

July 2015

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Recommended Citation

Dressler, Joshua (2005) "The Wisdom and Morality of Present-Day Criminal Sentencing," *Akron Law Review*: Vol. 38 : Iss. 4 , Article 9.

Available at: <http://ideaexchange.uakron.edu/akronlawreview/vol38/iss4/9>

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THE WISDOM AND MORALITY OF PRESENT-DAY CRIMINAL SENTENCING

*Joshua Dressler**

First, let me just say how much I have enjoyed being on campus these last two days. I thank the Dean, the criminal law faculty, and the students who have participated in the classes I have taught here these two days. And, I most especially want to thank Professor Margery Koosed who worked exceptionally hard pulling everything together. I will only say that she is a real “*mensch*” and if you need me to translate that, I will gladly do so after this lecture. In short, I have greatly enjoyed being here.

Today I want to talk about criminal sentencing and its connection, or I fear lack of connection, to basic principles of punishment that are supposed to make our system rational and morally just. Let’s keep in mind that, everyday, in courts all over the country, judges are sentencing persons to prison. They are doing that in *our* name. Punishment—sentencing people to prison—involves intentionally inflicting pain on persons by denying them liberty, which we all value, and separating them from their community. Certainly, we need to care about why we do this, to be sure there are justifications for treating people this way.

Now I think we know that there are two general theories or justifications for punishment and sentencing. First, utilitarianism. Utilitarians believe that the purpose of all laws is to maximize the net happiness of society. Laws, all laws, should be used to exclude as far as possible all painful or unpleasant events. To a utilitarian, both crime and punishment are unpleasant and therefore, generally speaking, undesirable. In a perfect world we wouldn’t have crime or punishment. It isn’t a perfect world, of course, and there are people disposed to commit crimes. Therefore, utilitarians believe that the infliction of pain

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in the form of punishment is justifiable if, but only if, it is expected to result in a net reduction of pain of crime that otherwise would occur.

The second primary justification for punishment and sentencing is retribution. Retributivists believe that punishment is justified when it is deserved. It is deserved when the wrongdoer freely chooses to violate society's rules. To an uncompromising retributivist, the wrongdoer should be punished whether or not it will result in a net reduction of crime. This act of punishment is required, to retributivists, because of the moral desert of the wrongdoer.

Now, the debate between retribution and utilitarianism applies on different levels. I think, probably, that most people today would say that the basis for our criminal justice system—that is, the reason why the legislature defines crimes, why the police try to arrest those who committed the crimes, and why we developed a court system to adjudicate and impose punishment for those crimes—is primarily utilitarian, not retributivist. We have defined the crimes, for example murder, not because we want to go out and punish murderers, but because we hope the threat of punishment will cause people not to murder in the first place.

On the other hand, if one looks carefully at the rules of criminal law, the rules you learn in law school—the requirement that a person not be punished in the absence of voluntary conduct; the requirement of *mens rea*, a guilty mind; and when one looks at the various defenses to crimes—are far easier to explain pursuant to retributive principles than utilitarian ones. In other words, once we set up the criminal justice system, perhaps on utilitarian grounds, the determination of who should be punished, namely only those who act voluntarily with a guilty mind and without justification or excuse, and in determining how much punishment is just, retributive justice is the key. This means that ideally, in a just system, the punishment we potentially inflict for violations of the law should only occur if, first, the wrongdoer caused harm to society, and second, he or she morally deserves to be punished. Here, then, we turn to the subject for today, sentencing.

