

# IGNORING ISSUES OF MORALITY OR CONVICTING THE INNOCENT, IS CAPITAL PUNISHMENT A GOOD IDEA OR A BAD IDEA?

*Ronald J. Allen\**

I believe I was invited to Professor Arnold Loewy's conference this year because he believes that I am a supporter of capital punishment and will stir things up and provide a target for the standard liberal commentary that one expects at such events. I hate to come under false pretenses, and thus I hasten to add that I have told Professor Loewy a number of times that I am neither a supporter of the death penalty, nor am I an opponent. I am truly in equipoise, but I do think that the State should be required to cross all its t's and dot all its i's before taking a person's life. Indeed, unless there are some clinicians in the room who specialize in death-penalty cases, I suspect I have handled or helped in more death-penalty cases than anyone in the room—from trial to arguing a death-penalty case in the Supreme Court, a process that continues today at Northwestern.<sup>1</sup> Why I am in equipoise is a personal story that I have told once in print and will not bore you with again.<sup>2</sup> Perhaps being in equipoise still makes me enough of an odd duck at legal academic conferences to play the role of provocateur that my dear friend Arnold is hoping I will undertake, and I certainly do not want to disappoint a good friend.

The difficulty is that the obvious way to be provocative here is not to defend capital punishment, but to attack the comprehensibility of the question; it seems to be internally inconsistent although, as we will see in a moment, I think more highly of the question than that. But note the difficulties; if one ignores questions of morality, how does one assess whether something is a good or bad idea? One can, I suppose, list all the ways one might (but apparently is instructed by the question not to) appraise the death penalty and point out that the death penalty succeeds in accomplishing the various agendas or does not, and then identify whatever secondary consequences might flow from whatever the previous analysis turns up. Having done all that, without a moral foundation, one still cannot

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\* John Henry Wigmore Professor of Law, Northwestern University; President, Board of Foreign Advisors, Evidence Law and Forensic Sciences Institute; Fellow, Procedural Law Research Center, ZhengFa University.

1. See *Heath v. Alabama*, 474 U.S. 82 (1985).

2. See generally Ronald J. Allen & Amy Shavell, *Further Reflections on the Guillotine*, 95 J. CRIM. L. & CRIMINOLOGY 625 (2005) (describing my internal conflict between the realization that humans commit unthinkable acts and the finality of execution).

assert that something is a good idea or a bad idea. One can, at best, assert a set of consequences.

The difficulties press further. Having engaged in a form of utilitarianism, one might be tempted to then say that the death penalty is good if its consequences fulfill its proponents' dreams but bad if it does not. But the question strictly rules out such a move because utilitarianism is as much a moral theory as natural law, concern for human flourishing, or Dworkin's interpretive theory.

I have commented so far solely on the morality of the death penalty, but the same problems affect the significance of convicting the innocent. It is pretty easy to say (although what one might want to do about it is considerably more difficult, as I hope to demonstrate below) that all things considered, convicting the innocent is a bad idea because it is morally wrong and has devastating consequences—both points being forms of moral thinking excluded by the question. So, we are left with trying to answer whether it is a bad idea to do a bad thing if you ignore the badness of the thing that you are thinking about. This, I believe, would challenge even the Thurman Arnold/Thomas Reed Powell critique of legal reasoning that “[i]f two things are inextricably tied together, and you can think of one without thinking of the other, why then, you have a legal mind.”<sup>3</sup>

I fear I am disappointing Professor Loewy's hopes of my stirring up the waters, as it were, so let me take a different tack. Purely on the intellectual merits, the conventional debate about the death penalty that focuses on the risk of executing an innocent person is misguided to the point of being vacuous. To be clear, I mean all these things putting aside all moral issues. The debate is an intellectual embarrassment, non-morally speaking. It is at worst internally inconsistent and at best blind to the landscape that surrounds it. It focuses on one variable when any sensible analysis would immediately see the need to grapple with many. It elevates the killing of an innocent person in a certain way to the heights of injustice, while ignoring that the failure to do so may endanger many more just as equally innocent. To be sure, the proponents of capital punishment are also frequently guilty of equally egregious intellectual malpractice, but that point needs no defense at any academic conference in the United States where the death penalty is on the agenda.

