

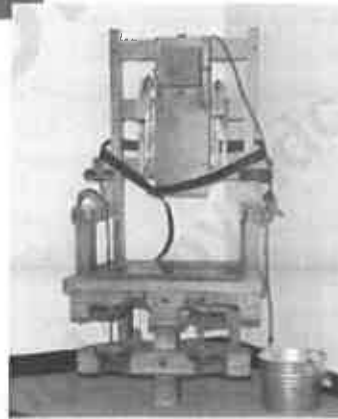
CHAPTER 9

THE DEATH PENALTY AND CAPITAL PUNISHMENT

LEARNING OBJECTIVES

After reading this chapter, you will be able to:

- 9.1 Evaluate the ethical issues involved in the death penalty.
- 9.2 Explain the different theories of punishment that could be used to support or oppose the death penalty, and articulate your own position.
- 9.3 Analyze Sister Helen Prejean's Aristotelian argument against the death penalty.



Electric chair "Old Sparky" used in electrocution of condemned prisoners.

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9.1 ETHICAL ANALYSIS OF THE DEATH PENALTY

The ethical analysis of capital punishment falls within the scope of the broader discussion of punishment by the state. Punishment is the deliberate limitation or revocation of rights and liberties by the government, and, as such, it must be justified. There are four contemporary theories for the justification of punishment by the state. **Capital punishment**—the

premeditated legal killing of a criminal by the state for his or her crimes—is certainly the greatest punishment the state can exact against any criminal. There are strong arguments on both sides of this issue. Some, harking to arguments from religion, argue that life is sacred and that only God or some higher authority has the right to take the life of a person. Others argue that capital punishment dehumanizes the criminal and society as a whole as we become insensitive to the importance of life. This last argument falls in the Aristotelian camp of virtue ethics: What kind of person would do this, what sort of country does this?

MORAL PHILOSOPHERS: ERNEST VAN DEN HAAG (1914–2002)

In 1937, Ernest van den Haag was nearly murdered by a political assassin who shot him five times. After this event, he spent almost three years in prison. He spent the majority of that time in solitary confinement. After being released, he drifted through various European countries in an effort to avoid the cronies of the Italian dictator Mussolini who were still attempting to assassinate him.

He eventually made his way to the United States—without knowing any English. He eventually managed to attend and graduate from University of Iowa. In 1942, van den Haag graduated with an MA in economics. Over the years, van den Haag took particular interest in the field of capital punishment and the death penalty. In his most famous book, *Punishing Criminals: Concerning a Very Old and Painful Question* (1975), he developed his theory in support of the death penalty.

Sister Helen Prejean—a Catholic nun perhaps best known for the book, play, opera, and film *Dead Man Walking*—forgoes the Catholic Church's usual antideath penalty position from a Divine Command or Natural Law argument, opting instead for a powerful Aristotelian argument in her article "Would Jesus pull the switch?" In other words, Sister Helen knows how to back this argument up with biblical references; the answer to "What would Jesus do?" is not likely to be "Torture and kill the guy." A virtuous person would not do that.

Some proponents of the death penalty argue that punishment requires taking an eye for an eye, and as such the murderer ought to have his or her life taken by the state. Some argue that certain crimes and criminals are so reprehensible that they do not deserve to breathe the air of the innocent and ought to have their life ended. This is the Kantian position on the death penalty.



DO YOU AGREE WITH THE DEATH PENALTY?

Are there certain crimes that demand that society kill the perpetrator? Or should we work toward reform and rehabilitation of criminals? You decide.

“Even if a civil society were to be dissolved by the consent of all its members (e.g., if a people inhabiting an island decided to separate and disperse throughout the world), the last murderer remaining in prison would first have to be executed, so that each has done to him what his deeds deserve and blood guilt does not cling to the people for not having insisted upon this punishment; for otherwise the people can be regarded as collaborators in his public violation of justice.”

Immanuel Kant,
The Metaphysics of Morals (1797)

9.2 THEORIES OF PUNISHMENT

Some theories of punishment related to the death penalty are worth noting.

