an element included in the defense of duress—that the defendant take advantage of a reasonable opportunity to escape. 4 Ohio Jury Instructions § 411.20(a) (Provisional Criminal 1974) ("When a person is forced to participate in a crime against his will because he honestly believes and has good reason to believe that he is in immediate danger of death or great bodily harm, and that there was no reasonable opportunity to escape, he is entitled to be acquitted on the ground of duress."); W. LAFAVE & A. SCOTT, *supra* note 120, § 49 at 378 (footnote omitted) ("One threatened with immediate death or serious bodily injury may lose his defense of duress if he does not take advantage of a reasonable opportunity to escape, where that can be done without exposing himself unduly to death or serious bodily injury.").

136. 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976), *cert. granted*, 97 S. Ct. 2971 (1977).

137. *Id.* at 281, 358 N.E.2d at 564.

138. *Id.* at 282, 358 N.E.2d at 564. Hall and Bell accosted the victim with a shotgun and forced him into the trunk of his automobile, which they then stole. Hall drove the victim's automobile, Bell drove the automobile in which Hall and Bell were riding prior to the crime. The victim was later taken to a cemetery and shot. It is unclear which of the two actually killed the victim. *Id.* at 271-72, 358 N.E.2d at 559.

139. *Id.*

> very easily quit the scheme while following in another car. Further, it must be remembered that [Bell] and Hall were engaged in the same type of scheme the very next day when Hall was arrested. We agree with the panel that, after considering all relevant factors, the second mitigating circumstance was not established.[140]

The court never explained in either case how a defendant who is acting under the domination or influence of another could be expected to suddenly escape that domination to avoid committing the murder.

Most recently in *State v. Weind*,[141] the Ohio Supreme Court rejected the defendant's contention that mitigating duress had been proved. The court summarized the evidence in mitigation as follows:

> In the instant cause, while the doctors agreed that the defendant's involvement in the crime was highly unusual, given his behavioral history, there was no evidence adduced at trial, during the psychiatrists' interviews, or at the mitigation hearing, of any force or threat of force that could have motivated the defendant to commit the crime. Nor was there any evidence to indicate that the defendant acted out of necessity. The only evidence to indicate that a mitigating force affected the acts of the defendant was that he was easily led because he felt a need to belong, and that he was non-violent in nature.[142]

The court held this evidence insufficient to establish mitigation:

> Although this evidence suggests that the defendant may have acted under a strong domination or persuasion, it is outweighed by other evidence, such as his relationship to his co-conspirators, his motive for committing the crime, and his participation in the planning and cover-up of the crime, which suggests his acts were voluntary.[143]

If the court meant that in order to prove the mitigating circumstance of duress, the defendant must negate the voluntariness of his act, then the court effectively made this mitigating circumstance illusory. Proof of the voluntariness of the defendant's act is "an absolute requirement for criminal liability,"[144] and thus must be established in order to convict the defendant in the first instance. At any rate, *Weind* is further illustration that the court's broad definition of duress has been narrowed considerably by application. Proof that Weind acted under "strong domination or persuasion"—purportedly

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140. *Id.* at 282, 358 N.E.2d at 564-65.

141. 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977).

142. *Id.* at 231, 364 N.E. 2d at 230.

143. *Id.*

144. W. LAFAVE & A. SCOTT, *supra* note 120, § 25 at 181. *See* Robinson v. California, 370 U.S. 660 (1962). Additionally, OHIO REV. CODE ANN. § 2901.21 (Page 1975) provides in relevant part:

> (A) . . . a person is not guilty of an offense unless both of the following apply:
> (1) His liability is based on conduct which includes either a voluntary act or an omission to perform an act or duty which he is capable of performing;

sufficient to prove mitigation by the court's own definition—was insufficient to mitigate Weind's punishment. It would seem that a defendant, in order to prove mitigating duress, apparently must either meet the requirements of the defense of duress—which has already been proved not to exist beyond a reasonable doubt by virtue of the conviction of aggravated murder[145]—or must meet a higher standard of proof than by a preponderance of the evidence—which, of course, violates the statute.

Thus, because of the narrowness of the factor "strong provocation" and the narrow application of the factors "duress" and "coercion," these factors authorize an extremely narrow inquiry into the characteristics of the criminal and his crime. As a result, few, if any, defendants will be able to rely on them to establish mitigation.

c. Psychosis or Mental Deficiency.[146] The third mitigating circumstance authorizes the sentencing authority to inquire whether "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."[147] As the provision indicates, Ohio law also provides for a defense of insanity which, when established, absolves the defendant from criminal liability for his act.[148] The legal defense of insanity was defined by the Ohio Supreme Court in *State v. Staten*:[149]

> One accused of criminal conduct is not responsible for such criminal conduct if, at the time of such conduct, as a result of mental disease or defect, he does not have the capacity either to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law.[150]

In order for the third mitigating circumstance to have any substantive effect, it must be more broadly defined than the *Staten* definition of the legal defense of insanity. This is especially true in light of the Ohio Supreme Court's recent holding that insanity is an affirmative defense

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145. *See* note 128 *supra* and accompanying text.

146. For a discussion of the third mitigating circumstance, see Brief of Amicus Curiae, *supra* note 102, at 11-23.

147. OHIO REV. CODE ANN. § 2929.04(B)(3) (Page 1975). This provision apparently is a variation on the ill-fated *Durham* test for insanity. That test, set forth in Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), is as follows: "[A]n accused is not criminally responsible if his unlawful act was the product of mental disease or defect." *Id.* at 874-75.

148. *See* OHIO REV. CODE ANN. §§ 2943.03(E) (plea of not guilty by reason of insanity) and 2945.37-.40 (procedure for inquiry into sanity of defendant and effect of verdict of not guilty by reason of insanity) (Page 1975).

149. 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969).

150. *Id.* at 13, 247 N.E.2d at 294 (syllabus 1). This definition is a combination of the M'Naghten "right from wrong" test and the "irresistible impulse" test for legal insanity. *See generally* W. LAFAVE & A. SCOTT, *supra* note 120, § 37 at 274-86.

that under Ohio's burden of proof statute[151] the defendant must raise, but the prosecution must negate beyond a reasonable doubt.[152]

The Ohio Supreme Court's first attempt at defining the third mitigating circumstance produced this formulation in *State v. Bayless*:

> Mental deficiency is consistently defined to mean a low or defective state of intelligence. Construing the term broadly, a deficiency may be severe or mild, and may be hereditary or caused by brain defect, disease, or injury, or by whatever other condition might cause subnormal intelligence. But it does not include the emotional and behavioral abnormalities claimed to exist by the defense.[153]

This definition would nearly collapse the mitigating circumstance of mental deficiency or psychosis into the defense of insanity—which has already been proved not to exist beyond a reasonable doubt by virtue of the conviction for aggravated murder.[154] The mental conditions "psychosis" and "mental deficiency," as defined by the court in *Bayless*, would appear to be included in the mental conditions considered in the legal defense of insanity, as articulated in *Staten*.[155]

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151. OHIO REV. CODE ANN. § 2901.05 (Page 1975).

152. State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977), interpreting OHIO REV. CODE ANN. § 2901.05(A) (Page 1975). Prior to the enactment of the new criminal code in Ohio, the defendant was required to prove his insanity by a preponderance of the evidence. State v. Jackson, 32 Ohio St. 2d 203, 291 N.E.2d 432 (1972), *cert. denied*, 411 U.S. 909 (1973); State v. Johnson, 31 Ohio St. 2d 106, 285 N.E.2d 751 (1972); State v. Staten, 18 Ohio St. 2d 13, 247 N.E.2d 293 (1969).

153. 48 Ohio St. 2d 73, 96, 357 N.E.2d 1035, 1050-51 (1976).

154. It seems highly unlikely that any defendant would not take advantage of the defense of insanity when available to him in a trial for aggravated murder. The failure of counsel to enter a plea of not guilty by reason of insanity when a basis exists for such a plea has been held to be a denial of effective assistance of counsel, requiring a reversal of the conviction. Schaber v. Maxwell, 348 F.2d 664 (6th Cir. 1965).

155. The *Staten* definition of legal insanity requires a "mental disease or defect." These mental conditions would appear to be quite broadly defined. *See* W. LAFAVE & A. SCOTT, *supra* note 120, § 37 at 275, 276 (footnotes omitted), referring to the M'Naghten test for insanity:

> There has never been a clear and comprehensive determination of what type of mental disease or defect is required to satisfy the M'Naghten test. Some believe that only a few types of psychoses will suffice. However, it would seem that any mental abnormality, be it psychosis, neurosis, organic brain disorder, or congenital intellectual deficiency (low IQ or feeblemindedness), will suffice if it has caused the consequences described in the second part of the test.
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> . . . .
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> When a jury is instructed on the M'Naghten test, the usual practice is merely to recite the "disease of the mind" element to the jury. No effort is made to define or explain what qualifies as a mental disease.

See also McDonald v. United States, 312 F.2d 847, 851 (D.C. Cir. 1962), giving this definition of mental disease or defect for the purposes of the Durham test for insanity: "[T]he jury should be told that a mental disease or defect includes any abnormal condition of the mind which substantially affects mental or emotional processes and substantially impairs behavior controls."

4 OHIO JURY INSTRUCTIONS § 411.51(C) (Provisional Criminal 1974), does not attempt to define mental disease or defect:

> In order to establish the defense of insanity, the accused must establish by a preponderance of the evidence [This part of the instruction has since been overruled in State v. Humphries, 51 Ohio St. 2d 95, 364 N.E.2d 1354 (1977).] that a disease or other defect of his mind had so impaired his reason that, at the time of the criminal act

The only possible difference between the two formulations is that the mitigating factor requires only that the offense must be "primarily the product of" the offender's mental defect or disease, whereas the defense of insanity requires that the offender "not have the capacity" to conform his conduct to the law's requirements or to know the wrongfulness of his conduct because of his mental defect or disease. Thus, it must be determined whether there is any significant difference between these two formulations.

Although Ohio's definition of legal insanity apparently requires that the offender have *no* capacity to know the wrongfulness of his conduct or to conform his conduct to the requirements of the law, it has been argued that it is virtually impossible to ever say that an individual, no matter how mentally ill or deficient, lacks *all* capacity to know the wrongfulness of his conduct or to conform his behavior to the law.[156] To the extent that Ohio's defense of insanity can be considered to require less than total incapacity to know the wrongfulness of one's conduct or to conform one's acts to the requirements of the law,[157] the scope of the third mitigating circumstance is narrowed,

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with which he is charged, either he did not know that such act was wrong or he did not have the ability to refrain from doing that act.

Mitigation, on the other hand, requires a "psychosis" or "mental deficiency." A psychosis would presumably qualify as a mental disease, and the definition of "mental deficiency" in *Bayless* was limited to low intelligence caused by brain damage, defect, or disease.

156. MODEL PENAL CODE § 4.01, Comment (Tent. Draft No. 4, 1955). The Model Penal Code formulation of the defense of insanity is contained in § 4.01(1) (Proposed Official Draft 1962): "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks *substantial capacity* either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of the law." (Emphasis added). The Comment to § 4.01(1) of Tentative Draft Number 4 of the Model Penal Code, which is substantially identical to the provision quoted above, states:

> The law must recognize that when there is no black and white it must content itself with different shades of gray. The draft, accordingly, does not demand *complete* impairment of capacity. It asks instead for *substantial* impairment. That is all, we think, that candid witnesses, called on to infer the nature of the situation at a time they did not observe, can ever confidently say, even when they know that a disorder was extreme.

