

## THE WISDOM OF CAPITAL PUNISHMENT

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The utilitarian argument for capital punishment is that it deters would-be offenders from committing first degree murder. Thorstein Sellin's study of comparing states with and without capital punishment concludes that the death penalty is not a better deterrent of homicides than imprisonment. On the other hand, Isaac Ehrlich's study, the most thorough study to date, takes into account the problems of complex sociological data in terms of race, heredity, regional lines, standards of housing, education, opportunities, cultural patterns, intelligence, and so forth, and concludes that the death penalty does deter. His simultaneous equation regression model suggests that over the period 1933-1969 "an additional execution per year . . . may have resulted on the average in 7 or 8 fewer murders." It should be noted that Ehrlich began his study as an abolitionist, but his data forced him to change his position. However, Ehrlich's study has been criticized, largely for technical reasons, so that his conclusion that we have significant statistical evidence that the death penalty deters better than prison sentences is not conclusive. The problems seem to be that there are simply too many variables to control in comparing demographic patterns (culture, heredity, poverty, education, religion, and general environmental factors) and that the death penalty isn't carried out frequently enough to have the effect that it might have under circumstances of greater use. One criticism of Ehrlich's work is that if he had omitted the years 1962 to 1969, he would have had significantly different results. David Baldus and James Cole contend that Ehrlich omitted salient variables, such as the rate of migration from rural to urban areas. On the other hand, Stephen Layson's study in 1985 corroborates Ehrlich's conclusion, except that Layson's work indicates that each time the death penalty is applied, the murder rate is reduced by about eighteen murders. A consensus is wanting, so that at present we must conclude that we lack strong statistical evidence that capital punishment deters. But this should not be construed as evidence against the deterrence thesis. There is no such evidence for nondeterrence either. The statistics available are simply inconclusive either way.

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Precisely on the basis of this inconclusivity with regard to the evidence, some abolitionists, for example, Stephen Nathanson, argue that deterrence cannot be the moral basis for capital punishment. "The death penalty can be justified as analogous to defensive killing only if it can be shown that it does save lives. Since that has not been shown, one cannot appeal to this protective function as providing a moral basis for executing murderers." I think Nathanson is wrong about this. There is some nonstatistical evidence based on common sense that gives credence to the hypothesis that the threat of the death penalty deters and that it does so better than long prison sentences. I will discuss the commonsense case below, but first I want to present an argument for the deterrent effect of capital punishment that is agnostic as to whether the death penalty deters better than lesser punishments.

Ernest van den Haag has set forth what he calls the Best Bet Argument. He argues that even though we don't know for certain whether the death penalty deters or prevents other murders, we should bet that it does. Indeed, due to our ignorance, any social policy we take is a gamble. Not to choose capital punishment for first-degree murder is as much a bet that capital punishment doesn't deter as choosing the policy is a bet that it does. There is a significant difference in the betting, however, in that to bet against capital punishment is to bet against the innocent and for the murderer, while to bet for it is to bet against the murderer and for the innocent.

The point is this: We are accountable for what we let happen, as well as for what we actually do. If I fail to bring up my children properly, so that they are a menace to society, I am to some extent responsible for their bad behavior. I could have caused it to be somewhat better. If I have good evidence that a bomb will blow up the building you are working in and fail to notify you (assuming I can), I am partly responsible for your death, if and when the bomb explodes. So we are responsible for what we omit doing, as well as for what we do. Purposefully to refrain from a lesser evil which we know will allow a greater evil to occur is to be at least partially responsible for the greater evil. This responsibility for our omissions underlies van den Haag's argument, to which we now return.

