

# 14

## The Death Penalty

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I believe we have no right to risk additional future victims of murder for the sake of sparing convicted murderers.

—Ernest van den Haag<sup>1</sup>

But precisely because ... [man] is not absolutely good, no one among us can pose as an absolute judge and pronounce the definitive elimination of the worst among the guilty, because no one of us can lay claim to absolute innocence.

—Albert Camus<sup>2</sup>

## Introduction

We shall in this chapter explore the moral issues bound up in the death penalty. Since the death penalty is a form of punishment, we'll explain what punishment is and examine the two main rationales for punishment, deterrence and retribution. Morally speaking, the former is a consequentialist theory, the second nonconsequentialist. Both deterrence and retribution face serious objections as moral justifications of the death penalty, and we'll examine those objections in detail.

### 14.1 The death penalty in America

Early colonists brought the death penalty with them from England, where it was widely practiced for more than 300 offenses—including shoplifting, forging a birth certificate, or stealing a handkerchief. Its victims included children. A 7-year-old girl was hanged in 1808, a 9-year-old boy in 1831.

In addition to more usual offenses like murder, arson, and rape, the early colonists prescribed death for striking one's parents (New York), witchcraft (Massachusetts), and stealing slaves (North Carolina). A Virginia man was put to death in 1622 for stealing a pig and a cow and a Massachusetts woman in 1660 for defying the colony's ban on Quakers. Hanging was the preferred method, but shooting was used. Some slaves were burned at the stake. At least one man in Salem was reportedly crushed by a heavy weight.

The colonists believed that if the death penalty was to deter, executions must be public. People must not only know that an execution has taken place, they must see for themselves its horror. And the colonists' executions were public, often drawing huge crowds.

If public executions were meant to encourage sober reflection on the virtues of rectitude, however, they seemed to have the opposite effect. In England, the crowds they drew reportedly provided excellent opportunities for pickpockets—even though picking pockets was one of the offenses for which people were executed. Drunkenness and rowdiness came to characterize the crowds in the United States—prompting authorities to begin to move executions behind closed doors in the 1830s, where they are in the United States today.

Opposition to the death penalty began most notably with an abolitionist speech in 1787 by Benjamin Rush, a physician, peace advocate, and signer of the Declaration of Independence. The abolitionist movement gained momentum, with Michigan abolishing the death penalty except for treason in 1847, and Rhode Island abolishing the penalty for all crimes in 1852. But the momentum wasn't sustained, and abolitionist sentiment has waxed and waned to the present day.

Even many who weren't opposed to the death penalty were concerned about the method of killing. People were squeamish about hanging. Too short a rope and the person strangled slowly; too long a rope and his head might be torn off. New York State appointed a commission in 1886 to find the most humane way to kill people known to modern science. Physics pointed the way, and electrocution won out.

New York secured its place in history when it strapped convicted murderer William Kemmler to a crude electric chair at Auburn State Prison on August 6, 1890. It thereby became the first government ever to kill a person with electricity. Kemmler had protested that this would be a cruel and unusual punishment. If so, it would violate the Eighth Amendment.

**Key Quote 14A***Amendment VIII*

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. (US Constitution)

He was right, of course, that it would be unusual. After all, it hadn't been done before. But the Supreme Court ruled that it wouldn't be cruel because death would be instantaneous and painless.

The court was dead wrong. Kemmler's death was far from instantaneous, and his groans cast doubt on whether it was painless. Some witnesses fainted at the gruesome spectacle.

Nonetheless, other states followed New York's lead in harnessing the laws of physics to judicial purposes. Electrocuting eventually became the country's method of choice for legal homicide. Modern chemistry made its bid in 1923, however, and gassing ran a strong second for a time. Eventually, both gassing and electrocution gave way to medical technology. Since 1982, more and more states use lethal injection, combining deadliness with a bizarre hint of humanity: they swab the victim's arm before inserting the needle, as though to protect against infection. "The people that are involved in this are very concerned that what they do is proper, done professionally and with decorum," according to an Arkansas Correction Department spokesman following the execution of three men in less than three hours by lethal injection.<sup>3</sup>

Although it was widely believed that death by legal injection was painless, it has been reported, nonetheless, that several men "have had bad reactions to the drugs, moaning and heaving as they died."<sup>4</sup> Some critics fear that execution by lethal injection places the prisoner in what, in medical terms, is a locked-in state—one in which the person is fully conscious and experiencing pain but is incapable of speaking or moving (see Chapter 13, Section 13.6).

