In June 1941 the Nazis under the German Führer Adolf Hitler set out to exterminate European Jewry, a program now known as the Holocaust. The slaughter lasted four years by which time some six million of Europe’s eight million Jews had been systematically murdered. Another six million non-Jews – Poles, Catholics, Gypsies, homosexuals, and political enemies – were also destroyed. We are all aware of the atrocities committed at Auschwitz, Birkenau, Buchenwald, Chelmno, Dachau, Treblinka, Bergen-Belsen and Majdanek.

At the Nuremberg Trials, which took place after the War in late 1945, 21 German leaders were put on trial for war crimes and crimes against humanity. Eighteen were found guilty and 11 were sentenced to death, including Herman Göring, Hitler’s chosen successor, and Julius Streicher, the ardent Jew-baiter. Hitler, Himmler and Goebbels would have also have been condemned to death had they not already committed suicide.

What is particularly interesting – and problematic – in this case is that the Nazi criminals broke no German laws in their treatment of the Jews. The plaintiffs appealed to a higher law, the universal moral law that forbids killing the innocent, a minimal version of natural law. As Supreme Court Justice Robert Jackson, the US Prosecutor, stated,

The wrongs which we seek to condemn and punish have been so calculated, so malignant, and so devastating, that civilization cannot tolerate their being ignored, because it cannot survive their being repeated. . . . Against their opponents, including Jews, Catholics, and free labor, the Nazis directed such a campaign of arrogance, brutality, and annihilation as the world has not witnessed since the pre-Christian era. . . . At length bestiality and bad faith reached such excess that they aroused the sleeping strength of imperiled civilization.

Were the judges at Nuremberg justified in condemning the Nazi war criminals to death for their extermination policies? I think they were. Death was too good for these moral monsters. The gravity of their crime defies quantification, but they deserved no less punishment than death.

But perhaps you will demur on the grounds that the Nazis were being judged by ex post facto law, so that the trial had no legal standing. Suppose we accept that point. Then my question becomes: if there had been a law that forbade genocide, then, given due process, would the
Nazi criminals have deserved the death penalty? If German law attached the death penalty to such crimes against humanity, would the legal system have been immoral for violating the rights of Hitler, Himmler, Goebbels and Goring in sentencing them to death? Would it have been wrong even if such a sentence would deter others from embarking on genocidal policies? I would like to ask each of my panelists whether they think that the Nazi leaders – Hitler, Himmler and Göring – deserved the death penalty. Do you think they did?

If you agree that under conditions like these the death penalty is morally permissible (or required), then we have one clear case where it is acceptable. Absolute Abolitionism is defeated and the only question is where to draw the line between cases where the death penalty is morally permissible and where it ceases to be so. Do those who bombed the Murrah Federal Building in Oklahoma in April 1995, killing 168 men, women, and children deserve to be executed? Why is killing 168 innocent people relevantly different than killing a million? Isn’t the same malice aforesaid present in both cases? How about the serial killers Jeffrey Dahmer and Ted Bundy? Do they merit the death penalty? How about the cold blooded murder of one’s spouse, one’s parent, a helpless woman, a store keeper, a child, any one of us? If you accept the judgment of Nuremberg regarding the Nazis, the reasons that warrant the death penalty there may turn out to be applicable to other cases.

Here are my grounds for supporting the death penalty.

The Retributivist Argument

Let me say a word about my notion of desert. Historically, a component of justice, going back to Plato, Aristotle, Kant, the Biblical tradition, and virtually every major religion, holds that people ought to get what they deserve. Those who work hard for worthy goals deserve reward, those who do not make the effort deserve nothing, while those who purposefully do evil deserve punishment. The virtuous deserve to flourish to the degree of their virtue and the vicious deserve to suffer to the degree of their vice. “Whatsoever a man soweth, that shall he reap,” is an ancient adage, perhaps as old as its metaphysical counterpart of eternal judgment (Jewish/Christian tradition) or karma (Hindu/Buddhist tradition) – that what one does in this life will be part of one’s essential constitution in the next life. This notion presumes the principle of responsibility, that people are accountable for their actions and should be rewarded and punished accordingly. In this sense, the Nuremberg Trials were only carrying out our idea of universal justice as desert. Only in contemporary liberalism, such as John Rawls’s theory of justice as fairness, has the notion of natural desert been seriously undermined. But Rawls is wrong here. Though we may not deserve our initial endowments or capacities, we do deserve what we make with them. Our effort and contribution is worthy of moral assessment, and as agents we can be held accountable for our effort and contributions. That is, without the concept of desert, responsibility has no validity, and without the notion of responsibility, neither morality nor law has a foundation.

