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Further Reflections on the Guillotine

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Ronald Jay Allen and Amy Shavell

Abstract

The authors criticize the tone and substance of the current death penalty debate. The authors demonstrate that, as uncomfortable as it may sound, death is the commonality of social planning, and that all social policy decisions, including whether to have capital punishment, determine who will live and who will die. That we may execute some innocent people is an important consideration, but in light of the fact that without the death penalty other innocent people will be killed, it is not necessarily a reason to abandon it. If capital punishment deters crime, the point is obvious, but because the guilty will sometimes kill again if not executed, abolition would not obviously save innocent lives instead of merely displacing death. And just like any other form of social planning, the authors argue, such an allocation of death is the rightful province of a democratic society.

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FURTHER REFLECTIONS ON THE GUILLOTINE

RONALD J. ALLEN* & AMY SHAVELL**

Perhaps the most moving polemic against the death penalty is Albert Camus' *Reflections on the Guillotine.* Camus' sharp opposition to the death penalty may have derived from the force of the one story that he repeatedly heard about his father, who had died before Camus was one year old:[1]

> Shortly before the war of 1914, an assassin whose crime was particularly repulsive (he had slaughtered a family of farmers, including the children) was condemned to death in Algiers. He was a farm worker who had killed in a sort of bloodthirsty frenzy but has aggravated his case by robbing his victims. The affair created a great stir. It was generally thought that decapitation too mild a punishment for such a monster. This was the opinion, I have been told, of my father, who was especially aroused by the murder of the children. One of the few things I know about him, in any case, is that he wanted to witness the execution, for the first time in his life. He got up in the dark to go to the place of execution at the other end of town amid a great crowd of people. What he saw that morning he never told anyone. My mother relates merely that he came rushing home, his face distorted, refused to talk, lay down for a moment on the bed, and suddenly began to vomit. He had just discovered the reality hidden under the noble phrases with which it was masked. Instead of thinking of the slaughtered children, he could think of nothing but that quivering body that had just been dropped onto a board to have its head cut off.[2]

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[1] HERBERT R. LOTTMAN, ALBERT CAMUS: A BIOGRAPHY 23 (1979).

[2] Albert Camus, *Reflections on the Guillotine*, *in* RESISTANCE, REBELLION, AND DEATH 175 (Justin O'Brien trans., 1961).

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My[3] emotional response to the death penalty came about under quite different circumstances, and unlike Camus, left me agnostic about the death penalty. The main work that I did in the early years of my career centered on formal aspects of the process of proof, including the constitutional interest in proof beyond reasonable doubt. It so happened that derivatives of these questions were present in every capital case tried during that time, and thus I was consulted by both sides in the legal battles, and began taking some pro bono cases. In representation of this sort, engagement with the record is critical, but as I dug into the records in some of the cases I was repelled by what I found my clients had done. Truth is both stranger and crueler than fiction, and reading about some of my clients' inhuman acts left me unclear as to what it meant to be human, and thinking that execution of these individuals might be no different from putting a mad dog to sleep or cutting out a cancer. At the same time, I found that another incompatible notion exerted an influence on me, even though it seemed strange and almost mystical. Consciousness brings light into a cold and dark universe, and every speck of it, even in these cold-hearted killers, is the product of an infinite evolution that ought not to be extinguished lightly. These two views left me in equipoise, like the proverbial donkey dying of thirst because it was exactly halfway between two wells and found itself unable to decide which one to turn to. I resolved the conflict through agnosticism but one which demanded that the government take appropriate care prior to executing someone; and I was willing to be part of the process of trying to hold the government's feet to the fire through legal representation of capital defendants.

