

# Should the Death Penalty Be Abolished?

## Death Penalty Is Morally Justifiable

Advocate: Louis P. Pojman (1935–2005), recently retired from teaching philosophy at the U.S. Military Academy at West Point.

Source: From “Why the Death Penalty is Morally Permissible,” Chapter 3, *Debating the Death Penalty: Should America Have Capital Punishment?* edited by Hugo Adam Bedau and Paul G. Cassell (New York: Oxford University Press, 2005): 51–75.

## Death Penalty Is Morally Wrong

Advocate: Stephen B. Bright, President of the Southern Center for Human Rights; teaches criminal law courses at both Yale and Harvard Law Schools.

Source: “Why the United States Will Join the Rest of the World in Abandoning Capital Punishment,” Chapter 6, *Debating the Death Penalty: Should America Have Capital Punishment?* edited by Hugo Adam Bedau and Paul G. Cassell (New York: Oxford University Press, 2005): 152–182.

Though the death penalty has been abolished in most countries, it remains in effect in the United States, and it remains a topic of fierce disagreement. The classic argument for capital punishment is retributive: blood deserves blood, those who commit murder deserve to die, and justice is not done when a murderer is allowed to live. A more sophisticated argument gives capital punishment a symbolic or expressive function: Capital punishment is the strongest and most appropriate way for society to express its deep abhorrence of the most awful crimes. The argument that capital punishment is an effective deterrent of crime is perennially popular, though it offers little empirical support for its claims. Those opposing capital punishment argue that capital punishment may have an expressive function, but that it

expresses the wrong message: that killing is a solution, and that reform is possible. They also argue that capital punishment is a cruel, unusual, and degrading punishment. Among contemporary abolitionists, there are two prominent arguments: first, that capital punishment is administered in a capricious or racially discriminatory manner; and second, that because of many flaws in the system of justice and the honest mistakes of eyewitnesses, there is grave risk of wrongly executing the innocent.

Louis Pojman's case for capital punishment combines both the deterrence and the retributive arguments; and he insists that even if mistakes are made, we shouldn't give up capital punishment "because of a few possible mistakes in justice in which innocent people are executed. Stephen Bright argues that capital punishment is contrary to the best principles and positive image of the United States; that it is likely to result in executions of the wrongly convicted; that it is administered in an arbitrary, unfair, and racist manner. On some points, Pojman and Bright almost argue past one another: Bright argues that the United States' capital punishment is unfair and subject to serious mistakes, while Pojman argues that capital punishment is still justified even if the system is unfair and makes errors. But on some other key questions—especially on the fundamental question of capital punishment and the message it conveys—they are on a collision course.

### Points to Ponder

- Pojman notes that "abolitionists often make the complaint that the poor get death sentences for murder." In response, Pojman suggests that a death penalty might also be appropriate for white collar criminals who steal millions of dollars from the pension plans of their employees. Is this a fair answer to the abolitionists' complaint?
- The classic argument for capital punishment is retributive: blood for blood, those who commit murder deserve to die, and justice is not done when a murderer is allowed to live. The retributive view is stated by Igor Primoratz:

Capital punishment ought to be retained where it obtains, and introduced in those jurisdictions that have abolished it, although we have no reason to believe that, as a matter of deterrence, it is any better than a very long prison term. It ought to be retained, or reintroduced, for the simple reason: that justice be done in cases of murder, that murderers be punished according to their just deserts.

Many people (including, of course, Primoratz) regard this as a self-evident truth. But what is the *basis* for the claim that murderers *just* deserve to be executed? Is it a gut feeling? A matter of religious faith? An appeal to tradition?

