

U.S. Department of Justice
National Institute of Justice

136802 -
136810

This document has been reproduced exactly as received from the person or organization originating it. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the National Institute of Justice.

Permission to reproduce this copyrighted material has been granted by
Federal Probation

to the National Criminal Justice Reference Service (NCJRS).

Further reproduction outside of the NCJRS system requires permission of the copyright owner.

Federal Probation

NCJRS
A JOURNAL OF CORRECTIONAL PHILOSOPHY AND PRACTICE

Published by the Administrative Office of the United States Courts

MAY 14 1992

VOLUME LVI

MARCH 1992

NUMBER 1

ACQUISITIONS

This Issue in Brief

Public Policy and Sentencing Reform: The Politics of Corrections.—Author Peter J. Benekos focuses on the politicalization of corrections and presents a public policy critique of correctional reform. As fear of crime and victimization have generated retributive rhetoric and get-tough crime control policies, the consequences of these policies—high incarceration rates and prison crowding—have now become their own public policy issues with critical implications for corrections. A review of one state's legislative reform efforts suggests that sentencing policies can be proposed with the get-tough rhetoric but are ostensibly more responsive to correctional needs, i.e., overcrowding and cost, than to the issues of crime, criminals, or crime control.

The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty.—According to author Paul W. Keve, the United States—going contrary to the general trend among nations—is maintaining its death penalty, with growing numbers of prisoners on its death rows, while at the same time showing a general reluctance actually to execute. Meanwhile, the public is mostly unaware that maintenance of the death penalty is far more costly than use of life imprisonment and has no proven deterrent effect. The author cautions that the interest in expediting executions by limiting appeals must be resisted because even with all the presumed safeguards, there are still repeated instances of wrongful convictions. He adds that the death penalty as respectful of the feelings of victim families is a defective concept because it actually puts families through prolonged anguish with the years of appeals and successive execution dates.

The Refocused Probation Home Visit: A Subtle But Revolutionary Change.—Home visits have historically been used in the control/law enforcement function of probation work, as well as in the treatment/service function. However, the current state of probation—dramatically affected by burgeoning caseloads, increased numbers of “difficult” clients, and emerging issues of officer safety—has made it necessary to rethink the concept of home visits. Now, many

agencies are limiting home visits to high risk cases and using such visits solely for control—an approach which may be consistent with a shift in probation practice towards a law enforcement orientation. In an article reprinted from the *Journal of Contemporary Criminal Justice*, author Charles Lindner looks at the

CONTENTS

Public Policy and Sentencing Reform: The Politics of Corrections	Peter J. Benekos 4	136802
The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty	Paul W. Keve 11	136803
The Refocused Probation Home Visit: A Subtle But Revolutionary Change	Charles Lindner 16	136804
The Federal Demonstration Program of Mandatory Drug Testing	Timothy P. Cadigan 22	136805
When Courts Find Jail and Prison Overcrowding Unconstitutional	Richard B. Cole Jack E. Call 29	136806
The Ideal Meets the Real With the D.U.I. Offender	Thomas P. Brennan 40	136807
Successful Drug Treatment in a Criminal Justice Setting: A Case Study	Frederick R. Chavaria 48	136808
Understanding Mass Murder: A Starting Point	Ronald M. Holmes Stephen T. Holmes 53	136809
Growth-Centered Intervention: An Overview of Changes in Recent Decades	Ted Palmer 62	136810
Departments		
News of the Future	68	
Looking at the Law	73	
Reviews of Professional Periodicals	78	
Your Bookshelf on Review	88	
It Has Come to Our Attention	95	

Featured in “LOOKING AT THE LAW” ...

“Revocation of Community Supervision: What the Courts Have Made of Congress’ Ambiguous Language and Policies”

- Revocation of Probation
- Mandatory Revocation for Possession of Drugs
- Imposition of Supervised Release After Revocation

The Costliest Punishment--- A Corrections Administrator Contemplates the Death Penalty

By PAUL W. KEVE

IT'S A provocative question—when most of the Western nations have abolished capital punishment why does the United States go so resolutely against this humane current trend? Also a provocative question—why does this country sentence so many to death and then actually execute so few? The questions and their answers tell us much about the futility and counterproductive nature of this final penalty.

