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Criminal Acts of Violence among Capital Murder Offenders in Texas[1]

J. Keith Price, Ph.D., Associate Professor, West Texas A&M University, kprice@wtamu.edu
Roselyn K. Polk, Ph.D., Assistant Professor, Jackson State University, Roselyn,k.polk@jsums.edu
Robert E. Beckley, Ph.D., Professor, West Texas A&M University, rbeckley@wtamu.edu

Abstract

The prediction of secondary deviance is a difficult task. Texas capital juries label some murderers as a continuing threat to society. This label is accompanied by the sanction of death. Other capital murderers are only incapacitated for the rest of their life. An examination of this labeling process revealed that the tagged offenders were no more dangerous than other groups of offenders.

Introduction

After a capital murder conviction in Texas, jurors must resolve the issue of punishment. The punishment decision will send the offender to prison for life without parole or to death row to await execution. The punishment deliberation includes "all evidence admitted of the defendant's background and character and the circumstances of the offense that militates or mitigates against the imposition of the death penalty" (Texas Criminal Procedure, 2008, p. 11). The jury must also consider the "probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society" (Texas Criminal Procedure, 2008, p. 11).

Both categories of capital murder offenders will spend the remainder of their life in prison. Offenders with mitigating characteristics or who are not likely to commit criminal acts of violence will spend the rest of their natural life in prison (capital murder life). Offenders with aggravating circumstances and who are likely to commit criminal acts of violence will be confined on death row until the state executes the death sentence (capital murder death). Most capital murder offenders (life or death) will spend many years incarcerated (Mandery, 2005). During this period of confinement they will establish a history of *criminal acts of violence*. This situation poses an interesting research question. Is the criminal violence record of capital murder death offenders different from that of capital murder life offenders or from other groups of offenders?

Literature Review

The ability to predict future dangerousness is a complex process. Despite the difficulty, criminal justice personnel regularly predict future behavior. Judges grant probation instead of sentences to prison, prison classification committees assign offenders to minimum custody, and parole boards authorize early prison releases. Each of these decisions is based on a prediction of future behavior (*Jurek v. Texas*, 1976).

Capital juries in Texas also engage in this process of predicting future acts of criminal violence. In order to accomplish this task, jurors rely on three methods of prediction. The most common form of assessment used in capital trials is the clinical prediction. This prediction is usually provided by a psychiatrist or psychologist. The clinician utilizes his or her training and intuition to predict future violence. This method is very subjective and is the least accurate means of prediction (Sorenson & Pilgrim, 2006).

The most accurate form of forecasting future criminal violence is anamnestic prediction. This method utilizes an individual's previous patterns of behavior to predict future violence. The weakness in this method relates to context. Many criminals pose serious threats to citizens if unsupervised in the community. These same criminals, however, pose minimal risk while incarcerated. Since both categories of capital murderers in Texas will spend the remainder of their life in prison, predictions should focus on serious acts of violence committed in jail or prison. This distinction is often lost on jurors. As a result jurors may give too much attention to criminal acts of violence committed in the community. The appropriate context for anamnestic

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predictions in capital murder cases should be criminal acts of violence perpetrated in jail or prison (Sorenson & Pilgrim, 2006).

Actuarial statistics also offer a method to predict future acts of criminal violence (Cunningham & Reidy, 1998; Cunningham & Reidy, 2001). This method is often referred to as risk assessment and is widely utilized by the insurance industry. This type of prediction estimates the future dangerousness of a particular criminal from the behavior of groups of similar offenders. This method adds objectivity to prediction that is missing in the clinical forecast discussed earlier (Sorenson & Pilgrim, 2006). The weakness in this method relates to the nature of serious violent behavior. Serious acts of criminal violence are rare, especially in prison. This produces a low base rate in which over-prediction becomes the norm (Marquart & Sorenson, 1989).

Social scientists understand the difficulty in predicting future dangerousness discussed above. They also recognize that the death penalty is society's most consequential public policy. After all, it involves the State taking the life of one of its constituents. As a result, researchers have often examined the recorded dangerousness of capital offenders.