Suppose, we assume, as most of us do, that each person has a right to life. That right, however, is not absolute, but conditional (otherwise we could not kill even in self-defense). Like our right to property and liberty, it can be overridden for weighty moral reasons. When an offender threatens or attempts to kill the innocent person, the offender deserves a punishment appropriate to the severity of the crime. When the offender with malice aforesaid takes the life of an innocent person, he or she forfeits his or her own right to life. But the main idea in the retributivist theory is that not only is the death penalty permissible for the murderer; he deserves it. For the guilty deserve punishment and that punishment should be proportional to the severity of their crime. A complete retributivist like Kant holds that all and only those who are guilty should be so punished. The moderate retributivist holds that only the guilty should be so punished – but not necessarily all the guilty. Mitigating circumstances, the external costs of punishment, the possibility of reform, and so forth may prescribe lesser degrees
of punishment than are deserved. Hell itself may be a just desert for Hitler, but morality doesn’t require that we torture him. The moderate retributivist holds that giving people what they deserve (positive and negative) is a prima facie duty – not an absolute, non-overridable one.

Some have objected that the death penalty is itself murder. To quote the eighteenth-century abolitionist, Cesare di Beccaria, “Putting the criminal to death only compounds evil. If killing is an evil, then the State actually doubles the evil by executing the murderer. The State violates the criminal’s right to life. It carries out legalized murder. The death penalty cannot be useful because of the example of barbarity it gives to men . . . it seems to me absurd that the laws which punish homicide should themselves commit it.” But there is a difference. The murderer volunteered for his crime. The victim didn’t volunteer for his fate. The murderer had reason to believe that he would be justly and severely punished for his crime, so he has no reason to complain when the state executes him. The murderer violated the right to life of the victim, thereby forfeiting his own prima facie right to life. The fifth and fourteenth amendments of our Bill of Rights state that no one should be deprived of life, liberty or property without due process of the law, implying that so long as due process of the law has been observed, condemning a murderer to death is both legally and morally justified.

Society may rank punishments roughly corresponding to the gravity of the crime. That is, it draws up two lists. The first list consists of a list of crimes from the worst to the least serious. The second is a list of punishments that it considers acceptable from the most severe to the least severe. So long as there is a rough correspondence between the two lists, a society is permitted to consult its own sense of justice in linking the various punishments with each crime in question. The death penalty, it would seem, would be at the head of the list of severe punishments, linked retributively with the worst crimes. Whether torture is also permitted for the torturer, mutilation for the rapist, and so forth, may be debated. Strictly speaking I have no argument against their appropriate use, though I think torture is not necessary. It seems to me that death is a sufficient punishment for the most heinous crimes, but it’s not part of my thesis to sort out these matters. Where to put the limit of harm to be imposed on the murderer is partly a cultural matter, as the history of legal punishment indicates. Our notion of what is or is not “humane,” connected with repulsion against torture and corporal punishment in general is largely a cultural matter. It has to do with how we have been socialized, torture shocks our sensibilities, but not those of our ancestors, and not necessarily our moral principles. Although I am a moral objectivist, holding that moral truth exists, part of morality is relative to culture, to the sensibilities of the majority of its members.

One objection to the retributivist argument is that while the criminal may deserve the death penalty, the justification of the State’s execution of the criminal is another matter. It needs a separate justification. My response is: justice consists of giving people what they deserve. As Locke noted, in the state of nature we would each have the right and duty to punish the offender, but in organizing society we surrender that right and duty to the State. We may override justice because of mitigating circumstances, but in so far as the State has duty to dispense justice, it is justified in executing those who commit murder.

