

## Human Value and Capital Punishment

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From a sociological perspective, and in particular a functionalist one, the manifest purpose of the criminal justice system is fourfold: rehabilitation, physical restriction, retribution, and criminal deterrence.<sup>1</sup> Thus, when analysing any aspect of the system it must be asked, what function does it play? The death penalty was designed with the last three in mind. Physical restriction, that is removing the criminal from society to prevent further harm, has largely been taken up by prisons in modern times, rather than the death penalty fulfilling that function. What remains is retribution and deterrence. The recent debate has been focused on these two factors, both from moral and empirical grounds. Capital punishment is still practised in the US, as well as several other developed nations, such as the United Arab Emirates and Japan. On the other side of the spectrum are nations like Sweden, Norway, and Denmark which are all striving towards a more restorative system of criminal justice.<sup>2</sup> Canada falls in the middle, having abolished capital punishment in 1976,<sup>3</sup> yet still practicing a retributive system similar to that of the United States.<sup>4</sup> This paper will first argue from a normative position the issues capital punishment has when faced with the agreement that human life has innate value as outlined in the United Nations' *The Universal Declaration of Human Rights* (UDHR). I will respond to critiques that say any criminal system will fail to meet the standards outlined in the UDHR, and thus any argument built on the basis of human value will fail since it cannot be implemented consistently. Furthermore, I will respond to those who claim that innate human value is compatible with capital punishment. Finally, I will outline the empirical data supporting restorative justice in

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<sup>1</sup> There may be other latent functions, such as criminal socialization and labour.

<sup>2</sup> Tapio Lappi-Seppälä, "Penal Policy in Scandinavia," *Crime and Justice* 36, no. 1 (2007): pp. 217-295, <https://doi.org/10.1086/592812>, 220-225.

<sup>3</sup> Andrew S. Thompson, "Uneasy Abolitionists: Canada, the Death Penalty, and the Importance of International Norms, 1962-2005," *Journal of Canadian Studies* 42, no. 3 (2008): pp. 172-192, <https://doi.org/10.3138/jcs.42.3.172>, 1.

<sup>4</sup> It is difficult to find information on the Canadian penal system. The article I've found does have a clear bias, but overall it does outline the system and the similarities it has with the US. Lorraine C, "Everything You Were Never Taught about Canada's Prison Systems," *Intersectional Analyst* (Intersectional Analyst, July 20, 2017), <http://www.intersectionalanalyst.com/intersectional-analyst/2017/7/20/everything-you-were-never-taught-about-canadas-prison-systems>

developed nations to show that it is not just a theoretical idea, but one that practically works, and works well. In this I will outline a different approach to criminal justice that is in line with *The Universal Declaration of Human Rights*, and as such is incompatible with capital punishment.

The 20<sup>th</sup> century served as a time of rebuilding and restructuring for the international community. The UN was formed in 1945, and proclaimed the UDHR in 1949, a document that affirmed that every human being held value.<sup>5</sup> Humanity, after the horrors found in the Second World War, universally cried out that each human must be treated with intrinsic value. Capital punishment directly opposes this affirmation. Or rather, it presupposes that once a human has done an act of some defined severity, it has lost that value, and thus must be punished according to the harm of the act. It follows the dogma of retributive justice to its extreme: respond to hurt with more hurt. I find this nonsensical. There is no act that can remove or add onto the intrinsic value of a human being. It is innate, essential, a proposition affirmed by major international organizations, most prominently found in the UDHR.<sup>6</sup> Some might respond by articulating that innate human value is a philosophical assumption many don't agree with. Even so, it is generally socially agreed upon that a human being has innate value by a majority of the developed nations who subscribe to the UDHR, and because of that it shouldn't simply be rejected on a refusal to accept the philosophical assumption. It is now a part of a social contract, rather than just being a philosophical concept. Any nation, such as Canada and the United States that accepts the UDHR should also attempt to match its laws with what it outlines. And capital punishment simply does not do so. It forcibly takes away the life of another without consent, violating "the right to life, liberty, and security of person."<sup>7</sup>

There are two main arguments against the abolition of capital punishment on the grounds that humans innately have the right to live. The first, outlined by Cameron Talley, claims that upon accepting the "the sanctity of life"<sup>8</sup> as an assumption, one must apply this to all of society, not just capital punishment. Thus, when trying to justify it, it must be justified everywhere. For

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<sup>5</sup> "History of the United Nations," United Nations (United Nations), accessed November 24, 2019, <https://www.un.org/en/sections/history/history-united-nations/>

<sup>6</sup> "Universal Declaration of Human Rights," United Nations (United Nations), accessed November 24, 2019, <http://www.un.org/en/universal-declaration-human-rights/index.html>), Article 1,3,5.

