

The Structure of Death Penalty Arguments

Matt Stichter

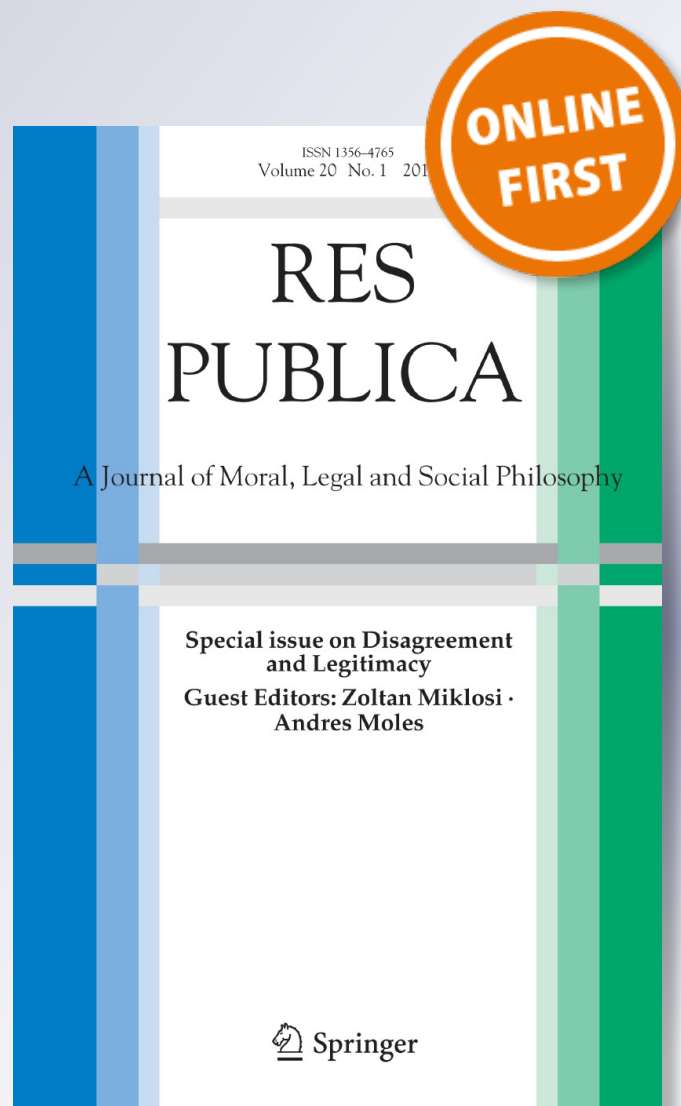
Res Publica

A Journal of Moral, Legal and Social
Philosophy

ISSN 1356-4765

Res Publica

DOI 10.1007/s11158-014-9242-1



Your article is protected by copyright and all rights are held exclusively by Springer Science +Business Media Dordrecht. This e-offprint is for personal use only and shall not be self-archived in electronic repositories. If you wish to self-archive your article, please use the accepted manuscript version for posting on your own website. You may further deposit the accepted manuscript version in any repository, provided it is only made publicly available 12 months after official publication or later and provided acknowledgement is given to the original source of publication and a link is inserted to the published article on Springer's website. The link must be accompanied by the following text: "The final publication is available at link.springer.com".

The Structure of Death Penalty Arguments

Matt Stichter

© Springer Science+Business Media Dordrecht 2014

Abstract In death penalty debates, advocates on both sides have advanced a staggering number of arguments to defend their positions. Many of those arguments fail to support retaining or abolishing the death penalty, and often this is due to advocates pursuing a line of reasoning where the conclusion, even if correctly established, will not ultimately prove decisive. Many of these issues are also interconnected and shouldn't be treated separately. The goal of this paper is to provide some clarity about which specific issues really determine whether the institution of capital punishment is morally permissible. The issues can be broadly grouped into three categories: substantive; procedural (comparative); and procedural (noncomparative). Substantive debates regard the inherent moral status of the death penalty, while procedural debates regard how the death penalty is applied in practice, with two types of injustice that can result. Substantive issues have the potential to be the most decisive, for if the death penalty is inherently immoral there's no need to even raise procedural questions. However, it appears difficult for either side to make a clearly compelling argument on substantive grounds. In regards to the procedural arguments, the concerns of noncomparative justice lead to stronger arguments than the comparative concerns, for the irrevocable nature of the death penalty can play a role in the former but not the later. Overall, abolitionists have a clear advantage in this debate, as they only have to make their case on one of these fronts, while supporters must defend themselves on all three fronts.