W. LAFAVE & A. SCOTT, *supra* note 120, § 38 at 293 says of the Model Penal Code formulation:

> Most significant is the fact that the A.L.I. test only requires a lack of "substantial capacity." This is clearly a departure from the usual interpretation of M'Naghten and irresistible impulse, whereby a complete impairment of cognitive capacity and capacity for self-control is necessary. Substantial capacity, the draftsmen noted, is all "that candid witnesses [. . .] can ever confidently say [. . .]." Moreover, even if witnesses could be more specific, it is undoubtedly true that there are many cases of advanced mental disorder in which rudimentary capacities of cognition and volition exist but which clearly present inappropriate occasions for the application of criminal sanctions. [footnotes omitted].

See Allen, *The Rule of the American Law Institute's Model Penal Code*, 45 MARQ. L. REV. 494, 501 (1962).

157. Note, *The Proposed Affirmative Defenses of Forced Perpetration, Entrapment, Intoxication and Insanity*, 33 OHIO ST. L.J. 397, 417 (1972) (The *Staten* test "reflects much similarity with the Model Penal Code's formulation."); OHIO LEGISLATIVE SERVICE COMMISSION, PROPOSED OHIO CRIMINAL CODE 59 (1971) ("An analysis of the *Staten* rule reveals that, substantively, it is equivalent to the American Law Institute's insanity defense . . . .").

since it would seem that if there were not even a reasonable doubt that the defendant lacked substantial capacity to conform his conduct to the requirements of the law or to know the wrongfulness of his acts, then the defendant could not prove by a preponderance that the offense was "primarily the product of" a psychosis or mental deficiency.

Another factor narrows the third mitigating circumstance still more. That factor, which the Supreme Court of Ohio has never confronted, is that the presence of a mental disease or defect can also operate as a reductive factor in a trial for aggravated murder if it raises a reasonable doubt about the defendant's purpose to kill or premeditation.[158] In a trial for aggravated murder when the defendant's mental condition is in issue, the jury must find against the defendant on his defense of legal insanity *and* have no reasonable doubt that the defendant's mental condition prevented him from forming the requisite criminal intent before the mitigating circumstances ever come into play. Thus, even if there is a difference between the *Staten* test for legal insanity and the third mitigating circumstance, that difference would appear to be virtually consumed by the scope of mental condition as a reductive factor. At best, the mitigating effect of mental condition is squeezed after the exculpating effect of insanity and the reductive effect of diminished capacity.

The Ohio Supreme Court apparently perceived the difficulties raised by the *Bayless* definition of the third mitigating circumstance, for in a later case it broadened its original approach. In *State v. Black*,[159] the court interpreted this mitigating provision more liberally:

> It is clear that the General Assembly chose the [terms "psychosis" and "mental deficiency"] to allow the trial judge or panel the broadest possible latitude in the examination of the defendant's mental state and mental capacity for the purpose of the mitigation inquiry, excepting only legal insanity, the existence of which would have absolved the defendant from criminal responsibility for his crime. Thus, incapacity may be considered in light of all the circumstances and including the nature of the crime itself so that it may be determined whether the condition found to have existed was the primary producing cause of the offense. To define terms such as those used in the statute is to narrow them.[160]

In the course of broadening the definition of the third mitigating factor, the Ohio Supreme Court may well have created another consti-

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The Ohio Supreme Court, however, apparently rejected the Model Penal Code formulation of the insanity defense in *State v. Staten*. It apparently felt that the *Staten* rule requires more than a substantial incapacity. 18 Ohio St. 2d 13, 18, 247 N.E.2d 293, 297 (1969). But, as noted elsewhere, the differences between the two formulations—if any—are slight.

158. State v. Nichols, 3 Ohio App. 2d 182, 209 N.E.2d 750 (1965); 4 OHIO JURY INSTRUCTIONS § 409.77 (Provisional Criminal 1974). *See generally* W. LAFAVE & A. SCOTT, *supra* note 120, § 42 at 325-32. *See also* MODEL PENAL CODE § 4.02(1) (1962).

159. 48 Ohio St. 2d 262, 358 N.E.2d 551 (1976).

160. *Id.* at 268, 358 N.E.2d at 555-56.

tutional problem. No matter how broad or narrow the mitigating circumstances may be, they must adequately focus and channel the sentencing authority's discretion in order to avoid the arbitrary sentencing condemned in *Furman*. In *Gregg v. Georgia*, the Supreme Court of the United States declared that while the existence of statutory standards is generally sufficient to eliminate this problem, such standards will not "inevitably satisfy the concerns of *Furman*."[161] "A system could have standards so vague that they would fail adequately to channel the sentencing decision patterns of juries with the result that a pattern of arbitrary and capricious sentencing like that found unconstitutional in *Furman* could occur."[162]

Thus, it is not enough that Ohio's statute contain mitigating circumstances. In addition, these circumstances must be sufficiently clear and certain to insure that sentencing authorities are using the same standards to determine sentence in all capital cases. The Supreme Court of Ohio, by refusing to define the third mitigating circumstance, has scarcely provided guidance to Ohio judges for setting sentences. To add to the confusion, the court in *Black* never even alluded to the *Bayless* definition, let alone overrule it. Nor did the court order new sentencing hearings for Bayless and other defendants sentenced under the older and presumably stricter standard.

Assuming it is not unconstitutionally vague, the *Black* formulation would seem to permit a consideration of a broad spectrum of mental conditions for the purposes of mitigation. In practice, however, the formulation has not been so applied. In fact, the Ohio Supreme Court has yet to reverse a death sentence because it felt that the requirements of the third mitigating circumstance had been met. In seven cases,[163] the court rejected the defendant's contention that mitigation under this provision had been proved. In *State v. Bayless*, for example, the evidence showed that Bayless was "of about normal or dull normal mental development," "emotionally and culturally deprived," and "sub-normal in emotional control or conscience,"[164] yet he received no benefit of the third mitigating circumstance. The defendant in *State v. Bell* was sixteen years old, had an "unsatisfactory home," lacked "family or other supervision," was involved with drugs, and unable "to cope with school demands."[165] Mitigation was not

161. 428 U.S. 153, 195 (1976) (footnote omitted).

162. *Id.* at 195 n.46.

163. State v. Weind, 50 Ohio St. 2d 224, 364 N.E.2d 224 (1977); State v. Sandra Lockett, 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *cert. granted*, 98 S. Ct. 261 (1977); State v. Edwards, 49 Ohio St. 2d 31, 358 N.E.2d 1051 (1976); State v. Harris, 48 Ohio St. 2d 351, 359 N.E.2d 67 (1976); State v. Bell, 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976), *cert. granted*, 97 S. Ct. 2971 (1977); State v. Black, 48 Ohio St. 2d 262, 358 N.E.2d 551 (1976); State v. Bayless, 48 Ohio St. 2d 73, 357 N.E.2d 1035 (1976).

164. 48 Ohio St. 2d 73, 94, 357 N.E.2d 1035, 1049-50 (1976).

165. 48 Ohio St. 2d 270, 282, 358 N.E.2d 556, 565 (1976).

found. Indeed the court rejected the defendant's contention "that a minor defendant is *per se* 'mentally deficient'."[166] Likewise in *State v. Harris*, evidence showing that the defendant, seventeen years old, was a sociopath was unavailing since the court did "not equate 'sociopath' as being [*sic*] either a psychosis or mental deficiency."[167]

Thus, the third mitigating circumstance has been defined broadly, but applied narrowly.[168] Defendants such as Bayless or Bell, whose mental conditions would appear to be encompassed by the *Black* definition of the third mitigating circumstance, are unable to obtain mitigation under it. The possibility of mitigation under the third mitigating circumstance is further reduced by the fact that mitigation must be proved by the defendant by a preponderance of the evidence. The mitigating potential of the third circumstance is also narrowed by the fact that the defendant's mental condition, by negating premeditation or purpose to kill, may reduce a charge of aggravated murder, thereby obviating the need for mitigation. The scope of the third mitigating circumstance is, of necessity, by definition and application, quite narrow, if indeed perceptible at all.

Thus, the three mitigating circumstances spelled out in the Ohio statutes are quite narrow in scope, and have been applied quite narrowly.[169] The problem is exacerbated by the fact that the sentencing authority is statutorily authorized to consider only the three mitigating circumstances spelled out in the statute.[170] Other factors, such as

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166. *Id.*

167. 48 Ohio St. 2d 351, 362, 359 N.E.2d 67, 73 (1976). Sociopathy is not always considered a mental disease or defect within the meaning of the insanity defense. W. LAFAVE & A. SCOTT, *supra* note 120, § 37 at 275-76; MODEL PENAL CODE § 4.01(2) (Proposed Official Draft 1962).

168. For a broader application of the mitigating effect of the defendants' mental condition in capital cases, see MODEL PENAL CODE § 4.02(2) (Proposed Official Draft 1962):

> Whenever the jury or the Court is authorized to determine or to recommend whether or not the defendant shall be sentenced to death or life imprisonment upon conviction, evidence that the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect shall be admissible in favor of sentence of imprisonment.

and State v. Staten, 18 Ohio St. 2d 13, 20, 247 N.E.2d 293, 298 (1969):

> However, if an accused knows that his criminal act is wrong and has the ability to refrain from that act, we see no reason for not punishing him for doing that act, even where his capacity for knowing the wrongfulness of that act or his capacity to refrain therefrom has been diminished. Such diminished capacity may represent a reason for a diminished punishment but not for an absence of any punishment.

169. The Ohio Supreme Court has yet to find mitigation in any case it has reviewed in which the death penalty was imposed. *See* note 189 *infra* and accompanying text.

Contrast the mitigating circumstances spelled out in the following statutes: ALA. CODE tit. 15, §§ 342(5), (9) (Interim Supp. 1975); ARK. STAT. ANN. § 41-1304 (Ark. Crim. Code 1975); CONN. GEN. STAT. ANN. § 53a-46a (West 1975); FLA. STAT. ANN. § 921.141(6) (West Cum. Supp. 1975-76) (set forth at note 95 *supra*); GA. CODE ANN. §§ 26-3102, 27-2534.1 (1976).

170. OHIO REV. CODE ANN. § 2929.04(B) (Page 1975):

> [T]he death penalty for aggravated murder is precluded when, considering the nature

the age or criminal record of the defendant are, *in and of themselves*, irrelevant to the sentencing decision. Although the Ohio Supreme Court has attempted to erode the exclusiveness of the three mitigating circumstances by saying that other factors may be considered,[171] it is clear that they are considered *only* insofar as they are relevant to the three statutory mitigating factors.[172] Under Ohio law, while the

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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. [emphasis added].

Some Ohio cases, however, have held that the mitigating circumstances listed in the statute are not exclusive, *e.g.*, State v. Farmer, 73 Ohio Op. 2d 341 (C.P. Montgomery County 1975). The court in *Farmer* held that § 2929.04(B) is *in pari materia* with another statutory provision relating to mitigation of penalty, OHIO REV. CODE ANN. § 2947.06 (Page 1975), which does not limit the scope of the sentencing authority's inquiry for purposes of mitigation. The court stated:

> R. C. §§ 2947.06 and 2929.04, being in pari materia (the latter not having been repealed) the mitigating circumstances set forth in (B)(3) [*sic*] of R. C. § 2929.04, are accumulative and the Court is not bound to R. C. § 2929.04(B)(1) (2) and (3), exclusively without being able to consider other matters . . . .

73 Ohio Op. 2d at 343.

Section 2947.06, however, cannot properly be read *in pari materia* with § 2929.04(B), for the former section authorizes the court to "determine whether sentence ought immediately to be imposed *or the defendant placed on probation.*" (emphasis added). On the other hand, the latter section authorizes the court to determine whether the defendant should be sentenced to death or to life imprisonment. OHIO REV. CODE ANN. § 2929.02(A) (Page 1975). Given the differences in the nature of these inquiries, it is difficult, if not impossible, to understand how § 2947.06 could apply to the sentencing decision in a capital case.

