

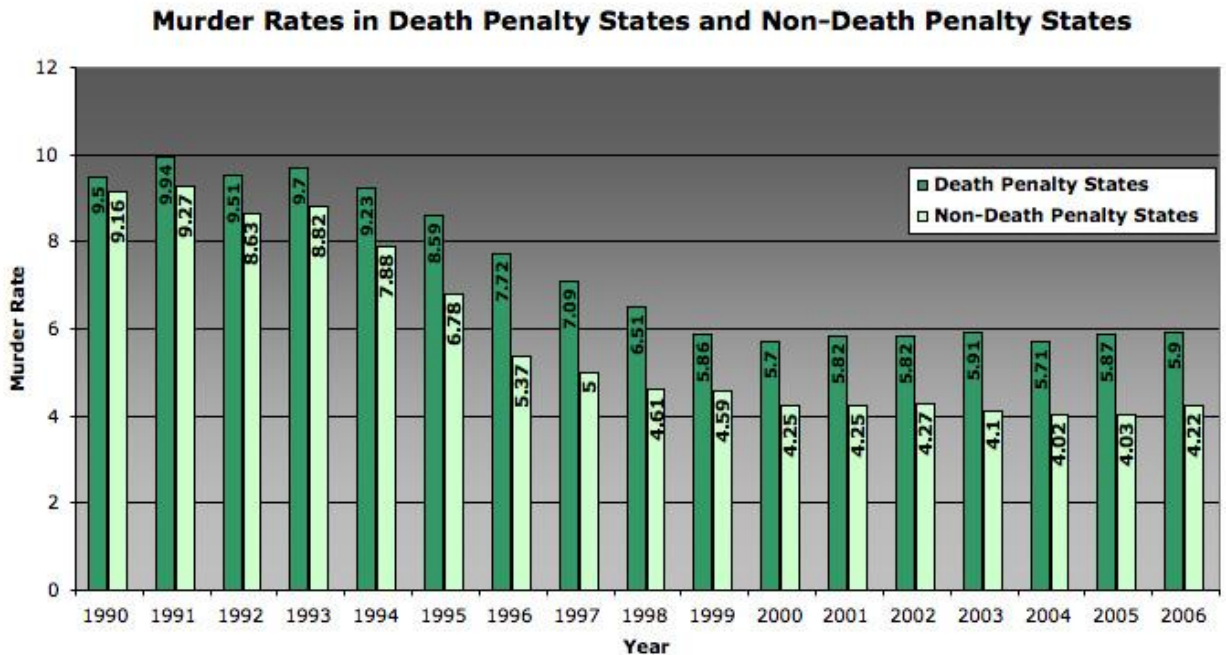
Further Notes on the Sunstein and Wolfers Death Penalty Op-Ed

This document is intended to provide the data and sources informing the arguments made in our recent Washington Post op-ed. We do this so as to make our analysis as transparent as possible, and to allow you to check the relevant facts for yourselves, and assess the robustness of each assertion in our article.

The format is simple: A separate bullet point provides the facts and useful links behind each factual assertion in our article.