Over the years my agnosticism matured from an irresolvable emotional conflict to a rational conclusion. Like the opposition of equal but opposite emotional forces, the consequentialist arguments for and against the death penalty are likewise in equipoise, in our[4] opinion, although one would not know it by hanging around either law schools generally or conferences such as the one that precipitated this article particularly. Conferences on the death penalty in American law schools typically are self-righteous displays of commitment to revealed truth, the truth being that opposition to death penalty goes without saying and the only issue is how strongly its proponents can be tarnished with either their illogic or moral depravity. Indeed, the opposition (i.e., the proponents of the death penalty) are typically represented, if at all, by someone who is supposed to utter

[3] Ms. Shavell is a full co-author of this article, but the article was motivated by Allen's experience, the story we are about to tell in the text.

[4] Note the shift from the minor to the major key, within which we shall stay the remainder of the essay.

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barely comprehensible rantings about victims and deterrence, but the real point of the display is to demonstrate the horrifying moral shortcomings of one who wishes deliberately to take another's life.

Obviously, we do not possess a commitment to this part of the received view of the American law school professoriate, although nor do we adhere to its opposition. Our view is that whether to have capital punishment is an enormously difficult and complex problem with no *a priori* correct solution. That in turn means that the type of arguments often heard at academic gatherings that are presented as serious indictments of capital punishment we do not believe to be very convincing, although neither are their obverses. Given the typical imbalance at conferences like this, we intend to examine the limitations of the abolitionist arguments.

First, a clarification. Two types of arguments bear on the death penalty debate, as they do on most debates, normative and consequential. We put normative arguments aside, not out of disrespect but primarily because we do not think an essay can alter them—we share Judge Posner's skepticism that moral arguments greatly influence adult beliefs or actions; they may instead simply reflect individual life experiences. Consequentialist arguments, by contrast, influence everybody all the time, and it is here where views may be affected. Our topic, though, will not be precisely what is implied by the title of this symposium, but it will soon become obvious how it relates. While our concern is not so much Innocence *in* Capital Sentencing, it is very definitely related to Innocence *and* Capital Sentencing, as innocence plainly bears on the question of the propriety of capital sentencing. However, its bearing on that question is more complex than it appears at first glance.

There are obviously plausible arguments against the death penalty. First, of course, and the primary focus of this conference, is the risk of error. The *bête noir* of those favoring capital punishment is the execution of an innocent person. In Illinois, there is a related parochial problem, which is the endemic corruption that infects politics here, which has had its grip at various times on all branches of government. Although apparently rampant corruption in the Secretary of State's and Governor's offices has been most in the public eye in recent years, it bears remembering that not long ago widespread corruption was uncovered in the Cook County judiciary that involved allegations of both wrongful acquittals for bribes and convictions imposed as cover-ups. Risk of error is bad enough, but compounding that risk with the risk of corruption makes the case compelling, or so it would seem. And of course there are other, supplemental, arguments, such as the high cost of executions, their brutalizing effects on the population, and the risk of discriminatory

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application. That these are plausible arguments, we grant; that they are compelling we deny.

Begin with what is by far the most important issue, the risk of error. The argument that the risk of executing an innocent person is a sufficient justification to eliminate capital punishment is a paradigmatic example of the regrettable consequences flowing from debates within the realm of criminal justice seeming to occupy their own conceptual space that exists without contact with other, related fields of regulation. Although it seems to have escaped the attention of the death penalty debate, a common feature of social planning is that it affects the incidence of death. Virtually all social policies and decisions quite literally determine who will live and who will die. Every year for half a century, between 25,000 and 40,000 people have died in vehicular accidents, many of whom are *innocent* in every sense of the word. The number of deaths on the roads is clearly quite sensitive to current regulation; faster speed limits mean more deaths, safety devices on cars affect the outcome of crashes, and so on.[5] Merely permitting people on the roads guarantees a slaughter, and the mere fact of innocent deaths is not sufficient to put an end to the slaughter. But, is that not because of the benefits that result? Maybe so, but that, actually, is our point: explicit tradeoffs are made between benefits and costs, including the costs of innocent deaths.

In a universe with finite resources, allocation decisions with real consequences must constantly be made, and one of the primary consequences invariably is who will live and who will die, if not tomorrow, then sometime in the future. The point is obvious, but let us make it on a grand and dramatic scale. It is not at all obvious that more lives are saved by all the tax dollars spent on medical research today as compared to using that money to improve the nation's schools, thereby improving the chances of the poorest and most vulnerable of our population. It is obvious, though, that the decisions made as to what level of support to give to which programs directly affects who lives for how long and who dies.

