

UPDATE: AMERICAN PUBLIC OPINION ON THE DEATH PENALTY—IT'S GETTING PERSONAL

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Americans' views on capital punishment have stabilized. In 1994, when Professor Phoebe Ellsworth and I published a review of research on death penalty attitudes in the United States,¹ we began by noting that "support for the death penalty [is] at a near record high."² That finding, like most of the others we reported, has not changed. Nonetheless, it is interesting to pause and review the data on public opinion on the death penalty that have accumulated over the past several years. Stability is less dramatic than change but it may be equally important, and there is some news to report. Recent studies shed more light on the reasons *why* Americans favor or oppose the death penalty, reinforce earlier findings that their views may be less predictable in concrete cases than they seem in the abstract, and hint at how these attitudes might someday change.

I

GENERAL TRENDS

The General Social Survey ("GSS"), a yearly opinion poll conducted by the National Opinion Research Center, is the best periodic, general-purpose national poll available.³ On twenty-one occasions from 1972 through 1996 it has included the question: "Do you favor or oppose the death penalty for persons convicted of murder?"⁴ From

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¹ See Phoebe C. Ellsworth & Samuel R. Gross, *Hardening of the Attitudes: Americans' Views on the Death Penalty*, J. Soc. ISSUES, Summer 1994, at 19. For simplicity, I sometimes refer to authors Ellsworth and Gross in the first-person plural, as "We."

² *Id.* at 19.

³ Most of the polls cited in this Article can be found on a publicly available computerized data base thanks to the Roper Center for Public Opinion Research at the University of Connecticut. They are available in LEXIS, News Library, Rpoll File, as well as the Westlaw and Dialog databases.

⁴ *General Social Surveys*, National Opinion Research Ctr., 1972-78, 1980, 1982-91, 1993-94, 1996, available in LEXIS, News Library, Rpoll File [hereinafter *General Social Surveys*]. To be precise, in 1972 and 1973 the question was: "Are you in favor of the death penalty for persons convicted of murder?"

1982 through 1996, the proportion of respondents agreeing has ranged from 70% to 76%, with no apparent temporal trend.⁵ That represents a very high level of support for the death penalty and a great increase over earlier decades. As we noted in 1994, this high level of support for capital punishment might be explained as a reaction to the sharp increase in homicide and other violent crimes that began in the early 1960s and continued through the 1970s.⁶ Since 1982, those crime rates have gone down and up and down again, while support for the death penalty has remained comparatively flat. See Figure 1.⁷

If homicide and crime rates affect death penalty attitudes, they do so indirectly rather than through personal experience.⁸ Neither prior victimization nor personal fear predict death penalty attitudes. General concern about crime, however, and exposure to crime through the media might be influential. In the last few years, Americans have witnessed dramatic decreases in violent crime in several large cities,⁹ most notably New York.¹⁰ For the nation as a whole the drop in violent crime has amounted to little more than a downturn from levels that had reached extraordinary heights—as Figure 1 shows—although the decrease in the homicide rate has been more substantial. This good news has not translated into reduced support for the death penalty. As we pointed out in 1994, people who came to support the death penalty because crime was increasing may not change their views again when crime levels off or even decreases.¹¹ Moreover, the message may not be getting through. The news media do report these cheering crime statistics; they may even exaggerate their significance.¹² But they devote a larger and growing portion of their space and time to individual crime stories—murders, if possi-

⁵ See *id.* (1982-91, 1993-94, 1996).

⁶ See Ellsworth & Gross, *supra* note 1, at 40-42.

⁷ The sources used in Figure 1 reflect competing considerations. The GSS is the best general-purpose, periodic national opinion poll available; the National Election Study ("NES") is comparable in quality, but has a different focus; Gallup has the longest history of conducting national surveys that include questions on capital punishment; and Harris is the polling organization with the next-longest record of conducting surveys on this issue. Therefore, we have used GSS or NES data when possible and Gallup data otherwise—except in 1997, for which we used Harris data because there were no relevant GSS, NES, or Gallup polls. The time lines for violent crime and for homicide are based on data from the United States Federal Bureau of Investigation's Uniform Crime Reports.

⁸ See Ellsworth & Gross, *supra* note 1, at 42.

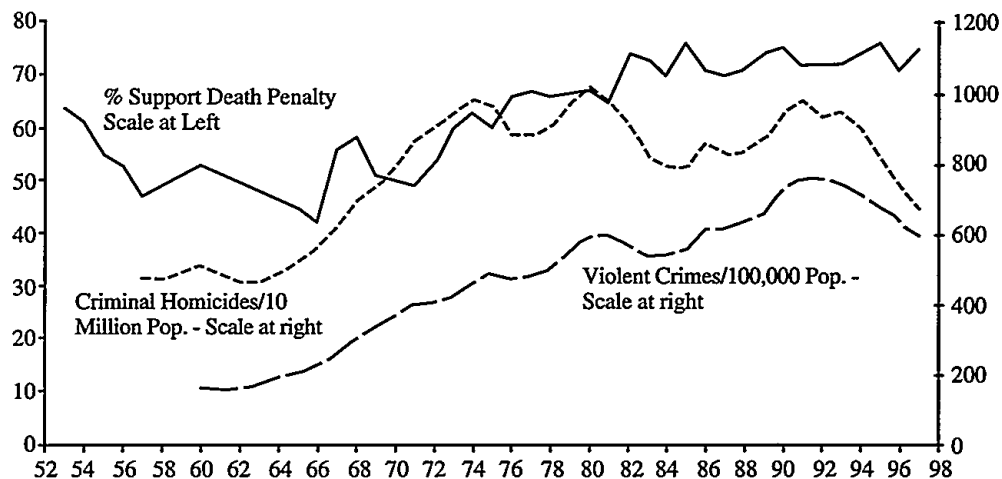
⁹ See James Risen, *U.S. Violent Crime Drops Record 7%*, L.A. TIMES, June 2, 1997, at A1 ("The FBI noted that the number of murders reported to police fell in each of the nation's three largest cities.").

¹⁰ See David Kocieniewski, *Crime in City Down in '97 by 9.1 Percent*, N.Y. TIMES, Jan. 3, 1998, at B1 (noting recent reductions in New York City's violent crime rate).

¹¹ See Ellsworth & Gross, *supra* note 1, at 42.

¹² For news reports of crime statistics, see, for example, Risen, *supra* note 9 (noting that preliminary FBI statistics show "a record 11% drop in the number of murders"); *Vio-*

FIGURE 1
SUPPORT FOR DEATH PENALTY AND CRIME RATES
1953-1997



SOURCE: The sources for the death-penalty attitude time line are: *Gallup Poll*, Gallup Org., 1953-1971, 1981; *General Social Survey*, National Opinion Res. Ctr., 1972-1978, 1980, 1982-1994, 1996; *American National Election Study*, Center for Political Stud., 1995; *Harris Poll*, Louis Harris & Assoc., 1997. All poll data are available in LEXIS, News Library, Rpoll File. The sources for the homicide and violent crime time lines are: Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics—1996*, at 306 tbl.3.106 (1997) 1960-1995; FBI, U.S. Dep't of Justice, *Uniform Crime Reports for the United States* 1957, 1958, 1959, 1996, 1997.

ble¹³—and the fictional world of television is filled increasingly with scenes of crime and violence.¹⁴ The effect is illustrated nicely in an August 1996 *Chicago Tribune* national poll: 75% of the respondents thought “crime in the nation” was increasing, but fewer than half (48%) thought it was increasing in their own communities.¹⁵

lent Crime Survey Shows Steep Decline, WASH. POST, Apr. 14, 1997, at A7 (reporting that “[t]he U.S. violent crime rate plunged more than 12 percent in 1995”).

¹³ See John Carmody, *The TV Column*, WASH. POST, Mar. 12, 1998, at C5 (reporting on a survey by the Center for Media and Public Affairs that found that crime stories overwhelmingly dominate local newscasts); Michael Winerip, *Looking for an 11 O’Clock Fix*, N.Y. TIMES MAG., Jan. 11, 1998, at 30, 33 (stating that “crime and violence continue to be the mainstay of local TV news”). See Center for Media and Public Affairs, *Crime Most Common Story on Local Television News* (visited May 21, 1998) <<http://www.cmpa.com/archive/healthtv.htm>>, for a complete version of this study.

¹⁴ See George Gerbner, *Television Violence: The Power and the Peril*, in GENDER, RACE AND CLASS IN MEDIA 547, 547-52 (Gail Dines & Jean M. Humez eds., 1995); cf. E-mail from George Gerbner, Bell Atlantic Professor of Telecommunications, Temple University, to Larry Gross, Professor of Communication, Annenberg School for Communication of the University of Pennsylvania (Apr. 2, 1998) (on file with author) (showing high levels of violence on television).

