
INTRODUCTORY ESSAY

CLASSIC ARGUMENTS FOR AND AGAINST THE DEATH PENALTY

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This death penalty symposium issue is an academic exploration of a wide variety of complex legal issues surrounding capital punishment law. It follows, then, that the authors of the articles examine these issues as academics, regardless of the political fallout from their findings. What this symposium issue is not, therefore, is a pro and con debate about the death penalty's morality, legality, or effectiveness. The organizers of this symposium assume, however, that at least some of our audience at the symposium and the readers of this symposium issue would appreciate having a primer on the classic arguments for and against the death penalty.¹ This is that primer, complete with references to guide readers to more complete information if they choose to pursue it.²

* Professor, Ohio Northern University College of Law; Senior Lecturing Fellow, Duke University School of Law. These materials are taken primarily from VICTOR STREIB, *DEATH PENALTY IN A NUTSHELL* 9-26 (3d ed. 2008).

¹ Symposium attendees did benefit considerably from the oral presentation by Professor Arnold Loewy entitled *The Death Penalty and Innocence*, *Elon Law Review Death Penalty Symposium* (Nov. 21, 2008), based upon his previously published article, *Police, Citizens, the Constitution, and Ignorance: The Systematic Value of Citizen Ignorance in Solving Crime*, 39 *TEX. TECH L. REV.* 1077 (2007).

² An excellent summary of these issues also can be found at LINDA E. CARTER, ELLEN S. KREITZBERG & SCOTT W. HOWE, *UNDERSTANDING CAPITAL PUNISHMENT LAW* 7-16 (2d ed. 2008), and at NINA RIVKIND & STEVEN F. SHATZ, *CASES AND MATERIALS ON THE DEATH PENALTY* 7-19 (2d ed. 2005).

This article sketches broadly the arguments on both sides of this intense societal issue. The major limitation on the scope of the arguments presented and discussed is the focus on issues that are of significance to criminal law. Undoubtedly many other arguments exist, but they are not included here unless our courts and legislatures have relied upon them in some significant manner. These materials were developed for a law review symposium held in a law school, so the restriction to legal issues seems reasonable.

The centuries old debate over the death penalty also dwells on theoretical, philosophical and religious pros and cons.³ However, the issues that arise in the day-to-day operations of the American death penalty system often encompass less lofty but perhaps more troubling concerns. The fundamental question discussed in this article is not whether certain crimes and certain offenders deserve the death penalty. Rather, it is whether we can trust a hodgepodge of loosely connected government agencies to carry out the death penalty in a fair and rational manner.⁴ Sadly, the experience in the United States, as elsewhere, has been that huge, expensive government programs seldom accomplish their perhaps worthy goals, due in large part to the problems that plague our entire society. Therefore, this sketch is of the most common arguments for and against the death penalty, both within criminological and religious theory and within the day-to-day death penalty system actually operating in the real world. The intent is to compare and contrast death penalty jurisprudence with actual practice, particularly seeking the critical junctures at which the best of intentions may fall through the cracks.

I. RETRIBUTION AND SYMBOLISM

The most significant and pervasive justification for the American death penalty is retribution.⁵ The horrible murders for which death is an authorized sentence are so shocking as to inflame strong passions to strike back, to make the murderer suffer as the victims suffered. Al-

³ See, e.g., THE DEATH PENALTY IN AMERICA: CURRENT CONTROVERSIES (Hugo Adam Bedau ed., 1997); and HUGO ADAM BEDAU, DEATH IS DIFFERENT: STUDIES IN THE MORALITY, LAW, AND POLITICS OF CAPITAL PUNISHMENT (1987).

⁴ For more of the author's views on this, see VICTOR STREIB, DEATH PENALTY IN A NUTSHELL (3d ed. 2008).

