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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.[1] 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.[2] 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.[3] 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.[4]

2. Ernest van den Haag and John P. Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983). Unless otherwise indicated, page references in the text and notes are to this book.

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?[6] 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

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.[7] 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.[8] But the *lex talionis* is

7. Jeffrie G. Murphy, "Marxism and Retribution," *Philosophy & Public Affairs* 2, no. 3 (Spring 1973):219.

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 "proportional retributivism," holds that what retribution requires is not equality 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]

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the victim's relatives or the fear produced in the general populace, and the like. For simplicity's sake, however, I shall continue to speak as if the harm for which retributivism would have us pay the offender back is the harm (intentionally attempted or done) to his immediate victim. Also, retribution is not to be confused with *restitution*. Restitution involves restoring the *status quo ante*, the condition prior to the offense. Since it was in this condition that the criminal's offense was committed, it is this condition that constitutes the baseline against which retribution is exacted. Thus retribution involves imposing a loss on the offender measured from the status quo ante. For example, returning a thief's loot to his victim so that thief and victim now own what they did before the offense is *restitution*. Taking enough from the thief so that what he is left with is less than what he had before the offense is *retribution*, since this is just what he did to his victim.

9. "The most extreme form of retributivism is the law of retaliation: 'an eye for an eye' " (Stanley I. Benn, "Punishment," *The Encyclopedia of Philosophy* 7, ed. Paul Edwards [New York: Macmillan, 1967], p. 32). Hugo Bedau writes: "retributive justice need not be thought 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, 1980], p. 177). See also, Andrew von Hirsch, "Doing Justice: The Principle of Commensurate Deserts," and Hyman Gross, "Proportional Punishment and Justifiable Sentences," in *Sentencing*, eds. H. Gross and A. von Hirsch (New York: Oxford University Press, 1981), pp. 243–56 and 272–83, respectively.

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 otherwise)" (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 murderers. 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

There is nothing self-evident about the justice of the *lex talionis* nor, for that matter, of retributivism.[11] The standard problem confronting those who would justify retributivism is that of overcoming the suspicion that it does no more than sanctify the victim's desire to hurt the offender back. Since serving that desire amounts to hurting the offender simply for the satisfaction that the victim derives from seeing the offender suffer, and since deriving satisfaction from the suffering of others seems primitive, the policy of imposing suffering on the offender for no other purpose than giving satisfaction to his victim seems primitive as well. Consequently, defending retributivism requires showing that the suffering imposed on the wrongdoer has some worthy point beyond the satisfaction of victims. In what follows, I shall try to identify a proposition—which I call the *retributivist principle*—that I take to be the nerve of retributivism. I think this principle accounts for the justice of the *lex talionis* and indicates the point of the suffering demanded by retributivism. Not to do too much of the work of the death penalty advocate, I shall make no extended argument for this principle beyond suggesting the considerations that make it plausible. I shall identify these considerations by drawing, with considerable license, on Hegel and Kant.

I think that we can see the justice of the *lex talionis* by focusing on the striking affinity between it and the *golden rule*. The *golden rule* mandates "Do unto others as you would have others do unto you," while the *lex talionis* counsels "Do unto others as they have done unto you." It would not be too far-fetched to say that the *lex talionis* is the law enforcement arm of the golden rule, at least in the sense that if people were actually treated as they treated others, then everyone would necessarily follow the golden rule because then people could only willingly act toward others as they were willing to have others act toward them. This is not to suggest that the *lex talionis* follows from the golden rule, but rather that the two share a common moral inspiration: the equality

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would bring if sold on the market, and he claims that these prices would be at least as much as what non-licenseholders would (for their own protection) pay licensees not to use their licenses. Now this obviously brings the cost to victims of crime back into the measure of punishment, though only halfheartedly, since this cost must be added to the value to the licensee of being able to use his license. And this still leaves open the distinct possibility that licenses for very lucrative theft opportunities would fetch higher prices on the market than licenses to kill, with the same counterintuitive result mentioned earlier.

11. Stanley Benn writes: "to say 'it is fitting' or 'justice demands' that the guilty should suffer is only to affirm that punishment is right, not to give grounds for thinking so" (Benn, "Punishment," p. 30).

of persons. Treating others as you *would* have them treat you means treating others as equal to you, because adopting the golden rule as one's guiding principle implies that one counts the suffering of others to be as great a calamity as one's own suffering, that one counts one's right to impose suffering on others as no greater than their right to impose suffering on one, and so on. This leads to the *lex talionis* by two approaches that start from different points and converge.

I call the first approach "Hegelian" because Hegel held (roughly) that crime upsets the equality between persons and retributive punishment restores that equality by "annulling" the crime.[12] As we have seen, acting according to the golden rule implies treating others as your equals. Conversely, violating the golden rule implies the reverse: Doing to another what you would *not* have that other do to you violates the equality of persons by asserting a right toward the other that the other does not possess toward you. Doing back to you what you did "annuls" your violation by reasserting that the other has the same right toward you that you assert toward him. Punishment according to the *lex talionis* cannot heal the injury that the other has suffered at your hands, rather it rectifies the indignity he has suffered, by restoring him to equality with you.

"Equality of persons" here does not mean equality of concern for their happiness, as it might for a utilitarian. On such a (roughly) utilitarian understanding of equality, imposing suffering on the wrongdoer equivalent to the suffering he has imposed would have little point. Rather, equality of concern for people's happiness would lead us to impose as little suffering on the wrongdoer as was compatible with maintaining the happiness of others. This is enough to show that retributivism (at least

12. Hegel writes that "The sole positive existence which the injury [i.e., the crime] possesses is that it is the particular will of the criminal [i.e., it is the criminal's intention that distinguishes criminal injury from, say, injury due to an accident]. Hence to injure (or penalize) this particular will as a will determinately existent is to annul the crime, which otherwise would have been held valid, and to restore the right" (G.W.F. Hegel, *The Philosophy of Right*, trans. by T. M. Knox [Oxford: Clarendon Press, 1962; originally published in German in 1821], p. 69, see also p. 331n). I take this to mean that the right is a certain equality of sovereignty between the wills of individuals, crime disrupts that equality by placing one will above others, and punishment restores the equality by annulling the illegitimate ascendance. On these grounds, as I shall suggest below, the desire for revenge (strictly limited to the desire "to even the score") is more respectable than philosophers have generally allowed. And so Hegel writes that "The annulling of crime in this sphere where right is immediate [i.e., the condition prior to conscious morality] is principally revenge, which is just in its content in so far as it is retributive" (ibid., p. 73).

in this "Hegelian" form) reflects a conception of morality quite different from that envisioned by utilitarianism. Instead of seeing morality as administering doses of happiness to individual recipients, the retributivist envisions morality as maintaining the relations appropriate to equally sovereign individuals. A crime, rather than representing a unit of suffering added to the already considerable suffering in the world, is an assault on the sovereignty of an individual that temporarily places one person (the criminal) in a position of illegimate sovereignty over another (the victim). The victim (or his representative, the state) then has the right to rectify this loss of standing relative to the criminal by meting out a punishment that reduces the criminal's sovereignty in the degree to which he vaunted it above his victim's. It might be thought that this is a duty, not just a right, but that is surely too much. The victim has the right to forgive the violator without punishment, which suggests that it is by virtue of having the right to punish the violator (rather than the duty), that the victim's equality with the violator is restored.

