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An Acerbic Look at the Death Penalty in Ohio

Lawrence Herman

The major problems of the criminal law are two: what behavior should be made criminal, and what should be done with persons who commit crimes.¹

INTRODUCTION

The question of what to do with criminal offenders reaches to the philosophical roots of any system of criminal law. At times the problem is debated in terms of its more superficial manifestations such as the appropriate form and conditions of institutionalization or other treatment. However, when the problem is placed in the context of capital punishment, superficiality cannot be maintained. The brutal question is whether the system ought to permit the killing of certain offenders; and the answer ultimately involves an excruciating examination of the philosophy of criminal law.

It is not surprising, then, that the problem of the death penalty is one of international interest. Indeed, in 1959, the General Assembly of the United Nations requested one of its councils to undertake a world-wide study of the problem, and the results of that study are now embodied in a special United Nations publication.²

Regarding Anglo-American law, interest in the problem has spanned at least 300 years. In 1659, Parliament was requested to consider, among other proposals for reform, the suggestion that the death penalty be limited to the offense of murder.³ At the other end of the spectrum, the most recent American criminal law casebooks contain a renewed emphasis upon the problem.⁴ A telescoping of highlights in the Anglo-American

1. MICHAEL & WECHSLER, *CRIMINAL LAW AND ITS ADMINISTRATION* 6 (1940).

2. Ancel, *Capital Punishment*, U.N. DEP'T. ECON. & SOC. COUNCIL (U.N. DOC. NO. ST/SC/SD/9, SALES NO.: 62.IV 2 1962). Several years ago, the fifteen nations comprising the Council of Europe established a committee to study the death penalty and feasible alternatives. See 1 BRIT. J. CRIMINOLOGY 377-78 (1961). The committee recently rendered a report without express recommendation. EUROPEAN COMMITTEE ON CRIME PROBLEMS, *THE DEATH PENALTY IN EUROPEAN COUNTRIES* (1962).

3. The incident is recounted in Ancel, *supra* note 2, at 59.

4. See DONNELLY, GOLDSTEIN & SCHWARTZ, *CRIMINAL LAW* 334-48 (1962); HALL & GLEUCK, *CRIMINAL LAW AND ENFORCEMENT* 85-86 (2d ed. 1958); INBAU & SOWLE, *CRIMINAL JUSTICE* 65-71 (1960); PAULSEN & KADISH, *CRIMINAL LAW AND ITS PROCESSES* 555-58 (1962).

experience would include abolition of the death penalty in certain states,⁵ the Report of the Royal Commission on Capital Punishment in 1953,⁶ the British Homicide Act of 1957,⁷ the Sellin Report to the American Law Institute,⁸ the recent Delaware experience of abolition followed by restoration,⁹ and substantial modifications in the death penalty made by the New York legislature in 1963.¹⁰

In Ohio, the problem has been one of continuing interest to all branches of government. In 1857, the Ohio Supreme Court observed that "punishment by death is provided only for the crime of the greatest atrocity; and even for this it has been opposed by some as a relic of barbarism, and as unsupported by an enlightened view of human rights."¹¹ At the executive level, reference may be made to the abolition efforts of Governor Joseph Vance in the 1830's,¹² to Governor Harry L. Davis' undertaking, in 1922, to collect comparative data relating to deterrence,¹³ and, most recently, to the abolition proposals of Governor Michael V. DiSalle.¹⁴ The problem of executive clemency aside, gubernatorial assaults against the death penalty have been directed primarily toward persuasion of the Ohio General Assembly. Although the General Assembly has never abandoned its position in favor of the death penalty, it has given constant attention to the problem.¹⁵ On two occasions an abolition

5. The abolition states are Alaska, Hawaii, Maine, Minnesota, and Wisconsin. Qualified abolition states are Michigan (retained for treason), North Dakota (treason and murder committed by prisoner serving life sentence for murder), and Rhode Island (murder committed by prisoner serving life sentence for murder). In ten states, experimental abolition was followed by restoration. The states are Arizona, Colorado, Delaware, Iowa, Kansas, Missouri, Oregon, South Dakota, Tennessee, and Washington.

6. ROYAL COMMISSION ON CAPITAL PUNISHMENT, REPORT (1953).

7. 5 & 6 ELIZ. 2, c. 11. The act treats as capital murder the following: murder in the course of theft, murder by shooting or explosion, murder in the course of resisting arrest, murder of a police officer who is in the execution of his duty, murder by a prisoner, and repeated murder. In addition, the act provides that if two or more persons participate in a capital murder, only the person whose act caused the death shall be subject to the death penalty. For a contemporary critique of the act, see Prevezer, *The English Homicide Act: A New Attempt to Revise the Law of Murder*, 57 COLUM. L. REV. 624 (1957).

8. SELLIN, *The Death Penalty*, in MODEL PENAL CODE (Tent. Draft No. 9, 1959) [hereinafter cited as SELLIN].

9. DEL. CODE ANN. tit. 11, § 107 (Supp. 1962).

10. N.Y. PEN. LAW §§ 1045-45(a). The act repeals the mandatory death penalty for murder. It provides: (1) that there may be a negotiated plea for a life sentence; (2) that, upon a finding of guilty of a capital offense, sentence is to be determined in a separate proceeding; and (3) that the death sentence may be imposed only by a unanimous jury.

11. *Robbins v. State*, 8 Ohio St. 131, 174 (1857).

12. See OHIO LEGISLATIVE SERVICE COMMISSION, REPORT NO. 46, CAPITAL PUNISHMENT 8-9 (1961) [hereinafter cited as OHIO REPORT].

13. *Id.* at 10-11.

14. Governor DiSalle's special message urging the abolition of capital punishment is contained in 128 OHIO S. JOUR. 155-56, 1431-38 (1959).

15. See OHIO REPORT 8-11.

bill was passed in one house, only to be defeated in the other house.¹⁶ On numerous other occasions proposals ranging from outright abolition to a requirement that the death penalty depend upon affirmative jury action have received legislative scrutiny.

During the session of the 105th Ohio General Assembly in 1963, three bills were introduced relevant to the problem under consideration. H.B. 292 substituted for the death penalty in all cases a sentence of imprisonment for life. H.B. 337 retained the death penalty, but provided that the trial judge or a majority of the judges of a reviewing court had the discretion to reduce a death sentence to life imprisonment. H.B. 416 also retained the death penalty, but provided for a sentence of life imprisonment unless the jury affirmatively recommended capital punishment. In addition to these bills a resolution (H.J.R. 28) was introduced to submit to the electorate the question of abolition versus retention. All of the proposals were referred to the House Judiciary Committee where, after two days of hearings, they died pursuant to motions to postpone consideration indefinitely.¹⁷

Although the proposals suffered an easily predictable fate, both abolitionists and retentionists presented vigorous arguments at the hearings. As might be expected, the retentionists were represented by law enforcement authorities, and the abolitionists by a law teacher and a criminologist. I was the law teacher, and my views on the matter are consequently subject to challenge for bias. With that caveat broadcast, it will be the burden of this paper to analyse and criticize the arguments advanced by the retentionists. At the outset, it should be made clear that arguments based on morality (i.e., whether the state has the moral right to kill or whether capital punishment is morally defensible as the only means of expiation) will not be considered herein. Reluctance to consider these arguments should not be taken as a suggestion that they are irrelevant. The point is, simply, that after these arguments are pushed to the hilt, there is stalemate. First, each side remains convinced of the validity of its moral position and of the invalidity of any other position. Second, there is no empirical method by which validity or invalidity can be demonstrated. Therefore, it is far more fruitful, in my opinion, to avoid the moral *cul-de-sac* and to concentrate upon those arguments as to which there is some body of evidence.