The most common method of examining dangerousness among capital offenders is through state-based studies. Since capital punishment is largely a function of state penal codes, the custody and execution of capital offenders is generally carried out by state departments of correction. Correctional agencies keep detailed records of offender conduct as part of their routine business. These records include the behavior of capital offenders.

The literature review revealed eight state-based studies that examined criminal acts of violence of capital murderers. These studies extended over a number of years and included several states. The research included studies of New Jersey (Bedau, 1964); Oregon (Bedau, 1965); New York (Stanton, 1969); Kentucky (Vito & Wilson, 1986); California (Sorenson, Marquart, & Bodapai, 1990); Missouri (Sorensen & Wrinkle, 1996); Indiana (Reidy, Cunningham, & Sorenson, 2001); and Arizona (DeLisi & Munoz, 2003). Only one of these studies (DeLisi & Munoz, 2003) reported that capital offenders were more dangerous than other offenders.

Other research examined aggregate capital murderers from multiple states. Giardini and Farrow (1952) examined the dangerousness of capital offenders in 22 states. They concluded that capital offenders were no more dangerous than other offenders. The most comprehensive study of capital offenders was completed by Marquart and Sorenson (1989). The researchers utilized the "natural experiment" produced by the *Furman v. Georgia* (1972) that overturned capital punishment in the United States. The study examined the violence of 558 commuted capital offenders. The group committed six homicides in prison and one outside of prison. The authors concluded that capital offenders were no more dangerous than other violent offenders. In a similar finding, Cunningham and Sorenson (2006) examined life-without-parole offenders and concluded that they had few disciplinary problems and instead helped stabilize behavior in prison.

Texas is the most active capital punishment jurisdiction in the United States (Sorenson & Pilgrim, 2006). Texas has led other states in the number of executions per year in the post-*Furman* era of capital punishment (Death Penalty Information Center, 2007). As a result, it is not surprising to find four research studies that have analyzed Texas capital murderers and their criminal acts of violence.

Marquart and Sorenson (1988) examined data that focused on institutional and post release behavior of 47 inmates in Texas for the years 1973 through 1986. Like the subjects in the Kentucky study, these offenders had received commutations as a result of the *Furman v. Georgia* ruling of the United States Supreme Court (1972). The researchers reported that only one commuted offender committed a subsequent murder while on parole. Overall, 25% of the commuted offenders committed serious (Level 1)[2] rule infractions in prison, compared to 30% of life-sentenced offenders.

Another study by Marquart, Ekland-Olson, and Sorensen (1989) analyzed 92 capital murderers in Texas from 1974 to 1988. They reported that only one former death row inmate had committed a murder in prison. Sorensen and Pilgrim (2000) conducted an actuarial risk assessment of potential violence of capital murderers that covered a period of eight years. Their assessment examined the behavior of 6,390

[2] The Texas prison system has three levels of disciplinary offenses: Level 1 offenses are the most serious, equitable to a criminal act of violence; Level 2 offenses involve serious prison rule violations; and Level 3 offenses are prison order violations.

murderers confined in the Texas prison system from 1990 through 1999. The researchers reported that a life-sentenced capital murderer had a 0.2% probability of committing a second murder over the period of a 40-year sentence, while the probability of committing an assault was 16%.

The Texas Defender Service (2004) studied the behavior of 155 Texas inmates who had evidence of predicted future criminal acts of violence presented by prosecutors and their experts to the jury. The behavioral experts (psychiatrists and psychologists) presented predictions of future dangerousness based on clinical assessments. Not one of the offenders in this group committed a second murder while in prison, and only seven committed serious assaults. Based on this evidence the researchers concluded that the prediction of future criminal acts of violence made by state experts and the juries was incorrect in 95% of the cases.

This review supported that the prediction of future violence is difficult. Empirical studies that examined these predictions in capital murder cases revealed that error rates were as high as 90 to 95%. In spite of this high rate of error, the criminal justice system continues to label some offenders as a continuing threat to society. Criminological theory provides a possible explanation for this process.

