

# THE FOLLY OF CAPITAL PUNISHMENT

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## Common Sense and the Deterrent Effect of the Death Penalty

Conceding that it has not been proven that the death penalty deters more murders than life imprisonment, Ernest van den Haag has argued that neither has it been proven that the death penalty does not deter more murders. Thus, his argument goes, we must follow common sense, which teaches that the higher the cost of something, the fewer the people who will choose it. Therefore, at least some potential murderers who would not be deterred by life imprisonment will be deterred by the death penalty. Van den Haag continues:

[O]ur experience shows that the greater the threatened penalty, the more it deters. . . .

Life in prison is still life, however unpleasant. In contrast, the death penalty does not just threaten to make life unpleasant—it threatens to take life altogether. This difference is perceived by those affected. We find that when they have the choice between life in prison and execution, 99% of all prisoners under sentence of death prefer life in prison. . . .

From this unquestioned fact a reasonable conclusion can be drawn in favor of the superior deterrent effect of the death penalty. Those who have the choice in practice . . . fear death more than they fear life in prison. . . . If they do, it follows that the threat of the death penalty, all other things equal, is likely to deter more than the threat of life in prison. One is most deterred by what one fears most. From which it follows that whatever statistics fail, or do not fail, to show, the death penalty is likely to be more deterrent than any other.

Those of us who recognize how commonsensical it was, and still is, to believe that the sun moves around the earth will be less willing than van den Haag to follow common sense here, especially when it comes to doing something awful to our fellows. Moreover, there are good reasons for doubting common sense on this matter. Here are three.

1. From the fact that one penalty is more feared than another, it does not follow that the more feared penalty will deter more than the less feared, un-

less we know that the less feared penalty is not fearful enough to deter everyone who can be deterred—and this is just what we don't know with regard to the death penalty. This point is crucial because it shows that *the common-sense argument includes a premise that cannot be based on common sense*, namely, that the deterrence impact of a penalty rises without limit in proportion to the fearfulness of the penalty. All that common sense could possibly indicate is that deterrence impact increases with fearfulness of penalty *within a certain normally experienced range*. Since few of us ever face a choice between risking death and risking lifetime confinement, common sense has no resources for determining whether this difference in fearfulness is still within the range that increases deterrence. To figure that out, we will have to turn to social science—as a matter of common sense! And when we do, we find that most of the research we have on the comparative deterrent impact of execution versus life imprisonment suggests that there is no difference in deterrent impact between the death penalty and life imprisonment. Since it seems to me that whoever would be deterred by a given likelihood of death would be deterred by an *equal* likelihood of life behind bars, I suspect that the commonsense argument only seems plausible because we evaluate it while unconsciously assuming that potential criminals will face larger likelihoods of death sentences than of life sentences. If the likelihoods were equal, it seems to me that where life imprisonment were improbable enough to make it too distant a possibility to worry much about, a similar low probability of death would have the same effect. After all, we are undeterred by small likelihoods of death every time we walk the streets. And if life imprisonment were sufficiently probable to pose a real deterrent threat, it would pose as much of a deterrent threat as death. And then it seems that any lengthy prison sentence—say, twenty years—dependably imposed and not softened by parole, would do the same.

2. In light of the fact that the number of privately owned guns in America is substantially larger than the number of households in America, as well as the fact that about twelve hundred suspected felons are killed or wounded by the police in the line of duty every year, it must be granted that anyone contemplating committing a crime already faces a substantial risk of ending up dead as a result. It's hard to see why anyone *who is not already deterred by this* would be deterred by the addition of the more distant risk of death after apprehension, conviction, and appeal.

3. Van den Haag has maintained that deterrence works not only by means of cost-benefit calculations made by potential criminals, but also by the lesson about the wrongfulness of murder that is slowly learned in a society that subjects murderers to the ultimate punishment. If, however, I am correct in claiming that the refusal to execute even those who deserve it has a civilizing effect, then the refusal to execute also teaches a lesson about the wrongfulness of murder. My claim here is admittedly speculative, but no more so than van den Haag's to the contrary. And my view has the added virtue of accounting for the failure of research to show an increased deterrent effect from executions, *without having to deny the plausibility of van den Haag's*

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*commonsense argument that at least some additional potential murderers will be deterred by the prospect of the death penalty.* If there is a deterrent effect from *not executing*, then it is understandable that while executions will deter some murderers, this effect will be balanced out by the weakening of the deterrent effect of not executing, such that no net reduction in murders will result. This, by the way, also disposes of van den Haag's argument that, in the absence of knowledge one way or the other on the deterrent effect of executions, we should execute murderers rather than risk the lives of innocent people whose murders might have been deterred if we had executed. If there is a deterrent effect of not executing, it follows that we risk innocent lives either way. And if this is so, it seems that the only reasonable course of action is to refrain from imposing what we know is a horrible fate.

