

COMMENTARIES*

THE ULTIMATE PUNISHMENT: A DEFENSE

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In an average year about 20,000 homicides occur in the United States. Fewer than 300 convicted murderers are sentenced to death. But because no more than thirty murderers have been executed in any recent year, most convicts sentenced to death are likely to die of old age.¹ Nonetheless, the death penalty looms large in discussions: it raises important moral questions independent of the number of executions.²

The death penalty is our harshest punishment.³ It is irrevocable: it ends the existence of those punished, instead of temporarily imprisoning them. Further, although not intended to cause physical pain, execution is the only corporal punishment still applied to adults.⁴ These singular characteristics contribute to the perennial, impassioned controversy about capital punishment.

I. DISTRIBUTION

Consideration of the justice, morality, or usefulness, of capital punishment is often conflated with objections to its alleged discriminatory or capricious distribution among the guilty. Wrongly so. If capital punishment is immoral *in se*, no distribution among the guilty could make it moral. If capital punishment is moral, no distribution would make it immoral. Improper distribution cannot affect the quality of what is distributed, be it punishments or rewards. Discriminatory or capricious distribution thus could not justify abolition of the

* The authors of these Commentaries have not seen drafts of each other's pieces. The Commentary format is not meant to be a debate, but rather is meant to present different perspectives on current issues of public importance.

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¹ Death row as a semipermanent residence is cruel, because convicts are denied the normal amenities of prison life. Thus, unless death row residents are integrated into the prison population, the continuing accumulation of convicts on death row should lead us to accelerate either the rate of executions or the rate of commutations. I find little objection to integration.

² The debate about the insanity defense is important for analogous reasons.

³ Some writers, for example, Cesare Bonesana, Marchese di Beccaria, have thought that life imprisonment is more severe. See C. BECCARIA, *DEI DELITTI E DELLE PENE* 62-70 (1764). More recently, Jacques Barzun, has expressed this view. See Barzun, *In Favor of Capital Punishment*, in *THE DEATH PENALTY IN AMERICA* 154 (H. Bedau ed. 1964). However, the overwhelming majority of both abolitionists and of convicts under death sentence prefer life imprisonment to execution.

⁴ For a discussion of the sources of opposition to corporal punishment, see E. VAN DEN HAAG, *PUNISHING CRIMINALS* 196-206 (1975).

death penalty. Further, maldistribution inheres no more in capital punishment than in any other punishment.

Maldistribution between the guilty and the innocent is, by definition, unjust. But the injustice does not lie in the nature of the punishment. Because of the finality of the death penalty, the most grievous maldistribution occurs when it is imposed upon the innocent. However, the frequent allegations of discrimination and capriciousness refer to maldistribution among the guilty and not to the punishment of the innocent.⁵

Maldistribution of any punishment among those who deserve it is irrelevant to its justice or morality. Even if poor or black convicts guilty of capital offenses suffer capital punishment, and other convicts equally guilty of the same crimes do not, a more equal distribution, however desirable, would merely be more equal. It would not be more just to the convicts under sentence of death.

Punishments are imposed on persons, not on racial or economic groups. Guilt is personal. The only relevant question is: does the person to be executed deserve the punishment? Whether or not others who deserved the same punishment, whatever their economic or racial group, have avoided execution is irrelevant. If they have, the guilt of the executed convicts would not be diminished, nor would their punishment be less deserved. To put the issue starkly, if the death penalty were imposed on guilty blacks, but not on guilty whites, or, if it were imposed by a lottery among the guilty, this irrationally discriminatory or capricious distribution would neither make the penalty unjust, nor cause anyone to be unjustly punished, despite the undue impunity bestowed on others.⁶

Equality, in short, seems morally less important than justice. And justice is independent of distributional inequalities. The ideal of equal justice demands that justice be equally distributed, not that it be replaced by equality. Justice requires that as many of the guilty as possible be punished, regardless of whether others have avoided punishment. To let these others escape the deserved punishment does not do justice to them, or to society. But it is not unjust to those who could not escape.