171. *See, e.g.*, State v. Bell, 48 Ohio St. 2d 270, 281, 358 N.E.2d 556, 564 (1976), *cert. granted*, 97 S. Ct. 2971 (1977):

> It has been alleged that the mitigating circumstances under R. C. 2929.04 (B) are unconstitutionally narrow because a number of very important factors, such as the age and criminal record of the defendant, appear to be irrelevant under the statute. We believe, however, that the Ohio statutory scheme can withstand this attack. The Ohio statutes, properly construed, permit the trial judge or panel to consider these factors at the mitigation hearing. Such a statutory construction is evident as R. C. 2929.04 (B) states that "the death penalty . . . is precluded when, considering the nature and circumstances of the offense *and the history, character, and condition of the offender*" (emphasis added), one or more of the mitigating circumstances is established. This conclusion is buttressed by the requirement that these statutory provisions be liberally construed in favor of the accused.

The court in *Bell*, however, looked only to the three mitigating factors in the statute, making it clear that age and lack of a criminal record are not independent mitigating factors. *Id.*

This response certainly does not meet the argument that was made, since the contention is that other factors, such as age, should not be merely *relevant* to, but *sufficient* for mitigation. Moreover, it is difficult to understand how the defendant's age or criminal record could be relevant to whether the "victim of the offense induced or facilitated it." It is also difficult to understand how the defendant's criminal record could be relevant to whether he acted under duress or provocation, or to whether he had a mental disease or defect which was the primary cause of his criminal act.

172. State v. Alberta Osborne, 49 Ohio St. 2d 135, 146-47, 359 N.E.2d 78, 86 (1976):

> In *State v. Bell* . . . we held that the mitigating circumstances of R. C. 2929.04 (B) were not to be construed narrowly and that relevant factors, such as prior criminal record and age of defendant, were to be considered by the sentencing authority.
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> Thus, in considering whether the crime was primarily the product of a mental deficiency under R. C. 2929.04 (B)(3), the trier of fact at the penalty proceedings may consider any mental deficiency or incapacity in light of all the circumstances including

sentencing authority may consider the fact that the defendant is sixteen years old in determining whether or not he is mentally deficient,[173] it cannot grant him mercy simply because he is sixteen years old, and, in the opinion of the sentencing authority, "too young to die."[174]

It is important to notice the kinds of factors deemed irrelevant to the sentencing decision by Ohio's death penalty statutes. Factors such as the absence of any previous criminal offense, or the youth of the defendant—factors which would seem to bring to bear in capital cases generally shared views on culpability and punishment—are given no independent weight in the sentencing decision. The Supreme Court of the United States has given some indication of the types of mitigating circumstances it has in mind when it speaks of mitigation in capital cases. In *Harry Roberts v. Louisiana*, the Court, in striking down a mandatory death penalty scheme, made the following observation:

> Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.
>
> As we emphasized repeatedly in *Roberts* and its companion cases decided last Term, it is essential that the capital sentencing decision allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense.[175]

Neither the Georgia nor Florida statutes restrict the inquiry into mitigating circumstances so narrowly as does the Ohio statute. Indeed, the Florida statute—to which the Ohio Supreme Court felt the Ohio statute is similar—contains a number of mitigating circumstances, including the defendant's age and criminal record, not contained in the Ohio statute.[176] The Model Penal Code also recognizes factors not recognized in Ohio as mitigating in capital cases.[177]

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the nature of the crime. . . . Similarly, in R. C. 2929.04 (B)(2), the terms "duress" and "coercion" are to be construed more broadly than when used as a defense in criminal cases. . . . These constructions appropriately allow consideration of a broad range of information relevant to mitigation set out in R. C. 2929.04.

173. State v. Bell, 48 Ohio St. 2d 270, 282, 358 N.E.2d 556, 565 (1976), *cert. granted*, 97 S. Ct. 2971 (1977): "[W]e do hold that a defendant's age is a primary factor in determining the existence of a mental deficiency."

174. The Ohio Supreme Court was also unwilling to say that a minor defendant is per se mentally deficient. *Id.* at 280, 358 N.E.2d at 563.

175. 97 S. Ct. at 1996 (footnotes omitted).

176. *See* note 95 *supra*.

177. MODEL PENAL CODE § 210.6(4) (Proposed Official Draft 1962):

(4) Mitigating Circumstances.

(a) The defendant has no significant history of prior criminal activity.

(b) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

It may be argued, however, that the Texas statute was upheld by the United States Supreme Court in *Jurek v. Texas* although it does not accord independent significance to various factors in the sentencing decision. The Texas statute provides that the death penalty cannot be imposed unless the jury unanimously finds beyond a reasonable doubt that the answer to each of three questions is yes.[178] The second of the three questions to be answered is "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."[179] As the United States Supreme Court viewed the Texas death penalty scheme, the inquiry required by the second question is sufficient "to allow a defendant to bring to the jury's attention whatever mitigating circumstances he may be able to show."[180] The Court noted the broad interpretation given the question by the Texas Court of Criminal Appeals:

> In determining the likelihood that the defendant would be a continuing threat to society, the jury could consider whether the defendant had a significant criminal record. It could consider the range and severity of his prior criminal conduct. It could look further to the age of the defendant and whether or not at the time of the commission of the offense he was acting under duress or under the domination of another. It could also consider whether the defendant was under an extreme form of mental or emotional pressure . . . .[181]

Thus, one can say that age and other factors are relevant under the Texas statute only insofar as they tend to negate the probability that the defendant will engage in further criminal acts that constitute a threat to society. Nevertheless, the inquiry conducted by the jury in answering the second question appears to be considerably broader than the inquiry permitted by the three mitigating circumstances in the Ohio statute. Whether a defendant will engage in criminal acts

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(c) The victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
(d) The murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation for his conduct.
(e) The defendant was an accomplice in a murder committed by another person and his participation in the homicidal act was relatively minor.
(f) The defendant acted under duress or under the domination of another person.
(g) At the time of the murder, the capacity of the defendant to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication.
(h) The youth of the defendant at the time of the crime.

178. TEX. CODE CRIM. PROC. ANN. art. 37.071 (c), (e) (Vernon Supp. 1976-77).

179. *Id.* art. 37.071 (b).

180. Jurek v. Texas, 428 U.S. 262, 272 (1976).

181. *Id.* at 272 (quoting Jurek v. State, 522 S.W.2d 934, 939-40 (Tex. Crim. App. 1975)). The United States Supreme Court also noted that the other two statutory questions to be answered by the jury could be construed to include consideration of other mitigating circumstances. Jurek v. Texas, 428 U.S. at 272 n.7.

in the future is an inquiry relevant in practical terms to all defendants convicted of capital crimes. It involves a consideration of a number of factors relating to both the nature of the offense and the offender, factors which can have a cumulative effect and can be weighed and judged in relation to one another.

By contrast, the three mitigating circumstances included in the Ohio statutes, because of their natures or their narrow interpretations, cannot or are not likely to lead to meaningful mitigation inquiries in all or even most capital cases. The Ohio statutes do not authorize a broad inquiry into the overall character of the offender or his offense. While a number of factors may be considered in determining whether a defendant is, for instance, mentally deficient, the ultimate inquiry is still quite narrow. The Texas statute, then, may be sufficiently different from the Ohio statute to be distinguishable.

The narrowness of the mitigating factors in Ohio's statute might be ameliorated somewhat if evidence in mitigation could have a cumulative effect, thus permitting the sentencing authority to consider all the evidence adduced as a totality. But, because each factor must be proved by a preponderance of the evidence in order for it to play any role in the sentencing decision, mitigation is essentially an all or nothing proposition. The defendant must meet the "fifty-plus" percent mark on at least one of the three mitigation circumstances in order to have his sentence reduced. Since the sentencing authority is not authorized, for example, to determine whether the evidence in mitigation outweighs the evidence of aggravation, evidence falling short of the "fifty-plus" percent mark is irrelevant to the sentencing decision, thus further limiting the breadth of the inquiry into mitigation.

Thus, there is good reason to believe that the Ohio statutes do not "allow for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense," as required by the United States Supreme Court.[182] The Supreme Court of the United States has repeatedly held that it is a violation of the eighth amendment for a state to legislatively predetermine that every defendant convicted of even a narrowly defined capital crime[183] shall die. Surely what a state may not do directly it may not do indirectly by so narrowly defining the circumstances that will mitigate the death sentence that virtually no defendant will be able to take advantage of them. Such a scheme, though not identical to the mandatory schemes previously struck down by the Supreme Court, certainly seems more closely akin to a mandatory death penalty scheme than to the capital sentencing schemes upheld by the Supreme

182. Harry Roberts v. Louisiana, 97 S. Ct. 1993, 1996 (1977).

183. *But see* note 3 *supra.*

Court. The Ohio Supreme Court's bald statement that there is "no distinction of constitutional dimensions between Ohio's mitigating factors . . . and those upheld in *Proffitt v. Florida*"[184] is scarcely a convincing response.[185]

2. *The Adequacy of Appellate Review*[186]

In *Proffitt*, *Gregg*, and *Jurek*, the United States Supreme Court stressed the importance of appellate review of cases in which the death sentence is imposed. It felt that appellate review insures both accuracy in the fact-finding process and proportionality in sentencing—that the sentence is not "disproportionate compared to those sentences imposed in similar cases."[187] The question arises, then, whether Ohio's death penalty scheme authorizes adequate appellate review of sentencing.

In *State v. Bayless*, the Ohio Supreme Court claimed the authority to review sentences in capital cases:

> [T]his court has a particular opportunity and responsibility to assure that death sentences, which may be brought to this court for review as a matter of right, are not imposed arbitrarily and capriciously. We have in this case, and will in all capital cases, independently review [*sic*] the aggravating and mitigating circumstances presented by the facts of each case to assure ourselves that capital sentences are fairly imposed by Ohio's trial judges.[188]

Although at first glance this statement would seem to warrant the broad type of appellate review approved in *Gregg*, the actual scope of review, as demonstrated by the performance of the Ohio Supreme Court, is much narrower.

As a starting point, it is illuminating to observe that the Ohio Supreme Court has yet to hold that a death sentence was inappropriate in any given case. To date, twenty-four cases in which the death sentence was imposed have been reviewed by the court, and in none was the death sentence found disproportionate to the crime or the criminal.[189] In fact, from the treatment given the cases on review, it

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184. State v. Bayless, 48 Ohio St. 2d 73, 86-87, 357 N.E.2d 1035, 1046 (1976).

185. The Ohio Supreme Court in more recent cases has declined to consider in greater depth its original position. State v. Weind, 50 Ohio St. 2d 224, 225-26, 364 N.E.2d 224, 227 (1977); State v. Alberta Osborne, 49 Ohio St. 2d 135, 146-47, 359 N.E.2d 78, 86 (1976).

186. For a discussion of this issue, see Brief of Amicus Curiae, *supra* note 102, at 48-52.

187. Gregg v. Georgia, 428 U.S. 153, 198 (1976). *See* note 66 *supra* and accompanying text.

188. 48 Ohio St. 2d 73, 86, 357 N.E.2d 1035, 1045 (1976).

