

Is Capital Punishment Just? Assessing the Death Penalty Using Justice Theory

Matthew Robinson
Government & Justice Studies
Appalachian State University

ABSTRACT

In this paper, I introduce and compare & contrast well-known theories of justice. Then, I introduce realities of capital punishment practice in the United States using both descriptive empirical data and summaries of recent studies of the death penalty. Finally, I assess capital punishment in terms of ways in which it is consistent and inconsistent with the major theories of justice. The primary goal of the paper is to answer the question of whether capital punishment in the United States is just or not, and why. This is the first time these theories of justice have specifically been applied to capital punishment as it is currently practiced in the United States.

Introduction

It is fair to say that capital punishment is under attack, particularly in the South where it is most commonly practiced. Not only have serious criticisms been raised by scholars in criminal justice, criminology and related disciplines (e.g., Robinson, 2009a), but newspapers have published scathing news reports suggesting that innocent people have been sentenced to death and even executed (e.g., Grann, 2009), and alleging racial discrimination in capital punishment practice (Burns, 2010).

States are taking notice. As one clear example, the state of North Carolina not only became the first state to create an “Innocence Inquiry Commission”— a state-level agency established in August 2006 to investigate and evaluate post-conviction claims of factual innocence — but it also became only the second state in the nation to pass a “Racial Justice

Act" in August 2009. The latter law allows death-row inmates to challenge death sentences based on alleged racial biases (including through the use of statistical studies). Judges can overturn death sentences if prosecutors are unable to disprove that race played a meaningful role in the death penalty cases. Pre-trial defendants can also allege racial biases which can result in judges not allowing death sentences at trial (North Carolina General Assembly, 2009). These developments are especially significant since they have occurred in a state that has historically been among the leaders in the nation in terms of its death sentencing rate, size of death row, and number of executions per year (in 2011, the state House passed a repeal of the Racial Justice Act but the Senate did not take up the bill, although it pledges to consider the bill next term).

Issues of innocence and race are but two of a handful of significant issues that are relevant to whether capital punishment practice is consistent with justice. There are many differing conceptions of justice, each of which suggests a different concept of greatest importance. In this paper, I introduce and compare & contrast well-known theories of justice. Then, I introduce the realities of capital punishment practice in the United States. Finally, I assess capital punishment in terms of ways in which it is consistent and inconsistent with the major theories of justice. The primary goal of the paper is to answer the question of whether capital punishment in the United States is just or not, and why. This is the first time these theories of justice have specifically been applied to capital punishment as it is currently practiced in the United States.

Theories of Justice

Justice is typically defined as administering and maintaining what is just or right. According to a leading justice scholar, Michael Sandel (2009), there are three broad issues discussed and debated by scholars of justice theory—freedom, welfare, and virtue. Some justice theorists argue that what matters most for deciding what is right or just is freedom—whether individual rights are respected and protected. These scholars are called *libertarians* because they say what matters most for justice is liberty. For some, this means protecting

civil liberties granted to citizens through the US Constitution (e.g., John Rawls, 1971). For others it means assuring the right of people to pursue, own, and control property with minimal governmental interference (e.g., Friedrich Hayek, 1960; Milton Friedman, 1962; Robert Nozick, 1974). The latter camp is often referred to as *free market libertarians* because most of their arguments are economic in nature.

Another school of thought is the *egalitarian libertarians*. These scholars suggest that what matters most for justice is equality of opportunity in society and taking care of the least advantaged citizens (e.g., David Miller, 2003). There is a basic disagreement between free market and egalitarian libertarians; the former end up arguing against government interference in property exchanges even in cases where capitalism produces massive inequities between the wealthy and the poor, whereas the latter often argue for government intervention to make arrangements in society fairer for all and especially for the poor and needy.

Other justice theorists focus on welfare, or general well-being and happiness of people in society. They argue that what matters most for justice is the welfare of society, or its overall happiness. For example, Jeremy Bentham's (1789) *utilitarianism* says that whether something is just depends on whether it maximizes utility or the greatest happiness for the greatest number of people.

Finally, other justice theorists argue that what matters most for justice is virtue, or moral goodness and righteousness. For example, Aristotle's (1280) theory suggests that justice demands giving people what they deserve or what they are due. This means honoring and rewarding those values or virtues that are worthy of honor and reward. In order to make such determinations, we must first make decisions about what is good or righteous in the first place. There is a controversy between those, like Michael Sandel, who believe that justice theory cannot be silent on matters of virtue or the "good life" and those, like John Rawls, who always argued that it must be.

Immanuel Kant's (1785) view is also relevant here. According to Kant, whether something is just or not depends only whether it is the right thing to do, regardless of the consequences. That is, whether something is just is determined by motive, or whether it is morally right. Something is morally right, according to Kant, if it respects the moral law which requires us to treat each other as autonomous beings worthy of respect.

Although each approach is organized primarily around one major concept (i.e., freedom, welfare, or virtue), specific theorists have over time "borrowed" from the other schools of thought to build their own theories of justice. As such, there is significant overlap between these different theories of justice. For example, John Stuart Mill (a *utilitarian*) claimed that the best way to achieve maximum happiness in society is to respect people's liberties (like a *libertarian*) (Mill, 1869). Mill argued that individuals should be allowed to do whatever they want as long as they produce no harm to others. Another example is Friedman Hayek (a *free market libertarian*), who also wrote about the importance of enforcing equality in the law (like an *egalitarian*) (Hayek, 1960). Hayek noted that, although unequal outcomes in society are an inevitable result of competition in a free market system, everyone should still enjoy equal protection of the law so that they have equal opportunity to succeed. Another example is John Rawls (an *egalitarian*), who stressed the importance of "equal liberty" (like a *libertarian*). Rawls first principle of justice is that every citizen has the same basic rights, protected by the US Constitution (Rawls, 2003). Finally, David Miller (an *egalitarian*) presents a theory of justice containing three principles, one of which is desert (Miller, 2003). To Miller, in matters of "instrumental associations" such as work, justice requires that people get what they deserve (similar to the virtue based theory of Aristotle).

Finally, the concept of *social justice* is important here. Social justice is a concept that is generally equated with individual rights and equality (Berry, 2005; Brighouse, 2005). As such it is most related to the libertarian and egalitarian theories of justice, two theories of justice Americans hold dear, as reflected in our Declaration of Independence and US Constitution and the due process of law these documents celebrate and establish (Martin,

2010; Orth, 2007). Thus, the question of whether America's death penalty is consistent with libertarianism and egalitarianism should be an important question for Americans, and has great relevance for whether capital punishment is socially just.

Which Theories of Justice are Relevant for Capital Punishment?

Each of the major theories outlined above—libertarianism, egalitarianism, utilitarianism, and virtue-based theory—is relevant for the practice of capital punishment in the United States. When it comes to the death penalty, the most important question for libertarians is whether it respects liberty or freedom. The most important question for egalitarians is whether capital punishment practice is equal (i.e., applied in an equal fashion). For utilitarians, the most important question is whether capital punishment increases overall utility or happiness in society. Finally, for virtue-based theorists, the question is whether capital punishment respects and promotes our values, our moral goodness, and whether it is the right thing to do.

Some of these questions may be more difficult to answer because they appeal to our values themselves, values that vary in a pluralistic society like the United States. Given the plurality of values, disagreement among scholars should not be surprising; some scholars argue that capital punishment is morally wrong (Bedau, 2004; Bright, 2004; Reiman, 2004), while others argue that the death penalty is perfectly acceptable (Cassell, 2004; Pojman, 2004; van den Haag, 1997). Interestingly, such arguments often revolve around issues of freedom (libertarianism), equality (egalitarianism), and morality (virtue). For example, one person might say that capital punishment is unjust because it takes away a person's life and therefore all of his or her liberties and rights, including the right to life (Reiman, 2004). Another person might argue that murderers give up their rights by committing murders and that killing murderers actually increases respect for life by demonstrating to would-be murderers that "innocent" life is so sacred that it will be protected even by executing murderers (Pojman, 2004). An individual might argue that the death penalty is applied in a racially biased manner and is therefore not equal (Bright,

2004). Another individual might argue that the racial distribution of death row or executions is irrelevant when you are talking about convicted murderers, all of whom deserve to die (Cassell, 2004). Where ever the truth lies, the point is that these are arguments about freedom, equality, and virtue.

Although some will see the death penalty as merely a "values issues," there is also empirical evidence about death penalty practice that will help us answer whether the death penalty in the United States is consistent or inconsistent with the major theories of justice. We now turn to this evidence which establishes important empirical realities of American capital punishment.

The Real Death Penalty

It is important to note that capital punishment does not exist in theory, only in practice. Thus, the review of evidence presented here does not pertain to any theoretical or philosophical argument either in favor or opposed to capital punishment. Instead, the evidence is relevant only to whether the death penalty, as it is actually practiced in our nation, is consistent or inconsistent with the theories of justice (as well as the values which underlie them).