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[5] The number of innocent lives lost from automobile accidents could be decreased rather painlessly and quite dramatically. According to the Automotive Coalition for Traffic Safety, 65,000 lives have been saved by safety belts since 1982. However, an additional 9,000 lives could be saved each year if all automobile passengers used safety belts. Increasing the proper use of safety belts is considered the most effective means of saving lives in automobile-related deaths. *See* Statement by Philip W. Haseltine, President of the American Coalition for Traffic Safety (Jun. 12, 1996), *available at* http://www.actsinc.org/61296_1.cfm. We could, for example, attach harsh penalties to not wearing safety belts (as has Israel) in order to save a considerable number of innocent lives, but few municipalities have enacted such legislation.

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But still, the riposte should be forthcoming, even if government engages in contestable cost/benefit analyses, the objectives are laudatory in general, and how, the complaint would run, can one say the same of capital punishment? There are two answers to this. First, it admits that debate over capital punishment is a debate over price not principle, and there are obvious benefits in the retributive and deterrent consequences of capital punishment. These are conventional points that we will not tarry over except to say that the abolitionists seem to neglect with respect to retribution that perhaps the most important justification for the criminal law is that it legitimizes and civilizes the natural retributive impulse that victims feel.

As for deterrence, the evidence historically has been ambiguous, but there has recently been an intriguing series of papers demonstrating a deterrent effect.[6] If capital punishment has any deterrent effect at all, then obviously the choice whether to have it, so far as mistakes are concerned, reduces to the standard choice of governmental policy of which innocents shall live and which shall die. Even if some innocents are executed, it would take but a small deterrent effect to overwhelm those wrongful deaths with the savings of innocent lives—namely, those individuals who are not murdered because of the deterrence of the crime of murder.[7] This point, of

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[6] *See, e.g.*, Joanna M. Shepherd, *Murders of Passion, Execution Delays, and the Deterrence of Capital Punishment*, 33 J. LEGAL STUD. 283 (2004) (finding that each execution on average deters three murders); *see also* Hashem Dezhbakhsh et al., *Does Capital Punishment Have a Deterrent Effect? New Evidence from Postmoratorium Panel Data*, 5 AM. L. ECON. REV. 344 (2003) (finding that each execution deters between ten and eighteen murders); H. Naci Mocan & R. Kaj Gittings, *Getting off Death Row: Commuted Sentences and the Deterrent Effect of Capital Punishment*, 46 J.L. & ECON. 453 (2003) (finding that each additional execution results in a reduction of five murders, but that the total impact of each removal from death row (other than execution) results in an increase of one additional homicide). These recent studies have been criticized by Richard Berk in his article, *New Claims About Executions and General Deterrence: Déjà Vu All over Again*, J. EMPIRICAL LEGAL STUD. (forthcoming). Berk points to the "dominant" effect that few states actively executing individuals have on the results of the entire group observed. The thrust of Berk's criticism appears to be that the results of the recent studies were driven by the few states where a substantial number of executions actually occurred. But this strikes us as a strange criticism based on an implausible causal model that assumes a direct linear relationship between executions and deterrence. A "critical mass" model, which is consistent with the Shepherd data, seems to us much more realistic.

[7] We accept the claim that innocent people have been executed. Estimates of how many there are, however, are remarkably low. Franklin Zimring has calculated that the number of people executed based on false convictions during the past three decades is about five. *See* FRANKLIN E. ZIMRING, THE CONTRADICTIONS OF AMERICAN CAPTIAL PUNISHMENT 170 (2003). Hugo Bedau, Michael L. Radelet and Constance E. Putnam have identified three individuals who they believe were wrongfully convicted and executed. *See* Charles S. Lanier & James R. Acker, *Capital Punishment, the Moratorium Movement, and Empirical Questions: Looking Beyond Innocence, Race, and Bad Lawyering in Death Penalty Cases*,

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course, explains why the liberal academy always responds with such fury to anyone with the audacity to publish findings showing a deterrent effect, and we predict we will see the same phenomenon with respect to the recent studies that adduce a significant deterrent effect.