Amid diminishing public support for the death penalty, its use waned during the mid-twentieth century, with no executions taking place between June 2, 1967, and January 17, 1977. Juries, with considerable discretionary power to choose between the death penalty and life imprisonment, were voting against the death penalty. But they were inflicting it at a disproportionately high rate on minorities. In 1972 the Supreme Court

(*Furman v. Georgia*) struck down existing death penalty laws which gave juries such discretion. Death-penalty states quickly redrafted their laws to take account of the court's objections, and in 1976 (*Gregg v. Georgia*) the court effectively opened the way to resumption of the death penalty. By 2016, the imposition of the penalty had dropped to a 40-year low, with only thirty new executions. As of 2016, thirty-three states and the Federal Government had the death penalty, with nearly 3,000 persons on death row. More than 18,000 executions have taken place overall in America. As the death penalty is a form of punishment, let us begin by asking what punishment is.

## 14.2 What is punishment?

Morality has two dimensions: the first, governing ordinary conduct toward others; the second, governing responses to wrongdoing by others. Depending upon circumstances, when others do wrong (at least to us) we can, among other things, either forgive them or retaliate. Often people respond in kind, repaying harm or injury with harm or injury. That is, they think in terms of retribution. Retribution can take many forms. But it will either be limited or unlimited in terms of the kind or quantity of harm it inflicts upon wrongdoers. The best example of unlimited retribution is *revenge*: retaliation for hurt or harm received by you or those you identify with. Revenge as an action is often disproportionate and done in anger or with malice. As a motive, revenge is the desire to inflict hurt or harm for hurt or harm received. *Vengeance* is closely related. Although often used interchangeably with revenge, it may stand for justified retaliation without necessarily any anger or malice. (An avenger might, for pay, harm someone on behalf of someone else, without knowing or harboring any anger toward the person he harms.) An example of limited retaliation is *Lex Talionis*, the Law of Hammurabai and the Bible.

### Key Quote 14B

#### *Lex Talionis*

And if *any* mischief follow, then thou shalt give life for life, eye for eye, tooth for tooth, hand for hand, foot for foot, burning for burning, wound for wound, stripe for stripe. (Exod. 21:23)

In *Lex Talionis* we find an important element in punishment as an institutionalized practice in society: it typically involves a measured, rule-governed response to wrongdoing that has some sort of societal sanction. With that in mind, we can now define punishment as a societal response to wrongdoing as follows:

### Definition Box 14A

**Punishment: The deliberate infliction of (usually predetermined) pain, suffering, deprivation, or death in response to alleged offenses.**

So understood, punishment is a retributing of something bad for wrongdoing. It's like retaliation, except that it isn't necessarily repayment for harm to the particular individuals who inflict the punishment. It's society's response to perceived offenses regardless of who is victimized by them. It's necessary to specify "alleged" offenses, because sometimes innocent people are mistakenly (and occasionally intentionally) punished. Punishment sometimes extends to those associated with the offenders, such as family, friends, or community, in which case it constitutes *collective punishment*. There are, it should be noted, nonviolent as well as violent forms of punishment, such as exile, economic sanctions, ostracism, or shunning.