- Based on the high number of mistaken convictions that have been overturned during the last decade—many for prisoners on death row—there seems little doubt that if capital punishment continues, the

that reform is impossible, unusual, and dehumanizing. There are two prominent arguments for abolition: the first is that capital punishment is capricious or arbitrary because of many flaws in the legal system; the second is that there is grave danger that the system will execute both the guilty and the innocent. If mistakes are made, the possibility of miscarriage of justice is a real one. Bright argues that capital punishment is the image of the United States as a nation of the convicted; and that it is a symbol of the law. On some points, Pojman agrees that the U.S. system is flawed, while Pojman insists that the death penalty is unfair and prevents the fundamental principle of a collision course.

claim that only the death penalty suggests that the state is serious about criminals who are employees. Is that a fair claim? Pojman's response is negative: blood does not speak. Justice is not done by the death penalty. The law is stated plainly: "Who so sheddeth man's blood, by man shall his blood be shed." (Genesis 9:6) There is an ancient tradition, going back to biblical times, but endorsed by the mainstream of philosophers, from Aristotle to Thomas Aquinas, from Thomas Hobbes to Immanuel Kant, from Thomas Jefferson, John Stuart Mill, and C. S. Lewis, that a fitting punishment for murder is the execution of the murderer. One prong of this tradition, the *backward-looking* or deontological position, epitomized in Aquinas and Kant, holds that because human beings, as rational agents, have dignity, one who with malice aforethought kills a human being forfeits his right to life and deserves to die. The other, the *forward-looking* or consequentialist, tradition, exemplified by Jeremy Bentham, Mill, and Ernest van den Haag, holds that punishment ought to serve as a deterrent, and that capital punishment is an adequate

wrongly execute some innocent persons along with those who are guilty. If that is true, is that a sufficient reason to halt capital punishment? Pojman argues that abolishing capital punishment because we occasionally make a mistake and execute an innocent person would be like "abolish[ing] the use of fire engines and ambulances because occasionally they kill innocent pedestrians while carrying out their mission." Is that a good analogy? Walter Berns—a supporter of capital punishment—insists that "the criminal law must be made awful, by which I mean inspiring, or commanding 'profound respect or reverential fear.' It must remind us of the moral order by which alone we can live as *human* beings, and in America . . . the only punishment that can do this is capital punishment." Assuming that the death penalty does command "reverential fear," is that an appropriate goal for a democratic society to have toward its laws, or is it more appropriate to a monarchical or tyrannical society?

## Why the Death Penalty Is Morally Permissible

Louis P. Pojman

### Defense of the Death Penalty

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Louis P. Pojman, "Why the Death Policy Is Morally Permissible," from *Debating the Death Penalty: Should America Have Capital Punishment?* edited by Hugo Adam Bedau and Paul G. Hirsch (New York: Oxford University Press, 2005); 51–75. Reprinted with permission from Oxford University Press.

deterrent to prospective murderers. Abolitionists like Bedau and Jeffrey Reiman deny both prongs of the traditional case for the death penalty. They hold that long prison sentences are a sufficient retributive response to murder and that the death penalty probably does not serve as a deterrent or is no better deterrent than other forms of punishment. I will argue that both traditional defenses are sound and together they make a strong case for retaining the death penalty. That is, I hold a combined theory of punishment. A backward-looking judgment that the criminal has committed a heinous crime plus a forward-looking judgment that a harsh punishment will deter would-be murderers is sufficient to justify the death penalty. I turn first to the retributivist theory in favor of capital punishment.

### Retribution

A couple of years ago I spent a long evening with the husband, sister and parents of a fine young woman who had been forced into the trunk of a car in a hospital parking lot. The degenerate who kidnapped her kept her in the trunk, like an ant in a jar, until he got tired of the game. Then he killed her.

Human beings have dignity as self-conscious rational agents who are able to act morally. One could maintain that it is precisely their moral goodness or innocence that bestows dignity and a right to life on them. Intentionally taking the life of an innocent human being is so evil that absent mitigating

circumstances, the perpetrator deserves his own right to life. He or she has to die.

The retributivist holds three propositions: (1) that all murderers deserve to be punished; (2) that the guilty deserve to be punished; (3) that the guilty deserve to be punished in proportion to the gravity of their crime. . . .

