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Feature

In Defense of the Death Penalty

BY THE HONORABLE PAUL CASSELL

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ABOLITIONIST ARGUMENTS concerning the death penalty always seem a bit unsatisfying. Concepts of retribution, deterrence, and just punishment are discussed in the most thoughtful terms, but nowhere do we find a clear discussion of the crimes at issue. In some ways, these discussions are a bit like playing Hamlet without the ghost—reviewing the merits of capital punishment without revealing just what a capital crime is really like and how the victims have been brutalized.[1]

So, enter a ghost … or rather, enter one Kenneth Allen McDuff. McDuff raped, tortured, and murdered at least nine women in Texas in the early 1990s, and probably many more. The facts of just one such killing will reveal the horror of his crimes. On December 29, 1991, in Houston, Texas, McDuff and an accomplice manhandled 28-year-old Colleen Reed into the back of a car driven by another accomplice. Reed screamed, "Not me, not me," but McDuff forced her in and tied her hands behind her back. As the accomplice drove to a remote location, McDuff repeatedly struck and raped Reed in the back seat of the car. Not finished, McDuff then got cigarettes from his accomplice, puffed them into a cherry glow, and inserted them into her vagina. Finally, as Reed pleaded for her life, McDuff killed her by crushing her neck. McDuff would later say that, "Killing a woman's like killing a chicken... They both squawk." After *America's Most Wanted* aired a program about him, McDuff was arrested in 1992, convicted, and given two death sentences. He was finally executed in 1998.[2]

McDuff's torture and slaying of Reed and numerous other women are horrific standing alone, but what makes his murders even more tragic is that they were easily preventable. McDuff resembles a ghost in more ways than one. He had previously been a "dead man walking," that is, a prisoner sentenced to die. In August 1966, McDuff and an accomplice had forced a teenaged girl and two teenaged boys into the trunk of a car. McDuff drove them to a secluded spot, murdering the two boys with gunshots to the head at close range. McDuff and his companion then raped the boys' companion, Edna Sullivan. Not finished, McDuff tortured Sullivan with a soft drink bottle and a broken broom handle, finally killing her by crushing her neck. A jury convicted McDuff of the crimes, and recommended death. The judge agreed, imposing a capital sentence that was later affirmed by the Texas courts. McDuff narrowly escaped execution three times before the United States Supreme Court, in its 5–4 decision in *Furman v. Georgia*, invalidated all death penalties in 1972. As a result, McDuff escaped execution and was ultimately released by Texas authorities in 1989, producing the killing spree that left Colleen Reed and many other women dead.

ABOLITION OF THE DEATH PENALTY HAS ITS CONSEQUENCES

As I write this, I remain haunted by these consequences, by

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the story of Colleen Reed. Perhaps it is a photograph I have seen of her in a book, *No Remorse*, which recounts Reed's murder and the manhunt that ultimately apprehended McDuff. Reed looks so young, enthusiastic, energetic—so full of life. Perhaps it is the young girls in my neighborhood. What will they look like when they are 28 years old? Could something like this happen to them? Perhaps it is the crime victims' volunteers I know in Texas. They were galvanized by Reed's murder and have fought hard, with little recognition, to make sure that victims like Reed and others will never be forgotten. Their moving Web site (*www.murdervictims.com*) contains a seemingly endless string of photographs of men and women, boys and girls, who all seem full of life before their brutal murders. Behind each photograph lies a story—a tragic story—that one might recount just as well as Reed's. These photographs represent what Judge Alex Kozinsky called "the tortured voices of the victims crying out… for vindication."[3]

Our legal system, of course, has a procedure in place for hearing these voices. A jury of 12 persons, selected for their ability to be impartial in evaluating the facts, reviews all of the evidence, including whatever evidence a defendant might choose to present, before determining whether a defendant has committed an aggravated, capital murder, and, if so, whether death is the appropriate penalty. No death penalty is ever imposed unless the jury (or, in some states, a judge) decides that the ultimate penalty is justified by the facts of the case.

Obviously, reasonable people might disagree about what constitutes fair and just punishment in particular cases. Reasonable people might likewise disagree over whether the death penalty ought to even be in the statute books. In a democratic society, disputes about appropriate sentencing are resolved through the legislative process. Today in our country, Congress and the great majority of state legislatures have authorized the use of a death sentence for aggravated murders like McDuff's.

Those who would abolish the death penalty, of course, see things differently. In the book *Debating the Death Penalty*, Hugo Bedau decries the "brutality and violence" of the death penalty.[4] Bryan Stevenson contends that the punishment is "rooted in hopelessness and anger."[5] And Stephen Bright maintains that the penalty is "inconsistent with the aspirations of equal justice and fairness which have long been promised in the U.S. Constitution."[6]

These views have not resonated with either the courts or the public. In 1976, the Supreme Court emphatically rejected a constitutional challenge to the death penalty.[7] Similarly, in the court of public opinion, the abolitionists have lost. A Gallup poll in October 2007 found that 69 percent of Americans favor the death penalty while only 27 percent oppose it.[8] These results come from a generic question: "Are you in favor of the death penalty for a person convicted of murder?" Support is even higher when the respondents are asked for their views not in the abstract, but in regard to a particular case. For instance, even among those who identify themselves as generally opposing the death penalty, more than half believed Oklahoma City bomber Timothy McVeigh should have been executed.[9] These numbers are especially interesting because they starkly reveal the true public view of the death penalty in the context of an actual case. The strong support for McVeigh's execution suggests that more information about the death penalty's application might, at least in some cases, increase public support.

In the face of the public's rejection of their philosophical arguments, abolitionists have recently decided to change tactics. Rather than mounting a frontal assault on capital punishment, today they make a tactical end run by stressing narrower administrative arguments—e.g., alleged racial disparities in the application of the penalty and deficiencies in appointed counsel. These new arguments seem to have gained some modest traction. Governor Ryan of Illinois, on his way out of office and contrary to previous promises made to victims' families, issued a blanket commutation of death row inmates in his state. As explained in his speech entitled "I Must Act," his concerns were defects in the way in which death sentences were determined in Illinois.[10]

These administrative arguments, however, provide no general reason for abolishing the death penalty. And the consequence of abolition for the Colleen Reeds of the future may be no less grim.

The aims of this text are two-fold. The first is to provide a brief overview of the underpinnings of the death penalty. (The death penalty is firmly grounded in many traditional rationales for punishment, a fact that may explain why death penalty abolitionists have made so little progress in challenging it head on.) The second is to examine the new wave of administrative challenges to the death penalty. Here again, these claims fail to provide a significant reason for abolishing capital punishment.[11]

Perhaps the most straightforward argument for the death penalty is that it saves innocent lives by preventing convicted murderers from killing again. If the abolitionists had not succeeded in obtaining a temporary moratorium on death penalties from 1972 to 1976, McDuff would have been executed, and Colleen Reed and at least eight other young women would be alive today.

Some sense of the risk here is conveyed by the fact that, of the roughly 52,000 state prison inmates serving time for murder, an estimated 810 had previously been convicted of murder and had killed 821 persons following those convictions.[12] Executing each of these inmates after the first murder conviction would have saved the lives of more than 800 persons.

Abolitionists respond to this argument by observing that only a fraction of murderers receive the death penalty. Bedau,

for instance, argues that "the only way to [completely] prevent such recidivism would be execute *every* murderer—a policy that is politically unavailable and morally indefensible."[13] This response is unsatisfying. It is no indictment of death penalty procedures to learn that they do not single-mindedly pursue the goal of incapacitating murderers. Instead, the American death penalty responds to a variety of concerns—including not only incapacitation but also the possibility of rehabilitation and mercy. No other criminal justice sanction makes the prevention of recidivism its exclusive goal. Society sends most criminals to prison for a term of years, rather than for life, reserving the life sentence for the worst of the worst. Yet no one would argue that recidivism is somehow inappropriately pursued with life imprisonment, merely because such sentences are reserved for the circumstances where, in light of all relevant factors, they are most appropriate.

