

Irrevocable Punishment is Unjust and Imprudent

[From *The Orange County Register*]

Capital punishment or the death penalty is usually administered for very grave crimes such as high treason, the murder of police officers, serial murders, etc. I want to provide a line of argument opposed to it. I believe the conclusion of this argument deserves close scrutiny and then adoption.

My thesis is somewhat unusual in that I do not argue against the death penalty as a cruel and unusual type of punishment, nor do I claim that the death penalty is barbaric or demeans the members of the society in which it is practiced. There certainly are people who do not deserve to remain alive among the rest of us, whose evil doings warrant the most terrible, most severe rejection of them by us. In short, some people deserve to die for what they have done, there is not much doubt about this.

What is wrong with the death penalty is that it is a form of punishment we cannot undo if we are mistaken. There is little doubt that defendants are often found guilty even though they may in fact not be guilty. That is because human beings -- even twelve of them working diligently together, let alone twelve who may be angry, prejudiced, emotionally out of control, etc., as well as judges of appeals courts and the federal judiciary -- *can* make mistakes. Usually if mistakes have been made in the criminal justice process and were later discovered, reparations can be made to those who have been wronged. But if a defendant's punishment included execution, there is no way to remedy matters. It is not possible for us to restore someone to life. It is not possible to apologize and make amends. We are left with the burden of guilt for having given ourselves no option in the wake of a very real possibility, namely, having mistakenly convicted and executed someone.

Thus, being against the death penalty on the basis I have outlined does not mean that convicted criminals are being coddled or safe guarded against the consequences of their actions. Nor does this line of reasoning assume that defendants could not deserve being executed -- certainly it is arguable that many who have received the death penalty, as well as some who are about to be sentenced, have wronged others so severely, so viciously, that they have no reason left to live.

Not executing even such persons is only to ensure that we, law-abiding citizens, do not find ourselves acting irresponsibly in the face of our fallibility. We need to make sure that *we* can recover from mistakes. It is only ra-

tional *for us* to anticipate that now and then this will be necessary and avoid policies that make it impossible.

Indeed, in any given case, very likely the defendants have earned the most severe punishment for their crime, although I am not privy enough to most of them to make such a determination myself. Still, the process may have been flawless.

Yet, it is not at all silly to suppose that -- given how close knit many communities are, how a legal community is itself a kind of professional fraternity and sorority, and how many connected to a case are part of a de facto cabal which makes for the possibility of a bad designation of venue -- one cannot guarantee against mistakes.

And it is vital that we guard against the worst consequence of such a possibility. Not because of the defendant, but because *we* want to do the right thing, even if only belatedly.

The punishment of criminals need not, of course, be seen as having to be thawed *via* the abolition of the death penalty. A person who, as his or her punishment, is properly incarcerated for life -- without the possibility of parole and with no privileges at all that would approximate a civilized life -- would most likely suffer more than one who is put to death in the ways often done in our day (e.g., electric chair, lethal injection). Once dead, no one suffers in the ordinary sense of that term, in the sense in which human punishment may create suffering in others. (At most it is living for some time with the knowledge of the serious prospect of being executed that amounts to severe suffering and, thus, grave punishment.) But once death occurs, there is no more suffering. (Even with the prospect of an afterlife, a convicted criminal, about to be executed, can make his or her peace with divine authority and escape supernatural punishment!)

Suppose one continues to live while having been properly, seriously banished from society (that is, other persons and whose presence and creations could be the source of most of one's joys in life) -- that is, without all the current, namby-pamby athletic, recreational, educational and related pleasantries and benefits to make jail an experience akin at most to a hospital stay. One will then suffer the prolonged consequences of one's criminal actions, namely, being banished from nearly all of civilized community, day in and day out, relentlessly. (Few rational persons would prefer spending the rest of their lives thus *properly* incarcerated, to being put to death.)

Some might object that we can tell well enough who deserves to be killed for his or her crimes. The process is strict enough for that. We are rightly confident about many of our decisions based on no better evidence

and reasoning than is available to and from a jury. We build bridges, airplanes, dams, and undertake innumerable risky operations, some of them involving the possible loss of life, without giving them up because a mistake might be made.

Sure enough. However, there are positive goals to be gained from such risky ventures, and these are usually not at the expense of others who are *unwilling* participants. Airline passengers, people living beneath dams, those who drive in tunnels, mountain climbers, drag racers and so forth are all willing to take the risk.

Those who turn out to be the victims of wrongful convictions are not willing participants in their own fate. Granted, many got what they implicitly asked for when they were severely punished. But the few who have been mistakenly convicted, all the way through the justice system, are not among them. Thus we must take every possible measure not to expose them to *irrevocable* punishment.

Tibor R. Machan teaches philosophy at Auburn University. His most recent book is *The Virtue of Liberty* (Foundation for Economic Education, 1994).