

1996

Reply to Daniel Polsby (Symposium: The New York Death Penalty in Context)

Samuel R. Gross

University of Michigan Law School, srgross@umich.edu

Available at: <https://repository.law.umich.edu/articles/194>

Follow this and additional works at: <https://repository.law.umich.edu/articles>



Part of the [Criminal Law Commons](#), and the [Criminal Procedure Commons](#)

Recommended Citation

Gross, Samuel R. "Reply to Daniel Polsby (Symposium: The New York Death Penalty in Context)." *Buff. L. Rev.* 44, no. 2 (1996): 541-4.

This Article is brought to you for free and open access by the Faculty Scholarship at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Articles by an authorized administrator of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

Reply to Daniel Polsby

SAMUEL R. GROSS†

I'd like to offer a few words in response to Professor Polsby's articulate, forceful and amusing essay in favor of capital punishment.

Professor Polsby is right. The central utilitarian question about the death penalty is not whether it alters the pre-crime calculus of a would-be murderer. That is implausible, and perhaps beside the point. James Fitzjames Stephen put the issue of deterrence in its proper perspective over a hundred years ago:

"Some men probably abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged."¹

Professor Polsby proposes an even broader test:

"The ultimate test of the death penalty is whether it enhances the legal system's reputation for dispensing justice."²

Seen from this perspective, a reduction in the murder rate would be an indicator of the value of capital punishment, but not the only indicator. We could also look to reductions in the incidence of other crimes, or to other measures of social order and judicial well being.

"Ultimate test" may be an overstatement, but I'm willing to grant the argument. But there's a problem. The syllogism for which Professor Polsby is reaching is something like this:

MAJOR PREMISE: A sanction that enhances the legal system's reputation for justice is valuable.

MINOR PREMISE: The death penalty enhances the legal system's reputation for justice.

CONCLUSION: The death penalty is a valuable sanction.

Even granting the major premise, the conclusion only follows

† Professor of Law, University of Michigan. A.B. 1968, Columbia College; J.D. 1973, University of California, Berkeley.

1. JAMES F. STEPHEN, *A HISTORY OF CRIMINAL LAW IN ENGLAND* (1883).

2. Daniel D. Polsby, *Recontextualizing the Context of the Death Penalty*, 44 *BUFF. L. REV.* 527, 529 (1996).

if the minor premise is true—and for that, there is no evidence.

The basic problem with utilitarian arguments for the death penalty—and perhaps the root reason why so few academics make them—is that we now know we can do just fine without it. The modern western world presents us with a continuing social experiment: Is there any evidence that “the legal system’s reputation for dispensing justice” is better in Illinois, where Professor Polsby enjoys the benefits of a death penalty, than in Michigan, where I live happily without one? Perhaps you don’t believe in inter-state comparisons within a nation; but where is the evidence that Great Britain suffers from the absence of the death penalty, by comparison to the United States? Did respect for the law drop in Canada when capital punishment was abolished in 1967? Or, to get closer to home, does anyone seriously believe that respect for law will soar in New York now that it’s been restored? Professor Polsby of course, is no fool. He recognizes that there is no specific evidence of the value of capital punishment, but argues by analogy that this is not fatal. After all, it’s also hard to assess the contribution of a single kidney to a person’s well being: If the remaining one is healthy we can lose one kidney with no ill effects. Given our experience with the death penalty, I think a different metaphor is closer to the mark: If an organ is removed from one person after another and no one seems to suffer, shouldn’t we conclude that it’s really a vestigial appendage?

Professor Polsby disputes my argument that “death is different,” but I think he misunderstands it. My point is not that capital punishment is different but that *death* is different—in particular, that homicide prosecutions are different from other criminal prosecutions. Adding the death penalty to the equation no doubt makes the problem worse, but many of the sources of error that I identify are common among non-capital homicide cases, and also occur in a small fraction of non-homicide prosecutions.

My main claim is that erroneous convictions are more common in capital cases than in run-of-the-mill felony prosecutions. Professor Polsby’s response to my argument is simply to reject it. Contrary to his assertion, however, I don’t “assume” that homicides and capital cases are particularly error prone; I point out that the available data strongly suggests that conclusion, and I explore the special problems that make it plausible. But Professor Polsby’s rejection is not the usual Pollyannish variety: “We almost never make mistakes, and certainly not when someone’s life is at stake!” Instead he is the cynic: Errors and uncertainties are endemic, the police are corrupt, and capital cases are no worse than the rest. It’s hard to see this as a defense of our system of prosecuting homicides and executing prisoners, if that’s how it is intended.

In my own defense, I will point out that I didn't cut this argument from whole cloth. At the beginning of this project I asked a retired police officer, with twenty years experience as a patrolman and detective, if he thought homicide investigations were more error prone than other criminal cases. He said, "of course"—and gave some of the reasons I've attempted to explore. When I was finishing this paper, I asked the same question to a former prosecutor with a dozen or more years experience, and he said the same thing: "Absolutely. Of course." Why does Professor Polsby disagree? The reason, I think, is that, cynic though he be, Professor Polsby sees criminal justice in idealized terms. In reality, the big problem with the police is not dishonesty or even incompetence, but over extension. Sure, cops will occasionally "frame a guilty man" on a drug bust. But in general, if it's not a homicide they're not likely to have the time or interest to do enough work to get far enough into a hard case to make a serious mistake.

Professor Polsby does recognize that errors in capital cases are inevitable. But what about the consequences that follow? Three points:

First, Professor Polsby attributes to me the sentiment that a single wrongful execution is worse than many cases of wrongful imprisonment for life. I do not believe that. I do think that it is worse to kill in error than to imprison in error, even for life—but who doesn't? Beyond that obvious point, I have no conviction. I do not think it's a balance that can be struck, since I see no moral basis by which to compare destroying one life by one means and destroying other lives by another means. I do believe that one of the most serious problems of our current system of homicide prosecutions is that quite a few defendants are erroneously sentenced to prison for life, and their convictions go largely unexamined. Those are probably the most common errors in capital prosecutions, and (as I argue) I believe their frequency is increased by the availability of the death penalty.

Second, Professor Polsby argues that we need not too *much* procedure, not too *little* procedure, but just the *right* amount of procedure. I don't want to pick an argument with Goldilocks, but what does this mean? Is Professor Polsby really saying that we have, somehow, arrived at just the *right* balance? In the context of his argument, this is a brave claim: The police are shoddy and dishonest, the judicial process is unreliable, errors are endemic—but Not To Worry. The patchwork of procedure stitched together by the courts, the legislatures and our chief executives is just the right response to this depressing state, taking into account all relevant considerations.

Third, Professor Polsby recognizes—with commendable hon-

esty—that inevitably, we will come to know that an execution, or several, were carried out in error. He worries about how this tragedy will be perceived: will the public be able to set aside the “childish notion of perfectibility of governmental functions like the dispensing of justice” and support the process as it really is? But wait: haven’t we lost the thread? Didn’t Professor Polsby just tell us that the key to the value of the death penalty is its ability to “enhance the legal system’s reputation for dispensing justice”? When it’s shown that a citizen who was convicted, condemned and killed by the state was in fact innocent—what will that do to “the sovereign’s reputation for dispensing justice”?