What is meant by the statement that "capital punishment does not exist in theory, only in practice" is this: people often argue about whether the death penalty is just or unjust based on theoretical or philosophical arguments, often without considering the facts of the death penalty. One example concerns the issue of retribution. A supporter of capital punishment might say, "I support the death penalty because of 'an eye for an eye.'" Or perhaps he or she might say because "the death penalty is the only way to achieve justice for murder victims." These statements ignore the facts of the death penalty, as it is actually utilized in the United States—the most important of which is that only about 1% of murderers are ever executed. So a reasonable response to these claims might be, "If a state kills only 1% of murderers, do we achieve an 'eye for an eye'?" Or perhaps, "What

about the vast majority of murderers who do not get executed but who instead spend decades in prison for their crimes; is this not justice?"

Four basic facts establish the realities of American capital punishment. The first is that capital punishment is practiced in most but not all US jurisdictions. Specifically, there are 34 states with the death penalty, and 16 without (the state of Illinois abolished the death penalty in 2011). The federal government also maintains capital punishment, as does the military, but the District of Columbia does not carry out executions. However, of these death penalty jurisdictions, only nine regularly carry out an execution, meaning they have averaged at least one execution a year since 1976 when capital punishment was reinstated; thus only about one-quarter (26%) of death penalty states (nine of 34) and 18% of all states in the country (nine of 50) average one or more executions per year. Further, only one state has carried out at least ten executions per year since 1976—Texas (Robinson, 2008). In fact, only about 10% of counties with the death penalty imposed a death sentence between the years 2004-2009 (Smith, 2010a).

As may already be obvious, executions are extremely rare in the United States, even though the number of executions per year regularly ranks America in the top five nations in the world (behind nations like China, Iran, Saudi Arabia, and Pakistan). This raises the second fact of capital punishment practice, which is, relative to murder, capital punishment is especially rare in the United States. For example, in the first thirty years after capital punishment was reinstated (1977-2006), there were 592,580 murders and nonnegligent manslaughters in the US, for an average of 19,752 killings per year. During this time, 7,225 death sentences were handed down, for an average of 241 death sentences per year. And there were 1,099 executions, for an average of 37 executions per year. This means that about 1.2% of killings from 1977 to 2006 led to death sentences, and only about 0.185% of killings have led to an execution so far (Robinson, 2008), with another 3,261 death row inmates awaiting death at the end of 2009 (Death Penalty Information Center, 2010b).

The rare nature of capital punishment can be attributed to at least two reasons. First, the numbers above come from all jurisdictions, including those without the death penalty. Yet, even in death penalty states, death sentences and executions are quite rare relative to killings. For example, Texas—which leads the United States in the number of executions since 1976— had 51,729 murders between the years of 1976 and 2002, for an average of 1,915 killings per year. During these years, Texas handed down only 31 death sentences per year and carried out a meager 12 executions per year. Thus, even in Texas (which leads all states in the number of executions every year), only 1.6% of the killers from 1976 to 2002 were sentenced to death and even less (only 0.63%) of its murderers were executed. The state that leads the nation in its sentencing of convicted murderers (Nevada) sentences only about 6% of murderers to death, meaning even there 94% of killers do not get sentenced to death (Robinson, 2008).

Second, not all murderers are even eligible for capital punishment, as only *aggravated murderers* can be sentenced to death and executed (Bohm, 2003). Research shows that only a tiny fraction of death eligible murderers receive death sentences and are executed (Zimring, 2003). This owes itself to at least three simple facts: 1) prosecutors rarely seek the death penalty; 2) juries rarely impose death sentences even when they are sought; and 3) states cannot afford the high costs of capital punishment practice (Robinson, 2009b).

The third reality of American capital punishment is that death penalty practice is geographically disparate. Since 1976, about 82% of all executions have taken place in the South, largely because of its higher murder rates and much larger population bases. Only 12% of executions have occurred in the Midwest, followed by 6% in the West; and less than five executions have been carried out in the entire Northeast. Amazingly, Texas has carried out 37% of all executions since 1976, including 49% of all executions in 2006, 59% in 2007, 49% in 2008, 46% in 2009, and 37% in 2010.

In fact, the policy of capital punishment is something that is pursued by prosecutors in just a handful of locales within the country. For example, county level data illustrate that, since 1976, only about 14% of counties in the entire country have handed down death sentences that have led to an execution (Smith, 2010b). Further, only five counties are responsible for a disproportionate share of all the executions carried out since 1976, and four of the five are in Texas (Harris County, Texas has carried out more executions than any entire state!).

These first three, interrelated facts call into serious question the ability of capital punishment to achieve its assumed goals of incapacitation, deterrence, and retribution. *Incapacitation* is understood as removing the ability of offenders to commit future crimes; incarceration is the typical form whereas execution is the ultimate form. *Deterrence* refers to creating fear in would-be offenders through punishment to prevent future crimes; capital punishment can only be aimed at preventing crime by would-be murderers (general deterrence) since it cannot create fear in murderers who have already been executed (specific deterrence). *Retribution* refers to righting or rebalancing the scales of justice through punishment in order to achieve justice for crime victims (i.e., the government); executions are often depicted as retribution for the crime of murder, as well as a source of closure for murder victims' families.

Criminologists and capital punishment scholars overwhelmingly indicate that the death penalty fails to achieve these goals, mostly because of the rarity of death sentences and executions (Radelet and Lacock, 2009; Robinson, 2008). Logically, if death sentences and executions were more common, capital punishment would be more likely to achieve these goals. Yet we also know that the more frequently the death penalty is used, the greater the costs associated with the policy, including not only additional financial costs but also a greater risk of convicting, sentencing to death, and executing the innocent (Liebman, Fagan, and West, 2004). This ultimately has great significance for the "justice" of capital punishment.

This raises the fourth major reality of capital punishment in the United States, and that is that serious problems have been identified with death penalty practice. The two most significant problems relate to extra-legal sources of bias revolving around race, class, and gender; and wrongful conviction and execution.

Starting with race, America's death penalty has always been plagued by serious racial biases (Kotch, 2010; Steiker and Steiker, 2010). Little evidence remains of the historic discrimination by race of defendant, although state-specific anecdotal evidence suggests blacks are still occasionally discriminated against, especially when accused of killing whites and when juries are overwhelmingly white (Paternoster and Brame, 2003; Pierce and Radelet, 2005; Unah and Boger, 2001). Consider these real-life cases identified in North Carolina, which led to the passage of only the second Racial Justice Act in the nation:

- Kenneth Rouse, a black man sentenced to death in Randolph County by an all-white jury, was judged by one self-admitted racist juror who reportedly believes that "black men rape white women so they can brag to their friends." This juror admitted in a sworn affidavit that "blacks do not care about living as much as whites do." He referred to African Americans as "niggers" and stated that bigotry played a meaningful role in his decision to vote for death. He also admitted that he lied about his racist beliefs so that he could be on the jury. Rouse is still on death row.
- Raymond Rowsey, a black man, was sentenced to death in Alamance County by a jury comprising only one African American. This juror did not want to vote for death and stated in an affidavit that she was intimidated by other jurors to vote for death; she speculates that her race is why she was not given more attention by other jurors. Rowsey was executed in 2004.
- Robert Bacon, a black man sentenced to death in Onslow County by an all-white jury, was granted clemency shortly before his execution after a juror came forward

and claimed that the jury made derogatory racial comments during deliberations and that his death sentence was motivated by racism.

As noted earlier, the Racial Justice Act allows people to challenge both capital prosecutions as well as death sentences if they can show racial bias in capital punishment practice.

In fact, most experts now point to a "race of victim" effect, whereby killers of whites are far more likely to be sentenced to death and executed than killers of other races (Petrie and Coverdill, 2010). For example, a comprehensive study of race and the death penalty in North Carolina showed that killers of whites were more than three times more likely to receive death sentences than killers of blacks (Unah and Boger, 2001). In the state, 80% of those people executed since 1976 killed white people; only about 40% of North Carolina homicide victims are white. Further, a study of capital punishment practice in the state from 1999 to 2006 found that blacks who killed whites were 14 times more likely to be sentenced to death than whites who killed blacks. Also, there were six executions of blacks who killed whites during the time period, yet zero executions of whites who killed blacks (Howell, 2008). The very latest studies at the time of this writing also show serious biases based on race of victim in the state of North Carolina (Baumgartner and Unah, 2010; Grosso, O'Brien, and Baldus, 2010).