The Utilitarian Argument

The utilitarian argument for capital punishment is that it deters would-be offenders from committing first-degree murder. If the death penalty deters, we have an auxiliary argument for its use. It may supplement (but not replace) the retributivist argument. Isaac Ehrlich’s study, to my knowledge the most thorough study to date, takes into account the complex sociological data and concludes that over the period 1933–69 “an additional execution per year . . . may have resulted on the average in 7 or 8 fewer murders.” Ehrlich’s findings have been challenged by many opponents with the result that the issue is left in doubt. It seems an enormous
undertaking to prove either that the death penalty deters or that it does not deter. The statistical evidence is inconclusive—which is different from saying it is “zero,” as the abolitionist sometimes claims.

There are common sense reasons for believing that the death penalty deters some would-be murderers from murdering. Richard Herrnstein and James Q. Wilson in Crime and Human Nature have argued that a great deal of crime is committed on a cost–benefit scheme, wherein the criminal engages in some form of risk assessment as to his or her chances of getting caught and punished in some manner. If the would-be criminal estimates the punishment to be mild, the crime becomes inversely attractive, and vice versa. So if the potential murderer judges that he may be punished by imprisonment or death, he will be more deterred from committing a crime than if he judges he will be punished only by imprisonment. Doesn’t the fact that those condemned to death do everything in their power to postpone it and to get their sentences reduced to long-term prison sentences, show that the death penalty is feared as an evil to be avoided? The potential criminal need not go through deliberate cost–benefit analysis. The awful association of murder with the penalty of death may have embedded a powerful deterrence in the subconscious mind of the potential criminal. Perhaps the abolition of the death penalty from the 1960s until the late 1970s, and the fact that it is only recently being carried out with any regularity, has eroded the awful association, accounting for the increased murder rate from 1980 until 1993. The fact that it is beginning to be carried out, may partially account for the decrease of homicides in the past two years.

Former Prosecuting Attorney for the State of Florida, Richard Gernstein, has set forth the common-sense case for deterrence. First of all, the death penalty certainly deters the murderer from any further murders, including those he or she might commit within the prison where he is confined. Secondly, statistics cannot tell us how many potential criminals have refrained from taking another’s life through fear of the death penalty. As Hyman Barshay puts it:

Some of the common sense evidence is anecdotal as reported by the British member of parliament, Arthur Lewis, who was converted from being an abolitionist to a retentionist:

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

It’s difficult to know how widespread this kind of reasoning is. My own experience, growing up in a neighborhood where some of my acquaintances were criminals, corroborates this testimony. These criminals admitted being constrained in their behavior by the possibility of the death penalty. No doubt some crimes are committed in the heat of passion or by the temporally insane, but not all crime fits that mold. Perhaps rational risk assessment which involves the cost–benefit analysis of crime, is mainly confined to certain classes of potential and professional criminals, including burglars and kidnappers. It probably applies to people who are tempted to kill their enemies. We simply don’t know how much capital punishment deters, but this sort of common sense, anecdotal evidence cannot be dismissed as worthless. Common sense tells us that people will be deterred by greater punishments like death than by lesser ones like imprisonment.

I have been arguing that we do have some statistical and common-sense evidence that the death penalty deters would-be killers. But, even if you are skeptical about that evidence, another
argument based on the mere *possibility* that it deters is available to us. This is the argument set forth by Ernest van den Haag, which he calls the “Best Bet Argument.”¹² Van den Haag argues that even though we don’t know for certain whether the death penalty deters or prevents other murders, we should bet that it does. Indeed, due to our ignorance, any social policy we take is a gamble. Not to choose capital punishment for first degree murder is as much a bet that capital punishment doesn’t deter as choosing the policy is a bet that it does. There is a significant difference in the betting, however, in that to bet against capital punishment is to bet against the innocent and for the murderer, while to bet for it is to bet against the murderer and for the innocent.

The point is this: We are accountable for what we let happen as well as what we actually do. If I fail to bring up my children properly, so that they are a menace to society, I am to some extent responsible for their bad behavior. I could have caused it to be somewhat better. If I have good evidence that a bomb will blow up the building you are working in, and fail to notify you (assuming I can), I am partly responsible for your death, if and when the bomb explodes. So we are responsible for what we omit doing, as well as what we do. Purposefully to refrain from a lesser evil which we know will allow a greater evil to occur, is to be, at least partially responsible for the greater evil.

