University of Richmond Law Review

Volume 41 | Issue 4 Article 2

5-1-2007

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Hon. William W. Wilkins
Chief Judge, United States Court of Appeals for the Fourth Circuit

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Recommended Citation
Hon. William W. Wilkins, *The Legal, Political, and Social Implications of the Death Penalty*, 41 U. Rich. L. Rev. 793 (2007).
Available at: https://scholarship.richmond.edu/lawreview/vol41/iss4/2

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ADDRESS

THE LEGAL, POLITICAL, AND SOCIAL IMPLICATIONS OF THE DEATH PENALTY

The Honorable William W. Wilkins *

A recent national poll found that sixty-five percent of Americans favor the death penalty. That's down from eighty percent ten years ago. Moreover, the total favoring the death penalty dropped to fifty percent when those polled were asked to assume that the alternative to the death penalty was life in prison with no chance of parole. And, the number of death sentences imposed in the United States during the last few years has dropped to the lowest level since capital punishment was reinstated thirty years ago. Thus, it would seem that our society's attitude toward capital punishment is changing. What was once routine is now exceptional, and what was once virtually unquestioned is now questioned. Along with abortion and the war on terror, capital punishment implicates not only legal, but social and political issues as well. We'll be talking about these issues and how our society has dealt with them in the past, and how it is dealing with them now.

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* Chief Judge, United States Court of Appeals for the Fourth Circuit. B.A., 1964, Davidson College,. J.D., 1967, University of South Carolina School of Law. Chief Judge Wilkins was the Solicitor (chief prosecuting attorney) for the Thirteenth Judicial Circuit of South Carolina from 1974 until 1981, when he was appointed to the federal district court bench by President Ronald Reagan. He was appointed to the Fourth Circuit on June 16, 1986. He served as Chair of the United States Sentencing Commission from 1985 until 1994 and as Chair of the Criminal Law Committee of the Judicial Conference of the United States from 1999 until 2003. Chief Judge Wilkins has been involved in 96 individual death penalty cases in either his capacity as an attorney or as a judge.

This article is excerpted from remarks made by Chief Judge Wilkins at the Charleston School of Law on September 14, 2006, and at the Riley Institute at Furman University on October 11, 2006.

Even though I have given considerable thought to what I should say tonight, I have been at a loss as to finding the right structure for my remarks. Consequently, I have decided to engage in a question-and-answer session with you. And, since I am in control of the podium, at least temporarily, I intend not only to supply the questions, but the responses as well.

Question: What do proponents of the death penalty contend it serves?

Those who support the death penalty contend that it serves two primary purposes: retribution and deterrence. Retribution has two subcomponents. On one hand, the imposition of the death penalty allows society to express its moral outrage at the commission of the most outrageous of offenses: the taking of innocent life. And, on the other hand, the death penalty is a just punishment in terms of retribution: an eye for an eye, a life for a life. Taken together, these two facets of retribution are said to restore social order, which has been upset by the commission of a terrible crime.

Proponents also contend that there are two facets to the deterrent aspect of the death penalty: not only is the condemned forever incapacitated from murdering again, but potential murderers are dissuaded from committing their crimes by fear of being executed. We'll talk more about deterrence in a minute.

In the early years of this country, procedures surrounding the death penalty were specifically intended to achieve the goals of retribution and deterrence. Executions—which were almost always by hanging—were public events, many times attended by large crowds of people. History records that a preacher would mount the gallows and preach a sermon. One minister noted that "an execution could be 'a very miserable, but also a very profitable spectacle.'"

Today, executions take place behind prison walls and are viewed by only a select few. In most cases, execution is by lethal injection or electrocution instead of hanging or the gas chamber. Thus, although executions today are public knowledge, they are no longer in the public view.

Question: How has the death penalty evolved over time?