Studies from numerous other states also find the same race of victim effect (Robinson, 2011). They show that the group most likely to be sentenced to death and ultimately executed is black killers of whites (Keil and Vito, 2006; Paternoster and Brame, 2008), although this effect is not found in every state (Scheb, Lyons, and Wagers, 2008) and may in some cases be partially explained by legal factors (Berk, Li, and Hickman, 2005). In the United States since 1976, 15 whites who killed blacks have been executed versus 242 blacks who killed whites (Death Penalty Information Center, 2010d). Looking even farther back, a study of 15,978 executions since 1739 found only 30 cases in which a Caucasian was put to death for a crime against an African American (Radelet, 1989).

The racial biases in capital punishment practice are so serious that they lead to this conclusion from some of the leading scholars researching racial bias in criminal justice practice:

We contend that the type of discrimination found in the capital sentencing process falls closer to the systematic end of the discrimination continuum ... Racial discrimination in the capital sentencing process is not limited to the South, where historical evidence of racial bias would lead one to expect differential treatment; it is applicable to other regions of the country as well. It is not confined to one stage of the decision making process; it affects decisions made by prosecutors and juries. It also is not confined to the pre-*Furman* period, when statutes offered little or no guidance to judges and juries charged with deciding whether to impose the death penalty; it is found, too, under the more restrictive guided discretion statutes enacted since *Furman*. Moreover, this effect does not disappear when legally relevant predictors of sentence severity are taken into consideration (Walker, Spohn, and Delone, 2007, p. 332).

One significant source of racial disparities in capital punishment practice may be "innocent" in nature; i.e., unintended because it may stem from the fact that 98% of prosecutors in death penalty jurisdictions are white (Robinson, 2008). These prosecutors may simply better identify with white victims and may also feel more pressure to pursue death sentences when whites are murdered. Nevertheless, it seriously threatens justice when prosecutors consider race, gender, and other legal factors in their decisions to seek death sentences (Songer and Unah, 2007; Unah, 2010).

Research also shows that capital juries often use race in deliberations both during trial as well as in the sentencing phase (Gonzalez-Perez, 2002; Lynch and Haney, 2000; Otto, Applegate, and Davis, 2007). The Capital Jury Project, which studied 1,198 jurors from 353 capital trials in 14 states, has identified significant problems with capital juries,

including bias in jury selection (Bowers, 1995, 1996; Blume, Eisenberg, and Garvey, 2003; Bowers, Steiner, and Antonio, 2003; Sandys, 1998); premature decision making by jurors (Bowers, Sandys, and Steiner, 1998); failure to understand jury instructions (Bentele and Bowers, 2002; Bowers and Steiner, 1999; Eisenberg and Wells, 1993; Foglia, 2003; Garvey, Johnson, and Marcus, 2000; Luginbuhl and Howe, 1995); erroneous beliefs by jurors that death is required based on its heinous nature (Blume, Garvey, and Johnson, 2001; Eisenberg, Garvey, and Wells, 1996; Garvey, 1998); underestimating the length of time murderers will serve in prison if not sentenced to death (Hoffman, 1995, 1997; Sarat, 1995; Steiner, Bowers, and Sarat, 1999); and a race of juror effect on capital sentencing, so that the odds of death sentences for black defendants with white victims are highest when there are white males on the jury (Bowers, Sandys, and Brewer, 2004; Bowers, Steiner, and Sandys, 2001; Eisenberg, Garvey, and Wells, 2001; Foglia and Schenker, 2001).

Finally, the racial and ethnic make-up of both county and state populations has a direct and meaningful impact on capital punishment practice (Urbina, 2003). For example, states that have higher concentrations of Black citizens and conservative populations, as well as a higher percentage of Hispanics in the population, tend to have more people on death row and also carry out more executions (Pritchard and Wiatrowski, 2008). Additionally, counties with higher levels of white residents, especially when bordering counties with larger black populations, tend to produce more death sentences and executions (West et al., 2010).

As for social class bias, there has been little systematic examination into this issue, but it is clear that the nation's death rows are filled with poor killers (i.e., wealthy killers rarely get sentenced to death). Some scholars point to a class effect created by a bias in the criminal law, whereby only some forms of killings are even eligible for the death penalty (Bohm, 2003; Reiman, 1998; Robinson, 2009a). Forms of killings committed by the wealthy (e.g., through defective products and dangerous working conditions) tend not to lead to death sentences, even when committed with culpability such as through negligence or

recklessness (Robinson and Murphy, 2008). Even within forms of killing classified as murder, experts overwhelmingly point to the issue of quality of defense representation and note that the poor are the least able to pay for competent defense, which increases the odds of death sentences (Bright, 1997, 2004; Dow, 2002; McAllister, 2003; Mello and Perkins, 2003).

A survey of scholars who have published articles and books on capital punishment found they overwhelmingly believe capital punishment to be biased against the poor. Experts responded to this question with responses such as "There's a reason it's called capital punishment; those without the capital get the punishment" and "The criminal justice system knows who pays for it and in no place is it the poor" (Robinson, 2008).

The impact of gender on capital punishment practice is not widely understood because it also has not been widely studied (Reza, 2005). Yet, we know that women are underrepresented among capital punishment populations. For example, although women make up about 10% of murderers, only about 2% of people on death row are women and only 1% of those executed have been women (Streib, 2004). This is due first to the fact that women are less likely to commit aggravated forms of murder, the type that of murder is eligible for death. Yet, it is also possibly due to a "chivalry effect," whereby we are less likely to seek to kill women in the first place, and to sentence them to death in the second (Chesney-Lind and Pasko, 2004; Crew, 1991; Rodriguez, Curry, and Lee, 2006).

Finally, some research now suggests that killers of women are more likely to be sentenced to death, especially killers of white women (Dieter, 1998; Holcomb, Williams, and Demuth, 2004; Phillips, Potter, and Coverdill, 2010). Although it may be too early to tell, early evidence suggests it is jurors who may be responsible for this reality rather than prosecutors (Williams, Demuth, and Holcomb, 2007). Additional research shows that cases involving white female victims and minority offenders are most likely to result in death sentences (Curry, 2010; Songer and Unah, 2007), although some of these disparities might be explained by other factors (Stauffer et al., 2006).

As for the issue of innocence, there is little doubt that people are wrongly convicted of murder every year and that a handful are even sentenced to death (Liebman, Fagan, and West, 2004; Radelet and Bedau, 2003; Radelet, Bedau, and Putnam, 1994). More than 130 people have been freed from death row during the era of "super due process" that began in 1976 when the US Supreme Court reinstated capital punishment. Wrongful convictions often occur due to honest errors such as mistaken eyewitness testimony and faulty forensic evidence, but when they occur due to issues such as "false confessions, lying informants, government misconduct, and ineffective defense counsel," the justice implications for "justice" become pretty clear (Raderer, 2009, p. 14). Some characterize wrongful capital convictions as "state crimes" based on the hardships faced by the wrongly convicted (Westervelt and Cook, 2010).

There is also little doubt that innocent people have even been executed, although most of the known cases are from prior to the era of super due process in capital sentencing (Harmon and Lofquist, 2005). There remain at least eight widely known cases where men have been recently executed despite serious doubts about their actual guilt (Death Penalty Information Center, 2010c). For example, Cameron Willingham was convicted of murder by arson of his three children in 1992 in the state of Texas and executed in 2004. Subsequently, four experts demonstrated significant flaws with the arson investigation of the case and showed that it is possible the fire was accidental. According to arson expert Gerald Hurst: "There's nothing to suggest to any reasonable arson investigator that this was an arson fire. It was just a fire." And former fire instructor Kendall Ryland stated that: "It made me sick to think this guy was executed based on this investigation. ... They executed this guy and they've just got no idea—at least not scientifically—if he set the fire, or if the fire was even intentionally set." Aside from the flawed fire investigation, the only other significant evidence in the case was a supposed confession to a jailhouse snitch named Johnny Webb; Webb was a drug addict on psychiatric medication.

After learning of the problems with the case, former Juror Dorinda Brokofsky asked, "Did anybody know about this prior to his execution? Now I will have to live with this for the rest of my life. Maybe this man was innocent." Ironically, another Texas death row inmate was exonerated only a year after Willingham was executed, based on nearly identical evidence that would have been used to free Willingham if a judge would have allowed for a review of the evidence prior to his execution (Mills and Possley, 2004).

Another example of a person executed who might be innocent is Gary Graham, who was convicted and sentenced to death (and ultimately executed) based on the eyewitness testimony of one witness; the witness saw him from about 40 feet away and only looked at his face for a few seconds through the windshield of a car. His defense attorney was Ronald Mock, an attorney that "had so many clients sentenced to death that some refer to the 'Mock Wing' of death row. Mock failed to seriously contest the state's case, conduct an independent investigation, and present witnesses at the scene who would have testified that Graham was not the person who committed the crime and that the perpetrator was much shorter than Graham" (Bright, 2004: 160).