189. *See* note 6 *supra*, for a list of cases in which the death sentence was imposed. In addition to those cases, death was imposed in the following cases reviewed by the Ohio Supreme Court: State v. Bates, 48 Ohio St. 2d 315, 358 N.E.2d 584 (1976), and State v. Roberts, 48 Ohio St. 2d 221, 358 N.E.2d 530 (1976). Death was also imposed on the defendant in State v. James Lockett, 49 Ohio St. 2d 71, 358 N.E.2d 1062 (1976), but his conviction was reversed because of an unrelated evidentiary matter.

seems clear that the Ohio Supreme Court does not actually engage in a proportionality review. At best, the review is limited to determining whether the conviction (*i.e.*, the finding of guilt of the principal charge and at least one aggravating circumstance) and sentence (*i.e.*, the finding against the defendant on all three matters of mitigation) are supported by the evidence. In *State v. Edwards*, the Ohio Supreme Court, when reviewing evidence claimed by the defendant to prove "mental deficiency" and thus mitigation, said: "In criminal appeals, this court will not retry issues of fact. In the circumstances at hand, we confine our consideration to a determination of whether there is sufficient substantial evidence to support the verdict rendered."[190] More recently, in *State v. Weind*, the Ohio Supreme Court, rejecting a claim of mitigation due to mental deficiency, bluntly indicated the scope of review undertaken: "Having reviewed the psychiatric reports and the evidence adduced at the mitigation hearing, this court finds *no abuse of discretion* of the trial court in finding that the offense was not primarily the product of Weind's psychosis or mental deficiency."[191]

Even this narrow review is not always diligently performed. For example, in *State v. Woods*, the court was attempting to discern whether or not the defendant's claim that mitigation had been proved was correct. The court's effort, however, was hampered: "One difficulty in considering the claims for mitigation in this case is that the pre-sentence report required to be made by the statute does not appear in the record."[192] Yet the Ohio Supreme Court affirmed the sentence of death. It is difficult to understand how the court could adequately review the trial court's finding of no mitigation without all the relevant evidence before it. Moreover, in some cases, the Ohio Supreme Court has affirmed the death sentence without mentioning aggravating or mitigating circumstances at all,[193] or with merely an off-hand mention of them,[194] thus violating its own requirement set forth in *Bayless*.[195] Nor has the Ohio Supreme Court reversed the death sentence when there was doubt whether the trial court correctly defined the mitigating circumstances.[196] Indeed, the Ohio Supreme

190. 49 Ohio St. 2d 31, 47, 358 N.E.2d 1051, 1062 (1976).

191. 50 Ohio St. 2d 224, 233, 364 N.E.2d 224, 231 (1977) (emphasis added).

192. 48 Ohio St. 2d 127, 134 n.2, 357 N.E.2d 1059, 1064 n.2 (1976).

193. State v. Shelton, 51 Ohio St. 2d 68, 364 N.E.2d 1152 (1977); State v. Downs, 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977).

194. State v. Jackson, 50 Ohio St. 2d 253, 259, 364 N.E.2d 236, 241 (1977); State v. Carl Osborne, 50 Ohio St. 2d 211, 222-23, 364 N.E.2d 216, 224 (1977); State v. Alberta Osborne, 49 Ohio St. 2d 135, 144, 359 N.E.2d 78, 85 (1976).

195. *See* text accompanying note 188 *supra*.

196. In *State v. Carl Osborne*, the defendant sought a new sentencing hearing on the ground that the trial court failed to state what definition of "duress" and "coercion" it was using at the mitigation hearing. The situation was described as follows:

Court has held that trial courts need not specify the definitions of mitigating circumstances they employ.[197] Obviously, careful and systematic appellate review, even simply for accuracy, is impossible under such circumstances.

From the foregoing, it is apparent that the Ohio Supreme Court makes no serious effort to determine whether the death sentence is appropriate for any particular offense and any particular offender. In no instance has the Ohio Supreme Court compared the facts of a given case with those of other relevant cases in which the death sentence was imposed to determine whether imposing death would be proportionate to the offense.[198]

By comparison, the Georgia Supreme Court, pursuant to the death penalty provisions upheld in *Gregg*, "is required to specify in its opinion the similar cases which it took into consideration" in determining whether the death sentence is disproportionate in any given case, and is authorized to consider other cases in which the death penalty was imposed and appealed cases in which life sentence, rather than death was imposed.[199] The Georgia Supreme Court, at the time *Gregg* was decided, had actually reversed death sentences for being disproportionate in a given case, including the death sentence Gregg himself received under the robbery counts of which he had also been convicted.[200] Similarly, the United States Supreme Court found in *Proffitt* that the Florida Supreme Court actively engages in proportionality review, as evidenced by the fact that it had reversed a considerable number of death sentences.[201] The Ohio Supreme Court has yet to reverse a death sentence for any reason,

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> At the mitigation hearing, the trial court made reference to the prosecution's closing argument. Therein, the assistant prosecutor apparently looked to a common law definition of duress and coercion. Because the trial court cited the assistant prosecutor's argument, appellant deems it probable that the trial court wrongly applied the common law definition. We disagree.
>
> . . . We have examined the relevant portions of the transcript and conclude that the reference to the assistant prosecutor's argument did not demonstrate reliance by the trial court upon an erroneous definition of duress and coercion.

50 Ohio St. 2d 211, 221, 364 N.E.2d 216, 223 (1977).

197. "The court does not hold that, as a general rule, a trial court's mitigation hearing discussion of duress and coercion must include an explicit definition of these terms." *Id.* In view of the fact that the statute relating to mitigation has only recently been authoritatively interpreted, and that the Ohio Supreme Court has changed its interpretation midstream, *see* text following note 162 *supra*, the likelihood that some incorrect definitions have been employed is substantial.

198. The Ohio Supreme Court does not consider either cases in which the death penalty has been imposed or cases in which the death penalty was available but not imposed, for the purposes of comparison. Contrast the practices of the Georgia and Florida Supreme Courts described in text accompanying notes 199-201 *infra*.

199. Gregg v. Georgia, 428 U.S. 153, 204 n.56 (1976).

200. *See* note 67 *supra*.

201. Proffitt v. Florida, 428 U.S. 242, 253, 259 (1976). "The Supreme Court of Florida, like that of Georgia, has not hesitated to vacate a death sentence when it has determined the sentence should not have been imposed. Indeed, it has vacated eight of the 21 death sentences that it has reviewed to date." *Id.* at 253.

let alone because the penalty of death was disproportionate to a given offense. Given the type of appellate review actually employed by the court, it is doubtful it ever will. To illustrate this point, one case in particular, *State v. Sandra Lockett*,[202] is noteworthy.

In that case, the defendant, Sandra Lockett, along with Nathan Dew, Al Parker, and James Lockett, devised a plan to rob a local pawn shop. The robbery was to be committed by Dew, Parker, and James Lockett, while Sandra Lockett waited outside in the getaway car. None of the four had a weapon, but Parker had four cartridges. A plan was therefore devised whereby Parker would ask the pawn shop owner to see a pistol that would accommodate the cartridges Parker had. Parker would then load the gun and use it to rob the owner of the pawn shop.

The robbery was carried out according to plan until Parker pointed the gun at the pawn shop owner. The owner unexpectedly grabbed for the gun, and it fired, killing him. The trio left the pawn shop and split up, with only Parker returning to the car in which Sandra Lockett was waiting. Later, he told Sandra what had transpired at the pawn shop.[203]

Parker, the triggerman, pleaded guilty to aggravated murder without specifications and thus received a life sentence.[204] Sandra was prosecuted for aggravated murder with specifications under Ohio's complicity statute.[205] She stood trial and was sentenced to death. The Ohio Supreme Court affirmed the conviction and death sentence despite Sandra's claim that the prosecution had failed to prove beyond a reasonable doubt either her or Parker's intent to kill. The court held that when

> the participants in the offense entered into a common design to commit the armed robbery by the use of force, violence and a deadly weapon and all the participants were aware that an inherently dangerous instrumentality was to be employed to accomplish the felonious purpose, [then,] a homicide occurring during the commission of the felony is a natural and probable consequence of the common plan which *must be presumed to have been intended* . . . .[206]

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202. 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *cert. granted*, 98 S. Ct. 261 (1977). For a perceptive treatment of the *Lockett* case, see Black, *The Death Penalty Now*, 51 TUL. L. REV. 429 (1977).

203. 49 Ohio St. 2d at 51-53, 358 N.E.2d at 1066-67.

204. State v. James Lockett, 49 Ohio St. 2d 71, 72, 358 N.E.2d 1062, 1078 (1976).

205. OHIO REV. CODE ANN. § 2923.03 (Page 1975) reads in relevant part:

> (A) No person, acting with the kind of culpability required for the commission of an offense, shall do any of the following:
>
> . . . .
>
> (2) Aid or abet another in committing the offense;
>
> . . . .
>
> (F) Whoever violates this section is guilty of complicity in the commission of an offense, and shall be prosecuted and punished as if he were a principal offender . . . .

206. State v. Sandra Lockett, 49 Ohio St. 2d at 48, 358 N.E.2d at 1065 (syllabus 3) (emphasis added).

To the dissent, the court established a "conclusive judicial presumption that one person had the specific intent to commit murder, because his confederate had such intent."[207] The dissenters argued that imposing the death sentence on an aider and abettor solely on the basis of "imputed guilt" was disproportionate to the offense and therefore unconstitutional.[208] The majority, however, refused to consider whether the punishment fit the crime, despite the fact that "[t]here was no evidence that the defendant or the other participants in the robbery had an actual purpose or intent to kill."[209] The court, finding no mitigation,[210] upheld the death sentence. Thus Sandra, the driver of the getaway car, was condemned to die while Parker, the triggerman, received a life sentence.[211]

In practice, then, the Ohio Supreme Court does not attempt to guarantee that similar results are reached in similar cases. Unlike the Florida and Georgia Supreme Courts, which undertake active appellate review,[212] the Ohio Supreme Court engages "in only cursory or rubber-stamp review"[213] of the decisions of trial judges in Ohio. When the difference is between life and death, the ultimate decision should not be left, unchecked, to the broad discretion and idiosyncrasies of sentencing authorities. The only way to insure the uniform application of the death penalty, while still having regard for the particular characteristics of the offense and the offender, mandated by *Furman*, *Gregg*, and *Woodson*, is to have careful scrutiny of death sentences on a statewide level, to check for accuracy[214] and proportionality. To the extent that similar results are not reached in similar cases,

207. *Id.* at 70, 358 N.E.2d at 1076 (Stern, J., dissenting).

208. *Id.* at 67, 68-71, 358 N.E.2d at 1076-77 (Stern, J., dissenting). *See* Woodson v. North Carolina, 428 U.S. 280 (1976), in which the defendant Woodson, like Sandra Lockett, was not the principal offender. The Court stated that since Woodson's death sentence was overturned, it was "unnecessary to reach the question whether imposition of the death penalty on petitioner Woodson would have been so disproportionate to the nature of his involvement in the capital offense as independently to violate the Eighth and Fourteenth Amendments." *Id.* at 305 n.40. The Court referred to *Gregg*, in which it had stated, "[W]hen a life has been taken *deliberately* by the offender, we cannot say that the punishment [of death] is invariably disproportionate to the crime." 428 U.S. 153, 187 (1976) (footnote omitted) (emphasis added).

209. State v. Sandra Lockett, 49 Ohio St. 2d at 67, 358 N.E.2d at 1075 (Stern, J., dissenting).

210. *Id.* at 67, 358 N.E.2d at 1075.

211. Compare State v. Farmer, 73 Ohio Op. 2d 341 (C.P. Montgomery Cty. 1975), in which the defendant was sentenced to life imprisonment rather than to death. The court focused on the fact that the defendant was not a principal offender:

> The Court, in exercising its discretion, is influenced considerably by the fact that the defendant's guilt was based upon the aider and abettor theory of law as retained in the conspiracy and complicity section of the new code. This defendant was not the principal offender except as to the aggravated robbery.

Id. at 345. The Ohio Supreme Court made no reference to this case.

212. *See* notes 199-201 *supra* and accompanying text.

