

THE ROLE AND CONSEQUENCES OF THE DEATH PENALTY IN AMERICAN POLITICS

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INTRODUCTION

As we enter the last decade of the twentieth century, the death penalty has become a prominent issue in a wide range of American political campaigns. Along with other symbolic issues, such as the pledge of allegiance and the furlough of Willie Horton, President George Bush and his advisors made the death penalty a central issue in the 1988 presidential race.¹ One of the

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1. "As the centerpiece of his own campaign, Bush used criticism of those Dukakis actions as governor that had struck the most responsive chords with the focus group [used by campaign strategists to determine which issues and themes would be most likely to resonate with the voting public]. They soon had become familiar to anyone who watched the evening news on television: Dukakis' veto of the Massachusetts flag-pledge bill; a Massachusetts prison furlough

most memorable (and damaging) questions of the campaign was raised by Cable News Network (CNN) correspondent Bernard Shaw during the second debate between candidates Bush and Michael Dukakis, when Shaw provided a dramatic opening to the debate by asking Dukakis whether his opposition to the death penalty would be swayed if someone raped and murdered his wife.²

In retrospect, there is no question that focusing on the candidates' differences on the death penalty was an effective political strategy for the Republican Party. But does it benefit the nation's citizens when politicians campaigning for state³ or national office make advocacy of the death penalty centerpieces of their campaigns? It can have such an effect only if the death penalty addresses a fairly widespread social problem and there is simultaneously sufficient reason to believe the death penalty is an effective and practical tool for reducing the problem's occurrence.

We begin this Article by estimating the frequency of crimes potentially subject to the death penalty compared to the frequency of non-capital crimes, particularly those which are considered violent. We then examine what is known about the death penalty's relative effectiveness in reducing the frequency of criminal homicide. We use the results from these two inquiries as a framework for examining the role of capital punishment in American politics at the state and national level, as well as examining how and why politicians use the death penalty to manipulate the crime issue. Finally, we argue that debates surrounding capital punishment generate misinformation that restricts the public's ability to make informed judgments about public policy, and undermines its faith in the political system.

I.

THE DEATH PENALTY IS AN ILLUSORY SOLUTION TO A PRESSING SOCIAL PROBLEM

A. *While Violent Crime Is Epidemic, Capital Homicides Are Few*

Few would disagree with the position that the fourteen million Index crimes reported each year in the United States⁴ constitute a significant social

program in which a convicted murderer named Willie Horton, released for a weekend during Dukakis' tenure, fled and later committed rape; and Dukakis' opposition to the death penalty." J. GERMOND & J. WITCOVER, *WHOSE BROAD STRIPES AND BRIGHT STARS? THE TRIVIAL PURSUIT OF THE PRESIDENCY*, 1988, at 10 (1989).

2. "Governor," Shaw inquired, "if Kitty Dukakis were raped and murdered, would you favor an irrevocable death penalty for the killer?" *Id.* at 5.

3. In addition to its presence in national presidential campaigns, the death penalty also plays a major role in many state level election campaigns. *See infra* notes 48-51 and accompanying text.

4. The Part I or Index crimes are murder, aggravated assault, rape, robbery, burglary, larceny, auto theft, and arson. These eight offenses are used by the Uniform Crime Reporting Program administered by the FBI to measure the fluctuation in United States crime rates. U.S. DEP'T OF JUSTICE — F.B.I., *CRIME IN THE UNITED STATES*, 1989, at 6 (1990) [hereinafter U.S. DEP'T OF JUSTICE, 1989]. There were 14,251,449 Index crimes reported to the police in 1989. *Id.* at 49.

problem in general and a central problem for the criminal justice system. But only a minuscule proportion of these crimes constitutes the type of problem the death penalty is intended to address or conceivably could address within existing constitutional parameters. Supreme Court decisions and resulting legislation over the past twenty years have restricted the use of the death penalty to a fairly small pool of aggravated homicides,⁵ which constitute but a small proportion of violent crimes. The relative size of this pool compared to the universe of all felony crimes, and, more specifically, to all major crimes of violence can be estimated by examining national crime statistics from the Uniform Crime Reporting Program of the FBI for 1989, the most recent year for which data are available. In 1989, approximately 14,251,400 Index crimes were reported to the police, of which 1,646,040 were classified as crimes of violence,⁶ which include murder, non-negligent manslaughter, aggravated assault, forcible rape, and robbery.⁷ Of these, only 21,500 were criminal homicides.⁸ Among the homicides, 4,773 (22.2%) were classified as "felony-type" or "suspected felony-type," that is, as occurring in the course of another felony, a designation that provides us with a rough estimate of the number of "potentially" capital crimes in the country.⁹

By "potentially" capital, we mean that given the right combination of circumstances (including the particular facts of the crime, a poor defense, and a rigorous prosecution) the case may result in a death sentence. Because the vast majority of death sentences are imposed in homicide cases in which evidence of other felonies is also present,¹⁰ the number of felony homicides can be used as a rough approximation of the number of cases potentially eligible for a death sentence under present constitutional parameters. This procedure results in an estimate that the death penalty is potentially relevant to only about 1 in 2,986 known Index crimes, and to only about 1 out of every 345 known

5. This series of decisions began with *Furman v. Georgia*, 408 U.S. 238, 239 (1972) (per curiam) (the imposition and carrying out of the death penalty in one case of murder and two of rape constituted cruel and unusual punishment in violation of the eighth and fourteenth amendments), and includes such cases as *Coker v. Georgia*, 433 U.S. 584, 600 (1977) (death penalty disproportionate for rape of an adult woman when the victim is not killed), and *Godfrey v. Georgia*, 446 U.S. 420, 427 (1980) (aggravating circumstances cannot be so broad that they fail to restrict the pool of convicted murderers eligible for the death penalty). See generally Ledewitz, *The New Role of Statutory Aggravating Circumstances in American Death Penalty Law*, 22 DUQ. L. REV. 317 (1984).

