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CRIMINOLOGY

A "COMMONSENSE" THEORY OF DETERRENCE AND THE "IDEOLOGY" OF SCIENCE: THE NEW YORK STATE DEATH PENALTY DEBATE

JAMES M. GALLIHER* & JOHN F. GALLIHER**

Capital punishment is one of the most contentious public policy debates in the United States. While surviving since colonial times,¹ the debate has become especially heated since the U.S. Supreme Court decision in *Furman v. Georgia* in 1972.² In that decision, the Supreme Court outlawed executions as then practiced due to the arbitrary and capricious manner in which they had been administered.³ Most states rushed to reinstate capital punishment statutes they hoped would pass constitu-

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¹ HERBERT H. HAINES, AGAINST CAPITAL PUNISHMENT: THE ANTI-DEATH PENALTY MOVEMENT IN AMERICA, 1972-1994 (1996); Herbert H. Haines, *Flawed Executions, the Anti-Death Penalty Movement, and the Politics of Capital Punishment*, 39 SOC. PROBLEMS 125-138 (1992).

² *Furman v. Georgia*, 408 U. S. 238 (1972).

³ CHARLES L. BLACK, JR., CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE 19-20 (1974).

tional review. In the equally historic decision of *Gregg v. Georgia* in 1976,⁴ the Supreme Court cleared the way for the resumption of legal executions by approving death penalty statutes containing "guided discretion" provisions. Actual executions began again on January 17, 1977 after a ten-year hiatus with the execution of Gary Gilmore in Utah.⁵

The states that led the movement to restore capital punishment typically had long traditions of executions, especially those states of the former Confederacy.⁶ Zimring and Hawkins argued that:

[A] history of frequent executions . . . serves as a kind of precedent, reassuring political actors that their own participation is neither inhumane nor immoral . . . on the grounds that, historically, executions do not violate local community morality.⁷

And, based on local experience, it wasn't only southern states that rushed to enact new death penalty laws. New York is a case in point. According to the Espy file on executions,⁸ New York ranked second among American states in the number of legal executions prior to *Furman* with 1,130 executed between 1630 and 1963. Correspondingly, polls of New York state legislators in the 1980s and 1990s indicated that a majority supported capital punishment.⁹ We will demonstrate in this Article that the New York State Senate and Assembly debated death penalty bills for nineteen consecutive years beginning in 1977.

Kansas is another American state having had a protracted death penalty debate. In the Kansas State Legislature, the death penalty was annually debated between 1975 and 1993. Capital

⁴ *Gregg v. Georgia* 428 U. S. 153 (1976).

⁵ *Gilmore is Executed After Say is Upset; "Lets Do It!" He Said,* New York Times, Jan. 18, 1977, at 1.

⁶ JAMES W. MARQUART, SHELDON EKLAND-OLSON, & JONATHAN R. SORENSEN, *THE ROPE, THE CHAIR, AND THE NEEDLE: CAPITAL PUNISHMENT IN TEXAS, 1923-1990* x (1994).

⁷ FRANKLIN E. ZIMRING & GORDON HAWKINS, *CAPITAL PUNISHMENT AND THE AMERICAN AGENDA* 144 (1986).

⁸ M.W. ESPY & J.O. SMYKLA, *EXECUTIONS IN THE UNITED STATES, 1608-1987* (1987), COMPUTER FILE.

⁹ TIMOTHY J. FLANAGAN, PAULINE GASDOW BRENNAN, & DEBRA COHEN, *ATTITUDES OF NEW YORK LEGISLATORS TOWARD CRIME AND CRIMINAL JUSTICE: A REPORT OF THE STATE SURVEY—1991* 1 (1991); TIMOTHY J. FLANAGAN & EDMUND F. MCGARRELL, *ATTITUDES OF NEW YORK LEGISLATORS TOWARD CRIME AND CRIMINAL JUSTICE: A REPORT OF THE STATE LEGISLATOR SURVEY—1985*, Working Paper 26 1 (1986).

punishment bills typically only passed both houses of the legislature when a death penalty opponent was governor who promised to veto all death penalty bills.¹⁰ Some legislators apparently felt they could support death penalty initiatives only when sure of a gubernatorial veto.¹¹ In 1994 the legislature passed a death penalty bill during the term of a capital punishment opponent who, contrary to precedent, allowed the bill to become law without her signature.¹²

In New York from 1977 to 1995, we will show that during each of these nineteen legislative sessions, the New York Assembly and Senate debated death penalty bills and passed them, by large margins, only to have the bills vetoed by Democratic governors (Hugh Carey, 1975-1983 and Mario Cuomo, 1983-1994). During some sessions, the Senate was successful in overriding the governor's veto while the assembly's efforts always fell short by only a few votes. George Pataki, elected Governor in 1994, fulfilled a campaign promise when he signed a death penalty bill into law on March 7, 1995,¹³ making New York the thirty-eighth and most recent state to do so.

I. STATEMENT OF THE PROBLEM

This research will consider the principal claims and counterclaims made by death penalty supporters and opponents, as well as document the manner in which these claims were advanced or refuted. The nineteen-year debate provides a natural laboratory that can assist our understanding of why the United States is the only Western industrialized democracy to retain capital punishment. As Zimring has observed: "The ongoing debate in New York was the most visible and sustained at any level of government in the United States since 1980."¹⁴ With a population of approximately eighteen million, New York is among the most populous of American states and its cities have the problems of urban decay, poverty, and crime found in other

¹⁰ James M. Galliher & John F. Galliher, "Déjà Vu All Over Again": *The Recurring Life and Death of Capital Punishment Legislation in Kansas*, 44 SOC. PROB. 369, 373 (1997).

¹¹ *Id.*

¹² *Id.* at 379.

¹³ NEW YORK STATE ASSEMBLY AND SENATE RECORDS OF PROCEEDINGS, 1977-1995, NEW YORK STATE LIBRARY, ALBANY.

¹⁴ Franklin E. Zimring, *The Wages of Ambivalence: On the Context and Prospects of New York's Death Penalty*, 44 BUFF. L. REV. 303, 316 (1996).

states.¹⁵ Thus, there is no basis for suggesting that the underlying reasoning found in New York on capital punishment would not appear elsewhere in the United States.

