

## The Death Penalty Debate: a Look at the Main Arguments

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### Abstract

*As the title suggests, the goal of this short article is to introduce readers to the main arguments and lines of reasoning used by both sides in the ongoing debate over capital punishment. I begin by briefly looking at current statistics pertaining to the global distribution of capital punishment, with a particular focus on Taiwan. I then address the debate by considering six arguments, namely, (i) the argument from ‘retribution’; (ii) the argument from ‘deterrence’; (iii) the argument from ‘miscarriage of justice’; (iv) the argument from ‘recidivism’; (v) the argument from ‘incapacitation’; and (vi) the argument from ‘brutalization’. As presented here, the article aims at helping readers reach their own conclusion in the debate, and as such, neither ‘pro’ nor ‘con’ position is clearly favored. Instead, a context is provided whereby each side’s rationale can be seen at work. The article closes with a number of general, thought-provoking questions.*

**Keywords:** capital punishment; retribution; deterrence; recidivism; incapacitation; brutalization; miscarriage of justice..

### ***1. Introduction - The Current Worldwide Distribution of Capital Punishment***

As of April 1<sup>st</sup> 2016, 103 countries have abolished capital punishment for all crimes; 6 have abolished capital punishment for ordinary crimes only; and another 31 have not used it for at least 10 years. On the other hand, 58 countries actively retain capital punishment. <sup>1</sup> According to Amnesty International, in 2015 “[n]umbers [of executions] rose by 54%, with at least 573 more people killed than in 2014.” <sup>2</sup>

Taiwan is among the list of retentionist nations, although there were only three executions in 2005, and none between 2006 and 2009, during the DPP’s previous tenure. The DPP government had indeed vowed to follow the world trend and abolish capital punishment, but polls indicating that 80% of the Taiwanese population supports capital punishment as an effective deterrent of violent crimes and private murders have created a political context in which *status quo* was increasingly difficult to maintain. Since 2010, under the DPP and KMT administrations, an average of five executions has been carried out each year, with the latest in early 2016. The current DPP administration has yet to officially take a stance on the issue.

Taiwanese abolitionists, grouped under the ‘Taiwan Alliance to End the Death Penalty’, cite major legal flaws in the Taiwanese judicial system, claiming that the risk of miscarriage of justice is so high as to be laughable. They urge the government to abolish capital punishment. According to the director of the Alliance, Lin Hsin-yi, “The government says it’s not the right time to abolish the death penalty, because most people still support it,” Lin said. “But if we look at examples in other countries, opinion is against abolishing the death penalty, but other governments still abolished it.” <sup>3</sup> Yet, even though the debate over capital punishment has never really reached any consensus, it has recently been rekindled after the publication of a number of important works in econometrics according to which there is evidence that the death penalty may have a clear deterrent effect. <sup>4</sup>

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<sup>1</sup> These numbers are taken from a document entitled “Abolitionist and Retentionist Countries,” published by Amnesty International. See <<https://www.amnesty.org/en/latest/research/2016/04/death-sentences-executions-2015/>>.

<sup>2</sup> See <<https://www.amnesty.org/en/latest/research/2016/04/death-sentences-executions-2015/>>.

<sup>3</sup> “Activists urge end of death penalty following report,” *Taipei Times*, Thursday, March 26 2009, p. 2. The TAEDP’s website can be found here: <<http://www.taedp.org.tw/en>>.

<sup>4</sup> Most prominent is work by Hashem Dezhbakhsh et. al. (2003; 2006); Joanna M. Shepherd (2004; 2005); H. Naci Mocan and R. Kaj Gittings (2003); and Paul R. Zimmerman (2004; 2006).

The recent empirical studies, which use sophisticated econometric methods, indeed claim that capital punishment has a strong deterrent effect against violent crimes. Dezhbakhsh's bottom line finding is that each execution saves eighteen innocent lives. While both abolitionists and retentionists have been involved in the debate over several decades, the issue remains highly controversial. In what follows, I provide the rationale for both sides of the debate behind each of the main arguments.

