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*Complete footnote references can be found on our website, www.lwvohio.org.*

## I. Introduction

> *When we execute a capital defendant in this country, we rely on the belief that the individual was guilty, and was convicted and sentenced after a fair trial, to justify the imposition of state-sponsored killing.*
>
> --Justice Harry A. Blackmun[1]

Across the United States, concerns about the just administration of the death penalty are spreading. For example, Governor Ryan of Illinois suspended executions in 2000, amid concerns that innocent people had been sentenced to death, as did Governor Glendening of Maryland in 2003, citing concerns about racial bias and fairness issues. Similarly, legislators in New Jersey and a Supreme Court committee in Pennsylvania have recently recommended moratoriums. In 2000, a majority of Ohioans (51 percent) believed innocent people will be put to death in capital cases.[2]

## II. Scope

It was in this context, then, that delegates to the 2003 State Convention of the League of Women Voters-Ohio (LWVO) adopted a resolution calling for a study of the death penalty in Ohio. The study was to consider: a) crimes punishable by the death penalty; b) the impact on the poor and minorities; c) due process issues; d) the role of deoxyrobonucleic acid (DNA) (see page 12); e) the effect of court-appointed lawyers; f) relative costs to the State of Ohio of life without parole (LWOP) versus the death penalty; g) the effectiveness of capital punishment as a deterrent; and h) the advantages of capital punishment.

## III. History of the Death Penalty in Ohio

The death penalty has been part of human history since ancient times. Currently, however, the United States, alone among all Western democracies, allows the death sentence. Thirty-eight states—including Ohio—and the federal government continue to execute people; 12 states do not.[3]

From our earliest days as a state until the end of the 19th century, Ohio sent those who had committed capital crimes to the gallows.[4] From 1972 on, executions were held at the prison in Lucasville, Ohio. Ohio used the more technologically advanced electric chair that was seen as more humane for the period 1897 until 2001. Since then, all executions have been by lethal injection. However, the humaneness of lethal injections is now being questioned by public defenders in a number of states, including Ohio.[5]

A moratorium on executions existed in Ohio from 1963 until 1999. Indeed, no one was executed in the U.S. between June 3, 1967, and January 17, 1977. In 1972 the U.S. Supreme Court found in the case of *Furman v. Georgia* that Georgia's death penalty sentencing (similar to Ohio's) was arbitrary and discriminatory, and it thus violated the Eighth Amendment's prohibition against cruel and unusual punishment. [6]

Responding to the high court's decision, the Ohio General Assembly revised the state's death penalty statute in 1974, but the revision was found to be unconstitutional by the Ohio Supreme Court in 1978. As a result of the two courts' findings, a total of 185 prisoners on Ohio's death row had their sentences commuted to life in prison.

The current Ohio statute defining capital crimes was enacted in 1981. In 2001, lethal injection became the only method of execution in Ohio.

From 1887 to 2004, Ohio has executed a total of 351 people—with eight more scheduled for 2004.[7]

## IV. Possible Death Penalty Crimes in Ohio

In Ohio an aggravated (or intentional) murder with one or more of the following circumstances may be deemed a capital crime by the prosecutor: a) the assassination of the President, Vice President, Governor, or Lieutenant Governor; b) murder for hire; c) murder to escape accountability for another crime; d) murder by a prisoner; e) killing or attempting to kill two or more people; f) killing a law enforcement officer; g) felony murder (i.e., murder in conjunction with kidnapping, rape, aggravated arson, aggravated robbery, or aggravated burglary); h) killing a witness to prevent their testimony, or in retaliation for their testimony; i) killing an individual under thirteen years of age; j) murder committed during or immediately after terrorism. [8]

However, sentencing options in capital cases where guilt has been proven beyond a reasonable doubt also include life without parole (LWOP), parole after 25 years, and parole after 30 years. Factors which may mitigate the imposition of the death sentence include: a) whether or not the victim induced or facilitated the offense; b) whether or not the offender was under duress, coercion, or strong provocation; c) whether or not the offender suffered from mental disease or defect, or lacked the capacity to understand their crime at the time of the offense; d) the offender's age (those under the age of 18 are not eligible for the death penalty); e) whether or not the offender lacked a prior criminal record or record of delinquency; f) the degree of the offender's involvement in the offense and the acts that led to the aggravated murder; g) the presence of any other facts and circumstances relevant to the imposition of the death sentence on the offender.[9]

