The Economics of Capital Punishment

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The recent execution by the State of California of the multiple murderer Stanley “Tookie” Williams has brought renewed controversy to the practice of capital punishment, a practice which has been abolished in about a third of the states and in most of the nations that the United States considers its peers; the European Union will not admit to membership a nation that retains capital punishment.

From an economic standpoint, the principal considerations in evaluating the issue of retaining capital punishment are the incremental deterrent effect of executing murderers, the rate of false positives (that is, execution of the innocent), the cost of capital punishment relative to life imprisonment without parole (the usual alternative nowadays), the utility that retributivists and the friends and family members of the murderer’s victim (or in Williams’s case victims) derive from execution, and the disutility that fervent opponents of capital punishment, along with relatives and friends of the defendant, experience. The utility comparison seems a standoff, and I will ignore it, although the fact that almost two-thirds of the U.S. population supports the death penalty is some, albeit weak (because it does not measure intensity of preference), evidence bearing on the comparison.

Early empirical analysis by Isaac Ehrlich found a substantial incremental deterrent effect of capital punishment, a finding that coincides with the common sense of the situation: it is exceedingly rare for a defendant who has a choice to prefer being executed to being imprisoned for life. Ehrlich’s work was criticized by some economists, but more recent work by economists Hashem Dezhbakhsh, Paul Rubin, and Joanna Shepherd provides strong support for Ehrlich’s thesis; these authors found, in a careful econometric analysis, that one execution deters 18 murders. Although this ratio may seem implausible given that the probability of being executed for committing a murder is less than 1 percent (most executions are in southern states—50 of the 59 in 2004—which that year had a total of almost 7,000 murders), the probability is misleading because only a subset of murderers...
are eligible for execution. Moreover, even a 1 percent or one-half of 1 percent probability of death is hardly trivial; most people would pay a substantial amount of money to eliminate such a probability.

As for the risk of executing an innocent person, this is exceedingly slight, especially when a distinction is made between legal and factual innocence. Some murderers are executed by mistake in the sense that they might have a good legal defense to being sentenced to death, such as having been prevented from offering evidence in mitigation of their crime, such as evidence of having grown up in terrible circumstances that made it difficult for them to resist the temptations of a life of crime. But they are not innocent of murder. The number of people who are executed for a murder they did not commit appears to be vanishingly small.

It is so small, however, in part because of the enormous protraction of capital litigation. The average amount of time that a defendant spends on death row before being executed is about 10 years. If the defendant is innocent, the error is highly likely to be discovered within that period. It would be different if execution followed the appeal of the defendant’s sentence by a week. But the delay in execution not only reduces the deterrent effect of execution (though probably only slightly) but also makes capital punishment quite costly, since there is a substantial imprisonment cost on top of the heavy litigation costs of capital cases, with their endless rounds of appellate and postconviction proceedings.

Although it may seem heartless to say so, the concern with mistaken execution seems exaggerated. The number of people executed in all of 2004 was, as I noted, only 59. (The annual number has not exceeded 98 since 1951.) Suppose that were it not for the enormous delays in execution, the number would have been 60, and the additional person executed would have been factually innocent. The number of Americans who die each year in accidents exceeds 100,000; many of these deaths are more painful than death by lethal injection, though they are not as humiliating and usually they are not anticipated, which adds a particular dread to execution. Moreover, for what appears to be a psychological reason (the “availability heuristic”), the death of a single, identified person tends to have greater salience than the death of a much larger number of anonymous persons. As Stalin is reported to have quipped, a single death is a tragedy, a million deaths is a statistic.

But that’s psychology; there is an economic argument for speeding up the imposition of the death penalty on convicted murderers eligible for the penalty; the gain in deterrence and reduction in cost are likely to exceed the increase in the very slight probability of executing a factually innocent person. What is more, by allocating more resources to the litigation of capital cases, the error rate could be kept at its present very low level even though delay in execution was reduced.

However, even with the existing, excessive, delay, the recent evidence concerning the deterrent effect of capital punishment provides strong support for resisting the abolition movement.

A final consideration returns me to the case of “Tookie” Williams. The major argument made for clemency was that he had reformed in prison and, more important, had become an
influential critic of the type of gang violence in which he had engaged. Should the argument have prevailed? On the one hand, if murderers know that by “reforming” on death row they will have a good shot at clemency, the deterrent effect of the death penalty will be reduced. On the other hand, the type of advocacy in which Williams engaged probably had some social value, and the more likely the advocacy is to earn clemency, the more such advocacy there will be; clemency is the currency in which such activities are compensated and therefore encouraged. Presumably grants of clemency on such a basis should be rare, since there probably are rapidly diminishing social returns to death-row advocacy, along with diminished deterrence as a result of fewer executions. For the more murderers under sentence of death there are who publicly denounce murder and other criminality, the less credibility the denunciations have.

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REFERENCES AND FURTHER READING


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