Capital Punishment

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Abstract

This essay reviews foundational and cutting-edge social science research on capital punishment. It first describes policy-relevant work on the death penalty as legal punishment, and then provides a brief overview of the more recent contributions on capital punishment and social theory. The scope of relevant scholarship is limited to more empirically based social science scholarship on the American death penalty. Specifically, relative to the longstanding, foundational research on capital punishment, it addresses in order, the research on the deterrent effect of the death penalty; racial inequality in the administration of capital punishment capital case processing and jury decision-making; and the role of public opinion in the death penalty. It then discusses the more recently developed body of research that addresses the culture of capital punishment; and capital punishment and state governance. Finally, it lays out several potential lines for new research, including contextualizing death penalty within a broader punishment framework.

INTRODUCTION

Capital punishment has generated a huge and diverse body of interdisciplinary social science research, dating back in earnest to the mid-twentieth century. During the 1950s, several notable sociologists turned their attention to the American death penalty as a subject of interest, focusing on the penological justifications for it, patterns of its use in different jurisdictions, and problems in its administration. In 1952, the editor of *Annals of the American Academy of Political and Social Science*, Thorsten Sellin, devoted an issue to capital punishment, partly in the context of the initial development of the Model Penal Code. The issue included contributions from both prominent and emerging scholars on a wide range of topics. Sellin (1959) later wrote a comprehensive report on capital punishment, included in a draft of the Model Penal Code, in which he reviewed data on its current status in the United States and assessed its value as a deterrent.

Scholarly interest in the death penalty continued to grow in subsequent decades, resulting in numerous studies that examined operational issues associated with its use. A long line of research has been devoted to exploring

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utility of the death penalty as legal punishment, especially as a deterrent. Other major lines of research have explored racial inequality in its administration; the mechanics of death sentencing, particularly the role of capital juries; public opinion and the death penalty; and mechanisms leading to retention or abolition globally. More recently, especially since the late 1990s, more theoretically driven scholarship that addresses the place of capital punishment in society has emerged. While some of this work intersects with the policy-oriented research, there is a robust body of scholarship that uses the death penalty as a primary object of inquiry into the culture of punishment; the nature of governance; and/or macrolevel social structural relations.

In this essay, I bifurcate the amorphous body of social science research on capital punishment roughly along these lines. First, I describe the more policy-relevant work on the death penalty as legal punishment, as it historically functions as the foundational research on capital punishment in the United States. I then describe the more recent contributions on capital punishment and social theory. Given the scope of scholarship on capital punishment, I am not able to comprehensively cover the entire range of excellent work that has been produced on the topic. Rather, I select several of the major thematic strands of research and provide a broad stroke review of each.

I also largely limit my scope to more empirically based social science scholarship on the American death penalty. Specifically, relative to the longstanding, foundational research on capital punishment, I address, in order, the research on the deterrent effect of the death penalty; racial inequality in the administration of capital punishment; capital case processing and jury decision-making; and the role of public opinion in the death penalty. I then turn to the more recently developed body of research that addresses the culture of capital punishment and capital punishment and state governance. I conclude by discussing potentially fruitful avenues for future research.

FOUNDATIONAL RESEARCH

Deterrence and the Death Penalty

There is a longstanding empirical debate, dating back more than 50 years, over whether the death penalty serves as a marginal deterrent, beyond what is provided by lengthy or life prison sentences. Deterrence theory rests upon several assumptions that have also been called into question by sociological and criminological scholarship on the death penalty. Specifically, the theory assumes, first, that those who commit capital crimes consciously consider

and weigh their objective risk of being caught, tried, sentenced, and executed, and, second, that they find this possibility to be sufficiently undesirable so as to dissuade them from committing the offense. Thus, it is fitting that economists, who are more likely to accept the "rational actor" assumption, as opposed to psychologists or sociologists, have been among the most committed to testing for a deterrent effect of the death penalty.