Keywords Capital punishment · Death penalty · Justice · Law · Political philosophy · Retributivism

M. Stichter (✉)
School of Politics, Philosophy, and Public Affairs, Washington State University, Johnson Tower
817, Pullman, WA 99164, USA
e-mail: mstichter@wsu.edu

Introduction

With a topic that is as passionately debated as the moral permissibility of the death penalty, it is perhaps not surprising that advocates on both sides tend to advance every possible argument they can think of to defend their position. Unfortunately, such tactics leave anyone studying the debate with a wide array of arguments to contend with, and a great majority of those arguments fail to support retaining or abolishing the death penalty. The goal of this paper is to provide some clarity about which specific issues really determine whether capital punishment is morally permissible. Often the failures can be traced to advocates pursuing a line of reasoning where the conclusion, even if correctly established, will not ultimately prove decisive. For example, even if you successfully conclude that murderers deserve to die, it does not follow necessarily that the legal institutions for administering capital punishment are morally justified. Even if you successfully conclude that arbitrariness affects decisions about which murderers receive the death penalty, this is not necessarily a decisive reason to abolish the death penalty. Establishing these conclusions requires arguing further points regarding the irrevocable nature of the death penalty, the possibility of executing the innocent, the conflicts between comparative and noncomparative conceptions of justice, etc. That is, many of these issues are interconnected and should not be treated separately.

In order to draw out the connections between these various issues, this paper surveys a large number of arguments for and against the death penalty. However, given the wide scope of this debate, it's not possible to survey all of them, and the focus here is limited to arguments based on retributive (rather than consequentialist) grounds. Furthermore, while there may be many retributive arguments seeking to resolve whether the death penalty is consistent with a respect for persons, for example, the main concern here is on more general questions such as how the overall status of the moral permissibility of the death penalty is affected by determining whether it is consistent with a respect for persons. In the end, this paper argues that when the connections between these arguments are explored, and the decisive issues are highlighted, that a much stronger case can be made to abolish the death penalty than to retain it, at least on retributive grounds.

The arguments regarding capital punishment can be broadly grouped into three categories: substantive; procedural (comparative); and procedural (noncomparative). First, there are substantive debates about whether the death penalty is an inherently immoral form of punishment. It might be that the death penalty is inconsistent with a respect for the dignity of persons. If so, that settles the debate. If not, and the death penalty is at least sometimes a morally permissible form of punishment, then the debate continues. The reason why it continues is that even if one believes that murderers deserve death for their crimes, it's a distinct issue whether we ought to put into place the kind of institutions and laws needed to give those murderers what they deserve, since the effects of those institutions must also be taken into consideration when judging the overall moral permissibility of the death penalty. After all, the institutions themselves may lead to unintended injustices and other undesirable results. Thus, the 'desert' argument will not be sufficient for establishing the moral permissibility of the death penalty.

While some substantive issues are outlined in this paper,¹ the focus is mostly on procedural issues where the concern is with the actual processes by which the death penalty is administered. It should be noted that there is a background assumption in procedural debates that at least some murderers deserve death for their crimes (and that it isn't inherently immoral to give them what they deserve). The reason for this background assumption in procedural debates is that if the substantive debate definitively goes against the death penalty, then there's no need to discuss procedural issues. After all, even a really effective and non-arbitrary implementation of an inherently immoral punishment will still be immoral overall. Thus, if the discussion is in regards to procedural issues, then there must be this background assumption (even if an abolitionist is just assuming this for the sake of argument).²

Objections to the death penalty on procedural grounds divide into two types of concern about injustice—comparative and noncomparative. With regard to the former, whether you're being treated justly depends in part on how others in a similar situation are being treated. With the latter, being treated justly depends only on whether you're getting what you deserve. Procedural problems with the administration of the death penalty can lead to either form of injustice. However, that there are such problems does not necessarily lead to the conclusion that the death penalty should be abolished to avoid such injustices, because of the inherent injustice in giving murderers a punishment that's less than they deserve (such as life in prison). This is where that background assumption that some murderers deserve death comes into play in procedural debates. Thus, arguments have to be made regarding trade-offs between different types of injustice.

In this debate, substantive issues have the potential to be the most decisive, for if the death penalty is inherently immoral there's no need to even raise procedural questions. However, it appears difficult for either side to make a clearly compelling argument on substantive grounds, as evidenced in part by the proliferation of procedural arguments. In regards to procedural arguments against the death penalty, the concerns of noncomparative justice lead to stronger arguments than the comparative concerns, in part because the irrevocable nature of the death penalty can play a role in the former but not the later. Overall, abolitionists have a clear advantage in this debate, as they only have to make their case on one of these fronts, while supporters must defend themselves on all three fronts.

The first section of this paper outlines some substantive issues, such as various interpretations of *lex talionis*, and what role a respect for persons plays in this debate. The second section begins the discussion of procedural objections to capital punishment, focusing specifically on the claim that it is being applied arbitrarily from the standpoint of comparative justice (and using racism as an example). The third section serves as a transition from comparative to noncomparative concerns of justice by arguing that the status of the death penalty as an irrevocable punishment

¹ For reasons that will be covered later on, settling the substantive issue of what punishments are actually consistent with a respect for persons is too large in scope to cover in this paper. One aspect not discussed here is how the recognition of social causes of crime should affect our views on what individuals deserve.

² While it might initially appear to be a weakness that the abolitionist has to take on this assumption in procedural debates, it actually represents a strength in their position that they can grant this claim and still mount an effective argument against the moral permissibility of the death penalty (or so I will argue).

lends support to concerns of the latter, but not the former, conception of justice. The fourth section discusses the arbitrariness objection from the standpoint of noncomparative justice, while using income inequality as an example. The final section covers what I take to be the most serious concern with respect to noncomparative justice and the death penalty—executing the innocent.