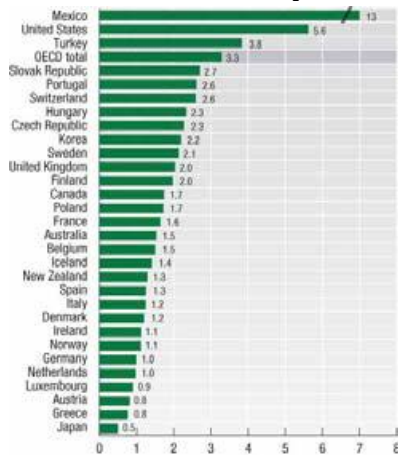
- “Although the Supreme Court banned capital punishment for child rape last week, the justices have made it clear that for homicide, states may inflict the ultimate penalty.” Two recent cases are particularly relevant: [Baze v. Rees](#), which clarified the constitutionality of the death penalty in general, and lethal injection in particular, and [Kennedy v. Louisiana](#), which found that capital punishment should be available for homicide, but not rape.
- “Last month, capital punishment resumed after a seven-month moratorium”: On Tuesday May 6, [the first post-Baze execution occurred in Georgia](#). The moratorium began on September 25, 2007, when the Supreme Court agreed to hear *Baze v. Rees*, and whether lethal injection constitutes cruel and unusual punishment. The Supreme Court granted stays of execution in a couple of subsequent cases, [leading state governments to infer that executions were to cease](#) until the case was decided.
- “Rapid scheduling of executions followed the Supreme Court’s ruling in *Baze v. Rees*, reaffirming the constitutionality of the death penalty in general and lethal injection in particular.” On April 16, 2008, [the Baze decision upheld the constitutionality of lethal injection](#) (7-2), clearing the way for [executions to resume](#). The full decision can be read [here](#). A list of upcoming executions is maintained by the Death Penalty Information Center, [here](#).
- “To support their competing conclusions on the legal issue, different members of the Court invoked work by each of us on the deterrent effects of the death penalty.”
 - Justice Stevens noted that “Despite 30 years of empirical research in the area, there remains no reliable statistical evidence that capital punishment in fact deters potential offenders.” (p.10) The subsequent footnote cites, among others, [Donohue and Wolfers \(2005\)](#).
 - Justice Scalia cited the above passage by Stevens, and argued that “JUSTICE STEVENS’ analyses barely acknowledges the ‘significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one. [Sunstein and Vermeule, Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs, 58 Stan. L. Rev. 703, 706 \(2006\)](#)”

- “One approach notes that in states with the death penalty, the average murder rate is about 40 percent higher than in states without the death penalty.” For instance, see the figures provided by the [Death Penalty Information Center](#):



- “Yet such comparisons are surely confounded by other influences, as those states that impose the death penalty also have a historic culture of violence, including lynching.”: This draws on Frank Zimring’s book, [“The Contradictions of American Capital Punishment”](#). At page 66, Zimring states: “Using lynching as the extreme example of vigilante values, the chapter shows a link between the excessive communal force at the dawn of the twentieth century and the propensity to execution a century later. The states and the regions where lynching was dominant show clear domination of recent executions, while those states with very low historic lynching records are much less likely than average to have either a death penalty or executions late in the twentieth century.”
- “If we compare countries, the United States has higher execution and higher homicide rates than nearly all other industrialized countries. Here, too, many alternative explanations remain, making it hazardous to conclude that the death penalty does not deter murder.”

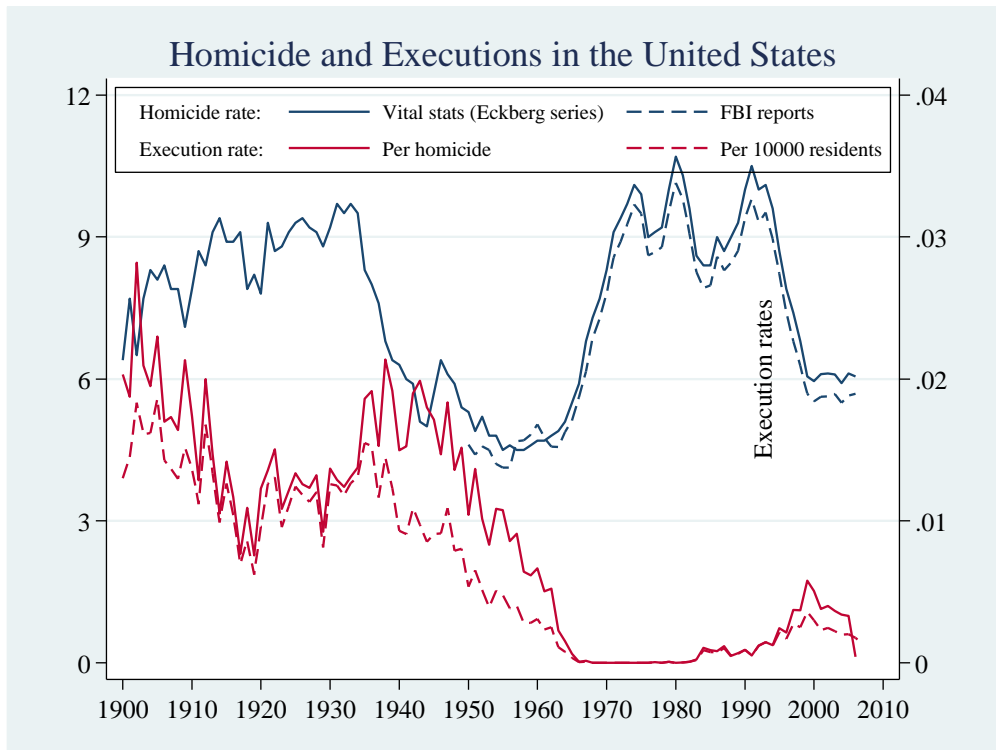
For homicide data, see p.136, “OECD Regions at a Glance, 2007”, citing 2003 homicide rates.



