

THE ADMINISTRATION OF CAPITAL PUNISHMENT

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Like most Americans, I am not morally opposed to capital punishment under certain circumstances. Early in my research on the death penalty, however, I became convinced that flaws in its imposition warranted abolition. Now, nearly twenty years later, I am not so sure. The efforts of the U.S. Supreme Court, elected officials, concerned citizens, and death penalty opponents have wrought changes in the administration of capital punishment in recent years that address many of these flaws and have caused me to reconsider my position. A close examination of recent empirical evidence challenges many widely held assumptions about how the death penalty is imposed. Most significant among these relate to the issues of fairness, reliability and cost.

Fairness

While the issue of fairness encompasses a host of factors, the most common concern is whether the death penalty is imposed against racial minorities more often than whites because of their minority status. There is little doubt that the death penalty, like other penal sanctions, has been applied in a manner that was racially discriminatory in the past. Currently, critics charge that the death penalty is still imposed in a discriminatory manner, arguing that African Americans, while only 12% of the U.S. population, constitute 40% of the death row population and 35% of those executed.¹ Proponents, however, may quickly point out that when the population *at risk* is used, instead of the general population, African Americans are actually less likely than whites to receive

capital punishment because African Americans account for over 50% of those arrested for committing homicide.²

These simple comparisons cannot be relied on in determining whether capital punishment is administered in a racially biased manner. To show that the system is discriminatory, one must carefully control for legally relevant factors that could have influenced the imposition of the sanction. Only then can one presume that some of the residual disparity could be due to inappropriate racial considerations.

Studies thus performed during the modern era³ have found little evidence that blacks are sentenced to death more often than whites for committing similar murders. Although some studies have found that cases involving black offenders and white victims are more likely to be prosecuted as death penalty cases than similar cases involving other racial combinations, methodological shortcomings have made it impossible to determine the veracity of these reported relationships.⁴ The only consistent racial disparity found in these studies is based on the race of the victim, cases involving white victims being prosecuted more often as death penalty cases than those involving black victims. However, it is unclear how such a relationship may be considered the result of discrimination. For example, such discrepancies could result from the socioeconomic status of the victim, the failure of defendants to accept plea bargains in such cases, or the lack of insistence on the part of black victims' families to push for the death penalty rather than racial discrimination. Consideration of these potential explanations is virtually absent from research studies on the death penalty.⁵

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PRESIDENT'S MESSAGE

As I write this, I am preparing to head off to lovely Bristol, Rhode Island to attend the regional meeting of the NEACJS. This will be the first of five such regional meetings I will be attending over the next six months. The main message I will carry to each meeting is one I want to share with you here. As you may know, ACJS is well on the road to assuming its rightful leadership role as the “keeper of the flame” with respect to quality criminal justice education. Let me briefly tell you where we have been on this road, where we are now, and where we are going.

This past year, the ACJS Executive Board adopted the position that ACJS would become a national certification body for criminal justice education. Pursuant to that decision, the Board charged an ad hoc committee with developing both standards and a plan for implementing those standards. The proposed standards and a preliminary plan were indeed developed and presented to the Board at the annual meeting in Las Vegas in March. In essence, the plan proposed adopting an *augmented* version of the standards used last year by the Massachusetts Board of Higher Education to assess criminal justice programs in that state under what was called the “Quinn Bill” assessments. These standards are intended to replace our ACJS Minimum Standards currently in use. The ad hoc committee also proposed a procedure for doing program reviews and for granting certification. The Board accepted the main outline of this plan, and the committee was charged with seeking additional information, clarifying, and further refining the plan before the Board would make a final determination on adopting both the standards and the procedures. As this process is not completed, we have not yet released these preliminary standards and procedures to the general membership. Because they are not finalized, and are thus subject to revision, it is our view that releasing them prematurely would only cause confusion about what ultimately will be formally proposed. That said, the Massachusetts BHE standards themselves are in fact available on their website, and they reflect to a considerable degree the substance of what we are considering.

To assist in moving us forward, I have expanded the existing Academic Review Committee (ARC) by rolling it and the ad hoc committees on standards and certification

and on assessment into one ARC committee. The co-chairs are Jay Berman, Dave Owens, and Tom Winfree. That seventeen person group now includes many of the folks in ACJS who have contemplated accreditation and certification over the years, several former ACJS presidents, former Board members, representatives of both four-year and two-year programs, and members from every region of the country. They and the members of the Board, as well as myself, take this as a very serious task, and we are giving every consideration to the concerns, issues, and problems that surround the undertaking. Once the Board has preliminarily adopted the standards and the plan for carrying out certification, we will present these to the membership for review and comment. Following that, revisions deemed necessary by the Board will be made, and only then will final adoption occur.

Needless to say, we want to move expeditiously but not hastily. Perhaps it is appropriate to consider the words of the U.S. Supreme Court’s *Brown v. Board of Education* decision of 50 years ago in this context, namely to move forward with “all deliberate speed.” Criminal justice education, as we know it, is now in its fourth decade. I personally have been a criminal justice educator for 33 years. During that time, we have come a very long way. But we still have a ways to go. When I ran for this office three years ago, my “campaign” statement emphasized my desire to work to do everything I could to improve the quality of our educational programs. My fervent hope as an educator – as a kind of legacy if you will — is to leave this presidency next year with our field better and stronger in this respect than it was when I assumed office. This can only happen with your help and participation. So, I ask you to attend your regional meetings, consider and debate the issues of certification, watch for mailings and website postings, and ultimately help us – all of us — to do ourselves proud in our chosen profession.