6. U.S. DEP'T OF JUSTICE, 1989, *supra* note 4, at 49.

7. *Id.* at 48 n.4.

8. *Id.* at 49.

9. *Id.* at 12, 13. The FBI reports data on the circumstances for 18,954 reported homicides for which the circumstances are reported. Of these, 4,049 were classified as felony-type and 150 were classified as suspected felony-type. This represents 22.2% of the criminal homicides in 1989 on which the FBI was able to collect circumstance data. We multiplied the 21,500 murders by 0.222 to obtain our estimate.

10. See Bowers & Pierce, *Arbitrariness and Discrimination Under Post-Furman Capital Statutes*, 26 CRIME & DELINQ. 563, 597, 628 (1980). The use of the FBI's classification of "felony homicides" to estimate "potentially" capital crimes is approximate, as not all felony homicides are eligible for the death penalty under the statutes of some states (notably in abolitionist jurisdictions), and as some non-felony homicides are also potentially capital crimes.

Index crimes of violence. Substantially fewer of these cases actually result in the imposition or execution of a death sentence.¹¹ These figures overstate the proportion of violent crimes subject to the death penalty, since crimes of violence which do not result in death are much less frequently reported to the police.¹²

Felony-type homicides not only represent an extremely small proportion of the overall crime problem, but viewed alone they are also rare events. They victimize approximately 2.0 persons per 100,000 population per year.¹³ Thus the risk of death from this particular criminal act is similar to risk of drowning or dying from accidental poisoning. In contrast, the probability of dying in a motor vehicle accident (47.9 per 100,000 population) is approximately twenty times greater than that of dying in a potentially capital crime; the probability of dying from heart disease (765.5 per 100,000) or cancer (469.4 per 100,000) is literally hundreds of times greater than that of being victimized by a capital murder.¹⁴

In sum, potentially capital homicides are rare events, representing an ex-

11. Using the 3,709 felony-type or suspected felony-type homicides in the United States in 1988, or the 3,708 in 1987, as an estimate of the number of potentially death-eligible cases per year, we can further see the improbability of death sentences. U.S. DEP'T OF JUSTICE — F.B.I., CRIME IN THE UNITED STATES, 1988, at 8, 13 (1988) [hereinafter U.S. DEP'T OF JUSTICE, 1988]; U.S. DEP'T OF JUSTICE — F.B.I., CRIME IN THE UNITED STATES, 1987, at 11 (1987). In 1988, for example, 339 people were sentenced to death in American jurisdictions. See Letter from Karima Wicks, NAACP Legal Defense and Educational Fund, Inc., to Michael Radelet (May 8, 1990) (on file with author). This means that approximately 1 out of every 11 potentially capital murders resulted in the actual imposition of a death sentence; and that approximately 1 in 60 of all criminal homicides, U.S. DEP'T OF JUSTICE, 1988, *supra*, at 7, resulted in a death sentence.

Even in states which use the death penalty most extensively, it is still a rare sanction. In their study, Gross and Mauro found that only 2.9% of reported homicides in Georgia, with a known suspect over age 14, resulted in an affirmed death sentence. S. GROSS & R. MAURO, DEATH AND DISCRIMINATION: RACIAL DISPARITIES IN CAPITAL SENTENCING 73 (1989). About 1.3% of all Florida homicides, with a suspect over age 14, resulted in an affirmed death sentence. *Id.* at 76.

In the 14 years following Gary Gilmore's execution in 1977, there were nearly 270,000 murders in the United States, but only 143 inmates, through the end of 1990, followed Gilmore's path to the executioner. In other words, in that 14-year span, there was one execution for every 1900 murders in America. As of January 1991 there were an additional 2,412 prisoners awaiting execution in American jurisdictions. NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., DEATH ROW, U.S.A. (Jan. 21, 1991). The rarity of the death penalty is not explained by the fact that these prisoners have not been executed, as even if we add their numbers to the 143 who have already met their fate, pretending all 2,536 had been executed, we would still have only one execution for every 106 murders over the last 14 years.

12. The Bureau of Justice Statistics estimates that, in 1985, 62.9% of all rapes between strangers, 52.7% of all robberies, and 58.8% of all aggravated assaults were reported to the police. U.S. DEP'T OF JUSTICE, CRIMINAL VICTIMIZATION IN THE UNITED STATES, 1985, at 74 (1987). Thus, because homicides are much less likely to go unreported to the police than other crimes of violence, the ratio of capital crimes to non-capital crimes of violence is probably less than 1 to 344.

13. See U.S. DEP'T OF JUSTICE, 1989, *supra* note 4, at 48. This estimate is obtained with an estimated population of 248,239,000.

14. U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, 1989, at 78, 84 (1990).

tremely small proportion of all serious crimes of violence. Hence, at best, capital punishment can only be viewed as a relatively minor criminal justice policy. To qualify as even a minor policy, however, the death penalty must have at least some effectiveness in reducing the occurrence of capital crimes. In the following section, we briefly examine the empirical evidence regarding the relative effectiveness of the death penalty as a criminal justice policy in reducing the frequency of those crimes which it is designed to address.

B. Any Benefits of the Death Penalty Are Outweighed by Its Costs

The most conventional approach for evaluating the effectiveness of a given social policy is a cost-benefit or cost-effectiveness analysis. This method of policy analysis attempts to measure the effectiveness and costs of a given policy as compared to those of available or plausible alternative policies.¹⁵ Using this approach, the death penalty as a criminal justice policy can be evaluated in terms of: 1) the relative effectiveness of capital punishment in controlling violence as compared to that of the alternative policy of long-term imprisonment, and 2) the costs of capital punishment relative to those of alternative policies.