Ostensible support for capital punishment is seen in the fact that in 53 jurisdictions (the 50 states, the District of Columbia, the Federal justice system, and the U.S. Military), there are 38 that authorize the death penalty, and as of the end of 1991 the death rows of 36 of the states were loaded with a total of 2,547 men and women.¹

The glut of condemned persons reflects an approving attitude which is encouraged by the frequent pronouncements of elected public officials. Every political campaign rings with cries for law and order, including reiterated declarations in favor of capital punishment by most candidates. Indeed, there have been particular campaigns in which the choice between two contestants has seemed to be determined largely by which one has called the loudest for more use of the death penalty.

But despite the proclamations in favor of it, and despite the steady accretions of death row populations, the country is persistently reluctant actually to execute. During the last decade we have been adding an average of about 170 new cases each year to the death rows while the actual executions have been averaging only about 21 annually.²

And now in the year just past, 1991, the execution count dropped to only 14!³ Of course the quick response to this from the true believer in capital punishment is to argue that the pace must be stepped up; that the successive appeals must somehow be curtailed and executions expedited. But my argument is that the pace cannot be materially speeded, nor should it be. The only sensible way out of the cumbersome problems with this penalty is in its abolishment.

There are good and practical reasons why the appeals must not be curtailed, but additionally, can it be

*The author is professor emeritus, administration of justice, Virginia Commonwealth University, and former director of corrections departments in Delaware and Minnesota.

that even the politicians who demand the penalty actually do not want the executions to go forward any faster? A believable point. A full-scale rate of executions commensurate with the rate of sentencing to death would be the sort of bloodbath that might well cause a revulsion which could reverse or appreciably reduce the present support for the penalty. By loudly demanding the death penalty's availability and use legislators can maintain their image of being "tough on crime," while at the same time feeling assured that the mere token rate of actual executions will prevent what would become unacceptably barbaric results.

Any casual daily reading of the news makes it evident that the average citizen is unaware of the vast difference between the presumed high use of the death penalty and the paucity of executions actually accomplished. And the discrepancy is much greater than that suggested by comparing the execution count with the 170-plus annual additions to the death rows. For if all the original death sentences were sustained the growth rate would be nearly twice what it is, since actual sentences are 300 or more annually.⁴ The shrinkage of nearly 50 percent tells much about why the appeals process is so valid and must be unabridged. It means that the appeals are indeed showing up defects in a high proportion of capital convictions.

It is a point on which the public seems to be deceived, and the news media seems quite willing to support the illusion that death sentences always are valid and will be carried out. The media, like the public generally, seems to prefer the illusion to the reality.

The public ought to be told—repeatedly—that the criminal justice system should not and cannot carry out the rate of executions that is now generally expected. For instance, suppose our rate of executing were to increase, let's say, to 25 per year. It would still take us fully a century to execute all the persons presently waiting on all the death rows! Furthermore, if the present rate of growth were to continue, there would be, during that century, another 17,000 or more new cases added to the backlog on the death rows! One writer calculates that for every person actually executed the U.S. courts are pronouncing 30 death sentences!⁵ Obviously the vast majority of ordered executions will never be carried out.

A Token Punishment

A sober look at the facts should persuade us that our constant effort to implement the capital punishment laws can never bring more than this kind of pretense. In effect, we are resorting to an occasional execution to keep ourselves persuaded that we are being tough on crime. It is a remarkably expensive pretense, and it adds to the anguish of all those involved in any murder and execution. Furthermore, if this corrections administrator's view is valid, the penalty serves no useful purpose and would be even less useful if executions were to keep pace with the sentencing.

The public's unawareness of how unlikely it is that a death sentence will result in actual execution is exceeded only by its unawareness of the exorbitant price we must pay to maintain our token death penalty. The public does know well enough that imprisonment is very expensive, and the mistaken inference, for most people, is that execution consequently must be much cheaper than life imprisonment. In a New York state poll, for instance, a 72 percent support for the death penalty dropped to 56 percent when the persons polled were informed that the death penalty is more costly than life imprisonment.⁶

As a useful example, in my state of Virginia the cost of keeping one person in prison is calculated at a current average of about \$17,000 per year.⁷ It is much too easy for the public to look at such a figure and think of what it would presumably cost if a young man of 20 or so would come into prison with a life sentence that might keep him inside for perhaps 40 years. The accumulated total would come to a staggering amount. Wouldn't it be much cheaper to sentence him to death and save all that imprisonment cost?

Not so. The dollar argument leads quite the other way.