This responsibility for our omissions underlies van den Haag’s argument, to which we now return. Suppose that we choose a policy of capital punishment for capital crimes. In this case we are betting that the death of some murderers will be more than compensated for by the lives of some innocents not being murdered (either by these murderers or others who would have murdered). If we’re right, we have saved the lives of the innocent. If we’re wrong, unfortunately, we’ve sacrificed the lives of some murderers. But what if we choose not to have a social policy of capital punishment? If capital punishment doesn’t work as a deterrent, we’ve come out ahead, but if it does, then we’ve missed an opportunity to save innocent lives.

If we value the saving of innocent lives more highly than the loss of the guilty, then to bet on a policy of capital punishment turns out to be rational. The reasoning goes like this. Let “CP” stand for “Capital Punishment”:

Suppose that we estimate that the utility value of a murderer’s life is 5 while the value of an innocent’s life is 10 (although we cannot give lives exact numerical values, we can make rough comparative estimates of value — e.g., Mother Teresa’s life is greater than Adolf Hitler’s — all things being equal, the life of an innocent person is at least twice the value of the murderer’s life. My own sense is that the murderer has forfeited most, if not all of his worth, but if I had to put a figure on it, it would be 1000 to 1). Given van den Haag’s figures, the sums work out this way:

- A murderer saved +5
- A murderer executed −5
- An innocent saved +10
- An innocent murdered −10

Suppose that for each execution only two innocent lives are spared. Then the outcomes read as follows:

(a) $-5 + 20 = +15$
(b) $-5$
(c) $+5 - 20 = -15$
(d) $+5$
If all the possibilities are roughly equal, we can sum their outcomes like this.

If we bet on capital punishment, (a) and (b) obtain $= +10$

If we bet against capital punishment, (c) and (d) obtain $= -10$.

So we optimize value by betting in favor of capital punishment. If, as I believe, the difference between an innocent life and a murderer’s life is more than double, it becomes even more value enhancing to bet on capital punishment for murderers. To abolish the death penalty for convicted murderers would be a bad bet. We unnecessarily put the innocent at risk.

Even if we only value the utility of an innocent life slightly more than that of the murderers, it is still rational to execute convicted murderers. As van den Haag writes, “Though we have no proof of the positive deterrence of the penalty, we also have no proof of zero or negative effectiveness. I believe we have no right to risk additional future victims of murder for the sake of sparing convicted murderers; on the contrary, our moral obligation is to risk the possible ineffectiveness of executions.”

Objections to Capital Punishment

Let us examine three major objections to capital punishment, as well as the retentionist’s responses to those objections.

1 Objection: Capital punishment is a morally unacceptable thirst for revenge. As former British Prime Minister Edward Heath put it:

The real point which is emphasized to me by many constituents is that even if the death penalty is not a deterrent, murderers deserve to die. This is the question of revenge. Again, this will be a matter of moral judgment for each of us. I do not believe in revenge. If I were to become the victim of terrorists, I would not wish them to be hanged or killed in any other way for revenge. All that would do is deepen the bitterness which already tragically exists in the conflicts we experience in society, particularly in Northern Ireland.

Response: Retributivism is not the same thing as revenge, although the two attitudes are often intermixed in practice. Revenge is a personal response to a perpetrator for an injury. Retribution is an impartial and impersonal response to an offender for an offense done against someone. You cannot desire revenge for the harm of someone to whom you are indifferent. Revenge always involves personal concern for the victim. Retribution is not personal but based on objective factors: the criminal has deliberately harmed an innocent party and so deserves to be punished, whether I wish it or not. I would agree that I or my son or daughter deserves to be punished for our crimes, but I don’t wish any vengeance on myself or my son or daughter.

Furthermore, while revenge often leads us to exact more suffering from the offender than the offense warrants, retribution stipulates that the offender be punished in proportion to the gravity of the offense. In this sense, the lex talionis which we find in the Old Testament is actually a progressive rule, where retribution replaces revenge as the mode of punishment. It says that there are limits to what one may do to the offender. Revenge demands a life for an eye or a tooth, but Moses provides a rule that exacts a penalty equal to the harm done by the offender.