I conclude then that we have no good reason to think that we need the death penalty to protect innocent people from murder. Life in prison (or, at least, a lengthy prison term without parole) dependably meted out, will do as well.

## PAIN AND CIVILIZATION

The arguments of the previous section prove that, though the death penalty is a just punishment for murder, no injustice is done to actual or potential victims if we refrain from imposing the death penalty. In this section, I shall show that, in addition, there are good moral reasons for refraining.

The argument that I gave for the justice of the death penalty for murderers proves the justice of beating assaulters, raping rapists, and torturing torturers. Nonetheless, I take it that it would not be right for us to beat assaulters, rape rapists, or torture torturers, *even though it were their just deserts*—and even if this were the only way to make them suffer as much as they made their victims suffer. Calling for the abolition of the death penalty, though it be just, then, amounts to urging that we as a society place execution in the same category of sanction as beating, raping, and torturing and treat it as something it would also not be right for us to do to offenders, *even if it were their just deserts*.

To argue for placing execution in this category, I must show what would be gained therefrom. To show that, I shall indicate what we gain from placing torture in this category and argue that a similar gain is to be had from doing the same with execution. I select torture because I think the reasons for placing it in this category are, due to the extremity of torture, most easily seen— but what I say here applies with appropriate modification to other severe physical punishments, such as beating and raping. First, and most evident, placing torture in this category broadcasts the message that we as a society judge torturing so horrible a thing to do to a person that we refuse to do it even when it is deserved. Note that such a judgment does not commit us to an absolute prohibition on torturing. No matter how horrible we judge something to be, we may still be justified in doing it if it is necessary to prevent something even worse. Leaving this aside for the moment, what is gained by

broadcasting the public judgment that torture is too horrible to inflict even if deserved?

### 1. The Advancement of Civilization and the Modern State

I think that the answer to the question just posed lies in what we understand as civilization. In *The Genealogy of Morals*, Friedrich Nietzsche says that in early times "pain did not hurt as much as it does today." The truth in this intriguing remark is that progress in civilization is characterized by a lower tolerance for one's own pain and that suffered by others. And this is appropriate, since, via growth in knowledge, civilization brings increased power to prevent or reduce pain, and, via growth in the ability to communicate and interact with more and more people, civilization extends the circle of people with whom we empathize. If civilization is characterized by lower tolerance for our own pain and that of others, then publicly refusing to do horrible things to our fellows both signals the level of our civilization *and, by our example, continues the work of civilizing*. This gesture is all the more powerful if we refuse to do horrible things to those who deserve them. I contend, then, that the more horrible things we are able to include in the category of what we will not do, the more civilized we are and the more civilizing. Thus we gain from including torture in this category, and, if execution is especially horrible, we gain still more by including it.

But notice, it is not just any refraining from horrible punishments that is likely to produce this gain. It is important to keep in mind that I am talking about modern states, with their extreme visibility, their moral authority (tattered of late but not destroyed), and their capacity to represent millions, even hundreds of millions, of citizens. It is when modern states refrain from imposing grave harms on those who deserve them that a powerful message about the repugnant nature of such harms is broadcast. It is this message that I contend contributes to civilization by increasing people's repugnance for such harmful acts generally. And, I believe that, because of modern states' unique position—their size, visibility, and moral authority, modern states have a duty to act in ways that advance civilization.

