HOW TO TALK CRIMEY AND INFLUENCE PEOPLE: LANGUAGE AND THE POLITICS OF CRIMINAL JUSTICE POLICY

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I. INTRODUCTION

Solving the problem of wrongful convictions is not just a legal issue, it is also a political one. Decisionmakers need to be persuaded that a problem exists, that solutions are feasible, and that they ought to expend the energy to identify and implement those solutions. Those seeking change need to understand the politics of policy formation, as well as the policies they wish to implement or alter.

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A critical piece in the politics of the policy puzzle is language—how an issue is understood by both the public and political elites determines whether each will act, and, if so, how. How an issue is perceived determines the range of allies, advocates, opponents, and outcomes in debates around that issue. These understandings are driven by language, such as what an issue is named, the metaphors used, and the terms employed. The language "frames" an issue, which sets the political and policy route the issue will follow. Well-selected language and frames can significantly increase the chance for success in policy disputes, while poorly chosen words and frames can mean near-certain failure. As such, political language and issue framing is hotly contested ground.

This Article examines the role language plays in the construction of political reality. It then looks at policy frames from the perspective of the recent shift in the capital punishment debate nationally, and, finally, offers a potential rhetorical and political path for those advocating changes to the system by which people are prosecuted and convicted.

II. LANGUAGE AND POLICY CREATION

Public policy does not exist in a vacuum. It results from, and is a part of, the larger political environment. This process is rooted in the language we use—our metaphors create our meaning, and our descriptions define our options and outcomes. The policies enacted are the result of the words with which we start. There is no meaningful political world outside of language. As political scientist Murray Edelman writes, "political language *is* political reality; there is no other so far as the meaning of events to actor and spectators is concerned."[1]

1. Murray Edelman, *Political Language and Political Reality*, 18 PS: POL. SCI. & POL. 10, 10 (1985). The notion of language creating political reality is not new. Aristotle considered the role and importance of metaphor in resolving political disputes. Aristotle, *Rhetoric* (Friedrich Solmsen ed., W. Rhys Roberts trans.), *in* THE RHETORICAL TRADITION: READINGS FROM CLASSICAL TIMES TO THE PRESENT 181-91 (Patricia Bizzell & Bruce Herzberg eds., 1990) [hereinafter THE RHETORICAL TRADITION]. Since then, authors ranging from John Locke to Michel Foucault, George Lakoff, Mark Johnson, and countless others have discussed the construction of perceptions, ideas, and political reality and power through language. *See generally* MICHEL FOUCAULT, THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE (A.M. Sheridan Smith trans., Pantheon Books 1972) (describing the history of discourse through archeological analysis); GEORGE LAKOFF & MARK JOHNSON, METAPHORS WE LIVE BY (1980) (demonstrating the power of metaphors in everyday language); John Locke, *An Essay Concerning Human Understanding*, *in* THE RHETORICAL TRADITION, *supra*, at 699-710 (discussing the civil and philosophical uses, abuses, and purposes of language).

Language, in critic Kenneth Burke's terms, frames reality.[2] It creates a "termanistic screen"[3] through which we view events. Burke uses the metaphor of a camera lens to explain his argument—the same photograph of the same scene looks different depending on the filter used on the camera.[4] And, of course, just as the camera lens and filter include information, they also exclude information; one cannot see what is outside of the camera frame or see the photograph in a different light. Language, therefore, is both a *reflection* and a *deflection* of reality.[5]

In policy terms, this construction of reality—both what something is and is not—means that how an issue is described determines what happens to that issue. Communications scholar Julie Andsager explains that "[a] primary function of rhetoric is the manipulation of the public vocabulary to bring about social change."[6] Policies are understood, and thus acted upon, based on how they are *perceived*.[7] Because policy exists in political space, it has no meaningful objective reality outside of politics or language.[8] As political scientists Frank Baumgartner and Bryan Jones write, "every public policy problem is usually understood, even by the politically sophisticated, in simplified and symbolic terms."[9] As such, "it is not the issue itself that matters so much as the public or elite understanding of the

2. Kenneth Burke, *Language as Symbolic Action*, *in* THE RHETORICAL TRADITION, *supra* note 1, at 1034.

3. *Id.* at 1034-40.

4. *Id.* at 1035.

5. *Id.* Just as countless scholars have considered the role of language in the construction of politics, countless scholars have considered the role of language in the construction of our reality. From the allegory of the cave in Plato's *Republic*, see PLATO, THE REPUBLIC 227-35 (Francis MacDonald Cornford ed. & trans., Oxford Univ. Press 1941), through Nietzsche's assertion that truth is a movable force "of metaphors, metonymies, [and] anthropomorphisms," Friedrich Nietzsche, *Truth and Falsity in an Ultramoral Sense*, *in* CRITICAL THEORY SINCE PLATO 636 (Hazard Adams ed., rev. ed. 1992) (1971), to Jean Baudrillard's descriptions of the "hyperreal," JEAN BAUDRILLARD, SIMULATIONS 23-26 (Paul Foss et al. trans., Semiotext(e), Inc. 1983), writers across centuries and academic disciplines have pondered the connection between our world and our language.

