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HOW EMPIRICAL STUDIES CAN AFFECT POSITIVELY THE POLITICS OF THE DEATH PENALTY

Ronald J. Tabak†

INTRODUCTION

Empirical studies concerning the death penalty can play an important role in public discourse on capital punishment and can affect our political system's handling of this issue. But constructive discourse will occur only if opponents of the death penalty educate themselves about what the empirical studies show. Abolitionists then can include these studies in their arsenal along with other arguments against state-implemented killings. The discussion below exemplifies how death penalty opponents can use empirical studies to make effective arguments against capital punishment.

I

DETERRENCE

Death penalty proponents persistently make the argument that capital punishment deters killing. This argument takes a variety of forms, none of which withstands analysis.

A. Reputable Studies Fail to Find a Deterrent Effect

Scholars conducting valid studies on the subject of deterrence have failed to find any deterrent effect from capital punishment.¹ This proposition holds true whether one looks just at the states with the death penalty or whether one compares death penalty states with non-death penalty states.²

Yet in the political discourse, the proponents of the death penalty often claim the contrary—that a deterrent effect exists. They still cite

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¹ See, e.g., RAYMOND PATERNOSTER, *CAPITAL PUNISHMENT IN AMERICA* 218-35 (1991).

² See, e.g., Ronald J. Tabak & J. Mark Lane, *The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty*, 23 *LOY. L.A. L. REV.* 59, 116-17 (1989) (comparing murder rates of several states with an active death penalty to the rate in New York, which at the time did not have the death penalty).

studies done by Isaac Ehrlich and his student, Stephen Layson.³ Ehrlich purported to show that every execution prevents eight homicides.⁴ Layson went further and claimed that each execution prevents eighteen homicides.⁵ Strangely, Layson "found" most of these "prevented" homicides in years during which no jurisdiction executed anyone.⁶ Layson conceded in congressional testimony that he did not "regard [his] evidence . . . as conclusive" and that it would require many more studies before one could argue that the death penalty deters killing.⁷

Even though no one has published any study confirming Ehrlich's or Layson's findings, many death penalty proponents continue to rely on their studies.⁸ To counter this reliance, abolitionists should point out that the National Academy of Sciences appointed a panel that strongly discredited Ehrlich's study.⁹ Additionally, many other scholars have criticized sharply the work of both Ehrlich¹⁰ and Layson.¹¹

³ See, e.g., *Habeas Corpus: Hearings on H.R. 3131 Before the Subcomm. on Civil and Const. Rights of the House Comm. on the Judiciary*, 103d Cong. 228, 252-55 (1993) (statement of Paul G. Cassell, Associate Professor of Law, University of Utah College of Law); Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 3 (1996).

⁴ See Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 398 (1975).

⁵ See Stephen K. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 SOC. ECON. J. 68, 80 (1985).

⁶ Although Layson's study covered 1934-77, he only claimed to have found a deterrent effect in the last 15 of those years, but in eight of those years no jurisdiction in the United States executed anyone. Indeed, Layson testified that if he were to exclude all of the post-1960 data, the evidence for the deterrent effect of capital punishment "becomes very weak" or even "nonexistent." *Capital Punishment: Hearings on H.R. 2837 and H.R. 343 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 99th Cong. 311, 316 (1987) (statement of Stephen Layson, Professor of Economics, University of North Carolina, Greensboro).

⁷ *Id.* at 313.

⁸ See, e.g., Thomas Sowell, *Death Penalty Is Valid Option*, ST. LOUIS POST-DISPATCH, Dec. 12, 1994, at 11C.

⁹ See Lawrence R. Klein et al., *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, in *DETERRENCE AND INCAPACITATION* 336, 358 (Alfred Blumstein et al. eds., 1978).

¹⁰ See, e.g., Brian Forst, *Capital Punishment and Deterrence: Conflicting Evidence?*, 74 J. CRIM. L. & CRIMINOLOGY 927, 938-39 (1983) (questioning Ehrlich's claim of deterrence through capital punishment); Radelet & Akers, *supra* note 3, at 3 (noting the criticism of Ehrlich's argument); Gordon P. Waldo, *The Death Penalty and Deterrence: A Review of Recent Research*, in *THE MAD, THE BAD, AND THE DIFFERENT* 169, 172-76 (Israel L. Barak-Glantz & C. Ronald Huff eds., 1981) (cataloging various critiques of Ehrlich's study).

¹¹ See generally James Alan Fox & Michael L. Radelet, *Persistent Flaws in Econometric Studies of the Deterrent Effect of the Death Penalty*, 23 LOY. L.A. L. REV. 29 (1989) (inspecting and criticizing Layson's econometric study as a means of determining whether the death penalty acts as a deterrent).

B. Anecdotal Assertions of Deterrence Are of Dubious Credibility and Are Offset by Evidence that the Death Penalty Sometimes May Lead to Murder

Death penalty supporters often claim that prisoners have stated that fear of the death penalty had prevented them from committing murder. These death penalty proponents then argue that capital punishment has at least deterred those people. The prisoners' statements in response to these "what if" questions, however, are inherently unreliable. In any event, the death penalty, in some cases, has had the opposite effect and encouraged homicides. For example, few people know that the notorious Ted Bundy went to Florida to commit his last murder because Florida had the death penalty and he had a death wish.¹² Moreover, several studies have found that the number of homicides actually may *increase* during the period immediately following a well-publicized execution.¹³

C. Studies Show that Criminologists, Police Chiefs, and Sheriffs Believe that the Death Penalty Is Not a Significant Deterrent