Substantive Issues

The initial concerns to address regarding the death penalty are substantive in nature. That is, is the death penalty inherently a morally permissible or an immoral form of punishment (regardless of how it is actually applied in practice)? It has long been important that punishments are in some sense appropriate to the seriousness of the crime, and one argument in support of the morality of capital punishment is that it is needed in order to have a punishment that ‘fits’ the crime of murder. The most direct route to arrive at this conclusion is to rely on a literal interpretation of *lex talionis*—such as the principle of ‘an eye for an eye’.³ Since murderers are guilty of killing, the most fitting punishment is then to be killed in return. However, abolitionists have a fairly easy task in showing the problems with taking this principle literally. Sometimes following *lex talionis* would lead to a punishment that seems not to fit the crime. For example, someone who kidnaps a person for a week seems to deserve only a week in jail as punishment.⁴

More problematically, consistently following the logic of *lex talionis* would lead us to torture torturers, rape rapists, molest child molesters, etc. Although Kant was a supporter of *lex talionis*, he recognized exceptions for following it in response to various sexual crimes, arguing that some punishments ‘would themselves be punishable crimes against humanity in general’.⁵ While this is a reasonable admission, it immediately undermines the thought that *lex talionis* will necessarily require the death penalty for murderers, for perhaps the death penalty would also fall into the class of punishments that are themselves crimes against humanity (even if Kant thought it acceptable). While there is something to the idea of ‘an eye for an eye’, it cannot be taken quite so literally.

A combination of the principle of proportionality and principle of commensurability yields a more plausible interpretation of *lex talionis*. With proportionality, the basic idea is that you rank crimes and punishments in terms of their severity, and you make sure that the severity of a punishment is equivalent to the severity of the crime. Whatever is the most severe punishment must be reserved for only the most severe crimes, or else you violate proportionality. Likewise, you would violate proportionality if you gave a minor punishment to a criminal guilty of a serious crime.

³ Immanuel Kant is one who famously supported this ancient principle of punishment: see Kant (1999).

⁴ In addition, there are some crimes for which it seems impossible to give an equivalent punishment, like for multiple-murder.

⁵ Kant (1999, p. 132).

While the proportionality principle doesn't lead to the problems of the literal interpretation of 'an eye for an eye', it does not directly support the claim that capital punishment is necessary. While the principle requires that the most severe punishment is reserved for what we designate as the most severe forms of crime, it doesn't mandate what the most severe punishment will be. Thus, it's perfectly consistent with the principle to give murderers life in prison without the possibility of parole, if we have reasons to believe that life in prison without the possibility of parole is the most severe punishment that is morally acceptable.

In addition to understanding *lex talionis* in terms of proportionality in determining punishments, it must be also understood in terms of commensurability, which requires that there are punishments that are severe enough to fit the seriousness of the crime of murder, as well as light enough to fit the crime of over-parking. For example, it would violate commensurability if the range of punishments in the legal system was only fines ranging from \$1 to \$100, and this is so even if the demands of proportionality are met. However, both execution and life in prison are severe enough to be considered commensurable with the crime of murder, so the principle by itself also does not necessarily require having the death penalty. Nor is it the case that the two principles conjointly require the death penalty to give a punishment fitting the crime of murder.⁶

Although these attempts fail to support the necessity of the death penalty, in order to have a punishment that fits the crime of murder, the abolitionist has not yet established that capital punishment is unnecessary. While proportionality and commensurability may not require instituting the death penalty, they also do not rule it out. In the end, claims about making the punishment fit the crime will not decide the matter by themselves. *Lex talionis* is inherently flawed when taken as an argument requiring capital punishment; proportionality can't tell us which kinds of punishments to have; and commensurability seems satisfied by either capital punishment or life in prison. In response to this, a defender of the death penalty could claim that *lex talionis* could be considered instead as establishing an initial (but by no means final) position on appropriate punishments. It could be understood as providing a defeasible reason for killing murderers and torturing torturers.⁷ If so, we then need to consider that we presumably have good reasons for not torturing torturers, and those reasons might also count as reasons not to kill murderers.

This brings us back to Kant's idea that there are some types of punishment that would be themselves punishable crimes against humanity. Why would this be? Drawing on Kant again, we can say that some types of punishment are inconsistent with a respect for persons. If a punishment is inconsistent with a respect for persons, then that's a sufficient reason to abolish it. If it is consistent, then that's at least a *prima facie* reason for permitting it (though not necessarily requiring it). The burden here falls heavily on the supporters of the death penalty, since it seems necessary to establish that the death penalty is consistent with a respect for persons, but even if

⁶ See Nathanson (2001) for further arguments against *lex talionis*.

