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# Deterrence, Death, and the Victims of Crime: A Common Sense Approach

*Frank G. Carrington\**

## I. INTRODUCTION

The concept of deterrence is one of the most important in the formulations of the victim advocate, primarily because of two essential premises that underlie the entire field of victim advocacy. The first, but not necessarily the most important, of these premises concerns the policy that favors assuaging the plight of persons after they have been victimized. This relief can be provided in a number of different ways: compensation to innocent victims from the states; restitution to victims as a condition of granting probation to the criminal; victim counselling;<sup>1</sup> and victim/witness assistance programs.<sup>2</sup> The second premise of victim advocacy, namely, preventing victimization from ever occurring, is also of critical importance because, obviously, in each instance in which a given act of victimization is prevented, the palliative measures described above will not be necessary.

This preventive goal can be effectuated through two types of activity. First, victim advocates often engage in activity that encourages and assists the potential victim of crime to help himself in programs such as neighborhood watch, inscription of identifying serial numbers on personal property, and other citizen crime prevention programs. The second type of activity, with which this Article primarily deals, entails efforts by victim advocates to structure the system to deter would-be criminals from engaging in acts of victimization. It also requires efforts to deter third parties—for example, parole officials, whose duties include making decisions

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1. An example of this type of counselling occurs within rape crisis centers.
2. A number of these programs have been established in various prosecutors' offices across the country.

that may place dangerous criminals in a position to victimize again—from acting to the detriment of potential victims.

In sum, the notion of deterrence has assumed critical dimensions in the area of victim advocacy and assistance. Part II of this Article deals with deterrence generally as a common sense concept and emphasizes the potential impact that different attitudes toward this concept have on crime victims. Part III then focuses on particular aspects of deterrence in the capital punishment controversy—again by emphasizing the effect on victims. The final part of the Article explores a rather new area of the law that applies the concept of deterrence—by threatening civil liability for gross negligence in the handling and release of prisoners—to third party custodial officials in an attempt to prevent future victimization. The Article concludes that a common sense approach to the question of deterrence, rather than one which is based on delaying any decision until all the empirical evidence is compiled, is necessary to combat the serious crime problem that now faces the country.

## II. DETERRENCE: A COMMON SENSE CONCEPT

To deter an individual from a contemplated activity, one must discourage or restrain that individual from acting or proceeding through the inducement of fear, doubt, or some sense of deprivation. Deterrence does not act as a direct restraint on conduct; rather, it works to manipulate the motives or incentives behind that conduct. The deterrence rationale depends on a conception of human motivation that is based on a function of cost over gain. Successful deterrence, therefore, requires that the certainty and quantum of punishment sufficiently outweigh any expectation of possible gain in the mind of the would-be wrongdoer.<sup>3</sup>

The value of punishment as deterrence rests not on how it affects individual offenders, but on how it affects the future conduct of the general public.<sup>4</sup> Indeed, in the individual case deterrence already has failed. As one contemporary proponent of deterrence, Ernest van den Haag, has pointed out, “[d]eterrent effects largely depend on punishment being meted out according to the crime, so that a prospective offender can know the likely cost of the offense and be deterred by it.”<sup>5</sup> In other words, members of the public

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3. See, e.g., E. VAN DEN HAAG, PUNISHING CRIMINALS 113-14 (1975); J. WILSON, THINKING ABOUT CRIME 53-55 (1975).

4. See E. VAN DEN HAAG, *supra* note 3, at 60-61.

5. *Id.* at 61.

must expect that if they commit a particular crime, their punishment will be comparable to what past offenders have received. If these offenders repeatedly are paroled, or if they are never apprehended at all, then the ostensible threat of a stiff statutory penalty has virtually no deterrent effect.<sup>6</sup>

These notions of a perceived threat and cost versus gain do not require that potential criminals perform some rational calculation of the cost/benefit ratio. Irrespective of their intellectual capacity to understand a concept, human beings are capable of responding to threats, learning from experience, and forming habits.<sup>7</sup> Deterrence, therefore, does not depend on the rationality of a response, but merely on the likelihood and regularity of a response to a particular threat.<sup>8</sup>

Some commentators, however, reject this theory of deterrence for a variety of reasons. One respected federal judge, for example, dismissed the concept outright in a recent article.<sup>9</sup> This criticism of the deterrence rationale primarily rests on two arguments, neither of which can withstand careful scrutiny. First, the article advances the theory that living in the inner city is worse than living in a prison, and that the threat of incarceration, therefore, has no deterrent effect on those who live in the ghettos.<sup>10</sup> From the premise that most crime is committed by members of "an underclass of brutal social and economic deprivation . . . [who] are raised in deteriorating, overcrowded housing . . . [and who] are denied [a] sense of order, purpose, and self-esteem,"<sup>11</sup> the article succinctly concludes that "the threat of prison may be a meaningless deterrent to one whose urban environment is itself a prison."<sup>12</sup>

By elevating a metaphorical illustration of the difficulties that

6. See *infra* notes 16-20 and accompanying text.

7. See E. VAN DEN HAAG, *supra* note 3, at 113. Van den Haag notes,

Prospective offenders need be no more rational than rats are when taught by means of rewards or punishments to run a maze. Experimenters must calculate the effects they desire and the means appropriate to achieve them. So must legislators. But the rats do not calculate, nor do the subjects of legislation need to.

