The Virtues of Thinking Small

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INTRODUCTION

In thinking about the topic of my panel—whether the end of the death penalty is near—my mind went back to Scott Sundby’s admonition several years ago that death penalty opponents ought to “think small” when thinking about abolition.1 It may be that a single blockbuster event will lead to the collapse of the death penalty, Sundby argued, but most likely, the future of capital punishment in the United States will be determined by a cauldron of “micro-factors” that will render it simply too politically and economically costly to maintain.2 At the time, Sundby was writing about declining death sentences and the role that better defense attorneys, more representative juries, and the availability of life without the possibility of parole (among other developments) had in the mix.3

For this symposium contribution—and in honor of Scott Sundby, and Miami being his new home—I decided to take him up on the charge to “think small” about the death penalty. We law professors are not used to that sort of thing. Our perspective tends to run from the top down—what the Supreme Court is doing, what the national public opinion polls say, what position the majority of states take on a particular death penalty practice. All of these are worthy considerations in thinking about whether the end of the death penalty is near, or at least a possibility. But what happens when we consider the death penalty from the bottom up, examining how individual actors (some small, some large) are affecting the administration of capital punishment in the United States? That is what I mean by thinking small.4

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2. See id. at 1964–72.
3. See id. at 1940–48.
4. To further clarify, these individual actors do not have to be thinking small, or even
I started by cruising the news. I wanted to get a feel for what was happening at the grassroots level and to assess the sort of impact that individual actions were having on the larger death penalty debate. So I looked at news clippings I had received over the past several years from Steve Hall’s “StandDown” listserv, which distributes to its subscribers various articles, op-eds, and other news on the death penalty from across the country. There were thousands.

What I found was remarkable. Thinking small allows us to see how effective ground-level resistance to the death penalty can be, and in this symposium contribution, I briefly explain what I mean. In Part I, I discuss a few of the more noteworthy examples of thinking small, examining individual actions in a number of areas. In Part II, I discuss the substantial impact that these actions have had on the death penalty in practice, and how that impact has fundamentally changed America’s death penalty debate. In Part III, I conclude with my own take on the death penalty debate—one that celebrates the virtues of thinking small but laments the need to do so.

I. THINKING SMALL

As one might imagine, the death penalty provides a multitude of opportunities for thinking small. A capital case that cannot manage to get a jury pool, even after summoning almost 1,000 potential jurors. A state governor who refuses to surrender a prisoner to federal authorities because they have stated their intent to seek the death penalty in the case, whereas the state has abolished it. Initially the First Circuit upheld the Governor’s refusal, but it ultimately reversed itself after a rehearing by a five-judge panel.

thinking about the impact their actions might have on the larger death penalty debate at all. Thinking small is my approach, not theirs.


8. See, e.g., James Eng, Too Crazy to Kill? Lawyers Try to Stop Execution of Inmate They Say is Mentally Ill, NBCNEWS.COM (Feb. 2, 2012, 6:09 PM), http://usnews.nbcnews.com/_news/
after challenge under North Carolina’s Racial Justice Act.9 A death row inmate who claims he cannot be executed by lethal injection because he is allergic.10 Yet another who claims he is too obese to be executed in any non-cruel manner (and at 480 pounds, he may well be right).11

Here, however, I have chosen to focus on two areas, and the first only briefly. One important piece of the death penalty puzzle, especially in the realm of thinking small, is the phenomenon of cases with issues. Not all death penalty cases have issues, but enough do that there is almost always a case in one of the states that is causing a public outcry (or at least audible gasps), raising serious, high-profile questions about the death penalty. Think Troy Davis.12 Timothy Cole.13 Anthony Graves.14 Cameron Todd Willingham.15 The West Memphis Three.16

I need not say much here because we are all familiar with the phenomenon. Every time there is an execution where the evidence is shaky, or an occasion where the defendant has been incarcerated for years and is then exonerated, we are left with the question: What happens when we get the death penalty wrong? That is the thing about the death penalty—it is so very permanent. We now have had over 140 exonerations from...
death row, cases in which we would have executed an innocent human being if only we had gotten around to it faster.\textsuperscript{17} And every case with issues slowly pushes the innocence problem more to the forefront of the public’s consciousness, to the realm of the deeply disturbing.

