Reply to Daniel Polsby

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Dan Polsby is far too modest when he disclaims suitability for the job of pro-capital punishment dissenter at the conference giving rise to these papers. I know it was not easy for Markus Dubber to find an academic to act as the sole proponent of the death penalty at an otherwise homogeneous conference, and Professor Polsby filled that role admirably. But Polsby's task was even more difficult: as commentator on my paper, he was asked to respond to the unremarkable argument that innocent people should not be executed. Even Justice Scalia said: "With any luck, we shall avoid ever having to face this embarrassing question again."[1] Though Professor Polsby claims he is not "a red-hot proponent of capital punishment," surely he is one of very few who would willingly mount a spirited defense of the need to accept the execution of innocent people as an unavoidable cost of applying the sanction.

Professor Polsby comments that legal academia seems to have reached the point where we all essentially agree about capital punishment. On the contrary, the differences are significant, and it is important not to underestimate them or misunderstand their nature. Even apart from the fundamental disagreement about whether capital punishment can ever be justified, there are fundamental disagreements about its application. These cannot be reduced to quantitative spats about line drawing, balancing, or—to borrow Polsby's Goldilocks metaphor—measuring just the right amount of porridge. The question of how much procedure is the right amount is a qualitative, value laden inquiry. "Too much procedure" is an entirely unhelpful concept without a normative baseline for comparison.

If, as Professor Polsby readily admits, implementing the death penalty will inevitably lead to the execution of innocent people, what is the significance of this fact? For some of us, it is one more reason why the death penalty ought never to be implemented.[2] For

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† Professor of Law, DePaul University College of Law. Visiting Professor, Northwestern University School of Law, Spring, 1996. Thanks to my friend and colleague Dan Polsby for having the courage to be the "skunk at the picnic." The picnic was the better for it.

1. Herrera v. Collins, 506 U.S. 390, 428 (1993) (Scalia, J., concurring).

2. *Id.* at 430 (Blackmun, J., dissenting); Scott E. Sundby, *The* Lockett *Paradox: Reconciling Guided Discretion and Unguided Mitigation in Capital Sentencing*, 38 UCLA L.

others, who defend capital punishment's legitimacy and importance, it means instead that, given the fallibility of human nature, the risk of some error will simply have to be accepted. This is no mere quibble about line drawing, but a fundamental disagreement about values.[3] The latter position elevates the importance of securing and enforcing final judgments in capital cases above the importance of protecting against miscarriages of justice.

But the particular focus of these papers is not whether the death penalty ought to be administered, but how it ought to be implemented. This is an important point. Even for those of us who may never find common ground on the issue of abolition, it is still possible to have a discourse on issues of implementation. When Professor Polsby says "[I]t is not so hard to tell that granting Professor Bandes' proposal would be tantamount to the abolition of the death penalty."[4] I believe he is creating a false choice. It does not follow that attempts to minimize the likelihood of executing innocent people must lead to the abolition of the death penalty. Once the right to a forum for presenting newly discovered evidence is recognized, there will be numerous choices for its implementation. Under any formulation, those who fail to meet the requisite threshold will not be granted a forum. Those entitled to a forum may not prevail therein. The defendant with new evidence will still face daunting hurdles, and may still be executed. There is a wide gulf between the right to a forum and abolition.

Rather, accepting the death penalty as a given, the question is: how do we take the measure of "procedure just right?" How shall we determine whether capital defendants are entitled to a forum for consideration of newly discovered evidence? Professor Polsby makes two basic arguments to support his point that a right to introduce newly discovered evidence would be too much procedure. First, he argues that there is no principled distinction between capital and non-capital cases, and that the risk of wrongful conviction is present in the latter as well as the former category. Second, he argues that the right I propose would be difficult to define or limit, and would invite abuse. In short, he makes two slippery slope arguments. Because of the difficulty of drawing appropriate lines, he argues, the right ought not to be recognized.

