

A DEFENSE OF THE DEATH PENALTY

By Louis Pojman (2004)

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 main-stream of philosophers, from Plato to Thomas Aquinas, from Thomas Hobbes to Immanuel Kant, 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 or her 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 deterrent to prospective murderers. ... 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 are sufficient to justify the death penalty. I turn first to the retributivist theory in favor of capital punishment.

Retribution

... I remember the grocer's wife. She was a plump, happy woman who enjoyed the long workday she shared with her husband in their ma-and-pa store. One evening, two young men came in and showed guns, and the grocer gave them everything in the cash register.

For no reason, almost as an afterthought, one of the men shot the grocer in the face. The woman stood only a few feet from her husband when he was turned into a dead, bloody mess.

She was about 50 when it happened. In a few years her mind was almost gone, and she looked 80. They might as well have killed her too. ...

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 the perpetrator forfeits his own right to life. He or she deserves to die.

The retributivist holds three propositions: (1) that all the guilty deserve to be punished; (2) that only the guilty deserve to be punished; and (3) that the guilty deserve to be punished in proportion to the severity of their crime. Thomas Jefferson supported such a system of proportionality of punishment to crime. ...

Criminals such as Steven Judy, Timothy McVeigh, Ted Bundy (who is reported to have raped and murdered more than 100 women), and the two men who gunned down the grocer (mentioned in the quotation by Royko, above) have committed capital offenses and deserve nothing less than capital punishment. No doubt malicious acts like the ones committed by these criminals deserve a worse punishment than death, but at a minimum, the death penalty seems warranted.

People often confuse *retribution* with *revenge*. ... While moral people will feel outrage at acts of heinous crimes, the moral justification of punishment is not *vengeance*, but *desert*. Vengeance signifies inflicting harm on the offender out of anger because of what he has done. Retribution is the rationally supported theory that the criminal deserves a punishment fitting to the gravity of his crime. ...

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 the laws should also satisfy our deepest instincts when they are consonant with reason. Our instincts tell us that some crimes, such as 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, and 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.

Deterrence

The second tradition justifying the death penalty is the forward-looking 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. ... However, one often hears abolitionists claiming that 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 common-sense 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, and his compatriots be held 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 USA and everywhere else plummeting. The close correlation between murder and cosmic retribution would surely 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 ... The question then becomes: how do we institute the death penalty in a manner that would have the maximal deterrent effect without violating the rights of the accused?

We would have to bring the accused to trial more quickly, and limit the appeals process of those found guilty "beyond reasonable doubt." Having DNA evidence should make this more feasible than hitherto. Furthermore, public executions of the convicted murderer would serve as a reminder that crime does not pay. Public executions of criminals seem an efficient way to communicate the message that if you shed innocent blood, you will pay a high price. ...

Common sense informs us that most people would prefer to remain out of jail, that the threat of public humiliation is enough to

deter some people, that a sentence of 20 years will deter most people more than a sentence of 2 years, and that a life sentence will deter most would-be criminals more than a sentence of 20 years. I think that we have common-sense evidence that the death penalty is a better deterrent than long prison sentences. For one thing, as Richard Herrnstein and James Q. Wilson have argued in *Crimes and Human Nature*, a great deal of crime is committed on a cost-benefit schema, wherein the criminal engages in some form of risk assessment as to his or her chances of getting caught and punished in some manner. If he or she estimates the punishment to be mild, the crime becomes inversely attractive, and vice versa. The fact that those who are condemned to death generally do everything in their power to get their sentences postponed or reduced to long-term prison sentences, in the way *lifers* do not, shows that they fear death more than life in prison. ...

Former Prosecuting Attorney for the State of Florida, Richard Gernstein, has set forth the common sense case for deterrence. First of all, he claims, the death penalty certainly deters the murderer from any further murders, including those he or she might commit within the prison where he is confined. Second, statistics cannot tell us how many potential criminals have refrained from taking another's life through fear of the death penalty. He quotes Judge Hyman Barshay of New York: "The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships its saves, but we do not tear the lighthouse down."

Some of the common-sense evidence is anecdotal ... Growing up in the infamous Cicero, Illinois, home of Al Capone and the Mafia, I had friends, including a brother, who drifted into crime, mainly burglary and larceny. It was common knowledge that one 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. ...