I call the second approach "Kantian" since Kant held (roughly) that, since reason (like justice) is no respecter of the sheer difference between individuals, when a rational being decides to act in a certain way toward his fellows, he implicitly authorizes similar action by his fellows toward him.[13] A version of the golden rule, then, is a requirement of reason: acting rationally, one always acts as he would have others act toward him. Consequently, to act toward a person as he has acted toward others is to treat him as a rational being, that is, as if his act were the product of a rational decision. From this, it may be concluded that we have a duty to do to offenders what they have done, since this amounts to according them the respect due rational beings.[14] Here too, however, the assertion

13. Kant writes that "any undeserved evil that you inflict on someone else among the people is one that you do to yourself. If you vilify him, you vilify yourself; if you steal from him, you steal from yourself; if you kill him, you kill yourself." Since Kant holds that "If what happens to someone is also willed by him, it cannot be a punishment," he takes pains to distance himself from the view that the offender *wills* his punishment. "The chief error contained in this sophistry," Kant writes, "consists in the confusion of the criminal's [that is, the murderer's] own judgment (which one must necessarily attribute to his reason) that he must forfeit his life with a resolution of the will to take his own life" (Immanuel Kant, *The Metaphysical Elements of Justice, Part I of The Metaphysics of Morals*, trans. by J. Ladd [Indianapolis: Bobbs-Merrill, 1965; originally published in 1797], pp. 101, 105–106). I have tried to capture this notion of attributing a judgment to the offender rather than a resolution of his will with the term 'authorizes.'

14. "Even if a civil society were to dissolve itself by common agreement of all its members

of a duty to punish seems excessive, since, if this duty arises because doing to people what they have done to others is necessary to accord them the respect due rational beings, then we would have a duty to do to all rational persons *everything*—good, bad, or indifferent—that they do to others. The point rather is that, by his acts, a rational being *authorizes* others to do the same to him, he doesn't *compel* them to. Here too, then, the argument leads to a right, rather than a duty, to exact the *lex talionis*. And this is supported by the fact that we can conclude from Kant's argument that a rational being cannot validly complain of being treated in the way he has treated others, and where there is no valid complaint, there is no injustice, and where there is no injustice, others have acted within their rights.[15] It should be clear that the Kantian argument also rests on the equality of persons, because a rational agent

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. . . , the last murderer remaining in prison must first be executed, so that everyone will duly receive what his actions are worth" (Kant, ibid., p. 102). Interestingly, Conrad calls himself a retributivist, but doesn't accept the strict Kantian version of it. In fact, he claims that Kant "did not bother with justifications for his categorical imperative . . . , [but just] insisted that the Roman *jus talionis* was the reference point at which to begin" (p. 22). Van den Haag, by contrast, states specifically that he is "not a retributionist" (p. 32). In fact he claims that "retributionism" is not really a *theory* of punishment at all, just "a feeling articulated through a metaphor presented as though a theory" (p. 28). This is so, he maintains, because a theory "must tell us what the world, or some part thereof, is like or has been or will be like" (ibid.). "In contrast," he goes on, "deterrence theory is, whether right or wrong, a theory: It asks what the effects are of punishment (does it reduce the crime rate?) and makes testable predictions (punishment reduces the crime rate compared to what it would be without the credible threat of punishment)" (p. 29). Now, it should be obvious that van den Haag has narrowed his conception of "theory" so that it only covers the kind of things one finds in the empirical sciences. So narrowed, there is no such thing as a theory about what justifies some action or policy, no such thing as a Kantian theory of punishment, or, for that matter, a Rawlsian theory of jusice—that is to say, no such thing as a *moral* theory. Van den Haag, of course, could use the term 'theory' as he wished, were it not for the fact that he appeals to deterrence theory not merely for predictions about crime rates but also (indeed, in the current context, primarily) as a theory about what justifies punishment—that is, as a *moral* theory. And he must, since the fact that punishment reduces crime does not imply that we should institute punishment unless we *should* do whatever reduces crime. In short, van den Haag is about moral theories the way I am about airplanes: He doesn't quite understand how they work, but he knows how to use them to get where he wants to go.

15. "It may also be pointed out that no one has ever heard of anyone condemned to death on account of murder who complained that he was getting too much [punishment] and therefore was being treated unjustly; everyone would laugh in his face if he were to make such a statement" (Kant, *Metaphysical Elements of Justice*, p. 104; see also p. 133).

only implicitly authorizes having done to him action similar to what he has done to another, if he and the other are similar in the relevant ways.

The "Hegelian" and "Kantian" approaches arrive at the same destination from opposite sides. The "Hegelian" approach starts from the victim's equality with the criminal, and infers from it the victim's right to do to the criminal what the criminal has done to the victim. The "Kantian" approach starts from the criminal's rationality, and infers from it the criminal's authorization of the victim's right to do to the criminal what the criminal has done to the victim. Taken together, these approaches support the following proposition: The equality and rationality of persons implies that an offender deserves and his victim has the right to impose suffering on the offender equal to that which he imposed on the victim. This is the proposition I call the *retributivist principle*, and I shall assume henceforth that it is true. This principle provides that the *lex talionis* is the criminal's just desert and the victim's (or as his representative, the state's) right. Moreover, the principle also indicates the point of retributive punishment, namely, it affirms the equality and rationality of persons, victims and offenders alike.[16] And the point of this affirmation is, like any moral affirmation, to make a statement, to the criminal, to impress upon him his equality with his victim (which earns him a like fate) and his rationality (by which his actions are held to authorize his fate), and to the society, so that recognition of the equality and rationality of persons becomes a visible part of our shared moral environment that none can ignore in justifying their actions to one another.

When I say that with respect to the criminal, the point of retributive punishment is to impress upon him his equality with his victim, I mean to be understood quite literally. If the sentence is just and the criminal rational, then the punishment should normally *force* upon him recognition of his equality with his victim, recognition of their shared vulnerability to suffering and their shared desire to avoid it, as well as recognition of the fact that he counts for no more than his victim in the eyes of their fellows. For this reason, the retributivist requires that the offender be

16. Herbert Morris defends retributivism on parallel grounds. See his "Persons and Punishment," *The Monist* 52, no. 4 (October 1968):475–501. Isn't what Morris calls "the right to be treated as a person" essentially the right of a rational being to be treated only as he has authorized, implicitly or explicitly, by his own free choices?

sane, not only at the moment of his crime, but also at the moment of his punishment—while this latter requirement would seem largely pointless (if not downright malevolent) to a utilitarian. Incidentally, it is, I believe, the desire that the offender be forced by suffering punishment to recognize his equality with his victim, rather than the desire for that suffering itself, that constitutes what is rational in the desire for revenge.