## 2. *Introducing the Six Arguments*

In a recent article titled "Deadly Stakes: the Debate Over Capital Punishment,"<sup>5</sup> John O'Sullivan argues in favor of capital punishment. His perspective may be termed *utilitarian* insofar as his two main arguments—the argument from deterrence and the argument from incapacitation—ultimately rest on the notion of *greater social welfare* he sees as a consequence of establishing capital punishment for perpetrators of serious crimes such as murder. O'Sullivan builds his argument on recent statistical analysis<sup>6</sup> which arguably shows that each execution deters an average of eighteen murders.<sup>7</sup> From this, he hypothesizes that executing each of the 3,527 prisoners that had been sentenced to death in the US at the time he wrote the article would have saved more than 63,000 lives. From his perspective, this alone justifies the establishment of capital punishment. As we shall see below, however, opponents to the death penalty counter such claims with the argument from 'miscarriage of justice'.

Yet, O'Sullivan's second argument is offered as a rebuttal to the argument from what he calls "wrongful execution," otherwise known as the argument from miscarriage of justice—cases where someone is *falsely* accused of murder and *wrongfully* executed. O'Sullivan grants the strength of the argument from miscarriage of justice, but counters with the argument from incapacitation—the claim that once a convicted murderer is executed, he/she will (obviously) not commit other murders. His claim rests on actual numbers of death row prisoners in the US who were sentenced for a *second* murder. His claim is that those lives would *certainly* have been saved had the prisoners been executed after their first offense. The number involved is 820 "second" murders. O'Sullivan pits that number against the number of known wrongful executions, and concludes that abolitionists—that is, those who *oppose* capital punishment—should seriously reflect on this fact.

Rhetorically, O'Sullivan's essay uses a negative strategy for the most part, whereby he examines a number of arguments put forth by his opponents, shows their weaknesses, and refutes them. By so doing, he manages to establish why his opponents' views are not worthy of consideration. It will be best to look at those arguments one by one in each of the following sections.

## 3. *The Argument from Retribution*

In the context of criminal law, and more specifically of the debate over capital punishment, retribution is the view that punishment should be *proportionate* to the crime committed. Defenders of the death penalty claim that murder should be punished by execution. Opponents of the death penalty claim that retribution is inhumane and barbaric because it brutalizes the society (see section below on the argument from brutalization) and leaves no room for rehabilitation—to restore one's moral sense. In place of capital punishment, opponents favor life sentence without parole—that is, imprisonment without the release of a prisoner on the promise of good behavior. O'Sullivan retorts that life sentence is *as cruel*, if not *crueler* than death penalty, because of the intrinsic brutality of life in prison. Legal scholar Carol Steiker defends an abolitionist perspective. Her central claim is that capital punishment *qua punishment* is not justified because it is undeserved. Her central line of reasoning is that capital punishment fails to meet what she calls the 'proportionality constraint', which is crucial to the notion of retribution. Her argument runs as follows:

- (i) though capital defendants have usually committed (or participated in) heinous murders, they very frequently are extremely intellectually limited; and/or
- (ii) they are suffering from some form of mental illness; and/or
- (iii) they are in the powerful grip of a drug or alcohol addiction; and/or
- (iv) They are survivors of childhood abuse; and/or

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<sup>5</sup> O'Sullivan (2002).

<sup>6</sup> The research is attributed to Dezhbakhsh, H., Rubin, P. & Melhop Shepherd, J. Two of the authors published their findings in Dezhbakhsh, H & Shepherd, J. M. (2006).

<sup>7</sup> Those numbers are attributed to Iain Murray, a contributor to *National Review Online*.

