A WILD JUSTICE

THE DEATH AND RESURRECTION OF CAPITAL PUNISHMENT IN AMERICA

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"Revenge is a kind of wild justice; which the more man's nature runs to, the more ought law to weed it out." —Sir Francis Bacon
to Furman, the Court had given LDF attitudes would affect its decision. Opinion, Gautha, hadn’t been discussed during the Witherspoon decision. Indeed, public and Boykin, and had been referenced in Furman, other but what it would be if the public were important role only in Stewart’s private capacity to alter public opinion, but its lash left it inadequately prepared to meet followed. Furman, with its diverse opinion in many new theatres, and amplified in several old ones. Douglas’s opinion on capital sentencing, a disputable question at the death penalty as employed didn’t. Stewart suggested that the death penalty’s arbitrariness could be curtailed. Again, Were it not for the backlash, these contested over the course of decades, as other information and attempt to answer at the avalanche of public opinion meant couldn’t defer revisiting the issue. Thus, D5 found itself fighting many battles at its standpoint, premature. As always these new battlegrounds opened like Byron White’s Furman opinion focused on deterrence. His central premise was that states used the death penalty so infrequently that it served neither the utilitarian nor the retributive goals of punishment. Marshall and Brennan doubted that even a regularly used death penalty could reduce murder.

The majority’s skepticism about the potential utility of capital punishment were based largely on the research of University of Pennsylvania sociologist Thorsten Sellin, one of the fathers of modern criminology and a founder of the Bureau of Justice Statistics. During his influential career, which stretched more than six decades, Sellin vigorously opposed the death penalty. In 1951 he testified to Britain’s Royal Commission on Capital Punishment that the death penalty served neither deterrence nor retribution. Over the next two decades Sellin authored more than twenty articles on capital punishment, a widely read book, and debated the issue hundreds of times. In Furman, Marshall referred to Sellin as “one of the leading authorities on capital punishment,” and laid out his work in detail.

Sellin, Marshall said, urged that if the death penalty deterred, four hypotheses should be true: One, murders should be less frequent in states with the death penalty than those without it, other factors being equal. Two, murders should increase when the death penalty
"a who's who of American econometricians": These included MIT's Franklin Fisher, University of North Carolina professor Gary Koch, and Duke's Daniel Nagin. The panel also included James Q. Wilson, Marvin Wolfgang, Yale sociologist Albert Reiss, and psychologist Paul Meehl.

"the available studies provide no useful evidence on the deterrent effect": The NAS report included a review of the literature written by Forst, Victor Filatov, and Lawrence Klein, who would soon win the Nobel Prize in Economics. The trio criticized Ehrlich's work as "extraordinary insofar as it employs a vast array of manipulations." On the question of how much economics had to offer, they came down squarely on the side of the criminologists. Referring to Ehrlich's murder function, they said, "We have doubts about the insight that this approach is likely to bring to an understanding of criminal behavior." They found greater usefulness in the methodology of smoking-cancer link studies that weren't locked into a utility calculus, and that allowed for the exploration of other variables, emotional behavior, and social phenomena. "Students of econometrics ought to learn very early that significant economic conclusions can rarely be drawn from estimates of single equations."


"There was no scandal": Zimring interview (April 28, 2010).

Even today, only the boldest of scholars would claim that the debate has been settled: In the academic community, all is as it was. Scholars in the field of criminal justice—which remains a hodgepodge of former policemen, corrections officers, lawyers, philosophers, and sociologists—almost uniformly believe that the death penalty doesn't deter. Over the past two decades, more than a dozen studies have been published in leading criminal justice journals finding no deterrent effect of the death penalty. Nothing published in these journals has found any evidence of deterrence. In a 2008 survey, 88 percent of past presidents of criminological associations said they didn't believe the death penalty prevents murder. Criminal justice types continue to have little respect for the potential contribution of economists. They largely believe, as Tony Amsterdam did, that potential murderers aren't rational actors.