Criminals like Steven McArthur, Dahmer, Timothy McVeigh, Bundy (who is reported to have murdered over 100 women) and Mohammed and John Lee (who murdered 12 people in a shooting spree of 2002, have committed heinous offenses and deserve nothing less than capital punishment. No one would say that these criminals deserve anything less than death, and I would not support suggestions of torture but at a minimum, the death penalty seems warranted.

People often confuse punishment with *revenge*. Governor Ryan, who recently commuted the sentences of all the prisoners on death row in the State of Illinois, quotes a letter from Desmond Tutu that "to seek revenge when a life has been lost is not justice." This is not justice. While moral people will not seek revenge for acts of heinous crime, the justification of punishment is not *vengeance*, but *desert*. Vengeance is inflicting harm on someone out of anger because of a wrong done. Retribution is the supported theory that a criminal deserves a punishment in proportion to the gravity of his crime.

the perpetrator for his or her crime. He or she deserves to be punished. The nineteenth-century British philosopher James Fitzjames Stephens thought vengeance was a justification for punishment, arguing that punishment should be inflicted "for the sake of satisfying the feeling of hatred—call it revenge, resentment, or what you will—which the contemplation of such [offensive] conduct excites in healthily constituted minds." But retributivism is not based on hatred for the criminal (though a feeling of vengeance may accompany the punishment). Retributivism is the theory that the criminal *deserves* to be punished and deserves to be punished in proportion to the gravity of his or her crime, whether or not the victim or anyone else desires it. We may all deeply regret having to carry out the punishment, but consider it warranted.

On the other hand, people do have a sense of outrage and passion for revenge directed at criminals for their crimes. Imagine that someone in your family was on the receiving end of violent acts. Stephens was correct in asserting that "[t]he criminal law yields to the passion for revenge in the same relation as marriage to sexual appetite." Failure to punish would no more lessen our sense of outrage than the elimination of marriage would lessen our sexual appetite. When a society fails to punish criminals in a way thought to be proportionate to the gravity of the crime, the danger arises that the public would take the law into its own hands, resulting in vigilante justice, lynch mobs, and state acts of retribution. The outcome is likely to be an anarchistic, insecure state of injustice. As such, retributive punishment stands as a safeguard

for an orderly application of punitive desert.

Our natural instinct is for *vengeance*, but civilization demands that we restrain our anger and go through a legal process, letting the outcome determine whether and to what degree to punish the accused. Civilization demands that we not take the law into our own hands, but it should also satisfy our deepest instincts when they are consonant with reason. Our instincts tell us that some crimes, like McVeigh's, Judy's, and Bundy's, should be severely punished, but we refrain from personally carrying out those punishments, committing ourselves to the legal processes. The death penalty is supported by our gut animal instincts as well as our sense of justice as desert.

The death penalty reminds us that there are consequences to our actions, that we are responsible for what we do, so that dire consequences for immoral actions are eminently appropriate. The death penalty is such a fitting response to evil.

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## Deterrence

The second tradition justifying the death penalty is the utilitarian theory of deterrence. This holds that by executing convicted murderers we will deter would-be murderers from killing innocent people. The evidence for deterrence is controversial. Some scholars, like Thornstein Sellin and Bedau, argue that the death penalty is not a deterrent of homicides superior to long-term imprisonment. Others, such as Isaac Ehrlich, make a case for the death penalty as a significant

deterrent. Granted that the evidence is ambiguous, and honest scholars can differ on the results. However, one often hears abolitionists claiming the evidence shows that the death penalty fails to deter homicide. This is too strong a claim. The sociological evidence doesn't show either that the death penalty deters or that it fails to deter. The evidence is simply inconclusive. But a commonsense case can be made for deterrence.

Imagine that every time someone intentionally killed an innocent person he was immediately struck down by lightning. When mugger Mike slashed his knife into the neck of the elderly pensioner, lightning struck, killing Mike. His fellow muggers witnessed the sequence of events. When burglar Bob pulled his pistol out and shot the bank teller through her breast, a bolt leveled Bob, his compatriots beholding the spectacle. Soon men with their guns, lying next to them were found all across the world in proximity to the corpses of their presumed victims. Do you think that the evidence of cosmic retribution would go unheeded?