*Id.*

8. See J. WILSON, *supra* note 3, at 174-77. Wilson contends that criminals may be less likely to respond to a given threat because they are willing to run greater risks. *Id.* at 175. He also argues that increasing the certainty of punishment deters crime more effectively than increasing its severity. *Id.* at 174.

9. Bazelon, *Crime: Toward a Constructive Debate*, 67 A.B.A.J. 438 (1981).

10. *Id.* at 440.

11. *Id.*

12. *Id.* (citing Diana Gordon, currently president of the ultrapermissive National Council on Crime and Delinquency).

the poor face in attempting to improve their situation to the level of a literal truth, this argument assumes its conclusion. It boldly equates the condition of life in the inner cities with the conditions found in Attica, Green Haven, Soledad, or San Quentin. Indeed, if this argument were extended to its logical conclusion, it would identify every person who lives in the ghetto with a felon who is behind bars because society has deemed that he is too dangerous to be at liberty. The argument completely ignores the great majority of inner-city dwellers who are decent, hard-working individuals. These people admittedly live under conditions that are deplorable, but they do not become criminals; rather, they want nothing more than to conduct their affairs in relative freedom from criminal harm. If everyone who resided in the inner city were a criminal and found prison life preferable to ghetto life, this argument might have some superficial merit; the facts, however, simply do not support such a proposition.

A positive correlation between poverty and crime undoubtedly does exist, but, as James Q. Wilson contends, "[t]he desire to reduce crime is the worst possible reason for reducing poverty. . . . Reducing poverty and breaking up the ghettos are desirable policies in their own right, whatever their effects on crime."<sup>13</sup> Opponents of deterrence, however, apparently conclude that if poverty is in some sense a cause of crime, then only the elimination of this cause will reduce crime. Wilson finds that these opponents have "become so preoccupied with dealing with the causes of the crime (whether . . . social conditions or police inadequacies) that [they] have almost succeeded in persuading [them]selves that criminals are radically different from ordinary people—that they are utterly indifferent to the costs and rewards of their activities."<sup>14</sup> He argues that no evidence exists to support this conclusion, and that regardless of whether criminals are prone to accept greater risks or have a weaker sense of morality than an average citizen, "if the expected cost of crime goes up without a corresponding increase in the expected benefits, then the would-be criminal . . . engages in less crime."<sup>15</sup>

Opponents of deterrence often base a second argument on sta-

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13. J. WILSON, *supra* note 3, at 203. In response to the notion that poverty causes crime, Wilson notes that the dramatic increase in crime during the last fifteen years has occurred "concurrently with a general rise in the standard of living and thus could not be explained by worsening social conditions." *Id.* at 74.

14. *Id.* at 175.

15. *Id.* at 175-76.

tistics that purport to prove the ineffectiveness of deterrence; these statistics support the determination that although both the rates of incarceration and the lengths of sentences have risen, the crime rate has not diminished.<sup>16</sup> Thus, the argument concludes, increases in the probability or length of confinement must not deter offenders. This argument, however, ignores the distinction between the likelihood of punishment after apprehension and conviction and the likelihood of actually being apprehended and convicted. The greatest prerequisite of the deterrence argument is that for an action or threat of action to be effective as a deterrent, those against whom the threat is directed—in this case, criminals—must perceive the cost of their deeds to be greater than their prospective gain. In addition, the threat must be total, that is, it consistently must be credible from the time of arrest to actual imprisonment. Despite an almost certain probability of being arrested, an offender will not be greatly deterred from committing a crime if he foresees only a negligible chance of going to jail. Conversely, the certainty of a long prison sentence after conviction is no deterrent to one who expects never to be apprehended.

Unfortunately, this consistency is absent today. A criminal of even marginal intelligence must know that although his chances of going to prison for a longer time are slightly higher now than they were in the past, his chances of ever being apprehended and convicted—especially in our major metropolitan areas—remain sufficiently minimal that the cost/gain ratio still favors committing the crime. Indeed, crime has reached such epidemic proportions that the police simply cannot deal with all of it, and the victims of this epidemic are bearing the burden. Moreover, our criminal justice system has instituted such a thicket of restraints on police activity and such a morass of contrived protections around criminal suspects—for example, the exclusion of evidence and confessions,<sup>17</sup> an almost unlimited right to bail despite the commission of other crimes while on bail,<sup>18</sup> and open-ended, post-conviction remedies<sup>19</sup>—that we indeed have become, in the words of the Chief Jus-

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16. See, e.g., Bazelon, *supra* note 9, at 440-41.

17. See, e.g., *Miranda v. Arizona*, 384 U.S. 436 (1966); *Mapp v. Ohio*, 367 U.S. 643 (1961).

18. See, e.g., The Bail Reform Act of 1966, 18 U.S.C. §§ 3146-3150 (1976).

19. See Finley, *The Appellate System: On a Vulnerable Plateau*, TRIAL, Nov.-Dec. 1971, at 19; Hanley, *Habeas Corpus Ad Infinitum*, NATIONAL SHERIFF, Dec. 1973-Jan. 1974, at —, 23-24.

tice, "an impotent society."<sup>20</sup>

Judge Bazelon candidly acknowledged in his article in the *American Bar Association Journal* that he has no ready answers for the country's crime problem.<sup>21</sup> This author makes the same acknowledgement.<sup>22</sup> The point of the foregoing discussion is simply that considering the unparalleled difficulties in apprehending and convicting criminals, the lack of a significant drop in crime rates as incarceration and lengths of sentences increase cannot alone support an argument against deterrence.