213. Proffitt v. Florida, 428 U.S. 242, 259 (1976).

214. In this regard, see, *e.g.*, State v. Miller, 49 Ohio St. 198, 361 N.E.2d 419 (1977), in which a conviction and death sentence were affirmed despite the fact that the evidence against the defendant was meager.

the Ohio statutes permit the kind of arbitrariness in imposing the death penalty that was condemned in *Furman*. Because of the failure of the Supreme Court of Ohio to engage in adequate appellate review, there is serious doubt whether the Ohio statutes comply with the eighth amendment standards set out by the United States Supreme Court.[215]

3. *Conclusion*

The statutes upheld in *Gregg*, *Jurek*, and *Proffitt* mark the constitutionally acceptable middle ground between completely open-ended sentencing provisions on the one hand and mandatory sentencing provisions on the other. The Ohio death penalty statutes fit somewhere between this middle ground and mandatory sentencing. Although the Ohio Supreme Court found Ohio's death penalty scheme sufficiently close to the statutes upheld in *Gregg*, *Jurek*, and *Proffitt* to be constitutionally acceptable, it is clear that on its face and as applied Ohio's scheme does not operate like that of Georgia, Texas, or Florida.

The mitigating factors included in Ohio's capital sentencing statutes are fewer, narrower, and exclusive. Not included among them are important factors such as the age and record of the offender. The narrowness and exclusivity of the mitigating factors contained in Ohio's capital sentencing provisions highly restrict the sentencing authority's inquiry into the relevant characteristics of the offense and the offender, and thereby insure that virtually all defendants will be sentenced to death upon conviction of a capital crime. The Ohio Supreme Court uses a lax standard in reviewing the accuracy of fact finding in sentencing decisions, and makes no attempt to determine if the death sentence is just and appropriate in any particular case, thus fostering the kind of arbitrariness condemned in *Furman*. Certainly, Ohio's death penalty statutes are quite dissimilar from the statutes of Georgia, Florida, and Texas. What is more, they fall too far short of the middle ground created in *Gregg*, *Jurek*, and *Proffitt* to meet the eighth amendment standards articulated therein.

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215. At times, the court's treatment of the mitigation issue was extremely shallow. In *State v. Alberta Osborne*, for example, the defendant asserted that the Ohio death penalty statutes "are unconstitutional . . . in that the statutes do not require the Supreme Court to compare the sentences imposed upon similarly situated defendants." 49 Ohio St. 2d 135, 145-46, 359 N.E.2d 78, 86 (1976). The court responded:

> As to the first assertion of this proposition, the constitutionality of Ohio's general scheme was upheld in *Bayless* . . . and need not be repeated at length here. The Ohio statutes require the death sentence to be imposed upon all defendants convicted of aggravated murder coupled with at least one of seven aggravating circumstances, provided that none of the three mitigating factors exist. All similarly situated defendants are thus sentenced alike.

Id. at 146, 359 N.E.2d at 86.

III. Related Constitutional Problems Raised by the Ohio Death Penalty Statutes

In addition to the eighth amendment issues discussed previously, the Ohio death penalty statutes raise other constitutional issues. While the resolution of these issues does not involve an application of the standards of *Furman* or *Gregg*, their resolution is essential to a complete assessment of the constitutionality of the Ohio statutes. Specifically, the three issues to be discussed are: (1) whether it is constitutional to place on the defendant the burden of proving mitigation; (2) whether it is constitutional to require that a judge or a three-judge panel rather than a jury decide if mitigation is proved; and (3) whether the Ohio statutes place an unconstitutional burden on the right to a jury trial.

A. *Placing on the Defendant the Burden of Proving Mitigation*[216]

The Ohio death penalty scheme requires the defendant to bear the burden of proving mitigation.[217] In *State v. Sandra Lockett*,[218] *State v. Carl Osborne*,[219] and *State v. Downs*,[220] the Ohio Supreme Court considered this provision; in each case, the court upheld it against constitutional attack. The court in its analysis[221] addressed the two basic

216. For a discussion of this issue, see Brief of Amicus Curiae, *supra* note 102, at 52-60. For a general treatment of the problem of allocating the burden of proof in criminal cases, see Underwood, *The Thumb on the Scales of Justice: Burdens of Persuasion in Criminal Cases*, 86 YALE L.J. 1299 (1977).

217. OHIO REV. CODE ANN. § 2929.04(B) (Page 1975); State v. Downs, 51 Ohio St. 2d 47, 55, 364 N.E.2d 1140, 1146 (1977).

218. 49 Ohio St. 2d 48, 358 N.E.2d 1062 (1976), *cert. granted*, 98 S. Ct. 261 (1977).

219. 50 Ohio St. 2d 211, 364 N.E.2d 216 (1977).

220. 51 Ohio St. 2d 47, 364 N.E.2d 1140 (1977).

221. Of all the constitutional attacks made upon the Ohio death penalty scheme, this issue produced the most confusing responses from the Ohio Supreme Court. In *State v. Sandra Lockett*, for example, the court ignored the relevant United States Supreme Court cases on the issue. *See* notes 226-31 *infra* and accompanying text. In other cases, the court avoided the issue by apparently stating that no one bears the burden of proof at the mitigation hearing. State v. Carl Osborne, 50 Ohio St. 2d 211, 222, 364 N.E.2d 216, 223 (1977) ("Furthermore, the record clearly establishes that no evidentiary burden was placed upon appellant at his mitigation hearing, and we do not accept his argument that constitutional standards require that such a burden be affirmatively lodged with the state."); State v. Weind, 50 Ohio St. 2d 224, 226-27, 364 N.E.2d 224, 228 (1977) ("The court does not reach this issue since the record reveals that such burden was not placed on the accused. In fact, the trial judge, in response to a question by the defense concerning who had the burden of proof at the mitigation hearing, stated that: '[I]nasmuch as there is no burden, I will suggest that the state go first.' "); State v. Downs, 51 Ohio St. 2d 47, 53, 364 N.E.2d 1140, 1145 (1977) ("A careful examination of the record in both *Lockett* and *Woods* reveals that the trial court did not in either case '[require the] defendant convicted of aggravated murder to prove certain mitigating circumstances by a preponderance of the evidence in order to be sentenced to life imprisonment, rather than to death . . .'."). The court may have meant that the trial court in each case required the state to disprove mitigation, but that certainly was not the standard used on review.

Perhaps Justice Celebrezze's concurring opinion in *State v. Downs* contains one of the most cryptic statements:

> Although it is true that one already convicted of aggravated murder, with a specification thereto, must shoulder the risk of non-persuasion at the mitigation hearing, such

areas of concern raised by Ohio's statute: (1) the general due process limitations on the allocation of the burden of proof in criminal cases; and (2) the eighth amendment limitations on the allocation of the burden of proving mitigation in capital cases.

The first area of concern involves the limitations placed by the due process clause of the fourteenth amendment[222] upon a state's power to place on a criminal defendant the burden of proving a particular fact. The argument that Ohio's mitigation statute violates the due process clause by requiring a capital defendant to prove mitigation rests upon two decisions of the United States Supreme Court, *In re Winship*[223] and *Mullaney v. Wilbur*.[224] A recent United States Supreme Court decision, *Patterson v. New York*,[225] however, has substantially undermined the argument by drastically limiting, if not overruling, *Mullaney*. Consequently, the discussion of this issue will be abbreviated, sketching only its broad outlines.

Simply put, *Winship* held that the due process clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[226] The scope of the facts to be proved by the prosecution was seemingly expanded in *Mullaney*.[227] Although *Mullaney* could

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hearing is not an adversary proceeding, and neither the prosecution nor the convicted murderer bears any burden of proof with reference to mitigating circumstances.

51 Ohio St. 2d at 67, 364 N.E.2d at 1152 (Celebrezze, J., concurring).

222. U.S. CONST. amend. XIV, § 2.

223. 397 U.S. 358 (1970).

224. 421 U.S. 684 (1975).

225. 97 S.Ct. 2319 (1977).

226. 397 U.S. at 364. The Court specifically held that, in a juvenile proceeding, the state must prove juvenile delinquency beyond a reasonable doubt, rather than by a preponderance of the evidence as was the practice prior to *Winship*. The Court felt that the stigma and possible loss of liberty attendant upon an adjudication of delinquency required the use of the same standard of proof as is used in criminal cases.

227. *Mullaney* involved a procedure of the State of Maine that required a defendant to prove, by a preponderance of the evidence, that he was acting in the heat of passion in order to reduce a charge of murder to manslaughter. Maine's murder statute defined murder as an unlawful killing "with malice aforethought, either express or implied," ME. REV. STAT. ANN., tit. 17, § 2651 (1964), while Maine's manslaughter statute defined manslaughter as an unlawful killing "in the heat of passion, on sudden provocation, without express or implied malice aforethought," *id.* § 2551. Under both statutes the killing had to be intentional and unlawful (*i.e.*, without justification or excuse); what distinguished murder from manslaughter was the element of malice aforethought. But, under Maine law

> if the prosecution established that the homicide was both intentional and unlawful, malice aforethought was to be conclusively implied unless the defendant proved by a fair preponderance of the evidence that he acted in the heat of passion on sudden provocation. The [trial] court [in Mullaney] emphasized that "malice aforethought and heat of passion on sudden provocation are two inconsistent things," . . . thus, by proving the latter the defendant would negate the former and reduce the homicide from murder to manslaughter.

Mullaney v. Wilbur, 421 U.S. 684, 686-87 (1975) (footnote omitted).

When the defendant Wilbur challenged this procedure under *Winship*—claiming that the state, by presuming malice aforethought, was relieved of the burden of proving an element of murder—the highest court of Maine decided that no essential element of guilt was presumed. It concluded that under Maine law, murder and manslaughter were not separate crimes; rather, there was but a single generic offense of felonious homicide, with murder and man-

have been decided on a narrower ground,[228] the broad language used by the Court lent itself to the interpretation that even if a particular fact were not technically related to guilt or innocence of a particular crime, but rather to the degree of punishment, the state would nevertheless be required to disprove that fact beyond a reasonable doubt if significantly different consequences in terms of punishment or moral culpability depended upon the fact's existence or nonexistence.[229]

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slaughter representing subcategories for the purposes of punishment only. The feature distinguishing murder from manslaughter—killing with malice aforethought rather than in the heat of passion—was not seen, then, as an element of guilt, but rather as a reductive factor for the purposes of punishment. *Id.* at 687-88.

228. The United States Supreme Court stated that it was bound by the Maine Supreme Court's interpretation of Maine law. Mullaney v. Wilbur, 421 U.S. at 690-91. But the Court need not have accepted that interpretation if it suspected that the Supreme Court of Maine had tampered with the statutory definition of murder in order to circumvent *Winship*'s holding. The Court could have rejected the Maine Supreme Court's ruling by relying on the doctrine of Indiana ex rel. Anderson v. Brand, 303 U.S. 95 (1938), which held that the United States Supreme Court may refuse to accept as binding, state court interpretations of state law that lack a fair and substantial basis, when the resolution of the issue of state law removes a premise for a federal claim from the case. The standard is articulated in Demorest v. City Bank Co., 321 U.S. 36, 42 (1944):

> Even though the constitutional protection invoked be denied on nonfederal grounds, it is the province of this Court to inquire whether the decision of the state court rests upon a fair or substantial basis. If unsubstantial, constitutional obligations may not be thus evaded. But if there is no evasion of the constitutional issue, and the nonfederal ground of decision has fair support, this Court will not inquire whether the rule applied by the state court is right or wrong, or substitute its own view of what should be deemed the better rule, for that of the state court.