As people have become more aware of these realities of American capital punishment, death sentences are getting rarer and rarer, and so too are executions (Baumgartner, De Boef, and Boydston, 2008). Ironically, as capital punishment is practiced less, it is less likely to achieve its assumed goals of retribution, incapacitation, and deterrence, increasing the possibility that it is a failed policy that offers few benefits compared to its enormous costs. Not surprisingly, this has meaningful consequences for justice theory.

Applying Theories of Justice to Capital Punishment Practice

Given these important empirical realities of the death penalty, the next issue to address is which of them are relevant for the "justice" of capital punishment practice. As noted earlier, it depends on which theory of justice is being referred to. Recall that the most important question for libertarians is whether capital punishment respects liberty or

freedom. The most important question for egalitarians is whether capital punishment practice is equal (i.e., applied in an equal fashion). For utilitarians, the most important question is whether capital punishment increases overall utility or happiness in society. Finally, for virtue-based theorists, the question is whether capital punishment respects and promotes our values, our moral goodness, and whether it is the right thing to do.

Liberty/Libertarianism

Supporters of capital punishment argue that executing murderers respects liberty by sending the clearest and strongest of messages about how important (innocent) life is to society; the most serious crime (murder) warrants the most serious consequence (death penalty). While this is logical, opponents point out that executions also end life and therefore greatly diminish liberty.

The fundamental issue of importance here is about the rights of citizens and whether they apply to murderers. These rights include the right to life. As noted in the Declaration of Independence: "We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are *Life*, Liberty and the pursuit of Happiness" (US History, 2010, emphasis added). Clearly, US law grants every citizen the right to life. Then there is the issue of rights of any human being. Article 3 of the Universal Declaration of Human Rights posits: "Everyone has the right to *life*, liberty and security of person" (United Nations, 2010, emphasis added).

The issue over which capital punishment supporters and opponents disagree is whether the right to life espoused in US and international law should be maintained after a person commits a murder; death penalty supporters maintain by taking a life, murderers should sacrifice their own life as a form of retribution; opponents disagree and argue these rights cannot be sacrificed, no matter what behaviors a person commits.

Such philosophical arguments cannot be resolved with empirical evidence. Thus, we must simply examine whether capital punishment, as actually practiced in the United

States, helps achieve liberty or diminishes it. Empirically, it is easy to see that capital punishment is so rarely carried out in literally every death penalty jurisdiction (including those counties and states that still practice it), that capital punishment does not help achieve or assure liberty in society. Stated simply, if an execution were necessary to help protect the liberties of potential victims, states fail citizens 98-99% of the time (because only 1-2% of murderers are executed and sentenced to death, respectively). Let's say that one liberty Americans value is freedom from serious criminal victimization. If capital punishment were necessary to incapacitate and thereby permanently deprive murderers of their ability to commit future murders—which would thereby assure the liberty of citizens from serious criminal victimization (i.e., crime prevention)—murderers would have to be convicted, sentenced to death, and executed at a much higher rate than 1-2%.

Finally, it is important to again acknowledge that innocent people are wrongly convicted of murder, sentenced to death, and even (apparently) occasionally executed. It is an affront to liberty when an innocent person loses his life for a crime he did not commit. The libertarian argument of capital punishment is thus that the death penalty is unjust. It is unjust because it does not help protect or assure liberty, and also because it occasionally is used against the innocent.

Free market libertarians have not written about the death penalty. Yet, it is interesting to know that capital punishment is generally more expensive than other severe sanctions including even life in prison (Bohm, 2003; Cook, 2010; Robinson, 2008, 2009b, 2011). As an example, in North Carolina, where the "most comprehensive death penalty study in the country" was conducted, the cost of a death penalty case all the way to execution above adjudication and a 20 year sentence was \$163,000. The extra cost per death penalty sentence was \$216,000, and the total costs per execution were \$2.16 million more than life imprisonment (Cook, Slawson, and Gries, 1993). Another study in found that North Carolina could save \$11 million annually if it did not pursue capital punishment. This figure includes dollars spent on extra defense costs for capital cases in the trial phase, extra

payments to jurors, post-conviction costs, resentencing hearings, and costs of imprisonment, but does not include money spent on the Office of the Appellate Defender and the North Carolina Supreme Court, the extra time spent by prosecutors in capital cases, and the costs to taxpayers for federal appeals (Cook, 2009). And an additional study found North Carolina spends \$20 million per year just on defense costs alone (North Carolina Office of Indigent Services, 2008). It would be interesting to see what free market libertarians might say about capital punishment if they ever took the time to weigh in on it.

One relevant question would be is the capital punishment system a good use of resources given it is so rarely used. Studies now show, for example, that to maintain their capital punishment systems (whether used frequently or not), states have had to make cuts to spending on police, criminal defense, prison guards, highways, indigent care, libraries, higher education, health care, and state employee raises. They have also had to raise taxes (Death Penalty Information Center, 2010a).

Equality/Egalitarianism

Clearly, there are significant racial disparities, class disparities, and gender disparities in capital punishment practice. Scholars nearly universally agree that these problems stem from systemic biases pertaining both to characteristics of defendants as well as victims. Thus, an undeniable conclusion of capital punishment practice is that the death penalty is applied in an unequal fashion. This should not be surprising given that there are also very disturbing extra-legal biases in virtually all of criminal justice practice, including imprisonment (which itself is a very unpleasant experience) (Barak, Leighton, and Flavin, 2006; Feagin, 2001; Reiman, 2003; Robinson, 2009a; Walker, Spohn, and DeLone, 2007; Shelden, 2000).

While it is undeniably true that much, if not all, of criminal justice is biased against certain groups in society—and it is quite possibly true that such biases will be difficult if not impossible to eradicate—it is also true that capital punishment has long been viewed as different than any other sanction, best captured in the phrase, “Death is different” (Acker,

2009; Foster, 2004). According to Abramson (2004), capital punishment is "different in kind" from any other punishment, including even life imprisonment. At least two things make it different. The first is the "finality" of execution, making biased outcomes "irrevocable" and "irreversible." The second is the "severity" or "enormity" of the punishment, making biased outcomes not only uncorrectable but also more perverse.

The United States has a long history of treating some groups of people differently than others in terms of criminal punishments; one horrific example is the extra-legal punishment of lynching blacks for crimes (both real and imagined) mostly against whites (Bright, 2002; Jacobs, Carmichael, and Kent, 2005; Messner, Baller, and Zevenbergen, 2005). Zimring (2003: 66) finds that the "states and the region where lynching was dominant show clear domination of recent executions, while those states with very low historic lynching records are much less likely than average to have either a death penalty or execution late in the twentieth century." Zimring finds that the median number of executions in high lynching states is 24, versus zero in low lynching states. Zimring explains that: "The statistical contrast between these two groups of states shows that they occupy the same extreme positions on the distribution of two distinct varieties of lethal violence in the United States separated by almost a century and the formal participation of government authority in the killing" (p. 96). Capital punishment is now not only connected to this history but has become part of it. Thus, the egalitarian argument of capital punishment is that the death penalty is unjust.

The final issue of inequality pertains to the evidence of geographic disparities associated with capital punishment practice. While each state has the right to pursue its own laws and policies under the concept of federalism, the resulting disparities are claimed to be unjust by some egalitarian justice scholars (e.g., Miller, 2003). Their argument is that, in a nation of laws that values equality, a person should not be treated differently based simply on where he or she lives. The counterargument is that place of residence will inevitably impact risk of capital processing due to different laws as well as the discretion of

prosecutors to pursue whichever cases they see fit, using the threat of any punishment they choose to use (Davis, 2009).

Utility/Utilitarianism

Does the death penalty contribute to the overall happiness of society, to the general welfare of the people? One might think that if capital punishment could achieve desirable goals for society and that if the death penalty was actually used frequently enough to achieve these goals, it might contribute to societal welfare and citizen happiness. Yet, as noted earlier, capital punishment is so rarely carried out in literally every death penalty jurisdiction (including those counties and states that still practice it), that a safe conclusion is that capital punishment does not help achieve or assure happiness or welfare.

This is not to say that the death penalty does not achieve any benefits to society. Clearly, executions do result in some incapacitation of offenders. That is, to whatever degree murderers do not commit murders that they would have committed but cannot because of their execution, this is a benefit to society. The relevant questions here are, to what degree are murderers likely to kill again?; and, is capital punishment necessary to stop such future killings? The answer to the first question is very unlikely, mostly because most people who commit murder do not reoffend. For example, a study of those inmates released as a result of the *Furman* decision found that they "lived a combined total of 1,282 years in the community while committing twelve violent offenses—approximately two violent offenses per year for the released inmates or nine violent offenses per 1,000 releases per year." Further, of the 238 paroled offenders, "only a small percentage (less than 1%) of released murderers were returned to prison for committing a subsequent homicide. For example, of 11,532 murderers released between 1971 and 1975, twenty-six committed new homicides in the first year after release from prison ... after five years on parole, only one murderer committed a second murder while in the larger society ... Seven (1.3%) *Furman*-

commuted prisoners were responsible for seven additional murders" (Marquart and Sorensen, 1997: 171-174).

