Annu. Rev. Sociol. 2000. 26:43–61

THE CHANGING NATURE OF DEATH PENALTY DEBATES

Michael L. Radelet and Marian J. Borg
Department of Sociology, University of Florida, Gainesville, Florida 32611-7330; e-mail: radelet@soc.ufl.edu; mborg@soc.ufl.edu

Key Words capital punishment, public opinion, deterrence, retribution, social science research

■ **Abstract** Focusing on the last 25 years of debate, this paper examines the changing nature of death penalty arguments in six specific areas: deterrence, incapacitation, caprice and bias, cost, innocence, and retribution. After reviewing recent changes in public opinion regarding the death penalty, we review the findings of social science research pertinent to each of these issues. Our analysis suggests that social science scholarship is changing the way Americans debate the death penalty. Particularly when viewed within a historical and world-wide context, these changes suggest a gradual movement toward the eventual abolition of capital punishment in America.

INTRODUCTION

In a monumental 1972 decision by the US Supreme Court, all but a few death penalty statutes in the United States were declared unconstitutional (*Furman v. Georgia*, 408 US 238). Consequentially, each of the 630 or so inmates then on America's death rows was resentenced to life imprisonment. The nine opinions in the case, decided by a 5–4 vote, remain the longest ever written by the Supreme Court. Four years later, defying predictions that the United States would never again witness executions (Meltsner 1973:290–92), the Supreme Court reversed its course toward abolition by approving several newly enacted capital statutes (*Gregg v. Georgia*, 428 US 153). By mid-1999 there were some 3500 men and 50 women (including 65 juveniles whose capital offenses predated their eighteenth birthdays) on death rows in 38 states and two federal jurisdictions (NAACP Legal Defense Fund 1999). Another 550 death row inmates had been executed in the two preceding decades (Death Penalty Information Center 1999).

The goal of this paper is to review recent social science research that has examined various dimensions of capital punishment. We organize this review by examining how the public debate on the death penalty in the United States has changed over the past quarter century. We attempt to show that arguments supporting the

0732-0582/00/0815-0043$14.00

death penalty today, compared to 25 years ago, rely less on such issues as deterrence, cost, and religious principles, and more on grounds of retribution. In addition, those who support the death penalty are more likely today than in years past to acknowledge the inevitability of racial and class bias in death sentencing, as well as the inevitability of executing the innocent. We suggest that many of these arguments have changed because of social science research and that the changing nature of the death penalty debate in this country is part of a worldwide historical trend toward abolition of capital punishment.

Public opinion on the death penalty in America over the past 50 years has vacillated. Support decreased through the 1950s and until 1966, when only 47% of the American public voiced support; since 1982 about three quarters of the population has favored capital punishment (Ellsworth & Gross 1994). While it remains accurate to say that the vast majority of the American public supports the death penalty, at least under some circumstances, it is also true that support for the death penalty is highly conditional. The best data on public support for the death penalty come from Gallup Polls, and since the early 1980s these surveys have regularly found that approximately three quarters of the American population supports the death penalty. In 1991, Gallup found that 76% of Americans favored the death penalty; in 1994 support had reached 80% (Gallup & Newport 1991:44, Gillespie 1999).

More recent data indicate that public approval for the death penalty has peaked, and even decreased a bit in recent years. By 1999, support for capital punishment had dropped to 71% (Gillespie 1999). State polls in California, Texas, and Florida—the states with the highest number of prisoners on their death rows—further suggest that death penalty support has peaked. In California, a 1997 Field Poll found that support for the death penalty had dropped to 74% from a 1985 peak of 83% (Kroll 1997). In Texas, a 1998 Scripps Howard Poll found that support for the death penalty stood at 68%, down 18 points since 1994 (Walt 1998). A 1998 Florida poll conducted by the New York Times Regional Newspapers also found that 68% favored the death penalty (Judd 1998); a second 1998 Florida poll done by Mason/Dixon registered support at 63% (Griffin 1998).

What accounts for these patterns? To further probe fluctuations in public opinion on the death penalty and changes in the ways that people discuss the issue, we would like to turn the clock back 25 years and examine a handful of arguments that supporters of the death penalty were making at the time.

DETERRENCE

In the early 1970s, the top argument in favor of the death penalty was general deterrence. This argument or hypothesis suggests that we must punish offenders to discourage others from committing similar offenses; we punish past offenders to send a message to potential offenders. In a broad sense, the deterrent effect of punishment is thought to be a function of three main elements: certainty, celerity,

and severity. First, people do not violate laws if they are certain that they will be caught and punished. Second, celerity refers to the elapsed time between the commission of an offense and the administration of punishment. In theory, the more quickly a punishment is carried out, the greater its deterrent effect. Third, the deterrent effect of a punishment is a function of its severity. However, over the last two decades more and more scholars and citizens have realized that the deterrent effect of a punishment is not a consistent direct effect of its severity—after a while, increases in the severity of a punishment no longer add to its deterrent benefits. In fact, increases in a punishment's severity have decreasing incremental deterrent effects, so that eventually any increase in severity will no longer matter. If one wishes to deter another from leaning on a stove, medium heat works just as well as high heat.

Writing in a special issue of the *Annals of the American Academy of Political and Social Science* devoted to the death penalty in 1952, criminologist Robert Caldwell asserted, "The most frequently advanced and widely accepted argument in favor of the death penalty is that the threat of its infliction deters people from committing capital offenses" (Caldwell 1952:50–51). Scores of researchers, including such eminent criminologists as Edward Sutherland (1925) and Thorsten Sellin (1959), have examined the possibility that the death penalty has a greater deterrent effect on homicide rates than long-term imprisonment (see reviews in Bailey & Peterson 1997, Bohm 1999, Hood 1996:180–212, Paternoster 1991:217–45, Peterson & Bailey 1998, Zimring & Hawkins 1986:176–86). While some econometric studies have claimed to find deterrent effects (e.g., Ehrlich 1975), these studies have been sharply criticized (e.g., Klein et al 1978). Overall, the vast majority of deterrence studies have failed to support the hypothesis that the death penalty is a more effective deterrent to criminal homicides than long imprisonment. As two of this country's most experienced deterrence researchers conclude after their review of recent scholarship, "The available evidence remains 'clear and abundant' that, as practiced in the United States, capital punishment is not more effective than imprisonment in deterring murder" (Bailey & Peterson 1997:155).