The issue of whether the death penalty deterred seemed settled in 1978, when the National Research Council (1978) issued a report on deterrence and criminal sanctions. The report surveyed all of the available research, and concluded that no good evidence of a robust deterrent effect existed. One of the only studies (Ehrlich, 1975) to that date to find a deterrent effect of capital punishment was largely discounted owing to major methodological flaws; the bulk of the empirical research found no significant evidence of marginal deterrence for the death penalty. Indeed, some evidence supported the "brutalization" hypothesis (Bowers & Pierce, 1980), which predicts that executions spawn more homicides rather than fewer. Over the next two decades, the few studies that tested the deterrence hypothesis confirmed the NRC report's conclusions (for a full review, see Bailey & Peterson, 1999).

The deterrence debate resurfaced in the past 10 years when several economists began to apply newer econometric data analytic techniques to test, once again, whether executions deter homicide. A few studies have reported large deterrent effects (Dezhbakhsh, Rubin, & Shepherd, 2003; Zimmerman, 2009), yet these too have been critiqued for their methodological choices, and for their underlying assumptions about human behavior (Donohue & Wolfers, 2005; Fagan, Zimring, & Gellers, 2006; Kovandzic, Vieraitis, & Boots, 2009). In 2012, the National Research Council released yet another report assessing the body of work produced since its last report on the subject. The committee reviewed empirical scholarship that used multiple methodological approaches and concluded, "that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates. Therefore, the committee recommends that these studies not be used to inform deliberations requiring judgments about the effect of the death penalty on homicide" (National Research Council, 2012, p. 102). The committee expressed disappointment that the science on deterrence had not progressed since its 1978 report, leading it to reach virtually the same conclusion that it had 34 years earlier.

Capital Punishment and Racial Inequality

There is also a long line of empirical research that has examined the discretionary use of the death penalty in the United States, with a particular

focus on racial disproportionality in its application. Early, primarily descriptive studies were conducted in the 1940s and 1950s (Johnson, 1957), however, the pace and sophistication of this line of research heightened in the years leading up to the landmark Supreme Court case, *Furman v. Georgia* (1972). Sociologist Marvin Wolfgang was one of the early empirical scholars to use longitudinal data to "analyze statistically" (Wolfgang, Kelly, & Nolde, 1962, p. 301) whether the imposition of capital punishment was racially unequal, finding evidence that in Pennsylvania, Black death row inmates were significantly less likely to have their sentences commuted than their White counterparts. Wolfgang went on to work with law professor Anthony Amsterdam to examine patterns of death sentencing for rape in the South, as a function of defendant and victim race (Wolfgang & Riedel, 1973). By the time the Supreme Court ruled in *Furman*, declaring capital punishment unconstitutional as then administered, Wolfgang and Riedel's (1973, p. 133) review of the totality of empirical evidence indicated that, "the significant racial differentials found in the imposition of the death penalty are indeed produced by racial discrimination."

Because *Furman* left open the door to a "constitutional" death penalty—which was fashioned 4 years later in *Gregg v. Georgia* (1976)—scholars continued to assess patterns of racial disproportionality in the administration of capital punishment. Therefore, even though just a few members of the *Furman* Court paid even glancing attention to the racial disparity data presented in the case, it seemed evident to legal advocates and scholars that any new death penalty scheme would need to address this problem. Thus, through the 1980s, a number of longitudinal state-level studies were conducted, which indicated that while the nature of racial disparities in death sentencing had changed from pre-*Furman* to post-*Furman*, they had not been eliminated (Bowers & Pierce 1980; Gross & Mauro 1989; Paternoster 1983; Radelet & Pierce, 1985).

The ultimate study of this type was conducted by Baldus, Woodworth, and Pulaski (1990), who examined sentencing patterns in the state of Georgia pre- and post-*Furman* using a regression analysis that controlled for hundreds of potentially explanatory variables. The analyses demonstrated a strong post-*Furman* race-of-victim effect (cases involving White victims were more likely to receive death) and an interaction effect, in that Blacks who killed Whites were the most likely to receive death. This study became the empirical basis for a challenge to Georgia's death penalty law on equal protection grounds, culminating in the Supreme Court case, *McCleskey v. Kemp* (1987). The Court rejected the underlying argument of the plaintiffs, that a pattern of racial disproportionality, as demonstrated by the Baldus study, was evidence of an equal justice violation, and instead articulated a

standard of proof that requires a showing of individualized intent to discriminate. Thus, while the Court did not dispute the findings of significant racial disparities, the majority denied its legal relevance.