The amount of punishment we impose should be roughly proportional to the crime, taking into consideration the harm the person caused and his or her moral blameworthiness in causing it. Now having said that, this does not mean that utilitarianism has no role in sentencing. One scholar, the late Norval Morris, felt that retribution and utilitarianism could and should work together. His basic point was this: retributivists cannot tell us *exactly* how much punishment is proportionate to a crime. I mean, how many years of punishment are

proportionate to a robbery, or a rape? Is it 5 years, is it 14 years, is it 7.2 years? We can't answer that question precisely, if we are retributivists. But retributivists *can* set parameters. We know intuitively that a certain amount of punishment is too much for a particular crime, and that some punishment is too low because it trivializes the offense. That sets your retributive parameters: you impose no *fewer* than X number of years for a particular crime, but no more than Y number of years for the offense. Within those parameters, Norval Morris would argue, if a society wishes, it can choose to apply utilitarian considerations—weighing deterrence, rehabilitation, incapacitation—but *retribution set the parameters*. Now I, Joshua Dressler, might prefer to exclude all utilitarian considerations, but certainly a legislator has every right if he or she chooses to apply utilitarian factors, but retribution should set the top and bottom limits.

The problem is there is little evidence that lawmakers set penalties in this sort of coherent manner. Typically, lawmakers apply *no* theory of punishment at all in setting penalties. They apply the “What do I need to get re-elected?” principle. And it is always easier to appear to be tough on crime than to develop sensible penalties. This process of increasing penalties, and then increasing them some more, and then increasing them again—despite all utilitarian or retributive arguments to the contrary—has been going on in the United States for at least the last quarter century in a manner that should put this country to shame. In 2001, nearly two million men and women were in the United States penal system. That is a *per capita* rate of 690 persons per 100,000 population. That compares 690 *per capita*, to a 79 *per capita* rate as recently as the mid-1970s. In other words, we have experienced a 900% increase in the incarceration rate in this country in the past thirty years. There is simply no utilitarian or retributive justification for this momentous change.

Nowhere, perhaps, are sentencing rules worse than in the federal system. As a result of sentencing “reforms” in the 1980s, and I put quotation marks around the term “reforms,” we now have the much reviled Federal Sentencing Guidelines, hundreds of pages long, that require a federal judge to proceed through a complex seven-step sentencing process that ultimately leads to a Table at the end that tells judges basically what sentence they should impose. Supposedly, the Guidelines follow largely retributive principles. In actuality, they do not.

First, the essence of retribution, the expression of moral condemnation, has been largely lost because of the Guidelines. Let me read a quote from Professor Kate Stith and Judge José Cabranes, who

have observed that before guidelines existed, observers of sentencing proceedings in federal courts:

witnessed a ritual of undeniable moral significance. . . . The audience included victims, their families and friends, the family and friends of the defendant, the general public. . . . But the judge *addressed* only one person when imposing a sentence. . . . This solemn confrontation was predicated on the fundamental understanding that only a person [here, a judge] can pass moral judgment, and only a person can be morally judged.¹

But under the Guidelines, the judges have little discretion; they just have a mechanistic seven-step process for calculating a punishment. They may as well be a calculator as a judge. As Judge Cabranes and Professor Stith go on:

The guidelines have replaced the traditional judicial role of deliberation and moral judgment . . . with complex quantitative calculations that convey the impression of scientific precision and objectivity. The judge on the elevated bench remains a visible symbol of society's moral authority, but the substance and meaning of this ancient staging is gone in most cases. . . . With a far more limited role, the federal trial judge in today's sentencing ritual has little or no opportunity to consider the overall culpability of the defendant before him. The Guidelines themselves determine not only which factors are relevant (and irrelevant) in criminal punishment, but also, in most circumstances, the precise quantitative relevance of each factor.²

In short, the essence, the core of retribution, which requires that we look not just at the harm caused, but also at the very individualized factors relating to the defendant's moral culpability, are gone—in favor of a system that fails to treat the defendant as unique, and instead treats the defendant as a member of a faceless, undifferentiated mass to be subjected to a set of entirely depersonalized guidelines.³

1. KATE STITH & JOSÉ CABRANES, FEAR OF JUDGING: SENTENCING GUIDELINES IN THE FEDERAL COURTS 81-82 (1998).

2. *Id.* at 82-83.

