

5-1-2017

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Recommended Citation

Paul G. Gill, *Virginia Executioner to Wear a Cloak: Diversion from the Real Controversy*, 51 U. Rich. L. Rev. 43 (2020).

Available at: <https://scholarship.richmond.edu/lawreview/vol51/iss5/5>

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VIRGINIA EXECUTIONER TO WEAR A CLOAK: DIVERSION FROM THE REAL CONTROVERSY

*Paul G. Gill **

Recent amendments to Virginia law made confidential and exempt from the Freedom of Information Act identifying information for those who contract with the Commonwealth to compound drugs necessary to carry out an execution by lethal injection.¹

The amendments were not without controversy.² But debating whether to identify or cloak those who help an execution take place deflects attention from the real legislative question about capital punishment: Does it have benefits which outweigh its costs, financial and otherwise? This article briefly explores that question, suggesting that if execution is examined by evidence-based standards we otherwise commonly apply to sentencing, the answer is clear.

I. PENOLOGY WARRANTS AN EVIDENCE-BASED RATIONALE FOR SENTENCING

“Certainty is missing the point entirely,” opined one author about religious faith.³ Americans enjoy tremendous freedom to select and practice our faith as we see fit.⁴ Apologetics aside, we do not generally require a person’s faith to be rational.

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1. Act of Apr. 20, 2016, ch. 747, 2016 Va. Acts __ (codified as amended as VA. CODE ANN. § 53.1-234 (Cum. Supp. 2016)).

2. See, e.g., Editorial Board, *Virginia’s False Choice on the Death Penalty: Barbarism or Secrecy*, WASH. POST (Apr. 13, 2016), https://www.washingtonpost.com/opinions/virginias-false-choice-on-the-death-penalty-barbarism-or-secrecy/2016/04/13/d438b3e4-0022-11e6-9203-7b8670959b88_story.html?utm_term=.00b9a9455387. See generally Ellyde Roko, *Executioner Identities: Toward Recognizing a Right to Know Who is Hiding Beneath the Hood*, 75 FORDHAM L. REV. 2791 (2007) (advocating such a right).

3. ANNE LAMOTT, PLAN B: FURTHER THOUGHTS ON FAITH 257 (2005).

4. See, e.g., U.S. CONST. amend. I; James Madison, *Madison Papers*, THE FOUNDER’S CONSTITUTION 85 (P. Kurland & R. Lerner eds., 1987) (“[N]o man shall be compelled to frequent or support any religious worship, place, or ministry whatsoever.”).

But penology is not religion. *Striving* for certainty, at least, makes sense. Sentencing practices should be informed by *evidence* that they advance legitimate goals of penology. State legislatures seem to agree, based on their laws mandating evidence-based practices in one or more aspects of criminal justice.

II. EXISTING STATE AND FEDERAL PRACTICES FOR NON-CAPITAL CASES REFLECT THIS PRINCIPLE

Alabama requires the use of evidence-based practices in the supervision, treatment, and providing of services to criminal offenders.⁵ Arkansas defines evidence-based practices as “policies, procedures, programs, and practices proven by scientific research to reliably produce reductions in recidivism.”⁶ The Alaska Criminal Justice Commission has the immodest task to evaluate whether sentencing laws provide for public protection, community condemnation of the offender, rights of crime victims and accused, restitution, and the principle of reformation.⁷ It must also consider the efficacy of evidence-based restorative justice initiatives on convicted persons, their victims, and the community.⁸

Evidence-based practice mandates exist in many other states.⁹ This is consistent with the 2007 resolution of the Conference of Chief Justices and the Conference of State Court Administrators for states to adopt sentencing and corrections policies and practices “based on the best research evidence of practices shown to be effective in reducing recidivism,” including the use of actuarial tools to identify particular factors related to recidivism.¹⁰

5. ALA. CODE § 15-18-174(8), -(9) (LexisNexis 2016).

6. ARK. CODE ANN. § 16-93-101(4) (2016).

7. ALASKA STAT. § 44.19.645(a) (2015).

8. *Id.* § 44.19.646(2)(L). Oversimplifying greatly, restorative justice focuses on the healing of victims, acceptance of responsibility by offenders, and reconciliation between them through apology, forgiveness, and mutual understanding. *See, e.g.*, Kristen F. Gurnewald & Priya Nath, *Defense-Based Victim Outreach: Restorative Justice in Capital Cases*, 15 CAP. DEF. J. 315, 316–17 (2003). It has long had application to death penalty cases, where it has facilitated agreed dispositions of a sentence other than death. *See id.* at 315–16, 333–52.