Yet, a small number of murderers would kill again if not effectively incapacitated. Ironically, it is incapacitation through imprisonment that tends to stop these murderers from killing again. Thus, in answer to the second question, executions may be excessive because effective incapacitation can be achieved through life imprisonment.

Executions may also produce a small general deterrent effect, thereby lowering the murder rate in society, although the vast majority of research on this topic suggests that capital punishment does not deter murder (Bailey, 1998; Berk, 2004; Cochran and Chamlin, 2000; Cochran, Chamlin, and Seth, 1994; Donohue and Wolfers, 2005; Fagan, 2005; Goertzel, 2004; Kovandzic, Vieraitis, and Boots, 2009; Land, Teske, and Zheng, 2009; Peterson and Bailey, 1991; Sorensen et al., 1999; Stack, 1993; Thomson, 1997; Yunker, 2001).

If there is any deterrent effect, it is likely so small that it cannot even be measured (Robinson, 2008). This is, in fact, not even a controversial statement, since the following groups do not think the death penalty deters murder, according to the studies: scholars of capital punishment (Robinson, 2008); Presidents of the American Society of Criminology (ASC), the Academy of Criminal Justice Sciences (ACJS), and the Law and Society Association (LSA) (Radelet and Akers, 1996); ASC fellows, winners of the ASC Sutherland Award, and presidents of ASC between 1997 and 2009 (Radelet and Lacock, 2009); ASC's National Policy Committee (2001); everyday, ordinary citizens (Gallup, 2006) and law enforcement chiefs (Dieter, 1995).

The relevant question here is not really whether capital punishment deters murder but whether it deters murder more than other available, severe sanctions (such as life imprisonment without the possibility of parole). The available evidence suggests that executions produce no further deterrent effect (Robinson, 2008).

Finally, executions undeniably provide some closure to murder victims' families (Lifton and Mitchell, 2000). Yet, it is also true that executions do not provide closure to many victims' families (Peterson, 2008), in part because of the delay between conviction, sentencing, and ultimate execution (average time span of 11 years). Vandiver (2003: 621) explains:

The end of the trial and sentencing may mark an end to the involvement of the victim's family with the legal system. If the defendant is sentenced to life without parole or to a very long term of imprisonment, the sentence will begin immediately, and there should be no reason for the family to have to deal with the defendant again. If the defendant is sentenced to a short term of years, or will be eligible for parole after a short time, or above all, if he is sentenced to death, then the victims' family is likely to face a prolonged engagement with the criminal justice system. ... If the sentence is death, the family's involvement will continue beyond the trial for three or four years at a minimum, and may go on for as many as 20 or more years (p. 621).

It is also true that some families do not seek or want the death penalty for killers of their loved ones and that family members of the condemned also suffer immensely, typically without the support of greater society (King, 2003, 2005; Vandiver, 1989).

And once again, the relevant question is whether capital punishment leads to a greater sense of closure than that offered by other available, severe sanctions (such as life imprisonment without the possibility of parole). Unfortunately, there is no definitive answer to this question; yet, executions are so rare that if closure requires an execution, we as a society fail to provide it to murder victims' families about 98-99% of the time.

To determine the relative utility of capital punishment, one must of course assess these modest benefits against the costs of capital punishment. Assessing the contribution of capital punishment to the overall welfare of society is problematic for at least a few reasons. First, although one can readily identify the costs and benefits of policies like the death

penalty, quantifying some of them is quite difficult. How, for example, does one measure the worth of the closure that some victims' families may receive when the person who murdered their loved ones is executed? Second, weighing such benefits against costs associated with the practice of capital punishment such as biases based on extra-legal factors like race, class, and gender—not to mention easily quantifiable costs such as additional financial expense of capital punishment above and beyond other criminal sanctions such as life imprisonment—is difficult if not impossible.

Third, as should be obvious by the term "weighing," any weighing of costs and benefits involves much more than just counting them up and seeing whether there are more costs or more benefits; the weighing part requires that each benefit and each cost be prioritized more or less based on each person's own values. For example, one person may think the little bit of closure provided to victims' families by capital punishment and the possibly small crime reduction effect (through a tiny incapacitative effect and a possible general deterrent effect of executions) is worth more than extra-legal biases in the application of the punishment; this person would thus weigh the benefits more than the costs. Another person may find the risk of executing an innocent person, however small, to be such a serious costs that it outweighs any conceivable benefit of capital punishment.

Such individualized opinions and preferences are affected by many factors, including race, gender, age, income level, political party and ideology, geography of residence, and religious beliefs (Young, 2002). Support for the death penalty is also partially determined by fear crime, views of how courts treat suspects, and racial animosity (Cochran and Chamlin, 2006; Young, 2004).

In spite of all this, it is a safe conclusion is that capital punishment, as actually practiced in the United States, has only modest benefits but enormous costs. Thus, the utilitarian argument of capital punishment is that the death penalty is unjust.

Conclusion

In this paper, I laid out the main theories of justice related to freedom, welfare, and virtue. I then outlined important realities of capital punishment in the United States. Finally, I showed how American capital punishment is mostly inconsistent with these theories of justice. When evaluating the death penalty against these theories of justice, we see that the death penalty fails to provide justice. This is because it does not respect liberty, it is not equally applied, and it imposes more costs than benefits and thus fails to increase overall utility or happiness in society.

With regard to virtue-based theorists, recall that the most important question is whether capital punishment respects and promotes our values, our moral goodness, and whether it is the right thing to do. These are questions that are difficult to answer given the wide variety of values, morality, and sense of “right” among citizens. Yet, given that the death penalty fails to comport with libertarianism, egalitarianism, and utilitarianism, it would be hard to argue that capital punishment satisfies any virtue-based theory. That is, it would be hard to convincingly argue that capital punishment is valuable or moral or right when it fails to respect liberty, when it so unequally applied, and when it imposes more costs than benefits and thus fails to increase overall utility or happiness in society.

Given that citizens actually hold values consistent with the theories of justice laid out in this paper—especially libertarianism and egalitarianism—it logically follows that they would not agree to capital punishment practice if they were aware of its realities. This is consistent with the hypothesis of US Supreme Court Justice Thurgood Marshall, who suggested that support for capital punishment among citizens would decline if Americans were aware of the facts of its application (Kennedy-Kollaw and Mandery, 2010). Marshall wrote, “the question with which we must deal is not whether a substantial proportion of American citizens would today, if polled, opine that capital punishment is barbarously cruel, but whether they would find it so in the light of all information presently available.” Marshall

put forth his view of the reality of capital punishment and suggested that people would not support it if they knew this reality. He concluded by writing:

I believe the following facts would serve to convince even the most hesitant of citizens to condemn death as a sanction: capital punishment is imposed discriminatorily against certain identifiable classes of people; there is evidence that innocent people have been executed before their innocence can be proved; and the death penalty wreaks havoc with our entire criminal justice system (pp. 263-264).

There are actually three related Marshall hypotheses including: 1) support for capital punishment is inversely related to knowledge about it; 2) exposure to information about capital punishment generally leads to increased opposition to it; and 3) exposure to information about capital punishment does not reduce support among those who based their support mostly on matters of retribution. More than twenty published studies now find consistent but qualified support for these hypotheses (Cochran, Sanders, and Chamlin, 2006).

Research has clearly demonstrated significant problems with capital punishment practice in the United States, problems including but not limited to innocence and biases based on extra-legal factors such as race, class, and gender. While Americans may become less supportive of capital punishment as these facts are demonstrated through media accounts of the research, a significant part of the argument ought to relate to justice; specifically the theories of justice addressed in this paper.

Finally, to the degree that support for capital punishment persists for reasons related to retribution, citizens could be made aware of the utilitarian argument that shows that the death penalty is simply too rarely practiced to achieve any meaningful level of retribution in society whereas alternatives such as life imprisonment are also available and much more effective.