But enough about that. Exonerations, even just lingering doubts about guilt, are an important piece of the death penalty puzzle, but one that I need not dwell on because we all know the phenomenon is out there, doing its zeitgeist thing.

The place I will spend some time is lethal injection. What I did not understand about the lethal injection issue until I started cruising the news is how this brouhaha started. It started with individual actors making decisions that snowballed into a massive hitch in the administration of capital punishment in the United States.

Until recently, lethal injection was typically accomplished using a three-drug protocol that included a drug called sodium thiopental, which, as it turns out, had just one domestic producer—a company called Hospira.\textsuperscript{18} Hospira did not approve of the use of its product for executions and first asked states not to use the drug for that purpose.\textsuperscript{19} But the states did not honor its request.\textsuperscript{20} Hospira then had discussions with its distributors to see if they could block the sale of sodium thiopental to prisons but ultimately decided that the only way to stop the “misuse” of its drug was to stop making it altogether.\textsuperscript{21} So that is what Hospira did.\textsuperscript{22}

This caused all sorts of problems as death penalty states started looking beyond the United States for other suppliers of the drug. Germany has several pharmaceutical companies that make sodium thiopental, but they refused to export the drug to the United States for lethal injections, explaining in a joint statement, “This is not about money, but ethical principles.”\textsuperscript{23} A Swiss pharmaceutical company also makes sodium thiopental, and it actually asked Nebraska to give its “wrongfully diverted” product back, stating that the company does not support

\begin{footnotesize}
\begin{enumerate}
\item See Koppel, supra note 18.
\item Id.
\item Hospira to Stop Making Lethal-Injection Drug, supra note 18.
\item See id.
\end{enumerate}
\end{footnotesize}
the use of its drug in lethal injections.\(^24\) Great Britain produces sodium thiopental too, but it banned the export of lethal injection drugs to the United States and urged the European Union to do same, which it did.\(^25\) Under the EU’s new rule, pharmaceutical manufacturers may not export drugs used for executions in the United States unless they have a special permit showing that the export is not for executions.\(^26\) Meanwhile, a prison warden back in the United States was quoted as saying, “I am beginning to think drug companies and suppliers are not real happy to have to supply us for this use.”\(^27\)

The long and short of all this is that about the only way for states to get sodium thiopental for their executions is to get it illegally. Pakistan may be involved, some fly-by-night operation “in a gritty London neighborhood” too.\(^28\) So now there is a veritable black market for sodium thiopental because nobody wants to sell it to the United States for executions, certainly not countries that abolished the death penalty almost fifty years ago.\(^29\) And because there is a black market, there are also questions about whether the drugs that make it to the United States meet minimal purity standards, not to mention the fact that most lethal injection procedures assume that the drugs come from some approved or appropriate, or at least not illegal, source.\(^30\)


\(^{29}\) By 1968, seventy countries had formally rejected the death penalty, including almost all of Western Europe. See DAVID GARLAND, PECULIAR INSTITUTION: AMERICA’S DEATH PENALTY IN AN AGE OF ABOLITION 111–12 (2010).

\(^{30}\) See Joe Duggan, Killer Fights His Execution on Two Fronts, OMAHA WORLD-HERALD, Feb. 14, 2012, at 3B (reporting on death row inmate’s claim that stolen Swiss drug to be used for
Because states are importing the drug (often illegally), the Food and Drug Administration is also involved. It tried not to be. The FDA’s first stance was that it was taking a hands-off approach to lethal injection drug imports. According to the FDA, it was tasked with regulating drugs to protect public health, and drugs used for lethal injection were definitely not for public health, so the whole enterprise was outside the ambit of its authority. That did not go over well in federal district court, where a District of Columbia judge found that the FDA had “arbitrarily and capriciously” abused its discretion in refusing to review the states’ imports. So now the FDA is asking states to turn over their stock of sodium thiopental for its review and approval. Thus far, South Dakota has refused—California too.