Many people today talk in reverent terms of empirical evidence—primarily statistics—as if this were the touchstone of any argument. The conclusion to Judge Bazelon's article typifies this approach:

We need to know much more about the precise costs of an effective program of deterrence before we can dismiss the recent proposals. At the present time, however, the case for deterrence has not been convincingly made. After a comprehensive review of the literature, a panel of the National Academy of Sciences concluded: "Despite the intensity of the research effort, the empirical evidence is still not sufficient for providing a rigorous confirmation of the existence of a deterrent effect. . . . Policy makers in the criminal justice system are done a disservice if they are left with the impression that the empirical evidence, which they themselves are frequently unable to evaluate, strongly supports the deterrence hypothesis."<sup>23</sup>

Nevertheless, the unifying theme of this Article is that considering all the variables at issue in such a volatile area as criminal justice, and taking into account all the statistics for and against deterrence, the entire matter ultimately reduces to principles of common sense.

The disagreement over the question of deterrence between the pragmatists—Wilson, van den Haag, and others<sup>24</sup>—and the theoreticians—represented by Judge Bazelon and the National Academy

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20. Address by Chief Justice Warren E. Burger, American Bar Association Annual Convention (Feb. 8, 1981), noted in Bazelon, *supra* note 9, at 438.

21. Bazelon, *supra* note 9, at 438.

22. *But see* U.S. DEP'T OF JUSTICE, ATTORNEY GENERAL'S TASK FORCE ON VIOLENT CRIME: FINAL REPORT (1981) [hereinafter cited as TASK FORCE REPORT]. This report contains a number of recommendations on bail abuse, admissibility of evidence, limitations on post-conviction release, and other procedural aspects of the criminal justice system that are designed to streamline the process and restore a balance between the rights of accused and convicted criminals and the rights of the law-abiding members of society. The author was a member of the Task Force and is naturally prejudiced in favor of the Report. Nevertheless, the recommendations at least are worthy of consideration in dealing with the current crisis in crime in this country.

23. Bazelon, *supra* note 9, at 441.

24. *See* E. VAN DEN HAAG, *supra* note 3; J. WILSON, *supra* note 3; authorities cited *infra* note 32.

of Science panelists—can be stated clearly and succinctly. The former in effect argue that if the threat of punishment increases, or if the perceived cost of crime rises to exceed the perceived gain, then society will deter criminals. The theoreticians, on the other hand, take a conservative, cautious approach; they apparently would argue that policymakers must study the question of deterrence to a far greater degree—until they are clearly convinced of its soundness—before they would alter the system toward a more truly deterrent model.

The argument for delay ignores two salient points. First, criminal justice is not a finite science, and deterrence is not a finite concept. Theorists probably will never know with certainty the inner and outer limits of the deterrence model as a solution to the crime problem. This fundamental reality is the reason that this Article favors a common sense view of deterrence. Since no other approach has produced the desired results, a return to traditional notions about human behavior appears to be the only sensible alternative. Although some people might view this response as simplistic, the cost versus gain rationale is intrinsically logical, and no reason exists not to attempt to apply these principles to criminal justice, particularly when the more complex alternatives have failed demonstrably.

Second, from a pragmatic point of view, crime has reached such alarming proportions that society cannot afford the time that would be necessary to perform leisurely studies of deterrence—gathering empirical data on a gradual basis until the more learned professors are satisfied that deterrence works. Medical scientists, for example, have worked for years to produce cures for chronic, preexisting maladies such as the common cold, influenza, and arthritis that do not place the patient's life in danger. Studies and tests are time controlled; they are conducted first *in vitro* and then *in vivo* by beginning with laboratory animals and progressing to human experiments only under the most rigid conditions. This approach is known as the scientific method, and it is perfectly proper when the urgency is not immediate. The situation, however, is entirely different in emergency circumstances caused by a raging killer epidemic such as a plague or a new and deadly virus that is decimating the population. At this point, any potential remedy that appears likely to cure the disease or prevent its spread will be used without first undergoing rigid testing in clinical conditions.<sup>25</sup>

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25. In the spring of 1976, for example, the possibility of a new strain of an influenza



The analogy between the current epidemic of crime and a medical emergency is in no way attenuated, and society thus needs to adopt measures that will abate the alarming rise in crime immediately—not some distant point in the future when everyone concludes that the concept of deterrence breeds no harmful side effects.

As individuals continue to become victims of crime, society's attempts to solve the problem remain frustrated because of the tension between the need for immediate action and the quest for reasonable certainty about the effectiveness of deterrence. No single aspect of the criminal justice system highlights this tension more clearly than the arguments for and against deterrence and the death penalty, which this Article discusses below. The thesis of the Article is that the plight of the victim should be society's overriding consideration, and that the only viable solution to the present stalemate lies in a common sense approach to deterrence and capital punishment.

### III. DEATH AND DETERRENCE: THE CAPITAL PUNISHMENT CONTROVERSY

Proponents of the deterrent value of capital punishment—or, for that matter, any other aspect of deterrence—find themselves in the unenviable position of having to prove a negative. If a person is deterred from doing something, then, by definition, he does not do it. Thus, the numbers of people who refrained from committing felonies because of their fear of execution are difficult to ascertain. Rarely does a resident drop by the station house in his local police precinct to confide to the desk sergeant, "You know, I was planning to kill my wife for the insurance money, but the thought of the death penalty kept me from doing it." Homicide figures in the United States roughly indicate how many people obviously were not deterred from killing, but the number of those who actually were deterred remains—and must remain—incalculable.

