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Capital Punishment

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Anthony G. Amsterdam is a lawyer who has represented many clients who have received the death sentence.

Amsterdam begins by asserting that capital punishment is a great evil simply because it is intentionally killing a person. Furthermore, it is wrong because it results in killing people in error, and these errors cannot be corrected. Moreover, it is unfairly applied. The death sentence is disproportionately imposed on the poor and blacks.

Armstrong concludes with a discussion of retribution and deterrence. He argues that neither the appeal to retribution nor the appeal to deterrence justifies capital punishment.

MY DISCUSSION OF CAPITAL PUNISHMENT will proceed in three stages.

First, I would like to set forth certain basic factual realities about capital punishment, like the fact that capital punishment is a fancy phrase for legally killing people. Please forgive me for beginning with such obvious and ugly facts. Much of our political and philosophical debate about the death penalty is carried on in language calculated to conceal these realities and their implications. The implications, I will suggest, are that capital punishment is a great evil—surely the greatest evil except for war that our society can intentionally choose to commit.

This does not mean that we should do away with capital punishment. Some evils, like war, are occasionally necessary, and perhaps capital punishment is one of them. But the fact that it is a great evil means that we should not choose to do it without some very good and solid reason of which we are satisfactorily convinced upon sufficient evidence. The conclusion of my first point simply is that the burden of proof upon

the question of capital punishment rightly rests on those who are asking us to use our laws to kill people with, and that this is a very heavy burden.

Second, I want to review the justifications that have been advanced to support capital punishment. I want to explore with you concepts such as retribution and deterrence, and some of the assumptions and evidence about them. The conclusion of my second point will be that none of these reasons which we like to give ourselves for executing criminals can begin to sustain the burden of proof that rightfully rests upon them.

Third, I would like to say a word about history—about the slow but absolutely certain progress of maturing civilization that will bring an inevitable end to punishment by death. That history does not give us the choice between perpetrating and abolishing capital punishment, because we could not perpetuate it if we wanted to. A generation or two within a single nation can retard but not reverse a long-term, worldwide evolution of this magnitude. Our choice is narrower although it is not unimportant: whether we shall be numbered among the last generations to put legal killing aside. I will end by asking you to cast your choice for life instead

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of death. But, first, let me begin with some basic facts about the death penalty.

I

The most basic fact, of course, is that capital punishment means taking living, breathing men and women, stuffing them into a chair, strapping them down, pulling a lever, and exterminating them. We have almost forgotten this fact because there have been no executions in this country for more than ten years, except for Gary Gilmore, whose combined suicide and circus were so wildly extravagant as to seem unreal. For many people, capital punishment has become a sanitized and symbolic issue: Do you or do you not support your local police? Do you or do you not care enough about crime to get tough with criminals? These abstractions were never what capital punishment was about, although it was possible to think so during the ten-year moratorium on executions caused by constitutional challenges to the death penalty in the courts. That is no longer possible. The courts have now said that we can start up executions again, if we want to. Today, a vote for capital punishment is a vote to kill real, live people.

What this means is, first, that we bring men or women into court and put them through a trial for their lives. They are expected to sit back quietly and observe decent courtroom decorum throughout a proceeding whose purpose is systematically and deliberately to decide whether they should be killed. The jury hears evidence and votes; and you can always tell when a jury has voted for death because they come back into court and they will not look the defendant or defense counsel in the eyes. The judge pronounces sentence and the defendant is taken away to be held in a cell for two to six years, hoping that his appeals will succeed, not really knowing what they are all about, but knowing that if they fail, he will be taken out and cinched down and put to death. Most of the people in prison are reasonably nice to him, and even a little

apologetic; but he realizes every day for that 700 or 2,100 days that they are holding him there helpless for the approaching slaughter; and that, once the final order is given, they will truss him up and kill him, and that nobody in that vast surrounding machinery of public officials and servants of the law will raise a finger to save him. This is why Camus once wrote that an execution

... is not simply death. It is just as different . . . from the privation of life as a concentration camp is from prison. . . . It adds to death a rule, a public premeditation known to the future victim, an organization . . . which is itself a source of moral sufferings more terrible than death . . . [*Capital punishment*] is . . . the most premeditated of murders, to which no criminal's deed, however calculated . . . can be compared. . . . For there to be an equivalency, the death penalty would have to punish a criminal who had warned his victim of the date at which he would inflict a horrible death on him and who, from that moment onward, had confined him at his mercy for months. Such a monster is not encountered in private life.

