

Lesson 12

Capital Punishment/Death Penalty

In the past half-century, the incarceration rate in the United States has increased by a factor of seven. In the United States, many people are in jails, prisons, and under correctional supervision. According to the U.S. Bureau of Justice Statistics, at the end of 2014 (the most recent year for which complete data were available), over 2.2 million people were incarcerated (in federal and state prisons and local jails)—the prison population (for individuals sentenced and not simply held until trial) was about 1.5 million. Including probation and parole, correctional authorities supervised about 6.8 million offenders as of year-end 2014, which was down slightly from a high of almost 7 million in 2011. This means that more than 2 percent of the U.S. population is under some form of correctional supervision (including probation and alternatives to incarceration). In raw numbers, the United States has the world's largest prison population. Of the 10.35 million people in prisons and jails around the world, about 20 percent of them are in American prisons. In more recent years, there has been a slow decline in incarceration rates, due in part to budget pressures on state governments and also due to political pressure to reduce the prison population in light of these startling statistics. But the problem of “mass incarceration” remains a significant one, including racial disparities in incarceration rates. According to the Bureau of Justice Statistics, in 2014, nearly 3 percent of black males were in prison and 1 percent of Hispanic males were in prison (compared to 0.5 percent for non-Hispanic white males). Of those incarcerated, 37 percent were black males; 32 percent were white males; and 22 percent were Hispanic males. Critics have argued that there is something wrong with a society that locks away so many people, many of them people of color.

The public is concerned about crime. Every day, it seems, we hear stories of horrible violence. School shootings, kidnappings, rapes, and other violent crimes flood the headlines. Horrendous crimes have occurred at Columbine, in Colorado; at Virginia Tech; in Newtown, Connecticut; at the Boston Marathon; in San Bernardino, California; in Orlando, Florida and elsewhere. In many cases, the perpetrators of mass atrocity have wound up dead—either killing themselves or being killed by police. If mass murderers are captured alive, is it appropriate to sentence them to death? We tend to assume that police, in the heat of the moment, are entitled to kill dangerous criminals, without a trial, in order to protect themselves or the general public. But can that justification of lethal violence be extended to a justification of the death penalty, which is carried out after a legal trial and subsequent appeals long after the original crime occurred? More and more states are moving to abolish the death penalty. But would the death penalty be justifiable in cases of mass murder or terrorism?

While horrific crimes can make us feel insecure, the good news is that crime, in general, is down in the United States. The murder rate has fallen from 8 per 100,000 in 1995 to 4.5 per 100,000 in 2014. In New York City, the home of more than eight million people, there have even been days in recent years when no one at all has been murdered. Some American cities still have significant crime problems, but nationwide, there is a general downward trend in violent crime. There is also a trend toward less violent forms of punishment. Although American authorities used torture on suspects in the “war on terrorism” following September 11, the Supreme Court has restricted the use of the death penalty (for example, it has forbidden the practice when the convicted is mentally retarded or a minor at the time the crime was committed), and some states have abolished capital punishment altogether. As of early 2016, nineteen states have eliminated capital punishment, including Nebraska, which abolished the death penalty in 2015.

So why is crime down? Experts debate the reasons for this. It may have something to do with economics and opportunities. Or it may have something to do with our massive prison system and the huge numbers of people incarcerated in it. It may have to do with the epidemiology of drug addiction. Or it may have to do with aggressive policing—for example, the use of “stop-and-frisk” techniques. On the other hand, it may have to do with more engaged community policing and grassroots neighborhood activism. Perhaps it has to do with the success of social welfare programs, which provide hope, opportunities, and alternatives to crime and violence. At least one expert, economist Steven Levitt, has claimed that the decline in crime may have something to do with the legalization of abortion, which prevents the birth of unwanted children. A more recent theory is that the decrease in crime may be a result of decreasing levels of lead in the atmosphere. According to this view, the lead produced by old-fashioned leaded gasoline—which causes neurological and behavioral problems—may have produced the rise in violence and deviance that peaked in the 1990s.

Some worry that as we get soft on crime, rates will rise. It could be that rates declined in past decades because so many people are already in prison. Prison reform movements and the use of alternatives to incarceration may impact future crime rates. Some argue that recent data indicating an upswing in crime can be chalked up to sentencing reform and a general tendency toward a lenient crime policy.

