The Future of America's Death Penalty

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An Agenda for the Next Generation of Capital Punishment Research

Edited by

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To the late Kermit L. Hall—historian, constitutional scholar, and former President of the University at Albany, whose encouragement and support remain a continuing inspiration for our Capital Punishment Research Initiative.

And …

To Adriana, Trevor, and Logan Henry, who joined us just two short years ago. And, to Gail, who left us just yesterday.

—CSL

To Deborah, Nina, Anna, Paul, Michael, and Steven, all beloved veterans of my capital punishment research.

—WJB

To Jenny, Elizabeth, and Anna: that we may raise a glass and drink l'chaim.

—JRA

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Foreword

Ronald J. Tabak

There is a continuing need for concerted research bearing on capital punishment. Such research can be important to courts and legislative bodies in considering challenges to aspects of how the death penalty is implemented and proposed judicial or legislative remedies therefor. It can also be invaluable to those considering public policy issues relating to capital punishment, including whether to reform it in particular ways, to declare a moratorium on executions while the issues are studied comprehensively, or to abolish it completely. And for those elected or would-be elected officials who might be contemplating the political ramifications of voting one way or another on reform, moratorium, or abolition measures, careful research can shed light on whether political "conventional wisdom" remains (if it ever was) valid. Finally, sophisticated research into jury decision making can help inform the judgments of counsel who actually litigate capital cases.

Impact on Court Decisions and Possible Legislative Reforms

Research has played a significant role in past court decisions concerning capital punishment. For example, in holding the death penalty unconstitutional if applied to people with mental retardation, the Supreme Court cited various research studies that show that people with mental retardation "have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others," and "often act on impulse rather than pursuant to a premeditated plan, and … in group settings … are followers rather than leaders" (*Atkins v. Virginia* 2002:318 & nn. 23–24). Similarly, the Supreme Court relied on several re-

search studies in concluding that juveniles under age 18 have "general differences" from older offenders such that they cannot be said to have the requisite moral culpability to make them constitutionally eligible for execution (*Roper v. Simmons* 2005:569–70, 573).

Future research could affect court decisions or legislative determinations about the manner in which the death penalty is implemented. These could involve a variety of subjects.

Mental Retardation

One example is mental retardation. Despite *Atkins*, it is extremely likely that some people with mental retardation will continue to be sentenced to death, and executed. To some extent, this may occur due to misconceptions by jurors and judges about mental retardation—which may cause them to be unwilling to find someone retarded who, according to the leading definitions, is indeed retarded (*see* Blume, Johnson, and Seeds, this volume).

Among the misconceptions that many people have are that if someone is mentally retarded, he or she cannot possibly do certain things, such as hold a job, get married, and read. It would be useful to have studies done of actual jurors who have sat on cases in which evidence of mental retardation was presented, as well as of citizens who would be eligible for service in a capital case, to see to what extent these beliefs exist and whether such people would be willing either to reconsider these misconceptions if presented with expert testimony about the nature of mental retardation or to follow court instructions that explain the consensus view among experts in the field.

Another area in which research could be useful concerns the ability to assess retrospectively what in the field is called "adaptive behavior." All leading definitions of mental retardation require not only a showing of low mental intelligence (as typically measured by I.Q. testing) but also some inabilities prior to adulthood to engage in normal behavior. When dealing with anyone who could be executed—which after *Roper* means dealing with an adult—one cannot use the usual assessment protocols to assess adaptive behavior, because those tools presume that one is making a contemporaneous assessment regarding the person's present capabilities. But in capital cases, the adaptive behavior shortcomings at issue are those that may have existed prior to age 18. Thus, a retrospective assessment must be undertaken unless—as is almost never the case—an assessment using the usual protocols was done during childhood.

Accordingly, research is needed into how best to make such an assessment after the fact, sometimes well over a decade after the most significant years of

development. Moreover, the research should examine whether such a retrospective assessment—relying both on documents from childhood plus people's recollections about the person's childhood—may legitimately be used as a basis for determining whether a person has mental retardation. Some such work has already been undertaken. But there is a significant need for more well-researched studies on retrospective assessments.