Suppose that we choose a policy of capital punishment for capital crimes. In this case we are betting that the death of some murderers will be more than compensated for by the lives of some innocents not being murdered (either by these murderers or others who would have murdered). If we're right, we have saved the lives of the innocent. If we're wrong, unfortunately, we've sacrificed the lives of some murderers. But say we choose not to have a social policy of capital punishment. If capital punishment doesn't work as a deterrent, we've come out ahead, but if it does work, then we've missed an opportunity to save innocent lives. If we value the saving of innocent lives more highly than the loss of the guilty, then to bet on a policy of capital punishment turns out to be rational. The reasoning goes like this. Let "CP" stand for "capital punishment":

**THE WAGER**

*CP works*

*CP doesn't work*

We bet on CP

- a. We win: Some murderers die & innocents are saved.
- b. We lose: Some murderers die for no purpose.

We bet against CP

- c. We lose: Murderers live & innocents needlessly die.
- d. We win: Murderers live & some lives of others are unaffected.

Suppose that we estimate that the utility value of a murderer's life is 5, while the value of an innocent's life is 10. (Although we cannot give lives exact numerical values, we can make rough comparative estimates of value—e.g. Mother Teresa's life is more valuable than Adolf Hitler's; all things being equal, the life of an innocent person has at least twice the value of a murderer's life. My own sense is that the murderer has forfeited most, if not all, of his worth, but if I had to put a ratio to it, it would be 1,000 to 1.) Given van den Haag's figures, the sums work out this way:

A murderer saved	+5
A murderer executed	-5
An innocent saved	+10
An innocent murdered	-10

Suppose that for each execution only two innocent lives are spared. Then the outcomes (correlating to the above wager table) read as follows:

- a.  $-5 + 20 = +15$
- b. -5
- c.  $+5 - 20 = -15$
- d. +5

If all the possibilities are roughly equal, we can sum their outcomes like this:

If we bet on capital punishment, (a) and (b) obtain = +10.

If we bet against capital punishment (c) and (d) obtain = -10. So to execute convicted murderers turns out to be a good bet. To abolish the death penalty for convicted murderers would be a bad bet. We unnecessarily put the innocent at risk.

Even if we value the utility of an innocent life only slightly more than that of a murderer, it is still rational to execute convicted murderers. As van den Haag writes, "Though we have no proof of the positive deterrence of the penalty, we also have no proof of zero or negative effectiveness. I believe we have no right to risk additional future victims of murder for the sake of sparing convicted murderers; on the contrary, our moral obligation is to risk the possible ineffectiveness of executions."

**A Critique of the Best Bet Argument**

The abolitionist David Conway has constructed an instructive, imaginary dialogue about van den Haag's argument in which an opponent (O) objects to

this line of reasoning, contending that the gambling metaphor regarding capital punishment (C.P.) is misleading, for it seems to devalue the lives of the guilty. We ought not to gamble with human lives. The issue is between *the possibility* of saving some lives (if deterrence works) and the *certainty* of sacrificing some lives (whether or not it works). Conway's proponent (P) for van den Haag's argument counters that gambling can be interpreted as doing a cost-benefit analysis with regard to saving lives. Here is a segment of Conway's dialogue:

P: [T]here are other circumstances in which we must gamble with lives in this way. Suppose you were almost, but not quite certain that a madman was about to set off all the bombs in the Western hemisphere. On [your] principle [that we ought not gamble with human life], you would not be justified in shooting him, even if it were the only possible way to stop him. O: Yes, I suppose that I must grant you that. But perhaps my suppositions that gambling is taking the risk and that gambling with human lives is wrong, taken together, at least partially account for my intuitive revulsion with van den Haag's argument.

P: That may be. But so far, your intuitions have come to nothing in producing a genuine objection to the argument. I might add that I cannot even agree with your intuition that not gambling is taking the sure thing. Don't we sometimes disapprove of the person who refuses to take out life insurance or automobile insurance on the grounds that he is unwisely gambling that he will not die prematurely or be responsible for a highway accident? And he is taking the sure thing, keeping the premium money in his pocket. So, in common sense terms, failure to take a wise bet is sometimes "gambling." O: You are right again. . . . But that does not change my views about C.P. Once the bet is clarified, it should be clear that you are asking us to risk too much, to actually take a human life on far too small a chance of saving others. It is just a rotten bet.

