

Refuting Reiman

Ernest van den Haag

In the previous essay, Jeffrey Reiman argued that van den Haag is wrong in supposing that capital punishment deters and that it is therefore justified. In this response, van den Haag provides his response to Reiman's criticisms.

Reiman believes the death penalty is deserved by some murderers but should never be imposed. Moral scruples should preclude it. If the punishment deserved . . . is morally repugnant, we may impose less, provided the suffering imposed in lieu of what is deserved is proportional to the suffering inflicted on the crime victim. However, suffering exceeding that of his victim can never be deserved by the offender; to impose it would be "unjust for the same reasons that make punishment of the innocent unjust."¹ . . .

I share some of Reiman's scruples: although he deserves it, I do not want to see the torturer tortured. Other scruples strike me as unjustified.

POVERTY AND CULPABILITY

Reiman believes "that the vast majority of murders in America are a predictable response to the frustrations and disabilities of impoverished social circumstances" which could be, but are not remedied because "others in America benefit," wherefore we have "no right to exact the full cost . . . from our murderers until we have done everything possible to rectify the conditions that produce their crimes." Murder here seems to become the punishment for the sins of the wealthy. According to Reiman, "the vast majority" of current murderers are not fully culpable, since part of the blame for their crimes must be placed on those who fail to "rectify the conditions that produce their crimes."

I grant that certain social conditions predictably produce crime more readily than others. Does it follow that those who commit crimes in criminogenic

conditions are less responsible, or blameworthy, than they would be if they did not live in these conditions? Certainly not. Predictability does not reduce responsibility. Reiman remains responsible for his predictable argument. Culpability is reduced only when the criminal's ability to control his actions, or to realize that they are wrong, is abnormally impaired. If not, the social conditions in which the criminal lives have no bearing on his responsibility for his acts. Conditions such as poverty, just or unjust, may increase the temptation to commit crimes. But poverty is neither a necessary nor a sufficient condition for crime and thus certainly not a coercive one. If there is no compulsion, temptation is no excuse. The law is meant to restrain, and to hold responsible, those tempted to break it. It need not restrain those not tempted, and it cannot restrain those who are unable to control their actions.

Reiman's claim that even "though criminals can control their actions, when crimes are predictable responses to unjust circumstances, then those who benefit from and do not remedy those conditions bear some responsibility for the crimes and thus the criminals cannot be held *wholly* responsible for them. . . ." seems quite unjustified. Those responsible for unjust conditions must be blamed for them² but not for crimes that are "predictable responses to unjust circumstances" if the respondents could have avoided these crimes, as most people living in unjust conditions do.

If crimes are political, that is, address not otherwise remediable "unjust circumstances," they may be held to be morally, if not legally, excusable, on some occasions. But the criminal's moral, let alone legal, responsibility for a crime which he committed

for personal gain and could have avoided is not diminished merely because he lives in unjust circumstances and his crime was a predictable response to them. Suppose the predictable response to unjust wealth were drunken driving or rape. Would his wealth excuse the driver or the rapist? Why should poverty, if wealth would not?

B: Crime is produced by many circumstances, "just" and "unjust." The most just society may have no less crime than the least just (unless "just" is defined circularly as the absence of crime). Tracing crime to causal circumstances is useful and may help us to control it. Suggesting that they *eo ipso* are excuses confuses causality with nonresponsibility. . . . Excuses require specific circumstances that diminish the actor's control over his actions. . . .

CIVILIZATION

Reiman thinks that the death penalty is not civilized because it involves the total subjugation of one person to others, as does slavery or prostitution.³

Whereas slavery usually is not voluntary, the murderer runs the risk of execution voluntarily: he could avoid it by not murdering. I find nothing uncivilized in imposing the risk of subjugation and death on those who decide to murder.

Nota bene: Persons who act with diminished capacity, during moments of passion, are usually convicted of manslaughter rather than murder. Even if convicted of murder, they are not sentenced to death; only if the court believes the murderer did have a choice, and intended to murder, can he receive the death sentence.

Reiman refers to research finding a brutalization effect such that executions lead to more homicides. The data are unpersuasive. Some researchers find an increase, some a decrease, of homicides immediately after an execution.⁴ Either effect seem[s] ephemeral, involving bunching rather than changes in the annual homicide rate.

To argue more generally, as Reiman also does, that capital punishment is inconsistent with the advancement of civilization is to rely on arbitrary definitions of "advancement" and "civilization" for a circular argument. If civilization actually had "advanced" in the direction Reiman, quoting Durkheim, thinks it has, why is that a reason for not

preferring "advancement" in some other, perhaps opposite, direction? I cannot find the *moral* (normative) argument in Reiman's description.

DETERRENCE

The death penalty should be retained if abolition would endanger us, Reiman believes. But he does not believe that abolition would. He may be right. However, some of his arguments seem doubtful.