Mental Illness

The American Bar Association, the American Psychological Association, the American Psychiatric Association, and others have adopted in recent years proposed limitations on the extent to which people with severe mental illness can be sentenced to death or executed. To the extent that legislative bodies or courts consider adopting these proposals, research could shed light on some significant factors.

For example, to put this subject in context, it could be useful to analyze situations in which a child's severe mental illness was identified, treatment was sought but was not provided, and the child then grew up and committed one or more capital crimes. Such situations have frequently been documented in death row inmates' post-conviction and habeas corpus filings, as well as clemency petitions—but often not in evidence presented to the jury.

With respect to people who volunteer to be executed (which Johnson *et al.,* this volume, estimate to account for about one in ten executions), it would be useful to research the extent to which death row conditions may lead to inmates' exhibiting aggravated mental illness that may cause them to volunteer to be killed.

Jury Instructions

Past studies by William Bowers and his colleagues, as well as by others, have repeatedly shown that some of the most commonly used jury instructions are not properly understood by jurors, and that this has a disproportionately adverse effect on capital defendants (*see* Bowers, Brewer, and Lanier, this volume). These past studies can have continuing utility in judicial and legislative reform efforts.

In addition, new studies that bear on as-yet unstudied but commonly used jury instructions could also be useful. These could include studies about instructions regarding mental retardation, the mitigating effect of mental illness, the use of certain testimony for limited evidentiary purposes but not on the underlying issue of guilt, the use of certain answers not for the truth of the matter asserted but only for credibility, and the use of victim impact testimony

solely for the purpose of showing the harm the victim suffered. A key matter that could be studied would be the extent to which jurors, even if they *do* understand the instructions, are likely to violate them.

Averting Convictions of the Innocent

Additional research would be useful in helping to develop protections against convicting, and even executing, innocent people (*see* Dieter, this volume).

One area that has been the subject of some analysis, but could benefit from further work, involves the factors that have led to convictions of people who were later exonerated—whether by DNA or otherwise. Particularly since DNA is not available in the vast majority of capital cases, it is important to examine the extent to which these same factors—for example, threatening the death penalty as a way to get the suspect to confess or to get an alleged co-conspirator to implicate him—may lead to erroneous convictions in cases in which DNA is not available.

Another matter that could benefit from research is the extent to which special pre-trial questioning in capital cases—designed to weed out all potential jurors who would never be willing to impose capital punishment—may contribute to convictions of innocent people. Previous studies have shown that such pre-trial "*Witherspoon*" questioning (*Witherspoon v. Illinois* 1968) makes it more likely that innocent people will be convicted. These studies show that those unwilling to vote for capital punishment are more likely than other jurors to be skeptical of questionable prosecution testimony in determining whether guilt has been proven beyond a reasonable doubt. It would be useful to undertake studies on cases in which innocent people were sentenced to death, and to focus on the impact in those cases of *Witherspoon* exclusions.

It would also be useful to gain more understanding about the nature of false confessions, particularly ones induced by the police. The December 2007 issue of *The Champion* includes a discussion of some of the emerging research in this area and debunks various myths about the supposed implausibility of any sane person's making a false confession. As an article in that issue notes, some leading manuals still promote the use of interrogation methods that have led to false confessions. And many of these methods continue to be approved by most courts. Additional persuasive studies are likely needed in order to get courts or legislatures to preclude the use of "confessions" secured by techniques with an undue danger of producing false confessions,. These new studies, in

addition to the existing research, could also form the basis for expert testimony and improved training of police, counsel, and judges.

Jury studies have shown that even when jurors are told to disregard coercive confessions, the conviction rate is greater than if such confessions were never brought to the jury's attention. This suggests the need either for improved instructions or for completely precluding juries from hearing about such confessions.

Race

Racial disparities in capital punishment continue to be the subject of studies relevant to courts and public policy makers (*see* Baldus *et al.*, this volume).

