

LAWRENCE HERMAN
PRESIDENT'S CLUB PROFESSOR OF LAW EMERITUS
MORITZ COLLEGE OF LAW, THE OHIO STATE UNIVERSITY
IN SUPPORT OF H.B. 160 TO ABOLISH DEATH PENALTY IN OHIO
DECEMBER 14, 2011

1. INTRODUCTION

- A. Name, academic position, subject matter
- B. Former practitioner, both prosecution and defense, have worked on death penalty cases in both capacities
- C. Have written briefs in death penalty caseS for both the Ohio Supreme court and US Supreme Court. In 1978, in the case of Bell v. Ohio, I wrote a brief for the US Supreme Court arguing that Ohio's death penalty statutes were unconstitutional. Bell was one of the two cases in which the Court invalidated Ohio's statute.
- D. Legislative witness on the subject of the death penalty.
 - 1. I first testified before an Ohio legislative committee in 1960
 - A. State poll, plurality against death penalty
 - B. Special legislative committee held hearings around the state, including Cleveland, where I was in my first year of teaching law at Western Reserve University.
 - C. I was invited to testify and accepted the invitation.
 - D. I was a lukewarm supporter of the death penalty then. I knew that a major purpose of criminal punishment was protection of society through deterrence, and my intuition told me that the most severe punishment would do the best job of deterrence
 - E. However, concerned that my intuition might be wrong, I began to study the death penalty closely. I was unsettled by what I found. The only then-existing analysis of death penalty statistics - by Professor Thorsten Sellin, a highly regarded sociologist - absolutely failed to support my intuition. There was no evidence that the death penalty was a better deterrent to murder than some other severe penalty, such as life imprisonment.

- F. At that moment, I became an opponent of the death penalty, and so testified before the legislative committee.
 - G. I soon became vice-president of a state-wide organization that sought the abolition of the death penalty.
2. Fast forward to 1981. The Ohio Senate Judiciary Committee was considering a bill to reinstate the death penalty in Ohio.
- A. Paul Pfeifer, a former prosecutor, now an Ohio Supreme Court Justice, and also now an ardent opponent of the death penalty, chaired the committee.
 - B. I spoke against the death penalty. However, believing that the legislature was going to reinstate the death penalty, I worked with Senator Pfeifer to address flaws in the proposed bill. I drafted amendments to insure that the proposed bill would conform to the recent decisions of the US Supreme Court, and testified frequently about the amendments, both before the Senate Judiciary Committee and its House counterpart. As amended, the bill passed both houses and the death penalty was reinstated in Ohio.
 - C. To this day, some friends and acquaintances, including former senator Richard Finan, the principal Senate sponsor of the bill, tease me by referring to the present death penalty law as "Larry Herman's law."
3. I appear before you today to ask, respectfully, that you vote to repeal "Larry Herman's law."

2. WHY REPEAL THE DEATH PENALTY? I OFFER YOU THREE SEPARATE REASONS.

- A. THE FIRST IS THAT THERE IS NO PERSUASIVE EVIDENCE THAT THE DEATH PENALTY DOES A BETTER JOB OF PROTECTING SOCIETY THAN SOME OTHER SEVERE PENALTY SUCH AS LIFE IMPRISONMENT WITHOUT PAROLE (LWOP).

- B. THE SECOND REASON IS RELATED TO RETRIBUTION - DESERVED PUNISHMENT. THE REASON IS THAT THE ACCURACY OF THE DECISION THAT THE DEFENDANT DESERVES TO DIE IS FATALLY UNDERCUT BY VARIOUS RACIAL AND GEOGRAPHIC BIAS AND BY THE UNDENIABLE FACT THAT WE SOMETIMES TRY, CONVICT, AND SENTENCE TO DEATH PEOPLE WHO ARE INNOCENT, AND, I BELIEVE, OCCASIONALLY EXECUTE THEM - - PEOPLE WHO DID NOT DESERVE TO BE CONVICTED, SENTENCED TO DEATH, AND EXECUTED.

