

# The University of Kansas Law Review

## THE DEATH PENALTY IN THE LEGISLATURE: SOME THOUGHTS ABOUT MONEY, MYTH, AND MORALITY

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For more than a decade, Kansans have debated whether the state should adopt a system of capital punishment. In 1987 and 1989, after particularly stormy debates, the legislature narrowly defeated efforts to reinstate the death penalty. In political terms, these decisions were stunning. The newly elected Governor had made the imposition of capital punishment one of his top campaign issues. He had majorities of his party in both houses of the legislature. According to public opinion polls, his position was supported by the majority of the citizens of the state. Moreover, bills reinstating capital punishment had passed in previous legislative sessions, only to be vetoed by the former Governor. Given the presumed popularity of capital punishment, it was difficult to understand why legislators would defy the wishes of their constituents or invite the wrath of the Governor.

Like the result, the course of the debates in the legislature was surprising. In most fora, the debate over capital punishment has seemed to be primarily a theoretical or moral contest, with pro-

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\* Professor, University of Kansas School of Law. I wish to acknowledge the helpful assistance of Sidney A. Shapiro, John Rounds Professor of Law, University of Kansas, in reviewing an earlier draft of this article. I am also indebted to many other colleagues at Kansas for challenging and provoking me on this issue for many years. Finally, I dedicate this article to William Lucero, Sister Therese Bangert, and the others who have helped Kansas remain an anomaly on this issue.

ponents insisting that it is right and useful, and opponents arguing that it is immoral. In the 1987 session, however, considerations such as the cost of capital punishment and its impact on the criminal justice system were moved to the forefront of the debate.

This article analyzes the current debate over capital punishment and its impact on the legislature in 1987 and 1989.<sup>1</sup> My thesis is twofold. First, all moral arguments aside, I believe that a compelling argument can be made against the death penalty as it currently exists in the United States. Whatever the outcome of any abstract moral debate over the wisdom of enacting a capital punishment statute, the actual experience of jurisdictions that have reimplemented the penalty is one of failure. The goals of just punishment and deterrence, which are often expressed by capital punishment supporters as the reasons for the penalty, cannot be achieved in late twentieth century America. Instead, in an almost perverse turn, capital punishment has imposed a terrible drain on resources and has resulted in an administration so capricious that it probably diminishes society's ability to control violent crime.

Second, I believe that arguments on the actual impact of capital punishment may make a difference in legislative debate on the issue. This conclusion, far more tentative than my first, means that a focus on the reality of capital punishment may be a more effective argument for opponents of capital punishment than moral exhortation. In reaching this conclusion, I will briefly consider theories of legislative behavior drawn from economics and political science to see if they explain the turn the legislative debate has taken in Kansas. Finally, I close with a few thoughts about the effort to reimpose the penalty in the 1989 legislative session.

## I. THE FAILURE OF THE DEATH PENALTY

### A. *The Modern System of Capital Punishment*

Although there are several reasons why the death penalty is a failure in this country, the most significant is that our moral belief in the sanctity of life, although not stopping widespread support of capital punishment, has made us extremely hesitant about its actual imposition. This ambivalence has expressed itself first in a judgment that the penalty should be reserved for only the "most heinous" of murderers. In an effort to so limit the penalty, a complex jurisprudence has been developed to attempt to define with precision the most culpable individuals. Also, a set of pro-

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1. I do not pretend to be a "neutral" observer of this process. I am an opponent of the death penalty, and I have participated in the debate I am about to describe.

cedures has been developed to attempt to assure that the judgment of who is to live and die is made accurately. Defendants in capital cases have used every means provided by these procedures to forestall executions. These factors result in a process of enormous length, cost, and complexity that ultimately selects a small class from among those eligible for execution. Despite these efforts, the few actually selected are generally no more culpable than those spared.

The first step to understanding capital punishment is the recognition that it is applied to an extremely small percentage of those who kill. Indeed, even in earlier generations, society never practiced capital punishment against more than a fraction of murderers. National data on capital punishment were first collected in 1930. Since that time, the maximum ever executed in a single year was 199.<sup>2</sup> Following World War II the numbers steadily dropped. By 1961 we were executing fewer than fifty people a year nationwide.<sup>3</sup> Presently, we are executing less than half that number per year.<sup>4</sup> Even if the number of executions in the 1990s approaches the levels reached before World War II, we will still be executing only dozens of the tens of thousands who commit homicides every year.

Prior to 1972 prosecutors and juries, on an essentially ad hoc basis, determined who was to receive capital punishment. Prosecutors would decide in standardless fashion against whom to bring the penalty, and juries would exercise almost completely unguided discretion in determining whether the particular individual merited capital punishment. In 1972, faced with this system and the steady decrease in executions, the Supreme Court in *Furman v. Georgia*<sup>5</sup> declared that the death penalty, as then administered, violated the cruel and unusual punishment clause.

Although the precise meaning of the Court's decision was difficult to discern, the basic thrust was that the determination of

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2. That figure was reached in 1935. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CAPITAL PUNISHMENT 1982 at 14, Table 11 (1983); see also F. ZIMRING & G. HAWKINS, CAPITAL PUNISHMENT AND THE AMERICAN AGENDA 26-27 (1986).

3. See BUREAU OF JUSTICE STATISTICS, *supra* note 2; see also F. ZIMRING & G. HAWKINS, *supra* note 2, at 30.

4. See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN ON CAPITAL PUNISHMENT 1987 at 9, Fig. 3 (1988); NAACP LEGAL DEFENSE AND EDUCATION FUND, DEATH ROW U.S.A. In 1987, 25 individuals were executed; in 1988, 11 were killed. The Legal Defense Fund Data Base has often been used by judges and commentators. See, e.g., Powell, *Review of Capital Convictions Isn't Working*, 3 CRIM. JUST. 11, 12 (Winter 1989); Greenberg, *Against the American System of Capital Punishment*, 99 HARVARD L. REV. 1670, 1671 n.7 (1986).

5. 408 U.S. 238 (1972).

who should die had become so arbitrary that it rendered the death penalty cruel and unusual.<sup>6</sup> Almost all first degree murderers were not receiving the penalty; the few who received it were selected in an essentially capricious manner. The Court thus began enunciating a jurisprudence with the goal of accurately identifying the small minority of murderers who are culpable enough to deserve the penalty.

Four years later, in *Gregg v. Georgia*,<sup>7</sup> the Court upheld what it found to be a more rational and careful system. In concluding that Georgia's revised death penalty standard was constitutional, the Court stated that the arbitrariness found in *Furman* might be cured by (1) a statute that specified, by enumerating aggravating factors, first degree murderers who deserved the ultimate penalty; (2) a bifurcated sentencing proceeding; and (3) the careful review of the sentence by the Georgia Supreme Court.<sup>8</sup>

In cases following *Gregg* the Court has elaborated upon these requirements to impose a multitude of additional rules for determining who deserves death. First, the Court rejected any statute imposing a mandatory death penalty. In *Woodson v. North Carolina*<sup>9</sup> the Court invalidated a mandatory death penalty for first degree murder, finding it so disproportionate that it would induce judges and juries in many cases to acquit rather than impose the penalty. The Court also found the statute to violate the cruel and unusual punishment clause because it treated "all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death."<sup>10</sup> Thus, while narrowing the class of cases that could receive the death penalty, thus limiting jury discretion, the Court simultaneously required that the jury retain discretion to decide who within the more limited class should live or die.

In cases following *Woodson* the Court has emphasized both that the jury must be given the option to impose a sentence of less than death and that the defendant must be permitted to offer any mitigating evidence that might cause the jury to impose imprisonment rather than capital punishment.<sup>11</sup> A court must permit the

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6. See *id.* at 256-57 (Douglas, J., concurring), 306-10 (Stewart, J., concurring), 312-13 (White, J., concurring).

7. 428 U.S. 153 (1976).