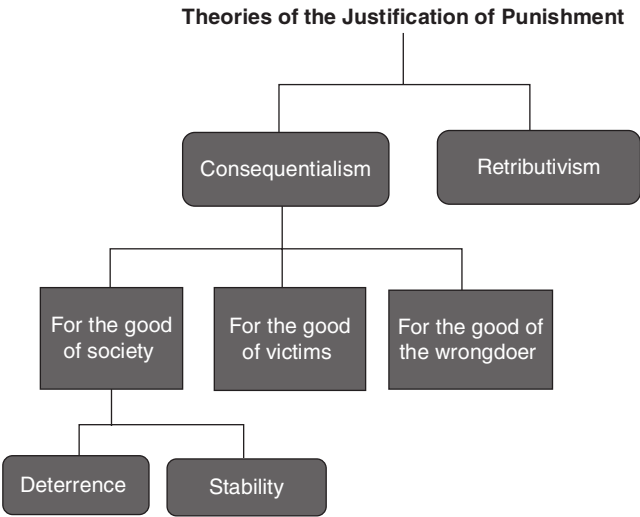
## 14.3 Deterrence and retribution

Much of the discussion of the death penalty centers about deterrence and retribution. Those who support the death penalty (retentionists) argue from either or both of these viewpoints. Those who appeal to deterrence claim that the death penalty is justified because it deters others from committing similar crimes. In that way it safeguards society and promotes a social good. Those who appeal to retribution maintain that, whether or not the death penalty promotes a social good through deterrence, it's justified because those guilty of the most serious crimes simply *deserve* to die.

Underlying these two appeals are two different moral theories of punishment: *consequentialist* and *retributivist*. These center around three considerations:

1. The nature of the offense
2. The nature of the offender
3. The consequences of punishment

The first two considerations are central to retributivism; the third is central to consequentialism. Consequentialist theories of punishment typically appeal to a good to be promoted by punishment. The commonest of consequentialist theories is utilitarian, appealing to the good of society or the community or the state, that is, to some collectivity. (See Theory Box 1E in Chapter 1, Section 1.8, and Theory Box 6A in Chapter 6, Section 6.5.) The good is usually thought to be grounded in the deterrent value of the death penalty, or (as in the *Gregg v. Georgia* case mentioned in 14.1) to the promotion and maintenance of stability in society. But it's also possible to argue that punishment is justified because of its consequences for the victims of crimes (or in the case of murder, also for the families of victims). It's possible, still further, to argue (as Plato did) for the promotion of the good of the offender. Thus we have the following principal theories:



14.4
What is retributivism?

The underlying idea of retributivism is simple. It's captured in a statement by a waitress concerning Timothy McVeigh, the 1995 Oklahoma City bomber who was at the time under a death sentence. (He was executed in 2001.)

### Key Quote 14C

He took another person's life. He deserves to die. (*The New York Times*, April 19, 2001)

This is the simplest and probably commonest of the ideas underlying the death penalty. It says, first of all, what McVeigh *did*: he took another person's life (actually 168 persons' lives). Second, it concludes from this what should be done to him. The one is intended to follow from the other. This simple idea receives elaboration in the philosophy of Hegel, one of the chief historical proponents of a retributivist justification of the death penalty. Consider the following passage from Hegel:

The injury [the penalty] which falls on the criminal is not merely *implicitly* just—as just, it is *eo ipso* his implicit will, an embodiment of his freedom, his right; on the contrary, it is also a right *established* within the criminal himself, i.e., in his objectively embodied will, in his action. The reason for this is that his action is the action of a rational being and this implies that it is something universal and that by doing it the criminal has laid down a law which he has explicitly recognized in his action and under which in consequence he should be brought as under his right ... Since that is so, punishment is regarded as containing the criminal's right and hence by being punished he is honoured as a rational being. He does not receive this due of honour unless the concept and measure of his punishment are derived from his own act.<sup>5</sup>

The main point, in Hegel's view, is that even the murderer is a rational being; and respect for rational beings demands that they be accountable for wrongdoing and punished accordingly. When the offense warrants it, the death penalty is demanded by respect for the offender as a rational being.