II. COGNITIVE DISSONANCE THEORY AND THE "IDEOLOGY" OF SCIENCE

Just as social scientists construct theories to explain criminal behavior and conformity, such as cultural conflict, anomie, and social learning, so too do non-scientists. Hartjen presents the argument that human beings should be viewed as theorizers or "constructors of a commonsense reality."¹⁶ He contends:

[C]ommonsense actors are as fully engaged in reality construction as the scientist. . . . That is, to study the apprehended realities of everyday actors—the results of *their* constructs—it is advantageous to treat these constructs as instances of theories, albeit commonsense ones.¹⁷

Swidler argues that while "ideology" is a highly articulated, self-conscious belief and ritual system, *aspiring* to offer a unified answer to problems of social action, . . . '[c]ommonsense' [refers to] the set of assumptions so unselfconscious as to seem a natural, transparent, undeniable part of the structure of the world."¹⁸

This paper will describe the underlying "commonsense" theory used by death penalty proponents. Lindblom and Cohen refer to commonsense thinking as "ordinary knowledge" which can be "highly fallible"¹⁹ since it does not have its origins in social science research, but rather in speculation and casual observation, and is error prone due to "inferences based on small amounts of data."²⁰ The lay observer also believes that

¹⁵ BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES (1990); FEDERAL BUREAU OF INVESTIGATION, CRIME IN THE UNITED STATES, 1995 (1996).

¹⁶ Clayton A. Hartjen, *Crime as Commonsense Theory*, 18 CRIMINOLOGY 435 (1981).

¹⁷ *Id.* at 437.

¹⁸ Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AMER. SOC. REV. 271, 279 (1986) (emphasis added).

¹⁹ CHARLES E. LINDBLOM & DAVID K. COHEN, USABLE KNOWLEDGE: SOCIAL SCIENCE AND SOCIAL PROBLEM SOLVING 12 (1979).

²⁰ RICHARD NISBETT & LEE ROSS, HUMAN INFERENCE: STRATEGIES AND SHORTCOMINGS OF SOCIAL JUDGMENT 181 (1980).

"punishment decreases [targeted behaviors since] people seek to maximize pleasure and minimize pain."²¹

Cognitive dissonance theory argues that people attempt to avoid inconsistency among their cognitions by selective perception.²² Others have concluded: "It is unsurprising, therefore, that important social issues and policies generally prompt sharp disagreements, even among highly concerned and intelligent citizens, and thus disagreements often survive strenuous attempts at resolution through discussion and persuasion" because "people tend to interpret subsequent evidence so as to maintain their initial beliefs."²³ For example, research has found that subjects' attitudes toward the death penalty determine how evidence on the effectiveness of the death penalty as a deterrent is interpreted.²⁴ Still, it is true that "[p]eople place a premium on being rational."²⁵

To make sense of these apparent contradictions between bias and rationality, research by Lord, Ross and Lepper used both those opposed to, and those in favor of, capital punishment.²⁶ Subjects were presented with information from studies demonstrating a deterrent effect of the death penalty and other studies showing the opposite. Subjects only remembered the limitations and critiques of research that contradicted their original beliefs, and thus the attitudes of the two groups became more polarized. The authors concluded that "social scientists cannot expect rationality, enlightenment, and consensus about policy to emerge from their attempts to 'furnish' objective data."²⁷

We will show how protracted legislative debate in New York survived "strenuous attempts at resolution" in spite of the presentation of "objective data" from a host of scientific studies. Social science research has arrived at different conclusions than lay opinion and thus is cast into the role of "ideology," irrespec-

²¹ *Id.* at 30.

²² SUSAN T. FISKE & SHELLEY E. TAYLOR, *SOCIAL COGNITION* 360 (1984).

²³ Charles G. Lord, Lee Ross & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCH. 2098-109 (1979).

²⁴ See NISBETT & ROSS, *supra* note 17.

²⁵ THOMAS GILOVICH, *HOW WE KNOW WHAT ISN'T SO: THE FALLIBILITY OF HUMAN REASON IN EVERYDAY LIFE* 53 (1991).

²⁶ See Lord, Ross & Lepper, *supra* note 20, at 2098-109.

²⁷ *Id.* at 2108.

tive of its scholarly merit. This Article will address the common-sense "ordinary knowledge" of the deterrent effect of capital punishment on homicides advanced by New York legislators, by far the most frequent justification for reinstatement of capital punishment in these legislative debates (Table 1). Other arguments included whether capital punishment is racist in application, and error prone yet impossible to rectify, each accounting for less than half of the debates about deterrence. Public opinion on capital punishment, financial costs of executions, and the role of retribution were mentioned only infrequently and debate on these issues was never really joined. We will see that at times speakers discussing deterrence appeared to refer to incapacitation of those executed (specific deterrence), sometimes to the prevention of crime among other potential offenders (general deterrence) and sometimes to both incapacitation and deterrence.

The statements of legislators we will study are undoubtedly a combination of their personal beliefs and what they feel they must say to represent the views of their constituents. In any case, their utterances give some cross-section of views of capital punishment in New York. For their part, social scientists have also expressed considerable interest in deterrence theory. After a slow start in the 1950s and early to mid-1960s deterrence research began a period of popularity in the late 1960s and throughout the 1970s.²⁸ Between 1968 and 1979 there was an average of eight studies published per year in criminology, law, and sociology journals, compared to a total of only seven articles during the previous seventeen years.²⁹ Although most of the studies found no evidence of deterrence (especially in the case of capital punishment), the spate of articles demonstrated that scholars recognized this as a legitimate and important area of study. The most frequently cited studies in this body of research included an article by Ehrlich, often mentioned by death penalty proponents in the New York state legislature, emphasizing his conclusion that "an additional execution per year . . . may have resulted, on average, in 7 or 8 fewer murders."³⁰

²⁸ Albert DiChiara & John F. Galliher, *Thirty Years of Deterrence Research: Characteristics, Causes and Consequences*, 8 CONTEMP. CRISES 247 (1984).

²⁹ *Id.*

³⁰ Isaac Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 414 (1975).

TABLE 1.
NUMBER OF TIMES ISSUES APPEAR IN THE NEW YORK LEGISLATIVE
DEBATE ON CAPITAL PUNISHMENT, 1977-1995*

<u>Year</u>	<u>Deterrence</u>	<u>Racism</u>	<u>Innocence</u>
1977	79	23	16
1978	107	37	32
1979	55	14	10
1980	70	14	10
1981	7	7	12
1982	21	8	10
1983	12	3	2
1984	7	0	5
1985	25	17	10
1986	5	7	4
1987	22	6	6
1988	8	7	6
1989	51	9	8
1990	19	11	10
1991	27	17	3
1992	21	19	7
1993	15	6	9
1994	17	27	22
1995	<u>22</u>	<u>33</u>	<u>22</u>
	590	265	204

* Figures reflect each time an issue was raised, not length of debate.

III. METHODS AND DATA

The research in this Article makes use of the verbatim text recorded in the New York assembly and senate. New York is one of the few states that transcribes all debates on the floors of both houses. While Kansas also experienced a long legislative debate on the death penalty,³¹ it did not record the debate. There the record debate was available only from secondary sources, primarily the local newspapers, such as the Topeka Capital-Journal and the Wichita Eagle-Beacon. The New York legislative debate in the assembly and the senate analyzed here includes nineteen consecutive years (1977-1995). Each chamber's annual death penalty debate varied from several hours to over two days, followed by a vote. The process of abstracting and analyzing these archival materials For the purposes of the purposes of this Article consisted of four steps. First, each year's debate was read for assertions related to the death penalty as a deterrent. Each specific passage where deterrence was mentioned was highlighted in the text. Second, the task of identifying and highlighting such texts was repeated so that relevant text would not be overlooked. Third, a computer file was created in which the identified deterrence text was copied verbatim, including the speaker's name, the date, and page number in the record.