Jim Finckenauer
President, ACJS

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Further, empirical findings often directly contradict the discrimination hypothesis. For example, research examining capital murders in Texas during 1974-88 found that cases involving white victims were more likely to be prosecuted as death penalty cases when the offender was white as opposed to black.⁶ Additionally, regardless of the reason for the over-representation of white victims among the death-sentenced population in Texas, it appears that this trend is reversing. The percentage of defendants sentenced to death for killing white victims has consistently decreased from over 90% during the 1970s to less than 50% by 2003.⁷ A comparison of death-sentenced inmates to homicide arrests during 1994-2001 confirms that cases involving white victims are no longer over-represented among death row inmates in Texas. In fact, controlling for legally relevant variables, the proportion of black victim cases and white victim cases resulting in death sentences were nearly identical. The only racial combination significantly over-represented on death row in comparison to arrests was the killing of Asians by African Americans. What theory of discrimination explains the harsher treatment of one minority group by another?⁸

Determining whether racial bias influences the administration of capital punishment is much more complicated than suggested by those quoting simple, unadjusted racial proportions. Evidence of racial discrimination in death sentencing in the modern era hinges on differences based on the race of the victim during the early stages of case processing. Upon closer examination, however, such findings often fail to adequately rule out other potential explanations for these differences.

Reliability

One of the greatest fears among both opponents and proponents of the death penalty is that an innocent person may be executed. The specter of executing innocent defendants has been the driving force behind the abolition of the death penalty in other countries. The abolition of capital punishment in England, for example, is credited in large part to the execution of James Hanratty in 1962, who was widely believed to be innocent.⁹ Exonerations of non-capital inmates using DNA testing, the commutation of death row inmates in Illinois by Governor Ryan (due in large part to his fear of executing an innocent person), and even the influence of Hollywood with the release

of *The Life of David Gayle*, have recently caused many Americans to question whether all of those awaiting execution are guilty of the crimes for which they were sentenced to death.

The empirical questions that arise from such speculation involve the actual odds of executing an innocent person and the evidence upon which such estimates are based. In a landmark study, Bedau and Radelet cataloged 350 instances where individuals were wrongfully convicted of capital or "potentially" capital crimes in the U.S. during the twentieth century.¹⁰ A response by the U.S. Attorney General's Office illuminates some of the problems in defining wrongful convictions and estimating their prevalence.¹¹ Of the 350 defendants convicted of "potentially capital crimes" in the original study, Markman and Cassell point out that only 139 were actually sentenced to death, of which only 23 were carried out. Assuming that each of the 23 executed individuals were actually innocent, they calculated the likelihood of executing an innocent person to be less than 1/3 of 1% (23 of approximately 7000 executions carried out during that period). Markman and Cassell further challenged the evidence relied on by Bedau and Radelet in determining that these 23 executed individuals were actually innocent. Bedau and Radelet admitted that "no state or federal officials have ever acknowledged that a wrongful execution has taken place in this century."¹² The evidence they relied upon to "prove" innocence in these cases consisted of "another person's confession (6 cases), the implication of another person (3 cases), a state official's opinion (6 cases), and 'subsequent scholarly judgment' that the defendant was innocent (8 cases)."¹³

Bedau and Radelet's study served as the starting point for the list of wrongful convictions in death sentences during the modern era now maintained and updated by the Death Penalty Information Center (DPIC). This compilation, found on the DPIC website under the title *Cases of Innocence: 1973 - Present*, includes short summaries of the cases of 113 persons wrongfully sentenced to death as of March 1, 2004.¹⁴ The DPIC restricts the list to cases in which "[defendants] had been sentenced to death, and subsequently either a) their conviction was overturned and they were acquitted at a retrial, or all charges were dropped; or b) they were given an absolute pardon by the governor based on new evidence of innocence." In a footnote, the DPIC admits that the

strength of evidence suggesting innocence varies considerably among these cases, from 5 that did not meet their stated criteria for inclusion to 13 cases in which "DNA played a substantial factor in establishing the innocence of the inmate." While the question of factual guilt would appear to be foreclosed in the latter cases, DNA evidence seldom completely exonerates the defendant. As noted in an example by the Indiana Criminal Law Study Commission, "post-trial DNA testing showing that semen evidence belonged to the rape-murder victim's husband, not the defendant, does not prove that the defendant did *not* rape and murder the victim. Few convictions are the result of a single piece of evidence. However, if a reviewing court finds that the semen played a strong part in proof of guilt, the remaining evidence, depending on its strength, may or may not be sufficient to maintain the court's full confidence under the law in the defendant's conviction."¹⁵

While the DPIC "innocence list" is often quoted as the authoritative source, the limitations of the list should not be overlooked. First and most obviously, none of these cases actually resulted in execution. To opponents of the death penalty, the list nevertheless shows, by those that have come to light, the pervasiveness of critical mistakes in capital cases. Coupled with the fact that such investigations typically cease once a death-sentenced inmate is executed, opponents state with confidence that innocent people have, and continue to be, executed. On the other hand, proponents sometimes interpret these data as evidence that fail-safes built into the system work to free those who are potentially innocent from death sentences before execution. Of the more than 7000 defendants sentenced to death during this era, incontrovertible evidence that an innocent person has been executed does not exist.

