

The Death Penalty's Demise and the Withering of Authority

by Theodore Dalrymple



Listening to the Liberty Law Talk podcast “[Liberalism and the Death Penalty](#)” leads me to offer my own thoughts on how its abolition in Great Britain has had much broader consequences for crime and punishment. If I had been a prison doctor while the death penalty was still imposed in Britain, I should have had the somewhat awkward task of certifying murderers fit for execution. Needless to say, certification for such fitness was not a subject taught at medical school, but the main criterion seemed simple enough, namely that the man to be hanged had to be sane. It was not permitted to execute madmen even if they had been sane at the time of their crime; but with the ever-

widening and loosening of psychiatric diagnosis, I should no doubt have been tempted always to find a medical reason to postpone the execution *sine die*. I would have found it hard to sign what would have amounted to a medical death warrant, all the more so with the man before my very eyes. Nor would I have much relished attending the execution itself, to certify that the execution had worked. The operation was a success but the patient died, went the Victorian post-surgical bulletin; here it would be *and* the patient died, rather than *but*.

Why did the man to be executed have to be sane (there were very few women executed, and here was a case of sex inequality that even the most ardent feminist would not have wanted to correct)? It was surely not so that he could learn his lesson: few people are quite so convinced of continued *post mortem* existence that they believe that an execution could teach the executed man a valuable lesson. The death penalty might teach society a lesson, but not the executed man himself: in which case his mental state at the time of his execution was irrelevant.

But while I should not have wanted to participate in an execution, I was nevertheless viscerally in favour of the death penalty because it seemed to me that there were crimes (though by no means all of them murder) so heinous, so despicable, that no other penalty was adequate to express society's outrage at, or repudiation of, them. Moreover – though quite late in my career – I discovered evidence that suggested that the death penalty did in fact act as a deterrent to murder, something which has long been contested or outright denied by abolitionists.

I happened to read a book published in 1965, the year Britain legislated to end the death penalty, titled *Murder Followed by Suicide*, by the distinguished criminologist, D.J. West. For forty years up to that date, about a third of homicides had been followed by the suicide of those who committed them.

Most people who committed homicide followed by suicide were highly disturbed psychologically, if not outright mad. For example, in killing their families they imagined that they were saving them from a worse fate. They were not the kind of people who would be deterred by anything, including the death penalty.

Here was a natural experiment. I hypothesized that if the death penalty acted as a deterrent, the homicide rate would increase but the proportion of homicide followed by suicide, which in absolute numbers would remain more or less the same, would decrease. My friend, the criminologist David Fraser, looked at the actual figures and found that this was indeed the case. Some sane people who might otherwise be inclined to kill managed to control themselves knowing that they might be executed if they did.

For the death penalty to deter, it was not necessary for it to be applied in every case. Although the death penalty for murder was mandatory in Britain, it was commuted in nine cases out of ten. All that was necessary for it to deter was that execution was a real possibility. We shall never know whether the death penalty would have deterred even more if it had been applied more rigorously.

Does its deterrent effect, then, establish the case for the death penalty, at least in Britain? No, for two reasons. First, effectiveness of a punishment is not a sufficient justification for it. For example, it might well be that the death penalty would deter people from parking in the wrong place, but we would not therefore advocate it. Second, the fact is that in all jurisdictions, no matter how scrupulously fair they try to be, errors are sometime made, and innocent people have been put to death. This seems to me the strongest, and perhaps decisive, argument against the death penalty.

Against this might be urged the undoubted fact that some convicted murderers who have been spared death have gone on to

kill again, and this will continue to be so. Victims of those who murder a second time are probably more numerous than those executed in error. Therefore, utilitarians might argue, even if mistakes are sometimes made, that the death penalty overall would save lives. (Let us disregard the fact that those murderers who go on to murder a second time would not necessarily have been executed after their first murder, for nowhere are all murderers executed.)

The argument holds only if utilitarianism is accepted as a true ground of ethics. But few of us would accept that it is. It might be that hanging the wrong person after the commission of a terrible crime would have a better social outcome than hanging no one at all, provided only that it was never publicly known that the wrong person had been hanged: but we would still be horrified at the prospect. Moreover, in practice, the execution of the innocent, once it is known, serves disproportionately to undermine faith in the justice system. And surely it is true that for the state to kill an innocent man is peculiarly horrific.