Direct Retributive Theory, also known as *Lex Talionis* (from the Latin meaning an eye for an eye), falls into the category of direct retributivism; that is, a person committing a crime ought to be punished by having the same crime inflicted on them—literally, an eye for an eye. Although this sounds fair, it is not very practical. If a murder kills your father, is society to kill his father? Or is a rapist to be raped? It simply is not practical to employ this type of retributivism. **Proportional Retributive Theory**, a slight variation, claims that a person should

be punished in a way proportional to the crime he or she committed. Society is going to inflict pain and suffering to an equal degree on him or her. The rapist is not going to be raped, but he is going to suffer in an equal degree.

Forfeiture Theory states that although we have certain positive rights within society, when we violate laws and the rights of others, we forfeit our own rights. As such we must be punished for these violations, and the state has the right, obligation, and duty to see that we are punished. Immanuel Kant provides a good foundation for this theory and practice.

Deterrence Theory states that punishing criminals deters others from committing the same crimes. Punishment is justified only if it has a deterrent effect. If punishment did not deter future crimes, then there would be no reason to punish people. This is a utilitarian argument and, as such, easy to analyze. The United States in fact has more violent crime and murder per capita than any of its allies that do not have the death penalty, so clearly the claim of deterrence as a justification for the death penalty is wrong. Capital punishment has not been shown to diminish murder. Of course other facts may be at play here, including the ease with which a gun can be purchased in the United States compared to in Canada or any country in Europe. Still, there is no evidence for the deterrence theory.

Reform/Rehabilitation Theory claims that the goal of punishment is to reform criminals. If the punishment does not have such an effect, then it is not justified. Clearly, the death penalty does not reform the criminal; it simply kills the criminal.

MIXED THEORIES

It is possible to mix elements of the different theories and claim that together they justify punishment. The argument of unfairness is as clear as it is challenging: There are no rich people in death row, and the vast majority of executed criminals are black or Hispanic. Another major complicating element in recent decades has been the advent of DNA evidence. It turns out that as many as 5% of the criminals executed have been proved to be innocent and that percentage still applies to today's death-row inmates. One can always let an exonerated prisoner out of jail, with apologies for the time served, but one cannot let anyone out of a grave even if he or she has been proved innocent. That mistake can't be fixed.

THE PRACTICE OF CAPITAL PUNISHMENT

Capital punishment has a long history in Western society. Holy books, such as the Hebrew and Christian scriptures, although citing commandments such as “Thou shall not kill” (*Exodus* 20, 13), also have lesser-known rules (immediately following the commandments, in *Exodus* 21) such as “Anyone who curses his father or mother is to be put to death” (*Exodus* 21, 17).

The Spanish who first settled in the Americas meted out the death penalty as much as they had done in their own country. The most prominent among these was the burning at the stake of the Taíno Cacique Hatuey, a pioneer in the opposition to colonial powers in the New World. His execution was recorded by Friar Bartolomé de Las Casas and became the seed for a future argument against both slavery and the death penalty in the colonies: The first antislavery book, *A Just Defense of the Natural Freedom of Slaves* by Fr. Epifanio de Moirans, was written in Havana, Cuba, in 1682. It was discovered in the General Archive of the Indies and translated and edited as recently as 2007 by Prof. Edward Sunshine of Barry University.

We find the first recorded instance of capital punishment in the English colonies in 1608, a century after the arrival of the Spanish, the execution of Captain George Kendall at the Jamestown Colony. The use of the death penalty in the United States has ebbed and waned over centuries—currently a slim majority of Americans favor the death penalty, with Texas and Florida topping the list of states with the most executions to date. In the late 20th century, a number of Supreme Court cases established the current law regarding the death penalty in the United States. Most of its European allies as well as Canada no longer have the death penalty as an option for punishment and consider it barbaric.

In *Furman v. Georgia* (1972), the Supreme Court ruled that capital punishment statutes in certain states were “cruel and unusual” and therefore unconstitutional. The Court also noted that there was not consistent application of the law in certain jurisdictions. In *Gregg v. Georgia* (1976), the Court ruled that newly revised death penalty statutes adding a long appeal process in Florida, Georgia, and Texas were constitutional, thus reinstating the death penalty in those states, and the death penalty was ruled constitutional in the United States again.