Indeed, both the federal district court and the court of appeals that heard the defendant Wilbur's habeas corpus action rejected the interpretation of state law given by the Maine Supreme Court. Wilbur v. Mullaney, 473 F.2d 943, 947 (1st Cir. 1973), *vacated*, 414 U.S. 1139 (1974); Wilbur v. Robbins, 349 F. Supp. 149, 152-53 (D. Maine 1972), *aff'd sub nom.* Wilbur v. Mullaney, 473 F.2d 943 (1st Cir. 1973), *vacated*, 414 U.S. 1139 (1974).

Thus, the Court could have found, contrary to the holding of the Maine Supreme Court, that murder was a separate offense of which malice aforethought was an element, and that Maine law, by presuming malice aforethought unless the defendant negated it by proving provocation, violated *Winship* by not requiring the state to prove beyond a reasonable doubt every element of the crime. The Court apparently felt it unnecessary to redetermine the law of the State of Maine since it was willing to reach the due process issue in any event. *See* Mullaney v. Wilbur, 421 U.S. at 691 n.11.

229. In *Mullaney*, the Court focused on the fact "that the consequences resulting from a verdict of murder, as compared with a verdict of manslaughter, differ significantly." 421 U.S. at 698. (Punishment for manslaughter under Maine law ranged from a fine of 1000 dollars to imprisonment for twenty years. Punishment for murder was life imprisonment. *Id.* at 698, 700.)

The Court rejected the notion that because proof of manslaughter would not wholly exonerate the defendant, it was permissible to require the defendant to bear the burden of proof on that issue. The Court stated:

> This analysis fails to recognize that the criminal law of Maine, like that of other jurisdictions, is concerned not only with guilt or innocence in the abstract but also with the degree of criminal culpability. Maine has chosen to distinguish those who kill in the heat of passion from those who kill in the absence of this factor. Because the former are less "blameworth[y]," . . . they are subject to substantially less severe penalties. By drawing this distinction, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, Maine denigrates the interest found critical in *Winship*.

Id. at 697-98. The Court also found that the defendant's interest, and society's interest, in a reliable verdict outweighed the state's interest in avoiding the difficulties of negating heat of passion. Because of the disparity of consequences depending upon whether the defendant could or could not prove heat of passion, the Supreme Court felt it fundamentally unfair to

Thus read, *Mullaney* would appear to apply to the Ohio death penalty scheme since the existence or nonexistence of mitigation, though not an element of guilt,[230] nevertheless spells the difference between life and death—a drastic difference in consequences. The Ohio Supreme Court, however, in *State v. Downs*, handed down before *Patterson* was decided, rejected the argument that Ohio's death penalty scheme runs afoul of *Mullaney*.[231]

Of greater significance than the Ohio Supreme Court's holding in *Downs*, however, is *Patterson v. New York*. In *Patterson*, the United States Supreme Court held that, within certain broad limits, the only facts that a state is required to prove beyond a reasonable doubt are those elements specifically included in the statutory definition of a particular crime.[232] The defendant may be required to

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permit a defendant to be punished for murder when it was as likely as not that he should only be punished for manslaughter. *Id.* at 699-702.

230. The Ohio Supreme Court rejected the argument that lack of mitigation is an element of guilt of aggravated murder. State v. Downs, 51 Ohio St. 2d 47, 57, 59, 364 N.E.2d 1140, 1147-48 (1977). Stated more fully the argument is that Ohio's law of homicide includes murder, aggravated murder without specifications—punishable by life imprisonment, aggravated murder with specifications and mitigation—punishable by life imprisonment, and aggravated murder with specifications and no mitigation—punishable by death. Viewed in this light, the lack of mitigation would be an "essential element of guilt" of the crime of aggravated murder with specifications and no mitigation, and thus would have to be proved by the state beyond a reasonable doubt.

231. 51 Ohio St. 2d 47, 57, 364 N.E.2d 1140, 1147 (1977): "Although this court recognizes that some of the principles in *Mullaney* might be applied to the provisions of R. C. 2929.04(B), we do not find it persuasive authority for the defendant's position." The court explained:

> In *Mullaney*, the court's analysis was based upon an historical examination of the concepts of homicide and provocation. . . . A similar analysis of the death penalty and a consideration of those factors relevant to mitigation show a radically different genesis and development. . . . In light of the historical dissimilarities between the issues of provocation in homicides and of mitigation in death sentences, the constitutional requirements for judicial resolution of those issues differ.

Id. at 57-58, 364 N.E.2d at 1147. Apparently, the court believed that since historically the lack of mitigating circumstances has not been the criterion for distinguishing those defendants who suffer the death penalty from those who do not, *Mullaney* would have no application to allocating the burden of proving mitigation in capital cases.

When the court first considered the burden of proof issue in *State v. Sandra Lockett*, however, it totally ignored both *Winship* and *Mullaney*. The court rejected the constitutional attack out of hand without citing any authority, claiming that, since the mitigating circumstances relate to the extent of punishment and not to guilt or innocence, the state need not disprove mitigation. State v. Sandra Lockett, 49 Ohio St. 2d 48, 65-66, 358 N.E.2d 1062, 1074 (1976), *cert. granted*, 98 S. Ct. 261 (1977).

232. In *Patterson*, the constitutionality of New York's second degree murder statute was called into question. Under that statute, second degree murder is defined as intentionally causing the death of another person. N.Y. PENAL LAW § 125.25 (McKinney 1967). Malice aforethought is not explicitly a statutory element of the crime. The statute, however, provides for an affirmative defense that the defendant acted under extreme emotional disturbance. *Id.* This defense is characterized in the manslaughter statute as a mitigating circumstance reducing murder to manslaughter. *Id.* § 125.20. The defendant bears the burden of proving this defense by a preponderance of the evidence. Patterson v. New York, 97 S. Ct. 2319, 2322 (1977). The Supreme Court stated:

> To recognize at all a mitigating circumstance does not require the State to prove its nonexistence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.
>
> We thus decline to adopt as a constitutional imperative, operative country-wide,

prove other facts that could reduce the charge or mitigate punishment, regardless of the differences in consequences that would result if those facts existed.[233] Thus, although not expressly overruling *Mullaney*, *Patterson* would seem to virtually limit it to its facts.[234] Therefore it is likely that an argument based solely on a broad reading of *Mullaney* would not be successful.

The potential lack of success of an argument based on *Mullaney*, however, does not necessarily imply that the due process principles governing the allocation of the burden of proof in criminal cases are totally without application to the Ohio mitigation statute. In *In re Winship*, the due process requirement that a state prove guilt beyond a reasonable doubt was based on the severe consequences that may attend upon conviction of a crime and the resulting need for a high degree of reliability in fact finding. Justice Harlan, in his concurring opinion in *Winship*, pointed out that

> a standard of proof represents an attempt to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication. . . . [T]he requirement of proof beyond a reasonable doubt in a criminal case [is] bottomed on a fundamental value determination of our

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> that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. . . . We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. . . .
>
> This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously constitutional limits beyond which the States may not go in this regard. "[I]t is not within the province of a legislature to declare an individual guilty or presumptively guilty of a crime." . . . The legislature cannot "validly command that the finding of an indictment, or mere proof of the identity of the accused, should create a presumption of the existence of all the facts essential to guilt."

Id. at 2326-27.

233. *Cf.* Rivera v. Delaware, 97 S. Ct. 226 (1976) (appeal attacking constitutionality of state scheme requiring criminal defendant to prove insanity by a preponderance of the evidence dismissed for want of substantial federal question); Leland v. Oregon, 343 U.S. 790 (1952) (state may require criminal defendant to prove insanity beyond a reasonable doubt).

234. *Patterson* certainly overrules the rationale of *Mullaney* and would seem to read *Mullaney* as if it had been decided on the narrow ground described in note 228 *supra*. *See* the dissenting opinion of Justice Powell, the author of *Mullaney*, in *Patterson*: "The Court manages to run a constitutional boundary line through the barely visible space that separates Maine's law from New York's. It does so on the basis of distinctions in language that are formalistic rather than substantive. . . . [Its] explanation of the *Mullaney* holding bears little relationship to the basic rationale of that decision." 97 S. Ct. 2319, 2333 (1977) (Powell, J., dissenting). The defendant in *Patterson* argued that "New York's murder statute is functionally equivalent to the one struck down in *Mullaney*." *Id.* at 2322. The Supreme Court, however, distinguished *Mullaney* by stating that under Maine law "[p]remeditation was not within the definition of murder; but malice, in the sense of the absence of provocation, was part of the definition of that crime." *Id.* at 2330. But, as the Maine Supreme Court interpreted Maine law, murder and manslaughter were not separate crimes in Maine and the absence of provocation was not an element of the crime of felonious homicide—a holding that the Supreme Court purportedly accepted.

society that it is far worse to convict an innocent man than to let a guilty man go free.[235]

While it is true that *Winship* was concerned specifically with how weighty the burden of proof, already allocated to the prosecution, should be,[236] rather than upon whom that burden should be placed in the first instance, the reliability rationale underlying *Winship* has particular force in the context of capital sentencing. Reliability of fact finding is crucial at the mitigation stage of a capital case, for upon that fact finding the life of the defendant depends. As the Supreme Court of the United States stated in *Woodson v. North Carolina*:

> [T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[237]

The eighth amendment principles governing the role of mitigation in capital cases also disfavor requiring the defendant to establish mitigation. A consideration of mitigating circumstances, as well as aggravating circumstances, has been held by the United States Supreme Court to be a constitutionally indispensable part of inflicting the penalty of death.[238] Given the crucial nature of the mitigation inquiry, it would seem that requiring the state to disprove mitigation would maximize the ability of sentencing authorities to consider all relevant evidence in mitigation of the sentence of death. Under Ohio's statute, however, the sentencer's assessment of mitigation is restricted to the extent that mitigating evidence can play no role in the sentencing decision unless it meets the preponderance standard.[239] Under Ohio's statute, if it is equally likely that mitigation has been proved as that it has not been proved, the defendant will die. Consequently Ohio's allocation of the burden of proving mitigation can be said to denigrate the constitutionally critical mitigation inquiry.

The Ohio Supreme Court's treatment of this eighth amendment issue is sparse. In response to the argument that Ohio's statute violates *Winship* and *Mullaney*, the court said: "We find no authority in *Mullaney* or in any of the recently promulgated death cases decided by the United States Supreme Court to support the proposition that the lack of mitigating factors is an additional, constitutionally mandated element of a capital offense."[240] Presumably, the court meant

235. 397 U.S. 358, 370, 372 (1970) (Harlan, J., concurring).

236. *See* note 226 *supra*.

237. 428 U.S. 280, 305 (1976).

238. *See* notes 100-01 *supra* and accompanying text.

239. *See* text preceding note 182 *supra*.

240. State v. Downs, 51 Ohio St. 2d 47, 59, 364 N.E.2d 1140, 1148 (1977).

that the state need not prove lack of mitigation in order to convict of a capital crime. Yet the court never mentioned the crucial point: that a lack of mitigation is a constitutionally mandated prerequisite to imposing the death penalty. The only argument the court offered in support of Ohio's statute was that the Supreme Court of the United States upheld Florida's capital sentencing provision, which arguably requires the defendant to prove mitigation by a preponderance of the evidence. The Florida statute requires the jury to consider "[w]hether sufficient mitigating circumstances exist . . . which outweigh the aggravating circumstances found to exist."[241] The fact that this provision, which seems to require that the defendant prove mitigation by a preponderance of the evidence, was upheld in *Proffitt v. Florida*, led the Ohio Supreme Court to conclude that placing the burden of proving mitigation on the defendant is not unconstitutional.[242]

In response, however, two points must be made. First, the burden of proof issue was neither expressly raised nor directly faced or decided by the Court in *Proffitt*. Thus, the *Proffitt* decision in this context may not be a reliable indicator of the Court's position. Second, the Florida statute upheld in *Proffitt* is considerably different from Ohio's mitigation statute.[243] The Florida statute permits a broad inquiry into mitigating circumstances and authorizes a consideration of many mitigating factors, including the age and record of the defendant. As the burden of proof is apparently allocated, the mitigating factors may have a cumulative effect. Thus, requiring that the mitigating factors outweigh aggravating factors may not so restrict the mitigation inquiry as to render the statute violative of the eighth amendment.