3. Since I gave this address, the Supreme Court declared unconstitutional aspects of the Federal Sentencing Guidelines. *United States v. Booker*, 125 S. Ct. 738, 756 (2005). The effect of *Booker* is that the Guidelines are now advisory to the judges, and not mandatory. *Id.* at 757. Judges

And, as bad as these Guidelines are, they have been made far worse in the last twelve months as a result of the so-called Feeny amendments.⁴ In April 2003, Congress sharply limited further the authority of federal judges to issue what are referred to as “downward departures.” After a judge goes through the seven-step process, he or she arrives at the Guidelines Tables. The judge is told there what sentence ought to be imposed. But, the Guidelines permit judges some limited authority to go below or above the figures set out in the Tables, if their reasons for departure can be justified pursuant to specific Guideline rules. The new amendments to the Guidelines, however, provide that judges may *not* issue downward departures based on a convicted defendant’s family circumstances or family responsibilities, or because the defendant suffers from diminished capacity, if the defendant has been convicted of a sexual offense or a crime against a minor. The new law further directs the United States Sentencing Commission, which has the responsibility to update the Guidelines, to promulgate amendments that ensure that the incidents of downward departures are substantially reduced. And, meanwhile, there is no such rule or recommendation regarding *upward* departures: there, the judges are not limited by the new amendments. Furthermore, the new legislation permits the Attorney General of the United States to monitor the downward departure rates of individual judges. Accordingly, Attorney General John Ashcroft issued an amendment to the United States Attorney’s Manual, the manual that every federal prosecutor in the United States must follow, requiring prosecutors to report to the Department of Justice whenever a federal judge issues a sentence falling below the sentencing guidelines. The clear message the Attorney General is sending is that factors regarding the defendant that might call for mitigation, might call for compassion, are essentially factored out of the Guidelines, either expressly or practically now that the Attorney General is looking over the shoulders of the federal judges. In no way, in other words, can we say that defendants will likely get their just deserts—punishment truly representative of their personal blameworthiness.

Finally, you must add to all of this, a spate of mandatory minimum

now have much greater freedom, post-*Booker*, to impose sentences they believe are appropriate. It is too soon to know to what extent judges, instructed by the *Booker* Court to consider seriously the now-advisory Guidelines, will diverge from them. And, of course, *Booker* invites Congress to re-enter the picture: whether they will do so remains an open question; and if they do become involved, it is unclear whether Congress will seek to enhance or diminish judicial discretion.

4. *But see, supra* note 3.

sentencing provisions enacted by Congress: these are laws that prohibit federal judges from imposing sentences below a very high minimum number of years of imprisonment, thus reducing judicial discretion further.⁵

In light of all of this, federal sentencing laws, and state sentencing systems to the extent they are modeled after the Federal Sentencing Guidelines, are in clear violation of both utilitarian and retributive values.

Not only are defendants punished more than they deserve under any decent retributive system, and far more punishment than is necessary for utilitarian purposes, but there are a number of negative side effects. First, the Guidelines now result in punishment so grossly disproportionate that some judges are rebelling. A few judges have resigned their lifetime positions rather than continue to impose what they consider to be draconian sentences. At least one judge threatened to tell a jury in the guilt phase of a trial what sentence the judge would be required to impose if the jurors convicted, essentially inviting jurors to nullify the law and acquit. There have been a few stories of juries who have nullified the law on their own and acquitted because a particular juror either knew or thought he or she knew what the sentence was going to be, and convinced the other jurors to acquit. Thus, people who are genuinely guilty of crimes may be acquitted simply in order to avoid draconian sentences. That is no way to run the criminal justice system.