The retributivist principle represents a conception of moral desert whose complete elaboration would take us far beyond the scope of the present essay. In its defense, however, it is worth noting that our common notion of moral desert seems to include (at least) two elements: (1) a conception of individual responsibility for actions that is "contagious," that is, one which confers moral justification on the punishing (or rewarding) reactions of others; and (2) a measure of the relevant worth of actions that determines the legitimate magnitude of justified reactions. Broadly speaking, the "Kantian" notion of authorization implicit in rational action supplies the first element, and the "Hegelian" notion of upsetting and restoring equality of standing supplies the second. It seems, then, reasonable to take the equality and rationality of persons as implying moral desert in the way asserted in the retributivist principle. I shall assume henceforth that the retributivist principle is true.

The truth of the retributivist principle establishes the justice of the *lex talionis*, but, since it establishes this as a right of the victim rather than a duty, it does not settle the question of whether or to what extent the victim or the state should exercise this right and exact the *lex talionis*. This is a separate moral question because strict adherence to the *lex talionis* amounts to allowing criminals, even the most barbaric of them, to dictate our punishing behavior. It seems certain that there are at least some crimes, such as rape or torture, that we ought not try to match. And this is not merely a matter of imposing an alternative punishment that produces an equivalent amount of suffering, as, say, some number of years in prison that might "add up" to the harm caused by a rapist or a torturer. Even if no amount of time in prison would add up to the harm caused by a torturer, it still seems that we ought not torture him even if this were the only way of making him suffer as much as he has made his victim suffer. Or, consider someone who has committed several murders in cold blood. On the *lex talionis*, it would seem that such a criminal might justly be brought to within an inch of death and then revived (or to within a moment of execution and then reprieved) as many times as

he has killed (minus one), and then finally executed. But surely this is a degree of cruelty that would be monstrous.[17]

Since the retributivist principle establishes the *lex talionis* as the victim's right, it might seem that the question of how far this right should be exercised is "up to the victim." And indeed, this would be the case in the state of nature. But once, for all the good reasons familiar to readers of John Locke, the state comes into existence, public punishment replaces private, and the victim's right to punish reposes in the state. With this, the decision as to how far to exercise this right goes to the state as well. To be sure, since (at least with respect to retributive punishment) the victim's right is the source of the state's right to punish, the state must exercise its right in ways that are faithful to the victim's right. Later, when I try to spell out the upper and lower limits of just punishment, these may be taken as indicating the range within which the state can punish and remain faithful to the victim's right.

I suspect that it will be widely agreed that the state ought not administer punishments of the sort described above even if required by the letter of the *lex talionis*, and thus, even granting the justice of *lex talionis*, there are occasions on which it is morally appropriate to diverge from its requirements. We must, of course, distinguish such morally based divergence from that which is based on practicality. Like any moral principle, the *lex talionis* is subject to "ought implies can." It will usually be impossible to do to an offender exactly what he has done—for example, his offense will normally have had an element of surprise that is not possible for a judicially imposed punishment, but this fact can hardly free him from having to bear the suffering he has imposed on another. Thus, for reasons of practicality, the *lex talionis* must necessarily be qualified to call for doing to the offender *as nearly as possible* what he has done to his victim. When, however, we refrain from raping rapists or torturing torturers, we do so for reasons of morality, not of practicality. And, given the justice of the *lex talionis*, these moral reasons cannot amount to claiming that it would be *unjust* to rape rapists or torture torturers. Rather

17. Bedau writes: "Where criminals set the limits of just methods of punishment, as they will do if we attempt to give exact and literal implementation to *lex talionis*, society will find itself descending to the cruelties and savagery that criminals employ. But society would be deliberately authorizing such acts, in the cool light of reason, and not (as is often true of vicious criminals) impulsively or in hatred and anger or with an insane or unbalanced mind. Moral restraints, in short, prohibit us from trying to make executions perfectly retributive" (Bedau, "Capital Punishment," p. 176).

the claim must be that, even though it would be just to rape rapists and torture torturers, other moral considerations weigh against doing so.

On the other hand, when, for moral reasons, we refrain from exacting the *lex talionis*, and impose a less harsh alternative punishment, it may be said that we are not doing full justice to the criminal, but it cannot automatically be the case that we are doing an *injustice* to his victim. Otherwise we would have to say it was unjust to imprison our torturer rather than torturing him or to simply execute our multiple murderer rather than multiply "executing" him. Surely it is counterintuitive (and irrational to boot) to set the demands of justice so high that a society would have to choose between being barbaric or being unjust. This would effectively price justice out of the moral market.

The implication of this is that there is a range of just punishments that includes some that are just though they exact less than the full measure of the *lex talionis*. What are the top and bottom ends of this range? I think that both are indicated by the *retributivist principle*. The principle identifies the *lex talionis* as the offender's desert and since, on retributive grounds, punishment beyond what one deserves is unjust for the same reasons that make punishment of the innocent unjust, the *lex talionis* is the upper limit of the range of just punishments. On the other hand, if the retributivist principle is true, then denying that the offender deserves suffering equal to that which he imposed amounts to denying the equality and rationality of persons. From this it follows that we fall below the bottom end of the range of just punishments when we act in ways that are incompatible with the *lex talionis* at the top end. That is, we fall below the bottom end and commit an injustice to the victim when we treat the offender in a way that is no longer compatible with sincerely believing that he deserves to have done to him what he has done to his victim. Thus, the upper limit of the range of just punishments is the point after which more punishment is unjust to the offender, and the lower limit is the point after which less punishment is unjust to the victim. In this way, the range of just punishments remains faithful to the victim's right which is their source.

This way of understanding just punishment enables us to formulate proportional retributivism so that it is compatible with acknowledging the justice of the *lex talionis*: If we take the *lex talionis* as spelling out the offender's just deserts, and if other moral considerations require us to refrain from matching the injury caused by the offender while still

allowing us to punish justly, then surely we impose just punishment if we impose the closest morally acceptable approximation to the *lex talionis*. Proportional retributivism, then, in requiring that the worst crime be punished by the society's worst punishment and so on, could be understood as translating the offender's just desert into its nearest equivalent in the society's table of morally acceptable punishments. Then the two versions of retributivism (*lex talionis* and proportional) are related in that the first states what just punishment would be if nothing but the offender's just desert mattered, and the second locates just punishment at the meeting point of the offender's just deserts and the society's moral scruples. And since this second version only modifies the requirements of the *lex talionis* in light of other moral considerations, it is compatible with believing that the *lex talionis* spells out the offender's just deserts, much in the way that modifying the obligations of promisers in light of other moral considerations is compatible with believing in the binding nature of promises.

