Counterblast: Death Penalty Resistance Revisited in the Post-Trust Era

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Abstract: A decade ago this journal reported that support for the death penalty in the United States had begun to wane. This follow-up confirms the continuation of that trend and brings the earlier article up to date. Concern about executing the innocent and racial disparity persists amid evidence that the public is in a post-trust era where government decisions are highly suspect.

Keywords: capital punishment; race; innocent; trust

According to some England-based commentators, American politics is teetering on the edge of a nervous breakdown. Its worldwide reputation is in a downspin, in part because its heritage of political compromise has been largely defeated by Tea Party-led polarisation that, again, threatened to derail Federal budget negotiations during the past presidential campaign. Its obese God-driven public is – some say – more concerned about abortion, guns and gay marriage than the fact they have been hoodwinked (again) by a billionaires’ coup masquerading as a genuine populist movement, relentlessly promoted by Murdock’s Fox TV (MacAskill 2011; Monbiot 2011; Koffler 2011; Kettle 2011; Toynbee 2011). Whereas the accuracy of these snapshot are debatable – it certainly appeared that between early 2012 and President Obama’s May 2012 announcement that he supported gay marriages, the cultural wars over social issues had once more become dominant in national presidential debates (Stevenson 2012) – a close reading of the United States during the last decade finds an intellectually-critical public intensively and increasingly discontented with state and Federal legislative and judiciary decisions. It is within this context that an increased resistance to the death penalty now, more than ever, involves matters of costs, fairness and most importantly, the execution of the innocent. These issues are at the core of Cambridge-born Stafford Smith’s (2012) excellent new book Injustice: Life and Death in the Courtrooms of America, an ‘empirical study and exposition of that inimitably American blend of apathy and cruelty, of efficiency on one hand,
ineptitude on the other’ (Vulliamy 2012). The resistance is also part of a new and significant change in American cultural fabric that is identified here as a post-trust era of government that, to a lesser extent, applies to the news media.

**Death Penalty Resistance Grows**

Quite clearly, there continues to be a national reassessment of the death penalty in the United States, unseen since its 1960 heyday, when it influenced a 1972 United States Supreme Court decision that stated that capital punishment could not be imposed arbitrarily and unfairly (Turow 2003, p.20). Opposition to it, in fact, appears to have reached a tipping point. Death sentences in the United States are now below 100 per year for the first time since 1976. Only 43 people were executed in 2011, a 56% decrease from 2000. In October 2011, a CNN/Opinion Research poll found that more Americans, for the first time in recent memory, favoured a sentence of life in prison over the death penalty for murderers by 50% to 48% (see [http://news.blogs.cnn.com/2011/12/15/executions-death-sentences-continue-steady-declines-in-2011](http://news.blogs.cnn.com/2011/12/15/executions-death-sentences-continue-steady-declines-in-2011) (accessed 15 December 2011)).

Other polls – including a Gallup poll in early October 2011 – indicated that support for the death penalty was at the lowest since 1972. Only 61% of the public last year supported capital punishment, down from its high of 80% in 1994 (see [http://www.gallup.com/poll/150089/support-death-penalty-falls-year-low.aspx](http://www.gallup.com/poll/150089/support-death-penalty-falls-year-low.aspx) (accessed 1 April 2011)). This led a *New York Times* editorialist to conclude that this dramatic change ‘masks both Americans’ ambivalence about capital punishment and the country’s de facto abolition of the death penalty in most places’ (*New York Times* 2011b). Nonetheless, 40% of Americans say that the death penalty is not imposed often enough, but even this figure is the lowest percentage since Gallup first asked the question in 2001, and 13% lower than its high of 53% in 2005. A similar trend was reported on whether the death penalty was used about the right amount. This sentiment has, nonetheless, not deterred the growing resistance against capital punishment.

Since 2002, several states have abolished the death penalty. The latest – in 2011– was Illinois, preceded by New Jersey in 2007 and New Mexico in 2009 (*New York Times* 2011a; [http://www.cnn.com/2011/12/15/justice/us-death-penalty-year-ender/index.html](http://www.cnn.com/2011/12/15/justice/us-death-penalty-year-ender/index.html) (accessed 15 December 2011)). In California, long-time advocates of the death penalty now claim it is a colossal failure for economic reasons. At a cost of $184 million per year to house 720 death row inmates, the state is now considering replacing its death penalty with mandatory life without parole (LWOP) (Nagourney 2012). Connecticut, where only one person has been executed in a half-century is poised to send a bill abolishing the death penalty to its governor to sign, who in early 2012 indicated that he favoured the proposed legislation (*New York Times* 2012a).

