Making the Case for the Deterrence Effect of Capital Punishment

By James M. Reams and Charles T. Putnam

The concept of deterrence plays a central role in all criminal sentencing in New Hampshire’s criminal justice system. Judges in New Hampshire are required to consider three goals of sentencing in every criminal case: deterrence, rehabilitation, and punishment. “Specific deterrence” is a concept where a sentence is imposed on a particular offender in order to prevent him/her from engaging in criminal activity in the future.

“General deterrence” is designed to send a message to members of the general public that if they engage in criminal conduct their actions will be met with punishment. In this way, others are deterred from committing crimes for fear of the consequences meted out by the criminal justice system. It is axiomatic to say that the death penalty serves both the goals of specific and general deterrence.

There is no dispute that the death penalty accomplishes the goal of specific deterrence. It goes without saying that the death of a defendant who has committed capital murder ensures that he will not kill again. For some capital defendants the specific deterrence rationale is particularly appropriate.

For example, terrorists, who have pledged to continue to kill, need to be prevented from killing again and holding them in prison endangers the guards that work there. Also, defendants who have committed murder while already serving a sentence of life without parole or who have killed a prison guard while incarcerated or while attempting to escape from custody, have clearly demonstrated that incarceration alone is inadequate to prevent them from killing again. Thus, specific deterrence is particularly necessary for these categories of capital murder.

The death penalty also serves the goal of general deterrence. In recent years, increasingly sophisticated economic models have been developed to study the deterrent effect, if any, of the death penalty on future crime. The studies are hotly debated in the academic world. As of now, there is no universally accepted conclusion to this debate.

Moreover, as a practical matter it seems that it is difficult to measure, with any degree of accuracy, murders which were prevented as a result of the death penalty deterring them. It is difficult to comprehend how one could count the non-occurrence of a murder, even over large populations, because there are so many types of homicide and because it is difficult to get precise data by murder type.
Nonetheless, fundamental concepts in sentencing in New Hampshire, common sense, and practical experience, support the conclusion that the death penalty must deter some defendants from committing murder. The sentencing structure for most crimes in New Hampshire is premised on the concept that more severe punishments have a greater deterrent effect.

**PENALTIES CALIBRATED FOR SEVERITY OF CRIMES**

Sentencing for crimes in New Hampshire ranges from fines and probation through incarceration and even the death penalty. Those penalties are calibrated, at least in part, to ensure greater deterrence for more serious crime. Part I, article 18 of the New Hampshire Constitution recognizes this rationale of general deterrence by noting that unless sentences are proportional to the crime, “the people are led to forget the real distinction in the crimes themselves, and to commit the most flagrant with as little compunction as they do the lightest offenses.” Within most categories of misdemeanors and felonies, the judge is given broad discretion to impose an appropriate sentence to accomplish the three goals of sentencing mentioned above.

For example, a judge may impose a sentence from no incarceration to up to 15 years in New Hampshire State Prison for a Class A felony depending on the particular circumstances of both the offender and the crime itself. As a result, decisions by the New Hampshire Supreme Court recognize that even where a sentence is not necessary to rehabilitate the offender or provide specific deterrence, a harsher punishment may still be justified on the grounds that the sentence acts as a general deterrent. The belief is that others will be deterred from committing crime by the consequences for their actions. In fact, the very existence of a criminal penalty if a person is caught and convicted is intended to deter others from committing crime even before someone is caught and punished.

There is no reason to believe that the deterrent rationale is different for capital murder than for lesser crimes. In fact, under New Hampshire law, a defendant is only eligible for the death penalty if he is aware of his actions will cause the death of another person and he acts purposely in some manner to cause the victim’s death. Since capital murder requires at least some degree of forethought on the part of the offender, it is likely to have a deterrent effect on at least some murderers. In holding the death penalty is constitutional in the seminal case of Gregg v. Georgia, 428 U.S. 153 (1976), the United States Supreme Court recognized that capital murders committed with specific intent are the most likely type of crime to be deterred by the existence of the death penalty.

Anecdotal evidence also supports the conclusion that the death penalty has a deterrent effect. As Cheshire County Attorney Peter Heed detailed in an email to the Death Penalty Study Commission, in at least one case that he handled as a defense attorney, his client indicated that the only reason that he did not shoot a police officer was his awareness, and fear, of the existence of the death penalty in New Hampshire.

Some members of the Commission, including some members who would retain the New Hampshire death penalty statute, are not convinced that the death penalty deters all kinds of homicides. As the New Hampshire capital murder statutes are drafted and as they are applied, they are not intended to deter all kinds of homicide, because they do not apply to all kinds of homicide. Indeed it is not possible to develop a system of punishment that would deter every criminal act; otherwise it would be possible to calibrate the criminal justice system in such a way to eliminate all crime. Despite these difficulties, the deterrence theory provides a compelling rationale for retaining the New Hampshire death penalty statutes.