6. Julie L. Andsager, *How Interest Groups Attempt to Shape Public Opinion with Competing News Frames*, 77 JOURNALISM & MASS COMM. Q. 577, 578 (2000).

7. *Id.* at 577-78.

8. *Cf. id.* at 589-90 (reaching a similar conclusion after analyzing the recent conflict over partial birth abortion as framed by politicians, political interest groups, and the media).

9. FRANK R. BAUMGARTNER & BRYAN D. JONES, AGENDAS AND INSTABILITY IN AMERICAN POLITICS 26 (1993).

issue."[10]

Considered in this light, the important political fights are not just over what ought to happen and why; they also involve the language of that change. If there is no meaningful political reality outside of or apart from language, the most critical political concerns are over how a policy is described. The control over the language of policy is at least as important as—if not more important than—control over the policy itself. As Baumgartner and Jones write, "definition is at the heart of the political battle."[11]

Language creates and frames reality. It defines policies and policy options, which determines what a policy is and is not, and thus what it can and cannot be.

III. ISSUE FRAMING

Those who want to win policy disputes need to pay close attention to the rhetorical framing of the issue. Smart advocates focus on how the policy is understood as well as on what it is. The most successful advocates are those who consider the political *and* rhetorical landscape, and shape the meaning of an issue so it resonates with those whose support is needed to win a policy goal.[12] Winning, in other words, is not about the end, but, rather, the beginning.

There are numerous examples of the importance of framing across the policy spectrum: how Democrats and Republicans discuss topics such as federal spending[13] and nuclear power[14] are a couple of examples.[15] Clint

10. *Id.* at 42.

11. *Id.* at 29.

12. *See* BAUMGARTNER & JONES, *supra* note 9, at 7 (arguing that policy monopolies are established by "buttressing policy ideas" with "image and rhetoric" and by "convinc[ing] others that the[] [advocated] activities serve . . . lofty goals"). Baumgartner and Jones call these people "policy entrepreneurs." *Id.* at 3-4.

13. *See, e.g.*, William G. Jacoby, *Issue Framing and Public Opinion on Government Spending*, 44 AM. J. POL. SCI. 750, 752, 758-63 (2000) (summarizing the use and impact of government spending rhetoric during the 1992 presidential election).

14. *See, e.g.*, BAUMGARTNER & JONES, *supra* note 9, at 59-82 (chronicling the rise and fall of "the nuclear power policy monopoly" through the lens of issue framing).

15. There is a deep and growing literature on this topic. *See* JOHN W. KINGDON, AGENDAS, ALTERNATIVES, AND PUBLIC POLICIES 131-44 (2d ed. 1995) (discussing criteria that increases the likelihood that an issue will stay at the public agenda forefront). *See generally* BAUMGARTNER & JONES, *supra* note 9, at 59-82 (discussing issue definition and rhetorical framing in American politics). Frank Baumgartner is among the most prolific and important scholars in the field of policy

Bolick, successful effort, which convinced the United States Supreme Court that school vouchers do not violate the Establishment Clause,[16] provided one of the most succinct real-world impacts of intentional agenda setting. After the Court ruled in his favor in 2002,[17] he told *The New York Times*:

> "One of our strategies was to distill the message, not only for the [C]ourt but in the court of public opinion . . . . We wanted to make sure this was seen not as a case about religion but about education. If the [C]ourt perceived it as a religion case, then we would be in serious trouble. If [the Court] saw it as an education case, then we would win."[18]

IV. LANGUAGE, POLICY FRAMING, AND THE DEATH PENALTY

The death penalty debate provides an excellent and relevant case study of issue framing and reframing. While support for capital punishment in the abstract remains relatively high and constant,[19] the

agenda. *See, e.g.*, Frank R. Baumgartner, *Recent Conference Papers and Works-in-Progress*, *at* http://polisci.la.psu.edu/faculty/Baumgartner/papers.htm (last visited Mar. 18, 2005) (collecting much of Baumgartner's recent research and writing).

16. *See* Zelman v. Simmons-Harris, 536 U.S. 639, 662-63 (2002). *See generally* Hannah M. Rogers, Note, *School Vouchers: A Solution to an Educational Crisis or Impermissible Government Involvement in Religion?*, 52 DRAKE L. REV. 821, 833-43 (2004) (outlining the competing arguments before the Supreme Court in *Zelman v. Simmons-Harris*).

17. *See* Zelman v. Simmons-Harris, 536 U.S. at 662-63 (upholding Ohio's school voucher program in the face of an Establishment Clause attack upon its validity).