While the abolitionist response to incapacitation concern is unsatisfying, it does contain an important implicit concession whose implications are worth considering. The abolitionists argue that the death penalty for some murderers fails to prevent recidivism by other murderers, implicitly conceding that the penalty at least prevents some recidivism. In plain words: some innocent people will die if we abolish the death penalty. For example, we know that Colleen Reed would be alive today but for the temporary suspension of the death penalty in 1972. The only point open to debate is how many others like her were killed during those years. Moreover, the group of murderers sentenced to death is no doubt much more dangerous than the "average" murderer. The jury that first considered the risks posed by McDuff reached the conclusion that he deserved to die for his crimes, presumably because of the serious potential that he might repeat them. Unfortunately, that jury's conclusion was not respected, with fatal consequences for Colleen Reed and other women.

Deterrence

The death penalty's incapacitative benefit comes from preventing the individual murderers who are apprehended and executed from killing again. This effect is what criminologists refer to as *specific* deterrence. More significant benefits come from the death penalty's restraining effect on the much larger pool of people who are potential murderers, what criminologists refer to as *general* deterrence. Evidence for capital punishment's general deterrent effect comes from three sources: logic, first-hand reports, and social science research.

Logic

Logic supports the conclusion that the death penalty is the most effective deterrent for some kinds of murders: those that require reflection and forethought by persons of reasonable intelligence and unimpaired mental faculties. Such an assumption is uncontroversial in other contexts. As James Q. Wilson has explained:

> People are governed in their daily lives by rewards and penalties of every sort. We shop for bargain prices; praise our children for good behavior and scold them for bad; expect lower interest rates to stimulate home building and fear that higher ones will depress it; and conduct ourselves in public in ways that lead our friends and neighbors to form good opinions of us. To assert that "deterrence doesn't work" is tantamount to either denying the plainest facts of everyday life or claiming that would-be criminals are utterly different from the rest of us.[14]

Whenever society faces a problem with a bourgeoning number of crimes—be it kidnappings in the 1930s, aircraft hijackings in the 1970s, domestic violence in the 1980s, or political terrorism in the 2000s—the public response is almost invariably to increase the criminal penalties associated with those crimes. We take it as uncontroversial that these increased penalties will deter at least some prospective criminals, which makes the increased penalty worthwhile. Our entire criminal justice system is premised on the belief that increasing penalties increases deterrence.

The logic of deterrence applies to aggravated homicides no less than to other crimes. As the Supreme Court observed in *Gregg v. Georgia*:

There are carefully contemplated murders, such as the murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.[15]

Of course, as the Supreme Court suggests, the death penalty applies only to "carefully contemplated" first-degree murder. That is, murders committed with premeditation and malice. It is no answer to the deterrence argument to say that the death penalty cannot prevent a killing during a fight in a bar room brawl. Such heat of passion offenses are typically punished as second-degree murders and are not eligible for capital punishment. The ultimate penalty is reserved for first-degree murders, and, indeed, for a subset of first-degree murders that are especially aggravated. Nor is it an answer to say that murders continue to be committed in this country in the face of the death penalty. The salient issue is not whether the death penalty deters every murder—only whether it deters some murders. Logic suggests that at least some potential murderers will be deterred.

First-Hand Reports

First-hand reports from criminals and victims confirm our logical intuition that the death penalty deters. In 1993, Senator

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Dianne Feinstein recounted her experience in the 1960s at the parole hearing of a women convicted of robbery in the first degree:

> I saw that she carried a weapon that was unloaded into a grocery store robbery. I asked her the question: "Why was the gun unloaded?" She said to me: "So I would not panic, kill somebody, and get the death penalty." That was firsthand testimony directly to me that the death penalty in place in California in the sixties was in fact a deterrent.[16]

Another interesting historical example is Kansas's decision to reinstate the death penalty for first-degree murder in 1935 in the wake of a spate of deliberate killings committed in Kansas by criminals who had previously committed such crimes in surrounding states. In those states, their punishment, if captured, could have been the death penalty. These criminals admitted having chosen Kansas as the site of their crimes solely for the purpose of avoiding a death sentence in the event that they were captured.[17]

A more recent example comes from New York City following the Supreme Court's 1972 *Furman* decision temporarily suspending the death penalty. John Wojtowicz and another criminal held eight bank employees hostage and threatened to kill them before they were thwarted by FBI agents. In threatening the hostages, Wojtowicz said:

> I'll shoot everyone in the bank. The Supreme Court will let me get away with this. There's no death penalty. It's ridiculous. I can shoot everyone here, then throw my gun down and walk out, and they can't put me in the electric chair. You have to have a death penalty, otherwise this can happen everyday.[18]

Also, when the death penalty was suspended, a couple in Kansas was held hostage for three hours during a bank robbery. During this time, the robbers decided to kill the couple, rather than leave them alive as potential witnesses. Fortunately, the wife escaped and the husband survived after being shot twice in the head and left for dead. As the couple later wrote, "Thank God that we lived so that we can tell you that capital punishment does make a difference."[19]

Since the restoration of the death penalty in 1976, further evidence confirms the deterrent effect of the death penalty. Harvard Law professor Alan Dershowitz, a strong opponent of the death penalty, has conceded as much. "Of course, the death penalty deters some crimes," he acknowledged during a debate with me in 1995. "That's why you have to pay more for a hit man in a death penalty state than a non-death penalty state."[20]

The death penalty's deterrent effect may be an especially important consideration in preventing murders inside prison walls. While Bedau tersely asserts that there is "no evidence" that the absence of a death penalty increases the risk to prisoners or prison guards, in fact experienced prison administrators have observed such a risk. During the 1980s, when the federal death penalty was suspended, at least five federal prison officers were killed, and the inmates responsible in at least three of the incidents were already serving life sentences for murder.21 Norman Carlson, the widely respected Director of the U.S. Bureau of Prisons, testified that,

> In the case of someone serving a nonrevokable life sentence, execution is the only sanction which could possibly serve as a deterrent. … We must impose the death penalty on prisoners sentenced to life who murder guards or other inmates, in order to bring some semblance of security to our Federal prison system.[22]

In short, those serving a sentence of life without parole (often offered as a substitute for capital punishment) have a "license to kill" without the availability of a death penalty.

Statistical Support

A final support for the death penalty's deterrent effect comes from statistical analysis.[23] Abolitionists appear to have little time for investigating this issue. When they trouble to investigate the issue, they typically do little more than assert that the states without the death penalty have lower homicide rates than states with the penalty. Bright's chapter in *Debating the Death Penalty* can serve as a convenient illustration. Bright quickly dismisses the possibility of a deterrent effect with the factoid that the South has the highest murder rate in the country while the Northwest, with the fewest executions, has the lowest.[24]

This analysis is fundamentally flawed. It fails to account for a variety of regional differences—e.g., educational levels, criminal justice expenditures, economic prosperity—that are well known to have potential affects on homicide levels.[25] Indeed, Bright's observation may prove little more than that the states that most need death penalty laws have been the ones most likely to pass them.

A far better measure of a deterrent effect comes from measuring the experience of states with death penalty laws over time. Thus, we might compare what various states' murder rates were from 1968 to 1976 (a period of time in which no one was executed) with what they were during the years 1995–2000. Senator Hatch and other senators recently collected the relevant data.[26] The five states showing the greatest relative improvements are, in order: Georgia, South Carolina,

Florida, Delaware, and Texas. All these states have aggressive application of the death penalty.

Another way of reviewing the data over time is to compare a state's 1999 murder rate to those of 1966, the most recent year in which the national homicide rate equaled that of 1999. In 1999, the national homicide rate had fallen to 5.7 per 100,000 persons, a 32-year low and the lowest rate since 1966. If death-penalty states had simply followed the national trend in recent years, one would expect that in 1999, they and the non-death-penalty states would all have returned to the low rates they experienced in 1966. But the data reveals a strikingly different pattern: states aggressively using the death penalty have generally seen their murder rates decline while states not using the penalty have generally seen rates increase.