 - C. A THIRD REASON IS THAT THE DOLLAR EXPENSE OF EXECUTING A PERSON IS MUCH HIGHER THAN THE DOLLAR EXPENSE OF LIFE IMPRISONMENT AND WE DO NOT RECEIVE PROVABLE VALUE FOR OUR INVESTMENT.
3. IN ORDER TO EXPLAIN MY REASONS, I HAVE TO MAKE AN INTRODUCTORY COMMENT ABOUT THE DEATH PENALTY AND THE OBJECTIVES OF CRIMINAL PUNISHMENT.
- A. The death penalty is, of course, a form of criminal punishment. To be justifiable it must serve one or more of the objectives of criminal punishment.

 - B. However, given the death penalty's obviously unique harshness and irrevocability, it must clearly serve some objective of punishment measurably better than some other severe punishment, such as LWOP. Unless it can be clearly shown that life imprisonment will not do just as well, the death penalty is unjustifiable. It is, quite literally, overkill.

 - C. Criminal punishment has two purposes.
 - 1. One purpose is utilitarian: protection of society by having less crime. Under this purpose fall such strategies as rehabilitation, deterrence of this defendant (specific deterrence), and deterrence of other persons (general deterrence).

 - 2. The second purpose of criminal punishment is retribution - deserved punishment. This purpose is not utilitarian. People who are true retributionists say that retribution is justified even if it does not make society safer.

 - D. I say to you that whether you look at the death penalty from a utilitarian standpoint or a retributive one, the death penalty will not pass muster.

4. LOOK AT THE DEATH PENALTY FROM A UTILITARIAN PERSPECTIVE - PROTECTION OF SOCIETY
- A. Rehabilitation? We can immediately forget about it. The death penalty does not rehabilitate
 - B. Deterring this defendant. Sometimes called "specific deterrence."
 - 1. This utilitarian strategy for protecting society is based on an assumption: unless we kill this defendant, he will eventually get out of prison and will do it again. Therefore, he has to be deterred permanently
 - 2. This assumption has two large flaws. The first flaw is that the defendant need not be released from prison. The pending bill provides LWOP and an inmate who has received that sentence will not be released.
 - 3. The second flaw is that the assumption that released killers will kill again is not based on fact. Rather, studies show that convicted murderers who are paroled after serving long prison terms almost never kill again and have the highest parole success rate of any group in the parole population
 - A. The most dramatic evidence of this is contained in an Ohio Legislative Service Commission (OLSC) Staff Research Report #46, January 1961, which I updated some years ago into the middle 1960's.
 - B. This report, as updated, dealt with 288 persons who had been convicted of capital offenses, but were not executed. Rather, they served long terms of imprisonment and were then paroled.
 - C. Of the 288 persons, 17 returned to prison, 15 for violating technical conditions of parole, and 2 for new offenses, neither of which involved death
 - D. The parole success rate for this group was the highest in Ohio's parole population.
 - E. What was true in 1961 when the OLSC did its study, has remained true. Only ten years ago, John Shoemaker, then Chief of Ohio's Adult Parole Authority, said that he was unaware of any case in which an Ohio paroled murderer had killed again.
 - F. Thus, when the death penalty is defended on the ground that it is a

necessary means of protecting society against those who will be released and kill again, it turns out to be a cure for which there is really no disease.

G. Lest I be misunderstood, I hasten to add that I am not saying that no released murderer has ever again killed in any state. I am saying that the number must be so small, that it cannot be a general justification for the death penalty.

H. I am also saying that it is impossible to identify in advance the very few who might kill from the vast majority who will commit no crime at all

1. Mental health professionals uniformly disclaim their ability to predict future dangerousness and studies have shown that 2 out of 3 predictions of future dangerous turn out to be wrong. Indeed in one study 8 out of 10 predictions were wrong.

I. Consequently, one has to conclude that the death penalty cannot be justified on the ground of specific deterrence

C. LOOK AT THE DEATH PENALTY FROM ANOTHER UTILITARIAN PERSPECTIVE: DETERRING PERSONS OTHER THAN THE DEFENDANT - SOMETIMES REFERRED TO AS GENERAL DETERRENCE

1. Here we impose the death penalty on a particular defendant for the purpose of deterring others from committing similar crimes.