When the dust settles, we will see where we are. Still, so far as the justification for capital punishment goes, the ambiguity surrounding deterrence is no different from the ambiguity about which medical research to fund or whether to increase the funding of education at the expense of science.[8] These decisions, too, affect who lives and dies, and often with considerable less support than the deterrence hypothesis about capital punishment.

The argument about innocent lives is even more fundamentally flawed than the head in the sand neglect of the nature of regulatory questions. Even if there is no deterrent effect of capital punishment, its elimination will merely shift the set of innocent victims, just as competing governmental regulatory choices invariably do. Indeed, in a hypothetical regime where an execution does not deter any future murders, a decision not to execute an individual may nevertheless result in deaths of other individuals: namely an inmate who would have been executed may kill others in prison.[9] Consider the case of Corey L. Fox, who strangled his

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10 PSYCH. PUB. POL. & L. 577, 593 (2004) (citing MICHAEL L. RADELET ET AL., IN SPITE OF INNOCENCE 279 (1992)). Plainly, if these numbers approximate the truth, even a small deterrent effect from capital punishment would result in more innocent lives saved than lost through mistake.

[8] For example the National Institutes of Health spent approximately $1,069 per person afflicted with HIV/AIDS but only $296 per person suffering from cancer in 1996. There were 32,665 deaths from AIDS and $1.4 billion allocated in funding, or $43,206 per death. In the same year 544,278 people died from cancer, which garnered $2.57 billion in funding or $4,723 per death. *See* Nat'l Center for Pol'y Analysis, *Idea House: Medical Research*, *at* www.ncpa.org/health/pdh39.html (last visited Mar. 9, 2005).

[9] There are numerous inmate murders. A Lexis-Nexis search of inmate murders since 1999 yielded over thirty instances. *See, e.g.*, *Arizona Executes Two-Time Inmate Killer*, WASH. POST, May 6, 1999, at A18 (Arizona inmate "Bonzai Bob" killed two fellow inmates while he was on death row awaiting execution. His cellmate was strangled with a bed sheet because he had failed to wake "Bonzai Bob" for lunch. He killed another inmate for making a vulgar comment about his niece by tossing a flaming cup of hair tonic and toilet paper into the inmate's cell, causing him to burn to death.); *see also Attica Inmate Killed in Stabbing*, BUFFALO NEWS, June 11, 2000 at 5B (while waiting for breakfast, inmate stabbed in heart with an ice-pick-type weapon); David Chanen, *Stillwater Prison Inmate Killed in Work Area*, STAR TRIB. (Minneapolis), June 21, 2000, at 7B (prisoner attacked and killed in industrial work area where "parts of the [industrial] shop are had to see because of all the equipment"); Lisa L. Colangelo & Corky Seimaszko, *Death Row Inmate Killed in Jail Fight*, DAILY NEWS (N.Y.), Sept. 8, 1999 at 8 (death row inmate and cop killer stomped to death by another convicted murderer and rapist); Cathy Lynn Grossman, *Priest was "Prize" for Suspect*, USA TODAY, Aug. 26, 2003, at A3 (former priest convicted of child molestation strangled to death by fellow inmate serving a life sentence with no parole for murdering a

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cellmate Joshua Dascewitz because he was "tired of having a cellmate."[10] Or prison inmate Edward Montour Jr., who, while serving time for killing his eleven-week old daughter, beat a guard to death and claimed that he would murder again: "The court knows how little I value human life. . . . It is self-evident that I would kill again if another opportunity was afforded me. I am antisocial, homicidal and without remorse and will remain a potential threat. The state can kill me, I don't care."[11]