Two significant things have happened over time. First, the number of crimes for which the death penalty may be given has been reduced significantly. The list of death-eligible crimes during the colonial era seems shockingly long to modern ears. You will not be surprised when I tell you that, in addition to murder, serious crimes like treason, rape, burglary, and arson were punishable by death. The list goes on, however. In Puritan New England, a sentence of death could be imposed for adultery, as well as blasphemy, at least until the late seventeenth century. At one time, in the South, minor property crimes were capital offenses. On the Western frontier, horse stealing was a capital offense. Today, only the crime of murder has remained a capital offense, and as we shall see, there are limitations on when even a cold-blooded murder could carry a sentence of death.

The other thing that happened is that juries, once a defendant was convicted of a death-eligible crime, were given absolute discretion to decide whether to impose the death penalty or to sentence the defendant to life imprisonment.

In 1972, the Supreme Court issued the landmark decision in *Furman v. Georgia*,[1] invalidating every death penalty statute then in existence in this country. The Court was concerned that the process for imposing the death penalty was so unstructured and discretionary that any capital sentence was necessarily arbitrary. As Justice Stewart put it, "These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual" because "of all the people convicted of [death eligible crimes] in 1967 and 1968, many just as reprehensible as these, the petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed."[2]

To address this situation, many states, including South Carolina, chose to avoid arbitrariness by making the death penalty mandatory for murder if accompanied by certain aggravating circumstances, such as burglary, rape, arson, or kidnapping. Other examples of aggravating circumstances include murder by poison,

1. 408 U.S. 238 (1972).
2. *Id.* at 309–10 (Stewart, J., concurring).

creation of a risk of death to more than one person, murder of a law enforcement or judicial officer, or murder of a child younger than twelve. If a jury found as a fact, beyond a reasonable doubt, that the defendant had committed murder, for example, during the commission of a burglary, the death penalty was automatically imposed by law. Thus, if two defendants, on separate occasions, committed murder during a burglary, and the state proved beyond a reasonable doubt the commission of these crimes, both defendants would be sentenced to death—both would be fed from the same spoon. The arbitrariness factor that existed because different juries do different things, even when confronted with a similar set of facts, was completely removed.

However, in 1976, the Supreme Court struck down mandatory death penalty statutes like South Carolina's. The Court did approve of a system where the jury had to find the existence of certain aggravating factors to render the defendant eligible for a sentence of death, but held that a jury must have the discretion to impose a life sentence if it chose to do so. And, unless all twelve jurors voted for the death penalty, a life sentence was statutorily imposed.

So it seems that we have come full circle, back to a time when imposition of the death penalty, even though a highly controlled process, appears to be as random as it ever was.

Question: On whom should the death penalty be imposed?

It has always been the rule that those who are legally insane or incompetent to stand trial could not be prosecuted for any crime, including murder. Beyond those two categories, little attention was paid to the question of whether certain types of otherwise-eligible defendants should be protected from the death penalty. Recently, however, the Supreme Court has declared two types of defendants—the mentally retarded and those aged seventeen and younger—immune from the death penalty.

1. *Mental Retardation*

On the morning of October 25, 1979, John Paul Penry entered the home of Pamela Mosely Carpenter in Livingston, Texas. He raped her and stabbed her to death with a pair of scissors she had attempted to use in self-defense. At the time of the offense, Penry

was twenty years old, but had the mental capacity of a six-year-old. His IQ was between fifty and sixty-three, in the range of mental retardation, and he was unable to write his own name. He was convicted and sentenced to death.

Penry ultimately challenged his sentence before the Supreme Court, arguing that it was cruel and unusual punishment to execute a mentally retarded person. In a ruling issued in 1989, the Supreme Court disagreed. In reaching this conclusion, the Court noted that the profoundly retarded—those so disabled as to be unable to understand right and wrong or to assist counsel—would be protected from the death penalty by the insanity defense and rules governing competency to stand trial. However, the Court vacated Penry's death sentence because of faulty instructions given to the jury by the trial judge.