We can imagine the murder rate in the United States and everywhere else plummeting. The close correlation between murder and cosmic retribution would serve as a deterrent to would-be murderers. If this thought experiment is sound, we have a *prima facie* argument for the deterrent effect of capital punishment. In its ideal, prompt performance, the death penalty would likely deter most rational criminally minded from committing murder. The question then becomes how do we institute the death penalty so as to have the maximal

deterrent effect without violating rights of the accused.

We would have to get the accused to trial more quickly, the appeals process of the guilty "beyond reasonable doubt." Having DNA evidence makes this more feasible than otherwise. Furthermore, public execution of a convicted murderer would be a reminder that crime does not pay. Public executions of criminals is an efficient way to communicate the message that if you shed innocent blood you will pay a high price.

Former Prosecuting Attorney of the State of Florida, Gernstein, has set forth the commonsense case for deterrence. First, he claims, the death penalty deters the murderer from committing further murders, including those he might commit within the prison he is confined. Second, statistics tell us how many potential murderers have refrained from taking their own life through fear of the death penalty. He quotes Judge Hyman of New York: "The death penalty is a warning, just like a lighthouse beaming its beams out to sea. We see shipwrecks, but we do not see the ships the lighthouse guards on their way. We do not know the number of ships it saves nor how many it does not tear the lighthouse down."

Some of the common evidence is anecdotal, as the quotation shows. British Parliamentarian Arthur Lewis once was converted from an abolitionist to a supporter of the death

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[deterrence] to me beyond question, is that there was once a professional burglar in [my] constituency who consistently boasted of the fact that he had spent about one-third of his life in prison. . . . He said to me "I am a professional burglar. Before we go out on a job we plan it down to every detail. Before we go into the boozier to have a drink we say 'Don't forget, no shooters'—shooters being guns." He adds "We did our job and didn't have shooters because at that time there was capital punishment. Our wives, girlfriends and our mums said, 'Whatever you do, do not carry a shooter because if you are caught you might be topped [executed]'. If you do away with capital punishment they will all be carrying shooters."

It is difficult to know how widespread this reasoning is. My own experience corroborates this testimony. Growing up in the infamous Chicago, Illinois, home of Al Capone and the Mafia, I had friends who went to crime, mainly burglary and larceny. It was common knowledge that they stopped short of killing in the act of robbery. A prison sentence could be dealt with—especially with a good lawyer—but being convicted of murder, which at that time included a reasonable chance of being electrocuted, was an altogether different matter. No doubt exists in my mind that the threat of the electric chair saved the lives of some of those who were robbed in my town. No doubt that crimes are committed in the heat of passion or by the temporally

(or permanently) insane, but some are committed through a process of risk assessment. Burglars, kidnappers, traitors and vindictive people will sometimes be restrained by the threat of death. We simply don't know how much capital punishment deters, but this sort of commonsense, anecdotal evidence must be taken into account in assessing the institution of capital punishment. . . .

Gernstein quotes the British Royal Commission on Capital Punishment (1949–53), which is one of the most thorough studies on the subject and which concluded that there was evidence that the death penalty has some deterrent effect on normal human beings. Some of its evidence in favor of the deterrence effect includes these points:

1. Criminals who have committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captor though by killing, escape seemed probable. When asked why they refrained from the homicide, quick responses indicated a willingness to serve life sentence, but not risk the death penalty.
2. Criminals about to commit certain offenses refrained from carrying deadly weapons. Upon apprehension, answers to questions concerning absence of such weapons indicated a desire to avoid more serious punishment by carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty.

3. Victims have been removed from a capital punishment State to a non-capital punishment State to allow the murderer opportunity for homicide without threat to his own life. This in itself demonstrates that the death penalty is considered by some would-be-killers.