We know that some convicted murderers kill again, both after release and while in prison. David Smithers attempted to hire a fellow inmate to kill a six-year old girl and her mother for a price of $10,000.[12] After release from prison, convicted murderer Joseph Fischer killed twenty more people.[13] According to the Bureau of Justice reports, 6.6% of released murderers in 1983 were arrested for murder within three years of their release.[14] Of the state prisoners released in 1994, 1.2% of the 4,443 persons (or 53 individuals) who had served time for homicide were rearrested for homicide.[15]

The point is that incarceration, the alternative to execution, carries its own death risks for the "innocent" and "guilty" alike. In fact, the chances that one will be murdered while in prison are higher than the chances that one will be executed. During the years 1985-1997, a total of 980 people were murdered in prison; during this same period 400 people were

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gay man); Ed Timms, *Inmate Killed, Another Hurt in Prison Violence—Officials Believe Polunsky Incident was Gang-related*, DALLAS MORNING NEWS, Mar. 29, 2002, at 31A (inmate stabbed eleven times in the abdomen with a metal rod, which had possibly been removed from the lip of a cooking tray and made into a weapon).

[10] *Convict "Tired" of Cellmate, Killed Him, Official Says*, CHI. TRIB., May 13, 2004, § 2, at 4.

[11] Mike Patty, *Inmate: "Kill Me, I Don't Care"; Prisoner Who Beat Guard to Death Says He Would Murder Again*, ROCKY MOUNTAIN NEWS, Feb. 13, 2003, at 32A.

[12] *Murder-for-Hire Scheme Described at Hearing; Sentencing Date Set for Molester who Tried to Hire Inmate to Kill Victim and Her Mother*, INDIANAPOLIS STAR, Jan. 16, 2003, at 15; *see also* Lisa Sink, *Man Asked Inmate to Kill Girlfriend, Police Allege—Detectives Say They Recorded Agreement to Pay $1,500*, MILWAUKEE J. SENTINEL, Feb. 17, 1999, at 1 (twenty-eight-year-old Milwaukee inmate serving time for beating his girlfriend, offered to pay another inmate $1,500 to have his girlfriend killed prior to his next court appearance).

[13] *See* Bonin v, Calderon, 59 F.3d 815 (9th Cir. 1994) (Kozinski, J., concurring) (also mentioning Kenneth McDuff, convicted of two murders, released, and who then killed at least two and maybe as many as nine more individuals).

[14] ALLEN J. BECK & BERNARD E. SHIPLEY, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1983, at 6 tbl.9 (1997), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr83.pdf.

[15] PATRICK A. LANGAN & DAVID J. LEVIN, U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT: RECIDIVISM OF PRISONERS RELEASED IN 1994, at 9 tbl.10 (2002), *available at* http://www.ojp.usdoj.gov/bjs/pub/pdf/rpr94.pdf.

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executed.[16] In any event, there is a direct trade-off of innocent lives at stake that is unaffected by the deterrence hypothesis. Even if executions increase murder rates,[17] the critical question would be the relative magnitude of the various effects.[18]

Nonetheless, is there not something different between executions where there is a known risk of error and, say, deaths from car accidents? This is often expressed as the difference between knowing you're killing an innocent person and simply the risk one takes in living in society. This

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[16] *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995, at 14 tbl.1.16 (1997) (for statistics from 1985 to 1989); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997, at 10 tbl.1.20 (2000) (for statistics from 1990 to 1997); Death Penalty Information Center, *Executions By Year* (2005), *at* http://www.deathpenaltyinfo.org/article.php?scid=8&did=146.

[17] *See, e.g.*, William J. Bowers & Glenn L. Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIME & DELINQUENCY 453, 481 (1980) (finding on average an additional two homicides in the month following an execution).