Seven years after this decision, Daryl Atkins abducted Eric Nesbitt from a convenience store in northern Virginia. After forcing Nesbitt to withdraw money from an ATM, Atkins took him to a remote location and shot him to death. Atkins, who was 18 at the time, had failed the second grade and had been kicked off his high school football team because he could not consistently tell right from left. His tested IQ was fifty-nine, in the lowest one percent of the population. He was convicted and sentenced to death.

When Atkins' case reached the Supreme Court in 2002, the Court again considered the constitutionality of sentencing mentally retarded offenders to death. The Court now concluded that the insanity and competency protections that had been deemed adequate in *Penry*[3] would no longer suffice:

> Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however . . . they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. . . . [T]hey often act on impulse rather than pursuant to a premeditated plan.[4]

The Court determined that in light of these qualities, execution of the retarded was unconstitutional.

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3. Penry v. Lynaugh, 492 U.S. 302 (1989).
4. Atkins v. Virginia, 536 U.S. 304, 318 (2002).

Ironically, John Penry may benefit from the decision in *Atkins*. In the years since the Supreme Court held that he could constitutionally be executed, Penry has had two additional sentencing trials, both of which have resulted in death sentences. Both of these sentences have been overturned for procedural reasons. The most recent of these rulings was handed down on October 5, 2005, when the Texas Supreme Court ruled that the instructions given by the trial court in Penry's third capital sentencing hearing did not adequately account for *Atkins,* which was handed down during the hearing. As of this time, pretrial proceedings are ongoing for Penry's fourth capital sentencing hearing.

2. *Juveniles*

At common law, an individual could be held criminally responsible as an adult at the age of fourteen. This extended even to the ultimate penalty of death: In 1642, in Plymouth Colony, Massachusetts, Thomas Graunger—a young man of sixteen—was led to the gallows and hanged. Graunger's execution was by no means unusual—historically, on average a juvenile offender has been executed every year in this country.

The execution of juveniles—those seventeen years of age and younger at the time of the commission of murder—has been an area of particular controversy recently. In 1989, in a case called *Stanford v. Kentucky*,[5] the Supreme Court held that it was constitutionally permissible to execute a youth who was seventeen years old when he committed his crime. Kevin Stanford repeatedly raped and sodomized the victim during the course of a robbery at a gas station where she worked. He then drove her to a remote location and killed her because she could identify him. In reaching its holding, a majority of the Court rejected a comparison between imposing capital punishment on juvenile murderers and laws prohibiting juveniles from drinking alcohol or voting, reasoning that the kind of broad generalizations about the maturity of all juveniles that are necessary to decide minimum ages for drinking, driving, and voting simply do not apply to the constitutionally required individual judgment that is required for the imposition of the death penalty. In the course of its decision, the Court explicitly refused to consider the practices of other coun-

5. 492 U.S. 361 (1989).

tries, noting that "it is *American* conceptions of decency"[6] that are relevant to Eighth Amendment standards. Thus, were it not for the Governor of Kentucky's commutation of the death sentence on the basis of his disagreement with the Supreme Court's decision, Kevin Stanford would have joined the ranks of the 365 juvenile offenders who have been executed in America since Thomas Graunger.

Last year, in *Roper v. Simmons*,[7] the Supreme Court reversed itself and declared the execution of juvenile offenders to be unconstitutional. The view expressed by the Court in *Roper* would seem to be the polar opposite of its previous statements in *Stanford*:

> The susceptibility of juveniles to immature and irresponsible behavior means their irresponsible conduct is not as morally reprehensible as that of an adult . . . [I]t is less supportable to conclude that even a heinous crime committed by a juvenile is evidence of irretrievably depraved character. From a moral standpoint it would be misguided to equate the failings of a minor with those of an adult, for a greater possibility exists that a minor's character deficiencies will be reformed.
>
> . . . .
>
> We have held there are two distinct social purposes served by the death penalty: "'retribution and deterrence of capital crimes by prospective offenders'" . . . Whether viewed as an attempt to express the community's moral outrage or as an attempt to right the balance for the wrong to the victim, the case for retribution is not as strong with a minor as with an adult.
>
> As for deterrence, it is unclear whether the death penalty has a significant or even measurable deterrent effect on juveniles . . . .[8]

The Court therefore held that the Eighth Amendment of the Constitution prohibits the execution of those who were seventeen years of age or younger when they committed their crimes. The majority also noted "the stark reality that the United States is the only country in the world that continues to give official sanction to the juvenile death penalty" and deemed it proper to "ac-

6. *Id.* at 369 n.1.
7. 543 U.S. 551 (2005).
8. *Id.* at 570–71 (citation omitted).

knowledge the overwhelming weight of international opinion against the juvenile death penalty."[9]

Justice Scalia, in dissent, criticized the majority opinion at length, castigating the majority for making a "mockery" of the justice system. With regard to the majority's conclusions regarding the maturity and judgment of juveniles, he stated that "[i]t is entirely consistent to believe that young people often act impetuously and lack judgment, but, at the same time, to believe that those who commit premeditated murder are—at least sometimes—just as culpable as adults."[10]

Justice Scalia reserved special scorn for the majority's consideration of international views regarding the execution of juveniles. If America is to follow the lead of other countries that do not execute juveniles, Justice Scalia reasoned, then surely we should also follow those countries in making the death penalty mandatory for certain crimes or in allowing illegally obtained evidence to be used against a defendant. He concluded: "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking but sophistry."[11]

The decision in *Roper*, particularly the Court's reliance on foreign law, has evoked a firestorm. For example, Senator Richard Shelby of Alabama introduced a bill that would make it an impeachable offense for a federal judge to place any reliance on "foreign law."[12] It is worth noting here that Justice Scalia opposed this legislation, saying, "'I'll be darned if I think it's up to Congress to tell [the Supreme Court] how to rule.'"[13]

Tom Parker, a justice of the Alabama Supreme Court, published an op-ed piece regarding a case from which he was recused because of his involvement in the prosecution. Justice Parker decried the overturning by his court, on the basis of *Roper*, the death sentence of Renaldo Adams, who had been sentenced to death for raping and murdering a pregnant woman when he was seventeen. Justice Parker argued that "[t]he proper response to [the] blatant judicial tyranny" of *Roper* "would have been for the

9. *Id.* at 575, 578.

10. *Id.* at 618 (Scalia, J., dissenting).

11. *Id.* at 627 (Scalia, J., dissenting).

12. Constitution Restoration Act of 2005, S. 520, 109th Cong. §§ 201, 302 (2005).

13. Tony Mauro, *Scalia Tells Congress to Stay Out of High Court Business*, LAW.COM, May 19, 2006, http://www.law.com/jsp/article.jsp?id=1147943135671.

Alabama Supreme Court to decline to follow *Roper* in the Adams case. By keeping Adams on death row, our Supreme Court would have defended both the U.S. Constitution and Alabama law (thereby upholding their judicial oaths of office)."[14] Frankly, many agreed that "there is no magic—and certainly none of the constitutional variety—in the age 18."[15] Proponents point out that it certainly makes no difference to the victim and the victim's family whether, at the time of the murder, the defendant was 17 years and 11 months old or had celebrated his 18th birthday the day before.

Question: Is it possible that innocent people have been executed?

I remember visiting Tombstone, Arizona many years ago. In Boot Hill, a grave marker reads something like this:

Here lies an innocent man we hung by mistake.

Perhaps one of the most grave accusations against the death penalty as it is practiced in this country is the claim that innocent people are convicted and sentenced to die. If true, this is no doubt a serious indictment of our system. Therefore, we must ask: Is it true? Are innocent people sentenced to die, and have innocent people been executed?