- (v) They are the victims of some sort of societal deprivation—i.e. poverty, racism, poor education, inadequate health care, or some combination of the above;
- (vi) these defendants do not deserve all the blame for their terrible acts; furthermore,
- (vii) *if* their families and/or societies share responsibility for the tragic results, then
- (viii) the extreme punishment of death should be considered undeserved
- (ix) Capital punishment should be abolished. (Steiker, 2005)

#### 4. The Argument from Deterrence

The concept of deterrence is used to discourage or prevent wrongdoing. In the context of the debate over capital punishment, the claim is simply that the death penalty ultimately saves lives by *preventing* murders from being committed. The rationale is that people will think twice before committing murder if they know they risk execution if caught. Opponents claim that there is no evidence available to support the argument from deterrence, because it is impossible to establish the precise *effect* of deterrence one way or the other. O’Sullivan agrees in principle with the claim, but rejects the antecedent. He indeed indicates a recent study showing the strong deterrent effect of capital punishment (mentioned in the introduction), and passes the burden of proof to his opponents—that is, abolitionists will have to show that the recent study—Dezhabkhsh, H & Melhop Shepherd, J. (2006)—is false.

In their conclusion, Dezhabkhsh and Shepherd indeed state that “The results are boldly clear: executions deter murders and murder rates increase substantially during moratoriums.” Yet they go on to make the following comment at the end of their article: “This convincing evidence for the deterrent effect does not necessarily indicate that capital punishment is sound policy. Although executions provide a large benefit to society by deterring murders, they also have costs; these include the harm from the death penalty’s possibly discriminatory application and the risk of executing innocent people. Policymakers must weigh the benefits and costs to determine the optimal use of the death penalty.” (Dezhabkhsh & Shepherd, 2006: 534)

In their version of the argument from deterrence (Sunstein & Vermeule, 2005), legal scholars Cass Sunstein and Adrian Vermeule claim that governments are special moral agents, and that as *collective agents*, they have the moral obligation of maximizing the public good. A central tenet of their argument is that the act/omission distinction (AOD) does not apply to governments. In the general context of negative rights, AOD claims that individual moral agents are in general less morally responsible for what they omit than for what they do. Here’s a simple example. Imagine you are aware of domestic violence in the apartment next door, but decide not to do anything because you fear violent recrimination from your neighbor. Do you bear any moral responsibility for the harm inflicted upon your neighbor’s wife as a result of your omission to act? Intuitions will vary. What if in a particularly violent fit of brutality your neighbor kills his wife? Would you then bear moral—or legal—responsibility for your neighbor’s death? Ethicists who adopt AOD would claim that your omission in no way connects you directly to your neighbor’s wrongdoing—for that connection to hold, you would have to be part of the causal chain that results in your neighbor’s death. AOD would thus relieve you of moral responsibility.

As mentioned above, an important aspect of Sunstein and Vermeule’s argument is the claim that AOD does not apply to governments. This implies that governments always have a moral obligation to act in face of wrongdoings—which in the present context are understood as private murders. Here’s Sunstein & Vermeule’s argument:

- (i) Governments are special moral agents for whom the act/omission distinction does not hold;
- (ii) Governments have a moral obligation to provide optimal deterrence for wrongdoings such as private murders; furthermore,
- (iii) Since recent empirical research *may* establish that capital punishment has a 1/18 deterrent ratio, and
- (iv) *If* recent empirical research findings are shown to be valid, it follows that
- (v) Governments morally ought to retain/re-instate capital punishment as an optimal deterrent against private murders. (Sunstein & Vermeule, 2005)

Note that this retentionist argument can easily be transformed into a non-retentionist argument just in case premise (iv) should fail to obtain. Indeed, Sunstein & Vermeule clearly state the possibility that the recent empirical research findings could very well be found wanting.

Indeed, this is a claim put forth by Donohue & Wolfers (2005). On a non-retentionist version of the argument, the government would still be held morally obligated to provide optimal deterrence against wrongdoings such as private murders.

### **5. The Argument from Miscarriage of Justice**

As mentioned in the introduction, O’Sullivan refers to this line of reasoning as the argument from ‘wrongful execution’. Essentially, those are cases where an *innocent* person is accused of murder and then ‘wrongly executed’. Opponents to the death penalty claim that the mere *possibility* of miscarriage of justice is a sufficient reason to abolish capital punishment, and replace it with life imprisonment. This is the strongest argument against capital punishment, and O’Sullivan *cannot* refute it. Indeed, he concedes that it is impossible to “eliminate [the] risk” of miscarriage of justice (O’Sullivan, 2002: 380). Not only is it impossible to eliminate the risk, claim abolitionists; it is also impossible to *establish* the true number of miscarriages of justice because of the nature of the legal system itself. Murder trials are often manipulated when inexperienced public defenders are involved.