Although respected analysts overwhelmingly agree that no solid proof demonstrates that the death penalty deters homicide, the public largely still believes that it does.¹⁴ Indeed, if the public thought otherwise, significantly fewer people would support capital punishment.¹⁵

Accordingly, capital punishment opponents should be aware of studies that undercut the public's belief in deterrence. For example, the study that Professors Michael L. Radelet and Ronald L. Akers conducted shows that most criminologists do not believe that the death penalty deters crime.¹⁶ Moreover, in 1995, 386 randomly selected po-

¹² See DAVID VON DREHLE, *AMONG THE LOWEST OF THE DEAD: THE CULTURE OF DEATH* Row 314 (1995); see also Trisha Renaud, *What He Wanted: Sentence Is Death*, NAT'L L.J., Oct. 26, 1998, at A8 (discussing the death sentence of Daniel M. Colwell, a mentally ill defendant who committed murder because he wanted the death penalty and then threatened jurors should they fail to impose it).

¹³ See, e.g., Thorsten Sellin, *The Death Penalty: A Report for the Model Penal Code Project of the American Law Institute*, in MODEL PENAL CODE 220 post, 65-69 (Tentative Draft No. 9, 1959) (study conducted for the American Law Institute's Model Penal Code Project); William C. Bailey, *Disaggregation in Deterrence and Death Penalty Research: The Case of Murder in Chicago*, 74 J. CRIM. L. & CRIMINOLOGY 827, 855-58 (1983); William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIME & DELINQ. 453, 471-83 (1980).

¹⁴ See Samuel R. Gross, *Update: American Public Opinion on the Death Penalty—It's Getting Personal*, 83 CORNELL L. REV. 1448, 1453-54 (1998).

¹⁵ See Radelet & Akers, *supra* note 3, at 4 (noting that in a Gallup public opinion poll 76% of respondents initially supported the death penalty, but only 52% continued their support when asked to hypothesize that capital punishment does not deter murder).

¹⁶ See *id.* at 5-14 (reporting in part that only 4.5% of surveyed experts believe that the death penalty has been a stronger deterrent than long prison sentences).

lice chiefs and county sheriffs throughout the country ranked the death penalty *last* among seven potential ways to reduce crime.¹⁷ Rather, they responded by a 67% to 26% margin that they do not believe that the death penalty significantly lowers the number of killings.¹⁸

D. The Death Penalty Is Not Needed to Prevent People Who Have Committed Capital Murder from Killing Again

Some death penalty proponents make a somewhat different argument, asserting that even if the death penalty does not deter people who never before have committed murder, it surely prevents those already imprisoned for capital murder from killing again. This argument—although perhaps reasonable in theory—disregards empirical evidence about the behavior of prisoners who have committed capital murder. Do they kill again? The evidence shows that virtually all of them do *not* kill again. A study that Professors Marquart and Sorensen conducted of all 558 inmates in thirty states whom the Supreme Court's decision in *Furman v. Georgia*¹⁹ had saved from execution bears this out.²⁰ It shows that in the following fifteen years, none of them killed a prison guard in twenty-nine of the thirty states, and only seven committed a homicide against anyone—four against fellow prisoners, one against an ex-girlfriend, and two against Ohio prison guards.²¹ Meanwhile, by the time Marquart and Sorensen published their study, attorneys had shown that at least four people whom *Furman* saved from execution were innocent of the crimes for which they had been sentenced to death.²² As Professor Marquart said, "We would have executed nearly 600 convicts to protect us from [seven]. And we would have killed four innocent people in the process."²³ Professors Marquart and Sorensen conducted a separate study with Professor Eklund-Olson that focused on ninety-two inmates whom courts had sentenced to death *after Furman* only to have their sentences later changed to life imprisonment.²⁴ They found that only one of the inmates committed a murder (and that was committed in

¹⁷ See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., ON THE FRONT LINE: LAW ENFORCEMENT VIEWS ON THE DEATH PENALTY 4, 5 fig.1 (1995).

¹⁸ See *id.* at 9, 10 tbl.4.

¹⁹ 408 U.S. 238 (1972).

²⁰ See James W. Marquart & Jonathan R. Sorensen, *A National Study of the Furman-Commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 LOY. L.A. L. REV. 5, 22-24 (1989).

²¹ See *id.* at 19-21, 24-25, 27.

²² See *id.* at 25.

²³ Andrew H. Malcolm, *Society's Conflict on Death Penalty Stalls Procession of the Condemned*, N.Y. TIMES, June 19, 1989, at B10 (quoting Professor Marquart).

²⁴ See James W. Marquart et al., *Gazing into the Crystal Ball: Can Jurors Accurately Predict Dangerousness in Capital Cases?*, 23 LAW & SOC'Y REV. 449, 460 (1989).

prison), and that these inmates were generally less violent than other prisoners.²⁵ These facts are inconsistent with what capital punishment proponents would have the public believe.

Many death penalty opponents, however, say capital punishment is needed to prevent killings by prisoners released on parole. This argument is erroneous. Almost all parolee killings that death penalty proponents cite involve parolees whom capital punishment could not possibly have prevented from killing because they had not committed capital crimes.²⁶ (Indeed, many were not previously convicted of *any* degree of homicide.²⁷) Moreover, the parole of and subsequent killings by these prisoners and those few others who *were* previously convicted of capital murder has nothing to do with the most common *alternative* to the death penalty for those convicted of capital crimes: life without possibility of parole. The state cannot release those serving this sentence absent an extremely rare grant of clemency. Although states did release on parole some capital murderers and others whom capital punishment supporters cite when making their argument, these releases occurred under life (or term of years) *with* possibility of parole laws.²⁸ Yet most states now have replaced those laws with life *without* parole laws, at least for capital crimes.

