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A PENALTY WITHOUT LEGITIMACY

The Mandatory Death Penalty in Trinidad and Tobago

**Papers Prepared for a Conference held in
Port of Spain on 7 March 2009**

**Roger Hood and Florence Seemungal
Douglas Mendes
Jeffrey Fagan**

Funded by



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FOREWORD

Founded by Simons Muirhead & Burton Solicitors The Death Penalty Project is now established in its own right as an independent NGO with a connected charity, The Death Penalty Project Charitable Trust. The Death Penalty Project continues to be supported by the firm and is based at their London offices. The principal objective of the Organisation is to provide free legal representation to the many individuals still facing the death penalty in the Caribbean and Africa and to ensure that the domestic application of the law complies with regional and international human rights standards.

As a result of legal challenges, and in line with the trend worldwide, the mandatory death penalty has now been abolished in nine Caribbean countries and a discretion to impose a lesser sentence has been given to the judges of the Eastern Caribbean, Belize, Jamaica and the Bahamas. However, in relation to Trinidad & Tobago, in the case of Charles Matthew (Matthew v The State [2005] 1 AC 433), a majority of the Judicial Committee of the Privy Council decided - notwithstanding that the mandatory death penalty was cruel and unusual punishment in violation of entrenched fundamental freedoms and human rights established in the Constitution of Trinidad & Tobago - that it remained protected from constitutional challenge by the operation of the “savings clause” in the Constitution. As a result, Trinidad & Tobago remains one of only three Commonwealth Caribbean countries (Barbados and Guyana being the other two) that still retains the *mandatory* death penalty.

This is about to change because on 3rd May 2009, the Deputy Prime Minister and Attorney General of Barbados, Freudel Stuart, confirmed in an interview that the Government of Barbados would be moving to abolish the mandatory nature of the death penalty, while keeping the death penalty on the statute books as a possible sentence for those convicted of murder. He stated that: “*The mandatory death sentence can no longer be defended. The judge should have some power to determine what sentence should be imposed for a capital offence, with the benefit of a pre-sentencing report.*”

The Government of Barbados has also pledged to repeal the “savings clause” in the Constitution which had for so long effectively preserved pre-independence legislation from constitutional challenge on the basis that it contravened fundamental human rights guarantees. As is the case in Trinidad & Tobago, it had immunised and protected the mandatory death penalty from legal challenge. The removal of the “savings clause” is commendable and will provide the people of Barbados with a dynamic constitution that the domestic courts will be able to interpret in a contemporary fashion to take account of evolving international standards.

It is also important to note that the abolition of the mandatory death penalty and the repeal of the “savings clause” in Barbados is in accordance with the decision of the Inter American Court of Human Rights in the case of *Boyce et al v Barbados*, *Judgment of November 20, 2007 Series C. No. 169*, and that the same international human rights obligations under the inter-American Human Rights system are equally applicable to Trinidad & Tobago. By taking progressive measures to bring its domestic law into conformity with its international obligations to human rights Barbados has set an example to other states in the Caribbean and the wider international community about fulfilling obligations to its citizens through the active enforcement of decisions of human rights institutions. This also now means that Trinidad & Tobago and Guyana will be the only two countries in the Americas to retain the mandatory death penalty for murder.

It is clear that but for the “savings clause” in the Constitution of Trinidad & Tobago, the mandatory sentence of death would have been declared unconstitutional by the judiciary as has been the case with increasing frequency in virtually all other Caribbean and Commonwealth jurisdictions. However, the decision in *Matthew* confirmed that for Trinidad & Tobago there were no further legal avenues available to challenge the mandatory aspect of the death penalty other than through legislative action.

It is against this legal background that discussions have focussed on other ways of challenging the continued application of the *mandatory aspect* of the death penalty – a practice that does not conform to regional or international human rights standards on

the basis that it is both arbitrary and cruel. In Trinidad & Tobago, the death penalty remains popular with the majority of politicians and the electorate, no doubt largely in response to the ever-increasing rate of crime and the unprecedented number of homicides committed in recent years. This debate, however, had not been enlightened by any published empirical data on the phenomenon of homicide and the application of the death penalty in Trinidad and Tobago and as a result there were obvious risks that opinions on the death penalty were being formed even though it was not clear how many of the different types of homicide (for example domestic or gang related) were being committed and how many individuals were being brought to justice, convicted and mandatorily sentenced to death for these different types of homicide.

In 2005, aware of the lack of reliable data and available research on homicide in Trinidad & Tobago, the Death Penalty Project commissioned Professor Roger Hood and Dr Florence Seemungal to conduct a study under the auspices of the Faculty of Law at the University of West Indies, St Augustine Campus, Trinidad with the research support of the Oxford University Centre for Criminology. Their research focused on a particular issue – the phenomenon of murder as it related to convictions for murder and as a result the imposition of the mandatory death penalty during a particular period of time. The report entitled '*A Rare and Arbitrary Fate*' was based on a detailed study of all cases of homicide recorded by the police as murder in years 1998 – 2002, and all cases in which persons were committed for trial on indictment for murder in the same years followed through to the end of 2005 to record the decisions reached. Published in 2006, the report provided for the first time an analysis of the kinds of murder that were committed in Trinidad & Tobago in these years and the extent to which they resulted in a conviction for murder and a mandatory death sentence.

Among its many findings, the report concluded that "*the certainty of conviction for murder is so low that the mandatory death penalty cannot be an effective deterrent to murder. Further "that under the system of criminal justice as it operates in Trinidad & Tobago, there is a great deal of arbitrariness affecting which defendants are convicted for murder and sentenced to death"* and that "*the existence of a mandatory death penalty may itself be one of the factors affecting the ability of the system to secure convictions for murder.*"

The report was very well received and has been critical in stimulating further discussions in Trinidad & Tobago on the issue of homicide and the mandatory death penalty, not only amongst academics and the media, but also within the Judiciary, the legal profession and the offices of the State concerned with the criminal justice system. In 2008, in order to build on the earlier report, The Death Penalty Project commissioned a further study from Roger Hood and Florence Seemungal. In 2008, they began to conduct a survey of opinions about the problems associated with the administration of the mandatory death penalty. In particular, the aim was to obtain the views from those intimately involved in the criminal justice process on the current system as it operates in Trinidad & Tobago.

The Chief Justice of Trinidad & Tobago granted permission for the researchers to approach and interview the High Court judges who dealt with criminal cases and permission was also given by the Director of Public Prosecutions and the Chair of the Criminal Bar to conduct interviews of prosecutors and defence lawyers involved in capital cases.

Professor Hood and Dr Seemungal have prepared a Report of their findings entitled *“Experiences and perceptions of the mandatory death sentence for murder in Trinidad and Tobago: Judges, Prosecutors and Counsel”*, and this was presented and discussed at a conference held in Port of Spain, Trinidad & Tobago on 7th March 2009. To complement the research findings, Professor Jeffrey Fagan of Columbia Law School, New York was invited to deliver a paper on the important subject of *Deterrence and the death penalty*, a topic which plays a prominent role in discussions favouring the continued retention of the death penalty in Caribbean countries. In addition, Douglas Mendes SC delivered a paper entitled *The Mandatory Death Penalty — An International and Comparative Perspective*.

The conference was attended by a wide range of key individuals in Trinidad & Tobago. The participants included The Hon. Chief Justice Ivor Archie, Justices of the High Court and the President and Justices of the Caribbean Court of Justice. Prosecutors from the Office of the Director of Public Prosecutions, defence lawyers, academics, as well as some Members of Parliament.

The conference provided an opportunity for all the participants to engage in frank, but private discussions on the various issues raised during the presentations and in particular, to consider how best to take forward the debate concerning the mandatory aspect of the death penalty in Trinidad & Tobago. The research report and the other conference papers have been reproduced in this publication and it is hoped this will ensure wider circulation of the research findings as well as provide a further stimulus to continue the discussion.

Special thanks must go to Professor Roger Hood and Dr Florence Seemungal for their ground-breaking work in producing both the original report and their further research findings. They have provided data that was simply unavailable before in Trinidad & Tobago and we hope this will provide indispensable guidance to policy makers in Trinidad & Tobago in considering legislative change and the possibility of reform in light of contemporary human rights standards. We would also like to thank Professor Jeffrey Fagan and Mr Douglas Mendes SC for their invaluable contributions and we extend our gratitude to the Faculty of Law, University of the West Indies for their assistance throughout and for their efforts in ensuring this project could be completed on schedule. Finally, we would like to thank the British High Commissioner to Trinidad & Tobago, Mr. Eric Jenkinson for his support and the Foreign & Commonwealth Office for funding the project through the Human Rights, Democracy and Good Governance Programme.

Saul Lehrfreund MBE and Parvais Jabbar
Executive Directors of the Death Penalty Project

**EXPERIENCES AND PERCEPTIONS OF THE MANDATORY DEATH
SENTENCE FOR MURDER IN TRINIDAD AND TOBAGO: JUDGES,
PROSECUTORS AND COUNSEL**

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In preparing this paper we have been very much aware of the tremendous increase in the number of recorded homicides in Trinidad and Tobago. A decade ago, in 1998, 98 killings had been recorded as murder; by 2002 the number had risen to 171; by 2005 to 387; and by 2008 to an estimated 550. At the same time, the number of persons committed for trial in the High Court of Trinidad and Tobago on a charge of murder, as a proportion of recorded murders, had declined from 62 (1 committal to 1.6 recorded murders) in 1998 to 72 (1 committal to 7.7 recorded murders) in 2008.¹

The main aim of the paper is to report and discuss the findings of a recent study of opinions of judges, prosecutors and counsel on the mandatory death penalty in Trinidad and Tobago, and on the basis of these findings to suggest a possible way forward. But first it is necessary to set the new study in context by reviewing the main findings of our earlier research on the relationship between homicide and conviction for murder in Trinidad and Tobago, published under the title *A Rare and Arbitrary Fate* in 2006. We also review briefly the legal and political context within which consideration of the mandatory death penalty must be viewed in Trinidad and Tobago, following the judgment in 2004 of the Judicial Committee of the Privy Council which upheld, in the

¹ The number of defendants committed to trial on a charge of murder has fluctuated over this period of time, in part depending on the number of persons charged with a specific offence. The lowest number of defendants committed was in 2002 (38) and the highest in 2005 (107), since when the number has fallen to 72 in 2008.

case of *Matthew v State of Trinidad and Tobago*, the constitutionality of this penalty because of its protection by the savings clause (see pages 8-10 below)

I. Background to the Study

1. Our previous study, published in 2006 under the title *A Rare and Arbitrary Fate: Conviction for Murder, the Mandatory Death Penalty and the Reality of Homicide in Trinidad and Tobago*, had aimed, through identifying the types of murder committed in Trinidad and Tobago and by following each case through the criminal justice process, to shed light on three issues. First, to what extent was the State successful in obtaining prosecutions for murder? Was there evidence to support the State's contention that a mandatory death penalty would act as a general deterrent to murder? Second, what types of murder resulted most frequently in a conviction and thus a mandatory penalty of death? Were they the most heinous types of murder? And was the mandatory death penalty evenly applied to cases of murder or arbitrarily applied due to the way in which the system of criminal justice operated? Third, to what extent was the mandatory death penalty counterproductive by making it harder for the State to secure convictions for murder?

2. The research covered two overlapping samples of cases: all 633 murders recorded by the police during the five-year period from 1st January 1998 to 31st December 2002² and all 297 defendants³ prosecuted for murder and committed to the Trinidad and Tobago High Court for trial during the same period⁴

² However, in relation to 71 (11.2%) of these murders prosecution had still not been completed when the fieldwork came to a conclusion on 31st December 2005.

³ The prosecution of 17 indicted persons had still not been completed by the end of 2005 and one person who had been found unfit to plead was still confined to a mental hospital.³ Thus a sample of 279 completed prosecutions for murder was obtained.

⁴ A substantial proportion (37%) of such cases having arisen from homicides recorded by the police well before 1st January 1998.

3. Based on the police reports, supplemented where possible by other records, murders were grouped into five broad categories:

- Killings arising from a gang dispute or related to the trade in drugs including a sub-category where the killing was carried out like an assassination or execution (25%).
- Killings arising during the commission of another crime, such as robbery or burglary and killings arising from a sexual assault (23%).
- Killings arising from a domestic dispute including not only all killings in which the perpetrator and the victim were related by marriage or other family bonds but also those which arose from common-law relationships or former common-law relationships as well as child abuse and infanticide (17%).
- Killings as a result of an attack or fight arising from other inter-personal altercations or conflicts, usually between persons known to each other, including killings by police and security personnel in the exercise of their duty, and also those arising from inter-personal conflicts where innocent bystanders were killed (28%).
- Killings where the motive or relationship between victim and killer remained impossible to determine, the body having been found either ‘dumped’ or in other circumstances (8%).

4. Between 1998 and 2002 murders attributed to ‘gang or drug-related’ disputes and those committed during the commission of another crime – most often robbery – increased very substantially, as did the number of killings where the body was found but the motive unknown. In 1998 these three categories made up between them 41 per cent of the recorded murders, but by 2002 they accounted for 64 per cent. This was reflected in the method of killing, for deaths caused by gunshot wounds increased three-fold between 1998 and 2002, so that they accounted for 61 per cent of recorded murders in the latter year compared to only 31 per cent in the former. There is also no doubt that these kinds of murder account for the bulk of the increase since 2002.

5. Taking into account the cases for whom no suspect was arrested, the proportion of all recorded murders committed between 1998 and 2002 that had resulted in a conviction for murder by the end of 2005 was very low, only 1 in 20 (5.2%), with 17 per cent resulting in a conviction for *either* murder *or* manslaughter. But the ‘success rate’ is probably even lower. The 38 *persons* convicted of a murder by the end of 2005 accounted for only 3.8 per cent of an estimated 1,000 persons who may have been

involved in the 633 murders reported between 1998 and 2002. Taking into account the 88 *persons* convicted of manslaughter only 126 (13%) had been convicted of homicide.⁵

6. The *conviction* rate for ‘gang-related’ murders and those where the body was ‘dumped’ or found was extremely low. By the end of 2005 only 2 of the 208 recorded murders of this kind resulted in a conviction for murder and two for manslaughter – 2 per cent together, although they had made up 33 per cent of the recorded killings. By contrast, 16 per cent of murders committed in the domestic situation resulted in a conviction for murder. Although they accounted for only 17 per cent of all recorded murders⁶ they made up 52 per cent of the 33 murders where a conviction and mandatory death sentence had resulted. As far as other types of inter-personal altercations and disputes were concerned, only two of the 175 recorded murders of this type resulted in a conviction for murder and sentence to death and less than a quarter of these murders resulted in a homicide conviction of any kind. Of those murders committed during the course of involvement in another crime – usually robbery – for which the outcome was known (121), only 12 (10%) had resulted in a conviction for murder with a further 12 cases ending with a manslaughter conviction. Thus 80 per cent of such crimes had so far evaded punishment.

7. Thus, the research showed conclusively that the general probability of a recorded murder resulting in a conviction for murder in Trinidad and Tobago was not only very low, but that no category of cases could be identified with a very high probability of conviction and mandatory sentence to death for murder. Nor even of a conviction for murder *or* manslaughter.

8. These findings were reinforced by the study of persons indicted for murder in the High Court of Trinidad and Tobago. Of the 279 indicted for murder where proceedings

⁵ In 70 cases one person was convicted of manslaughter, in four cases two were convicted, in two, three and in one five persons were convicted.

⁶ Another 24 were convicted of manslaughter: thus 39% of the recorded domestic murders had resulted in a homicide conviction.

had been completed, only 58 (21%) – 1 in 5 – had been convicted of murder and 57 of them were mandatorily sentenced to death,⁷ whereas 35 per cent were convicted of manslaughter. Altogether, whether by withdrawal of prosecution or finding by a jury, 44 per cent had been acquitted. Furthermore, the success rate in obtaining convictions for murder appeared to be declining. Of the prosecutions begun in 2002 that had so far been completed only two (7%) had resulted in a conviction for murder.

9. Taking into account the outcome of appeals, by the end of 2005 only 23 of the 57 persons sentenced to death – 8 per cent of those prosecuted for murder – remained under sentence of death, including five whose domestic appeals had yet to be heard and 15 who were waiting a hearing before the Privy Council. Thus, it was clear that after very lengthy delays and great expense to the State the number of convictions for murder and death sentences that will eventually be upheld will be only a tiny fraction of the cases originally indicted and an even smaller fraction of all ‘murders’ recorded by the police.

10. Perhaps that would not matter so much if it was only the ‘worst of the worst’ type of murder that ended up being mandatorily sentenced to death. But not only were domestic-related murders the most likely to be cleared-up by the police, when the accused were brought to trial, they were also the most likely to be convicted of murder and sentenced to death. Although domestic homicides accounted for only a fifth of all persons prosecuted, they accounted for over a third (35%) of all persons convicted of murder and sentenced to death.

11. Analysis of the characteristics of cases and of defendants in the cohort of cases prosecuted between 1998 and 2002 showed that several variables were associated with the probability of prosecution resulting in a conviction for murder and sentence to death. A multivariate analysis (logistic regression), taking into account 13 different variables, made it possible to identify which variables best predicted whether a trial for murder had

⁷ One, who was under the age of 18 at the time of the offence, was detained indefinitely at ‘the President’s Pleasure’. Leaving aside those whose plea to manslaughter was accepted by the court, still only a third (32.8%) of the 177 persons tried by a jury for murder were convicted of murder.

ended with a conviction for murder. This showed that five variables best predicted a conviction for murder:

- type of murder: whether gang-related, committed during the commission of a crime, domestic-related, interpersonal conflict
- co-defendants: none or more
- counts of murder: one or more than one
- victim's sex: male or female
- race of accused and victim(s): African accused\ African or mixed parentage victim(s); East-Indian accused\ East-Indian victim(s); East-Indian accused\other race victim(s); African accused\other race victim(s); Mixed-parentage accused\other race victim(s)

12. The logistic regression model identified correctly 94.1 per cent of those not convicted of murder and 53.4 per cent of those convicted of murder – an overall 85.7 per cent correct classification. Two findings stood out. First, more than half (58%) of those indicted for murder had no greater than a 20 per cent probability of being convicted of murder. In other words, 80 per cent of persons with these characteristics escaped a murder conviction. At the other end of the scale only 5 per cent of defendants were identified who had at least a 58 per cent probability of being convicted for murder. Secondly, as regards the 57 persons actually convicted of murder and mandatorily sentenced to death, 12 of them (21%) had an average probability of being convicted of murder of only 0.12 (12%). In other words they belonged to a category of cases with like characteristics where 88 per cent escaped the death penalty. Altogether 26 (46%) of those sentenced to death belonged to a category of defendants who had less than a 50 per cent chance of being convicted of murder: in fact, the average probability of being convicted of murder and sentenced to death of these 26 defendants was only 0.21 or 21 per cent. The fate of those who were convicted of murder and sentenced to death in this group could certainly not be said to be 'even-handed' when compared with other defendants with similar case characteristics who had been indicted for murder. Thirty-one of the 57 (55%) sentenced to death had an average probability of receiving such a fate of 60 per cent, but only eight of the 57 belonged to a category of cases where it might be said that their treatment was reasonably 'even-handed': i.e. the characteristics of their cases meant

that their average probability of being mandatorily sentenced to death after being indicted for murder was 0.73 or 73 per cent.⁸

13. The findings of the research fully justified the conclusion not only that it had become exceedingly difficult to obtain a conviction for murder in Trinidad and Tobago but also that it seemed likely that one of the reasons for this was the reluctance of witnesses and jurors to convict people of murder when the result would be a mandatory sentence to death. It was concluded that such a low certainty of punishment made it very unlikely that the mandatory death penalty for murder would have had the general deterrent effect claimed for its retention, especially given the indications that the conviction rate for murder would rise if it were not the only punishment available. Furthermore the evidence showed that a conviction for murder and the inevitable death sentence which followed fell very unevenly on the persons indicted for murder, with a large proportion of them being applied to defendants with case characteristics which rarely resulted in a death sentence and whose crimes could not be described as ‘the worst of the worst’. Thus conviction for murder was truly both a rare and arbitrary fate in Trinidad and Tobago.

II. The Legal Context

14. Both the UN Human Rights Committee⁹ and the Inter-American Commission and Court have held that the mandatory death penalty is a violation of the respective

⁸ In his famous study of discretionary death sentencing in Georgia in the United States, David Baldus and his colleagues argued that where offenders convicted of murder were in a category where less than 0.35 were sentenced to death, such a sentence would be ‘presumptively excessive’ and suggested that it would only be ‘presumptively evenhanded’ to sentence a person to death when all those with similar case characteristics had a probability of being sentenced to death of 0.80 and over. See David Baldus, George Woodworth and Charles Pulaski, *Equal Justice and the Death Penalty. A Legal and Empirical Analysis*, Boston: Northeastern University Press, 1990, at p. 60. For a discussion of this study see Roger Hood and Carolyn Hoyle, *The Death Penalty. A Worldwide Perspective*, 4thrd ed. 2008, Oxford University Press pp. 302-3.

⁹ See *Kennedy v. Trinidad and Tobago*, 28 March 2002, CCPR/C/74/D/845/1998 *Thompson v. St Vincent and the Grenadines* (2000), UN doc. CCPR/C/70/D/906/1998, which held that the mandatory death penalty breached Article 6 (1) – the right to life – of the International Covenant on Civil and Political Rights.

conventions.¹⁰ This view was also taken in 2001 by the Eastern Caribbean Court of Appeal (which does not cover Trinidad and Tobago) because it deprived the person “upon whom sentence was passed of any opportunity whatsoever to have the court consider mitigating circumstances”,¹¹ a judgment which, along with similar cases challenging the mandatory death penalty from St Christopher and Nevis and from Belize, was upheld in 2002 by the Judicial Committee of the Privy Council.¹² It was not surprising therefore that the Privy Council in 2003, in the case of *Balkissoon Roodal v The State of Trinidad and Tobago*, also found that the mandatory death penalty was an infringement of the right not to be subject to cruel and unusual treatment or punishment. The majority of the Board held that the ‘savings clause’ (clause 6) of the 1976 Constitution of Trinidad and Tobago, which protected pre-constitution legislation from judicial change, could not override the duty of the courts “to construe and apply” the Constitution and Statutes so as to protect the guaranteed fundamental rights, including protection against the imposition of cruel and unusual punishment and treatment laid down in sections 1 and 2 of the Constitution. The Board noted that in Trinidad and Tobago “the crime of murder is based on the English common law [and thus] covers an extraordinarily wide spectrum of cases of homicide, most of which would not be regarded

¹⁰ *Hilaire v. Trinidad and Tobago*, Inter-American Commission Report 66/99 (1999); in *Hilaire, Constantine and Benjamin and Others v Trinidad and Tobago* (21 June 2002, Ser. C no 94 (2002) the Inter-American Court held that the mandatory death penalty in Trinidad and Tobago, because “it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different ... puts at risk the most cherished possession, namely human life, and is arbitrary according to the terms of Article 4 (1) of the Convention [because] it treats all persons convicted of the designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass subject to the blind infliction of the death penalty”. And “when it is used, as is the case in Trinidad and Tobago ... to punish crimes that do not exhibit characteristics of the utmost seriousness, in other words, when the application of this punishment is contrary to the provisions of Article 4(2) of the American Convention”. In support of its judgment, the Commission cited *Woodson v North Carolina* (1976), 428 at 304. See also William A. Schabas, *The Abolition of the Death Penalty in International Law*, 3rd ed., Cambridge, 2002, 111.

¹¹ *Spence and Hughes v. The Queen*, Criminal Appeal No. 20 of 1998, Eastern Caribbean Court of Appeal Judgment (2 April 2001). See Saul Lehrfreund, ‘International Legal Trends and the “Mandatory” Death Penalty in the Commonwealth Caribbean’, *Oxford University Commonwealth Law Journal* 1, (2001), 171-194.

¹² *The Queen v. Peter Hughes* [2002] 2 AC, 259; also in relation to St Christopher and Nevis, *Berthill Fox v. The Queen* [2002] 2 AC 284; and in relation to Belize, *Reyes v. The Queen*, [2002] 2 AC 235. In 2006, The Privy Council held that the mandatory death penalty in the Bahamas was in violation of that country’s Constitution, *Forrester Bowe Jr. and Trono Davis v. The Queen* [2006] UKPC 10.

as murder in ordinary parlance.”¹³ It therefore declared that the legislation should be interpreted to mean that death should be the maximum, not the only, penalty for murder; the sentence being left to the discretion of the trial judge. A minority of the Board, however, held that the existence of the savings clause meant that the Privy Council had no power to alter the law. A year later, on appeal from the State, a full nine-member Board of the Judicial Committee held, by 5 to 4, in the case of *Charles Matthew* that, notwithstanding that the state of Trinidad and Tobago did not challenge the fact that a mandatory death penalty was cruel and unusual punishment, it was indeed protected by the savings clause:

...section 6(1) provides that “nothing in sections 4 [protecting ‘the right of the individual to life’] and 5 [5(2)(b) which states that Parliament may not impose or authorize the imposition of cruel and unusual treatment or punishment] shall invalidate ... an existing law’. The law decreeing the mandatory death penalty was an existing law at the time when the constitution came into force and therefore, whether or not it is an infringement of the right to life or a cruel and unusual punishment, it cannot be invalidated for inconsistency with sections 4 and 5. It follows that ... it remains valid”.¹⁴

15. This decision was stigmatized by the minority, including Lord Bingham the Senior Law Lord, “as a legalistic and over-literal approach to interpretation ... unsound in law and productive of grave injustice to a small but important class of people in Trinidad and Tobago ... The result of reversing *Roodal* is to replace a regime which is just, in accordance with internationally-accepted human rights standards and (as

¹³ *Roodal v. State of Trinidad and Tobago* [2005] 1 AC 328 at 338-9.