The *McCleskey* decision disillusioned many scholars who had spent years working in this area, which in some sense opened the door to new scholarship on capital punishment that was less concerned with legal and policy implications. Baldus himself, however, continued to produce a number of studies at the state and local levels documenting racial inequality in the administration of the death penalty. In doing so, he and his colleagues have pinpointed the stages at which discretion seems to lead to bias (Baldus, Woodworth, Zuckerman, Weiner, & Broffitt, 1998). Taken together, the extensive body of research on racial disparities in capital charging and adjudication demonstrates a clear race-of-victim effect, which appears to be largely produced by prosecutorial filing decisions, and a smaller but relatively consistent race of-victim and offender interaction effect that appears to be partly the product of jury behavior.

The Capital Trial Process

The American capital trial has also generated a significant amount of empirical scholarship. This is due in part to the elevated importance of jury procedure in the post-*Furman* period. In *Gregg v. Georgia* and a series of subsequent cases, the Supreme Court has constructed its version of a constitutional death penalty process that relies upon several mandates concerning the jury. Most significantly, juries must be "guided" in their consideration of sentencing factors, so that each defendant receives an individualized sentence that is nonetheless bounded by rules about what weighs toward life or death.

There were a handful of empirical studies addressing the capital trial before *Furman*, including those that addressed the juror death qualification process (which screens potential jurors on their ability to impose a death sentence) and several that documented the diminishing number of death sentences meted out by juries and judges (Kalven & Zeisel, 1966). By the 1980s, however, the number of studies examining capital trial issues grew significantly. In 1984, a notable body of research on death qualification and its biasing effects on jury decision-making was published in a special issue of the journal *Law and Human Behavior*, edited by Craig Haney (1984). The individual studies that comprise this issue examined the *composition* effects of excluding some potential jurors based on their death penalty attitudes, and the biasing *process* effects that emerge as a result of the death qualification procedure. Taken together, the studies made a strong case that death qualified juries are biased in ways that may compromise the rights of the defendant.

A series of studies has also empirically examined how capital jurors use judicial instructions and weigh aggravating and mitigating evidence, with an eye toward documenting the gap between the *Gregg* ideal of rationalized sentencing and the courtroom realities. There have been two primary approaches in this regard: retrospective studies using interviews with prior capital jurors, and mock juror/jury simulation studies. The Capital Jury Project (CJP) is the most extensive of the interview studies. The CJP researchers interviewed nearly 1200 former jurors from over 350 capital cases in 14 jurisdictions, collecting data on a wide range of jurors' experiences in the trial (see Bowers, 1995 for a full description of this study). This project has produced more than 50 articles reporting on how jurors use and misuse the instructions they are supposed to follow; how racial and gender dynamics of defendants and jurors impact sentencing; how "common sense" beliefs and attitudes shape decision-making; and how misinformation leads to erroneous interpretations of the law (a list of CJP publications is available at: http://www.albany.edu/scj/13194.php).

The juror/jury simulation studies have isolated several specific processes that subvert the ideals of a fair and rationalized death penalty. In particular, this research has been able to measure the relative impacts of certain kinds of evidence on the decision-making process, including different kinds of mitigating evidence (which goes toward a life verdict), victim impact evidence, and future dangerousness evidence. A consistent finding across both types of studies is that death qualified jurors are more resistant to mitigating evidence than aggravating evidence (see Sandys, Pruss, & Walsh, 2009 for a review). Studies have also documented how poorly laypersons comprehend and apply penalty phase instructions in deciding on life or death, consistently finding that the nature of the comprehension problems creates a bias toward death (see Lynch, 2009 for review). In addition, both interview studies and simulation studies have collectively demonstrated how juror and defendant demographic characteristics interact at the individual and group level to shape racially disparate sentencing. As such, they have also contributed to sociological and psychological theory about how racial bias is activated in legal settings (Bowers, Steiner, & Sandys, 2001; Fleury-Steiner, 2002; Haney, 2005; Lynch & Haney, 2011).

Public Opinion and the Death Penalty

Public opinion plays an important role in death penalty jurisprudence, as it has long been used as one of the indicia of "the evolving standards of decency" that help define what constitutes cruel and unusual punishment. Moreover, in *Furman,* Justice Marshall hypothesized that if the public was better informed about the realities of capital punishment, it would soundly

reject the sanction. Thus, a number of social scientists have examined the qualities of American attitudes about capital punishment, and a subset has explicitly tested the "Marshall hypothesis."