P: But it is not. As I have said, the life of each murderer is clearly worth much less than the life of an innocent, and, besides, each criminal life lost may save many innocents.

The opponent remains troubled by the notion of evaluating human worth, but finally admits that he is willing to grant that the life of the innocent is worth somewhat more than that of the murderer. Yet he goes on to give his fundamental objection:

O: The basic problem with your wager is simply that we have no reason to think that C.P. does work, and in the absence of such reason, the probability that it does is virtually zero. In general, you're confused about the evidence. First, you say C.P. deters. Then you are confronted with evidence such as: State A and State B have virtually identical capital crime rates but State A hasn't had C.P. for one hundred years. You reply, for instance, that this could be because State A has more Quakers, who are peace-loving folk and so help to keep the crime rate down. And, you say, with C.P. and all those Quakers, State A perhaps could have had an even lower crime rate. Since we do not know about all such variables, the evidence is "inconclusive." Here "inconclusive" can only mean that while the evidence does not indicate that C.P. deters, it also does not demonstrate that it does not.

The next thing we see is your proponents saying that we just do not know whether C.P. deters or not, since the evidence is "inconclusive." But for this to follow, "inconclusive" must mean something like "tends to point both ways." The only studies available, on your own account, fail to supply any evidence at all that it *does* deter. From this, we cannot get "inconclusive" in the latter sense; we can't say that "we just don't know" whether it deters, we can only conclude, "we have no reason to think it does." Its status as a deterrent is no different from, e.g., prolonged tickling of murderers' feet. It could deter, but why think it does? . . .

P: So you demand that we have definite, unequivocal evidence and very high probability that C.P. deters before it could be said to be justifiable. O: No, I never said that . . . I think the "Best-Bet Argument" shows that the demand is too strong. Given the possible gains and losses, if there is even a strong possibility that it works, I do not think it would be irrational to give it another try. But we should do so in full cognizance of the betting situation. We would be taking lives on the chance that there will be more than compensating saving of lives. And, I also think that it is damned difficult to show that there is even a strong possibility that C.P. deters.

There are several things to say about Conway's dialogue. Like his opponent, you may object that this kind of quantifying of human life is entirely inappropriate. But if you had to choose between saving an innocent person and saving one who had just committed cold-blooded murder, which would you choose? We generally judge that conscientiously moral people are more worthy than viciously immoral ones, that the innocent are more worthy of aid than those who are guilty of squandering aid. Van den Haag's argument only formalizes these comparisons and applies them to the practice of capital punishment. Some humans are worth more than others, and some have forfeited their right not to be killed, whereas most people have not. Our practices should take this into account.

Secondly, you may still have doubts about the validity of putting a value on human life. But ask yourself, "What gives humans value?" or "What gives their lives value?" From a religious perspective they may have intrinsic value, but they still may forfeit a right to life by committing murder. But if you accept a secular point of view, isn't it some quality like moral integrity or contribution to the community that at least partly gives us worth? If so, then the murderer has lost a good bit of whatever value his life had. Kant, who set forth the idea that persons have intrinsic worth based on their ability to reason, held that we could forfeit that worth ("obliterate it") through immoral acts, so that the death penalty might well be appropriate.

Thirdly, if we had evidence that there was a 50 percent chance that executing a murderer would bring back the innocent victim, wouldn't you vote for the execution? I would vote for it if there was *virtually any chance* at all. But how different is that bet from the one that says there is a good chance that executing a person convicted of first-degree murder will prevent the murders of other innocent people? If the death penalty does deter, and we have evidence that it does, then we are partly responsible for the deaths of additional innocents by not inflicting that penalty.

Finally, the opponent is wrong in arguing that we have no evidence at all about the deterrent effect of capital punishment, so that it is tantamount to the evidence that tickling murderers' feet deters. We have evidence, though not statistical proof, based on commonsense experience, which makes the case for deterrence even stronger than the Best Bet argument. I now turn to the Argument from Anecdotal Evidence, a commonsense argument.