Among economists, however, ample support exists for the deterrence hypothesis. Many studies published in economics journals have found evidence that capital punishment prevents murder. Emory's Joanna Shepherd has been a central figure in the modern debate. In 2004 she told the House Judiciary Committee, which was considering a bill to extend the federal death penalty to terrorist acts, "In the economics literature, there is a very strong consensus. All of the modern economic studies in the past decade have found a deterrent effect." Her colleague Paul Rubin told the Senate Judiciary Committee in 2006, "All the refereed studies find a deterrent effect."

The economists regard the criminologists with reciprocal disdain, viewing them as unstructured, undisciplined, and lacking insight into criminal behavior. In 1996 Princeton's John DiLulio wrote that professional criminologists "gener-
ally lack the quantitative and formal modeling skills necessary to shed new light on old controversies or provide analytically compelling answers to methodologically complicated questions." Often the two camps act as if the other doesn’t exist. Shepherd said, "Each group tends to ignore the other’s research.”

Many of the actors in this long-running play remain the same. Even the setting hasn’t changed. The University of Chicago remains at the drama’s center. In a 2006 exchange Gary Becker and his intellectual sparring partner, Richard Posner, signed on with George W. Bush and Al Gore in the deterrence debate. In the Stanford Law Review, the well-known University of Chicago law professor (and future Obama administration official) Cass Sunstein, and his colleague Adrian Vermeule, argued that the death penalty is morally required because of research proving deterrence.

The study of deterrence continues to vex researchers. Yale Law School’s John Donohue is an intriguing and outspoken figure in the modern debate. Donohue is highly critical of the putative evidence of deterrence. It would be merely convenient, though, to group Donohue with the criminal-justice scholars. Rather, Donohue offers a cautionary note about the limited usefulness of any grouping of intellectuals, and especially the division I have drawn between criminologists and economists. Sunstein is but one example of a lawyer who credits the deterrence evidence. Donohue is an economist who doesn’t. Though a law professor, Donohue holds a Ph.D. in economics from Yale. Much of his work might be classified as conservative. In 2000, Donohue and Steven Levitt published a highly controversial paper in which they argued that half of the 1990’s crime drop was attributable to the Court’s protection of abortion rights in Roe. Nevertheless, Donohue believes deterrence hasn’t been proved and isn’t likely to be.

Donohue uses New York’s experiment with capital punishment to illustrate the problems of modeling deterrence. During the 1994 gubernatorial campaign, George Pataki ran on a pro-death penalty platform. His opponent, the three-term incumbent Mario Cuomo, had vetoed several bills aimed at reinstating capital punishment in New York. Pataki prevailed in the election, and in 1995 signed the death penalty into law. Nine years later the state’s highest court declared the statute invalid under the state constitution. Between 1995 and 2004, New York juries sentenced several murderers to death, but none were executed.

Donohue asks whether deterrence studies should include New York in the control group (because no one was executed) or the experimental group (because the death penalty was on the books). Given New York’s population, and that most studies weigh results by population, this threshold decision of how to classify New York is of enormous importance. The results of one study finding deterrence, by LSU’s Naci Mocan and Kaj Gittings, depend entirely on whether New York is included among the sample. The model is highly sensitive, Donohue says, in the same way that Ehrlich’s depended on whether one included the 1960s data. The important lesson is that Mocan and Gittings’s decision to include New York was a judgment call.

Donohue next asks what potential criminals know about the death penalty. Economic models presume knowledge, but a criminal in New York would need to
be highly sophisticated. Some of the district attorneys, including Robert Morgenthau of Manhattan and Robert Johnson of the Bronx, had sworn never to seek the death penalty. Complicating matters further, crime dropped more in these boroughs between 1995 and 2004 than in Brooklyn, where the DA actively sought death sentences. Would a potential offender in Manhattan or the Bronx respond to the incentives of living in a death penalty state or a non-death penalty state?

