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# Murder and Death Penalty

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# MURDER AND THE DEATH PENALTY

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# RESEARCH NOTES

## MURDER AND THE DEATH PENALTY

WILLIAM C. BAILEY\*

A survey of the literature on homicide and capital punishment reveals that the past decade has produced no new research on this question. Apparently, the early investigations by Bye,<sup>1</sup> Sutherland,<sup>2</sup> Kirkpatrick,<sup>3</sup> and Vold<sup>4</sup> and later examinations by Sellin,<sup>5</sup> Schuessler<sup>6</sup> and Savitz<sup>7</sup> have convinced most students of homicide that the ineffectiveness of the death penalty as a deterrent to murder has been demonstrated conclusively.<sup>8</sup>

Not all remain convinced, however, of the conclusiveness of the evidence. In a recent examination of the question, Bedau<sup>9</sup> argues that most criminologists skeptical of capital punishment have not come to this conclusion by a critical examination of the evidence, but rather because of their adherence to a general theory of violent crimes that excludes the influence of the threat of punishment.<sup>10</sup> Furthermore, careful examination of the literature reveals the evidence usually cited as questioning the death penalty to be less than conclusive. With few exceptions, these investigations suffer from a number of serious theoretical and

methodological shortcomings.<sup>11</sup> Before examining these shortcomings and the scope of the present investigations, it is necessary to review the available evidence.

### *Previous Research*

The conclusion that capital punishment has no deterrent effect on murder stems primarily from three types of investigations: (1) comparative analyses of homicide rates for states which differ in provisions for the death penalty; (2) longitudinal investigations of homicide rates for states before and after the abolition and/or restoration of the death penalty; and (3) longitudinal examinations of homicide rates immediately preceding and immediately following publicity of executions.<sup>12</sup>

The most common approach to testing the deterrent effect of the death penalty has been a comparison of homicide rates of abolitionist and retentionist states.<sup>13</sup> These investigations have generally shown homicide rates in the latter states to be two to three times that of the former.<sup>14</sup> This finding is contrary to what deterrence theory would predict. Such comparisons have usually been declared invalid, however, for the two groupings of states are not uniform with respect to other possible important etiological factors—population composition, social structure and cultural patterns.<sup>15</sup>

<sup>11</sup> E. SUTHERLAND & D. CRESSEY, *PRINCIPLES OF CRIMINOLOGY* (7th ed. 1970); F. ZIMRING & G. HAWKINS, *DETERRENCE: LEGAL THREAD IN CRIME CONTROL* (1973); Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L.C. & P.S. 539 (1970); Gibbs, *supra* note 8; Erickson & Gibbs, *The Deterrence Question: Some Alternative Methods of Analysis* (1972) (unpublished article).

<sup>12</sup> Sellin's examinations of police safety and prison homicides and the death penalty are also often cited in discussions of capital punishment as a deterrent to homicide. SELLIN, *CAPITAL PUNISHMENT* (1967); SELLIN, *ROYAL COMM'N*, *supra* note 5.

<sup>13</sup> E. SUTHERLAND & D. CRESSEY, *supra* note 11.

<sup>14</sup> *Id.* See also Schuessler, *supra* note 6; Sutherland, *supra* note 2.

<sup>15</sup> Schuessler, *supra* note 6; Sutherland, *supra* note 2. Schuessler points out that this criticism indirectly affirms that the relative occurrence of murder is the result of a combination of social circumstances of which punishment is only one.

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<sup>1</sup> R. BYE, *CAPITAL PUNISHMENT IN THE UNITED STATES* (1919).

<sup>2</sup> Sutherland, *Murder and the Death Penalty*, 15 J. AM. INST. CRIMINAL LAW & CRIMINOLOGY 522 (1925).

<sup>3</sup> C. KIRKPATRICK, *CAPITAL PUNISHMENT*, COMMITTEE ON PHILANTHROPIC LABOR OF PHILADELPHIA YEARLY MEETING OF FRIENDS (1925).

<sup>4</sup> Vold, *Can the Death Penalty Prevent Crime*, 3 PRISON J. 8 (1932).