¹⁵ See *Tribune Poll*, Market Shares Corp., Aug. 4, 1996, available in LEXIS, News Library, Rpoll File (questions 15-16). Similarly, on another survey, 67% of respondents thought crime nationally was increasing, and 45% thought it was increasing “a lot.” *Harris Poll*, Louis Harris & Assocs., May 5, 1997, available in LEXIS, News Library, Rpoll File [hereinafter *Harris Poll*] (question 1). The public is aware that the media overemphasize gory crimes—90% said that the media were more likely to report “terrible violent crimes” than

Race and sex, the two major demographic predictors of death penalty attitudes,¹⁶ continue to be influential on every survey. On the 1996 GSS, for example, blacks were far less likely to favor the death penalty than whites (51% to 75%), and women were considerably less likely than men (65% to 79%).¹⁷ A recent survey throws an interesting sidelight on the racial disparity: Black respondents were more likely than whites both to say that their clergyman spoke out on the issue of capital punishment (39% to 25%),¹⁸ and to report that their religious beliefs had the biggest influence on their thinking on the issue (33% to 17%).¹⁹

Political orientation has remained a stable predictor of death penalty attitudes, comparable in magnitude to sex. On the 1996 GSS, 61% of Democrats, 70% of Independents, and 85% of Republicans were in favor of the death penalty, as were 62% of liberals, 73% of moderates, and 78% of conservatives.²⁰ Regional differences are less clear. Past studies generally have found that Westerners favored the death penalty the most, while Easterners and Midwesterners favored it the least.²¹ Recent polls show more mixed results, and the only geographic pattern that seems to survive is a lower support in the East than elsewhere. For example, the 1996 GSS reports the following rates: East 66%, Midwest 72%, South 72%, and West 75%.²² However, even that weak regional pattern is violated in some polls,²³ which suggests that death penalty attitudes are becoming more homogeneous across the country.

A 1994 poll by the Survey Research Center at the University of California at Berkeley asked the following question:

Some people support the death penalty [for persons convicted of murder because justice is served when these criminals are forced to give "an eye for an eye"]. Others feel that the death penalty should be abolished [because it is imposed in a way that discriminates against minorities and poor people]. What about your opinion? Would you say you are strongly in favor of the death penalty, some-

"[g]ood news [that] violent crime [is] decreasing," *id.* (Apr. 29, 1996) (question 1)—but it appears to be affected nonetheless.

¹⁶ See Ellsworth & Gross, *supra* note 1, at 21.

¹⁷ See *General Social Surveys*, *supra* note 4 (May 25, 1996) (question 50).

¹⁸ See *People & the Press: American Churches, Politics Poll*, Princeton Survey Research Assocs., June 9, 1996, available in LEXIS, News Library, Rpoll File [hereinafter *Princeton Poll*] (question 60).

¹⁹ See *id.* (question 14).

²⁰ See *General Social Surveys*, *supra* note 4 (May 25, 1996) (question 50).

²¹ See Ellsworth & Gross, *supra* note 1, at 21.

²² See *General Social Surveys*, *supra* note 4 (May 25, 1996) (question 50).

²³ See, e.g., *Time*, *CNN*, *Yankelovich Partners Inc.*, Yankelovich Partners Inc., July 14, 1994, available in LEXIS, News Library, Rpoll File [hereinafter *Yankelovich Poll*] (question 11) (reporting the following results: East 81%; Midwest 78%; South 77%; West 75%).

what in favor, somewhat opposed, or strongly opposed to the death penalty?²⁴

Each bracketed statement was read to half of the respondents, producing four conditions: pro-death penalty argument only, anti-death penalty argument only, both, and neither. This manipulation had no discernable effect on the answers. For example, the combined pro-death penalty positions (favor strongly and favor) were endorsed by 80% of all respondents, 82% of those who heard neither argument, 78% of those who heard both arguments, 81% of those who heard the pro-death argument only, and 79% of those who heard the anti-death argument only. All of these differences are well within the expected range of chance fluctuations. These responses illustrate nicely a pattern that we noted in 1994: "[M]ost Americans know whether they 'favor' or 'oppose' the death penalty, and say so in response to any question that can reasonably be interpreted as addressing that issue."²⁵ By contrast, for other public issues—foreign policy and criminal sentencing in general—the precise wording of the questions or the answers offered may make a large difference in the percentages of respondents who give particular answers, or who say that they know enough to answer at all.²⁶

For most Americans, a position on capital punishment is an aspect of self-identification. We say, "I'm for the death penalty," the same way we say, "I'm a Republican," or "I'm a Red Sox fan." In this long-standing debate, sides have been chosen, and the great majority are for it. In fact, the consensus is so clear that the issue has become less controversial, at least on the national scene. Since Michael Dukakis's debacle in 1988, no serious candidate for president has expressed any opposition to capital punishment, and in 1996 President Clinton and his Republican opponents joined forces and overwhelmingly passed legislation that both greatly expanded the number of federal capital crimes and limited the ability of death-row prisoners to seek review in federal court.²⁷ As a barometer of public attitudes, the title of the bill may be even more telling than its contents: "The Antiterrorism and Effective Death Penalty Act of 1996."

At the same time, use of the death penalty has spread. Seventeen states performed a total of 158 executions in the fifteen years between 1977 (when executions resumed after a decade-long moratorium) and

²⁴ Survey Research Ctr., University of California at Berkeley, *1994 Multi-Investigator Study* (visited Sept. 2, 1998) <<http://csa.berkeley.edu:7502/D3/Multi/Doc/multi001.html>>.

²⁵ Ellsworth & Gross, *supra* note 1, at 25.

²⁶ *See id.* at 24-25.

²⁷ *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified in scattered sections of 28 U.S.C.).

the end of 1991.²⁸ Twenty-nine states performed a total of 274 executions in the six years that followed (from 1992 through 1997),²⁹ two states enacted new death penalty laws (Kansas in 1994³⁰ and New York in 1995³¹) for a total of thirty-eight, and capital punishment has been under active consideration in several of the twelve remaining abolitionist states.³² We seem to have reached a new status quo in which the death penalty is an accepted part of our criminal justice system; it is widely available, widely supported, and less controversial than in decades past. If so, it may increasingly be taken for granted and might eventually become less salient. Perhaps in twenty or forty years many Americans will once again have no clear position on capital punishment, for or against. For now, it remains a powerful issue over which there is little conflict because the sides are so severely mismatched.

II

EXPRESSED REASONS FOR DEATH PENALTY ATTITUDES

A. Deterrence, Retribution, and Incapacitation

Most Americans who favor the death penalty do so primarily for retributive reasons.³³ On a 1991 survey, most respondents who favored the death penalty continued to believe that it deterred crime, but only 13% cited deterrence as a basis for their support; the most popular justification by far was “[a] life for a life” (50%).³⁴ There have been no comparable studies since. Deterrence had been a more prominent justification for the death penalty—in 1981 35% of respondents cited it as a basis for their support³⁵—but even then few Americans believed that the death penalty was the *best* way to reduce crime. In 1981 only 5% of respondents mentioned the death penalty when

²⁸ See NAACP LEGAL DEFENSE & EDUC. FUND, DEATH ROW U.S.A. 8 (Summer 1998) [hereinafter DEATH ROW U.S.A.].

²⁹ See *id.*

³⁰ See 1994 Kan. Sess. Laws ch. 252 (H.B. 2578).

³¹ See Death Penalty—Imposition and Procedures—Assignment of Counsel, 1995 N.Y. Laws ch. 1.

³² See, e.g., *The Wisconsin Death Penalty Debate*, 79 MARQ. L. REV. 647 (1996) (introducing several articles that survey whether Wisconsin should adopt the death penalty); Adrian Walker & Doris Sue Wong, *No Death Penalty, by One Vote*, BOSTON GLOBE, Nov. 7, 1997, at A1 (detailing the Massachusetts legislature’s refusal “on a tie vote[] to reinstate the death penalty, bucking a wave of support [for it]”).

³³ See Ellsworth & Gross, *supra* note 1, at 27-29 (describing how retribution has become a more acceptable reason to support capital punishment and that more people now use it to justify their support).

³⁴ *Gallup Poll*, Gallup Org., June 16, 1991, available in LEXIS, News Library, Rpoll File [hereinafter *Gallup Poll*] (question 2).

³⁵ See ABC News, *Washington Post*, ABC News & Wash. Post, May 20, 1981, available in LEXIS, News Library, Rpoll File [hereinafter *ABC News and Post Poll*] (question 61).

asked, "What do you think is the best way of reducing crime?"³⁶ In 1990, on a similar question, 3% mentioned the death penalty;³⁷ and in 1994, when asked what the government should do to reduce crime, only 9% mentioned the death penalty first (following "Criminals serve total sentence" (38%), "More police" (22%), and "Longer jail times" (16%))³⁸ and only 11% mentioned it second (trailing the other options mentioned above, plus "[putting c]onvicted criminals away for life" (13%)).³⁹

From 1972 through 1990 belief in the deterrent effect of the death penalty held steady at about 60%.⁴⁰ A 1991 survey reported a substantial decrease from that level to 51%,⁴¹ but because this could have been a short-term or chance aberration, we attached no significance to this finding in 1994.⁴² A more recent poll with similar data suggests that the downward trend is real: in 1997 only 45% of those surveyed agreed that the death penalty deters crime, and 52% said that it does not.⁴³ This shift should not be surprising. By 1997 the pace of executions in the United States had picked up greatly, a fact that has been widely reported even as publicity surrounding many specific executions has decreased. At the same time, most people still believe that crime continues to increase,⁴⁴ which is conspicuously inconsistent with the theory that executions deter crime. In any event, despite the fact that people frequently mention general deterrence as the prime justification for capital punishment, changes in the level of belief in deterrence have had no obvious relationship to changes in support for the death penalty. Support went up in the 1970s and early 1980s while belief in deterrence remained steady, and support has remained steady in the 1990s as belief in deterrence has dropped.