Furthermore, this is all premised on the highly debatable notion that offenders are rational. Ample research suggests that, as a group, offenders seek risk. They are more impulsive than non-offenders. Their decision-making is often impaired by drug and alcohol abuse. They tend to ignore future considerations. North Carolina professor Charles Dean argues that the persistence of an orientation to the present, which most adults grow out of, explains long criminal careers. This, of course, is what Tony Amsterdam said forty years ago.

Donohue and Columbia's Jeffrey Fagan, among others, catalog a long list of thorny methodological questions. Executions happen long after murders, so how could current-year execution risk bear on current-year murder rates? Are the data reliable? Four decades later problems with the UCR haven't been resolved. States are inconsistent reporting crime to the FBI. In 1997 only 73 percent of Americans lived in jurisdictions reporting arrest records. Florida failed to report any homicides to the FBI in 1998, for only five months in 1989, and for no more than two months per year in 1997, 1998, and 1999. Yet, as Fagan points out, Florida is one of the most active death penalty states, so the omission of its data is highly material.

Finally, and most vexingly, has the murder function been properly stated? Consider Texas for a moment. The Lone Star State experienced a substantial drop in murder during the 1990s and 2000s. Some have attributed this to Texas's increased use of executions. But Texas also substantially increased incarcerations, which has also been known to reduce crime. Generally speaking, high crime rates are associated with more police, more aggressive policing, tougher gun laws, longer sentences, three-strikes laws, severe prison conditions, and harsh treatment of releases. All these policy responses have been shown to affect murder rates. But no published murder equation comes near considering them all. When a state implements multiple crime-control measures, how can a researcher know which are generating the benefit?

More problematic, what if some measures have offsetting responses? Suppose that to combat rising crime, a state hires more police and begins executing more prisoners. The policing works but, unknown to the state, the executions incite citizens to violence, partially offsetting the benefit of the policing initiative. Not seeing the sort of results it had hoped for, the state hires even more police and executes even more prisoners. As it turns out, the policing program has increasing marginal utility, and executions have decreasing marginal utility. In other words, the new police hires stop more crime than the executions encourage. At the end of the program, the state would achieve a reduction in crime for its efforts. It might further conclude that the death penalty had caused this reduction in crime. Of course in some sense it was the cause of the reduction in crime. The increased use of the death penalty may have helped, but it is less clear how much and to what extent.
attorneys, including Robert Morgenstern of the Bronx, had sworn never to seek the death penalty in any case in which the DA actively sought it. But crime dropped more in these boroughs than in Manhattan or the Bronx respond to the state or a non—death penalty state?

A highly debatable notion that offenders seek to reduce their risk of conviction. They often believe that the death penalty is more lenient than life sentences in these cases. North Carolina’s persistence of an orientation to crime for the state is long criminal careers. This, of course, may explain why offenders seek to reduce their risk of conviction. They may believe that the death penalty is more lenient than life sentences in these cases. North Carolina, for example, has a high percentage of executions compared to other states.

In 1997 Florida was the only state to report any executions in 1989, and for no more than three years. Yet, as Fagan points out, Florida’s omission of its data is highly significant. What is the state of the death penalty in these states? Are the data the UCR haven’t been resolved. States with low numbers of executions have been reported as having a higher rate of executions than those with high numbers. Generally speaking, a state’s rate of executions is driven by the simple facts that during the 1960s, the rate of executions and crime went up. But correlation doesn’t prove causation. What if another factor caused both the execution rate and the murder rate to decrease? Lawrence Klein and his colleagues noted critically, "Ehrlich assumes that economic factors affect criminal behavior, but that these factors do not affect economic behavior through the economic variables that he has selected." In other words, Ehrlich didn’t know his chicken from his egg.

Yet this isn’t the last word on this matter. Some have attributed this to Texas’s substantially increased incarcerations, which are more aggressive. Generally speaking, high crime rates are linked to aggressive policies. Some suggest that more aggressive policies, tougher gun laws, longer sentences, and harsh treatment of inmates have been shown to affect murder rates. But when considering them all, when a state has more police, how can a researcher know which factors have offsetting responses? Suppose a state hires more police and begins executing more people. What is the benefit of the policing initiative? Not all the state’s policy initiatives will be effective. The policing program may increase the number of people who are arrested or incarcerated. In other words, the more police, the more people who are arrested. The end result is that the number of people in prison increases. This may cause the state to hire more police officers, which in turn led to a reduction in crime. But it only brought about the crime decrease indirectly and serendipitously.