Also, it is necessary to note that in Ohio the death penalty may be imposed only for various forms of first-degree murder¹⁸ and for kidnap-

16. In 1850, the Senate passed an abolition bill by a vote of 18 to 12. In 1949, the House passed an abolition bill by a vote of 69 to 35. See OHIO REPORT 9, 11.

17. OHIO H. JOUR. 7, 9-11 (April 18, 1963).

18. OHIO REV. CODE §§ 2901.01 (first-degree murder); 2901.02 (killing by obstructing or damaging a railroad); 2901.03 (Supp. 1963) (killing a prison guard); 2901.04 (killing

pings in which the victim is not released unharmed prior to trial.¹⁹ Typically, debate upon the capital punishment problem primarily concerns the offense of murder and only passing reference is made to kidnapping.²⁰ The same limitation will obtain in this article.

IS THE DEATH PENALTY A DETERRENT?

Whether the death penalty is a deterrent to murder was the principal question debated before the House Judiciary Committee. Antecedent to any discussion of the question, however, it is essential to define its contours. Assuredly, the death penalty is a deterrent to the defendant who is executed. He will never again commit murder, nor will he engage in any other form of conduct for good or evil. However, this type of specific deterrence is not the basis of the retentionists' argument. Rather, the basis is twofold: that the death penalty generally deters others from committing murder, and that it does so with greater effectiveness than life imprisonment. It is to these two facets that consideration must be given.²¹

Although the retentionists argued that it is difficult to measure the deterrent effect of the death penalty, they asserted repeatedly that it is a deterrent. The argument proceeded along a variety of fronts. Initially, it was claimed by analogy that the existence of police departments is a deterrent to crime. Whether this claim is correct (and I certainly have no evidence to disprove it) need not be determined. Conceding that the threat of detection and apprehension is a deterrent, the analogy still fails because it gives no help in answering the question of whether the death penalty is a more effective deterrent than a sentence to life imprisonment.

Next, it was asserted that punishment is a deterrent and that there is a direct relationship between the severity of punishment and the efficacy of the deterrent. In support of this assertion, reference was made to the deterrent impact of increased punishment upon kidnapping and narcotics offenses. In addition, the unsupported claim was made that the threat of the death sentence has reduced the incidence of subversion, assassination, and organized crime. Regarding the latter claim, a denial is adequate refutation. There simply is no evidence that the death penalty has any peculiar deterrent effect on the three named offenses. Moreover, subversion and assassination are the offenses of zealots, persons whose

a police officer); 2901.09 (killing certain federal officials); 2901.10 (killing certain state officials); 2901.28 (killing during kidnapping).

19. OHIO REV. CODE § 2901.27.

20. Although kidnapping is a capital offense in some thirty-five states (see SELLIN 4) execution of the death penalty is infrequent. During the period 1930-1957, 3,096 persons were executed for murder in the United States. SELLIN 6. During the same period, only seventeen persons were executed for kidnapping. SELLIN 7. See also OHIO REPORT 17.

21. In the following paragraphs of the text, comment is made upon the retentionists' arguments. It should be made clear, however, that not every retentionist advocated every argument.

motivation makes it highly unlikely that they will be deterred by the threat of any punishment; and organized criminal activity (murder, in the instant context) flourishes in such capital punishment states as Illinois and Ohio.²² Much less laughable and much more demanding of careful consideration is the argument relating to kidnapping and narcotics offenses. There is some statistical evidence that an increase in the punishment for these offenses was followed by a decrease in incidence.²³ The important questions, however, are: (1) whether a causal relationship exists between punishment and incidence; and (2) if so, whether it rests upon a general principle of deterrence broad enough to comprehend not only a different offense (murder) but also the greater effectiveness of the death penalty over the penalty of life imprisonment. Answers to these questions are difficult, if not impossible. Although the position of the retentionists has a practical or logical appeal, the problem is complicated by certain variables. Narcotics offenses and kidnapping are almost always planned crimes in which money is sought. Murder, even though premeditated,²⁴ seldom involves such planning²⁵ and frequently involves

22. In a recent article, the Attorney General of the United States noted that there have been thirty-seven gangland killings in Chicago since 1960, and that there have been seventy bombings in the Youngstown area since 1950. Kennedy, *Robert Kennedy Defines the Menace*, N.Y. Times, Oct. 13, 1963, § 6 (Magazine), pp. 15, 105.

23. The evidence relating to kidnapping can be found in 1940 ATT'Y GEN. ANN. REP. 80, 155; 1936 ATT'Y GEN. ANN. REP. 127; 1934 ATT'Y GEN. ANN. REP. 130; 1933 ATT'Y GEN. ANN. REP. 105; Fisher & Maguire, *Kidnapping and the So-Called Lindbergh Law*, 12 N.Y.U.L. REV. 646 (1935). A scrutiny of the evidence relating to narcotics offenses in Ohio reveals that the retentionists may have jumped the gun in drawing conclusions. It is true that both the number of narcotics cases disposed of and the number of convictions declined sharply from 1956 (the first year of increased penalties) to 1959. See OHIO DEPT. MENTAL HYGIENE & CORRECTION, CRIMINAL COURT STATISTICS 23 (1955); *id.* at 19 (1956); *id.* at 24 (1957); *id.* at 25 (1958); *id.* at 17 (1959). However, in 1960 there was a dramatic increase to pre-1956 levels, and, although there were decreases in 1961 and 1962, the 1962 level is higher than the 1956 level. See *id.* at 13 (1960); *id.* at 15 (1961). The 1962 figures are not in published form. They were furnished by an employee of the agency. The figures for the period 1955-1962 are as follows:

Year	Total Cases Disposed of	Eliminated	Convicted	Other Offense
1955	283	26	257	
1956	216	36	180	
1957	239	48	190	1
1958	201	31	169	1
1959	176	41	134	1
1960	266	67	198	1
1961	242	41	201	
1962	240	41	198	1

24. In Ohio, premeditation does not require substantial planning. See *Shoemaker v. State*, 12 Ohio 43 (1843). On the question of how much planning is required, Ohio courts are in disagreement. In *Tolliver v. State*, 9 Ohio L. Abs. 488 (Ct. App. 1930), it was held error to instruct the jury that premeditation can come into existence in a moment. However, in *State v. Ross*, 92 Ohio App. 29, 108 N.E.2d 77, *appeal dismissed*, 158 Ohio St. 248, 108 N.E.2d 282 (1952), the court upheld an instruction that if the defendant had time to consider what he was doing, he had time to premeditate. Since premeditation often spells the

no financial gain.²⁶ Further, insofar as kidnapping is concerned, federal criminal liability subjects the potential offender to the substantial risk of detection and apprehension via the highly successful techniques of the Federal Bureau of Investigation.²⁷ Moreover, regarding Ohio narcotics offenses,²⁸ the threat of increased penalties is real because there is no lee-way under Ohio's indeterminate sentence procedure for mitigation of the legislatively prescribed minima and maxima.²⁹ In the case of murder, however, a jury recommendation of mercy will obviate the death penalty,³⁰ and, as will clearly appear later in this article,³¹ the recommendation is made with a frequency sufficient to discredit the reality of the threat of death. Consequently, there is substantial reason to doubt the validity of an analogy between kidnapping and narcotics offenses on the one hand and murder on the other hand. Indeed, it is apparent from the testimony at the hearings that even the retentionists entertained this doubt.