8. See *id.* at 196-98 (plurality opinion).

9. 428 U.S. 280 (1976). *Woodson* was decided the same day as *Gregg*.

10. *Id.* at 304.

11. See, e.g., *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

defendant to offer at sentencing evidence concerning any aspects of a defendant's background, the circumstances of the offense, and the decedent's conduct as a matter of constitutional law.<sup>12</sup>

In imposing these requirements, the Court has also reviewed the instructions on aggravating and mitigating circumstances given the jury. In a long and complex series of cases, the Court has struck down death sentences when the instructions on aggravating circumstances have been too vague,<sup>13</sup> when instructions on mitigating circumstances have not properly been given,<sup>14</sup> when arguments have minimized the jury's responsibilities in fixing the death penalty,<sup>15</sup> and when excessive attention has been focused upon the status of the victim.<sup>16</sup> All of these requirements, unknown to criminal litigation outside of the death penalty, are designed to assure that the selection of the small class of first degree murderers that actually receives capital punishment is made in an "accurate" manner. This heightened scrutiny is justified, as the Court has noted on many occasions, because as a punishment, death is "different."<sup>17</sup>

In addition to changing the jurisprudence of a criminal trial, the possibility of a death penalty also has a profound impact on the conduct of attorneys. As Justice Marshall stated more than a decade ago, "defense counsel will reasonably exhaust every possible means to save his client from execution . . . ."<sup>18</sup> Lawyers hope zealously to represent their clients in every case. The recognition that a case literally involves life and death, however, produces extraordinary efforts.

The difference between capital and noncapital litigation is apparent even before the jury is selected, with a far greater amount of energy normally expended in investigation of capital cases. Obviously, capital cases will rarely involve a guilty plea. Thus, the trial is the norm, not the exception. Furthermore, the trial tends to be longer. After the trial a separate evidentiary sentencing hearing occurs. The hearing often requires extensive investigation concerning all facets of a defendant's background and character,

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12. See, e.g., *Eddings*, 455 U.S. at 110-17.

13. See *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988); *Godfrey v. Georgia*, 446 U.S. 420 (1980).

14. *Hitchcock v. Dugger*, 481 U.S. 393 (1987).

15. *Caldwell v. Mississippi*, 472 U.S. 320 (1985).

16. *Booth v. Maryland*, 482 U.S. 496 (1987).

17. See, e.g., *Gardner v. Florida*, 430 U.S. 349, 357 (1977); *Gregg v. Georgia*, 428 U.S. 153, 181-88 (1976) (plurality opinion).

18. *Furman v. Georgia*, 408 U.S. 238, 358 (1971) (Marshall, J., concurring).

and it often involves considerable expert testimony.<sup>19</sup> But the greatest differences occur at the appellate and postconviction stages. Virtually every capital case goes through a protracted and expensive series of appeals and postconviction motions that can easily span over a decade.<sup>20</sup> Many states now have special offices to provide attorneys for this process, and where attorneys are not provided, volunteer lawyers from major law firms are often sought.<sup>21</sup>

Although somewhat harder to document, the possibility of a death penalty almost certainly affects the conduct of prosecutors and judges. Capital cases are more extensively investigated and prosecuted.<sup>22</sup> They also take more judicial time.<sup>23</sup> The spectre of the conviction of an innocent person, always a possibility in criminal litigation, becomes more troubling when the penalty is irreversible.

The enormous effort and complex jurisprudence in these cases have produced genuine distortions in the criminal justice systems of states that actively pursue capital punishment. Despite relatively small numbers, capital cases dominate the resources of some state criminal justice systems. In Florida, for example, justices of the state supreme court have estimated that they spend one-third of their time on capital punishment cases.<sup>24</sup> State defender offices in capital punishment jurisdictions spend enormous amounts of time and money on capital punishment cases. Resources that are needed to deal with the prosecution, defense, and adjudication of other offenders are diverted to capital litigation.<sup>25</sup>

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19. Other commentators have noted the high cost of capital cases. See, e.g., Nakell, *The Cost of the Death Penalty*, 14 CRIM L. BULL. 69 (1978); Comment, *The Cost of Taking a Life: Dollars and Sense of the Death Penalty*, 18 U.C. DAVIS L. REV. 1221, 1245-62 (1985); Gradess, *Execution Does Not Pay*, Wash. Post, Feb. 28, 1988, at C5, col. 3; NEW YORK STATE DEFENDERS ASS'N, CAPITAL LOSSES: THE PRICE OF THE DEATH PENALTY FOR NEW YORK STATE (1982) [hereinafter CAPITAL LOSSES]; see also COMMITTEE TO STUDY THE DEATH PENALTY IN MARYLAND, FINAL REPORT 1, 5, 20 (1985) [hereinafter FINAL REPORT] (showing death penalty cases approximately twice as expensive); Memorandum from Ohio Public Defender Randall M. Dana to Ohio Governor Richard D. Celeste at 6 (Apr. 12, 1983); telephone interviews with Tom Smith, Assistant Public Defender, Trenton, N.J. and Kevin McNally, Kentucky Dept. of Public Advocacy (Jan. 13, 1986).

20. See Powell, *supra* note 4, at 12.

21. *Id.* at 13; see also Tabak, *Capital Punishment in the 1980's*, 1 CAL. DEF. 4, 11 (Nov. 4, 1986).

22. See FINAL REPORT, *supra* note 19, at 20; CAPITAL LOSSES, *supra* note 19; Comment, *supra* note 19, at 1254-55.

23. See, e.g., Nakell, *supra* note 19, at 72; Comment, *supra* note 19, at 1254.

24. Miami Herald, July 10, 1988.

25. Even for corrections systems, capital punishment imposes unique burdens. Death row inmates are generally held in secure units in single cells. They are not usually provided work opportunities. As a result, death row confinement tends to be inordinately more

Although there is much complaint about the protracted nature of capital appeals, there is little doubt of their necessity. Whether due to the complexity of capital litigation, the poor quality of litigants in states most actively pursuing capital punishment, or the heightened attention paid to capital cases, an extraordinary number of capital cases are reversed at the appellate or postconviction level. Although in ordinary criminal cases, reversal rates on appeal may be around ten percent,<sup>26</sup> over half of the cases in which juries impose capital punishment are reversed on direct appeal or collateral review.<sup>27</sup>

On a national level, this modern system of capital punishment is producing a form of judicial gridlock. The population of death row has grown to more than 2000 inmates. The figure grows at a rate of approximately 300 a year. At the same time, hundreds of people a year leave death row, mainly by judicial invalidation of their sentences.<sup>28</sup> Yet in the last three or four years, capital punishment states have been executing fewer than twenty-five people per year.<sup>29</sup> Were this number to increase to 100 per year, it would still be extremely small compared to the number of willful homicides (almost 20,000 per year),<sup>30</sup> or to the death row population (over 2000). Thus, the "backlog" of inmates on death row will probably continue well into the next century.

### *B. Attempting the Impossible*

Although this elaborate funnel might be defensible if it actually succeeded in separating those who deserve the penalty from those who do not, there is no evidence that such is the case. Instead, the judgment regarding which murderers deserve to die continues to be made in haphazard fashion, with extraneous factors playing an important role.

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expensive than housing prisoners in general population. *See, e.g.*, Kansas Dep't of Corrections Memorandum re: House Bill 2062 (Jan. 27, 1987) (predicting increased corrections costs of \$261,313 per year in the event capital punishment enacted).

26. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR 155, Table B-5 (1987).

27. *See, e.g.*, Greenberg, *supra* note 4, at 1671 (from 1972 to 1980, 60% of sentences invalidated); NAACP LEGAL DEFENSE AND EDUCATION FUND, *supra* note 4; *see also* BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 1 (in 1987, 25 individuals were executed and 79 had their sentences vacated).

28. BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 1-2; NAACP LEGAL DEFENSE FUND, *supra* note 4.

29. BUREAU OF JUSTICE STATISTICS, *supra* note 4, at 8-9.

30. *See* FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, CRIME IN THE UNITED STATES 1986 at 7-8 (1987).

The most vivid anecdotal example of this point is provided by the first individual involuntarily executed after *Gregg v. Georgia*—John Spenkilnik. Spenkilnik was a “drifter” who killed a travelling companion who had sexually abused him. The Florida Assistant Attorney General in charge of capital cases stated that Spenkilnik was probably the “least obnoxious individual on death row in terms of the crime he committed,” yet he was the first executed.<sup>31</sup>

Unfortunately, such anomalies are probably inherent in the structure of our modern system. Although the Supreme Court purported to condemn unguided jury discretion in *Furman v. Georgia*, the system it approved in *Gregg* and succeeding cases perpetuates such discretion. These “guided discretion” statutes require that the jury find the existence of an aggravating circumstance before it may impose a death penalty. That inquiry, however, does not seriously limit the number of people who are eligible for death, let alone provide a rational scheme of deciding among those who are death eligible. First, some of these aggravating standards, such as the requirement that a murder be found to be “cruel, heinous, or atrocious,” are arguably so vague that they apply to all killing.<sup>32</sup> But even if the standards are regarded as precise, they do not eliminate the standardless nature of the death penalty judgment. The existence or nonexistence of an aggravating factor establishes only when an offender *cannot* be put to death; it says little or nothing about which offenders *should* be executed. For that inquiry, the jury is asked to “balance” aggravating against mitigating circumstances. Yet the jury is given no guidance whatsoever about how to engage in this process. No particular weight is given to any aggravating or mitigating factor. For example, a jury is left entirely to its intuition in judging whether a defendant’s lack of prior criminal history should outweigh the occurrence of the defendant’s act during the course of a felony, or whether the defendant’s disturbed mental state should outweigh the “heinous” nature of the murder.<sup>33</sup>

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31. Greenberg, *supra* note 4, at 1673; Adler, *Florida’s Zealous Prosecutors: Death Specialists*, 3 AM. LAW. Sept. 1981, at 35, 35-36.

32. See generally *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988).

33. I owe this insight to Franklin Zimring and Gordon Hawkins. See F. ZIMRING & G. HAWKINS, *supra* note 2, at 81-91. In this respect, the inquiry that jurors are asked to make is fundamentally different than the inquiry required in criminal trials. In most other contexts the jury is asked to find facts, the existence or nonexistence of which will produce a coherent result. Although the jury may use its common sense or intuition to determine, for example, whether to believe the defendant’s statement that the defendant is not a robber, once that fact is determined, the jury will be able to apply the law to produce a coherent outcome. The death penalty judgment is fundamentally different. No facts or combination thereof compel a death penalty finding; the process invites two juries that reach identical factual conclusions to reach opposing results.



Given the essentially intuitive judgment that is asked of jurors, it should not be surprising that extraneous factors and biases, such as the race of the victim or the physical repulsiveness of the defendant, may play an important role in the jury's decision.<sup>34</sup> It also explains why so many death row inmates are individuals that the public at large might not regard as the most deserving of the penalty. For example, a surprising percentage of death row inmates are mentally retarded.

Finally, the high reversal rate of capital cases assures a random quality to the individuals who finally end up marked for execution. Cases may be reversed for reasons wholly extraneous to the question of guilt or innocence.

In sum, the current capital punishment system is one that many acknowledge as not working. For supporters, it is implemented too rarely, only after extraordinary delays and expense. Despite enormous effort, it does not punish those who most deserve death. As former Florida Governor Bob Graham, an ardent advocate of capital punishment, summarized: "If the definition of justice is a system that administers equal and predictable results, then capital punishment in the United States today falls short."<sup>35</sup> Ed Austin, the procapital punishment prosecutor of Jacksonville, Florida has used even more dramatic language: "It's a joke. It doesn't work. It's a shell game."<sup>36</sup>

## II. THE CAPITAL PUNISHMENT DEBATE

The current regime of capital punishment is thus a system that inflicts death only rarely, upon individuals no more culpable than most of those spared, and after exhaustive and exhausting litigation. Whatever capital punishment might be like during another time or in another place, both evidence and intuition suggest that today's system fails as a deterrent and is ineffective as retribution. Moreover, this failure is purchased at enormous cost. In this section I analyze the arguments most frequently made about the death penalty—deterrence and retribution—in light of the actual system of capital punishment.

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34. See *McClesky v. Kemp*, 481 U.S. 279 (1987) (court assumes the validity of studies showing disparity in sentencing based upon race of victim, but finds such disparity not to violate the constitution). See generally B. NAKELL & K. HARDY, *THE ARBITRARINESS OF THE DEATH PENALTY* 158-61 (1987); Bentele, *The Death Penalty in Georgia: Still Arbitrary*, 62 WASH. U.L.Q. 573 (1985).

35. Miami Herald, July 10, 1988.

36. *Id.*, July 11, 1988.

### A. *Deterrence*

Perhaps no aspect of the death penalty has been examined more intensely than the question of whether it deters others from committing homicide. By deterrence, I mean general deterrence—the inhibiting effect of sanctions on the criminal activity of one other than the sanctioned offender.<sup>37</sup> In analyzing the deterrent effect of the death penalty, the relevant question must be whether capital punishment acts as a marginal deterrent. In other words, the issue is not whether capital punishment will deter people from committing murders, but whether it will do so better than a system of life imprisonment.

Researchers have attempted to test the hypothesis in at least three different ways: studying homicide rates in adjacent jurisdictions, studying homicide rates in a single jurisdiction before and after abolition or imposition of the death penalty, and employing time series and regression analyses concerning the impact of executions on the homicide rates. The result of this research demonstrates that even when executions were far more common than they are today, the death penalty did not act as a significant deterrent to homicides.<sup>38</sup> Indeed, there is evidence that executions have a brutalizing effect and therefore may actually increase homicides.

One of the first notable attempts to measure the comparative efficacy of the death penalty was carried out by Thorsten Sellin for the Model Penal Code Project of the American Law Institute. Sellin attempted to measure the effect of the death penalty by the use of matched group comparison—he located states that were similar to each other in as many respects as possible, but that differed in whether capital punishment was imposed. Sellin's study showed that capital punishment had no discernable impact on homicide rates.<sup>39</sup> Both before and after Sellin, numerous other researchers have repeated the study, and have reached the same conclusion—states with capital punishment do not have homicide rates lower than similar abolitionist states. Indeed, many of the

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37. There is no doubt, of course, that capital punishment can be effective as a "specific deterrent" or as "incapacitation" for the convicted offender. Obviously, if we execute someone, we will prevent that person from repeating the offense. Prison, however, is also an effective agent for incapacitation and specific deterrence. Absent some evidence that prison is ineffective at protecting society from the offender, the argument that capital punishment is necessary as a specific deterrent is hard to take seriously. See Bartels, *Capital Punishment: The Unexamined Issue of Specific Deterrence*, 68 IOWA L. REV. 601 (1983).

