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The Nebraska Death Penalty Study: An Interdisciplinary Symposium

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Introduction

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The four papers presented in this symposium reflect upon and develop the data presented and the concerns raised during a public panel at the University of Nebraska in February 2002. That panel and this symposium were organized to promote public discussion of and reflection upon an empirical study that examined the death penalty as it has been applied in Nebraska during the last quarter of the twentieth century! Those who support the death penalty, those who oppose it, and those who remain uncertain should agree at least on the following proposition. The death penalty raises some of the most important and perplexing moral, political, and legal questions that a society and its citizens of good conscience must confront. We partially define our lives, individually and collectively, by the manner in which we address the central questions of personal and political morality that we encounter. We define ourselves partially by the positions we take regarding these questions but perhaps even more fundamentally by the manner in which we pursue the inquiry through which we develop these positions. Thus, the manner in which we confront, examine, and attempt to resolve the ongoing debates regarding the death penalty constitutes an important component of the individual and collective lives we live.

The ongoing debate about the legitimacy of the death penalty can be understood as addressing at least three distinct evaluative questions. First, is the death penalty constitutional? Does if fall within the range of criminal punishments that the United States Constitution recognizes as within the legitimate authority of the state or federal governments to impose? Second, is the death penalty morally justifiable? Although the Constitution places legal limits on the criminal punishments that fall within the authority of our criminal justice systems, constitutional legitimacy does not entail moral justification.

1. David C. Baldus, George Woodworth, Catherine M. Grosso, & Aaron M. Christ, *Arbitrariness and Discrimination in the Administration of the Death Penalty:* A *Legal and Empirical Analysis ofthe Nebraska Experience* (1973·1999), 81 NEB. L. REV. 486 (2002) [hereinafter *Nebraska Study]*.

Those who accept the proposition that the Constitution allows capital punishment must confront the moral questions regarding the justification of capital punishment as an institution and regarding the legitimacy of the various roles that individuals must fulfill in such an institution. Third, is the death penalty prudent? Does it serve the interests ofthe citizens individually and ofthe citizenry collectively to maintain an institution of capital punishment? Those who accept the propositions that capital punishment is constitutional and morally justifiable must also ask whether maintaining such an institution imposes costs on society or on individual members of that society that provide good and sufficient reasons to refrain from imposing the death penalty.

Conscientious inquiry into each of these questions requires a complex analysis that can include a variety of empirical issues. When a fragmented Supreme Court overturned death sentences handed down under statutes that allowed sentencers to exercise unguided discretion, several of the opinions emphasized the risk of arbitrary and discriminatory sentencing under such statutes.[2] The Court later approved capital sentencing statutes designed to guide sentencer discretion in a manner intended to reduce the risk of arbitrary or discriminatory sentences and to promote sentences consistent with legitimate penal purposes, including deterrence and retribution.[3]

Empirical questions relevant to the constitutional inquiry can vary with the identified legitimate penal purpose. If a sentencing provision is intended to deter capital crimes or crime generally, for example, empirical study might increase our understanding of the degree and manner in which capital sentencing deters some individuals from committing such crimes or triggers a counterproductive brutalization effect contrary to the deterrent purpose. Alternately, a capital sentencing statute might be intended to promote a retributive purpose by increasing the correspondence between severity of sentence and offender culpability. Empirical evidence of the positive or negative relationship between capital sentencing and accepted criteria of culpability or moral responsibility would be relevant to the effectiveness of such a sentencing provision, and such evidence might provide. information that could be used to improve correspondence between culpability and sentencing.

Empirical inquiry might also inform the moral justification of capital punishment, although the type of evidence needed can vary with the moral justification advanced. Those who would justify capital punishment as an institution designed to protect innocent human life,

2. Furman v. Georgia, 408 U.S. 238, 240-57 (Douglas, J., concurring), 306-10 (Stewart, J., concurring), 310-14 (White, J., concurring) (1972).

3. Atkins v. Virginia, 122 S.Ct. 2428, 2434-2437 (2002); Gregg v. Georgia, 428 U.S. 153, 182-207 (Stewart, J., plurality opinion) (1976).

for example, should be particularly interested in empirical evidence regarding the degree to which capital punishment is associated with increasing or decreasing homicide rates and regarding the risk of executing innocent individuals. Those who would justify capital punishment as necessary to fulfill the requirements of retributive justice by treating people as they deserve should also be interested in the evidence regarding the risk of executing innocent or less than fully culpable individuals. They should also be interested in any evidence addressing the degree to which sentencers are able to reliably apply defensible criteria of desert or identifying the circumstances that enhance or undermine that ability.