For some the argument is simple, in that punishment prevents crime. Some defend the death penalty, for example, by claiming that capital punishment has a strong deterrent effect. Others defend long prison sentences by arguing that this increases public safety by keeping criminals off the street. But utilitarian reasoning can reach different conclusions—if the death penalty does not deter crime, or if there are equally useful (and cheaper) alternatives to incarceration. A different

approach focuses on deontological or natural law claims about the demand for retributive justice and retaliation. The thinking is that maybe murderers simply deserve to be executed, and thieves and rapists deserve long prison sentences. The question of “desert” is quite different from the question of what works. This chapter will consider justifications for punishment such as these. Moral questions abound with regard to punishment. How do we determine appropriate sentences for criminals, converting such disparate crimes as shoplifting, selling drugs, and murder into the common currency of months and years in prison? And while some argue against the death penalty in favor of life imprisonment without the possibility of parole, we may wonder whether it remains useful to keep seventy-year-olds in prison for crimes committed half a century ago. We might also wonder why taxpayer dollars should be used to keep people in prison, feeding and housing them for decades, while the victims of crime have to fend for themselves and pay their bills just like anyone else. Other moral questions might focus on the conditions in prison—for example, whether it is cruel to use solitary confinement in supermax facilities as a way to control the worst criminals. We might also be concerned about the impact of prison or the death penalty on the families and communities of those who are imprisoned or executed. Further, we may consider whether there are ways to rehabilitate criminals and restore communities that are broken by crime.

History

The death penalty, also known as capital punishment, is the infliction of death by the state as punishment for a crime. In the Middle Ages, the purpose of punishment was as much to save the criminal's soul as to protect society from harm. Torture instruments, isolation, hard labor, horrendous living conditions, the gallows, and burning at stake were used to terrorize criminals to the point that they would repent their evil ways and cry out for God's mercy.

During the nineteenth century, public executions were abolished in most of Europe and North America. Rather than abolish the death penalty, however, societies moved executions behind the walls of an impersonal penal system. It wasn't until the mid-twentieth century that there was a worldwide movement to abolish the death penalty.

Death Penalty Today

During the 1980s and 1990s, many countries abolished the death penalty. As of 2011, more than two-thirds of all countries had abolished the death penalty in law or in practice, including all of Western Europe, Canada, Australia, and most Central American, South American, and African countries. The United States is the only Western democracy that still uses the death penalty. Both the United Nations and the European Union support the abolition of the death penalty. The use of the death penalty has been declining worldwide, with 1,252 executions officially recorded in 2007. The overwhelming majority of these executions took place in five countries: China, Iran, North Korea, Yemen, and the United States.

Although the death penalty is permitted in most Islamic countries, the Koran's law of retributive justice or *lex talionis*—"an eye for an eye and a tooth for a tooth"—has been softened to permit the payment of "blood money." The imposition of the Islamic penal code and the death penalty on both Muslims and non-Muslims has become a controversial issue in Malaysia and other Asian countries that have both Islamic and non-Islamic populations.

Unlike Islamic law, Jewish law interprets the Old Testament law of retributive justice to prohibit capital punishment. According to the Jewish Mishnah, it is murder for the courts to execute a person.

Many Christian churches likewise regard capital punishment as being inconsistent with the sanctity of human life. Capital punishment is illegal in almost all Protestant and Catholic

countries, except the United States. The Roman Catholic papal encyclical *Evangelium Vitae* expressly forbids capital punishment. Although the U.S. bishops have issued statements opposing the death penalty, many U.S. Catholics still support capital punishment.

Before the 1970s, there was not much public support for the death penalty in the United States. In a 1971 Roper poll, Americans overwhelmingly responded that society has a duty to reform criminals and give them a second chance. The death penalty was ruled unconstitutional by the U.S. Supreme Court in the 1972 *Furman v. Georgia* case. The Court ruled that the unlimited discretion given to judges and juries to impose the death penalty led to its capricious and arbitrary use.

Between 1967 and 1977, there were no executions in the United States. The escalating violent crime rate in the 1970s led to increasing public support for the death penalty for murder. The media's extensive coverage of the most brutal and horrific cases and the onslaught of violent crime on television and in movies intensified people's fear of and anger over violent crime and their demand for harsher punishment.

In 1976, the U.S. Supreme Court in *Gregg v. Georgia* reversed the earlier ruling, saying that Georgia's new "guided discretion" laws had removed the arbitrariness of sentencing from the death penalty. All but fifteen states reinstated the death penalty.

A decline in violent crime beginning in the late 1990s convinced many Americans that strict punishment, including capital punishment, was the solution to the nation's crime rate.

The number of executions in the United States more than tripled between 1994 and 1999, when ninety-eight people were executed. The year 2002, when there were seventy-one executions, saw the first decrease since 1976 in the number of executions and the number of prisoners under sentence of death. Forty-six executions were carried out in 2010, down from fifty-two in 2009.