Thus, while the ill-fated paroles cited by death penalty supporters are upsetting, they are being used to reach a baseless conclusion. Death penalty opponents should use particular well-publicized examples of parolees who kill to show how the death penalty is irrelevant in considering how to prevent prisoners from being paroled and then committing murder.²⁹ They should also cite the empirical evidence discussed above concerning the subsequent histories of people who not only committed capital murder, but also were sentenced to death.

Perhaps most importantly, abolitionists need to inform the public that the sentence of life without possibility of parole exists as an alternative to the death penalty in most jurisdictions. And abolitionists must impress upon the public that this sentence really means life *without* possibility of parole. As Professor Gross states in his Symposium article, most people and most jurors do not believe that life without

²⁵ See *id.* at 460-62.

²⁶ Several anecdotal examples are cited in Tabak & Lane, *supra* note 2, at 120-23.

²⁷ See, e.g., *id.* at 120-21 (discussing California's Lawrence Singleton, whose prior conviction was for rape and attempted murder, not any degree of homicide).

²⁸ For example, it was parole under life *with* possibility of parole systems, and not either life *without* parole or clemency, that occurred in the Smith case, see *infra* note 29, and in the examples discussed by Tabak and Lane, *supra* note 2, at 120-23.

²⁹ See Tabak & Lane, *supra* note 2, at 121 (discussing California's Jimmy Lee Smith, who murdered a Los Angeles policeman the same year that he was paroled from prison, but whose prior convictions concerned theft and drugs, not any degree of homicide).

parole really exists.³⁰ Yet it does exist in most jurisdictions.³¹ Moreover, the states in which it does exist, such as Michigan (which does not have the death penalty), do not release capital murderers serving this sentence.³²

Abolitionists also should note in political discourse that in New York, Republicans fought against the enactment of a life-without-parole sentence either instead of enacting the death penalty or as a part of the death penalty statute. When Mario Cuomo was governor, the Republicans refused to enact a life-without-parole sentence because, as they publicly conceded, they knew that allowing such a sentence would weaken death penalty support.³³ In other words, they wanted to bolster the phony argument that the choice was between enacting the death penalty, which Cuomo was preventing, and letting the state parole convicts who would commit more murders. When New York elected George Pataki as governor, it became clear that New York would adopt the death penalty. Still, his former colleagues in the Republican-controlled State Senate opposed the inclusion of life without parole as an alternative.³⁴ The legislature ultimately included it at the insistence of Assembly Democrats.

E. Recent Murder-Rate Drops in Such States as New York and Texas Do Not Provide Legitimate Support to the Deterrence Argument

As yet another deterrence argument, death penalty supporters currently point to the declining murder rates in both Texas, which executes a tremendous number of people, and New York, which enacted the death penalty in 1995. Indeed, Governor Pataki has asserted that the enactment of the death penalty explains why the murder rate in New York is declining so rapidly.³⁵

³⁰ See Gross, *supra* note 14, at 1459-62; see also RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY 8 (1993) ("Most Americans are poorly informed about the likely sentences which capital murderers would receive if not given the death penalty.").

³¹ See DIETER, *supra* note 30, at 8, 11 fig.4.

³² See Diane Katz, *In Mich., Life Without Parole*, NEWSDAY, June 20, 1989, at 5 ("After a few years, lifers become your better prisoners. They tend to adjust and just do their time. They tend to be a calming influence on the younger kids, and we have more problems with people serving short terms" (quoting Michigan Department of Corrections official Leo Lalonde)).

³³ See Elizabeth Kolbert, *As Vote on Death Penalty Nears, Cuomo Advocates Life Sentences*, N.Y. TIMES, June 19, 1989, at B10.

³⁴ The first death penalty legislation to be introduced that year in the Republican-controlled New York State Senate did not include life without parole as a sentencing alternative. See James Dao, *Delay in Albany on Death Penalty*, N.Y. TIMES, Feb. 15, 1995, at A1.

³⁵ See Clyde Haberman, *Golden Oldie from Pataki: Death Ditty*, N.Y. TIMES, June 16, 1998, at B1.

Death penalty opponents, and anyone else with a modest regard for the truth, should respond that the declining Texas murder rate mirrors a national trend that includes many states without either the death penalty or Texas's blistering pace of executions. As for New York, the large drop in the murder rate began several *years* before it enacted the death penalty. Indeed, in New York City, where approximately 80% of the state's murders occur,³⁶ the murder rate dropped so sharply in the first half of 1995—*before* September 1995, when the death penalty law took effect—that on July 8 the *New York Times's* front-page headline read, *Murder Rate Plunges in New York City: A 25-Year Low in First Half This Year*.³⁷ In Manhattan, where District Attorney Morgenthau has never sought the death penalty, the murder rate now has reached its lowest level since the early-1950s.