We cannot consider Hegel's reasoning fully here, but he believes it's possible to derive the moral necessity of punishment from consideration of the offender's own nature and his offense. The aim isn't deterrence. Or to promote a social good. It's to nullify the wrong that was done. The wrong is a negation. Punishing the wrong negates that negation. (Recall from Chapter 8, Section 8.6, that the negation of the negation is one of the laws of dialectic which Marx adapted from Hegel.)<sup>6</sup>

So, in its simplest terms, the retributivist theory of the death penalty asserts:

### Theory Box 14A

#### *Retributivism*

**The death penalty is justified if, and only if, it puts to death those, and only those, who *deserve* to die.**

Whether one deserves to die is determined principally by one's offense and one's character. The consequences of the death penalty may or may not also be relevant, but in any event they are not the paramount consideration and are not in and of themselves decisive. A retributivist view is the following by contemporary philosopher Igor Primoratz:

This view that the value of human life is not commensurable with other values, and that consequently there is only one truly equivalent punishment for murder, namely death, does not necessarily presuppose a theistic outlook. It can be claimed that, simply because we have to be alive if we are to experience and realize any other value at all, there is nothing equivalent to the murderous destruction of a human life except the destruction of the life of the murderer. Any other retribution, no matter how severe, would still be less than what is proportionate, deserved, and just ... Accordingly, capital punishment ought to be retained where it obtains, and reintroduced in those jurisdictions that have abolished it, although we have no reason to believe that, as a means of deterrence, it is any better than a very long prison term. It ought to be retained, or reintroduced, for one simple reason: that justice be done in cases of murder, that murderers be punished according to their deserts.<sup>7</sup>

The Supreme Court justice in Stewart in *Furman v. Georgia* highlights such a consideration when he says:

### Key Quote 14D

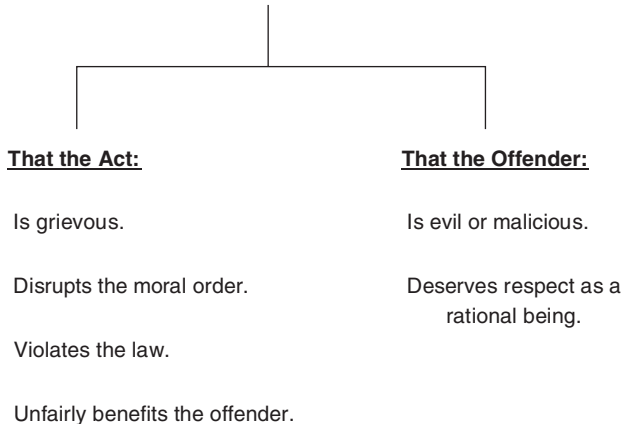
The instinct of retribution is part of the nature of man, and channeling that instinct in the administration of criminal justice serves an



important purpose in promoting the stability of a society governed by law. When people begin to believe that organized society is unwilling or unable to impose upon criminal offenders the punishment they “deserve,” then there are sown the seeds of anarchy—of self-help, vigilante justice, and lynch law. (*Furman v. Georgia*, 1972, Justice Stewart)

Sometimes retributivists emphasize the aspect of the offender that Hegel plays down, the fact that he or she may be evil or malicious. In fact, when juries consider a death penalty they weigh such considerations among the so-called *aggravating circumstances*. At other times, retributivists appeal to the fact that, by his offense, the criminal has violated the law. This is a non-consequentialist consideration. One needn't look to the consequences of punishing a person to know that he has broken the law. At other times it is the viciousness of the crime that is appealed to. At other times, the act is seen more broadly as upsetting the moral order. Punishment is thought to restore that order (what Hegel apparently means above by negating the negation). Thus, retributivists typically appeal to one or more of the following characteristics of the act or person:

#### Retributivist Considerations Warranting Punishment



Sometimes the necessity of punishment is presumed to follow immediately from these considerations. At other times, it's thought demonstrable by argument from one or more of these considerations.

## 14.5 Objections to the retributivist justification of the death penalty

We shall consider the consequentialist objection to the retributivist rationale for the death penalty in a moment. First, let's consider another objection. It pertains to the nature of morality and the scope of our responsibility as moral agents.