⁵ See STREIB, *supra* note 4, at 10; see generally Victor L. Streib, *Sentencing Juvenile Murderers: Punish the Last Offender or Save the Next Victim?*, 26 U. TOL. L. REV. 765, 767-68 (1995) (explaining that retribution is currently the only recognized goal of criminal sentencing).

most without fail, prosecuting attorneys in death penalty cases consult the murder victim's friends and family as to what punishment they desire for the offender.⁶ Not surprisingly, the family's extreme grief and anger typically cause them to urge the death penalty. This all-too-human passion is simply a desire for revenge against the person who has wreaked such horrible harm on their friend or family member. Victim family members may also believe that any punishment less than the maximum would not fully recognize and value the extent of their loss.⁷

The other, loftier meaning of retribution is "justice" or "just deserts," essentially, whether one who kills "deserves" to die himself.⁸ This argument often stems from a fundamental religious perspective, such "an eye for an eye."⁹ The notion of a "life for a life" can be found in a wide variety of religions and religious texts, although most major religions today do not condone the death penalty in general.¹⁰ Nonetheless, many pro-death penalty advocates rely very strongly upon this concept of "justice" for the condemned murderer.¹¹

Retribution, however defined, has always been a key part of the foundation of our criminal justice system, not just in the area of the death penalty.¹² Decisions made by legislators, judges, and jurors often rely explicitly or implicitly upon retribution as the justification for their actions. The Supreme Court has held that retribution is one of several acceptable bases for the death penalty,¹³ although some of the Justices thought that basing legal punishments upon retribution is beneath the dignity of the law.¹⁴

⁶ See STREIB, *supra* note 4, at 115.

⁷ See CARTER, *supra* note 2, at 13; FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 59 (2003).

⁸ WAYNE R. LAFAYE, *PRINCIPLES CRIMINAL LAW* 25-28 (2003); WAYNE R. LAFAYE, *CRIMINAL LAW* 29-31 (4th ed. 2003); SANFORD H. KADISH, STEPHEN J. SCHULHOFER, & CAROL S. STEIKER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 90-92 (8th ed. 2007).

⁹ See STEPHEN NATHANSON, *AN EYE FOR AN EYE?: THE MORALITY OF PUNISHING BY DEATH* (1987); CARTER, *supra* note 2, at 11.

¹⁰ See STREIB, *supra* note 4, at 10; see, e.g., *New Voices: Religious, Death Penalty Information Center*, <http://www.deathpenaltyinfo.org/new-voices-religious> (last visited March 19, 2009).

¹¹ See, e.g., Ernest van den Haag, Commentary, *The Ultimate Punishment: A Defense*, 99 HARV. L. REV. 1662 (1986).

¹² See STREIB, *supra* note 4, at 10.

¹³ See *Gregg v. Georgia*, 428 U.S. 153 (1976).

¹⁴ See *id.* at 237 (Marshall, J., dissenting).

Death penalty opponents have provided several responses to these retribution arguments. First, some question whether the victim's friends and family constitute the most appropriate group of persons to make this life-or-death decision.¹⁵ Such a group typically includes persons absolutely devastated by the victim's murder, to the point of being at least extremely emotional and probably somewhat irrational. As sympathetic as we are to such distraught individuals, it is not clear that persons in that state of mind should be making governmental and public policy decisions of such significance. Indeed, the American criminal justice system is based on a premise of decision-making by calm, rational professionals, so incorporating the highly emotional opinions of the victim's family is counter to that premise.

A corollary to the above argument addresses the now common practice of criminal prosecutors to include the recommendation of the victim's family in deciding whether to seek the death penalty.¹⁶ Some jurisdictions even permit a representative of the victim's family to sit at the prosecution's table during trial, as if they are the clients of the prosecuting attorneys.¹⁷ However, this practice blurs a basic difference between a murder case in criminal law and a wrongful death case in tort law. In the latter, the plaintiff's attorney clearly does represent the aggrieved family and is seeking compensation for their loss and for their pain and suffering. However, in a murder case in criminal court, the prosecuting attorney represents the state or federal government and all of the citizens of that jurisdiction.¹⁸ A criminal prosecutor's sworn oath is to seek justice for all of the people, not just retribution for the victim's family.

The rationale of "an eye for an eye" does lend itself to a sense of balance, of tit for tat. Perhaps the offender who takes a life should have his life taken.¹⁹ However, literally making the punishment fit the crime is not found in any other area of criminal law. The car thief is not punished by having his car stolen, the battering husband is not himself battered by the police, and the bank embezzler does not in turn have her bank accounts defrauded. In this literal sense, the punishment is

¹⁵ See STREIB, *supra* note 4, at 11; see also Victor L. Streib, *Sentencing Juvenile Murderers*, *supra* note 5, at 768.

¹⁶ R. MICHAEL CASSIDY, PROSECUTORIAL ETHICS 2-3, 8-9 (2005).