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virus—commonly known as swine flu—creating an epidemic among the American public during the following winter concerned United States public health officials. Researchers soon developed an effective vaccine, but it had potentially serious side effects for various segments of the population. Despite a sharp debate among policymakers about these risks compared to the benefits of a national immunization program, *see* TIME, April 26, 1976, at 36, President Ford announced a \$135 million program to inoculate the entire United States population. At that time, the Food and Drug Administration, which normally is the body that must approve such drugs before they are made available to the public, had neither tested the vaccine nor certified it as safe and effective. N.Y. Times, March 25, 1976, at 1, col. 1.

This discussion is not intended to suggest that those who are interested in statistics and empirical evidence have remained uninvolved in the deterrent controversy; indeed, a spirited, if rather arcane, debate currently is being waged among those who would seek to translate numbers and other variables into conclusions about the deterrent value of capital punishment. Of course, any detailed description of these statistical arguments about the death penalty and its deterrent effect is far beyond the scope of this Article. Briefly, sociologists and behavioral scientists initiated the discussion and purported to show—by comparing homicide rates in contiguous states that had adopted opposing positions on the death penalty—that capital punishment was not a crime deterrent.<sup>26</sup> Students of the crime problem accepted these findings almost without reservation for a good number of years.<sup>27</sup>

The debate subsequently widened with the entry of a new group of academic theorists: the econometricians. Using an econometric model that identified the various relevant determinants of murder, Isaac Ehrlich, a respected economist and opponent of the death penalty, published a paper in 1975<sup>28</sup> criticizing the sociologists' and behavioral scientists' method and indicating that each actual execution between 1933 and 1967 could have deterred an average of eight murders.<sup>29</sup> Ehrlich's conclusion drew immediate criticism,<sup>30</sup> to which he responded,<sup>31</sup> and the statistical warfare has continued up to the present.<sup>32</sup> The inconclusive results

26. See, e.g., J. SELLIN, *THE DEATH PENALTY* 34 (1959).

27. See, e.g., W. RECKLESS, *THE CRIME PROBLEM* 508 (4th ed. 1967). But see van den Haag, *On Deterrence and the Death Penalty*, 60 J. CRIM. L.C. & P.S. (1969), reprinted in *CAPITAL PUNISHMENT* 111 (J. McCafferty ed. 1972).

28. Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397 (1975). An amicus curiae brief in *Gregg v. Georgia*, 428 U.S. 153 (1976), cited Ehrlich's article. In many legal circles, it is credited with influencing the Court in its holding in *Gregg* that carefully drawn statutes providing for the death penalty are constitutional. For accounts of the Supreme Court's inconsistent holdings regarding the death penalty beginning with *Furman v. Georgia*, 408 U.S. 238 (1972), in which the Court held state death penalty statutes constitutionally invalid as "arbitrary and discriminatory," through *Gregg*, in which it reinstated the death penalty, see F. CARRINGTON, *NEITHER CRUEL NOR UNUSUAL* 143-92 (1977); M. MELTSNER, *CRUEL AND UNUSUAL* (1973).

29. Ehrlich, *supra* note 28, at 398, 414.

30. Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L.J. 187 (1975).

31. Ehrlich, *The Deterrent Effect of Capital Punishment: Reply*, 67 AM. ECON. REV. 452 (1977).

32. See generally F. CARRINGTON, *supra* note 28, at 82; Ehrlich, *Capital Punishment and Deterrence: Some Further Thoughts and Additional Evidence*, 85 J. POL. ECON. 741 (1977); Ehrlich & Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 65 J. LEGAL STUD. 35 (1977); Passell & Taylor, *The*

of this debate reinforce the contention that if the statistical theoreticians cannot agree—based on the best empirical evidence—whether capital punishment deters murderers, then perhaps returning to a common sense evaluation of the question, which all citizens are capable of making, will be a more feasible and productive approach to the problem.

This common sense perspective begins with a concession from capital punishment proponents that the threat of the death penalty cannot and will not deter every murderer. Crimes of passion, crimes committed by the certifiably insane, and crimes calculatedly undertaken for revenge are all examples of murders that no known threat can deter. Notwithstanding this admission, however, the proposition does not follow that because capital punishment does not deter all murderers, it deters *no* murderers. Justice Stewart succinctly articulated this theme in *Gregg v. Georgia*,<sup>33</sup> in which the Supreme Court affirmed—with Justices Brennan and Marshall dissenting—three state death penalty statutes. Justice Stewart reasoned,

Although some of the studies suggest that the death penalty may not function as a significantly greater deterrent than lesser penalties, there is no convincing empirical evidence either supporting or refuting this view. We may nevertheless assume safely that there are murderers, such as those who act in passion, for whom the threat of death has little or no deterrent effect. But for many others, the death penalty undoubtedly is a significant deterrent. There are carefully contemplated murders, such as murder for hire, where the possible penalty of death may well enter the cold calculus that precedes the decision to act.<sup>34</sup>

The first noteworthy aspect of the common sense analysis of the death and deterrence question is a simple cause and effect relationship. The several states quit executing murderers in 1966, a year in which slightly more than 10,000 murders were recorded.<sup>35</sup> This hiatus—initially *de facto*, but after 1972, *de jure*<sup>36</sup>—lasted approximately ten years, and during that period, the number of murders doubled to over 20,000 in 1976.<sup>37</sup> Undoubtedly, other factors also contributed to this increase, including population growth, deteriorating urban conditions, and an increasing disrespect for the law. The fact remains, however, that abandonment of the supreme

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*Deterrent Effect of Capital Punishment: Another View*, 85 AM. ECON. REV. 445 (1977); A. Symposium: *Capital Punishment in the United States*, 14 CRIM. L. BULL. 5 (1978).