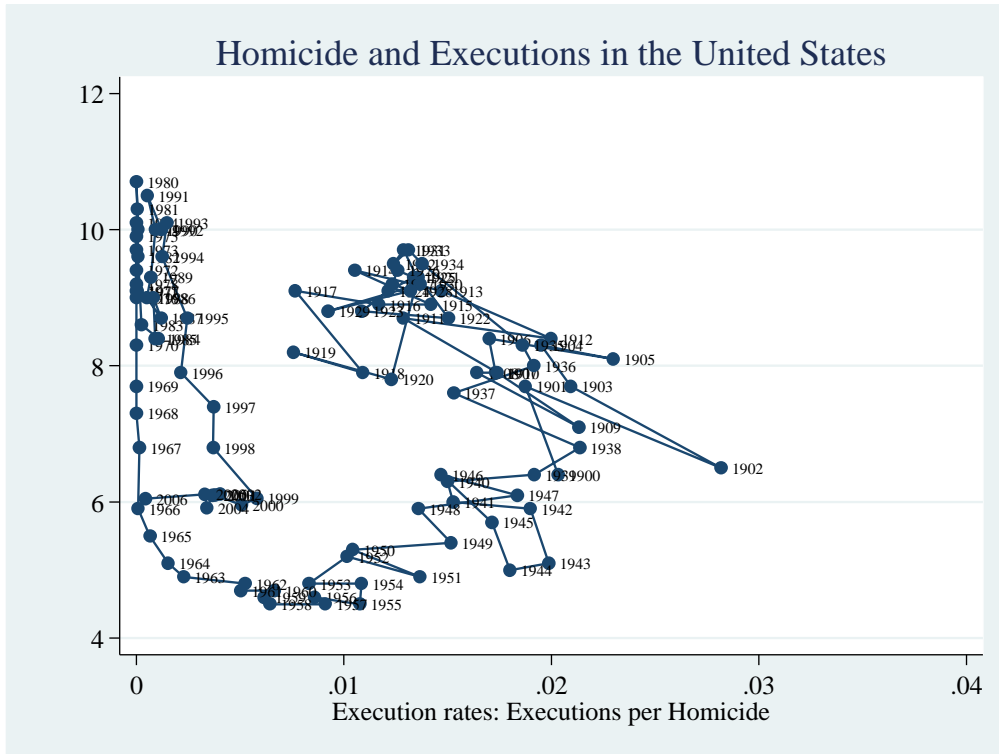
Among these countries only the U.S. and Japan have active capital punishment regimes. Korea is “abolitionist in practice”. Source: [Amnesty International](#).