⁷ Yost (2010) has an extended discussion of two reasons that might defeat this presumption, one grounded in the right to life and the other in human dignity. Yost argues that neither reason defeats the presumption in favor of executing murderers on Kantian grounds.

established it's not sufficient to actually require the death penalty. For abolitionists, showing the death penalty to be inconsistent with a respect for persons is a sufficient reason for abolishing it, but it is by no means necessary to demonstrate this to arrive at an argument in favor of abolition. Thus, the issue about whether the death penalty is consistent with a respect for persons is very central to the debate, and potentially decisive for the abolitionist, even if establishing the consistency is not a sufficient reason to retain the death penalty.

Unfortunately, settling the issue as to whether the death penalty is consistent with a respect for persons is no small matter, as both sides in this debate present numerous arguments as to what a respect for persons requires or rules out. Furthermore, any inquiry into the reasons why a punishment would be morally inappropriate will draw on ethical considerations beyond that of *lex talionis* and retributivism.⁸ Given the competing ethical considerations one could draw on in determining permissible punishments, it's beyond the scope of this paper to settle whether the death penalty is consistent with a respect for persons.

However, even if the death penalty is determined to be consistent with a respect for persons that still doesn't settle the question of its moral permissibility. It is one thing to determine what kind of treatment a person deserves, and it's quite another to determine whether we ought to give that person what he or she deserves, especially when doing so requires setting up specific political institutions and policies. The very practices that we set up to give people what they deserve may themselves lead to unintended results that are unjust.⁹ How reliable will the government be in handing out the death penalty only to those who truly deserve it? Even if we reach the conclusion that murderers deserve death, and that killing them is consistent with a respect for persons, there may be good reasons for rejecting the necessary institutions and laws to give them what they deserve.

Procedural (Comparative): Arbitrariness

In this section I begin to address procedural objections to the death penalty, and in so doing I start to differentiate the concerns of comparative and noncomparative justice with respect to how the death penalty is administered. Institutional concerns about the administration of the death penalty include arbitrariness in decisions regarding who lives and who dies.¹⁰ That there is some degree of arbitrariness in decisions regarding which murderers are assigned the death penalty is something both sides of this debate can agree on. Furthermore, both sides can agree that this

⁸ This point is raised by Roberts-Cady (2010, pp. 187–191).

⁹ See McDermott (2001, pp. 325–330) for an argument that institutional arbitrariness in capital sentencing might undermine the justness of any capital punishment. See Brooks (2004, pp. 188–191) for a reply to McDermott's argument.

¹⁰ As mentioned earlier, procedural issues concern the actual processes by which the death penalty is administered, and the results of those processes. Comparative justice concerns issues of fairness—whether you're being treated justly depends in part on how others in a similar situation are being treated. Thus, the concern specifically with arbitrariness is that people in similar situations are not being treated similarly (and for reasons that are not justifiable—such as discrimination).

arbitrariness leads to unjust results, and that we should take steps to reduce these injustices. What remains contentious is in what manner arbitrariness affects death penalty decisions, which people end up being treated unjustly by the system, and thus what steps should be taken to correct the problems. What this inevitably leads to is a difference between the demands of noncomparative and comparative justice, as we are led to concerns both about how individuals are treated *qua* individual, and how individuals are treated *qua* membership in a group (and in particular minority groups and the poor). On a noncomparative conception of justice, whether you are being treated justly does not depend on how others are being treated. With regards to capital punishment, perhaps all we care about is whether the person being punished is truly guilty of a crime that deserves death. However, it has been pointed out that sometimes whether you are being treated justly does in fact depend on how others are being treated (and specifically those in a similar position to yours).¹¹ The comparative conception of justice requires a concern for equality of treatment, insofar as like cases are treated similarly. Although the noncomparative approach may not make a distinction between whether you are being treated justly and whether you are getting what you deserve, the comparative approach allows that you could be treated unjustly even though you are getting a punishment that you deserve. The discussion of procedural issues will begin with concerns about comparative justice, before moving on to noncomparative justice.

One source of arbitrariness in procedures comes from racism. One effect that racism has is that white murderers are less likely to be given the death penalty. Thus, murderers belonging to a racial minority are disproportionately sentenced to death.¹² Clearly this result is unjust. Abolitionists argue that since it will be impossible to eliminate racism from affecting decisions involving the death penalty, the solution to this problem is to cease executions altogether. That way, we are not allowing racism to affect life and death decisions, and racial minorities will not be treated unjustly.

In response, supporters of the death penalty claim that there is a better solution to this problem. They argue that the racial minorities are not actually being treated unjustly. Those who are executed are still guilty of a crime that deserves death, so it's not unjust that they are getting killed. As Van Den Haag (1978) put it: guilt is personal. He argues that if arbitrariness results in one murderer avoiding the death penalty, that doesn't change the guilt of all the other murderers—and it's that guilt that makes their execution just. What's unjust is that some murderers are getting a punishment that is less than they deserve. The way to correct the problem, he argues, is to actually increase the number of executions. Justice requires that we give people what they deserve, and so we need to stop letting white murderers avoid execution.

This is why it matters how we identify the injustice that results from racism. So long as the injustice is a matter of one group of criminals receiving a punishment that is less than they deserve, the way to restore justice and fix the distribution of

¹¹ See Nathanson (1985, pp. 155–160), and Lenta and Farland (2008, pp. 276–280), for two such responses.