A clarification is in order: I am addressing, and only addressing, the argument that the death penalty should be eliminated because of the risk of executing an innocent person. I most decidedly am not addressing the work

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3. Melissa Murray, *Strange Bedfellows: Criminal Law, Family Law, and the Legal Construction of Inmate Life*, 94 IOWA L. REV. 1253, 1255 (2009) (quoting Ruth Bader Ginsburg); see also Thurman W. Arnold, *Criminal Attempts—The Rise and Fall of an Abstraction*, 40 YALE L.J. 53, 58 (1930) (quoting Thomas Reed Powell as saying, “If you think you can think about something which is attached to something else without thinking about what it is attached to, then you have what is called a legal mind.”).

of the Innocence Projects in attempting to identify wrongful convictions. Of course that work should be done, as should its converse of solidifying accurate convictions.

Let us now reconsider the question that Arnold Loewy has posed, for perhaps it is considerably more subtle than it initially appeared. Maybe he is saying just what I have laid out above (and of course anyone who says what you think is quite interesting indeed), to wit if you put aside the heated rhetoric of the death-penalty debate, what do you have left?

I have already expressed my conclusion, so let me press ahead to why the risk of wrongful executions is a vacuous reason to eliminate the death penalty. The explanation is simple to state, but complex in its operationalization. The simple point is that virtually every decision the government makes sits on the razor's edge of a deadly dilemma. Amy Shavell, Larry Laudan, and I have explored this point and its implications in a number of articles.<sup>4</sup> The simplest general explanation of this proposition is that every decision is also a decision not to do something else. If you build more roads, some people will live and others will die, but different ones will live and die if you build a hospital instead. If you build a road here instead of there, again there will be different winners and losers. If you pour money into AIDS or breast cancer research, other fields, including those affecting considerably more people, will be differentially affected.

Consider how this simple but powerful point plays out in the death-penalty context. No one knows for sure how many innocent people have been executed. Perhaps Frank Zimring's estimate that about five innocent people have been executed in the last three decades or so of the twentieth century is accurate.<sup>5</sup> One way to stop those five innocent lives from being lost is to eliminate the death penalty—the primary point of the abolitionists, of course. That means the approximately 1,000 people executed in that basic time frame would have been sentenced to imprisonment.<sup>6</sup>

What would these people have done? One thing we know is that inmates kill other inmates (and guards) at an appalling rate.<sup>7</sup> In this same

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4. See, e.g., Ronald J. Allen & Larry Laudan, *Deadly Dilemmas*, 41 TEX. TECH L. REV. 65, 73 (2008).

5. FRANKLIN E. ZIMRING, *THE CONTRADICTIONS OF AMERICAN CAPITAL PUNISHMENT* 170 (2003). Other work suggests that fear of innocence is out of proportion to the actual numbers of wrongful executions. Michael L. Radelet, *The Role of the Innocence Argument in Contemporary Death Penalty Debates*, 41 TEX. TECH L. REV. 199, 220 (2008).

6. See generally *Facts About the Death Penalty*, DEATH PENALTY INFO. CENTER, <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf> (last updated Oct. 2, 2014) (detailing the number of executions in the United States since 1976).

7. See Margaret E. Noonan, *Mortality in Local Jails and State Prisons, 2000–2010—Statistical Tables*, U.S. DEP'T OF JUSTICE 5, 19 (Dec. 2012), available at <http://www.bjs.gov/content/pub/pdf/mljsp0010st.pdf> (noting that 741 people were murdered while incarcerated between 2000 and 2010: 515 in state prisons and 216 in local jails).

basic time frame, there were about 2,000 murders in prisons and jail.<sup>8</sup> A number of these killings were by convicted murderers serving life sentences with nothing to fear, more or less.<sup>9</sup> We know that some convicted murderers kill again upon release, also with appalling frequency.<sup>10</sup> Joseph Fischer killed at least twenty more people after serving a sentence for murder.<sup>11</sup> According to the Bureau of Justice reports, 6.6% of released murderers in 1983 were arrested for murder within three years of their release.<sup>12</sup> Of the state prisoners released in 1994, 1.2% of the 4,443 persons (or fifty-three individuals) who had served time for homicide were rearrested for homicide.<sup>13</sup> All the people killed by these convicted murderers were innocent victims. Executing an innocent person is only one kind of mistake that can be made. Another is the failure to execute someone whom the State could have executed, resulting in identical social consequences.