These moral considerations are not meant to deny that irrational discrimination, or capriciousness, would be inconsistent with consti-

⁵ See *infra* pp. 1664-65.

⁶ Justice Douglas, concurring in *Furman v. Georgia*, 408 U.S. 238 (1972), wrote that "a law which . . . reaches that [discriminatory] result in practice has no more sanctity than a law which in terms provides the same." *Id.* at 256 (Douglas, J., concurring). Indeed, a law legislating this result "in terms" would be inconsistent with the "equal protection of the laws" provided by the fourteenth amendment, as would the discriminatory result reached in practice. But that result could be changed by changing the distributional practice. Thus, Justice Douglas notwithstanding, a discriminatory result does not make the death penalty unconstitutional, unless the penalty ineluctably must produce that result to an unconstitutional degree.

tutional requirements. But I am satisfied that the Supreme Court has in fact provided for adherence to the constitutional requirement of equality as much as is possible. Some inequality is indeed unavoidable as a practical matter in any system.⁷ But, *ultra posse nemo obligatur*. (Nobody is bound beyond ability.)⁸

Recent data reveal little direct racial discrimination in the sentencing of those arrested and convicted of murder.⁹ The abrogation of the death penalty for rape has eliminated a major source of racial discrimination. Concededly, some discrimination based on the race of murder victims may exist; yet, this discrimination affects criminal victimizers in an unexpected way. Murderers of whites are thought more likely to be executed than murderers of blacks. Black victims, then, are less fully vindicated than white ones. However, because most black murderers kill blacks, black murderers are spared the death penalty more often than are white murderers. They fare better than most white murderers.¹⁰ The motivation behind unequal distribution of the death penalty may well have been to discriminate against blacks, but the result has favored them. Maldistribution is thus a straw man for empirical as well as analytical reasons.

II. MISCARRIAGES OF JUSTICE

In a recent survey Professors Hugo Adam Bedau and Michael Radelet found that 7000 persons were executed in the United States between 1900 and 1985 and that 25 were innocent of capital crimes.¹¹ Among the innocents they list Sacco and Vanzetti as well as Ethel and Julius Rosenberg. Although their data may be questionable, I do not doubt that, over a long enough period, miscarriages of justice will occur even in capital cases.

⁷ The ideal of equality, unlike the ideal of retributive justice (which can be approximated separately in each instance), is clearly unattainable unless all guilty persons are apprehended, and thereafter tried, convicted and sentenced by the same court, at the same time. Unequal justice is the best we can do; it is still better than the injustice, equal or unequal, which occurs if, for the sake of equality, we deliberately allow some who could be punished to escape.

⁸ Equality, even without justice, may remain a strong psychological, and therefore political, demand. Yet Charles Black, by proving the *inevitability* of "caprice" (inequality), undermines his own constitutional argument, because it seems unlikely that the Constitution's fifth and fourteenth amendments were meant to authorize the death penalty only under unattainable conditions. See C. BLACK, *CAPITAL PUNISHMENT: THE INEVITABILITY OF CAPRICE AND MISTAKE* (1974).

⁹ See BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, BULLETIN No. NCJ-98,399, *CAPITAL PUNISHMENT* 1984, at 9 (1985); Johnson, *The Executioner's Bias*, NAT'L REV., Nov. 15, 1985, at 44.

¹⁰ It barely need be said that any discrimination *against* (for example, black murderers of whites) must also be discrimination *for* (for example, black murderers of blacks).

¹¹ Bedau & Radelet, *Miscarriages of Justice in Potentially Capital Cases* (1st draft, Oct. 1985) (on file at Harvard Law School Library).

Despite precautions, nearly all human activities, such as trucking, lighting, or construction, cost the lives of some innocent bystanders. We do not give up these activities, because the advantages, moral or material, outweigh the unintended losses.¹² Analogously, for those who think the death penalty just, miscarriages of justice are offset by the moral benefits and the usefulness of doing justice. For those who think the death penalty unjust even when it does not miscarry, miscarriages can hardly be decisive.