The principal exponent of the retentionists' position, Cleveland's Chief of Police Wagner, admitted that, in the "average murder," the defendant does not consider the punishment before he acts. But, he did take the position that the death penalty is a deterrent to the organized or planned killing. It is not clear whether he had in mind a so-called "syndicate" killing, the use of a hired killer for private purposes as in California's celebrated case of *People v. Duncan*,³² or simply a case in which there was an appreciable gap in time between the conception of the plan and its execution. Whatever the correct interpretation may be, it is sufficient to note that Chief Wagner's position of "limited deterrence" is in-

difference between first-degree murder, OHIO REV. CODE § 2901.01 (with its attendant permissible death sentence), and second-degree murder, OHIO REV. CODE § 2901.05 (life sentence), the phraseology of the instruction, as yet unsettled, may carry with it the defendant's life. Thus, in terms of the difficulty of distinguishing between the capital and the non-capital offense, there is an argument against the death penalty.

25. See BENSING & SCHROEDER, *HOMICIDE IN AN URBAN COMMUNITY* 72 (1960). In their inquiry into homicide in Cleveland, the authors found that most homicides arose from petty quarrels, marital discord, and non-marital love or sex disputes.

26. *Ibid.*

27. For a case in which the defendant inferentially claimed some awareness of this fact, see *United States v. Powell*, 24 F. Supp. 160 (E.D. Tenn. 1938) (defendant, charged with transporting a kidnapped person from Tennessee to Georgia, asserted that he entered Georgia believing that he was still in Tennessee and that he would not otherwise have entered Georgia).

28. OHIO REV. CODE §§ 3719.01-99 (Supp. 1963).

29. Penalties for various violations run a huge gamut from a fine of five dollars to imprisonment for life. OHIO REV. CODE § 3719.99 (Supp. 1963). Regarding the indeterminate sentence mechanism, see OHIO REV. CODE § 5145.01 (Supp. 1963). To the extent that a sentence to imprisonment can be suspended, OHIO REV. CODE § 2951.02, the judge does exercise control. However, probation is not available for certain narcotics offenses. OHIO REV. CODE § 3719.99(L) (Supp. 1963).

30. See statutes cited note 18 *supra*.

31. See p. 527-28 *infra*.

32. 53 Cal. 2d 803, 350 P.2d 103 (1960). In this case, the court upheld conviction of defendant who used hired killers to murder her daughter-in-law.

defensible not only because the bulk of murders do not involve such organization or planning,³³ but also because the death penalty is imposed in cases in which such planning is absent.³⁴

At this point, it should be observed that the hearings did not begin with the testimony of the retentionists. The abolitionists, as supporters of the proposed legislation, made the initial presentation. The gravamen of their argument was the lack of evidence that the death penalty is a more effective deterrent than life imprisonment. To evaluate critically the retentionists' reply, it is necessary to set out the abolitionists' argument in detail.

Initially, the abolitionists stressed certain facts regarding Ohio's experience with the death penalty which were said to cast doubt upon the reality of the threat of death and, hence, upon its deterrent effect. First, it was argued that if the death penalty is a deterrent, deterrence depends in part upon awareness not only of the existence of the death penalty but also of the horror of an execution.³⁵ However, Ohio law prohibits virtually every potential offender from attending an execution,³⁶ and thereby frustrates opportunity for awareness. Next, it was urged that the efficacy of an assumed deterrent must depend upon the frequency with which the deterrent is invoked.³⁷ In this regard, emphasis was placed upon statistical evidence indicating a marked decline in the use of the death penalty in Ohio. The evidence fell into three categories: (1) total number of executions, (2) ratio of executions to non-negligent homicides, and (3) ratio of executions to indictments for first-degree murder. Specifically, the statistical evidence was as follows: (1) Regarding the total number of executions, from 1920 through 1939, 167 persons were executed in Ohio. However, from 1940 through 1962, only 88 persons were executed³⁸ even though the population increase between 1940 and 1960

33. BENSING & SCHROEDER, *op. cit. supra* note 25, at 72.

34. Felony-murder, OHIO REV. CODE § 2901.01, is an example. See *State v. Salter*, 149 Ohio St. 264, 78 N.E.2d 575 (1948), in which the death penalty was imposed upon a defendant who, without desiring to do so, killed a girl while raping her. In their study of homicide in Cleveland, Professors Bensing and Schroeder found that of 22 persons convicted on an indictment charging premeditated murder with a count of felony-murder, 8 were sentenced to death. However, of 11 persons convicted on an indictment charging premeditated murder with no count of felony murder, *only 1* was sentenced to death. BENSING & SCHROEDER, *op. cit. supra* note 25, at 27.

35. See Ball, *The Deterrence Concept in Criminology and Law*, 46 J. CRIM. L., C. & P.S. 347, 351 (1955).

36. OHIO REV. CODE § 2949.25 permits the following to attend an execution: (1) the warden or his deputy, (2) guards, (3) the sheriff of the forum county, (4) the Director of Public Welfare or his agent, (5) the Commissioner of Corrections, (6) penitentiary physicians, (7) defendant's clergyman, (8) three designees of defendant, and (9) representatives of three newspapers in the forum county as well as one reporter for each daily newspaper published in Columbus.

37. See Ball, *supra* note 35, at 350.

38. OHIO REPORT 36. The report covers the period 1910-1959. Figures in the text were

was almost three million persons.³⁹ (2) Regarding the ratio of executions to non-negligent homicides, from 1910 to 1959, there was one execution for every 82 homicides. However, from 1950 to 1959, there was one execution for every 116 homicides.⁴⁰ (3) Regarding the ratio of executions to indictments for first-degree murder, slightly more than 1 out of every 4 indictments for first-degree murder results in a conviction of first-degree murder; approximately 1 out of every 4 convictions results in a death sentence; and approximately 1 out of every 3 death sentences is commuted.⁴¹ Thus, 100 indictments for first-degree murder will result in approximately 28 convictions, which will result in approximately 7 death sentences, which will result in approximately 5 executions. The conclusion drawn by the abolitionists was that the threat of the death sentence was so slight that it could not have the deterrent effect ascribed to it by the retentionists.

Next, the abolitionists discussed the most comprehensive statistical study of the death penalty — the report of Professor Thorsten Sellin of the University of Pennsylvania.⁴² This report, it was asserted, undercut any argument based on a theory of deterrence. In his study, Professor Sellin sought to answer four questions relevant to a claim that the death penalty more effectively deters murder than a sentence to life imprisonment: (1) with reference to groups of neighboring states having similar economic conditions and population components, whether an abolition state has a higher homicide rate than a retention state; (2) whether the safety of policemen is endangered by the abolition of capital punishment; (3) with reference to states in which abolition was followed by restoration, whether abolition increased the homicide rate and whether restoration decreased it; and (4) whether the publicity attending either the imposition or the execution of a death sentence produces a decrease in homicide rate.

The evidence relating to a comparison of neighboring states is of

brought up to date on the basis of information furnished by an employee of the Ohio State Penitentiary.

39. In 1940, Ohio's population was 6,907,612. In 1950, it was 7,946,627. In 1960, it was 9,706,397. *WORLD ALMANAC & BOOK OF FACTS* 255 (1963). Although the number of executions has diminished, Ohio holds an unfortunately high rank in comparison to other states. For the period 1930-1957, the leading execution states were New York (309), Georgia (280), California (242), North Carolina (205), Texas (189), Ohio (158), and Pennsylvania (146). *SELLIN* 5. For the period 1930-1959, statistics relating to Ohio and eight neighboring states show that Ohio, with 25.6% of this total population (1950), accounted for about 43 % of the total number of executions. *OHIO REPORT* 21.