¹² See Cholbi (2006, pp. 255–260) for supporting evidence. Also, see Bowers (1988).

death penalty sentences is to give that problem group more death sentences. However, what if the problem is instead that racism causes racial minorities to be given a punishment that is harsher than they deserve? Some studies suggest that if the murder victim is white, then the murderer is likely to get a more severe punishment than if the victim was not white.¹³ In effect, the lives of white people are being judged to be more valuable, and thus the killing of a white person is regarded as a more serious crime and deserving of a more serious punishment. So if a member of a racial minority kills someone who is white, then that murderer may be given a harsher punishment than is actually deserved. The abolitionist would argue that this particular injustice cannot be fixed by handing out more death sentences, but instead requires the death penalty to be abolished so that racism does not lead to anyone being executed who doesn't deserve it.

The abolitionist is correct in general when claiming that when arbitrariness leads to people being punished more severely than they deserve that fixing the injustice requires eliminating executions. However, in this situation, the supporter could reply that the problem is specifically that the lives of racial minorities are being undervalued. If so, then it becomes once again a problem with some murderers receiving a lesser punishment than deserved (as in when the victim is a member of a racial minority), and thus supporters like Van Den Haag (1985) argue that more executions are required to correct for the injustice.

The position of the supporter of the death penalty described above relies on a noncomparative conception of justice. In response to this claim that guilt is personal, some abolitionists argue that the focus should be on achieving comparative justice, where like cases are treated similarly. As an example of the comparative form of justice, Nathanson (1985, pp. 156–157) discusses a situation where three students are caught plagiarizing, but only one is punished. He believes in such a situation that the student who was punished was treated unjustly, and that it would have been better to have refrained from punishing any of the students (if one for whatever reason couldn't punish all three students). The implication of this is that from a comparative standpoint, it would be best if all murderers deserving of the death penalty received it. However, it seems unlikely that this is actually possible, due to concerns about arbitrariness and discrimination. If we're in a situation where only some of the murderers who deserve to die are being executed, then comparative justice requires that no murderers receive the death penalty. This is the only way to prevent the comparative injustice that arises from arbitrariness in capital sentencing.

One need not question the importance of comparative justice to see that this line of argument will not support an abolitionist position. Abolishing the death penalty will not change the situation from the standpoint of comparative justice. The injustice results from arbitrariness in the sentencing of murderers, and not in the punishment itself. We should expect to see the same kind of comparative injustice arise when some murderers are sentenced to life in prison without the possibility of parole, and some are given a lesser punishment due to those same factors of

¹³ See Nathanson (1985, p. 150) for supporting evidence.

arbitrariness. As Lenta and Farland (2008, pp. 285–287) argue, this ‘levelling down’ strategy is not a solution to the problem.

The abolitionist could reply that while abolishing the death penalty will not solve the overall problem of comparative injustice, it will at least lessen the degree of injustice since life in prison is not as severe a punishment. While this might be seen as a gain with respect to comparative justice, Lenta and Farland (2008, pp. 277–280) note that it comes at a cost of noncomparative injustice because some murderers will not receive the punishment they really deserve. This leads to a question of what to do when the two forms of justice pull us in opposite directions. It is not obvious how to accurately weigh the amounts of comparative and noncomparative justice lost in such a situation, especially since it’s not the case that one form always has priority over the other. Is there a burden of proof on either the supporter or abolitionist to show that one form of justice should take priority over the other? The burden appears to be on abolitionists, since they’re raising a procedural objection to the death penalty, and the objection won’t be strong enough unless they establish that the demands of comparative justice outweigh that of noncomparative justice.

Irrevocability in Comparative and Noncomparative Justice

While it is beyond the scope of this paper to fully address a conflict between comparative and noncomparative justice, this section address a potential weakness with the comparative approach concerning the irrevocability of the death penalty. A further concern with the ‘levelling down’ strategy from the previous section is that consistency could end up requiring that you keep levelling down punishments until there were none left, since the arbitrariness that leads to levelling down the punishment will still remain at the level of sentencing after the move has been made to impose a less severe punishment. In response, the abolitionist may attempt to invoke the irrevocable nature of the death penalty to block this move,¹⁴ and argue that the comparative injustice resulting from arbitrariness in capital punishment is more severe than that which results from other punishments. While this may be true, it would also open up the possibility that life in prison is also severe enough relative to other punishments to justify abolishing it as well. One cannot merely assume that only the death penalty would need to be levelled down on this strategy, and so the abolitionist would owe a further argument as to how to stop levelling down punishments until there are none left. But even if no other punishment is severe enough to require being levelled down, it’s not clear that the irrevocable nature of the death penalty can play a role in comparative injustice objections.