[18] The neglect of false negatives in the standard academic debate is both ubiquitous and shocking. There seems to be little concern about guilty individuals going free, and more importantly, committing additional crimes, which is surely prevalent. For example, according to an official survey of the seventy-five largest counties in the United States, 42% of all violent crime felony cases (which presumptively passed a preliminary innocence screening) were dismissed in 1990. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent*, 49 RUTGERS L. REV. 1317, 1336 (1997). Direct examples of Camus-like focus on the victims of executions to the neglect of their victims include the *Broken System* studies cataloguing reversal rates in capital cases. It is simply unclear what to make of the phenomena. *See* James Liebman et al., *A Broken System Part II: Why There Is So Much Error in Capital Cases, and What Can Be Done About It* (2002), *available at* http://www2.law.columbia.edu/brokensystem2/report.pdf (stating that 68% of all death penalty verdicts were reversed during the years 1973-1995). Another example is Professor Samuel R. Gross's article in this symposium that presents data showing that during the years 1989 to 2003 there were 328 exonerations. *See* Samuel R. Gross et al., *Exonerations in the United States, 1989 Through 2003*, 95 J. CRIM. L. & CRIMINOLOGY 523 (2005). Some, and maybe all, of these exonerations may have been factually innocent, and thus mistakes (a point that the author does not claim, of course). Even if so, again what should be made of that? That the system is indeed broken, or that it is functioning remarkably well? A conservative estimate of felony convictions during the years of Professor Gross's studies is 13,428,000. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *The Number of Adults Convicted of a Felony in State Courts Has Been Increasing*, *at* http://www.ojp.usdoj.gov/bjs/glance/felconv.htm (last visited March 3, 2005). Thus, the Gross data show an error (assuming each exoneration involves an error) rate of .0000244265 among felonies. Just as not all of these exonerations involves innocence, there are surely other cases of innocents being convicted lacking exonerations. What if for every case of an exoneration there were a 1,000 cases of wrongful felony convictions? Then the error rate would rise to .00244265, or two to three out of a thousand. Again, is this a "broken" system? One cannot conclude that on the basis of the errors alone. Moreover, it is not at all obvious that more social investment in lowering such a low error rate would be more beneficial than increasing the absolute number of factually accurate convictions.

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argument fails on both sides of the equation. First, no one intentionally executes an innocent person. *Ex post* we may conclude that happened, just like *ex post* we know innocent people die in car accidents. Second, *ex ante*, it would be considerably easier to avoid the possibility of being wrongful convicted of a capital crime than it would to avoid being killed by a car.[19] Pedestrians are killed by cars, after all, and so, too, are innocent people sitting in their homes occasionally killed in freakish accidents.

Admittedly, there seems to be something different in the act of execution, where by staying our hand a person lives, but how different can it be if the consequence is that someone else dies, even if we cannot identify now whom that unfortunate victim of our choice is? Suppose we could. Suppose we knew in advance who would be saved by executing Joseph Fischer. Would that really matter? Does the epistemological distinction between probability and certainty carry that much weight? If it does, it certainly carries an equal amount of weight with respect to the question of institutional design, and it is obvious to the point of banality that the choice between a world with or without capital punishment is largely a choice between which set of innocents will die. Some will object to this and argue that, no, the choice is over the deliberate execution of some, but we deliberately execute the innocent victims by our choice as well. Moreover, decisions as to who will live and die are not foreign to us at all; it is the essence of medical triage. There the argument is that there is no choice, as someone will live and someone will die. As we have already pointed out, though, by staying the executioner's hand, someone else will die, and so the only distinction here really lies in favoring this person (more accurately, this set of persons) over some potentially large set of unknown

[19] There is a tendency to confuse *ex ante* and *ex post* relationships. Consider the following example: There are two men awaiting death. One is a murderer in a cell on death row, the other is an AIDS patient lying in a hospital bed waiting for an experimental treatment which Congress has voted not to fund. People tend to think of the execution as different from the AIDS patient dying. They think that the decision to execute is made after the man committed the crime, only in order to end his particular life. Thus people conceive of this decision as ex post in nature. The AIDS patient on his deathbed they conceive differently; they think of his death as being the product of a prior legislative decision allocating funds to AIDS treatment. Hence, it is an *ex ante* decision, not a decision intended specifically to end this patient's life by denying him further treatment. But a moment's reflection reveals this distinction to be artificial. For the decision to execute the criminal is really just a byproduct of prior *ex ante* legislative decisions on criminal punishment. The judge and jury who decide on the death penalty are in principle fulfilling a role decided for them by ex ante decisions—in a way analogous to the role that physicians would play in not giving treatment to the AIDS patient. Upon closer consideration, it seems that execution, like many other forms of state-sanctioned death, is the result of prior decisions about social policy.