There is widespread agreement among both criminologists and law enforcement officials that capital punishment has little curbing effect on homicide rates that is superior to long-term imprisonment. In a recent survey of 70 current and former presidents of three professional associations of criminologists (the American Society of Criminology, the Academy of Criminal Justice Sciences, and the Law and Society Association), 85% of the experts agreed that the empirical research on deterrence has shown that the death penalty never has been, is not, and never could be superior to long prison sentences as a deterrent to criminal violence (Radelet & Akers 1996). Similarly, a 1995 survey of nearly 400 randomly selected police chiefs and county sheriffs from throughout the United States found that two thirds did not believe that the death penalty significantly lowered the number of murders (Radelet & Akers 1996).

Opinion polls show that the general public is gradually learning the results of this body of research. According to a 1991 Gallup Poll, only 51% of Americans

believed the death penalty had deterrent effects, a drop of 11% from 1985 (Gallup & Newport 1991). By 1997 this had fallen to 45% (Gross 1998:1454). In short, a remarkable change in the way the death penalty is justified is occurring. What was once the public's most widely cited justification for the death penalty is today rapidly losing its appeal.

INCAPACITATION

A second change in death penalty arguments involves the incapacitation hypothesis, which suggests that we need to execute the most heinous killers in order to prevent them from killing again. According to this view, we need the death penalty to protect the public from recidivist murders. On its face it is a simple and attractive position: No executed prisoner has ever killed again, and some convicted murderers will undoubtedly kill again if, instead of being executed, they are sentenced to prison terms.

Research addressing this issue has focused on calculating precise risks of prison homicides and recidivist murder. This work has found that the odds of repeat murder are low, and that people convicted of homicide tend to make better adjustments to prison (and, if released, exhibit lower rates of recidivism) than do other convicted felons (Bedau 1982a, 1997b, Stanton 1969, Wolfson 1982). The best research on this issue has been done by James Marquart and Jonathan Sorensen, sociologists at Sam Houston State University, who tracked down 558 of the 630 people on death row when all death sentences in the United States were invalidated by the Supreme Court in 1972. Contrary to the predictions of those who advocate the death penalty on the grounds of incapacitation, Marquart and Sorensen found that among those whose death sentences were commuted in 1972, only about one percent went on to kill again. This figure is almost identical with the number of death row prisoners later found to be innocent (Marquart & Sorensen 1989). Interpreted another way, these figures suggest that 100 prisoners would have to be executed to incapacitate the one person who statistically might be expected to repeat. Arguably, today's more sophisticated prisons and the virtual elimination of parole have reduced the risks of repeat homicide even further.

While the incapacitation argument might have made sense in an era when there were no prisons available for long-term confinement, the empirical evidence suggests that today's prisons and the widespread availability of long prison terms are just as effective as capital punishment in preventing murderers from repeating their crimes. Still, in papers first coauthored in 1994 (Ellsworth & Gross 1994) and updated in 1998, Gross (1998) concludes that next to retribution, incapacitation is the second most popular reason for favoring the death penalty. In a 1991 national poll, for example, 19% of death penalty supporters cited incapacitation as a reason for favoring the death penalty (Gross 1998:1454). But in the last two decades it has become clear that if citizens are convinced that convicted murderers will never be released from prison, support for the death penalty drops dramatically.

The public opinion polls presented at the beginning of this paper measure support for the death penalty in the abstract, not support for the death penalty as it is actually applied. A key factor that has changed in sentencing for capital crimes since the *Furman* decision in 1972 has been the increased availability of "life without parole" as an alternative to the death penalty. Today, at least 32 states offer this option (Wright 1990), although it is clear that most citizens and jurors do not realize this and vastly underestimate the amount of time that those convicted of capital murders will spend in prison (Fox et al 1990–1991:511–15, Gross 1998:1460–62). Another segment of the population realizes that life without parole is an alternative to the death penalty, but in spite of this, believe that future political leaders or judges will find ways to release life-sentenced inmates. It is a paradoxical position: Such citizens support giving the government the ultimate power to take the lives of its citizens but do so because of distrust of these same governments and/or the perception of governmental incompetency.[1]

Nonetheless, when asked about support for the death penalty given an alternative punishment of life without parole, public support for the death penalty plummets. In Florida, for example, where those convicted of first-degree murder must be sentenced either to life without parole or to the death penalty, only 50% of the public polled in 1998 expressed support for the death penalty given the former alternative, and 44% of the respondents supported the idea of entirely banning the death penalty given the life without parole option (Griffin 1998). Nationally, the 1999 Gallup Poll found that 56% of the respondents supported the death penalty given the alternative of life without parole—a vast difference from the "overwhelming support" that many erroneously believe the death penalty enjoys. As more and more Americans learn that, absent the death penalty, those convicted of capital crimes will never be released from prison, further withering of death penalty support seems likely.

CAPRICE AND BIAS

As new death penalty laws were being passed in the 1970s to replace those invalidated by the *Furman* decision, many thought that the death penalty could be applied in a way that would avoid the arbitrariness and racial and class bias that had been condemned in *Furman* (Bedau 1982b, Black 1981). However, research conducted in the years since has all but unanimously concluded that the new laws have failed to achieve this goal.

Most of these analyses conclude that for crimes that are comparable, the death penalty is between three and four times more likely to be imposed in cases in which the victim is white rather than black (Baldus & Woodworth 1998, Baldus et al 1990, Bowers et al 1984, Gross & Mauro 1989, Radelet & Pierce 1991). In a 1990 review of 28 studies that had examined the correlation between race

[1]We are indebted to Professor Samuel Gross for this point.

and death sentencing in the United States post-1972, the US General Accounting Agency (1990:6) concluded:

> the synthesis [of the 28 studies reviewed] supports a strong race of victim influence. The race of offender influence is not as clear cut and varies across a number of dimensions. Although there are limitations to the studies' methodologies, they are of sufficient quality to support the syntheses' findings.