## V. Evidence For and Against the Death Penalty in Ohio

> *"Both proponents and opponents of the death penalty cite the value of human life to bolster their positions. Opponents argue that because all human life is valuable, no one should be put to death. Proponents contend that those who take a human life must pay their debt to society."* [10]

### Arguments in Support of Capital Punishment

#### *The Death Penalty Is a Deterrent*

People have taken widely-divergent stances on the death penalty per se and the death penalty as a deterrent. It has been found that "intuition," an emotional feeling about capital punishment, determines individual reactions. Interestingly enough, "if it were proved that [the death penalty]

were or were not a deterrent, a large portion of those favoring or not favoring [it] would keep their basic pro or con positions." [11]

Deterrence is often the primary reason given to support the retention of the death penalty. Supporters argue that if the death penalty deters one criminal from committing that final step towards murder, the penalty serves its purpose. To bolster the argument, proponents cite two comprehensive studies published in 2002 and 2003 which sustain earlier findings that capital punishment significantly deterred homicides in the United States.[12]

The May 2002 study was conducted by the University of Colorado at Denver using 6,143 death sentences between 1977-1997 in the United States to investigate the impact of capital punishment on homicide. The study compared the changes in the states' murder rates to the probability of being executed for murder. The authors found not only that each execution has a significant deterrent effect, but that each commutation of a death sentence increases the number of homicides committed. [13]

The 2003 study was conducted by researchers at Emory University and their "results suggest that capital punishment has a strong deterrent effect. An increase in any of the three probabilities – arrest, sentencing, or execution – tends to reduce the murder rate. In particular, each execution results, on average, in 18 fewer murders – with a margin of error of plus or minus 10."[14] While early studies examined only national or statewide data, the Emory group tracked changes in murder rates and other data down to the county level. This study also controlled for the effect of other factors on murder rates, including age, race, unemployment, population density, other crime rates, and police-and prison-related variables.

In sum, "a better measure of the death penalty's deterrent effect can be found in the experience over time of those States that have enacted death-penalty statutes. Thus, to take the simplest example, the five States showing the greatest relative improvement in murder rates for the years 1995-2002 compared to 1968-1976 – the years of no executions – are, in order, Georgia South Carolina, Florida, Delaware, and Texas. Each of these States has aggressively enforced the death penalty since *Furman."* [15]

### *The Public Supports the Application of the Death Penalty*

A recent Gallup Poll shows a continued high level of public support for the death penalty for those convicted of murder. Gallup conducted a poll on May 5-7, 2003, which found that 74 percent of Americans favor and 24 percent oppose the "death penalty for person convicted of murder."[16] The majority support remains even if there is an option of a "life without parole" sentence. When asked to indicate the appropriate punishment for murder – the death penalty or "life imprisonment, with absolutely no possibility of parole" – 53 percent still opt for the former, the death penalty. These poll results are not new; the numbers have not changed significantly in the past 6 years. An August 1997 poll found 61 percent of Americans favoring the death penalty and only 29 percent favoring life imprisonment.

In addition, over the past several years, the polls show more people believe that the death penalty is applied fairly in the United States even though there have been numerous reports of wrongful convictions. Sixty percent say the death penalty is applied fairly while in a 2000 poll, only 51 percent agreed that it was applied fairly. Americans' support for the death penalty exists despite the belief of 73 percent of Americans that "an innocent person has been executed under the death penalty in the last five years."[17] More than half of these respondents think that an innocent person has been executed no more than 5 percent of the time.

### *The Death Penalty Provides Safety and Security, and Protects the Rights of the Victims' Loved Ones*

Another often cited argument is premised on the fear that a murderer, if ever released, may murder again.

> *"Those who would prevent the States from enforcing the death penalty must also account for why society should forego the incapacitation effect of the death penalty. An executed murderer will never kill a prison guard, will never escape, and will never be paroled into society, no matter who is elected governor. In 1984, this nation's prisons held 810 inmates serving sentences for murder who, once before in their lives, had been convicted on murder."*[18]

Had these killers been executed for their first murder convictions, 821 innocent men, women and children would have lived." [19]

According to the 2002 Department of Justice Bulletin on Capital Punishment, for those death row inmates with available criminal history information, 64 percent had prior felony convictions, including 8 percent with prior homicide convictions.[20] Forty percent of those inmates under a death sentence on December 31, 2002, had active criminal justice status at the time of the capital offense. Less than half were on parole; a quarter were on probation; and the remainder had charges pending, were incarcerated, had escaped or had some other criminal justice status.[21]