Governor Pataki's argument that a death penalty statute, under which *no one* had been sentenced to death until June 1998, has somehow greatly lowered the murder rate is ludicrous. If his argument were true, then why has Philadelphia, which has sent over 100 people to death row, not also had its murder rate plunge rather than remain at its high level?³⁸ Indeed, his claim is at odds with Reverend Pat Robertson's argument that the death penalty does not deter now but would deter if only states would carry it out more quickly.³⁹ In responding to those who argue that speedy executions would lead to deterrence, capital punishment opponents should point out that jurisdictions in this country during the pre-*Furman* era executed people much more quickly than they do now; yet the reputable scholarly studies have failed to find a deterrent effect during that time.⁴⁰

F. The Burden of Proof on the Deterrence Argument Should Rest on the Shoulders of Supporters, Not Opponents, of the Death Penalty

During the March 1995 debate in the New York State Assembly, which immediately preceded the enactment of the death penalty law, the legislation's Assembly sponsor, Eric Vataliano, stated that while

³⁶ See James R. Acker, *When the Cheering Stopped: An Overview and Analysis of New York's Death Penalty Legislation*, 17 PACE L. REV. 41, 89-90 & n.187 (1996) (citing N.Y. STATE DIV. OF CRIM. JUSTICE SERVS., 1994 CRIME AND JUSTICE ANNUAL REPORT 8 (1995)).

³⁷ Clifford Krauss, *Murder Rate Plunges in New York City: A 25-Year Low in First Half This Year*, N.Y. TIMES, July 8, 1995, at A1.

³⁸ See Haberman, *supra* note 35.

³⁹ Robertson, in opposing Texas's execution of Karla Faye Tucker, said that he would not have opposed her execution if Texas had carried it out many years earlier because back then, it would have deterred killings, and she had not yet shown remorse and become a pious person. See *60 Minutes: Inmate 777: Woman on Death Row Gets Support from Christian Community* (CBS television broadcast, Dec. 7, 1997) (transcript available in LEXIS, News Library, Script File).

⁴⁰ See sources cited *supra* notes 1, 10.

the death penalty might or might not deter, the burden of proof on deterrence rests with those who oppose the death penalty.⁴¹ Thus, he thundered, if the evidence regarding deterrence is inconclusive, New York should have the death penalty because it might deter.⁴²

In response, death penalty opponents should set forth reasons why the burden of proof must rest with *supporters* of the death penalty. First, the state takes lives with the death penalty. Thus, if supporters cannot show that it deters killing, the state surely should not take those lives. Indeed, the lack of demonstrable deterrence has compelled the Roman Catholic Church to favor, as a practical matter, the abolition of the death penalty.⁴³

Second, the death penalty brings with it the danger of executing innocent people. As Professors Radelet, Bedau, and Putnam have shown, this country has a long history of sentencing to death, and sometimes executing, innocent people.⁴⁴ In a growing number of cases, the state has averted executing innocent people only because of a variety of completely fortuitous circumstances.⁴⁵

Third, jurisdictions in the United States carry out the death penalty in a systemically unjust fashion. These systemic problems—including the lack of qualified and properly performing counsel,⁴⁶ the curtailment of habeas corpus as a means to rectify due process violations,⁴⁷ the pattern of racial discrimination in implementing capital punishment,⁴⁸ and the execution of both mentally retarded people and juveniles⁴⁹—prompted the American Bar Association (“ABA”) last year to call for a moratorium on executions in this country.⁵⁰ Thus,

⁴¹ See The Assembly, State of New York, Record of Proceedings, Mar. 6, 1995, at 8-10.

⁴² See *id.*

⁴³ See Panel Discussion, *Is There Any Habeas Left in This Corpus?*, 27 LOY. U. CHI. L.J. 523, 612-13 (1996) (remarks of Rev. Michael Place) [hereinafter *Habeas Panel*] (discussing JOHN PAUL II, ENCYCLICAL LETTER, EVANGELIUM VITAE, THE GOSPEL OF LIFE: ON THE VALUE AND INVIOABILITY OF HUMAN LIFE (1995)).

⁴⁴ See generally MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992) (cataloging past and contemporary examples of cases in which the state prosecuted, convicted, or executed innocent people).

⁴⁵ See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., INNOCENCE AND THE DEATH PENALTY: THE INCREASING DANGER OF EXECUTING THE INNOCENT 24-26 (1997).

⁴⁶ See Tabak & Lane, *supra* note 2, at 69-75.

⁴⁷ See *infra* Part III.B.1.

⁴⁸ See, e.g., David C. Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638 (1998).

⁴⁹ See generally Gross, *supra* note 14, at 1466-67 (discussing the discontinuity in public opinion concerning whether the death penalty should be applied to youths and the mentally retarded).

⁵⁰ Resolution 107, A.B.A. House of Delegates (Feb. 3, 1997) reprinted in Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 49 (1996).

the largest organization of American lawyers, based on its considerable expertise regarding the functioning of the American death penalty system, has said that the system is so unfair that executions must be halted until we correct all of these pervasive problems. Professors Randall Coyne and Lyn Entzeroth, the authors of the leading casebook on capital punishment, have set forth extensively the bases for the ABA resolution.⁵¹ United Nations Special Rapporteur Bacre Waly Ndiaye, an independent expert whom the United Nations Commission on Human Rights appointed to study the United States capital punishment system, echoed the ABA's conclusions and call for a moratorium in an extensive report released publicly in April 1998.⁵²

II COST

Many death penalty supporters justify their support for capital punishment by arguing that they do not want to spend money on imprisoning people convicted of capital murder. In response to this argument, death penalty opponents should point out that all serious studies on this point have found that the death penalty system costs considerably more than a non-death penalty system. Duke University's Terry Sanford Institute of Public Policy completed one of the most comprehensive of these studies in 1993.⁵³ It concluded, after two years of analysis, that in North Carolina death penalty cases cost at least \$2.16 million more per execution than life without parole.⁵⁴ The Death Penalty Information Center report, aptly titled *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*,⁵⁵ summarized the Cook and Swanson study and numerous other studies reaching similar conclusions.⁵⁶

To be effective, capital punishment opponents must look beyond the bottom line that these studies reveal. They also must know that postconviction and federal habeas corpus proceedings are *not* the major reasons that the death penalty system is more expensive than the alternative; and that even if jurisdictions completely abolished these proceedings, the death penalty system still would be more expensive

⁵¹ See Coyne & Entzeroth, *supra* note 50.