Former Illinois Governor George Ryan was sufficiently concerned about this possibility that on January 13, 2003—two days before he left office—he commuted to life imprisonment the death sentences of every prisoner on Illinois' death row, a total of 156. Four other death row inmates were pardoned. Governor Ryan took these actions because a group of journalism students was able to establish the actual innocence of death row inmate Anthony Porter within hours of his scheduled execution, and because a larger investigation led to the exoneration of twelve other inmates.

The Death Penalty Information Center states that since 1973, 123 persons who had been sentenced to death have been exonerated, fourteen of them through DNA testing. Many death penalty

14. Tom Parker, Op-Ed., *Alabama Justices Surrender to Judicial Activism*, BIRMINGHAM NEWS, Jan. 1, 2005, at 4B, *available at* http://www.alliancealert.org/2006/20060106.htm (last visited Mar. 29, 2007).

15. Petition for Writ of Certiorari at 7, Alabama v. Adams, No. 05–1309 (U.S. Mar. 22, 2006).

opponents point to this figure as evidence that surely, other prisoners must have been executed despite their innocence. Others claim that is not necessarily the case, however. The DPIC defines "exoneration" as reversal of the conviction followed by acquittal or dismissal of charges, or an absolute pardon based on new evidence of innocence. In other words, the 123 are individuals whose claims of innocence were verified through the ordinary procedures attendant to death penalty cases. Proponents of the death penalty contend that the fact that such convictions are discovered and remedied is evidence that the system is working, not that it is broken.

Let me tell you about Ruben Cantu. On the night of November 8, 1984, Juan Moreno and Pedro Gomez were sleeping in a partially built house they were building in San Antonio, Texas. Moreno and Gomez were there to guard against thieves who had previously stolen a water heater. As they slept on mattresses on the floor of the empty front room, Moreno was awakened by a young man who poked him with a .22 rifle. The room was lit by a 75-watt bulb, and Moreno could clearly see the young man and his accomplice, a younger looking boy. After taking the victims' watches and money, the young man shot Gomez nine times, killing him. Moreno was also shot nine times, but survived. He subsequently described his attackers as Latinos wearing blue jeans—a description that fit virtually every male teenager in the neighborhood.

Police officers investigating the crime three times showed Moreno a photographic lineup. The first set of pictures did not include one of Cantu, and Moreno did not identify anybody. Because of rumors circulating at Cantu's high school, a second photo lineup that did contain a picture of Cantu was shown to Moreno. At trial, the detectives who showed him the photographs testified that Moreno avoided looking at Cantu's picture and seemed afraid. Finally, several months after the murder, a seasoned bilingual detective showed Moreno a third lineup that again included Cantu's photo. This time, Moreno identified Cantu as the perpetrator.

Cantu was convicted and sentenced to death based on Moreno's identification of him. No physical evidence tied Cantu to the crime, and he vigorously protested his innocence. He was executed in 1993.

Since then, the only two people in a position to know what happened that night—Juan Moreno and the younger perpetrator, juvenile David Garza—have both publicly stated that Cantu was wrongly executed. Although Garza, who was fifteen at the time of the murder, admitted his involvement, he refused to name the triggerman and did not testify at Cantu's trial. He has now stated that Cantu was not with him on the night of the murders, but rather that he was accompanied by another individual, whom he will not name. Moreno has recanted his identification of Cantu, saying he was pressured by the police.

Of course, one may legitimately question why Garza and Moreno would only come forward now, many years after the crime. Garza claims that he adhered to the strict code of silence imposed by the street gang of which he was a member. Moreno simply says that he can no longer remain silent with the knowledge that he helped convict a man with false testimony. On the other hand, it is not unheard of for witnesses to come forward many years after a trial and falsely claim that their earlier testimony was not true.

Question: What are the political implications of the death penalty?