38. See *infra* notes 39-52 and accompanying text.

39. See T. SELLIN, *THE DEATH PENALTY* 19 (1959).

matched studies have shown the opposite of a deterrent effect with abolitionist states having lower homicide rates than contiguous states with the death penalty.<sup>40</sup>

In addition to examining pairs, Sellin also attempted to look at jurisdictions that abolished capital punishment to determine if they experienced a rise in homicides. Again, his studies found that the death penalty exercises no influence on the extent or fluctuating rates of capital crime.<sup>41</sup> Sellin's findings were matched in Scheussler's earlier studies on jurisdictions that had abolished the death penalty.<sup>42</sup>

In more recent years researchers have attempted to use more sophisticated economic and social science methodologies such as multiple regression analysis to study the problem. An initial study by Isaac Ehrlich seemed to find a deterrent effect.<sup>43</sup> That study had a profound political impact; it provided almost the sole support for proponents of the death penalty to argue that the evidence on deterrence was at least conflicting.<sup>44</sup> It also spurred several reanalyses of Ehrlich's data, which not only discredited Ehrlich's analysis, but which found that the actual effect of executions might be quite the opposite of that claimed by Ehrlich.<sup>45</sup> Thus, in an article published in 1978 David King examined executions in South Carolina between 1951 and 1962. King found a net increase of 1.8 homicides during an approximate two-month period after an execution story appeared in the state's leading newspaper.<sup>46</sup> In a more exhaustive analysis Bowers and Pierce examined executions in New York between 1907 and 1967.<sup>47</sup> After controlling for a number of

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40. See *id.*; see also Bowers & Pierce, *Deterrence or Brutalization: What is the Effect of Executions?* 26 CRIME & DELINQ. 453, 460-62 (1980) (discussing various studies).

41. See T. SELLIN, *supra* note 39.

42. Schuessler, *The Deterrence Influence of the Death Penalty*, 284 ANNALS 54 (1952) cited in T. SELLIN, *supra* note 39, at 34-38; see Lempert, *Desert and Deterrence: An Evaluation of the Moral Bases for Capital Punishment*, 79 MICH. L. REV. 1177, 1197-206 (1981).

43. See Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975); Ehrlich, *Deterrence: Evidence and Inference*, 85 YALE L.J. 209 (1975).

44. See *Gregg v. Georgia*, 428 U.S. 153, 185 & n.31 (1976) (Stewart, J.) (citing Ehrlich's study in support of view that evidence on capital punishment is conflicting).

45. See Bowers & Pierce, *supra* note 40, at 463 n.36 (citing six studies critical of Ehrlich's research).

46. King, *The Brutalizing Effect: Execution Publicity and the Incidence of Homicide in South Carolina*, 57 SOC. FORCES 683 (1978). King did not find an increase in the number of homicides during the month of an execution. Because the only increase was in the following month, King concluded there was insufficient statistical support for the brutalization hypothesis.

47. Bowers & Pierce, *supra* note 40.

variables, the authors found that there was an average of two to three more homicides than expected after a month in which executions took place.<sup>48</sup> These findings are arguably supported by earlier analyses of executions in California<sup>49</sup> and Pennsylvania.<sup>50</sup>

The brutalization hypothesis proceeds on a different and perhaps more realistic view of the attitudes of potential murderers than does the deterrence hypothesis. Proponents of capital punishment have posited two ways in which the penalty might deter. One argument supposes that potential murderers are rationally calculating individuals who weigh the risks of their activity and determine that although imprisonment is a risk worth taking, the possibility of a death sentence is not. As someone who has litigated in the criminal arena, I find this description of the reasoning process of potential murderers to be quite unrealistic. Indeed, it is difficult to find even anecdotal evidence of this kind of deterrence. A more realistic view of the way capital punishment might deter is that the penalty might convey to potential killers a standard of right and wrong that would inhibit homicide. There is at least anecdotal evidence from psychiatry, however, that executions convey the opposite message—cold-blooded vengeance is appropriate if the wrong is great enough.

The brutalization hypothesis suggests that this latter message of vengeance is the one actually conveyed. Potential murderers may thus identify with the executioner and compare their intended victims with the individual selected by the state to die. As one commentator has written: "For 'the potential killer [who] has a justification, a plan, a weapon, and above all a specific intended victim,' the violent atmosphere surrounding an execution may convey a message that lethal vengeance" is a justifiable and morally proper response.<sup>51</sup>

Whatever one concludes about this evidence, virtually all the debate over deterrence at least presupposes a death penalty that is administered on a regular basis. This is simply not the case today. Even if a capital punishment system with regular executions were capable of deterring homicides, the reality is that we are simply not operating under that kind of system. Proponents of capital punishment in Kansas have suggested that only two death sentences

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48. *Id.* at 481.

49. See Savitz, *A Study in Capital Punishment*, 49 J. CRIM. L. CRIMINOLOGY & POL. SCI. 338 (1958), discussed in Bowers & Pierce, *supra* note 40, at 466.

50. Dann, *The Deterrent Effect of Capital Punishment*, 29 FRIENDS SOC. SERV. SERIES 1 (1935), discussed in Bowers & Pierce, *supra* note 40, at 466.

51. S. DIKE, *CAPITAL PUNISHMENT IN THE UNITED STATES: A CONSIDERATION OF THE EVIDENCE* 41 (1982) (quoting Bowers & Pierce, *supra* note 40, at 483).

a year are likely even to be imposed.<sup>52</sup> It is genuinely difficult to see how a penalty, which is imposed on less than one in fifty who commit homicide and actually carried out far less frequently, would likely deter anyone rationally calculating homicide.

In sum, the empirical evidence supports the view that the death penalty was not a marginal deterrent even when executions took place with some frequency, and it is certainly not a marginal deterrent as presently employed. Proponents of the penalty must look elsewhere for its justification.

### *B. Retribution*

In addition to deterrence, the most common argument in support of the death penalty is that it is appropriate as retribution. Proponents of the penalty who argue on these grounds assert that killers deserve to die. A related argument is that failure to support capital punishment denigrates the rights of the family of the victim of homicide. Although these positions may seem impossible to argue intelligently—you either believe them or you don't—there are a couple of concerns even at the theoretical level that are worth discussing.

First, those who support capital punishment as retribution often misstate the issue. The question is not whether killers deserve to die, but whether we as a society should implement through our penal laws procedures deliberately to kill offenders. The answer to the question as rephrased may not be nearly as self-evident as is the answer to whether the offender deserves to die.

In particular, those who support capital punishment as retribution should not be able to support it solely by the intuitive appeal of an "eye-for-an-eye." This statement asks for a standard for capital punishment different than the standard that these people are likely to apply for other violent crimes. We simply do not believe that retribution requires us to inflict physical pain equal to that imposed by violent offenders. For example, it is unlikely that our Attorney General, who supports capital punishment, would ever appear before the Kansas Legislature to suggest that we institute a punishment for rape that involves deliberately tying up the rapist, delivering him to a punishment room, and having him forcibly sodomized under the watchful eye of a group of officials. Most of us would also agree that it would be inappro-

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52. See *Hearings on H.B. No. 2062 Before the Sen. Comm. on Fed. and State Affairs*, 1987 Kan. Leg. Sess. [hereinafter *1987 Senate Hearings*] (statement of Professor Emil Tonkovich, University of Kansas School of Law, at 5); see also Tonkovich, *The Kansas Death Penalty Debate*, 5 KAN. CRIM. PROC. REV. 45, 48 (1988).

priate punishment to batter a husband who abused his wife, or to torture someone who had tortured another, even if the individual concerned might merit the penalty.

There are several reasons, apart from the eighth amendment, why society has reached that judgment. First, placing torture or sodomy as something that is out of the reach of society is a way of communicating the message that such an action is so reprehensible that we will not do it even if it is deserved. Instead, we will find some other way to attempt to vindicate society's interest in retribution.<sup>53</sup> Second, we refrain from torture because of the impact on the person who must perform it. The complete subjugation of the tortured individual and the willingness of the torturer to impose intense physical pain give encouragement to sadism and require an unacceptable degree of a callousness.<sup>54</sup> Repetition of accounts of the effects of the electric chair is not necessary to understand that in most respects, capital punishment is akin to torture. It involves the utter subjugation of the individual to the state. It involves intense physical pain. It is the last form of criminal corporal punishment permitted.

In light of the difficulties with the death penalty, it is reasonable to argue that society's interest in retribution can be served adequately by a system of long-term imprisonment. That argument is strengthened by the knowledge that even retributivists do not believe that most murderers should (or will) receive the death penalty. Anyone who is remotely familiar with prison conditions understands that long-term incarceration is a drastic sanction. If imposed, it should suffice as retribution in both a political and moral sense. In fact, much of the hesitation to the use of long-term incarceration as an alternative is the fear that the sentence will be shortened, by parole or otherwise, rather than a belief that the penalty cannot function as retribution.