Needless to say, the content, direction, and even the worth of civilization are hotly contested issues, and I shall not be able to win those contests in this brief space. At a minimum, however, I take it that civilization involves the taming of the natural environment and of the human animals in it, and that the overall trend in human history is toward increasing this taming, though the trend is by no means unbroken or without reverses. On these grounds, we can say that growth in civilization generally marks human history, that a reduction in the horrible things we tolerate doing to our fellows (even when they deserve them) is part of this growth, and that, once the work of civilization is taken on consciously, it includes carrying forward and expanding this reduction. It might be objected that this view of civilization is ethnocentric, distinct to citizens of modern Western states but not shared, say, by hardy nomadic tribes. My response is that, while I do not believe the view is

limited in this way, if it is, then so be it. I am, after all, addressing the citizens of a modern Western state and urging that they advance civilization by refraining from imposing the death penalty. What other guide should these citizens use than their own understanding of what constitutes civilization?

Some evidence for the larger reach of my claim about civilization and punishment is found in what Emile Durkheim identified, nearly a century ago, as "two laws which seem . . . to prevail in the evolution of the apparatus of punishment." The first, the *law of quantitative change*, Durkheim formulates thusly:

The intensity of punishment is the greater the more closely societies approximate to a less developed type—and the more the central power assumes an absolute character.

And the second, which Durkheim refers to as the *law of qualitative change*, is this:

Deprivations of liberty, and of liberty alone, varying in time according to the seriousness of the crime, tend to become more and more the normal means of social control.

Several things should be noted about these laws. First of all, they are not two separate laws. As Durkheim understands them, the second exemplifies the trend toward moderation of punishment referred to in the first. Second, the first law really refers to two distinct trends, which usually coincide but do not always. Moderation of punishment accompanies both the movement from less to more advanced types of society and the movement from more to less absolute rule. Normally these go hand in hand, but where they do not, the effect of one trend may offset the effect of the other. Thus, a primitive society without absolute rule may have milder punishments than an equally primitive, but more absolutist, society. This complication need not trouble us, since the claim I am making refers to the first trend, namely, that punishments tend to become milder as societies become more advanced; and that this is a trend in history is not refuted by the fact that it is accompanied by other trends and even occasionally offset by them. Finally, and most important for our purposes, Durkheim's claim that punishment becomes less intense as societies become more advanced is a generalization that he supports with an impressive array of evidence from historical societies from pre-Christian times to the time in which he wrote—and this supports my claim that reduction in the horrible things we do to our fellows is in fact part of the advance of civilization.

Against this it might be argued that there are many trends in history, some good, some bad, and some mixed, and thus that the mere existence of some historical trend is not a sufficient reason to continue it. Thus, for example, history is marked generally by growth in population, but we are not for that reason called upon to continue the work of civilization by continually increasing our population. What this suggests is that in order to identify something as part of the work of civilizing, we must show not only that it generally advances over the course of history, but that its advance is, on some indepen-

dent grounds, clearly an advance for the human species—that is, either an unmitigated gain or at least consistently a net gain. And this implies that even trends we might generally regard as advances may in some cases bring losses with them, such that when they did, it would not be appropriate for us to lend our efforts to continuing them. Of such trends, we can say that they are advances in civilization except when their gains are outweighed by the losses they bring—and that we are called upon to further these trends only when their gains are not outweighed in this way. It is clear, in this light, that increasing population is a mixed blessing at best, bringing both gains and losses. Consequently, population increase is not always an advance in civilization that we should further, though at times it may be.

What can be said of reducing the horrible things that we do to our fellows even when deserved? First of all, given our attitude toward suffering and pain, it seems clearly a gain. Is it, however, an unmitigated gain? Would such a reduction ever amount to a loss? It seems to me that there are two conditions under which it would be a loss, namely, if the reduction made our lives more dangerous, or if not doing what is justly deserved were a loss in itself. As for the former, as I have already indicated, I accept that if some horrible punishment is necessary to deter equally or more horrible acts, then we might have to impose the punishment. (After all, in self-defense, we accept the imposition by the defender of harms equal to those threatened by his attacker.) Thus my claim is that reduction in the horrible things we do to our fellows is an advance in civilization *as long as our lives are not thereby made more dangerous* and that it is only then that we are called upon to extend that reduction as part of the work of civilization. Assuming, then, that we suffer no increased danger by refraining from doing horrible things to our fellows when they justly deserve them, does such refraining to do what is justly deserved amount to a loss?

