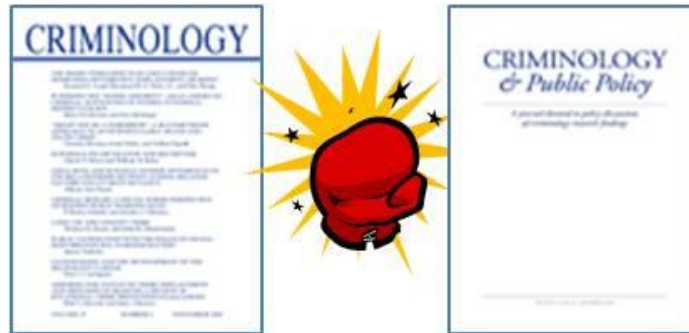Posted 1/24/10

TINKERING WITH THE MACHINERY OF DEATH*

Academics prove that the death penalty works. And that it doesn't.

    By Julius (Jay) Wachtel. When ASC members opened the November 2009 issues of the society's two publications, stodgy old *Criminology* and the supposedly more real-world *Criminology and Public Policy*, they must have felt dizzied. *Criminology's* lead piece, "The Short-Term Effects of Executions on Homicide," by Land, Teske and Zheng, concludes that capital punishment works, at least in Texas, preventing .5 to 2.5 homicides per execution. Meanwhile, in *Criminology & Public Policy*, Kovandzic, Vieraitis and Boots answer the question posed by their article, "Does the Death Penalty Save Lives?" with a resounding no, that it doesn't.

    Indeed, the differences in opinion seem unusually sharp, with C&PP Senior Editor John Donohue flat-out asserting in his introductory remarks that "no credible evidence exists" that the death penalty deters homicide. Whoa – it's not that simple! Decades of research have produced findings supporting both sides of the debate. Some of the squabbling can be attributed to differences between disciplines. Economists, who believe that criminal behavior is influenced by cost-benefit analyses, tend to favor the death penalty, while traditional criminologists, preferring to think that they take a broader, more nuanced view, often come out against.

    Either way, crunching the numbers presents a major challenge. While executions are exceedingly few, homicide is plentiful and influenced by many factors, so teasing out the unique effects (if any) of the former on the latter stretches the statistical arts, some would say to the breaking point. As far back as 1978 a book-length report commissioned by the National Academy of Sciences panned death-penalty studies for, among other things, making "implausible" assumptions about the data for the sake of applying sophisticated statistical techniques. (For a skeptic's more recent review of death penalty research click here and scroll to page 4.)

Alas, concerns about over-reaching haven't slowed investigators down. On reading these pieces one quickly encounters methodological complexities that are impenetrable to all but trained statisticians. Forgive the pun, but the impression is of a mathematical duel to the death. Writing in the same issue of *Criminology and Public Policy* that published the article favoring the death penalty (*Criminology* doesn't include opposing views) here is what Emory University economist Paul Rubin had to say:

> In sum, Kovandzic et al. (2009) change the model specification, estimation method, as well as both the dependent and independent variables used by earlier death penalty studies that report deterrence, and they find no deterrence....To prove their assertions, Kovandzic et al. instead should have established, with rigor, that their results are derived from more appropriate statistical models and must, therefore, be the correct one. Moreover, their statistical methods are unjustified and, at times, inappropriate. Their assertion about the lack of a deterrent effect is, therefore, unwarranted given their evidence. (p. 858)

After finishing off his enemy with a slide rule, Dr. Rubin goes on to suggest that (horrors!) human bias is likely at work:

> Most murders occur in poor neighborhoods and among relatively uneducated persons, often with risky lifestyles. An element of elitism may be present in academic recommendations for abolishing the death penalty, because others will bear the costs. (p. 858)

Yes, where one stands undoubtedly influences what one sees. But as the frailty of the adjudicative system has become well recognized, minds have changed for the best of reasons. In Texas, the hang 'em high State that hosts nearly half of America's executions, one barometer of the public mood, the Dallas Morning News, recently came out against the death penalty. It used to strongly favor it:

> It's hard to imagine that, at the start of this decade, it was legal to execute people for crimes they committed as children, to execute the mentally retarded and to bring racial biases into jury-selection processes. The Supreme Court righted those wrongs and, for the first time, established that post-conviction DNA evidence could be considered in the appeals process. And in Texas, life without parole – or 'death by prison,' as we like to call it – finally became an option for juries. These are all signs that courts, prosecutors, politicians and the public are recognizing the problems in our imperfect system of justice. This newspaper feels more strongly than ever that those flaws are sufficiently

widespread that the justice system cannot be trusted to impose irreversible sentences of death...

If, as most criminologists believe, punishment deters, then it's probably true that fear of being put to death has prevented some murders. But that presumed benefit alone isn't dispositive. State-sanctioned killing is a political and moral issue that goes to the heart of the relationship between the people and their government. Capital punishment is also replete with racial and socioeconomic disparities. Simply put, if you can't afford a good lawyer, better break open that Bible. What's more, it's become painfully clear that the justice system does goof, sometimes in a big way. According to the Death Penalty Information Center, 139 death-row prisoners have been exonerated since 1973. To date the Innocence Project reports 249 DNA-based exonerations, including seventeen on death row.

It's likely that our contemporary justice system has executed innocent persons. (For an example, click here.) Surely, such blunders are unforgivable. Yet as the article in *Criminology* suggests, enjoying Texas-sized benefits requires ramping up the threat of execution to Texas-size levels. Naturally, that might increase the frequency of tragic mistakes. To what extent is impossible to estimate. Dead men tell no tales, and since we don't track miscarriages of justice until they're officially acknowledged, the error rate remains a cipher. (It's analogous to the problem that plagues deterrence research. We don't know who's deterred, so how can we be sure how or if deterrence works?)

Considering its problems one would be hard-pressed to support the death penalty just because of its reported effects in Texas. But what if the benefits could be extended to the rest of the country? In 2009 the Lone Star State (pop. 24,782,302) put twenty-four persons to death, or approximately one per million. Applying that ratio to the U.S. (pop. 307,006,550) calls for about 300 executions per year. Using the benefit range reported by Kovandzic et al. that would save from 150 to 750 lives, yielding, based on 16,272 murders reported in 2008, an overall reduction in homicide from .9 to 4.6 percent.

Hmm. Executing two dozen persons *each month* might not be a problem in China or North Korea, but could we stomach that in the U.S.A.? Keep in mind that according to the deterrence paradox we can't know whose lives are saved, so stirring up public support might be problematic. Really, given the controversies about its fairness, doubts about its effectiveness, and the likelihood of wrongful executions, expanding the use of the death penalty seems unlikely and unwise. With fifteen States and D.C. having already abolished capital punishment, it may be time for the U.S. to quit "tinkering" and join the E.U. and the rest of the civilized world in doing away with this throwback to the Dark Ages altogether.

Adapted from Justice Blackmun's famous words in Callins v. James (1994): "From this day forward, I no longer will tinker with the machinery of death."