Proportional retributivism so formulated preserves the point of retributivism and remains faithful to the victim's right which is its source. Since it punishes with the closest morally acceptable approximation to the *lex talionis*, it effectively says to the offender, you deserve the equivalent of what you did to your victim and you are getting less only to the degree that *our* moral scruples limit us from duplicating what you have done. Such punishment, then, affirms the equality of persons by respecting *as far as is morally permissible* the victim's right to impose suffering on the offender equal to what he received, and it affirms the rationality of the offender by treating him as authorizing others to do to him what he has done though they take him up on it only *as far as is morally permissible*. Needless to say, the alternative punishments must in some convincing way be comparable in gravity to the crimes which they punish, or else they will trivialize the harms those crimes caused and be no longer compatible with sincerely believing that the offender deserves to have done to him what he has done to his victim and no longer capable of impressing upon the criminal his equality with the victim. If we punish rapists with a small fine or a brief prison term, we do an injustice to their victims, because this trivializes the suffering rapists have caused and thus is incompatible with believing that they deserve to have done to them something comparable to what they have done to their victims. If, on the other hand, instead of raping rapists we impose on them some

grave penalty, say a substantial term of imprisonment, then we do no injustice even though we refrain from exacting the *lex talionis*.

To sum up, I take the *lex talionis* to be the top end of the range of just punishments. When, because we are simply unable to duplicate the criminal's offense, we modify the *lex talionis* to call for imposing on the offender as nearly as possible what he has done, we are still at this top end, applying the *lex talionis* subject to "ought implies can." When we do less than this, we still act justly as long as we punish in a way that is compatible with sincerely believing that the offender deserves the full measure of the *lex talionis*, but receives less for reasons that do not undermine this belief. If this is true, then it is not unjust to spare murderers as long as they can be punished in some other suitably grave way. I leave open the question of what such an alternative punishment might be, except to say that it need not be limited to such penalties as are currently imposed. For example, though rarely carried out in practice, a life sentence with no chance of parole might be a civilized equivalent of the death penalty—after all, people sentenced to life imprisonment have traditionally been regarded as "civilly dead."[18]

It might be objected that no punishment short of death will serve the point of retributivism with respect to murderers because no punishment short of death is commensurate with the crime of murder since, while some number of years of imprisonment may add up to the amount of harm done by rapists or assaulters or torturers, no number of years will add up to the harm done to the victim of murder. But justified divergence from the *lex talionis* is not limited only to changing the form of punishment while maintaining equivalent severity. Otherwise, we would have to torture torturers rather than imprison them if they tortured more than could be made up for by years in prison (or by the years available to them to spend in prison, which might be few for elderly torturers), and we would have to subject multiple murderers to multiple "executions." If justice allows us to refrain from these penalties, then justice allows punishments that are not equal in suffering to their crimes. It seems to me that if the objector grants this much, then he must show that a punish-

18. I am indebted to my colleague Robert Johnson for this suggestion, which he has attempted to develop in "A Life for a Life?" (unpub. ms.). He writes that prisoners condemned to spend their entire lives in prison "would suffer a civil death, the death of freedom. The prison would be their cemetery, a 6′ by 9′ cell their tomb. Their freedom would be interred in the name of justice. They would be consigned to mark the passage of their lives in the prison's peculiar dead time, which serves no purpose and confers no rewards. In effect, they would give their civil lives in return for the natural lives they have taken."

ment less than death is not merely incommensurate to the harm caused by murder, but so far out of proportion to that harm that it trivializes it and thus effectively denies the equality and rationality of persons. Now, I am vulnerable to the claim that a sentence of life in prison that allows parole after eight or ten years does indeed trivialize the harm of (premeditated, coldblooded) murder. But I cannot see how a sentence that would require a murderer to spend his full natural life in prison, or even the lion's share of his adult life (say, the thirty years between age twenty and age fifty), can be regarded as anything less than extremely severe and thus no trivialization of the harm he has caused.

I take it then that the justice of the *lex talionis* implies that it is just to execute murderers, but not that it is unjust to spare them as long as they are systematically punished in some other suitably grave way. Before developing the implications of this claim, a word about the implied preconditions of applying the *lex talionis* is in order.

Since this principle calls for imposing on offenders the harms they are responsible for imposing on others, the implied preconditions of applying it to any particular harm include the requirement that the harm be one that the offender is fully responsible for, where responsibility is both psychological, the capacity to tell the difference between right and wrong and control one's actions, and social. If people are subjected to remediable unjust social circumstances beyond their control, and if harmful actions are a predictable response to those conditions, then those who benefit from the unjust conditions and refuse to remedy them share responsibility for the harmful acts—and thus neither their doing nor their cost can be assigned fully to the offenders alone. For example, if a slave kills an innocent person while making his escape, at least part of the blame for the killing must fall on those who have enslaved him. And this is because slavery is unjust, not merely because the desire to escape from slavery is understandable. The desire to escape from prison is understandable as well, but if the imprisonment were a just sentence, then we would hold the prisoner, and not his keepers, responsible if he killed someone while escaping.

Since I believe that the vast majority of murders in America are a predictable response to the frustrations and disabilities of impoverished social circumstances,[19] and since I believe that that impoverishment is

19. "In the case of homicide, the empirical evidence indicates that poverty and poor economic conditions are systematically related to higher levels of homicide" (Richard M. McGahey, "Dr. Ehrlich's Magic Bullet: Economic Theory, Econometrics, and the Death

a remediable injustice from which others in America benefit, I believe that we have no right to exact the full cost of murders from our murderers until we have done everything possible to rectify the conditions that produce their crimes.[20] But these are the "Reagan years," and not many—who are not already susceptible—will be persuaded by this sort of argument.[21] This does not, in my view, shake its validity; but I want to

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Penalty," *Crime & Delinquency* 26, no. 4 [October 1980]:502). Some of that evidence can be found in Peter Passell, "The Deterrent Effect of the Death Penalty: A Statistical Test," *Stanford Law Review* (November 1975):61–80.