40. *OHIO REPORT* 36.

41. *OHIO REPORT* 50. Cleveland statistics for the period 1947 through 1953 indicate that there were 116 indictments for first-degree murder, 33 convictions, and 9 death sentences. *BENSING & SCHROEDER, op. cit. supra* note 25, at 23. Regarding the infrequency of executions in other jurisdictions, see Younger, *Capital Punishment: A Sharp Medicine Reconsidered*, 42 A.B.A.J. 113 (1956).

42. The report, note 8 *supra*, was made to the American Law Institute.

particular interest to Ohioans because one of the groups comprised Ohio and Indiana (retention states), and Michigan (an abolition state). For the period 1930-1955, Professor Sellin found that Ohio's homicide rate was higher than Michigan's in 31 of the 35 years.⁴³ In evaluating these figures, it must be observed that Ohio is substantially more urbanized than is Michigan,⁴⁴ and that urbanization is a factor in high crime rates. However, the comparison between Michigan and Indiana is equally revealing: Indiana's rate was higher in 17 years, Michigan's rate was higher in 14 years, and the rates were the same in the remaining 4 years.⁴⁵ The Ohio-Indiana-Michigan comparison dramatically illustrates the *absence of evidence* of a relationship between the death penalty and a decreased homicide rate.⁴⁶ And the illustration is not one of a kind. Professor Sellin noted the same absence in all of the other comparisons.⁴⁷ Accordingly, he concluded:

1. The *level* of the homicide death rates varies in different groups of states. It is lowest in the New England areas and in the northern states of the middle west and lies somewhat higher in Michigan, Indiana and Ohio.
2. Within each group of states having similar social and economic conditions and populations, it is impossible to distinguish the abolition state from the others.
3. The *trends* of the homicide death rates of comparable states with or without the death penalty are similar.

43. SELLIN 28. Figures through 1958 show that Ohio's homicide rate was higher in 34 of the 38 years. OHIO REPORT 40. In making his study, Professor Sellin used the *crude homicide rate*. The rate was computed by using the number of reported deaths classified by the authorities as intentional homicide. Statistics relating to capital homicide were not available. However, as noted by Professor Sellin: "Students of criminal statistics have examined [the data relating to intentional homicides] with some care and have arrived at the conclusion that the homicide death rate is adequate for an estimate of the trend of murder. This conclusion is based on the assumption that the *proportion* of capital murders in the total of such deaths remains reasonably constant." SELLIN 22.

44. Of the fifty most populous cities in the United States, Ohio has six. The six, according to rank and 1960 population are Cleveland (8th), 876,050; Cincinnati (21st), 502,550; Columbus (28th), 471,316; Toledo (39th), 318,003; Akron (45th), 290,315; and Dayton (49th), 262,332. WORLD ALMANAC & BOOK OF FACTS 253 (1963). Michigan had only one of the fifty most populous cities, Detroit (5th), 1,670,144. Michigan's second city is Flint (62d), 196,940. *Ibid.* Ohio's population density in 1960 was 236.9 persons per square mile. Michigan's population density was 137.2. *Id.* at 258.

45. SELLIN 28. Indiana has but one of the fifty largest cities, Indianapolis (26th), 476,258. Indiana's second city is Gary (70th), 178,320. *Id.* at 253. Indiana's population density figure as of 1960, 128.9, was smaller than Michigan's. *Id.* at 258.

46. As pointed out in Hart, *Murder and the Principles of Punishment: England and the United States*, 52 NW. U.L. REV. 433, 457 (1957), it is important to distinguish between two propositions: "(1) There is no evidence from the statistics that the death penalty is a superior deterrent to imprisonment. (2) There is evidence that the death penalty is not a superior deterrent to imprisonment." The available statistics support the first proposition. Whether proof of the first proposition constitutes evidence of the second proposition is open to question. Whether proof of the first proposition, standing alone, is adequate reason for abolition will depend upon a dogmatic view as to which side bears the burden of proof. See note 66 *infra* and accompanying text.

47. SELLIN 23-24.

The inevitable conclusion is that executions have no discernible effect on homicide death rates which, as we have seen, are regarded as adequate indicators of capital murder rates.⁴⁸

Professor Sellin's conclusion was buttressed by his findings on the questions of police safety and impact of publicizing the imposition or execution of the death sentence. The evidence, admittedly of variable quality and quantity,⁴⁹ did not support the claims (1) that the police are safer in retention states than in abolition states,⁵⁰ and (2) that publicizing either the imposition or the execution of the death sentence was followed by a decrease in homicide rate.⁵¹ Of greater significance was his analysis

48. SELLIN 34.

49. Regarding police safety, Professor Sellin was unable to determine (1) whether the proportion of criminals who carry lethal weapons is greater for abolition states than for retention states, and (2) whether the proportion of criminals who use such weapons, with or without injury to police, is greater for abolition states than for retention states. SELLIN 53. Also, he was unable to determine the number of woundings in the cities under consideration. *Id.* at 55. Accordingly, he was remitted to using figures relating to killing of policemen. *Ibid.* Even as to killings, however, the information was incomplete because no reports were received from the police departments in Detroit, New York, Cleveland, and Boston. *Ibid.*

50. SELLIN 56-62. For the period 1919 through 1954, the police homicide rate per 100,000 population in Michigan, Ohio, and Indiana was as follows:

CITIES OF 10,000-30,000				
State	No. Cities	No. Incidents	Population	Rate
Mich.	24	8	419,904	1.9
Ohio	21	7	317,623	1.9
Ind.	10	3	170,785	1.7
CITIES OF 30,000-60,000				
Mich.	4	1	189,605	0.5
Ohio	7	3	223,303	1.3
Ind.	4	7	171,048	4.1
CITIES OF 60,000-100,000				
Mich.	2	3	187,912	1.6
Ohio	2	1	146,379	0.7
Ind.	no report			
CITIES OF 100,000-350,000				
Mich.	1	1	176,515	0.6
Ohio	3	14	635,389	2.2
Ind.	1	1	133,607	0.7
CITIES OF 500,000-650,000				
Mich.	no report			
Ohio	1	13	503,998	2.6
Ind.	no report			
ALL CITIES REPORTING				
Mich.	31	13	973,940	1.3
Ohio	34	38	1,880,692	2.2
Ind.	15	11	475,440	2.3

SELLIN 56.

51. SELLIN 50-52. Professor Sellin studied 5 executions stemming from offenses in Philadelphia. Each execution was well publicized. Taking a sixty-day period before execution and a sixty-day period after, there was a combined total of 105 days free from intentional homicide before the executions and 74 days free from intentional homicide after the executions. There were 91 homicides in the "before execution" period and 113 homicides in the "after execution" period. SELLIN 51. In a similar study using the dates of *imposition* of four death sentences as a base it was found that in the pre-sentence period (eight weeks) there were 23 definite capital homicides, and in the post-sentence period there were 28 definite capital homicides. In the pre-sentence period there were 20 homicides classified as "prob-

of the impact of abolition followed by restoration. Neither in terms of homicide death rate nor in terms of number of convictions for murder⁵² was there any trend indicating that abolition produced an increase in homicide and that restoration effected a decrease.⁵³

No one who carefully reads the Sellin Report will claim that it is an end-all.⁵⁴ However, it is persuasive, and it does require a reply from those who would retain the death penalty.