Of course, one must take into account the alternatives. Instead of killing people to stop them from killing again, lock them up in what is essentially solitary confinement. "Killing a person is a brutal thing; so, too, is locking him in an eight by ten cell for thirty years, with virtually no contact with any other human for long stretches of time."<sup>14</sup> And unfortunately, it does not work very well. A number of those previously-referred-to prison murders occur in lockdown facilities,<sup>15</sup> and at

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8. See *id.* From 2001–2010, 741 people were murdered in prison (515 in state prisons and 226 in local jails). *Id.* About a thousand more were murdered from 1980–1995. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1995 18 (1997) (for statistics from 1980 to 1995); BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CORRECTIONAL POPULATIONS IN THE UNITED STATES, 1997 10 (2000) (for statistics from 1990 to 1997).

9. See, e.g., Cathy Lynn Grossman, *Priest was "Prize" for Suspect*, USA TODAY (Aug. 26, 2003), [http://usatoday30.usatoday.com/news/nation/2003-08-25-geoghan-death\\_x.htm](http://usatoday30.usatoday.com/news/nation/2003-08-25-geoghan-death_x.htm) (discussing that a former priest convicted of child molestation was strangled to death by a fellow inmate who was serving a life sentence with no parole for murdering a gay man).

10. See Allen J. Beck & Bernard E. Shipley, *Bureau of Justice Statistics Special Report: Recidivism of Prisoners Released in 1983*, U.S. DEP'T OF JUSTICE 6 (April 1989), available at <http://www.bjs.gov/content/pub/pdf/rpr83.pdf>.

11. See *Bonin v. Calderon*, 59 F.3d 815, 851 n.1 (9th Cir. 1995) (Kozinski, J., concurring) (mentioning Kenneth McDuff, who was convicted of two murders, released, and then killed at least two, and maybe as many as nine, more individuals).

12. Beck & Shipley, *supra* note 10.

13. Patrick A. Langan & David J. Levin, *Bureau of Justice Statistics Special Report: Recidivism of Prisoners Released in 1994*, U.S. DEP'T OF JUSTICE 9 (June 2002), available at <http://www.bjs.gov/content/pub/pdf/rpr94.pdf>. This study was to be updated in 2013, but so far as I can tell has not yet been updated.

14. Allen & Shavell, *supra* note 2, at 634. The horror of solitary confinement is now being explored systematically. Nadia Ramlagan, *Solitary Confinement Fundamentally Alters the Brain, Scientists Say*, AM. ASS'N ADVANCEMENT SCI. (Feb. 15, 2014), <http://www.aaas.org/news/solitary-confinement-fundamentally-alters-brain-scientists-say>.

15. Sue Fox et al., *Lapses at Jail Led to Inmate's Killing*, L.A. TIMES (May 15, 2004), <http://articles.latimes.com/2004/may/15/local/me-jail15> (discussing that an inmate killed another inmate

least one happened with the inmate in “close custody, one step below the maximum security status reserved for death row inmates and meaning he was under armed supervision at all times.”<sup>16</sup> Inmates also kill themselves with depressing regularity, and if the point is the wrongful deaths caused by the State, presumably suicides caused by the State’s treatment of individuals should count in the ledger as well.<sup>17</sup> Executing people to stop them from committing suicide may seem like an odd argument—although one long countenanced by the common law—but this is not an argument at all. It is a consequence. The argument is that the State should not execute people because it will kill innocents, and the devastating counterargument is that the State will do so no matter what. Eliminating the death penalty is almost certainly going to exacerbate the situation.