Theoretical Perspective

Society's response to known offenders is important since it determines the individual futures of those who are labeled as criminals. The labeling perspective may contribute to a heightened incidence of criminality by reducing options for labeled offenders (Schmalleger, 2009).

Frank Tannenbaum provided an early description of societal reaction to deviance. He stated that offenders were tagged after the criminal justice process. This process was the result of two opposing definitions of a situation. The deviant possessed a view of an act that was in opposition to the view of the community at large. As these acts grew into problems for society, the attitude of the community hardened. As a result of this response, a demand for suppression evolved (Tannenbaum, 1938).

Edwin M. Lemert further developed the ideas of Tannenbaum. He described the initial deviant or criminal event as an act of primary deviance. This act was committed to solve some immediate problem or to meet the expectations of one's subculture. After the deviant was labeled as a criminal, he committed other deviant acts as a means of adjustment to this negative status. These secondary acts of deviance were a defense or attack to the overt and covert problems created by the societal reaction to the deviant (Lemert, 1951). These secondary acts (i.e. stealing, assaults, truancy, etc.) were not the result of an immediate problem but were instead an adoption of subcultural values.

Howard Becker later described how a person becomes an outsider. Becker noted that certain social groups make the rules in society. These rules are then applied to particular people who are labeled as outsiders. According to this perspective, deviance is not a part of a person's behavior, but is instead society's response to the act. Society then attaches a sanction to the act of deviance (Becker, 1963).

The prediction of future acts of violence is a labeling process. The capital murderer has committed a primary act of deviance. This brings about a social group response. Some offenders are not labeled as dangerous. These offenders are imprisoned for the rest of their lives as punishment for the primary act of deviance. Other offenders are labeled as a "continuing threat to society" (Texas Criminal Procedure, 2008, p. 11). This label assumes that the capital murderer will commit secondary acts of deviance, and carries with it the sanction of death by lethal injection.

Method

Researchers have examined the issue of predicting criminal acts of violence among capital murderers in a number of states, including Texas (Price & Byrd, 2008). Because the stakes in capital murder trials are so high (i.e. life or death), it is important to examine the social policy that guides this process. Texas continues to execute more offenders than any other jurisdiction in the United States. Texas sentences hundreds of murderers to prison each year, yet less than sixty are selected for death (Death Penalty Information Center, 2007). These statistics indicate that an examination of Texas capital murderers was relevant. This study was designed as a secondary analysis of existing archival data. While the methodology proposed for this study was similar to that used in prior research, it was expanded to include multiple comparison groups. The study utilized four discrete groups of offenders. Group one was a sample of general population offenders. This group resided in minimum security. Group two was a sample of capital murder death offenders. This group resided in maximum security. Members of this group had aggravating factors and

had been predicted to commit future criminal acts of violence that constituted a continuing threat to society by a capital murder jury (Texas Criminal Procedure, 2008). Group two was the group of primary interest to the study and the subject of the research question. Group three was a sample of capital murder life offenders who lived in general population. This group had mitigating factors or had been predicted not to commit future criminal acts of violence by a capital murder jury (Texas Criminal Procedure, 2008). Group four was a sample of administrative segregation offenders residing in maximum security. Administrative segregation offenders were confined to maximum security due to prison gang membership or serious acts of violence during incarceration.

Table 1 Comparison Groups

Group	Offender Groups	Custody	Status of Group
1	General population	Minimum	Comparison group
2	Capital murder death	Maximum	Research group
3	Capital murder life	Minimum	Comparison group
4	Administrative segregation	Maximum	Comparison group

The dependent variable for the study was criminal acts of violence. Criminal acts of violence were operationally defined as Level 1 disciplinary offenses (see Marquart & Sorenson, 1988). There are other ways that criminal acts of violence could be operationally defined, such as examining only subsequent murders or felony crimes. Felony crimes committed in prison are rarely prosecuted, however, since offenders are already incarcerated (Pollock, 2006). Prisons do closely monitor offender conduct. Therefore, the use of Level 1 disciplinary offense would appear to be a valid measure. Several prior studies also used this measure to examine dangerousness (see Sorenson & Pilgrim, 2000; and Marquart, Eklund-Olson, & Sorenson, 1989).

