

Who Deserves to Die? Discussions of the Death Penalty on Primetime Television

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The death penalty is a political issue which raises the passions of people on both sides of the debate. Yet despite the intensity of feeling about capital punishment, (or perhaps because of it) discussions in the television news media are relatively limited, focusing primarily on the utilitarian aspects of the death penalty rather than moral ones. This paper argues that more interesting and nuanced discussions about the death penalty in the US actually take place in the realm of television fiction. and that these are worthy of scholarly attention and study.

The United States is one of the only industrial nations that continue to implement the death penalty¹, and one of only four, including Iran, Pakistan, and Congo, which execute minors. However, despite the waning worldwide support for the death penalty, American support remains high, with 64% of Americans in favour of capital punishment². This support comes at a time when the procedural aspects of the system are increasingly called into question because of advances in DNA technology and several high profile cases in which death row inmates were exonerated.

The death penalty makes for compelling storytelling - both for news directors and producers of television's fiction. It is therefore unsurprising that capital cases command attention from the two formats. What is interesting to note however, are the differences and similarities between those discussions. Some of these differences can be explained by the distinctive characteristics of the two formats, while others are less intuitive.

¹ The other countries are: Afghanistan, Bahamas, Belarus, China, Congo (DR), Cuba, Egypt, Ethiopia, Guatemala, Iran, Iraq, Japan, Jordan, Kuwait, Kyrgyzstan, Lebanon, Nigeria, Oman, Pakistan, Palestinian Authority, Russian Federation, Rwanda, Saint Christopher & Nevis, Saudi Arabia, Sierra Leone, Singapore, Somalia, Sudan, Syria, Taiwan, Thailand, United Arab Emirates, Uzbekistan, Vietnam, Yemen, Zimbabwe (Death Penalty Information Center, <www.deathpenaltyinfo.org>, date accessed 7th November, 2004.)

² *Religion and Politics: Contention and Consensus*, Pew Research Center, July 24, 2003

The continued use of the death penalty in America is often considered an aspect of American cultural exceptionalism (Lipset, 1996; Steiker, 2002). Understanding the reasons behind the continued use of the practice in the US is complex. One of the most important considerations is the position of the death penalty as a political issue. There has not been an openly anti-death penalty presidential candidate since Michael Dukakis in 1988, and increasingly it has been considered political suicide to question the practice for fears that such a position would deem a candidate 'soft on crime'. Fears about levels of crime have been increasing significantly in the US since 1994³, and during the same period the criminal justice system has responded to these fears with mandatory sentencing and an increase in the number of prisons. The numbers of defendants sentenced to death row has also increased substantially.

Despite these trends however, recent opinion polls show that support for the death penalty is decreasing. A Pew Research Center poll from July 2003 revealed a significant decline in support for the death penalty, as 64% of respondents supported the punishment compared to 78% in 1996. In addition, the poll found that fewer respondents who favoured capital punishment felt strongly about their support (28% today compared to 43% in 1996), while a growing number of Americans are voicing opposition to the punishment altogether (30% today compared to 18% in 1996)⁴. Furthermore, the level of support for the death penalty is increasingly declining when the option of life without parole (LWOP) is offered. According to a Gallup Poll from May 2003, Americans are closely split on the proper sentence for convicted murderers. Though most respondents support the death penalty, that support dropped to 53% when people were offered the alternative sentence of life without parole, with 44% supporting LWOP. This split has remained fairly constant over the past 3 years, and support for LWOP has grown since 1997 when 61% chose the death penalty and only 29% favoured life imprisonment⁵.

It is difficult to know what is causing these changes in opinion, but it is important to note some developments in the last few years. The most important have occurred in Illinois. In January 2000, Governor George Ryan declared a moratorium on executions after journalism students at Northwestern University investigated a number of death penalty cases, finding new evidence which caused three inmates to be released from death row (Protest & Warden, 1998). Ryan established a fourteen member Commission on Capital Punishment. Their recommendations were published in April 2002 and, after considering their report, Governor Ryan decided to commute the sentences of all 160 inmates on Illinois' death row. His decision received significant levels of media interest, also bringing to attention other investigations into wrongful convictions, many of them discovered through recent advances in DNA technology. These concerns about how the death penalty is administered have shaped the debate about the practice. In research carried out by Gallup in May 2003, 73% of

³ In March 1992, 5% of people considered crime the Most Important Problem facing the country. In August 1994, this number had risen to 52%. Lowry *et al.* (2003) explained this rise in the content of network news shows as actual levels of crime were decreasing during the same period.

⁴ 'Religion and Politics: Contention and Consensus,' Pew Research Center, July 24, 2003, <<http://pewforum.org/docs/index.php?DocID=26>>, date accessed 7th November, 2004.

⁵ 'Support for the Death Penalty Remains High at 74%' May 19, 2003. <<http://www.deathpenaltyinfo.org/article.php?scid=23&did=592>>, date accessed 7th November, 2004.

respondents stated that they believed an innocent person had been executed in the last five years. Governor Ryan's decision also influenced other governors to consider their state's application of the death penalty, meaning that concerns and debate about the death penalty continue to grow⁶.

This paper is a qualitative discourse analysis which examines the arguments used to discuss the death penalty in the dialogue of primetime fictional dramas. We believe the discussions occurring in this type of television program differ from those offered in other formats, particularly the news media. Journalism studies scholars examine news texts believing the press provides a reflection of a given culture, constitutes a cultural product, and impacts cultural thought. We consider the scripts of 'ripped from the headlines' dramas in a similar way. Scriptwriters, like journalists, are part of a given culture, and are influenced by that culture, and we therefore feel these scripts can be read in the same way as a newspaper editorial, opinion piece or feature article. They reflect cultural beliefs, positions and attitudes about different social issues.