Well, shit happens, doesn’t it? Indeed it does—and everywhere you look. But the interesting point is that not everything is being looked at. The death-penalty debate is framed around the irrevocable error of executing the innocent and, as horrible as that is, the same kind of horror that is intimately connected to it is neglected. It is hard to look at the data and conclude anything other than that the failure to execute death-eligible individuals has caused a wholesale slaughter of innocent people. The number of innocents killed by the State in these other ways dwarfs any responsible estimate of the number of innocent people executed in modern times. Judged by the standards of internal consistency, this argument against the death penalty has it exactly backwards.

I should probably point out that my entire argument has proceeded without mentioning deterrence. If there is a deterrent effect to capital punishment, it is obvious that the choice is just over which lives to save, and if there is a deterrent effect, the only hope for shutting down the entire death-penalty apparatus all at once is all but lost. That is why so much academic effort is expended on discounting any studies plausibly showing that the death penalty deters. Here again, the debate is an intellectual embarrassment. Under modern conditions brought about by the Supreme Court because of the freakish nature of capital punishment, capital punishment has become even more freakish—an almost randomly delivered cost to an unsuspecting recipient. The deterrent effect of the death penalty under modern procedure is hardly equivalent to whether a realistic risk of death over long-term imprisonment would motivate individuals. But again, this is not necessary for my argument.

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who was supposed to be given special protection under a judge’s order; the inmate killer had wandered around the jail for hours).

16. Beth Kassab, *Prison Officials Say Inmate Killed in Fight*, ORLANDO SENTINEL (Sept. 24, 2001), [http://articles.orlandosentinel.com/2001-09-24/news/0109240115\\_1\\_felty-inmate-killed-tomoka-correctional](http://articles.orlandosentinel.com/2001-09-24/news/0109240115_1_felty-inmate-killed-tomoka-correctional).

17. See Allen & Laudan, *supra* note 4, at 74.

The strangeness of the framing of questions concerning criminal justice in modern American law schools goes well beyond the death-penalty debate. In one sense, the death-penalty debate is a part of the larger concern with convicting innocent people. Although I do not wish to depart from Arnold's assigned role of provocateur on the death penalty, I should say that, just as I would prefer not to kill innocent people, I am not really in favor of locking them up either. It is entirely unclear what that tells you, however. It would tell you a lot if there were ways of reducing wrongful convictions without reducing correct ones, but most of the proposals for eliminating wrongful convictions entail reducing the total conviction rate. This is obvious in the debate over lineups and almost certainly seems to be true with regard to ways to limit the effect of eyewitness testimony and so on.

The law schools are fascinated by false convictions, as you know, but how often have you attended a conference on the problem of false negatives—cases where the guilty person goes free? I presume exactly the same number as I have, which is zero. And how often in the standard criminal procedure class are the costs of limiting police investigations the focus rather than the consequences of doing so on various notions of rights? Probably more than zero, but I suspect a relatively small number. Maybe that is because such things are not serious public issues. Maybe the risk of wrongful conviction and its consequences—the fascination of modern American law schools—so dwarfs the risk of innocent people being crime victims that the latter point can be disregarded.

Let's see. Let's compare the risk of false convictions to the risk of being the victim of a serious crime. No one knows for sure the rates of errors, but using the data of critics of the American criminal-justice system, 5% is a conservative estimate of the rate of erroneous convictions in serious criminal cases following trial, and .045% following pleas.<sup>18</sup> Taking into account the relative number of trial convictions and pleas, there is about a .055% chance of being wrongfully convicted in the United States.<sup>19</sup> There is about a 6.6% chance of a person born in 2001 serving time in jail (at present rates, obviously).<sup>20</sup> About a third of individuals in prison are serving time for a violent offense.<sup>21</sup> The probability of being a victim of a serious crime over one's lifetime is approximately 83%.<sup>22</sup> Combining all these numbers, the likelihood of being a victim of a serious crime as compared to the likelihood of being wrongfully convicted of one is about 450/1.<sup>23</sup> Take a specific crime such as rape. The probability of a woman

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18. *Id.* at 80 n.81.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

being the victim of rape over her lifetime seems to be about 8%.<sup>24</sup> The likelihood of that compared to being falsely convicted of rape is about 150/1.<sup>25</sup>

