Murder and capital punishment share four elements. They are: (1) a planned act (2) to kill (3) a specific person who (4) is not immediately attacking anyone. Should then murder and capital punishment be judged just or unjust by the same standard?

The first question is whether killing is ever justified. The doctrine of most religions contains some variation of the commandment, “Thou shalt not kill.” For moral absolutists and pacifists, this prohibition is unbendable. They would not kill another person under any circumstances. Most people, however, are moral relativists who evaluate good and evil within a context. They do not condemn as immoral killing in such circumstances as self-defense and military combat.

What about premeditated acts by individuals? Most societies condemn these as murder even if the other person has harmed you. To see this, assume that a murderer has killed a member of your family. You witnessed it and thus are sure who is guilty. If you track down the murderer and execute him or her, by law now you are also a murderer. Yet 67% of Americans favor capital punishment, which is the state carrying out roughly the same act.

Arguably the difference is the willingness of most people to apply different moral standards to individuals acting privately and society acting through its government. This distinction is an ancient one. For example, God may have commanded “Thou shalt not kill” for individuals (Exodus 20:13), but in the very next chapter God details “ordinances” to Moses, including, “Whosoever strikes a man so that he dies shall be put to death” (Exodus 21:12). The point here is not whether you want to accept the words that Exodus attributes to a deity. After all, just two verses later, God also decrees death to “whoever curses his father or his mother.” This would leave few teenagers alive today. Instead, the issue to wrestle with is whether and why it is just or unjust for a government, but not an individual, to commit an act with the four
elements noted in the first paragraph. For those who see no moral distinction between actions by individuals and a society, capital punishment is wrong no matter how heinous the crime is, how fair the legal system is, or what the claimed benefits of executing criminals are.

There are others, though, who do not argue that capital punishment is inherently immoral. Instead they make a pragmatic case. They begin with the reasonable proposition that executing someone is a drastic step, then argue that there is no evidence of positive effect that would warrant such an extreme act. To think about this point, you have to first decide what it is you want capital punishment to accomplish. One possibility is to deter others from committing similar crimes. The other possibility is punishment as a way of expressing the society’s outrage at the act. A great deal of the debate at this level is about whether capital punishment is a deterrent. It is beyond the limited space here to take up that debate, but to a degree it misses the point of why most Americans who favor capital punishment do so. When asked in one poll why they support it, 70% replied it is “a fitting punishment for convicted murders,” while only 25% thought, “the death penalty deters crime,” and 4% were unsure.

Yet another line of attack on capital punishment is the argument that the system is flawed. Some contend that mistakes get made, and innocent people are sometimes convicted and executed. This view is well represented by Stephen B. Bright in the first reading and disputed by John McAdams in the second reading.

Then there is the argument that, as conducted in the United States, the process from investigation, through trial and sentencing to the carrying out of the death penalty is racially tainted. As evidence, those making this argument point to the fact that the demographic characteristics of those executed are not in proportion to their group’s percentage of the society. African Americans (about 12% of the population) made up 40% of those executed in 2009. Among other group, Latinos, 15% of the population, made up 13% of those executed, and Native Americans, 1% of the population, were 2% of those executed. No Asian Americans were put to death judicially in 2009. It is worth noting that all of the 52 prisoners executed in 2009 were men.

**POINTS TO PONDER**

➢ Before beginning, make a note to yourself about whether or not you favor the death penalty and the most important reason you take that view.
➢ Since no judicial system is perfect, it is safe to assume that at least some of those executed have been wrongly convicted. If you believe that the error rate does not have to be zero to continue capital punishment, then what is the highest acceptable error rate?
➢ What, if anything, would make you change your view on capital punishment?
The Death Penalty: Fatally Flawed

STEPHEN B. BRIGHT

This is a most appropriate time to assess the costs and benefits of the death penalty. Thirty years ago, in 1976, the Supreme Court allowed the resumption of capital punishment after declaring it unconstitutional four years earlier in *Furman v. Georgia*. Laws passed in response to Furman were supposed to correct the constitutional defects identified in 1972.

However, 30 years of experience has demonstrated that those laws have failed to do so. The death penalty is still arbitrary. It’s still discriminatory. It is still imposed almost exclusively upon poor people represented by court-appointed lawyers. In many cases the capabilities of the lawyer have more to do with whether the death penalty is imposed than the crime. The system is still fallible in deciding both guilt and punishment. In addition, the death penalty is costly and is not accomplishing anything. And it is beneath a society that has a reverence for life and recognizes that no human being is beyond redemption. Many supporters of capital punishment, after years of struggling to make the system work, have had sober second thoughts it. Justice Sandra Day O’Connor, who leaves the Supreme Court after 25 years of distinguished service, has observed that “serious questions are being raised about whether the death penalty is being fairly administered in this country” and that “the system may well be allowing some innocent defendants to be executed.”

Justices Lewis Powell and Harry Blackmun also voted to uphold death sentences as members of the court, but eventually came to the conclusion, as Justice Blackmun put it, that “the death penalty experiment has failed.”

The *Birmingham News* announced in November that after years of supporting the death penalty it could no longer do so “[b]ecause we have come to believe Alabama’s capital punishment system is broken. And because, first and foremost, this newspaper’s editorial board is committed to a culture of life.”

The death penalty is not imposed to avenge every murder and—as some contend—to bring “closure” to the family of every victim. There were over 20,000 murders in 14 of the last 30 years and 15,000 to 20,000 in the others. During that time, there have been just over 1,000 executions—an average of about 33 a year. Sixteen states carried out 60 executions last year. Twelve states carried out 59 executions in 2004, and 12 states put 65 people to death in 2003.