Ohio's statute, on the other hand, authorizes a much narrower inquiry into mitigating circumstances; only three factors are relevant and they cannot have a cumulative effect. Assuming arguendo that the mitigating factors in the Ohio statute are not unconstitutionally narrow, nevertheless requiring the defendant to prove mitigation by a preponderance may restrict the already narrow mitigation inquiry to a degree intolerable under the eighth amendment. For the more restrictive the inquiry into mitigating circumstances, the more similar to a mandatory death penalty the Ohio scheme becomes. For this reason, and because of the special need for utmost reliability of fact finding in capital sentencing, the failure of the Ohio statute to require the prosecution to disprove mitigation may well render the statute unconstitutional.

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241. FLA. STAT. ANN. § 921.141(2)(b) (West Supp. 1976-77).

242. State v. Downs, 51 Ohio St. 2d 47, 59-60, 364 N.E.2d 1140, 1148 (1977).

243. *See* note 176 *supra* and accompanying text.

B. *Jury Sentencing*

Another problem raised by the Ohio death penalty statutes is their failure to provide for jury sentencing.[244] In *State v. Weind*,[245] the Ohio Supreme Court rejected the contention that the failure to provide for jury sentencing violates the sixth and fourteenth amendments as interpreted by the United States Supreme Court in *Witherspoon v. Illinois*.[246] *Witherspoon* involved a constitutional attack on an Illinois statute governing the process by which jurors were selected in capital cases. The statute provided: "In trials for murder it shall be a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same."[247] Under this statute any venireman expressing an aversion to the death penalty could be challenged for cause regardless of whether his views about the death penalty would impair his ability to render a fair verdict.[248]

In striking down this jury-selection technique, the Court stressed the important function a jury performs in a capital case by bringing to bear on the sentencing decision contemporary community values, a function that the Illinois procedure impaired.

> But a jury from which all [individuals who oppose the death penalty] have been excluded cannot perform the task demanded of it. Guided by neither rule nor standard, "free to select or reject as it [sees] fit," a jury that must choose between life imprisonment and capital punishment can do little more—and must do nothing less—than express the conscience of the community on the ultimate question of life or death.[249]

In a footnote the Court added:

> And one of the most important functions any jury can perform in making such a selection [*i.e.*, between the death penalty and life imprisonment] is to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment

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244. If the defendant is tried by a jury, his sentence is imposed by the trial judge. If the defendant is tried by a three-judge panel, that panel imposes sentence. OHIO REV. CODE ANN. § 2929.03(C) (Page 1975).

245. 50 Ohio St. 2d 224, 364 N.E. 2d 224 (1976).

246. 391 U.S. 510 (1968).

247. ILL. REV. STAT., ch. 38, § 743 (1959).

248. The Court noted that its inquiry was a limited one:

> The issue before us is a narrow one. It does not involve the right of the prosecution to challenge for cause those prospective jurors who state that their reservations about capital punishment would prevent them from making an impartial decision as to the defendant's guilt. Nor does it involve the State's assertion of a right to exclude from the jury in a capital case those who say that they could never vote to impose the death penalty or that they would refuse even to consider its imposition in the case before them.

391 U.S. at 513-14 (footnote omitted).

249. *Id.* at 519-20 (footnotes omitted). *Witherspoon* was decided before *Furman*, when juries could be given unbridled discretion to determine sentence in capital cases.

> could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."[250]

The Court held that the Illinois procedure, by ensuring that only one view about the death penalty would be represented on the jury, denied "that impartiality to which the petitioner [Witherspoon] was entitled under the Sixth and Fourteenth Amendments."[251]

The attack on the Ohio death penalty statutes for their failure to provide jury sentencing uses as a point of departure the discussion in *Witherspoon* of the jury's role in imposing sentence in capital cases. The argument urges that the jury—"a significant and reliable objective index of contemporary values"[252]—plays an essential part in the sentencing decision in capital cases because it "maintain[s] a link between contemporary community values and the penal system."[253] By allowing the jury to take part in the sentencing decision,[254] the jury will bring to bear its moral sensibilities in deciding whether a given defendant deserves to die, and thus will reflect "evolving standards of decency" in the determination of punishment.

In *State v. Weind*, the Supreme Court of Ohio rejected the contention that "the Ohio death penalty statutes are unconstitutional in that one accused of a capital offense is denied the right to a judgment of his peers as to the existence of mitigating circumstances and the appropriateness of the death penalty."[255] The court stated: "In *Proffitt v. Florida* . . . the Supreme Court specifically upheld the Florida sentencing statute in which the jury renders an advisory verdict while the trial judge makes the actual determination of sentence."[256] The court then quoted a passage in *Proffitt* which, in its opinion, was dispositive of the issue:

> This Court has pointed out that jury sentencing in a capital case can perform an important societal function, *Witherspoon v. Illinois* . . . , but it has never suggested that jury sentencing is constitutionally required. And it would appear that judicial sentencing should lead, if anything, to even greater consistency in the imposition at the trial court level of capital punishment, since a trial judge is more experienced in sentencing than a jury, and therefore is better able to impose sentences similar to those imposed in analogous cases.[257]

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250. *Id.* at 519 n.15.

251. *Id.* at 518.

252. Gregg v. Georgia, 428 U.S. 153, 181 (1976).

253. Witherspoon v. Illinois, 391 U.S. 510, 519 n.15 (1968).

254. The Court in *Witherspoon* indicated its decision applied regardless of whether the jury's recommendation of sentence was binding on the trial judge. 391 U.S. at 518 n.12.

255. 50 Ohio St. 2d 224, 226, 364 N.E.2d 224, 227 (1977).

256. *Id.*

257. Proffitt v. Florida, 428 U.S. 242, 252 (1976) (footnote omitted).

Proffitt, however, may not be dispositive of the issue. First, the jury sentencing issue was not a central one in *Proffitt*, and indeed was not briefed by the parties. Second, the Florida sentencing procedure does in fact permit considerable jury input in the sentencing decision, while, under the Ohio statutes, the jury has no input at all.

The Florida procedure requires the jury in the first instance to recommend a sentence of life imprisonment or death based on its weighing of aggravating and mitigating circumstances.[258] The mitigating circumstances included in Florida's statute in some instances require consideration of degree,[259] and the ultimate decision whether mitigating factors outweigh aggravating factors is also a matter of judgment. In making these determinations, the jury of necessity reflects the community conscience with regard to the death penalty and its appropriateness in any given case. While the jury's decision is only advisory and the trial judge actually decides what the sentence will be,[260] the Florida Supreme Court has stated that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ."[261] Thus, under the Florida statute, the jury plays a significant role in bringing the community's moral sensibilities to bear on the sentencing decision.

The Supreme Court, on a direct and complete examination of the jury sentencing issue, may be unwilling to uphold a sentencing scheme that permits no jury input at all. The Court's stress in *Gregg* and *Coker* on looking to community values to determine whether the death penalty is a cruel and unusual punishment for a given crime[262] may provide another argument for rejecting Ohio's scheme, which excludes the jury from the sentencing decision altogether. Thus, despite a strong indication to the contrary in *Proffitt*, the Supreme Court may find the Ohio statutes unconstitutional for their failure to provide for some input by the jury in the sentencing decision.[263]

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258. *See* note 241 *supra* and accompanying text.

259. The mitigating factors included in Florida's statute are listed in note 95 *supra*. Factors calling for consideration of degree, include, for example, "[t]he age of the defendant."

260. Proffitt v. Florida, 428 U.S. 242, 249 (1976).

261. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). *Accord*, Thompson v. State, 328 So. 2d 1, 5 (Fla. 1975).

262. Coker v. Georgia, 97 S. Ct. 2861, 2866-68 (1977); Gregg v. Georgia, 428 U.S. 153, 179-83 (1976).

263. *But see* Richmond v. Arizona, 21 CRIM. L. REP. 4129 (BNA 1977), in which Justice Rehnquist, in his capacity as Circuit Justice for the Ninth Circuit, denied a stay of execution and suspension of an order denying certiorari: "Appellant argues that the Arizona statute violates the Sixth, Eighth and Fourteenth Amendments in failing to provide for jury input into the determination of whether aggravating and mitigating circumstances do or do not exist. Such jury input would not appear to be required under this Court's decision in Proffitt."

C. *Burden on the Right to a Jury Trial*

Yet another issue raised by the Ohio death penalty statutes is whether they place an unconstitutional burden on the right to trial by jury. The argument that they do stems from the fact that the Ohio procedure requires sentence to be set by the trial judge alone if the defendant is tried by a jury, but by a three-judge panel if the defendant waives his right to a jury trial.[264] If the decision is made by a three-judge panel, all three judges must concur upon a lack of mitigation before the death sentence can be imposed.[265] Thus, under the Ohio statutes, the defendant who chooses to be tried by a three-judge panel will have three chances to succeed in proving his claim of mitigation, but a defendant tried by a jury will have only one chance.

The argument just made finds further support in the United States Supreme Court decision in *United States v. Jackson*.[266] *Jackson* involved a constitutional attack on the Federal Kidnapping Act,[267] under which death was an available punishment, but only a jury could impose the death sentence. The statute contained no procedure for imposing the death sentence on one who waived his right to a jury trial or upon one who pleaded guilty. The statutory scheme was held to be unconstitutional because it "makes the 'risk of death' the price for asserting the right to jury trial, and thereby 'impairs . . . free exercise' of a constitutional right."[268]

On its face, *Jackson* might appear distinguishable because in *Jackson* the death sentence clearly was available only when a jury tried the case; the death sentence was never available when a judge tried the case. Under the Ohio scheme the death sentence is available whether or not a jury tries the case. The impairment of the right to jury trial arises because a defendant has a lesser chance to prevail in his attempt to establish mitigation of sentence when he exercises his right to a jury trial than when he waives that right.

Although it is true that the issue in *Jackson* involved an absolute imposition or removal of a burden—rather than the degree of burden being imposed—on the exercise of the right to a jury trial, much of the Court's opinion suggests that the absoluteness of the burden was not the determinative factor. Indeed, the government had argued that the Kidnapping Act did permit the trial judge to impose the death sentence, but that, in order to do so, he was required to commence a special hearing for that purpose. The Court responded:

> Even if the Government's statutory position were correct, the fact

264. OHIO REV. CODE ANN. § 2929.03(C) (Page 1975).

265. *Id.* § 2929.03(E).

266. 390 U.S. 570 (1968).

267. 18 U.S.C. § 1201(a) (1964).

268. 390 U.S. at 571.