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innocent victims. Try as one might, we—society—cannot escape from the awful truth that death is the commonality of social planning.[20]

The other arguments against capital punishment, being less dramatic, have less dramatic limitations. It is now common place to point out that the apparent cost of an execution exceeds by a large margin the cost of warehousing a person (two to three million as compared to half a million dollars are the typical figures used).[21] This simply puts into question how a society wishes to spend its money, and for the various reasons suggested above, some may believe this a satisfactory choice. Moreover, given the value of life, with ranges varying from one to eighteen million dollars, it would be more shocking if the state did not proceed with care, and the cost were not high.[22]

As for brutality, that is in the eye of the beholder, and its effects are an empirical not an analytical question. The warehousing for life of dangerous people is hardly a pleasant sight. Indeed, to reduce the risk that some of these will kill given the slightest opportunity, only virtual solitary confinement will suffice.[23] Killing a person is a brutal thing; so, too, is locking them in an eight by ten cell for thirty years, with virtually no contact with any other human for long stretches of time. But, as we say, the real issues here are empirical, yet the debate has adduced no empirical evidence of these matters of which we are aware. This is further evidence of the generally unfortunate level at which the debate has occurred.

Last is the risk of discrimination. There was certainly a time when rampant discrimination against African-Americans occurred. Those times are gone. One of the most remarkable aspects of the empirical studies of the death penalty process done by Baldus and his associates, is just how little discrimination was found. Most of us at the time were convinced that

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[20] Some abolitionists may attempt to take refuse in the act/omission distinction, but this entails a moral argument about the difference, and thus beyond our interest here. We will note, though, that most reject that there is a moral distinction between killing and letting die, although the criminal law makes that distinction in certain contexts out of practicality.

[21] *See, e.g.*, Rudolph J. Gerber, *Survival Mechanisms: How American Keeps the Death Penalty Alive*, 15 STAN. L. & POL'Y. REV. 363 (2004); John Paul Truskett, *The Death Penalty*, International Law and Human Rights, 11 TULSA J. COMP. & INT'L. L. 557 (2004).

[22] Robert W. Hahn, *The Economic Analysis of Regulation: A Response to the Critics*, 71 U. CHI. L. REV. 1021 (2004); Richard W. Parker, *Grading the Government*, 70 U. CHI. L. REV. 1345 (2003).

[23] However, instances of prison murder, even in lock-down facilities exist. Sue Fox et al., *Lapses at Jail Led to Inmate's Kiling*, L.A. TIMES, May 15, 2004, at 1 (inmate killed another inmate who was supposed to be given special protection under a judge's order; inmate killer had wandered around the jail for hours); Beth Kassab, *Prison Officials Say Inmate Killed In Fight*, ORLANDO SENTINEL, Sept. 24, 2001, at B2 (murdered inmate was held in "close custody, one step below the maximum security status reserved for Death Row inmates and meaning he was under armed supervision at all times").

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robust findings of discrimination would proliferate, and not be essentially limited to race of the victim. Moreover, the effect of the Baldus studies has been to point to the solution to this aspect of the discriminatory risk, and various states have now implemented proportionality review under the guidance of this work.[24]

At a more general level, and to return to the risk of error, various innovations are occurring throughout the United States with the objective of decreasing further the chance of an erroneous execution. One of the ironies of the twenty-first century will be that the work of the abolitionists was instrumental to the continued existence of capital punishment. Although the dedicated abolitionist will not recognize the point, social policy cannot avoid some form of a cost/benefit analysis. As the costs go down, as they have with the decreasing prospect of erroneous executions and the wringing of discrimination out of the system, the argument for maintaining capital punishment is strengthened. It isn't strengthened enough in our opinion to move us from our neutral stance, but that is simply an uninteresting biographical observation. We are not neutral, however, on the level of discourse that should inform the decision on capital punishment. To be frank, it has been lamentably low. We have concentrated here only on one