Using the keyword function, we programmed a Digital Video Recorder (DVR) to capture all episodes in which the description submitted to the DVR episode database and *TV Guide* included the words 'death penalty,' 'capital punishment,' and/or 'death row'⁷. In all we captured eleven episodes over a four month period from the 1st May until 31st August 2003. The majority of the episodes were from two programmes, *Law & Order* and *The Practice* (both legal dramas), with five captured from the former and four from the latter. The two additional programmes were from *The West Wing* and *Mister Sterling* (both political dramas). Although these eleven episodes were captured in a four month time frame, this is partially a result of syndication which means repeats of old primetime shows from the three networks are sold to smaller cable channels. The original airdates of these eleven episodes actually span a period of eleven years, with one *Law & Order* episode first appearing in 1992 and another episode airing in 2003. This research is preliminary, but is an attempt to understand the major arguments used in the dialogues from these television dramas, before undertaking audience reception research to explore whether the assertions we make here about how audiences may respond to the content, is borne out in interviews and focus groups with viewers.

Theoretical Framework: Death Penalty and News

Much of the research on media coverage of crime in the US has used content analyses to quantify the amount and type of coverage (Graber, 1980; Jerin & Fields, 1993; Lotz, 1991; Sheley & Ashkins, 1981; Sherizen, 1978 and has been undertaken because of concerns about journalists and their editors deciding to give the most coverage to the most violent, but least common types of crime. Crime news is a significant component of both television and printed news. In a content analysis of

⁶ *ibid*

⁷ We excluded talk shows like *Montel Williams* and news programmes like *Dateline* that ran specials on the death penalty. We also excluded movies like *Dead Man Walking* (dir. Tim Robbins, 1995) that discussed the death penalty.

12,179 news stories broadcast on the three network evening news programmes in the US in 2002, crime was the second most common story (1,318 stories) after terrorism (Media Monitor, Center for Media and Public Affairs, 2003). For newspapers alone, crime news stories account for between 4 to 28% of all the news, averaging about 7% overall (Jerin & Fields, 1993; Lotz, 1991). On all justice related stories those numbers rise to 22-28% (Graber, 1980:24). Perhaps most importantly, crime news is absorbed and remembered. An early study on crime news was able to conclude that crime news is remembered more than any other type of news (Sherizen, 1978:209). Reiner outlines six major concerns which have been established by these content analyses about the reporting of crime in the news. These include the sustained prominence of crime coverage, the bias towards the most violent offences, and, most relevant to this study, the continuous presentation of the criminal justice and penal systems in a good light as well as the lack of wider contextualisation for crime in favour of covering individual and specific cases in isolation (Reiner, 2002:378-93).

There has been relatively little research about media coverage of the death penalty. The most significant body of literature considers the deterrent effect of media coverage. Tremendous publicity surrounded the first few executions after the moratorium in the 1970s⁸ and nine studies since then have investigated the question of the impact of publicized executions in the press. Four reported that publicized executions had no effect on the homicide rate (Bailey, 1990; Bailey & Peterson, 1989; King, 1978; McFarland, 1983). Two studies concluded publicity caused an increase in the homicide rate (Bowers, 1989; Stack, 1993) and three argued that publicity caused a decrease in murders (Phillips & Hensley, 1984; Stack, 1987, 1990). In 1990, Bailey found no association between television news coverage and murder rates even when different types of coverage were analysed, for example 'very graphic versus matter-of-fact presentation[s]' (Bailey, 1990 quoted in Bailey & Peterson, 1998:69).

These studies considered media coverage of executions very simply, often coding content using low, medium and high categories based on crude measurements. More recently media coverage has been studied more closely. For example, Yanich examined local television news coverage of an execution in Delaware concluding that the format of 'Action News' created coverage which lacked context and focused almost exclusively on the last minute appeals to overturn the sentence. Yanich argues that covering executions is very appealing to television news stations, 'crime...is a prominent subject for broadcast news, but the subject of execution accentuates the dramatic character of crime more than any other story' (Yanich, 1996:5). Furthermore, from a production standpoint, execution stories are easy to cover as there is no need for investigation and the template is already in place. Television news reporters can use archived footage from trials, and the on-site live shots from outside the site of execution are easy to obtain. The result, Yanich argues, is news coverage which does the public a disservice by failing to consider the moral and

⁸ An unofficial moratorium existed from 1967 to 1972 because of strong opposition to the death penalty, and it was made official in 1972 with the *Furman v. Georgia* decision struck down death penalty laws which the Supreme Court ruled were 'arbitrary and capricious'. The ruling was overturned in 1977 and executions resumed.

utilitarian arguments about the death penalty question, preferring to concentrate on the individual and dramatic elements of the story.

More recently, a study by Fan *et al.* (2002) attempted to understand the recent decline in support for the death penalty, by studying press rather than television news. They coded 39,472 *Washington Post* and *Associated Press* articles from 1977 to 2001 scoring each on its favourability towards the death penalty. In their analysis, they concluded that press coverage since the 1990s has 'increasingly framed capital punishment in terms of the execution of innocent individuals, while in earlier years the frames concentrated on moral or utilitarian arguments for the death penalty' (Fan, *et al.*, 2002:441). Therefore they concluded that the change in death penalty support was due to the press turning a spotlight on errors in the judicial process which have led to instances of innocent persons being executed.