When simply asked whether they support or oppose capital punishment, the majority of Americans have consistently voiced support. Since 1936, when polls first measured this attitude, in only 1 year—1966—have more Americans expressed opposition than support. Yet extensive research indicates this support is relatively malleable, in that when offered an alternative to the death penalty, such as life in prison without parole, the percent favoring capital punishment significantly drops (Gross, 1998). Consistent with the Marshall hypothesis, support also erodes when respondents are provided with information about the death penalty (for an early test, see Sarat & Vidmar, 1976). Because most research indicates the death penalty is very problematic as a policy (as detailed to some extent above), this is not a huge surprise. Therefore, for example, when research participants learn about the lack of deterrent effect, high costs associated with the death penalty, issues with miscarriages of justice and racial disparity in its administration, their level of support for the punishment significantly drops (see Lambert, Camp, Clarke, & Jiang, 2011 for a review and extension of this research).

Relatedly, a body of research has examined the content of attitudes toward capital punishment as to their symbolic and expressive value. For instance, Tyler and Weber (1982) found that death penalty support functions as an aspect of political-social ideology, more than an as expression of instrumental policy support (see also Ellsworth & Gross, 1994). Moreover, a diverse body of work has demonstrated that White support for capital punishment is related to racist attitudes (see Unnever, Cullen, & Jonson, 2008 for a review).

CUTTING-EDGE RESEARCH

Until the 1990s, the bulk of social science research on capital punishment was fairly well rooted in policy considerations, even when it also was designed to test or extend social science theory about a given phenomenon. In other words, capital punishment research was done in the shadow of the law, generally speaking to how the sanction works as criminal justice policy and practice, and examining the gap between legal ideals and practical realities. However, by the 1990s, courts and policy makers alike sent a clear message to death penalty scholars that their insights would hold little sway. According to legal scholar Franklin Zimring (1993, p. 9), this turn of events brought with it the "liberating virtues of irrelevance," freeing death penalty researchers from the narrow kinds of research agendas required in capital litigation and policy research. Zimring himself was a very early pioneer in that regard, publishing a groundbreaking book with Gordon Hawkins in 1986, which, although

partly framed as a book about the American death penalty as policy, was a sustained political and cultural analysis. The authors first situate American capital punishment in an international context, then develop a compelling argument about why the US retained the punishment when its peer nations were abolishing, highlighting the role that historical factors, the decentralized political structure, and regional cultural histories play. As such, this book laid the groundwork for two strands of more theoretically driven, policy "irrelevant" scholarship that proliferated in the late 1990s and 2000s.

First, a diverse array of social scientists have conducted empirical examinations of media and communication sources, case law, trial transcripts, and other such social artifacts to explore how the death penalty "lives" in American social and political culture. This scholarship has uncovered the emotional, more symbolic cultural attachment to capital punishment in an effort to understand its persistence in the United States. Political scientist Austin Sarat has been prolific in this regard, publishing a range of work on the "cultural life of capital punishment" (Sarat, 2002). Sarat has taken an outsider perspective to examine the death penalty in media, politics, trial courts, and high courts, suggesting that fundamental legal values and legitimacy is eroded by its continued use. Another strand of this cultural analysis has been to examine the ironies and contradictions inherent in the quest for a "humane" system of execution, including its implications for state legitimacy (Banner, 2002; Kaufman-Osborn, 2002; Lynch, 2000).

A second line of work has focused on the question of American "exceptionalism" in its contemporary retention of the death penalty (when its Western peer nations have abolished), examining the historic and contemporary role of political structures, and comparative state development in order to explain this phenomenon. Thus, Garland (2010), Gottschalk (2006), and Zimring (2003) all point to the decentralized, federalist American political structure as one important component to retention, rendering state governance susceptible to interest group influence and allowing for the kinds of retributive, populist politics that have characterized American criminal justice at least in recent decades. While these scholars differ in their arguments about the relative importance (and stability) of present and historical factors, each places the United States in a comparative framework, and dissects the structures and practices of state systems of government as a way to help explain American retention.