¹⁴ *Matthew v. State of Trinidad and Tobago* [2005] 1 AC 433 at 447. For a discussion of this and the preceding cases see Margaret A. Burnham, ‘Saving Constitutional Rights from Judicial Scrutiny: the Savings Clause in the Law of the Commonwealth Caribbean’, *The University of Miami Inter-American Law Review*, 36 (2&3), 2005, 249-269. And Julian Knowles, ‘Capital Punishment in the Commonwealth Caribbean: Colonial Inheritance or Colonial Remedy?’ in William A. Schabas and Peter Hodgkinson (eds.), *Capital Punishment. Strategies for Abolition*, Cambridge University Press, 2004, 282-308.

experience in the Eastern Caribbean has shown) workable by one that is unjust, arbitrary and contrary to human rights standards as accepted by the State.”¹⁵

16. Thus, the decision in *Matthew* meant that the only way by which the mandatory death penalty could be repealed in Trinidad and Tobago is by an Act of Parliament. *Matthew*'s death sentence was set aside and a sentence of life imprisonment substituted, on the grounds that it would be a cruel punishment to execute him when he had been previously told that his sentence could be reviewed. The Privy Council recommended that the same considerations should apply to all prisoners on death row at the time of its judgment.¹⁶ Yet the government has signalled no intention of bringing in legislation to abolish the mandatory death penalty; nor, despite the expectation raised, did it immediately commute to life imprisonment the death sentences of those prisoners who would have benefited from the Privy Council's recommendation. However, in August 2008, Justice Nolan Bereaux ruled that 52 prisoners who had been already sentenced to death prior to the *Matthew* decision (7th July 2004) would have their sentences commuted to life imprisonment. This still left 30 prisoners sentenced to death since that time under threat of execution. It appears that the government has put its utilitarian justification for the death penalty – namely the belief that it is necessary to deter citizens from murder – above the recognised human rights principle that such a punishment should not be applied to all cases of murder whatever the circumstances may have been.

17. As far as the prospects of legislation to reform or abolish the death penalty in Trinidad and Tobago are concerned it should be noted that although the Prescott Commission of Enquiry of 1990 into the retention of the death penalty recommended that a number of defenses to the charge of murder, namely provocation, diminished responsibility, and self-defence should be introduced, it rejected the submissions that there should be categories of capital and non-capital murder. It therefore concluded that

¹⁵ *Ibid.* [2005] 453 and 469.

¹⁶ *Ibid.* 453.

the mandatory death penalty for murder should be retained.¹⁷ A decade later, in November 2000, it appeared that agreement had been reached to try to limit the scope of the mandatory death penalty to some extent by introducing a classification of murders. Act No 90 of 2000 *An Act to Amend the Offences Against the Person Act (Ch 11:08)* limited the mandatory death penalty to ‘Murder 1’ and in certain circumstances ‘Murder 2’. ‘Murder 3’ would cover involuntary homicide – essentially manslaughter – and would not be subject to capital punishment. Murder 1 was to encompass the following offences: The murder of a member of the security forces; a prison officer acting in the execution of his duties; a judicial officer or legal officer acting in the execution of his duties ... where the murder was intentionally carried out in retaliation for the performance of his official duties; the murder of witnesses, pending witnesses and jurors or their immediately family members, attributable to their status as witnesses or serving as a juror in any criminal trial; any murder committed by a person in the course or furtherance of an arrestable offence involving violence; murder committed by means of a destructive device, bomb or explosive; murder committed pursuant to an arrangement whereby money or anything of value is passed to a third party as a consideration for causing or assisting in causing the death of any person or counselling or procuring any person to do an act causing or assisting in causing that death; murder that is ‘especially heinous, atrocious or cruel, manifesting exceptional depravity’; and murder where the deceased was intentionally killed because of his race, religion, nationality or country or origin. The death penalty would also be mandatory for multiple murders under Murder 2: a person convicted of Murder 2 ‘shall be sentenced to death, if before conviction of that murder he has been convicted in Trinidad and Tobago of another murder, whether or not done on another occasion.’ Other offences charged (at the discretion of the DPP) as Murder 2 or Murder 3 would not be subject to the death penalty.

18. Following a change of government this legislation was not forwarded to the President for proclamation. The existence of this proposal to create classes of capital and non-capital murder continues to influence the debate on the reform of capital statutes in

¹⁷ *The Death Penalty in Trinidad and Tobago*, A Report on the Death Penalty whether it should be retained for offences under the Criminal Law of Trinidad and Tobago (Chairman Elton A. Prescott), 25 September 1990, mimeo.

Trinidad and Tobago. The merits of the proposal are discussed in the Summary and Conclusions below.

III. Purposes and Methods of the Survey

19. Given the findings of the previous research reviewed above and the outcome of legal challenges to the mandatory death penalty which have determined that reform can only be obtained through an Act of Parliament, it was considered that it would aid the debate if the views of criminal trial and appeal judges, public prosecutors and defence counsel with experience of murder trials were to be surveyed and presented – especially as to whether the status quo should persist and, if not, what the punishment for murder should be.

20. Thus, under the auspices of the Faculty of Law of the University of West Indies, St Augustine's Campus, Trinidad and with the research support of the Oxford University Centre for Criminology, approaches were made to the Chief Justice, the Director of Public Prosecutions and the Chair of the Criminal Bar, seeking their approval to carry out personal interviews with judges, prosecutors and defence counsel. All were sent for information a draft questionnaire and all readily gave their consent for the study to take place. Interviews were carried out during the Law term between mid-September 2008 and early January 2009.

21. Sixteen (84%) of the 19 High Court and Appeal Court Judges who presided over or heard appeals from criminal trials agreed to be interviewed: six Justices of Appeal (including the Chief Justice) and 10 Puisne judges. Thirteen were male and 3 female; six were of East Indian, six of African, three of mixed heritage and one white. All 12 Prosecutors (including the Director of Public Prosecutions) plus a Special State Prosecutor took part in the study. Ten were Senior Prosecutors. All 13 had at least two years standing. Five were male and eight female. In addition, 22 (49%) of the 45 Counsel practising at the Criminal Bar (including the Chair) who were approached for interview

agreed to take part in the study.¹⁸ Seventeen of them had been identified as defence counsel in the sample of 279 persons who had been tried on a charge of murder between 1998 and 2002 that had been previously studied and reported in *A Rare and Arbitrary Fate* (2006). The remainder were persons to whom we were referred as having had such trial experience since 2002.

22. All 16 Judges had been appointed by the age of 50 and half of them had over six years judicial experience. Fourteen had had at least one experience of trying a murder and 11 of them had tried more than 10 murders. In addition, 11 had had previous experience of murder trials as a defence counsel and 6 as prosecuting counsel. Four had appeared for both sides and only three judges had not had such pre-judicial trial experience. Altogether only one judge, an Appeal Court judge, had not dealt with murder cases at trial, but he had heard up to 20 appeals from murder convictions. Although four judges had not had the responsibility of imposing a mandatory death penalty at trial three of them had dealt with such cases on appeal. Only one, recently appointed, judge had yet to impose a death sentence, but he had had extensive experience of murder trials as a prosecutor (more than 10 but less than 20) plus once or twice as defence counsel. Thus, between them, the judges had a wide and varied experience from which to consider the merits and drawbacks of the mandatory death penalty for murder.

23. All 13 prosecutors (of whom 8 were female, 5 of East-Indian descent, 7 of African and 1 of mixed heritage) had had experience of prosecuting a defendant in a murder trial, 10 of them more than 10 times, and two of them had also appeared for the defence in a murder trial. Eleven had also appeared in an appeal from a murder conviction before the Trinidad and Tobago Court of Appeal and six had represented the State before the Judicial Committee of the Privy Council (JCPC). Eight of the 13 had been the prosecutor in at least 10 cases where the death penalty had been imposed. They were therefore an experienced group of informants.

¹⁸ A few (6 of the 22) chose to self complete the questionnaire because of pressure of time. In addition, several others agreed to take part but were unable to fit time for the interview into their schedule.

24. Each of the 22 counsel (of whom 17 were males, 12 of East Indian descent, six of African and four of mixed ancestry) had at least 8 years experience at the Bar, and 15 of the 22 (68%) at least 15 years. Twenty (91%) had appeared for the defence in more than 10 murder trials and 17 (77%), had done so 20 times or more. Thirteen had represented a person convicted of murder before the Trinidad and Tobago Court of Appeal, and three had represented a defendant before the JCPC. Six had also acted as a prosecutor in a murder trial. All had represented a defendant on at least one occasion when a mandatory death penalty had been imposed, 11 of them on four or more occasions.

25. Thus, in the four months available for fieldwork, the researchers were able to garner information about the opinions of 51 persons who had a wide and varied experience of murder trials in Trinidad and Tobago.

IV. Experience of Sentencing under a Mandatory System.

26. We probed whether there was evidence of four different outcomes that could be associated with the death penalty being the only punishment available on conviction for murder. First whether, in the opinion of our respondents, the imposition of the death penalty appeared to be excessive given the circumstances of the murder and the mitigating circumstances associated with the defendant. Second, whether there had been instances, where in their judgment the jury would have found the person accused of murder guilty of that crime had it not been that the penalty would have been mandatory death. Third, what they thought the effect would be of abolishing the mandatory death penalty on the conviction rate for murder among those indicted for murder. And fourth what they thought the effect of that reform would be on the rate of murder in Trinidad and Tobago.

a) Excessive punishment?

27. Of the 12 judges who had dealt with murder trials where the jury had brought in a conviction for murder and a mandatory death penalty had therefore been imposed, half

said they thought that in at least one instance that penalty had been excessive given the nature and circumstances of the crime and mitigating circumstances associated with the offender. The following examples were cited:

A man who comes home intoxicated and meets wife with baby sleeping in her grasp and who, with an exchange of words, expresses malice over an alleged extra-marital affair and who proceeds to chop her but kills the child instead and he is convicted of the murder of the child.

A single stab to the chest killing of a woman by her husband who complains that she is more interested in minding the goats and who attacks her with his hands and she uses excessive force in response - the death penalty here is way excessive.

..., it was a triple murder of wife, mother-in-law and sister-in-law. Defendant gave evidence attributing killing to an out of body experience- alleged provocation. The jury did not accept any direction of provocation. The sentence was upheld by the Court of Appeal. The Privy Council overturned the conviction and substituted manslaughter conviction. This was not a violent man, it did not warrant death.

Defendant bought a cigarette from a vendor selling outside in the street. Gave vendor \$100 bill he got angry when there was no change, he abused the women; the women retaliated by pouring flour on him. He was Negro, they were Indian, he used racial expletives. A law abiding citizen intervened with a barbeque fork ... there was no intention to kill by this bystander. He gave one chop and stab to the heart, the guy died. I found provocation extreme; mitigating features - I offered manslaughter. There were a lot of lies. Jury brought in a guilty verdict and sentenced him to death. I thought 8-12 years. Verdict consistent with the evidence in jail for the rest of his life.

28. Six of the 13 prosecutors said that there had been at least one instance when they believed that the imposition of the death penalty had been excessive given the facts of the case.¹⁹ They mentioned domestic situations, the youth of the defendant, the degree of provocation, and the lesser role on one of the parties in a joint enterprise.

As a prosecutor - there was a case that was excessive punishment because it was not done properly by the defence. Matter was one of domestic matter an older brother used excessive self-defence. I believe that there was an element of provocation. In law excessive self defence is not necessarily provocation. The defence was poor.

¹⁹ Five of them said once or twice, and one said more than twice and less than 10 times.

The degree of complicity. Joint enterprise trials - the look-out person or driver. [Name of defendant] was one person who fell into this category- he brought a cutlass only. In TT we apply the constructive malice rule. Whether the person played a principal or secondary role, the degree of participation

Yes, excessive because accused person was at the time acting under the strain of intense provocation. I also thought that the accused person at the time may have been particularly vulnerable as a female who has endured years of domestic abuse.

29. Fifteen of the 22 counsel (68%) said that there had been at least one instance where, in their judgment the mandatory death penalty had been an excessive punishment. Another one said that he did not know if the death penalty was always justified: *'If contract killing ...but for felony murders the death penalty is not justified'*. Six of the 15 said that this had happened only once or twice, four more than twice but less than 10 times, and four more than 10 times. It is not possible to compute the total number of instances but it must amount, at a very minimum, to at least 70 death sentences where these 15 counsel over the period they had been practicing believed that the penalty had been excessive given the circumstances of the case and the characteristics of the defendant.

They gave the following examples:

(1) Provocation: the case of [name of defendant] and the issues surrounding provocation. (2) Case of five murder accused where one of the persons given the death penalty was a secondary party in the joint enterprise.

Because in the one instance the incident occurred in the execution of duty as a police officer. This case shows that the law of self-defence needs to be amended with respect to police officers who are asked to respond to violence.

Both cases involved domestic killings. In one the Privy Council substituted manslaughter in the appellate process. I thought mitigating factors in both cases could have been of assistance to court as these were not 'worst of the worst' cases of murder although one was a triple murder which in a way was an aggravating factor. But multiple murder is not necessarily aggravating because it can be the way in which the multiple murder took place, for example, vehicle murder.

Examples of youth who did not appreciate the needs of the situation; cases of joint enterprise where you have the look-out and another person actually committing the robbery - the majority of cases in which the death penalty was excessive were joint-enterprise cases; also in cases in which the defendant was brought up in a background of violence and self hate, for example [name of defendant], the bench-mark for his behaviour is different, so the death penalty was excessive for him; it is unfair to apply the same sentencing rules to all cases and circumstances.

Excessive in domestic circumstances, a number of killings are in the heat of the moment with a subsequent cooling over time. Defendant regrets action but has to face the consequences. If one were to categorise killings, domestic killings not as heinous as those in pre-mediated felony/robbery.

One case in which a person murdered in a crime of passion - he saw his girlfriend in the arms of another man; in the second example there was evidence of provocation.

Several of the matters involved situations in which there were mitigating factors such as prolonged abuse and provocation in a family context.

b) A barrier to conviction for murder?

30. Eight [plus one who had ‘heard it from other judges’] of the 13 judges (69%) who had tried a murder case at first instance said that they had experienced cases where, in their judgment, ‘the jury would have found the person accused of murder guilty of that crime had it not been that the penalty would have been mandatorily death.’²⁰ They provided the following examples:

I remember one matter, a case of murder, the jury brought back a verdict of not guilty and there was no evidence of manslaughter. I found out from the Marshall two people on the jury used a sympathy verdict 'He could be my son'.

Jurors only convict where facts are particularly heinous when they are empowered by a confidence-building summation by the trial judge. The problem is that the court of appeal feels that the Judge enters the fray - with which I disagree [i.e. with the view of the Court of Appeal]. I seek to empower the jurors for them to do what is right but the Court of Appeal said that I am using a prosecutorial role.

²⁰ Of the other four trial judges, two had tried only 1 or 2 cases, another only 2-3, and one said that it was ‘difficult to say: don’t know’. The three judges who had dealt with cases on appeal all agreed that the fact that the death penalty had been mandatory rather than discretionary had played a role in the appeal.

Once. A case depended on the murder felony rule but where the broader 'moral culpability' of the young offender of previous good character was on the low scale. Had the possibility of the mandatory death penalty been removed then consistent with the strong evidence in the case and the plain priority involved the Jury ought properly to convict; they dismissed instead; twice in separate trials.

When juries have a middle course they take it; i.e. acquittal or manslaughter. Examples, last year in joint enterprise cases the issue was whether the accused could foresee death; juries take the lesser option.

31. Seven of the 13 public prosecutors also said that they too had experienced at least one situation where, in their opinion, the jury had not brought in a guilty verdict to murder because of the mandatory death penalty.²¹ They gave the following examples:

A guy went to his girlfriend's house - she left him and was living with her mother- the guy came into her home and shot mother and son in the household. He was charged for murder but committed for manslaughter. DPP indicted for murder. Jury came in with manslaughter. Court Marshall later told me that some jurors were of the view that they could not hang a handsome good-looking young man.

Case of joint enterprise, person did not have the central role. He was convicted instead of the lesser charge. When a person [defendant] is young the jury tends to either acquit or convict of the lesser charge.

A policeman charged with murder was convicted of manslaughter by gross negligence. In my view, this alternative did not arise on the evidence but the judge put it feeling that the accused was guilty of murder but the jury may not have convicted him.

An accused man stabbed the deceased 75 times, approximately half of which were in the back. The problem is that the deceased was a mentally ill manic depressive. I feel that presented with the alternatives of guilty of murder or an acquittal, they did not feel comfortable convicting in the circumstances of that case. If presented with another alternative, they may have.

Where a woman was clearly guilty on the evidence but because of sympathy the jury let her off.

Young men in fights and cases involving fights between persons. Domestic homicides with a genesis in domestic violence incidence.

²¹ 4 once or twice, 1 often, 2 more than 2 but less than 10 times.

32. Twelve of the 22 counsel who had defended a person who had received a mandatory death sentence said that in at least one instance, they thought the jury would have brought in a guilty verdict had it not been that the punishment was a mandatory death penalty. Six said once or twice, four more than twice up to 10 occasions and two (both very experienced senior counsel) at least 20 times. The minimum estimate would be 52 occasions reported by these 12 counsel. Some examples were:

A defendant shot a police officer who was taking advantage of him. Jury found him not guilty as jury was upset to sentence him to death

Another police officer ... who was convicted of manslaughter. The fatal injury was to the back.

In one instance the accused stalked a girl (the victim) he had sex with her in the back of the school and during the sexual intercourse she was having pain. The defendant was so excited because he had never had sex before and he strangled her. The way the matter proceeded I thought that the jury would have found him guilty of murder had it not been for the death penalty.

In Trinidad and Tobago the jury is reluctant to convict for murder when they know that pronouncement is death. They look at circumstances surrounding the crime. The jury sub-consciously look for a way out for the accused. When judge reminds them of reasonable doubt, they do not pay attention to evidence. Jury looks at the time the defendant locked up before trial. Defendant and jurors are from the same background. If there is a Pentecostal [religious group] on the jury, they acquit.

Yes, the case of two prison officers charged with murder of an inmate. The inmate was in a secured environment. The jurors acquitted the defendants because they did not want to convict the prison officers for killing an inmate. It affects the jurors when they know the identity /job of the killers (e.g. police and prison officers).

33. As regards the six Appeal Court justices, half said that the fact that the death penalty was mandatory played a part in the decision whether to uphold the conviction or to reduce it to manslaughter or allow the appeal. As one of them put it: ‘Subconsciously Yes, we bend over backwards’.

c) Effect on the conviction rate for murder

34. Respondents were asked more directly what they thought the likely impact might be of abolition of the mandatory death penalty on the conviction rate for murder.

35. Of the 14 judges who gave an opinion on what the effect might be, nine said that they believed that the conviction rate would increase: For example:

At the end of the day, if death penalty was not the only alternative jurors would have had a guilty plea; it would increase the probability of convictions for murder.

It will be higher if the death penalty is abolished.

The removal of the mandatory death penalty would increase the conviction rate since juries currently loath to convict because of the mandatory death sentence.

Five judges thought, for various reasons that it would have no effect because other, more powerful factors, were affecting the conviction rate. More importantly, no judge thought that the abandonment of the mandatory system would decrease the likelihood of gaining a conviction in a murder trial.

36. Similarly, 11 of the 13 prosecutors thought that the conviction rate for murder would rise if the mandatory death penalty were abolished. Only two thought it would have no effect:

It would increase the conviction rate for murder. Some jurors come back with guilty verdict, some prefer not guilty or guilty of a lesser charge.

It would make it easier for jurors to faithfully apply legal principles and facts of a case whether murder or manslaughter.

Possibly: Jurors could be more likely to convict if they didn't have to sentence to death. Does it have to be death by hanging? That is torture not a sentence.

37. On the other hand only half the counsel (11 of the 21 who gave an opinion) thought that the conviction rate for murder would rise:

... may affect conviction rate positively though this opinion clearly not scientific - In my view I have been able to win many murder cases by humanising my client before the jury - more difficult for them to convict of murder with a mandatory death penalty when they have grown to understand the accused and the motivations for his actions

If there is not death penalty a higher conviction rate.

38. But almost as many thought that it would have no such effect or even lower the conviction rate:

Negligible, not a big difference. Juries who are properly directed have to ponder on the evidence and they have to do the job properly.

Would dwindle even more. Question asked: What can be done to increase the conviction rate for murder? Response: a total overhaul needed of the criminal justice system. Police are either not motivated or they are not properly trained to solve murder; Police prosecutors are used in the Preliminary Inquiries for murder because of scarce resources in the DPP staff to conduct PI's but more trained prosecutors, not police, needed for the PI's.

d) Effects on the murder rate

39. Thirteen Judges gave their opinion when asked what they thought the effect would be on the murder rate in Trinidad and Tobago if the current mandatory death penalty were to be abolished. Not a single judge said with certainty that they thought there would be an increase in murder. Indeed 10 of the 13 judges who answered this question said definitely that the abolition of the mandatory death penalty would have no effect, and three others simply said that they didn't know.

Murder would not go up or down; there is need for better policing. In crimes of passion the defendant is not concerned about sentence, death or life imprisonment.

Instinctively I believe that it could lead to more slaughter but given the present murder rate there will be no difference since the current situation is not a deterrent.

None. People kill for killing sake. Our violence is imported from North America.

Would not appreciably decrease - don't necessarily discern a nexus although the general public may strongly perceive one.

40. Only three of the 20 counsel who responded to this question, thought that the murder rate would increase because of the lessened deterrent effect – *'it would skyrocket more'* - and a further one counsel thought it could *'possibly increase it'*. Sixteen of the remaining 17 (80% of the total 20) said that in their opinion it would have no effect on the rate of murders, and one simply *'didn't know'*.

41. Similarly, only two of the 13 prosecutors thought that abolition of the mandatory death penalty for all murders would be likely to escalate the rate of murders committed in Trinidad and Tobago. The others were either unsure what effect it might have or believed that it would have no effect at all. Several of them mentioned the low conviction rate for murder, thus drawing attention to the prime importance of the certainty of punishment without which marginally more severe punishments are not likely to have a greater deterrent effect than the threat of a slightly less severe punishment.

V. Support for the Status Quo?

a) Judges

42. On the crucial question of whether the death penalty should remain mandatory or become an entirely discretionary punishment, the judges were shown five options, ranging from no change (the status quo) to complete abolition of the death penalty. They were asked to rank them in order of preference. As can be seen from Table 1 (page 28 below), which compares the responses of the judges with those of the prosecutors and counsel, only one of the 16 judges supported the status quo as the first choice – on the conservative grounds that *'It is the law'*. Six said that they would prefer murders to be classified as capital (punishable by death) and non-capital (for which the death penalty would not be available) and made mandatory for all capital murders. Three of these six modified this position by supporting the idea that the judge should have the discretion

(whether in open court or privately) to recommend to the Advisory Committee on the Prerogative of Mercy (known as the Mercy Committee) the commutation of the death sentence. Seven judges were in favour, as their first choice, of discretion (4 exercised by the judge and 3 by the jury) whether or not to impose the death penalty. Four of the seven wanted murders to be classified by legislation into capital\non-capital but wanted the death penalty to be discretionary for capital murder, and three favoured the abolition of the mandatory penalty and its replacement by a discretionary system. All seven were in favour of guidelines being provided to exercise this discretion. Two judges preferred the complete abolition of capital punishment but, failing that, a discretionary system with guidelines. Thus, when those who favoured a mandatory death penalty for capital murder but wanted power for the judge or jury to recommend that the sentence should be commuted, are taken into account, a total of 12 judges were in favour of introducing discretion and only four judges were opposed to any discretion. The lack of support for the status quo was indicated by the fact that 12 judges ranked it 4th or 5th: their least favoured choice. On the other hand, there was little support for outright abolition of capital punishment: only two judges placed it as their first choice and 13 judges ranking this as their 4th or 5th choice.