We undertook an analysis of the news coverage on the nightly news of the three main networks ABC, CBS and NBC for the four month period in which we undertook our episode sample. We found only twelve references in that four month period. Eleven of those were not stories about the death penalty but included a reference to it because they were stories about crimes or offenders which may lead to the punishment. Examples from the sample include stories about a serial killer in Baton Rouge, the man accused of planting the bomb at the Atlanta Olympics, and Terry Nichols, the accomplice in the Oklahoma City bombing. Only one story was about the death penalty. It aired on 29th July 2003 on NBC's 'Nightly News' and discussed how a prosecutor who originally sent a defendant to death row, had worked to get his sentence overturned through DNA testing that proved the original sentence was faulty. This supports the work by Fan *et al.* (2001) which demonstrates that news stories about the death penalty are relatively rare, but when they do occur they focus on failings within the system and the unfair application of capital punishment.

Fiction and News

The use of strong narratives is the foundation of good fiction, as well as contemporary journalism practice. As Chibnall concluded, 'you can put six reporters in a court and they can sit through six hours of court verbiage and they'll come out with the same story' (Chibnall, 1981:86). While journalists would explain this phenomenon through the common acceptance of objective reporting, scholars such as Bird & Dardenne consider it a 'triumph of formulaic narrative construction' (Bird & Dardenne, 1988:67). They conclude that 'while news is not fiction, it is a story about reality, not reality itself. Yet because of its privileged status as reality and truth, the seductive powers of its narratives are particularly significant' (Bird & Dardenne, 1988:82). Narratives also have the power to elicit emotional responses. 'The power of narratives lies in their potential to increase reader and viewers' experiential bandwidth and to deepen their emotional sensitivity and their social commitment' (Van Peer & Chatman, 2001).

People often remember a single exemplar; one incident, episode, or event, and allow it to represent a whole phenomenon or set of risks. The emphasis on individual cases, rather than overarching social trends and 'actual' risks, means the reliance of the press on exemplars can result in misleading coverage. Zillmann & Brosius found that exemplification appeared in 93% of printed news reports and 53% of television news reports (Zillman & Brosius, 2000). Furthermore, research in exemplification has found that vivid exemplars, particularly emotional ones with high degrees of personal salience, are recalled with greater ease than those stories without exemplars or with pallid ones (Hammerton, 1973; Khaneman & Tversky, 1973; Lyon & Slovic, 1976). The disconnect between falling crime rates, but subsequent increases in levels of concern about crime, have been frequently explained by the news media coverage of crime (Altheide, 2002; Glassner, 1999; Williams & Dickinson, 1993), and particularly the emphasis on individualized 'episodic' news coverage (Iyengar, 1991).

As a result of news programmes relying so heavily on exemplars to tell their nightly news stories, news about the death penalty is much more likely to highlight the case of one individual about to be executed, rather than broadcast an in-depth investigation into the disproportionate number of African-American men on death row. This mimics the reliance on exemplars in fictional dramas, which often structure plotlines around the events experienced by key individuals. It is therefore not surprising that fictional programmes have started to steal ideas for their plots directly from the news media, and in the last decade some of the most successful television dramas in the U.S have borrowed extensively from the news. NBC in particular advertise their primetime dramas using the tagline 'ripped from the headlines'. Shows across all the networks, including *Law & Order*, *the West Wing*, *The Practice*, *Third Watch* and *ER* all use storylines which borrow heavily from recent news stories, blurring the lines between fiction and reality.

In recent years, scholars have begun to pay more attention to the ways in which people make sense of political messages in fiction. Delli Carpini & Williams (1994, 2001) argue that the distinctions between fiction and non-fiction which have previously divided research about political learning, are somewhat arbitrary and socially constructed. The format of news and the 'highbrow' biases of academia help to formalize these boundaries such that 'the structural walling off of news from non-news reified what was an essentially socially constructed distinction' (Delli Carpini & Williams, 2001:165). Like Delli Carpini & Williams, Green & Brock bemoan the lack of scholarship on the powers of fictional narratives, arguing that in the study of communication and persuasion, there has been a 'displacement of poetics by rhetoric,' with more attention paid to advocacy messages than to narratives (Green & Brock, 2000:701).

Delli Carpini & Williams argue that the traditional way scholars have looked at opinion formation has assumed a hypodermic model of media effects; 'that citizens are receptacles that store fixed opinions' (Delli Carpini & Williams, 1994:784). Such a conception of individuals ignores the complexity of the opinion formation process. They suggest a different way of thinking about people's relationship to television, by offering the metaphor of conversation as the best way to approach public opinion. They argue that rather than using the image of a computer or a file cabinet, we should

approach people's relationship with television and public opinion as dynamic, not as information to be 'stored' or 'processed' but rather as part of an ongoing exchange. Thus, as,

'...the central source of information in the United States, television provides both the topics and the substance on which most conversations are based,' and that given the ongoing dialogue on television about all types of political and social issues, television is a 'regular conversant in an ongoing discussion, and ultimately, the central forum for political discourse'.

(Delli Carpini & Williams, 1994:787).