### The Argument from Anecdotal Evidence

Abolitionists like Stephen Nathanson argue that because the statistical evidence in favor of the deterrent effect of capital punishment is indecisive, we have no basis for concluding that it is a better deterrent than long prison sentences. If I understand these opponents, their argument presents us with an exclusive disjunct: Either we must have conclusive statistical evidence (i.e., a proof) for the deterrent effect of the death penalty, or we have no grounds for supposing that the death penalty deters. Many people accept this argument. Just this morning a colleague said to me, "There is no statistical evidence that the death penalty deters," as if to dismiss the argument from deterrence altogether. This is premature judgment, for the argument commits the fallacy of supposing that only two opposites are possible. There is a middle position that holds that while we cannot prove conclusively that the death penalty deters, the weight of evidence supports its deterrence. Furthermore, I think there are too many variables to hold constant for us to prove via statistics the deterrence hypothesis, and even if the requisite statistics were available, we could question whether they were cases of mere correlation versus causation. On the other hand, commonsense or anecdotal evidence may provide insight into the psychology of human motivation, providing evidence that fear of the death penalty deters some types of would-be criminals from committing murder. Granted, people are sometimes deceived about their motivation. But usually they are not deceived, and, as a rule, we should presume they know their motives until we have evidence to the contrary. The general commonsense argument goes like this:

1. What people (including potential criminals) fear more will have a greater deterrent effect on them.
2. People (including potential criminals) fear death more than they do any other humane punishment.
3. The death penalty is a humane punishment.
4. Therefore, people (including criminals) will be deterred more by the death penalty than by any other humane punishment.

Since the purpose of this argument is to show that the death penalty very likely deters more than long-term prison sentences, I am assuming it is *humane*, that is, acceptable to the moral sensitivities of the majority in our society. Torture might deter even more, but it is not considered humane. I will say more about the significance of humaneness with regard to the death penalty below.

Common sense informs us that most people would prefer to remain out of jail, that the threat of public humiliation is enough to deter some people, that a sentence of twenty years will deter most people more than a sentence of two years, that a life sentence will deter most would-be criminals more than a sentence of twenty years. I think that we have commonsense evidence that the death penalty is a better deterrent than prison sentences. For one thing, as Richard Herrnstein and James Q. Wilson have argued in *Crime and Human Nature*, a great deal of crime is committed on a cost-benefit schema, wherein the criminal engages in some form of risk assessment as to his or her chances of getting caught and punished in some manner. If he or she estimates the punishment mild, the crime becomes inversely attractive, and vice versa. The fact that those who are condemned to death do everything in their power to get their sentences postponed or reduced to long-term prison sentences, in a way lifers do not, shows that they fear death more than life in prison.

The point is this: Imprisonment constitutes one evil, the loss of freedom, but the death penalty imposes a more severe loss, that of life itself. If you lock me up, I may work for a parole or pardon, I may learn to live stoically with diminished freedom, and I can plan for the day when my freedom has been restored. But if I believe that my crime may lead to death, or loss of freedom followed by death, then I have more to fear than mere imprisonment. I am faced with a great evil plus an even greater evil. I fear death more than imprisonment because it alone takes from me all future possibility.

I am not claiming that the fear of legal punishment is all that keeps us from criminal behavior. Moral character, habit, fear of being shamed, peer pressure, fear of authority, or the fear of divine retribution may have a greater influence on some people. However, many people will be deterred from crime, including murder, by the threat of severe punishment. The abolitionist points out that many would-be murderers simply do not believe they will be caught. Perhaps this is true for some. While the fantastic egoist has delusions of getting away with his crime, many would-be criminals are not so bold or delusory.

Former Prosecuting Attorney for the State of Florida, Richard Gernstein has set forth the commonsense case for deterrence. First of all, he claims, the death penalty certainly deters the murderer from any further murders, including those he or she might commit within the prison where he is confined. Secondly, statistics cannot tell us how many potential criminals have refrained from taking another's life through fear of the death penalty. He quotes Judge Hyman Barshay of New York: "The death penalty is a warning, just like a lighthouse throwing its beams out to sea. We hear about shipwrecks, but we do not hear about the ships the lighthouse guides safely on their way. We do not have proof of the number of ships its saves, but we do not tear the lighthouse down."