In the first place, that figure for the annual cost of imprisonment is misleading. The costs in running a prison are mainly fixed costs; as long as the prison is there and operating it has a steady annual cost that is not affected by minor variations in its prisoner population. In other words, as long as we have the prison anyway we do not save money by taking one prisoner out either to turn him loose or to execute him. Nor does it increase the overall cost noticeably to add one more prisoner. So an execution cannot truly be shown to save any imprisonment cost at all, even when compared with a life sentence.

But the cost of executing—now that's another matter.

Capital Prosecutions: The Taxpayers' Burden

A principle that can be counted on absolutely is that the more severe the possible punishment, the more

energetic will be the defense and the more costly the prosecution. The death penalty is the ultimate example of this. In 1976 the U.S. Supreme Court approved the principles which, in its opinion, would make the death penalty constitutional. In deciding three capital cases it specified that (1) the sentencing in such cases must be done in trials that are separate from the trials which determine guilt or innocence; (2) the sentencing hearing must examine both mitigating and aggravating factors, including pertinent features of the defendant's life and character as well as the conditions of the crime; and (3) each death sentence must be followed by an automatic right of appeal to the highest state court. Of course, each of these requirements imposes substantial additional costs.

In the first place, defendants in capital cases almost invariably are indigent and so must be served with defense counsel at the expense of the state. In a capital case the number of pretrial motions filed becomes excessive as compared with noncapital cases. "Jury selection is estimated to take, on the average, 5.3 times longer than jury selection for a noncapital case. . . [and it takes] approximately 3.5 times longer to try capital cases than to try noncapital murder cases."⁸ The trials are longer than in noncapital cases, requiring more time of judges, juries, and all court personnel. And even with all this, the trial is only the first stage of a torturous process.

In preparation for the penalty phase the defense must make extensive investigation of the defendant's life history, with all the costs of special investigators and usually considerable travel expense. The prosecution will also have to go over much of the same ground. And once the sentence is pronounced the required appeal process begins, with a certainty that reversals will occur in a high percentage of cases. According to one count, from 1976 to 1989 more than 1,400 death penalty cases in the U.S. were reversed by appellate courts. About half of death sentences are being overturned on appeals.⁹ After a reversal the case must go back to square one and start over again.

Meanwhile the defendant is held in idleness on death row where the operating cost is far greater than in other prison units. Those who are finally executed wait there an average of 6 to 8 years, while those not executed often wait much longer before their sentences are reversed or commuted to life.

Such observations are barely able to suggest the overwhelming complexity that now characterizes legal procedure in capital cases. The extensive literature on the subject details a body of law so specialized and labyrinthine that few defense attorneys can be expected to master it, and few states can be expected to finance the defense of such cases adequately.

Several states have made serious efforts to assess the cost of implementing the death penalty, though the findings have been given remarkably little publicity considering their dramatic quality. In 1982 the New York State Defenders Association made a substantial study of what it would cost to restore the death penalty in that state; it was calculated that "the potential costs of litigating a model New York capital case across just the first three levels of review [would be] \$1.9 million per case."¹⁰

In 1982 New Jersey adopted a death penalty despite an estimate that it would increase the state's criminal justice costs by \$16 million annually.¹¹ In Kansas a move to reestablish the death penalty was defeated partially on the basis of a 1987 study by the Kansas Legislative Research Department that the presence of the death penalty would cost the state an extra \$11,420,000 annually.¹² In 1989 a fiscal impact statement produced for the Indiana legislature found that the state would expect to save more than \$5 million annually by abolishment of its death penalty.¹³

Florida, the state with the second most populous death row, seems to be paying at the highest level of any, with a calculated cost of each execution figured at \$3,178,000.¹⁴ Similar findings have been produced by fiscal studies in Ohio and Oregon. With prices like these it would seem much more practical to spend that money instead on more social services to prevent violent crimes, more police services, and more services to deal constructively with the needs of victims' families.