In early 2008, a Connecticut judge refused to dismiss claims under the state constitution regarding alleged racially disparate implementation of capital punishment after considering, among other things, a study by Yale Law Professor John Donohue and his colleagues. In addition, in 2006 and 2007, numerous studies or mini-studies, as part of American Bar Association assessments of capital punishment in numerous states, found significant racial disparities, most often regarding race-of-the-victim. In addition, there have been press analyses of capital punishment, including a series in 2007 by the Atlanta Journal-Constitution that relied on a leading researcher's study of racial disparities.

It is useful, to the extent possible, for such studies to include not only cases in which defendants were prosecuted for capital crimes (that is, crimes for which the death penalty might be imposed), but also cases in which the factual allegations would have permitted prosecution for capital crimes but in which the defendants were actually charged with less severe crimes. This approach—when data make it feasible—permits a more complete analysis of prosecutorial discretion and its potential racially disparate impacts.

Further studies might also be done in the wake of two recent, innovative studies. One found that among all African-American defendants in potentially capital cases, those with darker skin or other stereotypical Negroid characteristics were considerably more likely to be sentenced to death. The other found that among all people actually sentenced to death, African Americans were considerably more likely to be executed.

Moreover, studies by the Capital Jury Project (such as those described by Bowers *et al.*, this volume) about the differences between African-American and white jurors in their consideration of evidence presented in mitigation might be relevant to legal claims concerning prosecutors' exclusions of African-

American jurors—by showing both a prejudicial effect and a reason why prosecutors would wish to exclude such jurors.

Using the Same Jury for Penalty as for Guilt/Innocence

Liebman and his associates (2002) have shown that in cases returned by courts for resentencing, the new sentencing juries are less likely to impose a death sentence than were the original juries that made both guilt and sentencing decisions. According to Bowers *et al.* (this volume), sitting on a jury during the guilt phase has a coarsening effect with regard to punishment.

If further research were conducted into why this is so, it might provide a reason for having separate juries in the guilt/innocence and punishment phases of capital cases. If this were done, those who would automatically vote against the death penalty could be jurors during the guilt/innocence phase. As discussed above, including such jurors would make erroneous convictions less likely. Moreover, it is possible that people who would automatically vote for capital punishment for anyone found guilty of capital murder would be less likely to end up on penalty phase juries if they were questioned in the context of the defendant's having been found guilty of capital murder. Some such people may, under the current system, evade exclusion because they read into the questions about sentencing the possibility that the defendant may not be found guilty.

Finally, defense counsel, during jury selection, often go to great lengths to express reasons why jurors really should be willing and able to vote for the death penalty. These counsel are hoping to avoid exclusions "for cause" of potential jurors who express qualms about ever being willing to vote for capital punishment. Research could fruitfully explore whether this kind of *voir dire* questioning can itself make convictions more likely, and whether it undercuts defense counsel's credibility when counsel later in the case argue against imposing the death penalty.

Public Policy Arguments on Whether the Death Penalty Should Exist

Further research can also play an important role in shaping public policy arguments as to whether capital punishment should be part of our legal system. Many of the "reform"-related subjects discussed above are relevant to those policy arguments. I now turn to issues that do not have reform implications.

Impact on Crime

On the issue of whether capital punishment is a deterrent, it would be useful to follow up on Professor Bedau's suggestion (this volume) that states with capital punishment be compared to states without capital punishment.

There is also a need for statistically sound analysis of whether capital punishment has been a deterrent in particular states. The studies given considerable press coverage in recent years as supposedly supporting the deterrence argument reach hard-to-believe conclusions, such as that every execution deters a large number of murders. These studies have been attacked by several leading experts in the field (*see* Fagan and West, this volume). But what is really needed is a comprehensive assessment by an expert panel—such as the one appointed by the National Academy of Sciences to assess earlier purported showings of deterrence. That panel concluded in 1978 that the studies on which those claims were based were fatally flawed.

Another useful type of research would bear on arguments that capital punishment—even if it may not prevent murders in general, does incapacitate a convicted murderer from killing again. Professor Sorensen notes (this volume) that there has been a tremendous drop in homicides in prisons, from 54 per 100,000 inmates in 1980 to four per 100,000 inmates in 2002. It would be instructive to analyze potential causes for this huge decrease.