Once a computer file was created, containing hundreds of deterrence quotes, each quote was classified into categories which appeared to exhaust the content of the deterrence arguments. The questions addressed in the text included: (1) What was said or implied about deterrence by supporters and by opponents of the death penalty? (2) What was the nature of the evidence used to support these claims? (3) How were these claims and evidence presented?; And, (4) How was this evidence interpreted and evaluated by supporters and opponents? (A similar procedure was followed for the issues of racism and innocence in death penalty administration.)

IV. BACKGROUND TO POST-FURMAN DEATH PENALTY DEBATE

Executions increased dramatically in New York after introduction of the electric chair in 1890, with 674 persons electro-

³¹ See Galliher & Galliher, *supra* note 10, at 369-85.

cuted between 1900 and 1963.³² These executions peaked in the 1930s, with a drastic reduction after the 1940s.³³ The reduced use of the death penalty was accompanied by legislative efforts to abolish it altogether.³⁴ Between 1950 and 1963, there was at least one abolition bill introduced in the Legislature in every session. On July 1, 1963, New York became the last state in the country to abolish mandatory death for murder, although it remained mandatory for treason.³⁵ In 1965, the Temporary Commission on Revision of the Penal Law and Criminal Code (the Bartlett Commission) recommended that the death penalty be abolished in the state.³⁶ The legislature enacted a new statute, effective June 1, 1965, which "so narrowed the class of capital offenses that *de facto* abolition of capital punishment had almost been accomplished."³⁷ The sanction remained a possible punishment for "deliberate and premeditated" murder of an on-duty police officer or a murder committed by the offender when either serving a life prison sentence or when in the process of escape from serving a life prison sentence.³⁸

In spite of the narrow coverage of New York's death penalty statute, the New York Court of Appeals ruled in the 1973 *People v. Fitzpatrick* case that the state's death penalty statute allowed too much jury discretion.³⁹ In response, the New York Legislature enacted a mandatory death penalty statute in 1974 for the intentional killing of a police officer, a correctional officer, or a killing committed by a life-term inmate, a statute very similar to the state's 1965 discretionary death penalty law.⁴⁰ In 1976, the U.S. Supreme Court rejected mandatory death penalty statutes for murder and approved the "guided discretion" capital punishment statutes of Georgia, Texas, and Florida.⁴¹ Such was the

³² WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA, 1864-1982*, 117 (1984); Michael Lumer and Nancy Tenney, *The Death Penalty in New York: An Historical Perspective*, 4 J. L. & POL. 81, 98 (1995).

³³ *Id.*

³⁴ James R. Acker, *New York's Proposed Death Penalty Legislation: Constitutional and Policy Perspectives*, 54 Alb. L. Rev. 522. (1990).

³⁵ *Id.* 522-523.

³⁶ *Id.* 524.

³⁷ *Id.* 525.

³⁸ *Id.* 525.

³⁹ *People v. Fitzpatrick*, 346 N.Y.S.2d 793 (N.Y. 1973).

⁴⁰ Acker, *supra* note 34 at 531.

⁴¹ *Jurek v. Texas* 428 U. S. 262 (1976); *Proffitt v. Florida*, 428 U. S. 242 (1976); *Gregg v. Georgia* 428 U. S. 153 (1976).

legal situation when the state legislature met in January, 1977 to consider once again a bill to reinstate the death penalty.

By the mid-1970s, when the New York Legislature began to debate reinstatement of a death penalty, the number and rate of homicides had risen dramatically (Table 2). In 1965, there were 833 cases reported and an increase to a rate of 4.6 (per 100,000 state inhabitants). At its peak, the number increased over 210-% to 2605 in 1990. In 1991, homicides began to decrease in New York and throughout the United States. By 1995, when reinstatement occurred, New York homicides had declined 40-% compared to their 1990 level, but were still 86-% higher than in 1965.

V. PRESENTING THE DETERRENCE ARGUMENT IN SUPPORT OF CAPITAL PUNISHMENT

From the opening of the 1977 legislative session to enactment of a capital punishment law in 1995, deterrence was the principal issue driving the death penalty debate. Early on, Assemblyman Mega argued: "Deterrence, we spoke about whether or not capital punishment is a deterrent and the Supreme Court mentioned that the question of deterrence is something that each individual state should consider when they consider a capital punishment bill."⁴² Similarly, the bill's annual senate sponsor, Senator Volker cautioned: "We are going to get into all sorts of arguments. . . . We are debating several issues. One is certainly the issue of the death penalty itself, and the issue of it as a deterrent."⁴³ Assemblyman Hevesi insisted: "The deterrent effect. That is the main argument for the advocates of the death penalty and if it is not, ladies and gentlemen, say so on this floor."⁴⁴ Senator Bernstein also asserted: "I've been through [the debate] like everybody else for years and years. We hear the same things, the same arguments. What is the purpose of the proposed death penalty if not as a deterrent?"⁴⁵ Assemblyman Ortloff summarized the situation: "It has been said here, as it is every year, that the issue in this matter is whether capital punishment deters."⁴⁶ Even toward the end of the debates, the

⁴² Assemblyman Mega, New York State Assembly Debate, AB8815, 1977, 7632.

⁴³ Senator Volker, New York State Senate Debate, SB 7250, 1978, 1562.

⁴⁴ Assemblyman Hevesi, New York State Assembly Debate, AB 1070, 1989, 76.

⁴⁵ Senator Bernstein, New York State Senate Debate, SB 600, 1989, 424.

⁴⁶ Assemblyman Ortloff, New York State Assembly Debate, AB 8960, 1990, 105.

TABLE 2.

**NUMBER AND RATE OF HOMICIDES IN NEW YORK
AND THE UNITED STATES,
1965-1995***

		New York	U.S.			New York	U.S.
<u>Year</u>	<u>Number</u>	<u>Rate+</u>	<u>Rate+</u>	<u>Year</u>	<u>Number</u>	<u>Rate+</u>	<u>Rate+</u>
1965	833	4.6	5.1	1981	2166	12.3	9.8
1966	879	4.8	5.6	1982	2013	11.4	9.1
1967	993	5.4	6.1	1983	1958	1.1	8.3
1968	1180	6.5	6.8	1984	1786	0.1	7.9
1969	1320	7.2	7.2	1985	1683	9.5	7.9
1970	1493	7.9	7.8	1986	1907	10.7	8.6
1971	1817	9.9	8.5	1987	2016	11.3	8.3
1972	2020	11.0	8.9	1988	2244	12.5	8.4
1973	2034	11.1	9.3	1989	2246	12.5	8.7
1974	1913	10.6	9.7	1990	2605	14.5	9.4
1975	1996	11.0	9.6	1991	2571	14.2	9.8
1976	1969	10.9	8.8	1992	2397	13.2	9.3
1977	1919	10.7	8.8	1993	2420	13.3	9.5
1978	1820	10.3	9.0	1994	2016	11.1	9.0
1979	2092	11.9	9.7	1995	1550	8.5	8.2
1980	2228	12.7	10.2				

* Source: F.B.I. Uniform Crime Reports 1965-1995.