⁵² See *Report of the Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions*, U.N. ESCOR, Hum. Rts. Comm., 54th Sess., Agenda Item 10, at 34, U.N. Doc. E/CN.4/1998/68/Add.3 (1998); Elizabeth Olson, *U.N. Report Criticizes U.S. for 'Racist' Use of Death Penalty*, N.Y. TIMES, Apr. 7, 1998, at A17.

⁵³ See PHILIP J. COOK & DONNA B. SLAWSON, *THE COSTS OF PROCESSING MURDER CASES IN NORTH CAROLINA* (1993).

⁵⁴ See *id.* at 98.

⁵⁵ RICHARD C. DIETER, *DEATH PENALTY INFO. CTR., MILLIONS MISSPENT: WHAT POLITICIANS DON'T SAY ABOUT THE HIGH COSTS OF THE DEATH PENALTY* (rev. ed. 1994).

⁵⁶ See *id. passim*.

than the alternative. The greatest expenses associated with capital punishment arise from the following: a considerably higher percentage of cases go to trial when prosecutors seek the death penalty than when they do not; and death penalty trials require both more intense pretrial preparation and more elaborate, two-phased trial proceedings.⁵⁷ Moreover, a high percentage of the cases in which prosecutors seek the death penalty, after incurring all these extra expenses, result in sentences other than death—either as the outcome of the original trial or as the result of other courts subsequently granting relief because of harmful constitutional error, an unusually common occurrence in capital trials.⁵⁸

If death penalty opponents are unaware of the actual reasons why the death penalty system is more expensive than the alternative, they unintentionally may support the arguments of those who want to eviscerate habeas corpus (and are having considerable success towards that end). This risk should not prevent death penalty opponents from making the cost argument. Rather, they must emphasize the major reasons why the death penalty system is more expensive and stress that the cost of litigating postconviction and habeas proceedings is a relatively minor factor.

III VENGEANCE

A. The Vengeance Argument Has Become Respectable

In the pre-*Furman* era, few people in respectable circles advanced vengeance as an argument for the death penalty.⁵⁹ Today however, many death penalty proponents concede that the traditional arguments for the death penalty are not persuasive, but they then assert that vengeance justifies the death penalty.⁶⁰ They argue that some criminals deserve the death penalty so society can show its most ex-

⁵⁷ See *id.* at 19-21.

⁵⁸ See *id.* at 19-22; see also Tabak & Lane, *supra* note 2, at 133-35 (articulating several reasons why the death penalty increases state expenditures). The extra cost of the death penalty is not due to the expense of litigating frivolous appeals, as the proponents assert. To the extent that defendants win appeals, the additional cost is obviously not due to frivolous appeals. Moreover, it is not due to the costliness of litigating meritorious appeals. Rather, the additional costs flow from the added expense of the original trial and also from the expense of either relitigating the trial or obtaining a life sentence that likely could have been reached without all of the added costs. The high rate of reversal is due, in larger part, to prosecutors and judges succumbing to the political pressures to sentence defendants to death once prosecutors have chosen to seek the death penalty. See *id.* at 133-34.

⁵⁹ See The Ass'n of the Bar of the City of N.Y., *A Symposium on the Death Penalty*, 23 HOFSTRA L. REV. 627, 630 (1995) (remarks of Norman Redlich).

⁶⁰ Death penalty proponents do not always use the word "vengeance," but their argument amounts to one for vengeance when they advocate the death penalty because the defendant "deserves" it or because it is supposedly necessary to honor the victim's memory.

treme disapproval of their crimes and supposedly provide some solace to the victim's survivors. Some death penalty proponents who make this argument do not insist on the death penalty if the person facing execution shows remorse, while others insist on executions notwithstanding remorse. Many death penalty supporters opposed Texas's early-1998 execution of Karla Faye Tucker, highlighting this partial divergence of views.

B. Empirical Evidence of Unfairness Counters the Call for Vengeance

In response to vengeance arguments, abolitionists must understand the moral arguments against vengeance and the true background of Biblical passages such as "An eye for an eye and a tooth for a tooth," which, when properly understood, do *not* justify capital punishment.⁶¹ Death penalty proponents, however, often seek to marginalize their opponents by disagreeing on the traditional moral arguments and ignoring other responsible bases for opposing the death penalty.

This makes it particularly important for death penalty opponents to know about empirical evidence showing many grossly unfair respects in which the death penalty system operates. Indeed, executions are for that reason alone immoral. As noted earlier, Coyne and Entzeroth summarize much of the empirical evidence in their article outlining the bases for the ABA's call for a moratorium on executions.⁶² The following discussion touches on empirical evidence concerning three grossly unfair aspects of the death penalty.

1. *Habeas Corpus and Clemency*

Professor James Liebman has done detailed studies showing that in habeas cases decided between 1976 and 1991, 47% of death row inmates who had lost in all state court proceedings obtained relief in federal habeas corpus.⁶³ This statistic is very important, but opponents of habeas corpus often prevail in the public discourse because habeas corpus's supporters fail to explain what it is and why it is important. Accordingly, some supporters belatedly have begun to highlight examples of cases in which death row inmates have obtained relief only through habeas corpus. Two compelling examples warrant discussion. The Supreme Court affirmed habeas relief for my client, Raymond Franklin, because the jury charge shifted the burden of proof to him on the crucial issue, and the judge's mistake was not

⁶¹ See Tabak & Lane, *supra* note 2, at 142-46.