At the hearings, there was a reply of sorts. Initially, the retentionists were content to arrogate all expertise in the matter. They, as law enforcement officers, had "experience on the street." All others were characterized as "closely allied with religious leaders," as "idealists," and as persons who "adjust statistics,"⁵⁵ wherein there was an "adjustment" was left to conjecture. It was claimed, however, that the statistical evidence had to be incorrect because the existence of the death penalty for certain *federal* offenses⁵⁶ converted every state into a capital punishment jurisdiction. The claim, of course, is factually correct in that there is federal land in every state upon which the commission of a murder may give rise to the death penalty. But the claim is monstrously irrelevant to the question of the validity of the statistics regarding deterrence. Indeed, any argument for relevance would have to proceed upon either or both of two untenable assumptions: (1) that murders on federal land comprise a significant part of all murders in a given abolition state;⁵⁷ or (2) that a potential murderer in an abolition state is deterred by the *mistaken* belief that the contemplated offense is punishable under federal law. The retentionist argument will not hold water.

ably capital," and in the post-sentence period there were 13 such homicides. Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L., C. & P.S. 338, 340 (1958). It cannot be said as to either study that the sample was adequate.

52. As to some states, Professor Sellin used the homicide death rate. As to other states he was forced to use the number of murder convictions.

53. SELLIN 34-38.

54. In evaluating Professor Sellin's conclusions, it is necessary to keep in mind the factors discussed in notes 43, 44, 46, 49, 51, and 52 *supra*. With particular reference to the abolition-restoration problem, consideration should be given to the following: "In the thirty years from 1910 to 1939 the ten year average murder rate in England fell from 4.1 to 3.3 per million. Yet if the death penalty had been abolished at the beginning of this period (1900), and if this had resulted in 100 more murders than there actually were during this period, there would still have been a substantial decrease (from 4.1 to 3.5 per million) in the murder rate following this abolition." Hart, *supra* note 46, at 457.

55. These verbatim quotations are in the notes taken by me at the hearings.

56. See, e.g., 18 U.S.C. §§ 794 (gathering or delivering defense information to aid a foreign government), 1111 (murder), 1201 (kidnapping), 2031 (rape), 2381 (treason).

57. For 1961, it is estimated that 8,600 intentional homicides were known to the police. STATISTICAL ABSTRACT OF THE UNITED STATES, 152, chart no. 195 (1963). For fiscal year 1962, in all of the federal district courts except those in the District of Columbia, Canal Zone, Guam, and Virgin Islands, only 32 homicide cases of all types were disposed of. Six of the cases resulted in convictions. *Id.* at 158, chart no. 207. For the period 1930-1957, there were 3,081 state executions for murder. For the same period there were only 15 federal executions for murder. SELLIN 6.

The second argument against the statistical position of the abolitionists was based on statements said to have been made to law enforcement officers by burglars, safecrackers, and other offenders. The essence of these statements was that the speaker, out of fear of the death penalty, forebore either from carrying or from using a weapon or dissuaded a confederate from carrying or using a weapon. If these statements are credible, they form the basis for an appealing argument in favor of the death penalty. Whether they are credible, however, is open to serious question. As was observed in a leading study of the death penalty in Ohio:

Penologists and criminologists most familiar with research into problems of criminality place little credibility in the results of polls of criminals in custody. Such persons, it is claimed, show a marked tendency to give whatever answers they believe the interviewer is seeking or answers which they believe will be to their advantage.⁵⁸

But even if credibility is assumed, the matter is not resolved. First, there is reason to doubt that the number of incidents referred to is statistically significant.⁵⁹ Second, and of greater importance, the statements, at best, indicate only that the offender considered the penalty. They do not shed light on the critical question of whether the death penalty deters murder more effectively than a sentence to life imprisonment. Indeed, the offenses typically referred to by the retentionists⁶⁰—robbery, burglary, and safecracking—either do not carry a maximum sentence of life imprisonment⁶¹ or involve only an alternate⁶² and not frequently imposed⁶³ sentence of life imprisonment. Consequently, there is reason to doubt the retentionists' position.

Ultimately, the retentionists abandoned any effort to deal on the merits with the arguments against a theory of deterrence. They simply, but forcefully, stated that they could not believe the statistics, and that abolition in Ohio would increase the homicide rate two or three times (the experience in the abolition-restoration states is a refutation of the

58. OHIO REPORT 35.

59. *Ibid.*

60. See *ibid.*

61. See OHIO REV. CODE §§ 2901.13 (armed robbery; 10-25 years) 2907.10 (burglary of a building other than an inhabited dwelling; 1-15 years); 2907.12 (forcing entrance into safe, vault or depository box; 1-20 years).

62. See OHIO REV. CODE §§ 2907.09 (burglary at night of inhabited dwelling; life or 5-30 years); 2907.141 (malicious entry of financial institution; life or 20 year minimum, no stated maximum).

63. Regarding the infrequency of a life sentence for burglary, the following is worth noting: from 1955 to the third quarter of 1963, the Ohio State Penitentiary received 398 persons convicted of burglary of an inhabited dwelling. Of this total, 321 (80.6%) were received under a sentence to a term of years. Only 77 (19.4%) were received under a life sentence. The 398 convicts comprised 6.2% of all convicts (6,439) received under a sentence for some form of burglary. This data is cited from a letter to the author from E. L. Maxwell, Warden, Ohio Penitentiary, October 25, 1963.

latter point).⁶⁴ In what was perhaps the least analytical statement made at the hearings, it was argued that the police, whether correctly or incorrectly, believe in the deterrent value of the death penalty, and that abolition of the death penalty would weaken police morale and therefore would be undesirable.

It is a fair summary of the testimony presented at the hearings that two basic arguments regarding deterrence clearly emerged. The argument of the abolitionists, resting on persuasive, albeit not conclusive, evidence, was that there is "room for substantial doubt that any solid case can be maintained for the death penalty, as it is employed in the United States, as a deterrent to murder."⁶⁵ The argument for the retentionists, based on introspection, was that the death penalty logically *should* be a deterrent. Thus, one issue for the legislature was clearly drawn: whether the state ought to kill certain offenders when the principal utilitarian argument in favor of killing (deterrence) rests upon a demonstrably speculative foundation.⁶⁶

DOES THE DEATH PENALTY SERVE A UTILITARIAN PURPOSE OTHER THAN DETERRENCE?

Many of the remaining issues can fairly be grouped under the question posed immediately above. In discussing these issues and in evaluating antagonistic arguments, care should be taken to distinguish between two disparate questions: (1) whether a given utilitarian purpose ascribed to the death penalty is, in fact, served; and (2) if so, whether it is the sort of purpose that ought to be taken into account in assessing the desirability of the death penalty. That both questions are important is apparent from a consideration of the retentionists' argument that the death penalty facilitates police investigation.

The Death Penalty as an Investigative Device

One of the claims made by the retentionists was that the death penalty ought to be retained because the threat of electrocution can be used by law enforcement officers as a wedge to induce a murderous co-felon to implicate his confederates. Specifically how the device functions was not discussed, and it cannot be determined whether, as utilized,

64. See notes 53, 54 *supra* and accompanying text.

65. MODEL PENAL CODE, comment 64 (Tent. Draft No. 9, 1959).

66. The resolution of this issue will depend in large part upon a dogmatic position regarding burden of proof. Retentionists argue that the burden of proving non-deterrence is on the abolitionists because it is they who seek to change the existing system. See Younger, *supra* note 41, at 199. The position of this author as an abolitionist is that killing, whether accomplished by an individual or by the state, is an act of such gravity that proof of utility is essential.

the device runs counter to rules prohibiting the acquisition and use of involuntary confessions.⁶⁷ However, even if the question of voluntariness is ignored, the retentionist argument is invalid because it proves too much. The same argument, that police investigation is facilitated, could just as well be urged in support of confessions obtained by force, unlawful arrest, and unreasonable search and seizure.⁶⁸ Implicit in the argument is a premise that the end justifies the means. If the premise is rejected, as it should be, the question remains as it was at the outset — whether the means can stand on their own merit.