The problem continues to be documented in research published in the 1990s. Again, race-of-victim effects are regularly found (e.g., Keil & Vito 1995), although some research, such as an extensive study just completed by David Baldus and his colleagues in Philadelphia (Baldus et al 1998), also finds race-of-defendant effects. In the most recent overview of the problem of racial bias in the administration of the death penalty, Amnesty International concluded that it was "undeniable" that the death penalty in the United States "is applied disproportionately on the basis of race, ethnicity, and social status" (Amnesty International 1999a:2).

By any measure, the most comprehensive research ever produced on sentencing disparities in American criminal courts is the work of David Baldus and his colleagues conducted in Georgia in the 1970s and 1980s (Baldus et al 1990). After statistically controlling for some 230 variables, these researchers concluded that the odds of a death sentence for those who kill whites in Georgia are 4.3 times higher than the odds of a death sentence for those who kill blacks. Attorneys representing Georgia death row inmate Warren McCleskey took these data to the Supreme Court in 1987, claiming unfair racial bias in the administration of the death penalty in Georgia. But the Court rejected the argument, as well as the idea that a statistical pattern of bias could prove any bias in McCleskey's individual case (*McCleskey v. Kemp*, 481 U.S. 279 (1987).

The vote in the McCleskey case was 5 to 4. Interestingly, the decision was written and the deciding vote cast by Justice Lewis Powell, who was then serving his last year on the Court. Four years later, Powell's biographer asked the retired justice if he wished he could change his vote in any single case. Powell replied, "Yes, *McCleskey v. Kemp.*" Powell, who voted in dissent in *Furman* and in his years on the Court remained among the justices who regularly voted to sustain death sentences, had changed his mind. "I have come to think that capital punishment should be abolished ... [because] it serves no useful purpose" (Jeffries 1994:451–52). Had Powell had this realization a few years earlier, it is quite likely that, as in 1972, the death penalty would have been abolished, at least temporarily.

In effect, the *McCleskey* decision requires that defendants who raise a race claim must prove that race was a factor in their individual cases, and that as far as the courts are concerned, the statistical patterns indicating racial bias are basically irrelevant. In later years, the "Racial Justice Act," which would have required courts to hold hearings to examine statistical patterns of disparities in capital cases, failed to gain congressional approval (Bright 1995:465–66).

Two ways in which possible bias and arbitrariness in the death penalty can be reduced are through the provision of effective counsel to the poor and the careful use of executive clemency powers. Again, social science research addressing these issues has identified problems.

Research on the quality of attorneys provided to indigent defendants charged with capital offenses has relied on case-study methodology and examination of statutory law or customary procedures used to attract and compensate counsel. Stephen Bright has documented dozens of cases in which death sentences were given despite the fact that the defense attorneys were drunk, using drugs, racist against their own clients, unprepared or outright unqualified to practice criminal law, or otherwise incompetent (Bright 1997a,b). In several cases, the defense attorney slept during the trial—giving a new meaning to the term "dream team" (Bright 1997b:790, 830). State governments are increasingly appointing attorneys in capital cases who submit the lowest bids; typically, attorneys are compensated at less than the minimum wage (Bright 1997b:816–21). As a result, those sentenced to death are often distinguishable from other defendants convicted of murder not on the basis of the heinousness of the crime, but instead on the basis of the quality of their defense attorneys.

A possible remedy for these failures at trial is executive clemency. Executive clemency can be used not only to remove bias and arbitrariness, but also to correct mistakes (e.g., when doubts exist about the prisoner's guilt, or when previously unknown or underweighted mitigation—such as evidence of mental illness or retardation—emerges), or to reward rehabilitation. Again, social science research in this area suggests the ineffectiveness of executive clemency in achieving these goals. Compared to the years before the 1972 *Furman* decision, clemency today is rarely granted (Bedau 1990–1991). Between 1972 and the end of 1992, only 41 death sentences in American jurisdictions were commuted to prison terms through power of executive clemency (Radelet & Zsembik 1993), and an average of just over one per year has been granted since. Of the 51 commutations granted through mid-1999, only six were granted on grounds of "equity."

Public opinion on the death penalty shows that while most Americans recognize the problems of race and class bias, they do not view such discrimination as a reason to oppose the death penalty. In the 1999 Gallup Poll, for example, 65% of the respondents agreed that a poor person is more likely than a person of average to above-average income to receive the death penalty for the same crime (Gillespie 1999). Half the respondents believed that black defendants are more likely than whites to receive a death sentence for the same crime. Despite recognizing these inequities, 71% of those polled favored the death penalty.

COST

A fourth way in which death penalty arguments have changed in the past 25 years involves the issue of its fiscal costs. Two decades ago, some citizens and political leaders supported the death penalty as a way of avoiding the financial burdens of

housing inmates for life or long prison terms. As recently as 1983, one of this century's most skilled proponents of the death penalty, Ernest van den Haag, was able to assert, "it is not cheaper to keep a criminal confined for all or most of his life than to execute him. He will appeal just as much [as a death-sentenced prisoner]" (van den Haag & Conrad 1983:34). A 1985 Gallup Poll found that 11% of those supporting the death penalty cited the high fiscal costs of imprisonment as a reason for their positions (Gallup Report 1985).

Since then, however, research has firmly established that a modern death penalty system costs several times more than an alternative system in which the maximum criminal punishment is life imprisonment without parole. This research has been conducted in different states with different data sets by newspapers, courts and legislatures, and academics (see reviews in Bohm 1998, Dieter 1997, Spangenberg & Walsh 1989). Estimates by the *Miami Herald* are typical: $3.2 million for every electrocution versus $600,000 for life imprisonment (von Drehle 1988). These cost figures for capital punishment include expenses for not only those cases that end in execution, but also the many more cases in which the death penalty is sought that never end with a death sentence, and cases in which a death sentence is pronounced but never carried out. They also include the costs both for trials and for the lengthy appeals that are necessary before an execution can be authorized. Consequently, the cost issue today has become an anti–death penalty argument, albeit of debatable strength. Absent the death penalty, its critics argue, states would have more resources to devote to the ends the death penalty is allegedly designed to pursue, such as reducing high rates of criminal violence or rendering effective aid to families of homicide victims. Those in favor of capital punishment, however, would argue that its retributive benefits are worth the costs.