18. Linda Greenhouse, *Win the Debate, Not Just the Case*, N.Y. TIMES, July 14, 2002, at A4 (quoting Clint Bolick).

19. *See* David W. Moore, *Public Divided Between Death Penalty and Life Imprisonment Without Parole*, GALLUP NEWS SERV., June 2, 2004, *at* http://www.deathpenaltyinfo.org/article.php?scid=23&did=1029) (setting forth various statistics indicating support for the death penalty). Public opinion has, of course, varied over time, but there has been no sustained shift from such support. *Id.* For example, the Gallup Organization found 59% of those surveyed supported the death penalty in 1936 (the first year they asked the question) and in May of 2004, that same organization found 71% supported the death penalty. *Id.* Public support for the death penalty has dropped as low as 42% in 1966 and has risen as high as 80% in 1994. *Id.* Since 2000, support has ranged from a low of 64% to a high of 74%, a time period which has included two presidential elections, the execution of Oklahoma City bomber Timothy McVeigh, the sniper shootings in the Washington, D.C. area, and the terrorist attacks of September 11, 2001. *See id.* (listing numerous survey results during this period).

actual number of people sentenced to death and executed is dropping dramatically.[20] In addition, several governors and state legislatures have considered and implemented moratoria on executions,[21] the United States Supreme Court has limited the classes of people eligible for the death penalty,[22] and the high Court is reviewing more and more state capital convictions.[23] The former Republican Governor of Illinois, George Ryan, suspended executions after a number of wrongful convictions, and ultimately commuted virtually every death sentence to life in prison without parole.[24] Former Maryland Governor Parris Glendening suspended executions in that state,[25] and interim Governor of New Jersey Richard Codey has requested legislation that would prevent executions in New Jersey until the state's capital punishment system is studied for

20. *See, e.g.*, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, CAPITAL PUNISHMENT (2003), *at* http://www.ojp.usdoj.gov/bjs/abstract/cp03.htm (last modified Nov. 14, 2004) (noting that 188 fewer prisoners were sentenced to death in 2003 than in 2002, and that six fewer were executed); DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2004: YEAR END REPORT 1-4, *at* http://www.deathpenaltyinfo.org/DPICyer04.pdf (Dec. 2004) (detailing the swift decline in capital sentences and executions in the past five years).

21. *See, e.g.*, DEATH PENALTY INFO. CTR., CHANGES IN DEATH PENALTY LAWS AROUND THE U.S.: 2000-2005, *at* http://www.deathpenaltyinfo.org/article.php ?did=236&scid=40 (last visited Mar. 18, 2005) (discussing different states' death penalty legislation proposals favoring the suspension and moratorium on executions). Former Illinois Governor George Ryan suspended executions in that state and on his way out of office commuted virtually all death sentences to life without parole. *Id.* Former Maryland Governor Parris Glendening suspended executions in that state, and interim New Jersey Governor Richard Codey has called for a moratorium on executions as well. *Id.* In addition, the North Carolina and Texas legislatures have nearly passed legislation calling for moratoria. *Id.*

22. *See, e.g.*, Roper v. Simmons, 124 S. Ct. 1183, 1200 (2005) (abolishing the death penalty for juvenile offenders); Atkins v. Virginia, 536 U.S. 304, 321 (2002) ("[T]he Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.") (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)).

23. *See* THE DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2004: YEAR END REPORT, *supra* note 20, at 6 (discussing recent cases in which the Supreme Court reevaluated death penalty sentences).

24. Jeff Flock, *'Blanket Commutation' Empties Illinois Death Row*, *at* http://www.cnn.com/2003/LAW/01/11/illinois.death.row/ (Jan. 13, 2003).

25. *See* DEATH PENALTY INFO. CTR., CHANGES IN DEATH PENALTY LAWS AROUND THE U.S.: 2000-2005, *supra* note 21. The current governor, Robert Ehrlich, has lifted the moratorium. Stephen Manning, *Death Penalty Moratorium Ends After Maryland Governor Takes Oath*, *at* http://www.kccall.com/News/2003/0117/Web_News/ 006.html (Jan. 17, 2003).

fairness and accuracy.[26] On the Saturday before the 2004 presidential election, President Bush signed the Justice for All Act[27] into law, which increases funding for DNA testing, increases the rights of victims, and creates safeguards against error in the capital system.[28]

This shift in advocates, allies, and outcomes is not the result of a national shift in attitudes about capital punishment in the moral abstract—that remains largely unchanged—but instead is the result of a redefinition of the death penalty debate through the use of different language. The death penalty, in political terms, has a different meaning now than it did five years ago.[29] It is *about* something else.

Historically, capital punishment has been a moral issue: whether it is appropriate for the state to intentionally take the life of one of its citizens.[30] The new debate, which has led to the dramatic change in policy outcomes, is about another issue entirely: the efficacy of the capital punishment system.[31] The focus has shifted from the ends of executions to the means of prosecution.[32]

In 1999, interest groups and legislators put aside differences on the abstract ends of capital punishment and began to focus on the very real

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26. Robert Schwaneberg, *Codey Supports Death Penalty Moratorium During New Study*, STAR-LEDGER, Dec. 7, 2004, at 1.

27. Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004) (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

28. *See generally id.*; Matt Canham, *Shurtleff Plans DNA-Based Cold Case Task Force*, SALT LAKE TRIB., Nov. 4, 2004, at C5 (noting Utah's efforts to obtain "$13.5 million in federal grant money from the Justice for All [A]ct" to help exonerate the wrongfully convicted and solve cold cases in Utah).

29. *See, e.g.*, Frank R. Baumgartner et al., *An Evolutionary Factor Analysis Approach to the Study of Issue-Definition*, at 13-22, *available at* http://polisci.la.psu.edu/faculty/DeBoef/mpsadraft18_SDB_FB.pdf. (May 11, 2004) (detailing a shift in the meaning of the death penalty through the empirical coding of *New York Times* articles during the past forty years).