“The death penalty in America is a broken process from start to finish. Death sentences are predicted not by the heinousness of the crime but by the poor quality of the defense lawyers, the race of the accused or the victim, and the county and state in which the crime occurred. From 1976 to 2015, 1,392 executions occurred in the United States, and 995 of them took place in the South. Time and time again, we have proven that the criminal justice system fails to protect the innocent and persons with serious mental disabilities and illnesses from execution. Even the administration of executions is utterly flawed: Every method of execution comes with an intolerably high risk of extreme pain and torture.”

The American Civil Liberties Union (ACLU),
<https://www.aclu.org/issues/capital-punishment>

Currently well over 100 countries have abolished the death penalty. The death penalty is still legal in over 50 countries that in fact have not carried out an execution in 10 years or more. In 40 other countries, it is routinely practiced: Among some nations of note are North Korea, Iran, Cuba, China, and the United States. On average, China sentences more people to death (between 3000 and 7000 annually) than all other countries combined.

9.3 READINGS ON THE DEATH PENALTY



READINGS: DANIEL LaCHANCE: WHAT WILL DOOM THE DEATH PENALTY: ANOTHER FAILED GOVERNMENT PROGRAM?

In this concise article, Emory University professor Daniel LaChance critically examines the use of death penalty in a historical context, emphasizing some practical, utilitarian reasons for opposing it.

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242 An Examined Life

To opponents of the death penalty, recent accounts of botched executions and DNA-based exonerations of death-row prisoners have revived hope that judges and voters will finally see capital punishment for what it is: an intolerable affront to human dignity.

But while such optimism is understandable, it is misplaced. Support for capital punishment is, in fact, in decline—but it's less the result of a moral awakening on the part of the public than a symptom of a 40-year-plus process of disillusionment.

In 1972, the Supreme Court declared the death penalty unconstitutionally unfair, but left the door open for states to come up with new laws to remedy the arbitrary sentencing criteria it found troubling. Conservatives seized that opportunity to advance a broader agenda of reclaiming a government that, in their minds, had been captured by liberal elites—welfare-oriented bureaucracies and Earl Warren's Supreme Court—that were intent on using big government to upend traditional values. The timing was right. Violent crime had been rising since the mid-1960s. More and more Americans wanted a government that would vanquish evil rather than manage it. The revival of capital punishment expressed a powerful moral clarity that "time off for good behavior" did not.

When it came to delivering punishment in a timely and dramatic fashion, moreover, the death penalty delivered the goods: As late as 1959, most of those executed spent less than two years on death row. Thus, as states created new death penalty laws, which the Supreme Court approved in 1976, few foresaw the degree to which federal oversight of capital cases would continue.

This, more than wrongful convictions and botched executions, is what is distinctive about the contemporary American death penalty. New layers of appeals and new issues to litigate at both the state and federal levels meant that inmates put to death in 2012 had waited an average of almost 16 years for their execution date. The deeply unsatisfying, decades-long limbo that follows a death sentence today is without precedent. The 3,054 men and women languishing on the nation's death rows have become the unwitting cast of a never-ending production of "Waiting for Godot."

A sense of moral solidarity is hard to generate when the devil appears in the execution chamber 20 years later, a middle-aged or elderly man whose crimes have long faded from popular memory. And it's impossible to generate when he doesn't appear in the execution chamber at all: A vast

majority of those sentenced to death since 1977 were not, or have not yet been, executed.

Efforts to remedy the problem by reforming the appellate process have been unsuccessful. In 1996, when the average stay on death row was approaching 11 years, Congress enacted legislation restricting death-row inmates' access to federal courts, in order to speed up executions. But it didn't work; since then, the time between sentencing and execution has grown by over 50 percent.