Some of the commonsense evidence is anecdotal as the following quotation shows. British member of Parliament Arthur Lewis explains how he was converted from an abolitionist to a supporter of the death penalty:

One reason that has stuck in my mind, and which has proved [deterrence] to me beyond question, is that there was once a professional burglar in [my] constituency who consistently boasted of the fact that he had spent about one-third of his life in prison. . . . He said to me "I am a professional burglar. Before we go out on a job we plan it down to every detail. Before we go into the boozier to have a drink we say 'Don't forget, no shooters' — shooters being guns." He adds "'We did our job and didn't have shooters because at that time there was capital punishment. Our wives, girlfriends and our mums said, 'Whatever you do, do not carry a shooter because if you are caught you might be topped [executed].' If you do away with capital punishment they will all be carrying shooters."

It is difficult to know how widespread this reasoning is. My own experience corroborates this testimony. Growing up in the infamous Cicero, Illinois, home of Al Capone and the Mafia, I had friends who went into crime, mainly burglary and larceny. It was common knowledge that one stopped short of killing in the act of robbery. A prison sentence could be dealt with—especially with a good lawyer—but being convicted of murder, which at that time included a reasonable chance of being electrocuted, was an altogether different matter. No doubt exists in my mind that the threat of the electric chair saved the lives of some of those who were robbed in my town. No doubt some crimes are committed in the heat of passion or by the temporarily (or permanently) insane, but some are committed through a process of risk assessment. Burglars, kidnappers, traitors and vindictive people will sometimes be restrained by the threat of death. We simply don't know how much capital punishment deters, but this sort of commonsense, anecdotal evidence must be taken into account in assessing the institution of capital punishment.

John Stuart Mill admitted that capital punishment does not inspire terror in hardened criminals, but it may well make an impression on prospective murderers. "As for what is called the failure of the death punishment, who is able to judge of that? We partly know who those are whom it has not deterred; but who is there who knows whom it has deterred, or how many human beings it has saved who would have lived to be murderers if that awful association had not been thrown round the idea of murder from their earliest infancy." Mill's points are well taken: (1) Not everyone will be deterred by the death penalty, but some will; (2) The potential criminal need not consciously calculate a cost-benefit analysis regarding his crime to be deterred by the threat. The idea of the threat may have become a subconscious datum "from their earliest infancy." The repeated announcement and regular exercise of capital punishment may have deep causal influence.

Gernstein quotes the British Royal Commission on Capital Punishment (1949-53), which concluded that there was evidence that the death penalty has some deterrent effect on normal human beings. Some of its evidence in favor of the deterrence effect includes:

1. "Criminals who have committed an offense punishable by life imprisonment, when faced with capture, refrained from killing their captor though by killing, escape seemed probable. When asked why they refrained from

the homicide, quick responses indicated a willingness to serve life sentence, but not risk the death penalty."

2. "Criminals about to commit certain offenses refrained from carrying deadly weapons. Upon apprehension, answers to questions concerning absence of such weapons indicated a desire to avoid more serious punishment by carrying a deadly weapon, and also to avoid use of the weapon which could result in imposition of the death penalty."
3. "Victims have been removed from a capital punishment state to a non-capital punishment state to allow the murderer opportunity for homicide without threat to his own life. This in itself demonstrates that the death penalty is considered by some would-be-killers."

Gernstein then quotes former District Attorney of New York, Frank S. Hogan, representing himself and his associates:

We are satisfied from our experience that the deterrent effect is both real and substantial . . . for example, from time to time accomplices in felony murder state with apparent truthfulness that in the planning of the felony they strongly rtf^ed the killer not to resort to violence. From the context of these utterances, it is apparent that they were led to these warnings to the killer by fear of the death penalty which they realized might follow the taking of life. Moreover, victims of hold-ups have occasionally reported that one of the robbers expressed a desire to kill them and was dissuaded from so doing by a confederate. Once again, we think it not unreasonable to suggest that fear of the death penalty played a role in some of these intercessions. On a number of occasions, defendants being questioned in connection with homicide have shown a striking terror of the death penalty. While these persons have in fact perpetrated homicide, we think that their terror of the death penalty must be symptomatic of the attitude of many others of their type, as a result of which many lives have been spared.