III. DETERRENCE

Despite much recent work, there has been no conclusive statistical demonstration that the death penalty is a better deterrent than are alternative punishments.¹³ However, deterrence is less than decisive for either side. Most abolitionists acknowledge that they would continue to favor abolition even if the death penalty were shown to deter more murders than alternatives could deter.¹⁴ Abolitionists appear to value the life of a convicted murderer or, at least, his non-execution, more highly than they value the lives of the innocent victims who might be spared by deterring prospective murderers.

Deterrence is not altogether decisive for me either. I would favor retention of the death penalty as retribution even if it were shown that the threat of execution could not deter prospective murderers not already deterred by the threat of imprisonment.¹⁵ Still, I believe the death penalty, because of its finality, is more feared than imprisonment, and deters some prospective murderers not deterred by the

¹² An excessive number of trucking accidents or of miscarriages of justice could offset the benefits gained by trucking or the practice of doing justice. We are, however, far from this situation.

¹³ For a sample of conflicting views on the subject, see Baldus & Cole, *A Comparison of the Work of Thorsten Sellin and Isaac Ehrlich on the Deterrent Effect of Capital Punishment*, 85 YALE L.J. 170 (1975); Bowers & Pierce, *Deterrence or Brutalization: What Is the Effect of Executions?*, 26 CRIME & DELINQ. 453 (1980); Bowers & Pierce, *The Illusion of Deterrence in Isaac Ehrlich's Research on Capital Punishment*, 85 YALE L. J. 187 (1975); Ehrlich, *Fear of Deterrence: A Critical Evaluation of the "Report of the Panel on Research on Deterrent and Incapacitative Effects"*, 6 J. LEGAL STUD. 293 (1977); Ehrlich, *The Deterrent Effect of Capital Punishment: A Question of Life and Death*, 65 AM. ECON. REV. 397, 415-16 (1975); Ehrlich & Gibbons, *On the Measurement of the Deterrent Effect of Capital Punishment and the Theory of Deterrence*, 6 J. LEGAL STUD. 35 (1977).

¹⁴ For most abolitionists, the discrimination argument, see *supra* pp. 1662-64, is similarly nondescriptive: they would favor abolition even if there could be no racial discrimination.

¹⁵ If executions were shown to increase the murder rate in the long run, I would favor abolition. Sparing the innocent victims who would be spared, *ex hypothesi*, by the nonexecution of murderers would be more important to me than the execution, however just, of murderers. But although there is a lively discussion of the subject, no serious evidence exists to support the hypothesis that executions produce a higher murder rate. Cf. Phillips, *The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy*, 86 AM. J. SOC. 139 (1980) (arguing that murder rates drop immediately after executions of criminals).

threat of imprisonment. Sparing the lives of even a few prospective victims by deterring their murderers is more important than preserving the lives of convicted murderers because of the possibility, or even the probability, that executing them would not deter others. Whereas the lives of the victims who might be saved are valuable, that of the murderer has only negative value, because of his crime. Surely the criminal law is meant to protect the lives of potential victims in preference to those of actual murderers.

Murder rates are determined by many factors; neither the severity nor the probability of the threatened sanction is always decisive. However, for the long run, I share the view of Sir James Fitzjames Stephen: "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."¹⁶ Penal sanctions are useful in the long run for the formation of the internal restraints so necessary to control crime. The severity and finality of the death penalty is appropriate to the seriousness and the finality of murder.¹⁷

IV. INCIDENTAL ISSUES: COST, RELATIVE SUFFERING, BRUTALIZATION

Many nondecisive issues are associated with capital punishment. Some believe that the monetary cost of appealing a capital sentence is excessive.¹⁸ Yet most comparisons of the cost of life imprisonment with the cost of execution, apart from their dubious relevance, are flawed at least by the implied assumption that life prisoners will generate no judicial costs during their imprisonment. At any rate, the actual monetary costs are trumped by the importance of doing justice.

Others insist that a person sentenced to death suffers more than his victim suffered, and that this (excess) suffering is undue according to the *lex talionis* (rule of retaliation).¹⁹ We cannot know whether

¹⁶ H. GROSS, A THEORY OF CRIMINAL JUSTICE 489 (1979) (attributing this passage to Sir James Fitzjames Stephen).