Furthermore, none of this considers the entirely plausible notion that something entirely different is driving the system. Republicans often fare better in elections following crime waves. In the example above, it’s easy enough to imagine the election of a Republican as the cause of both hiring more police and increased use of the death penalty. But what if criminals are responding to the election of the Republican governor rather than the policy changes? The law suggests this is possible. Would we say then that increased policing or the election caused the crime drop? Even this doesn’t resolve the causal knot. What if the governor’s election was due to a set of social and economic forces that themselves affected the crime rate. How do we identify the chicken and egg then?

Disentangling causation is a daunting task. In the context of the death penalty, many scholars feel these problems of what statisticians call “endogeneity” cannot be overcome. This is precisely what the NAS faulted Ehrlich for in its 1976 report. Ehrlich’s results were driven by the simple facts that during the 1960s, the rate of executions and crime went up. But correlation doesn’t prove causation. What if some other factor caused both the execution rate and the murder rate to decrease? Lawrence Klein and his colleagues noted critically, "Ehrlich assumes that economic factors affect criminal behavior, but that these factors do not affect economic behavior through the economic variables that he has selected." In other words, Ehrlich didn’t know his chicken from his egg.

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rates. It would be a mistake, though, to attribute the higher mortality to increased alcohol consumption. This confused correlation with causation. One could easily imagine that another factor—for instance, depression—is leading people both to drink and die. The challenge for the researcher is to figure out whether it's drinking or depression or something else that's driving the system.

The solution is to use an "instrument," a variable that is related to the independent variable, but not the dependent variable. In the above example the researcher might examine the impact of alcohol taxes on mortality. Alcohol taxes are useful to study because they predict alcohol consumption—taxes go up, consumption goes down—but aren't related to depression. If decreasing alcohol taxes caused death rates to increase, the rise in mortality could be casually linked to drinking.

In the 1970s, when Ehrlich conducted his pioneering research, instrumental variable analysis hadn't yet become popular. Researchers didn't immediately recognize its value. Even Philip and Sewall Wright failed to appreciate fully the usefulness of their creation for addressing causation questions. Beginning in the '90s, economists more frequently employed instruments to address endogeneity problems. In 1994 a team of researchers at Emory including Shepherd, Rubin, and Hashem Dehdashtian used instrumental variable analysis to address the alleged deficiencies of Ehrlich's work. The Emory team found that each execution saved, on average, eighteen lives. Over the next several years several other teams replicated their work or independently used instrumental variable analysis and found a deterrent effect to capital punishment. So the question has been answered, right?

Not so fast. Instrumental variable analysis doesn't end the causation debate; it only shifts its terms. Today the debate over deterrence research is whether the studies finding deterrence have relied upon proper instruments. "Proper" means a variable that's truly external to the system. But whether a variable is truly external is largely a matter of judgment. For example, in the earlier example, the researcher used alcohol taxes as the instrument on the theory that alcohol taxes directly affect alcohol consumption but aren't affected by the exogenous variable, depression. Who's to say, though, that depression isn't part of the system? Perhaps depression makes legislators more tolerant of taxes. Perhaps taxes cause depression. That's easy enough to imagine. If so, then the researcher doesn't have an instrument, she has a new endogeneity problem. This is the focus of the modern deterrence debate.