There is another negative side effect that few people realize, except those that are in the criminal law practice. The substantive criminal law recognizes few excuses, and those excuses, like insanity, are very narrowly defined. Now, overall, I happen to think that is good, that we ought to recognize few excuses. I think most people are morally responsible for their actions and therefore deserve to be convicted of crimes they committed. But to say that someone deserves to be punished is not the same as saying how much punishment they deserve. There are factors that should have no place in the guilt phase of the trial, but are perfectly appropriate in the sentencing phase to decide whether the convicted defendant deserves full or less punishment. But, in any sentencing system that bars mitigating evidence, or which makes it exceptionally hard for a judge to take such factors into consideration, the ultimate real world practical effect is that defense lawyers have no

5. *Booker*, 125 S. Ct. 738 (2005), in no way invalidates mandatory minimum laws. Indeed, Congress may be tempted to add more such laws to reduce judicial discretion and to counteract *Booker*.

choice but to raise such claims, claims that belong in the sentencing phase, in the guilt phase in order to push courts to expand the number of excuses recognized in the law—to create new excuses, or to make the current excuses broader. When sentencing provisions fail to allow judges to consider morally relevant factors in sentencing, it is inevitable that any good and ethical defense attorney will try to squeeze such claims into the only other place available, the guilt phase of the trial. But, such efforts delay the trial process and may ultimately distort the law. We may end up creating defenses when really we shouldn't. Again, we can't blame the defense attorneys for making such claims when they are effectively prevented from doing so at sentencing.

In short, we have every reason for being deeply dismayed by the sentencing provisions in the federal courts. Although most state sentencing systems are not as distorted as the federal system, I think it is fair to say that virtually all state legislators nationwide are guilty of following the "I am tough on criminals" approach to sentencing, rather than developing sentencing provisions that are rational under utilitarian theory, or humane under retributivist theory. Again, I start with what I said in the beginning: these sentences that are imposed in Ohio courts, Michigan courts, federal courts, occurring in our name. And if the sentences are irrational, or if they are unjust and immoral, *we* are responsible. Quite starkly, *we* are not providing justice.

Now, I want to add a few additional remarks about another aspect of sentencing: sentencing people to death. I think it is fair to say that there are few modern issues, and almost certainly none in the field of criminal justice, that are deeper, more provocative, more troubling, and more controversial than the question of whether and when our society should execute persons convicted of first degree murder. The constitutional issues are well settled: the death penalty is not unconstitutional *per se*. None of the nine justices currently serving on the Court disagree with that statement. The issue today relates to nonconstitutional issues, the wisdom and/or morality of the death penalty. So, in the few more minutes that I have remaining, I would like to reflect on those matters, on the wisdom and morality of the death penalty. I stress I am only reflecting. Many of you may disagree with what I have to say.

I want to start the same way as I started my earlier talk, and that is on the justifiability of the death penalty. That has to be considered, again, by considering the two basic theories of punishment. Usually we ask two questions: Is the threat of the death penalty a general deterrent and/or is the actual infliction of the death penalty retributively justified?

First, general deterrence. In 1976, when the United States Supreme Court upheld the constitutionality of the death penalty, that very same Court on that very same day observed, and I am quoting the Court now, “[T]here is no convincing empirical evidence either supporting or refuting this view [that is, that death is a significantly greater deterrent than lesser penalties].”⁶ Since 1976, nothing has changed, except that almost every study since then seems to support the conclusion that it is *not* a general deterrent. It is probably fair to say that the consensus among criminologists today is that there is no scientific basis for the claim that the death penalty is a general deterrent.

But here is the gist of the point. To utilitarians, pain, whether in the form of crime or punishment, is bad, unless its infliction results in a net reduction of future pain. In other words to a true utilitarian, the burden of proof is on those who would *impose* the death penalty and its resulting pain, and not on those who would abolish this punishment. Until we have good reason to believe that the death penalty deters more successfully than life imprisonment, until we have that evidence from a utilitarian perspective, we shouldn’t defend the death penalty.

But that is hardly the end of the discussion on capital punishment, because I don’t believe most proponents of the death penalty rely on deterrence for their position. I think most people want to ask and answer the second question, is the death penalty retributively justified? At first blush, it is hard to argue with a claim that killers deserve the death penalty. If one believes in the literal biblical principle of *lex talionis*, of an eye for an eye, a tooth for a tooth, killing a killer seems deserved. But I am going to suggest that is too simplistic a response. Here’s why: First, few of us really believe in *lex talionis*. We don’t *really* believe we should rob the robber, rape the rapist and steal from the thief. If we don’t believe in *that*, then we have rejected *lex talionis*, and thus there is no reason to believe that the only answer to a murder is to kill the killer.

