

Capital Punishment Saves Innocent Lives

Excerpted from "Chapter 5: Justice, Deterrence and the Death Penalty," by Ernest van den Haag, Ernest van den Haag was a John M. Olin Professor of jurisprudence and public policy at Fordham University in New York City. He died in March 2002.

The sanction of capital punishment is needed to deter murder. Life sentences have less of a deterrent effect on murder than capital punishment because incarcerated murderers can escape, be released on furlough, or kill other prisoners or prison staff. Furthermore, arguments that capital punishment is counterproductive in the fight against crime are flawed. For instance, executions do not decrease the public's sensitivity to the immorality of murder and result in the increase of homicide or violent crime. Also, capital punishment is advantageous in murder prosecutions—it can be used to persuade accomplices to testify against murderers or elicit guilty pleas from murderers in exchange for a life sentence. Because it effectively saves the lives of innocent people, capital punishment must be enforced.

Suum cuique tribue (to give to everyone what he deserves) is to do justice. What is deserved? In penal justice this depends on the gravity of the crime and the culpability of the criminal, both hard to determine. There is no objective measure of the cardinal gravity of a crime; or of the cardinal severity of a punishment; nor, finally, do we have an objective indication of what punishment is deserved per se by each degree of gravity.

However, ordinal ranking is possible. Crimes of a similar kind can be arrayed according to comparative gravity; and punishments according to comparative severity. Although ultimately it depends on subjective evaluations too, ordinal ranking is helpful, e.g., by telling us that murder with torture, or with premeditation, (or multiple murder), is more grave (and deserves more punishment) than murder without—even if we cannot determine how much more. We can conjecture also that manslaughter deserves more punishment than assault, or theft, and menacing less. But we cannot determine how much more or less, nor whether execution is more severe than life in prison (most convicts think so).

Lex talionis

Physical punishments, such as mutilations, are more readily coordinated with the crimes they punish. Thus, the ancient *lex talionis*¹ required fewer decisions on the comparative gravity of harms and punishments. But the *lex talionis* is irrelevant to criminal justice. It treated crimes as torts, which entitled victims to retaliation or compensation according to the harm inflicted, whereas we consider crimes mainly as harms to society, which entitle it (and only it) to retribution. Retribution, as deserved by the crime, is the paramount moral purpose of punishment. It is an end in itself, a categorical imperative. Doing justice by retribution is an expressive, rather than an instrumental act, retrospective by definition. The very notion of "punishment" is

retrospective.

Still, retributive punishment may yield legitimate, instrumental, non-moral (though not immoral) benefits. Being instrumental, these benefits are prospective. Thus, incapacitation of the convict by imprisonment, while it lasts, obviously protects society. Rehabilitation (sometimes called specific deterrence) may help to protect society by discouraging crimes by the released convict. Deterrence, finally, restrains others than the convict from doing in the future what he did in the past. It is the most important instrumental benefit of punishment.

Although a desirable effect consistent with it, deterrence is not part of the moral aim of justice. Deterrence can be justified, however, as an important instrumental purpose of punishment, if not as an independent one. It would be unjust to punish any person, guilty or innocent, merely to deter others. However, the deterrent effect of just (deserved) punishment, intended or not, is morally justifiable, since the convict volunteered for risking the punishment which has deterrent effects. He is not punished merely to deter others, which would be inconsistent with justice, even if he is guilty. However, if his deserved punishment deters others, it helps to repay for the harm the crime did to the social order—to pay his "debt to society."

Many abolitionists insist that the death penalty is no more deterrent than life in prison. This empirical question is, in principle, answerable by experiments, which, however, are seldom practical, feasible, or conclusive. But the justice of a punishment, such as the death penalty, as distinguished from deterrent effects, cannot be proved or disproved by any experiment....

