Debating Biden's Death Penalty Stance

From Theodore Dalrymple

President Biden's commutation of the death penalty for 37 federal prisoners was somewhat inconsistent. He said, in announcing it, that "guided by my conscience and my experience … I am more convinced than ever that we must stop the use of the death penalty at the federal level."

If that were truly the case, then leaving three men to be executed would not only be wrong, but deeply wrong. To make an exception of them because their crimes were particularly heinous is implicitly to admit that the death penalty is on occasion justified: it would remain only to decide on which occasions. Mr. Biden was not always against the death penalty, but in fairness to him, it is no criticism of him that he changed his mind, for a mind that cannot be changed is hardly a mind at all.

Another well-known case of a politician who changed his mind about the death penalty was the late President of France, François Mitterand. As minister of justice during the Algerian War of Independence, he personally signed more death warrants than any other contemporary French politician, but as

president he oversaw the total abolition of the death penalty. Whether this about-face was the consequence of a real change of mind, or a matter of political calculation, is a question that might be asked: Mitterand was notoriously a man for all seasons.

And likewise, Mr. Biden's retention of three federal prisoners on death row while commuting all the others might be similarly a matter of political calculation. The sparing of a terrorist and mass killers of blacks and Jews would not, after all, have struck everyone as an act of generosity or compassion, even if it were philosophically more consistent with his abolitionist conscience, and might well have been greeted with outrage. But it is not much of a reproach to a politician that he makes political calculations.

Mr. Biden might well have thought that to commute the sentences of the three whom he has excepted would have retarded the eventual abolition of the death penalty *in toto* by raising a firestorm of objection against such a commutation, and the abolition of the death penalty would hardly be the first reform achieved by degrees rather than all at once.
In any case, few abolitionists are entirely consistent on the question. Suppose, for example, that Heinrich Himmler had not committed suicide and had instead been sentenced to death at Nuremberg. Few people, I think, not even the most ardent of abolitionists, would have wasted much time or emotion on trying to save him from the gallows.

The fact is that he richly deserved the death penalty, if not very much worse than the death penalty. Even abolitionists would not have talked of Himmler's right to repentance or rehabilitation or restitution. A promise not to kill six million people again, because he now realized that to have done so was very wrong, and that he wished to make some amends by, for example, devoting his life by the transfer of printed books into braille, would not have counted in the balance.

Indeed, even to think that it might have done so would be an appalling failure to understand what Himmler had done, as well as being a dreadful insult to his victims and their relatives.

But desert cannot by itself be a guide to fit punishment: for, as Hamlet asked, “Use every man after his desert, and who shall ’scape whipping?” A civilized society cannot, in fact, treat every man after his desert, because, if it did so in the case of its worst citizens, it would cease to be civilized. There is a limit to the punishments that can be inflicted by a civilized system, irrespective of the desert of those to be punished.

Nor can the efficacy alone of punishment as a deterrent be a guide to its fitness or justification. Immediate torture of those who break the speed limit might well slow the traffic, but few people, I hope, would advocate it. Thus, the reduction of the murder rate by the death penalty, even if it could be conclusively demonstrated, would not by itself be sufficient to justify it.

A purely utilitarian argument therefore does not suffice. Suppose, for example, that it could be shown that the execution of *someone*, accused of being the culprit of a murder but not actually the culprit, was better in the matter of deterrence of murder than executing *no one* at all (not an implausible theory, given the immemorial history of hostage-taking of the innocent down the ages), we should still be appalled by the execution of an innocent man. We should not say, “Never mind, his death still acted as a deterrent.”
And in fact, in all jurisdictions where the death penalty is permitted, however scrupulous those jurisdictions, mistakes have been made. No utilitarian calculation of the numbers of people wrongfully executed versus the number of people murdered by murderers after they might have been executed if the death penalty had been imposed could remove the stain of the state having wrongfully put one of its citizens to death. And if, in answer to this objection, it is returned that the death penalty ought to be imposed only in a) especially

heinous cases, and in b) those cases in which there could not be a shadow of a doubt of the guilt of the perpetrator, faith in the criminal justice system would be severely undermined.

After all, those found guilty in courts are supposed to be equally guilty beyond all reasonable doubt; that is to say, the necessary legal fiction is that everyone found guilty is equally guilty of whatever he is successfully charged with. We cannot make the distinction between the guilty, the *really* guilty, and the *really, really* guilty. It cannot be right to imprison someone for the rest of his life when he cannot be executed because there is a shadow of doubt as to his guilt. If there is that shadow, he cannot be imprisoned for life, or for that matter at all.

Having said all this, I must admit that, in my heart, I cannot help but feel that, for some crimes and for some criminals, the only appropriate penalty is death. I suspect that this is the case with many abolitionists, too, though they do not like to admit it, even to themselves. What place our innermost feelings should play in advocacy of any policy, and how far they can override rational argument, I am not sure. But I know that I should not be prepared to carry out the death penalty myself. Can I rightfully ask others to do what I would not be prepared to do myself?

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