20. A similar though not identical point has been made by Jeffrie G. Murphy. He writes "I believe that retributivism can be formulated in such a way that it is the only morally defensible theory of punishment. I also believe that arguments, which may be regarded as Marxist at least in spirit, can be formulated which show that social conditions as they obtain in most societies make this form of retributivism largely inapplicable within those societies" (Murphy, "Marxism and Retribution," p. 221). Though my claim here is similar to Murphy's, the route by which I arrive at it differs from his in several ways. Most important, a key point of Murphy's argument is that retributivism assumes that the criminal freely chooses his crime while, according to Murphy, criminals act on the basis of psychological traits that the society has conditioned them to have: "Is it just to punish people who act out of those very motives that society encourages and reinforces? If [Willem] Bonger [a Dutch Marxist criminologist] is correct, much criminality is motivated by greed, selfishness, and indifference to one's fellows; but does not the whole society encourage motives of greed and selfishness ('making it,' 'getting ahead'), and does not the competitive nature of the society alienate men from each other and thereby encourage indifference—even, perhaps, what psychiatrists call psychopathy?" (ibid., p. 239). This argument assumes that the criminal is in some sense unable to conform to legal and moral prohibitions against violence, and thus, like the insane, cannot be thought responsible for his actions. This claim is rather extreme, and dubious as a result. My argument does not claim that criminals, murderers in particular, cannot control their actions. I claim rather that, though criminals can control their actions, when crimes are predictable responses to unjust circumstances, then those who benefit from and do not remedy those conditions bear some responsibility for the crimes and thus the criminals cannot be held *wholly* responsible for them in the sense of being legitimately required to pay their full cost. It should be noted that Murphy's thesis (quoted at the beginning of this note) is stated in a somewhat confused way. Social conditions that mitigate or eliminate the guilt of offenders do not make retributivism *inapplicable*. Retributivism is applied both when those who are guilty because they freely chose their crimes are punished *and* when it is held wrong to punish those who are not guilty because they did not freely choose their crimes. It is precisely by the application of retributivism that the social conditions referred to by Murphy make the punishment of criminals unjustifiable.

21. Van den Haag notes the connection between crime and poverty, and explains it and its implications as follows: "Poverty," he holds, "does not compel crime; it only makes it more tempting" (p. 207). And it is not absolute poverty that does this, only relative deprivation, the fact that some have less than others (p. 115). In support of this, he marshals data showing that, over the years, crime has risen along with the standard of living at the bottom of society. Since, unlike absolute deprivation, relative deprivation will be with us

make an argument whose appeal is not limited to those who think that crime is the result of social injustice.[22] I shall proceed then, granting not only the justice of the death penalty, but also, at least temporarily, the assumption that our murderers are wholly deserving of dying for their crimes. If I can show that it would still be wrong to execute murderers,

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no matter how rich we all become as long as some have more than others, he concludes that this condition which increases the temptation to crime is just an ineradicable fact of social life, best dealt with by giving people strong incentives to resist the temptation. This argument is flawed in several ways. First, the claim that crime is connected with poverty ought not be simplistically interpreted to mean that a low absolute standard of living itself causes crime. Rather, what seems to be linked to crime is the general breakdown of stable communities, institutions and families, such as has occurred in our cities in recent decades as a result of economic and demographic trends largely out of individuals' control. Of this breakdown, poverty is today a sign and a cause, at least in the sense that poverty leaves people with few defenses against it and few avenues of escape from it. This claim is quite compatible with finding that people with lower absolute standards of living, but who dwell in more stable social surroundings with traditional institutions still intact, have lower crime rates than contemporary poor people who have higher absolute standards of living. Second, the implication of this is not simply that it is relative deprivation that tempts to crime, since if that were the case, the middle class would be stealing as much from the rich as the poor do from the middle class. That this is not the case suggests that there is some threshold after which crime is no longer so tempting, and while this threshold changes historically, it is in principle one all could reach. Thus, it is not merely the (supposedly ineradicable) fact of having less than others that tempts to crime. Finally, everything is altered if the temptation to crime is not the result of an ineradicable social fact, but of an injustice that can be remedied or relieved. Obviously, this would require considerable argument, but it seems to me that the current distribution of wealth in America is unjust whether one takes utilitarianism as one's theory of justice (given the relative numbers of rich and poor in America as well as the principle of declining marginal returns, redistribution could make the poor happier without an offsetting loss in happiness among the rich) or Rawls's theory (the worst-off shares in our society could still be increased, so the difference principle is not yet satisfied) or Nozick's theory (since the original acquisition of property in America was marked by the use of force against Indians and blacks, from which both groups still suffer).

22. In arguing that social injustice disqualifies us from applying the death penalty, I am arguing that unjust discrimination in the *recruitment* of murderers undermines the justice of applying the penalty under foreseeable conditions in the United States. This is distinct from the argument that points to the discriminatory way in which it has been *applied* to murderers (generally against blacks, particularly when their victims are white). This latter argument is by no means unimportant, nor do I believe that it has been rendered obsolete by the Supreme Court's 1972 decision in *Furman v. Georgia* that struck down then-existing death penalty statutes because they allowed discriminatory application, or the Court's 1976 decision in *Gregg v. Georgia*, which approved several new statutes because they supposedly remedied this problem. There is considerable empirical evidence that much the same pattern of discrimination that led to *Furman* continues after *Gregg*. See for example, William J. Bowers and Glenn L. Pierce, "Arbitrariness and Discrimination in Post-*Furman* Capital

I believe I shall have made the strongest case for abolishing the death penalty.

III. Civilization, Pain, and Justice

As I have already suggested, from the fact that something is justly deserved, it does not automatically follow that it should be done, since there may be other moral reasons for not doing it such that, all told, the weight of moral reasons swings the balance against proceeding. The same argument that I have given for the justice of the death penalty for murderers proves the justice of beating assaulters, raping rapists, and torturing torturers. Nonetheless, I believe, and suspect that most would agree, that it would not be right for us to beat assaulters, rape rapists, or torture

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Statutes," *Crime & Delinquency* 26, no. 4 (October 1980):563–635. Moreover, I believe that continued evidence of such discrimination would constitute a separate and powerful argument for abolition. Faced with such evidence, van den Haag's strategy is to grant that discrimination is wrong, but claim that it is not "inherent in the death penalty"; it is a characteristic of "its distribution" (p. 206). Thus discrimination is not an objection to the death penalty itself. This rejoinder is unsatisfactory for several reasons. First of all, even if discrimination is not an objection to the death penalty *per se*, its foreseeable persistence is—as the Court recognized in *Furman*—an objection to instituting the death penalty *as a policy*. Moral assessment of the way in which a penalty will be carried out may be distinct from moral assessment of the penalty itself, but, since the way in which the penalty will be carried out is part of what we will be bringing about if we institute the penalty, it is a necessary consideration in any assessment of the morality of instituting the penalty. In short, van den Haag's strategy saves the death penalty in principle, but fails to save it in practice. Second, it may well be that discrimination is (as a matter of social and psychological fact in America) inherent in the penalty of death itself. The evidence of its persistence after *Furman* lends substance to the suspicion that something about the death penalty—perhaps the very terribleness of it that recommends it to van den Haag—strikes at deep-seated racial prejudices in a way that milder penalties do not. In any event, this is an empirical matter, not resolved by analytic distinctions between what is distributed and how it is distributed. Finally, after he mounts his argument against the discrimination objection, van den Haag usually adds that those who oppose capital punishment "because of discriminatory application are not quite serious . . . , [since] they usually will confess, if pressed, that they would continue their opposition even if there were no discrimination whatsoever in the administration of the death penalty" (p. 225). This is preposterous. It assumes that a person can only have one serious objection to any policy. If he had several, then he would naturally continue to oppose the policy *quite seriously* even though all his objections but one were eliminated. In addition to discrimination in the *recruitment* of murderers, and in the *application* of the death penalty among murderers, there is a third sort that affects the justice of instituting the penalty, namely, discrimination in the *legal definition* of murder. I take this and related issues up in *The Rich Get Richer and the Poor Get Prison: Ideology, Class, and Criminal Justice*, 2nd ed. (New York: John Wiley, 1984).

torturers, *even though it were their just deserts*—and even if this were the only way to make them suffer as much as they had made their victims suffer. Calling for the abolition of the death penalty, though it be just, then, amounts to urging that as a society we 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; and 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 evidently, 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?

