

National Judicial Academy Bhopal, INDIA

TRAINING PROGRAMME FOR JUDGES FROM SRI LANKA
21 August, 2016

USEFULNESS OF DEATH PENALTY

Prof.Dr.K.Chockalingam,
Former Vice Chancellor, M.S. University &
Professor of Criminology,
University of Madras, India

Contents

- 1.Introduction
- History and rationale of death penalty
- Purposes s of punishment
- Aims of punishment
- Moral justifications of death penalty
- Public policy issues
- Arguments Pro & Contra
- The Liberal Position
- Against the death penalty
- Conclusion.

Introduction

History and rationale of death penalty

- Society thinks that some people are so irredeemable and their actions so horrendous that justice demands that they should die.
- Death penalty, is a critical part of the CJS, reserved for the most serious and violent offenders.
- Death penalty has been common practice around the world as far back as history records, and in primitive social environments, dwellers had no choice but to kill criminals.
- There were no permanent facilities to lock up murderers and setting offenders free might give them a chance to do more damage. Besides, they had no financial resources to build detention centers and post guards to keep them from escaping.
- Hence in earlier societies, even minor offenses were punished with great severity.

History and rationale of death penalty

- But the story is different today: maximum security prisons are readily available for detaining the violent criminals.
- In recent times the trend around the world has been to abolish death penalty.
- A data says that out of the 195 countries, 90 do not allow death penalty, and only about 60 actively practice it. European countries have all but eliminated the death penalty and, among all industrialized countries, the U.S. stands virtually alone.
- In 2007, about 3,000 people were executed world wide, and the five leading countries were :
 - China: 470
 - Iran: 317
 - Saudi Arabia: 143
 - Pakistan: 135
 - United States: 42
 - Iraq: 33

History and rationale of death penalty (Cont.)

-
- Is it time to abandon the death penalty as a relic from a less civilized period of human history?
- In the present days of “evolving standards of decency” in civilized societies, the critical issue is whether society has reached the point at which death penalty is no longer an appropriate option.
- **BACKGROUND**
- As the death penalty is an extreme form of punishment, much of the controversy surrounding it can be discussed by considering the nature of punishment in general.
- Thus let us begin by examining more broadly at the notion of punishment.

Purposes of punishment

- **Punishment in General**
- Punishment involves the **deliberate infliction of suffering** on an offender for an offence involving legal transgression.
- Criminal law has a range of options in punishment that differ in severity.
- At the low end, punishments of community service require offenders to participate in some activity that benefits their local community, such as picking up litter, working at animal shelters, or assisting nonprofit organizations.
- Financial penalties, such as fines, are common with non-violent crimes.
- Incarceration in jail is the harshest form of punishment.

Purposes of punishment (Cont.)

- Many harsh forms of punishment practised in the past, involving torture, have been outlawed as inhumane in most countries. One major liberalizing influence was the views of the Italian Philosopher **Cesare Beccaria** through his book *On Crimes and Punishments* (1764).
- Beccaria believed that the entire concept of criminal punishment needed major rethinking, and society needed to shift away from severe methods to ones that would have a more lasting psychological impact on both the prisoner and the public.
- He writes,
“ *The intent of punishments is not to torment a sentient being, nor to undo a crime already committed. . . . Instead of being influenced by passion, such institutions should be the cool moderator of the passions of individuals. Can the groans of a tortured wretch bring back the time past, or reverse the crime he has committed*”.

Purposes of punishment (Cont.)

- Hence punishments, and mode of inflicting them should be chosen in a way that will make lasting impressions on the minds of others, with the least torment to the body of the criminal. [*On Crimes and Punishments*, 12]
- Beccaria was also firmly opposed to the death penalty and felt that **long term imprisonment was more effective than execution**. The only exception, he believed, was with violent criminals..
- In recent years the very notion of punishment has been questioned by social scientists who believe that the task of the CJS is to cure criminals.
- From this perspective, **people commit crimes because they are in essence behaving according to their psychological programming. Criminals thus should be reprogrammed, not punished.**

Aims of punishment

- **Aims of Punishment**
- All punishment has some aim which serves to justify the suffering that is inflicted on the offender. The main aims **are**:
 - **retribution,**
 - **incapacitation,**
 - **rehabilitation, and**
 - **deterrence.**
- With *retribution*, punishment is a matter of what is deserved in return for a wrongful act. The retributive theory of punishment is most often associated with the notion of “**eye for an eye**” justice, where the imposed punishment is equal to the harm done.