<sup>5</sup> T. SELLIN, *CAPITAL PUNISHMENT* (1967); Testimony of Thorsten Sellin before Royal Commission on Capital Punishment, ROYAL COMM'N ON CAPITAL PUNISHMENT, CMD. NO. 8932, at 17 (1955). [Hereinafter cited as Sellin, *ROYAL COMM'N*].

<sup>6</sup> Schuessler, *The Deterrent Influence of the Death Penalty*, 284 ANNALS 54 (1952).

<sup>7</sup> Savitz, *A Study of Capital Punishment*, 49 J. CRIM. L.C. & P.S. 338 (1958).

<sup>8</sup> Gibbs, *Crime, Punishment and Deterrence*, 48 SOUTHWESTERN SOCIAL SCIENCE Q. 294 (1965).

<sup>9</sup> Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L.C. & P.S. 539 (1970).

<sup>10</sup> In addition, McClellan points out that much of the evidence on the deterrence issue is questionable for it would appear to have been collected for the sole purpose of disproving the value claimed for punishment. G. MCCLELLAN, *CAPITAL PUNISHMENT* (1961).

To meet this objection, Schuessler<sup>16</sup> and Sellin<sup>17</sup> compared homicide rates of abolitionist states with neighboring capital punishment jurisdictions. These investigations have consistently led researchers to one of two conclusions: abolitionist states have slightly lower homicide rates than their death penalty neighbors<sup>18</sup> or that it is impossible to differentiate capital punishment from abolitionist states by solely examining homicide rates.<sup>19</sup> Furthermore, examinations of the relationship between the risk of execution in retentionist states and homicide rates have shown no discernible correlation between these two factors.<sup>20</sup>

Comparative examinations of homicide rates before and after abolition, and in some cases, the restoration of the death penalty, have also questioned the efficacy of capital punishment. These investigations reveal that states that have abolished the death penalty have generally experienced no unusual increase in homicide. Moreover, the reintroduction of the death penalty (even states have abolished the death penalty but later restored it) has not been followed by a significant decrease in homicide.<sup>21</sup>

Another source of evidence questioning the effectiveness of capital punishment has come from investigations of the effect that publicity of executions has on homicide rates. Dann's early analysis<sup>22</sup> of homicide rates in Philadelphia sixty days preceding and following the mass execution of five killers revealed no significant difference in rates before and after this highly publicized event. Similarly, in a more recent investigation in Philadelphia, Savitz found no significant difference in the rate of capital crimes eight weeks before and eight weeks after the well publicized sentencing of four men to death.<sup>23</sup>

In sum, the above investigations as well as case

<sup>16</sup> Schuessler, *supra* note 6.

<sup>17</sup> T. SELLIN, *CAPITAL PUNISHMENT* (1967).

<sup>18</sup> E. SUTHERLAND & D. CRESSEY, *supra* note 11; Sutherland, *supra* note 2.

<sup>19</sup> W. CHAMBLISS, *CRIME AND THE LEGAL PROCESS* (1969); T. SELLIN, *CAPITAL PUNISHMENT* (1967); Schuessler, *supra* note 6.

<sup>20</sup> H. BEDAU, *THE DEATH PENALTY IN AMERICA* (1967); T. SELLIN, *CAPITAL PUNISHMENT* (1967); Schuessler, *supra* note 6; Sellin, *ROYAL COMM'N*, *supra* note 5.

<sup>21</sup> H. BEDAU, *THE DEATH PENALTY IN AMERICA* (1967); H. MATTICK, *THE UNEXPLAINED DEATH: AN ANALYSIS OF CAPITAL PUNISHMENT* (2d ed. 1966); T. SELLIN, *THE DEATH PENALTY* (1959); Schuessler, *supra* note 6.

<sup>22</sup> Dann, *The Deterrent Effect of Capital Punishment*, FRIENDS SOCIAL SERVICE SERIES, Bulletin 29, Third Month (1935).