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[24] *See, e.g.*, David Baldus & George Woodworth, *Race Discrimination and the Legitimacy of Capital Punishment: Reflections on the Interaction of Fact and Perception*, 53 DEPAUL L. REV. 1411 (2004); DAVID C. BALDUS ET AL., EQUAL JUSTICE AND THE DEATH PENALTY: A LEGAL AND EMPIRICAL ANALYSIS (1990). The most prevalent finding is that when the victim of the murder is black, the likelihood that the offender will receive a capital sentence decreases. Moreover, as will be illustrated below, attempting to eliminate disparate impact by applying the same rate of death penalty conviction to black defendants as is applied to white defendants would result in *more* black defendants receiving capital sentences: In the 1990 study, Baldus et. al followed 2,484 homicide cases in Georgia between 1973 and 1979. *Id*. They found that when a black defendant killed a white victim, there was a 21% probability of receiving the death penalty (50 out of 233 cases) whereas in a white defendant-black victim case, there was only a 3% (2 out of 60 cases) probability of receiving the death penalty. However, when both the defendant and victim were black, the probability of a death sentence decreased to 1% or 18 out of 1443 cases. In a case where both the defendant and the victim were white (58 out of 748 cases), the probability of a capital conviction was 8%. *Id*.

According to the Baldus study, while black defendants who kill white victims face a 21% chance of receiving the death penalty, black murder defendants face an *average* probability of 3.8% (because 1443 out of the 1676 murders involved black defendants and black victims, where the rate of capital conviction is only 1%) (calculated as (21%)(233/1676) + (1%)(1443/1676) = (21%)(.14) + (1%)(.86) = 3.8% (average conviction rate)). White defendants in the Baldus study face an average probability of receiving the death penalty that is twice as high, or 7.6% (calculated as (8%) (748/808) + (3%)(60/808) = (8%)(.92) + (3%)(.074) = 7.6% (average conviction rate)). An attempt to apply the same rate of conviction to black murder defendants as was applied to white defendants would consequently result in twice the number of blacks sentenced to death—136 instead of the reported 68.

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side of the debate, because that side is usually underrepresented, but the point is a general one. Bad, ill-informed arguments are so no matter who makes them in pursuit of no matter what interest.[25] Rhetorically powerful but empty arguments are particularly endemic to law school settings with their great emphasis on normativity. Life and death questions deserve better than that, which is why we think law schools and legal scholarship focus too much on normative questions. But, we risk now being diverted from our focus, which is not law schools and legal scholarship, but the death penalty. To sum up, the death penalty is a complicated problem, just like any issue of social planning, of which wrongful convictions is just one part of the puzzle.

[25] As are misleading ones. For example, the Center on Wrongful convictions website posts an "Illinois Death Penalty Fact Sheet" that offers a list of statistics that collectively seem to show a racially skewed capital punishment process. For example, the fact sheet cites that although only 15.1% of the population is black, blacks account for 58.7% of persons sentenced to death. But there is no comparison to how many murders in Illinois are committed by blacks. Without the inclusion of such statistics as a meaningful comparison, it is difficult to know what to make of the numbers. See http://www.law.northwestern.edu/depts/clinic/wrongful/FactSheet.pdf

The deleterious effect of misleading public discourse can be seen in the June 2, 2003 editorial of the *Chicago Tribune*. Relying on unanalyzed data analogous to that posted on the Center's website, the Tribune remarks on the "astonishing disparity" in the racial demographics of capital punishment. Without a minimal level of analysis, there is no good reason to believe that the "disparities" are "astonishing," and a good deal of reason to believe much, although probably not all, of them are explained by legitimate variables.

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