"If you steal from another, you steal from yourself." In this way, that whoever steals anything makes the property of all insecure; he therefore robs himself of all security in property, according to the right of retaliation. Such as one has nothing, and can acquire nothing, but he has the will to live; and this is only possible by others supporting him. But as the state should not do this gratuitously, he must for this purpose yield his powers to the state to be used in penal labour; and thus he falls for a time, or it may be for life, into a condition of slavery. But whoever has committed murder, must die. There is, in this case, no juridical substitute or surrogate, that can be given or taken for the satisfaction of justice. There is no likeness or proportion between life, however painful, and death; and therefore there is no equality between the crime of murder and the retaliation of it but what is judicially accomplished by the execution of the criminal. His death, however, must be kept free from all maltreatment that would make the humanity suffering in his person loathsome or abominable. Even if a civil society resolved to dissolve itself with the consent of all its members—as might be supposed in the case of a people inhabiting an island resolving to separate and scatter themselves throughout the whole world—the last murderer lying in the prison ought to be executed before the resolution was carried out. This ought to be done in order that everyone may realize the desert of his deeds, and that bloodguiltiness may not remain upon the people; for otherwise they might all be regarded as participators in the murder as a public violation of justice.

The equalization of punishment with crime, is therefore only possible by the cognition of the judge extending even to the penalty of death, according to the right of retaliation.

**Review Questions**

1. According to Kant, who deserves judicial punishment?
2. Why does Kant reject the maxim "It is better that one man should die than that the whole people should perish"?
3. How does Kant explain the principle of retaliation?

**Discussion Questions**

1. Does Kant have any good reason to reject the "serpent-w windings of utilitarianism"?
2. Is death always a just punishment for murder? Can you think of any exceptions?

**The Ultimate Punishment: A Defense of Capital Punishment**

**ERNEST VAN DEN HAAG**

Ernest van den Haag (1915–2002) was John M. Olin Professor of Jurisprudence and Public Policy at Fordham University. For many years he had a private practice in psychoanalytical counseling, and for forty-five years he was a consultant and contributor to the *National Review*. His books include *The Fabric of Society* (1957),

Political Violence and Civil Disobedience (1973), and Punishing Criminals: Concerning a Very Old and Painful Question (1975).

Van den Haag replies to various objections to capital punishment. The fact that capital punishment is applied in a discriminatory manner is irrelevant to its morality. Nor does it matter if innocents die, because many activities such as trucking and construction cost the lives of innocent bystanders. The cost is not as important as doing justice. It is not excessive punishment for heinous crimes, and it is not inconsistent with human dignity. Van den Haag agrees that there is no conclusive evidence showing that the death penalty is a more effective deterrent than other punishments. But he thinks that deterrence is not decisive for either those opposed or those in favor of the death penalty. Still he believes that the death penalty is feared more than imprisonment, and for that reason deters some potential murderers. He goes on to use a subtle argument, sometimes called the "best-bet argument," to conclude that we should still use the death penalty because it might save innocents whose lives are more valuable than guilty murderers who are executed. In effect, the death penalty is a better bet than other punishments because it involves gambling with guilty lives rather than innocent lives.

In an average year about 20,000 homicides occur in the United States. Fewer than 300 convicted murderers are sentenced to death. But because no more than 30 murderers have been executed in any recent year, most convicts sentenced to death are likely to die of old age. Nonetheless, the death penalty looms large in discussions: It raises important moral questions independent of the number of executions. The death penalty is our harshest punishment. It is irrevocable: it ends the existence of those punished, instead of temporarily imprisoning them. Further, although not intended to cause physical pain, execution is the only corporal punishment still applied to adults. These singular characteristics contribute to the perennial, impassioned controversy about capital punishment.

I. DISTRIBUTION

Consideration of the justice, morality, or usefulness of capital punishment is often conflated with objections to its alleged discriminatory or capricious distribution among the guilty. Wrongly so. If capital punishment is immoral in se, no distribution cannot affect the quality of what is distributed, be it punishments or rewards. Discriminatory or capricious distribution thus could not justify abolition of the death penalty. Further, maldistribution inheres no more in capital punishment than in any other punishment.