The United States Drug Enforcement Agency has had better luck. Citing “questions about how the drug was imported,” the DEA seized Georgia’s entire supply of sodium thiopental in the spring of 2011, effectively preventing executions in the state. It then seized Kentucky and Tennessee’s supplies too, exacerbating shortages already plaguing states that have people to execute but lack the drugs to do so. As it turns out, Kentucky had reached out to more than two dozen states to
obtain sodium thiopental before ultimately buying it from Georgia.\footnote{Greg Bluestein, \textit{States Beg, Borrow and Import Scarce Execution Drug; Ga. Is Investigated}, \textsc{Star Tribune} (Minneapolis-St. Paul), Mar. 25, 2011, http://www.startribune.com/templates/Print_This_Story?id=118660629.} Tennessee had shared some of its supply with Georgia and Arkansas, and Arkansas had shared its supply with Oklahoma, Mississippi, and Tennessee, largely on a borrowing basis.\footnote{See id.} As one Arkansas official explained, it was understood that “there would be a payback when needed.”\footnote{Id.} And then there is California, which reportedly “scoured the nation” for sodium thiopental, calling hospitals, surgery centers, and even the Department of Veteran Affairs before eventually borrowing from Arizona.\footnote{Sam Stanton, \textit{California scoured U.S. for death-penalty drug, documents show}, \textsc{The Sacramento Bee}, Jan. 5, 2011, http://blogs.sacbee.com/crime/archives/2011/01/california-scou.html.} In gratitude, the California prison official who brokered the deal actually sent an e-mail to his Arizona counterpart offering to buy him a beer and adding, completely oblivious to the irony, “You guys in AZ are life savers.”\footnote{Bluestein, supra note 38.} Sometimes truth really is stranger than fiction.

So what can states determined to use the death penalty do? The chief alternative to sodium thiopental is a drug called pentobarbital, and states have increasingly turned to this drug for its executions instead.\footnote{See Ben Hirschler, \textit{Limit Execution Drug Distribution: Docs to Company}, \textsc{Reuters}, Jan. 6, 2012, available at http://uk.reuters.com/article/2012/01/06/us-hospira-executions-idUKTRE80500K20120106 (reporting a group of doctors pressured Hospira to restrict sale of pentobarbital, which is being used in executions since Hospira stopped making sodium thiopental).} But here, too, there is a hitch.

The sole supplier of pentobarbital in the United States is a Danish company called Lundbeck, and Lundbeck is likewise strongly opposed to the use of its drug in lethal injections.\footnote{David Jolly, \textit{Danish Company Blocks Sale of Drug for U.S. Executions}, \textsc{N.Y. Times}, July 1, 2011, http://www.nytimes.com/2011/07/02/world/europe/02execute.html?_r=0.} According to the company, this “distressing misuse” of its product is “against everything we’re in business to do.”\footnote{Id.; Andrew Welsh-Huggins, \textit{Drug Maker Asks Ohio, Oklahoma Not to Use Sedative for Putting Inmates to Death}, \textsc{Star Tribune} (Minneapolis-St. Paul), Jan. 27, 2011, http://www.startribune.com/templates/Print_This_Story?id=114672969.} The drug is intended to treat epilepsy and euthanize animals, Lundbeck claims, and is not safe for use in untested ways, including human executions.\footnote{See Sten Stovall, \textit{Lundbeck Won’t Pull Controversial Drug}, \textsc{Wall St. J.}, June 29, 2011, http://online.wsj.com/article/SB10001424052702304584004576415380592229742.html?; see also Andrew Jack, \textit{Danes Try to Block Use of Death Drug}, \textsc{Fin. Times} (London), June 8, 2011, at 4. Lundbeck has specifically asked several
states not to use its drug in lethal injections, to no avail.\textsuperscript{47} The company has now turned to end user clauses to stop the drug’s use in executions.\textsuperscript{48}