Deterrence is the only purpose of the threats of the criminal law. Punishment of those who were not deterred carries out these threats and 1) retributes, and 2) keeps the promise of the law (a threat is a negative promise and promises must be kept—*pacta sunt servanda*). So much for the moral purposes of punishment.

There are two non-moral (instrumental) purposes of punishment as well: 1) Legal threats of punishment would become incredible and lose their deterrent effectiveness if not carried out by actual punishment; and 2) the conditional threat of punishment addressed to prospective criminals is also a positive

promise to the law abiding, which may help to keep them law abiding. If threats were not carried out against those not deterred by them, the law abiding, who took the threats seriously and formed the habit of abiding by the law, would have been fooled. At least some of them may have foregone crimes in part because they believed that they would be punished if they committed them. If those who were not deterred are not punished, the legal threats which helped restrain the law abiding would be revealed as bluffs. Criminals would have gained an advantage by breaking the law, while the law abiding would have been placed at a disadvantage by trusting the law. The social order which depends on the formation of law abiding habits would be undermined.

The most grave of crimes

Traditionally murder has been thought the most grave of crimes, deserving the most severe punishment. Other crimes, such as theft, or even rape, leave the victim capable of recovering. Murder does not. It is final. So is the death penalty, which, therefore, traditionally has been thought fitting.

Can any crime be horrible enough to forfeit the life of the criminal? Can death ever be a deserved punishment? Some abolitionists do not think so. Others even believe, for unintelligible reasons, that no society has a moral right to impose the death penalty. I am confident that the following excerpt may help answer this question. (Res ipsa loquitur [the thing speaks for itself].)

... The appellant, after telling [seventeen-year-old] Donna Marie Dixon how pretty she was, raised his fist and hit her across the face. When she stood up, he grabbed her by her blouse, ripping it off. He then proceeded to remove her bra and tied her hands behind her back with a nylon stocking. Timothy McCorquodale then removed his belt, which was fastened with a rather large buckle, and repeatedly struck Donna across the back with the buckle end of the belt. He then took off all her clothing and then bound her mouth with tape and a washcloth. Leroy then kicked Donna and she fell to the floor. McCorquodale took his cigarette and burned the victim on the breasts, the thigh, and the navel. He then bit one of Donna's nipples and she began to bleed. He asked for a razorblade and then sliced the other nipple. He then called for a box of salt and poured it into the wounds he had made on her breasts. At this point Linda [McCorquodale's girlfriend], who was eight months pregnant, became ill and went into the bedroom and closed the door. McCorquodale then lit a candle and proceeded to drip hot wax over Donna's body. He held the candle about 1/2 inch from Donna's vagina and dripped the hot wax into this part of her body. He then used a pair of surgical scissors to cut around the victim's clitoris.

While bleeding from her nose and vagina, Leroy forced the victim to perform oral sex on him while McCorquodale had intercourse with her. Then Leroy had intercourse with the victim while McCorquodale forced his penis into the victim's mouth. McCorquodale then found a hard plastic bottle which was about 5 inches in height and placed an antiseptic solution within it, forcing this bottle into Donna's vagina and squirted the solution into her. The victim was then permitted to go to the bathroom to "get cleaned up." While she was in the bathroom, McCorquodale secured a piece of nylon rope and told Bonnie and her roommate that he was going "to kill the girl." He hid in a closet across the hall from the bathroom and when Donna came out of the bathroom he wrapped the nylon cord around her neck. Donna screamed, "My God, you're killing me." As McCorquodale tried to strangle her, the cord cut into his hands and Donna fell to the floor. He fell on top of her and began to strangle her with his bare hands. He removed his hands and the victim began to have convulsions. He again strangled her and then pulled her head up and forward to break her neck. He covered her lifeless body with a sheet and departed the apartment to search for a means of transporting her body from the scene. By this time, it was approximately 6:00 a.m. on the morning of January 17, 1974.