In 1991, on the most recent national survey that specifically asked respondents to give reasons for their death penalty attitudes, incapacitation—preventing a murderer from killing again—ranked as a distant second among reasons given for favoring the death penalty.⁴⁵ Nineteen percent of those who favored capital punishment mentioned it, compared to 50% who said they favored capital punishment

³⁶ CBS, *New York Times*, CBS News & N.Y. Times, June 27, 1981, available in LEXIS, News Library, Rpoll File [hereinafter *CBS & N.Y. Times Poll*] (question 58).

³⁷ See *Gallup Poll*, *supra* note 34 (Sept. 11, 1990) (question 20).

³⁸ *Crime and Shopping II*, America's Research Group, Aug. 12, 1994, available in LEXIS, News Library, Rpoll File [hereinafter *America's Research Poll*] (question 55).

³⁹ *Id.* (question 56).

⁴⁰ See Ellsworth & Gross, *supra* note 1, at 27.

⁴¹ See *Gallup Poll*, *supra* note 34 (June 16, 1991) (question 5).

⁴² See Ellsworth & Gross, *supra* note 1, at 27.

⁴³ See *Yankelovich Poll*, *supra* note 23 (June 5, 1997) (question 22).

⁴⁴ See *supra* note 15 and accompanying text.

⁴⁵ See *Gallup Poll*, *supra* note 34 (June 16, 1991) (question 2).

because it represents “[a] life for a life.”⁴⁶ Earlier surveys are consistent. A separate line of research, however, suggests that incapacitation might be a more important issue than those findings seem to indicate. In surveys conducted in several states, William Bowers and various colleagues asked respondents whether they would prefer punishment by life in prison with absolutely no chance of ever being released on parole or returning to society, as an alternative to the death penalty.⁴⁷ In each state, support for the death penalty dropped sharply when the survey offered life without parole (“LWOP”) as an alternative⁴⁸ and declined further with the additional condition that the murderer “be required to work in prison industries for money that would go to the families of their victims.”⁴⁹ Richard Dieter replicated these results in a national poll using similar questions.⁵⁰

The studies by Bowers and Dieter present problems of interpretation.⁵¹ The questions are worded forcefully and were asked repeatedly with escalating nondeath sentences—from “parole after 25 years” to “absolutely no chance of parole” to “no chance of parole” *plus* restitution.⁵² This format presents a danger that the shift in attitudes that Bowers and Dieter observed was exaggerated. Between 1991 and 1998, however, seven other national polls have asked more neutrally worded versions of the same question, usually: “[W]hat should be the penalty for murder—the death penalty or life imprisonment with absolutely no possibility of parole?”⁵³ Table 1 summarizes the results and shows a consistent 15-20% decrease in support for capital punishment when life without parole is the explicit alternative—less than that reported by Bowers and Dieter, but a sizeable effect all the same.⁵⁴

⁴⁶ *Id.*

⁴⁷ See William Bowers, *Capital Punishment and Contemporary Values: People's Misgivings and the Court's Misperceptions*, 27 LAW & SOC'Y REV. 157, 163 (1993); William J. Bowers et al., *A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer*, 22 AM. J. CRIM. L. 77, 102 (1994).

⁴⁸ See Bowers et al., *supra* note 47, at 102, 103 tbl.V.

⁴⁹ *Id.* at 104 tbl.V; accord Bowers, *supra* note 47, at 163-64; Bowers et al., *supra* note 47, at 102-03.

⁵⁰ See RICHARD C. DIETER, DEATH PENALTY INFO. CTR., SENTENCING FOR LIFE: AMERICANS EMBRACE ALTERNATIVES TO THE DEATH PENALTY 3-5 (1993).

⁵¹ See generally Ellsworth & Gross, *supra* note 1, at 31 (explaining the potential problems with Bowers's studies and related surveys).

⁵² *Id.*

⁵³ E.g., Gallup Poll, CNN, USA Today, Gallup Org., June 22, 1994, available in LEXIS, News Library, Rpoll File [hereinafter *Gallup, CNN, USA Today Poll*] (question 1). Compare *id.* (“In your view, what should be . . . ?”), with *id.* (Jan. 1998) (question 47) (“What do you think should be the penalty for murder committed by a man . . . ?” (emphasis added)), and *id.* (question 48) (same, “for murder committed by a woman . . . ?” (emphasis added)).

⁵⁴ The average level of support for the death penalty on the seven surveys in Table 1 was 55%.

TABLE 1
SUPPORT FOR DEATH PENALTY WHEN LIFE WITHOUT PAROLE
IS THE ALTERNATIVE

“What do you think should be the penalty for murder—the death penalty or life imprisonment with absolutely no possibility of parole?”

	Death Penalty (%)	Life Without Parole (%)
June 1991	53	35
Apr. 1992 ^a	50	37
Oct. 1993	59	29
June 1994 ^b	50	32
Aug. 1994 ^c	59	30
Aug. 1997	61	29
Jan. 1998		
“For a man”	54	36
“For a woman”	50	38

SOURCE: All data come from Gallup Org., available in LEXIS, News Library, Rpoll File, unless otherwise noted.

^a For this survey, the question began, “Which would you prefer as a penalty for murder . . .” rather than “What do you think should be the penalty for murder. . . .”

^b For this survey, the question began, “In your view what . . .” rather than “What do you think”

^c Data for this question come from CBS News, available in LEXIS, News Library, Rpoll File.

The Bowers and Dieter version of the life without parole question—“would you prefer this [punishment] as an *alternative* to the death penalty?”⁵⁵—could be misinterpreted. Some respondents who agreed might have meant that they wanted life without parole to be available, along with the death penalty, as an alternative. If so, they should be categorized as supporters of capital punishment because the death penalty is always discretionary in the United States, whatever the lesser penalty. Several of the more recent surveys report that from 8% to 11% of respondents volunteered that the choice between these two options “depends.”⁵⁶ These answers might or might not indicate a similar attitude—that the death penalty should be available for some murder cases, and life without parole for others. Fortunately, a 1996 survey⁵⁷ used a less ambiguous format, and its results are comparable. Those who said they favored the death penalty (79%) were asked: “If you knew that murderers would be given a true life sentence without

⁵⁵ Ellsworth & Gross, *supra* note 1, at 31 (quoting Bowers, *supra* note 47, at 163 (emphasis added)).

⁵⁶ The percentages of volunteered “it depends” responses varied. See, e.g., CBS News, Aug. 2, 1994, available in LEXIS, News Library, Rpoll File [hereinafter *CBS Poll*] (question 1) (8%); Gallup, CNN, USA Today Poll, *supra* note 53 (June 22, 1994) (question 1) (11%); *id.* (Oct. 18, 1993) (question 17) (10%); *Life Magazine—If Women Ran America*, Gallup Org., Apr. 5, 1992, available in LEXIS, News Library, Rpoll File (question 28) (10%).

⁵⁷ See *Crime in America Survey*, Public Policy Research Inst., June 1, 1996, available in LEXIS, News Library, Rpoll File [hereinafter *Public Policy Poll*] (question 65).

the possibility for parole, would you continue to favor the death penalty?"⁵⁸ Seventy-six percent of those who favored the death penalty—60% of the entire sample—said "Yes," and 20% said "No."⁵⁹

The attraction of life without parole may reflect retributive impulses as well as a desire to prevent future killings.⁶⁰ Most Americans believe that murderers who are sentenced to life imprisonment will be released in twenty, or ten, or even seven years.⁶¹ These perceived sentences simply may seem too light as punishment for murder, regardless of any future danger the defendant might pose. A recent paper by William Bowers and Benjamin Steiner attempts to disentangle these effects.⁶²

Since 1990 the Capital Jury Project has been collecting and analyzing data from interviews with jurors of capital trials in fourteen states.⁶³ Bowers and Steiner use data from the Capital Jury Project to examine the effects of jurors' perceptions of the alternative to a death sentence on the outcomes of capital trials. Their initial findings track survey data for the population at large. In each state 67% to 89% of the capital jurors agreed that murderers get out of prison "far too soon," and most agreed strongly.⁶⁴ Also, in each state the capital jurors' median estimates of sentences served by murderers who are not sentenced to death were considerably lower than the mandatory *minimum* term required before eligibility for parole.⁶⁵ Bowers and Steiner show that the jurors' beliefs about the alternatives to death sentences have a major bearing on the sentences they return. For example, of those who thought that a defendant who avoided the death penalty would serve nine years or less, 69% voted for death; of those who thought he would serve twenty years or more, only 43% voted for death.⁶⁶ What explains this difference? Clearly, the desire for incapacitation is a major factor; the jurors speak to that directly. Seventy-seven percent thought the defendant "would be dangerous in the fu-

⁵⁸ *Id.* (question 66).

⁵⁹ *Id.* The remaining 4% replied that they did not know. *See id.*

⁶⁰ *See* Ellsworth & Gross, *supra* note 1, at 31.

⁶¹ *See* DIETER, *supra* note 50, at 8; Sally Costanzo & Mark Costanzo, *Life or Death Decisions: An Analysis of Capital Jury Decision Making Under the Special Issues Sentencing Framework*, 18 LAW & HUM. BEHAV. 151, 163-64 (1994).

⁶² *See* William J. Bowers & Benjamin D. Steiner, *Death by False Choice and Forced Choice: Empirical Evidence of Misguided Discretion in Capital Sentencing* (1998) (unpublished manuscript, on file with author).