I think the answer to this lies in what we understand as civilization. In *The Genealogy of Morals*, Nietzsche says that in early times "pain did not hurt as much as it does today."[23] The truth in this puzzling 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 emphathize.[24] If civilization is characterized by lower tolerance

23. Friedrich Nietzsche, *The Birth of Tragedy and The Genealogy of Morals* (New York: Doubleday, 1956), pp. 199–200.

24. Van den Haag writes that our ancestors "were not as repulsed by physical pain as we are. The change has to do not with our greater smartness or moral superiority but with a new outlook pioneered by the French and American revolutions [namely, the assertion of human equality and with it 'universal identification'], and by such mundane things as the invention of anesthetics, which make pain much less of an everyday experience" (p. 215; cf. van den Haag's *Punishing Criminals* [New York: Basic Books, 1975], pp. 196–206).

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.* And 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 things we are able to include in this category, the more civilized we are and the more civiliz*ing*. Thus we gain from including torture in this category, and if execution is especially horrible, we gain still more by including it.

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 shall assume 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.

This claim broadly corresponds to 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 as:

> *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:

> *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.*[25]

Several things should be noted about these laws. First of all, they are not two separate laws. As Durkheim understands them, the second exem-

25. Emile Durkheim, "Two Laws of Penal Evolution," *Economy and Society* 2 (1973):285 and 294; italics in the original. This essay was originally published in French in *Année Sociologique* 4 (1899–1900). Conrad, incidentally, quotes Durkheim's two laws (p. 39), but does not develop their implications for his side in the debate.

plifies the trend toward moderation of punishment referred to in the first.[26] Second, the first law really refers to two distinct trends, which usually coincide but do not always. That is, 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.[27] 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. Moreover, I shall close this article with a suggestion about the relation between the intensity of punishment and the justice of society, which might broadly be thought of as corresponding to the second trend in Durkheim's first law. Finally, and most important for our purposes, is the fact that 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 in turn supports my claim that the reduction in the horrible things we do to our fellows is in fact part of the advance of civilization.[28]

Against this it might be argued that many things grow in history, some

26. Durkheim writes that "of the two laws which we have established, the first contributes to an explanation of the second" (Durkheim, "Two Laws of Penal Evolution," p. 299).

27. The "two causes of the evolution of punishment—the nature of the social type and of the governmental organ—must be carefully distinguished" (ibid., p. 288). Durkheim cites the ancient Hebrews as an example of a society of the less developed type that had milder punishments than societies of the same social type due to the relative absence of absolutist government among the Hebrews (ibid., p. 290).

28. Durkheim's own explanation of the progressive moderation of punishments is somewhat unclear. He rejects the notion that it is due to the growth in sympathy for one's fellows since this, he maintains, would make us more sympathetic with victims and thus harsher in punishments. He argues instead that the trend is due to the shift from understanding crimes as offenses against God (and thus warranting the most terrible of punishments) to understanding them as offenses against men (thus warranting milder punishments). He then seems to come round nearly full circle by maintaining that this shift works to moderate punishments by weakening the religious sentiments that overwhelmed sympathy for the condemned: "The true reason is that the compassion of which the condemned man is the object is no longer overwhelmed by the contrary sentiments which would not let it make itself felt" (ibid., p. 303).

good, some bad, and some mixed, and thus the fact that there is some historical trend is not a sufficient reason to continue it. Thus, for example, history also brings 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 grows in history, but that its growth is, on some independent 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 which 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 only called upon to further these trends 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, it 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 vulnerability to pain, it seems clearly a gain. Is it however an unmitigated gain? That is, 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. Let us leave aside the former, since, as I have already suggested and as I will soon indicate in greater detail, I accept that if some horrible punishment is necessary to deter equally or more horrible acts, then we may have to impose the punishment. 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, for the moment, 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?

It seems to me that the answer to this must be that refraining to do what is justly deserved is only a loss 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. In short, I take it that if there is no injustice in refraining from torturing torturers, then there is no injustice in refraining to do horrible things to our fellows generally, when they deserve them, as long as what we do instead is compatible with believing that they do deserve them. And thus that 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 not necessary to our protection, is an advance in civilization that we are called upon to continue once we consciously take upon ourselves the work of civilization.

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 us.[29] 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

29. Van den Haag seems to waffle on the question of the unique awfulness of execution. For instance, he takes it not to be revolting in the way that earcropping is, because "We all must die. But we must not have our ears cropped" (p. 190), and here he cites John Stuart Mill's parliamentary defense of the death penalty in which Mill maintains that execution only *hastens* death. Mill's point was to defend the claim that "There is not . . . any human infliction which makes an impression on the imagination so entirely out of proportion to its real severity as the punishment of death" (Mill, "Parliamentary Debate," p. 273). And van den Haag seems to agree since he maintains that, since "we cannot imagine our own nonexistence . . . , [t]he fear of the death penalty is in part the fear of the unknown. It . . . rests on a confusion" (pp. 258–59). On the other hand, he writes that "Execution sharpens our separation anxiety because death becomes clearly foreseen. . . . Further, and perhaps most important, when one is executed he does not just die, he is put to death, forcibly expelled from life. He is told that he is too depraved, unworthy of living with other humans" (p. 258). I think, incidentally, that it is an overstatement to say that we cannot imagine our own nonexistence. If we can imagine any counterfactual experience, for example, how we might feel if we didn't know something that we do in fact know, then it doesn't seem impossible to imagine what it would "feel like" not to live. I think I can arrive at a pretty good approximation of this by trying to imagine how things "felt" to me in the eighteenth century. And, in fact, the sense of the awful difference between being alive and not that enters my experience when I do this, makes the fear of death—not as a state, but as the absence of life—seem hardly to rest on a confusion.

spectacle of one human 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).[30] Execution shares this separate feature, since killing a bound and defenseless human being enacts the total subjugation of that person to his fellows. I think, incidentally, that this accounts for the general uneasiness with which execution by lethal injection has been greeted. Rather than humanizing the event, it seems only to have purchased a possible reduction in physical pain at the price of increasing the spectacle of subjugation—with no net gain in the attractiveness of the death penalty. Indeed, its net effect may have been the reverse.