What *lex talionis* in our modern society *really* means is that punishment should be proportionate to the offense committed, not that it must be identical. That is, retribution only requires that the most serious offense receive the most serious punishment, the least serious offense receive the least serious punishment, and so on. If we can agree that murder is the most serious offense in the penal code, then this only means that we must impose on murderers the most serious punishment that we as a community are prepared to impose, no less and no more. But there is no retributive *requirement* that the most serious punishment

6. *Gregg v. Georgia*, 428 U.S. 153, 185 (1976).

we, as a community are prepared to impose, be death. It cannot fairly be claimed that those states that reject the death penalty are not punishing their murderers sufficiently under retributive grounds. As long as we are prepared to say that we are not required to impose *lex talionis* simply for the sake of equality, then it follows that if the harshest punishment that a particular community is willing to bear is life imprisonment without possibility of parole, then that imposition, that harshest of all punishments, *is* retributively proper. We certainly do not trivialize the seriousness of murder by imposing life in prison.

But we still might ask is anything short of death *really* enough? I have lived in a number of states in my life. I have lived in death penalty states, my home state of California and here in Ohio, and I have lived in nondeath penalty states, Minnesota and Michigan. If you carefully listen, as I have, to families of murder victims, what they almost always say in every state is that what they want is justice for their loved one. Now “justice” doesn’t have to mean kill, it means, “treat my loved one with respect,” which we do when we say to a convicted killer, “You have committed the most heinous crime on our books. We will therefore impose the most severe punishment that we impose in our community.” If you talk to family members, for example in Minnesota, what you typically find is that they are satisfied, they feel their needs are met, when the murderer receives *that* community’s, Minnesota’s, most severe punishment of life imprisonment. The victim’s family feels its loss has been properly recognized by the community and by their neighbors, because that is as far as Minnesota is prepared to go. The family members say, in essence, “Okay, you have imposed the most severe penalty available in our community. That is all I can ask.”

It is claimed, however, by some that we must execute the killers for the sake of the families of the victims, to give them emotional closure when the murderer is put to death. It is said that such closure does not occur if we only sentence the defendant to life in prison. Here I would like to quote Larry Marshall from Northwestern University, from an article to be published next week in the *Ohio State Journal of Criminal Law*. It is a long quote but I would like to read it to you because it is so much on point to this issue. He writes:

[T]he claim is made that executions are essential for the families of some murder victims to heal. This assertion is often advanced by family members themselves, and there is a natural resistance to challenge the thesis for fear of appearing callous or insensitive to the views of the victims who have suffered so

much pain. To the extent that important public policy issues are at stake, though, it is essential to subject the healing/closure argument to critical analysis. We should do this with great sensitivity and compassion for those who have been victimized. Nonetheless, we must conduct the inquiry rigorously. . . . That sober inquiry reveals that the goals of promoting healing among the families of murder victims cannot justify the continued use of capital punishment. There is simply no evidence that executions deliver on their promise of promoting the psychological welfare of murder victims' families. . . . [T]here is no evidence that families of murder victims in non-death states . . . endure more lasting pain than families of murder victims in death states such as . . . Ohio. Remember also that only two percent of all murderers are punished with the death penalty, even in death penalty states. If we really believed that executions were essential to the well-being of victims' families, how could we betray these other 98% by depriving them of healing? Not one study of which I am aware, [Marshall writes], has ever found that the psychological health of families in cases in which executions have been imposed is better than in cases in which life sentences are imposed.⁷