The six leading states measured by total executions are, in order: Texas, Virginia, Missouri, Florida, Oklahoma, and Georgia. Obviously this way of comparing states is biased against the smaller states. An alternative yardstick is to examine the rate of executions per murders in each state. By this measure—executions per total murders since 1976—the most aggressive death penalty state in the country is Delaware, followed by Oklahoma, Missouri, Texas, Virginia, and Arkansas. Taking the eight states that show up on either of these two lists, six have seen their murder rates drop since 1966. Arkansas's murder rate is down by 1.5 percentage points, Virginia's by 2.4 points, Texas by 3.0 points, Georgia's by 3.8 points, Florida's by 4.6 points and Delaware's by 5.8 points. The only states whose murder rates went up—Oklahoma and Missouri—went up by only 1.4 and 1.2 points respectively. Of the six states with declining murder rates (Arkansas, Virginia, Texas, Georgia, Florida, and Delaware), the period between 1997 and 1999 saw all six reach their lowest murder rate since 1960. Indeed, four of these states—Virginia, Florida, Delaware, and Arkansas—went from having murder rates well-above the national average in 1966 to rates well-below the average in 1999.

In contrast to the general declines in the leading death penalty states, the largest abolitionist states have seen rising homicide rates. Among non-death penalty states, nine are large enough to have two congressmen, and have no wild swings in murder rates from year to year. These states are Wisconsin, Minnesota, Massachusetts, Iowa, Michigan, West Virginia, Rhode Island, and Hawaii. Of these, six have seen their murder rates go up since 1966 (Wisconsin, Minnesota, Michigan, West Virginia, Rhode Island, and Hawaii); one has stayed the same (Maine); and two have seen slight reductions (Massachusetts by 0.4 of a percentage point and Iowa by 0.1 point).

These state-by-state comparisons are bolstered by more sophisticated and recent econometric analysis that controls for the variety of demographic, economic, and other variables that differ among the states. The best of these studies suggest that the death penalty has an incremental deterrent effect over imprisonment: in plainer terms, the death penalty saves innocent lives.

Professors Hashem Dezhbakhsh, Paul Rubin, and Joanna Shepherd of the Department of Economics at Emory University have published the most comprehensive analysis of the American death penalty data.[27] Many other studies of capital punishment's deterrent effect relied on antiquated data developed before the Court's 1976 decision in *Gregg v. Georgia* established the modern American death penalty jurisprudence. The Emory researchers analyzed data for 3,054 American counties over the period 1977 to 1996, controlling for such variables as police and judicial resources devoted to crime, economic indicators, and other potentially confounding influences on the murder rate. The Emory researchers found that, in general, murder rates fell as more murderers were arrested, sentenced, and most important for present purposes, executed. In particular, they concluded that each additional execution during this period of time resulted, on average, in 18 fewer murders.

Parallel conclusions were reached by H. Naci Mocan, Chair of the Department of Economics at the University of Colorado (Denver), and graduate assistant R. Kaj Gottings.[28] In an article published in the October 2003 *Journal of Law and Economics*, they report the results of multiple regression analysis of a newly available data set concerning all 6,143 death sentences between 1977 and 1997. Controlling for numerous variables, the University of Colorado researchers found "a statistically significant relationship between executions, pardons and homicide." In particular, they found that each additional execution deters five murders. Of particular relevance to Governor Ryan's actions in Illinois, they also studied the effect of commutations of death sentences. They found that each commutation reduces deterrence and produces five murders, a finding that suggests that Governor Ryan's decree will cause the deaths of dozens of innocent persons.

Late in 2002, Paul Zimmerman, a statistician with the Federal Communications Commission, derived further support for the death penalty. He conducted an econometric study of state data over the years 1978 to 1997 to determine the deterrent effect of the probability of execution on the per capita rate of murder. Zimmerman controlled for a wide-range of possibly confounding factors. He concluded that each state execution deters somewhere between three and 25 murders a year (14 being the average). Zimmerman also found that the "announcement" effect of a capital sentence, as opposed to the existence of a death penalty provision, is the mechanism actually driving the deterrent effect associated with state executions.[29]

Finally, Professors Dale Cloninger and Roberto Marchesini of the University of Houston reached similar conclusions with a different methodology, investigating the number of homi-

cides committed in Texas during 1996 and 1997.[30] Before 1996, Texas executed about 17 convicted murderers per year. In 1996, the number of executions fell to near zero because of a temporary stay on actually carrying out the sentences entered by the Texas Court of Criminal Appeals. Then, in the following year, Texas executed 37 murderers. Using a model that compared the actual number of homicides with the "expected" number of homicides, Cloninger and Marchesini found that the suspension in executions produced a statistically significant increase in homicides in Texas. They estimated that the suspension resulted in about 220 additional murders that would have otherwise been deterred—or, put more bluntly, the deaths of 220 innocent people. They explained:

> The unexpected homicides occurred despite the fact that arrests continued to be made for homicide, scheduled trials for both capital and non-capital offenses went on, sentencing capital and non-capital verdicts went uninterrupted, and there were no known, dramatic changes in the states' demographics. The only change relevant to the crime of homicide was the suspension of executions.[31]

In the understated words of social scientists, they concluded that "politicians may wish to consider the possibility that a seemingly innocuous moratorium on executions could very well come at a heavy cost."[32]

The abolitionist response to such sophisticated deterrence studies is revealing: they essentially duck the issue. Bedau's chapter in *Debating the Death Penalty* exemplifies this approach. Bedau acknowledges that the abolitionist position is "vulnerable to evidence" of a deterrent effect; he contends, however, that.

> since there is so little reason to suppose that the death penalty is a marginally superior deterrent over imprisonment, or that such superiority (if any) can be detected by the currently available methods of social science, this "what-if" counter-argument can be put to the side and disregarded.[33]

Bedau forthrightly acknowledges recent research from the Emory professors shows a deterrent effect, but "predicts" that subsequent studies will reach the opposite conclusion.

The abolitionists are remarkably sanguine. If the deterrence argument is correct, innocent people will die when we rely solely on imprisonment and fail to carry out executions. Deterrence is supported by logic, first-hand reports, and statistical studies. All of these sources suggest a specific, incremental savings of lives from the death penalty, over and above long-term imprisonment. We owe to those who might die at the hands of emboldened murderers not to casually "put to the side and disregard" this very real possibility.

The abolitionists really appear to be seeking safety in the proposition that a deterrent effect cannot be (as Bedau puts it) "detected" by the currently available methods of social science. This point contains a kernel of truth: social science research is often uncertain. Yet indisputable social science evidence has never been the "sine qua non" of criminal justice policy. To cite but one obvious example: if ironclad evidence of a deterrence effect were required to justify prison sentences, then we would have to put every violent offender in the country back on the streets. After all, we lack indisputable evidence that prisons incapacitate and deter. Of course, no one would urge such a policy, as we have a reasonable intuition—bolstered by logic, reports from criminals and victims, and social science research—that flinging open all prison doors would be catastrophic. The parallel evidence concerning the death penalty likewise suggests that emptying the nation's death rows would be quite dangerous.

A final justification for the death penalty is that it constitutes just punishment for the most serious homicides. Capital punishment's retributive function vindicates the fundamental moral principles that a criminal should receive his or her just deserts. Even if capital punishment had no incapacitative or deterrent utility, its use would be justified on this basis alone. As Immanuel Kant persuasively explained, "[e]ven if a civil society resolved to dissolve itself…the last murderer lying in the prison ought to be executed…"[34] This act of punishment, which can provide no utilitarian benefit, is required because of the "desert of [the murderer's] deeds." More contemporary philosophers have echoed the argument. For example, noted philosopher Michael Moore of the University of Illinois College of law, asks us whether we would punish a brutal rapist, even if he has gotten into some sort of accident so that his sexual desires are dampened and we are certain that he no longer posses a threat of recidivism (no need for specific deterrence) and if we could pretend that he was punished, so that others would not be encouraged to commit crimes (no need for general deterrence). Moore suggests that our intuitions still would demand punishment—an intuition that reflects the needs for our criminal justice system to impose just punishment.