+ Rate per 100,000 inhabitants

question remained: "Is this [death penalty] a deterrent? You know that's the great question of our day."⁴⁷

A. DETERRENCE WORKS: DEAD MEN DON'T COMMIT CRIMES

Death penalty proponents buttressed their deterrence arguments by including the incapacitation of convicted offenders. According to Assemblyman Gromack: "[T]oo often we have seen convicted murderers get out for good behavior only to kill

⁴⁷ Assemblyman Singer, New York State Assembly Debate, AB 360, 1993, 139.

and murder again.”⁴⁸ Estimates were provided by Assemblyman Robach: “I think that number [of recidivist murderers] is at least 200 a year across this state, if not higher,”⁴⁹ and also by Assemblyman Kauffman: “Do you know that 850 people last year who were convicted of murder and got out of jail committed murder again? . . . But, I tell you, if you had the death penalty, 850 people would not have been out to kill again.”⁵⁰ When asking what the punishment other than capital punishment should be given to deter incarcerated murders from killing again, Assemblyman Saland answered: “What are we going to do when he kills the next time? Take away his conjugal visits? That is really good. Maybe we can take away his library privileges, or you know what, tell him he cannot pump iron two hours a day.”⁵¹

While the imposition of the death penalty would result in no future crimes being committed by the person executed, this represents the incapacitative effect rather than the deterrent effect of capital punishment.⁵² Assemblyman Vitaliano referred to this as the “incapacitative deterrent” effect.⁵³ Assemblyman Skidman claimed: “[A]ll I know is that if that murderer is given the death penalty, he will murder never again, and that is deterrent enough for me.”⁵⁴ Senator Farley agreed that “there’s [deterrence] studies on both sides, but . . . it would be a deterrent to that person that has killed several times. He won’t kill again.”⁵⁵ And Assemblyman Tedisco summarized the argument:

I suggest to you that it is irrefutably a deterrent And for all those individuals who have been given the death penalty and are no longer in existence, you cannot stand up and tell me they will murder again. They will not only never murder again, they will never steal your car or rape your wife or your daughter.⁵⁶

Yet Bedau has noted that it is impossible to measure incapacitation since most people convicted of homicide do not kill again,

⁴⁸ Assemblyman Gromack, New York State Assembly Debate, AB 305, 1991, 95.

⁴⁹ Assemblyman Robach, New York State Assembly Debate, AB 9028, 1994, 37.

⁵⁰ Assemblyman Kauffman, New York State Assembly Debate, AB 4843, 1995, 158.

⁵¹ Assemblyman Saland, New York State Assembly Debate, AB 1070, 1989, 137.

⁵² JACK P. GIBBS, *CRIME, PUNISHMENT, AND DETERRENCE* 22 (1975).

⁵³ Assemblyman Vitaliano, New York State Assembly Debate, AB 4843, 1995, 77.

⁵⁴ Assemblyman Skidman, New York State Assembly Debate, AB 9028, 1994, 94-95.

⁵⁵ Senator Farley, New York State Senate Debate, SB 6600, 1990, 522.

⁵⁶ Assemblyman Tedisco, New York State Assembly Debate, AB 9028, 1994, 77.

thus making it impossible to know which convicted murders will become recidivists.⁵⁷ Whatever the empirical merits of death penalty proponents' position, the confluence of incapacitation and deterrence appears to have made their commitment to deterrence much stronger.

B. INCREASED HOMICIDES AND PERCEIVED NEED FOR CAPITAL PUNISHMENT

An undisputed fact that death penalty proponents seized on throughout the debate was that homicides in the state had increased dramatically since the mid-1960s—at about the same time when executions ceased in New York. In opening the 1977 debate, the bill's lower house sponsor, Assemblyman Graber argued: "I am not saying the only reason for this increase [in homicides] was because the death penalty has declined . . . [but it is true that] homicides have increased at the same time that capital punishment has declined."⁵⁸ Senator Knorr was more explicit:

We all know in 1965 they abolished capital punishment. Prior to the abolishment . . . there [were] . . . approximately 400 innocent victims of murder. But as soon as the capital punishment was abolished within a period of three years the numbers of innocent victims of murder arose to around 1500 per year.⁵⁹

Senator Volker calculated that "since 1965, 41,667 people have been murdered as opposed to the previous 23 years, when only 11,513 were murdered. And last year we set a record."⁶⁰ Later, he said, "more people have been murdered on the streets of New York than were killed in the entire Vietnam War."⁶¹ Assemblyman George Pataki voiced this same concern: "I believe the cause and effect is clear: the absence of a death penalty has led to a massive increase in the instances of rational murder."⁶² And, the chief sponsor of death penalty legislation in the as-

⁵⁷ Hugo Adam Bedau, *The Controversy over Deterrence and Incapacitation, in THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES* 127-34 (Hugo Adam Bedau ed., 1997).

⁵⁸ Assemblyman Graber, New York State Assembly Debate, AB 8815, 1977, 7586.

⁵⁹ Senator Knorr, New York State Senate Debate, SB 7250, 1978, 4258.

⁶⁰ Senator Volker, New York State Senate Debate, SB 6600, 1990, 462.

⁶¹ *Id.* at 1183.

⁶² Assemblyman Pataki, New York State Assembly Debate, AB 8657, 1988, 193.

sembly asserted: "I would not be proposing this [death penalty] bill, incidentally, if our murder rate was as low as it was in [other] nations."⁶³ These arguments clearly demonstrate that existing biases dictate how co-variation is interpreted.

C. PREDICTED EFFECTIVENESS OF A REINSTATED DEATH PENALTY

If the premise was true that the absence of a death penalty resulted in increased homicides, according to Senator Volker, it was reasonable to conclude that reinstatement of the death penalty would result in decreased homicides: "If we had the death penalty in this state, we would not have as much murder."⁶⁴ Senator Knorr argued: "I am voting here today to save the lives of several hundred innocent victims annually in the near future."⁶⁵ Assemblyman Friedman asserted: "[C]apital punishment would deter a significant part of them and the percentages would be greater than simply saving 10 percent, it would be a very large percentage of the intentional killings."⁶⁶ And Assemblyman Hickey echoed this sentiment: "I agree that the restitution of the death penalty will significantly drive down the murder rate in this state."⁶⁷ Assemblyman Seminerio even referred to reducing all criminal activity: "I am begging you to vote for the death penalty if you want to stop crime."⁶⁸ All of these comments reflect the overconfidence Nisbett and Ross say is typical of the lay observer.⁶⁹ All the quotes in this subsection could be construed as referring to the incapacitative powers of capital punishment, as well as deterrence.