Opposition to the death penalty is also evident in two other significant quarters – state governor offices and those who are called ‘co-victims’ of
murders – the families of murder victims. Governor Kitzhaber – a Democrat and a medical doctor who narrowly defeated a Republican nominee in 2010 – ‘took a firm moral stand when he announced . . . he would halt an execution scheduled for next month and would block other executions while in office, until 2015’ (New York Times 2011c).

Contrary to the pro-death penalty voices that have long advocated capital punishment as ‘just deserts’ for convicted felons and necessary for victims to get ‘closure’ following the death of a loved one, ‘co-victims’ have recently turned the other way. They have said that rather than providing emotional closure, ‘the long appeals process in death penalty cases is actually prolonging their suffering’ (New York Times 2011a). The abolition of the death penalty in New Jersey and New Mexico each had the support of co-victims, as has Connecticut, where parents, children and other co-victims have recently given their support to capital punishment abolition.

Unfairness Continues

Whereas there have been no reports of all-white juries convicting blacks since 2002, there is still little faith in the idea that the death penalty has been imposed unfairly in the ensuing decade. Between 1976, when the death penalty was reinstated, and 2001, only eleven white defendants were executed for killing black victims, while 161 blacks were executed for killing white victims. This pattern did not change between 2002 and 2012. During this decade, only nine whites were executed for killing black victims compared with 92 blacks who were put to death for killing white victims (see http://www.deathpenaltyinfo.org/death-penalty-black-and-white-wholives-who-dies-who-decides (accessed 16 October 2012)).

Closely related to the issue of disproportionality is the execution of innocent people. Though it is impossible to know how many executed individuals were falsely convicted, the question of actual innocence was raised several times during the last decade and generated international attention. The most recent high-profile execution that dealt with this question involved an African American man who lost a years-long battle to prove he did not kill a white Georgia policeman. Convicted in 1991, seven of the nine witnesses who were originally against him, recanted their testimony. This did not persuade a Federal judge from concluding that the death row inmate ‘vastly overstates the value of his evidence of innocence’ (available at: http://www.cnn.com/2011/12/15/justice/us-death-penalty-year-ender/index.html (accessed 15 December 2011)).

The question of executing teenagers had been before the United States Supreme Court since 1989, when it refused to rule that it was constitutional to execute 16- and 17-year-olds. As reported in this journal in 2002, the Supreme Court ruled that year that it was excessive and inappropriate to execute retarded people (Lilly 2002). In 2005, the same court ruled in a bitter 5:4 decision to abolish the death penalty for juvenile offenders, saying that the practice offended the ‘evolving standards of decency’ (McGough 2005).
In 2005, when asked if they believed an innocent person had been executed in the United States within the previous year, a solid majority of 59% agreed. By late 2010, the percentage had surged to 72%, perhaps the strongest indicator of all that public trust of governmental death penalty decisions had fallen dramatically. In its wake, LWOP emerged two decades ago as an alternative to the death penalty but it, too, is fraught with flaws as questionable as the death penalty itself.

Life Without Parole

Today, DNA-based exonerations – as of September 2011, 17 death row inmates have been freed because of DNA testing – permeates the public’s consciousness and states that now give juries the option of using LWOP as a way to avoid sentencing/executing the innocent have seen a dramatic decrease in executions. Texas, for example, which executes far more people than any other state, gave juries the option of imposing LWOP and its death row sentences fell from 30–40 per year to single digits today.

Ironically, at first glance LWOP looks like a weakening of America’s love of punishment and capital punishment, but it is, in fact, hardly an alternative that avoids the pitfalls of capital punishment sentences. Some commentators have said that it is as dehumanising as capital punishment, and, in some ways, even worse. At the forefront of the objections to LWOP is that a person given this sentence may be just as likely to be innocent as those sentenced to death but later exonerated by DNA. LWOP is also criticised because it is a sentence without hope, even for those who may deserve a second chance after serving time and rehabilitation. In essence, it is a state-based sanction that gives up on people. In the words of Richard Dieters, Director of the Death Penalty Information Center, even with LWOP: ‘They just can’t get it right’ (available at: http://www.cnn.com/2011/12/15/justice/us-death-penalty-year-ender/index.html (accessed 25 October 2012)). This is one of the reasons that it can be argued that America has entered the post-trust era.