Consider two examples of how the Emory team responded to the critiques of Ehrlich. The NAS panel, among others, said that Ehrlich's murder function suffered from endogeneity problems. For instance, the likelihood of receiving a death sentence and the murder rate might be interrelated. One might affect the other, or they might each share a common external cause. To address this the Emory team used a proxy for the likelihood of receiving a death sentence once arrested: the Republican candidate's vote tally in the preceding election. Even if jury-sentencing rates and murder rates shared a common cause, they reasoned, this common cause wouldn't affect voting behavior. In other words, election results would be a valid instrument. John Donohue says the opposite. He points to a wealth of research suggesting that Republicans do better in elections following crime
increase in the mortality to increased consumption with causation. One could easily say—alcoholism is leading people both to drink and to consume alcohol. In the above example the researcher was concerned with mortality. Alcohol taxes are useful as an instrument—taxes go up, consumption goes down. If decreasing alcohol taxes caused an increase in drinking, the researcher had to determine whether the variable was causation or was due to the instrument used. Researchers didn’t immediately think of instrumental variables. Researchers failed to appreciate fully the causation of endogeneity. Beginning in the late 1970s, researchers addressed endogeneity with Emory including Shepherd, Rubin, and the Emory team found that each executive in the next several years several other researchers used instrumental variable analysis in their research. So the question has been raised in this debate; is the proper instrument? "Proper" means a variable that is truly external to the system in the earlier example, the researcher had to determine whether alcohol taxes directly affect consumption or the exogenous variable, depression. If the variable is not part of the system? Perhaps depression is a result of alcohol consumption. Thus, the question is raised: is the proper instrument? Most of the modern deterrence debate focuses on the modern deterrence debate. Experiments are conducted to determine if the deterrence function is able to predict the likelihood of receiving a death sentence once arrested. One might affect the other, and vice versa. To address this the Emory Emory Emory Emory Emory team responded to the critiques of Ehrlich’s function using state-specific estimates. What she found didn’t contradict her earlier findings. However, she found that deterrence exists on a national level, but that it is driven by a factor of crime rate in just six states. In eight states she found that executions had no impact on the murder rate. In thirteen others, they caused the murder rate to increase. She points to a wealth of data that suggest better in elections following crime increases. Thus, he says it’s easy to imagine that voting patterns might be part of the same causal chain as crime rates and jury behavior.

A second example: The Emory team used state-specific estimates on the judicial and legal system as a proxy for the likelihood of execution given a sentence. The idea, again, is that these expenditures aren’t part of the causal chain. But Duke’s Philip Cook, among others, has shown that states with lots of executions spend more on appellate appeals, which means that the likelihood of getting a second chance is affected by the putatively exogenous variable. To illustrate this point—and to underscore how expensive the death penalty can be—New York spent $170 million on its death penalty system between 1995 and 2004, and yet executed no one.

To critics these problems are fatal. Donohue writes, "Bad instruments cannot resolve an endogeneity problem. If valid instruments cannot be found, researchers must necessarily assess the acute endogeneity issue is. If debilitating, then the researcher must conclude that valid estimation of the impact of capital punishment is not possible." Fagan agrees. "The central mistake in this enterprise is one of causal reasoning: the attempt to draw causal inferences from a flawed and limited set of observation data, and the failure to address important competing influences on murder." The debate over causation goes on. Luke must surely have said something like this in mind when he said, "Woe unto you, lawyers."

Finally it would be remiss not to note the apparent tendency of researchers to find what they want to find. Daniel Moynihan observed this effect in his Public Interest article, which is worth reading simply for its elegance. "Social scientists," Moynihan wrote, "are never more revealing of themselves than when challenging the objectivity of one another’s work." Hans Zeisel dismissed the Gregg Court’s conclusions as merely an effort to “bolster with reasons the unwillingness to abandon the ancient sentiment” in favor of retribution. But Zeisel and the LDF lawyers were happy enough with the Massachusetts Supreme Court’s 1975 ruling in O’Neal, which rejected the same evidence of deterrence that Gregg credited. It’s challenging to find any basis other than wish fulfillment to discredit the U.S. Supreme Court’s decision as lacking objectivity, and yet credit the Massachusetts Supreme Court on the same score.