Basically, we give these terribly hurt families the promise that execution will lead to closure, and then, after execution, it isn't there. The horrible reality is that people never totally get over what happened, whether the killer is executed or sentenced to prison for life. And if you think about it, if emotional closure *is* supposed to happen *only* upon execution, then this means that when the murderer is convicted there is no emotional closure: family members must wait for the "closure" of the execution. But how long must they wait? They must wait years and years and years—and it will *always* take years to execute murderers because of the right of defendants to appeal, and the difficulty in finding attorneys to represent them on appeals. Closure can't even start, then, for eight or ten or more years. And then they see the execution, and they still don't have closure. At least with life imprisonment, the *moment* the person is convicted and sent off to prison for the rest of his life, the family members know nothing more is going to happen. They need not wait for an execution. Whatever closure *can* happen, can start

7. Lawrence C. Marshall, *The Innocence Revolution and the Death Penalty*, 1 OHIO ST. J. CRIM. L. 573, 582-83 (2004).

immediately. The family can start to resume your life. Do they heal? Tragically, no. They don't heal either way.

Let me move on to two final and related reasons why executing killers ought to give us all pause, even those who are otherwise in favor of the death penalty. And both relate in some way to innocence. As you may know, mandatory death penalty statutes, that is, statutes that provide that *all* first degree murderers must be executed, were declared unconstitutional in 1976 by the same Supreme Court that otherwise said the death penalty is constitutional.⁸ The law is that only “the worst of the worst” may be executed. But I am going to submit that that is not just a constitutional principle, it is a moral and retributively required principle—only the worst of the worst should be executed. Let me read one paragraph to you from the Supreme Court. The justices said in terms of the Constitution, that there must be:

particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition upon him of a sentence of death. . . . A process that accords no significance to [such factors] excludes . . . the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.⁹

And here we have the essence, the Court says “it [meaning a system that would justify the death penalty for all murderers] treats all persons . . . not as unique human beings, but as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.”¹⁰

Ultimately, this is the significant point under retributive principles: punishment should be proportional to the offense. But “offense” means not just the social harm caused, killing a person, but the personal moral blameworthiness of the person that caused the death. As we all know, we don't *execute* a person simply because A killed B. We don't say “You caused a death. Therefore we will take your life.” We don't even *convict* people of crimes simply because A killed B. A may have killed B justifiably in self-defense, or A may have killed B excusably because of insanity. And even when we do punish, the law, as we all know, distinguishes between a person who intentionally kills, and, say, a

8. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (stating “mandatory death sentence statute[s] violat[e] the Eighth and Fourteenth Amendments and therefore must be set aside”).

9. *Id.* at 303.

10. *Id.*

person who negligently kills. They caused the same harm, but we draw a distinction because of the difference in moral culpability. And even between two intentional killings we draw a distinction. The intentional killer who premeditatedly and coldly killed is guilty of first-degree murder. The person who intentionally kills as a result of adequate provocation is convicted of manslaughter. Or, and now we get to the point on the death penalty, we do not, or should not, execute killers, *even intentional killers*, if there are aspects of that person's life, character, or circumstances that should cause us to believe that mercy, compassion, or justice commands that we spare that person's life.

It may be that this person, although legally sane, and therefore responsible for his actions, suffers from a mental illness, or has a very low IQ, or simply has lived such a horrible life of abuse as a child or an adult, that killing them doesn't seem morally necessary. The late professor John Kaplan, who was a federal prosecutor, once observed:

[T]he more closely one examines their backgrounds [that is, of most capital murderers] and what has happened to them as they were growing up, the less one feels that it is morally necessary to kill them. . . . Though we certainly do not want anything to do with them, there appears to be no moral requirement that we injure further one whose humanity has been so diluted over the years by past injuries.¹¹

All of these distinctions that I have laid out add up to this general point: not all murderers deserve to be killed. Before we kill a person, we are obligated to look *deeply*, beyond even the facts of the crime, to determine *who* this person is, to look, if you will, into his or her soul and determine whether this human is so evil, and whether this person is to blame for that evilness, that taking this individual's life is morally justified. If the answer is no, if that person doesn't meet that level of evilness, then we might call him "death penalty innocent," even though he is guilty of murder.