- “Other studies have evaluated changes in homicide rates over time. In the 1960s, as the death penalty fell into disuse, homicide rates rose sharply, leading some studies to infer a deterrent effect.” In particular, see [Ehrlich \(1975\)](#), which analyzed data from 1935-69. Subsequently, [Passell and Taylor \(1977\)](#) showed that Ehrlich’s findings no longer held if one restricted the sample to 1935-62. Did something dramatic happen between 1963 and 1969? The number of executions fell from 21 in 1963 to zero in 1969, which is small relative to the decline from 191 homicides in 1935. But Ehrlich took logs, and hence in his series, the decline from 1935-1962 was 220 log points, compared with the 304 log point decline from 1963-1969.
- “Moreover, a large-scale decline in homicide in the past two decades coincided with renewed use of the death penalty.” According to the [FBI’s Uniform Crime Reports](#), homicide rate (murders or nonnegligent manslaughter per 100,000 residents) was 8.3 in 1987, peaking at 9.8 in 1991, and declining to 5.7 in 2006. The [BJS documents](#) 25 executions in 1987, rising to a peak of 98 in 1999, with 53 executions in 2006.

- “Countering this, homicide and execution rates rose together in the 1920 and early 1930s, then fell together through the 1940s and 1950s.” See plot below:



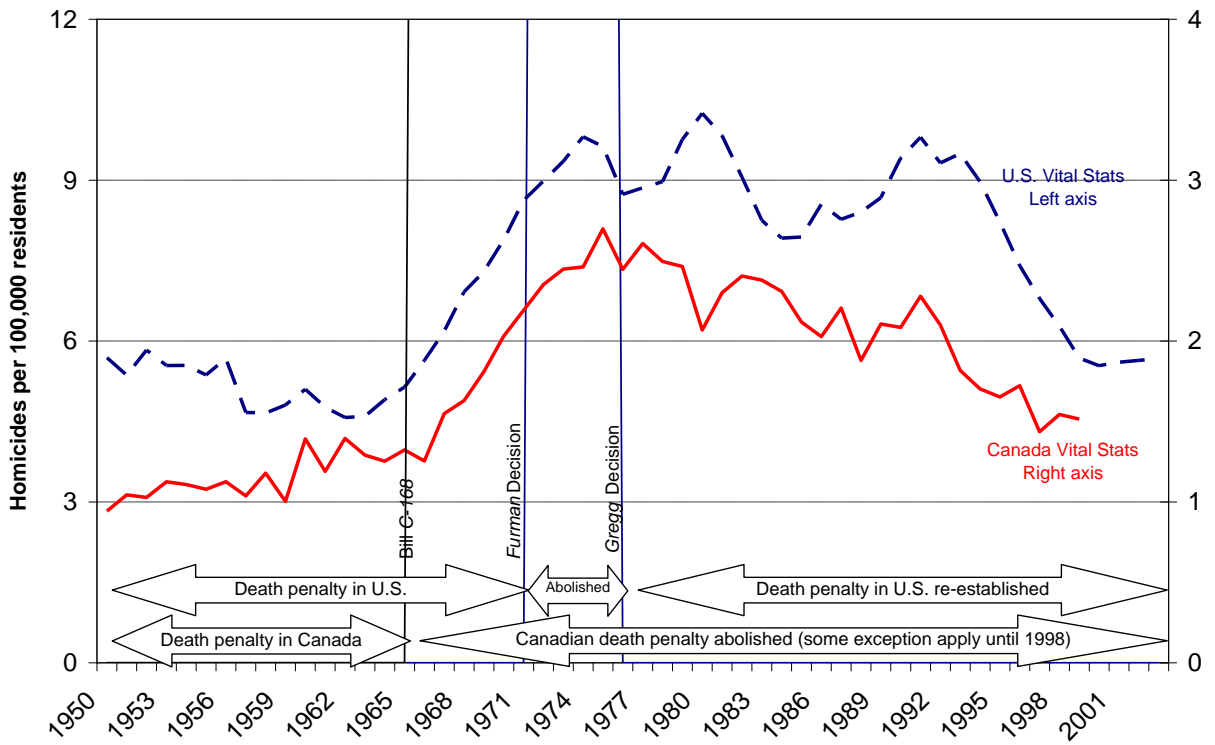
- “Because conclusions are so sensitive to the time period that is chosen, these studies fail to provide much help.” See plot below:



- “More sophisticated studies compare the different evolution of homicide rates across jurisdictions. Over the past six decades, the homicide rate in Canada has tracked that in the U.S. even as the countries’ punishment policies have diverged sharply.” See Figure 2 from