<sup>23</sup> Savitz, *supra* note 7.

study and clinical observations<sup>24</sup> have brought most criminologists to what Sellin has termed the "inevitable conclusion," that the death penalty has no discernible effect as a deterrent to murder.<sup>25</sup>

Deterrence theory suggests that if punishment is to act as an effective deterrent to crime it must be: (1) severe enough to outweigh the potential pleasures crime might bring; (2) administered with certainty; (3) administered promptly; (4) administered publicly; and (5) applied with the proper judicial attitude.<sup>26</sup> Typically, however, only one aspect of capital punishment—its severity—has been examined as a deterrent to murder. Little attention has been paid to the certainty of the death penalty, with examinations of the remaining three aspects of punishment being completely absent from the literature. In short, the question of the death penalty as a deterrent to murder has only been examined in the most narrow theoretical sense. Deterrence theory has simply never been tried and given a "fair chance."<sup>27</sup> As Jeffery states, "The lesson to be learned from capital punishment is not that punishment does not deter, but that the improper and sloppy use of punishment does not deter. . . ."<sup>28</sup>

Of methodological concern, each of the above studies rests upon a number of assumptions, some of which appear highly questionable.<sup>29</sup> These pri-

<sup>24</sup> J. GILLIN, *THE WISCONSIN PRISONER* (1946); L. LAWES, *TWENTY THOUSAND YEARS IN SING SING* (1932); K. MENNINGER, *THE CRIME OF PUNISHMENT* (1968); S. PALMER, *A STUDY OF MURDER* (1960); T. THOMAS, *THIS LIFE WE TAKE* (1965); Cuthbert, *A Portfolio of Murders*, 116 *BRIT. J. OF PSYCHIATRY* 1 (1970).

<sup>25</sup> As Bedau notes, a review of Sellin's writings on the death penalty, which span 1953-1967, reveal a certain vacillation in the conclusions he draws. At times, he categorically denies the death penalty as a deterrent to homicide, and at other times he denies it as a superior deterrent to life imprisonment—two quite different conclusions. Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 *J. CRIM. L.C. & P.S.* 539 (1970).

<sup>26</sup> C. BECCARIA, *AN ESSAY ON CRIMES AND PUNISHMENT* (1809); J. BENTHAM, *PRINCIPLES OF PENAL LAW* (1843); E. ROSS, *SOCIAL CONTROL* (1901).

<sup>27</sup> E. PUTTKAMER, *ADMINISTRATION OF CRIMINAL LAW* (1953).

<sup>28</sup> Jeffery, *Criminal Behavior and the Learning Theory*, 56 *J. CRIM. L.C. & P.S.* 294, 299 (1965).

<sup>29</sup> Bedau lists four such common assumptions: (1) homicides as measured by vital statistics are in a generally constant ratio to criminal homicides; (2) the years for which the evidence has been gathered are representative and not atypical; (3) however much fluctuations in the homicide rate owe to other factors, there is a non-negligible proportion which is a function of the severity of the penalty; and (4) the deterrent effect of a penalty is not significantly weakened by its infrequent imposition. Bedau, *Deterrence and the Death*

marily concern the adequacy of using available aggregate homicide statistics, issued by the Federal Bureau of Investigation and the Public Health Service, as an index of murder in examining the effect of the death penalty.<sup>30</sup>

In the United States, generally only one type of homicide—murder in the first degree—is punishable by death, with murder in the second degree and voluntary manslaughter usually being punished by imprisonment.<sup>31</sup> Typically, however, investigations of the death penalty have operationally defined premeditated murder as homicide, a much more inclusive offense category. This practice has been necessitated by the fact that no alternative statistics are currently available on a nationwide basis that break down homicide by type and degree. As a result, investigators have been forced to make a large and possible erroneous assumption whether they use police or mortality statistics, that the proportion of first degree murders to total homicides remains constant so that statistics on the latter provide a reasonably adequate indicator of capital offenses.

Most investigators have been quick to accept this assumption as a matter of faith.<sup>32</sup> Some, however, have attempted to justify this practice on empirical grounds. For example, Schuessler argues that the high degree of correspondence between police, prisoner and mortality statistics on homicide—not murder—clearly suggests its plausibility.<sup>33</sup>

The net effect is that no one has succeeded in accurately counting the number of capital offenses hidden in the available homicide statistics in order to test this assumption.<sup>34</sup> Presently, it is

*Penalty: A Reconsideration*, 61 J. CRIM. L.C. & P.S. 539, 545 (1970).