1. The alleged benefits of the death penalty are illusory

The effectiveness of the death penalty should be determined primarily by whether it decreases the number of homicides by increasing general deterrence to homicides, especially to potentially capital ones.¹⁶ Its effectiveness should be gauged against that of alternative policies, which increasingly include life-without-parole.¹⁷ Because the decision is generally whether to incapacitate by killing or by life imprisonment, specific deterrence is irrelevant to death penalty debates.¹⁸ An extensive body of scholarship has examined whether the threat or use of the death penalty reduces the volume of homicide; several excellent reviews are available elsewhere.¹⁹ A recent review of all post-1972

15. See, e.g., B. PETERS, *AMERICAN PUBLIC POLICY: PROMISE AND PERFORMANCE* (1986); E. STOKEY & R. ZECKHAUSER, *A PRIMER FOR POLICY ANALYSIS* (1978).

16. By general deterrence, we mean that punishment of one offender will reduce the inclination of others to engage in similar crimes.

17. Wright, *Life-Without-Parole: An Alternative to Death or Not Much of a Life at All?*, 43 *VAND. L. REV.* 529 (1990).

18. Specific deterrence means that "individuals who are punished for a particular crime will not commit that crime again because their risk-reward calculations have been altered by the punishment." J. CONKLIN, *CRIMINOLOGY* 425 (3d ed. 1989). If a child is punished for stealing cookies, and does not do so again because she wants to avoid being punished again, she has been specifically deterred; if she does not do so again because she has learned such behavior is wrong, she has been rehabilitated. If she does not do so again because she has been executed or made to live in a cage, the punishment has incapacitated, but not specifically deterred. This distinction between specific deterrence and incapacitation is occasionally missed even by the best death penalty scholars. See, e.g., Tabak & Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 *LOY. L.A. L. REV.* 59, 119-25 (1989).

19. For recent reviews, see R. HOOD, *THE DEATH PENALTY: A WORLD-WIDE PERSPECTIVE* 117-48 (1989) (A report to the United Nations Committee on Crime Prevention and Control); Bailey, *Murder, Capital Punishment, and Television: Execution Publicity and Homicide*

empirical studies on capital punishment identified no criminologist in the United States in the last fifteen years who has claimed to find data showing that the death penalty has a long-term deterrent effect greater than that exerted by lengthy imprisonment.²⁰ The only such study making such a claim was published not by a criminologist, but by an economist in a regional economics journal,²¹ and is severely flawed.²² A mentor of that author, economist Isaac Ehrlich, saw his deterrence claims of fifteen years ago²³ similarly discredited.²⁴ Some deterrence studies tend to support the conclusion that homicide rates may actually increase after executions.²⁵ Overall, even a conservative reading of this body of literature leads to the conclusion that the death penalty has no detectable deterrent effect on criminal violence, and may on occasion actually have a counterproductive effect.

A second claim made by advocates of capital punishment is the incapacitation argument: once a murderer is executed, she will never kill again.²⁶ This argument proves too much, as no dead person will kill in the future. Advocates of the incapacitation argument would point out that convicted murderers have significantly higher odds of committing future murders than do others in the society, and that the only way to protect society is to reduce the odds of repeat to zero through death.²⁷ Hence, to judge the argument's validity, data are needed that allow probabilistic estimates of repeat homicides.

Studies that have addressed this question have uniformly found that the probability of a convicted murderer repeating her crime is minute.²⁸ How-

Rates, 55 AM. SOC. REV. 628 (1990); Bailey & Peterson, *Murder and Capital Punishment: A Monthly Time-Series Analysis of Execution Publicity*, 54 AM. SOC. REV. 722 (1989); Tabak & Lane, *supra* note 18, at 114-19.

20. M. RADELET & M. VANDIVER, *CAPITAL PUNISHMENT IN THE UNITED STATES: AN ANNOTATED BIBLIOGRAPHY* (1988).

21. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 SO. ECON. J. 68 (1985).

22. Fox & Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effects of the Death Penalty*, 23 LOY. L.A. L. REV. 29 (1989).

23. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975).

24. See, e.g., Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975); Klein, Forst & Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Evidence*, in *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* 336 (A. Blumstein, J. Cohen & D. Nagin eds. 1978).

25. Bowers & Pierce, *Deterrence or Brutalization: What is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980).

26. See, e.g., Bartels, *Capital Punishment: The Unexamined Issue of Special Deterrence*, 68 IOWA L. REV. 601 (1983).

27. The argument also implies a distrust of prison authorities, in that it suggests that we are unable to build prisons in which the threat of violence is small. The argument contradicts itself insofar as its solution to the imperfections and fallibility of the criminal justice system is to give it the power to impose a penalty that is both irreversible and uncorrectable.

28. See, e.g., Bedau, *Recidivism, Parole, and Deterrence*, in *THE DEATH PENALTY IN AMERICA* 173-80 (H.A. Bedau ed., 3d ed. 1982); Radelet & Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 55 ALBANY L. REV. (1991) (forthcoming) (citing sources); Stanton, *Murderers on Parole*, 15 CRIME & DELINQ. 149 (1969).

ever, such studies are open to the criticism that they look at all murderers, not simply those who were once "eligible" for execution. Recidivism of defendants who killed spouses, for example, (rarely a death penalty crime) is not differentiated from the recidivism of those who committed felony-murders. But in 1989 a significant new study by Marquart and Sorensen addressed this question and provided a solid base on which to evaluate the probabilities of repeated homicides by convicted capital defendants.²⁹ It looked at the cases of 558 inmates whose death sentences were commuted to life imprisonment by the 1972 Supreme Court decision in *Furman v. Georgia*.³⁰ Of these, 243 of the inmates had been released to the community. The study found that the 558 *Furman*-commuted inmates had committed seven new homicides, six in prison and one in the community.³¹ Hence, we would have to execute eighty capital murderers to eliminate the one who statistically will repeat, either inside or outside the prison. With the risk quantified, we question whether it is morally justifiable to execute eighty or so offenders in order to incapacitate the one who, at least according to statistical probabilities, will repeat the offense.