### C. *Retribution and Reality*

Whatever the validity of the retributive argument in the abstract, principled supporters of the practice are obliged to confront the evidence that the current system of capital punishment fails meaningfully to satisfy the goals retributivists set forth. It is a dismal failure at providing just and consistent punishment, and it does

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53. See Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 *PHIL. & PUB. AFF.* 115, 135 (1985).

54. The impact of corporal punishment on the person responsible for administering it is one of the reasons it was declared unconstitutional in this country. See *Jackson v. Bishop*, 404 F.2d 571, 579-80 (8th Cir. 1968).

not and cannot provide solace for family members of most murder victims.

The moral force of capital punishment is undercut by the realities of executions in the 1980s. The system violates notions of just punishment because it is haphazardly administered against a small, almost randomly selected sample of eligible persons. Selected persons are chosen for reasons other than their culpability, for reasons of race, or for reasons of prosecutorial convenience.

The rejoinder of death penalty supporters, that the state's decision to spare some who deserve execution does not compromise its decision to execute others as long as they too are deserving,<sup>55</sup> is an exercise in self-delusion. We do not have a system in which an occasional murderer is spared out of a sense of mercy. Instead, the overwhelming majority of persons eligible for the death penalty receive a term of imprisonment. To the extent that prosecutors, judges, and jurors represent the consensus of the community, that consensus is that the majority of people who commit homicides should not be killed by the state. And when one criminal is executed while ten of equal culpability are spared, it is reasonable to conclude that the execution, rather than the sparing, is the morally inappropriate decision. Moreover, the retributive argument in favor of capital punishment must be balanced against the certainty that inevitably an innocent person will be put to death to achieve this moral goal.<sup>56</sup>

In a society that does not believe the death penalty is appropriate for most murders, a principled advocate of retribution must point to a system or guidelines that assures that the decision of who is executed is in fact made on morally relevant grounds. Whether such a judgment is possible at all, it is not being made at the present time.

The Kansas debate illustrates the lack of seriousness of the retributivist position in support of the death penalty. As part of their attempt to mitigate the cost issue, the former District Attorney of Sedgwick County<sup>57</sup> and the Kansas Attorney General<sup>58</sup> asserted that the number of jury trials might be reduced by the use of the threat of the death penalty as a negotiating tactic—prosecutors could promise not to seek the death penalty in return for an

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55. See, e.g., van den Haag, *Refuting Reiman and Nathanson*, 14 PHIL. & PUB. AFF. 165, 173-74 (1985).

56. See generally Lempert, *supra* note 42, at 1225-31.

57. 1987 Senate Hearings, *supra* note 52 (testimony of Clark V. Owens, Sedgwick County District Attorney, at 1-2).

58. 1987 Senate Hearings, *supra* note 52 (statement of Kansas Attorney General Robert T. Stephen, at 3).

agreement to plead guilty. Thus, two prosecutors in this state sought a system whereby two equally culpable defendants might appear, with one receiving the death penalty because of his insistence on going to trial, and the other receiving a term of imprisonment. Whatever the value of plea bargaining outside the capital context, allowing the decision to execute an individual to turn on whether he forgoes his right to trial undercuts the moral argument in favor of the death penalty.

The current reality of capital punishment also renders it a failure as a device to comfort the families of victims. In a system without capital punishment, most murderers receive the maximum penalty permitted by law, and receive it relatively quickly. Neither of those features is true in a capital punishment state. The families of victims instead begin an ordeal lasting ten years or more, with the guarantee of publicity at irregular intervals. For the overwhelming majority, the ordeal will end with a judgment that the crime in their case was infected with procedural error or was not sufficiently "cruel" to justify the maximum sentence.

#### *D. The Death Penalty As Symbol*

If, as I believe, the course of the death penalty over the last ten years is one of failure, it is fair to ask why the public continues to support the penalty. The answer, I believe, is that in many respects the success or failure of capital punishment on deterrent or retributive grounds simply does not make a great deal of difference to many of its supporters. Opinion research indicates that many people support capital punishment not out of a feeling that it is a rational policy choice for dealing with crime, but because it serves an important ritual or mythical function.<sup>59</sup>

The political scientist Murray Edelman has written on the importance of the symbolic uses of politics.<sup>60</sup> He has described the political myth as a symbol that may be generated or reflected by the Government to calm fears and reduce ambiguity.<sup>61</sup> The death penalty clearly fills such a mythical function. It sends a signal to the population that opinion leaders are concerned with the feelings of victims rather than the perpetrators; it affirms that society is doing something, even if it is not terribly effective, about violent

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59. There is no question that the abolitionist position can have symbolic meaning as well—a vote against capital punishment is a symbol of the legislator's and society's abhorrence of violence. For abolitionists, that symbolic position may be far more important than any empirical evidence about the impact of the penalty.

60. M. EDELMAN, *THE SYMBOLIC USES OF POLITICS* (1985).

61. *Id.* at 18-22.



crime. In supporting the myth, it is the enunciation of the attitude, rather than any particular action, that appears to be most significant. For the public, then, the death penalty is an expression of values more than an economic or policy choice.

The mythical importance of capital punishment explains why people who have little interest in imposing capital punishment nevertheless support the death penalty. For example, many contemporary societies have maintained statutes allowing capital punishment long after executions have ceased. In those societies, the nation has been able to retain the symbol while avoiding all the problems associated with the implementation of executions.<sup>62</sup> Similarly, many states outside the South have enacted capital punishment statutes, but have rarely sought the penalty. Indeed, in the debate in the Kansas Legislature, those supporting the bill took pains to emphasize that it would rarely be invoked.<sup>63</sup>

The mythical importance of capital punishment also explains the willingness of supporters to continue their support irrespective of the evidence concerning the deterrent effect of the penalty. Thus, Ellsworth and Ross conducted a close examination of the views of capital punishment supporters and found that two-thirds of the respondents would support the penalty even if it were proved to be no better as a deterrent than life imprisonment.<sup>64</sup> Indeed, half the supporters stated they would support the penalty if it caused as many murders as it prevented.<sup>65</sup> Other public opinion polls have found similar attitudes.<sup>66</sup>

Public support of the penalty on a symbolic level also helps explain the curious function of the death penalty on the national political level. George Bush was apparently able to make the issue of capital punishment a salient one in the 1988 presidential campaign even though for eight years neither he nor his administration made any particularly strong efforts to restore a federal death penalty, let alone carry out executions on the federal level. Similarly, the enactment of a "drug kingpin" death penalty bill in Congress was symbolic activity at its purest.<sup>67</sup> The attempt to argue that drug dealers are likely to be deterred by a federal death penalty is almost absurd on its face. Drug kingpins who kill are

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62. See F. ZIMRING & G. HAWKINS, *supra* note 2, at 10-15.

63. See *supra* note 52 and accompanying text.

64. Ellsworth & Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 147 (1983).

65. *Id.*

66. *Id.*

67. See Title VII, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181, 4387 (1988).

already subject to the death penalty in many states. In any event, participants in the illegal drug trade face death from their associates as a regular occupational hazard. Yet the bill passed with overwhelming public support.<sup>68</sup>

This investigation also suggests that two responses will be required to convince the public to moderate its support and abandon the myth. First, opposition to the death penalty must be presented in such a way that it does not appear to be "soft on crime." Death penalty opponents must offer genuine assurance that they are also serious about combatting violent crime and are genuinely concerned with its victims. In fact, recent public opinion polls suggest that the presentation of alternatives to the public that insure a serious response to violent crime dramatically lowers support of capital punishment. Thus, in recent surveys in Georgia<sup>69</sup> and Nebraska,<sup>70</sup> the same survey groups that overwhelmingly support capital punishment by figures of three to one or more when the question is presented in the abstract support its abolition if the alternative is a mandatory twenty-five year sentence combined with a restitution program requiring payment by the prisoner to the family of the victim.