Arguments in favor of abolishing the death penalty often require the abolitionist to make the case that the death penalty is fundamentally different from other forms of punishment. This stems from the need to block consistency-based arguments against the abolitionist. The most plausible way to do this is to claim that the death

¹⁴ Irrevocability is specifically a procedural concern, since it matters when we are considering people who may have been punished unjustly. It will be argued in the following pages that it can only play a significant role in discussions of non-comparative justice.

penalty is, unlike other punishments, irrevocable. What does it mean for a punishment to be irrevocable? It has to do with the idea that the punishment involves the infliction of a harm which cannot be undone, say in circumstances where the person punished is later discovered to be innocent. However, this claim needs to be distinguished from the sense in which most punishments are irreversible. An example of a reversible punishment would be a fine. If a person is wrongly fined, then the person can get back what was lost by being reimbursed. This isn't possible with imprisonment, for there's no way to give a person back the time that was spent in jail. Since both imprisonment and the death penalty count as irreversible punishments, the abolitionist has not yet avoided the consistency-based counter-argument. Thus, the abolitionist will need to claim that the death penalty is not only irreversible, but also irrevocable.

The death penalty is an irrevocable punishment, because once the punishment has been applied there is no possibility of making amends to the person should it turn out later that he or she was actually innocent. This differs from imprisonment in two ways. First, if someone is put away for life on the charge of murder, but is later found to be innocent, then that person can be freed. The sentence can be stopped midway, and the person need not suffer the full infliction of the harm involved in that sentence. Such a scenario isn't possible with the death penalty, since the punishment of execution cannot be partially applied. Second, although the time spent in imprisonment cannot be given back to the wrongly-accused person, at least it's possible to provide some level of compensation to the victim (such as financially), even if it falls short of genuine restitution. It appears evident to most that there is no way to compensate a dead person.¹⁵ Thus, the abolitionist is in a position to block these consistency-based counter-arguments, and to hold the death penalty to a higher standard than other forms of punishment.

There is, however, a limitation to when this particular defense can be invoked to block the consistency objection. Since an irrevocable punishment is distinguished from an irreversible punishment in terms of the impact it has on those who are wrongly accused, the significance of irrevocability is limited to cases where the concern is that we might have executed someone who didn't deserve it. Irrevocability prevents us from fixing this kind of mistake. On the other hand, if the concern is merely that arbitrariness results in some murderers receiving a lighter punishment than deserved, then the irrevocable nature of the death penalty plays no role in this type of abolitionist argument against the death penalty.¹⁶ While this is still an injustice, the irrevocability of the death penalty will not be an obstacle to correcting the injustice, since the correction requires giving more murderers the death penalty. In general, the irrevocable nature of the death penalty won't play a role in comparative injustice objections to the death penalty, because they don't involve the claim that someone is being executed who didn't deserve it. So only some types of abolitionist arguments will be able to rely on irrevocability to block consistency-based counter-arguments. Thus, the strongest objections based on

¹⁵ See Yost (2011, pp. 332–336) for a discussion, and refutation, of the idea that an executed person can be compensated after death in a manner that would meet the standards for a revocable punishment.

¹⁶ For an extended discussion of this point, see Lenta and Farland (2008, pp. 283–286).

arbitrariness affecting death penalty decisions will be those where the arbitrariness leads to people being executed who do not deserve to die. The reasons for abolishing the death penalty in such cases will not necessarily be reasons to do away with other forms of punishment, even if similar forms of arbitrariness are at work.

Procedural (Noncomparative): Arbitrariness

In this section I discuss the standpoint of noncomparative justice on the arbitrary administration of the death penalty, and how it leads us to concerns that persons are being punished more harshly than they deserve. Another form of arbitrariness is economic or class-based. You are far less likely to receive the death penalty if you are rich, and so the poor are disproportionately sentenced to die. It may be thought at first that the arguments here will basically mirror those above. The abolitionist will say the poor are being treated unfairly, and this requires abolishing the death penalty. The supporter will say the problem is that the rich are getting away with murder, and the solution is to make sure the rich cannot easily avoid a death sentence. So long as the poor that are executed are all guilty of a crime deserving of death, then the supporter says no injustice is done to them when they are executed (and even if they are disproportionately executed). However, it's not so clear that the supporter can confidently assume that the poor who are executed are actually guilty of a crime deserving of death. This marks a transition from comparative to noncomparative justice.

To make this point, it will be helpful to make more concrete a distinction that was alluded to in the previous discussion of racism. In sentencing, it must first be determined whether the defendant has committed a crime that is severe enough to be eligible for the death penalty. It must then be determined whether that eligible defendant will be selected for execution after any special considerations have been taken into account. Supporters of the death penalty can be understood so far to be arguing that as long as the death penalty is only being administered to murderers who are eligible for the death penalty, then those executed are not treated unjustly if arbitrariness only affects the selection process. While an acceptance of arbitrariness at the level of selection may seem problematic, it may also be that it is equally problematic to try to eradicate all possibility of arbitrariness in selection. The reason is that fairness requires taking mitigating factors into account when punishing, which in turn requires discretion in individual sentencing, and this discretion will always open the door to the possibility of arbitrariness. In the determination of eligibility, on the other hand, consistency plays a more important role. While racism might lead to results that suggest the killing of a white person is a more morally outrageous crime, and thus raising questions about who is eligible for the death penalty, supporters may be able to alleviate this concern by arguing that the outrage attached to white victims should be extended to victims of all races.