The Post-Trust Era

Structural Defects in the Court System

Civilian complaints against police misconduct and efforts to keep them accountable have seldom been far from the front page, as recently witnessed by a March 2012 announcement that an independent agency would have new powers to prosecute New York City police officers; a development that followed ‘an onslaught of corruption cases and increased scrutiny on several fronts, including surveillance and stop-and-frisk practices, the integrity of its crime data and its use of force in policing Occupy Wall Street protests’ (Baker 2012). Complaints about judicial fairness from within the highest ranks of the Federal court system are an entirely different matter. They are far more infrequent and they carry the weight of
authority and authenticity that is seldom found elsewhere in the criminal justice system in the United States. For this reason alone, it is highly instructive that some past and present members of the United States Supreme Court are on record saying that they think the process of electing judges and prosecutors represents an inherent obstacle to fairness.

Retired Justice, Sandra Day O’Connor – the Supreme Court’s first female judge – advocated in a *New York Times* Op-Ed piece for the selection of judges based on a merit system because ‘elected judges are susceptible to influence by political and ideological constituencies’ (O’Connor 2010). In early 2012, this theme received the attention of retired United States Supreme Court Justice, John P Stevens who stated:

> Arbitrariness in the imposition of the death penalty is exactly the type of thing the Constitution prohibits . . . Today one of the sources of such arbitrariness is the decision of state prosecutors . . . It is a discretionary call that may be influenced by the prosecutor’s estimate of the impact of his decision on his chances for reelection or for election to higher office. (Stevens 2012, p.12)

One year earlier, their one-time colleague, Justice Stephen G. Breyer – a death penalty opponent – pointed out that prosecutors and judges tend to be elected and reap political benefits from appearing tough on crime (Liptak 2011).

Criticism of an elected judiciary has not been confined to voices from within its boundaries. It has spilled over into public debates as well. The most prominent issues are the amount of money spent on judicial elections and the sources of such funds. For example: ‘The 2011 campaign season for the Michigan Supreme Court was the most expensive and most secretive in the nation’ (*New York Times* 2012b), where the average spending pre-seat reached $3.5 million and half of the total spending ($20.8 million) for the election came from undisclosed sources. Michigan is not the only state to permit undisclosed contributions to judicial elections, but it is an example where increased spending on ‘campaigns amplifies the public’s perception of judicial partisanship’ (*New York Times* 2012b). It is nearly unavoidable to conclude that some elected politicians use their pro-capital punishment as a symbolic enhancement of their ‘tough on crime’ reputations, with hope of expanding their re-election political capital. In view of the highly questionable value of capital punishment as a rational crime control tool, its only justification for existing may well be its political value (Garland 2010).

**Disapproval of Congress**

During the last decade, public approval of Congress has dramatically decreased. In 2002, a Gallup poll reported that Congress had a 40% public approval that declined to below 13% by 2012 (Jones 2010; Langers 2012; Pear 2012). This was the lowest approval rating on record in polls dating back for nearly 40 years. The United States Supreme Court fared better than Congress during almost exactly the same time frame. A Gallup poll in 2001 reported that 29% of the American public disapproved of the way it handled its job. By mid-2011, disapproval of the Supreme Court had
increased to 39%, down from its all-time record low of 42%, a rating that followed a decision broadening the government’s ability to seize private land (Saad 2012).

**Press Criticised**

The press is widely criticised too, but it is trusted more than other information sources, including government and business. In 2011, the Pew Research Center for the People & The Press reported that 69% of the public trusted local news organisations, more than national news organisations (59%), more than Federal government agencies (44%), more than business corporations (41%), and more than Congress (37%). The same survey found that most Americans ‘prefer news with no political point of view... a feeling... widespread when it comes to getting news online’ (Pew Research Center for the People & The Press 2011).

In summary, it would be an error to conclude without recognising that deep economic anxieties now in America may very well have an impact on the development of the post-trust era and a concomitant impact that has strengthened the growing anti-capital punishment sentiment. Unfortunately, there are no data at this time making this link. It is, nonetheless, clear that even though ‘the income gap has grown over the last 30 years the government has done little to curb the trend’ (Porter 2012). Likewise, the percentage of Americans who thought America was the land of opportunity was 87%, with only 8% disagreeing. In November 2011, a Gallup poll reported that only 41% said there was not much opportunity in America, up from 17% in 1998. A decade on from now may see clearer links between inequality and the further decline of capital punishment.

**References**


