JEFFREY H. REIMAN  

Justice, Civilization, and the Death Penalty: Answering van den Haag

On the issue of capital punishment, there is as clear a clash of moral intuitions as we are likely to see. Some (now a majority of Americans) feel deeply that justice requires payment in kind and thus that murderers should die; and others (once, but no longer, nearly a majority of Americans) feel deeply that the state ought not be in the business of putting people to death. Arguments for either side that do not do justice to the intuitions of the other are unlikely to persuade anyone not already convinced. And, since, as I shall suggest, there is truth on both sides, such arguments are easily refutable, leaving us with nothing but conflicting intuitions and no guidance from reason in distinguishing the better from the worse. In this context, I shall try to make an argument for the abolition of the death penalty that does justice to the intuitions on both sides. I shall sketch out a conception of retributive justice that accounts for the justice of executing murderers, and then I shall argue that though the death penalty is a just punishment for murder, abolition of the death penalty is part of the civilizing mission of modern states. Before getting to this, let us briefly consider the challenges confronting those who would

This paper is an expanded version of my opening statement in a debate with Ernest van den Haag on the death penalty at an Amnesty International conference on capital punishment, held at John Jay College in New York City, on October 17, 1983. I am grateful to the Editors of Philosophy & Public Affairs for very thought-provoking comments, to Hugo Bedau and Robert Johnson for many helpful suggestions, and to Ernest van den Haag for his encouragement.

1. Asked, in a 1981 Gallup Poll, “Are you in favor of the death penalty for persons convicted of murder?” 66.25% were in favor, 25% were opposed, and 8.75% had no opinion. Asked the same question in 1966, 47.5% were opposed, 41.25% were in favor, and 11.25% had no opinion (Timothy J. Flanagan, David J. van Alstyne, and Michael R. Gottfredson, eds., Sourcebook of Criminal Justice Statistics—1981, U.S. Department of Justice, Bureau of Justice Statistics [Washington, D.C.: U.S. Government Printing Office, 1982], p. 209).
argue against the death penalty. In my view, these challenges have been most forcefully put by Ernest van den Haag.

I. The Challenge to the Abolitionist

The recent book, *The Death Penalty: A Debate*, in which van den Haag argues for the death penalty and John P. Conrad argues against, proves how difficult it is to mount a telling argument against capital punishment. Conrad contends, for example, that “To kill the offender [who has committed murder in the first degree] is to respond to his wrong by doing the same wrong to him” (p. 60). But this popular argument is easily refuted. Since we regard killing in self-defense or in war as morally permissible, it cannot be that we regard killing per se as wrong. It follows that the wrong in murder cannot be that it is killing per se, but that it is (among other things) the killing of an innocent person. Consequently, if the state kills a murderer, though it does the same physical act that he did, it does not do the wrong that he did, since the state is not killing an innocent person (see p. 62). Moreover, unless this distinction is allowed, all punishments are wrong, since everything that the state does as punishment is an act which is physically the same as an act normally thought wrong. For example, if you lock an innocent person in a cage, that is kidnapping. If the state responds by locking you in prison, it can hardly be said to be responding to your wrong by doing you a wrong in return. Indeed, it will be said that it is precisely because what you did was wrong that locking you up, which would otherwise be wrong, is right.


3. Some days after the first attempt to execute J. D. Autry by lethal injection was aborted, an editorial in *The Washington Post* (14 October 1983) asked: “If the taking of a human life is the most unacceptable of crimes, can it ever be an acceptable penalty? Does an act committed by an individual lose its essential character when it is imposed by society?” (p. A26).