By imposing just punishment, civilized society expresses its sense of revulsion toward those who, by violating its laws, have not only harmed individuals but also weakened the bonds that hold communities together. Certain crimes constitute such outrageous violations of human and moral values that they demand retribution. It was to control the natural human impulse to seek revenge and, more broadly, to give expression to the deeply held view that some conduct deserves punishment that criminal laws administered by the state were established. The rule of law does not eliminate feelings of outrage,

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but does provide controlled channels for expressing such feelings. As the Supreme Court has recognized, society has withdrawn,

> both from the victim and the vigilante the enforcement of criminal laws, but [it] cannot erase from people's consciousness the fundamental, natural yearning to see justice done—or even the urge for retribution.[35]

The law's acceptability and effectiveness as a substitute for vigilantism depends, however, on the degree to which society's members perceive the law as actually providing just punishment for particularly serious offenses. Determining what sanction is proportionate and, therefore, what constitutes just punishment for committing certain types of murder is admittedly a subjective judgment. Nevertheless, when there is widespread public agreement that the death penalty is a just punishment for certain kinds of murders, as there is in this country today, and when a jury acting under constitutional procedures determines that a defendant has killed another under circumstances for which the Legislature has prescribed death as an appropriate penalty, the resulting judgment is no less "just" because its validity cannot be objectively verified.

Capital punishment is proportionate to the offense of the intentional and unjustified taking of an innocent person's life. Murder does not simply differ in magnitude from other crimes like robbery and burglary. It differs in kind. As a result, the available punishments for premeditated murder must also differ in kind. The available punishment must reflect the inviolability of human life. As Professor Walter Berns has explained:

> In a country whose principles forbid it to preach, the criminal law is one of the few available institutions through which it can make a moral statement….To be successful, what it says—and it makes this moral statement when it punishes—must be appropriate to the offense and, therefore, to what has been offended. If human life is to be held in awe, the law forbidding the taking of it must be held in awe; and the only way it can be made awful or awe inspiring is to entitle it to inflict the penalty of death.[36]

Faced with the clear public acceptance of the death penalty as just punishment in this country, abolitionists frequently retreat to the claim that other parts of the world condemn the penalty. Bedau, for example, notes that "opponents of the death penalty are cheered by the knowledge that the rest of the civilized world openly and increasingly condemns our death penalty practices."[37]

In our post-modern age, where many academics denounce the "alleged" superiority of "western civilization," the use of the term "civilized" seems almost quaint. It would be interesting, for example, to see how many death penalty abolitionists would employ this term in other contexts to describe such countries as Japan, Thailand, and China, all of whom retain the death penalty. But it is true that Canada and the Western European countries do not authorize the ultimate sanction. Is this because, as the abolitionists would have it, a moral consensus exists against the penalty?

In fact, the death penalty is abolished in these countries primarily because these countries are *less democratic* than we are.[38] Canadians are evenly split on the death penalty, while in Britain, a majority of the public supports the death penalty.[39] In France, a majority of the population backed capital punishment long after it was abolished in 1981. And even in Italy, where the Colosseum is bathed in light whenever a death sentence is commuted, a sizeable percentage of the population supports the death penalty. Liberal columnist Joshua Marshall nicely summarized things recently:

> Basically, then, Europe doesn't have the death penalty because its political systems are less democratic, or at least more insulated from populists' impulses, than the U.S. government.[40]

Administrative Objections

Because their general objections to death penalty have found so little support, abolitionists have largely abandoned these claims. Even if the death penalty is justified in principle, they maintain, in practice it is unfairly administered. The collection of essays in *Debating the Death Penalty* are typical of the modern debate. Three of the four abolitionist chapters (by Ryan, Bright, and Stevenson) rest almost exclusively on administrative challenges to the penalty.

The abolitionists most frequently raise three particular administrative challenges to the death penalty: first, that it is infected with racism; second, that innocent persons have been executed; and finally, that capital defendants do not receive effective assistance of legal counsel. This section explains why each of these objections cannot justify nationwide abolition of the penalty. But before turning to the details of these objections, an opening observation is in order.

No responsible supporter of the death penalty holds any brief for inadequate defense attorneys, racist prosecutors, or inattentive judges. If problems arise in a particular case, they should be corrected. And indeed, in many of the cases cited by the abolitionists, the problems in particular cases were in fact corrected. The issue, however, is whether such problems are sufficiently widespread to justify completely depriving the federal government and 38 states of the option of imposing a

capital sentence on a justly convicted offender. These are global questions that cannot be resolved by reciting isolated instances of abuse in a single jurisdiction (e.g., Alabama, where Bryan Stephenson conducts most of his work or Illinois where Governor Ryan conducted a review.) Rather, these questions are appropriately resolved by examining the data about the system as a whole. With the big picture in view, it is clear that the administrative objections provide no grounds for abolishing capital punishment.

Racism

Capital punishment in America is racist, its opponents claim. The arguments about racism come in two forms: a "mass market" version and a "specialist" form.[41] Both versions are seriously flawed.

In the "mass market" version, we are told that the death penalty discriminates against African American defendants. For instance, the Reverend Jesse Jackson, in his book *Legal Lynching*, argues that

> [n]umerous researchers have shown conclusively that African American defendants are far more likely to receive the death penalty than are white defendants charged with the same crime.[42]

The support for this claim is said to be the undisputed fact that, when compared to their percentage in the overall population, African Americans are over-represented on death row. For example, while 12 percent of the population is African American, about 43 percent of death row inmates are African American, and 38 percent of prisoners executed since 1977 are African American.[43]

Such simple statistics of over-representation fail to prove racial bias. The relevant population for comparison is not the general population, but rather the population of murderers. If the death penalty is administered without regard to race, the percentage of African American death row inmates found at the end of the process should not exceed the percentage of African American defendants charged with murder at the beginning. The available statistics indicate that is precisely what happens. The Department of Justice found that while African Americans constituted 48 percent of adults charged with homicide, they were only 42 percent of those admitted to prison under sentence of death.[44] In other words, once arrested for murder, blacks are actually less likely to receive a capital sentence than are whites.

Critics of this data might argue that police may be more likely to charge African Americans than whites with murder at the outset of the process. The data does not support this. One way of investigating this claim is to analyze crime victim reports of the race of those who have committed crimes against them. While it is obviously impossible to talk to murder victims, it is possible talk to victims of armed robberies, who are reasonable surrogates. When victims' reports of armed robbery cases are compared with the criminal justice processing of those cases, there is no evidence of racial discrimination in charging decisions.[45]

The over-representation of African Americans on death row to which Jackson refers is, indisputably, of great public concern. Policy makers must certainly examine the causes of that over-representation—for example, differences in economic or educational opportunities—and address them. But given such societal factors, racial bias cannot be inferred from such simplistic calculations.

To confirm or dispel concern about black defendants being singled out for the death penalty, one must conduct more sophisticated social science research. Various researchers (often of an abolitionist bent) have set out to prove such racial discrimination. They have been disappointed. The studies of the post-*Furman* death penalty in America have generally found that African American defendants are not more likely to receive the death penalty. Summarizing all the data in 1990, the General Accounting Office concluded that evidence that blacks were discriminated against was "equivocal."[46] Similarly, in a comprehensive study Professor Baldus and his colleagues reported that "regardless of the methodology used," studies show "no systematic race-of-defendant" effect.[47]

This ought to be treated as good news of progress in the American criminal justice system. One could draw the following conclusion—that, while African American defendants in capital cases were previously treated unfairly (especially in the South), modern statistics reveal considerable progress. This conclusion, of course, is anathema to the agenda of abolitionists. Thus, when pressed by someone who is familiar with the social science data finding no discrimination against African American offenders, more sophisticated abolitionists often abandon the mass market version of their racism argument and shift to the specialist version. Abolitionist Bryan Stevenson argues that data demonstrates the existence of "racial bias in Georgia's use of the death penalty," by which he means statistics suggesting that blacks who kill whites are more likely to receive a death penalty than are other victim/offender combinations.[48]

These specialist statistics are no less misleading than the mass market statistics. But before turning to them, it is important to note the implications of this retreat to a race-of-the-victim claim. It seems implausible, to say the least, that a racist criminal justice system would look past minority defendants and discriminate solely on the more attenuated basis of the race of their victims. If racists are running the system, why would they not just discriminate directly against minority defendants?