<sup>7</sup> "Universal Declaration of Human Rights", United Nations, Article 3.

<sup>8</sup> Cameron Talley, "In Favor of Capital Punishment: A Rebuttal of Abolitionist Arguments", *W. St. UL Rev.* 23 (1995): pp. 393), 4

Talley, sanctity of life fails to hold when applied in this way. He points to self-defence as an example, suggesting that when one defends themselves and kills another in doing so, the argument from innate human value falls apart. Talley claims an abolitionist must either denounce this act as morally wrong, or argue, as he says, that “self-defence provides a legitimate reason to kill human beings but retributive punishment does not.”<sup>9</sup> I agree with Talley’s first point, in that when one intends to kill when acting in self-defence, it is morally wrong due to violating the sanctity of human life. However, when the intention behind self-defence is to prevent death, both regarding the offender and the victim, it no longer violates the sanctity of life. The goal of capital punishment, however, is always to kill, either as an act of retribution or deterrence. Comparatively, an act of self-defence is trying to preserve life, as the harm has not yet occurred. Capital punishment is a response to an act already done. A response to this might point to the possibility that capital punishment may deter crime, and thus is a preventive action as is self-defence. I find this doesn’t hold, especially as you try to apply the logic of deterrence to the self-defence example. An individual doesn’t kill a stranger, even if that stranger has killed in the past, to stop a separate criminal from committing an ongoing crime. Rather, the attention is on the actual offender and on stopping them. Self-defence is focused entirely on preventing death on an action already occurring, and only relates to two people – the offender and the victim. The goal, unlike capital punishment, is to prevent the most harm, and save the most life.

The second argument offers a compatibilist view between capital punishment and innate human value. Chad Flanders, a proponent of this argument, accepts the assumption that human beings have intrinsic value and dignity, but uses this to suggest that it would be inhumane not to kill those who are deserving of capital punishment. This is a Kantian view, as Flanders says “that [the] respect for the dignity of an offender who committed murder require[s] that we put him to death” as, “anything less would be to treat him as less than an autonomous end-in-himself.”<sup>10</sup> This view, however, assumes (due to its Kantian roots) that human dignity comes out of our rationality.<sup>11</sup> There are two flaws with this. First, humans tend to be a mixed bag when it comes to rationality, especially when it comes to moral choices. Research has shown that emotions have

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<sup>9</sup> Talley, “A Rebuttal of Abolitionist Arguments,” 4.

<sup>10</sup> Flanders, “The Case Against the Case Against the Death Penalty,” 611.

<sup>11</sup> Obviously, there are deontologists that do not subscribe to the assumption that humans are innately rational. However, without this assumption, the argument that their act (of violating their human dignity) requires that we put them to death has no foundation.

a considerable influence on our moral decisions.<sup>12</sup> Secondly, it places the basis of human value and dignity on a philosophical assumption (we are rational beings), while I am arguing that the best basis is to be found in social-contracts that developed nations agree upon, such as the UDHR. From this basis, which is much stronger than a philosophical ideal because it exists practically in an agreement, the death penalty still is violating the right to life that every human being is born with. A final argument that Flanders tags onto this is that life imprisonment is violating human dignity the same as the death penalty is, or even more so. Although there are issues with this line of reasoning, I agree with Flanders.<sup>13</sup> But rather than concede to this point and accept that capital punishment is permissible as life imprisonment is, I would like to argue that life imprisonment must go as well, especially as a nation attempts to reshape their criminal system to one that adheres to the UDHR.