30. *See, e.g.*, Jeffrey L. Kirchmeier, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 6-21 (2002) (outlining the history of the death penalty in the United States and highlighting the moral, social, and legal arguments posited by death penalty opponents and proponents); Margaret Jane Radin, *The Jurisprudence of Death: Evolving Standards for the Cruel and Unusual Punishments Clause*, 126 U. PA. L. REV. 989, 1063 (1978) (noting that the death penalty has been a moral issue "for more than a century").

31. TIM JUNKIN, BLOODSWORTH: THE TRUE STORY OF THE FIRST DEATH ROW INMATE EXONERATED BY DNA 271-72 (2004).

32. *Id*.

means by which it is imposed.[33] In the spring of 2000, studies showing the rate at which capital verdicts were overturned were released,[34] as were numerous articles and books on the number of people wrongfully convicted and sentenced to death.[35] A shared understanding emerged among death penalty supporters and opponents of the common need to focus on these very real and very frightening flaws in the capital system. Having innocent people on death row meant increased doubt and fear for victims' families.[36] Shoddy trials done cheaply meant more appeals and higher costs to taxpayers.[37] Also, the public trust, which is critical to the success of the entire system, was jeopardized.[38] A broken system was in the best interest of no one, and improving that system clearly helped everyone involved. Federal legislation, which began as the bipartisan Innocence Protection Act in 2001,[39] became law in 2004 as part of the Justice for All Act[40] with overwhelming bipartisan support from a range of groups and

33. *See, e.g.*, COORDINATING COUNCIL ON JUVENILE JUSTICE & DELINQUENCY PREVENTION, STATE-BY-STATE DIFFERENCES IN SENTENCING OPTIONS, *at* http://www.ncjrs.org/html/ojjdp/coordcouncil/cc_05.html (Nov. 2000) (indicating how states reevaluated their use of the death penalty).

34. *See, e.g.*, James S. Liebman et al., *A Broken System: Error Rates in Capital Cases, 1973-1995*, *at* http://www.justice.policy.net/jpreport/liebman2.pdf (June 12, 2000) (finding that roughly two out of every three death penalty convictions were reversed due to serious error between the years of 1973 and 1993).

35. For a partial list of publications, see CRIMINAL JUSTICE REFORM EDUC. FUND, DEATH PENALTY IN POP CULTURE, *at* http://ccjr.policy.net/cjedfund/pop/books.vtml (last visited Mar. 18, 2005).

36. *See, e.g.*, Dan Levey, *Wrongfully Convicted: A No-Win Situation for the Victim*, 52 DRAKE L. REV. 695, 695-96 (2004) (presenting a crime victim's perspective on wrongful convictions).

37. *See, e.g.*, DEATH PENALTY INFO. CTR., COSTS OF THE DEATH PENALTY, *at* http://www.deathpenaltyinfo.org/article.php?did=108&scid=7 (Feb. 15, 2005) (comparing the relative costs of death penalty cases with life imprisonment cases in a variety of states).

38. *See, e.g.*, THE JUSTICE PROJECT, CAMPAIGN FOR CRIMINAL JUSTICE REFORM, BIPARTISAN, BICAMERAL BREAKTHROUGH REACHED ON DEATH PENALTY REFORM BILL, *at* http://ccjr.policy.net/proactive/newsroom/release.vtml?id=35267 (last visited Mar. 18, 2005) (discussing the need for death penalty reform "aimed at reducing the risk of error in capital cases"; noting reform packages included within the Innocence Protection Act).

39. Innocence Protection Act of 2001, S. 486, 107th Cong. (2001), H.R. 912, 107th Cong. (2001). A summary of the legislative history of the Act can be found in S. REP. NO. 107-315, at 2-8 (2002).

40. Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004) (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.). The Innocence Protection Act is Title IV of the Justice for All Act of 2004. *See* Justice for All Act of 2004, §§ 401-432, 118 Stat. at 2278-93 (to be codified in scattered sections of 18 and 28

individuals.[41]

The change in policy outcome—a decrease in executions—is a result of the change in focus. Advocates for reform avoided talking about morality, did not discuss whether any one person found guilty of any one crime "deserved" to die, and openly discussed their allies' disagreements about the death penalty.[42] Terms such as "wrongful convictions," "fairness," and "accuracy" steered discussions and debates.[43] A landmark study on error rates in capital cases released in 2000 is entitled *A Broken System: Error Rates in Capital Cases, 1973-1995*[44]—a title that focuses the debate on the means and not the ends. This shift in language (which can be further seen in both popular and elite understandings of the issue, as reflected in mass media and policymaking discussions[45]) clearly departs from the divisive moral issues surrounding capital punishment and creates a new frame through which everyone can see.[46] While a focus on morality entrenched attitudes about capital punishment,[47] a focus on the process has increased doubts and is driving the number of death sentences down.[48]

U.S.C.).

41. *See, e.g.*, 150 CONG. REC. S11609-01 (daily ed. Nov. 19, 2004) (statement of Sen. Leahy) (commenting on the bipartisan support for the adoption of Innocence Protection Act measures into portions of the Justice for All Act of 2004).