References

- Abramson, A. (2004). Death-is-different jurisprudence and the role of the capital jury.
Retrieved from:
http://moritzlaw.osu.edu/osjcl/Articles/Volume2_1/Symposium/Abramson.pdf
- Acker, J. (2009). Actual innocence: Is death different? *Behavioral Sciences & the Law* 27(3),
297.
- American Society of Criminology, National Policy Committee (2001). The use of the death
penalty. Retrieved from: <http://www.asc41.com/policypaper2.html>
- Aristotle (1280). *The Politics*. Edited and translated by E. Baker. New York: Oxford
University Press, 1946.
- Arrigo, B. (1998). *Social Justice, Criminal Justice*. Beverly Hills, CA: Wadsworth.
- Bailey, W. (1998). Deterrence, brutalization, and the death penalty: Another examination of
Oklahoma's return to capital punishment. *Criminology* 36(4), 711.
- Bailey, W., & Peterson, R. (1997). Murder, capital punishment, and deterrence: A review of
the literature. In H. Bedau (Ed.), *The Death Penalty in America: Current
Controversies* (pp. 139-161). New York: Oxford.
- Barak, G., Leighton, P. & Flavin, J. (2006). *Class, Race, Gender, and Crime: The Social
Realities of Justice in America* (2nd Ed.). Lanham, MD: Rowman and Littlefield.
- Baumgartner, F., De Boef, S., & Boydston, A. (2008). *The Decline of the Death Penalty and
the Discovery of Innocence*. New York: Cambridge University Press.
- Baumgartner, F., & Unah, I. (2010). The decline of capital punishment in North Carolina.
Paper presented to the annual meeting of the American Society of Criminology. San
Francisco, CA. November.
- Bedau, H. (2004). An abolitionist's survey of the death penalty in America today. In Bedau,

- H., & P. Cassell (Eds.), *Debating the Death Penalty: Should America Have Capital Punishment? The Experts From Both Sides Make Their Case* (pp. 15-50). New York: Oxford University Press
- Bentele, U., & Bowers, W. (2002). How jurors decide on death: Guilt is overwhelming; aggravation requires death; and mitigation is no Excuse. *Brooklyn Law Review* 66, 1013.
- Bentham, J. (1789). *An Introduction to the Principles of Morals and Legislation*. Oxford: Clarendon Press.
- Berk, R. (2004). New claims about execution and general deterrence: Deja vu all over again? *Journal of Empirical Legal Studies*. Retrieved from: <http://preprints.stat.ucla.edu/396/JELS.pap.pdf>.
- Berk, R., Li, A., & Hickman, L. (2005). Statistical difficulties in determining the role of race in capital cases: A re-analysis of data from the state of Maryland. *Journal of Quantitative Criminology* 21(4), 365.
- Berry, B. (2005). *Why Social Justice Matters*. Cambridge, England: Polity Press.
- Blume, J. Eisenberg, T., & Garvey, S. (2003). Lessons from the Capital Jury Project. In S. Garvey (Ed.), *Beyond Repair? America's Death Penalty* (pp. 144-177). Durham: Duke University Press.
- Blume, J., Garvey, S., & Johnson, S. (2001). Future dangerousness in capital cases: Always 'at issue.' *Cornell Law Review* 86, 397.
- Bohm, B. (2003). *DeathQuestII: An Introduction to the Theory and practice of Capital Punishment in the United States*. Cincinnati, OH: Anderson
- Bowers, W. (1996). The capital jury: Is it tilted toward death? *Judicature* 79, 220
- Bowers, W. (1995). The Capital Jury Project: Rationale, design, and a preview of early findings. *Indiana Law Journal* 70, 1043.
- Bowers, W., Sandys, M., & Brewer, T. (2004). Crossing racial boundaries: A closer look at

- the roots of racial bias in capital sentencing when the defendant is black and the victim is white. *DePaul Law Review* 53, 1497.
- Bowers, W., Sandys, M., & Steiner, B. (1998). Foreclosed impartiality capital sentencing: Jurors' predispositions, guilt trial experience, and premature decision making. *Cornell Law Review* 83, 1474.
- Bowers, W., & Steiner, B. (1999). Death by default: An empirical demonstration of false and forced choices in capital sentencing. *Texas Law Review* 77: 605.
- Bowers, W., Steiner, B., & Sandys, M. (2001). Death sentencing in black and white: An empirical analysis of the role of jurors' race and jury racial composition. *University of Pennsylvania Journal of Constitutional Law* 3, 171.
- Bowers, W., Steiner, B., & Antonio, M. (2003). The capital sentencing decision: Guided discretion, reasoned moral judgment, or legal fiction. In J. Acker, R. Bohm, & C. Lanier, (Eds.), *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Second Edition) (pp. 413-468). Durham, NC: Carolina Academic Press.
- Brewer, T. (2004). Race and jurors' receptivity to mitigation in capital cases: The effect of jurors', defendants', and victims' race in combination. *Law and Human Behavior* 28(5), 529.
- Brighthouse, H. (2005). *Justice*. Cambridge, England: Polity Press.
- Bright, S. (2004). Why the United States will join the rest of the world in abandoning capital punishment. In Bedau, H., & P. Cassell (Eds.), *Debating the Death Penalty: Should America Have Capital Punishment? The Experts From Both Sides Make Their Case* (pp. 152-182). New York: Oxford University Press.
- Bright, S. (1997). Counsel for the poor: The death sentence not for the worst crime but for the worst lawyer. In Bedau, H. (Ed.), *The Death Penalty in America: Current Controversies* (pp. 275-318). New York: Oxford University Press.

- Burns, M. (2010). Study: Race plays role in North Carolina death penalty. WRAL.com. July 22, 2010. Retrieved from: <http://www.wral.com/news/local/story/8017956/>
- Cassell, P. (2004). In defense of the death penalty, In Bedau, H., and P. Cassell (Eds.), *Debating the Death Penalty: Should America Have Capital Punishment? The Experts From Both Sides Make Their Case* (pp. 183-217). New York: Oxford University Press
- Chesney-Lind, M. & Pasko, L. (2004). *The Female Offender: Girls, Women, and Crime*. Thousand Oaks, CA: Sage.
- Cochran, J., & Chamlin, M. (2006). The enduring racial divide in death penalty support. *Journal of Criminal Justice* 34(1), 85-99.
- Cochran, J., & Chamlin, M. (2000). Deterrence and brutalization: The dual effects of executions. *Justice Quarterly* 17(4), 685.
- Cochran, J., Chamlin, M., & Seth, M. (1994). Deterrence or brutalization? An impact assessment of Oklahoma's return to capital punishment. *Criminology* 32(1), 107.
- Cochran, J., Sanders, B., & Chamlin, M. (2006). Profiles in change: An alternative look at the Marshall hypotheses. *Journal of Criminal Justice Education*, 17(2), 205-28.
- Curry, T. (2010). The conditional effects of victim and offender ethnicity and victim gender on sentences for non-capital cases. *Punishment & Society* 12(4), 438.
- Cook, P. (2010). Potential savings from abolition of the death penalty in North Carolina. Paper presented to the annual meeting of the American Society of Criminology. San Francisco, CA. November.
- Cook, P. (2003). Potential savings from abolition of the death penalty in North Carolina. *American Law and Economics Review*, advance access. Retrieved from: <http://www.deathpenaltyinfo.org/documents/CookCostRpt.pdf>
- Cook, P., Slawson, D., & Gries, L. (1993). The costs of prosecuting murder cases in North Carolina. Terry Sanford Institute of Public Policy Duke University, May. Retrieved from: <http://www.deathpenaltyinfo.org/northcarolina.pdf>
- Crew, B. (1991). Sex differences in patriarchy: Chivalry or patriarchy? *Justice Quarterly*

8(1), 59-83.

Davis, A. (2009). *Arbitrary Justice: The Power of the American Prosecutor*. New York: Oxford University Press.

Death Penalty Information Center (2010a). Cost of the death penalty. Retrieved from: <http://www.deathpenaltyinfo.org/costs-death-penalty>

Death Penalty Information Center (2010b). Death row. Retrieved from: <http://www.deathpenaltyinfo.org/death-row>

Death Penalty Information Center (2010c). Executed but possibly innocent. Retrieved from: <http://www.deathpenaltyinfo.org/executed-possibly-innocent>

Death Penalty Information Center (2010d). Executions by race of victims. Retrieved from: <http://www.deathpenaltyinfo.org/race-death-row-inmates-executed-1976#Vic>

Dieter, R. (1995). On the front line: Law enforcement views on the death penalty. Retrieved from: <http://www.deathpenaltyinfo.org/front-line-law-enforcement-views-death-penalty>.

Donohue, J., & Wolfers, J. (2005). Uses and abuses of empirical evidence in the death penalty debate. *Stanford Law Review* 58, 791-846.

Dow, D. (2002). How the death penalty really works. In Dow, D., & M. Dow (Eds.), *Machinery of Death: The Reality of America's Death Penalty Regime* (pp. 11-36). New York: Routledge.

Eisenberg, T., Garvey, S., & Wells, M. (2001). Forecasting life and death: Juror race, religion, and attitude toward the death penalty. *Journal of Legal Studies* 30, 277.

Eisenberg, T., Garvey, S., & Wells, M. (1996). Jury responsibility in capital sentencing: An empirical study. *Buffalo Law Review* 44, 339.