⁶³ *See* William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L.J. 1043, 1043 (1995).

⁶⁴ Bowers & Steiner, *supra* note 62, at 29 tbl.1.

⁶⁵ *See id.*; *see also* Theodore Eisenberg & Martin T. Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 CORNELL L. REV. 1, 7 (1993) ("[J]urors who believe the alternative to death is a relatively short time in prison tend to sentence to death. Jurors who believe the alternative treatment is longer tend to sentence to life.").

⁶⁶ *See* Bowers & Steiner, *supra* note 62, at 37 tbl.3.

ture"; 62% said that in choosing the punishment it was "very important" to keep the defendant "from ever killing again"; and 39% were "greatly" concerned that he "might get back into society someday, if not given the death penalty."⁶⁷ But Bowers and Steiner also found that the anticipated length of a noncapital sentence influences sentencing decisions for jurors that do *not* think the defendant is dangerous, and that are *not* concerned that he might kill again.⁶⁸ If we can generalize from capital jurors to the population at large, these findings suggest that "[c]onsiderations of retribution, as well as those of incapacitation" explain the attraction of life imprisonment without the possibility of parole as an alternative to capital punishment.⁶⁹

B. Factors That Might Change Death Penalty Attitudes

In his concurring opinion in *Furman v. Georgia*,⁷⁰ Justice Marshall argued that if the American public knew the depressing truth about the death penalty, they would not support it.⁷¹ This prediction—the "Marshall Hypothesis"—has not fared well. Several old studies have shown that few death penalty supporters are swayed by information that it does not deter crime and is arbitrary and unfair.⁷² A couple of more recent, small-scale studies add support to that conclusion,⁷³ as do recent poll data. On one recent survey, 42% of respondents said that a nonwhite defendant was more likely to receive the death sentence than a white defendant.⁷⁴ On another, 49% agreed that a black defendant was more likely to be sentenced to death than a white defendant, and 67% agreed that a poor defendant was more likely to be sentenced to death than one of average income.⁷⁵ Obviously, many Americans do not consider discrimination by race or wealth a suffi-

⁶⁷ *Id.* at 52 tbl.6 (percentages recalculated by author based on data in table).

⁶⁸ *See id.*

⁶⁹ *Id.* at 54.

⁷⁰ 408 U.S. 238 (1972).

⁷¹ *See id.* at 360-69 (Marshall, J., concurring).

⁷² *See, e.g.,* Phoebe C. Ellsworth & Lee Ross, *Public Opinion and Capital Punishment: A Close Examination of the Views of Abolitionists and Retentionists*, 29 CRIME & DELINQ. 116, 139-49 (1983).

⁷³ *See, e.g.,* Robert M. Bohm & Ronald E. Vogel, *A Comparison of Factors Associated with Uninformed and Informed Death Penalty Opinions*, 22 J. CRIM. JUST. 125, 140 (1994) (reporting that exposure to death penalty information does not change "core" reasons for original positions); Robert M. Bohm et al., *Knowledge and Death Penalty Opinion: A Panel Study*, 21 J. CRIM. JUST. 29, 41-44 (1993) (finding that while knowledge does affect attitudes, they often "rebound" to their original state as time passes).

⁷⁴ *See Los Angeles Times*, L.A. Times, July 26, 1994, available in LEXIS, News Library, Rpoll File [hereinafter *L.A. Times Poll*] (question 26).

⁷⁵ *See Newsweek Poll*, Princeton Survey Research Assocs., June 6, 1997, available in LEXIS, News Library, Rpoll File [hereinafter *Newsweek Poll*] (questions 9-10). In each case, black respondents overwhelmingly agreed with these propositions—71% in the *L.A. Times Poll*, *see L.A. Times Poll*, *supra* note 74 (July 26, 1994) (question 26), and 82% and 76%, respectively, in the *Newsweek Poll*, *see Newsweek Poll*, *supra* (June 6, 1997) (questions 9-10).

cient reason to oppose capital punishment. There is a similar pattern in public opinion on the issue of deterrence. An older set of surveys asked death penalty proponents if they would still favor capital punishment if "new evidence show[s] . . . that it does not lower the murder rate," and 69% to 73% said they would.⁷⁶

But how about those who say they *would* change their minds? A quarter to a third of respondents who favor the death penalty say they would not continue to support it if life without parole were available instead,⁷⁷ and about as many say they would oppose the death penalty if they were to learn that it does not deter.⁷⁸ On both issues, either the facts are not getting through or the opinions are not as flexible as the respondents report. The great majority of American states that use the death penalty *already* provides for life without parole as the alternative.⁷⁹ Apparently, most people are not aware of this or do not believe what they have heard. For example, in California, where life without parole is the only sentencing alternative to the death penalty,⁸⁰ 64% of respondents on a 1990 study said that they did not believe that criminals sentenced to life without parole will never be released.⁸¹ Similarly, there is a vast amount of evidence that the death penalty does not deter homicide—that is the clear consensus among criminologists and police chiefs alike.⁸² Still, about 50% of the population continues to believe that the death penalty does deter crime, and—more telling—support for the death penalty has been unaffected by a sizeable drop in belief in deterrence.⁸³

In short, for the present, public opinion on the death penalty seems locked in place. Inevitably, that will change. If change occurs anytime soon, a couple of strands in the research suggest how it might come about.

1. *Incapacitation*

So far we have talked about incapacitation in the context of the argument by opponents of capital punishment that imprisonment for life without parole is an option that makes the death penalty unnecessary. Indeed, judging by their expressed opinions, the majority who favor the death penalty think of incapacitation as a comparatively mi-

⁷⁶ Alec Gallup & Frank Newport, *Death Penalty Support Remains Strong, but Most Feel Unfairly Applied*, GALLUP POLL NEWS SERVICE, June 26, 1991, at 1, 3.

⁷⁷ See Table 1; *supra* text accompanying notes 57-59.

⁷⁸ See *supra* text accompanying note 76.

⁷⁹ See Bowers & Steiner, *supra* note 62, at 120 n.122.

⁸⁰ See CAL. PENAL CODE § 190.3 (West 1988).

⁸¹ See *No Parole Means What It Says*, S.F. CHRON., Apr. 13, 1990, at A26 (reporting on a survey by the Field Institute).

⁸² See, e.g., Michael L. Radelet & Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 7-9, 12-15 (1996).

⁸³ See *supra* text accompanying notes 40-44.

nor issue. In 1991 only 19% of pro-death penalty respondents mentioned incapacitation ("Keeps them from killing again") as a reason for their support, while 50% mentioned retribution ("A life for a life").⁸⁴ This finding, however, may greatly understate the importance of incapacitation in the debate between those who favor capital punishment and those who oppose it. On a 1997 survey respondents were asked: "Whatever your feelings about the death penalty, which of the following do you consider to be among the best reasons to support the death penalty for persons convicted of murder?"⁸⁵ Table 2 shows the proportions of respondents who said that a given reason was "among the best."

TABLE 2
ARGUMENTS FOR THE DEATH PENALTY

	Percent who say the argument is "Among the best reasons to support the death penalty"
It removes all possibility that the convicted person can kill again	74
It is a deterrent, that is, fear of such punishment discourages potential murderers	53
It is not fair to make taxpayers pay to keep convicted murderers in prison for life	49
"A life for a life": anyone who takes another person's life deserves to be executed	48

SOURCE: All data come from Princeton Survey Res. Associates, June 6, 1997, *available in* LEXIS, News Library, Rpoll File (questions 11-14).

In other words, whether respondents favor the death penalty or oppose it, most of them seem to think that incapacitation is the pro-death penalty argument that is most likely to influence others.

In most states there is little general debate over the death penalty as a social policy for the obvious reason that the issue has been unambiguously decided. Jury deliberations at the penalty phase of capital trials are a different matter. There the jurors must decide case-by-case whether to impose the death penalty or life imprisonment on particular defendants. These deliberations are often prolonged and painful, and the outcome is rarely a foregone conclusion—despite the fact that all capital jurors must endorse the death penalty at least to the extent that they are willing to consider imposing it.⁸⁶ In this context,

⁸⁴ *Gallup Poll*, *supra* note 34 (June 16, 1991) (question 2).

⁸⁵ *Newsweek Poll*, *supra* note 75 (June 6, 1997) (question 11).