2. *The death penalty has high fiscal and moral costs*

There are costs associated with the use of capital punishment that must be considered in assessing its relative effectiveness as a criminal justice policy.³² In the case of the death penalty, one can identify both fiscal and moral costs.

Moral costs are important in the cost-benefit formulae of both retentionists and abolitionists, though they are not in agreement that among the moral questions is the fundamental morality of the state taking the lives of some of its citizens.³³ However, both abolitionists and retentionists agree on at least two moral costs: the possibility of executing the innocent and racial disparities in capital sentencing.

As long as they continue in our employ, executioners will always count the innocent among their victims.³⁴ This is admitted even by America's most prolific death penalty supporter, Ernest van den Haag, who has conceded: "I do not doubt that, over a long enough period, miscarriages of justice will oc-

29. Marquart & Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5 (1989).

30. 408 U.S. 238 (1972) (per curiam).

31. See *infra* note 38.

32. For a recent overview, see Tabak & Lane, *supra* note 18.

33. In addition to the moral costs discussed herein, we note that the vast majority of religious organizations in the United States have formal positions in opposition to the death penalty. See National Coalition to Abolish the Death Penalty & National Interreligious Task Force on Criminal Justice, *The Death Penalty: The Religious Community Calls for Abolition* (unpublished pamphlet on file with authors).

34. See Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

cur even in capital cases."³⁵ Added to this problem is a much larger number of death row inmates, who while not innocent of the act of taking another's life, are innocent in the sense of diminished criminal intent — that is, the killing may have arisen out of self-defense, insanity, or low premeditation.³⁶ Yet, the political importance of the death penalty is such that this liability, if acknowledged at all, is dismissed as minuscule.³⁷ In fact, the best estimates indicate that the odds of executing the innocent are roughly equal to the odds of a repeat homicide. Marquart and Sorensen found there have been seven repeat homicides in the *Furman*-commuted group.³⁸ There have also been five from this group who later proved their innocence, and, if not for the *Furman* decision, might have been executed.³⁹ It is plausible that there are other innocent defendants in this group, who have not been successful in proving it. Hence, the argument that some murderers will kill again, if not executed, can be countered and offset by the observation that executions will occasionally take the lives of the innocent.

A second moral cost of the death penalty is the impact of racial bias in its administration. The statistical evidence showing strong race-of-victim correlations with the imposition of the penalty, while not sufficient to mount a successful constitutional challenge,⁴⁰ is sufficient to raise serious moral questions. The best evidence comes from a study conducted in Georgia by Baldus and his colleagues, which found that, other factors being equal, those who kill whites were 4.3 times more likely to be sentenced to death than those who kill blacks.⁴¹ Similar patterns have been found in a number of other recent studies.⁴² For example, a 1990 study for the U.S. Congress, prepared by the Gen-

35. van den Haag, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662, 1664 (1986).

36. See C. BLACK, CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MIS-TAKE 17-24 (2d edition 1981); Bedau & Radelet, *supra* note 34, at 39-42.

37. See Markman & Cassell, *Protecting the Innocent: A Response to the Bedau - Radelet Study*, 41 STAN. L. REV. 121 (1988). But see Bedau & Radelet, *The Myth of Infallibility: A Reply to Markman and Cassell*, 41 STAN. L. REV. 161 (1988).

38. In the prison setting, these prisoners committed six murders — killing four prisoners and two correctional officers; while one parolee from Texas committed a second homicide. Marquart & Sorensen, *supra* note 29, at 27.

39. Four such cases are described in Bedau & Radelet, *supra* note 34, at 115, 131, 139. They include the petitions of Lawyer Johnson, Frederick Keaton, Wilbert Lee, and Freddie Pitts. A fifth, James Richardson, was released in Florida in 1989. See *Richardson v. State*, 546 So. 2d 1037 (Fla. 1989); M. LANE, ARCADIA (1970); N.Y. Times, Apr. 23, 1989, at 24, col. 4.

40. *McCleskey v. Kemp*, 481 U.S. 279 (1987) (statistical study insufficient to demonstrate unconstitutional discrimination in the fourteenth amendment context or to show irrationality, arbitrariness, and capriciousness under an eighth amendment analysis).

41. See D. BALDUS, C. PULASKI & G. WOODWORTH, EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS 143 (1990) [hereinafter EQUAL JUSTICE]. Baldus' study found that discrimination based upon the race of the victim decreased after *Furman*, but remained significant. Baldus, Pulaski & Woodworth, *Arbitrariness and Discrimination in the Administration of the Death Penalty*, 15 STETSON L. REV. 133, 161-65 (1986); see EQUAL JUSTICE, *supra* at 149-60.

42. See, e.g., W. BOWERS, LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA 224-32 (1984); S. GROSS & R. MAURO, *supra* note 11; R. HOOD, *supra* note 19, at 98-116 and

eral Accounting Office, examined the literature and statistical evidence and concluded that there is "a strong race of victim influence" in contemporary American death sentencing patterns.⁴³

Finally, capital punishment is an extremely expensive policy financially, and any effort to make it less costly would threaten various due process protections which must be preserved, if the death penalty is to be imposed fairly. It is now clear that a criminal justice system in which the death penalty is used is far more expensive than one in which it is not.⁴⁴ Homicide trials are more expensive when the death penalty is a possibility than when it is not, in part because of a greater need for expert testimony, exclusion of more potential jurors, and the necessity to conduct a second, or penalty, phase of the trial. After trial, there is a near-automatic appeal of the case through state and federal courts; this involves years of litigation before the final disposition. Finally, a greater proportion of death penalty cases than other homicide cases are sent back to trial courts for resentencing, meaning that a cost-per-execution calculation must also consider the costliness of cases in which the death penalty was considered or indeed imposed, but not carried out.⁴⁵ While precise estimates vary, typical is one from Florida, where each death sentence is estimated to cost approximately 3.18 million dollars, compared to a cost of life imprisonment (forty years) of approximately \$516,000.⁴⁶