Aims of punishment (Cont.)

- In the ancient Babylonian *Law of Hammurabi* (c. 1750 BCE): “If a man puts out the eye of another man, then his eye shall be put out. If he breaks another man's bone, then his bone shall be broken.”
- By today’s standards, strict adherence to “eye for an eye” justice is **barbaric**: we don’t punish rapists by raping them, or punish arsonists by burning down their houses. Rather, **we seek redress through more humane types of suffering that we can impose on offenders.**
- With ***incapacitation***, punishment keeps offenders from repeating similar crimes, typically by physically restraining them.

Aims of punishment (Cont.)

- With *rehabilitation*, punishment aims to change the offender's predisposition towards criminal behavior, and changes him from becoming a threat to the community through psychological counseling or other types of behavior-modification therapy.
- With *deterrence*, punishment is a means of discouraging others from committing similar offenses by creating a fear of punishment. The aim here is to use the criminal as an example for others to learn from.

Aims of punishment (Cont.)

- In our ordinary lives, revenge often plays a role in our motivations to have someone punished.
- By harshly punishing the perpetrator, you have the opportunity to vent your rage and some sense of satisfaction from your ordeal.
- What distinguishes revenge from retributive aims of punishment is **impartiality**. *Revenge stems from an individual's personal desire for retaliation, whereas retribution considers more abstractly what justice calls for in a specific situation.*

Aims of Punishment (Cont.)

- The critical question is whether revenge is a valid aim of punishment. While part of our justice system aims to give satisfaction to the victims, it is routine for victims and their family to testify at trials which might influence the court on the severity of the punishment awarded.
- There is a sense in which victims need to be avenged for the wrongs done to them. On the other hand, we often associate revenge with uncivilized societies indulging in blood feuds that last generations. In a civilized society, revenge is not considered a legitimate aim of punishment.
- One of the jobs of the CJS is to protect society from our extreme emotional reactions to criminals, and instead make more impartial, rational judgments.

Aims of Punishment (Cont.)

- All the above aims of punishment—except reform—have been used as justifications for the death penalty, particularly with murders. It is eye for an eye retribution: if you take someone's life, justice demands that society takes your life.
- It is incapacitation in the most extreme possible way since executed murderers can never repeat their crimes. Executing murderers is also a deterrent to other potential murderers.
- Finally, death penalty is an important way for family members of murder victims to vent their rage.
- **Whether any of these are good justifications for the death penalty, though, remains to be seen and is at the center of the death penalty controversy.**
- **What People Think**
- Most people in the U.S. today favor the death penalty and appear to be reasonably satisfied with the number of executions that take place, as reflected in some surveys (www.pollingreport.com).

Moral justifications for death penalty

- **ETHICAL ISSUES/ moral justifications**
- Of the many moral justifications offered for death penalty, **three of the most important ones draw on the notions of rights forfeiture, retribution, and deterrence.** We'll look at each of these.
- **Rights Forfeiture**
- A classic justification of the death penalty is **that when people commit serious crimes, they forfeit their rights to life, and thus may be executed.**
- **Rights forfeiture is a justification for other forms of punishment, such as imprisonment..**

Moral justifications for death penalty(Cont.)

- The British philosopher John Locke (1632-1704), argued that everyone has fundamental, God given rights to life, health, liberty and property. We retain all of these rights, unless we violate the rights of others, in which case we forfeit all our rights, including right to life.
- Locke argued that even with minor crimes, such as theft, the criminal forfeits his right to life. Due to the influence of Locke's theory, English law had some 200 capital offenses by 1800. . However, in time, death penalty became reserved only for most serious crimes, and only to murderers in U.S.
- Some critics have argued that the very concept of natural rights is a fabrication, a mere rhetorical device. Natural rights have no real substance or meaning, and the notion of rights forfeiture is all the more meaningless and hence it is groundless to use the concept of rights forfeiture in support of the death penalty.

Moral justifications for death penalty(Cont.)