Moreover, the death penalty is not evenly distributed around the country. Most executions take place in the South, just as they did before *Furman*. Between 1935 and 1972, the South carried out 1887 executions; no other region had as many as 500. Since 1976, the Southern states have carried out 822 of 1,000 executions; states in the Midwest have carried out 116; states in the west 64 and the Northeastern states have carried out only four. The federal government, which has had the death penalty since 1988, has executed three people. Only one state, Texas, has executed over 100 people since 1976. It has executed over 350.

Further experimentation with a lethal punishment after centuries of failure has no place in a conservative society that is wary of too much government power and skeptical of government’s ability to do things well. We are paying an enormous cost in money and the credibility of the system in order to execute people who committed less than one percent of the murders that occur each year. The death penalty is not imposed for all murders, for most murders, or even for the most heinous murders. It is imposed
upon a random handful of people convicted of murder—often because of factors such as the political interests and predilections of prosecutors, the quality of the lawyer appointed to defend the accused, and the race of the victim and the defendant. A fairer system would be to have a lottery of all people convicted of murder; draw 60 names and execute them. Further experimentation might be justified if it served some purpose. But capital punishment is not needed to protect society or to punish offenders. We have not only maximum security prisons, but “super maximum” prisons where prisoners are completely isolated from guards and other inmates, as well as society.

THE DEATH PENALTY IS ARBITRARY AND UNFAIR

Justice Potter Stewart said in 1972 that the death penalty was so arbitrary and capricious that being sentenced to death was like being struck by lightning. It still is. As was the case in 1972, there is no way to distinguish the small number of offenders who get death each year from the thousands who do not. This is because prosecutorial practices vary widely with regard to the death penalty; the lawyers appointed to defend those accused are often not up to the task of providing an adequate defense; differences between regions and communities and the resulting differences in the composition of juries; and other factors.

PROSECUTORIAL DISCRETION AND PLEA BARGAINING

Whether death is sought or imposed is based on the discretion and proclivities of the thousands of people who occupy the offices of prosecutor in judicial districts throughout the nation. (Texas, for example, has 155 elected prosecutors, Virginia 120, Missouri 115, Illinois 102, Georgia 49, and Alabama 40.) Each prosecutor is independent of all the others in the state.

The vast majority of all criminal cases—including capital cases—are decided not by juries, but through plea bargains. The two most important decisions in any capital case are the prosecutor’s—first, whether to seek the death penalty and, second, if death is sought, whether to agree to a lesser punishment, usually life imprisonment without any possibility of parole, instead of the death penalty as part of a plea bargain.

The practices of prosecutors vary widely. They are never required to seek the death penalty. Some never seek it; some seek it from time to time; and some seek it at every opportunity. Some who seek it initially will nevertheless agree to a plea bargain and a life sentence in almost all cases; others will refuse a plea disposition and go to trial. In some communities, particularly predominantly white suburban ones, the prosecutor may get a death sentence from a jury almost any time a case goes to trial. In other communities—usually those with more diverse racial populations—the prosecutors often find it much more difficult, if not impossible, to obtain a death sentence. Those prosecutors may eventually stop seeking the death penalty because of they get it so seldom. And regardless of the community and the crime, juries may not agree to a death sentence.

Timothy McVeigh’s codefendant, Terry Nichols, was not sentenced to death by either a federal or state jury for his role in the bombing of the federal building in Oklahoma City that caused 168 deaths. Without being critical of any person or community and without questioning the motives of any of them, it is clear that there is not going to be consistent application of the death penalty when prosecutors operate completely independent of one another.

Because of different practices by prosecutors, there are geographical disparities with regard to where death is imposed within states. Prosecutors in Houston and
Philadelphia have sought the death penalty in virtually every case where it can be imposed. As a result of aggressive prosecutors and inept court-appointed lawyers, Houston and Philadelphia have each condemned over 100 people to death—more than most states. Harris County, which includes Houston, has had more executions in the last 30 years than any state except Texas and Virginia.

Whether death is sought may depend upon which side of the county line the crime was committed. A murder was committed in a parking lot on the boundary between Lexington County, South Carolina, which, at the time, had sentenced 12 people to death, and Richland County, which had sent only one person to death row. The murder was determined to have occurred a few feet on the Lexington County side of the line. The defendant was tried in Lexington County and sentenced to death. Had the crime occurred a few feet in the other direction, death penalty almost certainly would not have been imposed.

There may be different practices even within the same office. For example, an Illinois prosecutor announced that he had decided not to seek the death penalty for Girvies Davis after Davis’ case was reversed by the state supreme court. However, while the case was pending, a new prosecutor took office and decided to seek the death penalty for Davis. He was successful and Davis was executed in 1995.

As a result of a plea bargain, Ted Kaczynski, the Unabomber, who killed three, injured many others, and terrified even more by mailing bombs to people, avoided the death penalty. Serial killers Gary Leon Ridgway, who pleaded guilty to killing 48 women and girls in the Seattle area, and Charles Cullen, a nurse who pleaded guilty to murdering 29 patients in hospitals in New Jersey and Pennsylvania, also avoided the death penalty through plea bargains, as did Eric Rudolph, who killed a security guard in Birmingham and set off a bomb that killed one and injured many more at the 1996 Olympics. Rudolph was allowed to plead and avoid the death penalty in exchange for telling the authorities where he hid some dynamite in North Carolina. Others avoid the death penalty by agreeing to testify for the prosecution against the other(s) involved in the crime.

Although some serial killers are sentenced to death, most of the men and women on death rows are there for crimes that, while tragic and fully deserving of punishment, are less heinous that the examples mentioned above as well as many other cases in which death was not imposed.