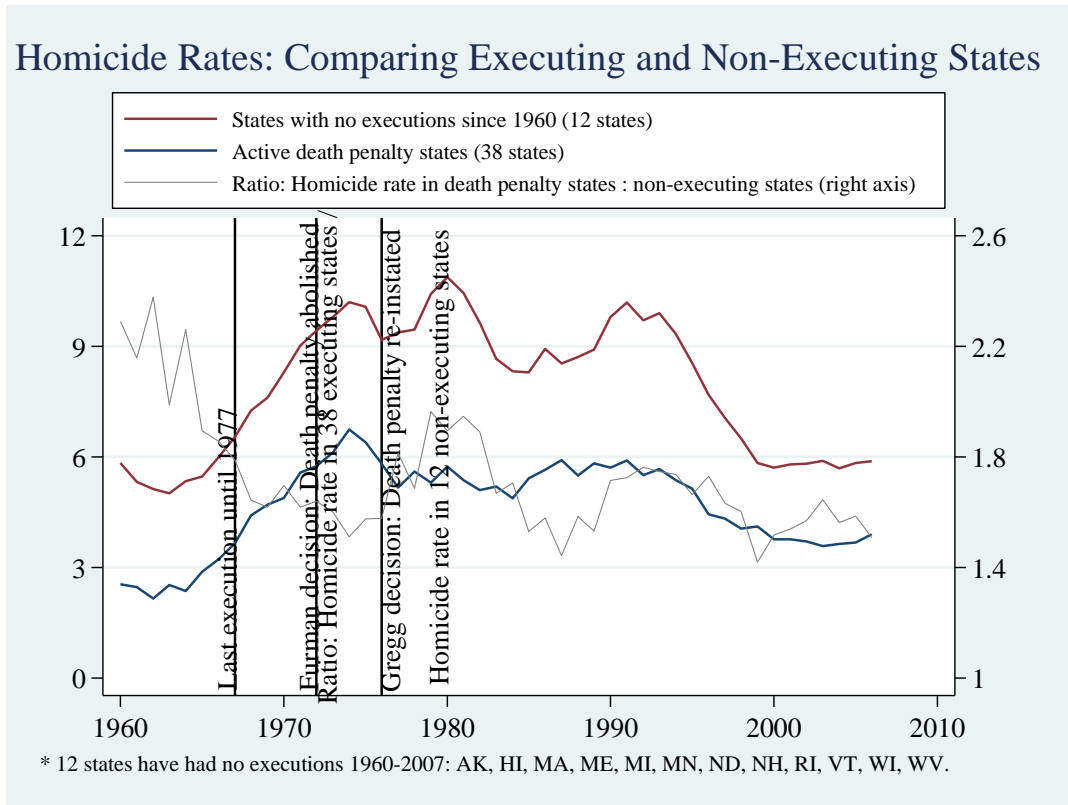
[Donohue and Wolfers \(2005\)](#):

Homicide Rates and the Death Penalty in the U.S. and Canada



- “Similarly, the twelve U.S. states that have not executed a prisoner since 1960 comprise a useful comparison group; murder rates in these states have largely tracked those that subsequently adopted or rejected the death penalty.” The twelve states with zero executions since 1960 are: Alaska, Hawaii, Massachusetts, Maine, Michigan, Minnesota, North Dakota, New Hampshire, Rhode Island, Vermont, Wisconsin and West Virginia. (Similarly, DC has zero executions since 1960.) The plot below contrasts homicide rates in

these 12 states with those in the remaining 38 states:



- “One might like to conclude that these latter studies demonstrate that the death penalty does not deter. But this is asking too much of the data. The number of homicides is so large, and varies so much year to year, that it is impossible to disentangle the effects of execution policy from other changes affecting murder rates.” This paragraph relies on the findings in Donohue and Wolfers (2005), who argue at p.841: “We are led to conclude that there exists profound uncertainty about the deterrent (or antideterrent) effect of the death penalty; the data tell us that capital punishment is not a major influence on homicide rates, but beyond this, they do not speak clearly. Further, we suspect that our conclusion that econometric studies are highly uncertain about the effects of the death penalty will persist for the foreseeable future. Quite simply, it is difficult to foresee any states providing a sharp enough policy shock for social scientists to reliably estimate an effect on homicide rates.”