¹⁷ See, e.g., ALA. CODE § 15-14-50 to -57 (2008).

¹⁸ *Id.*

¹⁹ See CARTER, *supra* note 2, at 12.

almost never like the crime, so the argument for taking the life of the killer seems out of context with the rest of criminal law.

Those who oppose this rationale point out that only about one percent of all convicted killers are actually executed while the rest serve various prison sentences.²⁰ Therefore, it appears society has concluded that ninety-nine percent of killers do not “deserve” to die. Even if we doubled or tripled the number of executions, we still would not be executing more than ninety-five percent of all killers. Therefore, almost all convicted killers apparently do not fit the “eye for an eye” formula.

One last version of this “eye for an eye” rationale is that society should treat the offender as the offender treated the victim. The offender didn’t consider the victim’s life to be of value and concern to him, so we shouldn’t consider the offender’s life to be of value and concern to us. Opponents to this rationale point out that the murder of the victim was, obviously, the act of a murderer. A murderer, almost by definition, does not display thoughtfulness, morality and rationality in a decision to take a life. As society debates and deliberates this same life-or-death decision, it seems odd for society to look to the personal standards of murderers for guidance as to how we should act. Most would agree that society’s standards should be considerably loftier than the standards of murderers and would reject any societal deference to the murderer’s level of concern for the victim’s life.

While not a classic justification for criminal punishment, the notion of symbolism plays a major role in American death penalty law.²¹ As a society, we are outraged at our overall murder rate and determined to make a clear statement about it. Our most prominent statement may be to declare that these crimes are so outrageous as to require those who commit them to forfeit their lives at the hands of the state. Whether or not such executions are ever imposed or actually carried out, society has thereby made its values known in the most extreme of measures. Such symbolism also occurs on an individual case basis. Members of a homicide victim’s family and local community typically express disappointment if the death penalty is not sought or obtained in their individual case, somehow equating the severity of the

²⁰ See STREIB, *supra* note 4, at 12; see also Bureau of Justice Statistics, *Capital Punishment, 2007: Statistical Tables*, tbl.4 (2008), <http://www.ojp.gov/bjs/pub/html/cp/2007/tables/cp07st04.htm>.

²¹ See CARTER, *supra* note 2, at 12.

penalty sought or imposed on the offender with a societal assessment as to the inherent value of the victim's life.

The other side of this issue includes the notion that our collective symbolic statements should not demean the value of human life or fall beneath the dignity of the law.²² At the individual case level, opponents argue that the criminal sentencing process is not designed generally to assess the value of the victim's life to the family and community.²³ They also note that executing the killer cannot bring back the victim or provide any lasting comfort to anyone.²⁴ Moreover, to the degree that any members of the victim's family or the community demand the death of the offender as an essential salve for their wounds, opponents simply suggest that this is too extreme and that no form of punishment of the offender would be sufficient to heal their wounds.²⁵

II. INCAPACITATION AND DETERRENCE

A very common and seemingly logical justification given by those who support the death penalty is that executing this convicted murderer will reduce the number of future murders.²⁶ Any criminal sanction which promises to prevent future crime is very attractive, and this

²² See *Gregg v. Georgia*, 428 U.S. 153 (1976) (Brennan, J., dissenting); *Furman v. Georgia*, 408 U.S. 238 (1972) (Brennan, J., concurring); and Carol Steiker, *No, Capital Punishment is Not Morally Required: Deterrence, Deontology, and the Death Penalty*, 58 STAN. L. REV. 751, 773-74 (2005).

²³ "Because victim harm in most instances is intangible, the sentencer can never truly know how much victim harm a capital defendant has inflicted in any particular case." David M. Paul, *Payne v. Tennessee: A Case of Precedents Forgotten*, 54 U. PITT. L. REV. 893 (1993).

²⁴ For example, a father who lost his daughter stated that seeing her murderer put to death "won't help me in the healing process. People talk about execution bringing 'closure.' To hell with 'closure.' My little girl is not coming back, and that's for the rest of my life." Beth E. Sullivan, *Harnessing Payne: Controlling the Admission of Victim Impact Statements to Safeguard Capital Sentencing Hearings from Passion and Prejudice*, 25 FORDHAM URB. L.J. 601, n.138 (1998). See also James R. Acker, *Be Careful What You Ask For: Lessons from New York's Recent Experience with Capital Punishment*, 32 VT. L. REV. 683,724 (2008) ("Dad's violent death mangled my heart In our grief, the state tells us this will help you, but it is the murdered life we want back and in the end, nothing changes that and an execution leaves us silent.").