Maldistribution between the guilty and the innocent is, by definition, unjust. But the injustice does not lie in the nature of the punishment.

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

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

3 Some writers, for example, Cesare Bonesana, Marchese di Beccaria, have thought that life imprisonment is more severe. See C. Beccaria, Dei Delitti e Delle Pene (1764) pp. 62–70. More recently, Jacques Barzun has expressed this view. See Barzun, In Favor of Capital Punishment, in The Death Penalty in America, ed. H. Bedau (1964), p. 154. However, the overwhelming majority of both abolitionists and of convicts under death sentence prefer life imprisonment to execution.

justice demands that justice be equally distributed, not that it be replaced by equality. Justice requires that as many of the guilty as possible be punished, regardless of whether others have avoided punishment. To let these others escape the deserved punishment does not do justice to them, or to society. But it is not unjust to those who could not escape.

These moral considerations are not meant to deny that irrational discrimination, or capriciousness, would be inconsistent with constitutional requirements. But I am satisfied that the Supreme Court has in fact provided for adherence to the constitutional requirement of equality as much as is possible. Some inequality is indeed unavoidable as a practical matter in any system.  
But, *ultra posse nemo obligatur* (nobody is bound beyond ability).  

Recent data reveal little direct racial discrimination in the sentencing of those arrested and convicted of murder. The abrogation of the death penalty for rape has eliminated a major source of racial discrimination. Concededly, some discrimination based on the race of murder victims may exist; yet, this discrimination affects criminal murder victimizers in an unexpected way. Murderers of whites are thought more likely to be executed than murderers of blacks.

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

8 Equality, even without justice, may remain a strong psychological, and therefore political, demand. Yet Charles Black, by proving the *inseparability* of “caprice” (inequality), undermines his own constitutional argument, because it seems unlikely that the Constitution’s fifth and fourteenth amendments were meant to authorize the death penalty only under unattainable conditions. See Black, *Capital Punishment: The Inseparability of Caprice and Mistake* (1974).

Black victims, then, are less fully vindicated than white ones. However, because most black murderers kill blacks, black murderers are spared the death penalty more often than are white murderers. They fare better than most white murderers. The motivation behind unequal distribution of the death penalty may well have been to discriminate against blacks, but the result has favored them. Maldistribution is thus a straw man for empirical as well as analytical reasons.

II. MISCARRIAGES OF JUSTICE

In a recent survey Professors Hugo Adam Bedau and Michael Radelet found that 7,000 persons were executed in the United States between 1900 and 1985 and that 35 were innocent of capital crimes. Among the innocents they list Sacco and Vanzetti as well as Ethel and Julius Rosenberg. Although their data may be questionable, I do not doubt that, over a long enough period, miscarriages of justice will occur even in capital cases.

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

III. DETERRENCE

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

Deterrence is not altogether decisive for me either. I would favor retention of the death penalty as retribution even if it were shown that the threat of execution could not deter prospective murderers not already deterred by the threat of imprisonment. Still, I believe the death penalty,

10 It barely need be said that any discrimination against (for example, black murderers of whites) must also be discrimination for (for example, black murderers of blacks).
12 An excessive number of trucking accidents or of miscarriages of justice could offset the benefits gained by trucking or the practice of doing justice. We are, however, far from this situation.
14 For most abolitionists, the discrimination argument, see supra pp. 1662-64, is similarly non-decisive; they would favor abolition even if there could be no racial discrimination.
15 If executions were shown to increase the murder rate in the long run, I would favor abolition. Sparing the innocent victims who would be spared, ex hypothesi, by the non-execution of murderers would be more important to me than the execution, however just, of murderers. But although there is a lively discussion of the subject, no serious evidence exists to support the hypothesis that executions produce a higher murder rate. Cf. Phillips, “The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy,” 86 Am. J. Soc. 139 (1980) (arguing that murder rates drop immediately after executions of criminals).
because of its finality, is more feared than imprisonment, and deters some prospective murderers not deterred by the thought of imprisonment. Sparing the lives of even a few prospective victims by deterring their murderers is more important than preserving the lives of convicted murderers because of the possibility, or even the probability, that executing them would not deter others. Whereas the lives of the victims who might be saved are valuable, that of the murderer has only a negative value, because of his crime. Surely the criminal law is meant to protect the lives of potential victims in preference to those of actual murderers.