Empirical inquiry might inform the prudential evaluation of capital punishment insofar as it advances our ability to understand whether a constitutionally and morally justifiable institution of capital punishment imposes costs on society that undermine the broader set of societal interests. Does a justifiable institution of capital punishment promote a rigorous process of trial and appeal in the criminal justice system more generally, for example, or does it draw so heavily on the available resources that it undermines the quality of the criminal justice process in noncapital matters? Does the practice of capital punishment motivate individual participants in the criminal justice system to pursue excellence in the discharge of their responsibilities, or does it inflict stress so severe that it undermines their abilities to discharge those responsibilities and their general well-being?

The constitutional, moral, and prudential inquiries are distinct, but they are not mutually exclusive. Some empirical questions, such as those addressing our abilities to accurately identify guilty and innocent defendants or to consistently apply criteria of culpability, may have relevance to all three types of inquiry. The specific relevance of particular empirical questions can vary with the conceptual and justificatory formulations of each inquiry. Thus, it will be difficult to design, perform, interpret, and apply empirical inquiries in the absence of a more comprehensive analysis of the relevant legal, moral, and prudential questions.

The study reported in the first paper in this symposium represents a sophisticated investigation ofthe factors associated with capital sentencing in Nebraska during the last quarter ofthe twentieth century.4 David Baldus and his colleagues collected and analyzed data regarding the degree to which capital sentencing during this period reflects the presence or absence of statutory aggravating and mitigating factors. They also examined evidence regarding the degree to which capital sentencing during this period is associated with illegitimate factors such as the race, ethnicity, or socioeconomic status of the offender or

4. Nebraska Study, supra note 1.

of the victim. The study presents a wealth of empirical information that can advance serious attempts to evaluate the sentencing process and address the evaluative questions.

In order to understand this empirical information and interpret its significance for the three types of evaluative questions previously identified, we must review and evaluate the methodology and results of the study, and we must examine the relationships among those results and the evaluative questions we want to address. The second and third papers in this symposium pursue this task. Neither attempts to provide a comprehensive review and evaluation of the *Nebraska Study*. Rather, each raises important methodological issues regarding the design, interpretation, and application of this study as an example of the rigorous application of empirical methodology to difficult questions of public policy. In doing so, each strives to provide the reader with a greater understanding of the important questions to be asked in the processes of interpreting the *Nebraska Study* and of assessing its significance for public policy decisions regarding capital punishment in Nebraska. Furthermore, each provides important guidance regarding the more general questions that arise when citizens or officials must evaluate, interpret, and apply sophisticated empirical inquiries intended to inform a broad range of public policy decisions.

In the second paper, Richard Wiener reviews the *Nebraska Study* from the perspective of a research psychologist with considerable experience in the application of social science methodology to questions of public policy.[5] He discusses the strengths and weaknesses of research involving the statistical analysis of archival data, identifies a series of additional questions raised by the *Nebraska Study*, and suggests additional research strategies that might expand the understanding provided by that study. It is important to recognize that he suggests these alternative strategies in addition to, rather than as substitutes for, the archival design of the *Nebraska Study*. These suggestions remind us that serious examination of complex legal or social institutions requires an extended program of integrated research, rather than a single definitive study. Thus, those who are interested in pursuing comprehensive understanding of legal institutions are committed to an extended agenda of research and analysis.

In addition to examining the place of the *Nebraska Study* in a more comprehensive program of related research, Wiener addresses the significance of the study for Nebraska capital sentencing in light of the recent Supreme Court decision in *Ring u. Arizona*.[6] He reviews several of the major findings of the *Nebraska Study* with an eye toward suggesting further inquiries that might enrich our understanding of

5. Richard Wiener, *Death Penalty Research in Nebraska: How Do Judges and Juries Reach Penalty Decisions?*, 81 NEB. L. REV. 757 (2002).
6. 122 S.Ct. 2428 (2002).

the sentencing process under the current statutory system and of the manner in which that system might be revised in order to promote consistency with *Ring* and with legislatively enacted principles of capital sentencing. This review constantly draws our attention to the importance of designing, performing, and interpreting an extended program of empirical research that integrates rigorous design and psychological theory with the relevant legal and public policy analysis.