- **Second**, the idea of forfeiture is very ill-defined. Beccaria argued that no one would agree to give up his or her right to life as a requirement for entering society: “Each person gives only the smallest portion of his liberty over to the good of the public. Is it possible that this small portion [of liberty] contains the greatest good of all, namely, that person's life?” (*On Crimes and Punishment*, 28).
- The whole point of entering society is to get some benefit, and a person would get no such benefit if he is dead. Thus, rights forfeiture is at best limited to the removal of our liberties, such as the rights of free movement and expression, but does not extend to the destruction of our lives.
- **Third**, some defenders of natural rights argue that the right to life is completely non-negotiable, regardless of what crimes we may have committed. The idea of a right to life is not particularly meaningful if it can have exceptions here and there.
- **The bottom line**: there are many assumptions behind the concepts of natural rights and rights forfeiture, and there is no uniformly acceptable way to use these notions to justify the death penalty.

Moral justifications for death penalty(Cont.)

- **Retribution**
- Another justification of the death penalty is its retributive conception : **an eye for an eye, a life for a life**. Application of this principle has many problems.
- **First**, when applied literally it can lead to absurd consequences. Consider the following statement from the Law of Hammurabi:
- If a builder builds a bad house for someone, and the house falls in and kills its owner, then that builder shall be put to death.
- If it kills the son of the owner, then the son of that builder shall be put to death. While the first sentence makes at least some sense, the second sentence of killing the son is ridiculous.

Moral justifications for death penalty(Cont

- **Second**, a strict application of the “eye for an eye” formula may even be inadequate. If a mass murderer kills ten people, then taking his single life is technically not punishment in kind. Think of how many times we’d need to have executed Hitler to balance out the murders that he’s responsible for.
- **Third**, civilized societies do not strictly apply “an eye for an eye” punishment in non-murder situations—we don’t punish rapists by raping them. It seems arbitrary to apply “an eye for an eye” punishment when it comes to murder.

Moral justifications for death penalty(Cont.)

- **Deterrence**

- Yet another defense of capital punishment is that it deters others from committing similar crimes.
- It's not really a question of whether the death penalty has any deterrent value at all. Rather, it's a question of whether executing criminals does a better job at deterring others than sending them to prison for life.
- How, a defender of the death penalty can demonstrate that it really does have greater deterrence value? Ideally, a truly scientific study of the question would involve a comparison between two otherwise identical societies in which capital punishment was not used in the control group but was used in the test group.
- The problem, though, is that it is a practical impossibility to isolate two otherwise identical societies upon which to conduct the study. There would be an almost endless variety of differing factors in the respective groups, such as differing rates of unemployment, drug use, education, gun ownership, church attendance, single parenthood, gang membership and a plethora of other negative factors..

Moral justifications for death penalty(Cont.)

- In the absence of being able to conduct a scientifically perfect experiment to test the deterrence value of capital punishment, researchers have tried other approaches.
- A common method is to compare the murder rates of states that have the death penalty to those that do not have.
- Another is to compare whether murder rates have increased or decreased when those same states have increased or decreased the number of executions. Again, though, it is nearly impossible to remove the impact of other influences, such as cultural and economic ones, which differ from state to state and even differ over time within the same state.
- Not surprisingly, most studies on the deterrence value of capital punishment are either inconclusive or methodologically flawed.

Moral justifications for death penalty(Cont)

- Even if the death penalty has some extra deterrent value, a question remains about how frequently it needs to be imposed in order to successfully deter others.
- In the first place, these sentences are "cruel" as they excessively go beyond, not in degree but in kind, the punishments that the state legislatures have determined to be necessary. . . .
- In the second place, these sentences are "unusual" in the sense that the penalty of death is infrequently imposed for murder, and that its imposition for rape is extraordinarily rare.
- These death sentences are cruel and unusual in the same way that being struck by lightning is cruel and unusual.

Public Policy issues

PUBLIC POLICY ISSUES

- The legal issues surrounding the death penalty is about its fair implementation. That is, even if we concede that death penalty is morally justifiable (for example, on the grounds of retribution or deterrence), the question remains whether it is good public policy.
- Public policy discussions about capital punishment in the U.S. often focus on three specific issues: **proportionality, executing the innocent, and racial bias.**
- Much of the debate centers on Supreme Court decisions.
- **Proportionality**
- An initial legal issue regarding death penalty involves the notion of proportionality, that is, whether death penalty sentences are handed down uniformly in similar situations.
- The issue surfaced in the Supreme Court decision *Furman v. Georgia* (1972), in which the Court ruled that the death penalty was unconstitutional because it was imposed capriciously and arbitrarily.