In this regard, if New Hampshire’s capital murder statutes save even one innocent life by deterring even one capital murder, it should be an acceptable choice for the state to maintain those statutes. Is it not, in fact, morally required to save the innocent, if unknown, life? The state shoulders obligations to protect innocent lives in many other contexts. Laws against drunk driving, for instance, are intended to deter risky behavior that endangers innocent third persons as well as drunk and their passengers (some of whom are entirely innocent, like children, and some who are not, like social guests). Drunken driving laws do not, of course, deter all drunk driving, but that’s not the test for legislation in a democratic society — the legislature deems the trade offs between imperfect protection, imperfect deterrence and imperfect punishment to be worth the cost of maintaining these laws.

**STUDIES SHOW MURDERS PREVENTED BY DEATH PENALTY**

Moreover, with the caveats about the academic studies discussed above, it is still worth noting that there is a substantial body of scientific literature that supports the deterrent effect of the death penalty. While the conceptual

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it is difficult, if not impossible, to measure with any precision the deterrent effect of the death penalty, the academic studies showing a deterrent effect support the practical observations and common sense experience discussed above.

The groundbreaking study on this path was the development of a sophisticated econometric model by Isaac Ehrlich, The Deterrent Effect of Capital Punishment, 65 American Economic Review 397 (1975). Ehrlich concluded that there was a deterrent effect caused by the presence of capital punishment.

Many authors have continued the work of Ehrlich and developed even more sophisticated measurement models based upon criticism of Ehrlich’s work. An extremely significant work was published by Dezhbakhsh, Rubin, and Shepard entitled “Does Capital Punishment have a Deterrent Effect: New Evidence from Post-Moratorium Panel Data,” 5 American Law and Economic Review (Fall 2003).

Dezhbakhsh, et al. used panel data from 3,054 counties across the country covering the period from 1977-1996 to look at a deterrent effect of capital punishment. The time period covers the resumption of the death penalty through the most recent data available in 2003. Dezhbakhsh, et. al. concluded that the data showed that there was “a significant deterrent effect” from the use of capital punishment. Dezhbakhsh, supra at 25. They further calculated that an average of 18 murders were not committed as a result of capital punishment. Dezhbakhsh, supra 21-22.

“Our results suggest that the legal change allowing executions beginning in 1977 has been associated with significant reductions in homicide” Dezhbakhsh, supra at 25.

In fact, when Texas had an unofficial moratorium on executions, Cloninger and Marchesini reported that the stay “appears to have contributed to additional homicides.” Cited in Dezhbakhsh, supra at 7


Shepard also states that “it is evident that the murder rates in death penalty states have been declining since 1977, while murder rates in non-death penalty states have been increasing...[and that] the difference in the trends of states with capital punishment and states without capital punishment widens as the number of executions increases.” Shepard, supra at 4.

The Shepard study also analyzed data to determine if all types of murders are deterred by the death penalty and if the length of time on “death row” affected the murder rate. Shepard found that “of all of the measured murders—whether committed by intimates, acquaintance or strangers; whether a crime of passion or consequence of another felony; whether a crime against whites or African Americans—are deterred both by death penalty sentences and by executions.” Shepard, supra at 9.

Not surprising, the data documenting a deterrent effect for the death penalty has resulted in calls for the use of the death penalty to save lives. See Sunstein and Vermeule, Is Capital Punishment Morally Required? The Relevance of Life-Life Tradeoffs, U. of Chicago Law School (Mar. 2005).

Sunstein and Vermeule’s argument essentially is that saving the lives of unidentified, but quantifiable, victims mandates the use of the death penalty to protect those innocent lives. They further argued that if there is a possibility that the death penalty will save one innocent, but unidentified, life the state is obligated to take the steps needed to protect that life.

Despite the scientific literature tending to show that the death penalty has a deterrent effect, there is also a significant body of literature that comes to the opposite conclusion. Nonetheless, the majority of the Commission members believed, for the reasons articulated above, that common sense and experience support the conclusion that the deterrent effect of the death penalty still exists even if the deterrent effect is not precisely quantifiable.

New Hampshire’s death penalty statutes are narrow in scope and rare in application. In this regard, the death penalty in New Hampshire’s capital punishment system sends a message that the death penalty is reserved as an exemplary punishment for particularly egregious homicides. The Commission members feel that because the death penalty is applied only for a select group of the worst crimes and the worst criminals, the deterrent effect is heightened. In this regard, that effect may not be entirely lost even when a jury finds that mitigating factors outweigh aggravating factors and votes not to impose the ultimate punishment.