The second means of convincing the public is to demonstrate that capital punishment may be counterproductive to the goals represented by the myth. Although the public may continue to support capital punishment despite its knowledge that it is not effective, it may feel very differently if it is informed that the existence of a capital punishment system will actually prevent the criminal justice system from accomplishing its goals as effectively as a system without capital punishment. It is in this regard that the information on the cost of capital punishment may play a useful part in the public debate. Those who support capital punishment as an abstract symbol may feel differently about the penalty upon being informed that it may result in higher taxes or fewer resources for police.

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68. In the initial House vote on September 22, 1988, the bill passed on a vote of 375 to 30. 2 Cong. Index (CCH) 35, 112 (1987-1988). In the initial Senate vote the bill passed on a vote of 87 to 3. *Id.* On October 21, 1988, the House agreed to Senate amendments on a vote of 346 to 11. *Id.* On October 21, 1988, the Senate agreed to House amendments by a voice vote. *Id.*

69. Thomas & Hutcheson, Georgia Residents' Attitudes Toward the Death Penalty, the Disposition of Juvenile Offenders, and Related Issues (Center for Public and Urban Affairs, Georgia State University) (Dec. 1986) (unpublished manuscript) (cited in *The Atlanta Constitution*, Jan. 7, 1987, at 10-A, col. 1).

70. Johnson & Booth, The Nebraska Annual Social Indicators Survey (Bureau of Sociological Research, University of Nebraska) (Jan. 1988) (unpublished manuscript).

### III. THE DEATH PENALTY IN THE KANSAS LEGISLATURE

#### A. *The 1987 Debate*

The 1987 debate in the Kansas legislature may provide some support for the theory that information on the systemic effect of capital punishment may influence opinion leaders. The debate began along fairly predictable lines. Testimony from the State Highway Patrol, the Kansas Sheriff's Association, and the Governor's Legislative Liaison, among others, was presented.<sup>71</sup> Most of the witnesses noted that public opinion favors the penalty and that capital punishment is the proper punishment for persons who willfully take human life. Although the Attorney General acknowledged that reliable empirical data could not show that capital punishment was a deterrent, he asserted that it might deter some individuals and, in any event, was a just punishment.<sup>72</sup>

The opponents then diverged from the typical death penalty arguments by introducing the issue of cost. By using data supplied by the Board of Indigents Defense Service for defense costs, and by attempting to predict prosecution and court costs based upon these estimates, testimony was submitted estimating that the death penalty could cost seven million dollars per year above current expenditures.<sup>73</sup> The testimony, which garnered a good deal of publicity and criticism, was apparently sufficiently intriguing to cause the state's own Legislative Research Department to study the likely cost of implementing the penalty. To the surprise of many, that estimate was significantly higher than the estimate presented by the opponents of capital punishment. The Research Department predicted that the costs of the death penalty would amount to 11.5 million dollars per year. The estimate did not reflect what the Research Department believed would be an additional 1.7 million dollars to 3 million dollars in postconviction costs that would eventually be incurred.<sup>74</sup>

By the time the capital punishment bill reached the Senate, the effort to rebut the probable cost of the death penalty had become

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71. See *Hearings on H.B. 2062 Before the House Comm. on Fed. and State Affairs*, 1987 Kansas Leg. Sess. [hereinafter *1987 House Hearings*] (Jan. 20, 1987) (statements of Bob Clester, Kansas Sheriffs' Ass'n; John Peterson, Governor's Office; Bert Cantwell, Highway Patrol).

72. See *id.* (statement of Attorney General Robert Stephen).

73. See *id.* (statement of Professor David J. Gottlieb, University of Kansas School of Law).

74. KANSAS LEGISLATIVE RESEARCH DEPARTMENT, MEMORANDUM: COSTS OF IMPLEMENTING THE DEATH PENALTY—H.B. 2062 AS AMENDED BY THE HOUSE COMMITTEE OF THE WHOLE, 1987 Kansas Leg. Sess. at 6 (Feb. 11, 1987).

a principal focus of capital punishment supporters. The attack consisted essentially of three arguments. First, at least some of the supporters simply disagreed that capital litigation is more expensive. Thus, the Attorney General stated his view that neither the trials nor appeals procedures in capital cases would likely be longer than in ordinary litigation.<sup>75</sup> Another conferee expressed his view that the trial phases of death penalty cases are not litigated differently than ordinary cases, and implied that the appellate issues would not be significantly more complex.<sup>76</sup>

The second argument used by supporters of the death penalty was that the costs would not be great because there would be few death penalty prosecutions.<sup>77</sup> In their zeal to emphasize how cheap the death penalty would be, supporters apparently ignored that this argument might undermine claims that the penalty can function as a deterrent or as effective retribution. Thus, supporters made no effort to explain how a punishment imposed on one or two of the approximately 120 individuals who commit homicides in Kansas in any year would serve as a significant deterrent. It is also unclear why a penalty imposed so rarely would serve any important retributive goal.

The third complaint over the cost issue, and one expressed with some vehemence, was that the issue was an inappropriate one upon which to base a judgment on the death penalty. According to proponents, the issue was one of justice, and cost was an inappropriate consideration.<sup>78</sup> It was as if there was an unspoken covenant violated by treating the capital punishment question as something other than a symbolic test of an individual's attitude toward crime and criminals.

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75. 1987 Senate Hearings, *supra* note 52 (statement of Robert Stephen, Attorney General). It is not my purpose in this article to rekindle the battle over the cost of the death penalty. It is worth noting, however, that the Attorney General's assumption that capital appellate and postconviction litigation does not consume greater time and money than noncapital litigation is contradicted by every study that has been done on this question. See, e.g., THE SPANGENBERG GROUP, A CASELOAD/WORKLOAD FORMULA FOR FLORIDA'S OFFICE OF THE CAPITAL COLLATERAL REPRESENTATIVE (sponsored by ABA Standing Committee on Legal Aid and Indigent Defendants, Bar Info. Prog.) (Feb. 1987); THE SPANGENBERG GROUP, TIME AND EXPENSE ANALYSIS IN POST-CONVICTION DEATH PENALTY CASES IN NORTH CAROLINA (sponsored by ABA Bar Info. Prog.) (June 1988); THE SPANGENBERG GROUP, STUDY OF REPRESENTATION IN CAPITAL CASES IN VIRGINIA (Final Report, Nov. 1988); see also *supra* note 19 and accompanying text.

76. 1987 Senate Hearings, *supra* note 52 (statement of Professor Emil Tonkovich, University of Kansas School of Law, at 5, 7).

77. See *id.* (statement of Professor Emil Tonkovich, University of Kansas School of Law) (estimating two death sentences per year).

78. See, e.g., *id.* (statement of Attorney General Robert Stephen) (statement of Jimmy D. Huff, President, Kansas Peace Officers' Ass'n).

On this somewhat unusual note, the debate on the penalty ended. The bill, after failing in the House on a voice vote, passed the chamber.<sup>79</sup> Later in the spring, it was narrowly defeated in the Senate.<sup>80</sup>

### *B. The Death Penalty and Public Choice*

The defeat of the death penalty in 1987 was surprising for several reasons. The penalty was supported by the newly elected Governor, who had a majority of his party in both houses of the legislature. The bill had passed in previous sessions of the legislature. The passing of capital punishment legislation would have been consistent with a national trend. States that had implemented capital punishment prior to 1970 have, almost without exception, moved to reinstate the penalty.<sup>81</sup> Most of all, capital punishment was seen as overwhelmingly popular with the electorate. If one makes the plausible assumption that legislators are interested in re-election, the willingness of a substantial minority of the House and majority of the Senate to defy public opinion seems unusual. In this section, I attempt to identify some of the possible reasons for the degree of opposition to capital punishment in the legislature.