Advocates for the death penalty also direct attention to the rights of the victims by arguing that imposing the death penalty on the perpetrator provides a permanent, final resolution of the crime and provides the victims' loved ones with the most visible closure of the crime.* "In our understandable desire to be fair and to protect the rights of offenders in our criminal justice system, let us never ignore or minimize the rights of their victims. The death penalty is a necessary tool that reaffirms the sanctity of human life while assuring that convicted killers will never again prey upon others." [22]

### *Federal and State Statutory Safeguards Are Sufficient to Insure Justice*

Finally, the system of appeals (including multiple levels of review at the state and federal levels, ending at the United States Supreme Court) is cited as sufficient to safeguard any concerns over the imposition of the death penalty. Proponents argue that additional safeguards are being added to address new concerns. In addition, Ohio has a provision for DNA testing through the state Attorney General's (AG) office. The Capital Justice Initiative is a voluntary program for death row inmates that allows the petitioner to apply to the Ohio AG's office for DNA testing if the DNA was not subjected to previous testing and the expected results must be exonerative in nature and outcome determinative. [23]

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* However, there is a national organization, Murder Victims' Families for Reconciliation (MVFR), whose members believe that execution of the murderer is not the answer, and that an execution does not bring closure for the victim's family. George White, MVFR member, says, "What began with a horrible act of violence should not be memorialized by an act of vengeance. Not in our name; our hearts have bled enough." About 35 members of the organization toured Ohio in the fall of 2003, spreading the message.

Additional protections are being considered at the federal level. Currently winding its way through the federal legislative process is the Innocent Protection Act of 2001 (S.486, H.R. 912), a bill that represents a bi-partisan effort to reduce the risk of wrongful convictions and wrongful executions. The stated purpose of the bill is to "reduce the risk that innocent persons may be executed." The bill is part of a comprehensive package of programs known as the Advancing Justice Through DNA Technology Act of 2003 (H.R. 3214, S. 1700) which provides more than $1 billion over the next five years to assist federal and state authorities in solving crimes and protecting the innocent. The full House of Representatives passed the bill on November 5, 2003. As of April 29, 2004, the bill is pending before the Senate Committee on the Judiciary. The broad bi-partisan support of this legislation is reflected by the 11 Democrats, 67 Republicans, and one Independent who signed on as co-sponsors. The Senate bill has 30 co-sponsors including 24 Democrats, 5 Republicans, and one Independent. [24]

## Arguments for the Abolishment of the Death Penalty

### *The Death Penalty Is not a Deterrent*

Those against the death penalty, the abolitionists, argue that the death penalty is not a deterrent. First, if it were, one would expect that the 38 states with death penalty laws would have fewer homicides than those without it. However, after the federal government reinstated the death penalty, the gap between the murder rates in states without the death penalty was 37 percent lower in 2001 than the murder rates in states with the death penalty. "Empirical research has found that the murder rate goes up, not down, following an execution."[25]

Second, Victor Streib,[26] a respected authority on death penalty issues in America, argues that for the death penalty to be a deterrent, murderers would have to make a rational cost/benefit analysis of their actions prior to committing the homicide. "The deterrence principal assumes ...such things as (1) your knowledge of the death penalty's existence, (2) your belief that you will be caught and convicted for your acts, (3) your calculation that you would be within the one percent of convicted killers who are actually executed, and (4) your engaging in this careful cost/benefit analysis before you pull the trigger."

Hugo Adam Bedau's perspective is that "the death penalty inherently violates the constitutional ban against cruel and unusual punishment and the guarantee of due process of law and the equal protection of the laws." [27] To be a deterrent, the death penalty would have to be consistently and promptly used. Promptness in carrying out the death penalty is tantamount to abrogating a citizen's constitutional rights. Indeed, there is often an eight-to-ten year gap between conviction and execution.