⁸⁶ The current standards for disqualification are defined by *Wainwright v. Witt*, 469 U.S. 412, 424 (1985) (limiting the states' power to exclude death penalty opponents from juries to those jurors whose "views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath" (quoting *Adams v.*

as Bowers and Steiner document, the need for incapacitation surfaces frequently as a key argument to win over those who may prefer a life sentence, and to stiffen the resolve of pro-death jurors who might waiver.⁸⁷ In one common scenario, jurors who favor the death penalty persuade others who do not that if the defendant is not sentenced to death he will be released and might try to kill someone on the jury. A juror in one case discussed this argument somewhat obliquely:

There were a couple of jurors that were recommending life in prison. . . . We discussed the fact to our understanding that putting someone into jail for life didn't mean that they were going to stay there. That they were eligible for parole in twenty years, in some cases seven years, and that this individual . . . would come out with vengeance and try to go after those who had been involved in the crime or [otherwise] involved.⁸⁸

A juror in another case, who initially favored life imprisonment, was more explicit:

Now one major thing, one thing that was discussed was the problem, this man, this man, if we give this man a life sentence he'd be eligible for parole in ten years. And he could possibly be back out on the streets. Would he do the same thing over again? Many thought that he would. Course I didn't know. There were, I think, about three women [who] were afraid of the man. . . . One of them actually feared that the man might get out and come back after her. I remember one of them saying that. The girl lives right not far from the shooting. So that was discussed. And I remember, that's the way I see it, about it, that's all I, I try to remember it and I just felt, that's where I got to thinking about it, the death penalty.⁸⁹

On the other side, jurors who oppose the death sentence have to neutralize the incapacitation argument. To do so they often argue that *this defendant* will never get out of prison because he has been or will be convicted of other offenses, and his combined prison sentences will keep him confined for life. For example, a juror in a Virginia case responded:

Something else that was brought up, that he would be tried for shooting at [a second victim who did not die]. That he had another trial to go through so they felt like the life sentence plus whatever

Texas, 448 U.S. 38, 45 (1980))), and *Morgan v. Illinois*, 504 U.S. 719, 728-29 (1992) (requiring the exclusion from juries of some strong proponents of capital punishment). Also relevant are *Witherspoon v. Illinois*, 391 U.S. 510, 522 (1968) (holding that a jury may not impose the death sentence if "it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty"), and *Lockhart v. McCree*, 476 U.S. 162, 182-84 (1986) (permitting the exclusion of opponents of the death penalty despite evidence that doing so affects the jury's decision on guilt or innocence).

⁸⁷ See Bowers & Steiner, *supra* note 62, at 74-82.

⁸⁸ *Id.* at 69 (alterations in original).

⁸⁹ *Id.* (alterations in original).

he got for shooting at [that victim] would be enough to keep him in prison for life. That was the deciding factor. If he hadn't be [*sic*] up on the other crimes, he would have been given the death sentence.⁹⁰

As Bowers and Steiner document in detail, capital jurors greatly underestimate the time that capital murderers who are not sentenced to death will spend in prison, and they rarely believe that life without the possibility of parole means what it says.⁹¹ Apparently the possibility of additional terms of imprisonment is more likely to persuade jurors that a defendant will remain confined for life than the option of sentencing him to life without parole. The result is not merely ironic; it is perverse: A murderer is spared the death penalty *because* he is believed to have committed other noncapital, violent crimes as well.

2. *Convicting the Innocent*

On a 1991 Gallup survey only 11% of the respondents who opposed capital punishment mentioned "[p]ersons may be wrongly convicted" as a reason for their position.⁹² The leading justification by a large margin was "[w]rong to take a life" (41%), followed by "[p]unishment should be left to God" (17%).⁹³ However, just as incapacitation is an argument for the death penalty that is important because it is persuasive to those who are inclined to *oppose* capital punishment, so the risk of executing innocent defendants is important because it is persuasive to those who generally *favor* the death penalty.

On a 1993 survey respondents were asked, "Regardless of how you feel about the death penalty, which of the following reasons do you think is the best reason to oppose the death penalty . . . ?"⁹⁴ The leading reason offered was "Innocent[s] may be killed" (33%).⁹⁵ Respondents gave this reason ahead of "Immoral to kill" (21%), "Too expensive" (12%), "Prison more severe" (11%), "Not a deterrent" (10%), and "Racist punishment" (3%).⁹⁶ On the same survey respondents were read several assertions about the death penalty and asked after each if it gave them "serious doubts," "some doubts," "minor doubts," or "no real doubts" about the death penalty.⁹⁷ The issue that produced the most doubts was: "Over the years there have been many

⁹⁰ *Id.* at 87 (alterations in original).

⁹¹ *See id.* at 26-34.

⁹² *Gallup Poll*, *supra* note 34 (June 16, 1991) (question 3).

⁹³ *Id.*

⁹⁴ *Death Penalty Poll*, The Tarrance Group & Greenberg, Lake, Mar. 1, 1993, *available in* LEXIS, News Library, Rpoll File (question 15).

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* (questions 10-14).

people sentenced to death who have later been found innocent.”⁹⁸ This was the only anti-death penalty argument that raised “serious doubts” or “some doubts” for a majority of the respondents (58%) and the only argument for which those with “serious doubts” (29%) outnumbered those with “no real doubts” (24%).⁹⁹ Claims that the death penalty is racist, that it is unduly expensive, that it does not deter crime, and that long-term imprisonment plus restitution is a more severe punishment than death were all substantially less troubling.

The 1997 survey that asked respondents, regardless of their own feelings, to rate arguments for the death penalty,¹⁰⁰ also included a parallel set of questions about arguments against the death penalty. The clear winner, with 73% of respondents saying it was “among [the] best reasons,” was “innocent people may be wrongly convicted and executed.”¹⁰¹

TABLE 3
ARGUMENTS AGAINST THE DEATH PENALTY

	Percent who say the argument is “Among the best reasons to oppose the death penalty”
Innocent people may be wrongly convicted and executed	73
It is always wrong to take a life	50
A life term is a worse punishment than quick death by execution	43
Those convicted of murder should be kept alive to help catch others who may have been involved in the crime	32

SOURCE: All data come from Princeton Survey Res. Associates, June 6, 1997, *available in* LEXIS, News Library, Rpoll File (questions 15-17, 19).

The danger that innocent defendants might be sentenced to death is not an abstraction. In the past decade incontrovertible examples have come to light repeatedly;¹⁰² some have been highly publicized.¹⁰³ It is hardly surprising that on a 1995 Gallup survey, 82% of

⁹⁸ *Id.* (question 12).

⁹⁹ *Id.* (questions 10-14).

¹⁰⁰ *See Newsweek Poll, supra* note 75 (June 6, 1997) (questions 9-19).

¹⁰¹ *Id.* (question 17).

¹⁰² *See, e.g.,* MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES (1992); Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN. L. REV. 21, 91 app. a (1987); Samuel R. Gross, *The Risks of Death: Why Erroneous Convictions Are Common in Capital Cases*, 44 BUFF. L. REV. 469 (1996).

¹⁰³ *See, e.g.,* Peter Applebome, *Alabama Releases Man Held on Death Row for Six Years*, N.Y. TIMES, Mar. 3, 1993, at A1 (describing the case of Walter McMillian, who spent six years on

respondents who favored the death penalty said that they thought an innocent person had been sentenced to death in the past twenty years, and only 13% said that they thought it never happened.¹⁰⁴

How does the danger of executing innocent defendants affect people's attitudes toward the death penalty? In the abstract, the impact may be modest. On the 1995 Gallup survey that asked respondents whether this ever happened, they also were told that "[s]ome experts estimate that one out of a hundred people who have been sentenced to death were actually innocent."¹⁰⁵ Seventy-four percent of the 77% of respondents who supported the death penalty on this survey—57% of all respondents—continued to support it in the face of this information, and 20% did not.¹⁰⁶ But "one out of a hundred" may be a low estimate for the proportion of innocent defendants on death row, and the question asks about innocent people who are "sentenced to death" rather than "executed." A different version of this question might show a greater reduction in support for the death penalty, even in the abstract.

In actual cases, data from the Capital Jury Project indicate that jurors are quite concerned about the danger of convicting innocent defendants—sometimes. In several cases jurors have reported that their jury sentenced the defendant to life imprisonment because some of its members felt the evidence of guilt, while strong enough to warrant a conviction, was not good enough for a death sentence.¹⁰⁷ Also, in a study of South Carolina's capital jurors, "lingering doubt" about the defendant's guilt emerges as the single most powerful mitigating factor in capital sentencing.¹⁰⁸ However, unlike future dangerousness, jurors' doubts about guilt are an issue in only a small proportion of the capital murder trials that reach the sentencing hearings.¹⁰⁹

death row before being exonerated); Ted Gregory, *Lacking 'Closure' After 12 Years, Nicaricos Blast Judge's Verdict*, CHI. TRIB., Nov. 5, 1995, at A14 (reporting on the case of Rolando Cruz, who was twice sentenced to death before being exonerated).

¹⁰⁴ See Gallup, CNN, *USA Today Poll*, *supra* note 53 (May 14, 1995) (question 30).

¹⁰⁵ *Id.* (question 31).

¹⁰⁶ See *id.*

¹⁰⁷ See, e.g., Marla Sandys, *Cross-Overs—Capital Jurors Who Change Their Minds About the Punishment: A Litmus Test for Sentencing Guidelines*, 70 IND. L.J. 1183, 1197 (1995) (reporting that one juror "thought [the defendant] was guilty, but thought that [it] wasn't right to go with death due to strength of evidence, *circumstantial . . . evidence*" (first and second alterations in original) (quoting from a juror interview (internal quotation marks omitted))).

¹⁰⁸ Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1559, 1562-63 (1998).

¹⁰⁹ See *id.* at 1571 tbl.8.

III

WHO SHOULD BE SENTENCED TO DEATH?