While supporters of capital punishment would often refer to the deterrence argument in relationship to previous and future homicides, there was little mention of research supporting the death penalty as a deterrent. The notable exception was periodic reference to Ehrlich's work:⁷⁰ "[Professor Ehrlich] offered

⁶³ Assemblyman Graber, New York State Assembly Debate, AB 1070, 1989, 62.

⁶⁴ Senator Volker, New York State Senate Debate, SB 4414, 1979, 3731-32.

⁶⁵ Senator Knorr, New York State Senate Debate, SB 7250, 1978, 4260.

⁶⁶ Assemblyman Friedman, New York State Assembly Debate, AB 8657, 1988, 83.

⁶⁷ Assemblyman Hickey, New York State Assembly Debate, AB 9028, 1994, 111.

⁶⁸ Assemblyman Seminerio, New York State Assembly Debate, AB 8431, 1980, 133.

⁶⁹ See NISBETT & ROSS, *supra* note 17.

⁷⁰ See generally Ehrlich, *supra* note 26, at 397-417 (where each legal execution was alleged to reduce homicides several-fold); Isaac Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741, 741-88 (1977).

his evidence that the death penalty has a . . . remarkable deterrent effect. I have since encountered no valid study to rebut his position."⁷¹ This limited reliance on scientific literature was not an oversight by death penalty supporters; there simply was very little published research to support the death penalty as a deterrent. Clearly, these attitudes toward capital punishment influence how evidence of the deterrent effect of capital punishment is interpreted.

VI. THE OPPOSITION'S CHALLENGE TO THE DETERRENCE ARGUMENT

Opponents could not deny that homicides in the state had increased since *de facto* abolition of the death penalty in 1965. Nonetheless, they did not accept this fact as evidence of the deterrent effect of capital punishment. For example, Senator Bernstein argued: "You have not established in your argument that the abolition of the death penalty in 1965 is the *causal factor* for the increase in homicides. . . . The increase is national, and . . . caused not by the abolition of the death penalty [in New York]."⁷² Instead, the opponents argued that the burden of proof in proving the deterrent value of capital punishment is "on those who are for it."⁷³ The opponents insisted on scientific research evidence. Senator Goodman asked: "Who says that the death penalty deters? Where is the evidence? Produce it forthwith. Now is the time we need it to evaluate this measure."⁷⁴ And, Senator Leichter lamented: "I don't think that the absence of proof can be overcome by parroting over and over again the phrase 'The death penalty will be a deterrence.' . . . All we have is the claim, we don't have the proof."⁷⁵

If death penalty supporters seldom relied on scientific studies, the opposition devoted most of its attention to the results of social science research to argue that the death penalty in New York would not be a deterrent to homicide. Early in the annual debates, Assemblyman McCabe claimed: "[A]s some people have already said, the death penalty is a deterrent to the crime

⁷¹ Assemblyman Walsh, New York State Assembly Debate, AB 8431, 1980, 146.

⁷² Senator Bernstein, New York State Senate Debate, SB 6600, 1990, 512 (emphasis added).

⁷³ Assemblyman Ryan, New York State Assembly Debate, AB 8815, 1977, 8920.

⁷⁴ Senator Goodman, New York State Senate Debate, SB 7250, 1978, 1600.

⁷⁵ Senator Leichter, New York State Senate Debate, SB 7250, 1978, 4068.

of murder, I have searched all the literature I could find, and I can find no objective evidence that proves that such is the case [T]he deterrent argument appears to be without merit."⁷⁶ Believing that death penalty opponents had met their responsibility in presenting research evidence against deterrence, Assemblyman Stringer asked rhetorically: "So, how many studies and statistics do you need. . . . to figure out that as far as deterrence goes, the death penalty is an abysmal failure?"⁷⁷ And, Assemblyman Hevesi concluded: "So, you have evidence, you have citations, you have academic studies and you have numbers."⁷⁸

Some death penalty opponents argued that the penalty actually had a "brutalizing" effect resulting in increased homicides. Such claims were supported by the research of Bowers and Pierce which found that in New York, from 1907-1963, approximately two additional homicides occurred the year after an execution.⁷⁹ Possibly drawing on this study, Senator Nolan explained: "Executions spread violence by signaling that it is acceptable to kill."⁸⁰

In addition to this criticism, in 1994 Senator Leichter noted a change in local crime rates: "In fact, in New York State in the last two years, the homicide rate has gone down. So, so much for that argument."⁸¹ A year later, Senator Gold observed the same trend: "[I]n the *New York Post* today . . . [it was reported] here that from last year to this year, the murder rate . . . is down 36 percent."⁸² By this time, however, the state had a new pro-death penalty governor (George Pataki) and these patterns didn't matter. Caught up in the continuing and strident debate, death penalty opponents argued that no evidence existed to support capital punishment as a possible deterrent. It would have been more precise for them to have said that there is little scientific evidence that capital punishment is a more effective deterrent than long-term imprisonment.

⁷⁶ Assemblyman McCabe, New York State Assembly Debate, AB 8815, 1977, 8804.

⁷⁷ Assemblyman Stringer, New York State Assembly Debate, AB 4843, 1995, 282.

⁷⁸ Assemblyman Hevesi, New York State Assembly Debate, AB 1070, 1989, 84.

⁷⁹ William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What is the Effect of Executions?* 26 CRIME & DELINQ. 453, 473 (1980).

⁸⁰ Senator Nolan, New York State Senate Debate, SB 6600, 1990, 473.

⁸¹ Senator Leichter, New York State Senate Debate, SB 6350, 1994, 1021.

⁸² Senator Gold, New York State Senate Debate, SB 2850, 1995, 1961.

VII. DEFENDING THE DETERRENCE ARGUMENT AGAINST CHALLENGES

Given the evidence presented against the deterrent effect of the death penalty, proponents reacted by challenging the research literature. Their response was three-fold: (1) they questioned the objectivity and honesty of deterrence researchers and, thus, the validity and relevance of the deterrence literature; (2) they presented other non-scientific evidence of deterrence; and (3) they argued that the burden of proof rested with the opposition to disprove deterrence.