Studies of legislative behavior have been dominated by two different models. The so-called "public interest" model assumes a deliberative view of the political process with legislators operating, at least to some degree, autonomously of interest groups to promote the public good.<sup>82</sup> The philosophical antecedents of this theory extend at least as far in the past as Burke and were central to the republican formation to create legislatures that were, to some degree, insulated from political pressure.<sup>83</sup>

The competing view treats legislative behavior as a simple response to constituent power. Under this model, legislative outcomes simply reflect the balance of political power. Actual political choices are determined by the efforts of individuals and groups to further their own economic interests with the "winner" in legislation being the group that has the most to offer the legislator.<sup>84</sup>

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79. See KANSAS HOUSE JOURNAL 111, 127 (Jan. 28 and 30, 1987).

80. See *id.* at 506, 510 (Apr. 3, 1987).

81. See F. ZIMRING & G. HAWKINS, *supra* note 2, at 43.

82. See, e.g., Farber & Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 876 (1987); Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 45-48 (1985).

83. See Sunstein, *supra* note 82, at 38-48.

84. See generally Farber & Frickey, *supra* note 82, at 875-76.

In recent years, this conception of legislative behavior has been given intellectual lustre by the use of economic models. In what has been called "public choice" theory, the political process is conceived of as a market. Legislation is "sold" by the legislature and "bought" by the beneficiaries of the legislation. Crucial to these models is a self-interested, perhaps selfish, view of human motivation. The constituents desire legislators to promote the constituents' interest. The legislators, in turn, will grant the benefit if they believe that it furthers their interest, which is, above all, to win re-election.<sup>85</sup>

The literature also posits at least two different methods by which politicians may help assure their re-election. The first is to help achieve particularized benefits for interest groups in return for the support provided by those groups. In a significant work published in 1974, David Mayhew described this kind of political behavior as "credit claiming."<sup>86</sup> Because political responsibility is diffuse, this kind of behavior is most often found in dealing with particularized matters of interest to smaller economic groups. A second form of action is described by Mayhew as "position taking."<sup>87</sup> Mayhew defines position taking as "the public enunciation of a judgmental statement on anything likely to be of interest to political actors."<sup>88</sup> According to Mayhew, the important feature of position taking is not that the legislators make important things happen, but that they make pleasing judgmental statements.<sup>89</sup> In situations in which a solid majority exists in favor of the particular position or sentiment, the expected outcome would be legislative endorsements of that particular position. Both credit claiming and position taking have in common a lack of concern for the legislator's own ideology and a belief that the legislator's conception of the public interest is not central to a decision.

To say the least, the capital punishment debate in the legislature is difficult to explain as an example of credit claiming. It is hard to see capital punishment as providing a particularized benefit to anyone. Moreover, it is even more difficult to posit the groups that oppose capital punishment as possessing the political power to buy legislation. The organizations that oppose capital punish-

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85. *Id.* at 890-93; Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 205-06 (1988). See generally Eskridge, *Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation*, 74 VA. L. REV. 275 (1988).

86. D. MAYHEW, CONGRESS: THE ELECTORAL CONNECTION 53-54 (1974).

87. *Id.* at 61.

88. *Id.*

89. *Id.* at 62.

ment, such as the American Civil Liberties Union, the League of Women Voters, and Amnesty International, have little to offer prospective legislators. They are not financially equipped to deliver large campaign contributions, nor do they seem to command a significant block of votes capable of swaying an election. Although it is somewhat more likely that supporters of capital punishment could be credit claiming to achieve the support of law enforcement groups, even that theory is not too plausible. The groups supporting the death penalty, such as the Kansas Peace Officer's Association and the Kansas Sheriff's Association, have little in the way of wealth or membership to offer prospective legislators. Thus, the public choice model of interest group bidding for legislator votes seems an extremely poor description of the process surrounding the death penalty.

Mayhew's description of position taking, on the other hand, does seem to fit much of the debate surrounding the death penalty. In fact, capital punishment seems a paradigm for position taking. It is a mythical, symbolic issue. It is an issue in which the sentiment expressed by the legislator is far more significant than the result achieved. And it is an issue upon which public sentiment has apparently crystallized. Thus, the public choice model would argue that this is an issue in which position taking would occur.

The public choice theory would also predict huge majorities, however, in favor of capital punishment. Because capital punishment is regarded as the overwhelmingly popular position, one would assume that the self-interested legislator would favor its imposition. That, of course, is precisely what happened last year in Congress when the death penalty was proposed for homicides committed during certain drug offenses. Congressional members from both political parties rushed to support a bill that may have no impact whatsoever on crime or drugs, but which does demonstrate opposition to both.<sup>90</sup>

In Kansas, however, a different phenomenon occurred. The vote in both houses was closely contested, and the bill failed in the Senate. That pattern cannot simply reflect the actions of rational legislators single mindedly seeking re-election. Moreover, the position-taking hypothesis would also predict that it would be highly unlikely for legislators to change their views on the subject. As Mayhew has written, "the best position-taking strategy for most congressmen at most times is to be conservative—to cling to their own positions of the past where possible and to reach for new

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90. See *supra* note 68 and accompanying text.

ones with great caution where necessary."<sup>91</sup> In Kansas, however, several legislators did switch their votes during the 1987 legislative session. In particular, six senators who had formerly supported capital punishment decided to vote against it. The notion of a legislator not only taking a position most of the public opposes, but changing sides to do it, confounds the prediction one would make from public choice theory.

In sum, the model of self-interested legislators single-mindedly seeking re-election utterly fails to describe the conduct in recent years of the Kansas House and Senate regarding capital punishment. Many legislators would appear to be making judgments on this issue either on the assumption that position taking on this issue is not crucial or even in the belief that their decision may harm their chances of re-election.

It would appear, therefore, that the public interest model offers a superior guide to the behavior of many of the legislators in this state at least with regard to this issue. Because self-interest probably does not account for legislative sentiment against the death penalty, the most plausible reason for a legislator to vote against the death penalty is probably the belief that it is a bad idea.<sup>92</sup> That belief, of course, can stem from several different bases, including moral and ideological opposition to the penalty and concerns about its utility and cost.

My colleague, Emil Tonkovich, has suggested that one of the reasons that senators may have changed their votes was a reassessment of the moral arguments on the penalty.<sup>93</sup> Although this may have been a concern of some legislators, I am skeptical about whether this is a completely satisfactory answer. The morality argument presupposes legislators with moral views that are in opposition to most of their constituents. My experience in talking with legislators was that they shared their constituents' revulsion toward violent crimes and violent criminals. I saw no evidence that they were more likely to be pacifist than the rest of the population. Instead, my inclination is that concerns about the efficacy, accuracy, and utility of capital punishment were a greater

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91. D. MAYHEW, *supra* note 86, at 67.

92. I have no doubt that support of capital punishment in the legislature was also motivated by concern for the public interest—a belief that the death penalty was appropriate and just. When a legislator's conception of the public interest coincides with what is politically popular or personally rewarding, however, it is more difficult to identify the principal motivating factor.

93. See Tonkovich, *supra* note 52, at 52. Professor Tonkovich reported this explanation as having been offered by death penalty proponents.



concern. "It just doesn't work," was a phrase I heard uttered by several individuals.

I do not believe, however, that these concerns are enough to explain the defeat of the bill. These concerns also operate at the national level and were insufficient to defeat the Congressional death penalty for drug-related homicides. One difference in Kansas is that legislators were also presented with information indicating that capital punishment could in fact cause harm to the existing criminal justice system. Rather than a simple position to be taken, support of capital punishment could be seen as committing the state to a significant expenditure of revenue and to disruption of the criminal defense and court systems. A concern for these real world consequences might have caused some legislators to abandon a position-taking strategy.