Murder rates are determined by many factors; neither the severity nor the probability of the threatened sanction is always decisive. However, for the long run, I share the view of Sir James Fitzjames Stephen: “Some men, probably, abstain from murder because they fear that if they committed murder they would be hanged. Hundreds of thousands abstain from it because they regard it with horror. One great reason why they regard it with horror is that murderers are hanged.”

Penal sanctions are useful in the long run for the formation of the internal restraints so necessary to control crime. The severity and finality of the death penalty is appropriate to the seriousness and the finality of murder.

IV. INCIDENTAL ISSUES: COST, RELATIVE SUFFERING, BRUTALIZATION

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

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

Another argument heard at least since Beccaria is that, by killing a murderer, we encourage, endorse, or legitimize unlawful killing. Yet, although all punishments are meant to be unpleasant, it is seldom argued that they legitimize the unlawful imposition of identical unpleasantness. Imprisonment is not thought to legitimize

17 Weeks v. United States, 217 U.S. 349 (1910) suggests that penalties be proportionate to the seriousness of the crime—a common theme in criminal law. Murder, therefore, demands more than life imprisonment. In modern times, our sensibility requires that the range of punishments be narrower than the range of crime—but not so narrow as to exclude the death penalty.
20 Thus restitution (a civil liability) cannot satisfy the punitive purpose of penal sanctions, whether the purpose be retributive or deterrent.
21 See infra note 3.
kidnapping; neither are fines thought to legitimize robbery. The difference between murder and execution, or between kidnapping and imprisonment, is that the first is unlawful and undeserved, the second a lawful and deserved punishment for an unlawful act. The physical similarities of the punishment to the crime are irrelevant. The relevant difference is not physical, but social.\textsuperscript{22}

V. JUSTICE, EXCESS, DEGRADATION

We threaten punishments in order to deter crime. We impose them not only to make the threats credible but also as retribution (justice) for the crimes that were not deterred. Threats and punishments are necessary to deter and deterrence is a sufficient practical justification for them. Retribution is an independent moral justification.\textsuperscript{23} Although penalties can be unwise, repulsive, or inappropriate, and those punished can be pitiable, in a sense the infliction of legal punishment on a guilty person cannot be unjust. By committing the crime, the criminal volunteered to assume the risk of receiving a legal punishment that he could have avoided by not committing the crime. The punishment he suffers is the punishment he voluntarily risked suffering and, therefore, it is no more unjust to him than any other event for which one knowingly volunteers to assume the risk. Thus, the death penalty cannot be unjust to the guilty criminal.\textsuperscript{24}

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

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

Justice Brennan has insisted that the death penalty is “uncivilized” “inhuman,” inconsistent with “human dignity” and with “the sanctity of

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

\textsuperscript{23} See van den Haag, “Punishment as a Device for Controlling the Crime Rate,” 33 Rutgers L. Rev. (1981) 706, 719 (explaining why the desire for retribution, although independent, would have to be satisfied even if deterrence were the only purpose of punishment).

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

\textsuperscript{25} The Works of Jeremy Bentham, ed. J. Bowring (1973), p. 105. However, I would be more polite about prescriptive natural rights, which Bentham described as “simple nonsense.” Id. (It does not matter whether natural rights are called “moral” or “human” rights as they currently are by most writers.)
life,”26 that it “treats members of the human race as nonhumans, as objects to be toyed with and discarded,”27 that it is “uniquely degrading to human dignity”28 and “by its very nature, involves a denial of the executed person’s humanity.”29 Justice Brennan does not say why he thinks execution “uncivilized.” Hitherto most civilizations have had the death penalty, although it has been discarded in Western Europe, where it is currently unfashionable probably because of its abuse by totalitarian regimes.