33. 428 U.S. 153 (1976).

34. *Id.* at 185-86.

35. See F. CARRINGTON, *supra* note 28, at 86.

36. See *Furman v. Georgia*, 408 U.S. 238 (1972).

37. F. CARRINGTON, *supra* note 28, at 86.

penalty corresponded to a spectacular and unprecedented rise in the number of capital murders. At the very least, this ten year period of enlightenment—or softness—toward capital punishment created no parallel sense of gratitude in the hearts of potential killers. On the contrary, a more reasonable conclusion is that these people cynically and calculatedly took advantage of the new permissiveness. With the death penalty defunct and state parole laws allowing for release in a relatively few years, they justifiably believed that the murder of the victims of an armed robbery to avoid being identified, for example, was not an unacceptable risk considering the potential gain.

Another type of input offers additional support for the proposition that the relationship between the abandonment of capital punishment and the rise in the number of murders is one of cause and effect. Because actual thought processes and motivations are necessarily private matters that others can only approximate, criminals themselves may provide unique insights into their feelings about the death penalty. In 1970 and 1971 the Los Angeles Police Department surveyed persons whom they had arrested for violent crimes, but who either had carried no weapons, had not used their weapons, or had carried inoperative weapons.<sup>38</sup> Of the ninety-nine criminals who responded to the question about why they had not killed, or, alternatively, why they deliberately had avoided placing themselves in a position where they could have killed, their responses indicated that fifty percent were deterred by fear of the death penalty; about eight percent were unaffected by the death penalty because it was not being enforced; ten percent were undeterred by the death penalty and would kill whether it was enforced or not; and approximately thirty-two percent were unaffected by the death penalty because they would not carry a weapon under any circumstances, primarily because of a fear either of being injured themselves or of injuring someone else.<sup>39</sup> Thus, one out of every two persons who had avoided circumstances in which they might have killed provided the best possible empirical basis for believing in the deterrent effect of the death penalty—their own statements that a fear of the gas chamber governed their actions.<sup>40</sup>

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38. Los Angeles Police Dep't, A Study on Capital Punishment (February 1971).

39. *Id.*

40. This study was one of the rare instances in which the proponents of deterrence actually were able to "prove the negative." In discussions with capital punishment experts—both retentionists and abolitionists—the author often has encountered the caveat

A dissenting opinion in a capital punishment case written by the late Justice Marshall McComb of the California Supreme Court<sup>41</sup> provides another example of the average criminal's perception of the death penalty's deterrent effect. To demonstrate the deterrence factor, Justice McComb collected statements from police files of fourteen arrested criminals who had failed to use deadly force in the commission of their crimes because of their fear of being executed. The police had arrested one of these criminals for assault with a knife. She told investigating officers: "Yeh, I cut him and I should have done a better job. *I would have killed him but I didn't want to go to the gas chamber.*"<sup>42</sup> In another case the police arrested three persons, two of whom had prior criminal records, for robbery. Using toy pistols, these offenders had forced their victims into a back room and bound them. When the investigating officers asked them why they had used toy guns instead of real ones, all three agreed that "real guns were too dangerous, as if someone were killed in the commission of the robberies, they would all receive the death penalty."<sup>43</sup> In yet another example cited by Justice McComb, an ex-convict with at least four aliases and a felony record that dated from 1941 was arrested for robbery. He had used guns in prior robberies in other states, but only pretended to carry a gun in the robbery in question. He told investigating officers that although he had spent only one month in the state, he had known about the California death penalty. When questioned about the gun bluff, he said, "*I knew that if I used a real gun and that if I shot someone in a robbery, I might get the death penalty and go to the gas chamber.*"<sup>44</sup> Overall, the offenders demonstrated an awareness of the potential penal consequences of their conduct in each of the fourteen cited cases, and they all intentionally placed themselves in a situation in which an unacceptably adverse result—namely, capital punishment—could not possibly occur. Justice McComb concluded from this evidence that

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that "these people were simply telling the cops what they thought they wanted to hear." This explanation for the results of the survey might well be accurate, but the fact remains that the condition which gave rise to the study—that the weapon either was not used or could not be used—existed *before* the criminals knew that they would be apprehended, much less before they knew whether they would be questioned about their failure to use the weapon.

41. *People v. Love*, 56 Cal. 2d 720, 366 P.2d 33, 16 Cal. Rptr. 777 (1961).

42. *Id.* at 735, 366 P.2d at 41, 16 Cal. Rptr. at 785 (McComb, J., dissenting) (emphasis in original).