¹⁷ *Weems v. United States*, 217 U.S. 349 (1910), suggests that penalties be proportionate to the seriousness of the crime — a common theme of the criminal law. Murder, therefore, demands more than life imprisonment, if, as I believe, it is a more serious crime than other crimes punished by life imprisonment. In modern times, our sensibility requires that the range of punishments be narrower than the range of crimes — but not so narrow as to exclude the death penalty.

¹⁸ Cf. Kaplan, *Administering Capital Punishment*, 36 U. FLA. L. REV. 177, 178, 190-91 (1984) (noting the high cost of appealing a capital sentence).

¹⁹ For an example of this view, see A. CAMUS, REFLECTIONS ON THE GUILLOTINE 24-30 (1959). On the limitations allegedly imposed by the *lex talionis*, see Reiman, *Justice, Civilization, and the Death Penalty: Answering van den Haag*, 14 PHIL. & PUB. AFF. 115, 119-34 (1985).

the murderer on death row suffers more than his victim suffered; however, unlike the murderer, the victim deserved none of the suffering inflicted. Further, the limitations of the *lex talionis* were meant to restrain private vengeance, not the social retribution that has taken its place. Punishment — regardless of the motivation — is not intended to revenge, offset, or compensate for the victim's suffering, or to be measured by it. Punishment is to vindicate the law and the social order undermined by the crime. This is why a kidnapper's penal confinement is not limited to the period for which he imprisoned his victim; nor is a burglar's confinement meant merely to offset the suffering or the harm he caused his victim; nor is it meant only to offset the advantage he gained.²⁰

Another argument heard at least since Beccaria²¹ is that, by killing a murderer, we encourage, endorse, or legitimize unlawful killing. Yet, although all punishments are meant to be unpleasant, it is seldom argued that they legitimize the unlawful imposition of identical unpleasantness. Imprisonment is not thought to legitimize kidnapping; neither are fines thought to legitimize robbery. The difference between murder and execution, or between kidnapping and imprisonment, is that the first is unlawful and undeserved, the second a lawful and deserved punishment for an unlawful act. The physical similarities of the punishment to the crime are irrelevant. The relevant difference is not physical, but social.²²

V. JUSTICE, EXCESS, DEGRADATION

We threaten punishments in order to deter crime. We impose them not only to make the threats credible but also as retribution (justice) for the crimes that were not deterred. Threats and punishments are necessary to deter and deterrence is a sufficient practical justification for them. Retribution is an independent moral justification.²³ Al-

²⁰ Thus restitution (a civil liability) cannot satisfy the punitive purpose of penal sanctions, whether the purpose be retributive or deterrent.

²¹ See *supra* note 3.

²² Some abolitionists challenge: if the death penalty is just and serves as a deterrent, why not televise executions? The answer is simple. The death even of a murderer, however well-deserved, should not serve as public entertainment. It so served in earlier centuries. But in this respect our sensibility has changed for the better, I believe. Further, television unavoidably would trivialize executions, wedged in, as they would be, between game shows, situation comedies and the like. Finally, because televised executions would focus on the physical aspects of the punishment, rather than the nature of the crime and the suffering of the victim, a televised execution would present the murderer as the victim of the state. Far from communicating the moral significance of the execution, television would shift the focus to the pitiable fear of the murderer. We no longer place in cages those sentenced to imprisonment to expose them to public view. Why should we so expose those sentenced to execution?

²³ See van den Haag, *Punishment as a Device for Controlling the Crime Rate*, 33 RUTGERS L. REV. 706, 719 (1981) (explaining why the desire for retribution, although independent, would have to be satisfied even if deterrence were the only purpose of punishment.)

though penalties can be unwise, repulsive, or inappropriate, and those punished can be pitiable, in a sense the infliction of legal punishment on a guilty person cannot be unjust. By committing the crime, the criminal volunteered to assume the risk of receiving a legal punishment that he could have avoided by not committing the crime. The punishment he suffers is the punishment he voluntarily risked suffering and, therefore, it is no more unjust to him than any other event for which one knowingly volunteers to assume the risk. Thus, the death penalty cannot be unjust to the guilty criminal.²⁴

There remain, however, two moral objections. The penalty may be regarded as always excessive as retribution and always morally degrading. To regard the death penalty as always excessive, one must believe that no crime — no matter how heinous — could possibly justify capital punishment. Such a belief can be neither corroborated nor refuted; it is an article of faith.