Finally, others argue that it is close to impossible to measure the effect of the death penalty on deterrence. One has to hold all other conceivable causes of crime constant while varying only the expected penalty.[28]

### *Due Process Is Often Violated*

In "A Broken System," a national study of death penalty cases from 1973 to 1995, Columbia University researchers found an overall error rate of 68 percent—or reversible errors in almost seven out of every ten capital cases. Professor James Liebman, principal researcher, stated, "A

number of factors work in favor of death sentences that often will not be carried out, and in favor of executing people who may not deserve to die. These factors include prosecutorial overcharging and overreaching, chronically incompetent defense counsel, weak supervision by trial judges, mis-instructed jurors, and expensive appeals by an overburdened review system that does a poor job of finding defendants who are innocent of a capital crime, and of disciplining faulty trial actors." [29]

The high rate of reversible error in death penalty cases in Ohio highlights the potential for mistaken execution. Indeed, nearly 40 percent of Ohio's death penalty cases have been overturned by the federal appeals court.[30] Currently, 17 people on Ohio's death row (eight percent) have had their convictions reversed and are awaiting retrial.[31] Yet in 2003, Ohio was third in the country—behind Texas and Oklahoma—in executing people.[32]

At least four Ohio death row inmates have ultimately been found innocent and released in the past 25 years because of prosecutorial and judicial misconduct, including the withholding of exculpatory evidence and the denial of the right to cross-examine prosecution witnesses.[33] Collectively, the four spent 61 years in prison for crimes they did not commit. David Bodiker, Director of the Office of Oho Public Defenders (OPD), argues: "More than a few times prosecutors have withheld exculpatory evidence. They will do what they can to win the case….The police lie because it enhances their job performance. They say what they have to say to get convictions. They think the system is stacked against them."

Bodiker also notes, "Death penalty cases attract a lot of media interest. These are horrible homicides. The prosecutor and the police become heroes by bringing a person to justice. The cases become more than trials. They become crusades with the prosecutors' political futures invested in it. But his job is <u>not</u> to win, but to do <u>justice</u>."

A 1995 national random survey of police chiefs and county sheriffs found that 85 percent of responding chiefs thought that politicians in general supported the death penalty simply to indicate that they were tough on crime.[34] Mr. Bodiker of the OPD agrees: "Many prosecutors and courts are influenced by the PR aspect of death penalty cases and how the results of the case will reflect upon their future elections. If they are seen as soft on crime, they probably won't get the endorsement of the FOP. So we, the defense community, are constantly faced with a tilted playing field, probably by happenstance as much as design."

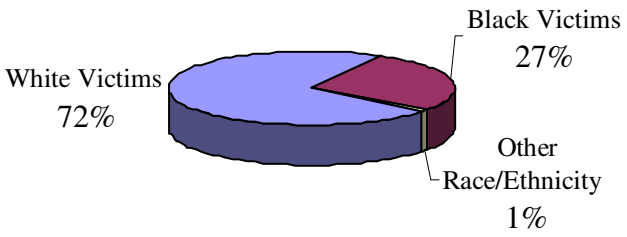
### *Capital Punishment is Systemically Biased against Minorities*

In 1990, the U.S. General Accounting Office (GAO) reviewed and agreed with the many studies that, throughout the past quarter century, have found that race is a key factor in whether a death penalty is sought and whether it is imposed.[35] Indeed, Amnesty International USA found that <u>*murderers of whites are about six times more likely to be executed than murderers of blacks, although about equal numbers of blacks and whites are homicide victims*</u> (emphasis added).[36] Nationally, the majority of the 4,220 prisoners executed in the U.S. between 1930 and 1996 were black.[37]

**Race of the Victim in Ohio:** In an expansion of GAO's research for the American Bar Association in 1997, Professors Baldus and Woodworth found that studies of Ohio's statistics suggest the same: the chances of a defendant being charged with a capital crime and of being sentenced to death row were significantly increased if the murder victim was white.[38] David Bodiker, OPD, concurs: "The race of the victim [i.e., if the victim is white] has a great deal to do with who gets the death penalty."

Seventy-two percent of the victims whose murderers are on Ohio's death row were white and 27 percent were black victims (as of Nov. 19, 2003; see Figure 1).[39] This is consistent with the proportions examined in 1999 by the Ohio Commission on Racial Fairness, which said of race-of-victim disparities, "The numbers speak for themselves. A perpetrator is geometrically more likely to end up on death row if the homicide victim is white rather than black."[40]

**Figure 1: Race/Ethnicity of Death Row Inmates' Victims**
(November, 2003)

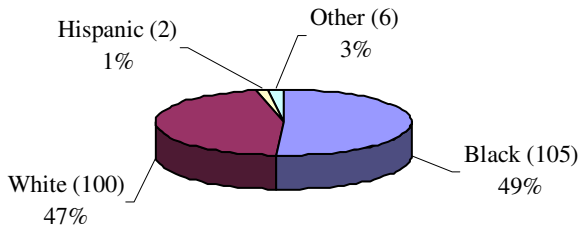



**Race of the Defendant in Ohio:** In a state with a population that is 85 percent white and 11.5 percent black (U.S. Census, 2000), about half of the inmates on death row are black. More specifically, while black males over the age of 18 comprise less than 5 percent of Ohio's population aged 18 or over (U.S. Census, 2000), they make up 49 percent of the inmates on death row (see Figure 2).[41]