²⁵ It has been suggested that remorse and apology from the guilty are helpful in healing psychological wounds. See Stephanous Bibas and Richard A. Bierschbach, *Integrating Remorse and Apology into Criminal Procedure*, 114 YALE L.J. 85, 87 (2004).

²⁶ See Cass R. Sunstein, Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 STAN. L. REV. 703, 706 (2005) ("The foundation for our argument is a significant body of recent evidence that capital punishment may well have a deterrent effect, possibly a quite powerful one.")

argument claims the ultimate benefit: saving innocent lives. Unlike retribution's somewhat unsavory taste for some, the prevention argument appeals to everyone.

One basic mode of preventing future crimes by the present offender is to take away his ability to commit them through incapacitation.²⁷ This logic has led to cutting off the hands of pickpockets, castrating rapists, and disbaring lawyers who steal from their clients. Referred to as incapacitating or restraining the offender, these actions will prevent him or her from committing that particular crime at least for a given period of time. The focus of incapacitation is solely upon the future behavior of this specific offender and not upon other potential offenders of a like mind.

Incapacitation is not the same principle as specific deterrence. The latter presumes punishing a past offender sufficiently will convince him to avoid repeating his criminal conduct in the future, not because he can't do it but because he fears more of the detested punishment if he does.²⁸ Incapacitation, in contrast, makes it essentially impossible for the offender to repeat his crimes, not because he fears more punishment but because he is physically unable to commit the crimes. The death penalty serves incapacitation, not specific deterrence. Obviously, a foolproof means of physically preventing a specific killer from ever killing again is to take his life. An executed homicide offender will never kill again. Incapacitation is the one justification that the death penalty serves better than could any other criminal punishment.

Death penalty opponents note that other than the extremely small chance of escape from prison, an imprisoned murderer also is incapacitated, essentially permanently, from committing any murders outside the confines of prison.²⁹ Therefore, it may be that long-term imprisonment is nearly as effective an incapacitant as is the death penalty.³⁰ In

²⁷ LAFAYE, *supra* note 8, at 23-24; KADISH ET AL., *supra* note 8, at 101-05.

²⁸ LAFAYE, *supra* note 8, at 23-25; KADISH ET AL., *supra* note 8, at 92-97.

²⁹ "Regarding deterrence, some studies are 'at most, inconclusive' as to whether the death penalty deters any more than does life imprisonment without parole." Daniel G. Bird, *Life on the Line: Pondering the Fate of a Substantive Due Process Challenge to the Death Penalty*, 40 AM. CRIM. L. REV. 1329, 1369 (2003).

³⁰ "While the facts of *Coker v. Georgia* make a compelling case for the death penalty . . . the facts provide no empirical evidence that death incapacitates or deters any better than life imprisonment." *Id.*

any event, research reveals that murderers are very unlikely to repeat their crimes, so the overall need for an incapacitant is unclear.³¹

In addition to incapacitating the executed offender, death penalty proponents argue that its use will deter the behavior of others.³² The rationale of this principle of general deterrence is that others who were considering committing murders will be frightened away from that behavior due to the threat of being executed for their murders. The appeal of this principle is that it is basically intuitive; a credible threat of being killed if you do something arguably would make anyone think twice before doing it. General deterrence is very popular in political campaigns as well, with almost all political candidates espousing their personal belief that the death penalty is a deterrent.³³

This general deterrence principle assumes, of course, such things as (1) your knowledge of the death penalty's existence, (2) your belief that you will be caught and convicted for your acts, (3) your calculation that you would be within the one percent of convicted killers who are actually executed, and, finally, (4) your engaging in this careful cost/benefit analysis before you pull the trigger. Here is where this very seductive theory may break down in practice. An enormous amount of academic research has been performed around this thesis, and the results are still being debated.³⁴ However, the vast majority of criminologists interpret this research as indicating that the death penalty is no greater general deterrent of the behavior of other potential murderers than is long-term imprisonment.³⁵ It appears that most murderers don't tend to think before they act but do have an unrealistic view of their ability to escape arrest and conviction. In any event, fear of spending the rest of one's life in prison seems more than sufficient to provide the deterrent effect needed.