42. *See, e.g.*, THE JUSTICE PROJECT, CAMPAIGN FOR CRIMINAL JUSTICE REFORM, REASONABLE PEOPLE AGREE . . . REFORM IS NEEDED, *at* http://ccjr.policy.net/proactive/ newsroom/release.vtml?id=20220 (last visited Mar. 18, 2005) (listing the common concerns of prominent public figures on both sides of the political and ideological spectrum).

43. *See, e.g.*, Kenneth C. Frazier, *"Dying for Representation": Promoting Justice Through Pro Bono Participation*, 35 U. TOL. L. REV. 523, 532-33 (2004) (noting that the number of death row inmates who are found innocent casts doubt on the accuracy and fairness of our criminal justice system); Myrna Raeder, *What Does Innocence Have to Do with It?: A Commentary on Wrongful Convictions and Rationality*, 2003 MICH. ST. L. REV. 1315, 1316 (stating that Americans "can no longer put [their] collective heads in the sand, reciting the traditional mantra that the American jury system is error free").

44. Liebman et al., *supra* note 34.

45. *See, e.g.*, Frank R. Baumgartner, *From "Justice" to Mistake: Changing Public Understandings of the Death Penalty in the United States* (Nov. 22, 2004), *at* http://polisci.la.psu.edu/faculty/Baumgartner/IUE_Nov_22_2004.pdf (setting forth a quantitative analysis of this shift in issue framing).

46. *See id*. (describing a change in focus with respect to the death penalty from moral issues to issues of fairness and a focus on the defendant).

47. *See supra* note 30 and accompanying text.

48. *See* Adam Liptak, *Number of Inmates on Death Row Declines as Challenges to Justice System Rise*, N.Y. TIMES, Jan. 11, 2003, at A13 (stating that "public discomfort with the administration of the system" has led to a decline in the

Referring to the declining number of death sentences, Adam Liptak explains that "[d]espite enduring and strong popular support for the death penalty, these numbers suggest that those directly involved in the justice system have serious concerns about the way capital punishment is carried out."[49] The issue of capital punishment underwent a redefinition and reframing between 1999 and 2004, and, as a result, the policy outcomes are changing dramatically.

Another outcome of the reframing of the death penalty debate has been a shifting of traditional alliances in the criminal justice landscape. The reframing resulted not just in a change of policy implementation (fewer executions) but also in a new coalition of advocates. The debate over crime and punishment has often put defense attorneys and liberal activists on one side and prosecutors, law enforcement, and victims' families on the other. The framing or definition determined the advocates and set the lines of who would fall where.[50]

Historically, the debate has been about how much and how harshly to punish those accused of crimes,[51] with advocates on each side reinforcing the terms and results of the debate; it has been a debate about outcomes rather than process. Shared interests in the system working efficiently, the reliability of outcomes, and other process questions generally have not been addressed because the debate has been about ends, not means, and traditional alliances have reinforced that framing. The recent reframing has created new alliances with traditional opponents now working

number of death sentences issued).

49. *Id.*; *see also* Kenneth Jost, *Rethinking the Death Penalty*, 11 CQ RESEARCHER 947, 947 (2001) ("While polls still show a solid majority of Americans favor use of the death penalty, critics have made headway with arguments about the fairness and reliability of the system . . . ."); Peter Beinart, *New Life*, NEW REPUBLIC, May 27, 2002, at 6, 6 ("[T]he death penalty debate has shifted from outright abolition—which remains unpopular—to a moratorium; from whether the government has the right to kill to whether it is doing so competently and fairly."). For the results of a controlled experiment testing the argument that the reframing of the death penalty debate has led to changes in attitudes and by extension policy outcomes, see Suzanna De Boef et al., Strategic Framing and Cognitive Response to the Death Penalty 12-26 (Feb. 27, 2005), *available at* http://polisci.la.psu.edu/faculty/Baumgartner/Strategic_Framing.pdf (unpublished manuscript, on file with authors).

50. There are clearly exceptions to this rule. Murder Victims' Families for Reconciliation, a group of murder victim family members, has long opposed capital punishment, but in the popular press and understanding of the issue, victims' family members have traditionally supported the death penalty. *See* Murder Victims' Families for Reconciliation, Inc., *at* http://www.mvfr.org (last visited Mar. 18, 2005) (explaining that the organization's "mission is to abolish the death penalty").

51. *See supra* note 30 and accompanying text.

together.

In addition, the reframing of the death penalty debate has helped shine light on not just the flaws in the capital system but also on the criminal justice system more broadly. If the most scrutinized part of the criminal justice system has been making this many mistakes, the thinking goes, what must the other parts of the system be doing? The alliances developed around the process of the death penalty can be used to address process questions in other parts of the criminal justice system as well.

V. ADVANCING THE CRIMINAL JUSTICE EFFICACY DEBATE

In recent years a series of events have forced a reevaluation of a variety of criminal justice policy areas, primarily at the state level[52]—the Justice for All Act being the notable federal exception.[53] One cause is the redefinition of the capital punishment debate.[54] An examination of the process by which people are sentenced to death revealed numerous errors across the system.[55] These errors are not limited to death penalty cases—problems of snitch testimony, eye witness identification, and corruption are not unique to capital prosecutions.[56]

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52. *See, e.g.*, CTR. ON WRONGFUL CONVICTIONS, DEATH PENALTY REFORM BILL, *at* http://www.law.northwestern.edu/depts/clinic/wrongful/DeathPenaltyReform Bill.htm (last modified Mar. 18, 2004) (discussing the passage of Illinois's death penalty reform bill).