The problem, it turns out, isn't foot-dragging by defense lawyers or bleeding-heart judges. It's money. In California, for instance, the low wages paid by the state to qualified lawyers who take on indigent inmates' appeals have meant that there aren't enough lawyers willing to do the work. Inmates wait an average of three to five years after sentencing for a government-appointed lawyer to handle their appeal. And that's just the beginning of a process—sometimes lasting 25 years or more—that a federal judge recently determined was so protracted that it made capital punishment in California unconstitutionally cruel and unusual.



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More money for defense lawyers would reduce the high error rates in capital trials and speed up appellate reviews. But it is unlikely to be forthcoming. The costs of capital trials and appeals overwhelm budgets everywhere, but particularly in places, like the South, where the political will to fund them is the weakest. It has simply become unsustainable to be both pro-death penalty and anti-taxation, as so many Americans are.

Delivering this message to voters, rather than a moralistic one, might change their thinking. A 2012 ballot measure to abolish the death penalty in California, the shrewdly named Savings Accountability and Full Enforcement for California campaign, appealed to voters' wallets more than their hearts and came tantalizingly close to passing. Importantly, though, that near-win occurred after nearly seven years of no executions in the state, suggesting that it wasn't just about the financial cost of the death penalty. It was about

what that money had stopped delivering to taxpayers: the sense of control, closure and confidence that are the *raison d'être* of the death penalty.

As depressing as it may be to abolitionists driven by a commitment to human rights, Americans, most of whom are white and live above the poverty line, find it hard to sympathize with members of an indigent, mostly minority death-row population who have been convicted of horrible crimes. Preaching to the congregation rather than the choir, then, ought to focus on the failure of capital punishment to live up to the promise of retributive justice it once held.

Casual supporters of the death penalty can be made to recognize that the death penalty has become inextricably mired in the very bureaucracy and legalism it was once supposed to transcend, and that the only solutions to the problem—an elimination of appellate lawyers for death-row inmates or a financial bailout—are unlikely to be legal or feasible.

Resources for fighting the death penalty are scarce, and for too long, abolitionists have spent them appealing to the humanistic ideals they wished most Americans shared, instead of one they actually do: distrust of government. Arguing that the death penalty is an affront to human dignity just doesn't work. But portraying it as another failed government program just might.



READINGS: ERNEST VAN DEN HAAG: THE DEATH PENALTY—A DEBATE

*In Ernest van den Haag's most famous book, *Punishing Criminals: Concerning a Very Old and Painful Question* (1975), he developed his theory in support of the death penalty. In the essay given here, he summarizes his position and main tenants of his theory.*

Until approximately the eighteenth century, death was not the harshest punishment available for law enforcement in civilized countries. Torture was. People found guilty of major crimes (often minor crimes by our lights) were not executed: They were tortured to death, and torture was so cruel that death came as a relief. Condemned persons were commonly boiled, burned, roasted on spits, drawn and quartered, broken on wheels, disemboweled, slowly dismembered, or torn apart by horses. Infinitely elaborate

From *The Death Penalty: A Debate Pro/Con* by Ernest van den Haag and John P. Conrad. Copyright © 1983 Springer. Reprinted by permission of Springer.

and breathtakingly cruel tortures lasted for days, with those subjected to them begging for death, sometimes granted—as a form of leniency. Often the tortures of criminals served as public spectacles and family entertainments. (Although no fan, I regard TV as an improvement. Less gripping, it also is less painful.)

For the sake of historical perspective, it should be noted that until the nineteenth century, when anesthetics were invented, pain was far more common, and more commonly inflicted and accepted than it is today. Even surgical operations had to take place without anesthetics. Further, the notion of human solidarity was very restricted: The suffering of any one person was not much felt by others religious rhetoric to the contrary notwithstanding and it was socially quite acceptable to be amused by their pain. Death at an early age was common. Life expectancy was short, and infectious diseases were ever present, whereas today the degenerative diseases of old age are the major threat to life. Since it happens to all of us, death was not regarded as much of a punishment. The mere shortening of the lifespan was thought insufficient to deter or punish crimes.