Gernstein then quotes former District Attorney of New York, Frank S. Hogan, representing himself and his associates:

We are satisfied from our experience that the deterrent effect is both real and substantial . . . for example, from time to time accomplices in felony murder state with apparent truthfulness that in the planning of the felony they strongly urged the killer not to resort to violence. From the context of these utterances, it is apparent that they were led to these warnings to the killer by fear of the death penalty which they realized might follow the taking of life. Moreover, victims of hold-ups have occasionally reported that one of the robbers expressed a desire to kill them and was dissuaded from so doing by a confederate. Once again, we think it not unreasonable to suggest that fear of the death penalty played a role in some of these intercessions.

On a number of occasions, defendants being questioned in connection with homicide have shown a striking terror of the death penalty. While these persons have in fact perpetrated homicide, we

think that their terror of the penalty must be symptomatic of the attitude of many other types, as a result of which many have been spared . . .

Gernstein notes:

The commissioner of London, England, in his report before the Royal Commission on Capital Punishment, told of armed robbers who were in operations after one of the robbers was sentenced to death. His sentence commuted to life in servitude, but the same robbers banded and disappeared. On a later occasion, two of the convicted of murder and

Gernstein sums up the argument: "Surely it is a common sense based on what is known of human nature, that the death penalty has a deterrent effect particularly on the kinds of murderers. Further, the Royal Commission opined that the death penalty helps to educate the conscience of the whole community, and among many people a quasi-religious sense of awe. In the mind of the community there remains a strong distinction between murder and the death penalty. Certainly one of the factors which restrains some people from murder is fear of punishment. Since people fear death more than anything else, the death penalty is an effective deterrent."

I should also point out that the *retributivist argument* for the death penalty, based on desert, the utilitarian does not have to pre-

the terror of the death penalty may be symptomatic of many others of the kind of which many lives have been sacrificed . . .

notes:

Commissioner of Police of New York, and, in his evidence to the Royal Commission on Capital Punishment, told of a gang of members who continued to murder after one of their members had been sentenced to death and the others were commuted to prison. The same gang had disappeared when the death penalty was introduced, two others were executed, and a third was murdered and hanged.

He sums up his common sense argument as follows: "It is known of many cases that the death penalty has been particularly effective in deterring murderers. Furthermore, the Commission opined, the death penalty would educate the community, and it would give people a quasi-religious feeling in the mind of the public. There is a strong association between murder and the penalty of death. Only one of the reasons why some people fear death more than the death penalty is that the death penalty is a deterrent."

He also points out that the death penalty is a deterrent, and that the argument for the death penalty on desert, the retentionist argument, is that a bomb will blow up the house if you are working in and fail to turn off the gas.

Death penalty deters *better* than long prison sentences, but if the death penalty is deemed at least as effective as its major alternative, it would be justified. If evidence existed that life imprisonment were a *more effective* deterrent, the retentionist might be pressed to defend it on retributive lines alone. My view is that the retentionist argument plus the common sense evidence—being bolstered by the following argument, the Best Bet Argument, strongly supports retention of the death penalty.

The late Ernest van den Haag has set forth what he called the Best Bet Argument. He argued that even though we don't know for certain whether the death penalty deters or prevents other murders, we should bet that it does. Indeed, due to our ignorance, any social policy we take is a gamble. Not to impose capital punishment for first-degree murder is as much a bet that capital punishment doesn't deter as choosing the policy is a bet that it does. There is a significant difference in the betting, however, in that to bet against capital punishment is to bet against the innocent and for the murderer, while to bet for it is to bet against the murderer and for the innocent.

The point is this: We are accountable for what we let happen, as well as for what we actually do. If I fail to teach my children properly so that they are a menace to society, I am to the extent responsible for their bad behavior. I could have caused it to be somewhat better. If I have good evidence that a bomb will blow up the house if you are working in and fail to turn off the gas, I am responsible for your death, if

and when the bomb explodes. So we are responsible for what we omit doing, as well as for what we do. Purposefully to refrain from a lesser evil which we know will allow a greater evil to occur is to be at least partially responsible for the greater evil. This responsibility for our omissions underlies van den Haag's argument, to which we now return.