Sample Selection

The four comparison groups consisted of male offenders in the Texas Department of Criminal Justice (TDCJ). No male offenders were precluded from the opportunity for selection. The TDCJ Research Department provided random samples for the four research groups. Three hundred and fifty cases were determined to be the desired size for each comparison group. This number was approximately 90% of capital murder death offenders. The number of death row residents was so variable that a 90% sample was determined to be the largest size available, since the population was in such a state of constant flux. Equivalent sample cases of the remaining three groups were randomly selected to match this group for comparison purposes. The use of random selection of participants provided the major control for the research comparisons.

Capital murder death offenders reside on death row, a maximum security cellblock. Security procedures in death row allow these offenders out of their cell for only one or two hours per day (Pollock, 2006). As a result, it can be argued that capital murder death offenders do not have the same opportunity for violent criminal behavior as other offenders. To control for this alternate explanation, a comparison group of maximum-security offenders was randomly selected. These 350 offenders had the same opportunity for violent behavior as the capital murder death offenders on death row.

Three hundred and fifty general population offenders were also randomly selected as a comparison group. This comparison group consisted of individuals who did not reside in maximum-security cellblocks but had the same opportunity for violent criminal behavior as the capital murder life offenders.

Data Collection

After the groups were selected, the respective offender files were examined ex post facto. The Texas Department of Criminal Justice provided an aggregate summary of Level 1 offenses for the members of the comparison groups utilizing subject codes. These data provided a frequency distribution for research comparison. The examination looked at offense reports from the years 1994 to 2005. These years were readily available in TDCJ's data archives and were thus selected as the period of examination. This data served as the source for comparison. No other usable descriptive data were provided by the TDCJ.

Data Analysis

A one-way analysis of variance was utilized to test for any statistically significant differences among the four group means. A one-way analysis of variance is appropriate for analyzing one independent variable for significant difference among three or more population means (Spatz, 1997).

Findings

The various groups committed 2,359 serious (Level 1) disciplinary offenses from 1994 – 2005. The capital murder death offenders accounted for 505 serious offenses. The capital murder life offenders also accounted for 505 serious offenses. The general population comparison group committed 135 serious offenses. The administrative segregation comparison group committed 1,214 serious offenses. The statistical analysis produced the following findings: $F = 2.28$, $p = .077$. The score was not statistically significant. The analysis indicated that capital murder death offenders were no more or less likely to commit criminal acts of violence than other groups of inmates.

Table 2 Descriptive Statistics of Comparison Groups

Comparison Groups 1-4	Serious Offenses N	Mean	Std. Deviation	Std. Error	95% Confidence Interval for Mean	
					Lower Bound	Upper Bound
1-General Population	135	.01	.121	.010	-.01	.04
2-Capital Murder Death	505	.03	.175	.008	.02	.05
3-Capital Murder Life	505	.03	.175	.008	.02	.05
4-Administrative Segregation	1214	.02	.124	.004	.01	.02

Table 3 One-Way Analysis of Variance

	Sum of Squares	df	Mean Square	*F*	Sig.
Between Groups	.150	3	.050	2.281	.077
Within Groups	51.659	2355	.022		
Total	51.809	2358			

Discussion

The research question asked if the history of criminal acts of violence was different for capital murder death offenders than for other groups of offenders. Since capital murder offenders spend the remainder of their life in prison, the threat of criminal violent acts was operationally defined as violent acts in prison or Level 1 disciplinary offenses. It is interesting to note that the two sample groups of capital murderers committed exactly the same number of violent offenses during the 12 years of the study. It appears that there is little difference between the two groups of capital murder offenders as demonstrated by violent criminal acts. There is also no significant difference when this result is compared to other groups of offenders.