9. *See, e.g.*, ARIZ. REV. STAT. § 8-807(B) (LexisNexis 2016); CAL. PENAL CODE § 17.5(4) (Deering 2016); GA. CODE ANN. §§ 42-2-11(c)(2)(A)(i)–(ii)(B) (2016); KY. REV. STAT. ANN. § 439.3103(1)(a) (LexisNexis 2016); MD. CODE ANN., PUB. SAFETY § 1-401(g)(6) (LexisNexis 2016); MICH. COMP. LAWS 791.408(4)(c) (LexisNexis 2016); 61 PA. CONS. STAT. ANN. §§ 6131(a)(13)-(14), -(d) (LexisNexis 2016); WASH. REV. CODE ANN. § 13.40.0357 (Option B)(1)(a) (LexisNexis 2016).

10. JENNIFER K. ELEK ET AL., NAT’L CTR. FOR STATE COURTS’ CTR. FOR SENTENCING INITIATIVES, USING RISK AND NEEDS ASSESSMENT INFORMATION AT SENTENCING:

Federally, the United States Sentencing Commission's guidelines are supposed to "reflect, to the extent practicable, advancement in knowledge of human behavior as it relates to the criminal justice process."¹¹ The Commission is also to develop "means of measuring the degree to which the sentencing, penal, and correctional practices are effective in meeting the purposes of sentencing."¹²

III. DECADES OF RESEARCH FAIL TO DEMONSTRATE THAT CAPITAL PUNISHMENT DETERS CAPITAL CRIME

Even if one perceived evidence-based practices as more relevant for less serious cases than capital ones, the question remains: What evidence, actuarial or otherwise, supports the use of capital punishment on grounds that it deters violent crime?¹³ The most definitive recent response comes from a 2012 report which summarized more than thirty years of research as follows:

The committee concludes that research to date on the effect of capital punishment on homicide is not informative about whether capital punishment decreases, increases, or has no effect on homicide rates.¹⁴

Put another way, executions have not consistently demonstrated

OBSERVATIONS FROM TEN JURISDICTIONS 1 (2015), <http://www.ncsc.org/~media/microsites/Files/CSI/RNA%20Guide%20Final.ashx> (quoting CON. OF CHIEF JUSTICES & CONF. OF ST. CT. ADM'RS., NAT'L CTR. FOR ST. CTS., RESOLUTION 12 IN SUPPORT OF SENTENCING PRACTICES THAT PROMOTE PUBLIC SAFETY AND REDUCE RECIDIVISM (2007), <http://ccj.ncsc.org/~media/Microsites/Files/CCJ/Resolutions/08012007-SupportSentencing-Public-Safety-Reduce-Recidivism.ashx>).

11. 28 U.S.C. § 991(b)(1)(c)(2012).

12. *Id.* at § 991(b)(2).

13. A prison term of life without parole should logically be as effective as a death sentence at satisfying sentencing goals of protecting the public and preventing the defendant's further crimes. *Cf.* BUREAU OF JUSTICE STATISTICS, MORTALITY IN LOCAL JAILS AND STATE PRISONS, 2000–2010—STATISTICAL TABLES 6, 14 (Dec. 2012), <http://www.bjs.gov/content/pub/pdf/mljsp0010st.pdf> (noting homicide rate consistently at five or fewer per 100,000 in state prisons and jails); Brian Palmer, *Which is Safer: City Streets or Prison?* SLATE (June 19, 2013, 2:29 PM), http://www.slate.com/articles/news_and_politics/explainer/2013/06/murder_rate_in_prison_is_it_safer_to_be_jailed_than_free.html (noting this rate is lower than the national non-prison average, and less than one-tenth the prison rate in 1980). Life in prison permits rehabilitative efforts; death obviously limits those, and related restorative justice goals. Retribution and punishment remain the top rationale for death penalty supporters in the general public. *See* Art Swift, *Americans: "Eye for an Eye" Top Reason for Death Penalty* (Oct. 23, 2014), <http://www.gallup.com/poll/178799/americans-eye-eye-top-reason-death-penalty.aspx>.