To put it briefly, the death penalty is a political minefield. In many states, including South Carolina, most political analysts agree that it is virtually impossible to be a successful candidate for statewide public office without being in favor of capital punishment, lest one be painted as "soft on crime" by an opponent. Some of you may remember that during the 1988 presidential campaign, Democratic candidate Michael Dukakis was asked whether he would support the death penalty if his wife, Kitty, were raped and murdered. This question gave the candidate dubbed "the ice man" an opportunity to show a more human face, and respond with passion in his voice. However, Dukakis' lukewarm response, in which he reiterated his opposition to the death penalty and then went on to talk about the war on drugs, significantly hurt his chances for a successful campaign. Indeed, some political analysts point to this answer as the beginning of a slow but steady decline in his campaign.

The United States's use of capital punishment has earned us international criticism. There are only three established democ-

racies in the world where the death penalty may be imposed—Japan, South Korea, and the United States. Even Russia, with its bloody history of political executions, effectively abandoned the death penalty in 1999 under pressure from the Council of Europe. Turkey has likewise abolished the death penalty. The People's Republic of China recently announced that in the future, capital punishment would be exercised with extreme caution. America's divergence from most of the rest of the developed world on this issue often makes it more difficult to obtain extradition of criminal suspects. In 2001, for example, the Canadian Supreme Court, ruling on an extradition request from the United States Government, unanimously held that it would no longer permit extraditions to the United States in cases where the death penalty could be imposed. International opposition has affected the United States' ability to wage its war on terrorism. For example, shortly after the terrorist attacks of September 11, 2001, Spain indicated that it would not extradite suspected al Qaeda members if they would face the death penalty in the United States.

Question: What is the social impact of the death penalty?

This final question is, perhaps, the most basic of all. In light of the other questions we have already examined—and in light of the monetary costs of the penalty—is the death penalty worth it?

Let's start with the costs. There is no question that the death penalty is an expensive proposition. Studies of how much states spend on death penalty cases versus life-without-parole cases range from an additional cost of $2.2 million per case in North Carolina to $24 million per case in Florida. A recent study in California indicated that "the California death penalty system costs taxpayers more than $114 million a year beyond the cost of simply keeping the convicts locked up for life and not counting the millions more in court costs needed to prosecute capital cases."[16] A recent study in Texas revealed that it costs the state an average of $2.3 million per execution—that's almost three times the cost of locking someone up in solitary confinement for life. Across the board—at the trial level, on direct appeal, and in various collateral review proceedings—capital cases simply cost

16. Rene Tempest, *Death Row Often Means a Long Life; California Condemns Many Murders, But Few Are Ever Executed*, LOS ANGELES TIMES, Mar. 6, 2005, at B1.

more money. Much of the increased cost is up-front, during the trial phase. Capital defendants, who are almost universally indigent, are entitled to two lawyers at taxpayer expense, instead of just one in non-capital cases. Added to the defense costs are investigators and any number of expert witnesses: perhaps a ballistics or fingerprint expert, a mitigation expert to help develop the defense against the death penalty in the event the trial moves to the penalty phase, a social worker to interview family members, a psychiatrist to assess the defendant, and so on. The prosecution will probably have experts of its own. All of the lawyers involved—defense counsel, the prosecutor, and the judge—will spend much more time on a capital case than on virtually any other criminal prosecution. Juries are often sequestered in capital cases, resulting in additional costs for what may be a lengthy trial and penalty phase.

The costs do not end when the trial is over, however. A capital defendant, like all other defendants, will have his case reviewed on appeal through the state and federal courts. Unlike in other cases, the government will use taxpayer-generated funds to pay multiple defense attorneys and experts, in numerous post-conviction proceedings, to comb the record for mistakes made by the trial court and previous attorneys. In South Carolina, it takes an average of twelve years from the date of imposition of the death penalty to the date of execution, if there is one.