The number of prisoners on death row is also decreasing. These rates can be expected to continue declining because of DNA evidence and legislation restricting the imposition of the death penalty.

In 2001, President George W. Bush created military commissions that have the power to impose the death penalty on people convicted of "international terrorism." In 2003, Attorney General John Ashcroft asked lawmakers on Capitol Hill to expand the death penalty to cover people who are accused of perpetrating terrorist activities, even though they may not be directly involved in the actual killings. Thousands of "foot soldiers of terror" have been captured since the passage of the USA Patriot Act on September 11, 2001. So far, no international terrorists have been executed, within the United States at least, under the law.

The United States has the highest incarceration rate in the world, with 1 out of every 133 people in this country in prison. This is five times the rate of any other Western nation. Of the over 2 million people in prison in the United States in 2010, about 3,200 are on death row. Blacks are disproportionately represented both on death row and in the prison population. A black male in the United States has a 1 in 3 chance of being in prison at some time in his life, compared to 1 in 6 for a Hispanic male and 1 in 17 for a white male.

Support for the death penalty for a person convicted of murder began rising in the 1980s and peaked in 1994 at 80 percent. A 2011 Gallup poll reported that support had dropped to 64 percent, the lowest level since 1978. And, if given the option of life imprisonment without parole, support for the death penalty drops to 47 percent. Support for the death penalty among college freshmen is about the same as that found in the general public. Men and white people are more likely than women and black people to favor the death penalty. White people are also more likely to believe that the death penalty is being applied fairly.

Despite continuing support for capital punishment, the vast majority of murderers do not receive the death penalty. Of the approximately 15,000 homicides that occur in an average year in the United States, fewer than 200 convicted murderers are sentenced to death. Of those sentenced to death, the great majority are poor and have to rely on public defenders. While blacks make up only 12 percent of the U.S. population, they represent more than 35 percent of death row inmates. According to Amnesty International, however, the greatest predictive factor in giving the death penalty is not the race of the criminal but the race of the victim. Although blacks and whites are victims of murder in almost equal numbers, 76 percent of death penalties involve white victims.

Philosophers On The Death Penalty

Capital punishment became an issue during the Enlightenment period, with its increasing emphasis on individual rights and the inherent dignity of the individual. According to natural rights ethicist John Locke, the right to life is the primary human right. This right, however, can be forfeited if we violate another person's right to life. Locke writes in his *Second Treatise of Government*:

Every Man hath a right to punish the Offender and be Executioner of the Law of Nature... Thus it is, that every Man in the State of Nature, has a Power to kill a Murderer, both to deter others from doing the like injury, which no Reparation can compensate ... and also to secure Men from the attempts of a Criminal, who having renounced Reason.... hath by the unjust Violence and Slaughter he hath committed upon one, declared War against all Mankind, and therefore may be destroyed as a Lyon or a Tyger, one of those wild Savage Beasts, with whom Men

can have no Society nor Security: And upon this is grounded the great Law of Nature, *Who so sheddeth Man's Blood, by Man shall his Blood be shed.*

The right to punish, including the right to administer the death penalty, is transferred to the state when people enter a social contract. Governments assume the prerogative to punish wrongdoers in order to prevent society from degrading into a state of disorder and anarchy, or what Locke refers to as a "state of nature."

The main objection to capital punishment came from social reformers such as Karl Marx and utilitarian Jeremy Bentham. Bentham opposed punishment in general because it subtracts from the total happiness of the community. He wrote. "All punishment is evil." The deliberate infliction of suffering on a person who has committed an evil, such as murder, he argued, merely adds more evil and suffering to the world. Punishment, therefore, can be justified only if it is the only way to remove an even greater evil.

Not all utilitarians oppose the death penalty. John Stuart Mill believed that the benefits of capital punishment outweighed the harms. In an 1868 speech delivered in the British House of Commons, Mill called the death penalty appropriate for brutal crimes, arguing that it has a deterrent effect.² Both Ernest van den Haag and Hugo Adam Bedau examine the deterrent argument in their readings at the end of this chapter.

Immanuel Kant rejected consequentialist arguments for capital punishment. A murderer must die, he argued, not because of any social benefits but because this is the only way to satisfy the requirement of retributive justice. Kant writes:

The penal law is a categorical imperative; and woe to him who creeps through the serpent-windings of utilitarianism to discover some advantage that may discharge him from the justice of punishment, or even from the due measure of it. ... For if

justice and righteousness perish, human life would no longer have any value in the world ...