Compare these stark numbers to the often triumphalist account of the Blackstone ratio and its liberty preserving features that it is much better to acquit ten guilty defendants than convict one innocent one. This makes us all feel good about the American tendency to resist autocratic authority and our commitment to liberty, does it not? But at what cost to the triumphalism? What if those ten acquitted rapists each commit five more rapes that would have been prevented by their convictions? And what if changing the rules to convict them would have resulted in one more conviction of an innocent person? Are fifty forcible rapes justified to save one innocent person from a jail term? But, you may be thinking, why pick the number one? Why not assume that there would be ten more innocent people convicted? Fine, then the question is whether five rapes are worse than a wrongful conviction. More importantly, though, by asking this question you are admitting to yourself that we are haggling over price, not principle. Exactly so.<sup>26</sup>

Make the hypothetical more gruesome and assume we are talking about murderers. Now it gets more interesting. Precisely what price should society pay to preserve an innocent life? Five other innocent lives? Why? For the life of me, I do not see how the answer can be anything other than that a life is a life, pure and simple. By now, if not previously, I suspect some slippery slope arguments are forming here and there. For example, if I am right then we should cut people up for their organs to save other lives. Maybe we should, but maybe there is a critical difference in the risks society is willing to take that excludes randomly being chosen as an organ donor against one's will and the treatment given to someone proven beyond a reasonable doubt to have killed others. And in any event, my argument is focusing on the irrationality of the argument against capital punishment because of the risk of executing an innocent person, which ignores the very costs that supposedly animate it. A more analogous situation would be the decision not to give a heart that could be

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24. *Id.*

25. *Id.*; see also JOAN PETERSILIA, WHEN PRISONERS COME HOME: PAROLE AND PRISONER REENTRY 166 (2003) (discussing victims' notification of prisoner release dates).

26. BRIAN FORST, ERRORS OF JUSTICE: NATURE, SOURCES AND REMEDIES 60–61 (2004) (demonstrating a different perspective from the inanity of the Blackstone ratio approach to justifying burdens of persuasion in criminal cases). He shows that if 80% of individuals who go to trial are guilty, and there is a 1% conviction error rate, that a "high" burden of persuasion resulting in a 40% conviction rate will produce four false convictions and 404 false acquittals. *Id.* at 60. By contrast, a "low" burden of persuasion resulting in an 80% conviction rate will produce eight false convictions but only eight false acquittals. *Id.* at 61. Thus, were these numbers representative of reality, the question would be whether four additional false convictions is worth 396 true convictions. *Id.* at 60–61. Presumably the legal system would adjust to the changed burdens of persuasion, but Forst's presentation is startling nonetheless. See *id.*

used for a transplant to one of two potential recipients because giving it to one causes the other to die, and we cannot cause innocent deaths. I believe that would be viewed as crazy by just about everybody precisely because it ignores that the failure to give it to either results in two deaths rather than one.

Some will want to respond to this by hiding behind strange notions of intentionality, causation, or ignorance. The State does not intend for those other people to die—but of course it knows full well that they will—and no respectable distinction can be made here between intent and knowledge. The State does not cause those other people to die, but that is ludicrous. This is most clear in the prison context where murders and suicides only occur because the State has warehoused those individuals, but it extends further as well. The State makes enforcement decisions that have effects—this is simply another example of the deadly dilemmas of state choices. The State does not know who is going to die because it imprisons someone, lets someone go, or fails to provide adequate police protection. But the State does not intentionally execute innocent people either. Knowing something is going to happen but not the exact details is not exonerating in either case. The bombardier knows full well he has unleashed hell even if he does not have a front-row seat at the carnage.