C. Summary: The Death Penalty as an Illusory Solution

The evidence clearly shows that capital punishment applies to an extraordinarily small segment of the violent crime problem in the United States. Furthermore, even in terms of capital punishment's highly restricted objectives, social science research indicates that the death penalty has no effect on the prevalence of homicide. Equally important, alternative and far more widely applied sanctions (e.g., long term imprisonment) are available to punish and incapacitate the relatively few offenders convicted of the most serious crimes. Finally, the death penalty places unique and significant moral costs on the criminal justice system, and does so with a fiscal price tag which far exceeds the costs of long-term imprisonment. Thus, the death penalty can only be

sources cited therein; Bowers & Pierce, *supra* note 10; Radelet, *Racial Characteristics and the Imposition of the Death Penalty*, 46 AM. SOC. REV. 918 (1981); Radelet & Pierce, *Choosing Those Who Will Die: Race and the Death Penalty in Florida*, 43 UNIV. FLA. L. REV. 1 (1991); Radelet & Pierce, *Race and Prosecutorial Discretion in Homicide Cases*, 19 LAW & SOC'Y REV. 587 (1985).

43. GOVERNMENT ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES GAO/GGD-90-57 B-236876 (Feb. 26, 1990).

44. NEW YORK STATE DEFENDERS ASSOCIATION, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (April 1, 1982); Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221 (1985); Nakell, *The Cost of the Death Penalty*, 14 CRIM. L. BULL. 69 (1978); Spangenberg & Walsh, *Capital Punishment or Life Imprisonment? Some Cost Considerations*, 23 LOY. L.A.L. REV. 45 (1989).

45. Nakell, *supra* note 44, at 72.

46. von Drehle, *The Death Penalty: A Failure of Execution*, Miami Herald, July 10, 1988, at 12A, col. 1.

characterized as an ineffective, and morally costly social policy that lacks any crime control objective. From this point of view the death penalty is an inconsequential social policy. Why then is the death penalty featured at the center of so many American political debates and election campaigns?

II.

POLITICIANS ADVOCATE THE DEATH PENALTY FOR POLITICAL GAIN

From the standpoint of society's collective interests, most would agree that politicians should focus their limited time and attention on the most widespread and serious problems confronting society. Moreover, politicians should use their energies to promote only those policies that they honestly believe represent effective and realistic responses to these problems. How, then, can we explain the enormous discrepancy between the high profile of the death penalty in American politics and the obvious insignificance of this policy as an actual or potential crime control strategy?

One thesis might be that politicians are ignorant and do not know what policies can or cannot reduce crime rates. More specifically, some politicians may be deficient in their understanding of 1) the nature and causes of violent crime; 2) the range of public policies that are able to control crime; and 3) the extraordinarily limited scope of the death penalty as a crime control policy under existing constitutional law. Yet so many research projects have documented the limited scope and benefit of the death penalty⁴⁷ that it is unlikely that its persistence can be explained simply by politicians' ignorance. We explore another thesis: that politicians make the death penalty a prominent part of their crime control platforms to help themselves "manage" crime as an apparent issue, and to generate public support. When viewed as a campaign strategy that serves the political ambitions of politicians, rather than as a genuine, if misguided crime control strategy, the role of capital punishment in American politics becomes more understandable.

A. The Use of the Death Penalty to Attract Votes

Politicians use advocacy of the death penalty as a campaign tool because promoting the death penalty as if it were a useful answer to the problem of violent crime achieves three campaign goals. First, the extreme nature of the death penalty allows politicians to draw on and reinforce the highly simplified and sensationalized view of crime that is typically shown in the media. This enables politicians to treat crime as a simple, easy-to-understand phenomenon and allows them to capitalize on the fears of the public. Second, the death penalty enables politicians to say that they have the appropriate answer to the highly menacing, but unrealistic picture of crime that they have presented to the public. The politicians can appear to be tough; the constituents can be

47. See *supra* notes 10-31 and accompanying text.

reassured. Third, by emphasizing the death penalty, politicians can avoid the need to discuss comprehensive (but complex and expensive) crime-control strategies. Advocating the death penalty allows politicians to hide their failures.

The 1990 Florida gubernatorial campaign provides an excellent example. Governor Bob Martinez made capital punishment a prominent part of his reelection campaign. In March, Martinez's campaign began to air a television commercial in which he stated — even bragged — that he had signed “some 90 death warrants.” He went on to say, “each one of those [offenders] committed a heinous crime that I don't even choose to describe to you. . . . I believe in the death penalty for one who has taken someone else's life.”⁴⁸

At least two factors suggest that Martinez's promotion of capital punishment primarily reflects a concern for campaign strategy rather than a concern for serious crime-control policy. First, the ninety warrants Martinez had signed are greatly overshadowed by the four thousand or so homicides that had occurred in Florida between the time Martinez took office in 1987 and when the commercial aired in 1990. Even in a highly pro-death penalty state such as Florida, capital punishment is an infrequently applied criminal justice sanction. Secondly, and far more importantly, Martinez failed to mention that during the first three years of his administration, 1987-1989, the state of Florida had either the highest or second highest rate of violent crime in the nation, and one of the highest rates of murder and non-negligent homicide.⁴⁹ Clearly, Martinez had a major crime problem on his hands.

Martinez's apparent campaign strategy was to avoid discussion of the widespread prevalence of violent crime in Florida, and to focus on the fact that he had signed ninety death warrants, especially one for the notorious serial murderer, Ted Bundy. His campaign commercial implied that most violent crimes are committed by individuals like Ted Bundy, and that executions are the answer to this problem. In reality, the majority of homicides are committed by persons known to their victims; very few are committed by serial murderers.⁵⁰ Equally important, Martinez's efforts to control homicide and violent crime during his administration were, to say the least, highly unsuccessful. But vigorously advocating the death penalty made it easy for Martinez to convey the appearance that he was tough on crime.⁵¹

48. Pictured in this commercial is Theodore Bundy. He is first seen walking through a courtroom; then viewers see a close-up freeze-frame picture of Bundy's eyes. U.S.A. Today, Mar. 6, 1990, at 9A, col. 1. The commercial implies that all Florida death row inmates have criminal histories as long and as serious as Bundy's.