⁶² See Coyne & Entzeroth, *supra* note 50, at 35-37.

⁶³ See 1 JAMES S. LIEBMAN & RANDY HERTZ, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 17 & n.21 (2d ed. 1994).

harmless error.⁶⁴ The Court also granted Tony Amadeo habeas relief⁶⁵ after “an independent civil action in federal court brought to light a scheme” in which the district attorney surreptitiously had the jury commissioner discriminate against African Americans.⁶⁶ The district attorney did this by constructing a jury venire that was racially imbalanced by an amount just under the level likely to attract scrutiny.⁶⁷ Without seeing a lengthy list of such examples,⁶⁸ otherwise sophisticated lawyers—not to mention nonlawyers—often fail to realize the fundamental nature of the Bill of Rights violations that lead to habeas corpus relief.

Unless people know about both the realities of habeas corpus and Professor Liebman’s empirical data, habeas corpus opponents will succeed with their erroneous claims that defendants who have secured relief in habeas corpus have won merely on “technicalities” and that habeas corpus “reform” is merely an effort to prevent frivolous delay tactics. If habeas corpus reform really were aimed at stemming frivolous arguments, I, for one, would not object to it. Underneath the veneer of its proponents’ reasonable-sounding verbiage, however, this reform actually is aimed at preventing relief for death row inmates with *meritorious* arguments. That is, habeas corpus reform principally aims to preclude a person, whose constitutional rights the state has violated in a way that very possibly has affected the trial’s outcome, from securing a federal court ruling on his meritorious constitutional claims. Because the supporters of habeas corpus largely have failed to expose this aim effectively, Congress enacted habeas corpus reform in 1996 as part of the misleadingly named Antiterrorism and Effective Death Penalty Act of 1996.⁶⁹

Many death penalty supporters and habeas corpus opponents join Paul Kamenar of the Washington Legal Foundation in arguing that our legal system now provides “super due process” and thereby eliminates unfairness problems in the death penalty’s implementation.⁷⁰ Yet even before Congress “reformed” habeas corpus, there were numerous examples to the contrary. These examples include cases in which the state executed people because their lawyers negligently had failed to object to a serious constitutional violation on

⁶⁴ See *Francis v. Franklin*, 471 U.S. 307, 325-26 (1985).

⁶⁵ See *Amadeo v. Zant*, 486 U.S. 214, 228-29 (1988).

⁶⁶ *Id.* at 217.

⁶⁷ See *id.* at 217-18.

⁶⁸ See, e.g., *Habeas Panel*, *supra* note 43, at 526-29 (commentary by Ronald J. Tabak).

⁶⁹ Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

⁷⁰ Conference, *The Death Penalty in the Twenty-First Century*, 45 AM. U. L. REV. 239, 340 (1995) [hereinafter *Death Penalty Conference*] (remarks of Paul Kamenar, Washington Legal Foundation).

which others had obtained relief or because the Supreme Court has erected various other procedural "booby traps" for capital defendants.⁷¹ Supporters of habeas corpus need to know about and discuss these examples. The "booby traps" are the real technicalities, *not* the meritorious constitutional claims that the "booby traps" and habeas corpus reform prevent the federal courts from reaching. Empirical studies about jurors' misunderstandings of jury charges are important in explaining (1) the importance of habeas corpus, because courts have sometimes granted habeas corpus relief due to misleading jury charges; and (2) why clemency is needed, because the severe new limitations on habeas corpus may prevent relief in situations that, due to misleading jury charges, would have led to habeas relief in the past.

Oponents of granting clemency often argue that the state has no reason to consider granting clemency because the defendant had both a jury that considered everything and super due process throughout the proceedings. Yet several empirical studies have shown that jurors have problems understanding legal instructions that are vital to a fair determination in a capital case.⁷² For example, one empirical study conducted by Professors Bowers and Steiner shows that jurors often do not believe or follow instructions stating that life without parole is an alternative to the death penalty.⁷³ This study indicates that jurors are rejecting life without parole in favor of capital punishment because they erroneously believe that life *without* parole really means life *with* parole. If this study is accurate, then states are sending people to death row and, in the absence of clemency, executing them because jurors are unable or unwilling to follow the judge's charge.⁷⁴ These studies therefore demonstrate that we need not only habeas corpus but also meaningful clemency proceedings.

2. *Racial Discrimination in Implementing the Death Penalty*

Many people believe the current implementation of the death penalty is racially discriminatory; others, however, believe that discrimination only happened in the old days or, if it does exist today, that it occurs only in the South. This reality is why the work of Professors Baldus and others,⁷⁵ which demonstrates racial discrimination in Phil-

⁷¹ See Ronald J. Tabak, *Habeas Corpus as a Crucial Protector of Constitutional Rights: A Tribute Which May Also Be a Eulogy*, 26 SETON HALL L. REV. 1477, 1483-89 (1996).

⁷² See, e.g., Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 9-12 (1993) (presenting data that indicate capital jurors often do not properly understand the judge's standard-of-proof instructions).

⁷³ See William J. Bowers & Benjamin D. Steiner, *Death by False Choice and Forced Choice: Empirical Evidence of Misguided Discretion in Capital Sentencing 65-90* (unpublished manuscript, on file with author).

⁷⁴ See Eisenberg & Wells, *supra* note 72, at 12; Bowers & Steiner, *supra* note 73, at 91-96.

⁷⁵ See Baldus et al., *supra* note 48.

adelphia, is particularly important. It shows that even in a large Northern "City of Brotherly Love," a pattern of racial discrimination, by both the race of the defendant and the race of the victim, exists in the implementation of the death penalty.