Further relevant work would consider the extent to which people convicted of, or pending trial for, capital murder have committed murders while in prison, have escaped, or have engaged in serious assaults on prison staff. My impression is that past studies indicate that such inmates are considerably less likely than the general prison population to engage in such acts, but updated and more comprehensive study would be useful. It would also be useful to consider whether long-term prisoners given non-death sentences are, on the whole, a positive influence on other prisoners.

An additional area of potential research concerns the impact of an active capital punishment regime on other law enforcement. For example, United States Attorneys' offices have faced great financial strains and been further limited in fighting "regular" federal crimes by having many FBI agents devoted to anti-terrorism work and by having to litigate a huge upsurge in immigration appeals. It would be instructive to study the extent to which the dramatic increase in federal death penalty prosecutions in places like the Eastern District of New York has inhibited federal prosecutors' ability to deal with other crimes.

Impact on Prison Guards

It would be useful to research the impact that executions have had on the retention of high quality prison guards.

A powerful documentary released in 2008, *At the Death House Door*, focuses mostly on the experiences of the former long-time chaplain who provided day-of-execution counseling to Texas death row inmates. It also highlights (among many other things) how the experience of participating in executions led to the departure from the prison system of one of its best guards. There have been many other anecdotal accounts over the years of how highly respected prison guards—particularly those who got to know death row inmates well—have left corrections after some of these inmates were executed. These guards have commented that even if the death penalty may have made sense for the person whom the inmate was at the time of the crime, it made no sense to execute the dramatically better person that the inmate had become.

Victims' Survivors

Increasingly over the last 10 to 15 years, capital punishment has been justified as being the best way to support the survivors of murder victims. Yet, there has been virtually no research bearing on this claim.

To see how many murder victims' survivors might purportedly be helped by the death penalty, it would be useful to consider the incredibly low percentage of homicide cases in which the death penalty is secured, and the even lower percentage in which someone is actually executed. As Professor Vandiver points out (this volume), in a great many cases, there is no prosecution at all. In over 1/3 of the cases, she writes, the killer is either unidentified or dead. As she further notes, of the homicide cases that are prosecuted, there are a great many

in which the death penalty is never an option, and a great many more where it can be but is not imposed.

Clearly, even if one were to assume that executing the convicted defendant somehow helps the murdered person's survivors, this purported benefit is only available to extremely few of them. This would be so even if the execution rate were to be increased many times over.

What is the effect on the huge majority of murder victims' survivors of being denied this supposed solution to at least some of their problems? Researchers could usefully study these issues, to see whether, in fact, this phenomenon aggravates the suffering of murder victims' survivors by making them feel like second-class survivors.

Beyond that, the underlying assumption should be studied. That is, there should be analysis of whether in those rare cases in which there is an execution, the entire process in some discernible way benefits the victims' survivors—and whether the impact is different where one or more of those survivors are against the defendant's execution.

Finally, as Professor Vandiver properly states, there is a pressing need to focus on interventions that are far more obviously beneficial to victims' survivors than capital punishment. Research could help identify the most cost-effective of these measures.

Costs

Analyses of whether having the death penalty increases the costs of the criminal justice system played a major role in leading to New Jersey's abolishing the death penalty in 2007 and New York's not having corrected a flaw that has rendered its capital punishment statute inoperative since 2004. While such studies have been done in many states, studies in additional states would add to the overall knowledge on this subject (*see* Gradess and Davies, this volume).

When undertaking such studies, or analyzing their results, it is vital to point out a fallacy in the "common sense" view of costs—namely, that the proper approach is to compare the respective costs of putting a particular defendant to death and of keeping that defendant in prison for life. This completely ignores the fact that for every case in which there is an execution, there are several others in which the death penalty is sought but no one is ever executed. The cost of a system that includes capital punishment includes the extra death penalty-related costs—such as two-phase trials, more complex jury selection, and prosecutorial and defense investigation into penalty phase

issues—that are incurred even in cases in which the defendant ends up serving a life sentence, or gets acquitted.