2. This is the utilitarian ground on which the death penalty is commonly defended.

3. However, AND I MUST STRESS THIS, the question is not whether the death penalty is A deterrent, but whether it is a BETTER deterrent than some other severe punishment such as life imprisonment.

4. The only honest answer to that question is that no one knows the answer.

A. I cannot honestly say to you that the evidence clearly shows that the death penalty is not a better deterrent.

B. On the other hand, those who argue for the death penalty cannot honestly say to you that the evidence clearly shows that the death

penalty is a better deterrent.

- C. In recent years, there have been a number of studies that use econometric methods of analysis
1. Some purport to show that the death penalty is not a better deterrent than life imprisonment
 2. Some even purport to show that executions cause an increase in homicides through a "brutalizing" effect on society - that is, teaching people that killing is permissible
 3. Of course, some also purport to show that the death penalty is a better deterrent. However, other recent studies purport to find serious flaws in these studies.
- D. What's the bottom line here? I can't put it any better than it was put by the principal House sponsor of Ohio's 1981 death penalty restoration bill, Representative Terry Tranter of Cincinnati. He wrote that "the question of deterrence could be argued forever without reaching any definite conclusion"
- E. But if that is so, then whichever side is required to carry the burden of proof on the deterrence issue will lose, and the question then becomes: which side should be required to carry the burden of proof.
1. Some might say that since I want you to change the status quo, I should bear the burden of proof.
 2. I disagree. I say that (1) GIVEN THE VALUE THAT OUR LEGAL SYSTEM PLACES ON PRESERVING LIFE, AND (2) GIVEN THE FACT THAT THE DEATH PENALTY UNDENIABLY KILLS, THOSE WHO SUPPORT KILLING ON THE GROUND OF GENERAL DETERRENCE MUST BEAR THE BURDEN OF PROOF.
 3. However, they cannot prove their case and the death penalty is therefore indefensible on general deterrence grounds and on all other utilitarian grounds as well

5. I NOW WANT TO LOOK AT THE DEATH PENALTY FROM THE STANDPOINT OF RETRIBUTION - DESERVED PUNISHMENT
- A. Some opponents of the death penalty flatly reject retribution as a basis for any criminal punishment, particularly the death penalty.
1. They say that only utilitarian reasons can justify the death penalty, but that no such reason has been proved to exist.
 2. They also say that non-utilitarian, retributive punishment is unworthy of a civilized society.
 3. Finally, they say that a death penalty that is based on retribution teaches people the lesson that vengeance is good, and leads people to have a vigilante or frontier attitude that may even increase the homicide rate.
- B. I am perfectly willing to mention these points to you because they are important and deserve your close attention.
- C. However, I want to make a different point to you. The point is that if we assume that retribution - deserved punishment - is a proper basis for sentencing, it then becomes crucial to determine what the defendant deserves. However, the accuracy of that determination in Ohio death penalty cases is fatally undercut by three long-standing problems:
1. Ohio's death penalty system is infected with racial bias
 2. Ohio's death penalty system is infected with geographical bias.
 - 3.. Ohio's death penalty system has tried, convicted, and sentenced to death persons who deserved no punishment at all because they were factually innocent of any homicide. And it is certainly likely that we have executed people who were factually innocent.
- D. Racial bias.
1. This subject has been studied and reported on intermittently in Ohio since 1961 by a variety of sources: The Ohio Legislative service Commission, Staff Research Report 46, January 1961; The Ohio Commission on Racial Fairness, a joint effort of the Ohio Supreme Court and the Ohio State Bar Association, in 1999; The Associated Press, in an investigative journalism

effort, in 2002; The American Bar Association, 2007; and a book entitled "No Winners Here Tonight," in 2009, written by Andrew Welsh-Huggins, the Associated Press's Ohio legal affairs reporter, who was also the principal researcher on the 2002 project