<sup>30</sup> The homicide offense category used by the Federal Bureau of Investigation is murder and non-negligent manslaughter. It is defined as "all willful felonious homicides as distinguished from deaths caused by negligence." FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES: UNIFORM CRIME REPORTS at 61 (1967). The Public Health Service defines homicide as "a death resulting from an injury purposely inflicted by another person." Intent to kill is not required to classify a death as a homicide. PUBLIC HEALTH SERVICE, HOMICIDE IN THE UNITED STATES: 1950-1964 at 9 (1967).

<sup>31</sup> T. SELLIN, THE DEATH PENALTY (1959).

<sup>32</sup> *Id.* See also Schuessler, *supra* note 6; Sutherland, *supra* note 2.

<sup>33</sup> Schuessler, *supra* note 6. *But see* Bailey, First and Second Degree Murder: Some Empirical Evidence (paper presented at the 1974 Alpha Kappa Delta Sociological Research Symposium, Mid-Atlantic Region, Richmond, Virginia).

<sup>34</sup> Studies of homicide have consistently recognized the absence of adequate statistics on capital homicide.

necessary to accept the view of experienced criminologists<sup>35</sup> that available homicide statistics permit an adequate test of the effect of the death penalty.<sup>36</sup> This is a regrettable situation because so much of the deterrence debate over death penalty turns on the validity of this assumption.<sup>37</sup> Clearly, additional research is needed in this area.

### *The Present Investigation*

The research reported in this article is a further examination of the relationship between homicide and capital punishment. The approach is similar to that of Schuessler<sup>38</sup> and Sellin's<sup>39</sup> with one important exception: the murder data examined here permit a direct rather than indirect assessment of the relationship between capital homicides and the death penalty.

To avoid the above difficulties and obtain theoretically appropriate data on first degree murder, a survey was conducted of all State Bureaus of Corrections throughout the United States. Inquiries were made to each agency requesting figures on the number of convicted first degree murderers referred to penal institutions in 1967 and 1968.<sup>40</sup> Data were only requested for 1967 and 1968 because initial inquiries to corrections authorities revealed that referral statistics for prior years (before 1967) were unavailable in many cases. Secondly, this investigation was initially launched late in 1970, and referral statistics in many cases had not yet been compiled for 1969. Consequently, reasonably complete data could only be obtained for these two years. In total, complete data were received from 41 states, with Mississippi, Arkansas, Georgia, South Carolina, Missouri, Pennsylvania, Arizona and Alaska unwilling or unable to supply the needed figures.<sup>41</sup>

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M. WOLFGANG, PATTERNS IN CRIMINAL HOMICIDE (1958). Nevertheless, there has been no progress in filling this void.

<sup>35</sup> T. SELLIN, CAPITAL PUNISHMENT (1967); Schuessler, *supra* note 6; Sutherland, *supra* note 2.

<sup>36</sup> H. BEDAU, THE DEATH PENALTY IN AMERICA (1967).

<sup>37</sup> T. SELLIN, CAPITAL PUNISHMENT (1967).

<sup>38</sup> Schuessler, *supra* note 6.

<sup>39</sup> T. SELLIN, CAPITAL PUNISHMENT (1967); T. SELLIN, THE DEATH PENALTY (1959).

<sup>40</sup> For states with no central corrections authority, individual inquiries were made of each penal institution in the state.

<sup>41</sup> For the states of Virginia, New Jersey, Oregon, Minnesota and Connecticut, figures were only available for the fiscal years 1967 and 1968. Further, statistics were only available for 1967 for New Jersey. These cases were included in the analysis.

### *First and Second Degree Murder*

Due to variations in homicide statutes across the country, a definition of murder in the first degree was provided with the inquiry to assure comparability of the data.<sup>42</sup> Since it was impossible to break down homicide referrals by degree for Florida, this state was dropped from the analysis.<sup>43</sup> In addition, prison officials were asked to report admissions for murder in the second degree. Second degree murder, although usually not thought of as of theoretical importance in examining the death penalty, is considered here for two reasons. First, it is well recognized that many offenders initially charged with first degree murder are later recharged with second degree murder in exchange for a guilty plea. As a result, many actual first degree murders are listed in court and prison statistics as second degree murders.<sup>44</sup>

Second, although first degree murder is the only capital homicide in most states, deterrence theory suggests that the death penalty may also have a deterrent effect for other forms of homicide as well. The fact that society so condemns murder that it demands the life of the offender "helps to engender attitudes of dislike, contempt, disgust, and even horror for these acts, and thus contributes to the development of personal forces hostile to crime."<sup>45</sup> In fact, the subtle, unconscious effect of law and punishment, as opposed to the cool, conscious calculation of punishment, was believed by Beccaria and Bentham to provide the major mechanism of deterrence.