McCorquodale soon returned to the apartment and asked Bonnie for her trunk and Leroy and McCorquodale tried to place Donna's body in the trunk. Finding that the body was too large for the trunk McCorquodale proceeded to break Donna's arms and legs by holding them upright while he stomped on them with his foot. Donna's body was then placed in the trunk and the trunk was placed in the closet behind the curtains. McCorquodale and Leroy then went to sleep on the couch in the living room for the greater portion of the day, leaving the apartment sometime during the afternoon.

Because a strong odor began to emanate from the body, and her efforts to mask the smell with deodorant spray had been unsuccessful, Linda called Bonnie to request that McCorquodale remove the trunk from the apartment. Shortly after 8:00 p.m. McCorquodale arrived at the apartment with a person named Larry. As they attempted to move the trunk from the closet, blood began

spilling from the trunk onto the living room floor. McCorquodale placed a towel under the trunk to absorb the blood as they carried the trunk to Larry's car. When McCorquodale and Larry returned to the apartment they told Linda that the body had been dumped out of the trunk into a road and that the trunk was placed under some boxes in a "Dempsey Dumpster." Donna's body was found about half a mile off Highway No. 42 in Clayton County, Georgia. [McCorquodale was convicted of murder, and executed on September 21, 1987.]

The sanctity of life

Former Supreme Court Justice William Brennan thought the death penalty inconsistent with "the sanctity of life." His unargued notion may derive from the ancient homo homini res sacra (man is a sacred object to man). But the Romans, who coined the phrase, believed the sanctity of life best safeguarded by executing murderers who had not respected it. Brennan may also have based his view on the Constitution. However, it does not grant an imprescriptible right to life which murderers would be as entitled to as their victims. He also held that execution is a "denial of the executed person's humanity." Yet, philosophers, such as Immanuel Kant and G.W.F. Hegel, thought that punishments, including the death penalty, recognize and asseverate the humanity of the convict, even though he himself may have repudiated it by his crime.

We protect ourselves from ferocious beasts, but we do not punish them, because, unlike criminals, they cannot tell right from wrong or restrain themselves accordingly. Animals therefore are not, but criminals are responsible for their actions because they are human. Their punishment acknowledges rather than denies their responsibility and, thereby, their humanity. Brennan finally asserts that "the deliberate extinguishment of human life by the state is uniquely degrading to human dignity." He does not tell whether the criminal or the executioner is degraded, nor wherein the degradation lies, or whether any crime could degrade humanity and call for a degrading punishment.

Capital punishment, a deliberate expulsion from human society, is meant to add deserved moral ignominy to death. This irks some abolitionists, who feel that nobody should be blamed for whatever he does. But murder deserves blame. Death may well be less punishment than what some criminals deserve. Even torture may be. But, although they may deserve it, we no longer torture criminals. Unlike death, torture is avoidable. It is now repulsive to most people, and no longer thought entertaining, as it was in the past.

However much deserved, the death penalty should not be imposed if, by not threatening it, we can save innocent lives. If (unlike the Supreme Court) we believe that rape deserves capital punishment, we

nevertheless should not impose it because the threat would be an incentive to the rapist to murder his victim and make apprehension and conviction less likely without increasing the severity of his punishment if convicted. Indeed, capital punishment should be threatened rarely, because it would give threatened criminals—e.g. burglars—an incentive to kill victims, witnesses and arresting officers. However, the importance of trying to deter a first murder by the threat of capital punishment outweighs the usefulness of not encouraging additional murders by not threatening capital punishment for the first. Therefore, the threat of capital punishment for murder is not counter-productive, whereas it might be for most other crimes.

Nature has sentenced us all to death. Execution hastens, but does not create the unavoidable end of human life. What makes execution different is that it brands the executed as morally unworthy to belong to human society. The phrase "death is different," darkly intoned by abolitionists, is impressive and rings true, although it applies to execution more than to death. What follows from it? More capital punishment, or less? Or just caution in inflicting it?