The answer to this must be that refraining to do what is justly deserved is a loss only where it amounts to doing an injustice. But such refraining to do what is just is not doing what is unjust, unless what we do instead falls below the bottom end of the range of just punishments. Otherwise, it would be unjust to refrain from torturing torturers, raping rapists, or beating assaulters. If there is no injustice in refraining from torturing torturers, then there is no injustice in refraining from doing horrible things to our fellows generally, when they deserve them, as long as what we do instead is compatible with believing that they do nonetheless deserve those horrible things. Thus, if such refraining does not make our lives more dangerous, then it is no loss, and, given our vulnerability to pain, it is a gain. Consequently, reduction in the horrible things we do to our fellows, when those things are not necessary to our protection, is an advance in civilization.

## 2. The Horribleness of the Death Penalty

To complete the argument, however, I must show that execution is horrible enough to warrant its inclusion alongside torture. Against this it will be said

that execution is not especially horrible, since it only hastens a fate that is inevitable for all of us. I think that this view overlooks important differences in the manner in which people reach their inevitable ends. I contend that execution is especially horrible, and it is so in a way similar to (though not identical with) the way in which torture is especially horrible. I believe we view torture as especially awful because of two of its features, which also characterize execution: intense pain and the spectacle of one person being completely subject to the power of another. This latter is separate from the issue of pain, since it is something that offends us about unpainful things, such as slavery (even voluntarily entered) and prostitution (even voluntarily chosen as an occupation). Execution shares this separate feature, since killing a bound and defenseless human being enacts the total subjugation of that person to his fellows.

Execution, even by physically painless means, is characterized not only by the spectacle of subjugation, but also by a special and intense psychological pain that distinguishes it from the loss of life that awaits us all. Interesting in this regard is the fact that, although we are not terribly squeamish about the loss of life itself, allowing it in war, in self-defense, as a necessary cost of progress, and so on, we are, as the extraordinary hesitance of our courts testifies, quite reluctant to execute. I think this is because execution involves the most psychologically painful features of death. We normally regard death from human causes as worse than death from natural causes, since a humanly caused shortening of life lacks the consolation of unavoidability. And we normally regard death whose coming is foreseen by its victim as worse than sudden death because a foreseen death adds to the loss of life the terrible consciousness of that impending loss. As a humanly caused death whose advent is foreseen by its victim, an execution combines the worst of both. Indeed, it was on just such grounds that Albert Camus regarded the death penalty as itself a kind of torture: "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. Compared to such torture, the penalty of retaliation seems like a civilized law."

Thus far, by analogy with torture, I have argued that execution should be avoided because of how horrible it is to the one executed. But there are reasons of another sort that follow from the analogy with torture. Torture is to be avoided not only because of what it says about what we are willing to do to our fellows, but also because of what it says about us who are willing to do it. To torture someone is an awful spectacle not only because of the intensity of pain imposed, but also because of what is required to be able to impose such pain on one's fellows. The tortured body cringes, using its full exertion to escape the pain imposed upon it—it literally begs for relief with its muscles as it does with its cries. To torture someone is to demonstrate a capacity to resist this begging, and that, in turn, demonstrates a kind of hard-heartedness that a society ought not to parade.

This is true not only of torture, but of all severe corporal punishment. Indeed, I think this constitutes part of the answer to the puzzling question

of why we refrain from punishments like whipping, even when the alternative (some months in jail versus some lashes) seems more costly to the offender. Imprisonment is painful to be sure, but it is a reflective pain, one that comes with comparing what is to what might have been and that can be temporarily ignored by thinking about other things. But physical pain has an urgency that holds body and mind in a fierce grip. Of physical pain, as Orwell's Winston Smith recognized, "you could only wish one thing: that it should stop." By refraining from torture in particular and corporal punishment in general, we both refuse to put a fellow human being in this grip and refuse to show our ability to resist this wish. The death penalty is the last corporal punishment used officially in the Western world. It is corporal not only because it is administered via the body, but also because the pain of foreseen, humanly administered death strikes its victim with the urgency that characterizes intense physical pain, causing even hardened criminals to cry, faint, and lose control of their bodily functions. There is something to be gained by refusing to endorse the hardness of heart necessary to impose such a fate.