It's arguable that everything we do (leaving aside reflexive, unintentional, and involuntary acts) is susceptible of moral evaluation. It's always relevant to ask whether what we do is morally right or wrong. Not that there is always a need to do so. Many of our acts raise no moral questions in the contexts in which they occur (whether you put your right shoe on before your left raises no moral issues, though it conceivably could in some contexts). But this just means that we can justifiably assume that they are permissible, not that they aren't susceptible of moral evaluation.

If every act is susceptible of moral evaluation, the same is true of responses to wrongdoing. It's one thing to establish that an act is wrong. It's another to say that any particular response to that wrongdoing is permissible. The wrong is one act, the response to it another. The wrong act doesn't itself tell us which of many possible responses to it is morally permissible. Whatever we do in response to a wrongful act itself needs to be justified.

Some responses to wrongful acts are themselves wrong. It would be wrong, for example, to impose the death penalty for parking violations or for fishing without a license. Retributivists often speak as though there's one and only one proper response to offenses, and that it follows immediately from the nature of the offense what that is. But if the principle we just cited is correct (that every act must be susceptible of moral evaluation), this is a non sequitur. There are always options in responding to wrongdoing (e.g., imprisonment, forgiveness). Which is the correct one is an open question morally. This doesn't mean that the retributivist is necessarily wrong in saying that the death penalty is the right option, say, for the offense of murder. It just means that it must be shown to be the correct option; it cannot simply be assumed to follow immediately from the character of the offense.

There are some who argue that the retributivist idea of responding in kind to severe offenses is itself wrong. Socrates said as much when he was himself awaiting execution after a death sentence in ancient Athens. In an exchange with a friend, Crito, depicted in Plato's dialogue, *Crito*, Socrates says:

- Socrates:** Then in no circumstances must one do wrong.  
**Crito:** No.  
**Socrates:** In that case one must not even do wrong when one is wronged, which most people regard as the natural course.  
**Crito:** Apparently not.  
**Socrates:** Tell me another thing, Crito. Ought one to do injuries or not?  
**Crito:** Surely not, Socrates.  
**Socrates:** And tell me, is it right to do an injury in retaliation, as most people believe, or not?  
**Crito:** No, never.  
**Socrates:** Because, I suppose, there is no difference between injuring people and wronging them.  
**Crito:** Exactly.  
**Socrates:** So one ought not to return a wrong or an injury to any person, whatever the provocation is.<sup>8</sup>

Centuries later a similar thought is attributed to Jesus in the *New Testament*:

You have heard it said, "An eye for an eye and a tooth for a tooth." But I say to you, do not resist one who is evil. But if anyone strike you on the right check, turn to him the other also and if anyone would sue you and take your coat, let him have your cloak as well; and if anyone force you to go one mile, go with him two miles . . . You have heard that it was said, "You shall love your neighbor and hate your enemy." But, I say to you, love your enemies and pray for those who persecute you. (Matt. 5:38–41; 43–44)

The reference to "an eye for an eye," you recall, is a reference *Lex Talionis* (see Section 14.2). This leaves it open, of course, what constitutes returning "evil for evil" or "injustice for injustice." Hegel would deny that imposing the death penalty is returning evil for evil. He would say it's returning right for wrong, justice for injustice. The issue between Socrates and Jesus, on the one hand, and Hegel, on the other, would then be over the proper moral evaluation of the death penalty. The point is that it's possible to maintain, in the spirit of Socrates and Jesus, that putting people to death isn't honoring them as rational beings. It's treating them inhumanely when they're defenseless before the power of the state.

A second and related objection is that the death penalty is excessive. It goes beyond the proper function of the state. The state's function, on this

view, is to protect society. (It has other functions, of course, but this is the one that pertains specifically to the issue of wrongdoing.) To presume to judge individuals morally is not the state's business. It can protect society by imprisoning people for life. It doesn't need to kill them. In so doing it exceeds its legitimate role.

Supreme Court Justice Thurgood Marshall in effect makes this argument in his dissent from the majority decision in *Gregg v. Georgia*. His point is that the death penalty violates the Eighth Amendment prohibition of "cruel and unusual" punishment because it's excessive.