43. Ten of the 16 judges (63%) said that if the death penalty were to remain mandatory, they would be in favour of the judge (6) or Jury (3) or both (1) being granted the power to recommend in open court to the Mercy Committee that the person should not be executed and the sentence commuted on the grounds of mental disorder, youth, lesser guilt in a joint enterprise etc. Two others were in favour of a recommendation being made to the Mercy Committee but not in open court, making 12 of the 16 judges in favour of this approach as a way of introducing some discretion into the mandatory system if it were to remain in force. When asked whether there were any other reforms of the law of murder they would like to see enacted, eight of the 14 Judges who replied stated that the felony-murder rule should be repealed, reflecting the strong support for more discretion in sentencing where murder arises from a joint enterprise.

b) Counsel

44. Only one of the 22 experienced counsel favoured the status quo, but even that person would want to introduce some discretion or leeway into the system by giving the jury power in open court to recommend to the Mercy Committee that the death sentence should be commuted. Five favoured a classification of murder into capital and non-capital with the death penalty remaining the mandatory punishment for a murder defined as capital, but three of these five²² would also introduce discretion through a recommendation for mercy in open court at the end of the trial. Ten (45%) chose a discretionary system – seven within a classification of capital/non-capital murders, and three with no legislative classification, but with guidelines for the exercise of discretion. More than a quarter (6) of the counsel wished to see the death penalty abolished altogether. Thus 16 (73%) of the counsel were in favour of a discretionary system aimed at restricting the use of capital punishment or abolishing it altogether, and a further 23 per cent were in favour of restriction through classification of capital and non-capital murders, albeit with a mandatory death penalty for capital murders.

45. As with the judges, half of the interviewed counsel placed retention of the status quo as their least favoured option and 17 of the 22 (77%) as their 4th or 5th option. Similarly, nine of the 22 placed complete abolition as their least preferred option and 16 (73%) as their 4th or 5th choice.

46. Furthermore, 18 of the 22 counsel (82%) also said that if the death penalty were to remain mandatory, they would like to see the Judge (10), the Jury (4) or both (4) being given the power to recommend in open court to the Mercy Committee that the person should not be executed and the sentence commuted. Fifteen counsel (71%) thought that various other reforms were required to the law of murder, nine of them favouring the abolition of the felony murder rule.

²² Of the two who did not recommend this, one thought that because T&T is a small society the judge and jury could be put under undue pressure and the other thought juries were too unpredictable when a defendant's life depended on it.

c) Prosecutors

47. The responses from the 13 prosecutors were somewhat different. Just over half (seven) of them said that they thought that the judge (5) or jury (2) should have discretion whether to impose the death penalty.

There are so many varying circumstances under which murder is committed that if there is any evidence which can mitigate the penalty, given those circumstances it should be taken into consideration.

Yes to the judge. All murders are not equal. Some murders are particularly evil. The case of joint enterprise situations but in some secondary parties in such situations not in the same category as one who rapes, murder and mutilate the victim.

48. Five of the seven would do so subject to murder being classified into capital and non-capital murder:

The discretion should come from legislation. Hence the need to legislate categories of murder. Murder 3 should not carry the death penalty. Murder 1 or 2 should be discretionary. Jury has no say in sentencing, this would be clouding their role.

The other two would prefer an entirely discretionary system subject to guidelines for the use of the death penalty. Five also favoured the judge or jury being given the power formally to recommend commutation of the sentence to the Mercy Committee. And they agreed that there should be Guidelines for the exercise of that discretion.

49. Although six prosecutors did not think that the judge or jury should be given any discretion in sentencing, four of them wished to see a restriction on that discretion through the classification of murder, made by the legislature, with only capital murder remaining subject to the death penalty, but none of them wanted to see discretion given to the judge or jury to recommend commutation of the sentence:

I feel that the matter is for Parliament. Either create defined categories of murder and the DPP will indict whichever he feels is appropriate having regard to the evidence or for the punishment to be mandatory but not for the judge or jury.

It is a matter for the legislators. This can be achieved by classifying murder into capital and non-capital. It is not for the judge.

I believe that there is no lesser guilt in the joint enterprise. Mental disorder and youth are already taken into account in mitigating factors. Currently in TT gang/drug/kidnapping murder a fear of death will deter them. Jury can be touched by defence and other attorneys so don't let them have discretion. For judge to have discretion we don't need a choice. We are in desperate straits, we need the death penalty. There are enough checks and balances in the system to filter out family situations and to filter out murder from manslaughter.

The discretion may not be evenly applied and that itself may result in injustice.

50. In fact only two public prosecutors chose the *status quo* as their preferred solution.

No discretion. Everybody in a trial has a different role. The jury can convict if evidence is consistent with the charge. The judge is concerned with sentencing. Each party has a separate function. Also before an indictment is made all issues of provocation, grounds of mental disorder etc have already been considered/taken into account. Jury can reject prosecution evidence if they reject the ingredients of mental disorder, diminished responsibility etc.

*Discretions can be exercised arbitrarily. Murder is murder and once this had been proven all other factors have already been taken into account or eliminated.
The discretion may not be evenly applied and that itself may result in injustice.*

But none of the 13 Prosecutors advocated abolition of capital punishment. Indeed, this was the least preferred of the 5 options for 10 of them. As reflected in their other responses, 10 of the 13 prosecutors, when mentioning possible reforms in the law of murder referred to the failure of government to put into effect Act 90 of the Offences Against the Person Act 2000 which would have created categories of capital and non-capital murder (see above para 17).

d). Conclusion

51. Thus, the finding of this survey of 51 experienced and influential judicial and legal professionals in Trinidad and Tobago, summarised in Table 1, shows clearly that there is very little support (from less than one in ten) among those who are responsible for administering criminal justice for the maintenance of the mandatory death penalty for all murders.

Table 1
Most preferred option for death penalty legislation

	Judges		Counsel		Prosecutors		All	
	N	Percent	N	Percent	N	Percent	N	Percent
Status quo to continue	1	6.2	1	4.5	2	15.4	4	7.8
Two classes of murder: capital and non capital mandatory only capital murder	3	18.8	2	9.1	4	30.8	9	17.6
Two classes of murder: capital and non capital mandatory only capital murder but with power for judge/jury to recommend commutation	3	18.8	3	13.6	0	0	6	11.8
Two classes of murder: capital and non capital discretionary only capital murder	4	25.0	7	31.8	5	38.5	16	31.4
Abolition of mandatory death penalty altogether replacement with discretionary death penalty guidelines for application	3	18.8	3	13.6	2	15.4	8	15.7
Abolition of the death penalty altogether	2	12.5	6	27.3	0	0.0	8	15.7
TOTAL	16	100	22	100	13	100	51	100

VI. The Alternative to Death

52. Asked what penalty they would choose, from a list of five options, were the death penalty to be abolished, 13 of the 16 judges favoured ‘Life imprisonment, with a minimum period to be served before release can be considered (11 of them by an Independent Parole Board and 2 by The Mercy Committee), including the power to order

a full life sentence with no possibility of release.’ Only one judge favoured a sentence of life imprisonment, with discretion as to its length to be exercised by the Ministry of National Security, and only two judges favoured, as their first choice, mandatory life imprisonment without parole for all cases of murder. Twelve judges placed this bottom of their list – as the least favoured alternative.

53. If the death penalty were to be abolished, the least favoured alternative form of life imprisonment chosen by the 21 defence counsel who answered this question was ‘mandatory imprisonment of life imprisonment without parole’. Only one of the 21 counsel who responded to this question chose this. The other 20 favoured discretion as to length being in the hands of the executive, 10 favouring an independent parole board being entirely responsible and 10 favouring the judge being able to chose the minimum term before eligibility for release can be considered by the Parole Board.

54. As regards the alternative to the death penalty if it were to be abolished, 10 of the 13 prosecutors said they would prefer life imprisonment, with the minimum period before consideration of release being specified by the judge, including a whole life sentence. Only two favoured as their first choice a mandatory sentence of life imprisonment without parole for all persons convicted of murder.

55. Thus, there was very strong support for an independent parole system in which the judiciary could play a part by stipulating the minimum period of years of imprisonment that must be served before consideration of release (See Table 2); some support, particularly from counsel, for an Independent Parole Board with no judicial minimum sentence pronounced; only one Judge was in favour of the power of release to be granted to the Minister of National Security; and there was no support whatsoever for the matter to be left entirely in the hands of the Mercy Committee.

Table 2
Most preferred option for an alternative to the death penalty

	Judges		Counsel		Prosecutors		All	
	N	Percent	N	Percent	N	Percent	N	Percent
Life imprisonment, discretion as to length exercised by Ministry of National Security	1	6.3	0	0	0	0	1	2.0
Life imprisonment, discretion as to length exercised by Mercy Committee	0	0	0	0	0	0	0	0
Life imprisonment, discretion as to length exercised by an Independent Parole Board	0	0	10	47.6	1	7.7	11	22.0
Life imprisonment minimum period by judge before release can be considered by Parole Board, including power to order a full life sentence with no possibility of release	13	81.3	10	47.6	10	76.9	33	66.0
A mandatory sentence of life imprisonment without parole for all cases of murder	2	12.5	1	4.7	2	15.4	5	10.0
TOTAL	16	100	21	100	13	100	50	100

56. Despite the fact that 19 respondents had favoured retaining a mandatory death sentence (18 of them for capital murder alone), it is significant that only five would replace the death penalty, were it to be abolished, with a mandatory sentence of life imprisonment without any hope of release.

VII. Summary and Conclusions

a) Summary

57. The findings of this research have, to a large extent, complemented those of the previous statistical study of homicide and the use of the mandatory death penalty in Trinidad and Tobago. Specifically it has shown:

- A considerable proportion of judges, prosecutors and defence counsel, amounting to just over a half of those interviewed, were able to recall instances when, in their judgement a mandatory death sentence had been imposed which they considered to be an excessive punishment given the nature of the murder and the characteristics of the defendant.
- A majority of respondents from all sectors had dealt with cases where, in their judgment, the jury would have brought in a verdict of guilty to murder had it not been that the penalty would have been a mandatory death sentence.
- Almost two-thirds of respondents, including 11 of the 13 prosecutors, said that they believed that the conviction rate for murder would increase if the mandatory element were to be abolished.
- Eight out of ten respondents believed that if the current mandatory death penalty for all murders were to be abolished it would not have a deleterious effect on the murder rate in Trinidad and Tobago.
- Only four respondents (one judge, one counsel and two prosecutors) were in favour of the present death penalty statute: in other words 47 of the 51 respondents favoured change.
- Sixty-one per cent of the respondents were in favour of murders being classified by legislation into capital and non-capital categories.
- There was some support for the death penalty to be the mandatory punishment (29% of respondents) for capital murders. However of the 15

who favoured this, six would wish to grant discretion to the judge or jury to recommend to at the conclusion of the trial that the penalty should be commuted. Thus leaving only 18 per cent in favour of the mandatory death sentence with no discretion to impose it or recommend commutation.

- Almost a third of respondents (31%) would favour a classification of murder, but with capital punishment being discretionary only for capital murder.
- Only a minority (16%) favoured no statutory classification of murder with the judge being able to exercise discretion, subject to guidelines, as to whether to impose capital punishment or not.
- Similarly, only 16 per cent of the respondents would favour abolition as their first choice reform (two judges, 6 counsel and no prosecutors).
- Thus, altogether only a quarter (13) of the 51 respondents would, as their first choice want either to retain the status quo (4) or retain capital punishment for a statutorily defined class of capital murder (9) with no possibility of discretion being exercised by judge or jury over the penalty, either at the sentencing stage or through a recommendation for commutation.
- Of the 32 respondents who favoured a discretionary system (including eight whose first choice would have been complete abolition), three quarters (24) would prefer the discretion to be exercised by the judge, the remainder by the jury alone.
- As regards the alternative to capital punishment were it to be abolished, two thirds favoured a sentence of life imprisonment, with a minimum period of custody to be set by the judge (including detention for a full life term), subject then to review by an Independent Parole Board, as in the United Kingdom.
- Only five respondents (10% of those who responded to this question) were in favour of a mandatory life sentence without parole for all cases of murder.

b) Conclusions

58. The clearest conclusion to be drawn from this study is that there is very little support among those who administer punishment for murder for the status quo. In other words, in their opinion the mandatory death penalty lacks legitimacy, being regarded as an unfair and ineffective response to all types of murder. It therefore appears that the government could count on support from this influential and knowledgeable section of the community in repealing the mandatory death penalty for all murders, in line with the policy elsewhere in the world where capital punishment is still retained.
59. As regards the system to replace it, there is still not a great deal of support from this sector of opinion for complete abolition at this stage, most likely because of perceptions of what the reaction would be from the general public at a time when the homicide rate is so high (see page 0 above).
60. The support for classification into capital and non-capital murder would need to be considered very carefully. In our view the proposal to create a class of capital murder endorsed by Parliament in Act 90 of 2000 to amend the Offences Against the Person Act, but never passed into law were, as summarised in paragraph 17 above, encompassed a too wide and ill-defined range of offences. And the proposal to retain capital punishment as the mandatory sentence on conviction for ‘Murder 1’ and for multiple killing in ‘Murder 2’ would run into the same problem as that experienced in Jamaica under its Offences Against the Person Act of 1992 which had created a distinction between capital and non-capital murder modelled on the defunct and discredited UK Homicide Act of 1957. In its judgement in the case of *Lambert Watson v The Queen* in 2004, the Judicial Committee of the Privy Council held that the death penalty could not be mandatorily applied even to a narrow range of capital murders, and that each person sentenced to death under this law should have a new sentencing hearing to determine the

appropriate penalty.²³ It is striking that only four of the 45 persons then under sentence of death were again sentenced to death when they appeared before a court with discretionary power over the sentence. It seems very unlikely now that any international tribunal would uphold the mandatory death penalty for capital murder were it to be introduced in Trinidad and Tobago.

61. Given the differences of opinion revealed by this study on what should replace the mandatory death penalty for murder in Trinidad and Tobago, we believe that the best way forward would be for the Government to establish a Commission of Inquiry tasked with bringing a proposal before the legislature. In our view the most viable solution would be to adopt the system now in effect in the jurisdiction of the Eastern Caribbean Court of Appeal. Namely, to establish a set of guidelines to be followed, case by case, which aims to ensure that the only people who are subject to capital punishment, pending its final abolition, are those who are truly agreed to be ‘the worst of the worst’.
62. Above all, what is now required is the generation of the political will necessary to bring about the change required.

²³ *Lambert Watson v Queen* [2005] 1AC 400.

The Mandatory Death Penalty – An International and Comparative Perspective

Douglas L Mendes SC

I. Introduction

Upon conviction for murder, death is the only penalty which the law allows a Trinidad and Tobago judge to impose.¹ There is no room for taking into account the personal circumstances of the accused or the motivations which may have led to the killing. Such considerations are irrelevant because in any event the judge is not empowered to select any other sentence but death. Traditionally, before pronouncing the sentence, the judge would ask the offender whether he or she has anything to say but this may be to give him or her the opportunity to refer to circumstances which in law might preclude the imposition of the death sentence, such as his or her young age at the date the murder was committed, or the fact that she is pregnant or that he or she is so mentally impaired as to obviate the death sentence. Other than these exceptional cases, however, it is not expected that the accused would seek to mitigate the death sentence.

Death was the mandatory sentence for murder at common law. Section 4 of the Offences Against the Person Act, enacted in 1925, incorporated the common law rule. When the 1962 Constitution came into force, the mandatory death sentence was an existing law and saved from challenge on the constitutional grounds by an uncompromising savings law clause which declared that the Bill of Rights did not apply to existing law.² For the next four decades, no one conceived that the mandatory death sentence was challengeable on the ground that it violated the human rights provisions in the constitution³ despite rulings

¹ Section 4 of the Offences Against the Person Act provides that “Every person convicted of murder shall suffer death.”

² Section 3 of the 1962 Constitution provided that: “Sections 1 and 2 of this Constitution shall not apply in relation to any law that is in force in Trinidad and Tobago at the commencement of this Constitution.” Sections 1 and 2 contained the human rights provisions.

³ *de Freitas v Benny* [1976] AC 239.

in the 1970's by the United States Supreme Court⁴ that depriving a person convicted of murder of the opportunity to mitigate the death sentence was an inhuman punishment violative of the 8th amendment of the United States Constitution. The same applied across the Caribbean where general savings laws clauses in Jamaica, Barbados, the Bahamas and Guyana⁵ precluded the mandatory death penalty from being held to be inconsistent with the human rights provisions⁶ and savings clauses specific to the prohibition against inhuman and degrading punishment in the Eastern Caribbean Constitutions⁷ protected punishments which were authorised under existing law. Only in Belize was existing law left unprotected by any savings law clause after a five year grace period, but the point was not taken there until the 21st century.

The turning point came with the ground-breaking decisions of the Eastern Caribbean Court of Appeal in *Spence* and *Hughes*⁸ at the turn of the century declaring the mandatory death penalty to be an inhuman and degrading punishment under the Constitutions of St Lucia and St. Vincent and the Grenadines. This led to appeals to the Privy Council, joined by an appeal from Belize, resulting in the landmark decisions in the first of a trilogy of cases, *Reyes*, *Hughes* and *Fox*⁹. The Privy Council held that, while the death penalty as a punishment was sanctioned by the Constitutions themselves in provisions which envisioned that life could be taken away as long as it was done pursuant to a judicial sentence, the mandatory aspect of the death penalty was an inhuman

⁴ *Woodson v North Carolina* (1976) 428 US 280; *Roberts v Louisiana* (1977) 431 US 633

⁵ For example, section 26(1) of the Barbados Constitution provides that:

"Nothing contained in or done under the authority of any written law shall be held to be inconsistent with or in contravention of any provision of sections 12 to 23 to the extent that the law in question—(a) is a law (in this section referred to as 'an existing law') that was enacted or made before 30 November 1966 and has continued to be part of the law of Barbados at all times since that day; (b) repeals and re-enacts an existing law without alteration; or (c) alters an existing law and does not thereby render that law inconsistent with any provision of sections 12 to 23 in a manner in which, or to an extent to which, it was not previously so inconsistent."

⁶ *Director of Public Prosecutions v Nasralla* [1967] 2 AC 238.

⁷ For example, section 17 of the Jamaican Constitution provides that :

(1) No person shall be subjected to torture or to inhuman or degrading punishment or other treatment.
(2) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this section to the extent that the law in question authorise the infliction of any description of punishment which was lawful in Jamaica immediately before the appointed day.

⁸ *Spence v The Queen*; *Hughes v The Queen* (unreported) 2 April 2001; Eastern Caribbean Court of Appeal (Saint Vincent and the Grenadines and Saint Lucia) (Criminal Appeals Nos 20 of 1998 and 14 of 1997)

⁹ *Reyes v The Queen* [2002] 2 AC 235; *R v Hughes* [2002] 2 AC 259; *Fox v The Queen* [2002] 2 AC 284.

treatment, not saved by the special savings law clauses. These clauses, which had to be construed narrowly, saved existing law which merely *authorised* the death sentence. They did not save an existing law which *required* the death sentence to be imposed. Accordingly, the mandatory death sentence was inconsistent with the constitution and pursuant to what are referred to as modification clauses¹⁰, stood to be modified by the courts to bring them into conformity with the constitution. This was achieved by making the death sentence a punishment which could be imposed in the discretion of the judge, but no longer the only sentence which could be imposed.

It was not immediately apparent that these developments applied to Trinidad and Tobago. Although, the Trinidad and Tobago Constitution Act contains a modification clause similar to those pressed into service in the first trilogy of cases there was no similarly malleable special savings law clause protecting the mandatory death sentence. Rather, section 6 of the Republican Constitution provided that the human rights provisions shall not invalidate existing law, albeit that this represented a change from the language used under the Independence Constitution. But it was this change in language which spurred the argument, first rejected by the Court of Appeal of Trinidad and Tobago, but later accepted by a 3 to 2 majority of the Privy Council in *Roodal*¹¹, that by interpreting the modification clause generously but the general savings law clause narrowly, it was permissible to modify the mandatory death penalty to make it conform to the human rights provisions, as long as the court stopped short of invalidating the death penalty. So the law in Trinidad and Tobago was declared to be on par with the remainder of the Eastern Caribbean.

This proved to be short lived. A matter of a few weeks later, an appeal from Barbados was before a differently constituted Privy Council, the members of which no doubt had concerns about the correctness of the *Roodal* decision. Accordingly, the appeal was

¹⁰ For example, section 5(1) of the Trinidad and Tobago 1976 Constitution Act provides that :
"Subject to the provisions of this section, the operation of the existing law on and after the appointed day shall not be affected by the revocation of the Order in Council of 1962 but the existing laws shall be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Act."

¹¹ [2005] 1 AC 328.

adjourned to be heard by a reconstituted panel of nine Privy Councillors, including one Caribbean judge, to be joined by pending appeals from Trinidad and Jamaica. This led to the second trilogy of *Matthew*, *Boyce* and *Watson*¹² in which, by another bare 5 to 4 majority, with the Caribbean judge joining the majority, the savings law clauses in Trinidad and Tobago and in Barbados were held to be a complete bar to any challenge to existing law for inconsistency with the human rights provisions. The legality of the mandatory death sentence was accordingly restored for Trinidad and Tobago and confirmed for Barbados.

Jamaica, on the other hand, had amended its existing law by establishing the mandatory death penalty to provide for certain classes of murder, with the mandatory death sentence being reserved for the more serious offences. The alteration of the existing law made the general saving law clause inapplicable with the result that, consistent with the first trilogy, the mandatory death penalty, even for the most atrocious murders, was held to be an inhuman punishment and modified accordingly.

Despite the setback in Barbados and Trinidad and Tobago, it was significant that the nine member panel was unanimous in finding that the mandatory death penalty violated the right not to be subjected to an inhuman or degrading punishment and it would have been modified out of existence but for the operation of the savings law clauses. But more than that, as I will attempt to show, the mandatory death penalty in Trinidad and Tobago sits disharmoniously with basic principles which lie at the core of our legal system, with developments in other countries and in the region, and with our international obligations.

¹² *Boyce v The Queen* [2005] 1 AC 400; *Matthew v State of Trinidad and Tobago* [2005] 1 AC 433; *Watson v The Queen (Attorney General for Jamaica intervening)* [2005] 1 AC 472.

II. Core Principles of Justice

One of the core principles which underpins our judicial system is that there must be a proportionate relationship between the punishment meted out to a convicted person and the gravity of the crime that he or she has been found guilty of. This principle can be traced back to Magna Carta. Its vintage and significance were captured by Saunders J.A (as he then was) in *Spence* and *Hughes* when he observed that

“It is and has always been considered a vital precept of just penal laws that the punishment should fit the crime.”

The principle was thought to be embodied in the 1689 Bill of Rights prohibition against cruel and unusual punishment which has been viewed by the United States Supreme Court since 1892 as being directed, not only at punishments which inflict torture “but against all punishments which by their excessive length or severity are greatly disproportional to the offences charged.”¹³

The principle that the punishment should fit the crime is pertinent particularly to the offence of murder which, of all offences, is unique in the multifarious ways in which it may be committed and the variety of motivations which might give rise to it. The Royal Commission on Capital Punishment (1949-1953) catalogued the infinite variety of circumstances in which murder is committed in a passage which, though long, deserves quotation in full:

Convicted persons may be men, or they may be women, youths, girls, or hardly older than children. They may be normal or they may be feeble-minded, neurotic, epileptic, borderline cases, or insane; and in each case the mentally abnormal may be differently affected by their abnormality. The crime may be human and understandable, calling more for pity than for censure, or brutal and callous to an almost unbelievable degree. It may have occurred so much in the heat of passion as to rule out the possibility of premeditation, or it may have been well prepared and carried out in cold blood. The crime may be committed in order to carry out another crime or in the course of committing it or to secure escape after its commission.

¹³ *O’Neil v Vermont* (1892) 144 US 323, 339-340.

Murderous intent may be unmistakable, or it may be absent, and death itself may depend on an accident. The motives, springing from weakness as often as from wickedness, show some of the basest and some of the better emotions of mankind, cupidity, revenge, lust, jealousy, anger, fear, pity, despair, duty, self-righteousness, political fanaticism; or there may be no intelligible motive at all.

To similar effect is this passage from the judgment of the Privy Council in *Reyes* (at para 11)

(The crime of murder) covers at one extreme the sadistic murder of a child for purposes of sexual gratification, a terrorist atrocity causing multiple deaths or a contract killing, at the other the mercy-killing of a loved one suffering unbearable pain in a terminal illness or a killing which results from an excessive response to a perceived threat. All killings which satisfy the definition of murder are by no means equally heinous.

Given the vastly differing circumstances in which a murder can occur, the imposition of one invariable penalty for anyone convicted of the crime, irrespective of his or her personal circumstances or the circumstances in which the crime was committed, is wholly incongruous with the basic principle that the punishment must fit the crime.

It is not surprising therefore that in every country which at one time had, or still retains the death penalty, including countries where the mandatory death penalty is still on the statute books, mechanisms are put in place to ensure that death is reserved only for those who deserve it. Some countries classify murder by degrees. Others abolish the mandatory death penalty altogether, allowing courts to take account of mitigating circumstances. In recognition of the notion that not everyone convicted of murder deserves to die, all of the Constitutions of the Commonwealth Caribbean mandate that the case of every person sentenced to death be referred to a committee charged with the responsibility of advising the Head of State on the power of pardon. In practice, this system has resulted in the reprieve of significant numbers of condemned prisoners. In the Bahamas, for example, there is evidence that “the proportion of those reprieved has been greater than the proportion of those executed.”¹⁴ In Trinidad and Tobago, before the spate of constitutional challenges following upon the Pratt and Morgan decision 1993,

¹⁴ See *Bowe v The Queen* [2006] 1 WLR 1623, para 34.

more than half those convicted of murder had their death sentences commuted to life imprisonment.¹⁵ In *Bowe*, the Privy Council could find no evidence of “any jurisdiction in which, by 1973, the mandatory death sentence was retained and it was considered just to execute all who were convicted.” As much as the law required the death sentence to be imposed in every case, the fact is that as a matter of practice, not every condemned prisoner was actually executed.