MISCARRIAGES OF JUSTICE

Death penalty arguments are changing in a fifth way: Death penalty retentionists now admit that as long as we use the death penalty, innocent defendants will occasionally be executed. Until a decade ago, the pro–death penalty literature took the position that such blunders were historical oddities and could never be committed in modern times. Today the argument is not over the existence or even the inevitability of such errors, but whether the alleged benefits of the death penalty outweigh these uncontested liabilities. Several studies conducted over the last two decades have documented the problem of erroneous convictions in homicide cases (Givelber 1997, Gross 1996, Huff et al 1996, Leo & Ofshe 1998, Radelet et al 1992). Since 1970 there have been 80 people released from death rows in the United States because of innocence (Death Penalty Information Center 1999; for a description of 68 of these cases, see Bedau & Radelet 1987, Radelet et al 1996).

The cases of those wrongly sentenced to death and who were totally uninvolved in the crime constitute only one type of miscarriage of justice. Another

(and more frequent) blunder arises in the cases of the condemned who, with a more perfect justice system, would have been convicted of second-degree murder or manslaughter, making them innocent of first degree murder. For example, consider the case of Ernest Dobbert, executed in Florida in 1984 for killing his daughter. The key witness at trial was Dobbert's 13-year-old son, who testified that he saw his father kick the victim (this testimony was later recanted). In a dissent from the Supreme Court's denial of certiorari written just hours before Dobbert's execution, Justice Thurgood Marshall argued that while there was no question that Dobbert abused his children, there was substantial doubt about the existence of sufficient premeditation to sustain the conviction for first-degree murder. "That may well make Dobbert guilty of second-degree murder in Florida, but it cannot make him guilty of first-degree murder there. Nor can it subject him to the death penalty in that State" (*Dobbert v. Wainwright*, 468 U.S. 1231, 1246 (1984)). If Justice Marshall's assessment was correct, then Dobbert was not guilty of a capital offense, and—in this qualified sense—Florida executed an innocent man.

In other cases, death row inmates have indeed killed someone, but, again, a more perfect system for deciding who should be convicted and who should die would have found these defendants not guilty because of insanity or self-defense, or because the killing was, in reality, an accident. Examined in this way, the class of "wrongful convictions" extends far beyond the group of those convicted who were legally and factually innocent of the crime.

Citing research by social scientists on racial disparities in death sentencing and on the inevitability of wrongful convictions, Supreme Court Justice Harry Blackmun, who until then counted himself as a supporter of the death penalty, wrote in 1994:

> From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored . . . along with the majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved . . . I feel morally and intellectually obligated to concede that the death penalty experiment has failed (*Callins v. Collins*, 510 U.S. 1141, 1145 (1994)).

Clearly, concern about the execution of the innocent is an issue that, at the very least, gives pause to some of those who at first glance might count themselves as favoring the death penalty.

This conclusion is further supported by data from the Capital Jury Project, an on-going study under the direction of William Bowers and sponsored by the National Science Foundation. The research is attempting to discover how jurors in capital cases spread over 15 states have decided whether or not to impose or recommend death sentences (Bowers 1995). In a 1998 analysis, Bowers et al (1998:1533) provide clear evidence that lingering doubt over the defendant's

guilt is the most significant factor in "fostering a pro-life commitment during the guilt phase of [a capital] trial." Among respondents who identified lingering doubt as a mitigator in their cases, 63% described it as "very important" in their punishment decisions. And 69% said that lingering doubt made them less likely to vote for death (Bowers et al 1998:1534). In comparison, the second most significant mitigator identified by the respondents was evidence that the defendant was mentally retarded. Forty-four percent cited this as "very important," and 55% considered it a factor in decreasing their likelihood of casting a death vote.

The results of the Capital Jury Project are consistent with findings from previous studies examining the significance of lingering doubt in jurors' final punishment decisions. In South Carolina, for example, lingering doubt about the defendant's guilt was identified as the single most important reason why jurors select prison sentences over death sentences (Garvey 1998:1559, 1562–64). And a study of capital jurors in Florida reported similar patterns (Bowers et al 1998:1536). In sum, "these data make it clear that lingering doubt, when it is present, is an integral element in forming a reasoned moral judgment about punishment. Indisputably, lingering doubt plays a central role in jurors' thinking about what punishment the defendant deserves" (Bowers et al 1998:1536).

THE GROWING FOCUS ON RETRIBUTION

Thus far we have argued that in the last two dozen years, debates over deterrence, incapacitation, cost, fairness, and the inevitability of executing the innocent have all been either neutralized or won by those who stand opposed to the death penalty. But while death penalty advocates increasingly acknowledge that these traditional justifications are growing less persuasive, in their place we have witnessed the ascendancy of what has become the most important contemporary pro–death penalty argument: retribution. Here one argues that justice requires the death penalty. Those who commit the most premeditated or heinous murders should be executed simply on the grounds that they deserve it (Berns 1979, van den Haag 1997, 1998). Life without parole, according to this view, is simply insufficient punishment for those who commit the most heinous and premeditated murders.

Retributive arguments are often made in the name of families of homicide victims, who are depicted as "needing" or otherwise benefitting from the retributive satisfaction that the death penalty promises. Perhaps the question most frequently posed to death penalty opponents during debates is "How would you feel if your closest loved one was brutally murdered?" For example, one of the most memorable and damaging questions of the 1988 presidential campaign was raised by Cable News Network (CNN) correspondent Bernard Shaw during the second debate between candidates George Bush and Michael Dukakis, when Shaw asked Dukakis

whether his opposition to the death penalty would be swayed if someone raped and murdered his wife (Germond & Wircover 1989:5).