We can begin this argument on common ground. We agree that the risk of error is great in non-capital cases as well, that non-

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REV. 1147, 1174-75 (1991).

3. *See* Susan Bandes, Empathy, Narrative and Victim Impact Statements, 63 U. CHI. L. REV. 361 (1996) (discussing the competing values at stake in the death penalty debate).

4. Daniel D. Polsby, *Recontextualizing the Context of the Death Penalty*, 44 BUFF. L. REV. 527, 532 (1996).

capital defendants also are erroneously convicted of crimes, and that the fact that such people serve sentences—sometimes life sentences—which they ought not to be serving is a terrible thing. What is the significance of this fact? The significance for Professor Polsby is that if the right to a forum for newly discovered evidence were recognized, it would have to be recognized in all criminal cases. Further, it could lead to successive retrials of the same case, on the off chance that additional process would lead to more accurate results. This would be too much procedure, for institutional, penological and other reasons, and therefore the right ought not to be recognized in any situation.[5]

This is a classic slippery slope argument. It constructs a worst case scenario, rejects the possibility of limiting the scope or application of the right, pronounces the scenario unworkable and undesirable, and concludes that the best response is not to recognize the right in any situation at all.[6] The argument assumes that by declaring the status quo "procedure just right," the messy job of line-drawing can be avoided. But of course this argument merely ratifies the status quo: which permits courts to uphold death sentences without ever considering newly discovered exculpatory evidence.

If the risk of erroneous conviction is important enough, we must start combating it somewhere. It makes sense to begin with capital cases, given the irrevocability of the sentence. It makes sense to limit the forum to evidence which could not have been considered in a prior hearing (newly discovered evidence, with a due diligence requirement) given the scarcity of judicial resources.[7] It makes sense to try to achieve consensus on definitional issues such as the meaning of the terms "newly discovered evidence", and "due diligence". It makes sense to combat abuse by enforcing reasonable rules against frivolous or dilatory motions.

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5. He also assumes that executive clemency provides a satisfactory alternative, an argument which I address in my paper. Polsby, *supra* note 4, at 534; Susan Bandes, *Simple Murder: A Comment on the Legality of Executing the Innocent*, 44 BUFF. L. REV. 501, 520-22 (1996).

6. *See* Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2326 (1990) (discussing the slippery slope methodology).

7. Several of those arguing for the provision of a forum for consideration of newly discovered evidence have argued that the number of death row inmates able to take advantage of such a forum would not be great. *See e.g.*, Tara L. Swafford, *Responding to* Herrera v. Collins*: Ensuring That Innocents Are Not Executed*, 45 CASE W. RES. L. REV. 603, 630 (1995). Commentators also point out that much of the current delay in adjudicating capital cases is caused by the complex procedural limitations on habeas petitions. Some of that complexity would be ameliorated by recognizing a right to raise bare innocence claims, so that petitioners no longer need to yoke these claims to constitutional allegations. *See, e.g., id.*; Jordan Steiker, *Innocence and Federal Habeas*, 41 UCLA L. REV. 303, 387-88 (1993).

There can be a discourse about line drawing and balancing, even between abolitionists and those who favor the death penalty. But that discourse cannot take place in the absence of agreement on one fundamental principle. Those who favor the death penalty should have a normative and strategic commitment to reserving this ultimate penalty for those guilty of the crime charged.[8] There is an important difference between acknowledging that some mistakes are inevitable, and constructing or condoning a system in which the likelihood of avoidable fatal mistakes is increased. A system which refuses to consider substantial new evidence of innocence is one which unacceptably increases the likelihood of fatal mistakes. We ought to be able to agree on an aspirational goal that fatal mistakes are unacceptable. Then we can proceed to the difficult discussion of how that goal is best achieved.

8. Professor Polsby notes that the goal of the system should be optimal procedure, and that "what we are trying to optimize is the reputation of the system for dispensing justice." Polsby, *supra* note 4, at 532. Both normatively and strategically, the specter of the execution, or near execution, of an innocent person is the greatest imaginable threat to this goal.