Suppose that we choose a policy of capital punishment for capital crimes. In this case we are betting that the death of some murderers will be more than compensated for by the lives of some innocents not being murdered (either by these murderers or others who would have murdered). If we're right, we have saved the lives of the innocent. If we're wrong, unfortunately, we've sacrificed the lives of some murderers. But say we choose not to have a social policy of capital punishment. If capital punishment doesn't work as a deterrent, we've come out ahead, but if it does work, then we've missed an opportunity to save innocent lives. If we value the saving of innocent lives more highly than the loss of the guilty, then to bet on a policy of capital punishment turns out to be rational. Since the innocent have a greater right to life than the guilty, it is our moral duty to adopt a policy that has a chance of protecting them from potential murderers. . . .

If the Best Bet Argument is sound, or if the death penalty does deter would-be murderers, as common sense suggests, then we should support some uses of the death penalty. It should be used for those who commit first-degree murder, for

whom no mitigating factors are present, and especially for those who murder police officers, prison guards, and political leaders. Many states rightly favor it for those who murder while committing another crime, such as burglary or rape. It should be used in cases of treason and terrorist bombings. It should also be considered for the perpetrators of egregious white collar crimes such as bank managers embezzling the savings of the public. The savings and loan scandals of the 1980s, involving wealthy bank officials absconding with the investments of elderly pensioners and others, ruined the lives of many people. This gross violation of the public trust warrants the electric chair. Such punishment would meet the two conditions set forth in this paper. The punishment would be deserved and it would likely deter future crimes by people in the public trust. It would also make the death penalty more egalitarian, applicable to the rich as well as the poor.

Let me consider two objections often made to the implementation of the death penalty: that it sometimes leads to the death of innocents and that it discriminates against blacks.

*Objection 1:* Miscarriages of justice occur. Capital punishment is to be rejected because of human fallibility in convicting innocent parties and sentencing them to death. In a survey done in 1985 Hugo Adam Bedau and Michael Radelet found that of the 7,000 persons executed in the United States between 1900 and 1985, 25 were innocent of capital crimes. While some compensation is available to those unjustly imprisoned, the death sentence is irrevocable. We can't

compensate the dead. As John A. Packer, a member of the British Academy, puts it, "If we allow one innocent person to be executed, more innocent people will be committing the same, or, in some cases, a worse crime than the person who committed the murder."

*Response:* Mr. Maxton is right in saying that mistaken judgment is morally the same as murder, for a deliberate killing of the innocent occurs whereas no such intention is involved in wrongful capital punishment.

Sometimes the objection is framed this way: It is better that some criminals go free than to execute an innocent person. If this is the case, call for safeguards, the argument is taken; but somewhere there must be a limit on the tolerance toward capital offenses. Abolitionists argue that it is better that 50 or 100 or 1,000 innocent people go free than that one innocent person be executed? Society has to protect itself from capital offenses even if this means taking a small chance of executing an innocent person. If the basic activity is justified, then it is regarded as morally acceptable, though mistakes are made. Fire trucks regularly kill innocent pedestrians racing to fires, but we regard the losses as justified by the good of the activity of the trucks. We judge the use of automobiles to be acceptable even though such use causes an average of 100 traffic fatalities each year. The morality of a defense is not the morality of a defense though it will result in the death of innocent people.

As John Maxton, a member of the British Parliament, said, "If we know one innocent person has been executed, morally we are obliged, or, in some cases, we are obliged to the person who has been executed."

Maxton is incorrect. A mistaken judicial execution is the same as or worse than a deliberate intentional execution that occurs in a murder trial.

Furthermore, the objection that it is better to let a person live than to execute a person is not a sufficient reason for us to refuse to use the death penalty, if on balance it serves a just and useful function.

Furthermore, abolitionists are simply misguided in thinking that prison sentences are a satisfactory alternative here. It's not clear that we always or typically compensate innocent parties who waste away in prison. . . .