High Expenditures With No Gain

Of course, the issue of cost is the least worthy of any arguments regarding the merits of the death penalty, for we should not flinch at the cost necessary for reduction of such a heinous crime as murder. That raises the controversial question of the deterrent value of the penalty, an issue that cannot be finally resolved to everyone's satisfaction. My own viewpoint comes from experience of more than 50 years in the field of corrections, including responsibility for top administration of correctional systems in two states, one with the death penalty and one without. Over that half century I have had ample opportunity to know many men and women who had committed murder, some of whom were sentenced to death. Even though their crimes are brutal, it seems impossible to know these offenders well and to conclude that the threat of death would have stopped them. Often chronic misfits with years of failures behind them, they are driven by the towering impulse of the moment and incapable of making any fine distinction between consequences of imprisonment versus death. This observation agrees

with the convictions generally of criminologists today who find no deterrent effect in the death penalty.

Some years ago a fellow corrections administrator, with years of experience in the California system, drew the same conclusion and noted the public's refusal to face the facts. "It is the unique deterrent value capital punishment is presumed to have that provides the mainstay of the arguments for retention of the death penalty. That this is true has been refuted year after year before the Legislature by a variety of witnesses—statistical experts, police officials from abolition states, psychiatrists, and criminologists among others"¹⁵

The Death Penalty as Provocative of Murder

There is another point about the nonutility of the death penalty—a point also unprovable but made convincing by years of experience. That is, I am convinced that I know of a number of murder victims who would still be alive if the death penalty had not been in effect. Sometimes a person has a wish to commit suicide at the same time that he has an incapacity to do it to himself. For some troubled people, at a subconscious level there is still a residue of the age-old suicide stigma that prevents the person from contriving his own death. But if the state will do it for him then his purpose is accomplished while he is relieved of the stigma. By committing a murder he callously exploits the state's willingness to abet a suicide. Sick and warped as it is, the pattern does exist and can be seen as the psychological condition in more than a few murders. One psychiatrist, observing the same phenomenon, commented that the death penalty "becomes a promise, a contract, a covenant between society and certain (by no means rare) warped mentalities who are moved to kill as part of a self-destructive urge."¹⁶

The pattern is reflected in the many cases of defendants who refuse to fight their death sentences, sometimes even bringing action to force the state to proceed with the execution. One writer points out that after the death penalty was reinstated in 1976, five of the first eight men to be executed vigorously opposed any efforts by others to forestall their executions.¹⁷ It becomes a bizarre perversion of the law's intent thus to reward the murderer by implementing the suicide which he wanted but which he could not do for himself.

In a similar category is the individual who suffers inwardly with intense frustration from never having accomplished anything of note in his unrewarding life. For this person the death penalty offers the chance, by committing a murder, to enjoy the spotlight with gripping notoriety for a brief season. Public excitement over his execution guarantees him the reward he seeks, the fame he has otherwise missed.

Restricting Appeals: A False Concept

With the prolonged and repetitive stages of appeals that keep capital cases languishing on death rows for years it is altogether natural that persons unfamiliar with the intricacies of the criminal justice system should see as a "solution" a drastic reduction of the prisoner's right to successive appeals. But here again there is vital reason for moving with great caution. The proven fact is that, contrary to popular assumptions about reliability of modern court processes, mistakes are still being made. Evidence for this has been gathered in very recent years by two researchers who have scouted all the U.S. cases since 1900 in which capital convictions were obtained but later set aside.

The project located a total of 350 men and women who were subjects of erroneous capital convictions! A detailed report of the findings was published in 1987, but the researchers still find evidence that such cases continue to occur.¹⁸ And as another research team reports, "Wrongful sentencing of innocent people shows no sign of diminishing with the passage of time. Indeed the capital punishment system seems to be becoming even less reliable over time. In 1987, 1988 and the first seven months of 1989 alone, at least a dozen more men who had received death sentences have been released as innocent."¹⁹

The conclusion is inescapable that it is still all too easy for fatal mistakes to be made, and as long as this is so we cannot afford to curtail any defendant's right to contest his conviction. If the protracted and costly appeal process is considered too burdensome the only acceptable solution is just to eliminate the death penalty.

Meanwhile, however, if defendants are going to get the quality of defense that our society now considers minimal there must be well funded and well trained defense counsel. But for many states the cost is beyond the resources the state is willing to commit. Adequate defense of a capital case calls for a great amount of time on the part of defense attorneys who have special knowledge and skill in this area of the criminal law that is so complex and so specialized that few are truly qualified. There is so much time involved for the attorney who would undertake it that most of them are reluctant to tolerate the resultant sacrifice of their law practice. An end result may often be to raise a constitutional question; a low limit set by a state on the amount allowed for a defense attorney's fee in a capital case has the likely effect of denying to the defendant the minimum legal defense that today's standards declare to be his right.²⁰

Consider Feelings of the Victims

But there is still the question—what about the family of the victim? Don't we owe it to them to proceed

swiftly to execute the murderer? Proponents of the death penalty seem to infer that if we do not we are grievously failing in the respect due to the victims. The response to that question can be brief. Murder victim families are entitled to all the help, comfort, and consideration that the state can reasonably give. But there is nothing whatever that we can do by executing the murderer which will restore his victim or bring serenity to the family. Experience shows that comfort and healing simply do not come to the victim families by means of the execution. They deserve from us a much more positive kind of help.