#### *Limitations of the Data*

It is important to note that the first and second degree murder figures examined here refer solely to persons convicted and imprisoned for these two

<sup>42</sup> Murder in the first degree typically includes both premeditation and malice aforethought, while murder in the second degree lacks the element of premeditation. "Premeditation designates intent to violate the law formulated prior to the activity," while "malice aforethought refers to the simple presence of intent to kill at the time of the act." D. GIBBONS, SOCIETY, CRIME AND CRIMINAL CAREERS 346 (1968).

<sup>43</sup> This is an unfortunate loss since Florida reported a total of 191 combined first and second degree murder convictions for 1967 and 256 combined convictions for 1968.

<sup>44</sup> It should be also noted that it is a common practice in many prosecutor's offices to initially charge many homicide suspects with first degree murder, and "bargain down" thereafter. Whether these two practices "balance out" one another in the statistics must remain an open question in the absence of hard data. See GIBBONS, *supra* note 42.

<sup>45</sup> R. CALDWELL, CRIMINOLOGY 425-26 (1965).

offenses. These data may not be interpreted as reflecting the number of first and second degree murders committed in each jurisdiction, the number accused of first and second degree murder nor the number of persons tried for these two offenses. In addition, these data also do not completely and accurately reflect the total number of first and second degree murder convictions in each state. Undoubtedly, a few persons convicted of these offenses were referred to mental rather than penal institutions. The number here is quite small, however, and probably does not exceed 3 per cent of convicted homicide offenders.<sup>46</sup>

In sum, these data do reflect, although probably with slight error, the number of convicted first and second degree murders for the states and years surveyed. How well these figures reflect the actual volume and distribution of first and second degree murder must remain a mystery, however, for as noted above there are no police or mortality figures currently available on a nationwide basis for these two offenses and the decision of whether a homicide is a first or second degree murder is a matter of court decision. Unfortunately, national figures are currently unavailable on court dispositions.<sup>47</sup>

#### *Comparison of Death Penalty and Abolition States*

Table I reports mean rates of first and second degree murder, total murder and homicide for the states and years surveyed. Comparison of figures for abolition and capital punishment states reveals that for both years, rates for each offense are substantially higher for death penalty states. For 1967, rates for all four offenses are at least twice as high as those for states without the death penalty. Similarly, mean rates for 1968 for death penalty jurisdictions substantially exceed those for abolition states and range from a high of 1.9 times higher for second degree murder to a low of 1.6 times higher for homicide.

A comparison of rates for death penalty and abolition states with mean rates for all states surveyed further reflects the disparity between the two types of jurisdictions.<sup>48</sup> For both years, aver-

<sup>46</sup> M. WOLFGANG, *supra* note 34.

<sup>47</sup> Until 1945, the Federal Bureau of the Census gathered court statistics under the title JUDICIAL CRIMINAL STATISTICS.

<sup>48</sup> For 1967, mean rates for first and second degree murder, total murder and homicide are .31, .73, 1.15 and 4.85, respectively. For 1968, corresponding rates are .50, 1.89, 1.38 and 5.48. For the relationship between rates of first and second degree murder and homicide, see Bailey, *supra* note 33. It is of interest to note that the correlation between rates of first degree murder and

TABLE I

MEAN OFFENSE RATES FOR FIRST AND SECOND DEGREE MURDER, TOTAL MURDERS AND HOMICIDE FOR DEATH PENALTY AND ABOLITION STATES, 1967 AND 1968<sup>a</sup>

Offense	Abolition States		Capital Punishment States		All States <sup>b</sup>	
	1967	1968	1967	1968	1967	1968
First Degree Murder	.18	.21	.47	.58	.31	.50
Second Degree Murder	.30	.43	.92	1.03	.73	.89
Total Murders	.48	.64	1.38	1.59	1.15	1.38
Homicide <sup>c</sup>	2.72	3.09	5.90	6.04	4.85	5.48

<sup>a</sup> Offense rates are computed per 100,000 population.