4. “Does fining a criminal show want of respect for property, or imprisoning him, for personal freedom? Just as unreasonable is it to think that to take the life of a man who has taken that of another is to show want of regard for human life. We show, on the contrary, most emphatically our regard for it, by the adoption of a rule that he who violates that right in another forfeits it for himself . . . . “ (John Stuart Mill, “Parliamentary Debate on Capital Punishment Within Prisons Bill,” in *Philosophical Perspectives on Punishment*, ed. Gertrude Ezorsky [Albany: State University of New York Press, 1972], p. 276; Mill made the speech in 1868.)
Conrad also makes the familiar appeal to the possibility of executing an innocent person and the impossibility of correcting this tragic mistake. “An act by the state of such monstrous proportions as the execution of a man who is not guilty of the crime for which he was convicted should be avoided at all costs. . . . The abolition of capital punishment is the certain means of preventing the worst injustice” (p. 60). This argument, while not so easily disposed of as the previous one, is, like all claims about what “should be avoided at all costs,” neither very persuasive. There is invariably some cost that is prohibitive such that if, for example, capital punishment were necessary to save the lives of potential murder victims, there must be a point at which the number of saved victims would be large enough to justify the risk of executing an innocent—particularly where trial and appellate proceedings are designed to reduce this risk to a minimum by giving the accused every benefit of the doubt.5 Since we tolerate the death of innocents, in mines or on highways, as a cost of progress, and, in wars, as an inevitable accompaniment to aerial bombardment and the like, it cannot convincingly be contended that, kept to a minimum, the risk of executing an innocent is still so great an evil as to outweigh all other considerations (see pp. 230–31).

Nor will it do to suggest, as Conrad does, that execution implies that offenders are incapable of change and thus presumes the offenders’ “total identification with evil,” a presumption reserved only to God or, in any case, beyond the province of (mere) men (p. 27; also, pp. 42–43). This is not convincing since no punishment, whether on retributive or deterrent grounds, need imply belief in the total evilness of the punishee—all that need be believed (for retribution) is that what the offender has done is as evil as the punishment is awful, or (for deterrence) that what he has done is awful enough to warrant whatever punishment will discourage others from doing it. “Execution,” writes van den Haag, “merely presumes an identification [with evil] sufficient to disregard what good qualities the convict has (he may be nice to animals and love his mother). . . . No total identification with evil—whatever that means—is required; only a sufficiently wicked crime” (p. 35).

Thus far I have tried to indicate how difficult it is to make an argument

5. Mill argues that the possibility of executing an innocent person would be an “invincible” objection “where the mode of criminal procedure is dangerous to the innocent,” such as it is “in some parts of the Continent of Europe. . . . But we all know that the defects of our [English] procedure are the very opposite. Our rules of evidence are even too favorable to the prisoner” (ibid., pp. 276–77).
for the abolition of the death penalty against which the death penalty advocate cannot successfully defend himself. But van den Haag’s argument is not merely defensive—he poses a positive challenge to anyone who would take up the abolitionist cause. For van den Haag, in order to argue convincingly for abolition, one must prove either that “no [criminal] act, however horrible, justifies [that is, deserves] the death penalty,” or that, if capital punishment were found to deter murder more effectively than life imprisonment, we should still “prefer to preserve the life of a convicted murderer rather than the lives of innocent victims, even if it were certain that these victims would be spared if the murderer were executed” (p. 275).

If van den Haag is right and the abolitionist cause depends on proving either or both of these assertions, then it is a lost cause, since I believe they cannot be proven for reasons of the following sort: If people ever deserve anything for their acts, then it seems that what they deserve is something commensurate in cost or in benefit to what they have done. However horrible executions are, there are surely some acts to which they are commensurate in cost. If, as Camus says, the condemned man dies two deaths, one on the scaffold and one anticipating it, then isn’t execution justified for one who has murdered two people? if not two, then ten? As for the second assertion, since we take as justified the killing of innocent people (say, homicidal maniacs) in self-defense (that is, when necessary to preserve the lives of their innocent victims), then it seems that we must take as justified the killing of guilty people if it is necessary to preserve the lives of innocent victims. Indeed, though punishment is not the same as self-defense, it is, when practiced to deter crimes, arguably a form of social defense—and parity of reason would seem to dictate that if killing is justified when necessary for self-defense, then it is justified when necessary for social defense.

It might be thought that injuring or killing others in self-defense is justifiable in that it aims to stop the threatening individual himself, but that punishing people (even guilty people) to deter others is a violation of the death penalty.