Another core principle which permeates all democratic societies is that decisions concerning the appropriate punishment which should be imposed are for the judiciary, not the executive, to make. As the Supreme Court of Ireland said¹⁶ “the selection of punishment is an integral part of the administration of justice and, as such, cannot be committed to the hands of the executive.” This principle has been recognised ever since Coke CJ in the early 17th century declared in the *Prohibitions del Roy* case¹⁷ that

“no King after the Conquest assumed to himself to give any judgment in any cause whatsoever, which concerned the administration of justice within this realm, but those were solely determined in the courts of justice.”

But the mandatory death sentence deprives the judiciary of the duty to consider the individual circumstances of the offenders in order to determine the appropriate sentence. And our Constitution compounds the error by allowing the Executive to decide who should live and who should die. The fact that the actual punishment which a person convicted of murder is to suffer is actually determined by the executive in the exercise of the prerogative of mercy can only be reconciled with the notion that sentencing is a quintessential judicial function by emphasising that what the executive does when it commutes a sentence of death is to dispense mercy, not justice. As Lord Diplock said in *De Freitas v Benny*, “Mercy begins where legal rights end.”

¹⁵ Commission of Enquiry into the Death Penalty – Report on the Death Penalty whether it should be retained for offences under the Criminal Law of Trinidad and Tobago.

¹⁶ *Deaton v Attorney General and Revenue Commissioners* [1963] IR 170, 183-3.

¹⁷ (1607) 12 Co. Rep. 63, 64.

But it was only a matter of time before these basic truths, that the punishment should fit the crime, that culpability for murder varies widely, that not everyone convicted of murder deserves death and that the appropriate sentence for murder should be determined by the judiciary, would result in the mandatory death penalty coming under constitutional scrutiny.

III. Developments in the United States of America

In response to the decision of the United States Supreme Court in *Furman v Georgia*¹⁸ that the vesting of an unbridled discretion in a jury to determine whether the death sentence should be imposed constituted a violation of the 8th and 14th amendments, North Carolina made the death penalty mandatory for first degree murder, defined as any murder perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or any other kind of wilful deliberate and pre-meditated killing or which is perpetrated in the preparation of the attempt to commit arson, rape, robbery, kidnapping, burglary or any other felony. In a constitutional challenge before the Supreme Court¹⁹ the sole issue was whether the mandatory death penalty constituted a cruel and unusual punishment. The Court held that the mandatory death penalty “treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.” Noting that “consideration of both the offender and the offence in order to arrive at a just and appropriate sentence has been viewed as a progressive and humanising development”, the Court took the view, particularly having regard to the qualitatively different nature of the penalty of death, differing from all other penalties in its finality, that there was accordingly a greater need to consider the character and record of the individual offender and the circumstance of the offence in order to ensure that “death is the appropriate punishment in a specific case.”²⁰

¹⁸ 408 US 238.

¹⁹ *Woodson v North Carolina* (1976) 428 US 280.

²⁰ *Ibid.* pp. 303-305.

Neither is the mandatory death sentence justifiable in relation to offences which are presumptively the worst of the worst. In Louisiana, first degree murder was defined as including any killing in connection with the commission of certain felonies; killing of a fireman or a peace officer in the performance of his duties; killing for remuneration; killing with the intent to inflict harm on more than one person; and killing by a person with a prior murder conviction or under a current life sentence. The Supreme Court virtually held that any mandatory death penalty constituted a cruel and unusual punishment irrespective of the category into which the murder fell. The Court said:²¹

There is a special interest in affording protection to these public servants who regularly must risk their lives in order to guard the safety of other persons and property. But it is incorrect to suppose that no mitigating circumstances can exist when the victim is a police officer. Circumstances such as the youth of the offender, the absence of any prior conviction, the influence of drugs, alcohol, or extreme emotional disturbance, and even the existence of circumstances which the offender reasonably believed provided a moral justification for his conduct are all examples of mitigating facts which might attend the killing of a peace officer and which are considered relevant in other jurisdictions.

The Supreme Court of India reached a similar conclusion in *Mithu v State of Punjab*²² in relation to murder committed while the offender was under sentence of imprisonment for life. The Court concluded that “so final, so irrevocable and so irrestitutable is the sentence of death that no law which provides for it without involvement of the judicial mind can be said to be fair, just and reasonable. Such a law must necessarily be stigmatised as arbitrary and oppressive.”²³

IV. The United Nations System

Trinidad and Tobago is a member of the United Nations and is accordingly bound by the provisions of the Universal Declaration of Human Rights. Article 5 of the Declaration prohibits cruel, inhuman and degrading treatment or punishment, while Article 3 protects

²¹ *Roberts v Louisiana* (1977) 431 US 633, 636-637

²² [1983] 2 SCR 690.

²³ *Ibid.*, p. 713.

the right to life and Article 10 entitles everyone to a criminal trial before an independent and impartial tribunal. On 21 December 1978, Trinidad and Tobago acceded to the International Covenant for Civil and Political Rights, Articles 7 and 14(1) of which mirror Articles 5 and 10 of the Universal Declaration. Article 6(1) provides that "Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life" and Article 14(5) provides that "Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law."

On November 14th 1980, Trinidad and Tobago acceded to the Optional Protocol to the ICCPR giving citizens the facility to petition the Human Rights Committee to complain of violations of the Covenant. However, Trinidad and Tobago withdrew from the Optional Protocol altogether on 27th March 2000, after its attempt to withdraw and re-accede with a reservation precluding persons under sentence of death from petitioning, was rejected as invalid by the Human Rights Committee. The concern was that the delay caused while petitions were being processed would trigger the *Pratt and Morgan*²⁴ principle, namely that a delay in execution of five years or more after conviction for murder constitutes inhuman and degrading punishment. As such, Trinidad and Tobago remains a party to and is bound by the Covenant but citizens are denied the right to complain about violations to the HRC.

In *Thompson v Saint Vincent and the Grenadines*²⁵, the Human Rights Committee held that the mandatory death penalty in St. Vincent violated the right not to be arbitrarily deprived of life. The Committee felt that provision for pardon by the executive was an insufficient substitute for a judicial determination of the appropriate sentence. The Committee said:

The committee considers that such a system of mandatory capital punishment would deprive the author of the most fundamental of rights, the right to life, without considering whether this exceptional form of punishment is appropriate in the circumstances of his or her case. The

²⁴ *Pratt v Attorney General for Jamaica* [1994] 2 AC 1.

²⁵ (2000) UN Doc CCPR/C/70/D/906/1998.

existence of a right to seek pardon or commutation, as required by article 6, paragraph 4, of the Covenant, does not secure adequate protection to the right to life, as these discretionary measures by the executive are subject to a wide range of other considerations compared to appropriate judicial review of all aspects of a criminal case. The committee finds that the carrying out of the death penalty in the author's case would constitute an arbitrary deprivation of his life in violation of article 6, paragraph 1, of the Covenant.

The Committee came to the same conclusion in *Kennedy v Trinidad and Tobago*²⁶, on a petition which was lodged before Trinidad and Tobago denounced the Covenant.

V. The Inter-American System

Trinidad and Tobago joined the Organisation of American States on 14th March 1967 and thereby became bound by the American Declaration of Human Rights. Article 1 thereof protects the right to life and Article 26 provides that

"Every person accused of an offense has the right to be given an impartial and public hearing, and to be tried by courts previously established in accordance with pre-existing laws, and not to receive cruel, infamous or unusual punishment."

Trinidad and Tobago ratified the Inter-American Convention on Human Rights on 28 May 1991 and simultaneously recognised the compulsory jurisdiction of the Inter-American Court of Human Rights whose judgments are binding. However, on May 26th 1999 Trinidad and Tobago denounced the Convention and the jurisdiction of the Court but not before a number of condemned prisoners had filed a petition challenging the mandatory death penalty. Nevertheless, Trinidad and Tobago remains a member of the OAS and the Inter-American Commission has held²⁷ that the Declaration is binding on members of the OAS, whether or not they have ratified the Convention.

²⁶ (March 26th 2002) CCPR/C/74/D/845/1998.

²⁷ Case No. 2141 (United States), 6 March 1981.

In *Edwards v The Bahamas*²⁸, the Inter-American Commission held that the mandatory death penalty violated Article 26 of the Declaration by which Trinidad and Tobago is still bound. The Commission said:

"147. The mandatory imposition of the death sentence, however, has both the intention and the effect of depriving a person of their right to life based solely upon the category of crime for which an offender is found guilty, without regard for the offender's personal circumstances or the circumstances of the particular offense. The commission cannot reconcile the essential respect for the dignity of the individual that underlies articles XXV and XXVI of the Declaration, with a system that deprives an individual of the most fundamental of rights without considering whether this exceptional form of punishment is appropriate in the circumstances of the individual's case."

In *Hilare, Constantine and Benjamin v Trinidad and Tobago*²⁹, the Inter-American Court held that the mandatory death penalty violated the prohibition against the arbitrary deprivation of life, in contravention of Article 4(1) and 4(2) of the Convention. The Court held that:

(Section 4 of the Offences of the Person) Act prevents the judge from considering the basic circumstances in establishing the degree of culpability and individualising the sentence since it compels the indiscriminate imposition of the same punishment for conduct that can be vastly different..... and is arbitrary according to the terms of article 4(1) of the Convention.....

The court concurs with the view that to consider all persons responsible for murder as deserving of the death penalty, 'treats all persons convicted of a designated offence not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the death penalty'.

The Court ordered Trinidad and Tobago to institute legislative reforms which would "include the introduction of different categories (criminal classes) of murder, in keeping with the wide range of differences in the gravity of the act, so as to take into account the

²⁸ Report No. 48/01 4 April 2001

²⁹ (Ser C) No 94 (2002), 21 June 2002, Inter-American Court of Human Rights.

particular circumstances of both the crime and the offender’ and to introduce a system of graduated levels which would “ensure that the severity of the punishment is commensurate with the gravity of the act and the criminal culpability of the accused.” To date Trinidad and Tobago has not complied with the order of the Court. In fact it had already withdrawn from the American Convention of Human Rights and thus from the jurisdiction of the Court.

Unlike Trinidad and Tobago and Jamaica, Barbados has not taken the drastic step of withdrawing from the jurisdiction of the Inter-American Court. It too was subject to a ruling by the Inter-American Court in *Boyce and Joseph v Barbados* that the mandatory death penalty violated Articles 4(1) and (2) of the Convention³⁰. The Court reiterated that

“the reference to “arbitrary” in Article 4(1) of the Convention and the reference to “the most serious crimes” in Article 4(2) render the imposition of mandatory death sentences incompatible with such provisions where the same penalty is imposed for conduct that can be vastly different, and where it is not restricted to the most serious crimes.... A lawfully sanctioned mandatory sentence of death may be arbitrary where the law fails to distinguish the possibility of different degrees of culpability of the offender and fails to individually consider the particular circumstances of the crime.”

In response to the argument that “the unique circumstances of the individual and of the crime are taken into account by the executive branch” when deciding whether a pardon should issue, the Court emphasized that sentencing is a judicial function and noted that while “the executive branch may grant pardon or commutation of a sentence already imposed the judicial branch may not be stripped away of its responsibility to impose the appropriate sentence for a particular crime.”

Furthermore, appreciating that the mandatory death penalty would be held to be in violation of the Barbados Constitution, but for the savings law clause, the Court ruled that the savings law clause itself violated Article 2 of the Convention since it embodied a

³⁰ Judgment of November 20, 2007 Series C. No. 169

failure by the State of Barbados to take steps to bring its laws into compliance with the Convention. The Court ordered Barbados to:

“adopt such legislative or other measures as may be necessary to ensure that the death penalty is not imposed through mandatory sentencing” and to “remove the immunizing effect of section 26 of the Constitution of Barbados on its “existing laws”...”

Caribbean States have not been known to comply with orders, far less recommendations of international human rights bodies, or if they have done so, they do not make such compliance public. It was therefore with great surprise and admiration that human rights lawyers received the news that Barbados has notified the Court that in compliance with its orders it intends to abolish the mandatory aspect of the death penalty and to repeal the general savings law clause in its Constitution.

VI. The Caribbean

The ruling by the Privy Council in first trilogy of cases (see page 2 above) has brought members of the Eastern Caribbean States and Belize in compliance with their international obligation. The Privy Council held that the mandatory death penalty violated the prohibition against inhuman and degrading punishment was accordingly modified to make the death penalty discretionary. The Board held that “To deny the offender the opportunity, before sentence is passed, to seek to persuade the court that in all the circumstances to condemn him to death would be disproportionate and inappropriate is to treat him as no human being should be treated and thus to deny his basic humanity, the core of the right which (the prohibition against inhuman and degrading punishment) exists to protect.”

Jamaica amended its laws to categorise murder into capital and non-capital murder. Death was the only penalty for capital murders and for non-capital murders where the offender has been convicted of murder on a previous occasion or on the same occasion.

The Privy Council in *Watson v The Queen* held nevertheless that attempts to confine the mandatory death sentence to those categories of murder that are most reprehensible will always fail to meet the objective of giving the offender the opportunity to persuade the Court that in the circumstances of his case the penalty is disproportionate or inappropriate.³¹ “Basic humanity”, the Board said

“requires that the appellant should be given an opportunity to show why the sentence of death should not be passed on him. If he is to have that opportunity, it must be open to the judge to take into account the facts of the case and the appellant's background and personal circumstances. The judge must also be in a position to mitigate the sentence by imposing, as an alternative, a sentence of imprisonment. The mandatory sentence flies in the face of these requirements, as it precludes any consideration of the circumstances.”

VII. The African Continent

The trend towards abolition of the mandatory death sentence has found momentum on the African continent due in no small part to the efforts of the organisers of this conference. On January 21st 2009 the Supreme Court of Uganda³² struck down the mandatory death penalty holding that it violated the right to a fair trial by denying the offender the right to persuade a court that death is not the appropriate sentence, the right to equality of treatment since persons convicted of crimes other than murder are given the opportunity to mitigate and that it violated that part of the Constitution which vested judicial power in the judiciary since it deprived the judiciary of the right to determine the appropriate sentence. The Supreme Court of Malawi had come to a similar decision.³³

³¹ *Watson v The Queen* [2005] 1 AC 490.

³² *A.G. of Uganda v Kigala* Constitution Appeal No. 3 of 2006, 21st January 2009

³³ *Kiafantanyeni v AG of Malawi* (Case No. 12 of 2005).

VIII. Conclusion

The picture which emerges is not a flattering one for Trinidad and Tobago. Maintaining the mandatory death penalty has put us in violation of our obligations under the International Covenant for Civil and Political Rights and the American Declaration on the Rights of Man. We are in default of a specific order of the Inter-American Court requiring us to abolish the mandatory death penalty while our neighbour just to the north has undertaken to comply with a similar order. We are now one of two CARICOM countries which maintain the mandatory death penalty. Guyana is the other country. I have left Barbados out of account since it has undertaken to amend its laws. The mandatory death penalty contravenes one of the rights considered by the international community to be a core fundamental right, namely the right not to be subjected to cruel and unusual punishment. This is the unanimous view of a nine member panel of the Privy Council. The mandatory death penalty subsists only because of the savings law clause which was included in our constitutions in the first place to preserve the status quo and to give the legislature the opportunity to take steps to bring colonial laws into conformity with the fundamental rights and freedoms. More than four decades after independence, successive Parliaments have failed to pass the necessary legislation. The mandatory death penalty is inconsistent with the bias principle that the punishment must fit the crime and that appropriate sentences must be determined by the judiciary. It violates basic human decency by precluding the individualisation of the sentencing process. It is not that we intend that all persons who are convicted of murder should suffer death. The vast majority of death sentences are commuted by the executive, thus usurping the judicial function. And, as the study conducted by Professor Hood and Dr. Seemungal demonstrates, the overwhelming majority of persons involved in the criminal justice system favour the abolition of the mandatory death sentence. In his letter to me apologising for not being able to attend this conference, the Honourable leader of the Opposition said

“I would like to say that I am against the mandatory death penalty, for the simple reason that 'murder' as defined by our law occurs in a variety of circumstances with varying levels of moral guilt/turpitude and,

consequently, should not be treated as if they were the same. I would like to suggest that we amend the law to allow for a verdict of guilty of varying degrees of murder, for example, first, second and third degree murders with appropriate sentences for each.”

It is high time that we bring our law into harmony with the core principles which underpin our system of justice.

DETERRENCE AND THE DEATH PENALTY*

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Two related issues are critical to the debate on the future of capital punishment in Trinidad and Tobago. The first issue is the deterrent effects of death sentences and executions. Recent evidence claiming strong reductions in homicides following death sentences and executions has rekindled the debate on the effectiveness of the death penalty as a deterrent to murder. Both legal scholars and social scientists have transformed this new social science evidence into calls for more executions that they claim will save lives.¹ Others challenge the scientific credibility of these new studies,² and warn about the moral hazards and practical risks of capital punishment.³ The points of contention among legal

* Portions of this essay were previously published as *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO STATE JOURNAL OF CRIMINAL LAW 255 (2006), and as *Capital Homicide and Capital Punishment: A Market Share Theory of Deterrence*, 84 TEXAS LAW REVIEW 1803 (2006) (with Franklin Zimring and Amanda Geller). All opinions are those of the author.

¹ Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 705 (2005). *See, also*, Richard Posner, *The Economics of Capital Punishment*, http://www.becker-posner-blog.com/archives/2005/12/the_economics_o.html#trackbacks (visited December 18, 2005); Gary Becker, *More on the Economics of Capital Punishment*, http://www.becker-posner-blog.com/archives/2005/12/more_on_the_eco.html#trackbacks (visited December 18, 2005). *But see* Cass R. Sunstein and Justin Wolfers, *A Death Penalty Puzzle: The Murky Evidence for and Against Deterrence*, Washington Post, June 30, 2008; Page A11, available at: http://www.washingtonpost.com/wpdyn/content/article/2008/06/29/AR2008062901476.html?nav=rss_opinion/columns

² Ethan Cohen-Cole, Steven Durlauf, Jeffrey Fagan and Daniel Nagin, *Model Uncertainty and the Deterrent Effect of Capital Punishment*, AMER. L. & ECON. REV. (2008, forthcoming); Jeffrey Fagan, *Death and Deterrence Redux: Science, Law and Causal Reasoning on Capital Punishment*, 4 OHIO STATE JOURNAL OF CRIMINAL LAW 255 (2006); John Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, 58 STAN. L. REV. 791 (2005) (reviewing the main study cited by Sunstein and Vermeule and finding “the empirical support for the proposition that the death penalty deters . . . to be quite weak”). *See, also*, Richard Berk, *New Claims About Executions and General Deterrence: Déjà vu All Over Again?*, 2 J. EMP. L. STUD. 303 (2005).

³ Carol S. Steiker, *No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751 (2005) (responding to claim of the “moral requirement” of Sunstein and Vermeule by stating that “... executions constitute a distinctive moral wrong (purposeful as opposed to nonpurposeful killing), and a distinctive kind of injustice (unjustified punishment)” and concluding that “... ‘acceptance of ‘threshold’ deontology in no way requires a commitment to capital punishment even if ...deterrence is proven”).

scholars and social scientists, and extensive sensitivity analyses of these models, creates uncertainty and instability in these findings that should be an important factor in the decisions of policymakers and lawmakers on the future of capital punishment.

The second issue is the accuracy of death verdicts, and the implications of error in the administration of capital punishment. I will discuss the results of research that I conducted, together with Professor James Liebman, on the outcomes of all death sentences imposed and reviewed in the US during the 23- year period from 1973-1995. We found very high rates of reversal in death sentences across the country, and identified the source of these errors as commonplace in the systems of capital punishment. Inaccuracies in death verdicts raise numerous concerns that have been voiced in the national debate on the future of capital punishment, including both excessive and unreasonable costs, the specter of wrongful execution, and the corrosive effects of high error rates on how citizens see the legitimacy of the criminal justice system.

Summary

Recent studies claiming that executions reduce murders have fueled the revival of deterrence as a rationale to expand the use of capital punishment. Such strong claims are not unusual in either the social or natural sciences, but like nearly all claims of strong causal effects from any social or legal intervention,⁴ the claims of a “new deterrence” are unreliable and weak. These new studies are fraught with technical and conceptual errors: inappropriate methods of statistical analysis, failures to consider all the relevant factors that drive murder rates, missing data on key variables in key states, the tyranny of a few outlier states and years, and the absence of any direct test of deterrence. These studies fail to reach the demanding standards of social science to make such strong claims, standards such as replication and basic comparisons with other scenarios.⁵

⁴ See, Christopher Winship and Martin Rein, *The Dangers of ‘Strong’ Causal Reasoning in Social Policy*, 36 SOCIETY 38 (July/August 1999); Michael E. Sobel, *An Introduction to Causal Inference*, 24 SOCIOLOGICAL METHODS & RESEARCH 353 (1996); Richard A. Berk and David A. Freedman, *Statistical Assumptions as Empirical Commitments*, in T.G. Blomberg and S. Cohen (eds.), PUNISHMENT AND SOCIAL CONTROL (2nd ed.) 235 (2003); PAUL A. ROSENBAUM, OBSERVATIONAL STUDIES (1995).

⁵ Lee Epstein and Gary King, *The Rules of Inference*, 69 U. CHICAGO L. REV. 1 (2002); Lee Epstein and Gary King, *Creating an Infrastructure for the Creation, Dissemination, and Consumption of High-Quality Empirical Research*, 53 THE JOURNAL OF LEGAL EDUCATION 311 (2003)

These studies also fail to distinguish and identify a deterrent effect from either the threat of execution or execution itself on the narrower category of homicides that are eligible for the death penalty. Research that identifies this group of murders shows that in the U.S. from 1976-2004, approximately 25% of all murders were eligible for the death penalty. The most logical test of the “price effect” of deterrence, that is whether the threat of death is driving homicide fluctuations in death penalty states, is whether this subset of killings threatened with death decline more sharply than in states where an execution will not happen. As executions go up, the percentage of homicides where a death sentence is possible – that is, the “market share” of homicides that are capitaleligible – should decline in places where the death penalty is available, and particularly in Texas, where executions are far more frequent than anywhere else in the U.S., and in Harris County, the Texas county that has produced the highest number of death sentences and executions in the state. However, we observed little variation over time in the rate of capital-eligible murders, while there is great variation in other types of murder. Instead, the market share is *rising* everywhere except the states that do not permit executions. Offenders faced with the threat of execution are not substituting less risky varieties of crime for crimes that lead to murder and capital risk, nor are they abandoning the types of crimes that might lead to a capital offense. But they do seem to be rejecting the types of murders that do not carry execution risk. This is the opposite of recent price effect economic theories of death penalty deterrence.

Finally, the system of capital punishment is plagued by errors that increase the risks of execution of a person whose culpability falls below the threshold for capital punishment, or who may be innocent of the crime itself. High rates of error and reversal, the high costs of capital prosecutions, and the weaknesses of evidence on deterrence raise hard questions for states considering the future of the death penalty. Two questions can be a useful guide to that decision. First is a policy question: If a state or a nation thinks of itself as having at least \$US 100 million to spend on law enforcement over the next two decades, is the *best* use of that money to buy a few executions --- along with dozens of initial capital prosecutions that end up in non-capital plea bargains and jury verdicts; and along with a predictable 10 court reversals, retrials, and lesser sentences for every execution? Will Trinidad & Tobago gain more public safety by spending \$US100 million dollars or more

executing 2 or 3 of the nation's relatively small number of murderers during that period or, for example, by funding additional police detectives, prosecutors, victim services and judges to arrest and incarcerate the many murderers, rapists, and robbers who currently escape any punishment because of insufficient law-enforcement resources?

The second question is a legal one. In 1972, the US Supreme Court reversed every capital statute in the country. Its decision was fragmented among several opinions, but the clearest was Justice White's.⁶ He found that when only a tiny proportion of the individual's who commit murder are given the death penalty for it, the penalty is unconstitutionally irrational because it serves no identifiable penological function. If almost no one gets executed for murder, then executing the tiny number of people who lose that lottery can't possibly serve as a deterrent, because no one really expects to be executed. Nor can the death penalty send a message about the punishment society deems appropriate for murder, because that crime almost never results in that penalty. The second question, then, is whether necessary and admirable efforts to avoid error and executing the innocent won't land Trinidad & Tobago in the end – after many hundreds of millions of dollars of trying – with a death penalty that will be ineffective and legally problematic because of the additional limitations of scarcity and arbitrariness?

⁶ *Id* at 311. He states: "...that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death or so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked. Most important, a major goal of the criminal law -- to deter others by punishing the convicted criminal -- would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. For present purposes I accept the morality and utility of punishing one person to influence another. I accept also the effectiveness of punishment generally and need not reject the death penalty as a more effective deterrent than a lesser punishment. *But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted* (emphasis added)."