Those who oppose capital punishment can reasonably respond by pointing out that the death penalty offers much less to families of homicide victims than it first appears. For example, by diverting vast resources into death penalty cases—a small proportion of all homicide cases—the state has fewer resources for families of noncapital homicide victims and for more effective assistance for families of all homicide victims. Or, one could argue that the death penalty hurts families of homicide victims in cases in which the killer is *not* sentenced to death, since the prison sentence risks making them feel as if their loved one's death was not "worth" the life of the killer. Or, one could argue that the death penalty serves to keep the case open for many years before the execution actually occurs, often through resentences or retrials, continuously preventing the wounds of the family of the victim from healing. Motivated by a desire to express these arguments, an organization of families that oppose the death penalty, Murder Victims Families for Reconciliation (now located in Cambridge, MA) was formed in 1976. They and other groups of "homicide survivors" have regularly pointed out that the scholarly community has devoted very little attention to families of homicide victims (for an exception, see Vandiver 1998). Indeed, we are aware of no research specifically studying the short-term and long-term effects of the execution of a killer on the family of the homicide victim, or on the family of the executed inmate. On the other hand, the scholarship of Robert Johnson (1981, 1998a, 1998b) and others (e.g., Cabana 1996) gives readers some insights into what prison life in general, and life on death row in particular, is like. The conclusions of these researchers lend credence to those who argue that in some respects, life imprisonment without parole can be even worse than execution.

Finally, in one of the last papers published before his death, criminologist Marvin Wolfgang (1996) reminds us that even if someone might "deserve" to die in the abstract, that does not mean that death is a punishment required by any consistent philosophy of punishment. Given well-documented injustices in the application of the death penalty, Wolfgang raises the issue of whether such a penalty can be applied in the name of "justice." For Wolfgang, the question becomes not "Who deserves to die?," but instead, "Who deserves to kill?"

Unlike the arguments reviewed above, retribution is a non-empirical justification and thus all but impossible to test with empirical data. After all, there are no mathematical formulae available or on the horizon that can tell us precisely (or even roughly) how much of a given punishment a murderer—or any other offender—"deserves." In the end, the calculation of how much punishment a criminal "deserves" becomes more a moral and less a criminological issue.

To the extent that the death penalty is justified on moral (retributive) grounds, it is paradoxical that much of what can be called the "moral leadership" in the United States is already opposed to the death penalty. Leaders of Catholic, most Protestant, and Jewish denominations are strongly opposed to the death

penalty, and most formal religious organizations in the United States have endorsed statements in favor of abolition (American Friends Service Committee 1998). In the words of Father Robert Drinan, a Jesuit priest and former member of Congress, "The amazing convergence of opinion on the death penalty among America's religious organizations is probably stronger, deeper, and broader than the consensus on any other topic in the religious community in America" (Drinan 1991:107).

Consequently, no longer are Old Testament religious arguments in favor of the death penalty widely used or heard. In the late 1990s the Catholic Church and its leader, Pope John Paul II, are increasingly speaking out against the death penalty. This activity likely has been fostered in part by the success of the book and movie *Dead Man Walking*, which presents the autobiographical "journey" of a Catholic nun who ministers to inmates on Louisiana's death row, as well as to the families of some of their victims (Prejean 1993). Prejean's account has become the most popular death penalty book of the century.

There is also evidence that the general public recognizes some limits to retributive punishments. In 1991, the Gallup Poll asked respondents which method of execution they preferred. After all, if one were *really* retributive, and if people like Oklahoma City bomber Timothy McVeigh *really* got what they "deserved," the preferred method might be slow boiling or public crucifixion. Yet, 66% of the respondents favored lethal injection, an increase of ten points from six years earlier (Gallup & Newport 1991:42). This preference likely reflects, at least in part, the belief that inmates might suffer too much in electric chairs and gas chambers. In contrast, lethal injection offers an ostensibly less painful death. In fact, death penalty opponents often argue against the use of lethal injection on the grounds that this method makes executions more palatable to the public by creating the appearance that the inmate is simply being put to sleep (Schwarzschild 1982).

A similar pattern in public opinion regarding execution methods is found in Florida, where one inmate burst into flames while sitting in the electric chair in 1990, and another did the same in 1997 (Borg & Radelet 1999, Denno 1997). Again, an ardent retributivist would shrug her shoulders at such painful botches and argue that while indeed these may be unfortunate, botched executions are not especially troubling. But contrary to the retributive hypothesis, half of the respondents polled in Florida in 1998 favored lethal injection, and only 22% the electric chair (10% chose "either" and 16% favored "neither") (Judd 1998). And in 1998, 77% of Floridians expressed support for the idea of allowing the condemned to choose between electrocution and lethal injection (Griffin 1998). Historically, these tendencies are not unique. The search for more "humane" methods of execution dates back at least to the eighteenth century when the guillotine was adopted because of botched beheadings (Laurence 1960), and to the nineteenth century when the electric chair was introduced as a "humane" remedy for botched hangings (Bernstein 1973). Nonetheless, the concern to reduce the prisoner's suffering is inconsistent with the idea that we need the death penalty on the grounds of retributive justice.

TRENDS TOWARD ABOLITION

The above changes in death penalty debates come at a time when there is a relatively rapid worldwide movement away from the death penalty. In 1998, five countries combined for over 80% of the world's executions–China, the Democratic Republic of the Congo, Iran, Iraq, and the United States (Amnesty International 1999b:15). These first four are countries with whom, normally, the United States does not share domestic policies.

Hugo Adam Bedau, the dean of American death penalty scholars, has argued that the history of the death penalty in the United States over the past two centuries is a history of its gradual retraction. Among specific changes that mark the path toward the decline of the death penalty have been:

> The end of public executions and of mandatory capital sentencing, introduction of the concept of degrees of murder, development of appellate review in capital cases, decline in annual executions, reduction in the variety of capital statutes, experiments with complete abolition, even the search for more humane ways to inflict death as a punishment . . . (Bedau 1982a:3–4).

With over 3500 men and women currently sentenced to death in the United States, it is quite easy for those who oppose the death penalty to preach doom and gloom. However, Bedau's observations invite students of the death penalty to take a long-term historical view. With such a lens, the outlook for abolition is more optimistic.

A century ago, only three countries had abolished the death penalty for all crimes; by the time of *Furman* in 1972 the number had risen to nineteen. But since then the number of abolitionist countries has tripled. By the end of 1998, 67 countries had abolished the death penalty for all offenses, fourteen more retained it only for "exceptional" crimes (i.e., during wartime), and 24 others had not had an execution in at least ten years. All fifteen members of the European Union have abolished the death penalty, and the Council of Europe, with 41 members, has made the abolition of the death penalty a condition of membership. In the first decision ever made by the newly constituted South African Constitutional Court in 1995—that country's Supreme Court—the death penalty was abolished as "cruel, inhuman and degrading" (Sonn 1996). Russia, a country that was among the world's leaders in executions in the early 1990s, announced in 1999 that it, too, was abolishing the death penalty (Amnesty International 1999b:16). In June 1999 President Boris Yeltsin commuted over 700 death sentences to terms of imprisonment. Clearly, in a comparatively short historical time span, more than half of the countries in the world have abolished the death penalty, and the momentum is unquestionably in the direction of total worldwide abolition.