By “degrading,” Justice Brennan seems to mean that execution degrades the executed convicts. Yet philosophers, such as Immanuel Kant and G.F.W. Hegel, have insisted that, when deserved, execution, far from degrading the executed convict, affirms his humanity by affirming his rationality and his responsibility for his actions. They thought that execution, when not treated as nonrational animal

27 Id. at 272–73; see also Gregg v. Georgia, 428 U.S. 153, 230 (1976) (Brennan, J., dissenting).
29 Id. at 290.

deserved, is required for the sake of the convict’s dignity. (Does not life imprisonment violate human dignity more than execution, by keeping alive a prisoner deprived of all autonomy?)30

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

To believe, as Justice Brennan appears to, that the degradation is inflicted by the execution reverses the direction of casualty.

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

30 See Barzun, supra note 3, passim.

**Review Questions**

1. How does van den Haag reply to the objection that capital punishment is discriminatory?
2. What is his response to the claim that innocent people are mistakenly executed?
3. According to van den Haag, why does the possibility or probability of deterrence support the use of the death penalty?
4. How does he reply to the objections about cost, excessive suffering, legitimizing killing, the right to life, and human dignity?

**Discussion Questions**

1. Do you agree that the death penalty is the harshest punishment? Can you think of worse punishments?
2. Are you willing to accept the execution of innocent people as van den Haag does? Why or why not?
3. Are you convinced by van den Haag’s arguments about deterrence? (You may want to read Reiman’s objections in the next reading.)
CHAPTER FOUR: CAPITAL PUNISHMENT

Justice, Civilization, and the Death Penalty

JEFFREY H. REIMAN


Reiman begins with a careful discussion of retributivism. He distinguishes between two versions of the doctrine, *lex talionis* and proportional retributivism, and between two different retributive approaches to punishment, a Hegelian and a Kantian approach. Then he argues that it does not follow from the retributivist principle that we ought to impose the death penalty even for crimes of murder because, like torture, it is too horrible to be used by civilized people. He concludes with a reply to van den Haag’s arguments. He rejects van den Haag’s commonsense argument that execution deters more than life imprisonment, and he is not convinced by van den Haag’s argument (sometimes called the best-bet argument) that we should execute murderers rather than risk the lives of innocent people whose murders might have been deterred. According to Reiman, the problem is that not killing murderers may also have a deterrent effect, so innocent lives are risked no matter whether we execute or not.

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, 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 a part of the civilizing mission of modern states.

I. 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

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).
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. But the *lex talionis* is 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. 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.

There is nothing self-evident about the justice of the *lex talionis* nor, for that matter, or retributivism. 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 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 quality between persons and retributive punishment restores that equality by “annulling” the crime.

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 person do to you violates the *equality of persons* by asserting a right toward the other that the other does not possess toward you. You viol- ion 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 in this “Hegelian” form) reflects a conception of morality quite different from that envisioned by utilitarianism.

Instead of seeing morality as administering does of happiness to individual recipients, the retributive envisons 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 illegitimate 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 quality 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. 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. Here too, however, the assertion 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.
It should be clear that the Kantian argument also rests on the equality of persons, because a rational agent 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. 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.

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.

I suspect that it will be widely agreed that the state ought not administer punishments of the sort described above even if recommended by the letter of the lex talionis, and thus, even granting the justice of lex talionis, there are occasions on

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4 Herbert Morris defends retributivism on parallel grounds. See his "Persons and Punishment," The Monist 52, no. 4 (October 1968): 475-501. Isn't it 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?

5 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 with an insane or unbalanced mind. Moral restraints, in short, prohibit us from trying to make executions perfectly retributive" (Bedau, "Capital Punishment," p. 176).
which it is morally appropriate to diverge from its requirements.

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.

II. 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 assailters, raping rapists, and torturing torturers. Nonetheless, I believe, and suspect that most would agree, that it would not be right for us to beat assailters, rape rapists, or torture torturers, even though it were their just deserts—and even if this were the only way to make them suffer as much as they 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 not be right for us to do to offenders, even if it were their just deserts.