I will spare you descriptions of the execution itself. Apologists for capital punishment commonly excite their readers with descriptions of extremely gruesome, gory murders. All murders are horrible things, and executions are usually a lot cleaner physically—although, like Camus, I have never heard of a murderer who held his victim captive for two or more years waiting as the minutes and hours ticked away toward his preannounced death. The clinical details of an execution are as unimaginable to me as they are to most of you. We have not permitted public executions in this country for over 40 years. The law in every state forbids more than a few people to watch the deed done behind prison walls. In January of 1977, a federal judge in Texas ruled that executions could be photographed for television, but the attorneys general of 25 states asked the federal Court of Appeals to set aside that ruling, and it did. I can only leave to your imagination what they are trying so very hard to hide from us. Oh, of course, executions are too hideous to put on television; we all know that. But let us

not forget that it is the same hideous thing, done in secret, which we are discussing under abstract labels like "capital punishment" that permit us to talk about the subject in after-dinner conversation instead of spitting up.

In any event, the advocates of capital punishment can and do accentuate their arguments with descriptions of the awful physical details of such hideous murders as that of poor Sharon Tate. All of us naturally and rightly respond to these atrocities with shock and horror. You can read descriptions of executions that would also horrify you (for example, in Byron Eshelman's 1962 book, *Death Row Chaplain*, particularly pages 160-61), but I prefer not to insult your intelligence by playing "can you top this" with issues of life and death. I ask you only to remember two things, if and when you are exposed to descriptions of terrifying murders.

First, the murders being described are not murders that are being done by us, or in our name, or with our approval; and our power to stop them is exceedingly limited even under the most exaggerated suppositions of deterrence, which I shall shortly return to question. Every execution, on the other hand, is done by our paid servants, in our collective name, and we can stop them all. Please do not be bamboozled into thinking that people who are against executions are in favor of murders. If we had the individual or the collective power to stop murders, we would stop them all—and for the same basic reason that we want to stop executions. Murders and executions are both ugly, vicious things, because they destroy the same sacred and mysterious gift of life which we do not understand and can never restore.

Second, please remember therefore that descriptions of murders are relevant to the subject of capital punishment only on the theory that two wrongs make a right, or that killing murderers can assuage their victims' sufferings or bring them back to life, or that capital punishment is the best deterrent to murder. The first two propositions are absurd, and the third is debatable—although as I shall later show, the

evidence is overwhelmingly against it. My present point is only that deterrence is debatable, whereas we *know* that persons whom we execute are dead beyond recall, no matter how the debate about deterrence comes out. That is a sufficient reason, I believe, why the burden of proof on the issue of deterrence should be placed squarely upon the executioners.

There are other reasons too. Let me try to state them briefly.

Capital punishment not merely kills people, it also kills some of them in error, and these are errors which we can never correct. When I speak about legal error, I do not mean only the question whether "they got the right man" or killed somebody who "didn't do it." Errors of that sort do occur: Timothy Evans, for example, an innocent man whose execution was among the reasons for the abolition of the death penalty in Great Britain. If you read Anthony Scaduto's recent book, *Scapegoat*, you will come away with unanswerable doubts whether Bruno Richard Hauptmann was really guilty of the kidnapping of the Lindbergh infant for which he was executed, or whether we killed Hauptmann, too, for a crime he did not commit.

In 1975, the Florida Cabinet pardoned two black men, Freddie Lee Pitts and Wilbert Lee, who were twice tried and sentenced to death and spent 12 years apiece on death row for a murder committed by somebody else. This one, I am usually glibly told, "does not count," because Pitts and Lee were never actually put to death. Take comfort if you will but I cannot, for I know that only the general constitutional attack which we were then mounting upon the death penalty in Florida kept Pitts and Lee alive long enough to permit discovery of the evidence of their innocence. Our constitutional attack is now dead, and so would Pitts and Lee be if they were tried tomorrow. Sure, we catch some errors. But we often catch them by extremely lucky breaks that could as easily not have happened. I represented a young man in North Carolina who came within a hair's breadth of being the Gary Gilmore of his day. Like Gil-

more, he became so depressed under a death sentence that he tried to dismiss his appeal. He was barely talked out of it, his conviction was reversed, and on retrial a jury acquitted him in 11 minutes.