In this age of hyperreality, it is often no longer possible to differentiate fact from fiction. As a result the study of 'infotainment' and 'faction' is growing in popularity. As Brown reminds us, '(i)t is the televisual which has above all reduced the apparent gap between 'news' and fiction' in its generic cross-dressing...This is a multifaceted phenomenon as the 'news' and fiction' undergo a rapidly accelerating process of hybridization' (Brown, 2003:53). Most scholars, however, have concentrated on the increase in dramatic techniques in news and the resulting 'dumbing down' and 'tabloidization' of news (Bird, 1998; Bromley, 1998; Fiske, 1992; Langer, 1992; Sparks & Tulloch, 2000) . The reverse, the use of real-life news stories in fiction has been studied less (exceptions include Brown, 2003; Turow & Gans, 2002), but as the implosion of format and genre distinctions becomes an acknowledged characteristic of contemporary television programming and these 'ripped from the headlines' shows remain popular, this particular format will hopefully receive more attention.

Fiction gives people in society the space they need to play with ideas and arguments that might be too politicized if attached directly to 'real' situations. Rather than concentrating on the 'content' of these shows in order to understand possible 'direct effects' on attitudes, or even whether the shows encourage viewers to 'read' the shows through a particular lens, these programmes need to be considered as a format which encourages conversation. We believe the frequent inclusion of controversial storylines and the resulting debates between characters could encourage viewers to engage with the issues, and to engage with other viewers of the shows in ways not always considered by communication scholars.

The Dialogue

In the news reports from the four month period we studied, only one report considered the death penalty and that was a story about a sentence that was overturned on the basis of new DNA evidence. In comparison, the length of time and the freedom available to television writers and producers allows them to examine the death penalty issue in more depth. In evaluating the episodes, we found cogent and clearly argued attempts to consider the following questions: Why do people oppose the death penalty? Why do people support the use of the death penalty? Why does the practice continue in the US? Within one programme, different questions were raised, and

arguments were usually posed from different sides, by different characters. At times, within one episode certain characters would display ambivalence, confusion or changing opinions about the death penalty. The result, we argue, is a sophisticated analysis of the debates surrounding the death penalty. Rather than accepting the commonly held position that television fiction provides a platform for liberal ideologies, we believe that, on this particular issue the shows engage in constructive dialogue, bringing together in one place arguments from both sides of the debate, while simultaneously illustrating the tensions between moral and utilitarian arguments, religious teachings and natural human instincts demanding revenge, abstract anti-death penalty positions and the emotional realities of an execution.

We believe that the fact that information about the death penalty is organised around well-structured, nuanced arguments, positioned within powerful narratives, means viewers may be more likely to a) process the information, b) think critically about the information, and c) continue a discussion inspired by the arguments raised by the characters in the television show after the programme has ended.

All eleven episodes from all four shows featured arguments both for and against the death penalty, and the arguments were often made during emotional speeches and dialogues made by the main characters as they struggled with the moral, practical and utilitarian elements of the death penalty. That these arguments were made by already 'trusted' characters in the show, strengthens the impact they may have on viewers. Many of the arguments were intellectual, sophisticated and informed, including positions used by death penalty supporters and opponents.

Why are People Against the Death Penalty?

Discussions in the episodes which used arguments opposing the use of the death penalty were divided between those that used moral and utilitarian explanations. The political shows, the *West Wing* and *Mister Sterling*, concentrated on moral and religious arguments whereas the legal show *The Practice* offered information about how the death penalty regularly fails defendants because of the way it is applied.

Moral and Religious Arguments

While issues of access constrain television news from giving viewers an intimate portrayal of the hours before an execution, journalistic conventions caused by the pressures to be considered 'objective' often preclude discussions of the moral and/or religious questions raised by the death penalty. Fiction operates under no such restrictions, and on topics such as the death penalty, it often has the most freedom and as a result the most to offer audiences. The legal and political characters in television fiction do not need to be concerned about re-election and therefore can explore complex moral questions without fear of political reprisal. They can engage in discussions about the role of religion in politics without worrying about First Amendment entanglements.

Moral and religious explanations for the continued use of the death penalty are fundamentally different than those that question the fairness of the system or debate its strengths and weaknesses in terms of deterrence. These are discussions that ask whether the State has the moral authority, indeed, the right, to execute individuals. These conversations are often absent from the American debate on capital punishment in the news media which often tends to focus on procedural aspects of the system and not its ethical dimensions.

The West Wing in an episode that widely confirmed the show's credentials as a vehicle for liberal ideology, explored the issue of the death penalty, having several of its characters engaging in religious, philosophical and moral discussions about capital punishment. In one instance, Toby Zeigler, the White House Communications Director engages his Rabbi in a conversation about the death penalty, arguing that the Old Testament does not prohibit capital punishment, quoting the idea of 'an eye for an eye.' The Rabbi responds:

You know what it also says? It also says a rebellious child can be brought to the city gates and stoned to death. It says homosexuality is an abomination and punishable by death. It says men can be polygamous and that slavery is acceptable. For all I know, that thinking reflected the best wisdom of its time. But it's just plain wrong by any modern standard. Society has a right to protect itself but it doesn't have a right to be vengeful. It has a right to punish but it doesn't have a right to kill. ('Take this Sabbath Day,' *The West Wing*, 2000)

The Rabbi juxtaposes the two concepts of punishment and vengeance, suggesting that the State goes beyond its authority when it seeks vengeance. Vengeance is a morally loaded term which inspires a number of philosophical questions that are generally absent from American political discourse. Later in the episode, the issue is explored further in an exchange between President Bartlet, a Catholic, and pollster Joey Lucas, a Quaker. President Bartlet quoting Thomas Aquinas and St. Augustine states:

President: They believed in that part of the Old Testament that said that who shedeth a man's blood by man shall his blood be shed.