But what is the mode and measure of punishment which public justice takes as its principle and standard? It is just the principle of equality, by which the pointer of the scale of justice is made to incline no more to the one side than the other.

It may be rendered by saying that the undeserved evil which any one commits on another, is to be regarded as perpetrated on himself."... If you strike another, you strike yourself; if you kill another, you kill yourself." This is the right of retaliation (*jus talionis*) ... whoever has committed murder must die.

Kant maintained that not only does the state have a right to punish; but wrongdoers also have a right to be punished. Punishment, including the death penalty, affirms the criminals' dignity by acknowledging that they are responsible for their actions. Denying people the right to punishment is to deny that they are rational beings capable of responsibility for their own decisions. As stated earlier some philosophers reject Kant's argument about the death penalty. They argue that other types of punishment can meet these moral requirements.

Marx rejected the Kantian justification of capital punishment based on retributive justice. He argued that an abstract theory, like the theory of retributive justice, is unable to take into account the unfair relations among different groups of people, especially in a capitalist society. Helen Prejean addresses this issue in the reading "Would Jesus Pull the Switch?" at the end of this chapter.

Both Buddhist and Confucian philosophers oppose the death penalty. Buddhists oppose capital punishment because it violates the principle of *ahimsa*, or "no harm." Confucius believed that crime is a symptom of a disordered state. It is the rulers, rather than individual citizens, who have

the most power to advance virtue in society and individuals. Because it is easiest for people to be virtuous when they are living in a just and well-ordered society, a state where there is a problem with crime needs to work on developing social policy that is more conducive to individual virtue and social harmony.

Contemporary philosophers are divided over capital punishment. Van den Haag and Christopher Morris support it. Bedau, Reiman, and Prejean, on the other hand, call for the abolition of the death penalty.

The Death Penalty

One of the most contentious issues for any philosophical conception of legal punishment—whether focused on retribution, deterrence, or some other value—is capital punishment. While the vast majority of developed nations (the United States being a notable exception) have abolished the death penalty, this most extreme form of punishment raises profound moral questions about the nature of punishment itself. Retributivists might be seen to favor capital punishment for murderers as an application of *lex talionis*, but it is hard to see how the death of another person “makes up for” the loss of the victim. Consequentialists may argue that the death penalty deters people from committing murder, but scholars continue to debate the actual deterrent effect of the death penalty.

The outrage, harm, and injustice of murder seem to call for the harshest of punishments, which may be why murder remains one of the only crimes punishable by death (at least in some states within the United States). However, we should note that advocates of restorative justice are often opposed to the death penalty. The U.S. Conference of Catholic Bishops also rejects the death penalty as part of a broader theological and philosophical commitment to a “culture of life.” But retributivist advocates of the death penalty argue that for murder, the only acceptable punishment

is death. The murder victim cannot be restored to life, and it also seems unlikely that the murderer can make amends for his or her crime in the same way that a thief can. Moreover, for some unrepentant predatory criminals—such as those who continue to murder while in prison—execution may be viewed as the only solution. Although the death penalty was once widely used for a variety of crimes, most people now view the death penalty as an extraordinary sort of punishment that requires extra justification. Ethicist Lloyd Steffen argues on natural law grounds that we ought to preserve life and not kill people and that the state ordinarily ought not to kill its citizens. Thus, he maintains that the death penalty requires special justification and that it may no longer be justifiable in contemporary social and political circumstances.

Legal Issues

As mentioned at the outset of this chapter, there is a global trend toward the abolition of the death penalty. According to Amnesty International, in 2021 only 579 people were executed in the eighteen nations that recorded executions. This low number does not include executions in China, which are not publicly reported. Nonetheless, Amnesty maintains that China is “the world’s lead executioner,” estimating that its annual execution number is in the thousands. After China, the largest numbers of executions in 2021 (according to official reports) occurred in Iran (314), Egypt (83), Saudi Arabia (65), Syria (24), Somalia (21), Iraq (17), Yemen (14), and the United States (11). (Amnesty International notes that the numbers may be higher in some countries that conceal or underreport executions—and that in addition to China, there are likely significant numbers of unreported executions in North Korea and Vietnam.)