He thinks that whatever marginal deterrent effect capital punishment has, if it has any, is not needed, since life imprisonment provides all the deterrence needed. How can it be ascertained that punishment *x* deters "everyone who can be deterred" so that punishment *x*-plus would not deter additional persons? I can see no way to determine this, short of experiments we are unlikely to undertake. Reiman may fear life imprisonment as much, or more, than death. Couldn't someone else fear death more and be insufficiently deterred by life imprisonment?

I cannot prove conclusively that the death penalty deters more than life imprisonment or that the added deterrence is needed. Reiman cannot prove conclusively that the added deterrence is not needed or produced. I value the life of innocents more than the life of murderers. Indeed, I value the life of murderers negatively. Wherefore I prefer over- to underprotection. I grant this is a preference.

SELF-DEFENSE

Reiman also believes that murderers who are not deterred by the risk they run because their victims may defend themselves with guns will not be deterred by the risk of execution. This seems unrealistic. Murderers rarely run much risk from self-defense since they usually ambush unsuspecting victims.

TORTURE

On my reasoning, Reiman contends, torture should be used, since it may deter more than execution; or else, even if more deterrent than alternatives, the death penalty should be abolished as torture was: "ei-

ther we must abolish the electric chair or reinstitute the rack" is his colorful phrase. But there is a difference. I do not oppose torture as undeserved or non-deterrent (although I doubt that the threat of the rack, or of anything, adds deterrence to the threat of execution) but simply as repulsive. Death is not; nor is the death penalty. Perhaps repulsiveness is not enough to exclude the rack. If Reiman should convince me that the threat of the rack adds a great deal of deterrence to the threat of execution, he might persuade me to overcome my revulsion and to favor the rack as well. It certainly can be deserved. . . .

MODES OF EXECUTION

As Reiman stresses, the spectacle of execution is not pretty. Nor is surgery. Wherefore, both should be attended only by the necessary personnel. I do not find Reiman's aesthetic or moral scruples sufficient to preclude execution or surgery. However, I share his view that lethal injections are particularly unpleasant, not so much because of the subjugation which disturbs him but because of the veterinary air. (We put animals "to sleep" when sick or inconvenient.) In contrast, shooting strikes me as dignified; it is painless too and probably the best way of doing what is necessary.

NOTES

1. See Jeffrey H. Reiman, "Justice, Civilization, and the Death Penalty: Answering van den Haag," *Philosophy & Public Affairs* 14, no. 2 (Spring 1985): 128. Unless otherwise noted, all my quotations are taken from Reiman's article.
2. Who are they? They are not necessarily the beneficiaries, as Reiman appears to believe. I benefit from rent control, which I think unjust to my landlord, but I'm not responsible for it. I may benefit from low prices for services or goods without being responsible for them or for predictable criminal responses to them. Criminals benefit from the unjust exclusionary rules of our courts. Are they to blame for these rules?
3. Prostitution does not involve total subjugation and is voluntary. In an ambiguous footnote, Reiman asserts that it is

LIFE IMPRISONMENT

Reiman proposes life imprisonment without parole instead of execution. Although less feared, and therefore likely to be less deterrent, actual lifelong imprisonment strikes me as more cruel than execution even if perceived as less harsh. Its comparative cruelty was stressed already by Cesare Bonesana, Marchese di Beccaria, and by many others since.

Life imprisonment also becomes undeserved over time. A person who committed a murder when twenty years old and is executed within five years—far too long and cruel a delay, in my opinion—is, when executed, still the person who committed the murder for which he is punished. His identity changes little in five years. However, a person who committed a murder when he was twenty years old and is kept in prison when sixty years old is no longer the same person who committed the crime for which he is still being punished. The sexagenarian is unlikely to have much in common with the twenty-year-old for whose act he is being punished; his legal identity no longer reflects reality. Personality and actual identity are not that continuous. In effect, we punish an innocent sexagenarian who does not deserve punishment instead of a guilty twenty-year-old who did. This spectacle should offend our moral sensibilities more than the deserved execution of the twenty-year-old. Those who deserve the death penalty should be executed while they deserve it, not kept in prison when they no longer deserve any punishment.

the perception of prostitution as subjugation that makes it offensive. But this perception, derived from pulp novels more than from reality, is not what makes the voluntary act offensive. Rather, it is the sale of sex as a fungible service, divorced from affection and depersonalized, that is offensive. Anyway, when something is offensive because misperceived it is not the thing that is offensive.

4. David P. Phillips, "The Deterrent Effect of Capital Punishment: New Evidence on an Old Controversy," *The American Journal of Sociology* (July 1980). See also Lester, "Executions as a Deterrent to Homicide" *Psychological Rep.* 562 (1979): 562