In any event, the race-of-the-victim claim cannot withstand close scrutiny. Of necessity, a race-of-the-victim claim involves comparison: i.e., comparing the facts of comparable cases in

different victim and offender combinations to see whether unexplainable disparities emerge. Thus, the anecdotes tell us little—the question belongs in the realm of statistical analysis.

Statisticians Stanley Rothman and Stephen Powers have offered the best review of the relevant data.[49] As they explain, the vast majority of homicides (no less than other offenses) are intra-racial: about 95 percent do not cross racial lines. The small minority of inter-racial homicides have vastly different characteristics. Black-on-black homicides and white-on-white homicides are most likely to occur during altercations between persons who know one another, circumstances often viewed as inappropriate for the death penalty. On the other hand, black-on-white homicides are much more often committed during the course of a serious felony, a classic case for the death penalty. For example, in Georgia, only seven percent of the black-defendant-kills-black-victim cases involve armed robbery; compared to 67 percent of the black-defendant-kills-white-victim cases. Similarly, black-defendant-kills-white-victim cases more often involve the murder of a law enforcement officer, kidnapping and rape, mutilation, execution-style killing, and torture—all quintessential aggravating factors—than do other combinations. Finally, white-defendant-kills-black-victim cases are so rare that it is difficult to draw meaningful statistical conclusions.

Given these obvious differences between, on the one hand, intra-racial homicides and, on the other, black-on-white homicides, the simple comparisons of the percent of death sentences within each classification reported in this volume by both Stephenson and Bright is un-illuminating. To put the point in more precise statistical terms, an alleged race-of-the-victim effect will be an obvious "spurious" correlation. To cite but one example, a significant number of death penalty cases involve murder of law enforcement officers, about 85 percent of whom are white. Unless there are statistical controls for this fact, it is virtually certain that a simple eyeballing of statistics will show a race-of-the-victim effect that is instead immediately explainable by this fact (among many others).

The issue of spurious correlations and the alleged race-of-the-victim effect was put on trial in 1984 in the Federal District Court for the Northern District of Georgia before District Court Judge J. Owen Forrester. Judge Forrester took testimony from Baldus and other statisticians who purported to have identified a genuine race-of-the-victim effect in Georgia. In an opinion that spans 65 pages in the *Federal Reporter*, Forrester squarely rejected the claim. Forrester first observed that Baldus found no race-of-the-*defendant* effect—that is, black defendants were not directly discriminated against. With respect to the race-of-the-*victim*, only his "summary" models (i.e., models including just a few control variables) purported to demonstrate the effect. The effect, in fact, disappeared entirely as additional control variable were added. When Baldus ran his regression equations with all of the 430 control variables for which he had collected data, no statistically significant evidence of discrimination remained. Forrester accordingly held:

> The best models which Baldus was able to devise which account to any significant degree for the major non-racial variables … produce no statistically significant evidence that races play a part in either [the prosecution's or the jury's capital decisions].[50]

Forrester's carefully reasoned and detailed opinion should have put an end to race of the victim claims. It is, after all, the only review of the claim by a neutral decision maker. Moreover, Forrester's findings about the Baldus study—that a purported race of the victim effect in "summary" models gradually disappears as more control variables are added into the equations—apply equally to the other race-of-the-victim studies. Without exception, the studies purporting to demonstrate a race-of-the-victim effect control for only a few relevant variables (nowhere approaching the 430 variables ultimately analyzed by Forrester), producing a spurious correlation rather than any casual connection. But abolitionists never discuss his findings. Instead, they refer to the later United States Supreme Court decision reviewing Forrester's opinion. The Supreme Court, perhaps unwilling to dive into the statistical subtleties of multiple regression analysis, decided to proceed on the "assumption" that the Baldus race-of-the-victim figures were *factually* accurate. The Court found that the figures were nonetheless *legally* insufficient to establish cognizable claim of discrimination.[51] Because it proceeded on this assumption, the Supreme Court could affirm Judge Forrester without needing to reach the statistical question of whether a race-of-the-victim effect actually existed. But Forrester's opinion might well serve an emblematic example of abolitionist claims—when put to the test before a fair-minded observer, they cannot withstand scrutiny.

Perhaps the most successful rhetorical attack on the death penalty has been the claim that innocent persons have been convicted of, and even executed for, capital offenses. The claim about innocents being executed is a relatively new one for abolitionists. Nowhere is this rhetorical shift better exemplified than in the writings by Bedau. In 1971, Bedau took the position that it is,

> false sentimentality to argue that the death penalty ought to be abolished because of the abstract possibility that an innocent person might be executed, when the record fails to disclose that such cases occur.[52]

Now, however, Bedau apparently takes the view that such cases happen frequently enough that capital punishment must be abolished in this country. More generally, the claim that inno-

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cents have actually been executed has been repeated by abolitionists so often that it has been something of an urban legend. But (like other abolitionist arguments) the claim does hold up under scrutiny.

The claim that innocent defendants have been executed was most notably advanced in a 1987 article by Bedau and his co-author, Michael Radelet.[53] In their widely cited article, they claimed that 23 innocent persons had been executed in this country in this century.

Of course, the immediate question that springs to mind is how precisely did Bedau and Radelet determine the "innocence" of these executed persons. Stephen Markman (then an Assistant Attorney General in the Justice Department and currently a Justice on the Michigan Supreme Court) and I began looking carefully at the 23 cases and published our response in the 1988 *Stanford Law Review*.[54] We found that most of the cases came from the early part of this century, long before the adoption of the extensive contemporary system of safeguards in the death penalty's administration. Moreover, Bedau and Radelet could cite but a single allegedly erroneous execution during the past 30 years—that of James Adams, convicted in 1974. A dispassionate review of the facts of that case demonstrates, however, that Adams was unquestionably guilty. To find Adams "innocent," Bedau and Radelet ignored such compelling evidence of guilt as money stained in blood matching that of the victim found in Adams' possession and the victim's eyeglasses found in the locked trunk of his car. A full recitation of the evidence against Adams is set out in a footnote,[55] but the compelling evidence of guilt raises the question of how Bedau and Radelet wound up making so many mistakes in their analysis of the case? Perhaps the reason is the source that they used. The *only* source cited in their article is Adams's Petition for Executive Clemency, a document written by his defense lawyers. An objective review of the claims by the Florida Clemency Board found the petition to be without merit, a finding Bedau and Radelet do not discuss. In short, James Adams was a murderer and was justly convicted.[56]

Bedau and Radelet's other alleged instances of "innocent" persons executed in earlier parts of this century are equally questionable. In our 1988 article, we reviewed all 11 cases of alleged executions of innocent people in which appellate opinions set forth facts proved at trial in detail sufficient to permit a neutral observer to assess the validity of Bedau and Radelet's claims, including all of the cases since 1940. While a full review of all of those cases would unduly extend this article, a few highlights will suffice to make the point. [57]

To prove the "innocence" of one defendant, Everett Appelgate who was executed for murdering his wife with rat poison in 1932, Bedau and Radelet cited two sources; those sources in fact actually believed that Appelgate was guilty.[58] In another case, that of defendant Sie Dawson, the authors stated, falsely, that there were no eyewitnesses to the crime. In fact, there was an eyewitness: the victim's four-year-old son, Donnie, who had been beaten and left to die at the scene of the crime. When found a day later, Donnie told his father, the police chief, and a family friend that Sie Dawson had committed the murder with a hammer.[59] As another example, Bedau and Radelet cite a book to prove generally the innocence of Charles Louis Tucker, executed in Massachusetts in 1906 for stabbing a young girl to death during a robbery. The book actually says that the governor's rejection of Tucker's clemency petition was "conscientious and admirable."[60]