³¹ "Studies that have addressed [repeat homicides] have uniformly found that the probability of a convicted murderer repeating her crime is minute." Glenn L. Pierce and Michael L. Radelet, *The Role and Consequences of the Death Penalty in American Politics*, 18 N.Y.U. REV. L. & SOC. CHANGE 711, 716 (1991).

³² Sunstein, *supra* note 26.

³³ "Politicians are often quick to use some version of the deterrence rationale . . . when they see such appeals as a promising way to attract votes." Michael L. Radelet and Ronald L. Akers, *Deterrence and the Death Penalty: The Views of the Experts*, 87 J. CRIM. L. & CRIMINOLOGY 1, 2 (1996).

³⁴ Carter, *supra* note 2, at 8-9.

³⁵ Radelet & Akers, *supra* note 33, at 8.

Some empirical research on this phenomenon has found that the murder rate goes up, not down, following an execution.³⁶ This finding, dubbed the “brutalization effect,” is essentially that the death penalty stimulates more murders than otherwise would occur. The common explanation for the unexpected result is that the death penalty “brutalizes” the surrounding community, both diminishing respect for life in general and providing the unfortunate example of our highest leaders in public office intentionally taking a person’s life. In any event, despite the professed claims of American political leaders, these research findings indicate that the death penalty does not actually serve a general deterrent function and apparently has the opposite effect.³⁷

III. BIAS, CAPRICE, AND ERROR

Many of the divisions between the pro-death penalty and anti-death penalty camps can be explained by their different perspectives. Pro-death penalty groups tend to focus upon who “deserves” to die from a religious and philosophical perspective, with few if any advocates giving serious consideration to the glaring differences between death penalty theory and actual practice. Anti-death penalty groups tend to focus more upon the serious malfunctions of the real world death penalty system. Both groups oppose bias, caprice, and error in the imposition of the death penalty, but theoretical discussions tend to be much loftier than the actions and decisions of the real world of criminal justice.³⁸

A key fact from the real world is that less than one percent of those who commit homicide are actually executed for their crimes.³⁹ Regardless of the constant drumbeat of media coverage of death penalty issues, the reality is that we almost never actually use it.⁴⁰ If, in fact, this ultimate punishment is to be reserved only for the most egregious

³⁶ WILLIAM J. BOWERS, *LEGAL HOMICIDE: DEATH AS PUNISHMENT IN AMERICA*, 1864-1982, 271-302 (1984).

³⁷ “As states begin to perform executions, the first executions do not deter crime. Instead, they either have no statistically significant effect on the murder rate, or the executions have a brutalization effect, increasing murders.” Joanna M. Shepherd, *Deterrence versus Brutalization: Capital Punishment’s Differing Impacts Among States*, 104 MICH. L. REV. 203, 240 (2005).

³⁸ CARTER, *supra* note 2, at 14-16.

³⁹ The Sourcebook of Criminal Justice Statistics from 2002 states that life, death, and indeterminate sentences account for less than one percent of all incarcerations. Sourcebook of Criminal Justice Statistics Online, <http://www.albany.edu/sourcebook/pdf/sb2002-section5.pdf> (last visited Mar. 18 2009).

⁴⁰ *Id.*

cases, then one would expect those cases to be limited to mass murderers, serial murderers, repeat murderers, etc. However, the hapless few who actually get executed are not the “worst of the worst” of all killers.⁴¹ They tend to be a fairly random selection from all those arrested for homicide, but a selection skewed by race, sex, poverty level, and just the luck of the draw as to who has been their judge, jury, and defense counsel.⁴²

Discrimination is one of the most obvious problems. Research reveals clear and unabashed discrimination based upon race of offender and race of victim.⁴³ That is, black offenders who kill white victims are several times more likely to be sentenced to death than white offenders who kill black victims under the same circumstances.⁴⁴ Research during the past two decades has documented that the major racial factor is race of victim.⁴⁵ Nothing in American statutes or case law instructs us to treat the murder of a white victim more harshly than the murder of a black victim, but this is in fact what happens at every stage of the process. Try as we might, race discrimination in the application of the death penalty and throughout the criminal justice system continues to stain our efforts to maintain a fair and evenhanded process.

