

CAPITAL PUNISHMENT IS GOOD PUBLIC POLICY

A RESPONSE TO GERBER AND O'CONNOR

PRO

“Indeed, the decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.”*

—Supreme Court of the United States

Authors Gerber and O'Connor have proven to be much better at writing about the death penalty than thinking about it. They claim the death penalty is not a deterrent, that its error rate is too high, that it is the product of caprice, and that it is immoral, putting us “out of step with the rest of the civilized world.” Theirs is a well-written, beguiling stream of words that invites you to float lazily down to a pacific conclusion—but watch out, that roar up ahead is from dangerous rapids, as the rocks of reality begin to close in around their languid current of sentiment.

As it turns out, most of what they claim to know just isn't so.

The Death Penalty Saves Lives

In the mid-1960s, the Supreme Court started regularly to overturn death penalty convictions. From 1963 to 1992, there were no executions in Arizona, and the murder rate

rose from 5 per 100,000 in 1965 to 10.5 in 1994. There was one execution in 1992, two in 1993, none in 1994, and one in 1995.

From 1996 through 2000, there were 18 executions. Correspondingly, the murder rate began to drop: In 2000, it fell to 7 per 100,000. Had the murder rate remained at 1994 levels throughout the second half of the 1990s, an additional 603 Arizonans would have been murdered.

These same effects have been seen nationally. In 1991, the national homicide rate was 10.5 per 100,000. Between 1991 and 2000, there was a steady increase in the number of executions, and murder rates plummeted to 6.4 per 100,000 in 1999.

Critics argue that this is not evidence of deterrence, that there is no cause and effect relation. Gerber and O'Connor argue that executions actually increase homicide rates. But when the death penalty rates and homicide rates of the individual states are examined, the deterrence correlation becomes even more dramatic.

Since 1990. In 1991, the Texas murder rate was 15.3 per 100,000. By 1999, the murder rate in Texas was 6.1, only slightly above the national average. Florida, fourth in executions since 1990, has reduced its murder rate from 10.7 to 5.7. Contrast this with the experience in New Mexico, a state that does not have the death penalty. In 1990, New Mexico had a murder rate of 9.2 per 100,000. By 1999, the rate had climbed to 9.8.

Gerber and O'Connor are dismissive of Isaac Ehrlich's deterrence studies at the University of Chicago. Yet, his research conclusions have been replicated, again and again, most recently in May of this year, by a team of economists at Emory University in Atlanta. The team, which included the highly respected economist Dr. Paul Rubin, concluded, “Our results suggest the legal change allowing executions beginning in

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Since 1994, murder rates in the states with death penalties have fallen significantly faster than have rates in states without.

Texas has had the highest number of exe-

1977 has been associated with significant reductions in homicide. In particular, the execution of each offender seems to save, on average, the lives of 18 potential victims.”

If you doubt these deterrent effects, let's try the experiment proposed by Ernest van den Haag. Let's only execute people for murders committed on Monday, Wednesday and Friday, to see if there would be any migration of murder to the other days of the week.

"Innocent" Offenders Do Not Fill Death Row

Gerber and O'Connor assert that Ray Krone was "the nation's 105th person wrongfully convicted and sentenced to death." About Krone, they write he was "twice sentenced to death." In fact, neither of these statements is true. (*Editor's Note:* The version of the alternate article provided to Steve Twist did contain the authors' error that Krone was twice sentenced to death.)

After Krone's retrial, he was not sentenced to death, but rather to life imprisonment. His ranking of 105th comes from the Innocence Project's list of (now) 110 convicts exonerated by DNA evidence, not simply murder convicts. Indeed, the vast majority of persons on the Project's list were not convicted of first-degree murder and were not sentenced to death.

These errors may seem minor, but they reflect an inattention to accuracy that permeate the essay.