Lucas: And Immanuel Kant said that the death penalty is a categorical imperative. But, Mr. President, those writings are from other centuries.

President: I've got a Harris poll that says that 71% of the American people support capital punishment.

Lucas: That's a political problem

President: I'm a politician

('Take this Sabbath Day,' *The West Wing*, 2000)

The programme distinguishes between religious and political questions, suggesting that sometimes a moral action is not necessarily a popular action. It is also interesting to note that these discussions which have a religious component do not rest solely on religious texts or traditions. Beyond the Jewish or Catholic faiths, the characters

appeal to a higher moral authority. Religion thus informs the debate but does not necessarily dictate the result. At the end of the episode the President refuses to stay the execution, bowing to political pressure. He is visited by his family Priest and expresses his anger at God for not providing better guidance. The Priest reprimands the President for not listening to his own moral conscience. The episode ends with the President offering his confession, intoning 'bless me Father, for I have sinned.' While the episode explored both pro- and anti- positions this sentence controversially displayed the view that the programme considered the execution as a sin.

Utilitarian

A significant amount of narrative energy was expended on the theme that the justice system is hopelessly broken in terms of its administration of capital punishment. The discussions that fell into this category were not concerned primarily with whether the death penalty is an appropriate punishment, but rather with whether it is applied, fairly. Although some of the defendants in these cases were innocent, and certain scenes highlighted the tragedy of sending an innocent man to his death, the focus of these episodes was the myriad ways in which the system is broken, and justice subverted or thwarted.

In an episode that won the 1998 Silver Gavel award from the American Bar Association, *The Practice* used a novel filming approach. The episode, entitled 'Spirit of America' was filmed in the style of a documentary capturing the last eighteen hours before the execution of prisoner Randy Jefferson, on death row in Pennsylvania for the brutal rape and murder of a young college student. Using 'fly-on-the-wall' documentary style filming techniques, the characters were filmed in their last minute attempts to stay Mr. Jefferson's execution. The episode follows not only the legal manoeuvring, but through the on-camera interviews, explores the characters' different positions on the death penalty.

At one point Bobby Donnell, the senior partner in the firm argues at the final clemency hearing that the system has hopelessly failed his client. In his arguments to the Judge, Donnell bemoans the woefully inadequate length of the trial, and the sole reliance on a jailhouse confession brought about by a promise to reduce the sentence of a convicted felon. In his impassioned closing argument he states, '(l)ook, a man is waiting to die here. And the truth is you may be his last hope. All I'm asking is that you look at the process that condemned him and ask yourself, was it conducted fairly?' ('Spirit of America', *The Practice*, 1998).

In this episode, the clemency board rejects the appeal, deliberating for only fifteen minutes. Indeed, most of the episode follows the same pattern, with eloquent arguments on the condemned's behalf meeting with institutional indifference. In the end, the defendant is executed. The episode is notable because it fails to establish, conclusively, the guilt or innocence of the defendant. The writers of the episode are clearly opposed to the death penalty, however they avoid the easy narrative device of the State executing an innocent man. The thrust of their anti-capital punishment

argument is not that innocent people are killed, but rather that the system itself is unfair.

The Practice as a programme seems to be more strongly opposed to the death penalty than *Law & Order*. It devoted a three-episode block to a story arc that handled the case of an innocent man on death row. In that episode, lawyer Eleanor Frutt tries to secure the release of Stuart Donovan, a young man who was convicted of a double homicide on the eye witness testimony of an alcoholic, a fabricated jailhouse confession and a blood type match that was later refuted by DNA tests. The episode depicts a system unwilling to correct its mistakes and hostile to the pleas of both the defence attorneys and the mother of the condemned. In the third episode in the series, Eleanor gives an impassioned speech to the judge in the case, arguing not so much on behalf of her client, but on behalf of the system to which she has dedicated her professional life. Significantly, the inherent weaknesses of the criminal justice system are acknowledged and accepted as a by-product of an overworked and under-funded system. In this argument however, Frutt places the death penalty in a different category, arguing that the weaknesses inherent in the wider system should not be tolerated when people's lives are hanging in the balance. The excerpt also illustrates the common use of including information, often accurate statistics, about the contemporary use of the death penalty. In the episodes we sampled the scriptwriters included percentage levels of public support for the death penalty, the number of people on death row, and the numbers released because their innocence was proven through the use of DNA technology:

“...technically the prosecution's evidence still holds up – technically - but in reality a man is going to be executed for a crime he didn't commit. The system doesn't always work Your Honour - in the last 10 years alone 44 people have been released from death row for crimes they didn't commit. The system uses jailhouse snitches who fabricate confessions. The system has police lying, the system is very very fallible. And maybe it is understandable given the enormous volume of criminal cases today. Mistakes happen. Lies happen. It is a by-product of the system I can almost comprehend. But what I can't fathom is when we have the ability to find out the truth through DNA evidence, we don't. In 48 states defendants don't have the right to have a simple DNA test that could prove their innocence....Is our system about getting convictions? Is that it?” (‘Liberty Bells,’ *The Practice*, 1998)

The writers of *The Practice* have constructed narratives that bring the viewer into the process once the defendant has already been sentenced to death. The crimes of which they are accused are not highlighted and remain peripheral to the story - a distant backdrop to the legal action. Due to the structure of the *Law & Order* series, in which the first half of the programme involves the investigation of the crime and the second half involves the legal proceedings, the *Law & Order* episodes we examined never questioned the guilt of the accused. Having witnessed the overall legal process, the

viewer of a *Law & Order* episode can be assured that the accused received a fair trial⁹. Thus, the discussions in *Law & Order* often take a more philosophical turn, with the writers bringing in questions of religion and free choice.