49. See U.S. DEP'T OF JUSTICE, 1989, *supra* note 4, at 54; U.S. DEP'T OF JUSTICE, 1988, *supra* note 11, at 56.

50. See generally J. LEVIN & J.A. FOX, MASS MURDER: AMERICA'S GROWING MENACE 19-21 (1985); U.S. DEP'T OF JUSTICE, 1989, *supra* note 4, at 12.

51. However, Martinez's reliance on the death penalty did not work as well for him as it did for President Bush in the 1988 campaign. Martinez lost to his Democratic challenger, Lawton Chiles.

B. *Why the Death Penalty Attracts Votes*

The Martinez advertisement illustrates the multiple functions the death penalty can serve in political campaigns. But politicians would not find advocacy of the death penalty so useful as a political campaign tool unless it somehow struck a responsive chord with the public. Given the ineffectiveness of the death penalty as a crime control strategy and its costliness, why is it that politicians can use it to gain public favor?

1. *The media sensationalizes, oversimplifies, and distorts "the crime problem"*

The public's view of crime is largely constructed from an image presented through the mass media.⁵² Journalists define crimes as newsworthy and select them for coverage based less on the crime's prevalence or threat than on the media's goals of expanding market share and attracting advertisers. The media therefore tends to select and emphasize events which are concerned with the risk of death from sensational and external causes, while downplaying more prevalent and commonplace threats to life.⁵³ As a result, the public develops a highly distorted view of crime and generally has a poor perception of the hierarchy of problems facing our society.⁵⁴ In one study, for example, respondents were asked to estimate the probabilities of death from assorted causes. Homicides were thought to cause more deaths than strokes, although in reality strokes cause eleven times the number of deaths.⁵⁵

Political strategies that rely heavily on the death penalty as a proposed solution to crime appear to take maximum advantage of media-promoted misconceptions about violent crime. The media tends to focus on the most frightening or irrational criminals (e.g., Willie Horton or Charles Manson) for news coverage. Criminals tend to be portrayed as one-dimensional, subhuman, evil, non-rational monsters. This results in an extraordinarily sensationalized and over-simplified view of crime and criminals that is at once frightening, but also useful in creating an image of an enemy that can be identified and targeted.⁵⁶

In terms of political strategy, media-promoted stereotypes of criminals and crime are invaluable vehicles for politicians advocating capital punishment. A one-dimensional policy such as the death penalty seems justified if

52. Sherizen, *Social Creation of Crime News: All the News Fitted to Print*, in *DEVIANCE AND THE MASS MEDIA* 203, 204 (C. Winick ed. 1978).

53. *Id.* at 215.

54. S. FISKE & S. TAYLOR, *SOCIAL COGNITION* (1984).

55. Slovic, Fischhoff & Lichtenstein, *Facts Versus Fears: Understanding Perceived Risk*, in *JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES* 463, 467 (D. Kahneman, P. Slovic & A. Tversky eds. 1982).

56. See, e.g., A. FRIENDLY & R. GOLDFARB, *CRIME AND PUBLICITY* 33-53 (1967); P. KANE, *MURDER, COURTS, AND THE PRESS* xii-6 (1986); H. PEPINSKY & P. JESILOW, *MYTHS THAT CAUSE CRIME* (1984); Fishman, *Crime Waves as Ideology*, 25 *SOC. PROBS.* 531 (1978); Molotch & Lester, *News as Purposive Behavior: The Strategic Use of Routine Events, Accidents, and Scandals*, 39 *AM. SOC. REV.* 101 (1974); Roshier, *The Selection of Crime News in the Press*, in *THE MANUFACTURE OF NEWS* (S. Cohen & J. Young eds. 1973).

the crime problem it addresses is also one-dimensional and simple. If, on the other hand, crime is a highly complex and diverse phenomenon, an extraordinarily limited policy such as the death penalty is a policy of little relevance. Executing Ted Bundy in Florida in 1989⁵⁷ in fact did little or nothing to make the country or the state of Florida safer.

2. *The death penalty reassures those who fear crime*

A second reason the death penalty serves as a useful political tool is that it allows politicians to reassure the public that they have an answer to the sensationalized view of crime which those same politicians and the media are fostering.⁵⁸ The message given is that there is no ambiguity about what the crime problem is or how it should be solved. Recent research on the psychology of mortality suggests that capital punishment may serve a "reassurance function," helping to make it an extremely valuable political tool. Researchers have found evidence to support the theory that when people are forced to think about their own deaths, they become more strict in their adherence to their individual moral codes. The researchers refer to this process as "terror management."⁵⁹ This research suggests that when people squarely face evidence of human vulnerability and mortality — as they surely do when learning the grisly details of a sensationalized homicide — they use cultural conceptions of reality and moral values to buffer the ensuing anxiety and terror.⁶⁰

The researchers theorize that moral codes serve to buffer people against the terror and anxiety of death. In periods of vivid awareness of vulnerability and death, individuals will vigorously defend their moral codes and world views, and react especially negatively to those who threaten them. Terror management theory suggests that individuals grow anxious when thinking about their vulnerability and mortality. Culturally-defined moral principles act as buffers or shields against this anxiety. When these moral principles are threatened, so is the anxiety buffer, and hence any threats, are countered with heightened negative reactions. One researcher found that, "[i]nducing subjects to think about their mortality presumably increased their need for faith in their values, and thus increased their desire to punish the moral transgressor."⁶¹ Thoughts about death lead to an enhanced desire to defend one's

57. FACTS ON FILE YEARBOOK 1989, at 49G3.

58. M. EDELMAN, *POLITICS AS SYMBOLIC ACTION: MASS AROUSAL AND QUIESCENCE* (1971).

59. Rosenblatt, Greenberg, Solomon, Pyszczynski & Lyon, *Evidence for Terror Management Theory: I. The Effects of Mortality Salience on Reactions to Those Who Violate or Uphold Cultural Values*, 57 J. PERSONALITY & SOC. PSYCHOLOGY 681 (1989) [hereinafter *Evidence for Terror*].