We do not know how many "wrong men" have been executed. We think and pray that they are rare—although we can't be sure because, after a man is dead, people seldom continue to investigate the possibility that he was innocent. But that is not the biggest source of error anyway.

What about *legal* error? In 1968, the Supreme Court of the United States held that it was unconstitutional to exclude citizens from capital trial juries simply because they had general conscientious or religious objections to the death penalty. That decision was held retroactive; and I represented 60 or 70 men whose death sentences were subsequently set aside for constitutional errors in jury selection. While researching their cases, I found the cases of at least as many more men who had already been executed on the basis of trials infected with identical errors. On June 29, 1977, we finally won a decision from the Supreme Court of the United States that the death penalty is excessively harsh and therefore unconstitutional for the crime of rape. Fine, but it comes too late for the 455 men executed for rape in this country since 1930—405 of them black.

In 1975, the Supreme Court held that the constitutional presumption of innocence forbids a trial judge to tell the jury that the burden of proof is on a homicide defendant to show provocation which reduces murder to manslaughter. On June 17, 1977, the Court held that this decision was also retroactive. Jury charges of precisely that kind were standard forms for more than a century in many American states that punished murder with death. Can we even begin to guess how many people were unconstitutionally executed under this so-called retroactive decision?

Now what about errors of fact that go to the degree of culpability of a crime? In almost every

state, the difference between first and second degree murder—or between capital and non-capital murder—depends on whether the defendant acted with something called "premeditation" as distinguished from intent to kill. Premeditation means intent formed beforehand, but no particular amount of time is required. Courts tell juries that premeditation "may be as instantaneous as successive thoughts in the mind." Mr. Justice Cardozo wrote that *he* did not understand the concept of premeditation after several decades of studying and trying to apply it as a judge. Yet this is the kind of question to which a jury's answer spells out life or death in a capital trial—this, and the questions of whether the defendant had "malice aforethought," or "provocation and passion," or "insanity," or the "reasonableness" necessary for killing in self-defense.

I think of another black client, Johnny Coleman, whose conviction and death sentence for killing a white truck driver named "Screwdriver" Johnson we twice got reversed by the Supreme Court of the United States. On retrial a jury acquitted him on the grounds of self-defense upon exactly the same evidence that an earlier jury had had when it sentenced him to die. When ungraspable legal standards are thus applied to intangible mental states, there is not merely the possibility but the actuarial certainty that juries deciding substantial volumes of cases are going to be wrong in an absolutely large number of them. If you accept capital punishment, you must accept the reality—not the risk, but the reality—that we shall kill people whom the law says that it is not proper to kill. No other outcome is possible when we presume to administer an infallible punishment through a fallible system.

You will notice that I have taken examples of black defendants as some of my cases of legal error. There is every reason to believe that discrimination on grounds of race and poverty fatally infect the administration of capital justice in this country. Since 1930, an almost equal number of white and black defendants has been

executed for the crime of murder, although blacks constituted only about a tenth of the nation's population during this period. No sufficiently careful studies have been done of these cases, controlling variables other than race, so as to determine exactly what part race played in the outcome. But when that kind of systemic study *was* done in rape cases, it showed beyond the statistical possibility of a doubt that black men who raped white women were disproportionately sentenced to die on the basis of race alone. Are you prepared to believe that juries which succumbed to conscious or unconscious racial prejudices in rape cases were or are able to put those prejudices wholly aside where the crime charged is murder? Is it not much more plausible to believe that even the most conscientious juror—or judge, or prosecuting attorney—will be slower to want to inflict the death penalty on a defendant with whom he can identify as a human being; and that the process of identification in our society is going to be very seriously affected by racial identity?

I should mention that there have been a couple of studies—one by the *Stanford Law Review* and the other by the Texas Judicial Council—which found no racial discrimination in capital sentencing in certain murder cases. But both of these studies had methodological problems and limitations; and both of them also found deathsentencing discrimination against the economically poor, who come disproportionately from racial minorities. The sum of the evidence still stands where the National Crime Commission found it ten years ago, when it described the following discriminatory patterns. "The death sentence," said the Commission, "is disproportionately imposed and carried out on the poor, the Negro, and members of unpopular groups."