In a 1998 episode, 'Bad Girl,' the district attorneys face a case in which a woman convicted of killing a police officer, Monica Johnson, experiences a religious conversion. The question arises in discussions between the characters, whether her sentence should be commuted because her conversion seems sincere. This excerpt is an example of how these shows often positioned characters against each other who had oppositional viewpoints about the death penalty, allowing them to explore different arguments, often without a clear resolution, leaving the audience to continue the argument where it ends on screen.

District Attorney: What if Monica Johnson has undergone an awakening? Don't we at least need time to explore it?

Assistant DA: You wouldn't be saying this if she were a 250 pound thug. She's the human equivalent of a baby seal.

District Attorney: That's not what this is about.

Assistant DA: Isn't it, Jack? Follow the logic of your position. If you're for the death penalty, you're for the death penalty, even if the condemned murderer is cute and cuddly

District Attorney: It's not that she's cuddly, it's that she seems sincere.

Assistant DA: Well, then there should be room for everyone to say they're sorry. If you spare her and not the others, you are admitting that the death penalty is not fairly applied.

District Attorney: And if we don't spare Monica Johnson we are proving that the death penalty is inhumane ('Bad Girl,' *Law & Order*, 1998)

In the end, the prosecutors argue that Monica Johnson cannot be afforded special treatment because she is 'white, female, and Christian,' and the execution takes place as scheduled.

⁹ For example, on *Law & Order* defendants *always* receive their Miranda rights, and if they do not, the issue *will* be raised in the 'order' portion of the programme.

Why do People Support the Use of the Death Penalty?

Deterrence

The two main arguments used to explain why the death penalty continues to be used and has high levels of support were a belief that the practice acts as a deterrent, and because it appeases the 'natural' human response for revenge. In the *Mister Sterling* episode, Senator Sterling in a press conference defending his anti-death penalty stance has the following exchange:

- Reporter: Senator, don't you think that widespread support for capital punishment is understandable - especially since 9/11?
- Senator Sterling: Yes, yes I think support for capital punishment is an understandable expression of a longing for a safer world, a world without fear. I long for that world too, but I don't think the death penalty can get us there. I don't think we can kill our way to a safer world.
- (*'The State-wide Swing,' Mister Sterling, 2003*)

His remark - that we can't 'kill our way to a safer world' - has a moral judgment within it - comparing the execution of a convicted criminal to murder, not simply punishment. The character expresses understanding for the motivations behind capital punishment but questions whether capital punishment really addresses those concerns. Senator Sterling seems to be asking, 'do we make the world safer by adding to the violence?', posing a rhetorical question about why the death penalty exists. He uses the popular held assumption that the death penalty acts as a deterrent to explain people's continued support for the practice, but rather than quote the scholarly evidence that the death penalty does not act as a deterrent, the script writers have the main character take a moral position, arguing that a safer world can not be achieved when the State kills its own.

Vengeance

The idea that the execution of a defendant could bring about some kind of relief has been a relatively new phenomenon, occurring alongside the rise of the victim's rights movement in America. As Garland explains, '(i)f victims were once forgotten, hidden casualties of criminal behaviour, they have now returned with a vengeance, brought back into full public view by politicians and media executives who routinely exploit the victim's experience for their own purposes' (Garland, 2001:143). Themes of vengeance emerge in television news stories about executions, when family members of the victims are interviewed and they describe the execution as a form of 'closure' which helps to put the horror of the ordeal behind them. In addition, the lengthy appeals system which is often considered as an integral part of the death penalty process, is frequently depicted as harmful to the victim's friends and family in their

struggle to recover. In contrast to the emotionality of the ‘closure’ themes in news, the fictional depictions are more nuanced, exploring ambivalence, the desire for revenge, and the way personal experience with violence can challenge political beliefs.

Two exchanges from a *West Wing* episode dedicated to the subject of the death penalty highlight this type of sophisticated consideration of the issue. In the first, the President asks his assistant, Charlie Young, a young African-American whose police-officer mother was killed in the line of duty, about his feelings on the death penalty.

President: What happened to the guy who shot your mother?
Charlie: They haven’t found him yet, sir.
President: If they did, would you want to see him executed?
Killing a police officer is a capital crime; I figured you must’ve thought about this before.
Charlie: Yes, sir
President: And?
Charlie: I wouldn’t want to see him executed, Mr. President,
(pause) I’d want to do it myself.
(‘Take this Sabbath day,’ *The West Wing*, 2000)

Charlie’s answer can be read either as support for the death penalty, or simply an acknowledgment of his own desire for revenge.

In another exchange, CJ Craig, the President’s press secretary expresses her ambivalence about the death penalty. Surrounded by White House staffers in the liberal Bartlet administration, CJ finds herself unable to muster the same level of enthusiasm about the issue as her colleagues. She mentions this to a female colleague in the following way:

“You know, I have no position on capital punishment. I’ve been trying to get worked up about it because it seems like I should. But the truth is I honestly don’t care if Simon Cruz lives or dies and I suppose if it brings some measure of comfort to the families of the victims then why the hell not?”
(‘Take this Sabbath day,’ *The West Wing*, 2000)

For CJ, clearly ambivalent about the subject of the death penalty, she is affected by the thought that the execution might give some closure to the families of those he killed.