Each of these arguments, however, assumes that the defendants in these cases were "factually" innocent of the crimes for which they were sentenced to death. Reversals in these cases, however, turn much more often on the question of "legal" as opposed to "factual" guilt, as noted by the Indiana Criminal Law Study Commission. In many of these cases, reviewing courts remained confident that the defendants were factually guilty, but were required to reverse based on procedural infirmities that they believed could be remedied upon retrial. In fact, such mistakes have warranted reversals in literally thousands of death penalty

cases during the modern era, nearly all of which resulted in subsequent convictions. A handful did not.

Occasionally, prosecutors are unable or reluctant to retry a case. In a case that is reversed for procedural errors, prosecutors are often barred from using some of the evidence against defendants in future prosecutions. Other evidence may have been misplaced or destroyed. Witnesses against the defendant, often co-perpetrators, have either already received, or in some cases failed to receive, their promised deal, and thus have no incentive to testify for the prosecution again. Other witnesses may be difficult to locate or even deceased. As time passes, witness recall is affected, which can inject doubt into the proceedings. Public sentiment may also have changed, no longer supporting a prosecution.

While courts overturn cases and prosecutors fail to sustain new convictions for a myriad reasons, seldom are defendants “factually” innocent of the crime for which they were initially sentenced to death.¹⁶ To speak of the initial convictions in such cases as “miscarriages of justice” as subsequent inability to convict as “exonerations” distorts the true nature of these events.

Cost

Prior to the modern era, the cost of capital punishment was not really an issue for the sanction was carried out relatively quickly and efficiently. However, the “super due process” afforded capital defendants in the modern era has meant extensive appeals, numerous reversals, and associated delays in the execution of death sentences. A series of studies conducted mainly by journalists since the late 1980s have found the procedures associated with the death penalty to be quite costly, exceeding by far the cost of life imprisonment. Again the most prolific disseminator of these findings has been the DPIC, stating that the overall cost of the death penalty is about \$2 to \$3 million per execution.¹⁷ Because these estimates are based on questionable assumptions, however, they should not be uncritically accepted.

One of the studies quoted extensively in the popular press, on websites, and in the academic literature was published by the *Dallas Morning News*, which estimated the cost of a death penalty case in Texas to be \$2.3 million.¹⁸ Many of the specific cost estimates used in the study appear to be well-grounded and are consistent with other

available sources. For instance, the reporter estimated the cost of a death penalty trial to be \$266k, the cost of state and federal appeals to amount to nearly \$200k, and the cost of incarceration on death row prior to execution to be \$137k. However, the reporter included a mysterious \$1.7 million “estimate of appellate court costs and outlays associated with the death penalty.” Excluding this unfathomable and completely unverifiable¹⁹ “per capita” estimate, a death penalty case in Texas, at about \$600k, would appear to fare favorably with a “40-year” life sentence, which was estimated to cost \$750k in the same report.

While the *Dallas Morning News* report and those completed by other journalists provide only rough estimates, economists have occasionally been enlisted to study the issue. The first comprehensive examination was performed by Duke researchers to estimate the cost of capital punishment in North Carolina.²⁰ Cook and colleagues included in their calculations not only the direct costs of litigation, such as fees for public defenders, prosecutors, and judges, but they also calculated an hourly “load” rate that would account for the indirect costs associated with trial, as well as appeals and retrials. The researchers performed similar calculations for non-capital trials where defendants were sentenced to a 20-year “life” prison sentence. They provided two separate cost estimates. In the first, a capital murder case was found to exceed the cost of a non-capital first-degree murder case by \$163k (\$67k over the cost of a non-capital trial plus an additional \$262k for appeals, minus \$166k in prison savings). In a second estimate, the researchers calculated the cost for “successful” capital prosecutions, meaning those resulting in execution, including the costs associated with reversals, resentencing, and ultimately housing for life many of those initially sentenced to death. Assuming a 10% successful execution rate for those initially prosecuted as capital murder, the cost per execution was estimated to be \$2.16 million. While this is the figure favored by the DPIC and other abolitionist groups, the researchers admit that the estimate is tenuous and dramatically affected by the percentage of death penalty cases assumed to result in executions. For example, the authors’ calculation of cost savings per execution decreases to \$780k if the hypothetical execution rate is increased to 30%.

Their study, however, was completed in 1993, before a major change in the statutory definition of “life.” Rather than 20 years,

North Carolina inmates convicted of capital murder must now serve the rest of their natural life in prison with no possibility for parole. Given the average age at entrance to prison and the average life expectancy, it has been estimated that such inmates will serve about 47 years behind bars.²¹ Including the additional 27 years of confinement, the total cost of a life sentence would be \$593k.²² Under the current definition of life, the cost associated with a capital murder case in North Carolina appears to be a bargain, saving the state \$264k in incarceration costs. Also in recent years, the percentage of death penalty cases resulting in executions has increased dramatically from the early modern era, lowering the costs associated with unsuccessful capital murder prosecutions. Given the lack of parole eligibility, the cost savings of life imprisonment essentially washes out when the rate of success in executing death sentences reaches 50%.²³

The available evidence thus suggests that capital punishment, if carried out with any degree of regularity, can be cost effective.