60. E. BECKER, *THE DENIAL OF DEATH* (1973); Greenberg, Pyszczynski, & Solomon, *The Causes and Consequences of a Need for Self-Esteem: A Terror Management Theory*, in PUBLIC SELF AND PRIVATE SELF 189-212 (R.F. Baumeister ed. 1986); *Evidence for Terror*, *supra* note 59.

61. *Evidence for Terror*, *supra* note 59, at 683.

moral code and to punish those who threaten it.⁶²

An important corollary of terror management research is that mortality salience (*i.e.*, awareness of one's mortality) not only seems to increase subjects' desire to punish moral transgressors, but also increases their desire to reward someone who appears to defend cultural values.⁶³ When death is at the forefront of thought, defenders of the moral code appear more worthy and violators appear more malevolent.

The first step for many politicians wishing to use the death penalty as a political tool is to elevate public fears concerning violent crime and mortality (through campaign commercials) or to draw on the already existing fears of the public, or both. The next step is for the politician to appear to defend the public against violence by advocating the death penalty. In terms of a political strategy, it makes little difference that the public is presented with a distorted view of the risks it faces and that the solution offered (the death penalty) is an irrelevant and ineffective policy. By linking the public's intensified fear of death and mayhem with sham solutions, politicians can appear to be defenders of the moral order. Thus, politicians can elevate themselves in the eyes of the public by appearing to respond to the same fears they may have helped to create in the first place.

In short, we all have anxieties about death, especially when reminded of it through learning of brutal homicides directly, through the news media, or through campaign commercials. Severe punishment of transgressors serves to revalidate the shared moral codes that have been offended. When politicians and the media exaggerate the threat that potentially capital felons pose to us, our fears of death operate to attempt to repair the violated moral values, and support for capital punishment increases. Politicians calling for the death penalty for murderers may be invoking the same psychological mechanisms that preachers have found to be so successful in their fire-and-brimstone warnings that death will trigger a judgment for moral wrongdoings.

3. *Advocating the death penalty allows politicians to appear to be tough on crime while avoiding the real crime problem*

A final political benefit of death penalty advocacy is that it allows politicians to create the illusion that they are responding to citizens' concerns regarding crime without having to discuss comprehensive or realistic

62. In one experiment, using hypothetical prostitution cases as an example of deviant behavior that violates dominant cultural norms, 22 municipal court judges were asked to set bond for a prostitute, identically described in a packet of materials given to each. Before setting bond, half the judges were asked questions probing their thoughts and feelings about their own deaths. Those judges ended up assessing the hypothetical prostitute a significantly higher bond than the other judges — an average of \$455 vs. \$50. *Id.*

63. In another experiment, researchers asked students to recommend a monetary reward (from \$50 to \$10,000) for a woman who had provided tips to police (at possible risk to herself) about the identity of a suspected violent criminal. Students who were asked to think about their own mortality recommended, on average, much higher rewards to the woman than students in the control group — \$3,476 versus \$1,112 respectively. *Id.*

approaches to this problem. A stereotypical enemy is identified who becomes nothing more than a scapegoat. Capital punishment enables the politician to offer a quick and simple solution. Politicians "exacerbate and channel legitimate public concern about crime into public support for capital punishment by advertising insupportable claims that capital punishment is an answer to the crime problem."⁶⁴ Responding to citizens' concerns, identifying an enemy, and presenting a solution can all be done quickly, easily, and simply, well within the parameters of available media time (e.g., thirty seconds in the case of Martinez's Ted Bundy commercial)⁶⁵ or viewers' attention spans.

Some politicians go further than using the death penalty to avoid responsible discussion of the crime issue. They affirmatively mislead the public about the risks of being victimized by extreme forms of violence and about the criminal justice system's alternatives to the death penalty. For example, when running for California's Democratic primary for governor on a strong pro-death penalty platform in 1990, San Francisco Mayor Dianne Feinstein claimed, "You can't expect somebody to be deterred from committing murder if they know they will only serve four to five years."⁶⁶ Partially as a result of such misinformation, many Americans believe that, if not executed, convicted murderers will be living back in the community in a few short years.⁶⁷ Certainly, support for the death penalty would rise if the alternative to execution were simply a few years in prison. But when used to justify the death penalty, this statement is clearly misguided and perhaps even consciously manipulative. In California, for example, those eligible for the death penalty but spared its imposition face only one possible sentence: life imprisonment without parole.⁶⁸

C. Summary: The Political Benefits of Death Penalty Advocacy

Used as a political tool, the death penalty enables politicians to manipulate public perception and sentiment in several important ways. First, use of the death penalty allows politicians to oversimplify greatly the issue of crime by suggesting that most crimes are committed by Charles Manson or Willie Horton-like sociopaths. This elevates the public's fears and sense of vulnerability. Next, the death penalty allows politicians to reassure the public by proposing a seemingly thorough and simple solution to the stereotyped and sensationalized view of crime that they have promoted. Finally, although they

64. Amsterdam, *Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 346, 353 (H. Bedau ed. 3d ed. 1982).

65. U.S.A. Today, Mar. 6, 1990, at 9A, col. 1.

66. The Sunday Times (London), Mar. 18, 1990. We suspect, however, that few Americans would go out and kill even if the penalty for murder were four or five years' imprisonment.

67. See Fox, Radelet & Bonsteel, *Death Penalty Opinion in the Post-Furman Years*, 18 N.Y.U. REV. L. & SOC. CHANGE 499 (1990-91); Paduano & Stafford-Smith, *Deathly Errors: Juror Misconceptions Concerning Parole in the Imposition of the Death Penalty*, 18 COLUM. HUM. RTS. L. REV. 211 (1987).