I. The Deterrent Effects of the Death Penalty

Since 1999, more than a dozen studies have been published claiming that the death penalty has a strong deterrent effect that can prevent anywhere from three to 18 homicides.⁷ But this is not a new claim. In 1975, Professor Isaac Ehrlich published an influential article saying that during the 1950s and 1960s, each execution averted eight murders.⁸ Although Ehrlich's research was a highly technical article prepared for an audience of economists, its influence went well beyond the economics profession. Ehrlich's work was cited in *Gregg v. Georgia*⁹, the central U.S. Supreme Court decision restoring capital punishment. No matter how carefully Ehrlich qualified his conclusions, his article had the popular and political appeal of a headline, a sound bite and a bumper sticker all rolled into one. Reaction was immediate: Ehrlich's findings were disputed in academic journals such as the *Yale Law Journal*¹⁰, launching an era of contentious arguments in the press and in professional journals.¹¹ In 1978, an expert panel appointed by the National Academy of Sciences issued strong criticisms of Ehrlich's work.¹² Over the next two decades, economists and other social

⁷ See, Fagan, *Death and Deterrence Redux*, *supra* note 2, for list of studies published through 2006.

⁸ Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AMERICAN ECONOMIC REVIEW 397 (1975); Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 JOURNAL OF POLITICAL ECONOMY 741 (1977)

⁹ *Gregg v. Georgia*, 428 U.S. 153 (1976)

¹⁰ See Editor's Introduction, *Statistical Evidence on the Deterrent Effect of Capital Punishment*, 85 YALE L. J. 164 (1975); David C. Baldus & James W.L. Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L. J. 170 (1975); William J. Bowers & Glenn L. Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L. J. 187 (1975); Isaac Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L. J. 209 (1975).

¹¹ See, for critiques of Ehrlich's work, Michael McAleer & Michael R. Veall, *How Fragile are Fragile Inferences? A Re-Evaluation of the Deterrent Effect of Capital Punishment*, 71 REVIEW OF ECONOMICS AND STATISTICS 99 (1989); Edward E. Leamer, *Let's Take the Con out of Econometrics*, 73 AMERICAN ECONOMIC REVIEW 31 (1983); Brian Forst, *Capital Punishment and Deterrence: Conflicting Evidence?* 74 J. CRIM. L. & CRIMINOLOGY 927 (1983); Walter S. McManus, *Estimates of the Deterrent Effect of Capital Punishment: The Importance of the Researcher's Prior Beliefs*, 93 JOURNAL OF POLITICAL ECONOMY 417 (1985); Jeffrey Grogger, *The Deterrent Effect of Capital Punishment: An Analysis of Daily Homicide Counts*, 85 JOURNAL OF THE AMERICAN STATISTICAL ASSOCIATION 295 (1990).

See, for support and extensions of Ehrlich's work, Stephen A. Layson, *Homicide and Deterrence: A Reexamination of the United States Time-Series Evidence*, 52 SOUTHERN ECONOMIC JOURNAL 68 (1985); James P. Cover & Paul D. Thistle, *Time Series, Homicide, and the Deterrent Effect of Capital Punishment*, 54 SOUTHERN ECONOMIC JOURNAL 615 (1988). George A. Chressanthis, *Capital Punishment and the Deterrent Effect Revisited: Recent Time-Series Econometric Evidence*, 18 JOURNAL OF BEHAVIORAL ECONOMICS 81 (1989).

¹² See Lawrence R. Klein, Brian Forst, & Victor Filatov, *The Deterrent Effect of Capital Punishment: An Assessment of the Estimates*, pp. 336-60 in Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds), *DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES* (1978)

scientists attempted (mostly without success) to replicate Ehrlich's results using different data, alternative statistical methods, and other twists that tried to address glaring errors in Ehrlich's techniques and data. The accumulated scientific evidence from these later studies also weighed heavily against the claim that executions deter murders.¹³

The new deterrence studies analyze data that span a 20 year period since the resumption of executions following the U.S. Supreme Courts decisions in *Furman v. Georgia*¹⁴ and *Gregg v. Georgia*.¹⁵ The claims of these new studies are far bolder than the original wave of studies by Professor Ehrlich and his students.¹⁶ Some claim that pardons, commutations, and exonerations cause murders to increase.¹⁷ One says that even murders of passion, among the most irrational of lethal acts, can be deterred.¹⁸ Another says that the deterrent effects of executions are so powerful that it will reduce robberies and even some nonviolent crimes.¹⁹ Thus, the deterrent effects of capital punishment apparently are limitless, leading some proponents to offer execution as a cure-all for everyday crime.²⁰

A close reading of the new deterrence studies shows quite clearly that they fail to reach the conditions for such causal claims, falling well below the scientific bar for causation, let alone cross it.²¹ Consider the following:

¹³ Id. See, also, William C. Bailey, *Deterrence, Brutalization, and the Death Penalty: Another Examination of Oklahoma's Return to Capital Punishment*, 36 CRIMINOLOGY 711 (1998); Jon Sorenson, Robert Wrinkle, Victoria Brewer, & James Marquart, *Capital Punishment and Deterrence: Examining the Effect of Executions on Murder in Texas*, 45 CRIME & DELINQUENCY 481 (1999).

¹⁴ *Furman v. Georgia*, 408 U.S. 238 (1972)

¹⁵ *Gregg v. Georgia*, 428 U.S. 153 (1976)

¹⁶ Joanna Shepherd, an author of several studies finding a deterrent effect, has recently argued before Congress that recent research has created a "strong consensus among economists that capital punishment deters crime," going so far as to claim that "[t]he studies are unanimous." Terrorist Penalties Enhancement Act of 2003: Hearing on H.R. 2934 Before the Subcommittee on Crime, Terrorism, and Homeland Security of the House Committee on the Judiciary, 108th Cong. 10-11 (2004), available at <http://judiciary.house.gov/media/pdfs/printers/108th/93224.pdf>.

¹⁷ See, for example, H. Naci Mocan and R. Kaj Gittings, *Getting Off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 JOURNAL OF LAW AND ECONOMICS 453 (2003).

¹⁸ Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 JOURNAL OF LEGAL STUDIES 283 (2004).

¹⁹ Zhiqiang Liu, *Capital Punishment and the Deterrence Hypothesis: Some New Insights and Empirical Evidence*, 30 EASTERN ECONOMIC JOURNAL 237 (2004)

²⁰ Id.

²¹ See, Epstein and King, *Rules of Inference*, *supra* note 5.

- *The studies produce erratic and contradictory results, and some find that there is no deterrent effect that can be attributed to executions.*²²

For example, one of the studies shows that executions are as likely to produce an increase in homicides in states following execution as there are states where there seems to be a reduction in homicides.²³ Moreover, depending on the year, some states exhibit “brutalization” effects from executions in some periods and deterrent effects in others.²⁴ A constitutional and moral regime of capital punishment cannot tolerate such inconsistency in one of its bedrock theoretical and constitutional premises. Moreover, such inconsistencies are the antithesis of what social scientists and economists demand when considering causal inference: robustness in their conclusions, or consistency across a range of conditions and tests. When the hypothesized deterrent effects of executions are so unstable over time, one must reject a hypothesis of deterrence.

- *Many of the same processes that produce murder rates also produce death sentences and executions,*²⁵ *so that determining the marginal causal effects of the death penalty is difficult.* More important, the models used in most of the current studies conflate these effects by including homicide, social structure, death sentences and executions in the same model. This is what social scientists would decry as a “specification error”: the piling on of correlated predictors – social forces, homicides and executions – can defeat efforts to reliably estimate the effects of capital punishment or any other correlated set of predictors on murder rates.²⁶ These errors in modeling, a general sources of bias caused by multicollinearity and endogeneity, inflates regression results and undermines the reliability of estimates of deterrent effects.

²² Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AMER. L. & ECON. REV. 318 (2003).

²³ Joanna M. Shepherd, *Deterrence versus Brutalization: Capital Punishment's Differing Impacts Among States*, 104 MICHIGAN LAW REVIEW 203 (2005).

²⁴ *Id.*

²⁵ Andrew Gelman, James S. Liebman, Valerie West and Alex Kiss, *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 209 (2004).

²⁶ See, e.g., Lauren J. Krivo & Ruth D. Peterson, *The Structural Context of Homicide: Accounting for Racial Differences in Process*, 65 AMERICAN SOCIOLOGICAL REVIEW 547 (2000); Kenneth C. Land et al., *Structural Covariates of Homicide Rates: Are There Any Invariances Across Time and Social Space?*, 95 AMERICAN JOURNAL OF SOCIOLOGY 922, 922-32 (1990). See generally Robert J. Sampson & Janet H. Lauritsen, *Individual-, Situational-, and Community-Level Risk Factors*, in UNDERSTANDING AND PREVENTING VIOLENCE, VOL. 3 (A.J. Reiss, Jr. & J.A. Roth eds.) 1 (1994).

- At the same time, *many of these studies fail to account for a variety of explanations for the rise and fall of murders over time. For example, the current crop of studies ignores the contemporaneous and severe effects of drug epidemics on homicide rates,²⁷ and also on broader social conditions that elevate homicide rates.*²⁸ In addition, many of the social structural factors that explain and predict homicide rates – demographic composition, concentrated poverty – at the state level also predict death sentencing rates.²⁹ A similar omission is the effect of firearms on murders. Nearly all of the increase and decline in the U.S. in homicides since 1985 was in gun homicides.³⁰ Yet none of the studies take into account the flat secular trend of decline in non-gun homicides since the early 1970s, none accounts for gun availability, and none control for the complex interaction of drug epidemics with gun violence.³¹
- *All the studies fail to control for autoregression, which is the tendency of trends in longitudinal or time series data to be heavily influenced by the trends in preceding years.*³² In other words, the thing that tells us most about what the murder rate will be next year is what it was last year. Failing to account for autoregression leads to underestimates of standard errors that seriously bias results and give a misleading picture of precision. For example, ignoring autocorrelation means that each year in a longitudinal panel of years is treated as a separate case with no ties to similar

²⁷ See, e.g., Jeffrey Grogger and Michael Willis, *The Emergence of Crack Cocaine and the Rise in Urban Crime Rates*, 82 REVIEW OF ECONOMICS AND STATISTICS 519 (2000); Graham Ousey and Matthew Lee, *Examining The Conditional Nature Of The Illicit Drug Market-Homicide Relationship: A Partial Test Of The Theory Of Contingent Causation*, 40 CRIMINOLOGY 73 (2002); Daniel Cork, *Examining Space-Time Interaction in City-Level Homicide Data: Crack Markets and the Diffusion of Guns Among Youth*, 15 JOURNAL OF QUANTITATIVE CRIMINOLOGY 379 (1999); Eric Baumer et al., *The Influence of Crack Cocaine on Robbery, Burglary, and Homicide Rates: A Cross-City, Longitudinal Analysis*, 33 JOURNAL OF RESEARCH IN CRIME AND DELINQUENCY 316 (1998).

²⁸ Roland Fryer, Paul Heaton, Steven Levitt and Kevin D. Murphy, *Measuring the Impact of Crack Cocaine*, Working Paper, Harvard University Department of Economics, http://post.economics.harvard.edu/faculty/fryer/papers/fryer_heaton_levitt_murphy.pdf (visited December 20, 2005).

²⁹ See, Liebman et al., *A Broken System*, Part II, *supra* note 4; Gelman et al., *supra* note 25.

³⁰ See, e.g., Philip J. Cook and John H. Laub, *The Unprecedented Epidemic in Youth Violence*, 24 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH – YOUTH VIOLENCE 27 (1998); See, also, Jeffrey Fagan, Franklin Zimring, and June Kim, *Declining Homicide in New York: A Tale of Two Trends*, 88 JOURNAL OF CRIMINAL LAW AND CRIMINOLOGY 1277 (1998); Franklin Zimring and Gordon Hawkins, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997).

³¹ See, e.g., Eric Baumer, et al., *supra* note 33; See, also, Alfred Blumstein, *Youth Violence, Guns, And The Illicit-Drug Industry*, 86 JOURNAL OF CRIMINAL LAW & CRIMINOLOGY 10 (1995).

³² See, e.g., William Greene, *ECONOMETRIC ANALYSIS* (5th edition) (2003)

cases. In fact, powerful social, economic and legal forces influence state homicide rates, and these forces operate dynamically over time and change at a relative slow pace. Statistically and conceptually, it is unlikely that effects of extremely rare events such as executions can influence these large forces, and in turn deflect trends that are so heavily influenced by their own history and context.³³ A change in statistical modeling techniques to account for the strong year-to-year correlation of murder rates over time produces dramatic changes in the statistical significance and effect size of executions on murder rates.³⁴ Such instability in the coefficients under varying measurement and analytic conditions should be a serious warning sign to those who would embrace the new deterrence evidence.

- *There are few statistical controls for the general performance of the criminal justice system, specifically clearance rates for violent crimes.* Some of the studies control for punishment, such as imprisonment rates, but not for the ability of local law enforcement to identify homicide offenders or high rate offenders generally. Accordingly, it is hard to evaluate the deterrent effects of execution without first knowing the clearance rate for homicides. Decades of research confirm that such efficiency in homicide detection and apprehension would be a more effective deterrent than poorly publicized and infrequent executions. These important but omitted variables are potential sources not just of errors in these analyses, but they produce misleading results.³⁵
- *The studies ignore large amounts of missing data in important states such as Florida.* Most of the studies rely on the same data, a compilation of death sentences published by the Bureau of Justice Statistics of the U.S. Department of Justice, and the published homicide rates from the Federal Bureau of Investigation.³⁶ Yet the FBI's data for Florida is missing in these national archives for four years in the 1980s and another

³³ Richard Berk, *New Claims about Executions and General Deterrence: D'ejà Vu All Over Again?*, *supra* note 2. See, also, Badi H. Baltagi, *ECONOMETRIC ANALYSIS OF PANEL DATA* (2001); Badi H. Baltagi and Q. Li, Testing AR(1) Against MA(1) Disturbances In An Error Component Model 68 J. ECONOMETRICS 133 (1995).

³⁴ Jeffrey Fagan, *Death and Deterrence Redux*, *supra* note 2

³⁵ See, e.g., Mocan and Gittings, *supra* note 17, reporting significant negative effects on deterrence for the homicide arrest rate. See, also, Katz et al., *supra* note 28.

³⁶ See, Michael D. Maltz, The Effect of NIBRS Reporting on Item Missing Data in Murder Cases, 8 HOMICIDE STUDIES 193 (2004).

four years in the 1990s. By simply leaving out these states, the results are most likely to be heavily biased. The studies fail to investigate alternate data sources that might fill in important gaps in annual homicide rates.³⁷ For example, when a complete homicide victimization data set from the National Center for Health Statistics is substituted for the incomplete FBI homicide data in the Mocan and Gittings dataset and regression programs, model results change dramatically and the magnitude of a putative deterrent effect is reduced by nearly half.³⁸

- *The studies avoid any direct tests of deterrence. They fail to show that murderers are aware of executions in their own state much less in faraway states, and that they rationally decide to forego homicide and use less lethal forms of violence.* There is no evidence that they update their knowledge or perceptions of risk following an execution in their own state or in a neighboring state.³⁹ A few studies measure newspaper accounts of executions,⁴⁰ but no one knows the newspaper reading habits or television viewing preferences of murderers. Moreover, the extension of traditional rational choice theories to would-be murderers faces several conceptual and real challenges. Numerous studies that directly examine the reactions of individuals to punishment threats consistently show the limits of the assumptions of rationality that underlie deterrence, especially in the case of aggression or violence.⁴¹ Many violent offenders have cognitive, organic and neuropsychological impairments, making it even more unlikely that they are aware of executions.⁴² Others are prone to exponential

³⁷ Michael Maltz, Bridging Gaps in Police Crime Data (NCJ 176365), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/bgpced.pdf> (visited November 12, 2005). In some specifications with these data, the deterrent effect becomes insignificant.

³⁸ See, Jeffrey Fagan, *Death and Deterrence Redux*, *supra* note 2.

³⁹ See, Randi Hjalmarsson, *Does Capital Punishment Have A 'Local' Deterrent Effect On Homicides?* AMER. L. & ECON. REV. (2008, forthcoming).

⁴⁰ *Id.* See, also, Joanna M. Shepherd, *Brutalization*, *supra* note 30.

⁴¹ See, for an overview, Francisco Parisi and Vernon Smith, Introduction, in THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR (Francisco Parisi and Vernon Smith, eds.) (2005).

⁴² See, e.g., , Adriane Raine et al., *Reduced Prefrontal and Increased Subcortical Brain Functioning Assessed Using Positron Emission Tomography In Predatory and Affective Murderers*, 16 BEHAVIORAL SCIENCES AND THE LAW 319 (1998); Lisa Gatzke, Adriane Raine, et al., *Temporal Lobe EEG Deficits in Murderers Not Detected by PET*, 13 JOURNAL OF NEUROPSYCHIATRY AND CLINICAL NEUROSCIENCES 486 (2001); Dorothy Otnow Lewis, *Ethics Questions Raised by the Neuropsychiatric, Neuropsychological, Educational, Developmental, and Family Characteristics of 18 Juveniles Awaiting Execution in Texas*, 32 JOURNAL OF THE AMERICAN ACADEMY OF PSYCHIATRY AND THE LAW 408 (2004); Dorothy Otnow Lewis, *Neuropsychiatric, Psychoeducational, and Family Characteristics of 14 Juveniles Condemned to Death in the United States*, 145 AMERICAN JOURNAL OF PSYCHIATRY 584 (1988).

discounting (“hyperdiscounting”) of risks, especially the threat of punishments and short-term harms, as well as the inflation of potential rewards of crime.⁴³

- *Rare execution events have no deterrent effect.* Death sentences are rare, as are executions; they are a product of the jurisprudence that recognizes “death is different” and should therefore be reserved for only the most heinous murders.⁴⁴ Many states have narrowly tailored capital punishment laws that constrain the number and types of homicides that are eligible for the death penalty. However, there is no evidence that these extremely rare events would be deterrable. Consider, for example, the imposition of the death penalty for persons who kill law enforcement officers. Assuming rationality, for the moment, such rare events are unlikely to influence decision processes by motivating would-be killers to adjust to these punishment threats.⁴⁵ Assassinations of law enforcement officers are rare events. The FBI reported that 52 police officers were feloniously killed in 2003.⁴⁶ Most of these deaths occurred in states and regions that more frequently use capital punishment: 28 occurred in the South, 13 in the West, and 8 in the Midwest. In the northeast, where most states do not have a valid death penalty statute or, if so, rarely use it, there were 3 assassinations of law enforcement officers in 2003. Evidently, the threat of execution has little influence on lethal assaults on police officers.
- *Efforts to replicate the results of several of the new deterrence studies have revealed their unreliability and instability.* In one study, Professors John Donohue and Justin Wolfers⁴⁷ re-analyzed several datasets with several corrections: (1) using alternate model specifications to address autocorrelation, (2) correcting computational errors

43 Gary Becker, Kevin M. Murphy and Michael Grossman et al., *The Economic Theory of Illegal Goods: The Case of Drugs*. NBER Working Paper 10976, available at <http://www.nber.org/papers/w10976> (visited January 14, 2006).

44 Hugo Adam Bedau, *DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT* 55-59 (1987); Jeffrey Abramson, *Death is Different and the Role of the Capital Jury*, 2 OHIO STATE J. CRIM. L. 117 (2004).

45 See, e.g., Paul Slovic, Howard Kunreuther and Gilbert White, *Decision Processes, Rationality and Adjustment to Natural Hazards*, in *PERCEPTION OF RISK* (Paul Slovic, ed.) 1 (2000).

46 FBI, Uniform Crime Reports, LEOKA files, various years.

47 John Donohue & Justin Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, *supra* note 2.

and coding anomalies,⁴⁸ and (3) subjecting the analyses to further tests using different samples of states, counties and years. They conclude that “...the existing evidence for deterrence is surprisingly fragile, and even small changes in specifications yield dramatically different results.... Our estimates suggest not just “reasonable doubt” about whether there is any deterrent effect of the death penalty, but profound uncertainty....[W]hether one measures positive or negative effects of the death penalty is extremely sensitive to very small changes in econometric specifications”⁴⁹

I obtained similar results analyzing the Mocan and Gitting dataset, correcting for: (a) biased coding of missing data⁵⁰, (2) replacement of missing cases (years with no murders) with true zero values, (3) use of alternate measures of homicide from national death registry data⁵¹ to avoid missing data problems in the Department of Justice data from Florida and other states, (4) alternate model specifications that accounted for autoregression, and (5) model controls to isolate the effects of Texas, a state that accounts for more than one third of all executions. The analyses produced unstable results that varied in the size of the putative deterrent effect, with unstable levels of statistical significance. In about half of the 15 alternate analyses, there was no evidence of a statistically significant deterrent effect.

An analysis of executions and murders by Professor Richard Berk also challenges the accuracy of the claims of deterrence.⁵² Professor Berk also undertook alternate specifications, including one test that shows that nearly all of the presumed deterrent effects are confined to one state – Texas – and only for a handful of years when there were more than five executions. No other state has reached that rate of executions in a single year, and it is highly unlikely that any will in the future. The general conclusions in the new deterrence studies are heavily

⁴⁸ Two of the datasets, one from Mocan and Gittings and a second from Shepherd, used unconventional methods to address recurring problems of missing data and instances where some calculations required division by zero. In each case, Donohue and Wolfers made appropriate corrections.

⁴⁹ Donohue and Wolfers, *Uses and Abuses of Empirical Evidence in the Death Penalty Debate*, *supra* note 2 at 836.

⁵⁰ Fagan, *Death and Deterrence Redux*, *supra* note 2. Cases that were missing due to division by zero were recoded to .99 by Mocan and Gittings, instead of coding these cases to a value closer to zero. I recoded them to .01.

⁵¹ Data were obtained from the National Center for Health Statistics.

⁵² Richard Berk, *supra* note 2.

influenced by these few outlier observations.⁵³ In fact, Berk shows that eliminating Texas eliminates any hint of deterrence from the relationship between execution and homicide.⁵⁴ It would be a grave error to generalize from the Texas data to any other state. Professor Berk states that ...“it would be bad statistics and bad social policy” to generalize from 1% of the data to the remaining 99%. He concludes that “for the vast majority of states for the vast majority of years there is no evidence for deterrence” and that even for the remaining 1%, “credible evidence for deterrence is lacking”⁵⁵.

A new study of the effect of executions on the murder rate in Texas also shows that there is no evidence of deterrence, even in the American state that most often executes its citizens.⁵⁶ Professor Randi Hjalmarsson analyzed the homicide rate as a function of the publicity that surrounded executions in the three largest counties in Texas over a 15 year period. She showed that there was no change in the homicide rate even when there was strong attention to the execution in local television and radio. She concluded that there is no evidence that persons who might commit murder are sensitive to the threat of execution, even when that threat is widely communicated.

A recent analysis has attempted to referee between the competing claims of the original studies and the critical responses. Professors Cohen-Cole and his colleagues, including

⁵³ *Id.* Not only are executions clustered in Texas, but most states in most years have no executions, a statistical burden that none of the new deterrence studies competently address. To address this problem statistically, one must first estimate a model that explains which states have any executions, and then a second model to show the factors that predict the frequency of its use. Such models are called “hurdle” regressions. See, e.g., Christopher J. Zorn, *An Analytic and Empirical Examination of Zero-Inflated and Hurdle Poisson Specifications*, 26 SOCIOLOGICAL METHODS AND RESEARCH 368 (1998). See, also, Yin Bin Cheung, *Zero-Inflated Models for Regression Analysis of Count Data: A Study of Growth and Development*, 21 STAT. IN MED. 1461, 1462-67 (2002). Statistical methods that fail to account for this two part process will produce unreliable and inflated results. There have been 965 executions from 1976 to June 2004, more than one in three (340) have occurred in Texas. One consequence of these data patterns is that computing deterrent effects based on a simple average would be deceptive. Even a simple estimate – there are 38 death penalty states, each with a valid law in effect for an average of 20 years since *Gregg* – suggests that on average, there is fewer than one execution per year per state. Since Texas accounts for more than one in three executions, the median state-year average is quite a bit lower. In Mocan and Gittings, *supra* note 17, for example, executions range from 0 to 18, with 859 of the 1000 over the 21 years (86%) equal to 0. As a result, the median is also 0. There are 78 values (8%) equal to 1. There are but 11 values (1%) larger than 5, ranging from 7 to 18 executions. Obviously, the distribution is highly skewed, and the mean is dominated by a few extreme values. Most states in most years execute no one.

⁵⁴ See, Berk, *Id.*

⁵⁵ *Id.* at 328.

⁵⁶ Randi Hjalmarsson, *Does Capital Punishment Have A ‘Local’ Deterrent Effect On Homicides?* AMER. L. & ECON. REV. (2008, forthcoming).

me, use “model averaging” techniques to understand and resolve conflicting research findings.⁵⁷ By varying the assumptions that are built into the separate studies and then re-analyzing the data, we can show the uncertainty in these estimates and their sensitivity to the assumptions of the researchers who constructed them. We did this type of analysis on datasets from three of the most widely cited publications,⁵⁸ and showed that the estimates from the original studies were very sensitive and changed dramatically with even slight manipulations of their empirical designs. We observed that the death penalty was just as likely to make homicides increase as to make them decrease. This instability in the findings of research studies suggests that it is dangerous and inaccurate to make inferences about law or policy from fragile results.