It seems likely that the death penalty does not deter as much as it could due to its inconsistent and rare use. For example, out of an estimated 23,370 cases of murder, nonnegligent manslaughter, and rape in 1949, there were only 119 executions carried out in the United States. In 1953, only 62 executions out of 7,000 cases for those crimes took place. Few executions were carried out in the 1960s and none at all from 1967 to 1977. Gernstein points out that at that rate a criminal's chances of escaping execution are better than 100 to 1. Actually, since Gernstein's report, the figures have become even more weighted against the chances of the death sentence. In 1993, there were 24,526 cases of murder and nonnegligent manslaughter and only 56 executions; and in 1994, there were 23,305 cases of murder and nonnegligent manslaughter and only 31 executions—for a ratio of better than 750 to 1 in favor of the criminal. The average length of stay for a prisoner executed in 1994 was ten years and two months. If potential murderers perceived the death penalty as a highly probable outcome of murder, would they not be more reluctant to kill? Gernstein notes:

The commissioner of police of London, England, in his evidence before the Royal Commission on Capital Punishment, told of a gang of armed robbers

who continued operations after one of their members was sentenced to death and his sentence commuted to penal servitude, but the same gang disbanded and disappeared when, on a later occasion, two others were convicted of murder and hanged.

Gernstein sums up his data: "Surely it is a commonsense argument, based on what is known of human nature, that the death penalty has a deterrent effect particularly for certain kinds of murderers. Furthermore, as the Royal Commission opined the death penalty helps to educate the conscience of the whole community, and it arouses among many people a quasi-religious sense of awe. In the mind of the public there remains a strong association between murder and the penalty of death. Certainly one of the factors which restrains some people from murder is fear of punishment and surely, since people fear death more than anything else, the death penalty is the most effective deterrent."

I should also point out that, given the retributivist argument for the death penalty, based on desert, the retentionist does not have to prove that the death penalty deters *better* than long prison sentences, but if the death penalty is deemed at least as effective as its major alternative, it would be justified. If evidence existed that life imprisonment were a *more effective* deterrent, the retentionist might be hard pressed to defend it on retributivist lines alone. My view is that the desert argument plus the commonsense evidence—being bolstered by the Best Bet Argument—strongly supports retention of the death penalty.

It is noteworthy that prominent abolitionists, such as Charles Black, Hugo Adam Bedau, Ramsey Clark, and Henry Schwartzchild, have admitted to Ernest van den Haag that even if every execution were to deter a hundred murders, they would oppose it, from which van den Haag concludes "to these abolitionist leaders, the life of every murderer is more valuable than the lives of a hundred prospective victims, for these abolitionists would spare the murderer, even if doing so will cost a hundred future victims their lives." Black and Bedau said they would favor abolishing the death penalty even if they knew that doing so would increase the homicide rate 1,000 percent. This response of abolitionists is puzzling, since one of Bedau's arguments against the death penalty is that it doesn't bring back the dead. "We cannot do anything for the dead victims of crime. (How many of those who oppose the death penalty would continue to do so if, *mirabile dictu*, executing the murderer might bring the victim back to life?)" Apparently, he would support the death penalty if it brought a dead victim back to life, but not if it prevented a hundred innocent victims from being murdered.

If the Best Bet Argument is sound, or if the death penalty does deter would-be murderers, as common sense suggests, then we should support some uses of the death penalty. It should be used for those who commit first-degree murder, for whom no mitigating factors are present, and especially for those who murder police officers, prison guards, and political leaders. Many states rightly favor it for those who murder while committing another crime, e.g., burglary or rape. It should also be used for treason and terrorist bombings.