Retributive justice

The paramount moral purpose of punishment is retributive justice. But there are important non-moral purposes as well, such as protection of life and property. They are achieved mainly by deterrence. It seems obvious that more severe and certain punishments deter more than less severe and certain ones. Yet, abolitionists contend that the death penalty is no more deterrent than life in prison, or, alternatively, that the additional deterrence is redundant. As mentioned, this empirical question could be decided by experiment. We could threaten capital punishment for murders committed on Mondays, Wednesdays, and Fridays (MWF) and life imprisonment on the other days. If fewer murders are committed on MWF, the death penalty would be likely to be more deterrent than life in prison. However, the MWF murders do not deserve more punishment than the others. It would be morally capricious to impose the death penalty just on MWF murderers. We will have to rely on observation and statistical analysis, rather than experiment, to establish degrees of deterrence. Preponderantly, though not conclusively, the data tend to show the death penalty to be the

most deterrent punishment available. Possibly, people fear the death penalty irrationally, despite low probability (executions are rare), just as they are irrationally attracted to lotteries with high prizes despite the low probability of winning.

Apart from less deterrence, life imprisonment, the alternative to capital punishment, also protects society less than capital punishment does. The convict may escape, he may be granted a furlough, or his sentence may be commuted by governors who, unavoidably, retain the right to pardon. Not least, the lifer may endanger guards and fellow prisoners, since without the death penalty there is no further punishment to deter him.

To proponents of capital punishment, deterrence, though important, is not decisive. Justice is. Still, most believe that the threat of execution does deter more than life imprisonment. In contrast, abolitionists believe that capital punishment not only is morally unjustifiable, but also has no more deterrent effect than life imprisonment. However, they would continue to advocate abolition, even if the death penalty were shown to deter more than life imprisonment. In effect, abolitionists appear to believe that the non-execution of murderers is morally more important than saving the innocent lives execution would save if it deters more than imprisonment. Asked whether they would execute murderers if each execution were to deter ten murders, thereby saving ten innocent lives, all abolitionists I have questioned answer in the negative.

The vulgar argument that holds execution to be wrong, because it does to the murderer what he did to his victim, neglects to note that many punishments do to the criminal what he did to his victim. In the past this was thought to be the essence of justice. The difference between a crime and a punishment is social, not physical. There is no need for physical dissimilarity. A crime is an unlawful act, legal punishment is a lawful act. Taking a person from his family and confining him against his will in a small cell may be an unlawful kidnaping, or a lawful arrest. The difference is not physical. Neither is the difference between murder and execution, or being fined and being robbed.

There is no evidence for brutalization caused by the death penalty. The idea that legal killing will lead to imitation by illegal killing, or to any increase in violent crime, is unsubstantiated. And proponents do not explain why legal imprisonment does not lead to kidnapings, or why violent crime in Singapore and Saudi Arabia, both renowned for executions and physical punishments, is so infrequent.

The brutalization argument might be somewhat more valid against televising executions, although there are more salient arguments against televising. The executions would be sandwiched between sitcoms, sports, advertisements, contests and popular songs. The

effect would be not so much to brutalize as to trivialize executions. Until two hundred years ago they served as popular entertainment. *Tempora mutantur et nos mutamur in illis*—we should not go back to using punishments as entertainment. Moreover, TV could show how the murderer is deprived of his life, but not what he did to his victim. The uninformed would be unduly stirred to pity for the criminal rather than the victim....

We have more than 20,000 homicides annually, but only about 300 death sentences (and less than 50 executions). At this rate most of the about 3,000 murderers now on death row are far more likely to die of old age than by execution. On the average convicts spend more than eight years appealing their convictions. This seems a long time. Many appeals are repetitious as well as frivolous. Despite elaborate precautions, nothing short of abolishing punishment can avoid miscarriages altogether. The salient question about the death penalty is not: Could innocents be executed by mistake? (The answer is yes—courts are fallible) but: Does the death penalty save more innocent lives than it takes? Is there a net gain or loss?