Apart from discrimination, there is a haphazard, crazy-quilt character about the administration of capital punishment that every knowledgeable lawyer or observer can describe but none can rationally explain. Some juries are hanging juries, some counties are hanging coun-

ties, some years are hanging years; and men live or die depending on these flukes.

However atrocious the crime may have been for which a particular defendant is sentenced to die, "[e]xperienced wardens know many prisoners serving life or less whose crimes were equally, or more atrocious." This is a quotation, by the way, from former Attorney General Ramsey Clark's statement to a congressional subcommittee; and wardens Lewis Lawes, Clinton Duffy, and others have said the same thing.

With it I come to the end of my first point. I submit that the deliberate judicial extinction of human life is intrinsically so final and so terrible an act as to cast the burden of proof for its justification upon those who want us to do it. But certainly when the act is executed through a fallible system which assures that we kill some people wrongly, others because they are black or poor or personally unattractive or socially unacceptable, and all of them quite freakishly in the sense that whether a man lives or dies for any particular crime is a matter of luck and happenstance, *then*, at the least, the burden of justifying capital punishment lies fully and heavily on its proponents.

II

Let us consider those justifications. The first and the oldest is the concept of *retribution*: an eye for an eye, a life for a life. You may or may not believe in this kind of retribution, but I will not waste your time debating it because it cannot honestly be used to justify the only form of capital punishment that this country has accepted for the past half-century. Even before the judicial moratorium, executions in the United States had dwindled to an average of about 30 a year. Only a rare, sparse handful of convicted murderers are being sentenced to die or executed for the selfsame crimes for which many, many times as many murderers were sent away to prison. Obviously, as Professor Herbert Wechsler said a generation ago, the issue of capital punishment is no longer "whether it is fair

or just that one who takes another person's life should lose his own. . . . [W]e do not and cannot act upon . . . [that proposition] generally in the administration of the penal law. The problem rather is whether a small and highly random sample of people who commit murder . . . ought to be despatched, while most of those convicted of . . . [identical] crimes are dealt with by imprisonment."

Sometimes the concept of retribution is modernized a little with a notion called *moral reinforcement*—the ideal that we should punish very serious crimes very severely in order to demonstrate how much we abhor them. The trouble with *this* justification for capital punishment, of course, is that it completely begs the question, which is *how severely* we ought to punish any particular crime to show appropriate abhorrence for it. The answer can hardly be found in a literal application of the eye-for-an-eye formula. We do not burn down arsonists' houses or cheat back at bunco artists. But if we ought not punish all crimes exactly according to their kind, then what is the fit moral reinforcement for murder? You might as well say burning at the stake or boiling in oil is as simple as gassing or electrocution.

Or is it not more plausible—if what we really want to say is that the killing of a human being is wrong and ought to be condemned as clearly as we can—that we should choose the punishment of prison as the fitting means to make this point? So far as moral reinforcement goes, the difference between life imprisonment and capital punishment is precisely that imprisonment continues to respect the value of human life. The plain message of capital punishment, on the other hand, is that life ceases to be sacred whenever someone with the power to take it away decides that there is a sufficiently compelling pragmatic reason to do so.

But there is still another theory of a retributive sort which is often advanced to support the death penalty, particularly in recent years. This is the argument that *we*—that is, the person making the argument—no longer believe in the outworn concept of retribution, but the *pub-*

lic—they believe in retribution, and so we must let them have their prey or they will lose respect for law. Watch for this argument because it is the surest sign of demagogic depravity. It is disgusting in its patronizing attribution to "the public" of a primitive, uneducable bloodthirstiness which the speaker is unprepared to defend but is prepared to exploit as a means of sidestepping the rational and moral limitations of a *just* theory of retribution. It out-judases Judas in its abnegation of governmental responsibility to respond to popular misinformation with enlightenment, instead of seizing on it as a pretext for atrocity. This argument asserts that the proper way to deal with a lynch mob is to string its victim up before the mob does.