This assumption, of course, posits legislators who know more, and perhaps care more, about the actual impact of capital punishment than citizens at large. It seems that this is a more plausible explanation of the divergence between the legislature and the public than the assumption that the legislator possesses a different moral orientation than her constituents. It also happens to accord with the actual explanation offered by a couple of senators for their votes.

### *C. Capital Punishment and Cognitive Dissonance*

If I am correct about American attitudes and practices, our current situation can be described as a kind of cognitive dissonance—a situation in which our beliefs and actual behavior are in conflict. Our attitudes seem to be dissonant; we support capital punishment despite our reluctance to execute and evidence that it does not work. The political scientist Samuel P. Huntington has applied the term "cognitive dissonance" to American political issues. Huntington suggests that public attitudes toward the dissonance will result in efforts to bring actions in accord with belief when the dissonance is uncomfortable and efforts to ignore the difference when it produces little tension.<sup>94</sup>

There are at least three different ways to resolve the dissonance. The first is to bring action into accord with belief by abandoning our qualms over the penalty and proceeding to execute in earnest. This policy would require, at the least, changes in juror behavior as well as eliminating some current protections that exist in our death penalty jurisprudence. Some death penalty supporters have

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94. S. HUNTINGTON, *AMERICAN POLITICS: THE PROMISE OF DISHARMONY* 64 (1981).

urged precisely such changes. They have proposed amendment of postconviction statutes to limit successive appeals and make executions easier.<sup>95</sup> An effective strategy here might also require some changes in sentencing, such as an enactment of Florida's system that permits a judge to override a jury's recommendation for mercy and impose a death sentence.

Whatever likelihood this strategy might have for success in other jurisdictions, it seems incapable of success in Kansas. Our political culture has never supported a high number of executions. Even when capital punishment was legal, executions were few and far between.

An alternative to becoming more active in capital punishment is to make the gap between myth and reality more comfortable. For example, one could minimize the costs of capital punishment, yet retain the penalty, by writing a law that reduces the likelihood that the penalty will actually be sought. In a jurisdiction reluctant to execute, the bill most likely to pass ought to be one with as few as possible real-world consequences. If this assumption is correct, one might predict an effort in Kansas to pass a bill so limited that it would rarely be used, for example, a bill limited to murders committed by life-term prisoners. If concerns about the real-world operation of capital punishment are truly motivating legislators, one might also predict that such a limited bill would result in a change of votes. The tremendous success of the federal drug death penalty seems to support this hypothesis. The federal penalty is redundant in many states that already have the death penalty. It is unlikely in any event to be frequently sought. It is thus an example of a capital punishment vote that was almost entirely symbolic.

Of course, there is a third method of resolving the dissonance—abandoning the myth. Such an abandonment could occur in at least two different ways. First, incessant attention to the reality of the penalty might actually convince people that the myth was not worth its price. Second, the myth might be lessened by a public secure that its elected representation were making serious efforts to combat violent crime. Myths die hard, however, and there is no reason to believe that lobbying efforts successful in convincing legislators that the penalty is a failure will have a similar impact on the public at large.

*D. The Words Change But The Song Remains The Same—The Death Penalty in the 1989 Session*

As this article was completed, the Kansas Legislature was again debating the death penalty. This year, the measure was first

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95. Powell, *supra* note 4, at 11-12.

introduced in the Senate. After brief hearings, a bill providing for the death penalty for premeditated murder and drug and law-enforcement-related felony murders was presented without recommendation to the Senate floor.<sup>96</sup> On February 1, 1989, the bill was defeated by the Senate, in all likelihood dooming it for this year and perhaps for next year as well. The margin of defeat, twenty-two to eighteen, was precisely the same as in 1987.<sup>97</sup>

Like the margin of defeat, several features of this year's debate were similar to 1987. As in that year, the testimony of the proponents of the penalty focused on the mythical importance of the death penalty. There was even less attempt than in 1987 to support the penalty as a deterrent to violent crime. Instead, the most notable and most extensively reported testimony during the hearings on the bill was the account by a father of his daughter's murder.<sup>98</sup> Moreover, the most frequently articulated reason given by supporters to justify a vote for the bill was public support for the death penalty.<sup>99</sup> In a striking comment during the floor debate, one of the bill's principal supporters conceded that the cost, discrimination, and deterrence arguments against the penalty might be valid. He then argued, however, that the bill ought to be passed because of widespread public support.<sup>100</sup>

Although the testimony against the bill also featured the emotional testimony of the parent of a murder victim, the bulk of the testimony, as in 1987, focused on the difficulties of implementing a system of capital punishment.<sup>101</sup> By 1989 the arguments concerning cost and delays in capital punishment seemed to have been aired with sufficient frequency that they provoked less controversy and no surprise.

Although these features of the debate seemed to mirror much of what happened in 1987, there were two significant changes in the way the issue was presented. For the first time, the issue seemed to take on a partisan dimension. In a widely-reported speech four days before the vote, a member of the Governor's party urged that the death penalty vote was an important expression of solidarity with the Governor.<sup>102</sup> A Democratic opponent publicly

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96. See S.B. 38, 1989 Sess. (as amended by Kan. Senate Committee).

97. See Topeka Capital-J., Feb. 2, 1989, at 1, col. 1.

98. Major portions of the account were broadcast over local radio and television stations.

99. See, e.g., Lawrence J.-World, Jan. 16, 1989, at 1, col. 4.

100. University Daily Kansan, Feb. 2, 1989, at 9, col. 1. Senator Ed Riley stated that "arguments about cost, deterrence and discrimination were viable, but that the polls showed the state wanted the death penalty as an option for murder criminals." *Id.* at 9, col. 3.

101. See Topeka Capital-J., Jan. 26, 1989, at 1, col. 1.

102. *Id.*, Feb. 1, 1989, at 1, col. 1.

urged that the issue not be transformed to a partisan question.<sup>103</sup> The actual vote divided far more along partisan lines than in 1987. Two former Republican opponents changed their votes to support the death penalty while all but two of the Democrats in the Senate opposed the bill.<sup>104</sup>

The second noticeable change was the diminution in publicity and apparent public interest on the issue. Two years ago the newspapers of the state covered the issue for weeks on end, and the defeat of the bill was the leading item in local newspapers and radio programs.<sup>105</sup> Although the debate was certainly covered by the media in 1989, it was covered far less extensively. On the day after the bill was defeated, it did not constitute the leading story in any of the newspapers in the Topeka and Kansas City areas.<sup>106</sup>

Although it would be a mistake to try to make too much of these developments, they may signal that the mythical power of capital punishment has been reduced in the last two years. In 1989 the death penalty seemed to be treated as a more typically political issue than it was in 1987. Perhaps one of the effects of the 1987 debate was to reduce the power of capital punishment's mythical significance in Kansas. If that is the case, one might suspect that capital punishment will command less and less attention as our years as an abolitionist state continue to increase.

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103. University Daily Kansan, Feb. 2, 1989, at 9, col. 1.

104. See Topeka Capital-J., Feb. 2, 1989, at 9-A, col. 6; cf. Wichita Eagle-Beacon, Apr. 4, 1987, at 6A, col. 2-3. In 1987 Republicans voted in favor of the penalty by a margin of 14 to 10; Democrats opposed it 12 to 4. In 1989 Republican support increased to 16 in favor, 6 opposed; Democrats opposed by a margin of 16 to 2.

105. See, e.g., Topeka Capital-J., Jan. 22, 1987, at 1, col. 3; Lawrence J.-World, Jan. 22, 1987, at 1, col. 1; Kansas City Times, Apr. 4, 1987, at 1, col. 1; Wichita Eagle-Beacon, Apr. 4, 1987, at 1, col. 2; Topeka Capital-J., Apr. 4, 1987, at 1, col. 1.

106. See, e.g., Topeka Capital-J., Feb. 2, 1989, at 1, col. 1.