Should a nation shape its criminal justice system around the UDHR? This is a good question. As I already mentioned above, a nation ought to live by the agreements to which it subscribes. That means when it is difficult and when it is easy to do so. Social contracts fail to work effectively when they are not ratified by the majority. Secondly, a nation should adopt a humane, restorative system due to its effectiveness in rehabilitating prisoners. The sort of system that aligns best with the UDHR is found in nations like Norway, Sweden, and Denmark. These countries see the prison system's primary function as restorative, to minimize "the suffering caused by the crime control system."<sup>14</sup> Punishment is restricted and more so focused on rehabilitation. This can be seen with community-focused programs being used heavily, as well as a higher number of open prisons found in these nations.<sup>15</sup> This all culminates with Scandinavia having some of the lowest incarceration rates found in Western democracies.<sup>16</sup> Yet their crime rates are lower, or about the same as other countries with considerably higher incarceration rates. For example, the US is rated at 46 on the crime index, while Sweden is at 47.<sup>17</sup> Incarceration

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<sup>12</sup>T. Wheatley and J. Haidt, "Hypnotic Disgust Makes Moral Judgments More Severe," *Psychological Science* 16, no. 10 (January 2005): pp. 780-784, <https://doi.org/10.1111/j.1467-9280.2005.01614.x>. This research outlines the impact of linking a word with disgust (via hypnosis) regarding moral judgements.

<sup>13</sup> Flanders, in my opinion, is failing to evaluate the good that can occur even in a harsh penal system. The imprisoned can still live a good life, and if proven innocent, regain their freedom. Capital punishment, however, completely removes any possibility of future good for the offender except for the immediate removal of suffering.

<sup>14</sup> Seppälä, "Penal Policy in Scandinavia," 233.

<sup>15</sup> Seppälä, "Penal Policy in Scandinavia," 225.

<sup>16</sup> Seppälä, "Penal Policy in Scandinavia," 217.

<sup>17</sup> "Crime," Crime Index by Country 2019 Mid-Year, accessed November 30, 2019, [https://www.numbeo.com/crime/rankings\\_by\\_country.jsp](https://www.numbeo.com/crime/rankings_by_country.jsp).

rates between the two countries vary massively, with the US at 655 prisoners per 100,000,<sup>18</sup> and Sweden sitting at 58 prisoners per 100,000.<sup>19</sup> From this, it seems likely that incarceration is not significantly correlated with crime levels. A higher number of prisoners, with harsher treatments, will not mean a lower crime rate. Neither will a lower number of prisoners, as is the case in Sweden. However, the systems found in Sweden (and other Scandinavian nations) have clear benefits when compared to the United States. Recidivism in Sweden is half that of the US.<sup>20</sup> Due to this and the low incarceration rates, Swedish prisons are less crowded and more humane,<sup>21</sup> which often results in improved prisoner well-being and better inmate-guard relations.<sup>22</sup> Moreover, justice is often done outside the prison system through community service, probation, and rehabilitation centers.<sup>23</sup> This leads to less fragmentation within society between criminals and the public, as the criminal may find himself serving his punishment within society instead of being isolated from it.

I point to the restorative systems found in Sweden, Norway, and other Scandinavian nations in order to show an alternative to the retributive justice system found in the USA and Canada. There are two reasons for a nation to adopt restorative justice and scrap capital punishment. The first is that upon accepting the UN's UDHR, a nation has an obligation to follow the values set within it. These values call for each human being, criminal or not, to be treated with respect, and given the right to live. Secondly, capital punishment is incompatible with more effective systems of criminal justice, most notably the ones found in Scandinavia. The restorative approach to criminal justice is more humane, reduces repeat offences, and leads to fewer prisoners. Capital punishment may have served several functions in the past, such as permanent physical restriction, retribution, and deterrence. Today, however, the story is different. With the sophisticated prison systems of the modern age easily containing prisoners, and the data being inconclusive on the deterrent effect of capital punishment, we are left with

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<sup>18</sup> "USA," United States of America | World Prison Brief, 2019, <https://www.prisonstudies.org/country/united-states-america>)

<sup>19</sup> "Sweden," Sweden | World Prison Brief, 2019, <https://www.prisonstudies.org/country/sweden>). When comparing this data it is important to note that each nation defines crime in different ways, and may not be completely accurate. Look at Josefin Hedstrom, "The American and Swedish Criminal Justice System: A Comparative Study,"<sup>20</sup> for more on this.

<sup>20</sup> Josefin Hedstrom, "The American and Swedish Criminal Justice System: A Comparative Study," *Electronic Theses and Dissertations, Paper 3397* (2018). <https://dc.etsu.edu/etd/3397>), 66.

<sup>21</sup> Hedstrom, "The American and Swedish Criminal Justice System," 77.

<sup>22</sup> Hedstrom, "The American and Swedish Criminal Justice System," 69.

<sup>23</sup> Hedstrom, "The American and Swedish Criminal Justice System," 84.

retribution. Is this notion of justice enough to justify the death penalty? If a nation is striving towards both a more humane and effective criminal justice system, the answer is clearly no.

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