The extended period between sentence and execution in the United States, caused by the many appeal processes open to convicted man, might be thought to obviate the possibility of wrongful execution. (The average length of time spent on Death Row in Texas between 1983 and 2006 before execution was ten and a half years, and in a few cases extended to more than twenty.) But this has to be shown, and it is certain that there have been quite a number of exonerations of those sentenced to death and very near execution. One would have to be overconfident to assert that wrongful execution had never happened or could never happen again.

Moreover, the long period between sentence and execution is not a sign of scruple, but of incompetence and lack of faith in the ability of the courts to find guilt correctly. Swiftiness, albeit tempered by probity and scrupulosity, is an important characteristic of justice itself, and in that

respect most jurisdictions already fail. Moreover, to hold a man on death row for years, even decades, might be regarded as cruel and unusual, if the words cruel and unusual are to mean anything.

Although, on balance, I am against the death penalty, I do not assume that those who are in favour of it are necessarily moral primitives, which abolitionists often give the impression of believing. For most of our history, the rightness of the death penalty has been taken for granted, and it cannot be that we are the first decent, reflective people ever to have existed. The self-righteousness of the Europeans in this respect disgusts me when they set themselves up to judge others. France, for example, abolished the death penalty only in 1981 – AD 1981, that is, not 1981 BC. When the death penalty in Britain was abolished in 1965 after many decades of campaigning by abolitionists, more than 90 per cent of the population was still in favour of it. Almost certainly it believed, if not necessarily in a fully coherent way, that to abolish the death penalty was to weaken the authority of society and to lessen the majesty of the law. It was also to weaken the prohibition against killing and, though involving the taking of a life (the murderer's), also lessened the sanctity of life.

That a measure that was so deeply unpopular was accepted without protest was itself a manifestation of faith in the authority of Parliament, but the impression was given to the population that murderers, henceforth, would be subject to life imprisonment, meaning incarceration for the term of their natural life, in place of the death penalty. But this impression turned out to be entirely false.

The average murderer in Britain (if I may be permitted so peculiar a phrase) serves 15 years in prison before release. His life sentence is for life only in the sense that, for the rest of his days, he may be recalled to prison if it is thought that he is misbehaving or breaking the conditions of

his release. In 1 per cent of cases, a life sentence may mean permanent incarceration without possibility of release, though the European Court of Human Rights (that giver of lessons to the world) has ruled that such a sentence breaches fundamental human rights because it does not allow for the possibility of repentance or rehabilitation. In my opinion, this goes only to show how lacking in realism, imagination and even compassion the ECHR really is. Poor Himmler! If only he had been given the opportunity of rehabilitation and repentance, perhaps he wouldn't have taken the cyanide.

In Britain, one of the effects of the abolition of the death penalty, the downward pressure on all prison sentences, has been little remarked. Punishment has to be roughly proportional to the gravity of the crime (exact proportionality cannot be achieved), but if murder attracts only 15 years' imprisonment *de facto*, what sentences can be meted out to those who commit lesser, but still serious, crimes? Moreover, the charge of murder is often reduced to the lesser crime of manslaughter, in which sentences – as a consequence – are often derisory. For example, a man who was a career criminal, with many convictions including for violence, was called to a supermarket by his girlfriend (also a criminal), who had had a trivial dispute with another shopper. He threw a punch at the man whom he thought was that shopper in question, though in fact he was not. The man was weak and frail, and hit his head on the ground, subsequently dying of a head injury.

There was no intention to kill, but the crime was sufficiently heinous in the case of a man who clearly did not just lose his temper that natural justice, one might have supposed, required a very long prison sentence, perhaps twenty-five or thirty years. But no such sentence could be given, since murderers, that is to say killers who intend to kill, serve but fifteen years. The man was given instead 4 years, which meant that he would be released in two, because remission of half a sentence

is now a 'right' in Britain.

It is scarcely any wonder that in the years since the abolition of the death sentence, Britain has gone from being a well-ordered, non-violent, law-abiding society to being a society with the highest rate of violent crime in Western Europe. Of course, the abolition of the death penalty was not the only cause, for crime was rising in any case, but it brought its contribution to the festival of disorder that followed.

It was not inevitable that the abolition of the death penalty should have had this effect, if conviction for murder had indeed carried a sentence of incarceration for life. But in order for this to have been the case, society as a whole, and the governing class in particular, including intellectuals, would have had to have sufficient faith in a moral authority to impose it. The abolition itself, in my view justified *per se*, was – in the manner in which it was carried out – a symptom in itself of the decline in that faith. The governing class and intellectuals believed only in their own moral authority only to defy the 'primitive' wishes and apprehensions of the unlettered majority. They replaced the moral view of human existence by the sociological and psychological one, with all its explaining and explaining away.

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