A. Which Crimes Should Be Punishable by Death?

A recent poll asked respondents whether they favored the death penalty for each of a range of crimes.¹¹⁰ The results (displayed in Table 4) show a slight elevation in support for murder of the President over murder of an ordinary citizen (78% to 75%), but none for murder of a police officer.¹¹¹ Among nonhomicidal crimes, the absolute levels of support for the death penalty are probably less telling than the rank ordering, and the relative levels of support for the listed crimes seem to have been influenced by the amount of public attention they have recently received.¹¹² Two overlapping criteria can be discerned: (1) the type of crime; and (2) the status of the victim. The public seems to regard sex crimes as the worst, followed by drug crimes, armed robbery (a crime of violence), and burglary (a property crime). Further, a given crime is considered worse when the victim is a child.¹¹³ The net effect should not be a surprise because the media and the public have paid far more attention to rape and child molestation in recent years than in previous decades.¹¹⁴

B. Who Should Be Eligible for the Death Penalty?

Recently, the issue of the death penalty for women reemerged with the January 1998 execution of Karla Faye Tucker in Texas¹¹⁵ and the March 1998 execution of Judy Bueneano in Florida.¹¹⁶ As of 1953, several months after the execution of Ethel Rosenberg, only 75% of those who favored capital punishment in general favored it for wo-

¹¹⁰ See *Yankelovich Poll*, *supra* note 23 (June 5, 1997) (questions 11-21). In addition, other polls have found that Americans generally favor "[e]xpanding the number of crimes to which the death penalty would apply," *Harris Poll*, *supra* note 15 (Aug. 18, 1993) (question 4) (67% favor), or "[e]xtending the death penalty for some serious crimes other than murder," *Gallup, CNN, USA Today Poll*, *supra* note 53 (Aug. 16, 1994) (question 42) (60% favor).

¹¹¹ See *Yankelovich Poll*, *supra* note 23 (June 5, 1997) (questions 12-14).

¹¹² See Ellsworth & Gross, *supra* note 1, at 38.

¹¹³ Similarly, on a 1991 survey, 24% supported capital punishment for "rape of an adult" and 47% for "sexual abuse of a child." *Star Tribune National Poll*, *Star Trib.*, Aug. 25, 1991, available in LEXIS, News Library, Rpoll File (questions 11-12); see also Garvey, *supra* note 108 (manuscript at 21 & tbl.3) (showing that 46% of respondents claimed to be "much more" likely to impose the death penalty when the "victim was a child").

¹¹⁴ Consider, for example, the 1995 passage of FED. R. EVID. 413-415, which carve out a special exception to the general prohibition against using propensity evidence to prove a person's conduct. The new rules permit the use of any evidence of prior acts of sexual assault or child molestation to prove a similar charge against a criminal or civil defendant.

¹¹⁵ See Sam Howe Verhovek, *Karla Tucker Is Now Gone, but Several Debates Linger*, N.Y. TIMES, Feb. 5, 1998, at A12.

¹¹⁶ See Amy Driscoll, *The Final Moments of a Murderer*, MIAMI HERALD, Mar. 31, 1998, at 1A.

TABLE 4
SUPPORT FOR THE DEATH PENALTY FOR PARTICULAR CRIMES

	(%)
Murder of the President	78
Murder of an ordinary citizen	75
Murder of a police officer	75
Rape ^a	47
Sexually molesting a child ^b	65
Selling drugs to children	44
Smuggling drugs	29
Selling drugs to adults	17
Armed robbery	17
Burglary of a home	8

SOURCE: All of the data come from Yankelovich Partners, Inc., June 5, 1997, *available in* LEXIS, News Library, Rpoll File (questions 12-21).

^a In August 1991, a survey found that 24% favored the death penalty for rape. *See Star Tribune National Poll*, *Star Trib.*, Aug. 25, 1991, *available in* LEXIS, News Library, Rpoll File (question 11).

^b In August 1991, a survey found that 47% favored the death penalty for sexual abuse of a child. *See id.* (question 12).

men.¹¹⁷ By 1991, 95% of those who favored the death penalty “for a man convicted of murder” also favored it “for a woman convicted of murder” (63% of 66%),¹¹⁸ and in January 1998, only 3% of those who favored the death penalty thought the State of Texas should cancel the scheduled execution of Karla Faye Tucker “because the criminal is a woman.”¹¹⁹ See Table 5. Support for the execution of teenagers also continues to rise. In 1994 we thought that the level of support reported on a 1989 poll (57%) “may be exaggerated” because it represented a sharp increase from previous rates.¹²⁰ However, on a Gallup Poll in late 1994, 61% of respondents said that teenagers should not be spared the death penalty on account of their age.¹²¹ On the other hand, consistent majorities continue to oppose the death penalty for mentally retarded defendants,¹²² which is sadly ironic: Of 467 defend-

¹¹⁷ *See* Ellsworth & Gross, *supra* note 1, at 39-40; *Gallup Poll*, *supra* note 34 (Nov. 5, 1953) (question 10).

¹¹⁸ *Great America TV Poll Survey*, Princeton Survey Research Assocs., May 5, 1991, *available in* LEXIS, News Library, Rpoll File [hereinafter *Princeton TV Poll*] (questions 2-3).

¹¹⁹ *Fox News, Opinion Dynamics Poll*, Opinion Dynamics, Jan. 8, 1998, *available in* LEXIS, News Library, Rpoll File [hereinafter *Opinion Dynamics Poll*] (question 3).

¹²⁰ Ellsworth & Gross, *supra* note 1, at 39.

¹²¹ *See Gallup, CNN, USA Today Poll*, *supra* note 53 (Sept. 7, 1994) (question 41). On a 1991 survey, 45% of respondents said a teenager should receive a death sentence if he “commits a crime that could carry the death penalty for an adult” and 19% volunteered that “it depends.” *Princeton TV Poll*, *supra* note 118 (Mar. 24, 1991) (question 15).

¹²² *See* Ellsworth & Gross, *supra* note 1, at 39.

ants executed since 1977, three were women,¹²³ eleven were teenagers,¹²⁴ and at least twenty-one were mentally retarded people.¹²⁵

TABLE 5
ELIGIBILITY FOR THE DEATH PENALTY
(Percent who support the death penalty for particular groups)

	Yes	No
Gender		
Favor the death penalty for a man? ^a	66	18
Favor the death penalty for a woman? ^a	63	20
Cancel execution because the defendant is a woman? ^b	3	96
	Death	Spare
Age		
Spare the death penalty because the defendant is a teenager? ^c	61	30
	Alright	Not alright
Mental capacity		
Is it alright to sentence a retarded person to death? ^d	32	56

^aThese data come from Princeton Survey Res. Associates, May 5, 1991, *available in* LEXIS, News Library, Rpoll File.

^bThese data come from *Fox News Opinion Dynamics Poll*, Opinion Dynamics, Jan. 8, 1998, *available in* LEXIS, News Library, Rpoll File (question 3).

^cThese data come from Gallup, Sept. 7, 1994, *available in* LEXIS, News Library, Rpoll File (question 4).

^dThese data come from The Tarrance Group & Greenberg, Lake, Mar. 1, 1993, *available in* LEXIS, News Library, Rpoll File.

C. Mitigating Factors

In the past few years, two national polls by Princeton Survey Research Associates have asked respondents whether they generally would favor the death penalty under a variety of mitigating circumstances. Table 6 summarizes the results.

The most popular mitigating factors are those that shift some of the culpability for the killing to another person—the actual killer (when the defendant was only an accomplice) or the victim (if he or

¹²³ See DEATH ROW U.S.A., *supra* note 28, at 8.

¹²⁴ Essential Information, *Juveniles and the Death Penalty* (visited June 22, 1998) <<http://www.essential.org/dpic/juvchar.html>>.

¹²⁵ The Death Penalty Information Center lists 33 mentally retarded offenders whom jurisdictions have executed in this time period. See Essential Information, *Mental Retardation and the Death Penalty* (visited Apr. 7, 1998) <<http://www.essential.org/dpic/dpicmr.html>>. I have excluded those listed as having IQ scores over 70, as “mildly” or “borderline” retarded, and as “probable.” This is a conservative measure. I suspect that with few exceptions, people who oppose the death penalty for mentally retarded defendants do not approve of executing a defendant like Ricky Lee Grubbs of Missouri, who had an IQ of 72. See *id.*

TABLE 6
MITIGATING FACTORS

	Percent who favor the death penalty even though the defendant was:	
	July 1995	June 1997
Only an accomplice to the killing	29	25
Severely abused as a child	48	47
Provoked to violence by the victim	27	26
Under the influence of drugs or alcohol	63	55
In an emotional state involving a lover or family member	49	
Temporarily insane	46	
A young teenager at the time of the crime	47	
In jail so long he or she has become a different person	46	
Mentally retarded	9	
Led to violence by political or ideological beliefs		56

SOURCE: Princeton Survey Res. Associates, July 28, 1995, *available in* LEXIS, News Library, Rpoll File (questions 8-16); Princeton Survey Res. Associates, June 6, 1997, *available in* LEXIS, News Library, Rpoll File (questions 4-8).

she provoked the violence). In those cases only 25% to 29% of respondents support the death penalty. At the other end of the continuum, causal factors that might be seen as within the defendant's control—intoxication or acting on political beliefs—do worst, with 55% to 63% supporting the death penalty.¹²⁶ Mitigating circumstances that are largely beyond the defendant's control but outside the scope of the criminal act itself fall in between: if the defendant suffered severe child abuse, 47% to 48% support the death penalty; if he or she was in an "emotional state," 49%; if temporarily insane, 46%.