**REPRESENTATION FOR THE ACCUSED**

Once a prosecutor decides to seek death, the quality of legal representation for the defendant can be the difference between life and death. A person facing the death penalty usually cannot afford to hire a attorney and is at the mercy of the system to provide a court appointed lawyer. While many receive adequate representation (and often are not sentenced to death as a result), many others are assigned lawyers who lack the knowledge, skill, resources—and sometime even the inclination—to handle a serious criminal case. People who would not be sentenced to death if properly represented are sentenced to death because of the incompetent court-appointed lawyers.

For example, Dennis Williams was convicted twice of the 1978 murders of a couple from Chicago’s south suburbs and sentenced to death. He was represented at his first trial by an attorney who was later disbarred, and at his second trial by a different attorney who was later suspended. Williams was later exonerated by DNA evidence. Four other men sentenced to death in Illinois were represented by a convicted felon who was the only lawyer in Illinois history to be disbarred twice.
A dramatic example of how bad representation can be is provided by this description from the *Houston Chronicle* of a capital trial:

Seated beside his client—a convicted capital murderer—defense attorney John Benn spent much of Thursday afternoon’s trial in apparent deep sleep. His mouth kept falling open and his head lolled back on his shoulders, and then he awakened just long enough to catch himself and sit upright. Then it happened again. And again. And again.

Every time he opened his eyes, a different prosecution witness was on the stand describing another aspect of the Nov. 19, 1991, arrest of George McFarland in the robbery-killing of grocer Kenneth Kwan.

When state District Judge Doug Shaver finally called a recess, Benn was asked if he truly had fallen asleep during a capital murder trial. “It’s boring,” the 72-year-old longtime Houston lawyer explained.

Court observers said Benn seems to have slept his way through virtually the entire trial. This sleeping did not violate the right to a lawyer guaranteed by the United States Constitution, the trial judge explained, because, “[t]he Constitution doesn’t say the lawyer has to be awake.” On appeal, the Texas Court of Criminal Appeals rejected McFarland’s claim that he was denied his right to counsel over the dissent of two judges who pointed out that “[a] sleeping counsel is unprepared to present evidence, to cross-examine witnesses, and to present any coordinated effort to evaluate evidence and present a defense.” Last year, the Court reaffirmed its opinion.

George McFarland was one of at least three people sentenced to death in Houston at trials where their lawyers slept. Two others were represented by Joe Frank Cannon. One of them, Carl Johnson, has been executed. Cannon was appointed by Houston judges for forty years to represent people accused of crimes in part because of his reputation for hurrying through trials like “greased lightening,” and despite his tendency to doze off during trial.

Ten of Cannon’s clients were sentenced to death, one of the largest numbers among Texas attorneys. Another notorious lawyer appointed to defend capital cases in Houston had 14 clients sentenced to death.

The list of lawyers eligible to handle capital cases in Tennessee in 2001, circulated to trial judges by the state Supreme Court, included a lawyer convicted of bank fraud, a lawyer convicted of perjury, and a lawyer whose failure to order a blood test let an innocent man languish in jail for four years on a rape charge. Courts in other states have upheld death sentences in cases in which lawyers were not aware of the governing law, were not sober, and failed to present any evidence regarding either guilt-innocence or penalty. One federal judge, in reluctantly upholding a death sentence, observed that the Constitution, as interpreted by the U.S. Supreme Court, “does not require that the accused, even in capital cases, be represented by able or effective counsel.”

The Supreme Court has said that the death penalty should be imposed “with reasonable consistency, or not at all.” That is simply not happening.

**THE COURTS ARE FALLIBLE**

Innocent people have been wrongfully convicted because of poor legal representation, mistaken identifications, the unreliable testimony of people who swap their testimony for lenient treatment, police and prosecutorial misconduct and other reasons.
Unfortunately, DNA testing reveals only a few wrongful convictions. In most cases, there is no biological evidence that can be tested. In those cases, we must rely on a properly working adversary system—in which the defense lawyer scrutinizes the prosecution's case, consults with the client, conducts a thorough and independent investigation, consults with experts, and subjects the prosecution case to adversarial testing—to bring out all the facts and help the courts find the truth. But even with a properly working adversary system, there will still be convictions of the innocent. The best we can do is minimize the risk of wrongful convictions. And the most critical way to do that is to provide the accused with competent counsel and the resources needed to mount a defense.

The innocence of some of those condemned to die has been discovered by sheer happenstance and good luck. For example, Ray Krone, was convicted and sentenced to death in Arizona based on the testimony of an expert witness that his teeth matched bite marks on the victim. During the ten years that Krone spent on death row, scientists developed the ability to compare biological evidence recovered at crime scenes with the DNA of suspects. DNA testing established that Krone was innocent.

The governor of Virginia commuted the death sentence of Earl Washington to life imprisonment without parole in 1994 because of questions regarding his guilt. Were it not for that, Washington would not have been alive six years later, when DNA evidence—not available at the time of Washington's trial or the commutation—established that Washington was innocent.

Poor legal representation led to a death sentence for Gary Drinkard, who spent five years on Alabama's death row for a crime he did not commit. At his trial, he was represented by one lawyer who did collections and commercial work and another who represented creditors in foreclosures and bankruptcy cases. The case was reversed on appeal for reasons having nothing to do with the quality of his representation. Our office joined with an experienced criminal defense lawyer from Birmingham and represented him at his retrial. After all the evidence was presented, including the testimony of the doctor, the jury acquitted Drinkard in less than two hours.

Evidence of innocence has surfaced at the last minute and only because of volunteers who found it. Anthony Porter, sentenced to death in Illinois, went through all of the appeals and review that are available for one sentenced to death. Every court upheld his conviction and sentence. As Illinois prepared to put him to death, a question arose as to whether Porter, who was brain damaged and mentally retarded, understood what was happening to him. Just two days before he was to be executed, a court stayed his execution for a mental examination.

After the stay was granted, a journalism class at Northwestern University and a private investigator examined the case and proved that Porter was innocent. They obtained a confession from the person who committed the crime. Porter was released, becoming the third person released from Illinois's death row after being proven innocent by a journalism class at Northwestern.