The death penalty system also discriminates even more sharply on the basis of the sex of the offender, with women almost totally excluded.⁴⁶ Part of this gender differential can be explained by the different kinds of homicide committed by women as compared to those

⁴¹ “It is set up now to try and get the ‘worst of the worst,’ but it does not achieve that. It gets ‘the unluckiest of the worst,’ or maybe ‘the unluckiest of the unlucky’ . . .” Jeffrey L. Kirchmeier, *Rethinking the Death Penalty: Can we Define who Deserves Death?* 24 *PAGE L. REV.* 107, 133 (2003).

⁴² See generally Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 *YALE L.J.* 1835 (1994); Ellen Kreitzberg, *Death Without Justice*, 35 *SANTA CLARA L. REV.* 485 (1995).

⁴³ See *McCleskey v. Kemp*, 481 U.S. 279 (1987); DAVID C. BALDUS, GEORGE WOODWORTH, & CHARLES PULASKI, JR., *EQUAL JUSTICE AND THE DEATH PENALTY* 400-04 (1990).

⁴⁴ David C. Baldus, *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 *CORNELL L. REV.* 1638, 1660 (1998) (“defendants with white victims faced, on average, odds of receiving a death sentence that were 4.3 times higher than the odds of similarly situated defendants whose victims were black.”)

⁴⁵ BALDUS, *supra* note 43, at 154.

⁴⁶ See, e.g., Elizabeth Rapaport and Victor Streib, *Death Penalty for Women in North Carolina*, 1 *ELON L. REV.* 65, 79 (2009).

committed by men, but a residue of gender bias appears to remain.⁴⁷ At bottom, despite the well documented daily violence against women perpetrated mostly by men, it appears that society is less willing to subject women than men to the death penalty.

Poverty level of the offender and victim also determines in part the outcome. That is, an offender from lower economic and social strata who murders a victim from higher economic and social strata stands the greatest chance of being sentenced to death and actually executed.⁴⁸ These and other legally irrelevant factors cause these literally life-and-death decisions to be made in a pervasively discriminatory manner.

Perhaps even more bedeviling than the impact of these various forms of discrimination is the appearance of mere chance and caprice.⁴⁹ Comparing sketches of the crimes and criminals receiving the death penalty with those which receive only prison sentences, it seems impossible to find rational distinctions between the two lists. Many of what seem to be the worst cases end up with prison sentences, while many mid-level, garden variety homicides receive the death penalty.

A major part of this apparent chance and caprice is the luck of the draw. Each capital jury is different, with some juries clearly leaning more toward the death penalty than other juries. Prosecuting attorneys have similar differences as to their interest in the death penalty. Even the same individual prosecutor may see political advantage in seeking the death penalty in one case while not in a nearly identical case falling at a different point in the political term of office. Judges also must keep one eye on the political polls if they face reelection, with several well known examples of judges facing stiff political opposition for their decisions in death penalty cases.⁵⁰ And as one moves around within almost any death penalty state, one can find hot spots and cold spots as

⁴⁷ STREIB, *supra* note 4, at 19; see also Victor Streib, *Women as Perpetrators of Crime: Rare and Inconsistent: The Death Penalty for Women*, 33 *FORDHAM URB. L.J.* 609, 615 (2006) (“[T]he attachment of the death penalty to some kinds of murder and not to other kinds of murder can be expected to produce a disparate impact upon males who kill versus females who kill.”).

⁴⁸ STREIB, *supra* note 4, at 19.

⁴⁹ See *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵⁰ STREIB, *supra* note 4, at 20; see generally Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 75 *B.U.L. REV.* 760 (1995).

to the actual imposition of the death penalty, even though the state law is identical across the entire state.⁵¹

Probably the most important factor in caprice is the defense attorney for the capital defendant.⁵² While the Sixth Amendment guarantees the “assistance of counsel,” the ability, support level, and work ethic of capital defense counsel vary quite widely. A capital defendant’s attorney should be experienced in capital cases, should devote major portions of time and energy to the case, and be aided and supported by legal assistants, investigators, mitigation specialists, and other members of a complete defense team.⁵³ This is the sort of team effort that the prosecuting attorney has, so the defense attorney should have a comparable team.

Only very rarely, however, does the defense team equal the prosecution team in numbers, experience, and funding. Most pro-death penalty advocates have no wish for the defendant to have inadequate counsel, although some have voiced criticisms of defense teams that “try too hard” to avoid the death penalty for their client.⁵⁴ Anti-death penalty advocates regularly claim that the mismatch between prosecution and defense too often results in a denial of a full and fair consideration of the defendant’s guilt and sentence.⁵⁵ Capital defendants with inadequate defense teams may receive the death penalty while an essentially identical case results only in a prison sentence, with the only difference being the quality of the defense attorney.