Capital punishment has a long history in the United States, but by the 1960s, a majority of Americans had come to oppose it. In 1972, the U.S. Supreme Court case *Furman v. Georgia* ushered in a brief moratorium on the death penalty, as the Court found that its imposition had

become too “arbitrary and capricious” and thus violated the Constitution’s ban on cruel and unusual punishment. That ruling also invalidated the use of the death penalty as punishment for the crime of rape. By 1976, however, the country’s mood had again begun to change, and states had established less arbitrary sentencing guidelines. That year, the high court ruled in *Gregg v. Georgia* that the death penalty does not violate the Eighth Amendment’s ban on cruel and unusual punishment. The Court argued that the death penalty is justifiable on both retributivist and deterrence grounds, concluding that it could be “an expression of the community’s belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.” The Court acknowledged that there was no conclusive empirical evidence about the deterrent effect of the death penalty but that it was reasonable to suspect that it might deter.

One interesting ruling returned to the question of whether the death penalty is cruel and unusual punishment. In 2014, federal judge Cormac Carney ruled that the death penalty in California was indeed cruel and unusual because it was so rarely applied. California has the nation’s largest death row population (690 convicts on death row as of January 2022, but the last person California executed was Clarence Ray Allen, in 2006. One reason that California executes so few convicts is that there is ongoing resistance to the death penalty, including legal challenges and difficulty obtaining the drugs for lethal injection. Judge Carney argued that since California exercised the death penalty so infrequently, execution would be the result of arbitrary factors; he concluded that arbitrary executions serve neither a retributive nor a deterrent purpose. Carney’s decision was overturned by the Ninth Circuit Court of Appeals in 2015. In 2016, Californians voted on two referendums and registered basic support for the death penalty. But in 2019, California’s governor, Gavin Newsom, instituted a moratorium on it. In 2022, Newsom ordered

the execution chamber at San Quentin to be dismantled while also transferring prisoners off of San Quentin's death row.

As we mentioned at the outset of this lesson, American states are divided about the death penalty. Currently, twenty-six states and the District of Columbia do not have the death penalty. And the federal use of the death penalty has shifted depending on the political winds. Under former president Trump, there was an increase in federal executions; but under President Biden, there has been a moratorium on federal executions. As of mid-2022, there have been over 1,500 executions in the United States since the death penalty was reinstated in 1976. The largest number of executions has occurred in Texas (with 74 executions as of mid-2022), Oklahoma (with 116), Virginia (with 113), and Florida (with 99). It is worth noting, given its place in this list, that the state of Virginia abolished the death penalty in 2021.

Bias and Fairness¹

Another issue that raises concerns about the death penalty is the evidence of racial bias in death penalty sentencing. A number of sources, including Amnesty International, have indicated that there is racial bias in the death penalty system. The Death Penalty Information Center has collected a number of empirical studies that show racial bias in the death penalty in a number of states². For example, in many states, Black inmates are more likely to receive a death sentence than White inmates especially when the murder victim is White.

Not surprisingly, then, there are significant racial disparities in the number of prisoners executed. Since 1976, the race of the executed is 56 percent White, 34 percent Black, 8 percent Hispanic, and 2 percent other; and 41 percent of the death row population is Black. Compare this to the

¹ Consider reading *Just Mercy* by Bryan Stevenson. It discusses the issues of racial bias that happened in the 1980's in Alabama. His push to get innocent men exonerated and released from Death Row.

² Death Penalty Information Center is a great resource. www.deathpenaltyinfo.org.

general population (based on 2021 data), in which Whites make up 75.8 percent of the population, Hispanics are 18.9 percent, and Blacks constitute only 13.6 percent. Most problematic, perhaps, is the fact that cases resulting in death sentences for interracial murders are quite skewed. Twenty-one White inmates have been executed for murdering a Black victim, but 300 Black inmates have been executed for killing a White victim. One issue of concern has to do with the racial makeup of juries in death penalty cases. Consider the case of Johnny Lee Gates, a Black man who was convicted of murder and sentenced to death by an all-White jury in Georgia in 1976. He served twenty-six years on death row until he was judged to be intellectually disabled and resentenced to life imprisonment without the possibility of parole. In 2020, after DNA evidence was reexamined, Gates's murder conviction was overturned, and he was released from prison. The judge in the case found that "evidence of systematic race discrimination during jury selection in this case is undeniable." These kinds of racial disparities have been employed in abolitionist arguments by scholars and activists such as Angela Davis, who has contended that the racist application of the death penalty is part of an overall pattern of racism that extends back to slavery. For that reason, Davis has called for the abolition of the death penalty.