There has been some argument over how many innocent people have been sentenced to death and whether any have been executed. We do not know and we cannot know. If DNA evidence had not been available to prove Ray Krone's innocent, if Earl Washington had been executed instead of commuted to life, if Gary Drinkard had not received a new trial, and if Anthony Porter was not mentally impaired and the journalism class had not come to his rescue, all would have been executed and we would never know to this day
of their innocence. Those who proclaim that no innocent person has ever been executed would continue to do so, secure in their ignorance.

With regard to the quibbling over how many people released from death rows have actually been innocent, even one innocent person being convicted of a crime and sentenced to death or a prison term is one too many. “Close enough for government work” is simply not acceptable when life and liberty are at stake. Regardless of how one counts and what one counts, we know that an unacceptable number of innocent people have been convicted in both capital and non-capital cases.

There is nothing wrong with looking at the system as it really is and with a little humility about what it is capable of. There are cases—many of them—in which the criminal courts have correctly determined that a person is guilty. There are others where it is clear the system was wrong because the innocence of those convicted has been conclusively established though DNA evidence or other compelling proof. There are also cases in which it is virtually impossible to tell for sure whether a person is guilty or innocent. There is no DNA evidence or other conclusive proof. The case depends upon which witness the jury believes. Or new facts come to light after the trial. It is impossible to know what the jury's verdict would have been if it had considered those facts. We want to believe that our judges and juries are capable of doing the impossible—determining the truth in every instance. And in most instances, they can determine the truth.

But cases that depend upon eyewitness identification, forensic evidence from a crime laboratory with shoddy practices like those that have come to light in Houston and Oklahoma City, the testimony of a co-defendant, who claims the defendant was the primary person, or the cellmate who claims the defendant admitted committing the crime to him, or there is inadequate defense for the accused, there is a serious possibility of an error. Just last week, a judge who presided over a capital case in California in which death was imposed wrote to the governor urging clemency for the defendant because the judge believes the sentence was based on false testimony from a jailhouse informant.

Often overlooked is the jury's verdict with regard to sentence—whether to condemn the person to die or sentence him to a long prison sentence—which is as important as its verdict on guilt. The decision of the legal system to bring about the deliberate, institutionalized taking of a person's life is surely a determination that the person is so beyond redemption that he or she should be eliminated from the human community. But that determination is quite often erroneous.

I have seen many people who were once condemned to die but are now useful and productive members of society. One of them, Shareef Cousin, works in our office. He was sentenced to death when he was 16 years old. However, it turned out that he was not guilty of the murder for which he was sentenced to death. We are tremendously impressed with him. He is a hard worker; someone we have found we can count on. He is applying to colleges. He is very serious about getting in to college and will be a very serious student.

But it is not just the innocent. William Neal Moore spent 16 1/2 years on Georgia's death row for a murder he committed in the course of a robbery. He had eight execution dates and came within seven hours of execution on one occasion. His death sentence was commuted to life imprisonment in 1990 and a year later he was paroled. He comes to the law schools and speaks to my classes every year. He was very religious while in prison, and he is has remained every bit as religious in the 15 years he has been out. He met and married someone with two daughters and has been a good father. Both girls are in college. He has judgment and maturity now that he did not have when he committed the crime.
I can give you many more examples like these of people who were condemned to die but who have clearly demonstrated that they were more than the worst thing they ever did.

**PEOPLE WHO KILL ARE NOT DETERRED**

The scholars will address whether a punishment that is imposed in less than one percent of murder cases serves as a deterrent to murder. I offer no statistics, only a few observations from over 30 years of dealing with the people who are supposedly being deterred.

In my experience, these are not people who assess risks, plan ahead and make good judgments. They would not have committed their crimes if they thought they were going to be caught, regardless of the punishment. But they don’t expect to get caught so they don’t even get to the question of what punishment will be inflicted. Why would anyone commit a crime—for example, murder and robbery to get money to buy drugs—if they thought that instead of enjoying the drugs in the free world they would be spending the rest of their life in prison or even years in prison?

Even if they get to the issue of punishment—I cannot imagine how they process the information. A large portion of the people who end up on death rows are people with very poor reading skills. They don’t read the newspaper or watch the news or listen to public radio. When they are assessing the risk of getting executed, are they supposed to consider that nationally they have a one percent chance of getting the death penalty if they are caught and convicted? Or are they to consider whether they are in one of the 12 to 16 states that has carried out a death sentence in the last three years? How much of a deterrent can it be in the states that have two or three people on their death rows and have carried out one or two executions over 30 years? Are they deterred if they are in New Hampshire, which has a death penalty law but has never imposed it? How do they learn that New Hampshire has a death penalty law? Do states that have not carried out any executions or have carried out just a few need to carry out more in order to deter, or can they benefit from executions in other states?

The more routine executions become, the less media coverage they get. How are people supposed to find out about executions and be deterred if they are not getting any media coverage?

Beyond that, is the potential murderer going to take into account the likelihood of being assigned a bad court-appointed lawyer, of being tried before an all-white jury instead of a racially diverse jury, and other factors which will increase his chances of getting the death penalty?

The people I have encountered who committed murder do not have the information and many are not capable of going through a reasonable consideration of it if they had it. Many people who commit murder suffer from schizophrenia, bi-polar disorder, major brain damage or other severe mental impairments. They may have a very distorted sense of reality or may not even be in touch with reality.