Finally, my favorite example of Bedau and Radelet's research comes from my home state of Utah and involves one of their sources cited "generally" to prove that Joseph Hillstrom was innocent. That source was a book published by Wallace Stegner entitled *Joe Hill: A Biographical Novel*. The foreword explained that the book "is fiction, with fiction's prerogatives and none of history's limiting obligations. … Joe Hill as he appears here—let me repeat it—is an act of the imagination." While citing a work of fiction is bad enough, even more startling is the fact that the novel strongly suggests that its protagonist, Joe Hill, is in fact a guilty murderer! This is not surprising, since Wallace Stegner published two magazine articles in which he gave his view that the real-life Joseph Hillstrom was a killer.[61]

The questionable examples in the Bedau-Radelet article make an important point about the debate over mistaken executions. It is easy for opponents of the death penalty to allege, despite a unanimous jury verdict, appellate court review, and denial of executive clemency, that an "innocent" person has been executed. Such an assertion costs nothing and will help abolitionists advance their cause. As this review demonstrates, such claims should be reviewed with a healthy dose of skepticism.

While abolitionists have been unable to find a credible case of an innocent person who has actually been executed in recent years, they have provided several credible "close call" cases—that is, examples of innocent persons who were sentenced to death who were exonerated shortly before the execution. Such miscarriages of justice are, to be sure, very troubling. These cases deserve careful study to determine what went wrong and what kinds of reforms can correct the problem. But when offered as justification for abolishing the death penalty, these close call cases are unpersuasive.

To justify abolishing the death penalty on grounds of risk to the innocent, abolitionists would have to establish that innocent persons are jeopardized more by the retention of the death penalty than from its absence. In fact, the balance of risk tips decisively in favor of retaining the death penalty. On the one hand, abolitionists have been unable to demonstrate that even a single innocent person has been executed in error. On the other hand, there are numerous documented cases of innocent persons who have died because of our society's failure to carry out death sentences. Earlier in this text, for example, I discussed the deaths of Colleen Reed and many other women because of society's failure to execute a single dangerous murderer—Kenneth Allen McDuff. The victims of McDuff were no "close calls" but rather fatalities directly resulting from abolition of the death penalty in 1972. Today, thousands of killers no less dangerous than McDuff are currently incarcerated on the nation's death rows. If they are not executed, they will remain serious threats to kill again—either inside prison walls or outside following an escape or a parole. Clearly, on any realistic assessment, the innocent are far more at risk from allowing these dangerous convicts to live than from executing them after a full and careful review of their legal claims.

Effective Representation of Counsel

A last attack on the death penalty concerns the quality of counsel appointed to represent indigent defendants charged with capital offenses. Abolitionists argue that inexperienced and even incompetent counsel is routinely appointed in capital cases. Abolitionist Stephen Bright argues that the death penalty is imposed "not upon those who commit the worst crimes, but upon those who have the misfortune to be assigned the worst lawyers."[62] Citing various anecdotal examples of ineffective assistance of counsel, Bright concludes that the death penalty ought to be abolished.

The conclusion does not follow from the factual premises. Ineffective assistance of counsel in a particular case calls for reversal of the conviction—something already required by Supreme Court precedents.[63] But to make a persuasive argument for completely abolishing capital punishment, the abolitionists would need to demonstrate that defendants in capital cases are represented by inadequate counsel (1) frequently, (2) throughout the United States, and (3) under current appointment procedures. The abolitionists cannot begin to make such a showing on any of these three points.

For starters, the abolitionists do not show the ineffectiveness is widespread. Instead, their inevitable tactic is to recite various anecdotal examples of defense ineffectiveness. The reader should assess those few examples against the backdrop of about 3,500 persons currently on death row[64]—all of whom have had, or will soon have, their cases reviewed by appellate courts to ensure that their trial counsel was effective. The abolitionists never explain why a handful of anecdotes justify setting aside literally thousands of capital sentences.

The abolitionists also fail to justify abolition through the United States. It is hard to understand, for example, why my home state of Utah should have its capital sentencing statute invalidated because of concerns over the quality of appointed counsel in, say, Alabama. Utah has a carefully developed procedure for appointing counsel in capital cases. The court must appoint at least two attorneys for the accused. At least one of the attorneys must meet stringent requirements for experience in criminal cases generally and capital cases in particular. The court is further required to make specific findings about the capabilities of the lawyers to handle a capital defense.[65] These new procedures have worked well to ensure high quality representation for capital defendants in Utah. Indeed, the only vocal complaints have come from county treasurers who complain about the sizeable cost of hiring defense lawyers from the small pool that meets the stringent certification requirements. In Utah, payments to defense attorneys in capital cases often exceed $100,000.[66] Josh Marquis has made a sim-

ilar point about his state of Oregon.[67]

Indeed, in another striking example of a mismatch between their evidence and their claims, the abolitionists seek to strike not merely 38 state statutes authorizing capital punishment, but also numerous federal statutes. Current federal law authorizes death penalties for such extremely serious offenses as terrorist bombings, espionage involving the nation's nuclear weapon systems, treason, and assassination of the President or members of Congress. In a death penalty case, federal law requires appointment of extremely well-qualified counsel and provides them with seemingly unlimited resources. The federal government spent in excess of $13.8 million to pay for attorneys and cover other costs of McVeigh's defense until his execution.[68] Yet even with what may have been the most expensive defense in the history of the world, McVeigh was sentenced to death and ultimately executed—disproving Bright's claim here that the ultimate penalty falls only on those who have "the misfortune to be assigned the worst lawyers." To be sure, McVeigh's case was the most costly in federal history, but defendants faced with death in the federal system receive generous financial support, with payments well in excess of $100,000 commonplace. The abolitionists offer no explanation as to why these federal provisions fail to assure effective representation.

The evidence of inadequacy of counsel suffers another serious flaw—it is grossly outdated. It is striking how many of the examples are more than 10 and even 20 years old. Perhaps such timeworn anecdotes would be instructive if attorney appointment procedures had remained the same. They have not. In recent years, nearly all of the states authorizing capital punishment have created specific competency standards for appointed counsel.[69] Most of those standards exceed the exacting qualifications that Congress required for appointment of counsel in federal cases.[70]

Recent reforms in the leading death penalty state of Texas will serve to illustrate the point. In 1995, Texas created local selection committees to handle appointment of counsel in capital cases and set a variety of competence standards for capital defense attorneys.[71] As part of the continuing effort to monitor defense counsel in capital cases, in 2001, Texas established a Task Force on Indigent Defense to develop further standards and policies for the appointment of defense counsel.[72]

Illinois provides another illustration. Governor Ryan's remarks in commuting previously imposed death sentences obscured (perhaps by design) the extent to which significant recent reforms have been made. For example, in 2001, the Illinois Supreme Court established a Capital Litigation Trial Bar that set demanding standards for attorneys representing capital defendants. It required that indigent defendants be appointed two attorneys, and that prosecutors give notification of their intent to seek the death penalty no later than 120 days after arraignment in order to give the defense more time to prepare. After putting these new rules into effect, the high court emphasized that it would continue to monitor closely all death penalty cases, and add additional reforms as appropriate.