The recent trial of codefendants Brandon Basham and Chadrick Fulks in the Federal District Court in Columbia resulted in findings of guilty of murder under aggravating circumstances and the imposition of death sentences. It was reported to me by the trial judge that the extra cost to the taxpayers was over $3 million.

In 1990, Paul Crews of Loris, South Carolina was sentenced to death for the murder of two hikers on the Appalachian Trail in Pennsylvania. The Perry County District Attorney recently announced that he had agreed to move to dismiss the death sentences in exchange for Crews agreeing to drop his appeal and accept a sentence of life imprisonment without parole. The District Attorney stated that the county simply could not afford to continue to fight the case on appeal. And, he stated, if a retrial were ordered by an appellate court, it would cost the county over a million dollars, money the county simply did not have.

These costs are, in a word, staggering. Is it too much? Could this money be spent to better purpose—toward education, toward programs like Head Start, toward a state's share of Medicaid costs, or reducing property taxes? I'm not saying that it is too much, but it is a legitimate question to ask.

Opponents of the death penalty argue that there is another way to impose a just sentence in murder cases where the death penalty is currently an option—that is, life in prison without the possibility of parole. Thirty-seven of the thirty-eight states that have the death penalty now also allow for life without parole. Some even say that this punishment is worse than the comparative peace of being put to sleep by lethal injection. The solution, proponents say, is a supermaximum security prison like the one located in Florence, Colorado. Let's take Zacarias Moussaoui—after I describe his conditions of incarceration, you decide whether his sentence of life without parole is actually greater punishment than being put to sleep by lethal injection.

Moussaoui was charged with being part of the September 11 attacks on this country and eventually pleaded guilty to conspiracy to commit acts of terrorism and conspiracy to commit murder. Because the Government was seeking the death penalty, a penalty trial was held. Although the jury found Moussaoui guilty beyond a reasonable doubt of ten aggravating factors, it could not agree to sentence Moussaoui to death. Consequently, the judge, as she was required to do, sentenced Moussaoui to life without the possibility of parole.

Moussaoui has been transported to the Supermax prison facility in Florence, Colorado. He is housed in solitary confinement in a concrete cell. He eats in his cell. He has no contact with other prisoners. Many claim that this total isolation, especially for someone who wanted to become a martyr, is greater punishment than being put to death by lethal injection. At sentencing, the trial judge said to him,

> Mr. Moussaoui, . . . every person in this room when this proceeding is over will leave this courtroom, and they . . . can go outside, . . . feel the sun, . . . hear the birds, . . . They can associate with whom they want.
>
> . . . [Y]ou will spend the rest of your life in a Super maximum security facility . . . it's quite clear who won . . .

> . . . [Y]ou came here to be a martyr and to die in a great big bang of glory, but to paraphrase the poet, T.S. Eliot, instead, you will die with a whimper.[17]

And, this is what a family member of a victim of 9/11 said right after Moussaoui's sentence was imposed:

> He will pay dearly. I mean, just think of the loss of the sun in your life; think of the loss of seeing the stars at night; and only being in one room for the rest of your life; and not having contact with another human being. He's getting exactly what he deserves.[18]

Of course, the question of cost cannot be fully answered without first considering whether the death penalty "works" in the sense of deterring crime. There are studies upon studies searching for the answer. Some studies conclude that the death penalty does act as a deterrent, while other studies conclude that it actually increases the murder rate due to what the experts have labeled the "brutalization effect," that is, the idea that state sponsored execution diminishes the value of human life in the eyes of those prone to violent acts.

Those who contend that the death penalty has no deterrent effect point to studies comparing the murder rate in neighboring states with and without the death penalty. For example, in West Virginia, a non death penalty state, the annual murder rate is four per 100,000 citizens, while in Virginia, which has one of the highest execution rates in the nation, the annual murder rate is six per 100,000 citizens. Of course, there are many factors that might influence these statistics.