- *Perhaps most important, the studies fail to take into account the deterrent effects of Life Without Parole sentences (LWOP).* LWOP has the same incapacitative effect as does execution. For a few death row inmates, it has a deterrent effect: at least 100 executions since *Gregg* were “voluntary” – death row inmates who elected to not fight their execution, and at least some of these persons explicitly said that death was preferable to life in prison. When multiple murderers like Michael Ross in Connecticut now say they prefer execution to life in prison, one must ask whether life without parole isn’t a stronger deterrent than death.⁵⁹

LWOP is a more frequent sentence in murder convictions today, far more frequent than death sentences. For example, there were 137 LWOP sentences in Pennsylvania in 1999, compared to 15 death sentences.⁶⁰ In 2000, there were 121 life sentences,

⁵⁷ Cohen-Cole, Ethan, Durlauf, Steven N., Fagan, Jeffrey and Nagin, Daniel, *Model Uncertainty and the Deterrent Effect of Capital Punishment*, *supra* note 2.

⁵⁸ Hashem Dezhbakhsh, Paul Rubin, and Joanna M. Shepherd. *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmortem Panel Data*, 5 AMERICAN LAW AND ECONOMICS REVIEW 344 (2003); Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich. *Prison Conditions, Capital Punishment, and Deterrence*, 5 AMERICAN LAW AND ECONOMICS REVIEW 318 (2003); John Donohue and Justin Wolfers, *supra* note 2

⁵⁹ See, e.g., Court TV, *Died Willingly*, available at http://www.crimelibrary.com/serial_killers/predators/michael_ross/8.html?sect=2. See, also, Gene Warner, The Death Penalty Debate Goes On, BUFFALO EVENING NEWS, July 11, 2005, at A1 (quoting convicted murderer Michael Grinnell on the deterrent effects of his LWOP sentence in New York’s Attica prison).

⁶⁰ Annual Statistical Report, Pennsylvania Department of Corrections, 1999, available at: <http://www.cor.state.pa.us/stats/lib/stats/ASR1999.pdf> (visited January 18, 2005).

compared to 12 death sentences.⁶¹ In California, there were 3,163 inmates serving life without parole on February 29, 2004, compared to 635 on death row.⁶² In North Carolina, when the state passed a law allowing capital murderers to plead guilty to first-degree murder and receive a sentence of life without parole rather than go to trial and risk the death penalty, death sentences fell from an average of 18.5 from 1999-2001 to seven in 2002, six in 2003, and four in 2004.⁶³ Analyses of the National Judicial Reporting Program in 2002 shows that LWOP sentences were more than three times more frequent in murder cases than were death sentences, and nearly 10 times more common than executions.⁶⁴ And Texas, where more than one execution in three takes place and where the locus of deterrent effects is thought to reside, had no life without parole statute until the 2005 legislative session. For that large and influential state, tests of the deterrent effects of execution are biased and unrepresentative of the norms in the states, and consequently, there has been no valid test of the incapacitative effects of LWOP compared to the death penalty.⁶⁵

The omission by researchers of this critical alternate and competing explanation for the decline in murder rates in California and other states is a fatal flaw in most of these studies. Integrating the potential effects of LWOP is critically important to fully understand “deterrence” and to compare the effects of incarceration to executions. Moreover, by examining declines in homicide rates in California, Texas and New York, since each state’s peak homicide rate in the early 1990’s, one can see the strong effects of such incapacitative sentences on murder rates. For example, in New York, a state with no death penalty until April 1995, 143 LWOP sentences from 1995 through

⁶¹ Annual Statistical Report, Pennsylvania Department of Corrections, 2000, available at: <http://www.cor.state.pa.us/stats/lib/stats/Annual%20Report%202000.pdf> (visited January 18, 2005).

⁶² California Department of Corrections, Facts and Figures, Third Quarter 2004, available at http://www.corr.ca.gov/CommunicationsOffice/facts_figures.asp (visited January 18, 2005). Fewer than 100 of the LWOP sentences were “Three Strikes Convictions.” See, Franklin Zimring et al., *Punishment and Democracy: Three Strikes and You’re Out in California* (2003).

⁶³ North Carolina News and Record, November 7, 2005

⁶⁴ U.S. Dept. of Justice, Bureau of Justice Statistics. NATIONAL JUDICIAL REPORTING PROGRAM, 2002: [UNITED STATES] [Computer file]. Compiled by U.S. Dept of Commerce, Bureau of the Census. ICPSR04203-v1. Ann Arbor, MI: Inter-university Consortium for Political and Social Research [producer and distributor], 2005-04-01.

⁶⁵ Texas Penal Code § 12.31, effective September 1, 2005.

2004 and no executions, homicide rates declined over the next decade by 65.5% since the peak in 1990.⁶⁶ In comparison, homicide rates in Texas, a state that until last year did not permit juries to sentence capital defendants to life without parole, declined by 61.4% since its peak rate in 1991.⁶⁷

- *Recent research suggests the importance of incapacitation – via efficient policing and effective use of imprisonment – in reducing rates of some crimes in recent panel studies identifying the sources of the nation’s decline in crime.*⁶⁸ In other words, what reduces homicides is increasing the risk of getting caught. Indeed, the only new deterrence study to directly test imprisonment patterns, by economists Lawrence Katz and colleagues, shows no deterrent effect from executions, but some type of suppression effect on murder from the rate of natural deaths in prison.⁶⁹ And, Mocan and Gittings find far larger (and statistically significant) effects for both incarceration and homicide arrests than for “deterrence,” but they call no attention to this important finding.

The 1978 National Research Council Panel on Research on Deterrence and Incapacitation⁷⁰ noted the complex relationship between deterrence and incapacitation, and showed the difficulty of separating the effects of each. To claim deterrence when there are simultaneous incapacitation effects from LWOP is a particular type of social science error – omitted variable bias.⁷¹ The omission of this alternate and competing explanation for the decline in murder rates in most death penalty states obscures and inflates the effects

⁶⁶ There have been 10 additional LWOP sentences in 2005, a year in which the murder rate in New York City and State are headed to new 50-year lows, despite the absence of executions and a declining incarceration rate.

⁶⁷ See, Uniform Crime Reports, Federal Bureau of Investigation, U.S. Department of Justice, various years.

⁶⁸ Steven D. Levitt, *Why Do Increased Arrest Rates Appear to Reduce Crime: Deterrence, Incapacitation, or Measurement Error?* 36 ECONOMIC INQUIRY 353 (1998).

⁶⁹ Lawrence Katz, Steven D. Levitt, & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AMERICAN LAW AND ECONOMICS REVIEW 318 (2003).

⁷⁰ Alfred Blumstein, Jacqueline Cohen and Daniel Nagin (eds), *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (1978)

⁷¹ Omitted variable bias occurs when a regression estimate of a parameter does not have the appropriate form and data for other parameters that may also influence the observed phenomenon. See, <http://economics.about.com/cs/economicsglossary/g/omitted.htm>.

of deterrence when no other explanation is included in the estimating models. Integrating the potential effects of LWOP is critically important to fully understand “deterrence” and to compare its effects to incapacitation effects on murder rates. The central mistake in the enterprise of the new deterrence research is the attempt to make causal inferences from a very flawed and limited set of data. One cannot treat these data as an experiment, where all the competing influences are ruled out by randomly assigning states to specific conditions.⁷² Murder is a complex and multiply-determined phenomenon, with cyclical patterns for over 40 years of distinct periods of increase and decline that are not unlike epidemics of contagious diseases.⁷³ There is no reliable, scientifically sound evidence that pits execution against a robust set of competing explanations to identify whether it can exert a deterrent effect that is uniquely and sufficiently powerful to overwhelm these consistent and recurring epidemic patterns in homicide. This new body of empirical work, based on infrequent capital punishment that is geographically spread across a large nation with little publicity and omits numerous competing but untested explanations of homicide changes, fails to provide a reliable, much less a dispositive, test of deterrence of murder. These are serious flaws and omissions in a body of scientific evidence that render it unreliable, and certainly not sufficiently sound evidence on which to base laws whose application leads to life-and-death decisions. To accept it uncritically invites errors that have the most severe human costs.

II. Deterrence of Capital-Eligible Homicides: A “Market Share” Analysis

All but one of the new studies lump all forms of murder together, claiming that all are equally deterrable. But logic tells us that some types of murder may be poor candidates for deterrence, such as crimes of passion or jealousy. Yet the one study that looked at

⁷² See, e.g., Franklin E. Zimring, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* (2003). See, also, Richard A. Berk, *Knowing When to Fold 'Em: An Essay on Evaluating the Impact of CEASEFIRE, COMSTAT, and EXILE*, *CRIMINOLOGY AND PUBLIC POLICY* (2005); Paul R. Rosenbaum, *OBSERVATIONAL STUDIES* (1995).

⁷³ See, e.g., Malcolm Gladwell, *The Tipping Point* (2nd ed.) (2001); Eric Monkkonen, *MURDER IN NEW YORK CITY* (2003); Jeffrey Fagan and Garth Davies, *The Natural History of Neighborhood Violence*, 20 *JOURNAL OF CONTEMPORARY CRIMINAL JUSTICE* 127(2004).

specific categories found that “domestic” homicides are more deterrable than others,⁷⁴ a claim that flies in the face of six decades of theory, research and facts on homicide⁷⁵ and especially murders of spouses and intimates.⁷⁶ Some homicide offenders simply are not responsive to threats of punishment.⁷⁷ It also belies the empirical fact that “domestic” or intimate partner homicides have been declining steadily since the early 1970’s,⁷⁸ at a steady pace, regardless of fluctuations in the number of executions since capital punishment was reinstated following *Gregg*.

The use of total intentional homicide has always been an aggregation error in the deterrence debate in the United States.⁷⁹ Under common law, only the top grade of murder was ever eligible for the death penalty, but the traditional legal framework of the criteria that made criminal homicide potentially capital was far from clear until the United States Supreme Court imposed minimum constitutional standards for death eligibility in *Gregg v. Georgia*⁸⁰ and its companion 1976 cases.⁸¹ The Supreme Court required the specific

⁷⁴ Joanna M. Shepherd, *Murder of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 JOURNAL OF LEGAL STUDIES 283 (2004).

⁷⁵ See, Franklin Zimring and Gordon Hawkins, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997).

⁷⁶ Kenneth Polk, *WHEN MEN KILL SCENARIOS OF MASCULINE VIOLENCE* (1994). See, also, Jeffrey Fagan and Angela Browne, *Violence toward Spouses and Intimates: Physical Aggression between Men and Women in Intimate Relationships*, in *UNDERSTANDING AND PREVENTING VIOLENCE*, VOL.3 (A.J. Reiss, Jr., & J.A. Roth, eds.) 115 (1994).

⁷⁷ Jack Katz, *SEDUCTIONS OF CRIME: THE MORAL AND SENSUAL ATTRACTIONS OF DOING EVIL* (1988) (describing “stone cold killers” who are insensitive to punishment threats, and whose homicides can only be described as the pursuit of domination and pleasure). See, also, Richard B. Felson & Henry J. Steadman, *Situational Factors in Disputes Leading to Criminal Violence*, 21 *CRIMINOLOGY* 59-60 (1983); David F. Luckenbill, *Criminal Homicide as a Situated Transaction*, 25 *SOCIAL PROBLEMS* 176 (1977); Richard B. Felson, *Impression Management and the Escalation of Aggression and Violence*, 45 *SOCIAL PSYCHOLOGY QUARTERLY* 245 (1982); David F. Luckenbill & Daniel P. Doyle, *Structural Position and Violence: Developing a Cultural Explanation*, 27 *CRIMINOLOGY* 422-23 (1989); William Oliver, *THE VIOLENT SOCIAL WORLD OF BLACK MEN* 138-40 (1994).

⁷⁸ See, e.g., Laura Dugan, Daniel Nagin and Richard Rosenfeld, *Explaining the Decline in Intimate Partner Homicide: The Effects of Changing Domesticity, Women’s Status, and Domestic Violence Resources*, 3 *HOMICIDE STUDIES* 187 (1999) (attributing the two-decades-long decline in the intimate partner homicide rate in the U.S. as a function of three factors that reduce exposure to violent relationships: shifts in marriage, divorce, and other factors associated with declining domesticity; the improved economic status of women; and increases in the availability of domestic violence services).

⁷⁹ See THORSTEN SELLIN, *THE DEATH PENALTY: A REPORT FOR THE MODEL PENAL CODE PROJECT OF THE AMERICAN LAW INSTITUTE* 52–59 (1959) (testing execution effects by counting separately particularly highrisk categories of homicides, such as killings of police officers and prison guards).

⁸⁰ 428 U.S. 153 (1976).

⁸¹ *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976).

definition of murders that are death-eligible and the states responded with a series of death eligibility standards (usually drawn from section 210.6 of the Model Penal Code).⁸²

Yet most of the new deterrence studies have estimated the effects of executions on total homicides. This makes little sense, either jurisprudentially or as a matter of behavioral science. Since *Gregg*, the statutory description of deatheligible murders has been a constitutional requirement for state and federal criminal codes. State statutes recognize that there are grades of willfulness or premeditation, and these will impact the likelihood of a homicide resulting in the death penalty.⁸³ Similarly, there are some homicides—such as killings of police or children—that evoke strong normative responses from legislatures which in turn are expressed in particular sections of capital statutes creating eligibility for the death penalty for such crimes.⁸⁴ Jurisprudentially, the idea that “death is different” has guided states to craft death penalty statutes that reserve execution for offenders who not only meet capital eligibility requirements but whose culpability rises to a threshold that matches the severity of a death sentence.⁸⁵

⁸² Under *Gregg* and its companion cases, this definition can occur in one of two ways. A state may either narrowly define a class of death-eligible murders for a jury finding during the guilt–innocence phase of trial or a state may broadly define a class of death-eligible murders and provide for the narrowing of the class by jury findings of aggravating factors during the sentencing phase of trial. See *Jurek*, 428 U.S. at 276–77 (approving the Texas statute that embodies the narrow definition alternative); *Gregg*, 428 U.S. at 206–07 (approving the Georgia statute that embodies the broad definition alternative). For examples of the state statutes that were at issue at the time of *Gregg*, see GA. CODE ANN. § 27-2534.1 (Supp. 1974); TEX. CODE CRIM. PROC. ANN. art. 37.071 (Vernon Supp. 1974–1975); and FLA. STAT. § 921.141 (1973 & Supp. 1975). The modern version of the Georgia statute is codified at GA. CODE ANN. §§ 16-5-1, 17-10-30, 17-10-31, 17-10-35 (2005). The modern version of the Texas and Florida statutes can be found at the same citations as above.

⁸³ Hans Zeisel, *The Deterrent Effect of the Death Penalty: Facts v. Faith*, 1976 SUP. CT. REV. 317, 326.

⁸⁴ For example, several states include killings of children below statutorily defined ages as an aggravating circumstance that creates eligibility for capital punishment. See, e.g., ARIZ. REV. STAT. ANN. § 13-703(F)(9) (2001); 720 ILL. COMP. STAT. 5/9-1(b)(7) (2002); LA. REV. STAT. ANN. § 14:30(A)(5) (1997); NEV. REV. STAT. § 200.033(10) (2005); OHIO REV. CODE ANN. § 2903.01(C) (West 1997); 42 PA. CONS. STAT. § 9711(d)(16) (1998); VA. CODE ANN. § 18.2-31(12) (2004).

⁸⁵ Jeffrey Abramson, *Death-is-Different Jurisprudence and the Role of the Capital Jury*, 2 OHIO ST. J. CRIM. L. 117 *passim* (2004); see, e.g., *Ring v. Arizona*, 536 U.S. 584, 605–06 (2002) (“[T]here is no doubt that ‘[d]eath is different.’”) (alteration in original); *id.* at 614 (Breyer, J., concurring in the judgment) (“[T]he Eighth Amendment requires States to apply special procedural safeguards when they seek the death penalty.”); *Atkins v. Virginia*, 536 U.S. 304, 337 (2002) (Scalia, J., dissenting) (suggesting that the majority opinion holding it cruel and unusual to punish persons with mental retardation with death is the “pinnacle of . . . death-is-different jurisprudence”); *McCleskey v. Kemp*, 481 U.S. 279, 340 (1987) (Brennan, J., dissenting) (“It hardly needs reiteration that this Court has consistently acknowledged the uniqueness of the punishment of death.”); *Wainwright v. Witt*, 469 U.S. 412, 463 (1985) (Brennan, J., dissenting) (citing “previously unquestioned principle” that unique safeguards are necessary because death penalty is “qualitatively different”); *Spaziano v. Florida*, 468 U.S. 447, 459 (1984) (citing the Court’s prior recognition of the “qualitative difference of the death penalty”) (citation omitted); *id.* at 468 (Stevens, J., concurring in part and dissenting in part) (“[T]he death penalty is qualitatively different . . . and hence must be accompanied by unique safeguards”); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (holding death to be “qualitatively different”); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (“[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long.”); *Gregg v. Georgia*, 428 U.S. 153, 188 (1976) (joint opinion of Stewart, Powell, & Stevens, JJ.) (“[T]he penalty of death is different in kind from any other punishment”); *Furman v. Georgia*, 408 U.S. 238, 286–89 (1972) (Brennan, J., concurring) (“Death is a unique punishment”); *id.* at 306 (Stewart, J., concurring) (“The penalty of death differs from all other forms of criminal punishment, not in degree but in kind.”).

Social science research on homicide also has distinguished among types of murders and murderers.⁸⁶ These studies suggest that the capacity for rational action among offenders often is doubtful, as they are prone to hyperdiscounting of risk and inflation of the immediate value of their actions.⁸⁷ Accordingly, to lump all homicides into a singular category that assumes that all murders are equally deterrable runs afoul of both law and facts.

Instead, we assume that an increase in execution risk should reduce the proportion of killings that are potentially death-eligible *if* it is the change in death risk that is operating net of other factors that may be influencing rates of both capital-eligible and other homicides. It is only for capital-eligible killings that the threat has any reality.⁸⁸ If the risk of execution goes down, then the proportion of death-eligible killings in death penalty states should increase because the force of the death threat has weakened. The shorthand method for measuring these specific effects is to determine the “market share” of cases that would be deatheligible both over time and between states at various time points.

There are three different “market share” comparisons that test deterrence. In death penalty states, the market share of death-eligible cases should go down when execution risk increases and should go up when execution risk decreases. Cross-sectionally, the

⁸⁶ See, e.g., JACK KATZ, *THE SEDUCTIONS OF CRIME* 32–34 (1988) (differentiating homicides based on motivations for their commission); JAMES O’KANE, *WICKED DEEDS: MURDER IN AMERICA* 19–34 (2005) (examining and explaining the differences between homicide, murder, and manslaughter); KENNETH POLK, *WHEN MEN KILL: SCENARIOS OF MASCULINE VIOLENCE* 175–84 (1994) (distinguishing homicides based on relationships between victim and offender); MARVIN WOLFGANG, *PATTERNS IN CRIMINAL HOMICIDE* 20–27 (1958) (same).

⁸⁷ See, e.g., Francisco Parisi & Vernon Smith, *Introduction* to *THE LAW AND ECONOMICS OF IRRATIONAL BEHAVIOR* 1, 1–2 (Francisco Parisi & Vernon Smith eds., 2005) (arguing that doubts over human rationality arise from people’s varying degrees of “skills, endowments, and a variety of psychological and physical constraints”).

⁸⁸ See Shepherd, at 292. Shepherd maintains that executions deter all types of murder by allowing all would-be murderers to update their expectations of punishment risk, compensating for the uncertainty about whether the murder they are about to commit would be charged and prosecuted capitally. *Id.* Such uncertainty, she claims, has less to do with the putative murder than with exogenous factors such as prosecutorial discretion, quality of defense counsel, and juror preferences. *Id.* These assumptions of cognition, risk analysis, cost measuring, and premeditation in homicide are rarely observed in research on murder and murderers, except perhaps among the very small percentage of murder-for-hire and premeditated killings. See *Gregg v. Georgia*, 428 U.S. 153, 186 (1976) (“There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter into the cold calculus that precedes the decision to act.”). Rather, murderers are more likely to discount punishment risks and inflate the present value of whatever gains the crime may offer. See Yair Listokin, *Efficient Time Bars: A New Rationale for the Existence of Statutes of Limitations in Criminal Law*, 31 J. LEGAL STUD. 99, 100 (2002) (noting as “commonly accepted within ... criminology” the view that “criminals discount the future at a higher rate than society”). Recognizing this, state legislatures have historically enacted murder laws that focus on intent as a metric to identify and isolate a set of murders for the most serious punishments available in that state. See Cole, *supra* at 74 (stating that a killing will be classified as a criminal homicide only if the killer possessed a certain mental state).

market share of death-eligible cases should be larger in states without a death penalty (no marginal deterrent of capital threat) than in states with a death penalty. And as execution risk increases, the market share of death-eligible cases should shrink in death penalty states but not in states without the death penalty. In sum, the comparison of death-eligible versus non-eligible homicides becomes the preferred method of choosing between execution effects and other temporal factors. We see this in play both across the U.S., comparing death penalty states with those that do not permit capital punishment, then in Texas, where two-thirds of all the executions in the U.S. since *Gregg* have taken place, and again in Harris County in Texas, which has produced nearly half of all Texas executions since *Gregg*.

We placed special emphasis on Texas (and Houston) for two reasons. That state and that city have been the dominant users of executions in the modern era, with Texas accounting for more than one-third of all executions in the first quarter century after executions resumed (through 2006).⁸⁹ The second reason for a special Texas focus is that recent social science analysis of general homicide patterns has shown that the evidence of execution impact on total homicide can be dismissed for U.S. death states other than Texas.⁹⁰ Indeed, much of the deterrent effect observed in the new deterrence studies is leveraged by the influence of Texas, and within Texas, the effects are concentrated in and leveraged by the patterns in Harris County.⁹¹ If executions show a distinctive impact on death-eligible killings anywhere, Texas should be the place. Given the high rate of executions in Texas, the case for the impact of the death penalty on capital-eligible homicide over time cannot be so easily dismissed for Texas.

To identify which homicides were capital-eligible, we turned to the *Supplementary Homicide Reports*, a data archive created and maintained by the Federal Bureau of Investigation of the U.S. Department of Justice. Known as the SHRs, these case-level

⁸⁹ Death Penalty Info. Ctr., Executions in the United States, 1608–1976, By State, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=1110>. The Death Penalty Information Center’s website displays a number of statistical tables about the death penalty, which are periodically updated to take account of new death sentences, executions, and exonerations.

⁹⁰ See Richard Berk, *Deja Vue All Over Again*, at 320–24 (proving that the deterrent effect of executions disappears when Texas execution statistics are eliminated from statistical observations).

⁹¹ See *id.* at 328 (concluding that the inclusion of “Texas data can give the false impression that a deterrence relationship exists” and “distributional problems that characterize the number of executions remain when counties are the spatial units”).

records are created by participating police departments across the country and compiled by the FBI.⁹² Data are available from 1976 to 2003, and include records of 494,729 homicide cases.⁹³ The SHR has the unique advantage of providing detailed, case-level information about the context and circumstances of each homicide event known to the police.⁹⁴ This allows us to identify the presence of factors that map onto the statutory framework of the Texas murder statutes and more broadly onto the Model Penal Code aggravating factors.

To generate estimates of the prevalence of capital homicides, we coded each homicide record in the SHR as a capital-eligible homicide if the circumstances included any of the following elements that are part of the recurrent language of capital-eligible homicides across the states: (a) killings during the commission of robbery, burglary, rape or sexual assault, arson, and kidnapping; (b) killings of children below age six;⁹⁵ (c) multiple-victim killings; (d) “gangland” killings involving organized crime or street gangs; (e) “institution” killings where the offender was confined in a correctional or other governmental institution; (f) sniper killings; and (g) killings in the course of drug business. We excluded killings by persons below age sixteen, whose eligibility for the death penalty was removed by the United States Supreme Court in *Thompson v. Oklahoma* in 1988.⁹⁶ The ban was extended

⁹² Bureau of Justice Statistics, U.S. Dep’t of Justice, Homicide Trends in the U.S., <http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm#contents>. The source data are published as Uniform Crime Reports [United States]: Supplementary Homicide Reports, 1976–2003 (ICPSR Study No. 4351, 2005) [hereinafter SHR], available at <http://webapp.icpsr.umich.edu/cocoon/ICPSR-STUDY/04351.xml>.

⁹³ SHR, *supra* note 92.