A. THE REPORTED RESEARCH EVIDENCE IS FLAWED

From the beginning, death-penalty supporters questioned the validity and relevance of published research challenging the deterrence argument. Not only did the research fly in the face of their "commonsense" theories of crime and punishment, but death penalty proponents also questioned the motives and qualifications of social science researchers. Senator Volker argued: "Almost all of the deterrence studies that have found that the death penalty has no deterrence [value were] done by people who started out opposing the death penalty and wanted to find out how in effect they could find out how to oppose it through the deterrence argument."⁸³ Senator Ruiz agreed: "[A]ll the so-called studies that have been done by the so-called liberal experts [claim] that there is really no deterrence if there's a death penalty."⁸⁴ Assemblyman Saland remarked: "I heard a lot of talk of studies. . . . These studies basically are the work of criminologists, of social scientists; and why they are called scientists, I don't know."⁸⁵ This same Assemblyman later observed: "None of your social scientists, and I use the word rather loosely, none of them have the ability to measure this type of conduct."⁸⁶ In referring to this academic research, Senator Volker concluded: "We have looked at all the so-called deterrence studies, and what we determined is they are all phonies."⁸⁷

⁸³ Senator Volker, New York State Senate Debate, SB 7250, 1978, 4040.

⁸⁴ Senator Ruiz, New York State Senate Debate, SB 7600, 1982, 2470.

⁸⁵ Assemblyman Saland, New York State Assembly Debate, AB 9379, 1982, 7019.

⁸⁶ *Id.*, SB 7040, 1986, 59.

⁸⁷ Senator Volker, New York State Senate Debate, SB 4414, 1979, 3698.

Assemblyman Graber also asserted: "I would surmise that . . . we are going to hear about statistical studies that seem to show capital punishment is not a deterrent. . . . I would like to indicate I am not impressed by [the] Sellin [study]."⁸⁸ The debate also was punctuated with frequent negative characterizations of deterrence research and empirical studies. Assemblyman Nicolosi claimed: "[W]e can play the statistics game. . . . the statistics are unclear, sure they are. Because figures don't lie, but liars figure."⁸⁹ And Assemblyman Frisa observed: "We have heard a lot of arguments in opposition to this measure. Most of them have tended to rely on statistics and studies and logic that is not very logical and sense that is not very common."⁹⁰ Senator Volker sarcastically added:

[S]o the anti-death penalty people that did those wonderful studies back in the '60s, after they decided that they were opposed to the death penalty, they did studies to prove why they were right. . . . it's unbelievable. . . . [Father] Hessburgh . . . now president of Notre Dame, the celebrated anti-death penalty opponent, did a study which I think a third grader could probably tear apart on the issue of deterrence.⁹¹

The next year, he continued, saying that: "[T]here are some people in this country who are so opposed to things that they will manufacture facts. . . ." Then, referring to the legislative committee testimony of Professors Hugo Bedau and Michael Radelet, Volker added, "they manufactured facts and, if they did it here, I'm sure they did it in other places across this country."⁹²

As to a possible brutalization effect documented in the research literature, this was even harder for death penalty proponents to consider seriously. Assemblyman VanVarnick remarked: "I reject that possibility [that one more person would be murdered due to the death penalty and its brutalization effect]."⁹³ And Assemblyman Proskin claimed that the deterrent effect was not inconsistent with increasing murder rates: "The

⁸⁸ Assemblyman Graber, New York State Assembly Debate, AB 12, 1979, 174-75; THORSTEN SELLIN, *THE DEATH PENALTY* 135 (1959).

⁸⁹ Assemblyman Nicolosi, New York State Assembly Debate, AB 8815, 1977, 8762-8763.

⁹⁰ Assemblyman Frisa, New York State Assembly Debate, AB 8657, 1988, 181.

⁹¹ Senator Volker, New York State Senate Debate, SB 6600, 1990, 457-458.

⁹² *Id.*, SB 200, 1991, 1290.

⁹³ Assemblyman VanVarnick, New York State Assembly Debate, AB 9031, 1992, 162.

figures shown to us that . . . where there is a[n] execution, that the rate of killings may rise. That doesn't say that the death penalty is not a deterrent."⁹⁴ Assemblyman Friedman explained: "[P]erhaps the murder rate in those states [with the death penalty] would be twice what it is today if they didn't have capital punishment."⁹⁵

Thus, the reported research and empirical evidence presented by death penalty opponents showing either no measurable deterrent effect of capital punishment or a "brutalization effect" were simply dismissed. Assemblyman Friedman stated: "[C]apital punishment is a deterrent, there is no question about it, and the findings of any studies notwithstanding."⁹⁶ A similar view was presented by Assemblyman Kremer: "I don't work with charts . . . I am in the real world"⁹⁷ This was reiterated by Assemblyman Healey: "Don't give me statistics . . . what we are living [with] in New York State is a condition that is out of control."⁹⁸

Others suggested sardonically that if severe punishments did not deter, then the criminal sanctions needed revision—to make them *less* severe. Assemblyman Friedman argued: "[A] compilation of statistics and charts that are aimed at proving that a more severe penalty does not result in less crime. . . . I [suppose] what he is really saying is that the less severe the penalty the less crime we will have."⁹⁹ And Assemblyman Tedisco then concluded:

The logical conclusion tells me that when those states go to a death penalty, they seem to increase the amount of murders. . . . So, the logic to that is we take them [the murderers] to dinner, buy them a drink, we treat them nice and say, "Don't do it anymore," and that will solve all the problems.¹⁰⁰

This sarcasm reflects both a strong belief in punishment and an inability to alter opinions based on disconfirming evi-

⁹⁴ Assemblyman Proskin, New York State Assembly Debate, AB 1039, 1987, 150.

⁹⁵ Assemblyman Friedman, New York State Assembly Debate, AB 9031, 1992, 142.

⁹⁶ *Id.*, AB 12, 1979, 205.

⁹⁷ Assemblyman Kremer, New York State Assembly Debate, AB 8657, 1988, 111.

⁹⁸ Assemblyman Healey, New York State Assembly Debate, AB 8657, 1988, 124.

⁹⁹ Assemblyman Friedman, New York State Assembly Debate, AB 8657, 1988, 72-73.

¹⁰⁰ Assemblyman Tedisco, New York State Assembly Debate, AB 8657, 1988, 132.

dence. Politicizing the research of social scientists makes this intransigence possible.

In the end, there would be little agreement on any of these issues by the contending parties—one's position on deterrence and the death penalty were typically one and the same. As Senator Eckert remarked to a death penalty foe: "[Y]ou are not opposed to capital punishment because you don't think it's a deterrent. You don't think it's a deterrent because you're opposed to it."¹⁰¹ The same could be said of those in favor of the sanction. This theme was repeated by Senator Ohrenstein: "I think . . . that nobody is going to convince anyone on either side as to whether capital punishment deters or doesn't deter."¹⁰²

B. OTHER EVIDENCE IN SUPPORT OF DETERRENCE

While proponents could advance little scientific research in support of their assertions of a deterrent effect of capital punishment, they did rely on other more personal and direct forms of evidence. Assemblyman Greenberg injected this:

It is true I haven't any statistics . . . in fact, I doubt if anything I say can be documented, but I offer you the benefit of the instinct and knowledge I have acquired while dealing with the criminal element. . . . Instinct and experience tells me the threat of execution is a deterrent to murder.¹⁰³

This position was also presented by Assemblyman Kisor: "I would like to speak in favor of this bill, and I don't speak from some academic study. . . . I speak from 25 years of experience with the New York State police."¹⁰⁴ Senator Ruiz referred to his constituents:

I think it [the death penalty] truly is a deterrent and it's not because I've made this determination by myself. It's because I've walked my district, I've talked to hundreds of . . . people in my district and they tell me, 99 percent of them, that if there is a death penalty they would . . . think twice before they killed anyone¹⁰⁵

¹⁰¹ Senator Eckert, New York State Senate Debate, SB 7100, 1980, 87-88.