There remains for consideration, however, what might be termed the purely retributive justification for the death penalty—that the death penalty is appropriate, not because of its beneficial effect on society, but because the taking of the murderer's life is itself morally good. Some of the language of the opinion of my Brothers Stewart, Powell, and Stevens . . . appears positively to embrace this notion of retribution for its own sake as a justification for capital punishment.

*[T]he decision that capital punishment may be the appropriate sanction in extreme cases is an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the penalty of death.*

Then they quote with approval from Lord Justice Denning's remarks before the British Royal Commission on Capital Punishment:

*The truth is that some crimes are so outrageous that society insists on adequate punishment, because the wrong-doer deserves it, irrespective of whether it is a deterrent or not.*

Of course, it may be that these statements are intended as no more than observations as to the popular demands that it is thought must be responded to in order to prevent anarchy. But the implication of the statements appears to me to be quite different—namely, that society's judgment that the murderer "deserves" death must be respected not simply because the preservation of order requires it, but because it is appropriate that society make the judgment and carry it out. It is this latter notion, in particular, that I consider to be fundamentally at odds with the Eighth Amendment. The mere fact that the community demands the murderer's life in return for the evil he has done cannot sustain the death penalty, for as Justice Stewart, Powell, and Stevens remind us, "the Eight Amendment demands more than that a challenged punishment

be acceptable to contemporary society.” To be sustained under the Eighth Amendment, the death penalty must “comport with the basic concept of human dignity at the core of the Amendment;” the objective in imposing it must be “[consistent] with our respect for the dignity of [other] men.” Under these standards, the taking of life “because the wrongdoer deserves it” surely must fail, for such a punishment has as its very basis the total denial of the wrongdoer’s dignity and worth.<sup>9</sup>

While Marshall’s concern as a Supreme Court justice is with the constitutionality of the death penalty, one can raise the moral issue independently of that concern. To do so opens up the broader range of issues concerning the legitimacy of the state and its proper functions.

This concern brings us to the other principal line of justification for the death penalty, namely, that it promotes a social good by deterring other potential criminals.

## 14.6 The consequentialist justification of the death penalty as a deterrent

Remember that we have distinguished *persons*, *acts*, and *consequences* (Chapter 13, Theory Box 13C, Section 13.8). In these terms, retributivism appeals to the nature of persons (e.g., the fact that they are rational beings) and/or the nature of their acts (e.g., committing murder) in justification of the death penalty. Some people, in the retributivist view, deserve to die quite independently of the consequences of putting them to death. Consequentialists (or utilitarians in particular) who defend the death penalty justify their position by appeal to the consequences of putting people to death for certain offenses. In their view, it serves to deter others from committing similar crimes in the future, hence promotes a social good.

In assessing this rationale, there are two questions: (1) is the death penalty a deterrent? And (2) if it is, is it a better deterrent than life imprisonment (or some other response)? It wouldn’t be enough to establish that a death penalty is a deterrent if life imprisonment (or some other punishment or mode of treatment) were at least as good or even better as a deterrent.

The prior question is: what is deterrence? Notice that deterrence differs from prevention. I can prevent you from crossing my lawn by building a fence around it. That way you *can't* cross it. But I've deterred you only if I've led you to refrain from crossing it when you otherwise would have—which I might do by putting up a sign that says “No trespassing” or “Beware of dog.” Deterrence presupposes a mental act that is part of the explanation of why a person didn't perform the act in question. In the cases of greatest interest legally and morally, one is deterred only if one chooses not to do something because of the threatened consequences if one does. To put this a little more formally, where A and B can be individual persons, or nation states:

### Theory Box 14B

#### *What Is It to Deter?*

A has deterred B from doing x if and only if:

1. A has threatened to do y if B does x,
2. B has not done x,
3. B has refrained from doing x because of the threat of y if B does x.