The U.S. Court of Appeals for the 6th Circuit said in 2001 that the racial imbalance in Ohio's death penalty is 'glaringly extreme' and 'extremely troubling.' It was, however, not able to order the state to address the imbalance because of the U.S. Supreme Court's 1987 ruling in the *McCleskey* case.[42] In that case the court found "that 'apparent disparities in sentencing are an inevitable part of our criminal justice system,' and that for a defendant to be successful in an appeal, he or she would have to provide 'exceptionally clear proof' that the decision-makers in his or her particular case had acted with discriminatory intent."[43]

The Report of the Ohio Commission on Racial Fairness, published by the Ohio Supreme Court and the Ohio State Bar Association in 1999, argued, "The issue is the integrity of the criminal justice system, whether black males are looked upon as expendable and treated differently than white males resulting in disparate sentencing…."[44]

**Figure 2: Race/Ethnicity of Ohio Death Row Inmates**
(November, 2003 )




**Race of Prosecutors in Ohio:** Prosecutors have discretion in determining which cases are capital cases, and as shown above, cases in Ohio that involve white victims are more likely to result in the death penalty than other cases. One reason proffered for this is that the vast majority of prosecutors—those in whose hands the decision resides—are white. Of the 88 county prosecutors in Ohio in 1998, 99 percent (87 of 88) were white and one was black.[45]

**Race of Jurors in Ohio:** The Ohio Commission on Racial Fairness noted that "the American legal system is based upon peer decision making….Exclusion and other kinds of bias deprive citizens of the benefits of a diversity of perspectives, especially if the perspective absent in a jury pool is that of a party's community, class, age, race, ethnicity, gender or religion….Many people expressed concern that in the various public hearing testimonies that minority defendants, particularly black defendants, are being tried before all-white juries." [46]

In fact, the Commission reported that there was evidence that Ohio juries, like those in states across the U.S., were likely to have a pattern of minority under-representation, "especially…poor people of color." [47] For example, the prosecutor in a Hamilton County death penalty case excluded nine of eleven qualified black members from the jury pool with no reason given in the trial of an African American executed in 2002 for the murder of a white woman. During the appeals process, the issue of discrimination was defaulted as the basis for an appeal because the inmate's original appeal lawyers had failed to raise the issue.[48]

### *Unequal Quality of Representation Is an Issue*

> *I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial. …[P]eople who are well represented at trial do not get the death penalty.*
>
> -- Supreme Court Justice Ruth Bader Ginsburg, April, 2001[49]

In Ohio, David Bodiker, Director of the office of the Ohio Public Defender, reports that "[The cost of a death penalty defense] is so expensive that unless you're in the top one percent of wage earners, you're probably content to have a defense attorney appointed." Appointed defense attorneys in capital cases must be death-penalty certified by the Ohio Supreme Court prior to assignments, i.e., they must receive special training, although private-pay defense attorneys are not required to do so. While the OPD does not track the statistics, it estimates that four or fewer

defendants of the 80 to 90 capital cases brought each year pay for private attorneys. OPD reports, however, that private-pay attorneys are no more successful than appointed public-pay attorneys in preventing their defendants from being sentenced to death.

But Bodiker also argues that while there are very good court-appointed lawyers who work very hard for little pay, they are not universal. "Inadequate representation is a problem. Money really isn't the cause of it. There are cases where really bad lawyers make stupid mistakes." First, lawyers may be death penalty-qualified, but that does not necessarily mean they will be able to devote their full attention to a capital case.

Bodiker notes, "When lawyers from private practice are appointed to do death penalty work, it's difficult because they have to do a very demanding and time-consuming function while they are handling the remainder of their practice. No matter how hard they work and how capable they are, they—and OPD—are all subject to missteps and mistakes. There are obviously some who do not work as hard as others, even though they have the qualifications."

