On the Economics of Capital Punishment

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Posner provides a good discussion of the various issue related to capital punishment. I will concentrate my comments on deterrence, which is really the crucial issue in the acrimonious debate over capital punishment. I support the use of capital punishment for persons convicted of murder because, and only because, I believe it deters murders. If I did not believe that, I would be opposed because revenge and the other possible motives that are mentioned and discussed by Posner, should not be a basis for public policy.

As Posner indicates, serious empirical research on capital punishment began with Isaac Ehrlich’s pioneering paper. Subsequent studies have sometimes found much weaker effects than he found, while others, including a recent one cited by Posner, found a much larger effect than even that found by Ehrlich. The available data are quite limited, however, so one should not base any conclusions solely on the econometric evidence. Still, I believe the preponderance of evidence does indicate that capital punishment deters, although a recent article by John J. Donahue and Justin Wolfers in the Stanford Law Review reaches the opposite conclusion after a review of many studies on the subject. In correspondence I gave them some reasons why I believe they understated the evidence that capital punishment deters.

Of course, public policy on punishments cannot wait until the evidence is perfect. Even with the limited quantitative evidence available, there are good reasons to believe that capital punishment deters murders. Most people, and murderers in particular, fear death, especially when it follows swiftly and with considerable certainty following the commission of a murder. David Hume said in discussing suicide that “no man ever threw away life, while it was worth living. For such is our natural horror of death…” (emphasis added). Schopenhauer added also in discussing suicide “...as soon
as the terrors of life reach a point at which they outweigh the terrors of death, a man will put an end to his life. *But the terrors of death offer considerable resistance...* (emphasis added).

As Posner indicates, the deterrent effect of capital punishment would be greater if the delays on its implementation were much shortened, and if this punishment was more certain to be used in the appropriate cases. But I agree with Posner that capital punishment has an important deterrent effect even with the way the present system actually operates.

**Trading off lives is inevitable**

Opponents of capital punishment frequently proclaim that the State has no moral right to take the life of anyone, including that of a most reprehensible murderer, even if we assume that the deterrent effect on murders is “sizeable”. Yet that is absolutely the wrong conclusion for anyone who believes that capital punishment deters. To show why, suppose that for each murderer executed (instead of say receiving life imprisonment), the number of murders is reduced by three, which is a much lower number than Ehrlich’s and some other estimates of the deterrent effect. This implies that for each murderer not given capital punishment, three generally innocent victims would die. This argument means that the government would indirectly be “taking” many lives if it did not use capital punishment. The lives so taken are usually much more worthwhile than that of the murderers who would be spared execution. For this reason, the State has a “moral” obligation to use capital punishment if such punishment significantly reduces the number of murders and saves lives of innocent victims.

Saving three other lives for every person executed seems like a very attractive trade-off. Even two lives saved per execution seem like a persuasive benefit-cost ratio for capital punishment. But let us go further and suppose only one life was saved for each murderer executed. Wouldn’t the trade-off still be desirable if the life saved is much better than the life taken, which would usually be the case? As the deterrent effect of capital punishment is made smaller, at some point even I would shift to the anti-capital punishment camp.

Admittedly, the argument gets less clear-cut as the number of lives saved per execution falls from two to lower values, say, for example, to one life saved per execution. Many readers of the Posner-Becker blog have objected to this comparison of the qualities of the life saved and the life taken. Yet I do not see how to avoid making such a comparison. Consider a person with a long criminal record who holds up and kills a victim who led a decent life and left several children and a spouse behind. Suppose it would be possible to save the life of an innocent victim by executing such a criminal. To me it is obvious that saving the lives of such a victim has to count for much more than taking the life of such a criminal. To be sure, not all cases are so clear-cut, but I am just trying to establish the principle that a comparison of the qualities of individual lives has to be part of any reasonable social policy.
Why capital punishment is not appropriate for lesser crimes

The above argument helps explain why capital punishment should only be used for some murders, and not for theft, robbery, and other lesser crimes. For then the trade off is between taking lives and reducing property theft, and the case in favor of milder punishments is strong. However, severe assaults, including some gruesome rapes, may approach in severity some murders, and might conceivably at times call for capital punishment, although I do not support its use in these cases.

A powerful argument for reserving capital punishment for murders is related to what is called marginal deterrence in the crime and punishment literature. If perpetrators of assaults were punished with execution, an assaulter would have an incentive to kill the victims in order to reduce the likelihood that he would be discovered. That is a major reason more generally why the severity of punishments should be matched to the severity of crimes. One complication is that capital punishment may make a murderer fight harder to avoid being captured, which could lead to more deaths. That argument has to be weighed in judging the case for capital punishment. While marginal deterrence is important, I believe the resistance of murderers to being captured, possibly at the expense of their own lives, is really indirect evidence that criminals do fear capital punishment.

The problem of executing the innocent

Of course I am worried about the risk of executing innocent persons for murders committed by others. In any policy toward crime, including capital punishment, one has to compare errors of wrongful conviction with errors of failing to convict guilty persons. My support for capital punishment would weaken greatly if the rate of killing innocent persons were as large as that claimed by many. However, I believe along with Posner that the appeal process offers enormous protection not so much against wrongful conviction as against wrongful execution, so that there are very few, if any, documented cases of wrongful execution. And this process has been strengthened enormously with the development of DNA identification. However, lengthy appeals delay the execution of guilty murderers, and that can only lower the deterrent effect of capital punishment.

Final comments

European governments are adamantly opposed to capital punishment, and some Europeans consider the American use of this punishment to be barbaric. But Europeans have generally been “soft” on most crimes during the past half-century. For a long time they could be smug because their crime rates were well below American rates. But during the past twenty years European crime has increased sharply while American rates have fallen— in part because American apprehension and conviction rates have increased considerably. Now some European countries have higher per capita property crime rates than the United States does, although violent crimes are still more common in the United States. At the same time that America was reducing crime significantly in part by greater use of punishments, many European intellectuals continued to argue that not just capital
punishments, but punishments in general, do not deter.

To repeat, the capital punishment debate comes down in essentials to a debate over deterrence. I can understand that some people are skeptical about the evidence, although I believe they are wrong both on the evidence and on the common sense of the issue. It is very disturbing to take someone’s life, even a murderer’s life, but sometimes highly unpleasant actions are necessary to deter even worse behavior that takes the lives of innocent victims.

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REFERENCES AND FURTHER READING


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To create this column, Gary Becker combined two of his blog entries from the discussion between Judge Richard Posner and himself on capital punishment in their weekly blog (Becker-Posner-blog.com; December 18 and 25, 2005).