⁹⁴ *Id.*

⁹⁵ We included killings of children that are found in the death statutes of states with high death sentencing or execution rates (Texas, Maryland, Pennsylvania, Virginia, and Alabama), but are not present in several other states with populous death rows or high execution counts (California, Florida, and Georgia). To illustrate, the following states include child killings in their capital statutes: ARIZ. REV. STAT. ANN. § 13-703 (F)(9) (2001 & Supp. 2005); 720 ILL. COMP. STAT. ANN. 5/9-1(b)(7) (West 2002 & Supp. 2005); LA. REV. STAT. ANN. § 14:30(A)(5) (1997 & Supp. 2006); NEV. REV. STAT. § 200.033(10) (2005); OHIO REV. CODE ANN. § 2903.01(C) (West 1997); 42 PA. CONS. STAT. ANN. § 9711(d)(16) (West 1998 & Supp. 2005); VA. CODE ANN. § 18.2-31(12) (2004). Several other states do not mention child killings. *See, e.g.*, CAL. PENAL CODE § 189 (West 2006); FLA. STAT. ANN. § 782.04 (West 2000 & Supp. 2006); GA. CODE ANN. § 17-10-30 (2004).

⁹⁶ 487 U.S. 815, 838 (1988). For a review of the jurisprudence on immaturity and the diminished culpability of adolescents in capital trials, see Jeffrey Fagan, Atkins, *Adolescence, and the Maturity Heuristic: Rationales for a Categorical Exemption for Juveniles from Capital Punishment*, 33 N.M. L. REV. 207, 234–52 (2003), which discusses evidence of juveniles’ immaturity, the risk of false confessions, and the risk of error in attempts to assess individual juveniles’ culpability, and Victor L. Streib, *Prosecutorial Discretion in Juvenile Homicide Cases*, 109 PENN ST. L. REV. 1071, 1085 (2005), which discusses the importance of limiting the scope of prosecutorial discretion in juvenile homicide cases due to the special circumstances in these cases.

in 2005 to all persons below the age of 18 in *Roper v Simmons*.⁹⁷ We also included a separate count of the killings of police officers.

Figures 1a–c show the trends for the nation, and then separately for death penalty and nondeath penalty states. Recall that a state is a death penalty state in any year only if there was a valid death penalty statute in effect in that state during that specific year. To frame these trends, note that executions were a relatively rare event in the United States before 1984: executions rose from 5 nationally in 1983 to 21 in 1984, declined to 11 in 1988, and then rose steadily for over a decade—peaking in 1999 with 98 executions nationally before declining again to 59 in 2004.⁹⁸

Figure 1a shows the national trend for all states from 1976 to 2003. The index of capital-eligible murders varies within a narrow range over nearly three decades, from a low of 1 per 100,000 persons in 2000 to a high of 2 per 100,000 persons in 1993. The long-term trend in noncapital murders shows a large decline over the same period, with a decline of nearly 50% from 1980 to 2000. Most important for our analysis is the long-term rise in the market share of homicides that are capital-eligible. The market share rises from a low of approximately 22% in 1975 to a peak of nearly 28% in 1995, and then varies by one percent each year above or below the 28% level through 2003. This pattern also is evident in death penalty states. Figure 2b shows the same roller coaster pattern of capital-eligible homicides and a similar secular decline of more than 50% in noncapital homicides. The market share of capital-eligible crimes rises substantially in the death penalty states, from approximately 18% in 1975 to 27% in 1995. The market share fluctuates in a narrow range for the next nine years before returning to its previous high in 2004. The rise in market share of capital-eligible homicides was concurrent with a rise in executions (21 in 1984 to 98 in 1999).

Figure 1c identifies similar trends over the same period in states without the death penalty. Homicide rates are lower in these states over time, and the partitioned rates reflect the general base rate differences between death penalty and nondeath penalty states. The pattern of capital-eligible homicides fluctuates over time in a manner similar to the death

⁹⁷ 543 U.S. 551 (2005).

⁹⁸ Death Penalty Info. Ctr., Executions by Year, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=146>.

Figure 1a: Capital and noncapital homicide rate per 100,000 persons and percent capital, all states, 1976–2003⁹⁹

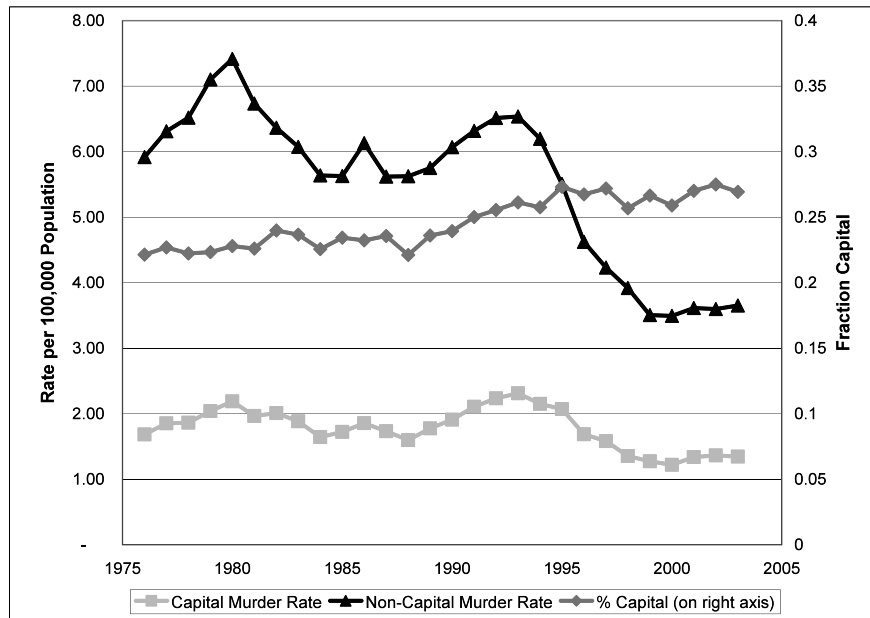
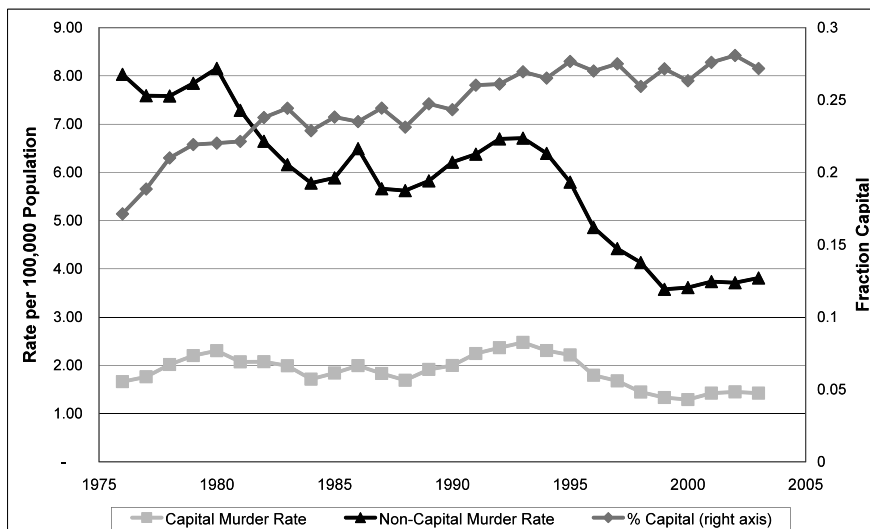


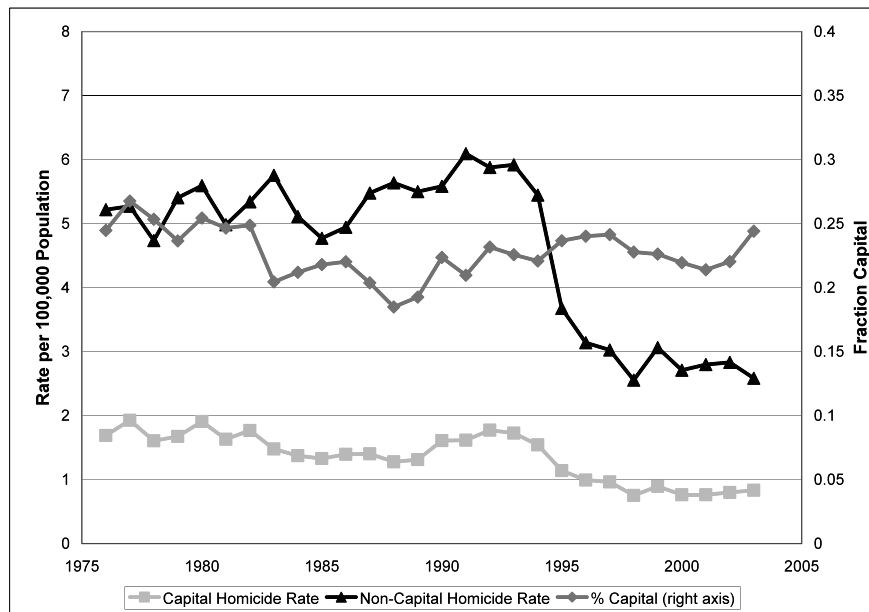
Figure 1b: Capital and noncapital homicide rate per 100,000 persons and percent capital, death penalty states, 1976–2003¹⁰⁰



⁹⁹ See SHR, *supra* note 92.

¹⁰⁰ See *id.*

Figure 1c: Capital and noncapital homicide rate per 100,000 persons and percent capital, nondeath penalty states, 1976–2003¹⁰¹



penalty states. The market share of capital-eligible homicides in the nondeath penalty states varies erratically, between a high of 26% in both the early and later years of the time series to a low of 19% in 1988, a year when executions were rare. The secular decline in noncapital homicides is sharpest beginning in 1995, when New York State passed a death penalty statute and its capital-eligible and other homicides were removed from this count.¹⁰²

Texas as a Natural Experiment

Several studies in the new deterrence literature point to Texas as the place where the deterrent effects of execution may be the strongest.¹⁰³ Among states, Texas is the most

¹⁰¹ See *id.*

¹⁰² 1995 N.Y. Laws 2 (codified as amended at N.Y. PENAL LAW § 60.06 (McKinney 2005)).

¹⁰³ See, e.g., Cloninger & Marchesini, *supra* at 571–76 (reporting empirical findings in Texas consistent with the deterrent hypothesis); Joanna Shepherd, *Deterrence Versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203, 233 (2005) (finding a strong deterrent effect in Texas). But see Berk, *supra* at 324, 328 (asserting that data give a “false impression” of deterrence in Texas due to three outlier years).

frequent user of capital punishment in the post-*Gregg* era, accounting for 369 of the 1,032 executions in the United States since 1976.¹⁰⁴ This gives Texas unusual leverage on the relationship between executions and homicides in comparative analyses across states.¹⁰⁵ Indeed, recent social science analyses of general homicide patterns have shown that the evidence of execution impact on total homicide can be dismissed for U.S. death states other than Texas.¹⁰⁶ And within Texas, both death sentences and executions are concentrated in Harris County, which includes the city of Houston.¹⁰⁷ Since 1976, Harris County has accounted for 90 of the 369 executions in Texas in the time since *Gregg*, more than twice the number in Dallas County, the state's second highest contributor to Texas's death row.¹⁰⁸

In addition, 282 persons from Harris County have been sentenced to death since *Gregg*,¹⁰⁹ and there are currently 137 on death row.¹¹⁰ The county's high execution rate affords it statistical influence on the deterrence patterns that have been attributed to Texas. Accordingly, if executions show a distinctive impact on death-eligible killings anywhere, Texas should be the place. Given the high rate of executions in Texas, the case for the impact of the death penalty on total homicide over time cannot be so easily dismissed for Texas. Figures 2 and 3 show the trends in capital-eligible and noncapital homicide rates for Texas and Harris County, and the market share of capital-eligible homicides in each. The patterns in Texas closely resemble the patterns for all the death penalty states shown in Figure 1b. Capital-eligible homicides rise and fall over time, varying from a

¹⁰⁴ According to DPIC, there have been 1,032 executions in the U.S. from *Gregg* through July 17, 2006. See Death Penalty Info. Ctr., Executions by State, <http://www.deathpenaltyinfo.org/article.php?scid=8&did=186>.

¹⁰⁵ See Berk, *supra* at 305 (explaining how the large number of executions in Texas can skew statistical results).

¹⁰⁶ *Id.* at 320–23.

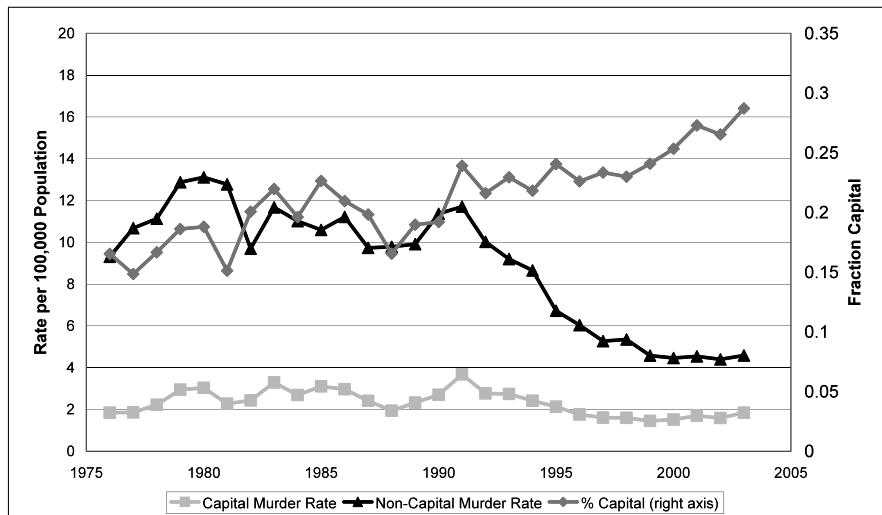
¹⁰⁷ Tex. Dep't of Criminal Justice, County of Conviction for Executed Offenders, <http://www.tdcj.state.tx.us/stat/countyexecuted.htm>. The Texas Department of Criminal Justice's website displays a number of statistical tables about the death penalty, which are periodically updated to take account of new death sentences, executions, and exonerations. This Article's citations to the Texas Department of Criminal Justice reflect the statistics on its webpage as of July 17, 2006, and archived copies of those statistics as of that date are on file with the Texas Law Review.

¹⁰⁸ *Id.*

¹⁰⁹ Tex. Dep't of Criminal Justice, Total Number of Offenders Sentenced to Death from Each County, <http://www.tdcj.state.tx.us/stat/countysentenced.htm>.

¹¹⁰ Tex. Dep't of Criminal Justice, County of Conviction for Offenders on Death Row, <http://www.tdcj.state.tx.us/stat/countyconviction.htm>.

Figure 2: Capital and noncapital homicide rate per 100,000 persons and percent capital, Texas, 1976–2003¹¹¹



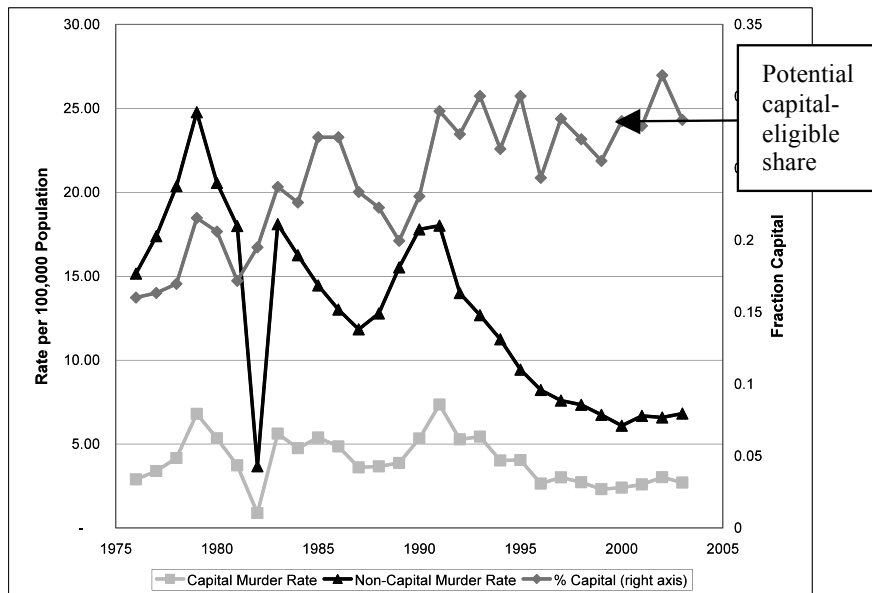
rate of 2 per 100,000 persons in 1976 to a peak of 4 before declining to a low rate of 1.8 in 1999 and beginning a shallow rise in the next four years through 2003. The rates fell by nearly half, from 4 per 100,000 persons, to less than 2 in 1996. The market share of capital-eligible homicides rises across the entire interval, and nearly doubles from 15% in 1988 to 29% in 2003. Similar to other states, noncapital homicides dropped sharply from 1990 to 1998 and have remained stable since. Since Texas resumed executions in 1982, its execution activity was consistently well above the national average for death penalty states.¹¹² But executions were extraordinarily high between 1996 and 2003. More than two-thirds of the post-*Gregg* executions took place in those years, with a peak of 40 executions in 2000 and another peak of 33 executions in 2002.¹¹³ During this time, the rate of capital-eligible homicides was virtually unchanged, from 1.8 per 100,000 persons in 1996 to 2.0 in 2003. One would expect the rate of capital-eligible homicides to decline steadily during years when there is very high execution activity. Assuming that would-be offenders who might be sensitive to execution risk are updating their information

¹¹¹ See SHR, *supra* note 92.

¹¹² See Death Penalty Info. Ctr., *supra* note 104 (showing that Texas has executed 369 inmates since 1972, far outstripping second-place Virginia, with 95).

¹¹³ Tex. Dep't of Criminal Justice, Executions by Year, <http://www.tdcj.state.tx.us/stat/annual.htm>.

Figure 3: Capital and noncapital homicide rate per 100,000 persons and fraction capital, Harris County, 1976–2003¹¹⁶



frequently, these updates based on high execution risk seem to have had little effect on the commission of capital-eligible murders. Executions in Texas were proceeding at a very high rate during this time, averaging almost three per month during the four-year period from 1997 to 2000 inclusive.¹¹⁴ Even allowing for a lag of a year or more, capital-eligible homicide rates in the succeeding years seemed unresponsive to the increase in executions in the late 1990s.¹¹⁵

The second natural experiment is Harris County. A single county case study has strong internal validity, due to the stability over time in legal contexts that surround the decision to seek and apply the death penalty, and the absence of noise from variations in legal contexts and the factors that may drive murder rates over time in other parts of the state and the country.¹¹⁷ Consistent with statewide trends in Texas and national trends in the death

¹¹⁴ *Id.*

¹¹⁵ The period when such updates take place is a matter of theoretical speculation. At least one proponent of the deterrent effects of execution has suggested that updates may be as frequent as monthly. *See, e.g.,* Shepherd, *supra* at 309 (suggesting that “capital punishment’s deterrent effect is captured in the monthly data regardless of the particulars of the model”).

¹¹⁶ *See* SHR, *supra* note 92.

¹¹⁷ *See, e.g.,* JAMES EISENSTEIN & HERBERT JACOB, FELONY JUSTICE: AN ORGANIZATIONAL ANALYSIS OF CRIMINAL COURTS (1977) (discussing court processes in Baltimore, Chicago, and Detroit and showing how stable working groups of court officers function in courts to establish shared guidelines and rules for the evaluation and disposition of criminal cases).

penalty states, the market share of capital-eligible homicides rose in Harris County from the onset of post-*Gregg* executions through 2003. Figure 3 also shows that the temporal fluctuation in the rate of capital-eligible homicides in Harris County is nearly identical to the statewide and national trends.¹¹⁸ Rates remained stable from 1996 through 2001, the period when execution activity in the state was at its peak. Noncapital homicides declined sharply from 1991 through 2000, in the same periods, capitaleligible homicides fell before rising after 2000. There was little change in capitaleligible homicides in Texas following the surge in executions in the late 1990s, and rates remained stable as executions declined in Texas after 1999. Together, the Texas and Harris County exercises confirm the trends across death penalty states: the market share of homicides that are capital-eligible continued to rise in the face of higher execution rates.

The Opposite of Economics?

The most logical test of “price effect” deterrence, that is whether the threat of death is driving homicide fluctuations in death penalty states, is whether the subset of killings threatened with death decline more sharply than in states where an execution will not happen. As executions go up, the percentage of homicides where a death sentence is possible should go down in the death penalty states, and particularly in Texas, the only state with any apparent deterrence in the aggregate homicide data.¹¹⁹ But there should be no such fluctuation in non-death penalty states because there is no death threat for this class of cases.

This distinctive pattern does not happen. The patterns are visible to the naked eye. The fingerprint for execution influence is missing from Harris County, from Texas as a whole, and from all death penalty states. Instead, the market share is *rising* everywhere except the nondeath penalty states. Offenders faced with the threat of execution are not substituting less risky varieties of crime for crimes that lead to murder and capital risk, nor are they abandoning the types of crimes that might lead to a capital offense. But they do seem to

¹¹⁸ We retained data from 1982, when rates were sharply lower than other years, despite the indication of problems in data compilation and reporting for Harris County in that year.

¹¹⁹ See Berk, *supra* at 320–24 (finding that all of the generalized deterrent effects in studies are attributable to Texas).

be rejecting the types of murders that do not carry execution risk.¹²⁰ Evidently, secular trends or risk factors other than executions are animating the aggregate homicide totals in Texas and elsewhere. This is the opposite of recent price effect economic theories of death penalty deterrence.

The insensitivity of capital-eligible homicides to execution trends is especially surprising when considered in the context of the sharply declining rates of other homicides. As these noncapital-eligible homicides decrease in number, it would be logical that police and prosecutors would devote more attention to the smaller number of capital-eligible cases. Greater resources would be available for police investigations and clearance rates should improve. Prosecutors also would have more time and greater resources to devote to these cases, increasing the likelihood of lengthy prison sentences if not capital sentences. Yet even this concentration of criminal justice resources on capital-eligible cases has not leveraged a decline in the rate of capital-eligible homicides.

The trends argue not against deterrence, but against the marginal deterrent effects of execution threats compared to other punishments, especially incarceration. Prison sentences and prison populations have been increasing dramatically since 1978,¹²¹ and the largest segment of the prison population is inmates convicted of violent crimes.¹²² In fact, the marginal punishment cost from the threat of execution may be discounted in the modal category of capital-eligible crimes: felony murders—homicides committed in the course of other crimes, especially robbery. The logic of criminal careers and the composition of the pool of capital-eligible homicides combine to argue against a marginal deterrent effect from the threat of execution.¹²³ The presence of a gun in a robbery further increases not

¹²⁰ Figure 2b shows an overall declining trend of noncapital homicide rates in all death penalty states. Even when only examining Texas, Figure 3 confirms that trend.

¹²¹ Alfred Blumstein & Allen J. Beck, *Population Growth in U.S. Prisons, 1980–1996*, 26 CRIME & JUST. 17, 18 (1999) (“Beginning in the early 1970s, the incarceration rate began a period of continuous growth of approximately 6.3 percent per year that has continued largely unabated to the present.”).

¹²² Paige M. Harrison & Allen J. Beck, *Prisoners in 2004*, BUREAU JUST. STAT. BULL., Oct. 2005, at 3 tbl.3, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/p04.pdf>.

¹²³ Robbery is not a crime that is committed casually, nor are robbers a random sample of the criminal population. Most have prior arrest records and many have completed spells in prison. Most acknowledge the risk of punishment as intrinsic to their work yet tend to discount the cost of punishment or overvalue present benefits of the robbery, or both. See, e.g., RICHARD T. WRIGHT & SCOTT H. DECKER, *ARMED ROBBERS IN ACTION: STICKUPS AND STREET CULTURE* 14 (1997). Wright and Decker interviewed men whose criminal careers included repeated robberies. Robbers were

just the risk of lethality but the decision by the robber to use it.¹²⁴ In other words, there is a strong risk of cognitive errors in situations of intense arousal—errors that are likely to mitigate the deterrent effects of punishment risk.¹²⁵ Felony murder offenders should be deterred both by the threat of prison *and* the threat of execution. But there seems to be no visible marginal threat from execution because both long prison sentences and execution are punishment costs, not risks. Perhaps present-oriented offenders discount such costs, reducing the salience of the threat of execution, leaving the margin for deterrence very thin. Finally, Figure 4 shows the relationship between the number of executions and the homicide rate in death penalty states, adjusted for differences in the socioeconomic factors and criminal justice variables that distinguish death penalty and non-death penalty states.