Gerber and O'Connor identify two kinds of error rates that they claim are too high and that prove their case for abolition. First, they cite reversals on appeal and, second, persons convicted who are subsequently acquitted or proven to be "necessarily innocent." The first proves nothing; the second are so infrequent they, in fact, are the exceptions that prove the care and deliberation that characterize the entire system.

Reversals on appeal have nothing to do with innocence. Reversal rates may reflect judicial fastidiousness, or judicial hostility to the death penalty, or myriad other reasons having nothing to do with innocence. Moreover, Liebman's 2001 study of "error" rates, on which Gerber and O'Connor rely, has been thoroughly repudiated. A Bureau of Justice Statistics study of capital punishment in 2000 concluded

that 28 percent of defendants have been removed from death row by appellate courts or commutations; of these, only one percent actually had their convictions overturned.

Nor does acquittal at retrial mean "innocence." It simply means that the proof available and admissible did not eliminate all "reasonable doubt." *Dowling v. United States*, 493 U.S. 342, 349 (1990). A jury must acquit "someone who is probably guilty but whose guilt is not established beyond a reasonable doubt." *Gregg v. Georgia*, 428 U.S. 153, 225 (1976) (White, J., conc.).

Gerber and O'Connor rely heavily on the Death Penalty Information Center's (DPIC) list of 102 death row inmates, whom the Center claims have been proven innocent. However, the authors confuse the list with the Innocence Project's list of 110 (presumably 108 when Gerber and O'Connor wrote their essay) that, as noted, is not limited to death penalty cases. Hence, the authors write, "Nationally, since 1973, roughly 3,702 individuals have been sentenced to death, 108 of whom have now been found necessarily innocent (i.e., not simply acquitted), an error rate of more than 1 in every 37, or about three percent."

One hardly knows where to begin. First, since 1977, 6,208 persons have been sentenced to death, not 3,702 as the authors assert. They are confusing the number currently on death row with the total number sentenced. Of this total, there is no evidence that a factually innocent person has ever been executed. Period. No evidence.

The DPIC list itself is rife with errors. Person after person reported on the list is clearly not factually innocent. A comprehensive critique prepared by the California Department of Justice called the list "dishonest, reckless, and irresponsible." Even Judge Rakoff, who recently relied on the flawed Liebman study to strike down the federal death penalty, *United States v. Quinones*, No. S3 00 CR 761 (CSR), 2002 WL 724231, *1-*2 (S.D.N.Y. Apr. 25, 2002), was only comfortable concluding that 32 defendants from the list may have been innocent. And that number is highly inflated. Even conceding Judge Rakoff's

conclusion—which we should not, as the California study makes clear—that would be an error rate of only 0.5 percent at the sentencing phase.

The Death Penalty Is Not the Product of Caprice

Every county attorney in our state discharges his or her duty, when considering the death penalty, with a profound sense of the obligation to seek justice. To suggest, by citing a *New York Times* article, that these men and women are motivated “primarily by political image” is seriously wrong and unfair.

In Maricopa County, as an example, every murder case is reviewed by the most senior and experienced prosecutors in the office. The circumstances of the offense and the offender, as well as aggravation and mitigation, are considered, before any decision to seek the death penalty is ever made. And, of course, theirs is only the charging decision. It is a decision reached only with a determined purpose to see justice done. Tellingly, Gerber and O’Connor cite not one case to the contrary.

The criticism of the murder statutes is equally unfounded. In Arizona, murder is of two degrees, first and second. Second-degree murder is the intentional killing of another human being. First-degree murder requires not only intention, but either premeditation, commission in the course of another dangerous felony or the killing of a police officer while in the line of duty; to qualify for capital punishment, aggravating circumstances beyond premeditation are required. The elements of the two offenses, while close, are different. The difference reflects the greater harm and threat that first-degree murderers pose to our society.