Jennifer Robbennolt's contribution to this symposium extends this focus on the relationship between empirical research and legal analysis. She identifies certain aspects of the *Nebraska Study* that exemplify areas of tension that occur more generally between the demands of empirical methodology and the needs of legal and public policy decision-makers.[7] She explores, for example, the tension between the scientific use of quantifiable data and the legal requirement of a comprehensive, individualized assessment of each offender and offense. She also explores a comparable tension between the scientific need for rigorous controls of confounding variables and the circumstances of sentencing and other legal processes that are open to influence by a broad and indefinite set of factors. These two areas of tension between social science methodology and the conditions under which legal institutions must operate reflect a more general concern regarding the compatibility of social science methodology and the study of social institutions. Social science methodology seeks quantifiable precision in the measurement of the effects of certain variables by isolating them from confounding variables or by statistically controlling for the effects of those confounding variables. Legal institutions, in contrast, must operate in extremely complex circumstances influenced by an indefinite variety of known and unknown factors. This contrast renders it virtually impossible to design and implement social science studies that accurately and comprehensively measure the functions of legal institutions in the circumstances in which they operate.

This lack of precise fit invites two complimentary errors. First, some readers may tend to reject the social science evidence as irrelevant because it is unable to account for all relevant factors. This response is misguided because although the social science evidence is imperfect, the alternative sources of information regarding the operation oflegal institutions, such as the personal experience and common sense of the participants, are wrought with a wide and unspecifiable array of contaminating factors. Alternately, some readers might recognize this misleading potential of reliance on personal experience or impressions and opt to rely solely on the social science as the best available source of information. This response is misguided because it

7. Jennifer K. Robbennolt, *Evaluating Empirical Research Methods: Using Empirical Research in Law and Policy*, 81 NEB. L. REV. 777 (2002).

fails to recognize and address the unspecified set of factors that the studies cannot accommodate. Robbennolt discusses alternative approaches that avoid these twin errors of categorical rejection or uncritical acceptance of social science data as applied to legal and public policy decisionmaking.

Wiener and Robbennolt reveal similar patterns of analysis, and they share at least two common themes. First, they address certain concerns that arise in interpreting and applying the *Nebraska Study*, but their discussion addresses useful approaches to the design, execution, interpretation, and application of empirical research methodology to legal and public policy decisionmaking more generally. Second, each rejects the simplistic alternatives of categorically rejecting or uncritically accepting data derived from empirical inquiry in favor of a more nuanced evaluation of the fit between the empirical methodology and the legal and policy questions addressed by that method.

In the final paper of the symposium, I direct attention to a different aspect of the relationship between empirical inquiry and the three evaluative questions articulated previously.8 This paper directs the readers' attention toward the relationship between principle and practice. A legal, moral, or prudential analysis might purport to demonstrate that a legal institution is defensible in principle or in practice. Insofar as that analysis purports to demonstrate that the institution is legally, morally, or prudentially justified in principle, it advances arguments contending that the institution as designed conforms to the applicable principles or criteria of constitutionality, morality, or social interest. A retributive argument in principle for capital punishment, for example, would advance reasoning to support the contentions that we ought to punish culpable offenders in proportion to their desert and that capital punishment constitutes such proportionate punishment for those who commit certain crimes under certain conditions. Alternately, an instrumental justification in principle for capital punishment might advance reasoning to support the contentions that capital punishment for certain offenders provides the most effective preventive effects of deterrence or incapacitation.

Insofar as the justificatory analysis purports to demonstrate that the institution is justified in practice, empirical evidence can provide information regarding the degree to which the institution in practice conforms to the justifications in principle. To the extent that empirical evidence provides reason to believe that the institution in practice deviates from the putative justification in principle for that institution, it calls into question the justification for maintaining the institution as it is currently applied. Such evidence might also contribute to

8. Robert F. Schopp, *Justifying Capital Punishment in Principle and in Practice: Empirical Evidence of Distortions in Application,* 81 NEB. L. REV. 805 (2002).

further inquiry regarding the degree to which it is reasonable to think that distortions in practice are subject to amelioration. Thus, comprehensive arguments regarding the justification (or lack thereof) for an institution in practice may require a complex integration of empirical evidence with justificatory reasoning.

The papers in this symposium make no pretense that they can resolve the final questions regarding the constitutional, moral, or prudential justification (or lack thereof) of capital punishment in principle or in practice. Rather they attempt to advance these inquiries by improving our ability to understand the manner in which the death penalty has been administered in Nebraska during the last quarter of a century. Such understanding cannot by itself resolve the evaluative inquiries, but it can inform the more comprehensive analyses. By facilitating our ability to responsibly pursue these integrated analyses, a well-designed and applied empirical research program can enhance our ability to formulate defensible decisions to endorse, repudiate, or modify our current institutions of capital punishment. By developing our abilities to pursue similarly integrated analyses regarding other issues, we can enhance our ability to responsibly address a range of difficult public policy questions.