Conclusion

In the early modern era, states went through a period of trial and error, in which the Supreme Court defined the constitutional limits of statutes through its review of specific cases. It was during this period of flux the above concerns came to light. Since that time, elected officials have made dedicated efforts to address these concerns, making the process fairer by providing greater resources for defense, making the process more certain by providing for post-conviction DNA testing, and making the process more efficient by streamlining appeals. Routinization in the process during recent years has resulted in significant changes in the way that the death penalty has been administered, although admittedly at different levels of success depending on the jurisdiction. First, this routinization seems to have attenuated racial disparity. Any remaining “disparity” likely stems from factors other than inappropriate racial considerations. Second, the danger of executing a truly innocent individual has been shown to be virtually nil. With safeguards and watchdogs in place, along with the advance of scientific testing such as DNA analysis, there is very little chance that an

THEORIZING CJ PHENOMENA: A CALL FOR DEVELOPING INFRASTRUCTURE

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Introduction: Crime Theory Substituting for CJ Theory

What is criminal justice theory? What does it mean to theorize criminal justice phenomena? Amazingly, despite the large number of academic programs and scholarly works dedicated to studying criminal justice, our field has hardly asked, let alone answered, these fundamental questions (exceptions include Bernard and Engel 2001; Marenin and Worrall 1998; Hagan 1989). A strong theoretical infrastructure is the heart and soul of any area of study. The time is past due to begin recognizing and developing a theoretical foundation explicitly intended to make theoretical sense of criminal justice.

It is not that Criminal Justice Studies and Criminology aren't experienced with theory and the activity of theorizing. Our field has amassed an impressive body of theoretical work. Its focus, however, has concentrated mostly on answering the why of crime and explaining crime rates. When we use the term "theory" in our field, we are generally referring to crime theory. Our "theory courses" and "theory textbooks" concentrate almost exclusively on explaining crime. Theoretical research in our field, as evidenced by the articles published in *Criminology* and *Justice Quarterly*, mostly test pre-existing explanations for crime. Our field's theoretical infrastructure is built on explanations of crime, not criminal justice.

An underlying assumption in our field is that the discipline Criminology is more interested in explaining the why of crime and thus by nature more theoretically oriented. Studying criminal justice is a policy-based pursuit more interested in effecting practical crime-control initiatives, as derived from theories of crime (Gibbons 1994). Studying criminal justice is tacitly relegated to the limited role of discerning "how to" and "what works" – laudable objectives, but incomplete insofar as substantively understanding the nature of our formal reaction to crime. Dantzker's (1998:107) delineation between Criminology and Criminal Justice is typical of this view.

Criminology is the scientific study of crime as a social phenomenon – that is, the theoretical application involving the study of the nature and extent of criminal behavior. Criminal Justice is the applied and scientific study of the practical applications of criminal behavior – that is, the actions, policies, and functions of the agencies within the criminal justice system charged with addressing this behavior.

Are not both Criminal Justice Studies and Criminology diminishing their theoretical integrity with this conception? Surely the study of criminal justice, by both criminological and criminal justice scholars, has involved far more than merely describing its functioning and devising means of crime control. There is no reason that the study of criminal justice cannot be approached in the same way Dantzker views the study of crime. By slightly modifying his quote, Criminal Justice studies could similarly be viewed as *the scholarly examination of criminal justice as a social phenomenon – that is, the theoretical application involving the study of the nature and extent of criminal justice behavior.*

Some traditional criminological theorists might take exception to this view. After all, they would argue, crime theory has already been used as the foundational material for developing *models* of criminal justice functioning (see Einstatder and Henry 1995). This approach to understanding criminal justice takes traditional crime theories and infers a model of criminal justice functioning based on that particular conception of crime causation. While modeling CJ functioning does shed important theoretical light on the system, even those involved in the activity admit that these models do not constitute the development of theory (Einstatder and Henry 1995). This exercise also reinforces the notion that there can be no other theoretical foundation for understanding criminal justice behavior, besides those pre-existing theories designed to make theoretical sense of crime.

Criminal Justice Theory: Varieties and Possibilities

Theorizing crime has proved to be a complex endeavor. The object of study is diffi-

cult to identify and agree upon, a plethora of theories compete for prominence, and determining the strength and worth of these theories is wrought with controversy and conflicting evidence. This description is not meant as an indictment; rather, criminological theory's complexity and conflicts render it dynamic and intellectually stimulating.

Theorizing criminal justice harbors high potential for this type of complexity and stimulation. The central reason is the multifaceted nature of our object of study. The entity we call "criminal justice" is actually comprised of numerous objects of study – including the criminal justice system, each of the major components within that system (police, courts, corrections, juvenile justice), crime control agencies and practices that fall outside the formal criminal justice system (private sector agencies, social services), and other participants in criminal justice including, but not limited to, academic researchers, the media, the legislative body, and the public.