Youth and mental retardation also appear on the list of mitigating factors, and in this context, they both are more influential than when presented separately. Only 47% of respondents favored the death penalty for "young teenagers" (compared to 61% when the question was asked in isolation)¹²⁷, and a mere 9% approved of the death penalty for mentally retarded defendants (compared to 32%).¹²⁸ This disparity, no doubt, is a contrast effect. Youth and retardation were, respectively, the seventh and ninth mitigating factors on the list used in the 1995 survey, and many respondents probably calibrated their answers by reference to those they had given on previ-

¹²⁶ A January 1998 poll also found that 59% of respondents favored the death penalty for a murder "if the convicted person was under the influence of drugs or alcohol at the time of the crime." *Opinion Dynamics Poll*, *supra* note 119 (Jan. 22, 1998) (question 2).

¹²⁷ *Gallup, CNN, USA Today Poll*, *supra* note 53 (Sept. 7, 1994) (question 41).

¹²⁸ See Table 5.

ous items. As a group, they apparently felt that youth was about as mitigating as most of the other factors listed, and mental retardation was much more so.

These findings may have limited value as quantitative estimates of public sentiment about particular mitigating circumstances, but they are striking nonetheless. When confronted with only one of several disparate factors—from becoming a different person in jail to having suffered severe abuse as a child—support for the death penalty drops considerably. For most of the factors, the drop is about 30% to 40%, and for a few, the effect is larger still. Evidence from post-trial interviews indicates that penalty-phase jurors also are influenced by many of the same considerations,¹²⁹ but these data do not speak to that. It would be an extravagant jump to extrapolate from polls such as these to the behavior of jurors who have sat through a trial and have convicted a defendant of capital murder. Rather, these data show that the high level of public support for the death penalty in the abstract can be reduced significantly simply by mentioning any of several factual circumstances that are common in capital homicide cases.¹³⁰

D. Particular Notorious Defendants

The O.J. Simpson murder prosecution in 1994 and 1995 commanded an extraordinary amount of public attention. In the four years since, several other murder cases also have become mass spectacles even though, unlike the Simpson case, none included televised court proceedings: the trial of Susan Smith in South Carolina in 1995 for drowning her two young sons; the trials of Timothy McVeigh and Terry Nichols in 1997 and 1998 for the 1995 bombing of the federal building in Oklahoma City; and the prosecution of Theodore Kaczynski, also in 1997 and 1998, for the “Unabomber” bombings. As one minor aspect of this remarkable national preoccupation, several nation wide surveys asked respondents whether they thought a particular famous defendant should be sentenced to death. The results are displayed in Table 7, together with data on attitudes toward the death penalty in general for those surveys that included such an item. Only one of these surveys used the simplest form of the case-specific question: “Do you think [name] should or should not receive the death

¹²⁹ See Garvey, *supra* note 108, at 1559, 1562-63.

¹³⁰ See, e.g., Daniel Goleman, *When Rage Explodes, Brain Damage May Be the Cause*, N.Y. TIMES, Aug. 7, 1990, at C1 (reporting that almost all 29 death row inmates involved in a study, including some from violent, abusive families, had suffered brain injuries that are likely to lead to violence); Dan Malone, *View from Death Row*, DALLAS MORNING NEWS, Apr. 20, 1997, at 1A (reporting that nearly 50% of the death row inmates who returned the survey reported that they had been physically abused as children, and nearly 30% said they had been sexually abused).

penalty?"¹³¹ In every other case, the question included a qualification (typically, "if the defendant is convicted"), additional information (typically, that the defendant has been convicted), or a specification of the sentencing alternative to capital punishment (such as life imprisonment). These additions are summarized in the right-most column of Table 7.

A couple of patterns are apparent across these surveys. First, in specific cases as in general, support for the death penalty decreases when the alternative is life without parole (or a "real" life sentence).¹³² Second, respondents were less likely to support the death penalty for these particular defendants than to support it in general. Throughout this period, public support for the death penalty ranged from 70% to 75%.¹³³ With one exception, support for the death penalty for these highly publicized defendants was consistently lower, despite the fact that they were all charged with extremely aggravated multiple killings: two unsuspecting people slashed to death (Simpson), two helpless children drowned in a car (Smith), a mass murder with a bomb (Nichols), and a series of killings and maimings with mail bombs (Kaczynski). Part of the explanation may be that each case included one or more of the mitigating factors that the American public takes most seriously.¹³⁴ Many people doubted O.J. Simpson's guilt,¹³⁵ and those who did not probably agreed that he was emotionally overwrought because of family problems. Once the story of Susan Smith's sons' deaths unraveled, no one doubted her guilt, but she was certainly "in an emotional state involving a lover," and as the evidence at her trial eventually revealed, she had been sexually abused as a child.¹³⁶ Terry Nichols was widely viewed as only an accomplice to the Oklahoma City federal building bombing¹³⁷—apparently a very powerful mitigating factor, considering the magnitude of the crime.¹³⁸ And Theodore Kaczynski—in addition to the unique fact that he was

¹³¹ *ABC News Poll*, ABC News, June 2, 1997, available in LEXIS, News Library, Rpoll File [hereinafter *ABC News Poll*] (question 2).

¹³² See Table 1; *supra* text accompanying notes 47-59.

¹³³ See Figure 1.

¹³⁴ See Table 6.

¹³⁵ See Richard Morin, *Poll Reflects Division over Simpson Case*, WASH. POST, Oct. 8, 1995, at A31.

¹³⁶ Stephanie Saul, *Life, Not Death: Jury Rejects Execution for South Carolina Mom*, NEWS-DAY, July 29, 1995, at A3.

¹³⁷ See Gaylord Shaw, *Spared Death/Jury Deadlocks on Nichols Penalty*, NEWS-DAY, Jan. 8, 1998, at A3.

¹³⁸ Cf. Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1580-1583 (1998) (discussing how jurors seem less inclined to impose the death penalty in multiple-defendant cases).

TABLE 7
SUPPORT FOR THE DEATH PENALTY FOR PARTICULAR
NOTORIOUS DEFENDANTS

Defendant	Support the death penalty generally (%)	Support the death penalty for this defendant (%)	(Additional information in question)
O.J. SIMPSON			
Gallup (June 22, 1994)		36	(If found guilty; death or LWOP)
Princeton (July 8, 1994)		50	(Should DA seek death penalty?)
ABC (July 20, 1994)		45	(If convicted)
NBC/WSJ (July 26, 1994)	70	55	(If found guilty)
Harris (July 28, 1994)		49	(If guilty)
SUSAN SMITH			
Gallup (Jan. 18, 1995)		65	(If found guilty)
Gallup (July 9, 1995)		68	(If found guilty)
Princeton (July 28, 1995)		63	(Was convicted)
TIMOTHY McVEIGH			
[Gallup (Apr. 20, 1995) ^a		80	(If convicted; death or LWOP)]
Princeton (July 28, 1995)		79	(If convicted)
Yankelovich Ptrs. (Apr. 17, 1997)		75	(If found guilty)
Princeton (May 30, 1997)	66	71	(If found guilty)
ABC (June 2, 1997)		67	
Yankelovich Ptrs. (June 5, 1997)	74	78	(Was convicted)
Princeton (June 6, 1997)		67	(Was convicted)
Harris (June 9, 1997)	75	64	(Was convicted; death or "real" life sentence)
CBS (June 11, 1997)	67	68	(Was found guilty)
NBC/WSJ (June 23, 1997)		76	(Approve of jury's death sentence?)
Gallup (Aug. 13, 1997)		64	(Was found guilty; death or LWOP)
TERRY NICHOLS			
Fox (Sept. 20, 1997)		58	(If convicted)
Gallup (Nov. 23, 1997)		52	(If convicted, death or LWOP)
ABC (Jan. 7, 1998) ^b		52	(Jury deadlocked on death sentence)
THEODORE KACZYNSKI			
Gallup (Nov. 23, 1997)		51	(If convicted; death or LWOP)
Fox (Jan. 1998) ^c	74	68	(If convicted)

SOURCE: All data can be found in LEXIS, News Library, Rpoll File.

^a Gallup conducted this survey after the crime, but before authorities had identified Mr. McVeigh as the criminal.

^b When ABC conducted this survey, the jury had deadlocked on the death sentence for Mr. Nichols.

^c Fox conducted the general death penalty poll on January 22, 1998; it conducted the poll concerning Kaczynski on January 8, 1998. On the January 8 survey, data suggest that 56% opposed a guilty plea with a life sentence and 49% supported the death sentence even if Mr. Kaczynski were insane.

turned in by a brother who campaigned to save his life—was obviously insane.¹³⁹

The exception is Timothy McVeigh, the convicted Oklahoma City bomber. On the seven surveys that asked for the respondents' views on the appropriate punishment for McVeigh without specifying that the alternative is life without parole and without mentioning the jury's sentence, an average of 72% said he should be sentenced to death. On three of these surveys the proportion who favored death for McVeigh averaged 3% higher than the proportion who favored the death penalty in general (72% to 69%). The only two surveys that have comparable data for other defendants show the opposite results: On one survey, 70% favored the death penalty in general, but only 55% did so for Simpson; on the other survey, 74% favored it in general, but only 68% did so for Kaczynski. See Table 7. Asking respondents to choose between death and life without parole did decrease support for the death penalty for McVeigh, but even so on two polls after his arrest, nearly two-thirds of respondents thought he should receive a death sentence, about 10% more than favor the death penalty over life without parole in general.¹⁴⁰ On a survey conducted the day of the Oklahoma City bombing, before any suspect was identified, 80% of respondents chose death over life without parole for the bomber.¹⁴¹ Apparently the McVeigh case defines the death-worthy end of the spectrum of murder. We have heard of far worse from war criminals, but it is hard to think of any peacetime crime that is more deserving of the death penalty than a calculated massacre with a massive bomb.