6. “As a general rule, a man is undone by waiting for capital punishment well before he dies. Two deaths are inflicted on him, the first being worse than the second, whereas he killed but once” (Albert Camus, “Reflections on the Guillotine,” in Resistance, Rebellion and Death [New York: Alfred A. Knopf, 1969], p. 205). Based on interviews with the condemned men on Alabama’s death row, Robert Johnson presents convincing empirical support for Camus’ observation, in Condemned to Die: Life Under Sentence of Death (New York: Elsevier, 1981).
of the Kantian prohibition against using people merely as means to the well-being of others. It seems to me that this objection is premised on the belief that what deters potential criminals are the individual acts of punishment. In that case, each person punished is truly being used for the benefit of others. If, however, what deters potential criminals is the existence of a functioning punishment system, then everyone is benefited by that system, including those who end up being punished by it, since they too have received the benefit of enhanced security due to the deterring of some potential criminals. Even criminals benefit from what deters other criminals from preying on them. Then, each act of punishment is done as a necessary condition of the existence of a system that benefits all; and no one is used or sacrificed merely for the benefit of others.

If I am correct in believing that the assertions that van den Haag challenges the abolitionist to prove cannot be proven, then the case for the abolition of the death penalty must be made while accepting that some crimes deserve capital punishment, and that evidence that capital punishment was a substantially better deterrent to murder than life imprisonment would justify imposing it. This is what I shall attempt to do. Indeed, I shall begin the case for the abolition of the death penalty by defending the justice of the death penalty as a punishment for murder.

II. JUST DESERTS AND JUST PUNISHMENTS

In my view, the death penalty is a just punishment for murder because the lex talionis, an eye for an eye, and so on, is just, although, as I shall suggest at the end of this section, it can only be rightly applied when its implied preconditions are satisfied. The lex talionis is a version of retributivism. Retributivism—as the word itself suggests—is the doctrine that the offender should be paid back with suffering he deserves because of the evil he has done, and the lex talionis asserts that injury equivalent to that he imposed is what the offender deserves. But the lex talionis is

8. I shall speak throughout of retribution as paying back for “harm caused,” but this is shorthand for “harm intentionally attempted or caused”; likewise when I speak of the death penalty as punishment for murder. I have in mind premeditated, first-degree murder. Note also that the harm caused by an offender, for which he is to be paid back, is not necessarily limited to the harm done to his immediate victim. It may include as well the suffering of
not the only version of retributivism. Another, which I shall call "pro-
portional retributivism," holds that what retribution requires is not equal-
ity of injury between crimes and punishments, but "fit" or proportionality,
such that the worst crime is punished with the society's worst penalty,
and so on, though the society's worst punishment need not duplicate the
injury of the worst crime.9 Later, I shall try to show how a form of
proportional retributivism is compatible with acknowledging the justice
of the lex talionis. Indeed, since I shall defend the justice of the lex
talionis, I take such compatibility as a necessary condition of the validity
of any form of retributivism.10

9. "The most extreme form of retributivism is the law of retaliation: 'an eye for an eye' "
to consist of lex talionis. One may reject that principle as too crude and still embrace the
retributive principle that the severity of punishments should be graded according to the
gravity of the offense" (Hugo Bedau, "Capital Punishment," in Matters of Life and Death,
ed. Tom Regan [New York: Random House, 1981], p. 177). See also, Andrew von Hirsch,
Punishment and Justifiable Sentences," in Sentencing, eds. H. Gross and A. von Hirsch
10. In an article aimed at defending a retributivist theory of punishment, Michael Davis
claims that the relevant measure of punishment is not the cost to the offender's victim
("property taken, bones broken, or lives lost"), but the "value of the unfair advantage he
[the offender] takes of those who obey the law (even though they are tempted to do other-
wise)" (Michael Davis, "How to Make the Punishment Fit the Crime," Ethics 93 [July
1983]:744). Though there is much to be said for this view, standing alone it seems quite
questionable. For example, it would seem that the value of the unfair advantage taken of
law-obeyers by one who robs a great deal of money is greater than the value of the unfair
advantage taken by a murderer, since the latter gets only the advantage of ridding his world
of a nuisance while the former will be able to make a new life without the nuisance and
have money left over for other things. This leads to the counterintuitive conclusion that
such robbers should be punished more severely (and regarded as more wicked) than mur-
derers. One might try to get around this by treating the value of the unfair advantage as
a function of the cost imposed by the crime. And Davis does this after a fashion. He takes
the value of such advantages to be equivalent to the prices that licenses to commit crimes