The above is not meant to suggest the absence of countries that continue to swim against the tide of worldwide abolition. Internationally, the death penalty is slowly expanding in a few countries, such as the Philippines, Taiwan, Yemen, and the English-speaking Caribbean (Amnesty International 1999b). In the United

States, both Congress and the Supreme Court are increasingly restricting access to federal courts by inmates contesting their death sentences (Freedman 1998, Yackle 1998). Few would disagree with the prediction that the next few years will be busy ones for America's executioners.

On the other hand, as the 1990s draw to a close, more and more countries are signing international treaties that abolish or restrict the death penalty (Schabas 1997). For the third year in 1999, the UN Commission on Human Rights, headquartered in Geneva, passed a resolution calling for a moratorium on death sentencing. The resolution was cosponsored by 72 states (compared to 47 in 1997) (Amnesty International 1999b:16). Although the total abolition of the death penalty is its ultimate goal, the resolution encourages a strategy of "progressively restricting the offenses for which the death penalty can be imposed" (*New York Times* 1999a:A4). Toward this end, the 1999 resolution reaffirms an international ban on executions of those under 18, those who are pregnant, and those who are suffering from mental illness. The resolution also calls for non–death penalty nations to refuse to extradite suspects to countries that continue to use executions as a form of punishment.

Other calls for moratoriums on death sentencing are also being made. In May 1999, the Nebraska legislature passed a resolution calling for a two-year moratorium on executions because of questions of equity in the administration of its state's death penalty. This resolution was vetoed by the governor, but later the legislature unanimously overrode the governor's veto of that part of the legislation that allocated some $165,000 to study the issue (Tysyer 1999). In March 1999, the Illinois House of Representatives passed a similar resolution calling for a moratorium on executions; authorities in that state have acknowledged that 12 prisoners have been sent to death row in the past two decades who turned out to be innocent (*New York Times* 1999b). Finally, in February 1997, on behalf of its 400,000 members, the normally conservative House of Delegates of the American Bar Association called for a moratorium on the death penalty. The House of Delegates cited four principal reasons: the lack of adequate defense counsel, the erosion of state post-conviction and federal habeas corpus review, the continuing problem of racial bias in the administration of the death penalty, and the refusal of states and the courts to take action to prevent the execution of juveniles and the mentally retarded (for an elaboration of this resolution and the reasons behind it, see the series of papers published in a special issue of *Law and Contemporary Problems*, Autumn 1998). Although the resolution cannot be seen as a statement of opposition to the death penalty per se, it is an attempt by the House of Delegates to bring these serious problems to the attention of legislators and the American public. What effect this resolution will have, of course, remains unknown.

CONCLUSION

The goal of this paper has been to present a brief overview of recent scholarship on the death penalty. We organized this discussion by examining six issues that have traditionally framed death penalty debates, paying particular attention to the

social scientific literature that has evaluated each one. Our discussion suggests that changes in the discourse of capital punishment have evolved partly in response to the findings of this research. We conclude with three observations derived from the foregoing discussion.

First, the past two dozen years have witnessed significant changes in the nature of death penalty debates. Those who support the death penalty are less likely, and indeed less able, to claim that the death penalty has a deterrent effect greater than that of long imprisonment, or that the death penalty is cheaper than long imprisonment, or that it gives significant incapacitative benefits not offered by long imprisonment. Fewer and fewer religious leaders adopt a pro–death penalty position, and advocates of capital punishment have been forced to admit that the death penalty continues to be applied with unacceptable arbitrariness, as well as racial and class bias. A fair assessment of the data also leads to the conclusion that as long as the executioner is in the state's employ, innocent people will occasionally be executed. Increasingly, the best (and arguably the sole) justification for the death penalty rests on retributive grounds.

Second, at the same time as American discourse on the death penalty is changing, there is an accelerating worldwide decline in the acceptance of capital punishment. Indeed, the trend toward the worldwide abolition of the death penalty is inexorable. To be sure, the immediate future will continue to bring high numbers of executions in American jurisdictions. In all probability, these will increase over the numbers witnessed today. Nonetheless, taking a long-term historical view, the trend toward the abolition of the death penalty, which has now lasted for more than two centuries, will continue. Things could change quickly; the final thrust might come from conservative politicians who turn against the death penalty in the name of fiscal austerity, religious principles (e.g., a consistent "pro-life" stand), responsible crime-fighting, or genuine concern for a "smaller" government. Public support for the death penalty might also drop if there emerged absolute incontrovertible proof that an innocent prisoner had been executed. For those who oppose the death penalty, the long-term forecast should fuel optimism.

Finally, our review sends a positive message to criminologists and other social scientists who often feel as if their research is ignored by the public and by policy makers. As our review suggests, changes in the nature of death penalty debates are a direct consequence of social scientists' close and careful examination of the various dimensions of these arguments. Scholars have examined questions of deterrence, race, cost, methods of execution, innocence, juror decision-making, and the political and social environments in which death penalty legislation has emerged (Mello 1999, Tabak 1999). Clearly, this is one area of public policy where social science research is making a slow but perceptible impact.

ACKNOWLEDGMENTS

We would like to thank Hugo Adam Bedau and Samuel R. Gross for their insightful comments on earlier drafts.

LITERATURE CITED

Acker JR, Bohm RM, Lanier CS, ed. 1998. *America's Experiment With Capital Punishment.* Durham, NC: Carolina Acad. Press

American Friends Service Committee. 1998. *The Death Penalty: The Religious Community Calls for Abolition.* Philadelphia: Am. Friends Service Com.

Amnesty International. 1999a. Killing with prejudice: race and the death penalty. *Amnesty Int. Pub. No. AMR 51/52/99.* London: Amnesty Int. Publ.