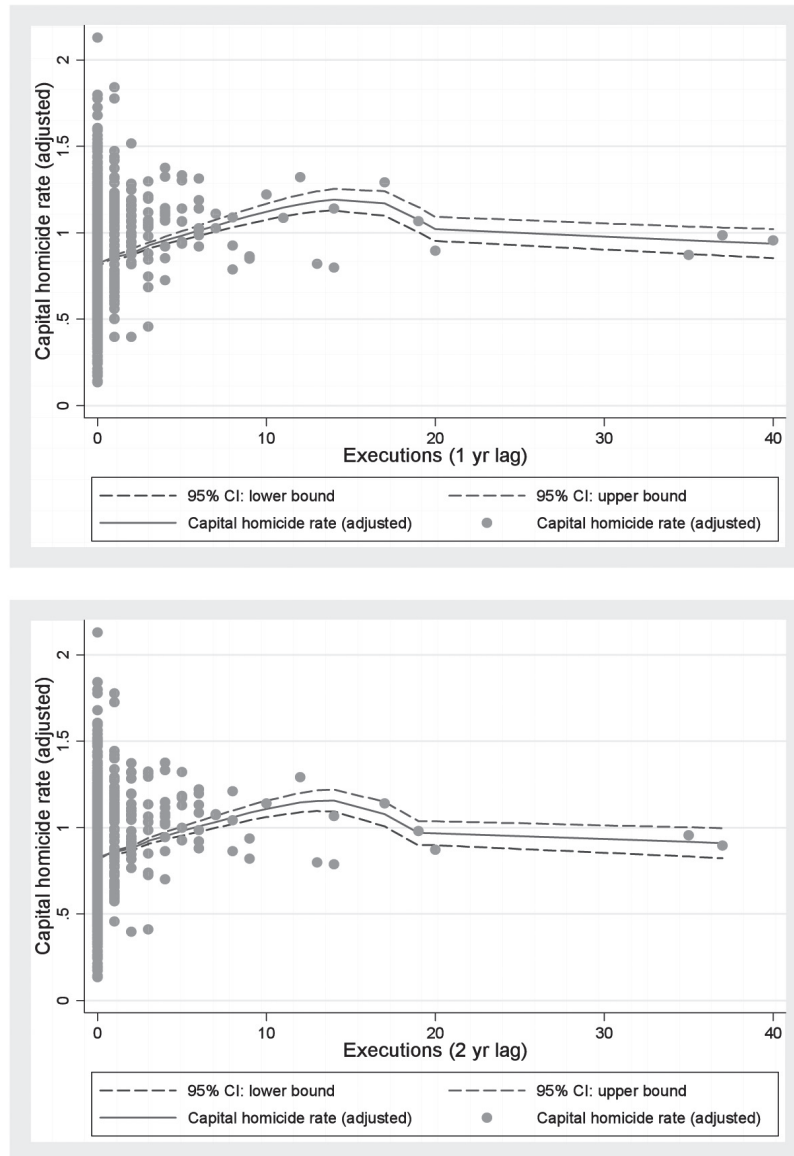
The graph shows a Lowess-smoothed function of the relationship between capital-eligible homicide rates and executions lagged one and two years, along with upper and lower bounds of the 95% confidence interval. The upper portion of Figure 5 shows the relationship of executions per state-year lagged by one year to the rate of capital-eligible homicides in death penalty states only, adjusted for the effects of the death penalty components, incarceration risks, and the socioeconomic and criminal justice covariates that were included in each of the regression models in Table 4. The lower portion of Figure 5 shows the relationship of the same adjusted rates of capital-eligible homicides to executions lagged by two years. The figures also include upper and lower 95% confidence intervals.

committed to a street culture that emphasized the material rewards and social status attendant to being successful “stick candy men,” while minimizing or heavily discounting punishment risk. *Id.* at 16; *see also* KATZ, *supra* note 86, at 165 (stating that robbers who “persist in robbery for several years ... must anticipate a break in their career for a long term of incarceration”); MERCER L. SULLIVAN, “GETTING PAID”: YOUTH CRIME AND WORK IN THE INNER CITY (1989) (examining the lives of three Brooklyn-area youths who had prior arrest records before committing robberies).

¹²⁴ See Jeffrey Fagan & Deanna L. Wilkinson, *Social Contexts and Functions of Adolescent Violence*, in *VIOLENCE IN AMERICAN SCHOOLS: A NEW PERSPECTIVE* 55, 62 (D.S. Elliott et al. eds., 1999) (“The availability of a firearm may encourage a robber to ... rely on a threat of force which may or may not need to be followed through.”); Deanna L. Williams & Jeffrey Fagan, *The Role of Firearms in Violence “Scripts”: The Dynamics of Gun Events Among Adolescent Males*, *LAW & CONTEMP. PROBS.*, Winter 1996, at 55, 71 (noting that “the availability and lethal nature of firearms has resulted in offenders taking on ‘risky or harder’ targets, anticipating little or no resistance when using a lethal weapon”); Zimring & Zuehl, *supra* at 14–16 (showing, statistically, that robberies involving guns are more likely to be lethal).

¹²⁵ See Daniel Kahneman & Amos Tversky, *Choices, Values and Frames*, 39 *AM. PSYCHOLOGIST* 341, 349 (1984) (finding that “an individual’s subjective state can be improved by framing negative outcomes as costs rather than as losses”).

Figure 4: Capital-eligible homicide rates, adjusted for deterrence components, noncapital homicide rates, punishment risk and covariates, by executions lagged 1 and 2 years



Both figures show the clustering of observations near zero for executions, a reflection of the scarcity of executions. The overall flatness of the curves—even at the extremes of execution frequency—is striking. Any variation from year to year occurs by chance, and the overall picture is one of no effect of the components of the death penalty on capital homicide rates. As executions increase to approximately 18 in any year, the homicide rate rises slightly. (Such high levels are exclusive to Texas.) The homicide rate declines

slightly for the next two observations before flattening out for the remainder, which are widely spaced. In both figures, the lines are flat, and the results in Table 4 suggest that any deviation from a zero slope is simply chance within the confidence intervals.

There is an odd and rather sad irony in the persistent failure of modern deterrence arguments to classify homicides by execution eligibility. In the earlier era of less complex statistical comparisons, Thorsten Sellin tested the impact of death penalty policy on specific types of killings like those of police officers.¹²⁶ At that time, the detailed classification by death eligibility of most reported killings was not possible. The legal changes that made the classifications used in this study possible were produced by the United States Supreme Court cases of *Furman*¹²⁷ and *Gregg*¹²⁸ and the pattern of state statute these cases required. So the capacity to control for death eligibility increased after the 1970s, but the modern studies that proclaimed their statistical sophistication in citing strong deterrent effects from the death penalty failed to distinguish between deatheligible and non-eligible cases.

Our search for death penalty deterrence where it should be a strong influence on homicide rates has produced consistent results: the marginal deterrent effect of the threat or example of execution on those cases at risk for such punishment is invisible.

III. The Accuracy of the Death Penalty in the U.S., 1973-95

This recent attention to the effectiveness of the death penalty takes place alongside new research on the accuracy and fairness of the administration of the death penalty. Across the world, there are new fears that capital trials put too many people on death row who may not deserve to be there. In research conducted by Professor James Liebman, Andrew Gelman, and myself on more than 4,700 death sentences in the U.S. between 1976 and 1995, we show that the system of capital punishment produces errors in more than two thirds of all

¹²⁶ See SELLIN, *supra* at 52–59. Sellin’s classic studies of more than fifty years ago included particularly high risk categories of homicides, such as killings of police officers and prison guards. See Thorsten Sellin, *The Death Penalty and Police Safety*, in CAPITAL PUNISHMENT, *supra* at 138, 152 (finding little difference between the murder rates of police officers in death penalty states and abolition states); Thorsten Sellin, *Prison Homicides*, in CAPITAL PUNISHMENT, *supra* at 154, 159 (finding that the threat of the death penalty had no effect in deterring prison violence).

¹²⁷ *Furman v. Georgia*, 408 U.S. 238 (1972).

¹²⁸ *Gregg v. Georgia*, 428 U.S. 153 (1976).

death sentences.¹²⁹ Our research showed that when a system of capital punishment is used persistently, it commits errors that risk the horrible possibility of executing an innocent person.¹³⁰ The central findings were:

Our two studies traced the final outcomes on judicial review of all 6000- plus death verdicts imposed in the 23-year study period by the 34 states that had the death penalty at the time, including Maryland. During that period, state and federal courts overturned 68% of all death verdicts reviewed. About half of those verdicts were overturned because the finding that the defendant was guilty of capital murder was so seriously flawed and so unreliable that the verdict could not be enforced. The other half were overturned because the sentencing determination was flawed and unreliable. In 85% of the states, the reversal rate was over 50%, meaning any death verdict imposed was more likely to be rejected on appeal than approved for execution.

Nationwide, at the review stage where we had the necessary information, 82% of all death verdicts reversed and sent back for new trials ended up in sentences *less* than death, including 9% ending in a finding that the previously condemned defendant was *not guilty*.¹³¹

Critics of our studies have focused mainly on reversals by judges ideologically opposed to the death penalty. That is absolutely wrong. These studies examined the outcomes reached by *every* judge in the nation who reviewed a capital verdict in the 23-year study

¹²⁹ James S. Liebman, Jeffrey Fagan, and Valerie West, A Broken System, Part I: Error Rates in Capital Cases, 1973-1995 (2000); James Liebman et al., A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It (2002). Each is available online, respectively, at <http://www2.law.columbia.edu/instructionalservices/liebman/> and <http://www2.law.columbia.edu/brokensystem2/report.pdf>. Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 209-261 (2004)

¹³⁰ James Liebman, Jeffrey Fagan, Valerie West, & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973 - 1995*, 78 TEXAS LAW REVIEW 1839 (2000) (showing that 68% of all death sentences since *Furman v. Georgia* were reversed either on direct appeal, state direct appeal, or federal habeas review; most - 82% - of those reversed were re-sentenced to non-capital punishments, 7% were exonerated, and the remainder were re-sentenced to death); see also BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES, AND REMEDIES, 201-04 (2004).

¹³¹ As of today, 129 people have been exonerated off of death row after official findings that they were not guilty. Death Penalty Information Center, <http://www.google.com/interstitial?url=http://www.deathpenaltyinfo.org/article.php%3Fdid=110>. Many others who were convicted of lesser crimes also have been exonerated. Some observers of the system of capital punishment suggest that the advent of advanced techniques for forensic tests of evidence, especially DNA evidence, will prevent such miscarriages in the future. But only about one in ten of these exonerations have been based on DNA evidence. Other factors, such as inaccuracy in eyewitness identification, exclusive reliance on jailhouse snitches, and discovery of new exculpatory evidence, are the causes of most exonerations.

period. Some have cited the pattern of reversals by the Rose Bird Supreme Court in California, which overturned most death verdicts it reviewed. However, the Bird Court was followed immediately by the Malcolm Lucas Court, which *affirmed* nearly all death verdicts it reviewed. The Lewis Court affirmed far more death sentences than the Bird court overturned. If we had ignored outcomes by one-sided courts, or outcomes by judges of one political party, or judges appointed by one President, the result would be a *higher* reversal rate than the 68% we found.

In fact, the vast majority of reversals were by judges disposed in *favor* of the death penalty. Ninety percent of all reversals were by *elected* state judges, who voters can and do throw out of office for opposing the death penalty. Over half of the remaining reversals, by *federal* courts, were ordered by panels of judges with majorities appointed by Republican, law-and-order Presidents.

We found, in short, very high amounts of serious, reversible error and unreliability in death verdicts from Pennsylvania to Oregon, Illinois to Alabama. From the perspective of the death penalty states themselves, we found huge expenditures of tax dollars and court time and little to show for it. Only 6% of the thousands of death verdicts imposed were actually carried out.

These errors and reversals also had enormous costs. Whether or not he is eventually executed, every defendant who is tried capitally and sentenced to die costs, on average, from \$2.5 to \$5 million dollars per inmate (in current dollars), compared to less than \$1 million for each killer sentenced to life without parole.¹³² A review of cost estimates

¹³² See, e.g., Aaron Chambers, *Resources a Concern in Death Penalty Reform*, Chi. Daily L. Bull., Apr. 24, 1999, at 19, available in Westlaw, News Library, CHIDLB file (estimating that a capital case costs \$5.2 million from pretrial proceedings to execution); Margot Garey, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS LAW REVIEW. 1268, 1268-70 (1985); Samuel R. Gross, *The Romance of Revenge: Capital Punishment in America*, 13 STUDIES IN LAW, POLICY & SOCIETY 71, 78 (1993) (reporting a \$3.2 million cost per execution in Florida, and Kansas' rejection of the death penalty because of the cost); Paul W. Keve, *The Costliest Punishment—A Corrections Administrator Contemplates the Death Penalty*, FEDERAL PROBATION, Mar. 1992, at 11; Duncan Mansfield, *The Price of Death Penalty? Maybe Millions*, A.P. Newswires, Mar. 26, 2000, available in Westlaw News Library, APWIRE file (estimated \$1 to \$2 million cost per Tennessee execution); David Noonan, *Death Row Cost Is a Killer: Capital Cases Can't Be Handled Fairly and Affordably, Critics Claim*, N.Y. Daily News, Oct. 17, 1999, at 27, available in 1999 WL 23488045 (giving cost of prosecuting and defending New York capital cases at the trial phase, in a period during which only five capital sentences were imposed (from 1994 to 1999 as \$68 million); A. Wallace Tashima, *A Costly Ultimate Sanction*, The Los Angeles Daily J., June 20, 1991 (cost per execution to California taxpayers is \$4 to \$5 million).

across the country in the past decade shows that the trial, incarceration and execution of a capital case costs. In the best available study, of Florida, that state spent between \$25 million and \$50 million per execution more than it would if all murderers received life without parole.¹³³ Other examples abound. In North Carolina, a 1993 study showed that *per execution* costs were \$2.16 million greater than the costs of non-capital murder cases that produced life sentences.¹³⁴ The Indiana Legislative Services Agency estimated that had the state sentenced its death row population to life without parole, Indiana taxpayers would have been spared approximately \$37.1 million.¹³⁵ The excessive costs of capital trials and executions have led Gerald Kogan, Chief Justice to the Florida Supreme Court, to ask Florida citizens to “...seriously reconsider whether the death penalty is a truly viable remedy for first degree murder.”¹³⁶ In Tennessee, the State Comptroller reported in 2004 that death penalty trials cost an average of 48% more than the average cost of trials in which prosecutors seek life imprisonment.¹³⁷ In Texas, a study by the *Dallas Morning News* conducted in 1992 estimated the costs of death penalty trials at \$2.3 million, approximately three times the cost of imprisoning someone in a single cell for 40 years.¹³⁸ And in Kansas, a 2003 study by the state legislature estimated that the cost of a death penalty case was 70% more than the cost of a comparable nondeath penalty case.¹³⁹

¹³³ S.V. Date, “*The High Price of Killing Killers*”, Palm Beach Post, Jan. 4, 2000, at 1A. Based on the 44 executions in Florida from 1976 to 2000, the state has spent \$51 million *per year* more on death penalty cases beyond what it would cost to obtain sentences of life without parole. The Post’s figure was derived using estimate of how much time prosecutors and public defenders at the trial courts and the Florida Supreme Court spend on extra work needed in capital cases. It accounts also for the time and effort expended on defendants who are tried but convicted of a lesser murder charge and whose death sentences are overturned on appeal as well as those handful of condemned inmates who are actually executed.

¹³⁴ See, e.g., Philip J. Cook & Donna B. Slawson, *The Costs of Prosecuting Murder Cases in North Carolina*, 1993.

¹³⁵ Kelly Lucas, “*Death Penalty is Fair and Proportionate*,” THE INDIANA LAWYER, Nov. 21, 2001.

¹³⁶ Martin Dyckman, “*Death Penalty Repair*,” St. Petersburg Times, Dec. 7, 1997 at 1D. Chief Justice Kogan noted that the Florida Supreme Court spends approximately half of its time devoted to death penalty cases, “an inordinate amount of time...when there is so much out there that affects the average citizen much more.”

¹³⁷ John G. Morgan, *Tennessee’s Death Penalty: Costs and Consequences* (2004), available at <http://www.comptroller.state.tn.us/orea/reports/deathpenalty.pdf>

¹³⁸ C. Hoppe, Executions Cost Texas Millions, *Dallas Morning News*, March 8, 1992, at 1A.

¹³⁹ Legislative Post Audit Committee, Costs Incurred for Death Penalty Cases: A K-GOAL Audit of the Department of Corrections (2003), available at http://www.kslegislature.org/postaudit/audits_perform/04pa03a.pdf. Death penalty case costs were counted through to execution (median cost \$1.26 million). Non-death penalty case costs were counted through to the end of incarceration (median cost \$740,000).

The estimated increase in taxes and expenditures for capital trials from 1983-99 was more than \$5.5 billion, borne by small and large counties alike.¹⁴⁰ And because of the high rate at which people sentenced to die end up being retried and, for the most part, resentenced to something less than death, the average *per execution* cost is much higher.

The burden of these costs are borne by local governments, diverting \$2 million per capital trial from local services – hospitals and health care, police and public safety, and education – or causing counties to borrow money or raise taxes, or diverting costs from capital expenditures such as roads and other infrastructure.¹⁴¹ The costs are about the same as a natural disaster: every capital trial burdens a county with the costs they would spend to recover from an earthquake, tornado or a serious flood. The high costs to counties for death penalty cases has forced them to seek help from state legislatures, persuading them in some cases to create “risk pools” or programs of local assistance to prosecute death penalty cases. This has the net effect of diffusing death penalty costs to counties that choose not to use – or have no need for – the death penalty in capital cases.

Our second study was a detailed statistical analysis of factors leading to serious error in capital cases.¹⁴² It found that efforts to *cut* the high cost of capital cases are counterproductive. States with cheap, mass production capital processes are the states with the highest reversal rates and highest risk of error overall – Alabama, Florida, Georgia, and Texas. Specifically, high capital error rates are associated with high capital-sentencing rates, ineffective law enforcement practices (low rates of arrest, conviction and incarceration per crime), low percapita spending on court systems, and sub-par state review procedures.

Other factors are also at work across the country in producing high reversal and error rates. Comparing reversal rates across states, we found that the proportion of African-Americans in a state’s population, and relatively high rates of homicide among whites as well as minority populations, both are associated with high capital error rates. And both

¹⁴⁰ *Id* at 13.

¹⁴¹ See, e.g., Katherine Baicker, *The Budgetary Repercussions Of Capital Convictions*, 4 ADVANCES IN ECONOMIC POLICY AND ANALYSIS, No.1, Article 6 (2004).

¹⁴² Andrew Gelman et al., *A Broken System: The Persistent Patterns of Reversals of Death Sentences in the United States*, 1 JOURNAL OF EMPIRICAL LEGAL STUDIES 209–261 (2004)

are salient risk factors in Maryland compared to other states. Our studies and others that replicate these findings provide strong proof that racially charged pressures to use the death penalty, including in cases where the facts don't actually support capital prosecutions and convictions, lead to overuse of the penalty and high rates of serious error.

Importantly, we found these same factors – especially, the ill-effect of high death-sentencing rates and high proportions of African-American citizens and white homicide victims – operating at the *county* as well as the state level. So, even in a state like Maryland, with a relatively low death-sentencing rate overall from 1973-95, the fact that a small group of counties accounted for more than half state's capital verdicts, is cause for concern.

IV. Policy Choices

The risks, costs and inefficiencies in all three options pose hard questions for states considering the future of the death penalty. Two questions can be a useful guide to that decision. First is a policy question: If Trinidad and Tobago thinks of itself as having a fixed and limited budget to spend on law enforcement over the next two decades, is the *best* use of that money to buy three or four executions – along with dozens of *initially* capital prosecutions that end up in *non*-capital plea bargains and jury verdicts; and along with a predictable 10 court reversals, retrials, and lesser sentences for every execution. Will Trinidad and Tobago gain more public safety by spending those resources to execute a tiny fraction of the state's relatively small number of murderers during that period or, for example, by funding additional police detectives, prosecutors, victim services and judges to arrest and incarcerate the many murderers, rapists, and robbers who currently escape any punishment because of insufficient law-enforcement resources?

The second question is a constitutional one. In 1972, the U.S. Supreme Court reversed every capital statute in the country. Its decision was fragmented among several opinions, but the clearest was Justice White's.¹⁴³ He found that when only a tiny proportion of

¹⁴³ *Id* at 311. He states: "...that the death penalty could so seldom be imposed that it would cease to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal justice system. It is perhaps true that no matter how infrequently those convicted of rape or murder are executed, the penalty so imposed is not disproportionate to the crime and those executed may deserve exactly what they received. It would also be clear that

the individual's who commit murder are given the death penalty for it, the penalty is unconstitutionally irrational because it serves no identifiable penological function. If almost no one gets executed for murder, then executing the tiny number of people who lose that lottery can't possibly serve as a deterrent, because no one really expects to be executed. Nor can the death penalty send a message about the punishment society deems appropriate for murder, because that crime almost never results in that penalty. The second question, then, is whether necessary and admirable efforts to avoid error and executing the innocent won't place Trinidad and Tobago in the untenable position – after millions of dollars of trying – with a death penalty that will be overturned again because of this additional constitutional problem.

When only a tiny proportion of the individuals who commit murder are sentenced to death, capital punishment is irrational because it serves no identifiable penal function. A death penalty that is almost never used serves no deterrent function because no would-be murderer can expect to be executed. Nor can a rarely used death penalty serve a declarative or symbolic function to express the punishment society deems appropriate for murder, because that crime will almost never lead to that penalty. The lesson of *Furman* will once again haunt the present day reality of the 36 states that statutorily authorize capital punishment and raise critical policy and legal concerns.¹⁴⁴ Accordingly,

executed defendants are finally and completely incapacitated from again committing rape or murder or any other crime. But when imposition of the penalty reaches a certain degree of infrequency, it would be very doubtful that any existing general need for retribution would be measurably satisfied. Nor could it be said with confidence that society's need for specific deterrence justifies death or so few when for so many in like circumstances life imprisonment or shorter prison terms are judged sufficient, or that community values are measurably reinforced by authorizing a penalty so rarely invoked. Most important, a major goal of the criminal law -- to deter others by punishing the convicted criminal -- would not be substantially served where the penalty is so seldom invoked that it ceases to be the credible threat essential to influence the conduct of others. For present purposes I accept the morality and utility of punishing one person to influence another. I accept also the effectiveness of punishment generally and need not reject the death penalty as a more effective deterrent than a lesser punishment. *But common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct and that the death penalty, unless imposed with sufficient frequency, will make little contribution to deterring those crimes for which it may be exacted* (emphasis added)."

¹⁴⁴ New York State's capital statute was invalidated in June 2004 by the New York State Court of Appeals in *People v LaValle* (3 NY 3d 88, 817 N.E.2d 341, 783 N.Y.S. 2d 485). While upholding LaValle's conviction, the Court invalidated the death sentence, on the grounds that § 400.27(10) [1] of the New York Criminal Procedure Law violated article one, section six of the New York Constitution. That section addressed what would happen if jury deadlocked, that is could not agree, on the penalty to be imposed, life without the possibility of parole or death. In that circumstance the trial judge would be empowered to sentence the defendant to as little as 20 years to life or as much as life without parole. Moreover, the statute required the judge to instruct the jury as to what would occur if they deadlocked. The New York State Assembly has declined in each legislative session starting in 2005 to consider legislation to correct the constitutional problem.

a threshold question is whether the necessary and admirable efforts to avoid error and the horror of the execution of the innocent won't – after millions of dollars of trying – burden Trinidad and Tobago with a death penalty that will be overturned because of its inevitable jurisprudential and policy problems.

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THE DEATH PENALTY PROJECT

For nearly twenty years, The Death Penalty Project has worked to protect the human rights of those facing the death penalty. Although the Project operates in all jurisdictions where the death penalty remains an enforceable punishment, its actions are concentrated in those countries which retain the Judicial Committee of the Privy Council in London and in other Commonwealth countries, principally in the Anglophone Caribbean and Africa.

The Project's main objectives are to promote the restriction of the death penalty in line with international minimum legal requirements; to uphold and develop human rights standards and the criminal law; to provide free and effective legal representation and assistance for those individuals who are facing the death penalty; and to create increased awareness and encourage greater dialogue with key stakeholders on the death penalty.

The provision of free legal representation to men and women on death row has been critical in identifying and redressing a significant number of miscarriages of justice, promoting minimum fair trial guarantees, and establishing violations of domestic and international human rights. Capacity building has also been encouraged through the provision of interactive training, by promoting exchange with the judges and by developing and commissioning appropriate studies and research.

Some of the Project's landmark cases which have restricted the implementation of the death penalty in the Caribbean include *Pratt & Morgan v the Attorney General of Jamaica* [1994] 2 AC 1, *Lewis v the Attorney General of Jamaica* [2001] 2 AC 50, *Reyes v the Queen* [2002] 2 AC 235, *The Queen v Hughes* [2002] 2 AC 259, *Fox v the Queen* [2002] 2 AC 284 and *Bowe and Davis v the Queen* [2006] 1 WLR 1623. Other landmark cases include *Attorney General v Kigula et al.* judgment of the Supreme Court of Uganda, January 2009 (abolition of the mandatory death penalty and delay on death row in Uganda); *Kafantayeni et al. v Attorney General* 46 ILM 564 (2007) (abolition of the mandatory death penalty in Malawi); and *Boyce et al. v Barbados*, 20th November 2007, decision of the Inter-American Court (savings clause, mandatory death penalty and prison conditions found to be in violation of the American Convention on Human Rights).

Notable publications include *A Guide to Sentencing in Capital Cases* by Edward Fitzgerald QC and Keir Starmer QC and *A Rare and Arbitrary Fate* by Professor Roger Hood and Dr Florence Seemungal.

The Death Penalty Project will continue to provide free legal representation and assistance to individuals facing execution and will advance the restriction of the death penalty in line with evolving human rights standards as long as capital punishment remains an enforceable punishment for those found guilty of serious crimes.