It is important that those fighting racial discrimination in the death penalty system rely on solid, statistically proper studies (such as the Baldus study) and not on raw data. Often, opponents of the death penalty make the following type of argument: because African Americans are "x" percent of the population, but constitute a much higher percentage of those on death row, jurisdictions must be discriminating when imposing the death penalty. Death penalty proponents easily knock down this type of argument. Opponents of the death penalty—and others who may not oppose the death penalty but want to pass legislation like the Racial Justice Act⁷⁶ in an effort to reduce racial discrimination in capital sentencing⁷⁷—must know the more sophisticated facts.

Opponents of the death penalty's racism also need to know how to respond to attacks on another Baldus study, which analyzed racial discrimination in Georgia's implementation of the death penalty,⁷⁸ as well as studies that others have done. Critics such as Kamenar assert that Baldus did not take into account the kind of crime involved, but Baldus did take this into account.⁷⁹ Those trying to combat racial discrimination in our capital punishment system need to know that the General Accounting Office ("GAO") has found Baldus's Georgia study (and many other studies by experts like Professors Gross and Bowers) valid.⁸⁰ Moreover, the GAO found major problems with some studies that reached opposite conclusions.⁸¹ In particular, the GAO found that a Rand study on the death penalty in California, which death penalty supporters often cite, had a conclusion that was "not supported by

⁷⁶ S. 1696, 101st Cong. (1989).

⁷⁷ For a description of a version of the Racial Justice Act that, under another name, Congress considered, see Ronald J. Tabak, *Is Racism Irrelevant? Or Should the Fairness in Death Sentencing Act Be Enacted to Substantially Diminish Racial Discrimination in Capital Sentencing?*, 18 N.Y.U. REV. L. & SOC. CHANGE 777, 789-98 (1990-1991). On March 30, 1998, the Kentucky legislature passed and sent to the governor for signature the Kentucky Racial Justice Act, a somewhat watered-down version of the legislation described in Tabak, *supra*. See Tom Loftus, *Bill to Fight Racial Bias in Capital Cases Passes*, LOUISVILLE COURIER-JOURNAL, Mar. 31, 1998, at B1.

⁷⁸ See DAVID C. BALDUS ET AL., *EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS* (1990).

⁷⁹ See, e.g., *Death Penalty Conference*, *supra* note 70, at 318-19 (remarks of Jamin Raskin, Associate Dean, The American University, Washington College of Law) (describing the Baldus methodology); *id.* at 341 (remarks of Harriet C. Ganson, Assistant Director, GAO) (responding to erroneous statements by Paul Kamenar).

⁸⁰ See Coyne & Entzeroth, *supra* note 50, at 37, 66 n.326.

⁸¹ See *Death Penalty Conference*, *supra* note 70, at 320-23, 341 (discussing U.S. GENERAL ACCOUNTING OFFICE, REPORT TO SENATE AND HOUSE COMMS. ON THE JUDICIARY, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES (1990)).

the data."⁸² Indeed, while the Rand study concludes that no racially discriminatory effect exists, the data from the largest analysis that Rand has performed shows a significant "race of victim" effect, meaning that it is "highly unlikely that [this discrimination] was tru[ly] due to chance."⁸³

Opponents of the Racial Justice Act sometimes argue that Congress and legislatures should not enact it because it would require abolishing the death penalty. In other words, these opponents say that we cannot have a death penalty system that does not systemically discriminate by race. In response, the Racial Justice Act's supporters should note that jurisdictions could take various steps to deal effectively with racial discrimination in our death penalty system.⁸⁴ In the political discourse, death penalty opponents also should respond by asking, "Do we have to tolerate racial discrimination as a price of having the death penalty?" This question goes to the morality of the death penalty in the United States.

Moreover, advocates of the Racial Justice Act have to make a connection between the empirical data and particular cases that illustrate racism in death penalty implementation. One example is the case of William Hance: a relatively rare capital case in which an African American defendant in Columbus, Georgia did not face an all-white jury. Instead, *one* African American sat on the jury. Under Georgia law, if even one juror votes for a life sentence, as the lone African American juror in fact did, the defendant is supposed to receive a life sentence.⁸⁵ In reporting on the jury's vote, however, the foreman lied and said that the jury had voted unanimously for death. When the judge polled the jury, the African American juror was afraid to contradict the foreman. Later, shortly before Hance's scheduled execution, the juror revealed these uncontradicted facts, which other jurors confirmed, and also that jury members had engaged in racial discussions.⁸⁶ Hance's counsel tried to secure relief based on these revelations.⁸⁷ But no court would grant Hance relief, and the state denied clemency. So Georgia executed him.⁸⁸

⁸² *Id.* at 341 (referring to the Rand study as the Klein study, as it is also known).

⁸³ *Id.*

⁸⁴ See Tabak, *supra* note 77, at 789-97 (illustrating that both courts and legislatures could greatly ameliorate the racial discrimination in implementing the death penalty).

⁸⁵ See GA. CODE ANN. § 17-10-31.1(c) (1997); *State v. Ingram*, 467 S.E.2d 523, 525 n.8 (Ga. 1996); *Hill v. State*, 301 S.E.2d 269, 270 (Ga. 1983); *Miller v. State*, 229 S.E.2d 376, 377-78 (Ga. 1976).

⁸⁶ See Bob Herbert, *Mr. Hance's 'Perfect Punishment'*, N.Y. TIMES, Mar. 27, 1994, at 17.