In addition, the caps on attorney fees (determined by each county's commissioners) varied across Ohio counties from $3,000 to $50,000 per trial, total, for appointed defense counsel in 2001. Thus for capital cases that may involve a year and a half of pre-trial work and two or more weeks at trial, court-appointed defense attorneys typically end up being paid a low hourly fee. The low limits raise due process issues: Is there enough money allotted to provide for an adequate defense? Will qualified attorneys work for extremely low pay? Compounding the problem, the maximum amount allotted for expert witness fees (e.g., a mitigation expert, psychological and IQ testing) varies from county to county, but many counties do not make available what appointed defense attorneys regard as the minimum, $10,000. As David Bodiker said, "[T]here is never enough public money for appointed attorneys to get the expert witnesses and mitigation experts they need."

Thus, the quality of representation varies from capital case to capital case, and those who are poorly represented are more likely to end up on death row. Witness, for example, the cases of Richard Frazier and Shawn Williams—two recent instances in which the death sentences were overturned, at least in part, because of inadequate representation.[50]

### *The Trial Location Is a Determinant*

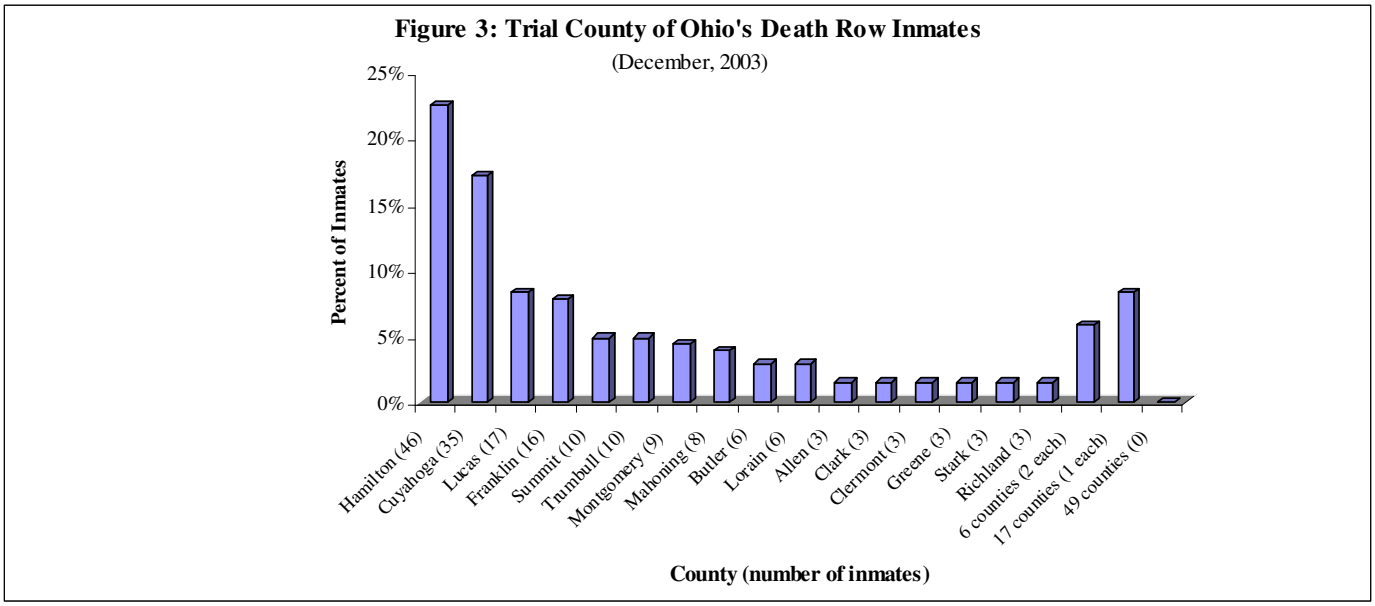
The county in which the crime is committed also seems to influence whether a defendant is charged and convicted of a capital crime. The higher costs of death penalty cases are a significant financial burden on local and state governments. Exemplifying this, a Vinton County, Ohio, judge initially ruled in 2002 that local prosecutors could not seek the death penalty in the case of Gregory McKnight. Judge J.L. Simmons cited the high cost of the trial and the probability that the county would not be able to pay for an adequate defense team.[51]

Mr. Bodiker of the OPD notes: "As managers of the county government, [county commissioners] are concerned about the costs of time, money, and resources which encourages them to want to avoid death penalty cases as an extravagant use of limited resources."

Therefore, Bodiker continued, "Many counties do not have anyone on death row, not necessarily because there have not been any potential death penalty cases, but because the death penalty process is time-consuming and difficult."