Finally, if death were a deterrent, it would surely deter gang members and drug dealers. They see death up close. Killings over turf and in retaliation for other killings make death very real. It is summary and there are no appeals. They see brothers and friends killed; go to funerals. They have much greater likelihood of getting death on the streets than in the courts. But, it does not change their behavior.
THE COST IS NOT JUSTIFIED

There is a growing recognition that it is just not worth it. A Florida prosecutor let a defendant plead guilty to killing five people because a sentence of life imprisonment without parole would bring finality. The Palm Beach Post observed “The State saves not only the cost of a trial; the victims’ relatives—who supported the deal—do not have to relive the horror. The state will save more by avoiding years of appeals;….Most important, [the defendant] never again will threaten the public.”

New York spent more than $170 million on its death penalty over a ten year period, from 1995 to 2005, before its Court of Appeals declared its death penalty law unconstitutional. During that time, the state did not carry out a single execution. Only seven persons have been sentenced to death—an average of less than one a year—and the first four of those sentences were struck down by the New York Court of Appeals on various grounds. The speaker of the state’s assembly remarked, “I have some doubt whether we need a death penalty…. We are spending tens of millions of dollars [that] may be better spent on educating children.” He also pointed out that the state now has a statute providing for life imprisonment without parole that ensures those convicted of murder cannot go free. Similarly, Kansas did not carry out any executions between 1994, when it reinstated the death penalty, and 2004 when the state supreme court ruled it unconstitutional. Kansas had eight people under sentence of death, six from one county. New Jersey, which just declared a moratorium on executions, has spent $253 million on its death penalty since 1983. It has yet to carry out an execution and has only ten people on its death row. In other words, the state has spent a quarter of a billion dollars over 23 years and has not carried out a single execution. Michael Murphy, a former prosecutor for Morris County, remarked, “If you were to ask me how $11 million a year could best protect the people of New Jersey, I would tell you by giving the law enforcement community more resources. I’m not interested in hypotheticals or abstractions, I want the tools for law enforcement to do their job, and $11 million can buy a lot of tools.”

These are states which made every effort to do it right. It is also possible to have death on the cheap. A number of states have done this. Capital cases may last as little as a day and a half. Georgia recently executed a man who was assigned a lawyer—a busy public defender—just 37 days before his trial and denied any funds for investigation or expert witnesses. But this completely undermines confidence in the courts and devalues life.

CONCLUSION

Supreme Court Justice Arthur Goldberg said that the deliberate institutionalized taking of human life by the state is the greatest degradation of the human personality imaginable. It is not just degrading to the individual who is tied down and put down. It is degrading to the society that carries it out. It coarsens the society, takes risks with the lives of the poor, and diminishes its respect for life and its belief in the possible redemption of every person. It is a relic of another era. Careful examination will show that the death penalty is not serving any purpose in our society and is not worth the cost.
There are a huge number of issues that relate to the merits of the death penalty as a punishment, including deterrence, the moral justice of the punishment, the cost of the imposition of the sanction, and even (implausibly) what policies European nations have. But I’m going to concentrate, given the limited time I have, on two issues that I think are key: the issue of “innocents” convicted and sent to death row, and the issue of racial disparity in the application of the punishment.

**HOW MANY INNOCENTS ON DEATH ROW?**

One of the most compelling arguments against the death penalty, at least one that accepts the claims of the death penalty opponents at face value, is the claim that a great many innocent people have been convicted of murder and put on death row. Liberal Supreme Court Justice John Paul Stevens, just to pick one case out of hundreds, told the American Bar Association’s Thurgood Marshall Award dinner that “That evidence is profoundly significant, not only because of its relevance to the debate about the wisdom of continuing to administer capital punishment, but also because it indicates that there must be serious flaws in our administration of criminal justice.”

The most widely publicized list of “innocents” is that of the Death Penalty Information Center (DPIC). As of January 2003, it listed 122 people. That sounds like an appallingly large number, but even a casual examination of the list shows that many of the people on it got off for reasons entirely unrelated to being innocent. Back in 2001, I analyzed the list when it had ninety-five people on it. By the admission of the Death Penalty Information Center, thirty-five inmates on their list got off on procedural grounds. Another fourteen got off because a higher court believed the evidence against them was insufficient. If the higher court was right, this would be an excellent reason to release them, but it’s far from proof of innocence.

Interestingly, prosecutors retried thirty-two of the inmates designated as “innocent.” Apparently prosecutors believed these thirty-two were guilty. But many whom prosecutors felt to be guilty were not tried again for a variety of reasons, including the fact that key evidence had been suppressed, witnesses had died, a plea bargain was thought to be a better use of scarce resources, or the person in question had been convicted and imprisoned under another charge.

More detailed assessments of the “Innocents List” have shown that it radically overstates the number of innocent people who have been on death row. For example, the state of Florida had put on death row 24 inmates claimed, as of August 5, 2002, to be innocent by the DPIC. The resulting publicity led to a thorough examination of the twenty-four cases by the Florida Commission on Capital Crimes, which concluded that in only four of the twenty-four cases was the factual guilt of these inmates in doubt.

Examinations of the entire list have been no more favorable. For example, in 2002 a liberal federal district judge in New York ruled, in *United States v. Quinones*, that the federal death penalty is unconstitutional. In this case, the court admitted that the DPIC list “may be over-inclusive” and, following its own analysis, asserted that for thirty-two of the people on the list there was evidence of “factual innocence.” This hardly repre-
sents a ringing endorsement of the work of the Death Penalty Information Center. In academia, being right about a third of the time will seldom result in a passing grade.

Other assessments have been equally negative. Ward A. Campbell, Supervising Deputy Attorney General of the State of California reviewed the list in detail, and concluded that:...it is arguable that at least 68 of the 102 defendants on the List should not be on the list at all—leaving only 34 released defendants with claims of actual innocence—less than \( \frac{1}{2} \) of 1% of the 6,930 defendants sentenced to death between 1973 and 2000.