The following questions are just a sample of the types of inquiry we're interested in when theorizing criminal justice.

- How do we best make theoretical sense of the criminal justice apparatus's (CJA) long-term historical development?
- What accounts for the steep growth in power and size of the CJA over the last 30 years?
- How do we best make theoretical sense of current and possible future trends associated with the CJA?
- On what theoretical basis can we best understand various controversial issues facing the CJA (e.g., racial profiling, death penalty, erosion of constitutional safeguards, privatization, etc.)?
- On what theoretical basis can we best make sense of past and current criminal justice reform efforts, including what drives them and why they succeed or do not?
- How does the CJA affect the larger society in which it operates; conversely, what societal forces shape the CJA?
- How do we best make theoretical sense of the behaviors of criminal justice practitioners?

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execution will be deemed a miscarriage of justice because of an individual's factual innocence. Finally, the process itself has become more efficient without sacrificing protection for defendants. Capital punishment in *active* death penalty jurisdictions is at least as efficient as life imprisonment, and perhaps more so.

Endnotes

¹JESSE L. JACKSON, SR. ET AL, *LEGAL LYNCHING: THE DEATH PENALTY AND AMERICA'S FUTURE* (Random House 2003).

²James Alan Fox & Marianne W. Zawitz, *Homicide Trends in the United States*, US Dept. of Justice—Bureau of Justice Statistics, available at <http://www.ojp.usdoj.gov/bjs/homicide/homtrnd.htm> (last accessed March 12, 2004); WILLIAM WILLBANKS, *THE MYTH OF A RACIST CRIMINAL JUSTICE SYSTEM* (Brooks/Cole 1987).

³The modern era includes the time period during which states reorganized their death penalty schemes to comply with the dictates of the U.S. Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238 (1972).

⁴See United States General Accounting Office, *Death Penalty Sentencing: Research Indicates Pattern of Racial Disparities*, Report to Senate and House Committees on the Judiciary (Feb. 1990).

⁵These studies also often fail to consider the role that the victim may have played in prosecutors' decision not to seek the death penalty, such as when a drug dealer is robbed and murdered or a rival gang member is killed in a drive-by shooting. See Jon Sorensen et al, *Empirical Studies on Race and Death Penalty Sentencing: A Decade After the GAO Report*, 37 CRIM. LAW BULLETIN 395 (2002).

⁶Jonathan R. Sorensen & James W. Marquart, *Prosecutorial and Jury Decision-Making in Post-Furman Texas Capital Cases*, 28 REV. OF L. & SOC. CHANGE 743, 766 (1990-1991).

⁷While space constraints preclude further discussion, a full description of the methodology and analysis is available from the author upon request.

⁸This "significant" finding is much more likely the result of shortcomings in the SHR data. For instance, many important legally relevant variables are missing from the data that could explain the harsher treatment in the processing of inter-racial homicides involving black offenders and Asian victims. One likely explanation for the difference is that a number of the cases involving Asian victims were committed during serial rob-

beries of Asian businesses and included many additional robberies, assaults, and even murders.

⁹Ironically, a recent DNA test carried out at the behest of his family to conclusively clear Hanratty's name actually proved that he was in fact guilty of the crime. *James Hanratty: The Final Verdict*, BBC News (May 10, 2002), available at <http://news.bbc.co.uk/1/hi/wales/1977508.stm> (last accessed on March 12, 2004).

¹⁰Hugo Bedau & Michael Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21 (1987).

¹¹Stephen Markman & Paul Cassell, *Protecting the Innocent: A Response to the Bedau-Radelet Study*, 41 STANFORD L. REV. 121 (1988).

¹²Cited by *id.* at 18.

¹³*Id.* at 127.

¹⁴Death Penalty Information Center, *Cases of Innocence: 1973–Present*, available at, <http://www.deathpenaltyinfo.org/article/php?scid=6&did=109> (last updated March 1, 2004).

¹⁵Indiana Criminal Law Study Commission, *The Application of Indiana's Capital Sentencing Law: Findings of the Indiana Criminal Law Study Commission*, 6-7 (Jan. 10, 2002), available at, http://www.gov/cji/lawstudy/law_book.pdf (last accessed March 12, 2004).

¹⁶The basis for my insights and conclusions in regard to these cases extends beyond the literature. I undertook an extensive re-examination of the seven Texas cases included in the DPIC list of innocence. Although egregious procedural errors occurred in the prosecution of a couple of these cases, the weight of the evidence suggests that each of the defendants was either guilty of the crime for which he was initially convicted, or at a minimum could have been tried as a party to the crime.

¹⁷See Richard C. Dieter, *The Costs of the Death Penalty*, presented to the Joint Committee on Criminal Justice, Legislature of Massachusetts, Mar. 27, 2003.

¹⁸Christy Hoppe, *Executions Cost Texas Millions*, DALLAS MORNING NEWS, Mar. 8, 1992, available at <http://www.tcadp.org/costs.html> (last accessed Nov. 4, 2003).