One study I read concluded that every execution both deters and promotes murders, but the rate of deterrence exceeded the rate of promotion in the six states in the nation—South Carolina, Florida, Georgia, Texas, Nevada, and Delaware—that executed a condemned murderer at least once every other year. In states that carried out executions with less frequency, the study concluded that promotion of additional murders was greater than the rate of deterrence.

Who knows? Studies on this issue, taken as a whole, will give support for any conclusion you wish to draw.

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17. Transcript of Sentencing at 13, 21, United States v. Moussaoui, 2006 Extra LEXIS 53, No. 2001-455 (E.D. Va. May 4, 2006).

18. *The NewsHour with Jim Lehrer* (PBS broadcast May 4, 2006).

The basic problem with answering this question definitively is that it is not possible to accurately count the number of individuals who were not murdered because a would be murderer did a cost benefit analysis and decided not to murder because he might have to pay with his own life.

I personally know of one individual who was deterred from committing murder and robbery because of the death penalty; at least, he said he was.

The last case I prosecuted as the chief prosecuting attorney for my circuit in South Carolina was entitled *State v. Yates*.[19] The facts brought out at trial showed that on the night of February 11, 1981, Dale Robert Yates, Henry Davis, and David Loftis discussed committing an armed robbery the next day. On the morning of the 12th, Yates armed himself with a loaded revolver and Davis with a Bowie knife. Loftis was unarmed. Each time the three approached a potential victim, Loftis would suggest a reason to look elsewhere—saying there were too many people in the store or the escape route was no good—until finally he asked Davis to drive him to a local shopping mall where his girlfriend worked. As he got out of the car, and before he closed the door, he leaned in the car and said to Yates and Davis, "If you keep on the way you are going, you are going to the electric chair, and I'm not going with you."[20]

Well, Yates and Davis did keep on going and in the middle of the afternoon, they entered a country store in upper Greenville County. In the store, behind the counter, was the proprietor, Willie Wood. Yates and Davis pulled their weapons and ordered Mr. Wood to empty the cash register. After Yates pocketed the money, they ordered the victim to lean over the counter. I argued to the jury that the purpose of this order was to allow Davis to kill him quietly with his Bowie knife. When Mr. Wood backed up, rather than lean over, Yates fired twice at close range. One bullet missed; the other shot Mr. Wood in his left hand, which he had placed over his heart in a defensive action. The force of the bullet knocked him down and Yates, believing Mr. Wood was dead, ran from the store and leapt into the getaway car. Davis, however, saw that Mr. Wood was still alive and began to run around the counter to finish him off with his Bowie knife.

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19. State v. Yates, 310 S.E.2d 805 (S.C. 1982).

20. Brief for Respondents at 5, Yates v. Aiken, 484 U.S. 21 (1988) (No. 86-6060) (citing Transcript of Record at 820–25, State v. Yates, 310 S.E.2d 805 (S.C. 1982) (No. 21835)).

All of this time, Mr. Wood's mother was in a small cubicle at the front of the store, which served as the post office for the small community she had served as the Post Mistress for many years. Hearing the two shots, she came out of the enclosed cubicle and saw Davis charging at her son. She yelled at Davis, who turned on her, fatally plunging the knife into her heart. By now, Mr. Wood was able to draw his pistol, which had been strapped to his left hip under his coat, and he shot Davis six times, killing him. Yates sped away but was later apprehended.

After convicting Yates of murder while in the commission of armed robbery, the jury sentenced him to death. How can that be, you might ask, when Yates did not personally kill anyone? In fact, when Davis murdered Mrs. Wood, Yates was not even in the building. Well, I will tell you how. You see, when two or more individuals combine together to commit an unlawful act, and a homicide occurs as a probable or natural consequence of the common design, each member of the group is equally responsible for the murder—

It matters not who struck the fatal blow, for the hand of one is the hand of all.

Thank you very much. I have enjoyed being here tonight.

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