2. Putting these sources together, one finds various evidence of racial bias in the administration of Ohio's death penalty.
 - A. First, from the report of the Ohio Commission on Racial Fairness, quoting a study on racial disparities in sentencing in Ohio: "In Ohio, blacks are arrested, convicted, and sentenced to prison almost 10 times as frequently as whites. One in 523 whites will spend some time in prison, while for blacks, the number grows to one in 53. The state's incarceration ratio of blacks to whites is 9.81, which is 28 % higher than the national average."
 - B. Second, The Ohio Commission on Racial Fairness was also concerned with disparities in Ohio's death-row population. I have updated the Commission's figures, using information from the Ohio Department of Rehabilitation and Correction: As of September 30, 2011, there were 147 men on death row in Ohio. Fifty-one percent (75) were African-American men. The percentage of African-American men in Ohio's total population is about 6%.
 - C. These two sets of statistics engender a strong suspicion of racial bias in capital sentencing. Although I am unaware of any statistical study in Ohio, this strong suspicion is confirmed by various studies of death-sentencing in other states that show that African-American defendants are disproportionately more likely to be capitally charged, convicted, sentenced to death and executed than defendants of other races.
 - D. The third evidence of racial bias deals with the race of the victim. This is a national problem and it exists in Ohio.
 1. The Ohio sources that I have mentioned all agree that if the victim is Caucasian, the sentence is two or three times more likely to be death than if the victim is African-American.
 2. One of these studies was conducted in Ohio in 2002 by Andrew Welsh-Huggins for the Associated Press. It spanned the period 1981-2002 and found that "people who had killed one or more white people were twice as likely to be sentenced to death than those whose victims were black."

3. A later study, this one by the American Bar Association, which covered a slightly different period, found that “those who kill Whites are 3.8 times more likely to receive a death sentence than those who kill Blacks.”
4. Studies outside Ohio also confirm that an African-American who kills a Caucasian is more likely to be sentenced to death and executed than a Caucasian who kills another Caucasian, and that a Caucasian who kills a Caucasian is more likely to be sentenced to death than a Caucasian who kills an African-American.

E. The fourth and final evidence of racial bias is the 1961 study of the death penalty by the Ohio Legislative Service Commission. This study disclosed, among other things, that a Caucasian was more than twice as likely to receive a commutation than an African-American.

E. Geographical Bias

1. This is a problem of national significance that has existed in Ohio for decades.
2. The 1961 study by the OLSC disclosed that certain counties were more likely to produce death sentences than other counties of similar population, demographics, and homicide rates
3. The 2002 Associated Press study reported that 5% of capital-charged defendants in Franklin County were sentenced to death, 8% of capital-charged defendants in Cuyahoga County were sentenced to death, but that 43% of those charged in Hamilton County received death sentences.
 - A. The ABA’s 2007 study disclosed that “the chances of a death sentence in Hamilton County are 2.7 times higher than in the rest of the state, 3.7 times higher than in Cuyahoga County, and 6.2 times higher than in Franklin County
 - B. Andrew Welsh-Huggins’s 2009 book reports that during the period 1981-2000, the first twenty years of Ohio’s present death-sentence law, 43% of capital indictments in Hamilton County resulted in death sentences. The comparative figure for Cuyahoga County was 8% and for Franklin County, only 5%. Mr. Welsh-Huggins strongly suggests that the disparity results from the fact that Hamilton

County's prosecutor is very averse to plea bargaining and that the Cuyahoga and Franklin County prosecutors are not.

- C. In an effort to obtain more relevant information, I consulted two other sources. Both strongly confirmed what I have already told you about geographical bias in Ohio.
1. Using 2010 census information and information supplied by the Ohio Department of Rehabilitation and Corrections, I discovered the following:
 - A. Hamilton County has 7% of Ohio's population, BUT 19.7% of Ohio's death-row population, and 25 % of the African-Americans on death row.
 - B. Cuyahoga County has 11.1% of Ohio's population, 16.2% of Ohio death-row population, and 18.7% of the African-Americans on death row, HIGH BUT NOT AS HIGH AS HAMILTON
 - C. Franklin County, ON THE OTHER HAND, has 10.1% of Ohio's population, but only 7.5 % of Ohio's death-row population and only 4% of the African-Americans on death row.
 - D. Another way of looking at these figures is this:
 1. Hamilton County's population is only 63% of Cuyahoga County's population, but Hamilton County's death-row population is 1.6 times that of Cuyahoga's.
 2. Hamilton County's population is only 69% of Franklin County's population, but Hamilton County's death-row population is 2.4 times that of Franklin County
 2. The second additional source I consulted was a Columbia University Study, 2002, which compared high and low death sentencing counties in the same state based on death sentences per 1000 homicides. The interesting figures for Ohio are:
 - A. The highest rate in the state was Summit County

(54/1000). The second highest was Hamilton County (40/1000).