2 Objection: Miscarriages of justice occur. Capital punishment is to be rejected because of human fallibility in convicting innocent parties and sentencing them to death. In a survey done in 1985 Hugo Adam Bedau and Michael Radelet found that of the 7,000 persons executed in the United States between 1900 and 1985, 25 were innocent of capital crimes. While some compensation is available to those unjustly imprisoned, the death sentence is irrevocable. We can’t compensate the dead. As John Maxton, a member of the British Parliament puts it, “If we allow one innocent person to be executed, morally we are committing the same, or, in some ways, a worse crime than the person who committed the murder.”

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

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

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

Furthermore, abolitionists are simply misguided in thinking that prison sentences are a satisfactory alternative here. It's not clear that we can always or typically compensate innocent parties who waste away in prison. Jacques Barzun has argued that a prison sentence can be worse than death and carries all the problems that the death penalty does regarding the impossibility of compensation:

In the preface of his useful volume of cases, 

Hanged in Error, Mr. Leslie Hale refers to the tardy recognition of a minor miscarriage of justice—death penalty.

The prisoner emerged to find that his wife had died and that his children and his aged parents had been removed to the workhouse. By the time a small payment had been assessed as ‘compensation’ the victim was incurably insane.” So far we are as indignant with the law as Mr. Hale. But what comes next? He cites the famous Evans case, in which it is very probable that the wrong man was hanged, and he

The abolitionist is incorrect in arguing that death is different than long-term prison sentences because it is irrevocable. Imprisonment also takes good things away from us that may never be returned. We cannot restore to the inmate the freedom or opportunities he or she lost. Suppose an innocent 25-year-old man is given a life sentence for murder. Thirty years later the mistake is discovered and he is set free. Suppose he values three years of freedom to every one year of life. That is, he would rather live ten years as a free man than thirty as a prisoner. Given this man's values, the criminal justice system has taken the equivalent of ten years of life from him. If he lives until he is 65, he has, as far as his estimation is concerned, lost ten years, so that he may be said to have lived only 55 years.

The numbers in this example are arbitrary, but the basic point is sound. Most of us would prefer a shorter life of higher quality to a longer one of low quality. Death prevents all subsequent quality, but imprisonment also irrevocably harms one in diminishing the quality of life of the prisoner.

3 Objection: The death penalty is unjust because it discriminates against the poor and minorities, particularly, African Americans, over against rich people and whites. Former Supreme Court Justice William Douglas wrote that “a law which reaches that [discriminatory] result in practice has no more sanctity than a law which in terms provides the same.” Stephen Nathanson argues that “in many cases, whether one is treated justly or not depends not only on what one deserves but on how other people are treated.” He offers the example of unequal justice in a plagiarism case. “I tell the students in my class that anyone who plagiarizes will fail the course. Three students plagiarize papers, but I give only one a failing
grade. The other two, in describing their motivation, win my sympathy, and I give them passing grades." Arguing that this is patently unjust, he likens this case to the imposition of the death penalty and concludes that it too is unjust.

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

With regard to Nathanson's analogy with the plagiarism case, two things should be said against it. First, if the teacher is convinced that the motivational factors are mitigating factors, then he or she may be justified in passing two of the plagiarizing students. Suppose that the one student did no work whatsoever, showed no interest (Nathanson's motivation factor) in learning, and exhibited no remorse in cheating, whereas the other two spent long hours seriously studying the material and, upon apprehension, showed genuine remorse for their misdeeds. To be sure, they yielded to temptation at certain — though limited — sections of their long papers, but the vast majority of their papers represented their own diligent work. Suppose, as well, that all three had C averages at this point. The teacher gives the unremorseful, gross plagiarizer an F but relents and gives the other two D's. Her actions parallel the judge's use of mitigating circumstances and cannot be construed as arbitrary, let alone unjust.

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

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

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

One must be careful in reading too much into these statistics. While great disparities in statistics should cause us to examine our judicial
Punishment procedures, they do not in themselves prove injustice. For example, more males than females are convicted of violent crimes (almost 90 percent of those convicted of violent crimes are males — a virtually universal statistic), but this is not strong evidence that the law is unfair, for there are psychological explanations for the disparity in convictions. Males are on average and by nature more aggressive (usually tied to testosterone) than females. Likewise, there may be good explanations why people of one ethnic group commit more crimes than those of other groups, explanations which do not impugn the processes of the judicial system.