Public Policy issues (Cont.)

- The decision came when there was little public support for death penalty, and there hadn't been any executions for five years.
- But as crime in the U.S. increased in the 1970s, public attitudes changed. Reflecting this, in the 1976 case *Gregg v. Georgia* the Supreme Court reversed its 1972 decision, declaring that States had fixed the problem and the death penalty was no longer arbitrarily imposed.
- New rules pertaining to executions provided “objective standards to guide, regularize, and make rationally reviewable the process for imposing the sentence of death.”
- Among these new rules were *proportionality reviews*, which would evaluate whether a particular crime warrants death penalty.
- The very following year the Supreme Court determined that capital punishment in cases of rape are unconstitutional because the sentence was disproportionate to the crime (Coker v. Georgia, 1977). In more recent cases, the Court has ruled against executing mentally retarded people and juveniles under age 18 (Atkins v. Virginia, 2003; Roper v. Simmons, 2005).

Public Policy issues (Cont.)

- The function of proportionality review systems is to determine whether a death sentence is consistent with the sentences imposed in factually similar cases.
- The challenge, is to devise a comprehensive list of the relevant factors in various crimes which can then be used to compare the similarity of one crime to another. Obvious factors would include the criminal's motivation and level of violence.
- Less obvious factors would be whether the defendant had a troubled childhood, poor education, drug addiction, or mental impairment.
- Some proportionality review systems have attempted to make the comparison process as mechanical as possible. A judge or review panel would simply plug the relevant factors of a case into a statistical formula, and out would come an answer, such as whether the crime is typically punishable through death, or by long-term imprisonment.
- Critics of proportionality review systems charge that it is nearly impossible to make a comprehensive list of all of the relevant factors and to assign to them the appropriate weight.

Public Policy issues (Cont.)

- **Executing the Innocent**
- Throughout history there have been concerns about innocent people being wrongfully executed. In 2000, such worries prompted Governor George Ryan to call a moratorium on all executions in his state of Illinois.
- His decision was the result of disturbing evidence that many inmates on death row were innocent of the crimes they were convicted of, or accused of based on faulty evidence.
- According to Ryan, the CJS is so flawed that innocent people are regularly given the death penalty. While many steps can be taken to improve the system, given human frailty, we can never guarantee that only the guilty will be executed. His decision sparked a national debate on the issue.
- One response to the problem of executing the innocent is to deny that this ever really happens. British philosopher John Stuart Mill (1806–1873) made this argument over a century ago in a speech before the British Parliament

Public Policy issues (Cont.)

- Our rules of evidence are too favorable to the prisoner; and juries and Judges carry out the maxim, “It is better that ten guilty should escape than that one innocent person should suffer,” .
- Judges are most anxious to point out, and juries to allow for, the barest possibility of the prisoner’s innocence. No human judgment is infallible; such sad cases as my hon. Friend cited will sometimes occur; but in so grave a case as that of murder, the accused, in our system, has always the benefit of the merest shadow of a doubt.
[Parliamentary speech, April 21, 1868]
- Mill’s point is that,, wrongful executions do unfortunately take place in other European countries, and in those places that is a decisive argument against the death penalty. But thankfully the English judicial system is so vigilant to avoid such errors that it doesn’t happen there. In more recent times George W. Bush, when governor of Texas, expressed a similar attitude regarding the large numbers of executions in his state:

Public Policy issues (Cont.)

- Death penalty opponents recognize the difficulty in naming innocent people who have been executed, and the reason for this, is that in most capital punishment cases there is no DNA evidence available from the crime scene. Nevertheless, the fact remains that many people on death row have been proven innocent through DNA testing. Indeed, as the survey cited at the outset indicates, most people in the U.S. believe that innocent people have been executed.
- Other death penalty defenders concede that innocent people may have been executed. However, they argue, the numbers are probably very small – only a few during the entire 20th century, and none in more recent decades.
- Further, many public policies result in the deaths of innocent people, such as when governments set highway speed limits, automobile safety standards, building safety codes, and prescription drug testing procedures. These decisions may result in the deaths of thousands of innocent people, and, by comparison, the number of innocent people executed is negligible.
- .