¹⁹While this figure accounts for the bulk of Hoppe's overall estimate, there is no explanation of how this figure was derived. The U.S. General Accounting Office, 1989 (GAO) is listed as the source of this estimate. In an email communication, Hoppe stated that she no longer retained background materials for that story, but did re-

call that the figures were presented to a congressional subcommittee by the GAO and that she had "found out about its existence through a printed article on the subcommittee hearing." Email correspondence with Christy Hoppe, reporter for DALLAS MORNING NEWS, (November 5, 2003). Nevertheless, a search of government documents and secondary sources did not turn up the source of this estimate. The only 1989 GAO report found referring to the cost of capital punishment, *Criminal Justice: Limited Data Available on Costs of Death Sentences, Report to the Chairman, Subcommittee on Civil and Constitutional Rights, Committee on the Judiciary, House of Representatives*, did not include any discussion of federal outlays on the death penalty. In fact, the first caption in the report read, "Federal Data on the Cost of the Death Penalty Are Nonexistent."

²⁰Philip J. Cook et al, *The Costs of Processing Murder Cases in North Carolina* (May 1993), available at <http://www.pps.aas.duke.edu/people/faculty/cook/comnc.pdf> (last accessed on March 12, 2004).

²¹Mark Goodpaster, *Cost Comparison Between a Death Penalty Case and a Case Where the Charge and Conviction is Life without Parole*, in THE APPLICATION OF INDIANA'S CAPITAL SENTENCING LAW: FINDINGS OF THE INDIANA CRIMINAL LAW STUDY COMMISSION, 122A-122FF (2002).

²²Based on the operating cost, in 1991 dollars, of \$15,819 per year to house inmates in minimum security, the additional 27 years would cost \$427k (added to the \$166k in savings for the 20 years for a total of \$593k). *Supra* note 19 at 72.

²³Based on a re-calculation of the authors' "Summing up the Costs." *Supra* note 19 at 77-79. ■

UPCOMING ACJS

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- What best explains the internal functioning and practices of criminal justice agencies?

These questions demonstrate that our field's crime theories, because they have been constructed specifically to explain crime, are insufficient for providing adequate answers. Attempting to explain the behavior of the state, public agencies, the criminal law apparatus, trends in crime control thinking and practice, private crime control organizations, and trends in social control, necessitate a theoretical infrastructure unique to these unique objects of study.

Numerous approaches to developing criminal justice theory are possible. One was already mentioned: constructing models of criminal justice functioning based on differing theories of crime. David Duffee (1990) has taken the more traditional approach by attempting to articulate a general theory of criminal justice, grounded in the context of local communities. Bernard and Engel (2001) organize criminal justice theory around the possible dependent variables employed in the existing literature. Another avenue has been to answer specific theoretical questions about a specific object of study. David Garland (2001), for example, limits his theoretical analysis to the question of what accounts for the rapid growth of criminal justice over the last 30 years. Other researchers concentrate on explaining individual practitioner behavior – such as why some police officers engage in corruption. Finally, some academics have worked on developing normative theories of criminal justice, concentrating on philosophical principles intended to guide criminal justice practices (Braithwaite and Pettit 1990; Ellis and Ellis 1989).

Theoretical Orientations— Infrastructure Beginnings

Despite these various avenues for developing criminal justice theory, our field still does not have a well-recognized theoretical infrastructure about criminal justice. To begin the process of rectifying this situation, Kraska (2004), in his book, *Theorizing Criminal Justice: Eight Essential Orientations*, has taken the unique approach of identifying and articulating the contours of eight “theoretical orientations” found in traditional and contemporary scholarship about the criminal justice system and trends in crime control. Theoretical orientations are not specific theories ready made for test-

ing; rather, they are broad-based interpretive constructs. Each orientation frames how we think about criminal justice phenomena, guiding the questions we might ask, influencing the research and specific theory-testing we might conduct, orienting our interpretations of criminal justice phenomena, and affecting policy and practice. These orientations are organized around the notion of metaphor – an approach that helps us make theoretical sense of criminal justice by relating it to something else. They include criminal justice as: (1) Rational-Legalism; (2) System; (3) Crime Control vs. Due Process; (4) Politics; (5) Socially Constructed Reality; (6) Growth Complex; (7) Oppression; (8) Late Modernity.

These eight orientations demonstrate that our field actually has a rich set of theoretical lenses through which to make sense of criminal justice phenomena, aside from theories about crime. The multi-theoretical approach found in this book not only catalogs the diversity of thinking and scholarly work in our field of study about criminal justice, it also avoids the ethnocentric tendency to view phenomena through a single theoretical filter (Kraska 2004). Even though the system's metaphor is the most recognized, a large body of work has also emerged using the interpretive orientation (social constructionism/cultural studies), the political framework, the growth-complex orientation, and most recently, studying criminal justice through the lens of “late modernity.”

The oppression orientation is another informative example. Critical criminology has a massive body of work theorizing the behavior of the State, the legal apparatus, and trends in social control – all in relation to gender, race, and class. In fact, compared to this area's analysis of criminal justice behavior, explaining law-breaking has been a secondary pursuit. This is one reason critical scholarship often seems out of place in most criminological theory textbooks: their object of study – an oppressive crime control apparatus – does not coincide well with theories focused only on crime causation. Even when critical criminologists explore the causes of crime, they most often focus on the oppressive features of how the State differentially defines acts as crime among marginalized groups (again, focusing on State behavior). Theorizing criminal justice seems a better description of this large body of work than does theorizing crime.