Implications

Predicting future acts of criminal violence continues to be an arduous task for juries and social science researchers (see Cunningham & Reidy, 2001; Mossman, 2000; Cunningham & Reidy, 1999; Cunningham & Reidy, 1998; Radelet & Marquart, 1990; Mullen & Norman, 1979; and Royal College of Psychiatrists, 1977). This study failed to validate the predictions of capital murder jurors in their determination of which capital murderers would be a continuing threat to others. Instead of trying to predict future criminal acts of violence, it may be more relevant for capital juries to decide who deserves death.

Limitations

This study continues the tradition of research that examined future acts of criminal violence among capital murder offenders. Like a number of earlier studies, this study examined capital murder offenders in Texas.

Thirty-seven other states also practice capital punishment. Examinations of capital murder offenders in these states could reveal different findings based on different demographic characteristics. The state of Texas, however, is the most active capital punishment state in the United States. California possesses a larger death row than Texas, but they rarely execute capital murderers. Texas, on the other hand, implements the highest number of executions annually in the United States (Death Penalty Information Center, 2007). The continued study of capital punishment in Texas adds to research findings about capital punishment.

This study only examined prison conduct from 1994 – 2005. The modern use of capital punishment dates back to 1975. Perhaps an examination of a longer period of time or other time periods could produce different results. In recent years, however, the number of death sentences has declined across the United States (Mandery, 2005). As a result, this time period (1994-2005) offers a relevant examination of how incapacitation currently operates in the United States.

The aggregate nature of the data created some methodological problems. The format of the archived data prevented the researchers from disaggregating the data for multivariate analysis or other more powerful statistical analyses. The data delivered by TDCJ was grouped by subject, category (group), and offense number (the prison code for the offense). This grouping limited the ability to analyze the dependent variable over time. Thus, the use of random assignment to the comparison groups served as the major source for generalization.

Future Research

As long as juries are required to predict future criminal acts of violence for capital murder offenders in Texas social scientists should continue to provide empirical studies of capital murderers. Although future criminal violence studies are overwhelmingly conducted in Texas, it is important that other jurisdictions also should be studied. The only national study of future criminal violence among capital murderers was conducted in 1989 by Marquart and Sorenson. Another study could include states that have implemented a moratorium on capital punishment, such as Illinois. The Illinois moratorium (like the *Furman* moratorium) has created a group of capital murderer death offenders who are now serving life sentences. A study of these offenders and their conduct would provide another look at the future dangerousness of capital murderers. A larger sample and a broader data base for comparison could help illuminate the true continuing threat capital murder offenders pose to society. As long as decisions of life and death continue to revolve around predictions of future criminal acts of violence, social scientists should continue their inquiry of this construct.

Conclusions

Texas capital murder jurors labeled one group of capital murderers as a continuing threat to society. This labeling was accompanied by the sanction of death. Other capital murderers were not labeled and were incarcerated as punishment. This study examined the accuracy of this labeling process.

Both groups of capital murderers were examined for acts of serious criminal violence over a period of twelve years in prison. Ironically, the 350 capital murder life offenders committed exactly the same number of criminal violent acts as the 350 capital murder death offenders. This challenges the validity of the predictions made by capital murder juries.

The capital murder offenders were also compared to two other groups of prisoners who were not labeled as a continuing threat to society. One group was a sample from the general population of the prison. The second group was a sample from maximum security, the most violent custody within the prison. These groups were no more or less dangerous than the labeled group.

This study adds to the findings produced in earlier studies. Capital murder death offenders are no more dangerous than other prisoners. What does this study contribute to the debate over capital punishment? It appears that labeling as practiced today is a poor predictor of secondary deviance. Perhaps the more appropriate justification for the use of the death penalty is the aggravating circumstances surrounding the crime and the offender. This standard weighs aggravating and mitigating factors in the determination of death. It does not require, however, that the jury predict secondary deviance. This seems to be a more reasonable social policy for capital punishment decision-making.

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