Other issues related to the death penalty have recently gained public attention, for example, whether persons with intellectual disabilities or juveniles should be executed. In June 2002, in *Atkins v. Virginia*, the U.S. Supreme Court ruled that defendants with intellectual disabilities should not be subject to the death penalty. One practical problem is how to determine when someone has an intellectual disability and to what degree it could exempt that person from the death penalty. In Georgia, for example, the defense must determine beyond a reasonable doubt that a convict has an intellectual disability. This standard is quite strict, requiring substantial proof of disability. Consider the case of Warren Lee Hill, a convicted Georgia murderer with an

IQ of 70. (Those with IQs below 70 are generally regarded as intellectually disabled.) Hill was scheduled to be executed in February 2013, but the execution was stayed hours before it was scheduled to allow courts to review the issue of his mental capacity. His execution was subject to ongoing legal challenges. Hill's lawyers hoped that a 2014 Supreme Court ruling might save him. That decision, *Hill v. Florida*, ruled that IQ alone was not sufficient to prove intellectual disability. Unfortunately for Hill, the ruling did not change the outcome. Hill was executed by the state of Georgia in 2015. Related to the question of mental capacity is the issue of executing juveniles. In March 2005, the U.S. Supreme Court ruled (in *Roper v. Simmons*) that it was cruel and unusual punishment, forbidden by the Constitution, to execute those who were under the age of eighteen when they committed their crimes. (A growing body of biological and psychological evidence suggests that adolescents "lack mature judgment and a full appreciation of the consequences of their actions.") Until this ruling, the United States had been the only remaining country in the world that executed juveniles, as Justice Kennedy explained in the Court's majority decision.

Racial disparities in executions, as well as executions of juveniles and individuals with intellectual disabilities, raise serious questions about the fairness of the death penalty and its application. These cases remind us that concepts such as criminal responsibility and appropriate punishment are complex and highly disputed issues and are all the more so when the punishment being considered is death.

Costs

Death penalty cases are expensive, in terms of both court costs and prison costs. While costs vary from state to state, one analysis from the Death Penalty Information Center in 2009 concludes that "for a single trial, the state may pay \$1 million more than for a non-death penalty trial. But

only one in every three capital trials results in a death sentence, so the true cost of that death sentence is \$3 million. Further down the road, only one in ten of the death sentences handed down may result in an execution. Hence the cost to the state to reach that one execution is \$30 million.”

As noted in our discussion of prisons, costs vary from state to state, and California is one of the most expensive states to imprison people. This translates to a very expensive execution system in California. In a report from 2021, from a committee of the California state legislature, the death penalty costs the state about \$150 million per year. As noted above, California has executed very few people since the death penalty was reinstated in the 1970s. The committee claims “California has executed 13 people at a cost of \$4 billion.” And “it costs at least tens of millions of dollars more each year to house people on death row compared to a non-death row prison setting.” It is not surprising that the committee recommended repealing the death penalty and reducing the size of death row.

Opponents of the death penalty often cite the high cost as an argument against capital punishment. This is certainly a concern for many who are interested in cost-benefit analysis.

Proponents of the death penalty will argue, however, that costs could be controlled by speeding up the trial and appeals process. However, a central reason for the lengthy trials and appeals is to ensure that innocent people are not executed, which is a concern for those interested in the basic idea of retributive justice.

The controversies surrounding the death penalty point to deeper philosophical questions about its justification. Generally, the same two arguments regarding legal punishment—deterrence and retribution—are used in arguments about the death penalty. We will return now to these

rationales and see what considerations would be relevant to arguments for and against the death penalty.

Moral Issues

Deterrence

Some argue that the threat of death is the ultimate deterrent. Deterrence is based on the assumption that the more severe the punishment for an action, the less likely people are to engage in it. If fear of punishment is removed, ordinarily law-abiding citizens may become violent and lawless. Abolitionists of the death penalty point out that studies have not found any connection between the use of capital punishment and the rate of violent crime. Indeed, in Canada, the homicide rate peaked in 1975, the year before the abolition of the death penalty, and continued to decline for the next ten years.⁹ In the United States, by contrast, two of the states with the most executions since 1979 have had an increase in murder rates following the reinstitution of the death penalty. Because capital punishment has not been shown to have a deterrent effect, abolitionists argue, that we are not saving innocent lives, but rather adding to the loss of human life.

Incapacitation

Whereas deterrence has the goal of keeping others from committing similar crimes, incapacitation is aimed at the specific person who was convicted of the crime. The death penalty, it is argued, is the only way to ensure that a murderer will never kill again. Just as people have the right to use lethal force to protect themselves, so too does the government have the right to use the death penalty to protect society from dangerous criminals. Opponents of capital punishment, maintain that life imprisonment, including the use of restraints and the isolation of those who pose a threat to guards and fellow inmates, is sufficient to incapacitate a would-be

repeat murderer. Self-defense justifies the killing of a wrongdoer only during the commission of a violent crime. Several states now have life imprisonment without the possibility of parole as an alternative to the death penalty.