The arbitrariness that affects poor defendants and questions about eligibility for the death penalty, however, cannot be handled in the same way as racism. Defendants who cannot afford their own lawyer will receive a court-appointed lawyer. Unfortunately, court-appointed lawyers are not always motivated (because

of pay) or even competent (because of prior experience) to handle a capital case.¹⁷ The general point that abolitionists want to get across is that if you are poor, then you are far more likely to have an incompetent lawyer to defend you, and thus far less likely to get a fair trial. Even if rich defendants too easily avoid the death penalty, the injustice done to the poor by an unfair trial cannot be fixed by giving more rich murderers the death penalty. In short, the poor are at a greater risk of being wrongly classified as eligible for the death penalty. The upshot of this is that the arbitrariness in the system is affecting the judgments about who deserves to die. Since the problem is not merely one of a maldistribution of death penalty sentences among those criminals who definitely deserve it, supporters of the death penalty cannot claim in response that no injustice is being done to the poor.

Overall, the arguments from arbitrariness lead to valid concerns that at least some criminals on death row, while perhaps not innocent of having committed any crime, are nonetheless not guilty of having committed a crime that makes them deserving of the death penalty. While not as grave as an injustice as executing the innocent, it still is a matter of having administered an irrevocable punishment on someone who did not fully deserve it. It should be noted, though, that if the arbitrariness is really severe then it might even lead to the wrongful conviction and execution of the innocent.

Procedural (Noncomparative): Executing the Innocent

Should we believe that innocent people may have been executed in the US? The most straight-forward reason for believing this is that our justice system has allowed innocent people to be convicted of murder. While some are exonerated, are we supposed to believe that we have found and corrected all of our mistakes? That is, it seems hard to believe that we can admit that we make mistakes that lead to innocent conviction, while also believing that we have never failed to catch our mistakes before it was too late. A further cause for concern is that the work done in exonerating the innocent is often carried out voluntarily by groups outside of the legal system—such as the evidence uncovered by Northwestern University journalism students over the last 15 years. While this falls short of proof, it is certainly plausible that we have in fact executed innocent people.

In response to the concerns of wrongful execution, supporters of the death penalty have suggested that the correct response is to eliminate the factors that lead to the mistakes. While this is undoubtedly a good step to take, it will be all but impossible to eliminate all the potential sources of error and arbitrariness within the system. Consider these factors: mistakes made by law enforcement officials, mistaken eyewitness testimony, perjury by witnesses for the prosecution, suppression of evidence, conflicts of interest when convicts are granted reduced sentences for testifying against others, fair treatment of suspects who are mentally

¹⁷ One particularly disturbing case is Ron Mock, discussed by Bright (2005), who was a court-appointed lawyer for capital cases in Texas in the 1980s. He rarely contested cases, challenged witnesses, presented witnesses for his defendant, or even conducted investigations. So many of his clients ended up on death row, that there came to be a section of prisoners known as the 'Mock Wing' of death row.

handicapped, use of intimidation to force an admission, etc. The permissibility of the death penalty cannot be decided purely in the abstract. The limitations of the institution that applies the punishment have to be taken into account.

Even if we think some innocent people have been executed, that by itself is not a sufficient reason to abolish the death penalty. One would have to make additional claims—such as the execution of an innocent person is so unjust (because it is an irrevocable punishment) that we should take whatever steps necessary to prevent it from ever occurring. Since the criminal justice system will never be perfect, the only way to prevent the unjust result is to abolish the death penalty. From the standpoint of noncomparative justice, executing an innocent is basically the height of injustice. Giving murderers life in prison still amounts to achieving a just result, even if it's less of a punishment than they deserve and thus some loss in noncomparative justice. Making life in prison the harshest punishment prevents the state from committing one of the gravest acts of injustice. While innocent people could still be wrongly sentenced to life in prison, at least they will never be subject to an irrevocable punishment.

Pojman (1997) articulates the main counter-argument to this abolitionist position, which is that our society accepts all sorts of risky practices that we know will lead to the accidental deaths of innocent people. Presumably having higher speed limits on road leads to more fatal accidents. If we wanted to prevent the accidental deaths of innocent people, then we could have a reason to ban dangerous sports like skydiving or NASCAR. In short, just because a practice runs the risk of the deaths of innocents that is not sufficient for showing we should prohibit the practice.

Abolitionists can reply by pointing out differences between the risks of accidental death from the death penalty and these other examples. One way to do this is to bring the focus back on the injustice done when we execute someone who didn't deserve to die. The death of someone in a car accident may be equally tragic, but it isn't necessarily a case of injustice. Radelet et al. (1992) brings up another relevant distinction in that many examples of prohibiting a risky practice would certainly limit our freedom in important ways. Prohibiting extreme sports, for example, would represent an objectionable form of paternalism that tried to protect us from ourselves. However, the same cannot be said of prohibiting the death penalty, as it would not involve the same kind of limitation on individual freedom.