53. *See* Justice for All Act of 2004, Pub. L. No. 108-405, 118 Stat. 2260 (2004) (to be codified in scattered sections of 10, 18, 28, and 42 U.S.C.).

54. *Cf.* Victoria Johnson, Note, *Elemental Facts: Did* Ring v. Arizona *Redefine Capital Sentencing?*, 16 REGENT U. L. REV. 191, 191 (2003-2004) (describing how "[c]apital punishment has been criticized from virtually every angle imaginable[,]" from economists to the courts to the Christian community).

55. *See* CTR. ON WRONGFUL CONVICTIONS, CAUSES & REMEDIES, *at* http://www.law.northwestern.edu/depts/clinic/wrongful/Causes/causes.htm (last modified Oct. 11, 2004) (listing weblinks to various causes of wrongful convictions, such as snitches and false confessions). *See generally* NORTHWESTERN UNIV. SCH. OF LAW, CTR. ON WRONGFUL CONVICTIONS, THE SNITCH SYSTEM: HOW SNITCH TESTIMONY SENT RANDY STEIDL AND OTHER INNOCENT AMERICANS TO DEATH ROW 14, *available at* http://www.law.northwestern.edu/wrongfulconvictions/documents/ SnitchSystemBooklet.pdf (Winter 2004-2005) [hereinafter THE SNITCH SYSTEM] (outlining the major sources of wrongful capital convictions since 1973).

56. *See* Steve Weinberg, *Anatomy of Misconduct*, *at* http://www.publicintegrity.org/pm/printer-friendly.aspx?aid=33 (June 26, 2003) (citing basic examples of misleading eyewitness testimony, fabricated informant testimony, and official corruption such as prosecutors withholding evidence, tampering with witnesses, and giving improper opening statements and closing arguments); *see also* THE SNITCH SYSTEM, *supra* note 55, at 3-13 (citing examples of snitch testimony

This leap from capital to noncapital error has been fueled by a variety of events and by advocacy, including the exposure of noncapital wrongful convictions,[57] state budget shortfalls which force legislators to reexamine expensive incarceration policies,[58] litigation about the unsafe and unsanitary conditions of incarceration,[59] and personal stories.[60]

Yet problems remain and attempts to improve efficacy still face significant political hurdles. How do policymakers—interested in improving the criminal justice system by decreasing the numbers of wrongful convictions and increasing the chances that the guilty will be found guilty—advance their cause?

VI. THE LANGUAGE OF CRIMINAL JUSTICE PROCESS EFFICACY

Following the logic of the Article to this point, the first task is to identify language that will shape the debate so that it may advance in the desired direction.

The metaphors we use and the nouns and verbs we deploy shape the ideas that come after those words.[61] After attending an American Judicature Society (AJS) conference focused on improving the efficacy of the criminal justice system (i.e., increase accuracy of convictions and

resulting in wrongful capital sentences).

57. *See, e.g.*, Weinberg, *supra* note 56 (referring to the media's exposure of noncapital wrongful convictions by publicizing the stories of professional informants).

58. *See, e.g.*, Editorial, *Release More Prisoners and Save Millions for State*, DETROIT NEWS, Jan. 4, 2004, at 12A (explaining that Michigan's corrections budget accounts for almost 25% of that state's general fund).

59. *See, e.g.*, Carla Crowder, *Inmate Gets $90,000 Settlement for Eye Injury*, BIRMINGHAM NEWS, Feb. 20, 2004, at C5 (reporting the story of an inmate who was denied protective goggles for his glass recycling job and subsequently suffered serious eye injury); Steve Visser, *Suit Seeks Oversight Again at Fulton Jail*, ATLANTA J.-CONST., June 22, 2004, at B1 (describing the overcrowded, unsanitary, and unsafe conditions of the Fulton County Jail).

60. *See, e.g.*, INNOCENCE PROJECT, CASE PROFILES, *at* http://www.innocenceproject.org/case/index.php (last visited Mar. 25, 2005) (detailing the personal stories of wrongfully convicted prisoners vindicated through DNA technology).

61. Think about the policy and political implications of terms like "pro choice" versus "pro life" and "late term abortion" versus "partial birth abortion." *See, e.g.*, CELESTE MICHELLE CONDIT, DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE 4 (1990) (describing the forces of social rhetoric in public discourse); Andsager, *supra* note 6, at 579-90 (studying how interest groups develop rhetoric with strong emotive appeal in the area of reproductive rights).

further minimize error),[62] it became clear to me that the initial words chosen by traditional critics of the system make alterations to the system unnecessarily difficult. Similarly, language used by defenders of the status quo creates unneeded obstacles to improvement. This strained sentence demonstrates the difficulty of finding neutral terms.[63]

Below is a speculative example drawn largely from personal experience. This should not be taken as "the way to go," but rather as an informed, suggested path. The research on politics, language, and policy agendas is sound and the literature deep—the basis for the following notion is solid. What is left to be determined is whether or not this is the solution that ought to be pursued; such an answer can only be determined by directed research, including a more thorough review of the relevant literature, candid conversations with all of the participants, and solid quantitative analysis. Should such research be undertaken, and I hope it will be, the following might be an avenue of analysis to examine.