The Death Penalty Is Moral

Far from being barbaric, as Gerber and O’Connor suggest, the death penalty affirms our highest moral values by protecting innocent life through insisting on the forfeiture of depraved life. It is a curious morality that finds barbaric ritualism in the execution of depraved murderers, when the evidence of both specific and general deterrence, the protection of innocent life, is so strong. Frankly, the only barbarism in the

**Rather than encumber this space with voluminous footnotes, the authors of both articles will provide sources upon request.*

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capital sentencing phase has been the ritual of allowing the defendant's family, one after another, to offer a recommendation as to the proper sentence, but then not affording the same right to the victim's family.

Finally, I urge my respected colleagues not to be so taken with the morality of European elites. It has not always proven trustworthy.

In fact, a majority of citizens in many European countries continue to support the death penalty. And with good reason. Consider the case of James Hanratty.

Hanratty was hung in England in 1962, one of the last murderers to be executed. He was executed for the murder of Michael Gregsten and the rape and shooting of Michael's girlfriend, Valerie Storie. After Hanratty was hung, another man confessed, but then recanted his confession. The case was a leading cause of the abolition of capital punishment in Great Britain. Hanratty's guilt was recently reconfirmed through DNA analysis.

Since the abolition of the death penalty, the murder rate in Britain has soared.

Conclusion

On careful examination, each of Gerber and O'Connor's arguments prove to be no more than the same liberal nostrums that common-sense Americans have rejected for more than 40 years. Like the aging suitor whose entreaties of love have been long ignored, perhaps it is time for the Left to just move on. ▀

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Have recent events changed your position on the death penalty? Send your comments to soundoff@azbar.org

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CON

More subtle is the assumption that our country can justifiably kill provided only that we adhere to such formalities. Aside from being shown false by the Liebman and capital case studies mentioned previously, this argument merely rearranges the deckchairs on the Titanic. In our Kafkaesque era, procedural niceties obscure moral substance as death penalty devotion becomes a litmus test for politicians seeking votes from the uninformed.

Senator Dianne Feinstein, who had opposed capital punishment as a member of the California parole board, embraced it when she ran for governor in 1990. Asked to explain her change of heart, she responded that she had read "some studies" (all unnamed) suggesting deterrence; despite her promises, she could not provide any such studies or citations.

Andrew Young, who had opposed capital punishment until running for governor of Georgia in 1990, changed his view during the campaign because, while acknowledging the lack of deterrence, he claimed that the absence of a death penalty lowered the morale of the police, a theory for which he could provide no support.

Other examples exist. As governor of Massachusetts, William Weld said that his pro-capital punishment position relied not on

deterrence but on his "gut." And in 1984, Bob Graham, running for the Senate from Florida, dismissed the repeated studies on non-deterrence by saying that capital punishment was "inherently beyond" all empirical study, thus enrolling him with these other gut trusters using death for political advantage.

Scholars closest to crime research have found capital punishment an empty symbol. Ninety-four percent of past and present presidents of criminological societies have indicated "no support" for the view that capital punishment reduces homicides, and these scholars know of no empirical studies that support that claim.

Many police may agree. Contrary to Andrew Young's assumptions about police morale, a 1995 Peter Hart survey of 400 U.S. police chiefs found that 67 percent thought that capital punishment had "no effect" on homicides, and the chiefs ranked it last among effective crime control techniques. New York City's former police chief Patrick Murphy added that "the flimsy notion" of capital punishment as an effective crime tool "is mere political puffery."

We should not be surprised, then, that homicide rates increase after the government models the utility of killing. A century ago, Nietzsche us warned to beware of those in whom "the instinct to punish is strong" for

sending a message as contradictory as a parent smacking an assaultive child and saying, "There, that will teach you not to hit your brother."

Conclusion

Our country has wandered away from being the world's champion of human rights, as well as from moral instinct and scholarly research. We keep capital punishment to allow politicians to pander to our basest instincts. Neither the criminal nor the government has the authority to kill. Valuing all life could do more to make us safe from violence than capital punishment ever will. No logic lies in the argument that killing is permissible for the government but impermissible for criminals. We expect more than such criminal behavior from our government. ▀

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