Conclusion

Both abolitionists and retentionists agree that punishment for crime is intended to deter (1) the criminal and (2) potential criminals from future crimes. We could deter people from crimes by framing and punishing the innocent, but that would violate justice. The innocent don’t deserve to be punished, but the guilty do. So we ground punishment on retributive foundations. The strong (Kantian) version of retributivism holds that the guilty must be punished equivalently or, if that’s not possible, in proportion to the gravity of their offense. It is a moral absolute. The moderate retributivist holds that the guilty ought to be punished in a manner proportionate to the gravity of the crime, but the punishment may be mitigated or even overridden for other moral reasons. The weakest version of retributivism holds that guilt is only a necessary (but not a sufficient) condition for punishment, and that it does not necessitate proportionality. In each of these retributivist theories capital punishment remains an option. When we add utilitarian reasons to the retributivist position, the case for capital punishment becomes even stronger. Common sense tells us that the death penalty deters potential murderers. If by executing murderers who deserve the death penalty we can prevent future murders, we should do so. Finally, I have dealt with three prominent objections to the death penalty: (1) that it is a form of revenge; (2) that it sometimes executes innocent people; and (3) that it discriminates against minorities. I have argued that these objections can be met.

Many good people would still object to my arguments, intending that they show a lack of regard for human life. But I think that the fact is just the opposite — that capital punishment respects the worth of the victim — is bluntly articulated by the newspaper columnist, Mike Royko:

When I think of the thousands of inhabitants of Death Rows in the hundreds of prisons in this country, I don’t react the way the kindly souls do — with revulsion that the state would take these lives. My reaction is: What’s taking us so long? Let’s get that electrical current flowing. Drop the pellets now!

Whenever I argue this with friends who have opposite views, they say that I don’t have enough regard for that most marvelous of miracles — human life.

Just the opposite: It’s because I have so much regard for human life that I favor capital punishment. Murder is the most terrible crime there is. Anything less than the death penalty is an insult to the victim and society. It says, in effect, that we don’t value the victim’s life enough to punish the killer fully.

It’s just because the victim’s life is sacred that I favor the death penalty as fitting punishment for first degree murder. I too regret the use of capital punishment and am in favor of its elimination. I would vote in favor of the abolition of capital punishment today but on one condition — that those contemplating murder would set an example for me. Otherwise, it is better that the murderer should perish than their innocent victims should be cut down by their knife or bullets.

Notes

A more complete set of notes and references is found in my jointly authored book with Jeffrey Reiman, The Death Penalty: For and Against (Rowman & Littlefield, 1999).

1 Michael Davis has an excellent discussion of “humane punishment” in “Death, Deterrence, and the Method of Common Sense” in Social Theory and Practice (summer 1981).
3 Ibid.
6 Ibid., 47.
8 I have been influenced by similar arguments by Michael Levin (unpublished manuscript) and Michael Davis, “Is the Death Penalty Irrevocable?” Social Theory and Practice, vol 10:2 (Summer 1984).
11 Ibid., 67.
12 The Department of Justice’s Bureau of Justice Statistics Bulletin for 1994 reports that between 1977 and 1994, 2,336 (51%) of those arrested for murder were white, 1,838 (40%) were black, 316 (7%) were Hispanic. Of the 257 who were executed, 140 (54%) were white, 98 (38%) were black, 17 (7%) were Hispanic and 2 (1%) were other races. In 1994, 31 prisoners, 20 white men and 11 black men, were executed although whites made up only 7,532 (41%) and blacks 9,906 (56%) of those arrested for murder. Of those sentenced to death in 1994, 158 were white men, 133 were black men, 25 were Hispanic men, 2 were Native American men, 2 were white women, and 3 were black women. Of those sentenced, relatively more blacks (72%) than whites (65%) or Hispanics (60%), had prior felony records. Overall the criminal justice system does not seem to favor white criminals over black, though it does seem to favor rich defendants over poor ones. Furthermore, one sometimes gets the impression that whites kill blacks more than vice versa, but actually the reverse is true. In 1997 Federal arrest records show that approximately 1,100 whites were killed by blacks, and 480 blacks were killed by whites, indicating that blacks are about 15 times more likely to kill a white than a white to kill a black.