Progress in civilization is characterized by a lower tolerance for one’s own pain and that suffered by others. And this is appropriate, since, via growth in knowledge, civilization brings increased power to prevent or reduce pain and, via growth in the ability to communicate and interact with more and more people, civilization extends the circle of people with whom we empathize. If civilization is characterized by lower tolerance for our own pain and that of others, then publicly refusing to do horrible things to our fellows both signals the level of our civilization and, by our example, continues the work of civilizing. 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 civilizing. Thus we gain from including torture in this category, and if execution is especially horrible, we gain still more by including it.

6 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, that 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” ([Ernest van den Haag and John P. Conrad, *The Death Penalty: A Debate* (New York: Plenum Press, 1983)]. p. 215: cf. van den Haag’s *Punishing Criminals* [New York: Basic Books, 1975], pp. 196–206).
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 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 assailants. 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 we do instead is compatible with believing that they do deserve them. And thus if such refraining does not make our lives more dangerous, then it is no loss, and given our vulnerability to pain, it is a gain. Consequently, reduction in the horrible things we do to our fellows, when 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. I think that this view overlooks important differences in the manner in which people reach their inevitable ends. I contend that execution is especially horrible, and it is so in a way similar to (though not identical with) the way in which torture is especially horrible. I believe we view torture as especially awful because of two of its features, which also characterize execution: intense pain and the spectacle of one human being completely subject to the

7 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 inflection 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 upon 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 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.
power of another. This latter is separate from the issue of pain since it is something that offends us about unpainful things, such as slavery (even voluntarily entered) and prostitution (even voluntarily chosen as an occupation). Execution shares this separate feature, since killing a bound and defenseless human being enacts the total subjugation of that person to his fellows. 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. 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 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

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8 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.

9 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 an early Middle Ages, Philippe Ariès 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 nobody dared talk about" (Philippe Ariès, The Hour of Our Death [New York: Vintage, 1982], p. 11).
wish one thing: that it should stop.”

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 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 deterrence 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 just punishment for murder, is part of the civilizing mission of modern states.

III. 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. 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.

11 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, irreversibility, 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.

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, 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 penalty, the more it deters.

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

From this unquestioned fact a reasonable conclusion can be drawn in favor of the superior deterrent effect of the death penalty. Those who have the choice in practice fear death more than they fear life in prison. If they do, it follows that the threat of the death penalty, all other things equal, is likely to deter more than the threat of life in prison. One is most deterred by what one fears most. From which it follows that whatever statistics fail, or do not fail, to show, the death penalty is likely to be more deterrent than any other. [pp. 68-69]

Those of us who recognize how commonsensical it was, and still is, to believe that the sun moves around the earth, will be less willing than 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. Since it seems to me that whoever would be deterred by a given likelihood of death would be deterred by an equal likelihood of life behind bars, I suspect that the 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.

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).

13 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).
2. In light of the fact that roughly 500 to 700 suspects fall into 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 the substantial risk of ending up dead as a result. It's hard to see why anyone who is not already 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 crueler 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.

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 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. 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.

16 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 deterrent 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.

17 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 the 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...
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, we 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

I believe that, taken together, these arguments prove that we should abolish the death penalty though it is a just punishment for murder.

Review Questions

1. What is Reiman’s distinction between lex talionis and proportional retributivism?
2. Explain the affinity that Reiman sees between lex talionis and the golden rule.
3. What is the Hegelian approach to crime and punishment, as distinguished from the utilitarian view?
4. What is the Kantian view as Reiman explains it?
5. What is the retributivist principle? Why doesn’t it settle the question about the application of lex talionis according to Reiman?
6. Why does Reiman reject the claim that we should rape rapists and torture torturers?
7. On Reiman’s view, why is execution similar to torture?
8. How does Reiman reply to van den Haag?

Discussion Questions

1. What is the appropriate punishment for the crimes of rape and torture?
2. Is execution really similar to torture, as Reiman says? Why or why not?
3. How could van den Haag reply to Reiman’s arguments?