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# The Death Penalty as the Will of the People

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Faced with massive protests on his first European tour in June 2001, President George W. Bush defended the United States death penalty in these terms: “We have a democracy; the death penalty is the will of the American people.” Both Bush’s explicit statement that the death penalty is the will of the people and his implicit assertion that a democratic leader is obliged to heed that “will” are highly debatable. Democratic leaders addressing the real concerns of the people about violent crime have solutions available that are far preferable to the death penalty.

**H**ow do we determine whether “the will of the American people” supports having a death penalty? If the will of the people is the justification for the death penalty, it certainly matters that we accurately assess public opinion on this complicated subject. Most commonly, we look to public opinion polls. But they are highly subjective devices. Using polls as indicators of majority will is an unstable barometer. The people’s will consists of complex layers of thoughts and feelings that cannot be easily reduced to yes and no answers. Does a poll reflect the wisdom of the populace? Could it just as easily reflect ignorance, knee jerk reactions and political maneuvering? Since the will of the people cannot be determined with certainty, polling is a dubious basis for setting public policy.

On the surface, recent polls indicate that most Americans favor capital punishment. A Gallup poll from February 2001 and a Harris poll from July 2001 both found that 67% of the people support the death penalty. Other polls, such as one conducted by *USA Today* in May 2001, show support at 59%. On the other hand, the Gallup poll found that support for the death penalty drops to 54% when those polled are given alternatives, such as a life sentence with no possibility of release. And a March 2001 poll by Peter D. Hart Research Associates found that, although 60% of Americans favor the death penalty, support drops to 38% when life imprisonment with mandatory restitution for victims’ families is an included alternative. Recent polls also suggest that most Americans have strong reservations about the ultimate punishment when specific issues are raised, such as executing the mentally retarded, juvenile murderers, people of a particular race and economic status, and people who are in fact innocent.

A February 2001 Gallup poll indicated that 50% of the people polled think blacks are more likely than whites to receive the death penalty. An ABC poll in April 2001 found that 68% believe that innocent people have been executed.

Most significantly, the polls show that a substantial majority of the people favors a moratorium on executions while issues such as fairness are studied. And the March 2001 Hart poll showed that 72% of the people support a moratorium on executions, up from the 63% support found in the NBC News/*Wall Street Journal* poll from the previous summer.

What these reports demonstrate is that polling results are highly sensitive to how the questions are framed. At the end of the day, if polls show anything, it's that more and more Americans are ambivalent about the death penalty even when they favor tough consequences for murderers. The polls also show that as people become more informed about the death penalty's administration, support for it wanes. In addition, spikes of high support in polls taken at the time of well-publicized violent crimes may distort the actual support for capital punishment. The McVeigh execution provides an example of this in the United States.

Peter Hodgkinson, Director of the Centre for Capital Punishment Studies at the School of Law of the University of Westminster in London, stated in a 1996 seminar before the Council of Europe that pro-death penalty public sentiment in Czechoslovakia grew stronger after five gruesome murders took place just after the 1992 vote to abolish execution passed and before the new law took effect. This same report cites similar episodic reactions in Britain in response to particularly heinous crimes. If "the will of the people" cannot be determined with any certainty, and if that will waxes and wanes in response to arbitrary events, it should not decide government policy, particularly one that determines life and death.

Even if we were confident that the people's will favored the death penalty, that alone would not require our elected leaders to accede to that will. The United States government is representative but not all public desires are implemented by the elected representatives. The "will of the people" often does not govern the results. The latest presidential election provides a good illustration. George W. Bush was elected president despite voter preference for his opponent. This can happen because the U.S. Electoral College inherently does not reflect the will of the people. Similarly, most people would support the abolition of the income tax, yet the government will not and cannot eliminate taxes. A majority wants access to affordable health insurance, but the U.S. does not have it. The U.S. is constructing a missile shield although only 22% of the people support such an effort. More to the point, in 2000 most Americans polled supported a death penalty moratorium in order that its fairness be studied; yet, no state but Illinois has put a moratorium in place, and President Bush himself recently ignored those polls to end a 40-year moratorium on federal executions.

The experience of other countries that have abolished the death penalty may be instructive. Many news articles report that most people in Europe still support capital punishment. According to *Time Magazine* on May 21, 2001, popular support in Britain was around 60% and in The Netherlands 52% were in favor. The death penalty enjoys a support level of 60% in Central Europe. But these countries have leaders who have chosen not to make such a critical decision based on majority opinion, and because they belong to the European Union it is not a debatable issue. Of the 196 countries in the world, including all of

Europe, Russia, and South Africa, 109 have eliminated use of the death penalty. Abandoning capital punishment is a requirement for admission to the European Union.

In many countries, the death penalty was abolished before consensus was reached or a vote taken. Individual leaders, in the name of government, made the decision that capital punishment did not further the goals of either their individual country or the global community, and took action. According to Supreme Court Justice Stephen Breyer, in an interview with the French newspaper *Liberation* on July 20, 2001, “The death penalty existed in France until 1981. Most of the French were for it. It is the same thing in the United States. But the difference is that in 1980 a candidate for president of the French Republic let it be known that he opposed capital punishment. Francois Mitterrand said: ‘If I am elected, there will be no more executions.’” Despite the support for capital punishment in polls, the only time a European country voted on the death penalty the results were a clear mandate for abolition. On June 6, 2001 a referendum in Ireland to remove the death penalty from its constitution generated a lot of discussion. But, in the end, more than 62% of the people voted for abolition. In some places, like Dublin, this number was as high as 75%.