Alternatively, or concurrently, one may believe that everybody, the murderer no less than the victim, has an imprescriptible (natural?) right to life. The law therefore should not deprive anyone of life. I share Jeremy Bentham's view that any such "natural and imprescriptible rights" are "nonsense upon stilts."²⁵

Justice Brennan has insisted that the death penalty is "uncivilized," "inhuman," inconsistent with "human dignity" and with "the sanctity of life,"²⁶ that it "treats members of the human race as nonhumans, as objects to be toyed with and discarded,"²⁷ that it is "uniquely degrading to human dignity"²⁸ and "by its very nature, [involves] a denial of the executed person's humanity."²⁹ Justice Brennan does not say why he thinks execution "uncivilized." Hitherto most civilizations

²⁴ An explicit threat of punitive action is necessary to the justification of any legal punishment: *nulla poena sine lege* (no punishment without [preexisting] law). To be sufficiently justified, the threat must in turn have a rational and legitimate purpose. "Your money or your life" does not qualify; nor does the threat of an unjust law; nor, finally, does a threat that is altogether disproportionate to the importance of its purpose. In short, preannouncement legitimizes the threatened punishment only if the threat is warranted. But this leaves a very wide range of justified threats. Furthermore, the punished person is aware of the penalty for his actions and thus volunteers to take the risk even of an unjust punishment. His victim, however, did not volunteer to risk anything. The question whether any self-inflicted injury — such as a legal punishment — ever can be unjust to a person who knowingly risked it is a matter that requires more analysis than is possible here.

²⁵ 2 THE WORKS OF JEREMY BENTHAM 105 (J. Bowring ed. 1972). However, I would be more polite about prescriptible natural rights, which Bentham described as "simple nonsense." *Id.* (It does not matter whether natural rights are called "moral" or "human" rights as they currently are by most writers.)

²⁶ THE DEATH PENALTY IN AMERICA 256-63 (H. Bedau ed., 3d ed. 1982) (quoting Furman v. Georgia, 408 U.S. 238, 286, 305 (1972) (Brennan, J., concurring)).

²⁷ *Id.* at 272-73; see also Gregg v. Georgia, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting).

²⁸ Furman v. Georgia, 408 U.S. 238, 291 (1972) (Brennan, J., concurring).

²⁹ *Id.* at 290.

have had the death penalty, although it has been discarded in Western Europe, where it is currently unfashionable probably because of its abuse by totalitarian regimes.

By "degrading," Justice Brennan seems to mean that execution degrades the executed convicts. Yet philosophers, such as Immanuel Kant and G.F.W. Hegel, have insisted that, when deserved, execution, far from degrading the executed convict, affirms his humanity by affirming his rationality and his responsibility for his actions. They thought that execution, when deserved, is required for the sake of the convict's dignity. (Does not life imprisonment violate human dignity more than execution, by keeping alive a prisoner deprived of all autonomy?)³⁰

Common sense indicates that it cannot be death — our common fate — that is inhuman. Therefore, Justice Brennan must mean that death degrades when it comes not as a natural or accidental event, but as a deliberate social imposition. The murderer learns through his punishment that his fellow men have found him unworthy of living; that because he has murdered, he is being expelled from the community of the living. This degradation is self-inflicted. By murdering, the murderer has so dehumanized himself that he cannot remain among the living. The social recognition of his self-degradation is the punitive essence of execution. To believe, as Justice Brennan appears to, that the degradation is inflicted by the execution reverses the direction of causality.

Execution of those who have committed heinous murders may deter only one murder per year. If it does, it seems quite warranted. It is also the only fitting retribution for murder I can think of.

³⁰ See Barzun, *supra* note 3, *passim*.