Many desirable social practices cannot avoid killing innocents by accident. For instance, ambulances save many lives, but also run over some pedestrians. We do not abolish ambulances, because they save more innocents than they kill. So does the death penalty, if it deters some murders, as is likely, and if the miscarriages are few, as is likely too. It seems safer then, to rely on executions, which through deterrence, may save innocent lives, than it would be not to execute and risk not saving an indefinite number of innocents who could have been saved. If we execute a convicted murderer and his execution does not produce additional deterrence, his execution, though just, would not have been useful. But if his execution deters prospective murderers, not executing him would sacrifice innocent people who would have been spared had he been executed....

The "root" of criminality

Perhaps college education helps explain opposition to the death penalty. Students are taught, accurately, that the great majority of criminals, including murderers, were mistreated and abused as children. Students infer, incorrectly, that mistreatment is the cause, or "root," of criminality. Unfortunately, they are not taught that the majority of mistreated and

abused children do not become criminals, let alone murderers. Mistreatment and abuse are neither necessary nor sufficient causes of murder. To be sure, poverty, lack of education, childhood abuse, and, more important perhaps, the absence of a law-abiding family, may dispose to crime more than affluence and suburban living. But the former circumstances do not make it impossible to avoid crime. The responsibility for it remains with the individual who volunteers for crime.

10 The threat of punishment is meant precisely to deter persons who, for whatever reason, are disposed to crime. The legal threat is not needed for others. The so called causes of crime are, at best, explanations, but neither justifications nor excuses, let alone exculpations. Causes are exculpatory only if they compel crime and thus eliminate responsibility. It is reasonable to assume that there are some exceptional factors in the background of murderers, since murder is an exceptional action. Such factors may help explain criminal acts. They cannot exculpate.

20 Anatole France² sarcastically remarked "the law in its majestic equality prohibits rich and poor alike to steal bread or to sleep under bridges," implying that the rich are hardly tempted to commit the crimes that may be nearly, but not quite, irresistible to the poor. No one any longer arrests the homeless who sleep under bridges, nor a hungry person who steals bread. Still, the law is meant to prohibit stealing by those tempted by their circumstances as well as by those who are not. For the latter the prohibition is academic, for the former burdensome. Is this unjust, as Anatole France suggests? Hardly. Although its prohibitions apply to everyone, the criminal law necessarily burdens mainly those who by their circumstances are tempted to do what it prohibits. They are the ones that need to be deterred. There would be no need for criminal laws if no one were tempted to break them. And, surely, the most disadvantaged groups are most tempted to engage in unlawful acts, since they have the fewest legitimate resources to fulfill their desires. The prohibition of stealing imposes a greater burden on the poor than on the rich. But the greater temptation does not justify yielding to it.

40 Education tends to influence most those who get most of it, the professional classes. In modern times education may induce students to regard nothing as final and to feel that no decision ever should be. Since showing that the earth is not flat science has undermined many certainties and sown many doubts. Thus the uneasiness about certainty among the educated. Death is and remains final. However, inflicting death as a final punishment which cuts off the future and any possibility of change seems psychologically in conflict with the spirit of the times imbued as it is by doubtfulness. Death is certain and we cannot abolish it. However, we can abolish the death penalty. The spirit which prevails

among the educated elite pushes us to do so. The finality of the death penalty makes us uncomfortable. Never mind that the death penalty does not create death but merely hastens it. People like to ignore death—which the penalty makes hard to do. Moreover, extreme moral blame attaches to capital punishment—and we like even our courts and judges to be nonjudgmental. It follows that, if present trends continue, the death penalty is likely to become more rare. Yet, history does not allow any trend to continue forever. Prediction is chancy. Still it seems likely currently that the death penalty will continue in America, Asia and Africa but is unlikely to be reinstated in most of Europe where it has been abolished...