What does all this mean for death penalty states? One thing it means is that a number of states are not executing—not because they don’t want to, but because they can’t. Suits are pending that challenge the drugs to be used in lethal injection as coming from unapproved, illegal, and unregistered sources.\textsuperscript{49} One state has answered that the point is moot because its existing supply of the drugs has expired, and it cannot obtain more anyway.\textsuperscript{50}

It also means that once again, states are on the hunt for a new paralytic to use in lethal injections. Missouri recently changed its protocol to use a drug called propofol for lethal injection, which is what caused the death of Michael Jackson.\textsuperscript{51} The state will likely have to try again, however, since the second of the only two domestic suppliers of propofol has now said it will not accept orders of the drug from U.S. corrections departments.\textsuperscript{52} Virginia has turned to a drug called rocuronium bromide, which forty-two states have banned as a paralytic for euthanizing animals because it may cause excruciating pain.\textsuperscript{53} Texas, too, switched its drug protocol due to shortages in its existing supply, then adopted a non-disclosure policy for all lethal injection drug information.\textsuperscript{54} Oklahoma has said that once it runs out of pentobarbital, its method of execution


\textsuperscript{48} Jack, supra note 46.

\textsuperscript{49} See supra note 30.


will be “up in the air.”

Not only is the shortage of lethal injection drugs gumming up the execution process, but it is also requiring states to rewrite their lethal injection statutes, which is causing problems of its own. Arkansas, for example, had amended its lethal injection statute to allow the Department of Corrections to choose “one or more chemicals” for use in lethal injection, but its Supreme Court struck down the law, holding that such “unfettered discretion” in the executive branch did not pass constitutional muster. And then there is California, which cannot seem to get an execution to save its life. Having just revised its three-drug protocol to remedy constitutional deficiencies in its prior lethal injection procedure, the state has now been told that its protocol is again deficient, in part because it failed to consider a one-drug option. So back to the drawing board California goes.

As one might imagine, all the logistical and legal troubles associated with lethal injection have also had a dramatic effect on the cost of this execution procedure. A 2012 article reported that states now pay fifteen times more for the chemicals they use in executions than they did a year ago, while a similar 2011 article estimated the cost at ten times greater than it had been in years past. One cannot help but think of Oregon in this regard—its governor recently imposed a moratorium on executions, and now the state is hoping to recover some $18,000 on lethal injection drugs by selling them back to the wholesaler. But if Oregon were really smart, it would just call states like Texas, Virginia, Georgia, and Ohio and offer to sell its drugs to the highest bidder. (Granted, that may be missing the point.)

Problems with the drugs involved are not the only thing slowing the pace of lethal injections—the death chambers in which lethal injections


occur have come under fire as well. In Montana, for example, the execution chamber is a decades-old, single-wide trailer that was once used as a residence but has since been retrofitted for executions.\(^{61}\) Apparently, the trailer is so decrepit that it is no longer usable, so the state proposed replacing it with a new, 800-square foot “multipurpose room” that would be used mainly for storage, but could function as a “makeshift execution chamber” on the side.\(^{62}\) Ultimately, however, Montana decided that although it indeed needed a new execution chamber, it had other needs to tend to first.\(^{63}\) So for now, the trailer-turned-execution-chamber stands.\(^{64}\) As a Montana native, somehow I get that.

And then there is Nevada. In Nevada, the State Public Works Board determined that the state’s death chamber was not up to code because it did not comply with the Americans with Disabilities Act.\(^{65}\) Yes, you just read that right—Nevada is concerned about whether its death chamber is wheelchair accessible. At this point, however, the state has to be concerned because if the death chamber is out of compliance, it cannot be state certified, and if it is not state certified, it cannot be used for executions. Apparently, bringing the chamber into ADA compliance is going to cost thousands of dollars, in part because it would require installing an elevator.\(^{66}\) Nevada officials have stated that they may update the chamber, or they may just phase it out and build a new death chamber that is up to code instead.\(^{67}\) Prison officials say it makes no difference at this point as they do not have the drugs necessary to carry out an execution anyway.\(^{68}\)


\(^{62}\) Id. When it was not being used to execute people, the death chamber would store shoes, portable food heaters, and extra mattresses, among other things. See id.