Nuance, Sophistication and Complications

The shows included clear arguments for and against the death penalty. They also included much more nuanced and sophisticated attempts at dialogue and monologues which showed examples of individual characters wrestling with the complexities of the issue, either because of personal experience with crime, or because of political realities, or because of a previous ambivalence. As the characters struggle with the

subject, we believe audience members might similarly consider their own attitudes and beliefs about the subject, provoking opinion in ways other mass media formats are rarely able to do. This is a political issue, which provokes tremendous emotional reactions from people who both support and oppose the punishment. It also suffers from a great deal of ignorance, because of the relatively minimal news media coverage and the institutional practices which keep it behind closed doors. It seems the response of primetime television shows in the US is to explore the range of views about the death penalty, and to offer sophisticated arguments for and against the continued use of the practice, as well as acknowledgements about the complexity of the issue.

These pro- or anti- death penalty arguments, based on moral or religious positions or concerns about how the punishment works in practice were situated within other debates about the realities of a political system influenced heavily by populist ideals. In multiple episodes the characters encountered district attorneys who asked for the death penalty in order to win re-election or those who were unwilling to admit past mistakes for fear of political consequences. The episodes make it clear however, that it is not simply corrupt DAs that are the problem, but a political environment in which fear of crime is a powerful motivator. In the aforementioned *Law & Order* episode, 'Bad Girl,' a lobbyist threatens to make the execution on Monica Johnson a political issue in the next election if the DA does not listen to his group.

In an episode of *Mister Sterling*, the newly appointed Senator makes a political gaffe by admitting to a reporter that he is opposed to the death penalty in all cases. In order to handle the media circus that ensues, he gives a press conference in which he acknowledges he is in the minority, agreeing that the 72% of American people who support the death penalty are represented by the vast majority of Senators. As he quotes, only three of the one hundred Senators publicly oppose the death penalty. The fictional Mister Sterling, who does not have to worry about actually getting elected, is able to explain, "(l)ook, I'm a realist. I know I'm not going to change many minds on this - but I am not going to change my own mind just to push up my poll numbers" ('State-wide Swing', *Mister Sterling*, 2003). This quote succinctly describes the political difficulties for U.S. politicians working in a far more populist system than their European counterparts.

The overwhelming support for the death penalty in the U.S. was the motivation for the description of capital punishment in a *Law & Order* episode as the 'penicillin of the 90's' ('Aftershock,' *Law & Order*, 1996), referring to the powerful effect authorizing an execution could have on a politician's popularity. In the *Mister Sterling* episode, the Senator received praise not so much for his position on the death penalty, but for his willingness to challenge public opinion. Indeed, the theme of *Mister Sterling* as a programme is that he is the one honest man in Washington because he refuses to 'play politics'. In this episode, he illustrates that refusal on the issue of the death penalty.

The fixed pro- or anti- positions were also seen to be tested by personal experience of a crime or the execution process. In 'Spirit of America', the documentary style episode of *The Practice*, Eleanor Frutt, who is strongly opposed to the death penalty,

discusses the event that forced her to re-evaluate her position on capital punishment. This is a monologue delivered directly to camera, with the character reliving her experience of losing a close friend who became the victim of a violent murder. The scene uses emotion and dramatic timing to provoke a visceral response in the viewer, as Frutt explains how her previously immovable position against the death penalty was seriously shaken:

“My position, if you want to call it that, I usually prefer not to speak in absolutes, but my position has changed somewhat over time. No, actually I know exactly when my position changed, April 27, 1991, when my very best friend let some guy into her walk up on east 73rd St. in New York... and he followed her upstairs and somehow got her up to the roof and he stabbed her and he killed her. Anyway, before Lisa’s death I was fervently anti-death, I mean loudly anti-death. I would have bumper stickers on my car- if I had a car. But you know, when I think of Lisa, so frightened up on that roof. She wanted to have kids you know? And then I think of him, the butt wipe that killed her, and how he must have smiled to have such a pretty girl with him on that roof. Actually my position hasn’t changed - but let’s just say I have a car now, no bumper stickers”.
(‘Spirit of America’, *The Practice*, 1998).

Although, in the end, the character continues to oppose the death penalty, her experience of having been close to a victim of violence had forced her face her own desires for revenge and given her more understanding of a pro-death penalty view. The scene explores the inherent complexities of the death penalty, the continued tension between philosophical and moral ‘rights’ and real-life demands for revenge and justice.

One of the advantages that fiction has over television news is its ability to ‘gain access’ to the execution, from the hours leading up to the event spent with family and clergy, to the last meal, to the walk to the chamber to the execution itself. These moments have profound emotional impact. In *The Practice*’s ‘Spirit of America’ the viewer meets Randy Jefferson, the condemned man through the eyes of Jimmy Berlutti, the one member of the legal team who supports the death penalty. Over the course of the episode Jimmy’s support for the execution of Randy Jefferson wanes as he watches Randy prepare for his own death. As Jimmy comes into contact with Randy’s humanity, he becomes more uneasy with the execution. In the end, it is Jimmy who spends the final moments with Randy, hoping to give him some peace before he dies.