There is, of course, a degree of subjectivity in all such assessments. The presence of “reasonable doubt” does not make a person factually innocent (although it’s an excellent reason to acquit them), and circumstances might conspire to make a factually innocent person appear to even an objective observer to be guilty “beyond a reasonable doubt.” The key thing to remember is that the numbers produced by DPIC are “outliers”—grossly inflated. Indeed, staffers of this very committee have pretty much dismantled the DPIC list. Taking at face value the claims of the activists is about as bad as taking at face value the claims of the National Rifle Association about the number of Americans who save themselves from bodily harm because they own and carry guns, or the claims of NARAL [National Abortion & Reproductive Rights Action League] about how many “back alley abortions” would result from overturning Roe v. Wade [1973].

HAVE ANY INNOCENTS BEEN EXECUTED?

Worse than putting an innocent person on death row (only to have him later exonerated) would be to actually execute an innocent person. But death penalty opponents can’t point to a single innocent person known to have been executed for the last 35 years. They do make claims, however.

In the 1980s, two academics who strongly opposed the death penalty (Hugo Adam Bedau and Michael Radelet) claimed that of 7,000 people executed in the United States in the 20th century, 23 were innocent. This doesn’t seem like a large number, especially when we remember that most of the cases they claimed were from an era when defendants had many fewer due process rights than they do today, when police forces and prosecutors were much less well-trained and professional than they are today, and when the media was less inclined to take an “advocacy” role in claimed cases of injustice.

Indeed, Bedau and Radelet produced only one case since the early 1960s where they claimed an innocent man had been executed—that of one James Adams. But even this one case was quite weak. Steven J. Markman and Paul G. Cassell, in a Stanford Law Review article, took Bedau and Radelet to task for “disregard of the evidence,” and for putting a spin on the evidence that supported their thesis of Adams’ innocence. Markman and Cassell concluded that there is, “no persuasive evidence that any innocent person has been put to death in more than twenty-five years.” In response, Bedau and Radelet admitted to the Chronicle of Higher Education that (in the words of the Chronicle’s reporter) “some cases require subjective analysis simply because the evidence is incomplete or tainted.” They admitted this was true of all 23 cases that they reported.

The most sober death penalty opponents have apparently given up claiming solid evidence of any innocent person executed in the modern era. Indeed Barry Scheck, cofounder of the Innocence Project, was featured speaker at the Wrongfully Convicted on Death Row Conference in Chicago (November 13–15, 1998), and was interviewed by the “Today Show.”
Schenk was asked by Matt Lauer, “Since 1976, 486 people have been executed in this country. Any doubt in your mind that we’ve put to death innocent people?” Scheck responded “Well, you know, I—I think that we must have put to death innocent people, but if you’re saying to me to prove it right now, I can’t.”

Nothing stops death penalty opponents from making all sorts of claims about innocent people being executed. But in the rare cases when their claims can actually be tested, they turn out to be false. Consider, for example, the case of Roger Keith Coleman, who was tried for a rape/murder, and finally executed by the State of Virginia in 1992. An essay still on the site of the Death Penalty Information Center discusses the case at considerable length, and clearly leaves the impression that Coleman must be innocent. After attacking all the evidence against Coleman, the essay claims that “official misconduct that has left the case against Roger Coleman in shreds” and goes on to claim:

...there is dramatic evidence that another person, Donney Ramey, committed the murder. For one thing, a growing number of women in the neighborhood have reported being sexually assaulted by Ramey in ways strikingly similar to the attack on Wanda McCoy. For another, one of these rape victims, Teresa Horn, has courageously signed an affidavit stating that Ramey told her he had killed Mrs. McCoy. He threatened to do the same to Ms. Horn.

Someone reading the Death Penalty Information Center website, and lacking due skepticism toward the assertions there, would doubtless conclude that Coleman was innocent. Unfortunately, the State of Virginia allowed DNA testing of key evidence in 2005, using technology unavailable in 1992, and proved decisively that Coleman was in fact guilty as charged. The credibility of anti-death penalty activists when making claims of innocence—whether for those on death row or those who have been executed—is tenuous at best.

HOW MANY INNOCENTS ON DEATH ROW ARE ACCEPTABLE?

At this point, death penalty opponents will argue that it doesn’t matter if their numbers are inflated. Even if only 20 or 30 innocent people have been put on death row, they will say, that is “too many” and calls for the abolition of the death penalty. If even one innocent person is executed, they claim, that would make the death penalty morally unacceptable.

This kind of rhetoric allows the speaker to feel very self-righteous, but it’s not the sort of thinking that underlies sound policy analysis. Most policies have some negative consequences, and indeed often these involve the death of innocent people—something that can’t be shown to have happened with the death penalty in the modern era. Just wars kill a certain number of innocent noncombatants. When the FDA approves a new drug, some people will quite likely be killed by arcane and infrequent reactions. Indeed, the FDA kills people with its laggard drug approval process. The magnitude of these consequences matters.

Death penalty opponents usually implicitly assume (but don’t say so, since it would be patently absurd) that we have a choice between a flawed death penalty and a perfect system of punishment where other sanctions are concerned.

Death penalty opponents might be asked why it’s acceptable to imprison people, when innocent people most certainly have been imprisoned. They will often respond that wrongfully imprisoned people can be released, but wrongfully executed people
cannot be brought back to life. Unfortunately, wrongfully imprisoned people cannot be
given back the years of their life that were taken from them, even though they may walk
out of prison.

Perhaps more importantly, its cold comfort to say that wrongfully imprisoned people
can be released, when there isn’t much likelihood that that will happen. Wrongful
imprisonment receives vastly less attention than wrongful death sentences, but Barry
Scheck’s book Actual Innocence lists 10 supposedly innocent defendants, of whom only
3 were sent to death row.