I don't think "the public" is a lynch mob or should be treated as one. People today are troubled and frightened by crime, and legitimately so. Much of the apparent increase of violent crime in our times is the product of intensified statistics keeping, massive and instantaneous and graphic news reporting, and manipulation of figures by law enforcement agencies which must compete with other sectors of the public economy for budget allocations. But part of the increase is also real, and very disturbing. Murders ought to disturb us all, whether or not they are increasing. Each and every murder is a terrible human tragedy. Nevertheless, it is irresponsible for public officials—particularly law enforcement officials whom the public views as experts—first to exacerbate and channel legitimate public concern about crime into public support for capital punishment by advertising unsupportable claims that capital punishment is an answer to the crime problem, and then to turn around and cite public support for capital punishment as justification when all other justifications are shown to be unsupportable. Politicians do this all the time, for excellent political reasons. It is much easier to advocate simplistic and illusory solutions to the crime problem than to find real and effective solutions. Most politicians are understandably afraid to admit that our society knows frighteningly little about the

causes or cure of crime, and will have to spend large amounts of taxpayers' money even to begin to find out. The facile politics of crime do much to explain our national acceptance of capital punishment, but nothing to justify it.

Another supposed justification for capital punishment that deserves equally brief treatment is the notion of *isolation or specific deterrence*—the idea that we must kill a murderer to prevent him from murdering ever again. The usual forms that this argument takes are that a life sentence does not mean a life sentence—it means parole after 7, or 12, or 25 years; and that, within prisons themselves, guards and other prisoners are in constant jeopardy of death at the hands of convicted but unexecuted murderers.

It amazes me that these arguments can be made or taken seriously. Are we really going to kill a human being because we do not trust other people—the people whom we have chosen to serve on our own parole boards—to make a proper judgment in his case at some future time? We trust this same parole board to make far more numerous, difficult, and dangerous decisions: hardly a week passes when they do not consider the cases of armed robbers, for example, although armed robbers are much, much more likely statistically to commit future murders than any murderer is to repeat his crime. But if we really do distrust the public agencies of law—if we fear that they may make mistakes—then surely that is a powerful argument *against* capital punishment. Courts which hand out death sentences because they predict that a man will still be criminally dangerous 7 or 25 years in the future cannot conceivably make fewer mistakes than parole boards who release a prisoner after 7 or 25 years of close observation in prison have convinced them that he is reformed and no longer dangerous.

But pass this point. If we refuse to trust the parole system, then let us provide by law that the murderers whose release we fear shall be given sentences of life imprisonment without parole which *do* mean life imprisonment without

parole. I myself would be against that, but it is far more humane than capital punishment, and equally safe.

As for killings inside prisons, if you examine them you will find that they are very rarely done by convicted murderers, but are almost always done by people imprisoned for crimes that no one would think of making punishable by death. Warden Lawes of Sing Sing and Governor Wallace of Alabama, among others, regularly employed murder convicts as house servants because they were among the very safest prisoners. There are exceptions, of course; but these can be handled by adequate prison security. You cannot tell me or believe that a society which is capable of putting a man on the moon is incapable of putting a man in prison, keeping him there, and keeping him from killing while he is there. And if anyone says that this is costly, and that we should kill people in order to reduce government expenditures, I can only reply that the cost of housing a man for life in prison is considerably less than the cost of putting the same man through all of the extraordinary legal proceedings necessary to kill him.

That brings me to the last supposed justification for the death penalty: *deterrence*. This is the subject that you most frequently hear debated, and many people who talk about capital punishment talk about nothing else. I have done otherwise here, partly for completeness, partly because it is vital to approach the subject of deterrence knowing precisely what question you want to ask and have answered. I have suggested that the proper question is *whether there is sufficiently convincing evidence that the death penalty deters murder better than does life imprisonment so that you are willing to accept responsibility for doing the known evil act of killing human beings—with all of the attending ugliness that I have described—on the faith of your conviction in the superior deterrent efficacy of capital punishment.*

If this is the question, then I submit that there is only one fair and reasonable answer. When the Supreme Court of the United States reviewed

the evidence in 1976, it described that evidence as "inconclusive." Do not let anybody tell you—as death-penalty advocates are fond of doing—that the Supreme Court held the death penalty justifiable as a deterrent. What the Court's plurality opinion said, exactly, was that "there is no convincing evidence *either supporting or refuting* . . . [the] view" that "the death penalty may not function as a significantly greater deterrent than lesser penalties." *Because* the evidence was inconclusive, the Court held that the Constitution did not forbid judgment either way. But if the evidence is inconclusive, is it your judgment that we should conclusively kill people on a factual theory that the evidence does not conclusively sustain?