These recent reforms make one last point about questions of adequacy of counsel: any deficiencies are not inherent in the death penalty. The abolitionists have chosen not even to discuss the recent changes in Texas, Illinois, and elsewhere. Instead, they engage in little more than rhetorical posturing. That is disappointing because it would be informative to hear suggestions from experienced capital defense attorneys like Bryan Stephen and Stephen Bright as to how the latest wave of improvements could be further improved. But the abolitionists apparently have little interest in incremental progress in the capital punishment system. Indeed, Hugo Bedau forthrightly reports in his essay that it is "troubling" to abolitionists that reforms "might succeed," thereby giving "an even more convincing seal of approval to whatever death sentences and executions were imposed under their aegis."[73] Abolitionists are certainly entitled to single-mindedly pursue their attack on the death penalty. But without squarely addressing the recent reforms made (for example) in providing counsel to capital defendants, their arguments for abolition will remain unconvincing.

Within this text, I have tried to briefly, but comprehensively, present the arguments for the death penalty, and respond to the claims lodged against it. In closing, it may be appropriate to step back from the specifics of the fray and look at the debate as a whole.

Those of us who support the death penalty do not pretend to have clairvoyant vision. Instead, we recognize that decisions about the death penalty, no less than many other social policies, must be made on the basis of imperfect information. At the same time, however, we recognize the extreme importance of the social choices that are being made. We understand that human lives are held in the balance whenever death penalty decisions are made—whether the decision is to impose the penalty on a defendant who might later prove to be innocent, or withhold it from a defendant who might later kill again or serve as a deterrent example. It is because of the value that we place on innocent human life that we find the choice an agonizing one. In *Debating the Death Penalty*, for example, both Judge Alex Kozinski and District Attorney Joshua Marquis have talked openly about the conflicts that they experience in handling death penalty cases.

In contrast, those opposed to capital punishment have a surety that we find surprising. Abolitionists are certain that the death penalty does not deter—indeed, that it has not ever deterred anyone, anywhere, at any time. They are certain that it has never incapacitated anyone and prevented a subsequent killing. Finally, they are certain that it is not just punishment,

(Continued on page 26)

(Continued from page 23)

despite the contrary views of the majority of the fellow citizens in this country (and in many others).

In probing this confidence, I have asked abolitionists, assuming for a moment that the death penalty deters, whether they would nonetheless continue to oppose it. They refused to answer what they viewed as a speculative question. Bedau, however, has given a straightforward response on other occasions. As Louis Pojman points out in his article in *Debating the Death Penalty*, Bedau has frankly stated that he would oppose capital punishment even if it decreased the homicide rate by 100 percent.[74] Most abolitionists probably hold the same view, but are unwilling to admit it quite so forthrightly. This difference is, perhaps, the starkest contrast between the abolitionists and the penalty's supporters. Those of us who support the death penalty find the anguish and destruction resulting from any murder too much to tolerate. We could never dream of society standing by while the homicide rate unnecessarily rose even one percent, let alone 100 percent. We know that behind the homicide "rate" are flesh and blood individuals, like Colleen Reed described earlier in this text.

We are confident of only one thing: that society must do everything reasonably within its power to prevent such tragedies. To be sure, the benefits of the death penalty are not always certain. But we are unwilling to risk innocent lives on the speculative chance that the death penalty will turn out not to deter and not to incapacitate. The last time abolitionists succeeded in invalidating capital punishment in this country, they released brutal murderers to kill again—ultimately causing the deaths of Colleen Reed and many others. That was too high a price then. It is too a high price now.

ENDNOTES

1 With apologies for borrowing a metaphor from Bernard Weisberg, *Police Interrogation of Arrested Persons: A Skeptical View* (1961) 52 Journal of Criminal Law, Criminology & Police Science (Northwestern University) 1, pp. 21–46.

2 *See generally* Stewart, No Remorse (Pinnacle 1996); *McDuff v. State* (Tex.Ct.Crim.App. 1997) 939 S.W.2d 607.

3 Kozinsky, *Tinkering with Death*, New Yorker (Feb. 10, 1997) p. 49, reprinted in Bedau & Cassell, Debating the Death Penalty: Should America Have Capital Punishment? The Experts from Both Sides Make Their Case (Oxford Univ. Press 2004).

4 Bedau & Cassell, *supra*, note 3 at 15.

5 *Id.* at 76.

6 *Id.* at 152.

7 *Gregg v. Georgia* (1976) 428 U.S. 153.

8 Jones, *Plurality of Americans Believe Death Penalty Not Imposed Often Enough*, Gallup News Service (Mar. 12, 2003), available at *http://www.gallup.com/poll/7984/Plurality-Americans-Believe-Death-Penalty-Imposed-Often-Enough.aspx* (last visited May 7, 2008).

9 Jones, *Vast Majority of Americans Think McVeigh Should Be Executed*, Gallup News Service (May 2, 2001), available at *http://www.gallup.com/poll/1567/Vast-Majority-Americans-Think-McVeigh-Should-Executed.aspx* (last visited May 7, 2008).

10 Bedau & Cassell, *supra*, note 3 at 218.

11 In writing this text, I am in debt to the very interesting Web site maintained by Dudley Sharp of Justice for All, a Texas-based crime victims' organization, available at *http://www.prodeathpenalty.com* (last visited May 7, 2008).

12 Memorandum from Lawrence A. Greenfeld to Steven R. Schlesinger 2 (Dec. 18, 1985). The numbers do not appear to have been updated recently, but there is no reason to think that the current statistics would be any different.

13 Bedau & Cassell, *supra*, note 3 at 15.

14 Wilson, Thinking About Crime (Random House rev. ed. 1983) p. 121.

15 *Gregg v. Georgia* (1976) 428 U.S. 153, 186 (plur. opn.).

16 141 Cong. Rec. S7662 (June 5, 1995). Senator Feinstein served as a member of the California Womens Parole Board in the 1960s.

17 Report of the Royal Commission on Capital Punishment 1949–53, at 375 in (1952) 7 Reports of Commissioners, Inspectors, and Others 677.

18 Frank Carrington, Neither Cruel Nor Unusual (Crown Publishers 1978) p. 96.

19 *Id.* at p. 99.

20 Debate among Paul Cassell, Alan Dershowitz, and Wendy Kamenar on the death penalty (Harvard Law School, Mar. 22, 1995).

21 Weld & Cassell, Report to the Deputy Attorney General on Capital Punishment and the Sentencing Commission (Feb. 13, 1987) at p. 28.

22 Hearings Before the Senate Subcommittee on Criminal Law, Prison Violence and Capital Punishment (Nov. 9, 1983) p. 3, available at *http://www.ncjrs.gov/App/publications/Abstract.aspx?id=94535* (last visited May 7, 2008).

23 The research in this section is current only to 2002. For an updated research on deterrence, please see: Adler, Saving Innocent Lives through Capital Punishment: The Evidence for Deterrence, 2 IACJ Journal 67.

24 Bedau & Cassell, *supra*, note 3 at 152.

25 *See generally* Cassell & Fowles, *Handcuffing the Cops? A Thirty-Year Perspective on Miranda's Harmful Effects on Law Enforcement* (1998) 50 Stan. L.Rev. 1055, 1074–1082 (collecting variables that effect criminal justice systems).

26 This data and my discussion of them draw heavily on the excellent report and accompanying charts prepared by Senator Hatch. See Sen. Rep. No. 107-315, The Innocence Protection Act of 2002, 107th Cong., 2d Sess. 89 (Oct. 16, 2002) (views of Senator Hatch), available at *http://www.congress.gov/cgi-bin/cpquery/?sel=DOC&&item=&r_n=sr315.107&&&sid=cp107PTnCb&&refer=&&&db_id=cp107&&hd_count=&* (last visited May 7, 2008) (hereinafter Hatch Report).

27 Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data* (Fall 2003) 5 American Law & Economics Review 2, pp. 344–376, available at *http://www.cjlf.org/deathenalty/DezRubShepDeterFinal.pdf* (last visited May 7, 2008).

28 Mocan & Kittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment* (Oct. 2003) 46 Journal of Law and Economics 2, pp. 453–478, available at *http://econ.cudenver.edu/mocan/papers/GettingOffDeathRow.pdf* (last visited May 7, 2008).

29 Zimmerman, *State Executions, Deterrence, and the Incidence of Murder* is available at *http://papers.ssrn.com/sol3/papers.cfm?abstract_id=354680* (last visited May 7, 2008).