The Death Penalty as a Counter-Recidivism Device

Another retentionist argument was that the death penalty is warranted because rehabilitative methods have failed. The inarticulate premise of the argument must be that paroled capital felons, in a significant number of cases, continue with homicidal endeavor. That the premise is incorrect is demonstrated by a study of the post-parole activities of 169 first-degree, life-sentence murderers, all of whom had been sentenced in Ohio. The study disclosed that 10 of the 169 parolees returned to penal institutions, 2 for felonies of violence (but not resulting in death), and 8 either for technical parole violations or for inability to adjust to non-prison life.⁶⁹ The success rate was 94.1 per cent. The success rate for all other parolees was 74 per cent.⁷⁰ Studies in states other than Ohio have yielded similar results.⁷¹ Such results are not surprising if it is kept in mind that a substantial percentage of first-degree murderers are first offenders. Consequently, the fear of recidivism is unjustified, and the death penalty, to the extent that it is deemed an anti-recidivism device, is a cure for which there is really no disease.⁷²

67. See *Haynes v. Washington*, 373 U.S. 503 (1963), for a collection of cases on the confessions rule.

68. See 1 STEPHEN, *HISTORY OF THE CRIMINAL LAW OF ENGLAND* 442 (1883): "During the discussions which took place on the Indian Code of Criminal Procedure in 1872 some observations were made on the reasons which occasionally lead native police officers to apply torture to prisoners. An experienced civil officer observed, 'There is a great deal of laziness in it. It is far pleasanter to sit comfortably in the shade rubbing red pepper into a poor devil's eyes than to go about in the sun hunting up evidence.'"

69. OHIO REPORT 81-82.

70. *Id.* at 82.

71. *Ibid.* See also SELLIN 76-77 in which similar evidence pertaining to Pennsylvania and California is noted.

72. Even if recidivism were a problem, the death penalty seems to be an exorbitant answer. The position that killing is justified because cure is impossible is not unlike the position taken by one of the characters in the comic-strip "Peanuts." After recounting an abortive effort to engage a new neighbor in conversation, he concluded in substance, "I didn't know what to say to her, so I hit her." SCHULZ, *GOOD OL' CHARLIE BROWN* 39 (1958). Prolonged, perhaps lifetime, detention of the potential recidivist would be a feasible alternative. And to the answer that such detention is more cruel than death, my reply is that I choose not to play God with another's life. At the very least, the choice of life or death should be the defendant's:

*The Death Penalty as a Device to
Facilitate Prison Administration*

The final utilitarian argument of the retentionists was that the death penalty facilitates discipline and thereby aids in prison administration. It was asserted that, absent the death penalty, there would be no effective deterrent for the first-degree, life-sentence murderer who, while serving his sentence, killed a guard. Moreover, vague reference was made to Black Muslims, apparently in an effort to suggest that imprisoned Black Muslims would run riot absent the death penalty.

Obviously it cannot be determined authoritatively whether an executed murderer would have been a disciplinary problem for prison administrators if his life had been spared. Accordingly, any argument, whether for retention or for abolition, is speculative. But it is clear that first-degree, life-sentence murderers, as a class, pose no peculiar problem for prison administrators.

Murderers serving life sentences, according to penal officials, know that they will spend a long time in prison, and that their only hope of release under any circumstances is through the earning of a parole. Lifers are said to be the least likely of all prisoners to engage in behavior which will jeopardize that hope.⁷³

Thus, there is built into the life sentence a natural deterrent, the desire for release; and the fears of the retentionists again are not well-founded.⁷⁴

In summary, whether in terms of prison administration, recidivism, or police investigation, the utilitarian purposes attributed to the death penalty are fancied rather than real. Yet, these purposes and the general deterrent purpose were advocated vigorously and sincerely by the retentionists. Why? The "real" reasons behind their position must be denied to all but the clairvoyant. An educated guess, however, might include three motivating factors: (1) a sort of "curbstone logic" regarding the utilitarian purposes; (2) a belief that the death penalty is consonant with a fair administration of criminal justice; and (3) a natural and understandable tendency to sympathize with the victim and his loved ones. The utilitarian arguments have already been explored. Consideration will now be given to the remaining factors.

73. OHIO REPORT 79. The penal officials referred to in the quotation were from Ohio. Their views are in agreement with the views of penal officials throughout the world. See SELLIN 70-72, in which the author sets out replies received in response to a study, undertaken in 1950, by the International Penal and Penitentiary Commission.

74. Suppose, however, that a convicted murderer had no hope for release. Would the death penalty be the only effective deterrent to subsequent killing in prison? Although speculation is admitted, the answer should still be in the negative. It is submitted that the threat of legitimate self-defensive action by armed guards would be at least as effective a deterrent as the threat of the death penalty. Indeed, as a more immediate threat, it might well be a more effective deterrent.

IS THE DEATH PENALTY CONSONANT WITH A FAIR ADMINISTRATION OF CRIMINAL JUSTICE?

To the abolitionists' argument that there are serious inequities in the administration of the death penalty, the retentionists' reply was little more than a general denial. It was asserted that indigent murderers are capably defended by court-appointed counsel, and that *if* there are inequities, then "our judicial system is wrong." The retentionists thus were content to rest upon their *belief* in the impartiality and accuracy of the judicial process. A discussion of the validity of that belief was left to the abolitionists. Their arguments will be noted briefly.

Inequality and Sex

Typically, in debates upon the death penalty, abolitionists contend that sex is a factor in the imposition and execution of a death sentence, and that it is less likely that a female defendant will be executed than a male defendant. This same claim was made before the House Judiciary Committee during the recent hearings, and statistical evidence pertinent to Ohio was introduced in support of the claim. For the period 1955-1960, 495 persons were charged with first-degree murder in Ohio. Of this total, 430 (approximately 87 per cent) were men; 65 (approximately 13 per cent) were women. Of the 430 male defendants, 136 (approximately 31.6 per cent) were found guilty of first-degree murder. Of the 65 female defendants, *only* 5 (approximately 7.7 per cent) were found guilty of first-degree murder.⁷⁵ Thus, it is clear that conviction of first-degree murder, a necessary pre-requisite to the imposition and execution of the death sentence, was more readily obtained in the case of the male defendant than in the case of the female defendant. And it is equally clear that, in terms of actual execution, the female has maintained her advantage. During the period 1930-1954, only 3 women were executed in Ohio,⁷⁶ and, from 1955 to date, there have been no executions of female prisoners.⁷⁷

Inequality and Race

It might be suspected that juries have a greater inclination to withhold a recommendation of mercy in cases of Negro defendants than in cases of Caucasian defendants. Regarding Ohio, the suspicion is ground-

75. OHIO REPORT 61.

76. SELLIN 6.

77. This information was furnished by an employee in the office of the Warden of the Ohio State Penitentiary. From the same source it was learned that of the three executions referred to in the text accompanying note 76 *supra*, two took place in 1954.

less.⁷⁸ In terms of commutation, however, the statistics tell a completely different story. During the period 1950-1959, 38 per cent of all death-sentence prisoners received commutation. Of all Caucasian death-sentence prisoners, 49 per cent received commutation. However, of all Negro death-sentence prisoners, *only 22 per cent* received commutation.⁷⁹ Thus, the abolitionists argued, the chance of commutation for the Caucasian prisoner was *four times* the chance of commutation for the Negro prisoner.