Currently, the Innocence Project website lists 174 persons who have been
exonerated on the basis of hard DNA evidence. But the vast majority was not
sentenced to death. In fact, only 15 death row inmates have been exonerated due to
DNA evidence.

There is every reason to believe that the rate of error is much lower for the death
penalty than for imprisonment. There is much more extensive review by higher courts,
much more intensive media scrutiny, cadres of activists trying to prove innocence, and
better quality counsel at the appeals level (and increasingly at the trial level) if a case
might result in execution.

Consider the following quote from an article about how prosecutors in Indiana are
tending more and more to ask for life imprisonment and not the death penalty because
of the cost of getting an execution:

Criminal rules require a capital defendant to have two death penalty certified
attorneys, which, if the defendant is indigent, are paid for on the public dime. Other
costs that might be passed onto taxpayers are requirements that the accused
have access to all the tools needed to mount a fair defense, including mitigation
experts, investigators, and DNA experts. Because the stakes are so high in a death
penalty case, the courts believe a defendant is entitled to a super due process. The
cost of getting a death penalty is too high in some ways (seemingly endless appeals).
But in other ways lesser penalties are too cheap (lacking good lawyers, DNA test-
ing, etc.). The system, in fact, it quite unbalanced, with it being relatively cheap and
easy to sentence someone to life imprisonment but excessively expensive to have
them executed. But until some balance is restored, the death penalty will remain the
fairest penalty we have.

Balance will be achieved by ending “dead weight loss” in administering the death
penalty (further limiting the number of appeals), while working for more substantive
justice where lesser sanctions are at issue.

PLAYING THE RACE CARD

Death penalty opponents tend to inhabit sectors of society where claiming “racial dis-
parity” is an effective tactic for getting what you want. In academia, the media, the
ranks of activist organizations, etc. claiming “racial disparity” is an excellent strategy for
getting anybody who has qualms about what you are proposing to shut up, cave in, and
get out of the way.

Unfortunately, this has created a hot-house culture where arguments thrive that
carry little weight elsewhere in society, and carry little weight for good reasons.

Consider the notion that, because there is racial disparity in the administration of
the death penalty, it must be abolished. Applying this principle in a consistent way
would be unthinkable. Suppose we find that black robbers are treated more harshly than white robbers?

Does it follow that we want to stop punishing robbers? Or does it follow that we want to properly punish white robbers also? Nobody would argue that racial inequity in punishing robbers means we have to stop punishing robbers. Nobody would claim that, if we find that white neighborhoods have better police protection than black neighborhoods that we address the inequity by withdrawing police protection from all neighborhoods. Or that racial disparity in mortgage lending requires that mortgage lending be ended. Yet people make arguments exactly like this where capital punishment is concerned.

A further problem with the “racial disparity” argument—and one underlining the fundamental incoherence of the abolitionist’s thinking—is the fact that there are two versions of it, both widely bandied around, and they are flatly contradictory. I have elsewhere described these as the “mass market” and the “specialist” versions of the racial disparity thesis.

The mass market version is the easiest to understand, since it relies on the notion that racist cops, racist prosecutors, racist judges, and racist juries will be particularly tough on black defendants. Jessie Jackson, never one to pass up an opportunity to nurse a racial grievance, has expressed this view as follows:

Numerous researchers have shown conclusively that African American defendants are far more likely to receive the death penalty than are white defendants charged with the same crime. For instance, African Americans make up 25 percent of Alabama’s population, yet of Alabama’s 117 death row inmates, 43 percent are black. Indeed, 71 percent of the people executed there since the resumption of capital punishment have been black.

In a more scholarly vein, Leigh B. Bienen [of Northwestern University Law School] has claimed:

There is a whole other dimension with regard to arguments that the death penalty is “racist.” The death penalty and the criminal justice system is an institutional system controlled by and dominated by whites, although the recipients of punishment, including the recipients of the death penalty, are disproportionately black. The death penalty is a symbol of state control and it is a symbol of white control over blacks, in fact and in its popular and sensationalist presentations. Black males who present a threatening personae and a defiant personae are the favorites of those administering the punishment, including the overwhelmingly middle-aged white male prosecutors who are running for election or re-election and find nothing gets them more votes than demonizing young black men. By portraying themselves as punishers and avengers of whites who are the “victims” of blacks, prosecutors get a lot of political support.

Thus Bienen adds another element to the mix: a racist public whose bias is translated by those paragons of political incorrectness, middle-aged white males, into harsh punishments for blacks. The problems of this view are numerous, but I’ll discuss only the most important one: it’s empirically just flat wrong. A whole raft of relatively sophisticated studies of the death penalty have been done, and findings of bias against black defendants are rare. Indeed, they are so few that they seem to illustrate the point...
that if you run a huge number of statistical “coefficients,” a few will turn up as “significant” when in fact nothing is there.

What the studies do show is a huge bias against black victims. Offenders who murder black people get off much more lightly than those who murder whites. Since the vast majority of murders are intraracial and not interracial, this translates into a system that lets black murderers off far more easily than white murderers.

This is clearly unjust, but it leaves open the question of whether the injustice should be remedied by executing nobody at all, or rather executing more offenders who have murdered black people.

Even more relevant is the question: would doing away with the death penalty improve the situation? Here, as elsewhere, death penalty opponents assume that the choices are a flawed death penalty and a pristine system of criminal justice for every other punishment. But the data don’t support that.

Scholars who study the death penalty often study several decisions in the process that might theoretically lead to execution. What they almost invariably find is large-scale bias in these earlier decisions, including decisions that would continue to be made if the death penalty were abolished. One particularly interesting study (although pre-Furman)…dealt with 245 persons arrested for homicide in Philadelphia in 1970.