CONCLUSION

Death penalty attitudes are about killing.¹⁴² Most Americans favor the death penalty because they feel that killing is wrong; their favorite explanation is "a life for a life." A minority oppose the death penalty because they believe that killing by the state is wrong; their usual explanation is that it is "wrong to kill." These are both absolutist moral positions and unlikely to yield to information or argument. But these two views are different in a critical respect. Opposition to the death penalty is as simple in action as it is in theory: Do not execute anybody. Support for the death penalty is never easy in practice. There is no simple rule that specifies when to kill and when not. We must choose which defendants to execute and which to spare—a fa-

¹³⁹ See *Kaczynski Pleads Guilty to Attacks; Unabomber to Receive Life Prison Sentence in Government Deal*, BALT. SUN, Jan. 23, 1998, at 1A.

¹⁴⁰ See Table 7.

¹⁴¹ See *Gallup, CNN, USA Today Poll*, *supra* note 53 (Apr. 20, 1995) (question 3).

¹⁴² See *Ellsworth & Gross*, *supra* note 1, at 32-33.

mously hopeless task that requires applying abstract support for the death penalty to concrete cases.

In June 1997, 77% of respondents on a national poll said that they approved of the jury's decision to find Timothy McVeigh guilty of a capital crime.¹⁴³ But of those who said that, 57% answered "No" to the question: "Are there other specific criminal cases . . . you can think of in which you supported the death penalty or not?"¹⁴⁴ Considering other recent, highly publicized murder cases on which they apparently had no particular views—O.J. Simpson, for example, and Susan Smith—it is a good guess that many had no position on the death penalty even in McVeigh's case, until they were asked. Almost all Americans have stated self-conscious positions on the death penalty in the abstract, but comparatively few have any occasion to apply those views to concrete cases.

When Americans are asked about the death penalty in the context of particular facts, support drops. It drops sharply in the face of each of several mitigating factors that are so prevalent that at least one is probably present in almost every death penalty case. With the telling exception of Timothy McVeigh, support is lower for particular famous defendants, even those charged with terrible multiple murders. This is no surprise. In 1978 Phoebe Ellsworth found that only a minority of subjects who supported the death penalty in general were willing to impose it in any of three hypothetical murder cases based on the facts of actual death row prosecutions.¹⁴⁵ Similar effects occur in other contexts. For example, most Americans distrust Congress as an institution, but trust their own representatives,¹⁴⁶ and samples of women and minorities report higher rates of discrimination against their groups than against themselves as individuals.¹⁴⁷ Across a range of issues, people's convictions run stronger when applied to a category than to a particular case.

What causes this effect? The psychological explanations that are offered focus on the images that are evoked when a judgment is made about a general category of people or events.¹⁴⁸ In this context, when

¹⁴³ See *ABC News Poll*, *supra* note 131 (June 13, 1997) (question 2).

¹⁴⁴ *Id.*

¹⁴⁵ See Phoebe C. Ellsworth, *Attitudes Towards Capital Punishment: From Application to Theory* 4, 7 tbl.1 (Nov. 10, 1978) (unpublished manuscript, on file with author).

¹⁴⁶ See GEORGE GALLUP, JR., *THE GALLUP POLL: PUBLIC OPINION 1993*, at 49-50, 132-33 (1994).

¹⁴⁷ See Donald M. Taylor et al., *Dimensions of Perceived Discrimination: The Personal/Group Discrimination Discrepancy*, in *THE PSYCHOLOGY OF PREJUDICE* 233, 234 (Mark P. Zanna & James M. Olson eds., 1994).

¹⁴⁸ See, e.g., J. FRANK YATES, *JUDGMENT AND DECISION MAKING* 15-16 (1990) (noting how people often make decisions based on "likelihood judgments"); Richard E. Nisbett et al., *The Dilution Effect: Nondiagnostic Information Weakens the Implications of Diagnostic Information*, 13 *COGNITIVE PSYCHOL.* 248, 272 (1981) (concluding that "[s]tereotypes may operate most

a person is asked whether she supports the death penalty, the images that come to mind are likely to be those that have dominated public debate over capital punishment: rising crime rates and heinous murders that go unpunished. The murderer—the individual to whom this punishment must be applied—is hardly a part of this picture. He is seen, if at all, in abstract stereotypical terms such as “crazed” or “cold hearted.”¹⁴⁹ But when we learn almost anything about the killer, even irrelevant details that are perfectly consistent with homicidal mania—that he has a “famil[y], pets, hobbies,”¹⁵⁰ that he “lives in a trailer, likes to go hunting, has a friend named Henry”¹⁵¹—the stereotypical image is diluted, and the focus shifts to the individual. As Ellsworth explains, because “it is part of the murderer prototype that he is *not* normal or ordinary in any respect, . . . any normal, ordinary detail tends to make people think that the particular murderer they are dealing with is an exception to the rule.”¹⁵²

This gulf between the abstract and the concrete comes into play directly in capital trials. It explains why jurors who are screened for their willingness to impose the death penalty¹⁵³ nonetheless frequently refuse to do so—even for multiple or mass murderers such as Susan Smith or Terry Nichols—if the trial teaches them to view the defendant as a person. But I do not expect this phenomenon to influence general public attitudes toward the death penalty any time in the near future. The great majority of those who favor the death penalty came to that view ten or twenty or thirty years ago, when executions were nonexistent or rare—when the death penalty *was* an abstraction. Having committed themselves to a point of view, they are unlikely to reconsider the issue unless some fundamental change forces them to do so. In the long run, however, the attention to Karla Faye Tucker and other obviously “normal” defendants who are executed—or even to fictional characters like Matthew Poncelet, the inmate executed in the movie *Dead Man Walking*¹⁵⁴—may be influential. The generation that grows up with these images may have a different view of the meaning of capital punishment.

powerfully in the abstract, applying primarily to undifferentiated groups or individuals”); see also Nancy Cantor & Walter Mischel, *Prototypes in Person Perception*, in 12 *ADVANCES IN EXPERIMENTAL SOCIAL PSYCHOLOGY* 3, 4 (Leonard Berkowitz ed., 1979) (explaining that people tend to categorize matters in an effort to reduce the complexity of the world).

¹⁴⁹ See Ellsworth, *supra* note 145, at 5.

¹⁵⁰ Charles G. Lord et al., *Typicality Effects in Attitudes Toward Social Policies: A Concept-Mapping Approach*, 66 *J. PERSONALITY & SOC. PSYCHOL.* 658, 659 (1994).

¹⁵¹ Ellsworth, *supra* note 145, at 5-6.

¹⁵² *Id.* at 6; see also Lord et al., *supra* note 150, at 659-60 (noting that in applying general attitudes to particular cases, death penalty proponents are affected more than opponents by the “typicality” of the defendant).

¹⁵³ See *supra* note 86.

¹⁵⁴ *DEAD MAN WALKING* (Polygram Video 1996).

There is, however, one specific, concrete possibility associated with the death penalty that could swamp all other considerations and produce major shifts in public opinion in short order: the danger of killing innocent people. This prospect comes up on both sides. On the pro-death penalty side, it is the danger that the defendant, if not sentenced to death, will be released and kill again. As we have seen, pro-death penalty capital jurors often use that argument in deliberations as an antidote to the reluctance to condemn an actual person to death. On the anti-death penalty side, it is the danger that the defendant himself may be innocent. Both of these dangers (especially subsequent murders by convicted murderers) are uncommon events, but very concrete and potentially very influential. For the moment, both issues are dormant.

We do keep hearing about innocent defendants who were sentenced to death, but we hear about them when they are exonerated and released from death row. Such an event is a failure of the system, of course, but it is also a success: The worst has been averted, innocence has been vindicated, all's well that ends well. In that context, it may be relatively easy to accept death sentences for innocent defendants as an inevitable flaw in a system that deserves support. But that could change if a defendant's innocence is proven beyond doubt only after he is executed. Executions of innocent defendants, or of defendants who were widely believed to be innocent, played major parts in successful movements to abolish the death penalty, from Michigan in 1846¹⁵⁵ to England in 1965.¹⁵⁶ It could happen again. Just last year, a death penalty bill failed to pass on a second reading in the Massachusetts House of Representatives because one representative switched his vote after a controversial murder verdict persuaded him "that innocent people could face execution."¹⁵⁷ On the other hand, we could see another Willie Horton—a convicted murderer who is released and promptly rapes or kills again. Most likely it would not be a capital defendant—common misconceptions to the contrary, they are rarely released¹⁵⁸—but the popular response would probably be the same even if he had previously been convicted of second degree murder or manslaughter: Support for the death penalty would harden and might even increase. On either side of the debate, general views may be trumped at any time by uncommon, unpredictable events that are conspicuous, concrete, and personal.

¹⁵⁵ See Bedau & Radelet, *supra* note 102, at 76.

¹⁵⁶ See *id.* at 77.

¹⁵⁷ Walker & Wong, *supra* note 32, at A1.

¹⁵⁸ See Bowers & Steiner, *supra* note 62, at 29-34.