In addition to the spectacle of subjugation, execution, even by physically painless means, is also characterized 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, 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 deaths. 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.[31] As a humanly caused death whose advent is foreseen by its victim, an execution combines the worst of both.

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

30. I am not here endorsing this view of voluntarily entered slavery or prostitution. I mean only to suggest that it is *the belief* that these relations involve the extreme subjugation of one person to the power of another that is at the basis of their offensiveness. What I am saying is quite compatible with finding that this belief is false with respect to voluntarily entered slavery or prostitution.

31. This is no doubt partly due to modern skepticism about an afterlife. Earlier peoples regarded a foreseen death as a blessing allowing time to make one's peace with God. Writing of the early Middle Ages, Phillippe Aries says, "In this world that was so familiar with death, sudden death was a vile and ugly death; it was frightening; it seemed a strange and monstrous thing that nobody dared talk about" (Phillippe Aries, *The Hour of Our Death* [New York: Vintage, 1982], p. 11).

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 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 hardheartedness that a society ought not parade.

And 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."[32] 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 modern world. And it is corporal not only because administered via the body, but because the pain of foreseen, humanly administered death strikes us with the urgency that characterizes intense physical pain, causing grown men 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, we broadcast 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

32. George Orwell, *1984* (New York: New American Library, 1983; originally published in 1949), p. 197.

too horrible to be capable of doing. And I contend that 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. Thus, I take it that the abolition of the death penalty, though it is a just punishment for murder, is part of the civilizing mission of modern states.

IV. Civilization, Safety, and Deterrence

Earlier I said that judging a practice too horrible to do even to those who deserve it does not exclude the possibility that it could be justified if necessary to avoid even worse consequences. Thus, were the death penalty clearly proven a better deterrent to the murder of innocent people than life in prison, we might have to admit that we had not yet reached a level of civilization at which we could protect ourselves without imposing this horrible fate on murderers, and thus we might have to grant the necessity of instituting the death penalty.[33] But this is far from proven. The available research by no means clearly indicates that the death penalty reduces the incidence of homicide more than life imprisonment does. Even the econometric studies of Isaac Ehrlich, which purport to show that each execution saves seven or eight potential murder victims, have not changed this fact, as is testified to by the controversy and objections from equally respected statisticians that Ehrlich's work has provoked.[34]

33. I say "might" here to avoid the sticky question of just how effective a deterrent the death penalty would have to be to justify overcoming our scruples about executing. It is here that the other considerations often urged against capital punishment—discrimination, irrevocability, the possibility of mistake, and so on—would play a role. Omitting such qualifications, however, my position might crudely be stated as follows: *Just desert limits what a civilized society may do to deter crime, and deterrence limits what a civilized society may do to give criminals their just deserts.*

34. Isaac Ehrlich, "The Deterrent Effect of Capital Punishment: A Question of Life or Death," *American Economic Review* 65 (June 1975):397–417. For reactions to Ehrlich's work, see Alfred Blumstein, Jacqueline Cohen, and Daniel Nagin, eds., *Deterrence and Incapacitation: Estimating the Effects of Criminal Sanctions on Crime Rates* (Washington, D.C.: National Academy of Sciences, 1978), esp. pp. 59–63 and 336–60; Brian E. Forst, "The Deterrent Effect on Capital Punishment: A Cross-State Analysis," *Minnesota Law Review* 61 (May 1977):743–67, Deryck Beyleveld, "Ehrlich's Analysis of Deterrence," *British Journal of Criminology* 22 (April 1982):101–23, and Isaac Ehrlich, "On Positive Methodology, Ethics and Polemics in Deterrence Research," *British Journal of Criminology* 22

Conceding that it has not been proven that the death penalty deters more murders than life imprisonment, van den Haag has argued that neither has it been proven that the death penalty does *not* deter more murders,[35] and thus we must follow common sense which teaches that the higher the cost of something, the fewer people will choose it, and therefore at least some potential murderers who would not be deterred by life imprisonment will be deterred by the death penalty. Van den Haag writes:

> . . . our 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

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(April 1982):124–39. Much of the criticism of Ehrlich's work focuses on the fact that he found a deterrence impact of executions in the period from 1933–1969, which includes the period of 1963–1969, a time when hardly any executions were carried out and crime rates rose for reasons that are arguably independent of the existence or nonexistence of capital punishment. When the 1963–1969 period is excluded, no significant deterrent effect shows. Prior to Ehrlich's work, research on the comparative deterrent impact of the death penalty versus life imprisonment indicated no increase in the incidence of homicide in states that abolished the death penalty and no greater incidence of homicide in states without the death penalty compared to similar states with the death penalty. See Thorsten Sellin, *The Death Penalty* (Philadelphia: American Law Institute, 1959).

35. Van den Haag writes: "Other studies published since Ehrlich's contend that his results are due to the techniques and periods he selected, and that different techniques and periods yield different results. Despite a great deal of research on all sides, one cannot say that the statistical evidence is conclusive. Nobody has claimed to have *disproved* that the death penalty may deter more than life imprisonment. But one cannot claim, either, that it has been proved statistically in a conclusive manner that the death penalty does deter more than alternative penalties. This lack of proof does not amount to disproof" (p. 65).

> follows that whatever statistics fail, or do not fail, to show, the death penalty is likely to be more deterrent than any other. [Pp. 68–69][36]

Those of us who recognize how common-sensical it was, and still is, to believe that the sun moves around the earth, will be less willing than Professor 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 four:

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, unless 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. Though I fear the death penalty more than life in prison, I can't think of any act that the death penalty would deter me from that an equal likelihood of spending my life in prison wouldn't deter me from as well.[37] Since it seems to me that whoever

36. An alternative formulation of this "common-sense argument" is put forth and defended by Michael Davis in "Death, Deterrence, and the Method of Common Sense," *Social Theory and Practice* 7, no. 2 (Summer 1981):145–77. Davis's argument is like van den Haag's except that, where van den Haag claims that people *do* fear the death penalty more than lesser penalties and *are* deterred by what they fear most, Davis claims that it is *rational* to fear the death penalty more than lesser penalties and thus *rational* to be more deterred by it. Thus, he concludes that the death penalty is the most effective deterrent *for rational people*. He admits that this argument is "about rational agents, not actual people" (ibid., p. 157). To bring it back to the actual criminal justice system that deals with actual people, Davis claims that the criminal law makes no sense unless we suppose the potential criminal to be (more or less) rational" (ibid., p. 153). In short, the death penalty is the most effective deterrent because it would be rational to be most effectively deterred by it, and we are committed by belief in the criminal law to supposing that people will do what is rational. The problem with this strategy is that a deterrence justification of a punishment is valid only if it proves that the punishment actually deters actual people from committing crimes. If it doesn't prove that, it misses its mark, no matter what we are committed to supposing. Unless Davis's argument is a way of proving that the actual people governed by the criminal law will be more effectively deterred by the death penalty than by lesser penalties, it is irrelevant to the task at hand. And if it is a way of proving that actual people will be better deterred, then it is indistinguishable from van den Haag's version of the argument and vulnerable to the criticisms of it which follow.