KEY ISSUES FOR FUTURE RESEARCH

The era of "policy irrelevance" has passed, as represented by a number of significant reform developments in recent years. In recent years, a handful

of states have legislatively repealed their death penalty statutes, and several more have come close to doing so. Reform-oriented political leaders now regularly cite data on costs, lack of policy effectiveness, discriminatory application, and miscarriages of justice in support of repeal. The Supreme Court has also recently used empirical findings to justify limiting the reach of capital punishment, most notably in prohibiting the execution of mentally retarded (*Atkins v. Virginia*, 2002) and juvenile offenders (*Roper v. Simmons,* 2005). In light of this, extensions of some (although not all) of the foundational scholarship on capital punishment may be in order.

There is little to recommend further empirical examination of the deterrence question. Social psychological insights into human decision-making almost completely invalidate it on its face, given the faulty assumptions upon which it rests. Moreover, the sustained effort by numerous investigators to uncover a deterrent effect has yielded no consistent findings of support. On the other hand, there is room to more fully flesh out the theoretical explanation for why race continues to matter in the administration of capital punishment. Individual-level theories of bias are not sufficient to explain the institutionally produced patterns of disparities, nor can they fully explain the group level behavior of capital juries (Lynch & Haney, 2011). As detailed below, one avenue to pursue in that regard is to recontextualize the administration of the death penalty within the larger criminal justice system, which may help identify how mundane institutional processes contribute to biased outcomes.

There is also reason to revisit how capital juries are selected and the implications for sentencing decisions, given the wealth of findings that capital juries are demographically and attitudinally distinguishable from the communities that they represent. Emerging empirical evidence suggests that nonwhite death qualified potential jurors are especially likely to be peremptorily "stricken" by prosecutors in capital cases (Grosso & O'Brien, 2012), and, as noted above, a growing body of work pinpoints how jury demographic makeup and defendant demographics interactively trigger biased outcomes. As public support for capital punishment softens, there is reason to expect that those deemed "death qualified" will become even more distinguishable from the general public, and more homogeneous as a group. Systematic research that models the full jury selection process in capital cases will be a first step in documenting how these procedures cumulatively result in unrepresentative juries. Another important line of research might use an experimental paradigm to directly manipulate the diversity of jury groups to then measure the impact of jury composition on the sentencing process (quality of deliberations; appropriate consideration of evidence, and application of instructions).

Death penalty opinion might also be fruitfully revisited, especially in light of the recent widespread concern about miscarriages of justice in the public, political, and legal arenas. Baumgartner, De Boef, and Boydstun (2008) provide an early examination of how the "discovery of innocence" at the turn of the twenty-first century seems to have resulted in shrinking numbers of death sentences across the country. They demonstrate how the innocence issue has not significantly diminished abstract support, but seems to have eroded important behavioral expressions of support—instances of death sentencing.

Building on Baumgartner *et al*.'s (2008) research, scholars might use qualitative interviews with capital case participants to more directly examine whether and how the concrete prospect of condemning innocent defendants affects decision-making in capital cases. More broadly, there is room to measure the relationship between the symbolic, expressive features of death penalty attitudes and attitudes about miscarriages of justice, especially as mediated by measures of racial bias. Finally, building upon the recent work aiming to document and catalog exonerations across the criminal justice system (Gross, 2012), it is crucial to understand the conditions that exacerbate miscarriages of justice, and the mechanisms that allow them to both occur and remain undiscovered despite procedural review, including the role of unreliable witnesses; prosecutorial misconduct, and police and lab error and malfeasance.

More empirical research is needed addressing the impact of subnational, especially county-level factors on how capital punishment is culturally understood and practiced. Traditionally, the death penalty was treated as a national phenomenon, and analyses of it did not try to explain the huge subnational variations in usage. Zimring was among the first (Zimring & Hawkins, 1986; Zimring, 2003) to grapple with why states differed so dramatically from each other in retention and execution rates. There is something of a "southern exceptionalism" populism thesis that derives from this work, at least as pertains to actual executions (Steiker & Steiker, 2006). LaChance (2012) has looked more closely at county-level dynamics, typologizing those locally elected prosecutors who aggressively seek death sentences as a kind of modern-day Western frontiersmen, adding a twist to regional culture arguments.