It seems likely that the death penalty does not deter as much as it could do, because of its inconsistent and rare use. For example, in 1994, there were 23,305 cases of murder and non-negligent manslaughter, and only 31 executions—for a ratio of more than

750 to 1. The average length of stay for a prisoner executed in 1994 was 10 years and two months. If potential murderers perceived the death penalty as a highly probable outcome of murder, would they not be more reluctant to kill? ...

The late Ernest van den Haag set forth what he calls 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 choose 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. ...

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 by others who would have murdered). If we are right, we have saved the lives of the innocent. If we are wrong, we have, unfortunately, 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 we do 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, e.g., burglary or rape. It should also be used for treason and terrorist bombings. It should also be considered for egregious white-collar crimes such as for bank managers who embezzle the savings of the public. ...

Objections to the Death Penalty

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 Maxton, a British Member of Parliament puts it, "If we allow one innocent person to be executed, morally we are committing the same, or, in some ways, a worse crime than the person who committed the murder."

Response: Mr. Maxton is incorrect in saying that mistaken judicial execution is morally the same or worse than murder, for a deliberate intention to kill the innocent occurs in a murder, whereas no such intention occurs in wrongful capital punishment.

Sometimes this objection is framed this way: It is better to let ten criminals go free than to execute one innocent person. If this dictum is a call for safeguards, then it is well taken; but somewhere there seems to be a limit on the tolerance of society towards capital offenses. Would these abolitionists argue that it is better that 50 or 100 or 1,000 murderers go free than that one guilty person be executed? Society has a right to protect itself from capital offenses even if this means taking a tiny chance of executing an innocent person. If the basic activity or process is justified, then it is regrettable, but morally acceptable, that some mistakes are made. Fire trucks occasionally kill innocent pedestrians while racing to fires, but we accept these losses as justified by the greater good of the activity of using fire trucks. We judge the use of automobiles to be acceptable, even though such use causes an average of 50,000 traffic fatalities each year. We accept the morality of a defensive war even though it will result in our troops accidentally or mistakenly killing innocent people. ...

The abolitionist is incorrect in arguing that death is different from long-term prison sentences because it is irrevocable. Imprisonment also takes good things away from us that

may never be returned. We cannot restore to the inmate the freedom or opportunities he or she has lost. Suppose an innocent 25-year-old man is given a life sentence for murder and 30 years later the error is discovered and he is set free. Suppose he values 3 years of freedom to every one year of life. That is, he would rather live 10 years as a free man than 30 as a prisoner. Given 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 estimation is concerned, lost 10 years, so that he maybe said to have lived only 55 years.

The numbers in this example are arbitrary, but the basic point is sound. Most of us would prefer a shorter life of higher quality 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 against rich people and whites. ...

Response: First of all, it is not true that a law that is applied in a discriminatory manner is unjust. ... The discriminatory application, not the law itself, is unjust. ... For example, a friend of mine once got two speeding tickets during a 100-mile trip (having borrowed my car). He complained to the police officer who gave him the 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. ... 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 are themselves are unjust. ...

If we concluded that we should abolish a rule or practice unless we treat 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, but is no longer so. Many states have made significant changes in sentencing procedures, with the result that, currently, whites convicted of first-degree murder are sentenced to death at a higher rate than blacks. ...

The complaint is often made by abolitionists that only the poor get death sentences for murder. If their trials are fair, then they deserve the death penalty, but rich murderers may be 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 have the trust of ordinary people, but who, through selfish and dishonest practices, ruin their lives. My proposal is to broaden, not narrow, the scope of capital punishment, to include businessmen and women who unfairly and severely harm the public. As I have mentioned above, the executives in the recent corporation scandals who bailed out with millions of dollars while they destroyed the pension plans of thousands of employees may deserve severe punishment and, if convicted, they should receive what they deserve. My guess is that the threat of the death sentence would have a deterrent effect in such cases. Whether it is feasible to apply the death penalty to horrendous white-collar crimes is debatable. But there is something to be said in its favor; it would certainly remove the impression that only the poor get executed. ...