\(^{64}\) It is unlikely to get much use, however, as a Montana judge has since struck down the state’s lethal injection procedure. See Laura Zuckerman, Montana judge strikes down state execution method, WASH. POST (Sept. 8, 2012), http://articles.washingtonpost.com/2012-09-08/national/35498038_1_state-execution-method-execution-process-lethal-injection. See also Katie Schneider, Judge finds execution method unconstitutional, SUN NEWS, (Sept. 7, 2012, 8:37 AM), http://www.sunnewsnetwork.ca/sunnews/world/archives/2012/09/20120907-083718.html (quoting the defendant’s lawyer as saying, “The drug is just one facet of it—it also has to do with the people who are qualified to administer it, the facility they have, it’s a lot more involved than just the drug.”).


\(^{66}\) Id.

\(^{67}\) Id.

\(^{68}\) Id.
Then finally, there is the question of who performs the lethal injection procedure. The American Medical Association opposes physician involvement, although thus far it has not imposed sanctions on doctors who choose to participate. The same cannot be said for the American Board of Anesthesiologists, which voted in 2011 to revoke the certification of members who conduct lethal injections, which would effectively prevent them from working at most hospitals. In Ohio, emergency medical technicians administer lethal injections, which a local governing board said did not violate their duties as EMTs because they are not serving as EMTs when putting people to death. In Virginia, by contrast, defense attorneys claimed that lethal injections by anyone other than trained doctors amounted to practicing medicine without a license (the judge in the case commended the attorneys for their “imaginative” challenge, then promptly dismissed it). For its part, North Carolina cannot seem to make heads or tails of this quandary; the question of whether medical ethics prohibit doctors from attending executions has resulted in an unofficial moratorium on executions since 2006.

All of this brings me to my second, and more brief, point—the huge impact that all these developments have had.

II. WINNING BIG

If thinking small has shown anything, it has shown how numerous actions at the ground level have thrown a wrench into the administration of capital punishment in the United States. What I discuss now is how that, in turn, is feeding into another debate over the death penalty—a debate about cost. And cost, for better or worse, is an issue on which death penalty opponents are winning big.


With the addition of Connecticut in April 2012, five states have now abandoned the death penalty in the last five years. In each of those states, the cost of the death penalty—or at least what the state was getting for the cost—played a critical role in the decision to abandon capital punishment as the ultimate sanction. Illinois reported that it had spent some $100 million on the death penalty in the ten years prior to its abolition in 2011, and had executed no one during that time. New York estimated that it spent $170 million on the death penalty in the modern era, while New Jersey’s estimate was $253 million—and neither of those states had a single execution to show for it. New Mexico’s governor explicitly cited economic considerations when the state abandoned the death penalty as well. In Connecticut, cost does not appear to have been a driving factor in abolition, but the “unworkability” of the death penalty was. In the modern death penalty era, the state had executed only two individuals, and only then because both had volunteered for it.

California’s death penalty costs are astronomically high, which to some extent is understandable because the state has the largest death row in the country—but even so, its experience is revealing. In 2008, a study by the California Commission on the Fair Administration of Justice reported that it costs California around $137 million annually to maintain its current death penalty system (the study claims that this is a conservative figure, and indeed other sources have put the figure much higher). The same study estimated that it would cost California