Conclusion: Nothing as Practical as a Good Theory

In 1998 Marenin and Worrall (1998:465) asserted that “criminal justice is an academic discipline in practice but not yet in theory.” Our field has not placed high value on this endeavor for two primary reasons. The first has already been discussed – crime theory suffices. The second is more difficult to overcome: while exploring the why of crime has *prima facie* importance, our field has not articulated nor acknowledged what value theorizing criminal justice provides us. Some assume, in fact, that studying criminal justice is inherently and necessarily a-theoretical because it concentrates on practice. The notion that practice can somehow be severed from theory has been thoroughly debunked in most other major fields of study (Bernstein 1976; Fay 1977; Habermas 1972; Carr and Stephens 1986). Theory and practice are implied in one another; no policy analysis, implementation, strategic plan, or practitioner action is devoid of theory. To deny the integral role theory plays in all these instances is to remain ignorant of its influence.

Theorizing criminal justice phenomena should also not be viewed as an endeavor intended exclusively for practical change. Numerous scholars in our field, including myself, find studying our society's reaction to crime intellectually stimulating in and of itself. Throughout my career, I've been fascinated with criminal justice phenomena – much like a biologist studies the animal kingdom or an anthropologist studies indigenous subcultures (see Kraska 2001). Studying humans and organizations attempting to control wrong-doing (and sometimes engaging in wrong-doing while trying to control it) yields intriguing insights about the nature of society, our political landscape, and cutting-edge cultural trends. In short, how we react to crime tells us a lot about ourselves and where our society might be headed.

Theories are repositories for substantive thought, filters for thinking through our history and major contemporary issues and trends, the foundational material through which we develop innovative solutions to our problems, and the backdrop for all research in our field – whether it be policy-based, descriptive, or theoretical. Developing and teaching a body of knowledge about criminal

justice requires the incorporation of criminal justice theory in our writing and research, within the classroom, and in our criminal justice and criminology curricula. Establishing a well-recognized theoretical infrastructure about criminal justice should be a higher priority. Thinking about and understanding the why of criminal justice is vital for credible pedagogy; it is also essential in laying claim to being a legitimate academic discipline.

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BOOK REVIEWS

Forst, B. (2004). *Errors of Justice*. New York: Cambridge.

REVIEWER: MICHAEL J. DeVALVE
Sam Houston State University

Forst's issue for the work is an important one: how might the criminal justice system be more effective at both limiting false positives (errors of due process) and false negatives (errors of impunity). The hook is legitimacy; our current dark state of affairs is the result of the criminal justice system's failure to avert a quiet crisis of confidence (sometimes that crisis is not so quiet, as evidenced by examples Forst provides). That failure is the result of an inability to perform promised roles: catch and punish offenders, maintain the peace for and not to molest non-offenders, and protect the constitutionally guaranteed rights of everyone. Over the course of several chapters, Forst applies his model to errors of justice in police, courts, and corrections contexts.

Toward his end, Forst recommends we seek an "elusive equilibrium" between an overemphasis on errors of impunity and errors of due process. As a key example, he desires to strike a balance between the costs of criminal justice system responses and the costs of future crime, at a point where the total cost of crime reaches a minimum.

For purposes of clarity, Forst uses classical probability-based social science logic as a framework for the idea of justice errors, their address and prevention. Although a sound idea, the execution is a little awkward. For example, in a comparison between prosecutors and researchers, Forst portrays prosecutors as more than likely being praised more for zealous prosecution than for a pursuit of justice. Although this argument is seaworthy, even in an adversarial system, prosecutors should, and more often do, seek to do justice. Thus an important argument for his case is missed: prosecutors and researchers both should serve the idea of Truth, even in an adversarial legal system. It would seem that this last qualification is particularly powerful, given that the value of justice would undergird the otherwise adversarial nature of the criminal court, and would have offered convincing evidence for his point.

An important question it is, but one that is far more difficult to resolve than this work seems to recognize. One conclusion to be drawn from his model is that we should be willing to accept a marginal increase in the number of individuals convicted of crimes they did not commit, in order to decrease the number of culpable individuals who escape punishment. How this mechanism would work is not fully clear; the case is made through a relatively simplistic hypothetical statistical analysis of homogenous cases under laboratory-like conditions. The idea that we should be willing to accept more false positives in order to reduce the number of false negatives may be a result of his use of statistical inferential logic as his framework; the implications of punishing the non-culpable are explored only cursorily.

Despite these criticisms, I feel this work would be useful as one of several readings for a Master's level criminal justice overview or capstone class, or perhaps for a Ph.D. criminal justice proseminar class. Forst's use of examples is beyond question broad and insightful. His linking of social science method and the pursuit of an error-free justice system in this manner seems to offer a unique way of teaching or reinforcing both method and system concepts. Failure for the professor to agree fully with a work such as this only makes class discussions that much more lively. I feel there are considerable problems with Forst's arguments, although his original premise is interesting; nevertheless, I would use his book in my classroom. I would not hesitate, therefore, to recommend that others use it in theirs. ■

Skogan, W., & Frydl, K. (eds.). (2004). *Fairness and Effectiveness in Policing: The Evidence*. Washington, D.C.: The National Academies Press.