Retributive Justice

Many supporters of the death penalty, state that it doesn't matter whether capital punishment is a deterrent. Retributive justice alone justifies the death penalty. Retribution is not the same as revenge. Revenge is based on a personal desire for retaliation; retribution, on the other hand, is the impersonal carrying out of punishment to "cancel out" an evil act. A person who commits a crime creates a debt that must be paid to society.

One of the underlying principles of retributive justice is proportionality. Retributive justice requires that the severity of the punishment be proportionate to the crime, what is called the "equality of crime and punishment." The only appropriate payment for murder is death. As long as the debt remains unpaid, there is a sort of imbalance in the community or universe—a state of injustice exists until the debt is paid. Kant argues that rather than denying the criminal's worth and dignity, retributive justice assumes moral worth and dignity by acknowledging that the criminal is a rational person who can be held morally responsible for his or her actions.

Some philosophers, question whether there is a moral duty of retribution. How can one act of violence cancel out another? Others argue that the principle of retributive justice does not require an exact fit between the crime and the punishment. We do not rape rapists or burn the homes of arsonists; the deliberate killing of a murderer is also an inappropriate punishment. Instead, the appropriate moral response to wrongdoing is to demand that wrongdoers provide restitution to their victims. The goals of restitution are incompatible with capital punishment because death removes all possibility of victim compensation.

Many opponents of capital punishment question Kant's assumption that retributive justice is required on the grounds that murder is based on a rational decision. Evidence indicates that, rather than being a rational decision, the great majority of murders are carried out impulsively, in the heat of passion, with little deliberation over the possible consequences. If murder is not based on a rational decision, murderers cannot be held morally responsible for their actions. Hence, the requirement of retributive justice that the murderer has a particular state of mind, when applied in practice, rules out capital punishment in most if not all cases.

Human Dignity and the Sanctity of Human Life

Some opponents of capital punishment, claim that all deliberate taking of human life is wrong. The use of the death penalty diminishes the value of human life and lowers us to the level of the criminal. Some also reject the retributivist argument, arguing instead that it is degrading and inconsistent with respect for the dignity of persons. Because humans have intrinsic moral value, it is wrong to deprive them of their lives.

Human Rights and Moral Standing

Both the United Nations and Amnesty International oppose the death penalty because it violates human rights. The human rights argument has also been used to support capital punishment.

Some maintain that humans have certain fundamental rights, such as the right to life; those who violate other people's right to life by murdering them in turn forfeit their right to life. Because they have forfeited this right, capital punishment cannot be said to violate it. In contrast to that some question the logic of this argument, which is known as reciprocity retributivism, concluding that it does not take into account unfairness in society. Rather than setting wrongs right, capital punishment can further perpetuate an unfair status quo that denies certain groups of people full rights.

Distributive Justice and The Principle of Equality

There is concern that capital punishment is unfairly distributed. In the United States, blacks are six times more likely than whites to end up on death row. Poorer defendants are also more likely to get the death penalty because they cannot afford good defense lawyers.

Some opponents of capital punishment argue that it is an extension of the slavery mentality, whereby the death penalty was frequently used on slaves who committed crimes against whites.

They point out that all the states that executed eight or more prisoners in the years since the Supreme Court declared capital punishment to be constitutional were Confederacy states.

In a study of why white Americans support the death penalty more than black Americans, researchers found that in some areas of the United States racial prejudice against blacks is the strongest predictor of support for the death penalty. Furthermore, although all sixteen states that formed the Confederacy have the death penalty, outside of the former slave-owning states most have either abolished it or do not use it even though it is still on the books.

Many maintain the distribution-of-justice argument is irrelevant to capital punishment. The principle of equality requires not the abolition of the death penalty, but that all those guilty of murder- whether white or black—receive it. Even if the death penalty is applied in a discriminatory manner, this does not mean that capital punishment itself is wrong; it means that too many murderers who deserve the death penalty are getting off.

Consequentialist Arguments

Because pain is essential to punishment, consequentialists maintain that punishment is permissible only if it leads to an overall decrease in pain and an increase in pleasure for society. Studies have not shown this to be the case, however.