B. The lowest rate in the state was Montgomery County (3/1000). The second lowest was Franklin (16/1000).

D. What all of this compellingly demonstrates is that the county in Ohio in which the defendant is tried is a crucial factor in whether the defendant is sentenced to death.

F. I now want to discuss briefly a wholly different matter: convicting the innocent in capital cases

1. There are some things of which we are certain:

A. We have convicted the innocent in capital cases in the United States and we have convicted innocent capital defendants in Ohio and sentenced them to death. Their names are Gary Beeman, Harry Bundy, Robert Domer, Timothy Howard, Gary James, Derek Jameson, and Dale Johnson.

B. We also know the common causes of such miscarriages of justice. They include mistaken identity, coerced confessions, perjured testimony, especially by prisoners who say that they heard the defendant admit guilt, bizarre forensic errors, forensic fraud, incompetence of defense counsel, and misconduct by prosecutors or police - particularly in withholding exculpatory evidence from the defense.

2. There are other things of which we are not certain but for which we have a reasonable basis of belief. The most important of them concerns the percentage of convicted capital defendants that are actually innocent and whether Ohio has executed an innocent person.

3. Recent careful studies of the problem, notably by Professor Samuel Gross of Michigan Law School conclude that the rate of wrongful capital conviction is between 2% and 5%.

A. Professor Gross's conclusions mean that from three to eight persons now on Ohio's death row are actually innocent.

B. At this point, I want to address two arguments that you are likely to hear from those who support the death penalty.

1. The first is that there is no proven case that an innocent person has ever been executed in Ohio.
 - A. Those who make this argument almost always mean that there is no case in which a court has held that an innocent person has been executed or that a prosecutor has admitted that an innocent person was executed.
 - B. What they don't tell you is that once the defendant has been executed, the case is finally closed and that a court therefore will not have any occasion to inquire into whether the defendant was innocent.
 - C. They also don't tell you that since county prosecutors in Ohio and most other states are elected officials, they have a very strong interest in not admitting that an innocent person was executed

2. The second argument that you are likely to hear from those who support the death penalty is that in the case of *Kansas v. Marsh*, 548 U.S. 163 (2006), Justice Scalia wrote a concurring opinion in which he said that the chance of an innocent person being executed is infinitesimal.

- A. Those who make this argument are not likely to tell you that Justice Scalia relied on research by an Oregon district attorney who used the wrong denominator in making a mathematical calculation.
- B. See the article by Professor D. Michael Risinger , 97 *J. Crim. L. & Crim.* 761 (2007),

C. Can I prove to you beyond a reasonable doubt that Ohio has executed an innocent person? No. However, I strongly believe that that event has very likely occurred, and I ask you to consider the following in support of my belief:

1. The website of Northwestern University Law School's Center on Wrongful Convictions lists 18 cases of executions despite "overwhelming doubt of guilt."