Public Policy issues (Cont.)

- **Racial Bias**
- Another critical legal issue in death penalty in the U.S. is racial bias. The issue came to light in the 1987 Supreme Court case, *McCleskey v. Kemp*. The defendant, Warren McCleskey, was a black man who was sentenced to death in Georgia for killing a white police officer.
- On appeal to the Supreme Court, McCleskey's attorney argued that the sentence was the result of racial bias, relying on research by law professor David Baldus who studied over 2,000 murder cases in Georgia during the 1970's..
- Among Baldus's findings were : (1) murderers were 4.3 times more likely to receive death penalty if their victims were white rather than black. (2) Second, when victims were white, the murderers who were black were more likely to receive the death penalty than white murderers. Thus, in the eyes of the justice system, more leniency was shown to white killers than to black ones. Ultimately, the Court ruled against McCleskey

Public Policy issues (Cont.)

- While the Court agreed that there were racial disparities in awarding death penalty in Georgia, they held that it did not violate McCleskey's constitutional right of equal protection under the law. Convicts like McCleskey cannot argue that they've been wronged because of a general pattern of racial bias; rather, a convict must show that race affected his or her specific case. McCleskey was executed in 1991.
- Although Baldus's findings were restricted to Georgia's death penalty cases in the 1970s, other studies draw similar conclusions about more recent death penalty convictions.
- Currently more than half of all people on death row are people of color, most of whom are black.
- A 2006 study by a Stanford University research team concluded that black male murderers found guilty of killing a white person were more than twice as likely to get the death penalty when they had stereotypically black-looking features, such as darker skin (Jennifer Eberhardt, "Looking Deathworthy").

Public Policy issues (Cont.)

- Death penalty defenders often concede that there is an element of racial bias when the death penalty is handed down, but it is actually a bias against white killers, not against black killers. The reason is that, first, the criminal justice system under-punishes those who kill blacks, just as Baldus indicated.
- Second, most killings occur within racial groups; that is, blacks typically kill blacks, whites typically kill whites. The result is that black killers are on the whole punished more lightly than white killers, both with the death penalty and the length of prison terms. Death penalty advocate John McAdams writes,
- 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 murders off far more easily than white murderers. [U.S. Senate, Judiciary Committee, *An Examination of the Death Penalty in the United States*, 2006]

ARGUMENTS PRO AND CONTRA

- According to McAdams, there are racial disparities throughout the CJS – particularly as the punishments are stiffer when the victim is white. This exposes an imperfection in the system as a whole.
- **The Conservative Position**
- The conservative view of capital punishment is that it is at least sometimes morally justifiable and it should be legal. Advocates of this view are often called “retentionists”, indicating that they seek to retain the practice of capital punishment in society.
- The main arguments of retentionists for their conservative position are:
 1. *Retribution*: Death penalty is deserved and ultimately balances the scales of justice. A criticism of this argument is that, while justice demands that murderers be punished, literal eye for an eye retribution is not an acceptable means of punishment in civilized societies.

ARGUMENTS PRO AND CONTRA (Cont.)

- 2. *Incapacitation*: death penalty keeps the murderer from killing again. A criticism of this argument is that murderers aren't often repeat killers, and the public overestimates the danger.
- 3. *Deterrence*: death penalty deters crime. A criticism of this argument is that there is no conclusive evidence that death penalty deters more than long term imprisonment.
- 4. *Financial Costs*: Detaining criminals in prison for life is very expensive, and society should not have to pay those costs for murderers. A criticism of this argument is that justice should not be determined by financial considerations.
- We could cut the costs of the criminal justice system even more by eliminating juries and appeal processes for all crimes. We could cut back on food and cell space in all prisons. We could, in short, have our criminal justice system be like those in third world countries, which are much more cost-effective than ours. In an advanced society, though, there is always a high financial price that we pay for being just and humane, and that price is worth it..