> would remain that the defendant convicted on a guilty plea or by a judge completely escapes the threat of capital punishment unless the trial judge makes an affirmative decision to commence a penalty hearing and to impanel a special jury for that purpose, whereas the defendant convicted by a jury automatically incurs a risk that the same jury will recommend the death penalty and that the judge will accept its recommendation.[269]

What the Court seemed to focus on was whether there was any need for the burden imposed. The Court asserted that "[t]he question is not whether the chilling effect is 'incidental' rather than intentional; the question is whether that effect is unnecessary and therefore excessive."[270] The Court pointed out that there were alternative sentencing schemes available that would effectuate Congress' purposes,[271] but not impose a burden on the exercise of the right to jury trial. The Court concluded:

> Given the availability of this and other alternatives, it is clear that the selective death penalty provision of the Federal Kidnapping Act cannot be justified by its ostensible purpose. Whatever the power of Congress to impose a death penalty for violation of the Federal Kidnapping Act, Congress cannot impose such a penalty in a manner that needlessly penalizes the assertion of a constitutional right.[272]

Thus, under a careful reading of *Jackson*, the issue would not be whether the Ohio statute imposes an absolute burden on the exercise of the right to a jury trial that is not imposed when that right is waived, but rather whether the burden imposed—though different only in degree from that otherwise imposed—is a justifiable one.[273]

The Ohio Supreme Court faced this issue in *State v. Bell*.[274] The court recognized that the Ohio statute differed from the statute considered in *Jackson*: "[W]e are confronted with only the arguably greater possibility of the avoidance of the death penalty by the require-

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269. *Id.* at 573 n.6.

270. *Id.* at 582.

271. The Government argued that the statute, by giving the jury discretion to grant mercy, avoided "the more drastic alternative of mandatory capital punishment in every case. In this sense, the selective death penalty procedure established by the Federal Kidnapping Act may be viewed as ameliorating the severity of the more extreme punishment that Congress might have wished to provide." *Id.* at 581-82.

272. *Id.* at 582-83.

273. *See* Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973) ("The Court [in *Jackson*] found that the interest of the Government in having the jury retain the power to render the death penalty could be realized without this imposition on the rights of the accused. Therefore, the sentencing structure of the statute was struck down because it 'unnecessarily' and 'needlessly chill[ed] the exercise of basic constitutional rights.' "); Oregon v. Mitchell, 400 U.S. 112, 238 (1970) (Brennan, J., dissenting and concurring) ("Of course, governmental action that has the incidental effect of burdening the exercise of a constitutional right is not *ipso facto* unconstitutional. But in such a case, governmental action may withstand constitutional scrutiny only upon a clear showing that the burden is necessary to protect a compelling and substantial governmental interest. . . . *United States v. Jackson* . . . .").

274. 48 Ohio St. 2d 270, 358 N.E.2d 556 (1976), *cert. granted*, 97 S. Ct. 2971 (1977). The same issue was addressed in State v. Weind, 50 Ohio St. 2d 224, 229, 364 N.E.2d 224, 229, as well as a related *Jackson* attack, not addressed in this Comment. *Id.* at 227, 364 N.E.2d at 228.

ment of unanimity within the panel, and not with its absolute avoidance as in *Jackson.*"[275] The court made three arguments in defense of the statute. The first argument was as follows:

> Although appellant asserts that there is a greater possibility of convincing one of three judges on a panel of a mitigating factor than one judge alone, by the same logic, there is also a greater possibility of convincing one or more of 12 jurors of the absence of evidence of guilt beyond a reasonable doubt than so convincing one of three judges. If the first consideration inclines against a jury trial, then the latter inclines toward one.[276]

Of course, the exact argument could have been made about the Kidnapping Act in *Jackson.* This sort of argument, if accepted, would seem to validate any burden on the exercise of the right to jury trial so long as the defendant could escape the burden by not being convicted in the first place.

The second argument made in support of the statute was that the statute serves only to give the defendant a choice. In the court's opinion, there was:

> nothing unreasonable or coercive in the statute: there are pros and cons with respect to each alternative. If a defendant feels uncomfortable with a jury as the trier of fact at trial and the trial judge as the trier of fact at the mitigation hearing, then he may elect a three-judge panel as the trier of fact for all the proceedings.[277]

It is difficult to see how this argument answers the contention that Ohio's statute imposes a burden on choosing a jury trial. It is true that the United States Supreme Court has said that "*Jackson* did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of constitutional rights."[278] But the Court has never held that a burden on a constitutional right is permissible *merely* because a choice is given to the defendant, along with the burden. The issue is still "whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved."[279]

The third argument made by the Ohio Supreme Court was that statistics showed that "this statutory scheme does not coerce or impel a defendant to waive jury trial."[280] At least the court was presented with no contrary evidence. But the United States Supreme Court in *Jackson* stated that "the evil in the . . . statute is not that it necessarily

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275. 48 Ohio St. 2d at 275, 358 N.E.2d at 561.
276. *Id.* at 275-76, 358 N.E.2d at 561.
277. *Id.* at 276, 358 N.E.2d at 561.
278. Chaffin v. Stynchcombe, 412 U.S. 17, 30 (1973).
279. *Id.*
280. State v. Bell, 48 Ohio St. 2d at 276, 358 N.E.2d at 562.

coerces guilty pleas and jury waivers but simply that it needlessly *encourages* them."[281] While statistical evidence has been required in some contexts,[282] *Jackson* would not seem to require such proof. In *Jackson*, the "coercion" to waive the right to jury trial was felt to be "the inevitable effect" of the sentencing scheme.[283]

To support its holding, the Ohio Supreme Court might have found that the "incidental" burden on the right to jury trial was justified by some substantial governmental interest.[284] Or it might have noted that *Jackson* has not been consistently or widely applied, and tried to liken the Ohio procedure to some other procedures upheld by the United States Supreme Court against a *Jackson* attack.[285] But the court undertook no such analysis, contenting itself instead with a shallow and unpersuasive defense of the statute.

In the final analysis, what should matter in deciding this issue is the nature of the competing interests. When life or death is the determination to be made, procedural regularity and utmost fairness should be of ultimate concern. The court offered no persuasive reason to justify requiring some defendants—those who choose a jury trial —to be sentenced by one individual, but other defendants—those who

281. 390 U.S. 570, 583 (1968).

282. *See, e.g.*, North Carolina v. Pearce, 395 U.S. 711 (1969) (defendant may be given heavier sentence on retrial than at original trial, but heavier sentence cannot be imposed out of vindictiveness toward the defendant for having successfully attacked his first conviction on constitutional grounds. Vindictiveness may be shown by statistical evidence.)

283. 390 U.S. at 581.

284. The court gave no rationale for the sentencing scheme. When the death penalty scheme was first being considered by the Ohio Senate, the bill provided that a panel of three judges would set sentence for every defendant, even if he were tried by a jury. Am. Sub. H.B. No. 511 § 2901.94(A), 109th Gen'l Assembly (1971-72). That provision was changed in conference to its present form. 134 OHIO HOUSE JOURNAL 2467 (1972).

Aside from administrative convenience, another reason for the change was suggested by Lehman & Norris, *supra* note 73, at 22: "The theory that brought about this result was recognition of the fact that the two additional judges would not have the benefit of the evidence given at trial, and the hearing on the issue of mitigation could result in a retrial of the case in its entirety." This, to some extent, is a variation on the administrative convenience rationale.

285. *See, e.g.*, Fuller v. Oregon, 417 U.S. 40, 54 (1974), in which *Jackson* was characterized as involving a statute which " 'had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them.' " The quote the *Fuller* Court used is taken out of context from the *Jackson* opinion. The Court in *Jackson* went on to say that the Federal Kidnapping Act was *not* such a statute, since the sentencing scheme embodied in it ostensibly served another governmental objective.

For cases in which a *Jackson* argument was rejected, *see, e.g.*, Fuller v. Oregon, 417 U.S. 40 (1974) (state recoupment statute requiring defendant who was indigent at the time of trial but who later became financially able to pay, to reimburse the state for attorney's fees of appointed counsel held not to infringe defendant's right to counsel); Chaffin v. Stynchcombe, 412 U.S. 17 (1973) (heavier sentence after retrial than received at first trial does not burden the right to challenge the first conviction); North Carolina v. Alford, 400 U.S. 25 (1970) (upheld sentence imposed under state statute which provided that jury could impose death, but highest penalty available upon plea of guilty was life imprisonment); Brady v. United States, 397 U.S. 742 (1970) (guilty plea under same statute as that in *Jackson* entered nine years before *Jackson* was decided held not invalid since not coerced by fear of death); Parker v. North Carolina, 397 U.S. 790 (1970) (state statute allowing heavier penalty to be given by a jury after conviction than upon a plea of guilty held not to vitiate the defendant's plea of guilty even though imposition of death by a jury under such a scheme may have been unconstitutional).

waive their right to a jury trial—to be sentenced by three individuals. If the state has no substantial interest in distinguishing in this manner between these two classes of defendants, it is difficult to see what justification there can be for gratuitously imposing a burden—however slight—on those who exercise their constitutional right to a jury trial.[286]

CONCLUSION

When the Supreme Court of the United States decides *State v. Bell* and *State v. Sandra Lockett*, it will be faced with a host of constitutional questions raised by the statutes under which Bell and Lockett were sentenced to death.[287] The answers to these questions must be derived from a careful analysis of the legal principles involved and a deep appreciation of the momentous decision to be made. The Court will receive little guidance from the pronouncements of the Ohio Supreme Court, which are too often shallow, evasive, or indefensible. In its attempt to salvage Ohio's death penalty scheme, the Ohio Supreme Court has slighted substantial constitutional questions, the solutions to which will have a critical impact on those who have been or will be sentenced to death in Ohio.

No matter what one believes about the merits of the death penalty, certainly no one would disagree that the decision to take the life of a human being in the name of justice is one of such gravity

286. *Cf.* James v. Strange, 407 U.S. 128 (1972 (state recoupment statute permitting state to bring civil action against indigent defendants for reimbursement of legal defense fees of appointed counsel struck down since it failed to provide protective exemptions given to other civil judgment debtors); Jackson v. Indiana, 406 U.S. 715 (1972) (state may not provide fewer procedural or substantive safeguards for an accused committed to a mental institution prior to trial, because of incapacity to stand trial, than for individuals committed through civil commitment proceedings); Baxstrom v. Herold, 383 U.S. 107 (1966) (struck down statutory procedure permitting prisoners to be civilly committed upon expiration of prison sentence without procedural or substantive safeguards given to others civilly committed).

287. It is quite possible that the United States Supreme Court will not reach some of the issues discussed in this Comment since not all these issues were raised by Bell or Lockett at trial or on appeal. Moreover, recent events seem to indicate that the Court may strike down Ohio's death penalty statute *as applied* to Bell and/or Lockett rather than on its face. In *Richmond v. Arizona*, in which the defendant attacked Arizona's death penalty scheme, the Supreme Court of the United States denied certiorari despite the fact that the Arizona scheme is quite similar to that of Ohio. Richmond then sought to suspend effect of the order denying certiorari or to stay his execution. Justice Rehnquist, acting in his capacity as Circuit Justice for the Ninth Circuit, denied Richmond's requests:

> The Ohio and Arizona death penalty statutes are similar in that their lists of mitigating circumstances do not include such factors as age and lack of prior criminal convictions, which are included in the Florida statute approved in Proffitt v. Florida, 428 U.S. 242 (1976). Applicant, unlike Bell however, does not allege that he would be aided by an expansion of the statutory list of mitigating circumstances. The petition in Bell pointed out that the defendant was 16 at the time of the penalty trial, had a low IQ, was considered emotionally immature and abnormal, had cooperated with the police, and had no significant history of prior criminal activity. What evidence is alluded to in the applicant's papers does not suggest that any of the factors that applicant contends must be considered in imposing capital punishment would be relevant to his case.

21 CRIM. L. REP. 4129 (BNA 1977). Moreover, the Court's recent grant of certiorari in *State v. Sandra Lockett*, 98 S. Ct. 261 (1977) (discussed in text accompanying notes 202-11 *supra*), suggests that the outcome in *Bell* will not dictate the result in *Sandra Lockett*.

that it should be made only with the greatest care and circumspection. It is deeply regrettable that the Supreme Court of Ohio, in performing its decisive role in capital cases, has not employed the high standards commensurate with the solemnity of the decisions to be made.

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