To be sure, the Academy is not alone in this myopic behavior. It had considerable help from, indeed was inspired by, the Supreme Court in the 1960s, and the deleterious consequences of this particular form of shortsightedness are still being felt. The recent flap over stop and frisk is a case in point. I put aside the questionable extrajudicial behavior of the judge and the Second Circuit's response to focus just on how the judge conceived the problem. The plaintiffs wanted to show a disproportionate impact on minorities, which obviously is fair game.<sup>27</sup> The City wanted to show that, far from disadvantaging minorities, the stop-and-frisk program quite dramatically benefited them.<sup>28</sup> The judge excluded the City's evidence:<sup>29</sup>

[T]his case is not about the effectiveness of stop and frisk in deterring or combating crime. This Court's mandate is solely to judge the *constitutionality* of police behavior, *not* its effectiveness as a law enforcement tool. Many police practices may be useful for fighting

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27. See *Floyd v. City of New York*, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013) (explaining that “the City adopted a policy of indirect racial profiling by targeting racially defined groups,” which “resulted in the disproportionate and discriminatory stopping of blacks and Hispanics”).

28. See *id.* at 562–63.

29. See Jeremy Beh, *Stopping and Frisking Floyd v. City of New York: Floyd, the NYPD's Stop-and-Frisk Policy, and Equal Protection*, NW. U. L. REV. (forthcoming).



crime . . . but because they are unconstitutional they cannot be used, no matter how effective.<sup>30</sup>

Such reasoning, while perhaps making the Kantian proud, should make the rest of us cringe.<sup>31</sup> If effectiveness is not at least part of the very assessment of constitutionality, then the law is an ass and the Constitution a suicide pact. The following chart shows the NYPD estimates of crime victimization in New York City in 2012:<sup>32</sup>

<u>Race</u>	<u>Murder and Non-Negligent Homicide</u>	<u>Shootings</u>
<b>Black</b>	60.1%	74.1%
<b>Hispanic</b>	26.7%	22.2%
<b>White</b>	8.7%	2.8%
<b>Asian/Pacific Isl.</b>	4.2%	0.8%

The great crime rate decline in New York City has benefited blacks and Hispanics in a grossly disproportionate manner, making their living space immeasurably safer.<sup>33</sup> The idea that this benefit to the groups supposedly being discriminated against is irrelevant to whether there is discrimination is further proof of the Arnold/Powell thesis.

Slippery slope arguments will again be popping into various minds, so let me be clear. I do not know whether or to what extent the stop-and-frisk program contributed to the unprecedented decline in serious crime in New York. Nor is my point that that is all there is to it. Maybe the stop-and-frisk program contributed, even a lot, but perhaps the conclusion still should be that the program was unconstitutional. My point is that the stop-and-frisk case is a paradigm of the general point that all governmental decisions are on the razor's edge of a deadly dilemma and that the real world effects matter.

The commonality of the various points I have made is the curious way in which problems are constructed by the human mind. Certain frames of reference are often taken for granted and their implications unexamined—a point first made in the legal context in Mark Kelman's brilliant article on

30. *Floyd*, 959 F. Supp. 2d at 556.

31. See *Immanuel Kant (1724–1804)*, FLA. INT'L U., <http://www2.fiu.edu/~harrisk/Notes/Ethics/KANT.htm> (last visited Oct. 24, 2014) (discussing some interpretations of Kant that state a person must always do his or her duty regardless of the consequences).

32. Raymond W. Kelly, *Crime and Enforcement Activity in New York City (Jan. 1–Dec. 31, 2012)* 1, 11, available at [http://nyc.gov/html/nypd/downloads/pdf/analysis\\_and\\_planning/2012\\_year\\_end\\_enforcement\\_report.pdf](http://nyc.gov/html/nypd/downloads/pdf/analysis_and_planning/2012_year_end_enforcement_report.pdf).

33. See FRANKLIN E. ZIMRING, *THE CITY THAT BECAME SAFE: NEW YORK'S LESSONS FOR URBAN CRIME AND ITS CONTROL* 28 (2011).

interpretive construction in the substantive criminal law.<sup>34</sup> For example, consider whether the proper frame of reference is individual rights or social consequences. I will close with another example that I fear may impugn my conservative credentials in Professor Loewy's eyes. Suppose a person acted intentionally with the result of subjecting another person to a perpetual state of deprivation somewhat akin to slavery. The victim's freedoms were eliminated; he could not go anywhere or do anything save with the approval of his captors, and he was forced to labor at their whim. Suppose this state would be perpetual, lasting possibly to the death of the victim. How should we think of this, and maybe back to Professor Loewy's question, would the death penalty be good (putting aside morality) for human traffickers? Although I am uninclined to state normative positions in print, I think the Supreme Court's limit of capital punishment to homicide is indefensible. Any way you slice it, there are many worse acts more deserving of death than the killing of another. Again, this is not to editorialize for capital punishment; it is just to say that, if you have it, then . . . I am inclined now to take a poll of the audience. I demur, but think to yourselves what you think the appropriate state response to such facts ought to be?