78. DIETER, supra note 77, at 13.


80. Id.; see also supra note 76 (explaining notion of modern death penalty era).

approximately $11.5 million annually to maintain a penal system with a maximum punishment of life without the possibility of parole.\footnote{See \textit{Cal. Comm'n Report}, supra note 81, at 10.} From those estimates, the Commission concluded that abolishing the death penalty in California could save the state around $125 million annually,\footnote{See \textit{id.}} and a separate 2012 study has now estimated the cost savings at around $130 million per year.\footnote{Maggie Clark, \textit{Cost Concerns Lead California’s Death Penalty Repeal Debate}, \textit{StateLine} (Aug. 31, 2012), http://www.pewstates.org/projects/stateline/heads/ties/cost-concerns-lead-californias-death-penalty-repeal-debate-85899414772.} Thus far, California has spent around $4 \textit{billion} on its death penalty in the modern era, with only thirteen executions to show for it.\footnote{Id.} You do the math—that amounts to an average of over $300 \textit{million per execution}. That’s a lot of health care. A lot of education. A lot more police officers on the streets. Little wonder California decided to scrap its $356 million plan to build a new death row\footnote{Press Release, Office of the Governor, Governor Brown Cancels Plan to Build New $356 Million Condemned Inmate Housing Facility at San Quentin (Apr. 28, 2011), available at http://gov.ca.gov/news.php?id=17010.} and put a repeal initiative on ballot instead.\footnote{See Californians to Vote on Abolishing Death Penalty, \textit{FoxNews.com} (Apr. 24, 2012), http://www.foxnews.com/us/2012/04/24/californians-to-vote-on-abolishing-death-penalty/. In November 2012, California’s repeal initiative was defeated by a vote of 53 to 47 percent. See DPIC, \textit{California Retains Death Penalty by Narrow Margin} (Nov. 7, 2012), http://www.deathpeninfo.org/california-retains-death-penalty-narrow-margin.}


Cost, and what the states get for it, is profoundly impacting the death penalty debate. The death penalty is breathtakingly expensive to maintain as a penal practice, and we do not get much bang for the buck.
Only one in 500 murders results in a death sentence,91 and those that do rarely lead to an execution. In 2010, the most recent year for which there is published data, 119 people were removed from death row.92 Of those, forty-six were executed, twenty died while they were waiting, and fifty-three were removed because of overturned convictions or commutations.93 Demurring on the death penalty is no longer about being “soft on crime”—it is about being “smart on crime.” It makes no sense to have a death penalty that costs millions to maintain, but is almost never used.

III. CONCLUDING THOUGHTS

In these austere times, the fact that the death penalty is so expensive to maintain, and so hard to carry out, is changing the script of the death penalty debate. Before, voting against the death penalty was political suicide.94 Now it is couched in terms of fiscal responsibility. Because it saves the taxpayers money, it is the right thing to do. Money is the new morality.

I, for one, view this development with mixed emotions. There are now over 140 people who were exonerated while on death row—over 140 people who the state claimed the right to execute and whose innocence has been proven.95 But that has not moved us.

We have dozens upon dozens of studies proving that the death penalty today is as arbitrary and capricious—and, let’s face it, racially discriminatory—as it was in 1972, when it was temporarily abolished.96 Death today turns more on the victim’s race,97 and random factors like the county where the crime was committed,98 than it turns on the worst

93. Id.
95. The Innocence List, supra note 17.
crime or even the worst criminal. But that has not moved us.

We have long heard about capital trials with woefully inadequate defense counsel, cases where people whose lives were at stake were represented by underpaid lawyers who were sleeping or drunk or otherwise grossly incompetent.99 We have heard about the death penalty’s dubious efficacy as a deterrent,100 and the sheer immorality of the killing state.101 But none of those arguments has moved us.

There is an unspoken cost to monetizing the death penalty debate—a cost to sparing an individual’s life just because it is not worth taking. But as for me, I will take an abolition argument that works over a moral argument that does not, and if thinking small helps us get there, then so be it. Here’s to Scott Sundby and the virtues of thinking small.

sacbee.com/2012/09/11/4806968/death-penalty-is-applied-unevenly.html (“Whether defendants get the death penalty depends as much, if not more, on where they did their crime as what they did.”).


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