Forty-nine of Ohio's 88 counties do not have any inmates on death row. In contrast, almost one out of every four men (23 percent) on Death Row comes from Hamilton County, the third largest county in the state and home to 7.4 percent of the total state population (see Figure 3). Cuyahoga is second, being home to 17 percent of the Death Row inmates. In terms of potential

new death row inmates, as of October, 2003, Mr. Bodiker reports that Franklin County had 32 of the 101 pending death penalty cases.




### *The Cost of the Death Penalty versus Life without Parole*

Jurors in capital cases prior to 1996 had only the sentencing options of death or life in prison *with* the possibility of parole. The option of life *without* parole (LWOP) has given jurors the means to punish an offender without the risk that s/he will be released someday. Since its introduction, LWOP has been frequently used. In Franklin County, Ohio, for example, capital cases that have gone to trial since 1998 have ended in 6 death sentences and 21 sentences of LWOP.[52]

In addition, David Bodiker of the OPD argues: "It's counter-intuitive, but the death penalty costs more than life without parole." Studies in New York, North Carolina[53], Texas[54], California, and Florida have confirmed that judicial systems in which the maximum sentence is death are more expensive than those in which the maximum sentence is life without parole.[55]

Why is this? The legal process from arrest to execution is complex and lengthy. Capital cases are estimated to be three and a half times as long as other murder trials and involve higher litigation costs than the next closest alternative, murder cases involving life without parole.[56] In addition, the Ohio judicial appeal process for capital cases includes a mandatory direct appeals process and the possibility for a post-conviction petition and a federal habeas corpus appeal, all of which take many years. For example, as of November 1, 2003, about half of all Ohio capital inmates (103 of 213) had been on death row for 10 or more years. More than a quarter of all death row inmates, (59 of 213) had been on death row for 15 years or longer.[57]

No comprehensive study has been made of the costs of Ohio's capital cases. However, the case of Wilford Berry ("The Volunteer"), a mentally ill man who was executed in 1999, is instructive. The cost of prosecuting and defending Wilford Berry's death-penalty case was estimated to be $1.5 million—though this figure did not include all potential costs.[58] Excluded from the $1.5 million figure were the costs of the federal appeals which Berry refused, but to which he was legally entitled.[59] In contrast, the cost of keeping Berry in prison for 50 years

(until he reached age 75) was estimated to be $950,000—though this, too, did not include all potential legal costs that might have arisen during his incarceration.[60]

Finally, because the cost of the death penalty is higher than that of life without parole, death penalty cases reduce the funds available for other public goods and services. "The exorbitant costs of capital punishment are actually making America less safe because badly needed financial and legal resources are being diverted from effective crime fighting strategies. such as schools, roads, and prevention programs." [61]

## VI. The Role of DNA Testing

The development of DNA testing has added a whole new dimension to the determination of guilt or innocence in some criminal cases. DNA is the fundamental building block of everyone's genetic makeup and is unique in each individual, except for identical twins. [62] Blood, semen or hair from a crime scene (the parent sample) can be compared with cells swabbed from a suspect's mouth to see if there is a match.

Presently 26 states have laws or pending legislation on post-conviction testing which allow inmates convicted of a felony to have their DNA tested. Ohio passed S.B. 11 in the summer of 2003 with these qualifications: inmate must not have had an earlier test with a definite result; application for the test by people already on death row must be made within a year of the law's enactment: prosecuting attorney must give permission for the test within 45 days of receiving the test application; prosecutor's decision cannot be appealed; there must be some expectation that testing will exonerate the inmate; and a satisfactory parent sample must be available for testing. The state must keep both the parent sample and the inmate's sample for two years after the release or execution of the inmate.[63]

Ohio crime labs have a huge backlog of tests to be performed. If the Innocence Protection Act of 2003 is passed (see Federal and State Statutory Safeguards Are Sufficient to Insure Justice, page 5), a portion of the bill's one billion dollars will be available over five years to states to help with the backlog. Indeed, DNA testing has been a factor in proving the innocence of at least a dozen death row inmates since its use in court. In Ohio seven inmates have had the test, but none was proved innocent.[64]

The time may come when policemen will routinely carry a DNA analyzer on their belts. Testing can result in fewer wrongful convictions, and also assure that the true murderer does not remain free to murder again.[65]

## VII. The Appeals Process and Clemency

After the arrest of a suspect for a capital crime, defense attorneys are appointed if needed. Following a grand jury indictment, a trial is held. If the defendant is unanimously found guilty beyond a reasonable doubt by the jury (or by a panel of three judges if a jury trial is waived), the mitigation and sentencing phase of the trial occurs. If the death sentence is imposed, the offender has the right to an appeals process[66] and to request clemency.