<sup>b</sup> Mean rates are only computed for the states surveyed in this investigation.

<sup>c</sup> Source: Federal Bureau of Investigation, Uniform Crime Reports, 1968, (Washington, D.C.: 60-65).

age rates for all four offenses are below the nation's average for abolition states, while rates for capital punishment states exceed the national average for each offense. A state-by-state comparison of rates for each type of state with the average for the country further reveals that for both years combined 88 per cent of the abolition states have first degree murder rates below the nation's average, while only 52 per cent of the retentionist states are below the mean. For second degree murder, 91 per cent of the abolition states have rates below the mean while 52 per cent of the death penalty states are again below the national average. In addition all states that have abolished the death penalty have rates of total murder below the country's average, while only 48 per cent of the capital punishment states are below the average. For homicide, 83 per cent of the abolition states have rates below the nation's average while 48 per cent of death penalty states again fall into this category.

In sum, a comparison of rates both between

homicide is  $r^2 = .38$  and  $r^2 = .20$  for 1967 and 1968, respectively. Corresponding correlations for these two years between second degree murder and homicide are  $r^2 = .42$  and  $r^2 = .24$ . Although each coefficient is statistically significant at beyond the .01 level, for neither year nor offense do police homicide figures permit as much as 50 per cent explained variation rate. In short, contrary to Schuessler and other's claims, police data do not appear to provide "a reliable index of murder in general and first degree murder in particular" as commonly assumed. Schuessler, *supra* note 6, at 55.

death penalty and abolition states as well as comparison of rates for each with the nation's average, shows rates of all murders to be substantially higher in capital punishment jurisdictions. These findings are consistent with those reported by Schuessler<sup>49</sup> and Sellin<sup>50</sup> for the offense of homicide, but quite contrary to what deterrence theory would predict. Some, however, have objected to comparing average offense rates for death penalty and abolition states for such comparisons ignore other possibly important etiological factors.<sup>51</sup> To meet this objection, a comparison of otherwise similar capital punishment and abolition states would seem warranted.

#### *Comparison of Contiguous Capital Punishment and Abolition States*

Table II reports rates of first and second degree murder, total murder and homicide for eight groupings of contiguous death penalty and abolition states for 1967 and 1968.<sup>52</sup> These data reveal a very similar picture to that reported above. Inspection of the first grouping of states (Maine, Vermont, New Hampshire) for first degree murder for 1967 reveals the rate for Maine, an abolitionist state, exceeds that for New Hampshire, a death penalty state, whereas the opposite is true when rates for Vermont, also an abolitionist state, and New Hampshire are compared. When such comparisons are repeated within all groupings of contiguous states for 1967, 67 per cent of the comparisons show death penalty states to have higher first degree murder rates than their abolitionist neighbors, while the opposite is true for only 20 per cent of the comparisons. In 13 per cent of the comparisons, rates for both types of states are the same.

For 1968, comparison of first degree murder rates for the two types of states reveals a very similar picture to the former year. For this year, 64 per cent of the comparisons within neighboring groups of states show rates to be higher in capital punishment jurisdictions, while rates are higher in

<sup>49</sup> *Id.*

<sup>50</sup> T. SELLIN, CAPITAL PUNISHMENT (1967); Sellin, ROYAL COMM'N *supra* note 6.

<sup>51</sup> Schuessler, *supra* note 6.

<sup>52</sup> Maine, Vermont, Rhode Island, Michigan, Minnesota, Wisconsin, Iowa, North Dakota, Oregon, West Virginia, Hawaii, and New York are considered abolition states. The death penalty may be prescribed, however, in Vermont, Rhode Island, North Dakota, and New York for certain offenses. See H. BEDAU, THE DEATH PENALTY IN AMERICA (1967).