But, what if the act that caused these consequences was done by a prosecutor? What if the prosecutor knowingly employed perjured testimony, failed to disclose seriously exculpatory evidence that led to a wrongful conviction, and essentially lied to the jury in closing argument about whether there was a plea deal with the one prosecution witness? Would that change your view? This might change the minds of some Californians because the hypothetical is based, somewhat loosely, on the facts of *Killian v. Poole*.<sup>35</sup> In *Killian*, the prosecutor received the worse-than-death sanction of admonishment.<sup>36</sup>

May I say to my good friends in California, this is embarrassing. It is particularly embarrassing to someone like myself who (spoiler alert—another normative sentence) thinks highly of both clear thinking and the rule of law. To be sure, there are institutional differences at play that need to be taken into account and so on, but still most criminal defendants facing capital charges are literally pathetic examples of humanity. They are on average woefully ill-educated, cognitively impaired, come from horrifying backgrounds, and have been systematically beaten down by the world around them. I do not believe in free will, but if I did, and there were

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34.. Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 STAN. L. REV. 591, 593–600 (1981).

35. *Killian v. Poole*, 282 F.3d 1204, 1206–07 (9th Cir. 2002).

36. See *In re Christopher Thomas Cleland*, Member N. 44976, Case No. 02-0-11782-PEM (State Bar Ct. of Cal. 2008), available at <http://i2.cdn.turner.com/cnn/2014/images/03/14/cleland.-prosecutor.admonishment.pdf>. There are disagreements about what the prosecutor knew and when he knew it, but all in all it is a sordid tale. *Id.* at 10. Gloria Killian served sixteen years for a crime that she obviously had nothing to do with before being released. *Id.*

exceptions to its domain, an awful lot of them would be found in the set of individuals facing capital charges. The point, in case it is not obvious, is that if ever there were a set of people who could not much help themselves, this would be it.

Compare prosecutors, who are none of these things. They are well-educated; have above average intelligence; probably come from normal dysfunctional, but not cruel families; and have benefited from society quite nicely, thank you. If anyone should know, and can do better, prosecutors would be the set. And yet an act with certain consequences by one set of people is viewed as a horrendous crime, and by another it is viewed as a questionable trial tactic.

So what is the bottom line here: a plague on all your houses? That would be rather anticlimactic, and even worse, boring. Quite the contrary, I think Professor Loewy's question leads us to think deeply about the only source of salvation for the human race, and that is rationality. Unfortunately, that question leads down only a dimly lit and murky path, but in my opinion we are making progress. For me, the interesting implication of Professor Loewy's question is that it encourages one to think about the framing of questions that concern matters of great significance and highlights that rationality is not just a matter of internal coherence—rule following and the like—but must extend to questioning the assumptions within which those processes occur.

This is a tall task and an impossible one if taken literally. It is paralyzing to question every aspect of everything one does. But to return one last time to dilemmas, the human race is on the razor's edge of another dilemma: paralysis or irrationality. The solution to or avoidance of this dilemma, if there is one, is that different people can do different things and knowledge can advance collectively as it spreads over the network. For the most part, we muddle through, and progress is slow and halting. But, there is progress, and that is the best that we can do.<sup>37</sup>

So, is capital punishment a good thing? Thinking about it clearly is clearly a good thing, and then you have to decide what you want to do.

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37. See generally Ronald J. Allen, *Rationality and the Taming of Complexity*, 62 ALA. L. REV. 1047 (2011) (discussing the increase in knowledge and extension of human rights).