I hope not. But let us examine the evidence more carefully because—even though it is not conclusive—it is very, very substantial; and the overwhelming weight of it refutes the claims of those who say that capital punishment is a better deterrent than life imprisonment for murder.

For more than 40 years, criminologists have studied this question by a variety of means. They have compared homicide rates in countries and states that did and did not have capital punishment, or that actually executed people more and less frequently. Some of these studies compared large aggregates of abolitionist and retentionist states; others compared geographically adjacent pairs or triads of states, or states that were chosen because they were comparable in other socio-economic factors that might affect homicide. Other studies compared homicide rates in the same country or state before and after the abolition or reinstatement of capital punishment, or they compared homicide rates for the same geographic area during periods preceding and following well publicized executions. Special comparative studies were done relating to police killings and prison killings. All in all, there were dozens of studies. Without a single exception, *none* of them found that the death penalty had any statistically significant effect upon the rate of homicide or murder. Often I have heard advocates of capital

punishment explain away its failures by likening it to a great lighthouse: "We count the ships that crash," they say, "but we never know how many saw the light and were saved." What these studies show, however, is that coastlines of the same shape and depth and tidal structure, with and without lighthouses, invariably have the same number of shipwrecks per year. On that evidence, would you invest your money in a lighthouse, or would you buy a sonar if you really wanted to save lives?

In 1975, the first purportedly scientific study ever to find that capital punishment *did* deter homicides was published. This was done by Issac Ehrlich of Chicago, who is not a criminologist but an economist. Using regression analysis involving an elaborate mathematical model, Ehrlich reported that every execution deterred something like eight murders. Naturally supporters of capital punishment hurriedly clambered on the Ehrlich bandwagon.

Unhappily, for them, the wagon was a factory reject. Several distinguished econometricians—including a team headed by Lawrence Klein, president of the American Economy Association—reviewed Ehrlich's work and found it fatally flawed with numerous methodological errors. Some of these were technical: it appeared, for example, that Ehrlich had produced his results by the unjustified and unexplained use of a logarithmic form of regression equation instead of the more conventional linear form—which made his findings of deterrence vanish. Equally important, it was shown that Ehrlich's findings depended entirely on data from the post-1962 period, when executions declined and the homicide rate rose *as a part of a general rise, in the overall crime rate that Ehrlich incredibly failed to consider.*

Incidentally, the nonscientific proponents of capital punishment are also fond of suggesting that the rise in homicide rates in the 1960s and the 1970s, when executions were halted, proves that executions used to deter homicides. This is ridiculous when you consider that crime as a whole has increased during this period; that

homicide rates have increased about *half* as much as the rates for all other FBI Index crimes; and that whatever factors are affecting the rise of most noncapital crimes (which *cannot* include cessation of executions) almost certainly affect the homicide-rate rise also.

In the event, Ehrlich's study was discredited and a second, methodologically inferior study by a fellow named Yunker is not even worth criticizing here. These are the only two scientific studies in 40 years, I repeat, which have ever purported to find deterrence. On the other hand, several recent studies have been completed by researchers who adopted Ehrlich's basic regression-analysis approach but corrected its defects. Peter Passell did such a study finding no deterrence. Kenneth Avio did such a study finding no deterrence. If you want to review all of these studies yourselves, you may find them discussed and cited in an excellent article in the 1976 *Supreme Court Review* by Hans Zeisel, on page 317. The conclusion you will have to draw is that—during 40 years and today—the scientific community has looked and looked and looked for any reliable evidence that capital punishment deters homicide better than does life imprisonment, and it has found no such evidence at all.

Proponents of capital punishment frequently cite a different kind of study, one that was done by the Los Angeles Police Department. Police officers asked arrested robbers who did not carry guns, or did not use them, *why* they did not; and the answers, supposedly, were frequently that the robber "did not want to get the death penalty." It is noteworthy that the Los Angeles Police Department has consistently refused to furnish copies of this study and its underlying data to professional scholars, apparently for fear of criticism. I finally obtained a copy of the study from a legislative source, and I can tell you that it shows two things. First, an arrested person will tell a police officer anything that he thinks the police officer wants to hear. Second, police officers, like all other human beings, hear what they want to hear. When a

robber tries to say that he did not carry or use a gun because he did not wish to risk the penalties for homicide, he will describe those penalties in terms of whatever the law happens to be at the time and place. In Minnesota, which has no death penalty, he will say, "I didn't want to get life imprisonment." In Los Angeles, he will say, "I didn't want to get the death penalty." Both responses mean the same thing; neither tells you that death is a superior deterrent to life imprisonment.