Of these, 170 were eventually convicted of some charge. Sixty-five percent of defendants who killed a white got either life imprisonment or a death sentence, while only 25 percent of those who killed a black did. Since these murders produced only three death sentences (all imposed on blacks who killed whites), most of the apparent racial unfairness involved life imprisonment, not execution. Blumstein, in a study of the racial disproportionality of prison populations, found that in 1991 blacks were underrepresented among prisoners convicted of murder. There were many limitations to Blumstein’s study, including failure to control for aggravating circumstances, and a research design what leaves possible racial discrimination in arrests entirely out of account. But his results strongly imply that the system does for imprisonment what it does with regard to executions: under punish those who kill blacks.

William J. Bowers [also at Northwestern University]…found that defendants who killed whites were more likely to be indicted for first degree murder—rather than a lesser charge—and more likely to be convicted for first degree murder than defendants who killed blacks. Along similar lines…a study of indictments for murder in Florida found that 85 percent of the killers of white victims were indicted for first-degree murder, while only 53.6 percent of the killers of black victims were.

Leigh Bienen and her colleagues, in their study of New Jersey homicides examined the issue of whether a particular case is plea bargained, or whether it goes to trial. Cases involving white victims were found to go to trial more often than cases involving either black or Hispanic victims.

One particularly interesting study involved prosecutors’ decisions to “upgrade” or “downgrade” a homicide. An “upgrade” involved a prosecutor making a charge of a felony connected with the homicide when no such felony was mentioned in the police report. On the other hand, cases were said to be “downgraded” when the police report indicated the commission of a felony, but the prosecutor’s charge did not mention it. A statistical model which controlled for the circumstances of the crime and of the offender showed that white victim murders were more likely to be upgraded than black victim murders.
In sum, the system is relatively lenient toward those who kill blacks, and that leniency extends to decisions that would continue to advantage those defendants who have killed blacks even in the absence of the death penalty. All of this makes perfect sense. If the system is biased toward punishing those who murder whites, it is implausible indeed that decisions leading up to sentencing are made with strict racial fairness, and only the imposition of a death sentence is racially biased. If people want to punish those who murder whites more harshly than those who murder blacks, this is likely to be reflected in prosecutors’ decisions to move ahead with a case, in decisions about whether to plea-bargain, in the allocation of staff to a particular case, in the decision to indict on more or less serious charges, and in jury verdicts. Even in sentencing, abolition of the death penalty only narrows the range of possible punishments, rather than eliminating it. While not all decision points have been studied equally well, theoretically the pervasive undervaluing of the lives of black victims ought to be reflected everywhere there is discretion.

CONCLUSION

It cannot be stressed too strongly that we do not face the choice of a defective system on capital punishment and a pristine system of imprisonment. Rather, nothing about the criminal justice system works perfectly. Death penalty opponents give the impression that the death penalty is uniquely flawed by the simple expedient of dwelling on the defects of capital punishment (real and imagined) and largely ignoring the defects in the way lesser punishments are meted out.

The death penalty meets the expectations we can reasonably place on any public policy. But it can’t meet the absurdly inflated standards imposed by those who are culturally hostile to it. But then, no other policy can either.
THE CONTINUING DEBATE:
The Death Penalty

What Is New
About two-thirds of the world’s countries have abolished the death penalty, and most others seldom use it. Knowing the exact number of legal (judicially ordered) executions globally is impossible because China classifies its statistic as top secret. However, the annual number is at least 1,000 and most estimates are higher. Beyond China, according to Amnesty International, there were 714 known legal executions in 18 countries in 2009. Of these executions, 388 occurred in Iran, 120 in Iraq, 69 in Saudi Arabia, and 52 in the United States. In recent years the Supreme Court has made several decisions about the death penalty. Two restricted it. In Roper v. Simmons (2005), the court ruled that executing prisoners for crimes committed as juveniles (under age 18) was unconstitutional. Then in Kennedy v. Louisiana (2008), the court struck down the state’s death penalty for child rape and indicated that the death penalty for any crime against an individual other than first-degree murder is unconstitutional. By contrast, the court supported the death penalty in Baze v. Rees (2008) when it ruled that death by lethal injection, the method now used in almost all executions, is not a “cruel” under the terms of the Eighth Amendment. Whatever the arguments about the death penalty or the data may or may not indicate, Americans continue to strongly support capital punishment. Polls in 2010 recorded 63% supporting executions for murder, only 26% opposed, and 11% unsure. Indeed a plurality (49%) in 2009 thought the death penalty was imposed too seldom, only 20% thought it was applied too often, with 24% thinking capital punishment was at about the right level, and 7% unsure.

Where to Find More
A pro-death penalty position is taken by Joshua Marquis, “The Myth of Innocence,” Journal of Criminal Law & Criminology (Winter 2005), and the opposite view is taken by Eliza Steelwater, The Hangman’s Knot: Lynching, Legal Execution, and America’s Struggle with the Death Penalty (Westview Press, 2003). For a group on each side of the issue, visit the Web sites of Pro-Death Penalty.com at www.prodeathpenalty.com/ and the Death Penalty Information Center at www.deathpenaltyinfo.org/. A site worth visiting is that of the Texas Department of Criminal Justice at www.tdcj.state.tx.us/stat/deathrow.htm/. You can hyperlink from the name of each of the more than 100 convicts on death row and the more than 400 people executed since 1982 to a picture, personal information, and a description of the crime each committed. It puts a “face” on the data about both those convicted of murders and the victims.

What More to Do
Discuss all the various permutations of the death penalty debate, including whether it is ever justified under any circumstances and, if so, under what circumstances; whether it is only justified by utilitarianism (it deters later murders) and/or as punishment per se, and whether the fact that executions are not proportionate among various demographic groups is evidence that capital punishment should be abolished. Also, get active. As of 2010, the federal government and 35 states have death penalty laws on the books; 15 states and the District of Columbia do not. Find out the law in your state and support or oppose it.