The ultimate end result of discrimination, caprice, and just plain bad luck can be clear error: convicting and sentencing to death an innocent offender.⁵⁶ The death penalty system is operated and controlled by human beings who are not immune to human error. Innocent people are sentenced to death and, in some cases, actually executed.⁵⁷ Whether for or against the death penalty, almost no one

⁵¹ See, e.g., Anne Blythe, *Death Penalty Filing Details Carson Shooting*, NEWS AND OBSERVER (Raleigh, N.C.), Feb. 15, 2009, at B4.

⁵² Bright, *supra* note 42.

⁵³ WELSH S. WHITE, LITIGATING IN THE SHADOW OF DEATH: DEFENSE ATTORNEYS IN CAPITAL CASES (2006); AMERICAN BAR ASSOCIATION, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES (OCT. 12, 2003) (*reprinted in* 31 HOFSTRA L.REV. 913 (2003)).

⁵⁴ STREIB, *supra* note 4, at 21.

⁵⁵ *Id.*

⁵⁶ MICHAEL RADELET, HUGO ADAM BEDAU & CONSTANCE E. PUTNAM, IN SPITE OF INNOCENCE: ERRONEOUS CONVICTIONS IN CAPITAL CASES 14-19 (1992).

⁵⁷ STREIB, *supra* note 4, at 21.

wants innocent people executed. First is the obvious tragedy of the death of an innocent person, but remember that this also means that the real murderer is still running around loose with no one looking for him.

Over 120 innocent persons have been sent to death row in the current era (since 1973),⁵⁸ and several other states have ordered a moratorium on executions until the causes of these fatal errors are found.⁵⁹ This criticism of the death penalty system may be the most telling politically, and many groups are studying means for improving the accuracy of the system and reducing the number of innocent persons receiving the death penalty. Some death penalty opponents are demanding perfect accuracy before executions can be carried out, but this would be impossible to achieve.⁶⁰ A system operated by human beings operating under intense political pressures is bound to make mistakes, so the more reasonable goal may be to minimize errors rather than to eliminate them. The overarching issue, of course, is how many death penalties for innocent persons are too many?

IV. OTHER CONCERNS

A wide variety of other, perhaps lesser, concerns exist for many people. One broad fear is the continuation of the cycle of violence by our killing those who have killed others.⁶¹ The death penalty is the ultimate legitimization of intentional, premeditated killings, a lesson that is not lost on young and impressionable persons wondering whether “thou shalt not kill” means what it says and whether premeditated killing is really wrong. Pro-death penalty advocates argue that a convicted murderer’s life is not of comparable value as that of the innocent victim, and the only way to show proper respect for the victim’s life is to impose the ultimate penalty upon the murderer who took that life. Death penalty opponents see all life as being of infinite value, and the life-for-a-life premise of the death penalty simply continues the cycle of killing.

This cycle of violence debate is part of a larger concern about the nature of human dignity. Death, obviously, is inevitable, so executing a

⁵⁸ CARTER, *supra* note 2, at 229-48.

⁵⁹ *Id.* at 364; DEATH PENALTY INFORMATION CENTER, THE DEATH PENALTY IN 2008: YEAR END REPORT 2-3 (Dec. 2008).

⁶⁰ James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2134 (2000).

⁶¹ STREIB, *supra* note 4, at 22-23.

convicted murderer simply moves his death to a time somewhat earlier than it otherwise would have occurred. In essence, the death penalty does not require a life-or-death decision; it only imposes an “unnatural” death now in lieu of a “natural” death whenever nature takes its course. Life, at least life forever, is not an earthly option. Death penalty opponents, however, argue that the inevitability of death does not justify the government’s imposition of an “early” death on a convicted offender.

The only major justification for criminal punishment in general that is not commonly given for the death penalty is reform of the offender.⁶² Obviously, in death penalty cases the offender is to be executed instead of being given a lengthy opportunity to reform himself. Note, however, the well established tradition of permitting the condemned prisoner ample opportunity to consult with a religious advisor, typically a Catholic priest or Protestant minister, as execution draws near. Such religious counseling is made available even to those condemned prisoners who previously have shown no interest in religion. This suggests at least some governmental recognition of the prisoner’s need to reform himself religiously before leaving this life. Death penalty opponents nonetheless decry the condemned prisoner’s lost opportunity to engage in fundamental reform and go on to lead a life of meaning and value.