Yet, O’Sullivan argues that the judicial system is better than before because no case of miscarriage of justice “has happened since the restoration of capital punishment in the US in 1976.” (O’Sullivan, 2002: 380) It is true that between 1973 and 2005, 123 people in the US were released from death row because their cases were found sufficiently uncertain. O’Sullivan claims that that is good news, because it shows his point: the judicial system is now more sophisticated, and mistakes are less likely to occur. Hence in his view, this reinforces the case in *favor* of capital punishment. He then moves on to argue what he calls the “exact equivalent on the other side of the argument—murders committed by those who have already committed a murder[.]” (O’Sullivan, 2002: 380) This leads to the next argument.

### **6. The Argument from Recidivism**

A ‘recidivist’ is a convicted criminal who reoffends—that is, commits more crimes. In this specific case, a second murder. We considered O’Sullivan’s use of the argument from recidivism in the introduction, so we can be brief. The point O’Sullivan is making in this context is that we should also consider recidivists who are accused of murder for the second time. He sees an equivalent between these cases and the cases of miscarriage of justice. While it is certainly bad to wrongly execute someone, it is just as bad to release murderers from prison only to take them back after they have committed a second murder. The weakness of this argument, as read from the abolitionist’s perspective, is that it does nothing to prevent miscarriage of justice in the second murder trial.

### **7. The Argument from Incapacitation**

This argument simply states that the death penalty would make sure to stop recidivism. As O’Sullivan bluntly puts it, “dead men commit no murders” (O’Sullivan, 2002: 380). To support his claim, he uses factual numbers stating that 820 individuals were at one point serving time in U.S. prisons for a second murder. For him, the numbers speak for themselves, and clearly justify establishing capital punishment. “If the death penalty had been applied after their first murders, their 820 victims would be alive today.” (O’Sullivan, 2002: 380)

### **8. The Argument from Brutalization**

I mentioned in section 2 above that many opponents of capital punishment claim that it is inhumane and that it brutalizes society. Let’s now look at this argument a little closer. The argument is quite simple: the death penalty sends the wrong message by *legitimizing* killing in specific circumstances. Furthermore, it has a negative effect on the moral and ethical value of life for individuals and society as a whole. O’Sullivan tears this argument to pieces at the end of his essay by claiming that a society that does away with capital punishment is “cruel rather than civilized.” (O’Sullivan, 2002: 381) This harsh judgement stems from his belief that felonies—murder, rape, etc.—are *intrinsically* uncivilized. He clearly *shares* the abolitionists’ dismay at the taking of human life, but he points out that *felons* should face the capital punishment *precisely* because of their *lack of civility*. So for O’Sullivan, the brutalization stems from felons, and not from society.

### **9. Conclusion**

So in the end, who is right? Can we really justify a position one way or the other? It seems that most, if not all, of the arguments can be pursued in both directions at once. If so, then how—or ‘where’—can we support the concept of justice?

The fundamental problem, it would seem, stems from the fact that every society seems to generate felons: murderers, rapists, criminals, etc., and no legal system can stop that. Should we blame parents and/or the educational system for failing to instill adequate ethical and moral values in individuals? Should we blame the 'culture of convenience'? Should we blame violent media? Should we blame human nature? The mere fact that felonies diachronically occur across cultures would seem to point to the latter. If so, research in psychopathy might provide new grounds for the debate over capital punishment.

In the end, the position adopted will likely rest on one's view of where responsibility lies: if we're all somehow responsible as societies, communities, and groups for generating felonies, then capital punishment will likely be seen as undeserved. On the other hand, if individuals bear most of the responsibility for their actions, then capital punishment would be permissible in cases of private murders.

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