14. NAT'L ACAD. OF SCI. COMM. ON DETERRENCE & THE DEATH PENALTY, DETERRENCE AND THE DEATH PENALTY 2 (Daniel S. Nagin & John V. Pepper eds., 2012).

marginal effect on homicide rates that is not achieved by life or long-term imprisonment.¹⁵

Accepting this proposition, it is hardly radical to suggest capital punishment “offers no practical benefits to weigh against its social costs.”¹⁶ Those costs include the execution or long-term imprisonment on death row of innocent people;¹⁷ the direct financial (and other) costs of drawn out death penalty litigation;¹⁸ and the indirect costs of a capital punishment system that continues to struggle with how to confidently and fairly make and implement a sentencing decision unlike any other.

IV. LET US AT LEAST DEBATE THE RIGHT QUESTION

At least two of our current slate of eight Supreme Court justices would rather go beyond debating death penalty implementation, to “ask for full briefing on a more basic question: whether the death penalty violates the Constitution.”¹⁹ That is a debate worth fearlessly having anew, as is the cost-benefit debate in state and federal legislatures. The resolution of those debates could make moot whatever controversy exists over “hooded executioner” bills.

15. This is consistent with the long-supported view that certainty and/or swiftness of punishment may have deterrent value, but “[i]maginable increases in severity of punishments do not yield significant (if any) marginal deterrent effects.” Michael Tonry, *Purposes and Functions of Sentencing*, 34 CRIME & JUST. 1, 28–29 (2006).

16. John Lamperti, *Does Capital Punishment Deter Murder? A Brief Look at the Evidence*, at 1 n.2 (2010), https://www.dartmouth.edu/~chance/teaching_aids/books_articles/JLpaper.pdf.

17. See *id.*; see also Samuel R. Gross, et al., *Rate of False Conviction of Criminal Defendants Who are Sentenced to Death*, PROC. OF THE NAT'L ACAD. OF SCI. (Apr. 5, 2013), <http://www.pnas.org/content/111/20/7230.full.pdf> (offering “conservative estimate” that “if all death-sentenced defendants remained under sentence of death indefinitely, at least 4.1% would be exonerated”).

18. See Jeffrey A. Fagan, *Capital Punishment: Deterrent Effects & Capital Costs*, COLUM. L. SCH. (2006), https://www.law.columbia.edu/law_school/communications/reports/summer06/capitalpunish (noting that Florida spent \$25 to \$50 million more per year on capital cases than it would have if the death penalty was not at issue, and Indiana bore \$37.1 million added expenses); Noah Berlinger et al., *Deterrent Value and Cost of Death Penalty*, U. VT. LEG. RES. SHOP (Apr. 2001), <http://www.uvm.edu/~vlrs/doc/deathpenalty.htm> (summarizing research on death penalty's marginal costs of up to six times that of prosecuting and incarcerating for life). Federally, median *defense* costs alone for capital crimes in which the death penalty was authorized by the Department of Justice exceeded \$353,000, increasing to \$465,602 for cases that were tried. The median was only \$44,809 for federal capital cases not authorized, in a survey of cases from 1998 to 2004. See JON B. GOULD & LISA GREENMAN, REPORT TO THE COMMITTEE ON DEFENDER SERVICES JUDICIAL CONFERENCE OF THE UNITED STATES UPDATE ON THE COST AND QUALITY OF DEFENSE REPRESENTATION IN FEDERAL DEATH PENALTY CASES 24–25 (2010), <http://www.uscourts.gov/services-forms/defender-services/publications/update-cost-and-quality-defense-representation-federal> (follow “report” hyperlink to download pdf).

19. *Glossip v. Gross*, 135 S. Ct. 2726, 2755 (2015) (Breyer, J., dissenting).