Capital punishment has not been proven to have a deterrent effect. In addition, the death penalty can be expensive. Because of the lengthy appeal process and the time prisoners spend on death

row, the average cost associated with a death penalty case can amount to several million dollars—up to three times higher than for life imprisonment. Most of these costs are incurred before and during trials, as trials for capital offenses are costly and time-consuming. In California, which has the death penalty but has not carried out an execution since 2006, the state spends more on the prison system than it does on higher education. It is estimated that the state could save a billion dollars over the next five years by replacing capital punishment with life imprisonment. The death penalty system is estimated to have cost taxpayers about \$138 million in 2008 alone.

Capital punishment has also been denounced as cruel and inhumane. Amnesty International writes: "International law states that torture or cruel, inhuman, or degrading punishments can never be justified. The cruelty of the death penalty is self-evident." In some cases, such as in the execution of Stanley "Tookie" Williams in California in 2005 and that of Angel Nieves Diaz in Florida in December 2006, lethal injection can take more than half an hour to kill a person, due to difficulty in administering the needle or to insufficient doses of lethal chemicals, causing the prisoner pain and suffering. Witnesses in the Diaz execution said that "the whole process appeared to be torture." In an article, it vividly described the cruelty of the death penalty, both during the execution and during the long wait before it.

The suffering of the criminal awaiting execution also has to be considered in a utilitarian calculus. The average time spent on death row before execution in the United States is ten years. French writer Albert Camus (1913-1960) once wrote that the moral contradiction inherent in a punishment that imitates the violence that it claims to abhor is only made worse by the premeditated nature of capital punishment.

According to social contract theory, governments are formed to protect themselves against danger. One of the primary purposes of capital punishment is to protect society against dangerous people. Some opponents of the death penalty, however, argue that it actually reduces public safety by draining public resources that could be used for crime prevention and drug treatment.

The death penalty has repercussions that reach far beyond the death chamber. The ripple effect reaches out to the family and friends of both the murder victim and the condemned person, as well as to society in general. Does capital punishment ease the grief of the murder victim's family? What is the effect of participating in an execution on medical professionals, who are sworn to save lives? Does violent punishment reinforce or legitimate violence in society in general?

Finality and the Risk of Errors

In 2003 New York City Mayor Michael Bloomberg expressed his opposition to the death penalty because of the number of innocent people who are executed. The death penalty also removes the possibility of restitution and repentance, as happened in the case of Karla Faye Tucker.

In addition to incorrect verdicts revealed by DNA testing, errors can occur because of flaws in the legal procedure. A Columbia University Law School study found that between 1973 and 1995 more than two-thirds of death sentences had been overturned in the appeal process because of "procedural flaws or unsound evidence." The report concluded that the American capital punishment system is "fraught with error" mainly due to three factors: incompetent defense lawyers, flawed instructions to jurors, and procedural misconduct such as suppressed evidence. Proponents dismiss these mistakes as part of the cost of doing justice. He points out that nearly all activities, such as construction work or even driving a car, carry risks and can cost the lives of

innocent bystanders. However, we don't give up on these activities. Abolitionists, on the other hand, believe that the risk of executing innocent people is morally unacceptable, especially when there is an alternative such as life imprisonment without the possibility of parole.

Care Ethics

Abolitionists claim that one reason people favor the death penalty is that we don't identify with the condemned persons; we don't see them as humans like us. Before we can discuss the morality of capital punishment, we first must see those who are condemned from a care perspective rather than a pure justice perspective. If adopting the Jesus Christ model, we ought to love and care for people despite what they may have done. We should return compassion and good for evil, rather than evil for evil as the retributivists claim.

Why Punish?

Most people assume that punishment is the appropriate moral response to wrongdoing. However, does justice require punishment as the retributive justice theorists claim? Or is the punishment paradigm counterproductive and harmful to society? One of the greatest frustrations of our criminal justice system is that criminals often come out in worse shape than when they went in. One study found that prisoners and guards interacted primarily at the lowest level of moral development—avoiding coercion and punishment. Within each group, however, they interacted primarily at Kohlberg's stage two of moral development-mutual benefit. The researchers concluded that prison life tends to mold prisoners into a morality lower than their "private best" outside the prison environment. In other words, the punishment paradigm, rather than making society safer, may be harming society by turning out more hardened criminals.

Conclusion

Capital punishment raises the issue of the moral value and dignity of humans who are at the most despicable end of the spectrum, and who have little or no respect for the dignity of those whom they brutally massacre. The debate over the death penalty also leads to a reexamination of the punishment paradigm that underlies capital punishment. Even if the death penalty can be morally justified in theory, it does not necessarily follow that it should be used in practice. Creating a just public policy regarding capital punishment requires balancing moral theory with the realities of human nature and society.