Those who advocate most aggressively for changing the ways in which police lineups are conducted and composite sketches are constructed, for example, say these are important "reforms."[64] They advocate for "criminal justice reform" and work for organizations with the word "reform" in their name.[65] Yet, upon my experiences at recent conferences bringing together

62. American Judicature Society, The Justice Management Institute, The National Judicial College, and the Open Society Institute Conference, Ensuring a Reliable and Effective Criminal Justice System: A Common Quest for Justice, Chapel Hill, N.C. (Dec. 18-20, 2004); American Judicature Society and the Open Society Institute Conference, Innovation in Criminal Justice: A National Conference on Preventing the Conviction of Innocent Persons, Alexandria, Virginia (Jan. 17-19, 2003). For more information on the latter conference, see http://www.ajs.org/ajs/ajs_natl_conf_summ.asp.

63. Following the logic of this Article, there can be no neutral terms. As Burke writes, "[w]e *must* use terministic screens, since we can't say anything without the use of terms; whatever terms we use, they necessarily constitute a corresponding kind of screen; and any such screen necessarily directs the attention to one field rather than another." Burke, *supra* note 2, at 1038. The goal is not always to find the perfectly correct words, but rather to find language that moves everyone in a direction we all want to go.

64. *See, e.g.*, THE JUSTICE PROJECT, CRIMINAL JUSTICE REFORM—BEST PRACTICES: A TOOL KIT, *at* http://ccjr.policy.net/cjreform/modelleg (last visited Mar. 18, 2005) (offering suggestions for criminal justice reform).

65. *See, e.g.*, THE JUSTICE PROJECT, ABOUT THE CAMPAIGN, *at* http://ccjr.policy.net/cjreform/about (last visited Mar. 18, 2005). The Campaign for Criminal Justice Reform "is a national movement focused on addressing flaws in the American justice system." *Id*. The Author of this Article directed this organization from 1999-2004.

representatives from across the criminal justice policy spectrum,[66] it has become clear that "reform" is a word that can stop changes before they start. Reform implies problems, which in turn invites blame. Typically those who get blamed are those whose help is needed to make the advocated changes. As a result, those needed allies are (understandably) reluctant to work together for change. Indeed, few of us are eager to work with our accusers to make ourselves over in the image of those who attack us.

Reform, while seemingly a neutral or even positive word to some, can be heard as a negative word by others. For example, errant teens are (or, at least used to be) sent to "reform" school; those who say churchgoers and priests have strayed are called "reformers" (Martin Luther led the Reformation, which was not done because all was going well in his eyes); political candidates who run on a "reform" platform usually challenge incumbents for corruption and failure.

Not surprisingly, law enforcement representatives at the AJS conferences (which led to, among other things, the production of two important issues of the *Drake Law Review*[67]) urge participants to stop talking about reform since they are the ones to which reform is being directed. Their images are posited as comparable to misguided youth, sinners, and corrupt politicians. Similarly, those advocating for change are reluctant to surrender all critiques of the status quo; after all, why fix something that is not broken? To many, there are serious flaws with the ways in which people are arrested, convicted, tried, and sentenced. In their view, blame must be placed and people punished for their transgressions against justice. Words implying that all is well and we just need to set about making the good guys better make other allies reluctant to participate in the difficult process of creating policy change.

What is needed, therefore, is an initial word or phrase that indicates changes ought to be made, that those changes need to be shared, and that the issue is serious. The term needs to be one that will appeal to elected officials, the media, and other constituencies. "Efficacy," while it may be accurate, is probably not a good term because it is not a word most people use—it is hard to get up in the morning and fight the good fight for increased efficacy. A word suggested by conference participants that may

66. *See supra* note 62. For more information on the conference attendees, see http://www.ajs.org/ajs/ajs_natl_conf_summ.asp.

67. *See Criminal Justice System Reform Symposium*, 53 DRAKE L. REV. 575 (2005); *Wrongful Convictions Symposium*, 52 DRAKE L. REV. 587 (2004).

work was "improvement."[68] This term acknowledges things can get better, but also implies everything is pretty good now. It may also be important to clearly indicate what is being improved to further delineate what advocates are talking about. A well-selected word will obtain the improvement, increase the chances for success, keep needed alliances together, and institutionalize progress.[69]

Given the analysis so far, an appropriate term could be the "process" by which people are convicted. A process is impersonal, apolitical, and ongoing. In addition, it is never perfected; one can always work to make it more efficient and more productive. Improvement also keeps the focus on the process. We can all work to continually *improve* the criminal justice *process*, making it better at achieving our objectives. Importantly, improvement and process set aside disagreement about the end result: punishment itself. Improving the process is a product-neutral phrase that places focus on the operations in the same way that managers improve toasters and automobile assembly lines or the efficiency of driving routes. The process cannot take offense at blame because it is not an independent actor in the politics of policy. This approach allows groups that might bitterly disagree about specific punishments, such as mandatory minimum sentences or the death penalty, to work together on an agreed issue, such as ensuring that whomever is convicted and sentenced is given every reasonable chance of demonstrating his or her innocence. Few advocates in the debate support punishing the innocent and freeing the guilty.