And once we accept that we must draw *these* distinctions, constitutional and moral, we have two other questions to answer. First, do any of us in this room have the capacity to make that judgment? Many of you will disagree with me when I say that my answer is "no, we do not." Jurors are being asked to punish as if they were God. One thing I *am* sure of is that jurors are not God.

11. John Kaplan, *The Problem of Capital Punishment*, 1983 U. ILL. L. REV. 555, 567 (1983).

Second, even if you *do* believe that humans are capable of making these God-like moral judgments, we have to ask: Does our criminal justice system, does our trial process, provide us with the requisite assurance that jurors will be able to distinguish the “death penalty innocent” from the others? Those who know how the criminal justice system really works know that in most counties in the United States, indigent defendants—and, let us be clear on this, it’s virtually only indigent defendants who end up on death row—are not represented by skilled, albeit overworked, public defenders, but more often are represented by court-appointed lawyers, sometimes from law firms that have contracted with the county to represent these indigents. Some of these lawyers have little criminal law experience and often no capital murder experience at all, and they are paid so little by the county or state that they lack either the incentive or the ability to zealously represent their clients as they are ethically obligated to do. Those who most understand the criminal justice system seriously doubt that our justice system presently is capable of making the life or death decisions with sufficient reliability to permit us to sleep comfortably at night, as we execute the thousands of persons now on the death rows in this country.

Indeed, one of the best reasons to doubt that we can properly determine “death penalty innocence” is our growing realization, with the advent of DNA, that we are not even able to feel comfortable that we are excluding from execution those who are entirely *factually* innocent of murder, much less of capital murder. And, our error rate has proven shocking to even some of the most cynical individuals in criminal law. There is a famous quote by Alan Dershowitz, who is certainly a pro-defense sort of guy, and whom I would consider a fairly cynical sort of guy, who believed and wrote at one point that “almost all criminal defendants are, in fact guilty,” and that “all criminal defense lawyers, prosecutors and judges understand and believe” that.¹² It *is* true that most criminal defendants *are* guilty. But even he must be shocked, as we all are, now that we have DNA, to realize how many times we have erred. Juries have failed; the system has failed, by convicting innocent people. Illinois has imposed a moratorium on the death penalty that continues to this day. Why? Because they put 25 people on death row and it turned out that 13 of the 25 were innocent. That is 50% plus.

So, that means that when we start thinking about the 3,500 people currently occupying our death rows around this country, we can’t know how many of them are entirely innocent of murder. If our accuracy rate

12. ALAN M. DERSHOWITZ, *THE BEST DEFENSE* xxi (1982).

were 99%, and obviously is isn't, then that means there are 35 persons on death row that are entirely innocent and many more that are "death penalty innocent," and we of course don't know how many who have already been executed fall into one of these categories. And, if our accuracy rate were 97%, then there are more than 100 people who will be executed who are entirely innocent. The question then becomes how many innocent people's lives are we willing to take, in our name, in order to kill the genuinely guilty ones? When we include in the calculations those who are guilty of murder but again, undeserving of death because they lack that evilness that is required, then it seems to me the risk of executing the innocent is extremely high.

We must remember that the issue before us is *not* executing them versus setting them free. The issue is executing them versus getting rid of the death penalty and sending people to prison for the rest of their lives, without the possibility of parole. Since *that's* the issue, then when you consider that there may be at least 100 or more persons innocent on our death rows, it places a heavy burden on those who would justify the death penalty. And I, at least, don't think that burden has been satisfied yet. Until it is, at a minimum, we ought to impose a death penalty moratorium until we are more comfortable about what we are doing.

So bottom line, we have, I think, good reason to be deeply troubled by our criminal justice system. We are punishing people in ways I think almost impossible to justify on either utilitarian or retributive grounds. We are punishing the innocent, and we are punishing the guilty more than they deserve, and more than I think society needs or can afford. Ultimately, the obligation is on all of us, as voters, as lawyers, as citizens, to publicize these inequities so other people learn that they exist, and so that we all can do our best to mend the system.