In addition to these distinctions, it is also important to note that a crucial element of justifying risky practices is to point out that there are benefits to allowing the practice that cannot be gained through other less risky means. For example, there are numerous benefits to having higher speed limits on roads. At this point, a supporter of the death penalty will have to make good on the claim that the death penalty brings benefits that are unavailable to an alternative like life in prison, in order to justify the risks associated with execution. The deterrence of would-be murderers from killing is probably the most popular benefit that is cited in connection with the death penalty, since it can lead to innocent lives being spared. However, there is a general lack of evidence that the death penalty actually deters more than life-in-prison, which undermines its status as a benefit that trumps the risks of execution. Furthermore, it's problematic for retributivists to rely on such a response, as deterrence is essentially a consequentialist consideration.

Conclusion

The structure of death penalty arguments reveals a number of problems for supporters. When it comes to substantive issues, supporters fail to make the case that capital punishment is required in order to have a fitting punishment. However, they need only make it the case that it is an option for a fitting punishment, for the issue to remain open. If abolitionists could make the case that capital punishment is inconsistent with a respect for persons, then that would remove it as an option. But it seems that it might still be an open question¹⁸ whether a respect for persons could lead to capital punishment as a possible (though not required) response to murder. It should be kept in mind that arguments of this sort will not allow a supporter to move from claims about murderers deserving death to a claim that capital punishment is permissible, since it is an entirely separate issue whether setting up the necessary institutions to give murderers what they deserve is permissible.

On procedural grounds, there are many valid concerns regarding the institution of capital punishment, both from the perspective of comparative and noncomparative justice. The issue of arbitrariness depends on what the arbitrariness leads to. If it only results in some murderers receiving a lighter punishment than others, then it does not look like it leads to any specific conclusions independent of views about how to weigh the difference in concerns from the perspectives of comparative and noncomparative justice. Supporters tend to place a greater emphasis on noncomparative justice, while some abolitionists focus on limiting comparative justice. However, abolitionists might be vulnerable to consistency-based counter-arguments, since it is not clear that the irrevocable nature of the death penalty will be relevant to concerns about comparative justice.

However, the emphasis placed by supporters on delivering noncomparative justice can turn out to be a double-edged sword, as abolitionists are on stronger ground if the arbitrariness involves someone being executed who didn't deserve it, and thus the irrevocability of the death penalty can play a role in helping to block consistency based counter-arguments from supporters. Thus, arbitrariness arguments lead into concerns about the risk of executing the innocent, which seems to be the most significant institutional reason to abolish the death penalty. Given all the claims supporters have to establish to defend their position, abolitionists have a relatively easier job of arguing that the death penalty is fatally flawed as an instrument of justice.

References

- Bowers, William. 1988. The effect of execution is brutalization, not deterrence. In *Challenging capital punishment: Legal and social science approaches*, ed. K.C. Haas, and J.A. Inciardi, 49–89. London: Sage.
- Bright, Stephen. 2005. Why the United States will join the rest of the world in abandoning capital punishment. In *Debating the death penalty*, ed. Hugo Bedau, and Paul Cassell, 152–182. New York: Oxford University Press.

¹⁸ Or at least for the purposes of this paper it's being treated as an open question.

- Brooks, Thom. 2004. Retributivist arguments against capital punishment. *Journal of Social Philosophy* 35: 188–197.
- Cholbi, Michael. 2006. Race, capital punishment, and the cost of murder. *Philosophical Studies* 127: 255–282.
- Kant, Immanuel. 1999. *The metaphysical elements of justice*. Hackett: Translated by John Ladd.
- Lenta, Patrick, and Douglas Farland. 2008. Desert, justice and capital punishment. *Criminal Law and Philosophy* 2: 273–290.
- McDermott, Daniel. 2001. A retributivist argument against capital punishment. *Journal of Social Philosophy* 32: 317–333.
- Nathanson, Stephen. 1985. Does it matter if the death penalty is arbitrarily administered? *Philosophy & Public Affairs* 14: 149–164.
- Nathanson, Stephen. 2001. *An eye for an eye? The immortality of punishing by death*, 2nd ed. Lanham: Rowman & Littlefield.
- Pojman, Louis. 1997. In defense of the death penalty. *International Journal of Applied Philosophy* 11: 11–16.
- Radelet, Michael, Hugo Adam Bedau, and Constance E. Putnam. 1992. *In spite of innocence: Erroneous convictions in capital cases*. York, PA: Northeastern University Press.
- Roberts-Cady, Sarah. 2010. Against retributive justifications of the death penalty. *Journal of Social Philosophy* 41: 185–193.
- Van Den Haag, Ernest. 1978. In defense of the death penalty: A legal, practical, moral analysis. *Criminal Law Bulletin* 14: 51–68.
- Van Den Haag, Ernest. 1985. Refuting Reiman and Nathanson. *Philosophy & Public Affairs* 14: 165–176.
- Yost, Benjamin. 2010. Kant's justification of the death penalty reconsidered. *Kantian Review* 15: 1–27.
- Yost, Benjamin. 2011. The irrevocability of capital punishment. *Journal of Social Philosophy* 42: 321–340.