2. The law library at Ohio State University contains books that discuss highly doubtful convictions that resulted in executions. Those books are currently in my possession.
3. Ohio's standard of proof in capital cases, as in all other criminal cases, is "beyond a reasonable doubt," not "beyond all doubt."
4. What does "proof beyond a reasonable doubt" mean to you? 95% certain? 96%? 97%. If it means any of those percentages, then Ohio's standard of proof permits at least a 3% rate of error in all cases, including capital cases..
5. And there has been error. Ohio juries have convicted innocent people and sentenced them to death..
 - A. Indeed. Harry Bundy, one of Ohio's death sentence exonerees, was only three days away from execution **WHEN HE WAS SAVED BY A WHOLLY FORTUITOUS CIRCUMSTANCE.** A woman who knew Bundy's co-defendant, read about the case in a detective magazine and remembered that the co-defendant, who had implicated Bundy, had told her that Bundy was actually innocent. She notified the authorities, the execution was stayed, and Bundy was granted a new trial and was acquitted.
6. DNA evidence, which has recently played a prominent part in exonerations, exists in only a small percentage of capital cases. Therefore, we cannot say, "Oh, don't worry about wrongful executions. DNA tests will save all who are innocent."
7. Where there is life there is hope. If the defendant is alive on death row, various segments of the legal and other professions pursue claims of actual innocence. When the defendant has been executed, however, these agencies will not expend their limited resources on such claims.
8. Moreover, the overwhelming majority of persons who have been executed were poor and so are their families. The families cannot afford to hire lawyers to investigate any post-execution claim of innocence, and court-appointed lawyers never pursue such claims because they are not

appointed to do so and they don't get paid for doing so.

9. If you put all of these together, my conclusion is that it is very likely that Ohio has executed innocent persons and it is not at all strange that we cannot identify who they are.

G. Much earlier in my testimony, I said that if one assumes that retribution - the infliction of deserved punishment - is a justification for the death penalty, the crucial question is how accurately we are determining whether a particular defendant deserves to die. In trying to answer that question for you, I have called your attention to a variety of factors:

1. The defendant's race. It should be irrelevant to the outcome of the death penalty decision, but it is playing a part nevertheless.
2. The victim's race. It should be irrelevant to the outcome of the death penalty decision, but it is playing a part nevertheless.
3. The county in which the trial takes place. It too should be irrelevant, but it too is playing a big part nevertheless.
4. Convicting and imposing a death sentence on an innocent person. We should be doing everything we can to avoid this ultimate injustice, but we haven't figured out how to do it, and so the ultimate injustice occurs.
5. All of this leads me to conclude that Ohio death-penalty system is broken beyond repair and that Ohio is unable to administer a death penalty that is based on retribution - deserved punishment- and Ohio should therefore abandon the death penalty completely.

6. ONE FINAL POINT: AT THE OUTSET OF MY TESTIMONY, I SAID THAT A REASON FOR REPEALING THE DEATH PENALTY WAS THAT THE DOLLAR COST OF EXECUTING A PERSON IS MUCH HIGHER THAN THE DOLLAR COST OF LIFE IMPRISONMENT AND WE DO NOT RECEIVE ANY PROVABLE VALUE FOR OUR INVESTMENT. I HAVE SO FAR IN MY TESTIMONY BEEN TRYING TO DEMONSTRATE THAT WE DO NOT RECEIVE ANY PROVABLE VALUE. I WOULD NOW LIKE TO ADDRESS BRIEFLY THE SUBJECT OF COMPARATIVE COST

- A. In dealing with the death penalty, we encounter some unknowns. Comparative cost is not one of them.

B. Each of five state-wide studies has concluded that trying a capital case to an execution costs the state considerably more than a life-sentence case.

1. California-2011. A capital case costs on average an additional \$1 million more than a non-capital case.
2. Maryland-2008. The cost of a single death sentence is approximately three times higher - or \$1.9 million more - than the cost of a non death penalty case. The cost for a prosecutor to seek, but not get, a death sentence is \$670,000 more than a case in which the death penalty is not sought.
3. Earlier studies in Kansas, Indiana, and North Carolina produced roughly similar results.

C. Ohio.

1. In its 2007 report on the administration of the death penalty in Ohio, the ABA said, "It appears that the cost of a capital case far exceeds the cost of a case seeking a life sentence."
2. If one assumes a cost differential of \$1 million per death sentence, the 147 people now on death row have cost Ohio a differential of \$147 million.
3. If I have succeeded in persuading you that Ohio gets no provable benefit for its \$147 million investment in the death penalty, you can do Ohio an economic favor and Ohio's criminal justice system a favor by voting to repeal the death penalty in Ohio

7. I THANK YOU FOR YOUR ATTENTION AND AM READY TO TRY TO ANSWER ANY QUESTION THAT YOU MIGHT HAVE.