There is more to be done, however, to understand the vast regional differences in capital charging and sentencing behavior, which is fundamentally a county-level issue (as nested in death penalty states). More fundamentally, there is a critical need for empirical examination of those pretrial legal processes that are not captured on transcripts in open court. Little is known about how county-level prosecutors decide which cases to pursue capitally, how office structures and resources, and larger community dynamics, shape

that decision, or how they may use the threat of capital punishment to coerce guilty pleas (although see Thaxton, 2012 for very recent work on this).

Such inquiries might be designed to more directly uncover how systemic injustices arise in our current system of capital punishment, including racial bias in charging, miscarriages of justice, and the proliferation of errors and procedural irregularities that occur in capital cases (Liebman, Fagan, & West, 2000). In addition, there are important conceptual and empirical reasons to redefine the category of "miscarriages of justice" to include those who are not factually innocent but whose death sentences were erroneously produced by the same set of procedural errors and failures (Haney, 2006).

Capital defenders have received more empirical scrutiny (Cheng, 2010; Kaplan, 2010; Sarat, 2002), but the mechanics of lawyering in capital cases, on both sides, is still ripe for further empirical inquiry. The biggest impediments to this line of research are access to court actors, especially prosecutors (for survey, interview or ethnographic studies), and access to meaningful case processing data that can be quantitatively analyzed.

A final, worthwhile substantive area for new research has to do with the post-sentencing "life" of capital punishment. As Steiker and Steiker (2006) point out, many jurisdictions have meted out death sentences prolifically, but do not then execute those sent to death row. Nationally, condemned inmates wait, on average, nearly 15 years before execution, and are almost three times as likely to leave death row owing to a legal status change or death by other means (Snell, 2011). This has raised concerns about the psychological consequences of this purgatory for condemned offenders, and has prompted inquiries into the post-death sentence experience, including why some condemned "volunteer" for execution (Rountree, 2011).

The indeterminate, long-term death row inmates may look like life-sentenced prisoners, but their experiences can be distinguished in part by the highly restrictive death row housing that most condemned inmates, as well as by the psychic experience of a pending execution in their future. Thus social psychological and microsociological research that examines how prisoners experience their confinement might be extended to include condemned prisoners. Such a line of inquiry might be able to tease out the deleterious effects of high-security and "supermax" living conditions from the psychological impacts of a pending execution that may or may not ever come to fruition.

CONCLUDING COMMENTS

Death penalty scholarship has, for the most part, treated the topic as an autonomous entity, disembodied from the larger penal culture and criminal justice systems in which it operates. Indeed, the "death is different" doctrine

that began with *Furman* seems to have also shaped the research agendas of social scientists. There are some exceptions, especially in theoretical treatments—most notably Gottschalk's (2006) *The Prison and the Gallows*—but on the empirical side, most examinations treat death penalty phenomena as stand-alone subjects of inquiry. There are theoretical, methodological, and policy reasons to examine the American death penalty in broader contextual frameworks.

Each of the substantive suggestions for future research would benefit by this contextualization. For example, there is no doubt that better access and data are needed to understand how prosecutors exercise their discretion in capital-eligible cases, which would help us better explain county-level variations and racial disparities in outcomes. These are areas that we know too little about, empirically, in noncapital cases as well, despite their centrality to all criminal case outcomes, so research designs that account for prosecutorial behavior across case types would be especially insightful. Are prosecutor offices that more prolifically seek death sentences the same ones that seek especially punitive prison sentences and/or oppose rehabilitative interventions? Are there contextual factors that similarly predict these kinds of practices?

This explicit linkage is beginning to be made in several sub-areas, and some scholarship is moving in this direction. A new edited volume by Ogletree and Sarat (2012) is comprised of a set of contributions that explore whether life without parole and other long punitive sentences are the "new death penalty." Similarly, the University of Texas School of Law sponsored a conference in Spring, 2013, "Mass Incarceration and the Death Penalty" that resulted in a 2-issue symposium published in American Journal of Criminal Law, volume 41 of papers examining aspects of this relationship. These developments are an excellent in-road into what will likely be an important new trajectory in the scholarship on capital punishment.

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