37. David A. Conway writes: "given the choice, I would strongly prefer one thousand years in hell to eternity there. Nonetheless, if one thousand years in hell were the penalty for some action, it would be quite sufficient to deter me from performing that action. The additional years would do nothing to discourage me further. Similarly, the prospect of the death penalty, while worse, may not have any greater deterrent effect than does that of life imprisonment" (David A. Conway, "Capital Punishment and Deterrence: Some Considerations in Dialogue Form," *Philosophy & Public Affairs* 3, no. 4 [Summer 1974]:433).

would be deterred by a given likelihood of death would be deterred by an *equal* likelihood of life behind bars, I suspect that the common-sense argument only seems plausible because we evaluate it 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 was 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 this is just what most of the research we have on the comparative deterrent impact of execution versus life imprisonment suggests.

2. In light of the fact that roughly 500 to 700 suspected felons are killed by the police in the line of duty every year, and the fact that the number of privately owned guns in America is substantially larger than the number of households in America, it must be granted that anyone contemplating committing a crime *already* faces a substantial risk of ending up dead as a result.[38] 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. Indeed, this suggests that people consider risks in a much cruder way than van den Haag's appeal to common sense suggests—which should be evident to anyone who contemplates how few people use seatbelts (14% of drivers, on some estimates), when it is widely known that wearing them can spell the difference between life (outside prison) and death.[39]

3. Van den Haag has maintained that deterrence doesn't work only by means of cost-benefit calculations made by potential criminals. It works also by the lesson about the wrongfulness of murder that is slowly learned in a society that subjects murderers to the ultimate punishment (p. 63). But if 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

38. On the number of people killed by the police, see Lawrence W. Sherman and Robert H. Langworthy, "Measuring Homicide by Police Officers," *Journal of Criminal Law and Criminology* 70, no. 4 (Winter 1979):546–60; on the number of privately owned guns, see Franklin Zimring, *Firearms and Violence in American Life* (Washington, D.C.: U.S. Government Printing Office, 1968), pp. 6–7.

39. *AAA World* (Potomac ed.) 4, no. 3 (May–June 1984), pp. 18c and 18i.

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 common-sense 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.[40] And 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. 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.[41]

40. A related claim has been made by those who defend the so-called brutalization hypothesis by presenting evidence to show that murders *increase* following an execution. See, for example, William J. Bowers and Glenn L. Pierce, "Deterrence or Brutalization: What is the Effect of Executions?" *Crime & Delinquency* 26, no. 4 (October 1980):453–84. They conclude that each execution gives rise to two additional homicides in the month following, and that these are real additions, not just a change in timing of the homicides (ibid., p. 481). My claim, it should be noted, is not identical to this, since, as I indicate in the text, what I call "the deterrence effect of not executing" is not something whose impact is to be seen immediately following executions but over the long haul, and, further, my claim is compatible with finding no net increase in murders due to executions. Nonetheless, should the brutalization hypothesis be borne out by further studies, it would certainly lend support to the notion that there is a deterrent effect of not executing.

41. Van den Haag writes: "If we were quite ignorant about the marginal deterrent effects of execution, we would have to choose—like it or not—between the certainty of the convicted murderer's death by execution and the likelihood of the survival of future victims of other murderers on the one hand, and on the other his certain survival and the likelihood of the death of new victims. I'd rather execute a man convicted of having murdered others than put the lives of innocents at risk. I find it hard to understand the opposite choice" (p. 69). Conway was able to counter this argument earlier by pointing out that the research on the marginal deterrent effects of execution was not *inconclusive* in the sense of *tending to point both ways*, but rather in the sense of *giving us no reason to believe that capital punishment saves more lives than life imprisonment.* He could then answer van den Haag by saying that the choice is not between risking the lives of murderers and risking the lives of innocents, but between killing a murderer with no reason to believe lives will be saved, and sparing a murderer with no reason to believe lives will be lost (Conway, "Capital Punishment and Deterrence," pp. 442–43). This, of course, makes the choice to spare the

4. Those who still think that van den Haag's common-sense argument for executing murderers is valid will find that the argument proves more than they bargained for. Van den Haag maintains that, in the absence of conclusive evidence on the relative deterrent impact of the death penalty versus life imprisonment, we must follow common sense and assume that if one punishment is more fearful than another, it will deter some potential criminals not deterred by the less fearful punishment. Since people sentenced to death will almost universally try to get their sentences changed to life in prison, it follows that death is more fearful than life imprisonment, and thus that it will deter some additional murderers. Consequently, we should institute the death penalty to save the lives these additional murderers would have taken. But, since people sentenced to be tortured to death would surely try to get their sentences changed to simple execution, the same argument proves that death-by-torture will deter still more potential murderers. Consequently, we should institute death-by-torture to save the lives these additional murderers would have taken. Anyone who accepts van den Haag's argument is then confronted with a dilemma: Until we have conclusive evidence that capital punishment is a greater deterrent to murder than life imprisonment, he must grant *either* that we should not follow common sense and not impose the death penalty; *or* we should follow common sense and torture murderers to death. In short, either we must abolish the electric chair or reinstitute the rack. Surely, this is the *reductio ad absurdum* of van den Haag's common-sense argument.

Conclusion: History, Force, and Justice

I believe that, taken together, these arguments prove that we should abolish the death penalty though it is a just punishment for murder. Let me close with an argument of a different sort. When you see the lash fall upon the backs of Roman slaves, or the hideous tortures meted out in the period of the absolute monarchs, you see more than mere cruelty at work. Surely you suspect that there is something about the injustice of imperial slavery and royal tyranny that requires the use of extreme

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murderer more understandable than van den Haag allows. Events, however, have overtaken Conway's argument. The advent of Ehrlich's research, contested though it may be, leaves us in fact with research that tends to point both ways.

force to keep these institutions in place. That is, for reasons undoubtedly related to those that support the second part of Durkheim's first law of penal evolution, we take the amount of force a society uses against its own people as an inverse measure of its justness. And though no more than a rough measure, it is a revealing one nonetheless, because when a society is limited in the degree of force it can use against its subjects, it is likely to have to be a juster society since it will have to gain its subjects' cooperation by offering them fairer terms than it would have to, if it could use more force. From this we cannot simply conclude that reducing the force used by our society will automatically make our society more just—but I think we can conclude that it will have this tendency, since it will require us to find means other than force for encouraging compliance with our institutions, and this is likely to require us to make those institutions as fair to all as possible. Thus I hope that America will pose itself the challenge of winning its citizens' cooperation by justice rather than force, and that when future historians look back on the twentieth century, they will find us with countries like France and England and Sweden that have abolished the death penalty, rather than with those like South Africa and the Soviet Union and Iran that have retained it—with all that this suggests about the countries involved.