The Liberal Position

- The liberal view of capital punishment is that it is never morally justifiable and it should be illegal. Advocates of this position, the “abolitionists” seek to abolish the practice of the death penalty. The chief arguments for the liberal position are:
 - 1. *Proportionality*: the death penalty is imposed arbitrarily, depending on the attitudes of specific prosecutors, judges, and one’s ability to afford a good defense. As one Supreme Court justice said, the death penalty should be imposed with “reasonable consistency, or not at all.” A criticism of this argument is that in US, many states have proportionality reviews to check that the death penalty is appropriate to the crime.
 - 2. *Executing the innocent*: mistakes are made in the CJS that sometimes result in innocent people being executed A criticism of this argument is that it is difficult to identify clear cases of innocent people being executed, and, even if it does occasionally happen, **many public policies result in the deaths of innocent people.**

The Liberal Position(Cont.)

- 3. *Racial bias*: Capital punishment is imposed with racial bias. A criticism of this argument is that the real bias appears to be against white killers (who typically kill whites), and not against black killers (who typically kill blacks). Typical black killers get the lighter sentences.
- 4. *International Standards*: The industrialized and advanced countries around the world have abandoned the death penalty, and by retaining the practice places itself in the same category as under developed countries.
- This is particularly so with the quantity of executions carried out in US, which compares to the most tyrannical governments today. A criticism of this argument is the American culture is not completely comparable to that of other developed countries. The per capita murder rate in US is among the highest in the world, and by far the highest of the most developed countries.

- **A Moderate Compromise**
- Technically, there is no true middle position on the issue of the death penalty since abolitionists on the liberal side believe that it is never justified under any circumstance.
- Nevertheless, there is room for at least some compromise by making the system less arbitrary and prone to error.
- For example, in US, some states overuse the death penalty, most notably Texas which in 2007 was responsible for more than 60% of all executions in the U.S. Other heavy users of the death penalty are also Southern states.
- Bringing these states more in line with national averages would eliminate some charges of disproportionality. To accomplish this, the Supreme Court could set strict guidelines to assure that the death penalty is imposed proportionally, only on the truly guilty, and without racial bias.

2. AGAINST THE DEATH PENALTY

Stephen B. Bright

- Attorney *Stephen B. Bright*, from Yale Law School, and President of the Southern Center for Human Rights argues that *death penalty today is still as arbitrary as it was decades ago, and it should be abolished.*
- *He argues that wrongful convictions frequently occur and result from poor legal representation, mistaken identifications, the unreliable testimony of informants who swap their testimony for lenient treatment, and police and prosecutorial misconduct.*”
- *Further, according to Bright, the death penalty does not deter since murderers are not the kind of people who rationally assess risks, and, even if they were, they don't have the right information about the death penalty to make a reasoned judgment.*

AGAINST THE DEATH PENALTY (Cont.)

- Forty years ago, in 1976, the US Supreme Court allowed the resumption of capital punishment after declaring it unconstitutional four years earlier in *Furman v. Georgia* in 1972.
- Laws passed in response to *Furman* were supposed to correct the constitutional defects identified in 1972.
- Decades of experience with even the amended laws has demonstrated that those laws have also failed to correct the malady.
- 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 death penalty is imposed than the crime. The system is still fallible in deciding both guilt and punishment. In addition, 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.

AGAINST THE DEATH PENALTY (Cont.)

- Many supporters of capital punishment, have had second thoughts about it. Justice Sandra Day O'Connor, of the US 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, that "the death penalty experiment has failed."
- Moreover, the death penalty is not evenly distributed around the US. 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 1000 executions;

AGAINST THE DEATH PENALTY (Cont.)

- 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.
- But capital punishment is not needed to protect society or to punish offenders. Our prisons are sufficient where these prisoners are completely isolated.

AGAINST THE DEATH PENALTY (Cont.)

- **I. 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.
- 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.

- **A. 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.
- 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.
- Because of different practices by prosecutors, there are geographical disparities with regard to where death is imposed within states
- .
- .

Against the death penalty

- **II. 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.
- 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.

- **III. 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.
- Experience tells us that 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.

- **IV. THE COST IS NOT JUSTIFIED**
- There is a growing recognition that **it is just not worth it.**
- **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 were 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.

- **V. 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.
- Source: U.S. Senate Judiciary subcommittee hearing on *An Examination of the Death Penalty in the United States* (2006). Notes have been removed (see www.gpoaccess.gov/chearings for complete text).
-
- Source: U.S. Senate, Judiciary subcommittee hearing on *An Examination of the Death Penalty in the United States* (2006). Notes have been removed (see www.gpoaccess.gov/chearings for complete text).

THANK YOU FOR YOUR ATTENTION