By placing execution alongside torture in the category of things we will not do to our fellow human beings even when they deserve them, our state broadcasts the message that totally subjugating a person to the power of others and confronting him with the advent of his own humanly administered demise is too horrible to be done by civilized human beings to their fellows even when they have earned it: too horrible to do, and too horrible to be capable of doing. And I contend that the state's broadcasting this message loud and clear would, in the long run, contribute to the general detestation of murder and be, to the extent to which it worked itself into the hearts and minds of the populace, a deterrent. In short, refusing to execute murderers though they deserve it both reflects and continues the taming of the human species that we call civilization—and it should, over time, contribute to reducing the incidence of murder. Thus, I take it that the abolition of the death penalty, though that penalty is a just punishment for murder, is part of the civilizing mission of modern states.

Notice, before moving on, that I have not here argued that the death penalty is *inhumane*. Inhumane punishments are normally thought to be incompatible with respecting the person of the offender and thus forbidden except perhaps under the most extreme circumstances. Speaking of the death penalty, Kant wrote that "the death of the criminal must be kept entirely free of any maltreatment that would make an abomination of the humanity residing in the person suffering it." Torture almost surely and maybe even execution are inhumane, but I have argued only that they are horrible, that is, that they are punishments that cause their recipients extreme pain, physical and/or psychological. I have tried to show the ways in which the death penalty, even imposed without physical pain, is still a horrible punishment in that it causes extreme psychological suffering often to the point of loss of physical control. I then urged that it would be good for the state to avoid doing such things to people, not simply because it is always morally preferable to impose less pain rather than more, but also because the state—

by virtue of its size, high visibility, and moral authority—is able to have impact on citizens beyond the immediate act it authorizes.

In particular, I have suggested that the state, by the vivid example of its unwillingness to execute even those—*especially those*—who deserve it, would contribute to the process of civilizing humankind, which I take in part to include reducing our tolerance for pain imposed on our fellows. I have called this an advance in civilization for two reasons: first, because history shows that the harshness of punishments seems generally to decline over time, and second, because it seems good to reduce our willingness to impose pain on our fellows. The first condition here is empirical, a matter of what history actually records. And while I think that the elimination of ear cropping, branding, drawing and quartering, and boiling in oil, as well as the practice of throwing members of unpopular religions to the lions for public entertainment, all suggest that the taming that I have in mind is the general trend of history, there are exceptions, of course. The Nazis, for example, tortured their enemies with awful ferocity. But most would recognize Nazism as a step backward in civilization. So, my claim is a broad empirical claim, much in the vein of Richard Rorty's recent suggestion that, in the West, there has been a tendency to want to reduce or eliminate cruelty. But it is equally a moral claim. I have argued that even stable historical trends do not count as advances in civilization unless they are also, on independent grounds, good.

In sum, my argument is that, though the death penalty is just punishment for some murders, execution is a horrible thing to do to our fellows, and, if the state can avoid execution without thereby doing injustice to actual or potential victims of murder, then, in addition to whatever is good about causing less pain, the state would also, by its example, contribute to a general reduction in people's tolerance for doing painful things to one another, a reduction that I think is an advance in civilization. And I think that modern states are morally bound to promote the advance of civilization because they are uniquely positioned to do so and because of the goodness that must characterize a trend if it is to count as an advance in civilization.

Recall that I argued . . . that offenders deserve the least amount of punishment that imposes on them harm equivalent to the harm they caused their victims *and* the harm they caused to society by taking unfair advantage of the law-abiding *and* that will effectively deter rational people from committing such crimes in the future. If we take these conjuncts separately, it should be clear from the previous section's argument that the deterrence component can be satisfied with life in prison or some lengthy prison term. Since I take the fairness component to be the same in any crime, it will not in itself add more than a small increment to any particular punishment. Consequently, it, too, should be satisfied if we impose a lengthy prison term on murderers. As for the first component, the *lex talionis* indicates that the murderer justly deserves to die, and nothing I have argued alters this conclusion. However, I have also argued that retribution can be satisfied without executing murderers, so long as they are punished in some other suitably severe way. It follows that, though the death penalty is justly deserved pun-

ishment for some murderers, all the rationales for punishment will be satisfied if murderers are sentenced to life in prison or at least to a substantial prison term, such as twenty years without parole. I have argued . . . that refraining from executing murderers will contribute to the advance of civilization and may, in the long run, reduce the incidence of murder. In sum, there are no moral reasons against, and some very good ones for, abolishing the death penalty. All of this has been based on the idea that the death penalty is just punishment for murder in principle. Additional reasons for abolishing the death penalty appear when we look at it in practice.