Inequality and Geographical Location

The abolitionists presented to the committee the results of a study devoted to the question of whether juries in certain Ohio counties have a greater tendency to impose the death penalty than jurors in other Ohio counties. The study disclosed the following:

[I]t would appear that differences have existed among counties of about the same size in Ohio in readiness of juries to impose the death penalty. Counties with comparable homicide rates and comparable murder conviction rates, furthermore, may differ in death sentence rates. [The comparisons made during the study] suggest the possibility that juries in some counties are more likely to extend mercy to murder convicts than are juries in other counties. A murderer who commits his crime in Greene or Crawford county, for example, has a much better statistical chance of avoiding the death sentence than the murderer who commits his crime in Belmont or Athens county.⁸⁰

The abolitionists demanded a reply from the retentionists. As noted above, however, their reply was an unsupported statement of their belief in the accuracy, impartiality, and fairness of the existing system.

Inequality and Representation by Counsel

Under enlightened Ohio law, long antedating recent Supreme Court cases,⁸¹ every indigent felon is entitled to representation by court-appointed counsel.⁸² The question raised by the abolitionists was whether it was more likely that the death sentence would be executed in the case of the indigent defendant than in the case of the non-indigent. On the basis of a recent study, the argument of the abolitionists was that, in terms of execution, the indigent defendant was at a significant disadvantage. The study, embracing the 67 death sentences imposed during

78. OHIO REPORT 62. As of April 1, 1960, Negroes comprised 39.8% of all Ohio prisoners. They comprised 37.3% of all death-sentence prisoners for the period 1950-1959.

79. *Ibid.*

80. *Id.* at 59. A detailed comparison of county-by-county statistics appears at 54-59.

81. See *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Lane v. Brown*, 372 U.S. 477 (1963); *Draper v. Washington*, 372 U.S. 487 (1963).

82. OHIO REV. CODE §§ 2941.50-.51.

the period 1950-1959, revealed that the defendant was executed in 50 per cent of the cases defended by retained counsel, and in 57.2 per cent of the cases defended by court-appointed counsel.⁸³ Moreover, the sentence was commuted in 44.4 per cent of the cases defended by retained counsel, but in only 30.6 per cent of the cases defended by court-appointed counsel.⁸⁴

These figures, particularly as they relate to commutations, were wholly ignored by the retentionists.

The "Innocent" Defendant and the Death Penalty

Sooner or later, in any discussion of the death penalty, attention must be given to the argument that either the death penalty results in the taking of some innocent life or it creates the unreasonable risk that innocent life will be taken. This argument was urged upon the members of the House Judiciary Committee with full realization that, as the number of executions in any jurisdiction diminishes, the opportunity for miscarriage of justice also diminishes.

Initially, the abolitionists claimed that because human judgment is fallible some innocent persons had been convicted. Reference was made to numerous cases, including two Ohio cases, involving conviction of the innocent.⁸⁵ Influential in these unfortunate convictions were mistaken identity and impeachment of credibility through evidence of prior convictions.⁸⁶ Although some of the defendants came perilously close to death, it was admitted that in none of the cases was the defendant executed.

Next, it was claimed on the basis of other evidence, that some innocents had been executed.⁸⁷ It was admitted that the number of known

83. OHIO REPORT 63.

84. *Ibid.* The figures do not total 100% because they exclude the percentage of convicts who were awaiting execution at the time of the study.

85. Cases are collected in BORCHARD, *CONVICTING THE INNOCENT* (1932); FRANK & FRANK, *NOT GUILTY* (1957). The two Ohio cases are *State v. McKinney*, 77 Ohio App. 309, 64 N.E.2d 129 (1945) (BORCHARD 154), and *State v. Thornton*, No. 8649, Butler County C.P., Feb. 15, 1957 (BORCHARD 27).

86. In the *McKinney* case, *supra* note 85, the defendant was convicted of the first-degree murder of a policeman. He was "identified" after the police dressed him in garments similar to those worn by the assailant. In addition, his record of prior convictions was used to impeach his credibility. Months after the conviction, another person confessed, was indicted, and pleaded guilty. McKinney was released. In the *Thornton* case, *supra* note 85, the defendant was convicted of robbery. The victim, a newly-arrived immigrant, provided the identification. Other links in the chain were that one John Ivory was identified as a co-felon; that he was jailed; that Thornton visited him in jail; that there was a joint trial; that the evidence against Ivory was strong; and that Thornton's alibi witnesses had bad reputations. Eleven months later another person confessed and Thornton was released.

87. In SELLIN 64, the following is stated: "It is claimed that both Maine and Rhode Island abolished the death penalty because of the execution, in each of these states, of an innocent person." As evidence in support of the statement, Professor Sellin refers to a letter from Edmund S. Muskie, then Governor of Maine, and to a letter from John A. Murphy, then

erroneous convictions far exceeds the number of known executions, and that the number of known erroneous executions is small. Indeed, it was conceded that in no Ohio case had innocence been proved after execution. In explanation of the latter, it was asserted that, in the case of the life-sentence convict, friends and relatives frequently undergo great financial sacrifice to obtain release, but in the case of the executed convict financial sacrifice is fruitless. In any event, it was the position of the abolitionists that Ohio's system of criminal justice ought not to permit even the risk of killing an innocent person.

Two arguments relevant to the issue under consideration were overlooked by the abolitionists. The first argument is that a defendant, guilty of some form of homicide, may erroneously be convicted of first-degree murder. *State v. Salter*⁸⁸ is a hideous example. The defendant, preparatory to raping an eleven year old girl, attempted to anesthetize her with chloroform. The dosage administered would probably not have been fatal under ordinary circumstances. However, the victim had an unusual glandular condition which made the administration of any anesthetic highly dangerous, and, as a result of the chloroform, she died. Defendant's conviction for first-degree murder was affirmed by a divided Ohio Supreme Court in spite of the facts that the defendant had no motive to kill and no desire to kill, and that he remained at the scene, awakened the victim's family, called the fire department emergency squad, and attempted artificial respiration. Salter was executed.⁸⁹ Clearly he was guilty of involuntary manslaughter under Ohio law.⁹⁰ Arguably his conduct was sufficiently reckless to establish murder under the law of some other jurisdictions.⁹¹ But in Ohio, intent to kill is a *sine qua non* to liability for first-degree murder even though the killing occurs during

Chief of Police, Providence, Rhode Island. Perhaps the most celebrated case involved the conviction and execution in England of Timothy Evans for the murder of his wife and child. After the execution, there was discovered compelling evidence that the murderer was the prosecution's chief witness. The case is discussed in HALE, HANGED IN ERROR 90-110 (1961). The author reports that the Home Secretary stated, "I think Evans' case shows, in spite of all that has been done since, that a mistake was possible, and that, in the form in which the verdict was actually given in a particular case, a mistake was made." *Id.* at 10. In addition, the author recounts part of a debate in 1961 in the House of Commons in which the then Home Secretary stated: "It may be said, and it may be true — and I will acknowledge this from the box — that if the facts as they are now known had been known in 1950 the jury would not have found that the case against Evans had been proved beyond all reasonable doubt. I am saying that deliberately and with authority." *Id.* at 110.