43. *Id.*

44. *Id.* (emphasis in original).

the death penalty was indeed an effective deterrent.<sup>45</sup>

The final argument in this common sense analysis of deterrence and the death penalty concerns those people who are most directly affected by the acts of violent criminals—the murder victims themselves. If one concedes that neither side in this debate can prove conclusively that capital punishment does or does not deter murderers, then two—and only two—options remain: either the death penalty does not deter any would-be murderers or it deters at least some of them. If the first possibility proves to be true, then the invocation of capital punishment will not save the lives of any potential victims. Society, however, will be rid of some of its most dangerous predators, and the possibility that these people will kill again should they be released or escape will be foreclosed. On the other hand, if the second possibility is true, then the deterrent effect of making the threat of execution a credible one actually will save a given number of innocent victims from being killed.

The essential question regarding the acceptance of a death penalty with an unproved deterrent value, therefore, becomes whether society should favor the lives of convicted murderers over the lives of innocent victims. Viewed from the perspective of its potential to spare lives, one unquestionably can save convicted murderers by not executing them, but only at a continued high cost in terms of the lives of the innocent. On the other hand, although saving the lives of innocent victims by executing criminals may be less certain, the costs to society of not doing so are also much more severe. Simply stated, a common sense, victim-oriented approach resolves the uncertainty about deterrence in favor of the potential victims rather than the convicted criminals.

#### IV. POSITIVE DETERRENCE THROUGH THIRD PARTY VICTIMS' RIGHTS LITIGATION

This part of the Article deals with an area of the law that advocates of victims' rights are just now beginning to accept: litigation on behalf of a crime victim against negligent, or grossly negligent, correctional officials.<sup>46</sup> This approach focuses on the concept of positive deterrence, which relies upon the threat of legal action to eliminate victimization opportunities for potential repeat of-

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45. *Id.* at 734-35, 366 P.2d at 40-41, 16 Cal. Rptr. 784-85 (McComb, J., dissenting).

46. For the sake of brevity and convenience, the term "correctional officials" includes parole boards, probation officers, wardens, sheriffs, and anyone else who has a duty to handle prisoners in some manner.

fenders. By committing one or more violent crimes—murder, rape, robbery, mayhem, kidnapping with violence, and aggravated assault—an individual unequivocally demonstrates that he is a danger to the community. When this individual is apprehended, convicted, or confined to a mental institution, the government takes full control of him through some form of incarceration or commitment. Similarly, the government assumes partial responsibility for an individual when it places him on parole, probation, work release, or the like. If correctional officials release the individual or permit him to escape under circumstances that constitute some form of negligence, or if they negligently supervise or control him, then these officials arguably should be held liable for any injury that results from the individual's future violent conduct. Liability also could be imposed for a negligent failure to warn certain potential victims either of threats against them or of the offender's dangerous tendencies.

Under this theory of liability, therefore, either the victim or the victim's survivors avoid suing the perpetrators of the crime and instead proceed against those third parties whose negligence—or gross negligence—actually put the offender in a position to victimize. According to the theory, the deterrence value arises from the perceived likelihood that the custodial officials or the government entities for which they work will be held civilly liable for gross negligence in the release or handling of prisoners. The theory holds that this threat will ensure—through the mechanism of enlightened self-interest—that these officials make their decisions and dispositions with the proper regard for the safety of society. By giving officials an incentive to be wary in their decisionmaking, and by deterring them from taking unnecessary risks, this approach may well prevent a good many of the current victimizations.

Several courts have begun to implement this deterrent rationale by permitting actions against correctional officials. *Grimm v. Arizona Board of Pardons and Paroles*,<sup>47</sup> for example, which the Supreme Court of Arizona decided in 1977, is a landmark case in this area. In 1973 Mitchell Blazak robbed a tavern in Tucson and killed John Grimm in the process. Blazak was a parolee whom the Arizona Board of Pardons and Paroles had released after he had served one-third of a 1967 sentence for armed robbery and assault with intent to kill. The Parole Board had released Blazak despite his criminal record dating from 1961, which included—besides the

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47. 115 Ariz. 260, 564 P.2d 1227 (1977) (en banc).

armed robbery and assault with intent to kill—convictions for burglary (twice), parole violation, and possession of marijuana.<sup>48</sup> In addition, the Board arguably possessed other evidence about the danger to society of releasing Blazak. The court in its opinion summarized eight different psychiatrists' prison evaluations that described him as

“an extremely dangerous person who should not be free in society until some major psychological changes take place.” He is a paranoid schizophrenic whose psychosis prevents him from distinguishing between right and wrong and from controlling his conduct. He has never made an adequate adjustment to society for any prolonged period and is unlikely to change. He has a definite potential for violence.<sup>49</sup>

In any event, the Board released Blazak after he had served only a fraction of his sentence, and shortly thereafter he murdered Mr. Grimm. Mrs. Grimm sued the members of the Parole Board for the wrongful death of her husband based on their gross negligence in the release; the Board defended on the grounds of an absolute immunity for public officials. On appeal, the Arizona Supreme Court ruled that the Parole Board members owed a duty to individuals when they make a decision “to release on parole a prisoner with a history of violent and dangerous conduct.”<sup>50</sup> In holding that plaintiffs had stated a cause of action—subject, of course, to proof of all the other elements of actionable negligence—the court rejected the Board's absolute immunity rationale and affirmed the need for some method of accountability for bureaucratic decision-making. The court stressed the need to deter grossly negligent official action:

We have come to this conclusion because of the increasing power of the bureaucracy—the administrators—in our society. The authority wielded by so-called faceless bureaucrats has often been criticized. . . . While society may want and need courageous, independent policy decisions among high level government officials, there seems to be no benefit and, indeed, great potential harm in allowing unbridled discretion without fear of being held to account for their actions for every single public official who exercises discretion. The more power bureaucrats exercise over our lives, the more we need some sort of ultimate responsibility to lie for their most outrageous conduct. There may even be some deterrent value in holding officials responsible for shocking outrageous actions. In any case, demeracy by its very definition implies responsibility. In this day of increasing power wielded by governmental officials, absolute immunity for nonjudicial, nonlegislative officials is outmoded and even dangerous.<sup>51</sup>

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48. *Id.* at 262, 564 P.2d at 1229.