The abolitionist is incorrect in claiming that death is different from long-term prison sentences because it is irrevocable. Imprisonment also takes good things away from us that never be returned. We cannot return to the inmate the freedom or opportunities he or she lost. Suppose an innocent 25-year-old man is given a sentence for murder. Thirty years later the error is discovered and he is released. Suppose he values three years of freedom to every one year of life. Then he would rather live 10 years as a free man than 30 as a prisoner.

Suppose this man's values, the criminal justice system has taken the equivalent of 10 years of life from him. If he lives until he is 65, he has, as far as his quality of life is concerned, lost 10 years, or he may be said to have lived 55 years.

The numbers in this example are arbitrary, but the basic point is sound. If we would prefer a shorter life to a longer one of

low quality. Death prevents all subsequent quality, but imprisonment also irrevocably harms one by diminishing the quality of life of the prisoner.

*Objection 2:* The second objection made against the death penalty is that it is unjust because it discriminates against the poor and minorities, particularly African Americans, over rich people and whites. Stephen B. Bright makes this objection. Former Supreme Court Justice William Douglas wrote that "a law which reaches that [discriminatory] result in practice has no more sanctity than a law, which in terms provides the same." . . .

*Response:* First of all, it is not true that a law that is applied in a discriminatory manner is unjust. Unequal justice is no less justice, however uneven its application. The discriminatory application, not the law itself, is unjust. A just law is still just even if it is not applied consistently. For example, a friend once got two speeding tickets during a 100-mile trip (having borrowed my car). He complained to the police officer who gave him his second ticket that many drivers were driving faster than he was at the time. They had escaped detection, he argued, so it wasn't fair for him to get two tickets on one trip. The officer acknowledged the imperfections of the system but, justifiably, had no qualms about giving him the second ticket. Unequal justice is still justice, however regrettable. So Justice Douglas is wrong in asserting that discriminatory results invalidate the law itself. Discriminatory practices should be reformed, and in many cases they can be. But imperfect practices in themselves do not entail that the laws

The fact that we can err in applying the death penalty should give us pause and cause us to build a better appeals process into the judicial system. Such a process is already in most places in the American and British legal systems. That an occasional error may be made, regrettable though this is not a sufficient reason for us to refuse to use the death penalty, if on balance it serves a just and useful function.

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low quality. Death prevents all subsequent quality, but imprisonment also irrevocably harms one by diminishing the quality of life of the prisoner.

*Objection 2:* The second objection made against the death penalty is that it is unjust because it discriminates against the poor and minorities, particularly African Americans, over rich people and whites. Stephen B. Bright makes this objection. Former Supreme Court Justice William Douglas wrote that "a law which reaches that [discriminatory] result in practice has no more sanctity than a law, which in terms provides the same." . . .

*Response:* First of all, it is not true that a law that is applied in a discriminatory manner is unjust. Unequal justice is no less justice, however uneven its application. The discriminatory application, not the law itself, is unjust. A just law is still just even if it is not applied consistently. For example, a friend once got two speeding tickets during a 100-mile trip (having borrowed my car). He complained to the police officer who gave him his second ticket that many drivers were driving faster than he was at the time. They had escaped detection, he argued, so it wasn't fair for him to get two tickets on one trip. The officer acknowledged the imperfections of the system but, justifiably, had no qualms about giving him the second ticket. Unequal justice is still justice, however regrettable. So Justice Douglas is wrong in asserting that discriminatory results invalidate the law itself. Discriminatory practices should be reformed, and in many cases they can be. But imperfect practices in themselves do not entail that the laws

engendering these practices themselves are unjust. . . .

If we concluded that we should abolish a rule or practice, unless we treated everyone exactly by the same rules all the time, we would have to abolish, for example, traffic laws and laws against imprisonment for rape, theft, and even murder. Carried to its logical limits, we would also have to refrain from saving drowning victims if a number of people were drowning but we could only save a few of them. Imperfect justice is the best that we humans can attain. We should reform our practices as much as possible to eradicate unjust discrimination wherever we can, but if we are not allowed to have a law without perfect application, we will be forced to have no laws at all.