Eisenberg, T., & Wells, M. (1993). Deadly confusion: Juror instructions in capital cases. *Cornell Law Review* 79, 1.

Fagan, J., Public Policy Choices on Deterrence and the Death Penalty: A Critical Review of

- New Evidence, testimony before the Joint Committee on the Judiciary of the Massachusetts Legislature on House Bill 3934, July 14, 2005. Retrieved from:
<http://www.deathpenaltyinfo.org/MassTestimonyFagan.pdf>
- Feagin, J. (2001). *Racist America*. New York: Routledge
- Foster, B. (1999). Why death is different: Capital punishment in the legal system. Retrieved from: <http://www.burkfoster.com/DeathIsDifferent.htm>
- Gallup (2006). Respondents reporting whether they believe the death penalty acts as a deterrent to murder. Retrieved from:
<http://www.albany.edu/sourcebook/pdf/t2572006.pdf>
- Grann, D. (2009). Trial by fire: Did Texas execute and innocent man? *The New Yorker*, September 7, 2009. Retrieved from:
http://www.newyorker.com/reporting/2009/09/07/090907fa_fact_grann
- Goertzel, T. (2004). Capital punishment and homicide: Sociological realities and econometric illusions. *Skeptical Enquirer Magazine*. Retrieved from:
<http://www.deathpenaltyinfo.org/article.php?scid=12&did=1176>
- Gonzalez-Perez, M. (2002). The potential for bias in capital juries. *Justice System Journal* 23(2), 235.
- Foglia, W. (2003). They know not what they do: Unguided and misguided decision-making in Pennsylvania capital cases. *Justice Quarterly* 20(1), 187-211.
- Foglia, W., & Schenker, N. (2001). Arbitrary and capricious after all these years: Constitutional problems with capital jurors' decision making. *The Champion* 25(6), 26-31.
- Garvey, S. (1998). Aggravation and mitigation in capital cases: What do jurors think? *Columbia Law Review* 98, 1538-76.
- Garvey, S., Johnson, S., & Marcus, P. (2000). Correcting deadly confusion: Responding to jury inquiries in capital cases. *Cornell Law Review* 85, 627.
- Grosso, C., O'Brien, B., & Baldus, D. (2010). The North Carolina Racial Justice Act study.

Paper presented to the annual meeting of the American Society of Criminology. San Francisco, CA. November.

- Harmon, T., & Lofquist, W. (2005). Too late for luck: A comparison of post-Furman exonerations and executions of the innocent. *Crime and Delinquency* 51(4), 498.
- Holcomb, J., Williams, M., & Demuth, S. (2004). White female victims and death penalty disparity research. *Justice Quarterly* 21(4), 877.
- Hoffman, J. (1997). How American juries decide death penalty cases: The Capital Jury Project. In H. Bedau (Ed.), *The Death Penalty in America: Current Controversies* (pp. 333-343). New York: Oxford University Press.
- Hoffman, J. (1995). Where's the buck? Juror misperception of sentencing responsibility in death penalty cases. *Indiana Law Journal* 70, 1137.
- Jacobs, D., Carmichael, J., & Kent, S. (2005). Vigilantism, current racial threat, and death sentences. *American Sociological Review* 70, 656.
- Keil, T., & Vito, G. (2006). Capriciousness or fairness? Race and prosecutorial decisions to seek the death penalty in Kentucky. *Journal of Ethnicity in Criminal Justice* 4(3), 27.
- Kennedy-Kollar, D., & Mandery, E. (2010). Testing the Marshall hypothesis and its antithesis: The effect of biased information on death-penalty opinion. *Criminal Justice Studies*, 23 (1), 65-83.
- King, R. (2005). *Capital Consequences: Families Of The Condemned Tell Their Stories*. Rutgers, NJ: Rutgers University Press.
- King, R. (2003). *Don't Kill in Our Names: Families of Murder Victims Speak Out Against the Death Penalty*. Rutgers, NJ: Rutgers University Press.
- Kotch, S. (2010). A history of race and the death penalty in North Carolina. Paper presented to the annual meeting of the American Society of Criminology. San Francisco, CA. November.
- Kovandzic, T., Vieraitis, L., & Boots, D. (2009). Does the death penalty save lives? New evidence from state panel data, 1977 to 2006. *Criminology & Public Policy* 8(4), 803.

- Land, K., Teske, J., & Zheng, H. (2009). The short-term effects of executions on homicides: Deterrence, displacement, or both? *Criminology* 47(4), 1009.
- Lempert, R. (1983). The effect of executions on homicides: A new look in an old light. *Crime and Delinquency* 29, 88-115.
- Liebman, J., Fagan, J., & West, V. (2000). *A Broken System: Error Rates in Capital Cases, 1973--1995*. Retrieved from:
<http://www2.law.columbia.edu/instructionalservices/liebman/>.
- Lifton, R., & Mitchell, G. (2000). *Who Owns Death? Capital Punishment, the American Conscience, and the End of Executions*. New York: William Morrow.
- Luginbuhl, J., & J. Howe (1995). Discretion in capital sentencing instructions: Guided or misguided? *Indiana Law Journal* 70, 1161.
- Lynch, M., & Haney, C. (2000). Discrimination and instructional comprehension: Guided discretion, racial bias, and the death penalty. *Law and Human Behavior* 24(3), 337.
- Marquart, J., & Sorensen, J. (1997). A national study of the *Furman*-commuted inmates: Assessing the threat to society from capital offenders. In Bedau, H. (Ed.), *The Death Penalty in America: Current Controversies* (pp. 162-175). New York: Oxford University Press.
- Martin, K. (2010). *A Liberal Mandate: Reflections on our Founding Vision and Rants on How We Have Failed to Achieve It*. New York: Weit Press.
- McAllister, P. (2003). *Death Defying: Dismantling the Execution Machinery in 21st Century U.S.A.* New York: The Continuum International Publishing Group.
- Mello, M., & Perkins, P. (2003). Closing the circle: The illusion of lawyers for people litigating for their lives at the *fin de siecle*. In Acker, J., Bohm, B., & C. Lanier, (Eds.), *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Second Edition) (pp. 347-384). Durham, NC: Carolina Academic Press.
- Messner, S., Baller, R., & Zevenbergen, M. (2005). The legacy of lynching and Southern

- homicide. *American Sociological Review* 70: 633.
- Mill, J. (1869). *On Liberty*. London: Longman, Roberts & Green.
- Miller, D. (2003). *Principles of Social Justice*. Boston, MA: Harvard University Press.
- North Carolina General Assembly (2009). Senate bill 461. North Carolina Racial Justice Act. Retrieved from: <http://www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S461v6.pdf>
- North Carolina Office of Indigent Services. (2008). FY07 Capital Trial Case Study. PAC and Expert Spending in Potentially Capital Cases at the Trial Level. Retrieved from: <http://www.ncids.org/Reports%20&%20Data/Latest%20Releases/FY07CapitalStudyFinal.pdf>
- Orth, J. (2007). *Due Process of Law: A Brief History*. Lawrence, KS: University of Kansas Press.
- Otto, C., Applegate, B., & Davis, R. (2007). Improving comprehension of capital sentencing instructions: Debunking juror misconceptions. *Crime and Delinquency* 53(3), 502.
- Paternoster, R., & Brame, R. (2008). Reassessing race disparities in Maryland capital cases. *Criminology* 46(4), 971.
- Paternoster, R., & Brame, R. (2003). An Empirical Analysis of Maryland's Death Sentencing System with Respect to the Influence of Race and Legal Jurisdiction. Retrieved from: <http://www.newsdesk.umd.edu/pdf/finalrep.pdf>
- Peterson, R., & Bailey, W. (1998). Is capital punishment an effective deterrent for murder? An examination of social science research. In Acker, J., Bohm, B., & C, Lanier (Eds.), *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (pp. 251-282). Durham, NC: Carolina Academic Press.
- Peterson, R. & Bailey, W. (1991). Felony murder and capital punishment: An examination of the deterrence question. *Criminology* 29(3), 367.
- Peterson, W. (2008). Voices of the victims: Capital punishment and a declaration of life. *The Review of Litigation* 27(4), 769.