In countries where statistics are available, support for the death penalty declines after abolition. For example, in Canada, pre-abolition support for the death penalty was as high as 73%, but after political leaders outlawed capital punishment in 1976 public support for it was around 70%. According to a February 2001 Ipsos-Reid poll for the *Toronto Globe, Mail* and CTV, support was about 52%, and it was much lower among people under the age of 30.

The death penalty is a highly divisive issue in the United States. A substantial minority of the people, including most religious leaders, opposes capital punishment entirely and a majority favors a moratorium on its use. In this situation, political leaders cannot just ignore the minority, but must search for a way to meet the legitimate concerns of the majority and the minority.

What are the concerns that lead a “majority” of Americans to favor the death penalty? What are Americans seeking when they encourage their state or federal government to kill a murderer? Some of the objectives frequently mentioned are vindication and closure for victims and their families; reciprocal justice, including revenge; prevention of additional offenses; acknowledgment of wrongdoing and remorse by the murderer; and cost savings from not having to imprison the murderer. These, then, are the real issues that must be addressed, not only by the victims of violent crime, but by each one of us. Murder can touch anyone. It affects our community and shapes the way we think and the way we behave. So what are some alternatives to execution?

Victims need to be heard. We need to know about their suffering and their loss, and whether they need emotional or financial support. Those touched by murder must find a way to regain control over their lives and must be assured that they and their loved ones are safe from further violence from the murderer. They need recognition for their rage and a response to it, and they need to know that there will be hard consequences for a person who commits murder. Surviving family and friends often want the murderer to feel remorse, and

sometimes want to hear an apology. Most victims' families could engage in victim impact activities and get counseling, financial help, and a plan tailored to their needs to help regain some control over their lives.

For the worst cases, a life sentence that holds no possibility of parole might be a sweeter form of justice because most people feel remorse after long years in prison, if rehabilitation is included in their program. Murderers rarely get out of prison before their sentence is up if the victims and their families oppose it. We have the ability to incarcerate people in prisons from which they will not escape, so the possibility of their re-offending is not a real issue.

Once a murderer is executed, another family is thrust into suffering in much the same way as the victim's family because they have also lost their loved one, albeit a murderer, to murder. And this family has not only lost someone they love but is experiencing the additional guilt of the crime their loved one committed. Does execution really bring "closure" to the victim's family? Can there ever be closure when you have lost someone to violent crime? Because of our constitutionally mandated appeals process and the isolation and special conditions of death row prisoners, it costs about four times as much to execute them as it does to incarcerate them for life. Isn't it possible that some people can do something terrible, be punished and also forgiven, and that this might create more healing for victims' families than simply taking the life of the murderer?

Alternatives to capital punishment could satisfy many of the needs of the victims and the community. The Restorative Justice movement, which is gaining momentum around the world as well as in the U.S., looks at core issues that cause criminality. It returns humanity to a person who commits a crime by treating him with dignity and fairness, allowing us to consider how violence leads to more violence, and how punishment without rehabilitation changes nothing. Restorative Justice aims to heal the wounds of violent crime while still holding the offender accountable. As human beings, we all experience anger and a desire for vengeance. Hopefully we learn how to control and to act on these feelings without committing murder. Our legal system intervenes to protect the community and all of us from our natural desire for revenge. Our elected leaders represent us in overseeing the whole process and in making and implementing policy. But it is our responsibility to inform ourselves and insist on accountability from both our legal system and our representatives in government.

The Death Penalty Information Center estimates that by the end of 2001, there will be about 17,000 murders in the U.S. Roughly 1% of these crimes will be prosecuted as capital cases that could result in the death penalty. Would a majority of people still choose capital punishment if they knew of realistic alternatives? Should a victim's family and loved ones gain their satisfaction at the price of creating other victims? Is it the best use of money and energy to kill people rather than to try to restore them and hold them accountable? Can we repair the horrors of violent crime by murdering murderers?

**W**e have examined some of the dangers of making policy by majority opinion. Sometimes the will of the people is unknowable and sometimes it is wrong. The government does not always follow the wishes of the majority. Minority opinion must not only be considered but often provides the leadership

for social change. Execution does not necessarily satisfy the deeper issues that society wants addressed in the wake of violent crime. And perhaps most telling of all is that we are part of a global community that is moving toward the complete abolition of capital punishment.

The death penalty has become a defining human rights issue internationally. The United Nations is currently debating a globalization of human rights standards. We see a shift in U.S. public opinion within the context of global pressure. Americans are asking questions about fairness, about innocence and about whether we should be executing mentally retarded and juvenile killers. With more international exposure of how the death penalty is enforced in the U.S., the fairness of the process is being increasingly questioned.

Robert Badinter, a French senator and former Justice Minister under Mitterrand, has argued in *Time Magazine* that “Americans don’t fully understand how their use of the death penalty has profoundly degraded the country’s image in the eyes of other democratic nations.” Just as the European Union declared capital punishment its top priority three years ago, Americans now have to question whether human rights should ever be subjected to majority opinion. Is not the abolition of the death penalty virtually inevitable in an informed democracy? Isn’t it time to join the 109 countries that have abandoned capital punishment?

People should demand safety and accountability in all parts of the community, from the leaders to the murderers. We can insist that victims get the recognition they need. We can call upon our leaders to give us alternatives to violence and retribution. We can become a society that looks at the causes of criminality, takes action against injustice and assures safety for its citizens and punishment for its offenders. We can also consider the humanity of violent offenders, despite their criminal acts, and we can design our punishment so that, in most cases, we are safe and they are sorry. No matter what outrage occurs, even in the height of passion, we can feel secure that we will not, as a country and through our government, become murderers. We can hold onto the idea of reason over passion, which is the foundation of the U.S. republic. We can elect leaders who will guide us in the moments when we lose sight of this reason.

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