TABLE II

RATES OF FIRST AND SECOND DEGREE MURDER, TOTAL MURDER AND HOMICIDE FOR EIGHT GROUPINGS OF CONTIGUOUS DEATH PENALTY AND ABOLITION STATES, 1967 AND 1968<sup>a</sup>

State	First Degree Murder		Second Degree Murder		Total Murder		Homicide <sup>b</sup>	
	1967	1968	1967	1968	1967	1968	1967	1968
Maine*	.50	.40	.30	.50	.80	.90	.4	3.0
Vermont*	.00	.50	.75	.00	.75	.50	3.1	2.6
New Hampshire	.14	.14	.00	.43	.14	.57	2.0	1.4
Rhode Island*	.00	.00	.11	.67	.11	.67	2.2	2.4
Connecticut	.28	.23	1.21	1.10	1.49	1.33	2.4	2.5
Massachusetts	.09	.28	.20	.54	.29	.82	2.8	3.5
Michigan*	.34	.44	.76	.78	1.11	1.22	6.2	7.3
Indiana	.16	.29	.32	.35	.48	.64	3.7	4.7
Ohio	.43	.55	.66	.71	1.09	1.26	5.2	5.3
Minnesota*	.08	.05	.14	.19	.22	.24	1.6	2.2
Wisconsin*	.26	.29	.21	.60	.47	.89	1.9	2.2
Iowa*	.07	.04	.21	.21	.28	.25	1.5	1.7
Illinois	.63	.96	1.17	1.46	1.80	2.42	7.3	8.1
North Dakota*	.00	.00	.00	.00	.00	.00	0.2	1.1
South Dakota	.00	.29	2.00	1.29	2.00	1.58	3.7	3.8
Montana	.00	.00	.14	.43	.14	.43	2.4	3.3
Washington	.09	.06	.44	.36	.53	.42	3.1	3.6
Oregon*	.30	.15	.45	.50	.75	.65	3.1	3.2
Idaho	.57	1.00	.43	1.14	1.00	2.14	4.3	2.3
West Virginia*	.33	.33	.61	.67	.94	1.00	4.6	5.5
Virginia	1.02	.72	1.31	1.37	2.33	2.09	7.3	8.3
New York*	.14	°	.11	°	.25	°	5.4	6.5
New Jersey	.24	.27	.74	.66	.96	.93	3.9	5.1

\* Abolition states.

<sup>a</sup> Offense rates are computed per 100,000 population.

<sup>b</sup> Source: Federal Bureau of Investigation, Uniform Crime Reports, 1968 (Washington, D.C.: 60-65).

° Murder I and II statistics were not available for New York for 1968.

only 29 per cent of the cases for abolitionist states. Seven per cent of the comparisons show rates of first degree murder to be the same for both types of states.

Further inspection of Table II indicates a very similar pattern for the remaining three offenses. Comparison of abolition and death penalty states for these offenses, as well as first degree murder, are summarized in Table III. Figures reported in Table III for contiguous death penalty and abolition jurisdictions for second degree murder and total murder and homicide (for both years) reveal that for at least 60 per cent or more of the states

compared, rates are higher in the former jurisdictions. In contrast, rates in abolition states exceed those in neighboring death penalty states in no more than 40 per cent of the cases compared. These findings are consistent with earlier examinations of homicide, but contrary to what deterrence theory would predict.

#### *Offense Rates and the Certainty of Punishment*

Proponents of punishment argue that if legal sanctions are to act as effective deterrents, they must be "real." That is, if the probability of punishment is very slight or non-existent, it will not



deter no matter how severe. This point assumes particular importance when examining past investigations of the death penalty, for as Giggs notes, much of the evidence on the inefficiency of the death penalty is based upon normative legal differences among political units (whether or not there is a statutory provision for the death penalty), and not upon the actual use of capital punishment.<sup>53</sup> No one would argue that the death penalty could be an effective deterrent if it is never used. Accordingly, the important question would appear to be, how are differences in the use of the death penalty in retentionist states related to offense rates in these jurisdictions? To examine this question, execution rates were computed for each retentionist state (operationally defined as the total number of executions for homicide during the last five years per 1000 homicides for these years) and correlated with rates of first and second degree murder, total murder and homicide for 1967 and 1968. Figures for homicide are used in the denominator of the execution index for figures for first degree murder—the most appropriate offense—are not available for these two years. In addition, a five year time period preceding 1967 and 1968 was used in computing average execution rates in order to provide greater stability in rate and to allow sufficient time for the presumed deterrent effect of executions to be realized. Results of this analysis are reported in Table IV.