49. *Id.* at 263, 564 P.2d at 1230.

50. *Id.* at 267, 564 P.2d at 1234.

51. *Id.* at 266, 564 P.2d at 1233 (citations omitted).



Citing the Arizona statute that set forth the criteria for parole release,<sup>52</sup> the court held that the Board's action in granting parole resulted in a voluntary assumption of responsibility over the convict.<sup>53</sup> The court reasoned that the supervision of a person having dangerous tendencies raises a duty to individual members of the general public and renders the Board liable for injury to individuals stemming from "grossly negligent or reckless release of a highly dangerous prisoner."<sup>54</sup> Under these circumstances, the court held that

members of the Board are under a duty to inquire further before releasing the prisoner. . . . If the entire record of the prisoner reveals violent propensities and there is absolutely no reasonable basis for a belief that he has changed, then a decision to release the prisoner would be grossly negligent or reckless.<sup>55</sup>

*Taylor v. State*,<sup>56</sup> a 1973 jury verdict in a lower court case in the State of Washington, reached a result similar to that in *Grimm*. In *Taylor* the warden of the maxi-security state penitentiary in Washington had instituted an ill-conceived and unauthorized "take-a-lifer-to-dinner" program, under which prisoners serving life sentences were permitted to go to dinner outside the prison as a rehabilitative device. One of the beneficiaries of this program was a convict serving a life term who had a prior criminal record of forty-one felony convictions and seventeen escape attempts. The prisoner went to dinner at the home of an unarmed prison baker, crawled out the bathroom window, and subsequently murdered Mr. Taylor and wounded his wife during an armed robbery. Mrs. Taylor's suit against both the State of Washington and the warden—in his personal capacity—resulted in a jury award of \$186,000.<sup>57</sup>

*Grimm* and *Taylor* are typical of those cases in which either victims or their survivors sue correctional officials for gross negligence in the handling of convicted criminals that results in harm to third parties. Despite several decisions in which courts have denied

52. *Id.* at 262, 564 P.2d at 1229. The Arizona statute provides,

If it appears to the board of pardons and paroles, from a report by the department of corrections, or upon the application by the prisoner for a release on parole, that there is a reasonable probability that the applicant will live and remain at liberty without violating the law, then the board may authorize the release of the applicant upon parole.

ARIZ. REV. STAT. ANN. § 31-412 (1976).

53. 115 Ariz. at 267, 564 P.2d at 1234.

54. *Id.* at 267, 564 P.2d at 1234.

55. *Id.*

56. No. 211-30 (Pierce County, Washington, Super. Ct., September 1, 1973).

57. *Id.*

recovery—principally on the traditional grounds of sovereign immunity<sup>58</sup>—these cases represent a discernible trend in the courts toward permitting recovery when the requisite elements of a negligence or gross negligence cause of action are present.<sup>59</sup> This line of cases is presented solely to illustrate the potential—and growing trend—for victims to utilize the civil courts in lawsuits against third parties, not only to vindicate their own rights—either as victims themselves or as victims' survivors—but also, and perhaps more importantly, to use the law itself as a deterrent against those who are far too willing to experiment with the safety and security of the innocent to advance their own rehabilitative theories.<sup>60</sup>

This application of the deterrence concept to tort litigation presents a difficult theoretical problem of determining the proper standard of care that correctional officials owe to each member of the public. In many, if not most, personal injury lawsuits, the connection between the defendant's action and the plaintiff's injury is relatively easy to foresee. In cases against correctional officials, however, the defendants are not the actors who directly cause the injury; rather, their negligence merely places the criminal in a posi-

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58. See, e.g., *Martinez v. California*, 444 U.S. 277 (1980). But see *Pate v. Alabama Bd. of Pardons & Paroles*, 409 F. Supp. 478 (M.D. Ala. 1976); *Thompson v. County of Alameda*, 27 Cal. 3d 741, 614 P.2d 728, 167 Cal. Rptr. 70 (1980); *Lloyd v. State*, 251 N.W.2d 551 (Iowa 1977); *Carrington, Martinez Ruling Won't Bar Suits on Negligent Custodial Releases*, Nat'l L.J., Feb. 11, 1980, at 26, col. 1.