VII. POLICY AGENDAS

Improving the process calls for cooperation among the parts of that process. For example, advocates used to toiling against each other need to cooperate to ensure that what goes on in court works to improve the process. There is a shared interest in improving the quality of the adversarial nature of our justice system by focusing on the elements that go into criminal litigation.

Such cooperative competition is typical elsewhere. For example, every professional sports league has a competition committee in which adversaries—rival team owners—gather to examine and improve the rules

68. *See supra* note 62. This suggestion was made overwhelmingly by law enforcement officers and prosecutors.

69. *See generally* BAUMGARTNER & JONES, *supra* note 9, at 3-38 (describing the importance of institutionalizing policy change).

under which the game is played.[70] Major League Soccer's D.C. United and Real Salt Lake compete fiercely on the soccer field; their games are better because they cooperate on setting the rules of that game, such as who can play, what counts as foul and fair, and how winners are determined. Team officials continually work to improve the process of Major League Soccer. The sport of soccer does not benefit if one side is allowed eleven players on the field and the other thirteen, or if the referee arbitrarily calls penalties against one side and not the other.

The improvement of the process becomes a shared external goal; frustration, anger, and blame become directed not at classes of participants (defense attorneys and prosecutors), but at the rules that govern their interaction.[71] Improving the process takes on fairness and equity rather than competitive advantage as its norm. The current system is one in which opposition is the norm and the sides vie for marginal political and competitive advantage. If cooperation and shared improvement seeking were the norm, the *Drake Law Review* would not have dedicated two of its recent issues to identifying means of decreasing wrongful conviction and proposing other criminal justice system reforms.[72]

Such efforts can also lead to the establishment of formal organizations whose goal is to continue to bring advocates together to seek ways of making the process more efficacious. Establishing an external body made up of the representatives from the constituent parts of the criminal justice system whose charter is to find ways to make error less

70. *See, e.g.*, Dan Daly, *NFL Looks Ahead, Baseball Behind*, WASH. TIMES, Mar. 17, 2005, at C1 (discussing the rule proposals and safety challenges faced by the National Football League and Major League Baseball Competition Committees).

71. I am not naïvely suggesting that in a world of shared norms all would be honey and puppies. There are participants in the process who believe it to be fair as is and see further change as unfairly benefiting one side, others want to maintain the blame-and-punish option to discipline bad actors. Because this is a political process, egos and personalities play a significant role in any action. Indeed, the very act of determining sides in the conversation—prosecutors versus defense attorneys in the adversarial environment of the courtroom, overseen by judges who often have personal or electoral considerations of their own—reinforces division and precludes shared solutions. *See, e.g.*, Edelman, *supra* note 1, at 15 ("For every political problem and ideological dilemma there is a set of statements and expressions constantly in use. In accepting one or another of these a person becomes a particular kind of subject with a particular ideology, role, and self conception . . . .").

72. *See* sources cited *supra* note 67. Indeed, the discussions which lead to these publications would not have been necessary if all of the participants in the process regularly met on their own to identify and implement ways to reform our criminal justice system.

likely continues to put emphasis on continuous improvement for the whole system rather than on marginal advantage for one side or the other.

VIII. CONCLUSION

Scholars have long noted the relationship between language and reality.[73] More recently, researchers have focused and refined this concept and have demonstrated how political language affects both political reality and policy outcomes.[74] Language frames issues, determines possible outcomes, and establishes advocates and adversaries in the policy process. As such, in the words of political scientist E.E. Schattschneider, "the definition of alternatives is the supreme instrument of power."[75]

In the field of criminal justice, an examination of language and framing helps explain the recent dramatic shift in death penalty policies over the past several years. While historically this debate has been about the morality of the ends in the abstract, the new debate is about the accuracy and fairness of capital prosecutions in concrete terms. Instead of focusing on the results of execution, advocates focused on the results of prosecution.[76] Instead of focusing on the conviction of the guilty, advocates focused on the protection of the innocent.[77] Instead of highlighting those who were executed, advocates highlighted those who were exonerated.[78] In creating the new capital punishment debate, the language and framing changed the debate's outcomes as well.[79]

This same model is applicable to the broader topic of noncapital wrongful convictions. Whereas in the past the two sides of the debate bickered over the ends of the process, with new language and a new frame, the two sides can focus on the means of the process.[80] Instead of working toward reform, a goal that draws division and erosive competition, groups can now work toward process improvement (or a similar metaphor): a goal that allows both sides to work together on their shared interest in the means by which people are convicted.

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73. *See supra* Part II.
74. *See supra* Parts II-III.
75. E.E. SCHATTSCHNEIDER, THE SEMI-SOVEREIGN PEOPLE 60 (1960).
76. *See supra* Part IV.
77. *See supra* Part IV.
78. *See supra* Part IV.
79. *See supra* Part IV.
80. JUNKIN, *supra* note 31, at 271-72.