70 Many criminologists believe deterrence requires that prospective criminals calculate the advantages of crime and compare them with the disadvantages, including punishment. Criminals usually do not do that. Nor does deterrence theory require that they calculate. To be sure, criminals volunteer for the risk of punishment because they expect a net advantage from crime. But they calculate no more than law abiding persons calculate to remain law abiding. Society offers disincentives to law breakers and incentives to law abiding persons. These incentives and disincentives powerfully contribute to the formation of law abiding or law breaking habits. But few people calculate. Law abiding people habitually ignore criminal opportunities. Law breakers habitually discount the risk of punishment. Neither calculates. Both follow habits largely produced by the incentives and disincentives society offers, which have different effects on different individuals in different circumstances. Once these habits are ingrained they are followed almost independently of new incentives and disincentives. The major impact of criminal justice is on habit formation, not on habits already formed. Most of our behavior arises from habits which are seldom explicitly calculated. One must be careful, then, not to confuse the rational reconstruction of one's behavior with the processes that actually lead to it.

Sundry arguments for abolition

110 Turn now to sundry arguments for abolition, some more popular than valid. The French writer Albert Camus insists that "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." (Would it follow that, had he murdered two persons, capital punishment would have been just?) The mistake Camus makes is in his belief, shared by many abolitionists, that the pain inflicted on the murderer should not exceed that of his victim. This limit derives from the limit the *lex talionis* set for retaliation or compensation. But the *lex talionis* regarded as torts acts we consider crimes. Camus' reasoning might govern tort rules for compensation. But criminal law must not be confused with tort law. Punishment for a crime is neither compensation nor retaliation, but retribution, as threatened by law, for the harm inflicted on the social order. Retribution need not be limited to, or be equal to the suffering of crime victims.

A somewhat frivolous argument alleges that life imprisonment without parole would cost less than execution. The argument is of doubtful relevance and accuracy. If one correctly calculates the cost of life imprisonment for murderers, who must be held in expensive high security prisons, it seems no less than the cost of execution. (Most murderers are young and likely to spend a long time in prison.) On the other hand, the cost of execution has been greatly inflated by the very persons who complain about it. They insist on lengthy procedures which add far more to cost than to justice. Frivolous appeals could be reduced with considerable savings. The cost of execution is currently estimated at about \$2.5 million. If one assumes a cost of \$30,000-40,000 for a year in high security prison and adds the cost of legal appeals (lifers keep their attorneys busy) and further assumes an average of forty years in prison, the cost is about the same whether we execute or incarcerate for life. But, as mentioned, the cost of execution is far higher than required by justice.

Some technical advantages of the death penalty should not be overlooked. By threatening it, prosecutors may persuade accomplices to testify against murderers, or persuade the murderers themselves to plead guilty in exchange for a life sentence. Also, in a hostage situation police can promise the criminal that the prosecution will not ask for the death penalty if he releases his hostages. Without the death penalty the criminal can threaten to kill his victims, while police can only threaten incarceration.

Religious objections to the death penalty reflect the *Zeitgeist* more than theology. In his *Summa Theologica* philosopher and theologian Thomas Aquinas writes: "a man shall be sentenced to death for crimes of irreparable harm." In his *Summa Contra Gentiles* Thomas points out that "[murderers] may be justly executed.... [T]hey also have, at the critical point of death, the opportunity to be converted to God through repentance." (They did not give this opportunity to their victims.)

Trendy abolitionists often conflate two different virtues, justice and charity. They must be distinguished. Justice tries to mete out what is deserved. Charity impels us to love and help regardless of desert. Religion enjoins compassion and forgiveness, even of murderers, but does not suggest that justice should be replaced by compassion. Scripture presents God as legislator and judge who imparts *Justitia Misericordiae Dulcore Temperata*: Justice tempered by mercy, but not replaced by it.

Abolition of the death penalty would promise prospective murderers that we will never do to them what they will do to their victims. Such a promise seems unwise as well as immoral.