Nathanson argues that the case of death is different. "Because of its finality and extreme severity of the death penalty, we need to be more scrupulous in applying it as punishment than is necessary with any other punishment." The retentionist agrees that the death penalty is a severe punishment and that we need to be scrupulous in applying it. The difference between the abolitionist and the retentionist seems to lie in whether we are wise and committed enough as a nation to reform our institutions so that they approximate fairness. Apparently, Nathanson is pessimistic here, whereas I have faith in our ability to learn from our mistakes and reform our systems. If we can't reform our legal system, what hope is there for us?

More specifically, the charge that a higher percentage of blacks than

whites are executed was once true is no longer so. Many states have made significant changes in sentencing procedures, with the result that now whites convicted of first-degree murder are sentenced to death at a lower rate than blacks.

One must be careful not to get too much into these statistics. The great disparities in statistics may cause us to examine our judicial procedures, they do not in themselves prove injustice. For example, more males than females are convicted of violent crimes (almost 90% of violent crimes are committed by males—a virtually universal fact), but this is not strong evidence that the law is unfair, for there are many biological/psychological explanations for the disparity in convictions. Males are on average and by nature more aggressive (usually tied to testosterone) than females. Simply having a Y chromosome predisposes males to greater violence. Nevertheless, we hold male criminals responsible for their violence and expect them to control themselves. Likewise, there may be good explanations for the fact that a disproportionate number of one ethnic group commit crimes than those of other groups. These are explanations that do not implicate the processes of the judicial system or absolve rational people of their responsibility.

Recently, Governor George Ryan of Illinois, the state with the highest number of death sentences of over 150 death row inmates. Apparently, some of these convicted were convicted on insufficient evidence. If so, their sentences should have been commuted.

ated was once true. Prisoners compensated. Such decisions should be done on a case-by-case basis. If capital punishment is justified, its application should be limited to clear cases in which the guilt of the criminal is "beyond reasonable doubt." But to overthrow the whole system because of a few miscarriages is as unwarranted as it is a loss of faith in our statistics. It is a loss of faith in our judicial system of criminal justice. No one should abolish the use of fire engines because occasionally they kill innocent pedestrians (almost 90% of the time while carrying out their mission). Abolitionists often make the complaint that only the poor get the death sentences for murder. If their statistics are fair, then they deserve the death penalty, but rich murderers are equally deserving. At the moment, only first-degree murder and treason are crimes deemed worthy of the death penalty. Perhaps our notion of treason should be expanded to include those who betray the trust of the public: corporation executives who lose the trust of ordinary people and expect to be forgiven. Likewise, those who, through selfish and disreputable practices, ruin their lives. As I have said above, my proposal is to broaden, not narrow, the application of capital punishment, to include business personnel who harm the public. The execution of the recent corporation scandal who bailed out of sinking Illinois, the state with the most youth, committed suicide while the pension of over 150 dead thousands of employees went apparently, some of them to the bottom of the economic ocean, were convicted or not, they should receive what they deserve. My guess is that the

threat of the death sentence would have a deterrent effect here. Whether it is feasible to apply the death penalty for horrendous white-collar crimes is debatable. But there is something to be said in its favor. It would remove the impression that only the poor get executed.

## Conclusion

... A cogent case can be made for retaining the death penalty for serious crimes, such as first-degree murder and treason. The case primarily rests on a notion of justice as desert but is strengthened by utilitarian arguments involving deterrence. It is not because retentionists disvalue life that we defend the use of the death penalty. Rather, it is because we value human life as highly as we do that we support its continued use. The combined argument based on both backward-looking and forward-looking considerations justifies use of the death penalty. I have suggested that the application of the death penalty include not only first-degree murder but also treason (willful betrayal of one's country), including the treasonous behavior of business executives who violate the public trust.

The abolitionists point out the problems in applying the death penalty. We can concede that there are problems and reform is constantly needed, but since the death penalty is justified in principle, we should seek to improve its application rather than abolish a just institution. We ought not throw out the baby with the dirty bathwater. ■