Whatever tiny hope exists of synthesizing this disparate body of research may rest with Joanna Shepherd of the aforementioned Emory team. In 2007 Shepherd reexamined the data that she and her colleagues had relied upon. This time, though, instead of looking at national execution risks, Shepherd looked at state-specific estimates. What she found didn’t contradict her earlier findings. However, it fundamentally alters the picture those earlier findings drew. Shepherd found that deterrence exists on a national level, but that it is driven by a factor of crime rate in just six states. In eight states she found that executions had no impact on the murder rate. In thirteen others, they caused the murder rate to increase. The 2004 study’s reliance on national data had masked this state-by-state variation.

How could it be that the death penalty deterred in some states but not others? The key to the answer is that the states where Shepherd observed a deterrence
effect executed many more people than the states where she found either no deterrence or anti-deterrence. Shepherd found that a threshold level of executions—at least nine during the period she studied, 1977–96—was necessary to generate a deterrent effect. One policy implication of this research is that if states want to achieve deterrence, they need to execute many people. Shepherd writes, "If a state is unwilling to establish a large execution program, it should consider abandoning capital punishment." Her work, though, says something broader about the nature of criminal behavior, and the possible damage that can be done by misapplied and misunderstood statistics.

A final example: A scientist is asked, "How quickly is that block on the table moving?" The scientist replies, "Zero miles per hour." The uninitiated observer is left with the impression of an object at rest. But this isn't the case. In fact, two men are pushing against the block in opposite directions, each with equal might. Since they are equally strong, the block doesn't move. The statistic—zero miles per hour—is accurate, but it doesn't give a descriptive picture of the block, which isn't at rest in the conventional sense.

If Shepherd is right, a similarly complex set of forces is at work regarding deterrence. Statistics may help identify classes of offenders or regions where deterrence works in the aggregate. But the statements "He has been deterred" or "He was not deterred" are as misleading as the statement "The block is moving zero miles per hour." The threat of the death penalty is but one of countless social forces that impel or deter a potential offender toward or away from crime. Even the death penalty isn't a simple force. It may both deter a potential offender and incite him to crime. These aren't mutually exclusive possibilities. Potential criminals, like all human beings, aren’t always rational or irrational. The threat of execution may deter some potential offenders, calmly calculating the costs and benefits of a contemplated crime, in the manner Gary Becker envisioned in 1968. To other potential offenders—or the same individuals in different states of agitation—the fact of executions may send a message that violence is a socially acceptable means to resolve disputes. Indeed, many studies have found support for the "brutalization" hypothesis in short-term murder-rate spikes following executions.

Shepherd's research suggests that executions do brutalize society. In fact, she says, the anti-deterrence or brutalization in non-deterrence states is substantial. In the non-deterrence states, Shepherd found that executions lead to an additional 250 murders per year. Her intuition is that executions contribute to an environment of violence. The death penalty, she said, "sets an example of killing to avenge grievances, an example that some private individuals then follow."

At the same time executions deter. But with low executions rates—as in states such as California, Oregon, and Utah—the deterrence effect is small. Thus these states appear to have encouraged killing through their use of the death penalty. It is only in states such as Florida, Texas, and South Carolina, which execute many people, that "potential criminals become convinced the state is serious about the punishment" and reduce their criminal activity. When the number of executions exceeds the threshold minimum, the deterrence effect becomes powerful and outweighs the brutalization effect. Only then does the death penalty appear to have worked.
States where she found either no deter-
rent effect or a threshold level of executions—at
least 55 to 777—was necessary to generate a
sufficient deterrent effect. This research is that if states want to
deter criminals, they should consider abandoning the death penalty and
switching to other, more effective deterrents.

The statistic—zero miles per hour on the block, which isn't
moving—relates to the idea that deterrence is not about
moving the block, but about making it clear that the block is
not moving and will not move. This makes it clear that the
block is not moving, which deters people from approaching it.

But states where she found a strong deterrent effect—states
that had at least 55 executions per year—were able to generate a
deterrent effect that was strong enough to deter potential
offenders from committing crimes. This shows that the death penalty
is an effective deterrent for certain types of crimes.

Shepherd points out that murderers executed in states that fell below
the execution threshold died needlessly and induced the murder of five thousand
innocent people between 1977 and 1996.