A thoughtful look at the alternatives makes clear that in a state with no death penalty the trial and sentencing are much sooner completed, and the ordeal for victims' families is more quickly over. By contrast, where the death penalty is used the families have a greatly prolonged period of anguish. Through successive appeals, successive execution dates, etc., they are repeatedly interviewed by the news media while their anger and distress are repeatedly revived, sometimes never to be resolved. The death penalty, instead of bringing comfort, actually denies the comfort and instead stretches out the agony endlessly.

In the final analysis, my own opposition to the death penalty is not based so much on its excessive cost, or even its failure to deter crime, but is simply found in these three successive points. (1) The act of murder reveals a lack of respect for human life. (2) In consequence then, we need to encourage a higher respect for life. But finally, (3) it defies all logic to suppose that we can encourage a greater respect for human life by the device of taking human life.

NOTES

¹*Death Row U.S.A.*, NAACP Legal Defense and Educational Fund, Inc., N.Y., Winter 1991

²Information furnished to author by editorial offices of *Death Row U.S.A.*

³*Ibid.*

⁴*Ibid.*

⁵Dave Von Drehle, *Miami Herald*, July 11, 1988.

⁶James Alan Fox, Michael L. Radelet, and Julie L. Bonesteel, "Death Penalty Opinion in the Post-Furman Years," *New York University Review of Law and Social Change*, 18(2), 1990-1991, p. 515.

⁷Information supplied to author by accounting services, Virginia Department of Corrections.

⁸Margot Garey, "The Cost of Taking a Life: Dollars and Sense of the Death Penalty," *U.C. Davis Law Review*, 18(4), Summer 1985, pp. 1257-1258.

⁹Robert E. Spangenberg, in speech (untitled) at Vanderbilt University, February 22, 1989. Also see, Barry Nakell, "The Cost of the

Death Penalty," *Criminal Law Bulletin*, 14(1), January/February 1978, p. 69; and Margot Garey, "The Cost of Taking a Life: Dollars and Sense of the Death Penalty," *U.C. Davis Law Review*, 18(4), Summer 1985, pp. 1221-1273.

¹⁰Jonathan E. Gradess, *The Washington Post*, February 28, 1988.

¹¹Margot Garey, "The Cost of Taking a Life: Dollars and Sense of the Death Penalty," *U.C. Davis Law Review*, 18(4), Summer 1985, p. 1261.

¹²Dave Von Drehle, *Miami Herald*, July 13, 1988.

¹³Indiana State Legislature, Fiscal Impact Statement for SB 0531 (replacing death penalty with life imprisonment), January 23, 1989.

¹⁴Von Drehle, *op cit*.

¹⁵Richard A. McGee, "Capital Punishment as Seen by a Correctional Administrator," *Federal Probation*, 28(2), June 1964, p. 11.

¹⁶Louis J. West, "Psychiatric Reflections on the Death Penalty," in *Capital Punishment in the United States*, by Hugo Adam Bedau and Chester M. Pierce, AMS Press, 1976.

¹⁷Welsh S. White, *The Death Penalty in the Nineties*. Ann Arbor, University of Michigan Press, 1991, p. 164.

¹⁸Hugo Adam Bedau and Michael L. Radelet, "Miscarriages of Justice in Potentially Capital Cases," *Stanford Law Review*, 40(1).

¹⁹Ronald J. Tabak and J. Mark Lane, "The Execution of Injustice: A Cost and Lack-of-Benefit Analysis of the Death Penalty," *Loyola of L.A. Law Review*, 23(1), November 1989, p. 102.

²⁰Ronald J. Tabak, "The Death of Fairness: The Arbitrary and Capricious Imposition of the Death Penalty in the 1980s," *New York University Review of Law and Social Change*, 14(4), 1986, p. 76.