59. See, e.g., *Payton v. United States*, 636 F.2d 132 (5th Cir. 1981) (reargued en banc Sept. 24, 1981); *Rieser v. District of Columbia*, 563 F.2d 462 (D.C. Cir. 1977), *aff'd en banc*, 580 F.2d 647 (1978); *Semler v. Psychiatric Inst.*, 538 F.2d 121 (4th Cir. 1976); *Patricia J. v. Rio Linda Union School Dist.*, 61 Cal. App. 3d 278, 132 Cal. Rptr. 211 (1976). See generally *Carrington, The Crime Victims Legal Advocacy Institute: A Victims' Legal Rights Organization Is Formed in Virginia*, 6 Va. B.A.J. 4 (1980); *Carrington, Victims' Rights Litigation: A Wave of the Future*, 11 U. RICH. L. REV. 447 (1977); *Carrington, Victims' Rights: A New Tort*, TRIAL, June 1978, at 39; *Rottenberg, Crime Victims Fighting Back*, PARADE MAGAZINE, March 16, 1980, at 1; *Comment, Victims' Suits Against Government Entities and Officials for Reckless Release*, 29 AM. U.L. REV. 595 (1980); *Barbash, Victims' Rights: New Legal Weapon*, Washington Post, Dec. 17, 1979, at 1, col. 1.

60. Areas other than the handling of prisoners also have utilized the concept of positive deterrence through victim lawsuits against negligent third parties. For example, victims who have been injured because of a failure of security on leased premises have successfully sued and recovered. See, e.g., *Kline v. 1500 Massachusetts Ave. Apt. Corp.*, 439 F.2d 477 (D.C. Cir. 1970); *Duarte v. State*, 84 Cal. App. 3d 729, 148 Cal. Rptr. 804 (1978); *O'Hara v. Western Seven Trees Corp.*, 75 Cal. App. 3d 798, 142 Cal. Rptr. 487 (1977). Likewise, innkeepers have been held liable for the failure to provide proper security for guests who were victimized. See, e.g., *Garzilli v. Howard Johnson's Motor Lodges, Inc.*, 419 F. Supp. 1210 (S.D.N.Y. 1976). Finally, owners of premises have been held liable to business invitees. See, e.g., *Quinn v. Smith*, 57 F.2d 784 (5th Cir. 1932); *Taylor v. Centennial Bowl*, 65 Cal. 2d 114, 416 P.2d 793, 52 Cal. Rptr. 569 (1966); *Earle v. Colonial Theater Co.*, 82 Mich. App. 54, 266 N.W.2d 466 (1978).

tion to victimize. Thus, the harmful result is not as immediately foreseeable, and a simple negligence standard arguably is inappropriate.

Correctional officials perform the most difficult and demanding job in criminal justice today. To second-guess every disposition made in good faith by these officials by permitting civil lawsuits might unfairly burden and unduly restrict their decisionmaking process. At the same time, a standard requiring intentional malefaction provides too little control over their actions. The proper balance between these two competing considerations, therefore, lies in the concept of gross negligence as a prerequisite for liability. Indeed, almost every court that has held correctional officials liable has based its decision on a finding of gross negligence.<sup>61</sup> The court in *Grimm*, for example, relied on this standard;<sup>62</sup> it reasoned that the standard struck "the proper balance between the competing interests. The public has an interest in protection from premature release of highly dangerous prisoners as well as an interest in holding public officials responsible for outrageous conduct. The Board members have an interest in freedom from suit for reasonable decisions."<sup>63</sup> Similarly, the recently published final report of *The Attorney General's Task Force on Violent Crime* also recommended a gross negligence standard in these situations.<sup>64</sup> For these reasons, a gross negligence standard, which requires a higher degree of culpability than a simple good faith mistake, strikes a proper balance between the unfettered discretion of correctional officials and the policy against second-guessing mistaken dispositions that are made reasonably in good faith. In any event, the wave of victim litigation against third parties is not likely to abate—nor should it. As long as the courts continue to be vigilant in maintaining an appropriate balance between competing societal interests, this type of litigation is the kind of benign, positive deterrence that furthers the policy goals of the American criminal justice system.

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61. See, e.g., *Grimm v. Arizona Bd. of Pardons & Paroles*, 115 Ariz. 260, 267, 564 P.2d 1227, 1234 (1977) (en banc).

62. *Id.*

63. *Id.* at 268, 564 P.2d at 1235 (footnote omitted).

64. TASK FORCE REPORT, *supra* note 22, Recommendation 63. Recommendation 63 states that "the Attorney General should study the principle that would allow for suits against appropriate federal governmental agencies for *gross negligence* involved in allowing early release or failure to supervise obviously dangerous persons or for failure to warn expected victims of such dangerous persons." *Id.* (emphasis added).

## V. CONCLUSION

This Article has attempted to demonstrate that only a paucity of actual knowledge is available on the concept of deterrence. Although the theory of cost versus gain—a pure threat of sanction as a deterrent to criminal activity—is logically compelling, hardly anything in this area can be proven even by a preponderance of the evidence, much less with mathematical certainty. The question that society must address, therefore, is whether to accept the reasonable, but concededly unprovable, proposition that a would-be criminal's motivation to commit lawless and violent acts will diminish in direct proportion to the extent that the criminal justice system provides a credible threat of swift and certain apprehension and punishment. The only alternative solution apparently is to wait—as the theoreticians cited above would advocate<sup>65</sup>—until the concept of deterrence can be proven empirically. The thesis of this Article is that this latter approach is in large part responsible for the lamentable situation in which our criminal justice system now finds itself. The time has come for society to adopt a common sense approach to the question of deterrence and to return the rights of innocent victims to their rightful position as the principal priority of the American criminal justice system.

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65. See *supra* note 23 and accompanying text.