State-Specific Studies

Deborah Fleischaker's chapter in this volume points up examples of states in which much more detailed studies of the death penalty system's functioning are warranted. It is only when such thorough analyses of a state's *actual* death penalty system is undertaken that any rational conclusion can be reached about whether to keep the system as is, to reform it, to impose a moratorium pending reform, or to abolish it.

Public Opinion and Influences Thereon

There are many public opinion analyses that could prove helpful in determining the future of capital punishment.

At the most basic level, it is important to know what the public's views on capital punishment are, especially in particular legislative districts. Such studies should not simply inquire about support for the death penalty in the abstract—as if the alternative were what many falsely believe it to be, namely, incarcerating the defendant for a relatively few years and then paroling him. Rather, they should ask those being surveyed to assume that the alternative is (as it is in almost every capital punishment jurisdiction) life with no possibility of parole.

It is also vital to determine the *intensity* of people's views on capital punishment. In particular, would a candidate's taking a different position than that of the person being surveyed likely change the person's vote? One notable after-the-fact study, done by researchers at Princeton University after New Jersey enacted capital punishment in the 1980s, found that lawmakers grossly overestimated the extent to which voters would have held it against them if the lawmakers had opposed the death penalty's enactment. To the extent that much support for the death penalty may be "a mile wide and an inch deep," that would be important for candidates to know.

The perception that being against the death penalty carries with it a political death sentence has been erroneously supported, in political circles, by the defeats in 1988 of Democratic Presidential candidate Michael Dukakis and in 1994 of New York Governor Mario Cuomo. However, Dukakis's infamous answer to the first question in the final debate was so damaging not because he opposed the death penalty, but rather because he seemed like he would not be emotionally affected at all if (as the hypothetical presupposed) his wife Kitty

were to be brutally raped and murdered. And Cuomo, who had won three elections in which the voters were well aware of his opposition to the death penalty, was defeated principally because of relatively low voter turnout in heavily Democratic New York City (where many, particularly people of color, had become disenchanted with him for reasons having nothing to do with the death penalty) and a high voter turnout upstate (where people who felt that Cuomo gave preferential treatment to New York City were inflamed by Cuomo's sending New York City Mayor Rudolph Giuliani upstate to campaign for him).

Also worth studying is what has happened to public opinion after the death penalty has been abolished in such places as Canada and Western Europe. Research may show that while a majority favored the death penalty at the time of abolition, public opposition to capital punishment increased thereafter, at least in some countries. Studying post-abolition changes could also shed light on Professor Garland's discussion (this volume) about symbolic aspects of death penalty support, and whether other symbols can replace capital punishment if it is abolished.

A final aspect of public opinion worthy of further research is the impact of television, radio, movies, plays, art, and other media in influencing attitudes about crime and the death penalty. This would include research into the so-called "CSI Effect," whereby juries now purportedly expect startling scientific proof of guilt before they will convict. But it would also include analysis of the myriad other ways in which our media deals with death penalty-related issues, and in particular the misconceptions that the media creates about how the legal system actually works.

Practice Implications of Studies Regarding Jury Decision Making

As suggested by Professors Bowers and Sundby (this volume), it is important to study the reasons why there have been remarkably fewer death sentences in recent years. Among the possible reasons are media-created changes, such as the supposed "CSI Effect" mentioned above; changes in law, such as North Carolina's now giving prosecutors discretion as to whether to seek the death penalty rather than mandating that they do so, and Texas' enacting life without parole as the alternative to the death penalty; and greater public awareness that our legal system is so fragile that many innocent people have been sentenced to death.

But there could be other reasons. In particular, it could be that certain types of mitigation evidence have been particularly successful, at least when pre-

sented in a certain way. Or some defense counsel may be improving the chances of life verdicts by essentially conceding guilt and focusing right from the guilt-phase opening argument on the themes of the penalty phase defense.

Conclusion

As you read this book, please consider carefully not only the wealth of information contained herein, but also the ideas regarding future research that could affect the course, or abolition, of the death penalty.

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