In the last two centuries capital punishment—originally beheading, from the Latin *caput* (head) or *capitis* (of the head)—has become the ultimate penalty. Few now think that death is not harsh enough, or that the threat of it is insufficient. Many indeed think that death is too much of a punishment for any crime. Is it? To answer this question we will have to consider the purpose of punishment in general and ask whether the death penalty is useful, or needed, to achieve it, and whether, apart from usefulness, it can be morally justified, whether it can be just. Let me consider a few subsidiary issues before turning to these questions.

1. Once a person has been sentenced to death, waiting for execution is likely to be psychologically painful. We all live both in the present and at least partly in the future. Expectations of the future play a major role in our present happiness or unhappiness. Obviously a condemned person has little to look forward to. Waiting for the end, while in prison, is hardly a happy experience. Therefore, there should be as little waiting as possible. Yet at present, the period of waiting and uncertainty is usually very long—up to ten years in some cases until all appeals are exhausted. Of the civilized countries that have retained the death penalty, the United States is the only one that permits or even insists on these long profitless delays. Although the death penalty is constitutional if imposed by due

process, well-meaning judges do, in effect, sabotage it by permitting and inviting infinite appeals and delays. The result is that in 1982 there were about one thousand convicts on death row. Nobody knows how many of them will actually be executed and who will be spared, after expecting execution for years. Most convicts on death row are kept in conditions far worse than those imposed on other prisoners. They are isolated in minuscule cells, with nothing to do but wonder about their fate.

The cruelty is gratuitous. It is not inherent in the death penalty or in any way required by it. Rules and practices mandating a reduction and a speedup of appeals and making sure that persons under death sentence are treated no worse than other persons confined to prison are entirely compatible with the death penalty. Abolitionists and retentionists alike should favor the elimination of unnecessary cruelty. A person sentenced to death is not sentenced to any additional and gratuitous suffering.

2. Death should be inflicted as painlessly as possible. The punishment consists of being deprived of life at a date certain-not of suffering pain beyond this. At present, executions take place by means of electrocution, shooting, gassing, and lethal injections. It seems that shooting is painless (pain occurs only some time after a bullet hits and is not suffered by a person who dies on being hit). Injections, too, are painless. A condemned man ought to be allowed to choose, and methods of execution that may be painful, such as electrocution, or present an avoidable psychological burden, such as gassing, ought not to be used. If this were done, unnecessary cruelty (a redundant phrase since cruelty is by definition unnecessary pain) would be avoided. But death itself remains a terrifying thing for most of us.
3. Death is not so terrifying that some people do not volunteer for it. They may fast to death to foster a cause more important to them than their own lives. (Hunger strikers have been known to do so.) Or they may commit suicide because unhappy with life.

However, most people condemned to death, or guilty of crimes that may bring the death penalty, fear death. They do all they can to avoid execution. They assiduously try to avoid apprehension, conviction, and, finally, the death penalty. Only a very small minority-much less than one percent of the condemned-resign themselves to death, or welcome it. They refuse to appeal their sentences, greatly disappointing their lawyers and the American Civil Liberties

Union. The latter has argued that convicts should not have the right *not to appeal* their death sentences, a novel civil liberty.

Some opponents of the death penalty have maintained that convicts resigned to execution may have committed their crimes for the sake of being executed, using the law as a means of committing suicide, wherefore the death penalty ought to be abolished: It may lead to crimes and suicides. This argument is unimpressive. According to it, high buildings ought to be abolished as well. They may serve a purpose, as does the death penalty, but also can be abused for suicide; and they may lead to crimes that would not be committed in their absence. Anyway, the idea that people commit crimes for the sake of execution is highly speculative. It seems much more likely that a convict who refuses to appeal his sentence does so because he does not wish to face the agony of waiting, or because he prefers death to a life in prison. It is even possible that he feels guilty enough about his crimes to agree with the sentence according to which he does not deserve to live. There is no serious evidence demonstrating that murders were committed for the sake of execution; and nearly all convicts do what they can to avoid it.