68. CAL. PENAL CODE § 190.2(a) (West Supp. 1991); cf. FLA. STAT. § 775.082(a) (1989) (the only alternative to the death penalty for those convicted of a capital felony is life imprisonment, of which they must serve at least 25 years before becoming eligible for parole).

only address a small part of the overall crime problem and only present an ineffective solution, at best, politicians benefit by avoiding any genuine discussion of the issues of crime and violence in America. Thus, the death penalty can be used as a three-for-one all-purpose campaign tool. Zimring and Hawkins label the death penalty as a punishment in search of a crime.⁶⁹ Perceptions of crime must be molded to fit the proffered solution.

CONCLUSION

Conventionally, in assessing the death penalty as a public policy, it is analyzed as a component of the criminal justice system. This approach weighs the death penalty's alleged benefits (retribution, general deterrence, and incapacitation) against its liabilities. The liabilities can be classified into two groups: economic costs, with the death penalty being more expensive than long-term imprisonment; and moral costs such as arbitrariness, racism, and the risk of executing innocent persons. This line of analysis leads us to conclude that, whatever benefits the death penalty may have for the criminal justice system, the same results can be attained with lower economic and moral costs by the alternative of lengthy imprisonment.⁷⁰

We conclude that the durability of the death penalty cannot be understood as long as it is analyzed as a tool of the criminal justice system. If it could, any number of studies using the above cost-benefit logic should have turned electric chairs into museum relics long ago. To understand the durability of the death penalty and its importance in political debates today, it must be viewed not as an instrument of justice, but as a political tool. The death penalty fails as a criminal justice tool, but it is a highly effective means for politicians to manipulate political debates and public perceptions.

The problems of violent crime in general and capital crime in particular are complex. Constructive policies addressing these problems are similarly complex, require long-term effort, and are diffuse insofar as their relationship to crime may not be readily apparent.⁷¹ They are not panaceas, as even the best-informed policies cannot completely eliminate violent crime from the country. For politicians, however, "it is much easier to advocate simplistic and illusory solutions to the crime problem than to find real and effective solutions."⁷²

The consequences of using the death penalty as a political strategy extend well beyond the boundaries of political manipulation in an election campaign. At the most elementary level, political campaigns that are based on deception (including self-deception) which tend to obscure or eliminate potentially realistic solutions to the problems facing our nation. As Bok notes, "[A]t times,

69. F. ZIMRING & G. HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 77 (1986).

70. For the best recent example of this type of analysis, see Tabak & Lane, *supra* note 18.

71. See, e.g., E. CURRIE, *CONFRONTING CRIME: AN AMERICAN CHALLENGE* (1985).

72. Amsterdam, *supra* note 64, at 353.

lies foster the belief that there are more alternatives than is really the case; at other times, a lie may lead to the unnecessary loss of confidence in the best alternative."⁷³

In the case of violent crime, the American obsession with the most extreme but infrequent forms of violence has encouraged the political leadership to focus on short-term and often illusory solutions to crime. Politicians advocating the death penalty have consciously or unconsciously encouraged this shortsightedness. It is becoming increasingly clear, however, that the crime-control policies of the last decade have not been successful. Not only can the value of the death penalty be challenged, but some researchers have questioned the extent of benefits arising from the massive increases in imprisonment over the last ten years.⁷⁴

While politicians have been focusing on illusory solutions to crime, pressing social problems have received inadequate attention. During the 1980s, we have seen the proportion of children living in poverty rise from seventeen to twenty-three percent, and watched the health care and nutritional supports for impoverished families with children stagnate or decline.⁷⁵ Today's youth are less healthy and less cared for than was their parents' generation.⁷⁶ Like the problem of violent crime, these are extremely difficult challenges to address, but failure to do so will have disastrous consequences.

The distortion and oversimplification of social problems like those the death penalty is supposed to solve help to convince the public that there are easy, "get tough," one-shot answers to these problems. As a result, the death penalty has systematically helped to divert public attention from a search for realistic solutions to crime and disorder. Such a system of politics binds us to inaction and a declining status quo. Genuine policies to reduce crime must incorporate comprehensive strategies of social investment and support for children, families, and our workforce.

Equally important, the continued manipulation of public fears and attitudes with shallow promises to control crime is likely to promote a loss of trust in the government and its representatives. According to Bok, "In America, distrust of government and cynicism about the political process have reached crisis proportions."⁷⁷ Continued advocacy of irrelevant policies, such as the death penalty, for the purpose of manipulating voters' attitudes and sentiment can only further deepen the public's cynicism and sense of malaise. Politicians who advocate the death penalty are not being responsive to crime in American society. They are advancing a policy that has no relevance to the vast majority of crimes, and is ineffective as a deterrent to the small number of

73. S. BOK, *LYING* 19 (1978).

74. See M. MAUER, *YOUNG BLACK MEN AND THE CRIMINAL JUSTICE SYSTEM* (1990).

75. NATIONAL CENTER FOR CHILDREN IN POVERTY, *FIVE MILLION CHILDREN: A STATISTICAL PROFILE OF OUR POOREST YOUNG CITIZENS* (1990).

76. NATIONAL ASSOCIATION OF STATE BOARDS OF EDUCATION, *CODE BLUE: UNITING FOR HEALTHIER YOUTH* (1990).

77. S. BOK, *SCHOOL FOR SCANDAL 2* (1990).

crimes to which it is addressed. Politicians are doing it either because of a lack of knowledge about the nature of crime, or because they are trying to manipulate public opinion for their own partisan interests to the detriment of the common interest. Our analysis leads to the conclusion that if our society *really* wants to be tough on crime, we should begin by recognizing that the death penalty is not a solution. To suggest otherwise is to participate in a charade that prevents us from addressing the real problems facing our nation.