In other words, deterrence says more than simply that someone hasn't done something in the face of threatened consequences; it says they've chosen not to do it because of those consequences. It provides an explanation for their failure to do the act. Nuclear deterrence, for example, purports to lead an adversary to refrain from a nuclear attack because of threatened nuclear retaliation. Deterrence can occur in legal and nonlegal contexts. In light of this, let us define deterrence, in a sense specifically relevant to the death penalty, as follows:

### Definition Box 14B

**Deterrence: Causing people to refrain from committing certain crimes for fear of execution if they do.**

Notice, further, that refraining implies that but for the threatened consequences, the person would have performed the act in question. You haven't refrained from doing something unless you otherwise would have done it.

To know that someone has been deterred requires *counterfactual knowledge*. It requires knowing what *would have* happened (but didn't) but for something that did happen (the threat of consequences). It requires knowing something contrary to the actual course of events.

Thus, to know that the death penalty functions as a deterrent, one would have to know that but for it as a threatened punishment for murder, some people would have committed murder but chose not to in order to avoid execution.

Now most people never commit murder. But most of them don't do so because they were deterred. Most of them don't do so because they've never had any inclination to or because they think it's wrong. It's not that they would commit murder if the death penalty were removed. If that were so, one would expect the murder rate to skyrocket when a state abolishes the death penalty, which doesn't happen. And one would expect soaring murder rates in states (or countries) which don't have a death penalty, which isn't borne out. In other words, the explanation why most people don't commit murder isn't because there is a death penalty for it.

If doesn't follow from this that some people aren't deterred by the death penalty. They might be. But it means it would be difficult to know that. To know that certain persons have been deterred by the death penalty would require knowing that, but for the death penalty, those persons would have committed murder. And this would require knowledge of the motives and intentions of those particular individuals, and counterfactual knowledge of what their behavior would have been but for the death penalty. More than this, it would require our knowing that:

1. They knew or believed there was a death penalty in the jurisdiction in which they contemplated committing murder.
2. They believed they would likely be caught if they committed murder.
3. They believed they would likely be convicted, sentenced to death, and the sentence would be carried out if they committed murder.

Absent any one of these beliefs, the death penalty would fail to deter potential murderers even if it *would have* deterred them if they had possessed this knowledge. And absent knowledge that potential murderers had all of these beliefs and refrained from murder because of them, one couldn't know that the death penalty functioned as a deterrent. It seems clear that over a population of millions of people, we simply don't have that kind of knowledge.

Simply compiling statistics on the number of homicides with and without a death penalty isn't enough. Any homicide rate is compatible both with the death penalty's being a deterrent (meaning that it would deter if potential murderers had the requisite beliefs or knowledge) and with it's not being a deterrent (meaning that some potential murderers commit murder even if they possess all of the requisite knowledge or beliefs in (1) through (3)). The same should be said for life imprisonment. Precisely the same kind of evidence would be required to know whether life imprisonment is a deterrent and whether, if it is, it's as good, less good, or better a deterrent than the death penalty.

We know the extent to which the death penalty fails as a deterrent. Every time there's a crime for which there's a death penalty there's a failure of deterrence, whether it's because the perpetrators lack the requisite beliefs to be deterred or because they have the beliefs but commit the crimes anyway. That we know for certain. In fact, some states that have the death penalty have higher murder rates than those that don't. This means that some of the statistics cited as reasons for retaining the death penalty (e.g., high murder rates) actually show the extent of its failure as a deterrent.

If people aren't deterred from speeding, smoking, or having unsafe sex by the threat of death from auto accident, lung cancer, or AIDS, it's not surprising that those who are inclined to kill aren't deterred by a death penalty. Indeed, some psychologists believe that self-destructive people sometimes kill in order to receive the death penalty—raising the possibility that capital punishment may actually help produce some homicides (just as some persons commit “suicide by cop,” as it is sometimes called, by provoking the police into shooting them).