**1. Automatic direct appeal**: If the death penalty is imposed, the case automatically goes to the Ohio Supreme Court on "direct appeal." This appeal involves the review only of the trial court record—no new evidence—and cannot be waived by the defendant.

**2. Post-conviction petition**: Inmates' post-conviction actions "appealing their convictions and death sentence under Ohio Revised Code § 2953.21…ask the trial court to compare new evidence with the evidence presented at trial [e.g., DNA, evidence withheld by police or prosecutors, and evidence of inadequate representation] to determine if the trial was fair, reliable, and the death sentence was appropriate."

**3. Federal Habeas Corpus**: The last step in the judicial appeal process involves a federal "habeas corpus" appeal. This is for those convicted of a capital crime but who have not been successful with the direct appeal or post-conviction petition "Habeas Corpus is an appeal to the federal courts for wrongful conviction and unconstitutional imprisonment. There can be no habeas corpus appeal until the direct appeal and the post-conviction petitions are finished in state court. The direct appeal and post-conviction actions are then combined into one federal habeas corpus appeal."

**4. Clemency**: In addition to the appeals process, the Parole Board can make recommendations to the governor regarding pardons or commutations of sentences. The governor can issue a pardon or commute a sentence on his/her own, but rarely does so without the recommendation of the Parole Board. Clemency may be granted for any reason. The governor can also issue a reprieve, thereby postponing the execution.

*Complete footnote references can be found on our website, www.lwvohio.org*

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The McCleskey case examined the appeal of a black inmate on death row in Georgia, Warren McCleskey. Evidence was presented to the Supreme Court "that defendants who killed whites in Georgia were more than four times more likely to be sentenced to death than those who killed non-whites, a probability that was even higher if the defendant was black and the victim white."

[43] Ibid.

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[48] "Death by discrimination - the continuing role of race in capital cases," op. cit.

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[50] Shawn Williams exemplifies the inadequacies of the capital punishment system. The Ohio Supreme overturned his death sentence in 2003 after finding "**errors on the part of the judge, prosecutor and defense counsel** (emphasis added) during the penalty phase."
http://www.state.oh.us/opd/dp_williams_shawn/dp_williams_shawn.htm; accessed Dec. 12, 2003.

[51] Hinchey, Frank and Ludlow, Randy. 2002. "Death-Penalty Trial Too Costly." *The Columbus Dispatch* (August 9): O1A.

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[53] For example, a 1993 study of North Carolina cases found that the cost of a capital case, including execution, was about $2.16 million more than the cost of a murder case that involved life without parole as the maximum possible sentence . (Cook, Philip J. and Donna B. Slawson. 1993. *The Costs of Prosecuting Murder Cases in North Carolina*. Referenced in "The High Costs of the Death Penalty," American Civil Liberties Union, Capital Punishment Project.
http://www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/9706e0aac59259be85256b740055872c/$FILE/DP_WhitePaper.pdf; accessed Oct. 29, 2003

[54] In Texas, the average cost of a death-penalty trial was found to be $2.3 million—three times the cost of 40 years of imprisonment at a high security prison ("The High Costs of the Death Penalty." 1992. *Dallas Morning News*

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[55] "Death Penalty Facts." Amnesty International USA. http://www.amnestyusa.org/abolish/cost.html; accessed Oct. 29, 2003.

[56] Death penalty cases involve more extensive pre-trial preparation, pre-trial motions, expert witness investigations, and comparatively longer jury selection processes than any other type of trial. They also involve a two-phase process: the determination of guilt or innocence phase, and the sentencing and mitigation phase. Thus, death-penalty trials are more than three and a half times as long as other murder trials (Cook, Philip J. Cook and Donna B. Slawson. 1993. *The Costs of Prosecuting Murder Cases in North Carolina*. Referenced in "The High Costs of the Death Penalty." Capital Punishment Project , American Civil Liberties Union. http://www.criminaljustice.org/public.nsf/2cdd02b415ea3a64852566d6000daa79/9706e0aac59259be85256b740055872c/$FILE/DP_WhitePaper.pdf; accessed Oct. 29, 2003.

[57] "Death Row Inmates," 2003. The Ohio Department of Rehabilitation and Correction (October 29). http://www.drc.state.oh.us/Public/deathrow.htm; accessed October 30, 2003.

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