REVIEWER: ELIZABETH QUINN DeVALVE
Sam Houston State University

It is important, when studying the area of law enforcement, to be familiar with the history of its implementation and the reason for its necessity, including its general goals and objectives. It is equally important to include an analysis of the fairness and effectiveness of law enforcement in or-

der to examine how well it meets those goals and objectives and if its purpose is evolving and to what end. *Fairness and Effectiveness in Policing: The Evidence* fulfills the need of this second area in an exquisite manner, including analyses of the following topics: a) current research on policing and how it is carried out; b) the nature of United States specific policing; c) an investigation into police behavior, both with people and situations and within organizations; d) effectiveness of police to reduce crime, disorder and fear; e) compliance of police to law; f) legitimacy of the police through police fairness; and g) future research needs for policing.

The authors review research dating from 1968 evaluating what has been found with regard to effectiveness and fairness of policing. An overall assessment illuminates the fact that there are numerous pockets of information that are missing in regard to policing practices. This fact informs us that accurate representations about policing may not be available yet and that research needs to fill these gaps to best understand the current state of policing in the United States.

The content of the report focuses on evaluating police operations in respect to fairness and effectiveness and suggests that police work that the public perceives as "just" more effectively garners a law-abiding society, as opposed to police work that is harsh and indiscriminate. Additionally, the presence of police in society is further legitimized by perceptions of fair treatment. This work explores the juxtaposition of having to respond to relatively nationwide goals, including crime prevention, reduction in disorder and fear of crime, and, more recently, the police role in antiterrorism, combined with the differing policies on how to be most effective across states and, more precisely, jurisdictions. It emphasizes the difficulty in evaluating departments when a wide range of discretion is used by line officers across jurisdictions every day but also addresses the issue of police allocation of resources with competing demands of neighborhood and city-level factors.

The authors indicate that there is a serious lack of research on the nature of policing on police-citizen contact, police behavior, and organizational administration. Fur-

thermore, research focuses almost singularly on patrol officers, thereby excluding integral components of law enforcement. On a more positive note, the issues of race and gender and policing are discussed both in the context of police-citizen interactions and as officer characteristics. In this sense, the authors suggest that there needs to be enhanced research in multiple areas relating to the nature of policing, but information is not completely lacking in every aspect.

A review of the effectiveness of the main model of policing, reactive policing, is presented with an evaluation of other, perhaps more effective, techniques, such as focused policing and community and problem-oriented policing techniques. Furthermore, an assessment is made evaluating the link between police compliance with laws governing their authority and with perceived legitimacy by the public it serves. Areas of police misconduct are reviewed in addition to administration's response to misconduct. Because police are the most visible component of the criminal justice system, the public's judgment of the validity of the system and laws in general can be affected greatly by those representatives seen most often. Finally, the authors propose multiple recommendations to address the lack of research in all areas presented with specific ideas on how best to carry out the needed studies.

This text could be used in a number of courses: a) as a supplement to an introductory undergraduate course in law enforcement so that students can compare goals of policing to effectiveness of current strategies; b) as a guide for evaluation to assess how well a component of the criminal justice system is serving its constituents; and c) as a reader for a graduate seminar in law enforcement where students gain a knowledge beyond the "typical" understanding of law enforcement. Additionally, practitioners may find this text useful to shed light on policing issues that may be present within their own departments.

This reviewer recommends this book emphatically. It has multiple uses in the classroom, both at the undergraduate and graduate level, and is equally useful to practitioners. It does a fantastic job of representing the available research on policing and elucidates the gaps that need to be filled in order for a true understanding of police fairness and effectiveness in the United States. ■

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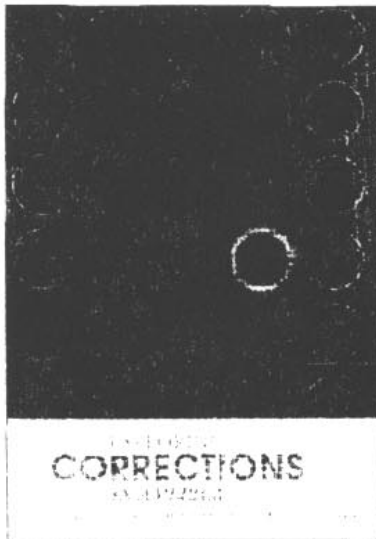
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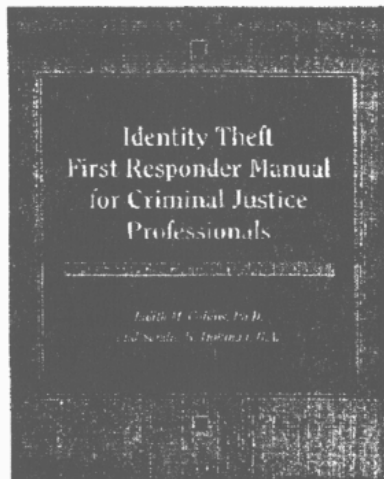
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