Amnesty International. 1999b. *Amnesty International Report 1999.* London: Amnesty Int. Publ.

Bailey WC, Peterson RD. 1997. Murder, capital punishment, and deterrence: a review of the literature. See Bedau 1997a, pp. 135–61

Baldus DC, Woodworth G. 1998. Race discrimination and the death penalty: an empirical and legal overview. See Acker et al 1998, pp. 385–415

Baldus DC, Woodworth G, Pulaski CA Jr. 1990. *Equal Justice and the Death Penalty: A Legal and Empirical Analysis.* Boston: Northeastern Univ. Press

Baldus DC, Woodworth G, Zuckerman D, Weiner NA, Broffitt B. 1998. Racial discrimination and the death penalty in the post-*Furman* era: an empirical and legal overview, with recent findings from Philadelphia. *Cornell L. Rev.* 83:1638–770

Bedau HA. 1982a. *The Death Penalty in America.* New York: Oxford Univ. Press. 3rd ed.

Bedau HA. 1982b. Deterrence: problems, doctrines, and evidence. See Bedau 1982a, pp. 95–103.

Bedau HA. 1982c. Is the death penalty "cruel and unusual" punishment? See Bedau 1982a, pp. 247–53

Bedau HA. 1990–1991. The decline of executive clemency in capital cases. *NY Univ. Rev. Law & Soc. Change* 18:255–72

Bedau HA. 1997a. *The Death Penalty in America: Current Controversies.* New York: Oxford Univ. Press

Bedau HA. 1997b. Prison homicides, recidivist murder, and life imprisonment. See Bedau 1997a, pp. 176–82

Bedau HA, Radelet ML. 1987. Miscarriages of justice in potentially capital cases. *Stanford Law Rev.* 40:21–179

Berns W. 1979. *For Capital Punishment: Crime and the Morality of the Death Penalty.* New York: Basic Books

Bernstein T. 1973. 'A grand success': The first legal electrocution was fraught with controversy which flared between Edison and Westinghouse. *IEEE Spectrum* 10:54–58

Black CL. 1981. *Capital Punishment: The Inevitability of Caprice and Mistake.* New York: WW Norton. 2nd ed.

Bohm RM. 1998. The economic costs of capital punishment: Past, present, and future. See Acker et al 1998, pp. 437–58

Bohm RM. 1999. *Deathquest: An Introduction to the Theory and Practice of Capital Punishment in the United States.* Cincinnati, OH: Anderson

Borg MJ, Radelet ML. 1999. On botched executions. In *Routes to Abolition: The Law and Practice of the Death Penalty*, ed. P Hodgkinson, W Schabas. In press

Bowers WJ. 1995. The capital jury project: rationale, design, and preview of early findings. *Ind. Law J.* 70:1043–102

Bowers WJ, Pierce GL, McDevitt JF. 1984. *Legal Homicide: Death As Punishment in America, 1864–1982.* Boston: Northeastern Univ. Press

Bowers WJ, Sandys M, Steiner BD. 1998. Foreclosed impartiality in capital sentencing: jurors' predispositions, guilt-trial experience, and premature decision making. *Cornell Law Rev.* 83:1476–1556

Bright SB. 1995. Discrimination, death and denial: the tolerance of racial discrimination in

infliction of the death penalty. *Santa Clara Law Rev.* 35:433–83

Bright SB. 1997a. Counsel for the poor: the death sentence not for the worst crime but for the worst lawyer. See Bedau 1997a, pp. 275–309

Bright SB. 1997b. Neither equal nor just: the rationing and denial of legal services to the poor when life and liberty are at stake. *Annu. Survey Am. Law* 1997:783–836

Cabana DA. 1996. *Death At Midnight: The Confession of an Executioner.* Boston: Northeastern Univ. Press

Caldwell RG. 1952. Why is the death penalty retained? *Annu. Rev. Am. Acad. Polit. Soc. Sci.* 284:45–53

Death Penalty Information Center. 1999. http://www.essential.org/dpic/

Denno D. 1997. Getting to death: Are executions constitutional? *Iowa Law Rev.* 82:319–464

Dieter RC. 1997. Millions misspent: What politicians don't say about the high costs of the death penalty. See Bedau 1997a, pp. 401–10

Drinan R. 1991. *The Fractured Dream: America's Divisive Moral Choices.* New York: Crossroad

Ehrlich I. 1975. The deterrent effect of capital punishment: a question of life and death. *Am. Econ. Rev.* 65:397–417

Ellsworth PC, Gross SR. 1994. Hardening of the attitudes: Americans' views on the death penalty. *J. Soc. Issues* 50:19–52

Fox JA, Radelet ML, Bonsteel JL. 1990–1991. Death penalty opinion in the post-*Furman* years. *NY Univ. Rev. Law & Soc. Change* 18:499–528

Freedman E. 1998. Federal habeas corpus in capital cases. See Acker et al 1998, pp. 417–36

Gallup Report. 1985. Support for death penalty highest in half-century. *Gallup Report* Nos. 232 & 233:3–13

Gallup A, Newport F. 1991. Death penalty support remains strong. *Gallup Poll Monthly,* June: No. 309:40–45

Garvey SP. 1998. Aggravation and mitigation in capital cases: What do jurors think? *Columbia Law Rev.* 98:1538–76

Germond J, Witcover J. 1989. *Whose Broad Stripes and Bright Stars? The Trivial Pursuit of the Presidency, 1988.* New York: Warner

Gillespie M. 1999. Public Opinion supports death penalty. http://www/gallup.com/POLL ARCHIVES/990219b.htm

Givelber D. 1997. Meaningless acquittals, meaningful convictions: Do we reliably acquit the innocent? *Rutgers Law Rev.* 49: 1317–96

Griffin, M. 1998. Voters approve of death penalty: the support would be weaker if Florida voters were certain that killers would be locked up forever, a poll found. *Orlando Sentinel*, Apr. 23, p. D1

Gross SR. 1996. The risks of death: Why erroneous convictions are common in capital cases. *Buffalo Law Rev.* 44:469–500

Gross SR. 1998. Update: American public opinion on the death penalty–it's getting personal. *Cornell Law Rev.* 83:1448–75

Gross S, Mauro R. 1989. *Death & Discrimination: Racial Disparities in Capital Sentencing.* Boston: Northeastern Univ. Press

Hood R. 1996. *The Death Penalty: A World Wide Perspective.* Oxford: Oxford Univ. Press. Rev. ed.