- Petrie, M., & Coverdill, J. (2010). Who lives and dies on death row? Race, ethnicity, and post-sentence outcomes in Texas. *Social Problems* 57(4), 630.
- Phillips, S., Potter, L., & Coverdill, J. (2010). Gender, media, and death in the capital of capital punishment. Paper presented to the annual meeting of the American Society of Criminology. San Francisco, CA. November.
- Pierce, G., & Radelet, M. (2005). The impact of legally inappropriate factors on death sentencing for California homicides, 1990-1999. *Santa Clara Law Review* 46.
- Pojman, L. (2004). Why the death penalty is morally permissible. In Bedau, H., & P. Cassell (Eds.), *Debating the Death Penalty: Should America Have Capital Punishment? The Experts From Both Sides Make Their Case* (pp. 51-75). New York: Oxford University Press
- Pritchard, A., & Wiatrowski, M. (2008). Race and capital punishment: State level analysis of the effects of race on states' capital punishment policies. *Journal of Ethnicity in Criminal Justice* 6(2), 103.
- Radelet, M. (1989). Executions of whites for crimes against blacks: Exceptions to the rule? *Sociological Quarterly* 30(4), 529-544.
- Radelet, M., & Akers, R. (1996). Deterrence and the death penalty: The views of the experts. *Journal of Criminal Law & Criminology* 81(1), 1-16.
- Radelet, M., & Bedau, H. (2003). The execution of the innocent. In Acker, J., Bohm, B., & C. Lanier (Eds.), *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Second Edition). Durham, NC: Carolina Academic Press.
- Radelet, M., Bedau, H., & Putnam, C. (1994). *In Spite of Innocence: Erroneous Convictions in Capital Cases*. Boston, MA: Northeastern University Press.
- Radelet, M., & Lacoock, T. (2009). Do executions lower homicide rates? The views of leading Criminologists. *Journal of Criminal Law & Criminology* 99(2), 489.
- Raderer, M. (2009). Postconviction claims of innocence. *Criminal Justice* 24(3), 14.

- Rawls, J. (2003). *Justice as Fairness: A Restatement* 2nd Ed. Boston, MA: Belknap Press.
- Reiman, J. (2003). *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice* (8th Ed.). Boston, MA: Allyn & Bacon.
- Reiman, J. (1998). *The Death Penalty: For and Against*. New York: Rowman & Littlefield.
- Reza, M. (2005). Gender bias in North Carolina's death penalty. *Duke Journal of Gender Law Policy*, 12, 179.
- Robinson, M. (2011). The Death Penalty in North Carolina: A Summary of the Data and Scientific Studies. Retrieved from:
<http://www.pscj.appstate.edu/ncdeathpenalty/ncdeathpenaltyfinal.pdf>
- Robinson, M. (2010). Assessing criminal justice practice using social justice theory. *Social Justice Research* 23, 77-97.
- Robinson, M. (2009a). *Justice Blind? Ideals and Realities of American Criminal Justice* (3rd Ed.). Upper Saddle River, NJ: Prentice Hall.
- Robinson, M. (2009b). The real death penalty: Capital punishment according to the experts. *Criminal Law Bulletin* 45(2), 262.
- Robinson, M. (2008). *Death Nation: The Experts Explain American Capital Punishment*. Upper Saddle River, NJ: Prentice Hall.
- Robinson, M. & Murphy, D. (2008). *Greed is Good: Maximization and Elite Deviance in America*. Lanham, MD: Rowman and Littlefield.
- Rodriguez, S., Curry, T., & Lee, G. (2006). Gender differences in criminal sentencing: Do effects vary across violent, property, and drug offenses? *Social Science Quarterly* 87(2), 318-339.
- Sandel, M. (2009). *Justice. What's the Right Thing To Do?* New York: Farrar, Straus, and Giroux.
- Sandys, M. (1998). Stacking the deck for guilt and death: The failure of death qualification to ensure impartiality. In J. Acker, R. Bohm, & C. Lanier (Eds.), *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of*

- the Ultimate Penal Sanction* (Second Edition) (pp. 385-312). Durham, NC: Carolina Academic Press.
- Sarat, A. (1995). Violence, representation, and responsibility in capital trials: The view from the jury. *Indiana Law Journal* 70, 1103.
- Scheb, J., Lyons, W., & Wagers, K. (2008). Race, prosecutors, and juries: The death penalty in Tennessee. *Justice System Journal* 29(3), p. 338.
- Shelden, R. (2000). *Controlling the Dangerous Classes: A Critical Introduction to the History of Criminal Justice*. Boston, MA: Allyn & Bacon.
- Smith, R. (2010a). Arbitrary as ever: Only 10% of counties in the country have imposed a death sentence in the last 6 years. Retrieved from:
<http://www.secondclassjustice.com/?p=116>
- Smith, R. (2010b). Arbitrary as ever (part II): 85% of counties have not sentenced to death a single person who has been executed since 1976. Retrieved from:
<http://www.secondclassjustice.com/?p=163>
- Songer, M., & Unah, I. (2007). The effect of race, gender, and location on prosecutorial decisions to seek the death penalty in South Carolina. *South Carolina Law Review* 58, 161-210.
- Sorensen, J., Wrinkle, R., Brewer, V., & Marquart, J. (1999). Capital punishment and deterrence: Examining the effect of executions on murder in Texas. *Crime and Delinquency* 45(4), 481-493.
- Stack, S. (1993). Execution publicity and homicide in Georgia. *American Journal of Criminal Justice* 18(1), 25-39.
- Stauffer, A., Smith, M., Cochran, J., Fogel, S., & Bjerregaard, B. (2006). The interaction between victim race and gender on sentencing outcomes in capital murder trials: A further exploration. *Homicide Studies* 10(2), 98.
- Steiker, C., & Steiker, J. (2010). The American death penalty and the invisibility of face.

Paper presented to the annual meeting of the American Society of Criminology. San Francisco, CA. November.

Steiner, B., Bowers, W., & Sarat, A. (1999). Folk knowledge as legal action: Death penalty judgments and the tenet of early release in a culture of mistrust and punitiveness. *Law and Society Review* 33, 461.

Streib, V. (2004). Death penalty for female offenders, January 1973 through December 31, 2005. Retrieved from: <http://www.deathpenaltyinfo.org/FemDeathDec2005.pdf>

Thomson, E. (1997). Deterrence versus brutalization: The case of Arizona. *Homicide Studies* 1(2), 110-128.

Unah, I. (2010). Choosing those who will die: The effect of race, gender, and law in prosecutorial decision to seek the death penalty in Durham County, North Carolina. *Michigan Journal of Race & Law* 15(1), 135.

Unah, I., & Boger, J. (2001). Race and the death penalty in North Carolina: An empirical analysis: 1993-1997. Retrieved from:
<http://www.deathpenaltyinfo.org/article.php?scid=19&did=246>

United Nations (2010). Universal Declaration of Human Rights. Retrieved from:
<http://www.un.org/en/documents/udhr/index.shtml>

Urbina, M. (2003). Race and ethnic differences in punishment and death sentence outcomes: Empirical analysis of data on California, Florida and Texas, 1975-1995. *Journal of Ethnicity in Criminal Justice* 1(1), 5.

US History (2010). Declaration of Independence. Retrieved from:
<http://www.ushistory.org/declaration/document/>

van den Haag, E. (1997). The death penalty once more. In Bedau, H. (Ed.), *The Death Penalty in America: Current Controversies* (pp. 445-456). New York: Oxford University Press.

Vandiver, M. (2003). The impact of the death penalty on the families of homicide victims

- and of condemned prisoners. In Acker, J., Bohm, B., & C. Lanier (Eds.), *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Second Edition) (pp. 613-646). Durham, NH: Carolina Academic Press.
- Vandiver, M. (1989). Coping with death: Families of the terminally ill, homicide victims, and condemned prisoners. In M. Radelet (Ed.), *Facing the Death Penalty: Essays on Cruel and Unusual Punishment* (pp. 123-138). Philadelphia, PA: Temple University Press.
- Walker, S., Spohn, C. & DeLone, M. (2007). *The Color of Justice: Race, Ethnicity, and Crime in America* (5th Ed.). Belmont, CA: Wadsworth.
- West, V., Gentry, K., Hiropoulos, A., & Pepper, K. (2010). Spatial concentration and dependence in capital sentencing. Paper presented to the annual meeting of the American Society of Criminology. San Francisco, CA. November.
- Westervelt, S., & Cook, K. (2010). Framing innocents: The wrongly convicted as victims of state harm. *Crime, Law and Social Change* 53(3), 259.
- Williams, M., Demuth, S., & Holcomb, J. (2007). Understanding the influence of victim gender in death penalty cases: The importance of victim race, sex-related victimization, and jury decision making. *Criminology* 45(4), 865.
- Young, R. (2004). Guilty until proven innocent: conviction orientation, racial attitudes, and support for capital punishment. *Deviant Behavior* 25(2): 151-167.
- Young, R. (2002). Religious orientation, race and support for the death penalty. In Martinez, J., Richardson, W., & D. Hornsby (Eds.). *The Leviathan's Choice: Capital Punishment in the Twenty-First Century* (pp. 69-80). Lanham, MD: Rowman & Littlefield.
- Yunker, J. (2001). A new statistical analysis of capital punishment incorporating U.S. postmoratorium data. *Social Science Quarterly* 82(2), 297-311.
- Zimring, F. (2003). *The Contradictions of American Capital Punishment*. New York: Oxford University Press.