¹⁰² Senator Ohrenstein, New York State Senate Debate, SB 7100, 1980, 157.

¹⁰³ Assemblyman Greenberg, New York State Assembly Debate, AB 8815, 1977, 8800-8801.

¹⁰⁴ Assemblyman Kisor, New York State Assembly Debate, AB 12, 1979, 261.

¹⁰⁵ Senator Ruiz, New York State Senate Debate, SB 4414, 1979, 3755.

Assemblyman Smoler mentioned other evidence: "I want to cite, finally, the experts. The experts are killers who are under a death sentence and being marched before the firing squad, and they say, 'There is only one way to stop added killings, and that is to have capital punishment.'"¹⁰⁶ In a similar fashion, Davis has concluded that since death is generally the most feared punishment, commonsense tells us that it must be the most effective deterrent.¹⁰⁷ The comments in this Section reflect the lay person's reliance on a small number of cases, a belief in punishment, reliance on myth, and considerable overconfidence.

C. BURDEN OF PROOF: SHOW THAT SANCTIONS DON'T DETER

Death penalty proponents argued that the deterrence provided by the death penalty was no different from deterrence provided by other legal sanctions. Senator Eckert claimed early in the debate: "[T]he argument that we cannot conclusively prove that capital punishment deters begs the question. All of our law is based on the presumption that there is a relationship between the penalty imposed and the likelihood of the occurrence of crime."¹⁰⁸ And given this underlying principle upon which American corrections is based, Assemblyman Vitaliano asserted:

I submit the burden is on the opponents to establish the exception, not on us to prove the rule . . . [I]t is on the opponents to establish the deviation from the norm, the deviation from the bedrock principles which undergird our criminal justice system and the common sense understanding of the desire to avoid death.¹⁰⁹

Capital punishment opponents have left themselves vulnerable to such criticism because these "abolitionists look like fools if they insist (as they often do) that 'the death penalty is no deterrent to murder' since this flies in the face of what passes for common sense."¹¹⁰

¹⁰⁶ Assemblyman Smoler, New York State Assembly Debate, AB 8431, 1980, 150.

¹⁰⁷ MICHAEL DAVIS, *JUSTICE IN THE SHADOW OF DEATH: RETHINKING CAPITAL AND LESSER PUNISHMENTS* 13-14 (1996).

¹⁰⁸ Senator Eckert, New York State Senate Debate, SB 7100, 1980, 2734.

¹⁰⁹ Assemblyman Vitaliano, New York State Assembly Debate, AB 4843, 1995, 76-78.

¹¹⁰ Bedau, *supra* note 57, at 129.

Assemblyman Mega testified: "My belief is [that] nothing is feared more than death, and I believe it is a deterrent" ¹¹¹ Assemblyman Fremming concurred: "It simply defies all common sense and my knowledge of human nature to argue that a penalty of death does not act as a deterrent." ¹¹² Senator Maltese concluded that: "[C]ommon sense and the fact that just about every responsible law enforcement group has come out in favor of the death penalty indicates that it is a deterrent." ¹¹³ Assemblyman Solomon shared this conviction: "There is no question in your minds, and there is no question in mine that this is a deterrent." ¹¹⁴ Senator Bloom concluded: "[T]here is no more effective deterrent than the condemning to death for taking the life of another fellow citizen." ¹¹⁵ And finally, Assemblyman Wemple stated his belief in the deterrent effect of a capital-punishment law even if never used, because of the message it sends to potential offenders: "I think the death penalty is a deterrent. Whether it's ever used or not, it's a deterrent because it will be on the books of the State of New York." ¹¹⁶ Only in this last instance is it clear that the speaker was referring to deterrence as opposed to incapacitation. Once again, we see an inability for lay observers to change their minds when confronted with disconfirming information.

VIII. CONCLUSION: LEGISLATIVE DEBATE ON DEATH PENALTY AND DETERRENCE

At the end of the debates, very few minds had been changed regarding the deterrent effect of capital punishment. Assemblyman Behan lamented: "I feel like I've been here 2,000 years debating this bill . . . you're not going to change my mind at all. I haven't even changed my socks since Christmas. I'm certainly not going to change my vote on this bill from sixteen years ago." ¹¹⁷

¹¹¹ Assemblyman Mega, New York State Assembly Debate, AB 9421, 1978, 2076.

¹¹² Assemblyman Fremming, New York State Assembly Debate, AB 9421, 1978, 2109.

¹¹³ Senator Maltese, New York State Senate Debate, SB 200, 1991, 1199.

¹¹⁴ Assemblyman Solomon, New York State Assembly Debate, AB 9421, 1978, 2242.

¹¹⁵ Senator Bloom, New York State Senate Debate, SB 7250, 1978, 4051.

¹¹⁶ Assemblyman Wemple, New York State Assembly Debate, AB 12, 1979, 225.

¹¹⁷ Assemblyman Behan, New York State Assembly Debate, AB 9028, 1994, 129-30.

We have demonstrated that a commonsense theory of capital punishment is strongly and widely held, just as Nisbett and Ross claimed, even though it is based on small amounts of empirical observation, as well as unreliable and idiosyncratic sources, leading to capricious inferences about the control of human behavior.¹¹⁸ We have also shown that “[m]istrust of the criminal justice process is inherent in public advocacy for punitiveness. It is reflected in a cultural common sense that holds that courts do not punish severely or effectively enough, that prisons release incarcerated offenders ‘far too soon.’”¹¹⁹

Even though the preponderance of published research did not support the deterrence argument, it was often assumed to have been conducted by liberal social scientists opposed to capital punishment, and thus the published evidence could be dismissed as invalid, inconclusive, or ideological. Some proponents of capital punishment shared a disdain or even contempt for social scientists and criminologists, much like that displayed by a conservative newspaper columnist:

Unlike the victimized, our Advanced Thinkers argue that the problem isn't crime, but the jail [or punishment]. The trouble . . . isn't the criminals, but that too many are being locked up. To borrow a line from George Orwell, you have to be an intellectual to believe that sort of thing; ordinary folks have too much sense.¹²⁰

The same skepticism was found regarding evidence of the brutalization effect of the death penalty; it was contrary to the claims advanced by proponents of deterrence, counterintuitive, and based on suspect evidence. In its place, other published research¹²¹ or non-statistical evidence in the form of “expert” testimony from selected law-enforcement officials, potential-perpetrators, or convicted murderers was introduced, along with legislators’ own claims of the deterrent effect, supported by instinct, or “ordinary knowledge” based on personal experience with crime and criminals. When faced with contradictory evi-

¹¹⁸ See NISBETT & ROSS, *supra* note 17.