The real mainstay of deterrence thesis, however, is not evidence but intuition. You and I ask ourselves: Are we not afraid to die? Of course! Would the threat of death, then, not intimidate us to forbear from a criminal act? Certainly! *Therefore*, capital punishment must be a deterrent. The trouble with this intuition is that the people who are doing the reasoning and the people who are doing the murdering are not the same people. You and I do not commit murder for a lot of reasons other than the death penalty. The death penalty might perhaps also deter us from murdering—but altogether needlessly, since we would not murder with it or without it. Those who are sufficiently dissocialized to murder are not responding to the world in the same way that we are, and we simply cannot "intuit" their thinking processes from ours.

Consider, for example, the well-documented cases of persons who kill *because* there is a death penalty. One of these was Pamela Watkins, a babysitter in San Jose who had made several unsuccessful suicide attempts and was frightened to try again. She finally strangled two children so that the state of California would execute her. In various bizarre forms, this "suicide-murder" syndrome is reported by psychiatrists again and again. (Parenthetically, Gary Gilmore was probably such a case.) If you intuit that somewhere, sometime, the death penalty *does* deter some potential murders, are you also prepared to intuit that their numbers mathematically exceed the numbers of these wretched people who are actually induced to murder by the existence of capital punishment?

Here, I suggest, our intuition does—or should—fail, just as the evidence certainly does fail, to establish a deterrent justification for the death penalty. There is simply no credible evidence, and there is no rational way of reasoning about the real facts once you know them, which can sustain this or any other justification with the degree of confidence that should be demanded before a civilized society deliberately extinguishes human life.

III

I have only a little space for my final point, but it is sufficient because the point is perfectly plain. Capital punishment is a dying institution in this last quarter of the twentieth century. It has already been abandoned in law or in fact throughout most of the civilized world. England, Canada, the Scandinavian countries, virtually all of Western Europe except for France and Spain have abolished the death penalty. The vast majority of countries in the Western Hemisphere have abolished it. Its last strongholds in the world—apart from the United States—are in Asia and Africa, particularly South Africa. Even the countries which maintain capital punishment on the books have almost totally ceased to use it in fact. In the United States, considering only the last half century, executions have plummeted from 199 in 1935 to approximately 29 a year during the decade before 1967, when the ten-year judicial moratorium began.

Do you doubt that this development will continue? Do you doubt that it will continue because it is the path of civilization—the path

up out of fear and terror and the barbarism that terror breeds, into self-confidence and decency in the administration of justice? The road, like any other built by men, has its detours, but over many generations it has run true, and will run true. And there will therefore come a time—perhaps in 20 years, perhaps in 50 or 100, but very surely and very shortly as the lifetime of nations is measured—when our children will look back at us in horror and unbelief because of what we did in their names and for their supposed safety, just as we look back in horror and unbelief at the thousands of crucifixions and beheadings and live disembowelments that our ancestors practiced for the supposed purpose of making our world safe from murderers and robbers, thieves, shoplifters, and pickpockets.

All of these kinds of criminals are still with us, and will be with our children—although we can certainly decrease their numbers and their damage, and protect ourselves from them a lot better, if we insist that our politicians stop pounding on the whipping boy of capital punishment and start coming up with some real solutions to the real problems of crime. Our children will cease to execute murderers for the same reason that we have ceased to string up pickpockets and shoplifters at the public crossroads, although there are still plenty of them around. Our children will cease to execute murderers because executions are a self-deluding, self-defeating, self-degrading, futile, and entirely stupid means of dealing with the crime of murder, and because our children will prefer to be something better than murderers themselves. Should we not—can we not—make the same choice now?

Review Questions

1. Why does Amsterdam think that capital punishment is a great evil?
2. What additional reasons does Amsterdam give for saying that capital punishment is wrong?
3. Why does Amsterdam reject the oldest concept of retribution, an eye for an eye, a life for a life?
4. What is the notion of moral reinforcement, and why doesn't Amsterdam accept it?