Huff CR, Rattner A, Sagarin E. 1996. *Convicted But Innocent: Wrongful Conviction and Public Policy.* Thousand Oaks, CA: Sage

Jeffries JC Jr. 1994. *Justice Lewis F. Powell, Jr.: A Biography.* New York: Charles Scribner's Sons

Johnson R. 1981. *Condemned to Die: Life Under Sentence of Death.* New York: Elsevier

Johnson R. 1998a. *Death Work: A Study of the Modern Execution Process.* Belmont, CA: West/Wadsworth. 2nd ed.

Johnson R. 1998b. Life under sentence of death: historical and contemporary perspectives. See Acker et al 1998, pp. 507–25

Judd A. 1998. Poll: most favor new execution method. *Gainesville Sun*, Feb. 18

Keil TJ, Vito GF. 1995. Race and the death penalty in Kentucky murder trials: 1976–1991. *Am. J. Crim. Justice* 20:17–36

Klein LR, Forst B, Filatov V. 1978. The deterrent effect of capital punishment: an assessment of the estimates. In *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates*, ed. A Blumstein, J Cohen, D Nagin, pp. 336–60. Washington, DC: Natl. Acad. Sci.

Kroll M. 1997. Death penalty monolith begins to crack. *El Hispano*, Aug. 27

Laurence J. 1960. *The History of Capital Punishment.* Secaucus, NJ: Citadel Press

Leo RA, Ofshe RJ. 1998. The consequences of false confession: deprivations of liberty and miscarriages of justice in the age of psychological interrogation. *J. Crim. Law Criminol.* 88:429–96

Marquart JW, Sorensen JR. 1989. A national study of the *Furman*-commuted inmates: assessing the threat to society from capital offenders. *Loyola of Los Angeles Law Rev.* 23:101–20

Mello M. 1999. The real capital punishment: the (shotgun) marriage between social science and litigation, and the inviting footnote in *Brown v. Texas. Crim. Law Bull.* 35:107–26

Meltsner M. 1973. *Cruel and Unusual: The Supreme Court and Capital Punishment.* New York: Random House

NAACP Legal Defense Fund. 1999. *Death Row, USA* (Spring). New York: NAACP Legal Defense Fund

New York Times. 1999a. U.N. panel votes for ban on death penalty. *NY Times*, Apr. 29

New York Times. 1999b. *Innocents on Death Row* (editorial). *NY Times*, May 23.

Paternoster R. 1991. *Capital Punishment in America.* New York: Lexington Books

Peterson RD, Bailey WC. 1998. Is capital punishment an effective deterrent for murder? An examination of social science research. See Acker et al 1998, pp. 157–82

Prejean, H. 1993. *Dead Man Walking.* New York: Random House

Radelet ML, Akers RL. 1996. Deterrence and the death penalty: the views of the experts. *J. Crim. Law Criminol.* 87:1–16

Radelet ML, Bedau HA, Putnam CE. 1992. *In Spite of Innocence.* Boston: Northeastern Univ. Press

Radelet ML, Lofquist WS, Bedau HA. 1996. Prisoners released from death rows since 1970 because of doubts about their guilt. *Cooley Law Rev.* 13:907–66

Radelet ML, Pierce GL. 1991. Choosing those who will die: race and the death penalty in Florida. *Florida Law Rev.* 43:1–34

Radelet ML, Zsembik BA. 1993. Executive clemency in post-*Furman* capital cases. *Univ. Richmond Law Rev.* 27:289–314

Schabas WA. 1997. *The Abolition of the Death Penalty in International Law.* Cambridge, UK: Cambridge Univ. Press

Schwarzschild H. 1982. Homicide by injection. *NY Times*, Dec. 23

Sellin T. 1959. *The Death Penalty.* Philadelphia: Am. Law Inst.

Sonn FA. 1996. Keynote address: The ideals of a democracy. *Cooley Law Rev.* 13:853–61

Spangenberg RL, Walsh ER. 1989. Capital punishment or life imprisonment: some cost considerations. *Loyola of Los Angeles Law Rev.* 23:45–58

Stanton JM. 1969. Murderers on parole. *Crime Delinq.* 15:149–55

Sutherland EH. 1925. Murder and the death penalty. *J. Crim. Law Criminol.* 15:522–36

Tabak R. 1999. How empirical studies can affect positively the politics of the death penalty. *Cornell Law Rev.* 83:1431–47

Tysyer R. 1999. Death penalty study OK'd. *Omaha World Herald*, May 28

US General Accounting Agency. 1990. *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities* (GGD-90-57). Washington, DC: General Accounting Agency

van den Haag E. 1997. The death penalty once more. See Bedau 1997a, p. 445–56

van den Haag E. 1998. Justice, deterrence, and the death penalty. See Acker et al 1998, pp. 139–56

van den Haag E, Conrad JP. 1983. *The Death Penalty: A Debate.* New York: Plenum

Vandiver M. 1998. The impact of the death penalty on the families of homicide victims and of condemned prisoners. See Acker et al 1997, pp. 477–505

von Drehle D. 1988. Capital punishment in paralysis. *Miami Herald*, Jul. 10, p. 1

Walt K. 1998. Death penalty's support plunges to 30-year low. *Houston Chron.*, Mar. 13

Wolfgang ME. 1996. We do not deserve to kill. *Cooley Law. Rev.* 13:977–90

Wolfson W. 1982. The deterrent effect of the death penalty upon prison murder. See Bedau 1981a, pp. 159–80

Wright JH Jr. 1990. Life-without-parole: an alternative to death or not much of a life at all? *Vanderbilt Law Rev.* 43:529–68

Yackle LW. 1998. The American Bar Association and federal habeas corpus. *Law Contemp. Problems* 61:171–92

Zimring FE, Hawkins G. 1986. *Capital Punishment and the American Agenda.* Cambridge, UK: Cambridge Univ. Press

Annual Review of Sociology
Volume 26, 2000

CONTENTS