88. 149 Ohio St. 264, 78 N.E.2d 575 (1948).

89. This information was furnished by an employee in the office of the Warden of the Ohio State Penitentiary.

90. OHIO REV. CODE § 2091.06.

91. See MODEL PEN. CODE § 201.2, (Tent. Draft No. 9 1959), for a proposed statutory formulation of the "recklessness" criterion and for a collection of cases in which this criterion is applied.

the commission of a felony.⁹² That the evidence fell short of establishing intent seems clear from just a statement of the facts.⁹³ At the very least, a compelling argument can be made against the decision, a decision which cost the defendant his life under Ohio's system of capital punishment.

The second argument is that a life-sentence defendant may well be accorded the retroactive benefit of changes in the law. For example, some recent federal cases have given retroactive effect to *Mapp v. Ohio*⁹⁴ and have overturned state convictions antedating *Mapp* in which illegally obtained evidence was utilized by the prosecution.⁹⁵ The conviction of an executed defendant may also have been tainted by illegally acquired evidence. It too should be overturned. But death and mootness are both permanent.

In summary, some defendants are not guilty of any offense, others are not guilty of the offense charged, and still others ought to be given a new trial. But the death penalty is irrevocable, and errors, whether of fact or law, are beyond correction. That such errors do occur, although not very often, is demonstrable. And the occurrence of each such error is a rebuke to those who believe that any system of law can be administered with pervasive accuracy.

If the question of accuracy is put to one side, the questions of equality and fairness still remain. How fair is a system in which the risk of execution is materially increased if the defendant is a male Negro represented in Belmont County by court-appointed counsel, and in which the risk is materially decreased if the defendant is a female Caucasian represented in Greene County by retained counsel?

IS THE DEATH PENALTY BASED ON VENGEANCE?

The criminal process is supposed to serve a screening function. At each step — arrest, preliminary examination, grand jury inquiry, trial, and appeal — those whose innocence is likely are weeded out. Those

92. *Turk v. State*, 48 Ohio App. 489, 194 N.E. 425 (1934), *aff'd per curiam by equally divided court*, 129 Ohio St. 245, 194 N.E. 453 (1935).

93. The validity of the statement in the text depends upon the definition of intent. Under Ohio case-law, there is reason to suggest that intent means desire. See *Robbins v. State*, 8 Ohio St. 131 (1857); *Turk v. State*, *supra* note 92. Salter clearly did not desire death. However, even if the definition reasonably were broadened to include foreseeability of the very strong likelihood of death, see HOLMES, *THE COMMON LAW* 53 (1881) ("that the act done will very certainly cause death, and the probability is a matter of common knowledge . . ."), the definition would not embrace the *Salter* facts. The only definition of intent consonant with the *Salter* result is the following: A person intends to kill if he applies a potentially dangerous device to the person of another and thereby kills the other. The definition comes perilously close to equating intention with causation.

94. 367 U.S. 643 (1961).

95. See, e.g., *Walker v. Peppersack*, 316 F.2d 119 (4th Cir. 1963); *Hall v. Warden*, 313 F.2d 483 (4th Cir. 1963).

whose guilt is likely are moved on to the next step for further screening.⁹⁶ The process operates in much the same way regarding the death penalty, although there are fewer steps. The prosecutor may elect not to ask for the death penalty; the jury may recommend mercy and thereby impose a life sentence; the governor may commute a death sentence. That the process does so operate is clear from a comparison for any given period of the number of indictments for first-degree murder and the number of executions.⁹⁷

What criteria are used by the decision-makers in this death-penalty screening process? It is suggested that, whatever other criteria might be involved, the criterion of vengeance or retribution or heinousness of the offense is a significant one. The prosecutor who argues for "selective use" of the death penalty, an argument made at the hearings, must have in mind the selection for death of the defendant whose crime is the most predatory and brutal and whose conduct is the least explainable or understandable. There is some evidence that juries function in a similar manner. During a fifteen year period, the California Supreme Court remanded for new trial 25 death-sentence cases. In only 3 of the cases was the defendant again sentenced to death.⁹⁸ One can imagine many factors which may have produced this result, but one cannot reject out-of-hand the notion that the retrials, removed in point of time from the incident, lacked the emotional impact of the original trials, and that there was a consequent mitigation of horror in assessing the defendant's conduct.

In public debate, retentionists seldom argue expressly that vengeance is a justification for the death penalty. But it takes no penetrating analysis to perceive the substantial undertone of vengeance. The argument of "selective use," already referred to, is one manifestation. Others are available. At the hearings in support of the position that Ohioans want the death penalty, it was asserted that persons who opposed the death penalty came to favor it after loved ones had been murdered.⁹⁹ One retentionist blithely observed that if the death penalty were abolished, he would have no satisfactory answer when relatives of the deceased inquired about the punishment of the defendant. And another repeatedly urged the death penalty for "rats" and "brutal" murderers. That these arguments are based upon vengeance is obvious.

96. See Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149 (1960).

97. See note 41 *supra* and accompanying text.

98. Note, *Post-Conviction Remedies in California Death Penalty Cases*, 11 STAN. L. REV. 94, 104 (1958).

99. The assertion was apparently based on an article appearing in a Columbus, Ohio newspaper after the trial of Donald Reinbolt. In this article, the victim's daughter stated her belief that the death penalty was "not revenge, not anger, but honest justice." Columbus Citizen Journal, Feb. 20, 1962, p. 1, col. 2.

It is not necessary, however, to denigrate the idea of vengeance. Nor is it necessary to suggest to the victim's friends and relatives that they turn the other cheek, that they try to understand the murderer, his motivations, or the pressures under which he acted. It would be impertinent to say to those law enforcement officers who must observe the dead and comfort the living that they should not sympathize with the bereaved. However, it is necessary to ask whether the state should undertake to satisfy understandable feelings of vengeance, and whether vengeance is an appropriate basis for the state's administration of criminal law. Some will say yes.¹⁰⁰ My answer is no, and the answer rests in part upon dogma and in part upon doubts that the sciences of the mind sufficiently understand the concept of free will which underlies the argument for vengeance.¹⁰¹

CONCLUSION

In this article an attempt has been made to assess critically the arguments in favor of capital punishment presented to the Judiciary Committee of the Ohio House of Representatives. The argument that the death penalty is a deterrent seems to boil down to two questions: whether the argument is anything more than speculative, and, if so, whether speculation is a legitimate predicate for legalized killing. The argument that the death penalty serves other utilitarian purposes is, in my view, demonstrably unsound, as is the argument that the death penalty is consonant with a fair, impartial, and accurate administration of criminal law.

In 1912, the question of abolition through constitutional amendment was submitted to the electorate. It was defeated by 44,540 votes, 303,246 to 258,706.¹⁰² The defeat, hardly an overwhelming one, took place at a time when judicial record-keeping was rudimentary and there was no body of statistical evidence against which the arguments for retention could be measured. Such evidence is available now. But whether Ohio, in the second half of the twentieth century, will be enlightened by it remains to be seen.

100. See SALMOND, JURISPRUDENCE 116 (10th ed. 1947): "The emotion of retributive indignation, both in its self-regarding and in its sympathetic forms, is even yet the mainspring of the criminal law. It is to the fact that the punishment of the wrongdoer is at the same time the vengeance of the wronged, that the administration of justice owes a great part of its strength and effectiveness."

101. On the relationship between free will and vengeance, see Younger, *Capital Punishment: A Sharp Medicine Reconsidered*, 42 A.B.A.J. 113 (1956).

102. OHIO REPORT 10.