4. We are all sentenced to death—it is part of our life sentence. Unlike a prison sentence, which deprives one of a freedom one would otherwise keep, the death sentence does not deprive one of a life one would otherwise keep. We all die even without a legally imposed sentence. But without the death sentence, we live indefinitely, though not permanently. The death sentence orders execution at a date certain and, in many minds, makes death certain as though it otherwise could have been eluded. What the sentence actually does is to hasten it, to shorten life. But this shortening is feared. Since life is a good, one wishes to continue and prolong it. Death defeats this wish. However, death also expunges the wish: The dead neither wish nor fear; nor do they suffer. They do not feel. They do not miss life any more than, the nonexistent or unborn do. Hence, it is hard to see how one can rationally fear *being dead*. One is afraid not of death but of dying, conflated with death and pictured as a painful process.

But execution is probably less physically painful than most natural ways of dying. Dying by disease is usually more painful and often more humiliating. Yet when execution is described in detail, one is moved to pity the condemned man. One is made to

feel that without the death sentence, he somehow would have been spared dying. And descriptions of executions nearly always give the impression that the sordid, undignified, or moving details of dying are details of execution and would have been avoided if the condemned man had lived, or (if one remembers that he would not have lived forever) if he had died in a hospital rather than by execution. Yet hospital death would have been no more barren of pain or of undignified details. On the contrary. It is misleading, then, to picture the indignities of dying, or of death, as though indignities of execution. Execution is neither more painful nor more sordid than dying usually is.

Whatever can be said against the death penalty, it cannot be said that it causes an otherwise avoidable death, or that it must make death physically more painful or sordid or less dignified than it otherwise would be. However, there is an important psychological difference between being put to death by one's fellow men, as a punishment, and dying from natural causes. To this we will turn anon. And the death penalty is intended to hasten death. We as yet have to consider whether this can be justified as a punishment for any crime.



Theories of Punishment and the Death Penalty

Which theory of punishment best supports (or opposes) the death penalty? What is your position on this issue?

BIBLIOGRAPHY AND SUGGESTED READINGS

- Bennett, Christopher. (2013). "Considering Capital Punishment as a Human Interaction." *Criminal Law and Philosophy* 7(2): 367–382.
- Cottingham, John, and Duff, R. A. (1987). "Trials and Punishments." *Philosophical Quarterly* 37(149): 448.
- Farrell, Daniel M. (1985). "The Justification of General Deterrence." *Philosophical Review* 94(3): 367–394.

Haag, Ernest van den, and Conrad, John P. (1983). *The Death Penalty: A Debate*. New York: Plenum Press. ISBN: 1489927875.

Hegel, Georg Wilhelm Friedrich. (1991). *Elements of the Philosophy of Right*. Cambridge, UK: Cambridge University Press.

Hoskins, Zachary. (2011). "Deterrent Punishment and Respect for Persons." *Ohio State Journal of Criminal Law* 8(2): 369–384.

LaChance, Daniel. (2014). "What Will Doom the Death Penalty." *The New York Times*, The New York Times, Web, 6/10/15

Prejean, Sister Helen. (1997). "Would Jesus Pull the Switch?" Claretian Publications. <http://salt.claretianpubs.org/issues/deathp/prejean.html>.

KEY TERMS

Capital punishment the premeditated legal killing of a criminal by the state for his or her crimes is certainly the greatest punishment the state can exact against any criminal.

Deterrence Theory maintains that criminal laws are passed to discourage individuals from committing offenses because the costs associated with committing them outweigh the benefits of not doing so.

Direct Retributive Theory also known as Lex Talionis (from Latin meaning "an eye for an eye"), this theory falls in the category of direct retributivism; that is, a person committing a crime ought to be punished by having the same crime inflicted on him or her—literally, an eye for an eye.

Forfeiture Theory states that although we have certain positive rights within society, when we violate laws and the rights of others, we forfeit our own rights. As such we must be punished for these violations, and the state has the right, obligation, and duty to see that we are punished.

Proportional Retributive Theory a slight variation of Direct Retributive Theory, claims that a person should be punished in a way proportional to the crime he or she committed.