30 Cloninger & Marchesini, *Execution and Deterrence: A Quasi-Controlled Group Experiment* (2001) 33 Applied Economics 596.

31 Cloninger, *Scientific Data Support Executions' Effect,* Wall Street Journal (June 27, 2002) p. A21.

32 Cloninger & Marchesini, *supra*, note 30.

33 Bedau & Cassell, *supra*, note 3 at 15.

34 Kant, The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right, William Hastie, translator (T. & T. Clark 1887)

35 *Richmond Newspapers, Inc. v. Virginia* (1980) 448 U.S. 555, 571.

36 Berns, *Defending the Death Penalty* (1980) 26 Crime & Delinquency 503, 509.

37 Bedau & Cassell, *supra*, note 3 at 15.

[38] This argument is developed in Marshall, *Death in Venice: Europe Death-Penalty Elitism*, The New Republic (July 31, 2002) p. 14.

[39] Welch, *Support for the Death Penalty: U.S., Britain, Canada*, Gallup Poll (March 16, 2004), available at *http://www.gallup.com/poll/11005/Support-Death-Penalty-US-Britain-Canada.aspx* (last visited May 7, 2008).

[40] Marshall, *supra*, note 38 at 14.

[41] *See* McAdams, *Racial Disparity and the Death Penalty* (1998) 61 Law and Contemporary Problems 153.

[42] Jackson, Legal Lynching: Racism, Injustice, and the Death Penalty (Marlowe 1996) p. 100.

[43] U.S. Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics 1999 (2000), tables 6.84 & 6.95, available at *http://albany.edu/sourcebook/archive.html* (last visited May 9, 2008).

[44] U.S. Dept. of Justice, Bureau of Justice Statistics, Bulletin: Capital Punishment 2005, available at *http://www.ojp.usdoj.gov/bjs/abstract/cp05.htm* (last visited May 10, 2008).

[45] Langan, *Racism on Trial: New Evidence to explain the Racial Composition of Prisons in the United States* (1985) 76 J. of Criminal Law & Criminology 666.

[46] U.S. General Accounting Office, Report: Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities (Feb. 1990).

[47] Baldus et al., Equal Justice and the Death Penalty: A Legal and Empirical Analysis (Northeastern University Press 1990) p. 254.

[48] Bedau & Cassell, *supra*, note 3 at 76.

[49] Rothman & Powers, *Execution by Quota? The Public Interest* (Summer 1994). To simplify the exposition, I will track Rothman and Powers in referring to African Americans as "blacks" in the discussion of race of the victim issues.

[50] *McCleskey v. Zant* (N.D. Ga. 1984) 580 F. Supp. 338, 368.

[51] *McCleskey v. Zant* (1991) 499 U.S. 467.

[52] Bedau, *The Death Penalty in America: Review and Forecast* (June 1971) 35 Federal Probation 32, p. 36.

[53] Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1987) 40 Stan. L.Rev. 21.

[54] Markman & Cassell, *Protecting the Innocent: A Response to the Bedau-Radalet Study* (1988) 41 Stan. L.Rev. 121.

[55] James Adams was convicted of killing then robbing a Florida rancher in 1974. Adams was executed in 1984. Bedau & Radelet claim that Adams was innocent, but do not mention the following salient facts:

- Adams was arrested shortly after the murder with money stained with blood matching the victim's;
- Adams claimed that the money was stained because of a cut on his finger, but his blood did not match the blood on the money;
- Clothes belonging to Adams were found in the locked trunk of his car stained with blood matching the victim's;
- Eyeglasses belonging to the victim were also found in the locked trunk of Adams's car;
- Adams told the police when arrested that the clothing and eyeglasses found in his trunk were his, but at trial, he changed his story and denied owning any of the items;
- A witness, John Tompkins, saw Adams driving his car to and from the victim's house at the time of the murder;
- Another witness saw Adams's car parked at the victim's house at the time of the murder;
- A few hours after the murder, Adams took his brown car to an auto shop and asked that it be painted a different color; and
- Adams' principal alibi witness contradicted him on the critical issue of his whereabouts at the time of the crime.

While ignoring all of this evidence, Bedau & Radelet offer the following to "prove" Adams's innocence:

- A witness who identified Adams's car leaving the scene of the crime was allegedly mad at Adams—but Bedau and Radelet do not mention that three other witnesses also saw Adams at or near the scene of the crime;
- A voice that sounded like a woman's was heard at the time of the murder—but the trial transcript reveals that this was the strangled voice of the victim pleading for mercy; and
- A hair sample was found that did not match Adams' hair—but Bedau & Radelet state inaccurately that it was found "clutched in the victim's hand," when in fact it was a remnant of a sweeping of the ambulance and could have come from any of a number of sources.

[56] A full review of the Adams case, including citations to the original trial transcript and other court documents is found in Markman & Cassell, *supra*, note 54 at 128–133, 148–150.

[57] *Id*. at 133–145.

[58] *Compare* Bedau & Radelet, *supra*, note 53 at 92 with Kilgallen, *Murder One* (Random House 1967) 190–191, 230 (Appelgate "very nearly got away" with the murder) and Lawes, Meet the Murderer! (Harper 1940) 334–335 ("Frankly, I do not doubt the culpability" of Appelgate).

[59] *Compare* Bedau & Radelet, *supra*, note 53 at 109 with *Dawson v. State* (Fla. 1962) 139 So. 2d 408, 412; St. Petersburg Times (Sept. 24, 1977) p. 12A, col. 1 and Markman & Cassell, *supra*, note 50 at 136. Interestingly, Bedau himself indicated in 1982 that the Dawson case "remain[ed] in the limbo of uncertainty" because "[t]he original news story [regarding Dawson's supposed innocence] merely reported allegations and was inconclusive; no subsequent inquiry known to me has established whether Dawson was really innocent." Bedau, *Miscarriages of Justice and the Death Penalty*, in The Death Penalty in America (Oxford University Press 1982) 236–237 (citing to the same sources later cited in the *Stanford Law Review* as somehow "proving" Dawson's innocence).

[60] *Compare* Bedau & Radelet, *supra*, note 53 at 164 with Edmund Pearson, Masterpieces of Murder (Little, Brown 1963) 171; Markman & Cassell, supra, note 54 at 143.

[61] *Compare* Bedau & Radelet, *supra*, note 53 at 126 with Wallace Stegner, Joe Hill: A Biographical Novel (Doubleday 1969) 13–14; Stegner, *Joe Hill: The Wobblies Troubadour*, New Republic (Jan. 5, 1948), p. 20; Stegner, *Correspondence: Joe Hill* (Feb. 9, 1948) New Republic 38–39. See also Markman & Cassell, *supra*, fn. 54 at 138–139.

[62] Bedau & Cassell, *supra*, note 3 at 152.

[63] *Strickland v. Washington* (1984) 466 U.S. 668.

[64] U.S. Dept. of Commerce, Statistical Abstract of the United States 205 (2002).

[65] Utah Rules of Criminal Procedure, Rule 8(b).

[66] *Inmate Legal Fees Could Deplete Sanpete Coffers,* Salt Lake Tribune (Aug. 16, 1994), p. A1.

[67] Bedau & Cassell, *supra, note 3 at 117.*

[68] *Defending McVeigh*, The Journal Record (Oklahoma City) (July 2, 2001).

[69] Herman, Indigent Defense & Capital Representation (National Center for State Courts, No. IS01-0407, July 17, 2001), available at *www.ncsconline.org/WC/Publications/KIS_IndDefMemoPub.pdf* (last visited May 10, 2008).

[70] *See* Hatch Report, *supra*, note 26.

[71] Tex. Crim. Proc. Rule 26.052.

[72] Tex. Gov. Code Ann. 71.060.

[73] Bedau & Cassell, *supra*, note 3 at 15.

[74] *Id*. at 71 (citing correspondence from Bedau, among other sources).