## 14.7 The role of fear in deterrence

Deterrence and retribution are the only remotely plausible nonreligious justifications for a death penalty. Deterrence requires instilling fear; retribution requires doing to offenders as they have done to others. Holding executions behind closed doors defeats the first purpose. Potential murderers are unlikely to read newspaper accounts of executions or to be much troubled if they do. No punishment deters if you don't expect to be caught, and few murderers expect to be caught. Many people don't even know which states have a death penalty. Making executions “humane,” on the other hand, defeats the second purpose. Diminish the pain and terror traditionally associated



with the death penalty, and you widen the gap between criminal homicide and judicial homicide. After Pedro Medina's death mask burst into flame during his electrocution on March 25, 1997, Florida Attorney General Bob Butterworth said that Medina's death, which many considered horrifying, would be a deterrent to crime. Those who wish to commit murder, he said, "better not do it in the state of Florida because we may have a problem with our electric chair." Commenting on lethal injection as an alternative to electrocution, the state's Senate Majority Leader said the next day, "A painless death is not punishment."<sup>10</sup>

There's a dilemma here that society must confront. If one hoped to deter crime by the death penalty, that would seem to argue for spreading the fear of the penalty as widely as possible through public executions, perhaps requiring children—among whom are tomorrow's criminals—to witness them. But then one risks the very brutalization of people that led American states to move executions behind closed doors in the 1830s. A special committee of the New York State Assembly spoke to this issue nearly 150 years ago in recommending abolition of the death penalty. It wrote:

### **Key Quote 14E**

If the child never sees the sanctity of human life invaded, his early reverence for it will remain in his maturer years; but if he sees society frequently cutting off its members . . . [his reverence for life] will pass away like the early dew, and the morning cloud; and he, perhaps in a moment of passion or excitement will follow the example which has been set him by the State.

On the other hand, if one defends the death penalty on retributivist grounds, one runs the risk that the message to people—and in particular to children—will be that it's permissible to kill people if you have the power to do so and are convinced you have the wisdom to judge who is and who isn't deserving of life. Such a message isn't lost on those who attack abortion clinics or assassinate world leaders or who engage in terrorism, much less those who initiate wars.

Finally, even if there were a compelling moral justification for the death penalty in theory, the practice of judicial execution is flawed, and numerous innocent people—as many as one in twenty-five in a 2014 study by the National Academy of Sciences—have erroneously been sentenced to death.

Part of the problem is the nature of the judicial system. At its best, it seeks to provide an impartial and fair process for determination of guilt or innocence. But the system is imperfect and errors can and do result. Moreover, eyewitness reports, which often are key elements in a finding of guilt for homicides, have come to be seen as highly unreliable, thus contributing to erroneous convictions.

## 14.8 Conclusion

The only safe conclusion, then, is that we simply don't know whether the death penalty is a deterrent, or if it is, how effective a deterrent it is, and whether it's better or worse as a deterrent than life imprisonment. But both sides on the death penalty question can agree on some things. In America today, thousands of children begin their lives poisoned by drugs or alcohol; hundreds of thousands of troubled teenagers flee their homes; millions grow up in poverty. At a time when violent crime is decreasing overall, it's increasing by young people. Privileged or disadvantaged, all children begin life innocent. Yet among them are tomorrow's criminals. We can, if we choose, regard them all as our children, and the adults they will become, as our brothers and sisters. We can, if we choose, help them to a better life now, in which respect for others becomes easy and natural for them. Or we can pour millions into concrete, barbed-wire, and execution chambers to contain or kill them later. The challenge to abolitionists and retentionists alike is to reflect on what kind of society we aspire to be.

## Study questions

1. What does the *Eighth Amendment* to the US Constitution assert (Key Quote 14A)?
2. What is *Lex Talionis* (Key Quote 14B)?
3. How does the text define *punishment* (Definition Box 14A)?
4. What is *retributivism* (Theory Box 14A)?
5. What kinds of considerations do retributivists believe justify the death penalty (take note of characteristics of the *act* and of the *offender*) (Section 14.4)?
6. How do the views attributed to *Socrates* and later to the historical *Jesus* go against the retributivist argument for the death penalty (Section 14.5)?