At the other end of the moral spectrum from the value and meaning of human life, an often heard argument for executing the offender is that it saves us the cost of providing room and board in a maximum security facility for the rest of the offender’s life.⁶³ Given the life expectancy of such prisoners and the annual costs of operating our prisons, the total expenditure might well be in the range of a million dollars. The surprising fact is that the death penalty is much more expensive than life imprisonment.⁶⁴ The very long and tedious death penalty process, coupled with the rarity of it ending in actual execution, results in a very high cost per execution. Research in several jurisdictions has shown that the average cost per execution is several million dollars,

⁶² *Id.* at 23.

⁶³ STREIB, *supra* note 4, at 24; see also Victor Streib, *Would You Lie to Save Your Client’s Life? Ethics and Effectiveness in Defending Against Death*, 42 BRANDEIS L.J. 405, 429-30 (2004) (“[Capital] cases are already extraordinarily expensive and rarely result in actual execution, so the price tag per execution in most death penalty states is at least several million dollars, many times what life imprisonment would cost.”).

⁶⁴ CARTER, *supra* note 2, at 16.

much more than the cost of keeping that executed prisoner in prison for several lifetimes.⁶⁵ This is counterintuitive to those who argue that we shouldn't use precious tax dollars to feed and house convicted murderers. It turns out that many more of those tax dollars are required to execute the prisoner than would be needed to keep him in prison.

Another argument over the death penalty stems from the worldwide movement to abolish it. Essentially all developed nations with very much in common with the United States have abandoned the death penalty for domestic crimes, retaining it perhaps only for treason and war crimes.⁶⁶ Among those countries still executing prisoners, China and Iran tend to be the perennial leaders.⁶⁷ These are not countries which we tend to emulate in human rights matters. In addition, several international treaties forbid the application of the death penalty against juveniles, for example.⁶⁸ Our stubborn refusal to abandon the juvenile death penalty until the Supreme Court found it unconstitutional in 2005 had put the United States in conflict with this international law.⁶⁹ The resulting domestic debate was whether we should be persuaded to join the rest of the global community or just continue to do what we think is best, even if we go it alone.

One final point of contention is both of immediate impact and of long-term significance. Advocates of the death penalty point with great concern at violent crime in America, particularly our murder rate.⁷⁰ We want answers, not theories, and we want them now. The death penalty is promised by some as the answer to murder, so it tends to be embraced by much of our society. This strong, emotional need for a "quick fix" for violent crime explains at least part of America's strong faith in the death penalty despite so many rational and factual questions concerning it.

Opponents of the death penalty point out that we are latching onto a "quick fix" for the extremely complex problem of violent

⁶⁵ DEATH PENALTY INFORMATION CENTER, *supra* note 59, at 4.

⁶⁶ ROGER HOOD, *THE DEATH PENALTY, A WORLDWIDE PERSPECTIVE* (3d ed. 2002).

⁶⁷ *Id.*

⁶⁸ STREIB, *supra* note 4, at 25; *see also* Victor Streib, *Emerging Issues in Juvenile Death Penalty Law*, 26 OHIO N.U.L. REV. 725, 735 (2000) (explaining that Article 37(a) of the United Nations Convention on the Rights of the Child provides that, "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences [sic] committed by persons below eighteen years of age[.]").

⁶⁹ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁷⁰ STREIB, *supra* note 4, at 26.

crime.⁷¹ This might be compared to overweight persons who grab at any new weight loss program requiring minimal if any effort on their part. They know in the back of their minds that the probable solution to their weight problem includes regular exercise and a careful diet, but these options seem too daunting. Similarly, strong reliance upon the death penalty may divert us from seeking appropriate, long-term solutions to our violent crime problems. The “exercise and diet” alternative here requires us to face several of society’s toughest problems, and they also may seem too difficult for us to accomplish. However, our reliance upon the death penalty “quick fix” for our violent crime problem diverts us from a sober and realistic approach based upon facts and logic.

⁷¹ STREIB, *supra* note 4, at 19; *see generally* Victor Streib, *Justice for Juvenile Violence*, 1 BARRY L. REV. 1, 2-3 (2000).