Steven Levitt has come to a similar conclusion: [a recent article published by the Minneapolis Fed](#) states:

“What’s interesting about this is that it mirrors so closely the Ehrlich debate of the ‘70s,” said Chicago’s Levitt, “which basically all came down to if you tweak his specification at all, you get numbers that are totally different.” And reaching a definitive answer about deterrence could well be impossible since current execution rates may be too low to provide sufficient empirical data. “I really think not that the answer is ‘yes’ or ‘no,’” said Levitt, “but that there’s not enough information to figure it out. There may never be enough. It may just be a question that can’t be answered.”

- “Moreover, execution policy doesn’t change often or much.” Changes in capital punishment laws are tracked by the Bureau of Justice Statistics [in the annual series “Capital Punishment”](#).

- “Just as a laboratory scientist with too few experimental subjects cannot draw strong conclusions, the best we can say is that homicide rates are not closely associated with capital punishment. On the basis of existing evidence, it is especially hard to justify claims about causality.”: Again, see [Donohue and Wolfers \(2005\)](#) for a discussion of these issues.
- “Justice Stevens argues that “In the absence of such evidence, deterrence cannot serve as a “sufficient penological justification for this uniquely severe and irrevocable punishment.””: See [page 10 of Stevens’ judgment in Baze v Rees](#).
- “Perhaps. But the absence of evidence of deterrence should not be confused with evidence of absence.” Apparently this common saying among empiricists is [attributable to Carl Sagan](#). For a discussion in a clinical setting, see [this article](#) in the British Medical Journal.
- “Justice Scalia relies on the suggestion by Sunstein and Vermeule that some evidence suggests a possible deterrent effect.” From [pages 3 and 4 of Scalia’s judgment in Baze v. Rees](#):

“JUSTICE STEVENS’ analysis barely acknowledges the “significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one.” Sunstein & Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 *Stan. L. Rev.* 703, 706 (2006); see also *id.*, at 706, n. 9 (listing the approximately half a dozen studies supporting this conclusion). According to a “leading national study,” “each execution prevents some eighteen murders, on average.” *Id.*, at 706. “If the current evidence is even roughly correct . . . then a refusal to impose capital punishment will effectively condemn numerous innocent people to death.” *Ibid.*
- “But that suggestion actually catalyzed Donohue and Wolfers's study of available empirical evidence. Existing studies contain significant statistical errors, and slightly different approaches yield widely varying findings, a problem exacerbated by researchers' tendency to report only those results supporting their conclusions.” [The same issue of the Stanford Law Review](#) cited by Scalia carried [the Donohue and Wolfers response](#), summarized in this quote. For more on model uncertainty, see [“Model Uncertainty and the Deterrent Effect of Capital Punishment”](#), by Ethan Cohen-Cole, Steven Durlauf, Jeffrey Fagan and Daniel Nagin.
- “This led Sunstein and Vermeule to acknowledge: “We do not know whether deterrence has been shown. . . . Nor do we conclude that the evidence of deterrence has reached some threshold of reliability that permits or requires government action.””: [The very same issue of the Stanford Law Review](#) contains Sunstein and Vermeule’s response: [“Deterring Murder: A reply”](#). The quotes above are from p.848.
- “In short, the best reading of the accumulated data is that they do not establish a deterrent effect from the death penalty.” Sources we relied upon include: [Donohue and Wolfers \(2005\)](#); concurring views have also been expressed by Steven Levitt ([here](#) and [here](#)), [Katz, Levitt and Shustorovich](#) (2003), and [Cohen-Cole, Durlauf, Fagan and Nagin](#) (2007). Beyond these sources, we note:

- [A 1978 National Academy of Science report](#) (summarized [here](#)) surveyed available evidence across criminology, sociology and economics, finding that the evidence of a deterrent effect of capital punishment was too weak to warrant reliance.
- [Radelet and Akers \(1996\)](#) surveyed 70 past presidents of the academic criminology associations asking them “on the basis of their knowledge of the literature and research in criminology” whether the death penalty lowered the murder rate. Only eight of these eminent criminologists responded affirmatively to the statement that “the death penalty acts as a deterrent to the commitment of murder – that it lowers the murder rate”, while 56 (or 84%) argued against deterrence. (3 past presidents had no opinion, while a further 3 failed to respond to the survey).
- [A 1989 resolution of the American Society of Criminology](#) argues that “social science research has found no consistent evidence of crime deterrence through execution.”
- [A 2001 resolution of the American Psychological Association](#) noted that “capital punishment appears statistically neither to exert a deterrent effect... nor save a significant number of lives through the prevention of repeat offenses.”
- In 1969, a resolution of the American Psychiatric Association’s Board of Trustees denounced the death penalty, noting “the best available scientific and expert opinion holds it to be anachronistic, brutalizing, [and] ineffective.”
- [Dieter \(1995\)](#) surveyed a nationally representative sample of U.S. police chiefs and county sheriffs, finding only 26% found the statement that the “death penalty significantly reduces [the] number of homicides” to be accurate, while 67% believed it to be inaccurate (7% were unsure).
- “Why is the Supreme Court debating deterrence? A prominent line of reasoning, endorsed by several justices, holds that if capital punishment fails to deter crime, it serves no useful purpose and hence is cruel and unusual, violating the Eighth Amendment.” This reasoning is addressed in particular in [Furman v. Georgia](#) and [Gregg v. Georgia](#); it is also a theme explored in [section II of Justice Steven’s decision in Baze v. Rees](#).
- “This reasoning tracks public debate as well. While some people favor the death penalty on retributive grounds...”

From the PSRA/Newsweek Poll, May 2001 (available from iPoll: USPSRNEW.051201.R07A), where 1,056 respondents were asked:

“I’m going to read you some reasons why people say they support the death penalty. As I read each one, please tell me how much effect, if any, it has on your own views toward the death penalty.

- It will deter others from committing murder and other violent crimes: Major=28%; Some=34%; No=35%; DK=3%
- An ‘eye for an eye’ is just punishment for those convicted of murder: Major=23%; Some=31%; No=42%; DK=4%
- It will provide some comfort and consolation for the loved ones of the victims: Major=27%; Some=38%; No=32%; DK=3%
- Keeping convicted murderers in prison for life costs the taxpayers too much money: Major=39%; Some=28%; No=31%; DK=2%

The same poll asks: "I'm going to read you some things people say have caused them to have reservations about the death penalty. Please tell me how much effect, if any, each one has on your own views toward the death penalty:

- Lack of evidence that the death penalty actually lowers the murder rate: Major=25%; Some=35%; No=37%; DK=3%
- New DNA evidence suggesting that many people sentenced to death have been wrongly convicted: Major=49%; Some=38%; No=12%; DK=1%
- Recent news stories about mistakes in crime labs leading to wrongful convictions in capital cases: Major=39%; Some=43%; No=15%; DK=3%
- The Pope's most recent statements against capital punishment: Major=13%; Some=22%; No=56%; DK=9%
- Religious belief that it is always wrong to take a human life: Major=33%; Some=30%; No=35%; DK=2%
- "many others (including President Bush) have argued that the only sound reason for capital punishment is to deter murder.": During the 2000 presidential debates, [Bush stated](#): "I do, that's the only reason to be for it... I don't think you should support the death penalty to seek revenge. I don't think that's right. I think the reason to support the death penalty is because it saves other people's lives.
- "We concur with Scalia that if a strong deterrent effect could be demonstrated, a plausible argument could be made on behalf of executions.": This "plausible argument" is developed in [Sunstein and Vermeule \(2005\)](#). For a contrary view, see [Steiker \(2005\)](#), and [Sunstein and Vermeule's response](#).

June 30, 2008