In reaching her conclusions, Shepherd incidentally came down on the same
side as Baldus and Cole on the question of whether national or state level data
should be used in studying deterrence. In their 1975 critique Baldus and Cole
faulted Ehrlich for presuming that an execution anywhere would have an equal
deterrent effect across the United States, even in states that didn't have the death
penalty. Shepherd similarly argues that earlier papers' focus on national averages
masked important "variation among states." It isn't that the other economics
papers were wrong. They were just nondescriptive in the same way that the
statistic "The block is not moving" is misleading. The earlier papers blended together
the large number of executions in the deterrence states with the small number of
executions in the other states. It thus appeared that executions deterred crime.
But this masked what was really going on—deterrence in some states, none
or anti-deterrence in the others. The appearance of deterrence on a national level
was driven "by a handful of high-execution, high-deterrence states," as Shepherd
puts it. "In most places," she says, "capital punishment either increases murder or has
no effect."

Shepherd's findings help bridge the divide between the economists who keep
finding deterrence and the criminologists and sociologists who persistently don't.
It could be that the results depend largely—or even entirely—on the level of
aggregation of the data. To test this hypothesis Shepherd reexamined the lead-
ing studies of the past decade. Sure enough, she found that economists tended
to use national data while sociologists and criminologists focused on individual
states. If these researchers picked a no-deterrence state, of which there are many
according to Shepherd's analysis, then, needless to say, they found no evidence of
deterrence. At a personal level Shepherd said in an interview that she has no strong
view about the death penalty. "For me all it ever was was that people respond to
incentives—surprise, surprise. There's a big difference between finding deterrence
and supporting a policy."

Richard Berk, professor of criminology and statistics at University of Pennsyl-
avania, and one of the few figures who is highly respected in both the economics
and criminology universes, suggests that the entire morass can be explained simply
by whether an individual study includes Texas in its data set. If it does, the
researcher will find deterrence. If it doesn't, no deterrence will be found. Since
1976 approximately eleven hundred executions have been conducted in the United
States. More than one-third have been in Texas. Texas has such a large deterrent
effect, and large population, that its results drive any study in which it's included.

In the end one might conclusively say this: the death penalty deters, but only
some people—specifically those not deterred by the risk of life imprisonment
without the possibility of parole—and only in some places and at some times and
under some conditions, but we don't know where and when and what conditions,
and where the effect exists it's almost certainly quite small, and almost certainly
not larger or more cost effective than other penal options.
Of course this all may be answering the wrong question. Even if it were possible to determine conclusively whether the death penalty deters, this would hardly end the public-policy debate. Utilitarians would need to evaluate the cost and efficacy of the death penalty against other penal and nonpenal options. And, of course, not everyone is a utilitarian. As Franklin Zimring, author of more than thirty books and one hundred articles on criminal justice issues colorfully put it, "I don't give a shit whether the death penalty deters." This core belief isn't something that even the most sophisticated and convincing social science can alter.


303 "I think the reason to support the death penalty is because it saves people's lives": Election 2000 Presidential Debate with Republican Candidate Governor George W. Bush and Democratic Candidate Vice President Al Gore (Oct. 17, 2000). Transcript available at http://www.debates.org.


306 Herbert Wechsler . . . opposed the death penalty as a matter of principle: Wechsler told this to Michael Meltsner, among others. Meltsner interview (December 4, 2010).


308 Wechsler was a retributivist for utilitarian reasons: The leading scholar on Wechsler, Professor Anders Walker of St. Louis University Law School, points to three events that helped form Wechsler's outlook. The first took place during Wechsler's childhood in New York under Prohibition. The Volstead Act, the law defining prohibited liquors under the Eighteenth Amendment, granted a ration of ten gallons of sacramental wine per family. Jewish leaders protested the infringement of their religious freedom. When the city's anti-Semitic Bureau of Prohibition refused to issue wine licenses, Wechsler's family defied the law, as Wechsler put it, "with abandon." Wechsler took from this that laws lacking popular support had no effect.