⁸⁷ See Bob Herbert, *Jury Room Injustice*, N.Y. TIMES, Mar. 30, 1994, at A15.

⁸⁸ See Peter Applebome, *Georgia Executes Murderer After Brief Stay from Court*, N.Y. TIMES, Apr. 1, 1994, at A1.

3. *The Real Risk of Executing Innocent People*

When people raise in political discourse the subject of innocent people being executed, death penalty supporters like to retort quickly that no one has cited any recent case in which a court has ruled unequivocally that the executed person was innocent. To deal with this argument, death penalty opponents should point out that once the state has executed someone, it is highly unlikely that any court will definitely opine on the person's innocence, even though very strong evidence of innocence might exist. An example is the case of Roger Coleman, which is the subject of John Tucker's recent book, *May God Have Mercy*.⁸⁹ As I discuss in my review of this book, Tucker's full account of the facts surrounding this case and its subsequent appeals strongly indicates that it is more likely than not that Coleman, whom Virginia executed, was innocent.⁹⁰

When Florida executed Jesse Tafero in 1990,⁹¹ it attracted attention only because the electric chair, "Old Sparky," malfunctioned.⁹² But now there are significant reasons to believe that he was innocent of the capital murder for which Florida executed him. The attorney for Sonia Jacobs, Tafero's codefendant and girlfriend, developed facts in the years following Tafero's execution that have led many to believe that both Tafero and Jacobs were probably innocent.⁹³ In 1992 the Eleventh Circuit vacated Jacobs's conviction because crucial prosecution witnesses had lacked credibility and the state had withheld important evidence from the defense.⁹⁴ Later that year, Florida released Jacobs after she agreed to plead guilty to second-degree murder and kidnapping, an agreement that was a condition of her release, and Florida permitted her to continue to assert her innocence.⁹⁵

Death penalty proponents also argue that because so many death row inmates ultimately have been exonerated and released, the system works. In reality, these situations do not show that the system works. By looking closely at those cases, one learns that fortuities were the sole reasons that states spared most of these people.⁹⁶ For example, happenstance led to Federico Martinez-Macias's becoming the first

⁸⁹ JOHN C. TUCKER, *MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT* (1997).

⁹⁰ See Ronald J. Tabak, *Death Penalty Be Not Proud: Examining the Legal Missteps in a Notorious Case*, A.B.A. J., Jan. 1998, at 80 (reviewing JOHN C. TUCKER, *MAY GOD HAVE MERCY: A TRUE STORY OF CRIME AND PUNISHMENT* (1997)).

⁹¹ See *Killer of 2 Police Officers Executed in Florida*, N.Y. TIMES, May 5, 1990, at 26.

⁹² See *Electric-Chair Dispute Brings Another Stay*, N.Y. TIMES, June 24, 1990, at 19.

⁹³ See *20/20: Crossing Paths Again* (ABC television broadcast, Mar. 27, 1992) (transcript available in LEXIS, News Library, Script File).

⁹⁴ See *Jacobs v. Singletary*, 952 F.2d 1282, 1296 (11th Cir. 1992).

⁹⁵ See Peter Marks, *I'm Free, I'm Free, I'm Free!': Serving Life in Murders, She's Released—With Friend's Aid*, NEWSDAY, Oct. 13, 1992, at 5.

⁹⁶ See DIETER, *supra* note 45, at 24-26.

pro bono, postconviction, death row inmate whom the Washington office of Skadden, Arps, Slate, Meagher & Flom LLP represented. No one expected when the firm was asked to handle the case that, after expending huge amounts of time and resources, it would be able to prove to the federal courts that Texas should never have convicted him.⁹⁷ Skadden, Arps presented evidence that persuaded the grand jury not even to reindict Martinez-Macias, resulting in his release.⁹⁸ This high-quality state postconviction, federal habeas corpus, and grand jury representation is rarely available to death row inmates.

Moreover, states inevitably will execute more innocent people as they (along with Congress) impose statutes of limitations in capital proceedings, and as they (along with the courts) take other steps to curtail the availability of habeas corpus. This conclusion is obvious from looking at the circumstances under which people on death row have been exonerated in recent years. In many of these cases, their lives were saved only because counsel had several years in which to develop the true facts or because witnesses finally came forward.⁹⁹

CONCLUSION

Before politicians will change how they approach the death penalty, renowned scholars must take the necessary first step and undertake the kinds of empirical studies that constitute the subject of this Symposium. In addition, death penalty opponents must learn about these empirical studies and synthesize them with real-life, anecdotal examples and moral arguments to develop persuasive, coherent arguments.¹⁰⁰ Only then will we have a real chance to abolish the death penalty in this country.

⁹⁷ See *Martinez-Macias v. Collins*, 979 F.2d 1067, 1067-68 (5th Cir. 1992) (affirming the judgment of the district court that Texas denied the defendant adequate assistance of counsel and ordering his release), *aff'g* 810 F. Supp. 782 (W.D. Tex. 1991).

⁹⁸ See Panel Discussion, *The Death of Fairness? Counsel Competency and Due Process in Death Penalty Cases*, 31 HOUS. L. REV. 1105, 1113-14 (1994) (remarks of Ronald J. Tabak).

⁹⁹ See generally DIETER, *supra* note 45, at 24-25 (describing numerous cases in which capital case convictions have been overturned due to a variety of circumstances).

¹⁰⁰ See, e.g., Rudolph J. Gerber, *Death Is Not Worth It*, LITIG., Spring 1998, at 3 (explaining in detail why after 25 years as a lawyer and judge, now on the Arizona State Court of Appeals, he has changed from a proponent to an opponent of the death penalty).