¹¹⁹ Benjamin D. Steiner, William J. Bowers, & Austin Sarat, *Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness*, 33 L. & SOC'Y REV. 461, 465 (1999).

¹²⁰ Paul Greenberg, *Liberals Need to Face Reality about Crime*, KANSAS CITY STAR, April 30, 1998, at C7.

¹²¹ See Ehrlich, *supra* note 26, at 397-417.

dence, cognitive dissonance is thus reduced by focusing on critiques of research and researchers opposing capital punishment as a deterrent. The annual votes in favor of capital punishment bills and surveys of legislators' attitudes confirmed widespread support for the death penalty, while patterns found in this legislative debate show some of the reasons how and why these lawmakers came to this position. The fundamental issue of the morality of capital punishment was only infrequently debated, perhaps because unlike the empirical issue of deterrence the basic moral principles of legislators do not lend themselves to floor debate. Unlike these legislators' opinions that seemed invariable for nearly two decades, Ellsworth and Gross found increasing support of capital punishment as retribution among the general public since the 1970s.¹²² And perhaps one reason for the relative stability of legislators' justifications for support of capital punishment is that, unlike those surveyed in polls, many legislators had gone on public record with their positions early in the debates.

By comparison with New York, Kansas has experienced an equally extended period of legislative death penalty debate.¹²³ Unlike New York, however, Kansas previously had a long tradition of abolition.¹²⁴ Thus, it is not surprising that the Kansas legislature passed a largely symbolic law that would apply the death penalty to almost no one, making it an option only in selected types of murders, including those also involving kidnapping and rape.¹²⁵ On the other hand, based on the evidence presented here, it seems clear that majorities in both houses of the New York state legislature wanted a capital punishment law that would be broadly applicable.

This analysis suggests that proponents held three central arguments favoring the deterrence proposition that could not be contested readily and, when taken together, constituted a commonsense theory of punishment and crime. First, some legislators relied on the "dead-men-don't-commit-crimes" conception of deterrence, referred to by one legislator as

¹²² Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' View on the Death Penalty*, in *THE DEATH PENALTY IN AMERICA*, *supra* note 47, at 90-115.

¹²³ Galliher & Galliher, *supra* note 10.

¹²⁴ *Id.*

¹²⁵ See Galliher & Galliher, *supra* note 10, at 369-85.

"incapacitative deterrence."¹²⁶ While criminologists might argue that this term makes no theoretical sense, (because those who have been executed cannot refrain from committing new crimes due to fear of legal punishment), the commonsense logic of this notion was to combine incapacitation and specific deterrence and make the deterrence (as crime prevention) argument much stronger. Moreover, to the extent that proponents claimed that first-time killers were responsible for vast numbers of subsequent homicides (either in prison or after release) the argument became even more compelling. Indeed, a series of studies suggest that incapacitation may be more important in people's thinking than previously imagined.¹²⁷

Second, without a death penalty as the ultimate punishment, homicides would increase. Homicide rates had increased dramatically since the 1960s, the time when executions stopped and death penalty laws had been abolished. These rates were promoted as evidence in favor of deterrence, along with the logically consistent prediction that a reinstated death penalty would result in fewer homicides. Had these rates remained fairly constant after the moratorium of the death penalty in 1965, chances of reinstating a death penalty might have been greatly reduced. Part of the basis for these increases was implied to have been the subsequent killings by convicted murderers. Death penalty opponents' evidence that homicides had in fact increased in Florida and Texas after those states reinstated the death penalty and began executing inmates was countered by the untestable proposition that these states' homicide rates might possibly be even higher without the death penalty.

The third position was the proponents' argument that the death penalty was similar to other penalties in at least one respect; it was imposed by the state with the legislative intent of deterrence. Harsher penalties had received widespread support in New York's recent past for offenses ranging from the sale of illicit drugs and drunk driving to spousal abuse.¹²⁸ Proponents further argued that deterrence underlies American jurispru-

¹²⁶ Vitaliano, *supra* note 53.

¹²⁷ See generally Ellsworth & Gross, *supra* note 122, at 90-115 for the argument that life in prison without parole is increasingly seen as a satisfactory alternative to execution.

¹²⁸ See for example: "The Nation's Toughest Drug Law: Evaluating the New York Experience." National Institute of Law Enforcement and Criminal Justice. Washington, D.C. (March 1978).

dence and corrections, and to require proof of the law's effectiveness would impose an unnecessary burden on legislators. Such proof had not been demanded of other sanctions, so why was it now being required for capital punishment? Moreover, this might be setting a precedent, requiring uncontested evidence in the form of published research about the deterrent effect of other legal sanctions. Thus, to argue against deterrence supplied by the death penalty and, by implication, legal penalties in general, was to argue against the philosophical foundations of American jurisprudence: (1) legal penalties of some sort are necessary to deter potential offenders; (2) harsher penalties deter more effectively than less severe penalties; and (3) the death penalty is the ultimate, or most severe, of all sanctions.

This commonsense theory of crime and punishment allowed legislators to support the deterrence proposition regardless of empirical evidence to the contrary. Research showing no deterrence was routinely criticized as biased and untruthful. The commonsense theory made sense to its proponents: its assertions were logically consistent; others tended to agree with it; it was parsimonious; it had a wide scope of applicability; and it had clear public-policy implications. Given this theory, even the most rigorous and value-neutral research can be dismissed by proponents holding little confidence in social science and statistics as a way of obtaining knowledge. When the published research is faulted on methodological grounds, whether deserved or not, and its authors' political motives and scientific status are questioned, then the purported evidence can be easily dismissed. The scientific evidence then takes on the epistemological status of opinion, the personal views of those attempting to undermine the legal system and institutionalized world view upon which it is based. Ideology thus becomes authoritative and science becomes ideological.

Not surprisingly, after two decades of debate in which the preponderance of scientific evidence presented did not support the deterrence argument, the 1995 New York death penalty bill concluded that: "The enactment of the death penalty will . . . send a strong deterrent message to persons who might be inclined to commit such crimes."¹²⁹ We found no evidence of

¹²⁹ LAWS OF THE STATE OF NEW YORK, Ch.1 at 1 (1995). New York State Library, Albany, N.Y.

changes in arguments over time, in spite of reductions in New York homicide rates during the 1990s immediately prior to reinstatement. The widespread “ordinary knowledge” or common-sense theory of crime and punishment uncovered in this debate make it all the more remarkable that capital punishment is still abolished in twelve American states.