Deterrence theory would suggest that the higher the execution rate the lower the rate of capital homicides in death penalty states. Figures in row one of Table IV reveal only a slight inverse relationship between executions and rates of first degree murder. Although both coefficients are in the predicted direction, neither is statistically significant at the .05 level nor does either permit as much as 4 per cent explained variation in rates of first degree murder. Further inspection of Table IV reveals a very similar pattern for the remaining three offenses. As with first degree murder, each of the coefficients is in the expected negative direction, but only the correlation for second degree for 1968 reaches statistical significance at the .05 level. Even here, however, only approximately 12 per cent of variation in offense rate can be accounted for by executions.

In interpreting these findings, it should be noted that for the five year periods preceding 1967 and 1968 there were relatively few executions in re-

<sup>53</sup> Giggs, *supra* note 8.

TABLE III

SUMMARY OF COMPARISON OF OFFENSE RATES FOR FIRST AND SECOND DEGREE MURDER, TOTAL MURDER AND HOMICIDE FOR CONTIGUOUS ABOLITION AND DEATH PENALTY STATES\*

Offense	Year	Higher Rates for Death Penalty States		Higher Rates for Abolition States		Rates Tied for Both Types of States	
		No.	%	No.	%	No.	%
First Degree Murder	1967	10	67	3	20	2	13
	1968	9	64	4	29	1	7
Second Degree Murder	1967	9	60	6	40	0	0
	1968	9	64	5	36	0	0
Total Murder	1967	10	67	5	33	0	0
	1968	11	79	3	21	0	0
Homicide	1967	10	67	4	27	1	7
	1968	9	60	6	40	0	0

\* Figures in the number (No.) columns refer to the total number of cases where comparison of contiguous death penalty and abolition states show rates to be (a) higher in the former, (b) higher in the latter, or (c) the same for both types of jurisdictions.

TABLE IV

CORRELATION OF RATES OF FIRST AND SECOND DEGREE MURDER, TOTAL MURDER AND HOMICIDE WITH EXECUTION RATES FOR 27 DEATH PENALTY STATES, 1967 AND 1968\*

Offense	1967	1968
First Degree Murder	-.137	-.194
Second Degree Murder	-.167	-.351
Total Murder	-.180	-.302*
Homicide	-.166	-.039

\* Coefficients are Pearson product moment correlations.

\* p < .05.

tionist states (two in 1967, one in 1966, seven in 1965, thirteen in 1964, twenty-one in 1963 and forty-seven in 1962), thus restricting the range of the execution index. Accordingly, it might be argued that had the distribution of this variable not been so restricted, the negative correlations between execution and offense rates would have been larger.

Although an attenuated distribution on an independent variable would have this effect, this factor is not of great importance since this study is concerned with the relationship between actual (not

hypothetical) execution practices and offense rates. In sum, it is merely speculation whether the negative correlations between executions and rates of homicide would have been more substantial if execution had been more common. In this regard, it is of interest to note the size of the negative correlation ( $r = -.26$ ,  $r^2 = .068$ ) Schuessler reports between executions and homicides for a period (1937–1941) when the death penalty was in much more common use.<sup>54</sup>

### *Summary and Conclusion*

The findings summarized above are consistent with those of earlier investigations of homicide and contrary to the results deterrence theory would predict. As in past analyses, examination of homi-

cide data as well as figures for first and second degree murder reveal that average rates for all three offenses are consistently higher in death penalty than abolitionist jurisdictions. In addition, rates for all three offenses are consistently higher for retentionist states than their contiguous abolitionist neighbors, and execution rates in death penalty states are only slightly inversely related to rates for all three offenses.

In sum, the evidence reported here falls within the pattern of previous death penalty investigations which span five decades.<sup>55</sup> The findings should not be viewed, however, as simply another study questioning the death penalty. By examining the question of capital punishment with figures for capital homicide, a major objection to past investigations appears to have been met.

<sup>54</sup> Schuessler, *supra* note 6.

<sup>55</sup> BYE, *supra* note 1; Sutherland, *supra* note 2.