The West Wing episode that tackled capital punishment also approached the theme of the human encounter to show the potential challenges to individual opinions about the death penalty. For CJ Craig, the press secretary who is ambivalent about the death penalty, her feelings of doubt stem not from her knowledge of the man who is about to die, but rather from her knowledge about his mother, as well as CJ’s own role in the process. In talking to another White House staffer, she describes the process of the execution: “...the first sign of death will be his hands twitching, after 60 seconds he’ll strain against the straps, his head will have snapped back violently, and after 90

seconds he'll be in convulsions. At 12:04 he will be pronounced dead". The staffer responds by saying she can't get upset about that because he killed two people. CJ responds:

"Me neither, that's what I'm saying me neither, - but at 12:04, cause that's when the warden calls me, it's my job tonight I have to tell the president that Simon Cruz is dead and we're the ones that killed him. So I just wish I didn't know his mother's name was Sophia is all I'm saying".
(*'Take this Sabbath day,' The West Wing*, 2000)

CJ's emotional connection to the condemned, Simon Cruz, stems from her knowledge about his humanity (he has a mother named Sophia) and her own participation in the process of ending his life.

In *Law & Order's* 'Aftershock,' the programme departed from its normal split format and instead began the episode with the execution of a man. The rest of the episode followed the after-effects on each of the characters of having witnessed the execution. It leads the recovering alcoholic detective to fall off the wagon, the faithful and honest young detective into an extramarital affair, the assistant DA into a professional crisis leading her to question her role in the system, while two other characters struggle to come to terms with their role in having a man killed. The episode, which was the season finale, was notable because it avoided the usual legal focus and instead concentrated on the human experience of bearing witness and its impact. While *Law & Order* is often quite cerebral, the 'Aftershock' episode seemed to imply that the reasons for being opposed to the death penalty were not at base logical, but human and emotional.

These examples show how these episodes were able to explore the natural tensions which exist within debates and opinions about the death penalty. Otherwise strongly held views on both sides of the debate can be challenged with personal experiences, whether that is the murder of a close friend, or the first-hand witnessing of the execution procedure.

Conclusions

These fictional television programmes included sophisticated explorations, discussions and heated debates between characters about justifications for the continued use of the death penalty. Whereas television news reports from the same period discussed the issue very minimally, and when they did the focus was on practical considerations of whether the sentence had been applied fairly in specific instances, these episodes included moral, religious, personal and emotional arguments to explore both sides of the debate, as well as reinforcing the messages in news about the flawed system and the resulting miscarriages of justice.

Why do these discussions happen in fiction and not in news? The simplest answer is the norms of objectivity, timeliness, and accuracy which define the news profession,

and preclude the type of discussion that occurs in fiction. Many scholars have pointed to the constructed nature of these 'norms' (Tuchman, 1972; Fishman, 1980; Schudson, 2001), but nevertheless, their powerful influence on the journalistic community continues to shape the news that people receive.

The routines of news mean that executions are frequently placed in the narrow timeframe of the execution itself, failing to place the event in the context of a much longer and more complex process. Carey (1986) discussed the absence of context in so much US news, explaining that the how, who, what, where and when of a news report are relatively transparent whereas the 'why is invisible'. He stated, '(e)xplanations do not lie within events or actions. Rather they lie behind them or are inferences or extrapolations that go well beyond the common sense evidence at hand. Explanation then cuts against the naïve realism of journalism with its insistence on objective fact' (Carey, 1986:167). It would certainly appear that news coverage of the death penalty is affected by these influences.

In comparing fiction and news, there is also the question of the amount of time dedicated to the issue of the death penalty. The programmes we studied were all hour-long dramas, and therefore had more time and flexibility to discuss the complexities of the death penalty question. The scripted nature of events allows the programmes to determine which issues they would like to raise and in ways that are not afforded to news outlets which have to cover actual cases.

In addition, techniques such as background music, camera angles, and close ups act as dramatic cues. They have the ability to raise viewers' emotional responses, engaging them more fully in the narrative. Furthermore the 'actors' in fiction owe their eloquence to scriptwriters who have the privilege of time. Death row inmates, defence attorneys and prosecutors are rarely as attractive and well-spoken as those who appear in television drama.

While episodes included arguments on both sides of the debate, overall the *West Wing*, *The Practice* and *Mister Sterling* all demonstrated an anti-death penalty stance. The *Law & Order* episode did not demonstrate a clearly defined position either way. However, the fact that ten out of eleven episodes displayed opinions so out of line with American public opinion, suggests that television fiction provides a rare space for confronting the status quo. If this is acknowledged, it raises the importance of studying audience reactions. Could these shows actually change opinions? Do viewers dismiss these episodes as examples of liberal Hollywood? Or do they, as we hope, spark conversations in the living room about the issues raised. While the likelihood of a hypodermic needle effect on the audience is highly unlikely, conversations sparked by the episodes are much more likely to lead at least to a re-consideration of individual opinions.

As a final point, it seems appropriate to return to the work of Reiner (2002) as well as Fan *et al.* (2001). The former underlined how news stories about crime consistently paint the criminal justice system in a positive light. But it would seem that news about the death penalty is different. Fan *et al.* (2001) found that increasing discussions in the news media about the flawed death penalty system were contributing to the decline in

support for capital punishment. It appears that news stories are focusing on miscarriages of justice carried out during the practice of the death penalty. This theme is being reinforced in primetime fiction, as these shows are raising other arguments and debates about the continued use of the death penalty. We therefore suggest that these shows need to be considered alongside discussions in the news. While this study is not able to demonstrate any causal link between the content of these shows and attitudes about the death penalty, it seems reasonable to assume that they are being watched within the context of news frames which are already questioning whether the death penalty is being fairly administered. The shows reinforce the message that there are serious flaws in the process, as well as expanding the debate through moral considerations of the death penalty question. By presenting dramatic exemplars for thinking about the death penalty, these shows may contribute to the way people think and talk about capital punishment.

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